No. 23-411

IN THE

Supreme Court of the United States

VIVEK H. MURTHY, U.S. SURGEON GENERAL, ET AL.,
Petitioners,
v.
MISSOURI, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, COMMON CAUSE, AND LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici, the Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee), Common Cause, and Leadership Conference on Civil and Human Rights (Leadership Conference) are leading members of Election Protection, a nationwide, nonpartisan coalition consisting of over 300 national, state, and local partners working to ensure that voters can exercise their right to vote. Election Protection provides comprehensive information about voting and operates a hotline to help voters overcome problems voting. During the 2020 election cycle, the hotline fielded approximately 246,000 calls. Election Protection may escalate a call received on the hotline to election officials, law enforcement, or social media companies.

The Lawyers' Committee, a nonpartisan, nonprofit organization, formed at the request of President John F. Kennedy in 1963, uses legal advocacy, inside and outside the courts, to achieve racial justice, to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. It has a national voting rights litigation practice. See, *e.g.*, *Arizona* v. *Inter-Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013); *Shelby Cnty.* v. *Holder*, 570 U.S. 529 (2013). It routinely participates in cases concerning online speech and voter intimidation. See, *e.g.*, *Gonzalez* v. *Google LLC*, 143 S. Ct. 1191 (2023); *Counterman* v. *Colorado*, 143 S. Ct. 2106 (2023); *Nat'l Coal. on Black*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Civic Participation v. *Wohl*, — F. Supp. 3d —, 2023 WL 2403012 (S.D.N.Y. Mar. 8, 2023).

Common Cause, one of the nation's leading democracy organizations with over 1.5 million members, was founded as a nonpartisan "citizens lobby" whose primary mission is to protect and defend the democratic process and make government accountable to the interests of ordinary people. Common Cause promotes, on a nonpartisan basis, its members' interest in open, honest, and accountable government and political representation and has participated as a party or amicus curiae in numerous court cases related to voting rights.

The Leadership Conference is a coalition charged by its diverse membership of more than 240 national organizations to promote and protect the civil and human rights of all persons in the United States. It is the nation's oldest and largest civil and human rights coalition working to build an America as good as its ideals. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. For more than seven decades, The Leadership Conference has led the fight for civil and human rights by advocating for federal legislation and policy—securing passage of landmark civil rights legislation including the Civil Rights Acts of 1957, 1960, and 1964; the Voting Rights Act of 1965 and all of its subsequent reauthorizations; the Fair Housing Act of 1968; the Americans With Disabilities Act of 1990; the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009; and more. Today, through advocacy and outreach, The Leadership Conference

continues to work toward the goal of a more open and just society. Through its Voting Rights program, it leads efforts to strengthen and improve voting rights laws and ensure that all citizens can fully participate in our democracy, including combatting disinformation in elections. With its Center for Civil Rights and Technology, it promotes access to communications services that expand equal opportunity and participation in our democracy. The Leadership Conference's work is also informed and amplified by The Leadership Conference Education Fund, its public education and research arm.

SUMMARY OF ARGUMENT

Disinformation is a major threat to the fabric of democracy. The spread of mis- and disinformation on social media platforms is commonplace. Examples abound of malicious actors using such platforms to spread false and intimidating messages to dissuade people from voting or to undermine election integrity—including domestic actors using scare tactics exploiting longstanding fears in Black and brown communities and foreign actors capitalizing on racial divisions to sow discord and doubt.[2]

Not only are social media platforms the top choice for bad actors to spread mis- and disinformation, but these platforms also are used to generate and amplify violent hostility toward election workers. This often involves doxxing, *i.e.*, publishing a person's personal

[2] *Amici* agree with petitioners that the lower courts erred in finding that petitioners violated the First Amendment. See Pet. Br. 23–43. *Amici* file this Brief specifically to provide background on the disinformation and voter protection landscape and explain how an impermissibly broad and vague injunction will endanger election integrity.

information online, often carrying an implicit or explicit call to action. Doxxing frequently results in election officials receiving threats of death and violence. These officials are being terrorized just for doing their jobs—jobs that are essential to the running of our democracy.

The scale of disinformation, the difficulty of identifying perpetrators, the limited resources of prosecutors and civil society, and the pace of litigation often render court challenges impracticable, if not impossible, for addressing this conduct. Social media companies' content policies prohibiting disinformation therefore play a vital role in preserving free and fair elections. Information sharing between and among government agencies, voting rights organizations, and social media companies is crucial in guarding against emerging threats, particularly to vulnerable communities. In this context, *amici* are members of the Election Protection coalition, and as a part of that coalition, share information with federal agencies, local election officials, and private companies to protect election integrity.

The Fifth Circuit's and the district court's injunctions infringe the rights of *amici* and other civil society groups to operate this information-sharing network in coordination with government agencies and private social media platforms. Initially, the district court's injunction restricted federal agencies and their employees from collaborating "with the Election Integrity Partnership, the Virality Project, the Stanford Internet Observatory, or any like project or group for the purpose of urging, encouraging, pressuring, or inducing in any manner removal, deletion, suppression, or reduction of content posted with social-media companies containing protected free speech." Pet. App. 159a.

This was a content-based speech and petition restriction that fails strict scrutiny. The Fifth Circuit appropriately overturned this restriction, and *amici* urge this Court not to reinstate any part of the district court's injunction. *Id.* at 247a.

The Fifth Circuit's more limited injunction, nevertheless, will continue to improperly restrict the government's ability to protect election integrity and consequently impair *amici*'s ability to protect the right to vote against election disinformation. The Fifth Circuit's modified injunction prohibits certain government agencies and their employees from taking "actions, formal or informal, directly or indirectly, to coerce or significantly encourage social-media companies to remove, delete, suppress, or reduce, including through altering their algorithms, posted social-media content containing protected free speech." *Id.* at 248a. This language is so overbroad and vague that it is likely to cause uncertainty in the minds of government officials at the affected agencies, as to what actions are allowed, thus leading to reductions in their interactions with social media platforms. This will endanger the right to vote as information sharing between and among civil society, government, and social media companies is essential to prevent malicious election interference and voter suppression efforts.

The Court should vacate the Fifth Circuit injunction, decline to reinstate the district court injunction, and remand with instructions to dismiss the case.

FACTUAL BACKGROUND

The use of social media to disseminate false information—whether directly by malicious actors (disinformation) or by those unaware that the information is false (misinformation)—threatens free

and fair elections. Such actions not only destabilize the election process itself, but also enable intimidation of voters and election officials and undermine the public's trust in the outcome of elections. The vast online landscape, especially social media, offers ideal conditions for those hostile to voting rights to reach broad audiences while also targeting specific individuals or communities.

A. Election Mis- and Disinformation on Social Media

Online misinformation and disinformation to influence elections and disenfranchise voters is commonplace. Sylvia Albert et al., *As a Matter of Fact: The Harms Caused by Election Disinformation Report*, Common Cause Educ. Fund, at 12 (Oct. 2021).[3] Traditionally, deceptive practices often involved narrow targeting by geography, such as distributing flyers in certain neighborhoods. Ian Vandewalker, *Digital Disinformation and Voter Suppression*, Brennan Ctr. for Just. (Sept. 2, 2020).[4] Today, malicious actors use "sophisticated microtargeting to surgically focus on certain demographics," directing disinformation online toward a specific local election or a national audience. *Id.* at 1.

Common forms of disinformation historically used include posting incorrect election dates or bogus election rules, often targeted towards a specific demographic or political group; voter intimidation targeted

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[3] https://www.commoncause.org/wp-content/uploads/2021/10/CC_AsaMatterofFact_FINAL_10.27.21.pdf (as visited Dec. 21, 2023).

[4] https://www.brennancenter.org/our-work/research-reports/digital-disinformation-and-vote-suppression (as visited Dec. 21, 2023).

at communities of color; untrue claims about election security; and untrue claims about postelection results. Albert, at 15. For example, in the leadup to the 2016 and 2018 elections, the false claim that Immigration and Customs Enforcement (ICE) officers would be patrolling the polls spread on social media. Blake Peterson, *ICE, Dispelling Rumors, Says It Won't Patrol Polling Places*, ProPublica (Nov. 2, 2019).[5] Social media posts about ICE presence at polls chill participation in elections by those fearful of and disproportionately impacted by ICE enforcement, particularly communities of color. Even though only U.S. citizens can vote, naturalized citizens may fear being mistaken for a non-citizen and unduly harassed, and voters with non-citizen family members may fear their relatives will be subject to unfair scrutiny.

False information has been disseminated during past election cycles via social media to deter Black voter participation or trick. In 2016, a prominent social media personality fraudulently promoted images and tweets encouraging voters to cast their ballots online or via text message, such as a fake advertisement purportedly on behalf of the Hillary Clinton campaign showing a Black woman holding an "African Americans for Hillary" sign and encouraging voters to "Avoid the Line" and "Vote from Home." Press Release, U.S. Att'ys Off. E.D.N.Y., *Social Media Influencer Douglass Mackey Convicted of Election Interference in 2016 Presidential Race* (Mar. 31, 2023).[6] While this instance of election interference resulted in a conviction, this is

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[5] https://www.propublica.org/article/ice-dispelling-rumors-says-it-wont-patrol-polling-places (as visited Dec. 21, 2023).

[6] https://www.justice.gov/usao-edny/pr/social-media-influencer-douglass-mackey-convicted-election-interference-2016 (as visited Dec. 21, 2023).

exceptionally rare. Prosecutors do not have the resources to combat the huge scale of voter intimidation online.

Likewise, in 2016, the Russian government used social media to attempt to suppress Black turnout. See S. Rep. No. 116-290, vol. II at 35, 38–39 (2020).[7] The Senate Select Committee on Intelligence found that the Kremlin used a private company, the Internet Research Agency (IRA), which operated over 50,000 "troll" accounts on social media to influence the public's perception of the 2016 election. *Id.* at 18, 23–27. Much of this content targeted Black audiences on Instagram, Twitter, and Facebook. *Id.* at 6, 49. For example, twelve IRA Instagram accounts with names like "@Blackstagram_" gained over 100,000 followers each. *Id.* at 49. These accounts then disseminated narratives to discourage voting—like "Don't Vote at All," "Why Would We Be Voting," or "Our Votes Don't Matter." *Id.* at 35. The Senate Intelligence Committee found that an

> overwhelming operational emphasis on race is evident in the IRA's Facebook advertisement content (over 66 percent contained a term related to race) and targeting (locational targeting was principally aimed at African-Americans in key metropolitan areas with well-established black communities and flashpoints in the Black Lives Matter movement), as well as its Facebook pages (one of the IRA's top-performing pages, Blacktivist, generated 11.2 million engagements with Facebook users), its Instagram content (five of the top

[7] https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume2.pdf (as visited Dec. 21, 2023).

10 Instagram accounts were focused on African-American issues and audiences).

Id. at 38–39 (internal quotations omitted).

Disinformation on social media in non-English languages, particularly Spanish, was also rampant in the 2020 and 2022 elections. Tiffany Hsu, *Misinformation Swirls in Non-English Languages Ahead of Midterms*, N.Y. Times (Oct. 12, 2022).[8] Ahead of the 2022 midterm elections, disinformation about election fraud, anti-discrimination policies, and reproductive rights saturated WeChat, a social media platform used by an estimated sixty percent of the Chinese American community. Kimmy Yam, *Right-Wing Disinformation Ramps Up on WeChat Ahead of Midterms, Report Finds*, NBC News (Oct. 3, 2022).[9] The reach of the internet allows even a low rate of impact to disenfranchise significant numbers of voters and threaten free and fair elections.

B. Intimidation of Election Officials

Those who want to disrupt elections use social media to harass or intimidate election officials. One common tactic is doxxing, which involves publishing individuals' personal information online so that others can attack and harass them and their families. Albert, at 15–16; see *Dumpson* v. *Ade*, No. 18-1011, 2019 WL 3767171 (D.D.C. Aug. 9, 2019) (neo-Nazi doxxed Black woman in an effort of coordinated harassment). Election officials have experienced doxxing in recent

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[8] https://www.nytimes.com/2022/10/12/business/media/midterms-foreign-language-misinformation.html (as visited Dec. 21, 2023).

[9] https://www.nbcnews.com/news/asian-america/right-wing- disinformation-ramps-wechat-ahead-midterms-report-finds-rcna50539 (as visited Dec. 21, 2023).

elections. Ahead of the 2018 midterms, the home addresses and phone numbers of two Black women election officials in Florida were posted to Facebook groups such as "Confederate Resistance." Jerry Iannelli, *Far-Right Groups Just Doxxed Elections Supervisors Brenda Snipes and Susan Bucher*, Mia. New Times (Nov. 14, 2018).[10]

Election officials also experience intimidation from doxxing and disinformation amplified on social media. Georgia Republican election official Gabriel Sterling lamented the threats workers in his office received after the 2020 election: "Someone's going to get hurt, someone's going to get shot, someone's going to get killed." Richard Fausset, *'It Has to Stop': Georgia Election Official Lashes Trump*, N.Y. Times (Dec. 1, 2020).[11] Both Democratic and Republican secretaries of state and other election workers have been targeted by death threats and violent intimidation.[12]

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[10] https://www.miaminewtimes.com/news/broward-countys-brenda-snipes- was-doxxed-online-10911462 (as visited Dec. 21, 2023).

[11] https://www.nytimes.com/2020/12/01/us/politics/georgia-election-trump.html (as visited Dec. 21, 2023).

[12] Linda So, *Trump-Inspired Death Threats Are Terrorizing Election Workers*, Reuters (June 11, 2021), https://www.reuters.com/investigates/special-report/usa-trump-georgia-threats/ (as visited Dec. 21, 2023); see also Marina Villeneuve, *Justice Department Details Threats Against Election Workers*, AP (Aug. 3, 2022), https://apnews.com/article/2022-midterm-elections-violence-presidential-judiciary-5125682e179ac1234a97756a644e353c (as visited Dec. 21, 2023) (DOJ task force investigated over "1,000 harassing and threatening messages directed at election workers. Roughly 100 of those have risen to the level of potential prosecution.").

C. The Roles of Platforms, Government, and Civil Society in Protecting Voting Rights Online

Civil society and government officials provide valuable information to social media companies to help them design policies and practices to protect elections.

Most major online platforms prohibit misrepresentations about when, where, or how to vote; doxxing; threats; harassment; and—to varying degrees—disinformation.[13] However, enforcement of these policies vary significantly and is often lacking. See, *e.g.*, Free Press, *Empty Promises: Inside Big Tech's Weak Effort to Fight Hate and Lies in 2022*, at 8 (Oct. 2022) (rating efforts of Meta, TikTok, Twitter, and YouTube "insufficient" at combatting hateful content and disinformation).[14]

Social media companies in turn rely on external engagement with civil society to help develop their policies and obtain information about ongoing threats. For example, Meta's policies prohibiting voter dis-

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[13] See *Facebook's Policies for Elections and Voting: What You Need to Know*, Meta, https://about.fb.com/wp-content/uploads/2020/12/Facebooks-Policies-for-Elections-and-Voting.pdf (as visited Dec. 21, 2023); *Community Guidelines*, YouTube, https://www.youtube.com/howyoutubeworks/policies/community-guidelines/ (as visited Dec. 21, 2023); *Community Guidelines*, TikTok, https://www.tiktok.com/community-guidelines/en/overview/ (as visited Dec. 21, 2023); see also Carnegie Endowment for Int'l Peace, *How Social Media Platforms' Community Standards Address Influence Operations* (Apr. 1, 2021), https://carnegieendowment.org/2021/04/01/how-social-media-platforms-community-standards-address-influence-operations-pub-84201 (as visited Dec. 21, 2023).

[14] https://www.freepress.net/sites/default/files/2022-10/empty_promises_inside_big_techs_weak_effort_to_fight_hate_and_lies_in_2022_free_press_final.pdf (as visited Dec. 21, 2023).

information were developed in part through its civil rights audit, which collected external feedback on voter suppression and election disinformation on Facebook. See Meta, *Facebook's Civil Rights Audit – Final Report*, at 6 (July 8, 2020).[15] Some platforms have "trusted partner" programs for civil society organizations to flag harmful content for expedited review and to augment the companies' competency with different cultures and communities—such as understanding regional slang.[16] Social media companies also partner with media organizations to help fact-check information.[17]

Information sharing between and among the federal government, state and local governments, and the private sector, including social media companies and nonprofit organizations, protects election integrity.[18]

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[15] https://about.fb.com/wp-content/uploads/2020/07/Civil-Rights- Audit-Final-Report.pdf (as visited Dec. 21, 2023).

[16] *About the YouTube Priority Flagger Program*, YouTube Help, https://support.google.com/youtube/answer/7554338?hl=en (as visited Dec. 21, 2023); *Bringing Local Context to Our Global Standards*, Meta, https://transparency.fb.com/policies/improving/bringing-local-context (Jan. 18, 2023) (as visited Dec. 21, 2023).

[17] See Olivia Ma, *How Google and YouTube Are Investing in Fact-Checking*, Google News Initiative (Nov. 29, 2022), https://blog.google/outreach-initiatives/google-news-initiative/how-google-and-youtube-are-investing-in-fact-checking/ (as visited Dec. 21, 2023); *Meta's Third-Party Fact-Checking Program*, Meta, https://www.facebook.com/formedia/mjp/programs/third-party-fact-checking (as visited Dec. 21, 2023).

[18] Presidential Decision Directive 63 on Critical Infrastructure Protection: Sector Coordinators, 63 Fed. Reg. 41804 (Aug. 5, 1998); Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector (Jan. 6, 2017), https://www.dhs.gov/news/2017/01/06/statement-

Some government programs counter election disinformation with accurate information. See Pet. Br. 6; CISA, *Election Security Rumor vs. Reality* https://www.cisa.gov/rumor-vs-reality (as visited Dec. 21, 2023). Others communicate with social media companies about disinformation trends that harm vulnerable communities, Dep't of Homeland Sec., Off. of Inspector Gen., *DHS Needs a Unified Strategy to Counter Disinformation Campaigns*, at 5–6, n.22 (Aug. 10, 2022).[19] In 2020, Facebook, Twitter, and Reddit had monthly meetings with DHS and CISA to discuss security threats and how to address election misinformation. See David Ingram & Kevin Collier, *Big Tech Met with Govt to Discuss How to Handle Election Results*, NBC News (Aug. 12, 2020).[20] The companies said these meetings were "necessary to protect the integrity" of the upcoming elections, given the companies' failures to prevent disinformation in the 2016 elections. Elizabeth Dwoskin & Ellen Nakashima, *Tech Didn't Spot Russian Interference During the Last Election. Now It's Asking Law Enforcement for Help*, Wash. Post (June 26, 2018).[21]

Voting rights experts recommend that election officials establish contacts at social media platforms to directly report disinformation or hacking of official

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secretary-johnson-designation-election-infrastructure-critical (as visited Dec. 21, 2023).

[19] https://www.oig.dhs.gov/sites/default/files/assets/2022-08/OIG-22-58-Aug22.pdf (as visited Dec. 21, 2023).

[20] https://www.nbcnews.com/tech/tech-news/big-tech-met-gov-t-discuss-how-handle-election-results-n1236555 (as visited Dec. 21, 2023).

[21] https://www.washingtonpost.com/technology/2018/06/26/tech-didnt-spot-russian-meddling-during-last-election-now-its-asking-law-enforcement-help/ (as visited Dec. 21, 2023).

channels. See Election Integrity P'ship, *The Long Fuse: Misinformation and the 2020 Election*, at 236 (June 15, 2021).[22] Voters who see false information online often call local officials to clear up their confusion, so these officials can alert platforms. See Amicus Br. of Brennan Ctr. for Just., Doc. 105-1 at 5, *Ayyadurai* v. *Galvin*, No. 1:20- cv-11889 (D. Mass. May 19, 2021).

D. The Role of the Election Protection Coalition

Monitoring online platforms, identifying disinformation and misinformation, pinpointing responsible parties, and implementing solutions require a wide range of actors. The Election Protection coalition routinely engages with federal officials, local election officials, and social media companies to address the proliferation of false information related to voting and elections. While litigation may be able to redress some instances of misinformation and disinformation, it is not sufficiently expedient to combat the volume and velocity of social media content. Further, the tremendous amount of time and resources entailed in litigation makes it crucial that governmental and private entities continue to work together to identify and mitigate these threats.

The Election Protection coalition engages thousands of volunteers who provide voters with information, document problems voters encounter, host voter protection field programs, and work on the ground to identify and remove barriers to voting. To that end, members of the coalition also periodically survey and speak with election officials, gathering reports of

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[22] https://stacks.stanford.edu/file/druid:tr171zs0069/EIP-Final-Report.pdf (as visited Dec. 21, 2023).

harassment, threats, and intimidation that they face online and in person. See Brennan Ctr. for Just., *Election Officials Under Attack: How to Protect Administrators and Safeguard Democracy* (June 2021);[23] Brennan Ctr. for Just., *Local Election Officials Survey* (June 2021);[24] (Mar. 2022);[25] (Apr. 2023).[26] Election Protection has a team that monitors social media and other online platforms for election disinformation, voter intimidation, and other threats to election integrity.

Amici have met with officials from DOJ, DHS, CISA, and other federal agencies, as well as state and local officials, to relay information gathered from community partners, election officials, online monitoring, and the hotline. The Lawyers' Committee has submitted complaints concerning online election disinformation, violent threats against voters and officials, and other forms of voter suppression to federal agencies such as the FBI and FCC. See, *e.g.*, *In re Burkman*, Forfeiture Order, FCC 23-44, No. EB-TCD-21-00032652 (June 6, 2023) (complaints concerning voter intimidation robocalls). Before elections, DOJ has asked Election Protection about concerns being reported to the hotline and for recommendations about where to send poll observers. The availability of these

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[23] https://www.brennancenter.org/our-work/policy-solutions/election-officials-under-attack (as visited Dec. 21, 2023).

[24] https://www.brennancenter.org/our-work/research-reports/local-election-officials-survey-june-2021 (as visited Dec. 21, 2023).

[25] https://www.brennancenter.org/our-work/research-reports/local-election-officials-survey-march-2022 (as visited Dec. 21, 2023).

[26] https://www.brennancenter.org/our-work/research-reports/local-election-officials-survey-april-2023 (as visited Dec. 21, 2023).

communication channels fosters collaboration and enables federal agencies to use the information to protect the safety and integrity of elections, including by better allocating limited resources to protect the security of election officials and voters.

Election Protection also works with major social media companies to alert them to polling place disruptions, evolving threats to voters and election officials, and disinformation that violates platforms' rules. Like government officials, social media companies rely on Election Protection to give them insight into the experiences of users so that the companies can better understand the threat landscape on their platforms.

ARGUMENT

I. THE COURT SHOULD NOT REINSTATE THE DISTRICT COURT'S INJUNCTION BECAUSE IT WOULD VIOLATE THE FIRST AMENDMENT RIGHTS OF *AMICI*.

The district court's injunction was an unconstitutional, content-based prior restraint on the free speech and the right to petition of voter protection organizations. These prohibitions in the district court's injunction failed strict scrutiny, as they sweepingly restricted, without justification, *amici*'s speaking and petitioning regarding election disinformation. Under no circumstances should this Court reinstate the district court's injunction.

A. The District Court's Injunction Was a Prior Restraint on *Amici*'s Free Speech.

It is well settled that injunctions prohibiting future communication between specified persons are prior restraints on free speech. *Bantam Books, Inc.* v.

Sullivan, 372 U.S. 58, 70 (1963); see also *Org. for a Better Austin* v. *Keefe*, 402 U.S. 415, 418–19 (1971) (treating temporary injunction as a prior restraint on free speech). That is precisely what the district court's injunction did, as the Fifth Circuit recognized. Pet. App. 247a. As relevant to voter protection organizations, such as *amici*, the injunction prohibited the federal government officials from:

> collaborating, coordinating, partnering, switchboarding, and/or jointly working with the Election Integrity Partnership, the Virality Project, the Stanford Internet Observatory, or any like project or group for the purpose of urging, encouraging, pressuring, or inducing in any manner removal, deletion, suppression, or reduction of content posted with social media companies.

Id. at 159a.

Each of the prohibited actions necessarily affected the core work of such organizations. Indeed, banning "switchboarding" prohibited communication between defendants and organizations like *amici*, as the district court defined switchboarding as a "disinformation-reporting system" for "forward[ing] information to CISA" which would "in turn share the information with the social-media companies." *Id*. at 68a.

The injunction's ban on collaboration and information sharing for certain purposes was indisputably content based. It explicitly turned on the purpose and substance of communications with organizations like *amici*, and so it plainly "applie[d] to particular speech because of the topic discussed or the idea or message expressed." *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015).

This content-based speech ban was not just a restraint on government officials' speech, it also restrained the voter protection organizations that would otherwise speak with officials. As the Fifth Circuit recognized, the district court injunction "may implicate private, third-party actors that are not parties in this case and that may be entitled to their own First Amendment protections." Pet. App. 247a. The injunction prohibited "all acting in concert with" agencies and their employees related to the injunction's prohibited conduct. *Id.* at 159a. While the district court did not define what constituted "acting in concert with" agencies, the implication of this pronouncement was clear: Nonparties beware; this injunction may apply to you.

B. The District Court's Injunction Infringed on *Amici*'s Right to Petition the Government.

The content-based speech ban also infringed on *amici*'s First Amendment right to petition the government for a redress of grievances. See Pet. App. 247a. The right to petition is "one of the most precious of the liberties safeguarded by the Bill of Rights." *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945, 1954–55 (2018). It "allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives." *Borough of Duryea* v. *Guarnieri*, 564 U.S. 379, 388 (2011).

The right to petition "extends to all departments of the Government." *BE & K Constr. Co.* v. *NLRB*, 536 U.S. 516, 525 (2002). This right, central to the nation's founding, encompasses citizens communicating concerns to federal and state government bodies tasked with protecting the right to vote. See *Bernstein* v. *Sims*, 643 F. Supp. 3d 578, 586 (E.D.N.C. Dec. 1, 2022)

(issuing preliminary injunction against county board of elections which had barred plaintiff from attending public board meetings).

Section 5 of the district court's injunction gutted *amici*'s and other voter protection organizations' right to petition the government about vitally important election security issues. Pet. App. 159a. As discussed above, the injunction, in all its opacity, could be read to prohibit the very federal agencies tasked with protecting the right to vote—DOJ, the FBI, and CISA—from receiving and sharing information from *amici* about election disinformation or voter intimidation. See *id.*

The injunction's broader ban on government agencies collaborating or coordinating "in any way" with *amici* regarding broad swaths of election disinformation, misinformation, and voter intimidation on social media prohibited two-way communication necessary for a redress of grievances. See *id.*; Pet. App. 247a. Even if there was no limit on *amici*'s ability to talk to defendants about disinformation or misinformation on social media, the agencies would be legally precluded from listening, much less taking any constitutionally valid action in response. This would render *amici*'s petition rights illusory.

C. The District Court's Injunction Failed Strict Scrutiny.

As a content-based prior restraint on free speech and the right to petition, the injunction was subject to strict scrutiny. See *Reed*, 576 U.S. at 163–64; *Wayte* v. *United States*, 470 U.S. 598, 610 n.11 (1985) (speech and petition are "related and generally subject to the same constitutional analysis"). Accordingly, the injunction was "presumptively unconstitutional and

may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163; see also *Carroll* v. *President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968) (An injunction "must be couched in the narrowest terms that will accomplish the pin-pointed objective."). An injunction cannot satisfy this test where its scope exceeds its purpose. See *Fed. Election Comm'n* v. *Wis. Right to Life*, *Inc.*, 551 U.S. 449, 478 (2007) ("A court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech.") (emphasis in original).

The injunction here failed the narrow tailoring requirement on both overbreadth and vagueness grounds. *First*, the injunction was not narrowly tailored to the asserted interest of halting unconstitutional government coercion. For example, the injunction against switchboarding prohibited merely communicating information for disfavored purposes, even when that communication did not amount to coercion. Pet. App. 160a. Moreover, the injunction restrained an untold number of non-governmental entities from communicating with the government—potentially including *amici*—regardless of whether they were involved in the alleged wrongs or underlying facts. By resorting to language such as "and like companies" and "or any like project or group," the injunction appeared to be limitless in application. *Id.* at 159a.

The injunction's exceptions further confirmed its lack of tailoring. For example, by carving out only "*criminal* efforts to suppress voting," *id*. at 160a (emphasis added), the injunction prohibited *amici* from reporting to government agencies voter intimidation that is subject to civil enforcement. See, *e.g.*, 52 U.S.C. § 10308(d)–(e); 42 U.S.C. § 1985(3). By its terms, then,

amici would not have been able to report to DOJ's Civil Rights Division the doxxing of voters of color or voters affiliated with a particular religion or political party, as doxxing may not always be criminal but may still cause civilly actionable voter intimidation. See *Wohl*, 2023 WL 2403012, at *22 (finding robocall deceptively threatening "that a voter's private information will become exposed if that person votes by mail" violates Voting Rights Act). Moreover, it may be unclear whether an act is a crime, exacerbating the risk that *amici* would have violated the injunction. By inhibiting voter protection organizations from reporting grave civil rights concerns to the proper agency, the injunction struck at the very core of the First Amendment's free speech and petition protections.

Second, the injunction's vague text failed to provide organizations like *amici* with adequate guidance as to what speech was prohibited. Injunctions do not provide adequate guidance where they proscribe vast swaths of expressive conduct without defining what conduct crosses the line. Illustrative is a case in which the Second Circuit vacated an injunction prohibiting various types of speech that generally are unprotected by the First Amendment, including "engaging in fraudulent or defamatory representations" and "threatening or harassing" the plaintiff. *Metro. Opera Ass'n, Inc.* v. *Local 100, Hotel Emps. & Rest. Emps. Int'l Union*, 239 F.3d 172, 176 (2d Cir. 2001). Noting that the district court held the defendant in contempt under the injunction for chanting "Shame on You" and "No More Lies," the Second Circuit held the injunction was an unconstitutional prior restraint that "fr[o]ze" legitimate, protected speech because the injunction was "so vague and imprecise that the [defendant] cannot fairly determine what future speech is permit-

ted and what speech might place it in contempt." *Id.* at 176, 178–79.

The district court's injunction suffered from the same constitutional defects when it carved out "threats that threaten the public safety or security of the United States" or based the injunction's prohibitions on whether a social media post was "protected free speech" or "protected by the Free Speech Clause of the First Amendment to the United States Constitution in accordance with the jurisprudence of the United States Supreme Court." Pet. App. 164a, 172a. Indeed, it is precisely because "the line between legitimate and illegitimate speech is often so finely drawn" that "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Se. Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 559 (1975); see also Pet. App. 247a ("[C]ourt orders that actually [] forbid speech activities are classic examples of prior restraints.") (quoting *Alexander* v. *United States*, 509 U.S. 544, 550 (1993)).

The other enumerated carveouts fared no better. The injunction frequently resorted to conclusory terms like "criminal activity," "criminal conspiracies," "national security threats," "criminal efforts to suppress voting," "threats that threaten the public safety or security of the United States," and "postings intending to mislead voters about voting requirements and procedures." Pet. App. 159a–160a. A government official may not know whether online conduct falls into one of these categories absent investigation and discussion with social media companies. If investigation alone were sufficient to meet one of the injunction's exceptions, then the exceptions would have swallowed the rule and the injunction would be

rendered meaningless—serving no purpose other than to paralyze those charged with protecting elections.

The injunction was even vague about which entities were prohibited from collaborating with the government, defining "social media companies" to include "and like companies," and identifying organizations with whom government officials may not collaborate, coordinate, partner, or switchboard to include "or any like project or group." *Id.* at 159a. The Fifth Circuit observed that the injunction failed to "identify the specific parties that are subject to the prohibitions" and that it "exceed[ed] the scope of the parties' presentation." *Id.* at 247a.

The resulting opaqueness in the district court's injunction left *amici* and comparable private actors, as well as government officials, helpless to divine the dividing line between permitted and prohibited. Social media posts about the security of mail-in voting could have come within exceptions for "informing social-media companies of postings intending to mislead voters about voting requirements and procedures," *id.* at 159a—or not, since they could have equally fallen within proscribed conduct. Obeying the law is not supposed to be a guessing game, particularly where constitutional rights are concerned.

D. The District Court's Injunction Inhibited *Amici*'s Ability to Discuss Election Protection Matters with the Government.

The injunction's crippling overbreadth and vagueness would have chilled critical information-sharing between organizations like Election Protection, local election officials, federal agencies, and social media companies. This in turn would have impeded citizens

from making informed decisions and participating in elections.

The government would have ceased engaging with social media companies and voter protection organizations to avoid the risk of contempt. This had already happened. One day after the injunction's issuance, the State Department cancelled its regular monthly meetings with Facebook "pending further guidance." Joseph Menn et al., *State Dept. Cancels Facebook Meetings After Judge's 'Censorship' Ruling*, Wash. Post (July 5, 2023).[27] Facebook's spokesperson anticipated that Facebook's regular meetings with other executive agencies, such as CISA, were also likely to be cancelled given the injunction. *Id.* Just as the State Department cancelled meetings with Facebook, other enjoined government agencies and officials likely would not have met with *amici* to discuss Election Protection priorities. And this would have undermined *amici*'s critical voter protection missions.

The injunction would likewise have chilled communications between Election Protection and state and local election officials. Election officials must be able to combat disinformation to administer free and fair elections, including by reporting falsehoods they learn about from voters and civil society groups such as Election Protection to those who host social media platforms. But there was no limiting principle in this injunction to prevent a similar injunction being issued against state actors beyond the federal agencies. Consequently, state and local election officials could have been intimidated from working with Election

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[27] https://www.washingtonpost.com/technology/2023/07/05/missouri-biden-judge-censorship-ruling-analysis/ (as visited Dec. 21, 2023).

Protection or from directly or indirectly combatting disinformation, imperiling its core mission.

II. THE FIFTH CIRCUIT'S INJUNCTION SHOULD BE VACATED BECAUSE IT IS VAGUE, OVERBROAD, AND WILL CHILL EFFORTS TO PROTECT VOTING RIGHTS.

The Fifth Circuit correctly found that that the district court's injunction was "broader than necessary" to remedy the plaintiffs' injuries and struck down nine out of the ten prohibitions, including those discussed above that would have directly impacted *amici*. Pet. App. 244a. It modified the remaining prohibition:

> Defendants [the White House, the CDC, the FBI, and CISA,] and their employees and agents, shall take no actions, formal or informal, directly or indirectly, to coerce or significantly encourage social-media companies to remove, delete, suppress, or reduce, including through altering their algorithms, posted social-media content containing protected free speech. That includes, but is not limited to, compelling the platforms to act, such as by intimating that some form of punishment will follow a failure to comply with any request, or supervising, directing, or otherwise meaningfully controlling the social-media companies' decision-making processes.

Id. at 248a.

The Fifth Circuit's modified injunction, however, is still fatally defective. *First*, it violates Rule 65 of the Federal Rules of Civil Procedure, which requires an injunction to be specific and defined. *Second*, it is

impermissibly overbroad because it seeks to remedy future actions of government agencies beyond the specific conduct complained of. The overall effect of the injunction, if permitted to persist, would be a substantial impairment of the government's ability to work collaboratively with civil society and social media platforms to protect elections against disinformation and voter suppression efforts.

A. The Fifth Circuit's Injunction Is Vague in Violation of Rule 65.

An injunction runs afoul of the Federal Rules of Civil Procedure if it fails to "state its terms specifically," and "describe in reasonable detail" the acts restrained or required. Fed. R. Civ. P. 65(d). The "specificity provisions of Rule 65(d) are no mere technical requirements," but rather "designed to prevent uncertainty and confusion on the part of those faced with injunctive orders." *Schmidt* v. *Lessard*, 414 U.S. 473, 476 (1974). The test is whether "an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed." 11A Charles Allan Wright & Arthur R. Miller, Federal Practice and Procedure, § 2955 (3d ed. 2023).

The Fifth Circuit does not even attempt to define key terms in the injunction. For example, it prohibits defendants from taking any "actions, formal or informal." Even assuming that "formal" actions refers to formal rulemaking or decision-making, nowhere does the Fifth Circuit define what "informal" action means. Pet. App. 248a. The record in this case shows that most of the communications between the federal officials and the platforms in 2020 occurred via emails. Are those "informal actions"? Would one email from a government official to the content moderation team

at a social media company constitute an "informal action"?

Similarly, the Fifth Circuit does not explain what it means for government agencies to take no "action" "directly or indirectly" vis-à-vis social media platforms. Indeed, the only use of the word "direct" by the court in its opinion is in describing whether conduct of social media platforms was a "direct" result of communications from the government, not whether the government "directly" acted vis-à-vis the platforms. See, *e.g.*, *id.* at 224a (Platforms changed their course "as a direct result" of messages from White House officials.); *id.* at 234a (The platforms "reacted" to requests from the FBI by taking down content "in direct compliance" with the request.); *id*. at 236a (CDC officials "directly impacted the platforms' moderation policies" because platforms later "adopted rule changes meant to implement the CDC's guidance."). What constitutes an "indirect" "action" to tell social media companies to take down content or change policies? Compounding the uncertainty, what is an "indirect," "informal" "action" and how are officials supposed to know where the line is?

The examples cited by the Fifth Circuit of impermissible "formal or informal," "direct or indirect" actions serve only to underscore the inherent vagueness in the injunction. The court faults the CDC for "engag[ing] on a regular basis" with platforms, "flagg[ing] content" such as misinformation that CDC recommended for removal and providing "direct guidance" on misinformation policies. *Id.* at 189a (cleaned up). The court chides FBI officials for "regularly me[eting] with the platforms," "shar[ing] strategic information," "frequently alert[ing] the social media companies to misinformation spreading on their

platforms," "monitor[ing] their content moderation policies," and "urg[ing]" the platforms to take content down." *Id.* at 190a–191a.

The court even admonishes White House officials for *speaking at press conferences about their policy positions*, such as "the White House expects more from the platforms." *Id.* at 187a (cleaned up). The Fifth Circuit's analysis with respect to White House officials illustrates just how ill-defined these injunction terms are. The court found that the officials' statements during press conferences were the types of impermissible "actions" that run afoul of the First Amendment. *Id.* at 222a–223a. As part of that analysis, the Fifth Circuit explains that officials "leaned into the inherent authority of the President's office" when they expressed their views at press conferences, for example, by stating that platforms "needed to take greater responsibility and action," or that the "President has long been concerned about the power of large social media platforms," or that "fundamental reforms" were needed. *Id.* at 189a. The court found that these statements amounted to "inflammatory accusations" that somehow *compelled* social media platforms to change their policies. *Id.* at 227a. In so finding, the Fifth Circuit suggests that White House officials could not even comment on such policies publicly without risking taking impermissible "action."

The Fifth Circuit uses such broad and undefined language that federal officials cannot discern which actions are permissible and which are impermissible under the terms of the injunction. It is unclear whether even general statements by officials at press conferences might be "formal or informal" or "direct or indirect" actions. Thus, the injunction places federal

officials in a bind, making it difficult for them to know what they may or may not do to address election disinformation and protect election integrity without risking contempt. The vagueness of the injunction violates Rule 65.

B. The Fifth Circuit's Injunction Is Impermissibly Overbroad.

The Fifth Circuit's injunction is impermissibly overbroad because it is not narrowly tailored to remedy a specific action, and in fact, reaches conduct far beyond the conduct challenged in the case.

An injunction is overbroad where it exceeds the legal basis of the lawsuit and the "extent of the violation established." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). A "plaintiff's remedy must be tailored to redress the plaintiff's particular injury," *Gill* v. *Whitford*, 138 S. Ct. 1916, 1934 (2018), and injunctive relief may "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Califano*, 442 U.S. at 702; see *United States* v. *Texas*, 599 U.S. 670, 703 (2023). The requirement for a narrowly tailored remedy stems from a federal court's "constitutionally prescribed role [] to vindicate the individual rights of the people appearing before it." *Gill*, 138 S. Ct. at 1916.

The plaintiffs here challenged certain government agencies for their communications specifically related to election misinformation in 2020, as well as the COVID-19 pandemic, vaccines, and interventions. But the injunction prohibits *all* future messages, communications, and interactions between certain government agencies, their employees and agents and social media platforms urging removal or deletion of material, *regardless* of the content of the material.

This will lead to serious consequences. Under the injunction, enjoined agencies and their officials would not be able to do anything about the abundant dis- and misinformation online pertaining to voting, including sharing intelligence with social media companies or voicing policy positions on content moderation at press conferences, for fear that these statements might be perceived by the platforms as "coercive." For example, as discussed above, the court faults White House officials for using their bully pulpit to make public statements directed towards content moderation policies and holding social media platforms accountable. Pet. App. 222a–225a. Similarly, the court finds that the FBI's communications such as "regularly meeting with platforms" and sharing "strategic information" with social media companies to "alert them to misinformation trends in the lead-up to federal elections," *id.* at 190a, might be perceived as threatening or coercive simply because the FBI has "inherent authority" as a law enforcement agency, *id.* at 233a–234a.

As these examples illustrate, there is no limiting principle to the Fifth Circuit's injunction. If strong words from the White House's bully pulpit and general communications from a law enforcement agency are impermissible actions, it is hard to see how *any* government communication to *any* online platform—or even just discussing a company's activities in public—could be permissible. See Pet. Br. 40–41. It would be functionally impossible for government officials to ever discuss any issue of significance related to a social media platform for fear of drawing a judicial rebuke or worse.

Perhaps anticipating that its remedy would generate widespread criticism, the Fifth Circuit acknowl-

edges that its injunction is broad because it "extend[s] [a] benefit or protection to persons other than prevailing parties," *id.* at 249a, but concludes nevertheless that this "breadth [is] necessary to give parties the relief to which they are entitled," *id.* at 250a. That logic runs counter to the narrow tailoring requirement which requires the relief ordered by a court to be *specific to the parties*. But the relief granted here is much broader and restricts the activities of federal officials far beyond the complained of conduct, creating significant obstacles to the government's duty to protect election integrity and the public welfare generally.

These chilling effects will reach beyond the sanctioned federal officials. State and local election officials will see the precedent of this case and proactively self-censor for fear of drawing a lawsuit because they cannot know, based on the Fifth Circuit's injunction, what is inbounds and out-of-bounds. See Pet. Br. 50. These election administrators are the first line of defense for our republic; they are often the ones who spot problems on the ground and raise the alarm. If they are afraid to report what they see, the integrity of our elections will be in grave danger, and it is the enemies of democracy, foreign and domestic, who will benefit. The defects in the Fifth Circuit's injunction strike at the core ability of the government to protect that which is "preservative of all rights"—the right to vote. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886).

CONCLUSION

The Court should vacate the Fifth Circuit's injunction and remand with instructions to dismiss the case.

Respectfully submitted,

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