No. 23-411

In the Supreme Court of the United States

VIVEK H. MURTHY, SURGEON GENERAL, ET AL.,
PETITIONERS

v.

STATE OF MISSOURI, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

Respondents are two States and five individual users of social-media platforms who allege that the federal government transformed the private platforms' content-moderation decisions into state action and violated the First Amendment by communicating with the platforms about content moderation and responding to the platforms' inquiries about matters of public health. The district court issued a preliminary injunction that, as modified by the court of appeals, restricts speech by thousands of federal officials and employees concerning any content posted by anyone on any social-media platform. The questions presented are:

1. Whether respondents have Article III standing.

2. Whether the government's challenged conduct transformed private social-media companies' content-moderation decisions into state action and violated respondents' First Amendment rights.

3. Whether the terms and breadth of the preliminary injunction are proper.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants below) are Surgeon General Vivek H. Murthy and Chief Engagement Officer for the Surgeon General, Katharine Dealy, along with their directors, administrators and employees; White House Press Secretary, Karine Jean-Pierre; Counsel to the President, Edward N. Siskel; White House Partnerships Manager, formerly Aisha Shah; Special Assistant to the President, Sarah Beran; Administrator of the United States Digital Service within the Office of Management and Budget, Mina Hsiang; White House National Climate Advisor, Ali Zaidi; White House Senior COVID-19 Advisor, formerly Andrew Slavitt; Assistant to the President and Director of Digital Strategy, Christian L. Tom (formerly Rob Flaherty); White House COVID-19 Director of Strategic Communications and Engagement, formerly Dori Salcido; White House Digital Director for the COVID-19 Response Team, formerly Clarke Humphrey; Deputy Director of Strategic Communications and Engagement of the White House COVID-19 Response Team, formerly Benjamin Wakana; Deputy Director for Strategic Communications and External Engagement for the White House COVID-19 Response Team, formerly Subhan Cheema; White House COVID-19 Supply Coordinator, formerly Timothy W. Manning; and Chief Medical Advisor to the President, formerly Dr. Anthony S. Fauci, along with their directors, administrators and employees; the Centers for Disease Control and Prevention (CDC), and specifically the following employees: Carol Y. Crawford, Chief of the Digital Media Branch of the CDC Division of Public Affairs; Jay Dempsey, Social-Media Team Leader, Digital Media Branch, CDC Division of Public Affairs; and Kate Galatas, CDC Deputy Communications Director; the Fed-

eral Bureau of Investigation (FBI), and specifically the following employees: Section Chief, FBI Foreign Influence Task Force, formerly Laura Dehmlow; and Elvis M. Chan, Supervisory Special Agent of Squad CY-1 in the FBI San Francisco Division; the Cybersecurity and Infrastructure Security Agency (CISA); the Director of CISA, Jen Easterly; the Senior Cybersecurity Advisor and Senior Election Security Lead, formerly Kim Wyman; Lauren Protentis; Geoffrey Hale; Allison Snell; and Brian Scully.*

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* All individual defendants were sued in their official capacities and their successors, if any, have automatically been substituted in their respective places. See Sup. Ct. R. 35.3; Fed. R. App. P. 43(c)(2); Fed. R. Civ. P. 25(d).

The following defendants-appellants, as named in the operative complaint, are not petitioners here because the court of appeals reversed the entry of injunctive relief against them: the Department of Health and Human Services (HHS); the National Institute of Allergy and Infectious Diseases (NIAID); Xavier Becerra, Secretary of HHS; Dr. Jeanne Marrazzo, Director of NIAID (formerly Dr. Anthony S. Fauci); Yolanda Byrd, HHS Digital Engagement Team; Christy Choi, HHS Office of Communications; Ashley Morse, HHS Director of Digital Engagement; Joshua Peck, HHS Deputy Assistant Secretary, Deputy Digital Director of HHS (formerly Janell Muhammed); along with their secretaries, directors, administrators, and employees; the United States Census Bureau, Jennifer Shopkorn, Census Bureau Senior Advisor for Communications, Division Chief for the Communications Directorate, and Deputy Director of the Census Bureau Office of Faith Based and Neighborhood Partnerships, along with their secretaries, directors, administrators and employees; the United States Department of Justice, along with its secretary, director, administrators, and employees; the United States Department of Homeland Security (DHS); Alejandro Mayorkas, Secretary of Homeland Security; Robert Silvers, Under-Secretary of the Office of Strategy, Policy and Plans for DHS; Samantha Vinograd, Senior Counselor for National Security in the Office of the Secretary for DHS, along with their secre-

Respondents (plaintiffs-appellees below) are the State of Missouri; the State of Louisiana; Aaron Kheriaty; Martin Kulldorff; Jim Hoft; Jayanta Bhattacharya; and Jill Hines.

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tary, directors, administrators, and employees; the United States Department of State (State Department); Leah Bray, Acting Coordinator of the State Department's Global Engagement Center (GEC); Alexis Frisbie, State Department Senior Technical Advisor and Member of the Technology Engagement Team at the GEC; Daniel Kimmage, Acting Coordinator of the GEC, along with their secretary, directors, administrators, and employees.

The following defendants are not petitioners here because the district court did not enter injunctive relief against them: Joseph R. Biden, Jr., President of the United States; the Food and Drug Administration; the Department of the Treasury; the Department of Commerce; Erica Jefferson; Michael Murray; Wally Adeyemo; Steven Frid; Brad Kimberly; Kristen Muthig; the Disinformation Governance Board; and Nina Jankowicz.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 1-84) is reported at 83 F.4th 350. A prior opinion of the court of appeals (J.A. 305-387) is reported at 80 F.4th 641. The opinion of the district court (J.A. 85-277) is not yet published in the Federal Supplement but is available at 2023 WL 4335270.

JURISDICTION

The judgment of the court of appeals affirming in part and modifying the district court's preliminary injunction was entered on October 3, 2023. On October 20, 2023, this Court treated the government's application for a stay of the injunction as a petition for a writ of certiorari and granted the petition. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech.

U.S. Const. Amend. I.

STATEMENT

This case concerns the fundamental principle that the First Amendment "restricts government regulation of private speech" but "does not regulate government speech." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 467 (2009). The government is entitled to "speak for itself" by sharing information, urging action, and participating in "debate over issues of great concern to the public." *Id.* at 467-468 (citations omitted). "Indeed, it is not easy to imagine how government could function if it lacked this freedom." *Id.* at 468. Of course, the government cannot punish people for expressing different views, and it cannot accomplish the same thing indirectly by threatening to punish private actors for disseminating those views. But so long as the government seeks to inform and persuade rather than to compel, its speech poses no First Amendment concern—even if government officials state their views in strong terms, and even if private actors change their speech or conduct in response.

Maintaining that distinction is vital to preserving the "constitutional boundary between the governmental and the private." *Manhattan Community Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1928 (2019). If the government is deemed to have compelled a private party to act, that party becomes a state actor subject to constitutional constraints. *Id.* at 1933. And this Court has emphatically rejected theories of state action that would

"endanger individual liberty and private enterprise" by too readily deeming private individuals and companies to be state actors—especially theories that would undermine private entities' "rights to exercise editorial control over speech and speakers on their properties or platforms" by subjecting them to the requirements of the First Amendment. *Id.* at 1932.

This is a suit brought by two States and five individuals who assert a sprawling challenge to federal officials' speech to and about social-media platforms such as Facebook, YouTube, and X (formerly known as Twitter). The district court and the Fifth Circuit held that a wide range of the officials' speech—including speech criticizing the platforms' content-moderation policies, identifying posts that may have violated those policies, and even answering platforms' questions about public health—transformed private social-media platforms' decisions to remove, demote, or label posts into state action that violated the First Amendment. The lower courts then entered a sweeping preliminary injunction that effectively installs the district court as the superintendent of the Executive Branch's communications with and about the platforms.

A. Background

1. Social-media platforms allow billions of people to share content instantaneously around the globe. See *Twitter, Inc.* v. *Taamneh*, 598 U.S. 471, 480 (2023). The unprecedented scale and speed of social-media communications have obvious benefits, but they also pose significant hazards. Terrorist organizations, for example, use the platforms "as tools for recruiting, fundraising, and spreading their propaganda"—including by radicalizing vulnerable individuals and inspiring attacks in the United States. *Id.* at 481; see Christopher Wray, *State-*

ment Before the House Judiciary Committee (Feb. 5, 2020) (*Wray Statement*), perma.cc/KZ2B-XZLP; C.A. ROA 23,864-23,866. Child predators use the platforms to groom and sexually exploit minors. C.A. ROA 23,869. And foreign governments such as Russia, China, and Iran use the platforms in "influence operations" that "spread disinformation, sow discord, push foreign nations' policy agendas, and ultimately undermine confidence in our democratic institutions and values." *Wray Statement*; see C.A. ROA 23,857-23,859.

Social-media companies have long sought to address those and other hazards—and thus preserve the value of their products to users and advertisers—by adopting and enforcing policies to moderate the content posted on their platforms. C.A. ROA 21,943-21,961. Moderation by the platforms can include "demoting" content to reduce its reach, removing content, or suspending a user's account. See, *e.g.*, *id.* at 22,546-22,547. Each platform's content-moderation policies reflect its views, market incentives, and editorial judgments. See, *e.g.*, *id.* at 22,044-22,053 (YouTube); *id.* at 22,069-22,073 (Facebook). Different platforms have adopted different approaches, and platforms have changed their policies in response to "evolving social concerns, including terrorism, election interference, and public health." *Id.* at 21,957; see *id.* at 21,957-21,961 (collecting examples).

"For example, in response to a large increase in violent terror-related content in 2014, social media platforms implemented more stringent rules against violent content." C.A. ROA 21,957. And during the COVID-19 pandemic, the platforms adopted and adjusted policies aimed at combatting the spread of harmful hoaxes and misinformation. See, *e.g.*, *id.* at 22,536-22,551 (Twitter and Facebook). In March 2020, for instance, Twitter

amended its content-moderation policies "to address content that goes directly against guidance from authoritative sources of global and local public health information." *Id.* at 22,539. And in November 2022, Twitter announced that it was "no longer enforcing" that policy. *Id.* at 22,536.

2. Throughout our Nation's history, government officials have communicated with the media and other private actors to inform, persuade, and protect the public. Federal officials have continued those practices in response to the new opportunities and dangers posed by the rise of social media. Given the ubiquity of social media in modern public life, those communications take a wide variety of forms and address a wide range of topics. To take just a few examples:

- The Department of Homeland Security (DHS) provides general "awareness briefings" to help social-media platforms "recognize and react to violent extremist content" posted by terrorist groups. DHS, *Strategic Framework for Countering Terrorism and Targeted Violence* 24 (Sept. 2019), perma.cc/ZR8A-MLHD.
- The Federal Bureau of Investigation (FBI) sometimes "provides social media platforms with notice, for whatever action they deem appropriate, that foreign terrorists or those promoting terrorism are using their platforms." C.A. ROA 23,866.
- When FBI intelligence reveals that a social-media account appears to be controlled by a "covert foreign malign actor," the FBI may share account details "that will enable social media companies to conduct their own independent investigation into

whether there is a violation of their terms of service." C.A. ROA 23,860.

- During the pandemic, platforms "regularly reached out" to the Centers for Disease Control and Prevention (CDC) "to ensure that the information the social media companies chose to promote on their platforms remained consistent with the latest CDC guidance." C.A. ROA 23,094. In some cases, platforms also solicited CDC's views on the veracity of specific claims. J.A. 138-139; see, *e.g.*, C.A. ROA 11,445-11,447.
- During the 2018 and 2020 election cycles, the Cybersecurity and Infrastructure Security Agency (CISA) forwarded messages from state officials identifying false election-related information posted on the platforms, such as false statements about the time, place, and manner of elections. See, *e.g.*, C.A. ROA 23,220-23,221 (Louisiana); *id.* at 23,226-23,227 (Greene County, Missouri). Those communications typically stated that CISA "makes no recommendations" about how the platforms should respond and "will not take any action, favorable or unfavorable," based on the platforms' "decisions about how or whether to use this information." *Id.* at 23,220; see, *e.g.*, *id.* at 14,504, 23,223, 23,230.
- During a few months in early 2021, some White House officials working on the rollout of COVID-19 vaccines communicated frequently with platforms about the platforms' publicly announced efforts to promote accurate information about the vaccines and remove or demote vaccine-related

content that violated the platforms' policies. See J.A. 6-9.

- White House officials also communicate with the platforms to manage the White House's own social-media accounts and to report accounts impersonating the President's family members. *E.g.*, J.A. 639 (February 2021 email exchange describing procedures Twitter used for such requests during "prior administrations").

In addition, senior government officials have often spoken publicly about a variety of issues raised by social media platforms, including the harms that can arise from the rapid spread of falsehoods online. In May 2021, for example, the White House Press Secretary expressed the President's view that social-media platforms have a "responsibility" to "stop amplifying untrustworthy content, disinformation, and misinformation, especially related to COVID-19, vaccinations, and elections." C.A. ROA 609. She also emphasized that the President "believe[s] in First Amendment rights" and that "social media platforms need to make" "the decisions" regarding "how they address * * * disinformation" and "misinformation." *Ibid.*

B. The Present Controversy

1. Respondents are two States and five individual social-media users. They allege that in the past, some of their social-media posts or accounts were "removed or downgraded by the platforms," J.A. 3, though their accounts have since been restored, C.A. ROA 23,513-23,514. Respondents "maintain that although the platforms stifled their speech" by moderating their posts, "government officials were the ones pulling the strings." J.A. 3. The operative complaint names 67 fed-

eral entities, officials, and employees, and characterizes their communications with and about social-media platforms as a "sprawling federal 'Censorship Enterprise.'" J.A. 395. Although respondents' allegations touch on a wide range of the platforms' content-moderation activities, they have focused primarily on content related to the COVID-19 pandemic and the 2020 election.

After allowing extensive discovery, the district court issued a preliminary injunction. J.A. 85-277. The court held that seven groups of defendants had transformed social-media platforms' content-moderation decisions into state action—and violated the First Amendment—by "coercing" or "significantly encouraging" the platforms' content-moderation activities. J.A. 194-227. The court enjoined those defendants, and hundreds of thousands of unnamed employees of the defendant agencies, from engaging in ten types of speech, such as "communication of any kind with social-media companies urging, encouraging, pressuring, or inducing" the "removal, deletion, suppression, or reduction of content"; "urging" those companies "to change their guidelines for removing" content; and "flagging content or posts." J.A. 281-283. The injunction also contained a series of carveouts that purported to permit the government to inform platforms of posts involving "criminal activity," "national security threats," and certain other categories of content. J.A. 283-284.

In the same order, the district court denied respondents' motion to certify two broad classes of "social-media users" who have posted or viewed, or who will post or view, content subject to moderation. J.A. 268-269 (citations omitted); see J.A. 265-275. Respondents did not seek to appeal that denial. Cf. Fed. R. Civ. P. 23(f).

2. Following a grant of panel rehearing, the Fifth Circuit vacated part of the preliminary injunction and modified the rest. J.A. 1-84; cf. J.A. 305-387 (original panel opinion). On appeal, the government had vigorously disputed many of the district court's factual findings, which were often demonstrably wrong. *E.g.*, Gov't C.A. Br. 29-32, 35-36, 39; Gov't C.A. Reply Br. 9-13. The Fifth Circuit did not rely on many of the disputed findings, but it held that the findings it did credit were sufficient to establish respondents' entitlement to relief.

a. The Fifth Circuit held that individual respondents have Article III standing to seek injunctive relief on the theory that the platforms' past moderation of their posts and accounts caused respondents "ongoing harm" because they now "self-censor" their social-media activity. J.A. 20-21. The court also found "a substantial risk" that individual respondents' injuries "will reoccur" because platforms "continue[] to enforce a robust general misinformation policy" and the government "continue[s] to be in regular contact with" the platforms. J.A. 22-23. The court held that respondent States have standing on the theory that the past removal of content posted by a state legislator, a state agency, and a county implicated the States' "'right' to speak." J.A. 29 (citation omitted). The court also held that the States have a right "to listen to their citizens" on social media. *Ibid.*

b. On the merits, the Fifth Circuit held that platforms' decisions to moderate content constituted "state action" subject to the First Amendment. J.A. 31-71. The court explained that state action exists "when a private party is coerced or significantly encouraged by the government to such a degree that its 'choice' * * * 'must in law be deemed to be that of the'" government. J.A. 32 (citations omitted).

The Fifth Circuit stated that a decision is "coerced" if "the government compelled the decision by, through threats or otherwise, intimating that some form of punishment [would] follow a failure to comply." J.A. 46. To identify such coercion, the court weighed four factors: "(1) word choice and tone"; "(2) the recipient's perception"; "(3) the presence of authority"; and "(4) whether the speaker refers to adverse consequences." J.A. 47.

The Fifth Circuit stated that the government can be found to have "significantly encouraged" private conduct if it "exercise[d] active, meaningful control over the private party's decision." J.A. 46. But the court held that such "control" can be established by mere "entanglement in a party's independent decision-making." *Ibid.*

Applying those standards, the Fifth Circuit determined that certain White House officials engaged in both coercion and significant encouragement in their communications about the platforms' approach to content related to COVID-19 vaccines. J.A. 49-62. The court asserted that those officials made threats, though it did not cite any communication threatening any specific action. See J.A. 49-50. The court also concluded that the four-factor test weighed in favor of finding coercion, especially in light of the officials' "tone." J.A. 51-59. And the court found significant encouragement because officials "entangled themselves in the platforms' decision-making processes" by engaging in frequent communications and making requests for information. J.A. 59; see J.A. 59-62. The court also lumped the Surgeon General's Office in with the White House based on what the court called their "close cooperation" and "the ministerial ecosystem." J.A. 4.

The Fifth Circuit held that the FBI coerced and significantly encouraged the platforms by communicating about "foreign threats" and false election information, such as "posts that stated incorrect poll hours." J.A. 15; see J.A. 62-65. The court acknowledged that the FBI did not "reference adverse consequences" in its communications. J.A. 63. But the court reasoned that the FBI has "inherent authority" as a law-enforcement agency and that platforms must have "perceived the FBI's messages as threats" because they sometimes removed content. J.A. 64.

The Fifth Circuit concluded that CDC's communications "were not coercive." J.A. 65. But the court determined that CDC officials engaged in significant encouragement because they provided guidance about COVID-related falsehoods, sometimes at the platforms' request, which the court viewed as causing the platforms "to *heavily rely*" on CDC in applying their content-moderation policies. J.A. 66.

Although the Fifth Circuit initially concluded that CISA did not engage in coercion or significant encouragement, see J.A. 372, the court reversed itself on panel rehearing, holding that CISA "significantly encouraged the platforms' content-moderation decisions" because it "'facilitat[ed]'" the FBI's interactions with platforms and "affirmatively *told* the platforms whether" certain content "was true or false" as part of its "switchboarding" operations. J.A. 67-68; see J.A. 15 (explaining that "'switchboarding'" involved CISA's "act[ing] as an intermediary for third parties by forwarding flagged content from them to the platforms").

The Fifth Circuit found that the remaining defendants did not engage in coercion or significant encour-

agement and thus reversed the injunction as to them. J.A. 68-69.

c. On the equities, the Fifth Circuit determined that respondents likely would suffer irreparable harm absent a preliminary injunction because federal officials continue to communicate with the platforms. J.A. 71-74. The court acknowledged that an injunction could impair the government's legitimate interest "in engaging with social-media companies, including on issues such as misinformation and election interference," as well as "the Executive Branch's ability to 'persuade' the American public." J.A. 73-74. But the court believed it could address those "legitimate concerns" by "modifying the scope of the injunction." J.A. 74.

d. The Fifth Circuit acknowledged that the district court's original injunction was vague and overbroad, and accordingly vacated nine of the ten prohibitions and all of the carveouts. J.A. 74-79. The Fifth Circuit then rewrote the remaining prohibition to incorporate the broad concepts of "coercion" and "significant encouragement" reflected in its opinion:

> Defendants, 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.

J.A. 80-81. The court rejected the government's request to limit relief to actions seeking the removal or suppression of the respondents' own content, stating that broader relief was appropriate because "[t]he harms that radiate from [the challenged] conduct" affect "every social-media user." J.A. 82.

3. This Court granted the government's application to stay the injunction, as modified by the court of appeals; treated the application as a petition for a writ of certiorari; and granted the petition. 2023 WL 6935337.

SUMMARY OF ARGUMENT

The Fifth Circuit's decision is flawed three times over: The court erred in finding that respondents have standing, in holding that the government's challenged conduct transformed the platforms' content-moderation decisions into state action, and in concluding that a sweeping preliminary injunction is proper.

I. Respondents lack Article III standing because they have not shown any cognizable injuries that are fairly traceable to the government or redressable by judicial relief. Respondents principally rely on past instances when their posts and accounts were subject to moderation by private platforms. But those injuries are not fairly traceable to the government; to the contrary, the content moderation that injured respondents began long before most of the government conduct they challenge. In any event, those past injuries cannot support standing to seek prospective relief because they do not establish a real and immediate threat of future injury attributable to the government. Nor can respondents establish standing by asserting a generalized desire to listen to other social-media users—a limitless theory no court has endorsed. And state respondents also lack

standing because they have no First Amendment rights to begin with.

II. Respondents' First Amendment claims lack merit. The Fifth Circuit held that the government's communications with private social-media platforms transformed the platforms' content-moderation decisions into state action attributable to the government and violated the First Amendment. But government officials are and must be free to inform, to persuade, and to criticize. Such government speech often prompts private entities to act, but that does not transform those entities into state actors. Were it otherwise, every successful public-awareness campaign or use of the bully pulpit would create state action.

Instead, this Court has emphasized that a private entity becomes a state actor only in "a few limited circumstances," such as when the government "compels the private entity to take a particular action." *Manhattan Community Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1928 (2019). Such compulsion requires either coercive threats or equivalent significant encouragement—that is, positive inducements that overwhelm the recipient's independent judgment and render its decisions fairly attributable to the government. Private entities that merely respond to information, persuasion, or criticism from government officials are not state actors.

Those principles resolve this case. The Fifth Circuit did not even purport to find that any government official offered the platforms any positive inducements to change their content-moderation decisions—much less the specific decisions that injured respondents. It also did not purport to conclude that officials from the FBI, CDC, CISA, or the Surgeon General's Office threatened platforms with adverse consequences if they failed to

moderate content; instead, those agencies largely just provided the platforms with information. And although the Fifth Circuit stated that White House officials threatened the platforms with legal reforms, the only statements it identified were general responses to press questions untethered from any specific content-moderation request.

Rather than asking whether the government used threats or inducements to compel the specific content-moderation decisions that injured respondents, the Fifth Circuit deemed *all* of the private platforms' content-moderation activities to be state action by radically expanding the state-action doctrine. The court applied malleable standards to find coercion even absent any threat of adverse action. The court held, for example, that communications from the FBI were inherently coercive merely because the FBI is a law-enforcement agency. And the court conceived of significant encouragement as requiring nothing more than "entanglement" in the platforms' content-moderation efforts—a novel standard the court found satisfied simply because various government agencies met with the platforms, shared information within their respective areas of expertise, and responded to platforms' questions.

The implications of the Fifth Circuit's holdings are startling. The court imposed unprecedented limits on the ability of the President's closest aides to speak about matters of public concern, on the FBI's ability to address threats to the Nation's security, and on CDC's ability to relay public-health information. And the court's holding that platforms' content-moderation decisions are state action would subject that private conduct to First Amendment constraints—a result that is

"especially problematic" because it would "eviscerate" the platforms' "rights to exercise editorial control over speech and speakers" they choose to present and promote. *Halleck*, 139 S. Ct. at 1932.

III. The injunction contravenes equitable principles. The Fifth Circuit did not identify any facts demonstrating that respondents will likely suffer irreparable injury in the future. The injunction is overbroad because it extends relief to nonparties and covers any governmental communication about moderation of content on any topic posted by any user on any platform. And because of its breadth and vagueness, the injunction would irreparably harm the government and the public by chilling a host of legitimate Executive Branch communications.

ARGUMENT

I. RESPONDENTS LACK ARTICLE III STANDING

Federal courts are limited to resolving "Cases" and "Controversies." U.S. Const. Art. III, § 2. "The doctrine of standing implements this requirement by insisting that a litigant 'prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision.'" *Carney* v. *Adams*, 141 S. Ct. 493, 498 (2020) (citation omitted). "[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press," "for each form of relief that they seek," and for each defendant against whom they seek it. *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2208 (2021).

"The principle of Article III standing is 'built on a single basic idea—the idea of separation of powers.'" *United States* v. *Texas*, 599 U.S. 670, 675 (2023) (citation omitted). Faithful adherence to Article III "helps safe-

guard the Judiciary's proper—and properly limited—role in our constitutional system," *id.* at 675-676, by ensuring that the federal courts do not become "forums for the ventilation of public grievances," *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982).

This case vividly illustrates the separation-of-powers problems that arise when federal courts fail to observe the limits of Article III. In a typical First Amendment challenge, the question is whether specific government action that affected specific expression by the parties before the court violated the Constitution. Here, in contrast, the lower courts undertook an audit of *all* of the federal government's dealings with *all* social-media platforms about *any* content posted by *any* user—and did so at the behest of a handful of plaintiffs who failed to establish any cognizable injury traceable to any particular government action.

A. Individual Respondents Lack Standing

As the Fifth Circuit recognized (J.A. 19-20), individual respondents assert standing principally based on platforms' past moderation of their social-media posts. The removal or demotion of respondents' content qualifies as an Article III injury. But respondents have not shown that those past actions by the platforms are fairly traceable to the government. And even if respondents had made that showing, those past incidents would not establish standing to seek prospective relief.

1. The Fifth Circuit recognized that the platforms adopted their content-moderation policies without government involvement; indeed, the court stated that respondents "do not challenge" the policies themselves. J.A. 25. Instead, the court held that respondents have standing to challenge alleged "government-coerced *en-*

forcement of those policies." *Ibid.* But the court did not even purport to find that any particular act of enforcement affecting respondents was attributable to any particular conduct by any particular government official. Instead, the court simply presumed that *all* of what it called the platforms' "censorship decisions" were "likely attributable at least in part" to the government's challenged conduct, viewed in the aggregate. J.A. 26.

That loose, general approach improperly relieved respondents of the burden to establish traceability. As the Sixth Circuit explained in dismissing another case involving social-media content-moderation, "'an injury that results from a third party's voluntary and independent actions' does not establish traceability." *Changizi* v. *HHS*, 82 F.4th 492, 497 (2023) (citation omitted). Respondents were thus required to show that the government's challenged conduct caused a platform to take action with respect to their content that the platform would not otherwise have taken in the exercise of "its 'broad and legitimate discretion' as an independent company." *Ibid.* (citation omitted).

Respondents could not make that showing because the content moderation that injured them began long before most of the government conduct at issue here. The Fifth Circuit focused on the government's actions "since the 2020 presidential transition," which occurred in January 2021. J.A. 2. The court stated that officials in the White House and the Office of the Surgeon General "began communicating with social media companies" in "early 2021" and began discussing content moderation "[l]ater that year." J.A. 4-5. But respondents allege that the platforms began moderating their content months earlier. Respondents Bhattacharya and Kulldorf, for example, focus on the "Great Barrington

Declaration," which was published in October 2020 and subject to moderation immediately. J.A. 584-585, 596-598. Respondent Hines alleges "social-media censorship beginning in October 2020." J.A. 630. And respondents Kheriaty and Hoft likewise describe moderation that "began in 2020." J.A. 622; see J.A. 608.

2. Even if respondents had identified past instances of content moderation that were fairly traceable to the government, that would not confer standing to seek prospective relief. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief"; rather, a plaintiff must establish a "real and immediate threat of repeated injury." *O'Shea* v. *Littleton*, 414 U.S. 488, 495-496 (1974); see *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-108 (1983). Respondents thus had to show that they face an imminent threat of content moderation that the platforms would not undertake but for the government's challenged conduct.

The Fifth Circuit asserted that respondents' injuries "will reoccur," but that conclusion was based solely on the court's determinations that *the platforms* "continue[] to enforce a robust general misinformation policy" and that the government "continue[s] to be in regular contact with social-media platforms." J.A. 22-23. Neither the Fifth Circuit nor respondents established that any ongoing contact between the government and platforms will result in any moderation of respondents' content that the platforms would not otherwise have undertaken.

Respondents thus failed to establish any "real and immediate threat of repeated injury" fairly traceable to governmental action. *O'Shea*, 414 U.S. at 496; see *Lewis* v. *Casey*, 518 U.S. 343, 356-357 (1996) (two instances of

past injury do not establish standing to seek sweeping injunctive relief). And for the same reason, respondents also failed to show that an injunction against *the government* would redress any future injuries caused by *the platforms'* content moderation. Cf. *Haaland* v. *Brackeen*, 599 U.S. 255, 294 (2023). The platforms could continue to enforce their current policies against respondents whether or not a court enjoins the Executive Branch from speaking with the platforms about those policies.

3. Finally, the Fifth Circuit held that respondents have standing because "prior censorship has caused [respondents] to self-censor." J.A. 20. But this Court has made clear that plaintiffs whose claims do not otherwise satisfy Article III "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper* v. *Amnesty International USA*, 568 U.S. 398, 416 (2013).

B. State Respondents Lack Standing

The Fifth Circuit held that state respondents have standing based on a few past incidents involving the moderation of content posted by state officials or entities, as well as on an injury to the States' purported right "to listen to their citizens" on social media. J.A. 29. Neither theory has merit, and the States additionally lack standing because they have no First Amendment rights to begin with.

The first theory suffers from the same flaws as individual respondents' parallel theory: The States rely on a handful of past incidents of content moderation, unconnected to any specific governmental actions. J.A. 615-616, 635-636. Those past injuries cannot confer standing to seek forward-looking relief because the

States have not identified any "real and immediate threat of repeated injury" traceable to the federal government. *O'Shea*, 414 U.S. at 496.

The second theory—based on the States' asserted "right to listen" to their residents on social media—is equally meritless. This Court has sometimes "referred to a First Amendment right to 'receive information and ideas.'" *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972) (citation omitted). But it has relied on that right to authorize suits only by intended recipients of speech who had some connection to the speaker and thus suffered some identifiable and particularized harm from the challenged act. See, *e.g.*, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-757 (1976) (consumers challenging prohibition on advertising the price of prescription drugs); *Mandel*, 408 U.S. at 762 (professors challenging denial of visa to a person they planned to "hear, speak, and debate with" at a conference). And the Court has more recently observed that an "asserted informational injury that causes no adverse effects cannot satisfy Article III." *TransUnion*, 141 S. Ct. at 2214 (citation omitted).

The state respondents have established no such adverse effects here. Indeed, they disavow the need to do so. In opposing a stay in this Court, respondents asserted (at 15) that "the only 'connection' required" is that "the listener would otherwise hear the speaker's message." That all-encompassing theory would give anyone standing to challenge any alleged abridgment of the First Amendment rights of any speaker whose speech she "would otherwise hear." If accepted, it would mean that anyone could sue whenever a city council denied a parade permit, a transit authority rejected a bus advertisement, or a district attorney's office pro-

hibited an employee from writing an intemperate op-ed—even if the plaintiff had no connection to the aggrieved party other than the desire to hear him. That is the sort of "boundless theory of standing" this Court has consistently rejected. *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 99 (2013). And where, as here, such a theory is invoked by States against the federal government, it is also "a thinly veiled attempt to circumvent the limits on *parens patriae* standing." *Brackeen*, 599 U.S. at 295 n.11.

Finally, state respondents cannot satisfy Article III for an additional reason: Just as Texas lacked standing to assert equal protection claims in *Brackeen* because it had "no equal protection rights of its own," 599 U.S. at 294, state respondents lack standing here because they do not have First Amendment rights. "The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors." *Manhattan Community Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1926 (2019). States thus cannot assert First Amendment claims. Cf. *United States* v. *American Library Association*, 539 U.S. 194, 210-211 (2003) (plurality opinion) (noting this issue without resolving it). And because state respondents have not asserted any injury to a "legally cognizable right," they lack Article III standing. *McConnell* v. *FEC*, 540 U.S. 93, 227 (2003), overruled on other grounds by *Citizens United* v. *FEC*, 558 U.S. 310 (2010).[1]

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[1] State respondents' lack of First Amendment rights could be viewed as another reason why their claims fail on the merits rather than another reason why they lack standing. Cf. Resp. C.A. Br. 28. Either way, the result is the same: State respondents' claims cannot support the lower courts' entry of injunctive relief.

II. RESPONDENTS' FIRST AMENDMENT CLAIMS LACK MERIT

A. Government Speech Does Not Create State Action Unless It Involves Compulsion By Threats Or Inducements

1. As this Court has long recognized, "the government can speak for itself." *Board of Regents* v. *Southworth*, 529 U.S. 217, 229 (2000). When it does, "the Free Speech Clause has no application." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 467 (2009). The government "'is entitled to say what it wishes' and to select the views that it wants to express" free from "'First Amendment scrutiny.'" *Id.* at 467-468 (citations omitted). Indeed, it is often "the very business of government to favor and disfavor points of view." *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment). "The Constitution * * * relies first and foremost on the ballot box," not the First Amendment, "to check the government when it speaks." *Shurtleff* v. *City of Boston*, 596 U.S. 243, 252 (2022). "If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Summum*, 555 U.S. at 468-469 (citation omitted).

Of course, the government may not punish people for disagreeing with it or use its authority to suppress contrary views. *Ashcroft* v. *American Civil Liberties Union*, 535 U.S. 564, 573 (2002). Nor may the government circumvent that limitation by compelling a nominally private party to do the suppression for it. But those principles limit only compulsion through threats or inducements, not the government's own speech. Government officials may "vigorously criticize a publication" or speaker "for any reason they wish." *Penthouse International, Ltd.* v. *Meese*, 939 F.2d 1011, 1015 (D.C. Cir. 1991), cert. denied, 503 U.S. 950 (1992). And throughout

our Nation's history, "corporations and other institutions" have been "criticized by government officials" for "speech protected by the First Amendment." *Id.* at 1016.

Presidents, for example, have long used the bully pulpit to shape private conduct and influence the public on the issues of the day—including by criticizing private speech. Theodore Roosevelt (who coined the term "bully pulpit") famously lambasted "muck-raking" journalists, belittling the media's coverage of political scandals as "not a help to society, not an incitement to good, but one of the most potent forces for evil."[2] In addressing reporting he viewed as false and dangerous, Woodrow Wilson said "[w]e ought not to permit that sort of thing to use up the electrical energy of the wires, because its energy is malign, its energy is not of the truth, its energy is of mischief."[3] Calling it a "matter[] of life and death" and "of national survival," Ronald Reagan "bluntly" stated that media executives who "value[d]" "human dignity" and "human worth" should "tak[e] active steps against drugs or drug use," including through "tough reporting" on drugs.[4] And George W. Bush denounced pornography for its "debilitating effects on communities, marriages, families, and children." Presidential Proclamation No. 7725, *Protection from Por-*

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[2] The American Presidency Project, *Remarks at the Laying of the Cornerstone of the Office Building of the House of Representatives: "The Man with the Muck-Rake"* (Apr. 14, 1906), perma.cc/7WMN-8ELF.

[3] The American Presidency Project, *Address at the Associated Press Luncheon in New York City* (Apr. 20, 1915), perma.cc/3XLL-VCFK.

[4] Ronald Reagan Presidential Library & Museum, *Remarks to Media Executives at a White House Briefing on Drug Abuse* (Mar. 7, 1988), perma.cc/QFL7-D4GQ.

nography Week, 2003, 3 C.F.R. 129 (2003 comp.). All of those presidential statements, and countless others, strongly criticized protected speech. All of them may well have caused private actors to refrain from creating, distributing, or promoting that speech. But none of them violated the First Amendment.

2. This Court's state-action precedents reflect the same fundamental distinction between persuasion and compulsion.

a. The "Free Speech Clause does not prohibit *private* abridgment of speech." *Halleck*, 139 S. Ct. at 1928. Instead, that Clause "can be violated only by conduct that may be fairly characterized as 'state action.'" *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 924 (1982). A private entity engages in state action if its conduct is "fairly attributable to the [government]." *Id.* at 937. And this Court has recognized only a "few limited circumstances" in which that might be true, including "(i) when the private entity performs a traditional, exclusive public function," "(ii) when the government compels the private entity to take a particular action," and "(iii) when the government acts jointly with the private entity." *Halleck*, 139 S. Ct. at 1928.

The challenged content-moderation actions in this case indisputably were taken by private social-media platforms, not by the government. The Fifth Circuit nevertheless held that the platforms were engaged in state action. J.A. 32-48, 69-71 & n.22. The court did not suggest that hosting and moderating speech by others is a traditional, exclusive public function. See *Halleck*, 139 S. Ct. at 1930-1931. And the court disclaimed reliance on a "joint action" theory, which demands a "*very high*" degree of "integration" between the government and the private party. J.A. 36 n.11. Instead, the court

reasoned that the government's communications compelled the platforms to undertake the challenged content moderation. J.A. 32-48.

b. Under this Court's compulsion test for state action, the government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982); see *Halleck*, 139 S. Ct. at 1928 (citing *Blum*).

Coercion giving rise to state action requires an express or implicit "threat of invoking legal sanctions." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 67 (1963). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient." *Blum*, 457 U.S. at 1004. And even general pressure or incentives created by government action are likewise insufficient; instead, the government must compel "the *specific* conduct of which the plaintiff complains." *Ibid.* (emphasis added).

In *Bantam Books*, for example, the Court found state action where a state agency identified certain publications as "'objectionable'" in notices to distributors and retailers; asked for "'cooperation in removing the listed and other objectionable publications'"; emphasized the agency's "duty to recommend to the Attorney General prosecution of purveyors of obscenity"; assured that "'[c]ooperative action will eliminate the necessity of our recommending prosecution'"; and had a police officer visit to assess compliance. 372 U.S. at 62-63 & n.5. The Court found that distributors' and retailers' decisions to stop selling the identified publications were the product of the agency's "intimidation and

threat of prosecution," converting them into state action. *Id.* at 64.

In *Blum*, by contrast, the Court found no state action when private nursing homes transferred certain Medicaid patients to facilities offering lower levels of care, even though the "nursing homes in [the State were] extensively regulated," 457 U.S. at 1004; those regulations placed pressure (backed by "a range of penalties") on nursing homes to discharge or transfer patients, see *id.* at 1009; and the State was obliged to review and "approve or disapprove continued payment of Medicaid benefits" following a transfer, *id.* at 1010. Notwithstanding those general pressures, the Court explained that the nursing homes' specific "decision[s] to discharge or transfer particular patients" were not state action because they "ultimately turn[ed] on medical judgments made by private parties," *id.* at 1008.

This Court has never found state action based on "significant encouragement," but that concept is merely the other side of the same coin: Offers of positive inducements ("significant encouragement"), like threats of negative consequences ("coercive power"), may overwhelm a private party's independent judgment, such that its choices must be attributed to the government. *Blum*, 457 U.S. at 1004. Indeed, the same conduct can often be framed as either a threat or an inducement: The Constitution does not distinguish between "comply or I'll prosecute" and "comply and I'll look the other way." Cf. *National Rifle Association* v. *Cuomo*, 525 F. Supp. 3d 382, 392 (N.D.N.Y. 2021) (describing an alleged offer "not to prosecute [certain] violations" in exchange for compliance), reversed, 49 F.4th 700 (2d Cir. 2022), cert. granted, No. 22-842 (Nov. 3, 2023).

Critically, "significant encouragement" does not exist when the government merely urges a private party to act—even repeatedly or in strong terms. Instead, the sort of "significant encouragement" that transforms private conduct into state action occurs only through "the [government's] use of positive incentives" to "overwhelm the private party and essentially compel the party to act in a certain way." *O'Handley* v. *Weber*, 62 F.4th 1145, 1158 (9th Cir. 2023), petition for cert. pending, No. 22-1199 (filed June 8, 2023). To hold otherwise would untether the significant-encouragement inquiry from its purpose: to determine whether the government has "*compel[led]* the private entity to take a particular action." *Halleck*, 139 S. Ct. at 1928 (emphasis added). Courts have thus "drawn a sharp distinction" between governmental attempts to compel and "attempts to convince," holding that only the former render the government responsible for choices that a private party makes in response. *O'Handley*, 62 F.4th at 1158 (collecting cases). "The First Amendment does not interfere" with government speech so long as the recipient is free to "make its own independent judgment about whether to comply with the government's request," and there is "no reason to draw the state action line in a different place." *Ibid.*

After all, "[g]overnment officials and agencies spend a great deal of time urging private persons and firms and other institutions to change their behavior." *Peery* v. *Chicago Housing Authority*, 791 F.3d 788, 790 (7th Cir. 2015). "Physically fit young men and women are encouraged to enlist in the armed forces," but "it would be absurd to claim that encouraging enlistment is the equivalent of forcing people to serve." *Ibid.* Absent a coercive threat for noncompliance or inducement for

compliance, those kinds of exhortations do not transform private choices—even choices made at the government's urging—into state action.

That distinction holds whether the communications are public, private, or a combination of the two. Presidents, for example, have long stepped in to help resolve labor disputes. Bill Clinton famously "ordered a Federal mediator to bring baseball's players and owners back to the bargaining table" when he felt that "the major league baseball strike was trying Americans' patience and imperiling thousands of jobs."[5] In 1989, George H.W. Bush sent Labor Secretary Elizabeth Dole to organize the "first face-to-face negotiations" between the United Mine Workers and the chairman of the Pittston Company in six months.[6] Other examples abound. See Adam S. Zimmerman, *Presidential Settlements*, 163 U. Pa. L. Rev. 1393, 1414-1418 (2015). The resulting agreements might be said to have been "significantly encouraged" by the government in a colloquial sense. But no one would suggest that they qualified as state action merely because the President or his representatives urged the parties to come to terms.

B. The Government Did Not Compel The Challenged Content-Moderation Decisions Through Threats Or Inducements

The lessons of this Court's precedents for this case are clear: Government officials do not violate the First Amendment when they speak in public or in private to inform, to persuade, or to criticize speech by others.

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[5] Douglas Jehl, *Clinton Warns Major Leagues To Settle Strike*, N.Y. Times, Jan. 27, 1995, at A1.

[6] Steven Greenhouse, *Labor Secretary Gets 2 Sides to Meet in Long Coal Strike*, N.Y. Times, Oct. 14, 1989, at A9.

And even when officials specifically "request that a private intermediary not carry a third party's speech," they do not violate the First Amendment so long as they neither "threaten adverse consequences if the intermediary refuses to comply" nor offer "positive incentives" sufficient to "overwhelm the private party and essentially compel the party to act in a certain way." *O'Handley*, 62 F.4th at 1158. Those principles resolve this case: No such inducements or threats occurred here.

1. The Fifth Circuit did not identify *any* positive inducements offered to the platforms—much less inducements tied to the moderation of respondents' content. The court also did not purport to conclude that officials from the FBI, CDC, CISA, or the Surgeon General's Office threatened platforms with adverse consequences if they failed to moderate content. Nor could the court have done so: Those agencies largely provided the platforms with information, leaving it up to the platforms to decide what action to take, if any. As explained in Part II.C, *infra*, the Fifth Circuit concluded that those communications gave rise to state action only by applying novel, malleable standards for coercion and significant encouragement that extend the state-action doctrine far beyond the boundaries set by this Court's precedents.

2. The Fifth Circuit did assert that officials from the White House threatened platforms with adverse consequences if the platforms failed to moderate content related to COVID-19. J.A. 49-50, 56-59. But again, the court did not even purport to conclude that those statements were tied to the moderation of respondents' posts in particular. And even taken on its own generalized terms, the court's analysis does not withstand scrutiny.

a. The Fifth Circuit focused almost entirely on a discrete period in 2021 when White House officials work-

ing on the rollout of the COVID-19 vaccines were communicating with Facebook and other social-media companies about vaccine-related falsehoods. J.A. 4-12. The companies had stated that they were working to combat the spread of such falsehoods on their platforms. *E.g.*, J.A. 653-656. White House officials, for their part, were trying to understand the factors affecting their efforts to persuade Americans to get vaccinated. The officials viewed the platforms as a significant vector for the spread of harmful falsehoods. They asked the platforms for information, and they publicly and privately criticized the platforms for what the officials perceived as a lack of transparency and a failure to live up to the platforms' commitments. *E.g.*, J.A. 10-11.

The Fifth Circuit stated that during those interactions, White House officials crossed the line from persuasion to coercion by "threaten[ing]—both expressly and implicitly—to retaliate against inaction." J.A. 50. In particular, the court repeatedly asserted, without citation, that officials "threw out the prospect of legal reforms and enforcement while subtly insinuating it would be in the platforms' best interests to comply" with requests to moderate content. *Ibid.*; see *ibid.* ("promises of legal regime changes, enforcement actions, and other unspoken threats"); J.A. 57 ("threats of 'fundamental reforms' like regulatory changes and increased enforcement actions"). But the court did not identify even a single communication in which officials threatened the platforms with legal reforms, enforcement action, or any other adverse consequence for failing to moderate content. Indeed, the Fifth Circuit discussed just two White House statements that even mentioned any of those topics. Neither was a threat of any

kind; to the contrary, they were general responses to press questions about matters of public policy.

First, during a July 2021 appearance on a cable news program, the White House Communications Director was asked whether the President was "open to amending [47 U.S.C.] 230" to allow platforms to be sued for "spread[ing] false information that cause[s] Americans harm." C.A. ROA 19,400. She declined to take a position on Section 230, stating only that "we're reviewing that." *Ibid.* She added that platforms "should be held accountable" in a general sense, emphasizing that "everybody bears responsibility to ensure that we are not providing people with bad information about a vaccine that will save their lives." *Id.* at 19,401; see J.A. 11.

Second, in April 2022—long after the other events on which the Fifth Circuit focused—the White House Press Secretary was asked to comment on the sale of Twitter and responded that "[n]o matter who owns or runs Twitter, the President has long been concerned about the power of large social media platforms," "has long argued that tech platforms must be held accountable for the harms they cause," and "has been a strong supporter of fundamental reforms to achieve that goal, including reforms to Section 230, enacting antitrust reforms, requiring more transparency, and more." C.A. ROA 784-785; see J.A. 12.

Those fleeting and general statements cannot plausibly be characterized as coercive threats tied to specific content-moderation requests. Presidents and their surrogates are entitled to respond to questions and express their views about important public issues of the day, including potential legislative reforms. Those statements of policy did not retroactively transform other officials' requests into coercion. And the fact that those general,

off-the-cuff statements by the Communications Director and the Press Secretary were the Fifth Circuit's *strongest* evidence of coercive threats only underscores that this case is nothing like *Bantam Books*.

b. The handful of other statements that the Fifth Circuit plucked from the record underscore the court's erroneous view of what constitutes a coercive threat. The court cited, for example, an email referring to "easy, low-bar things you guys do to make people like me think you're taking action." J.A. 722; see J.A. 50. But that email contains no express or implied threat. It came in the context of a May 2021 exchange in which Facebook volunteered to "preview" its "press outreach" touting "what we've been doing to help meet vaccination goals." J.A. 725. The government official simply made clear that the platform's attempt to impress the public had not impressed him. See J.A. 722, 724 (official's statement that he found it "[h]ard to take any of this seriously when you're actively promoting anti-vaccine pages in search" and that "'removing bad information from search' is one of the easy, low-bar things you guys do to make people like me think you're taking action"). That message surely expressed frustration, but it contained no threat of adverse action.

The same is true of the Fifth Circuit's reliance on White House officials' alleged "persistent and angry" communications or requests to remove or demote certain content posted on the platforms "'ASAP'" and "'immediately.'" J.A. 50. By the Fifth Circuit's own recounting, "[w]hen the platforms did not comply, officials followed up by asking" more questions—not by making threats or taking any adverse action. *Ibid.* And in any event, many of those statements are stripped of context. For example, many of the messages the Fifth Circuit

quoted expressed frustration at what officials viewed as a platform's lack of candor, not its failure to moderate content. See, *e.g.*, J.A. 5-7. And the quoted message relating to removing an account "immediately" involved not any of the sort of content moderation that respondents complain about, but rather frustration by a White House official about his difficulty proving to Twitter's satisfaction that he was "an authorized representative" of the President's granddaughter for the purpose of asking the platform to remove an impostor account. J.A. 642.

c. Rather than any pattern of coercive threats, the record of the White House's communications with platforms in 2021 reflects a back-and-forth—one in which officials and platforms often educated and informed each other, sometimes disagreed, and occasionally became frustrated—as all parties articulated and pursued their own goals and interests. See J.A. 5-12. Government officials believed that false information circulating on the platforms was causing preventable deaths. They said so publicly, and in strong terms. And officials sought to understand the platforms' publicly announced efforts to fight such falsehoods and to identify content that violated the platforms' own policies. The platforms, in turn, sought to address those concerns and may well have been motivated in part by a desire to avoid further public criticism from senior government officials. But that sort of successful use of the bully pulpit has never been regarded as violating the First Amendment or transforming private action into state action. As Judge Silberman observed, "[w]e know of no case in which the first amendment has been held to be implicated by governmental action consisting of no more

than governmental criticism of the speech's content." *Penthouse*, 939 F.2d at 1016 (citation omitted).[7]

C. The Fifth Circuit Found State Action Only By Embracing Malleable, Overbroad Standards For Coercion And Significant Encouragement

Although the Fifth Circuit purported to find that White House officials had compelled the platforms to act with threats of adverse action, the rest of its analysis applied a far looser standard lacking any foundation in this Court's precedents. Most fundamentally, the Fifth Circuit again ignored this Court's directive that the state-action analysis "begins by identifying 'the *specific* conduct of which the plaintiff complains.'" *American Manufacturers Mutual Insurance Co.* v. *Sullivan*, 526 U.S. 40, 51 (1999) (emphasis added; citation omitted). Here, respondents claim to have been injured by specific instances of content moderation, but the Fifth Circuit did not ask whether the government compelled those particular actions; instead, it presumed that *all* moderation decisions by *all* platforms are attributable to the government.

The implications of that holding are profoundly disruptive. If the platforms are state actors when they

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[7] The Fifth Circuit purported to find that the Surgeon General's Office engaged in coercion as well, lumping it in with the White House because of their allegedly "close cooperation and the ministerial ecosystem." J.A. 4. The court did not explain what it meant by "ministerial ecosystem," and the only "close cooperation" it cited was a July 2021 White House press conference at which the Surgeon General answered questions about an "advisory on health misinformation" he had published earlier that day. C.A. ROA 624. Neither his remarks nor the advisory contains anything remotely like a threat, much less a threat related to content moderation. See *id.* at 624-630 (transcript of remarks); *id.* at 651-672 (advisory).

moderate content, they are subject to First Amendment constraints—including prohibitions on viewpoint discrimination. And users affected by the platforms' content-moderation decisions could thus secure, on First Amendment grounds, injunctions compelling the platforms to restore content that they chose to delete. Cf. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 171 (1970) (allowing claims against private party "compelled" and "commanded" to act by the government). That could include content from spammers, trolls, or worse, see pp. 3-5, *supra*.

The Fifth Circuit erred in imposing those federal constitutional requirements on decisions by private social media companies about the content they choose to present on their own platforms. This Court has emphatically rejected sweeping state-action theories that would "eviscerate certain private entities' rights to exercise editorial control over speech and speakers on their properties or platforms" by subjecting those choices "to the constraints of the First Amendment." *Halleck*, 139 S. Ct. at 1932-1933. The Fifth Circuit's decision rests on just that sort of theory: The court embraced loose, malleable standards for coercion and significant encouragement that contradict this Court's precedents and radically extend the state-action doctrine.

1. The Fifth Circuit erroneously applied a four-factor test unmoored from the proper coercion inquiry

At times, the Fifth Circuit recognized that coercion occurs only if the government "intimat[es] that some form of punishment will follow a failure to comply." J.A. 46. To identify such threats, the court looked to a four-factor test developed by other circuits. See J.A. 47. The unweighted, "non-exclusive" factors are "(1) the

speaker's 'word choice and tone'; (2) 'whether the speech was perceived as a threat'; (3) 'the existence of regulatory authority'; and, 'perhaps most importantly, (4) whether the speech refers to adverse consequences.'" J.A. 42 (brackets and citations omitted). Properly understood and applied, those factors may be relevant in determining whether a communication constitutes a coercive threat of adverse government action.

Here, however, the Fifth Circuit erred by unmooring those factors from the ultimate coercion inquiry and instead refashioning them into an amorphous standard that can be satisfied by government speech unaccompanied by any threat. Instead of using tone to distinguish expressions of concern from veiled threats, the court found coercion based on nothing more than strong language. Rather than an objective test, the court gave dispositive weight to the recipient's subjective perceptions. The court considered not the speaker's authority to carry out a threat, but the government's general law-enforcement and regulatory authority. And the court relied on general public statements about potential legislative changes that were not connected to any content-moderation request.

a. *Tone.* Properly understood, a statement's tone sometimes can be probative: "That's a nice business you've got there; it'd be a shame if something happened to it" can be a genuine expression of concern or a veiled threat, depending on the delivery. But that is not how the Fifth Circuit conceived of "tone." Instead, it viewed the mere use of strong language, untethered from any intimation of a threat, as sufficient to imply coercion. See J.A. 51-52.

For example, the Fifth Circuit stated that White House officials and the President made "inflammatory

accusations, such as saying that the platforms were 'poisoning' the public, and 'killing people,'" and that they "needed to take greater responsibility and action." J.A. 57 (brackets omitted). Indeed, the Fifth Circuit appeared to view the critical events in the White House's 2021 interactions with the platforms as a series of public statements in which the President, the Press Secretary, and the Surgeon General strongly criticized the platforms and called on them to do more. J.A. 10-11. But as explained above, the government is entitled to forcefully "advocate and defend its own policies," *Southworth*, 529 U.S. at 229, including by using strong language to criticize others' constitutionally protected speech, without converting any responsive private conduct into state action. See pp. 23-29, *supra*.

b. *Perception.* Instead of undertaking an objective evaluation of the government's communications, the Fifth Circuit focused on "how the platforms perceived" them. J.A. 52. In the analogous context of "true threats," this Court has relied on an objective test and, in criminal cases, the speaker's subjective perception—not the recipient's perception. See *Counterman* v. *Colorado*, 600 U.S. 66, 72-78 (2023). Here, too, while the platforms' subjective perceptions might be evidence of how a reasonable person would have understood the communications, the Fifth Circuit's singular focus on the platforms' perceptions was misplaced.

In any event, the Fifth Circuit did not cite evidence establishing that the government's communications were objectively threatening. The court instead relied almost exclusively on the platforms' "subsequent conduct." J.A. 52. In the court's view, "the platforms were *influenced* by" the government because they took action in response to governmental requests and pledged

to work and communicate with White House officials. J.A. 53 (emphasis added). The court similarly relied on evidence that "the FBI warned the platforms of 'hack and dump' operations from 'state-sponsored actors' that would spread misinformation through their sites," and that the "platforms reacted * * * by taking down content." J.A. 64; see *ibid.* (asserting that some platforms changed their terms of service "to capture 'hack-and-leak' content after the FBI asked them to do so").

But influence is also the natural result of successful efforts to inform, to persuade, or to criticize. That the platforms often acted in response to the government's communications thus does not remotely show that those communications were coercive. See *O'Handley*, 62 F.4th at 1159. More telling is that the platforms routinely *declined* to act. Emails between the White House and the platforms contain several examples of the platforms' explaining that content would not be removed because "it does not violate [the platforms' policies]." J.A. 701; see, *e.g.*, J.A. 731, 748, 754. Similarly, platforms frequently chose not to remove content flagged by CISA. See, *e.g.*, C.A. ROA 23,234-23,235, 23,240-23,243, 23,245-23,256. And the platforms opted not to remove content that the FBI had flagged roughly *half* the time. J.A. 15, 165, 218.

That the platforms often declined to remove flagged content further confirms that the government was seeking to inform or persuade—not to coerce. And despite the platforms' routine refusals to act in response to the government's outreach, neither respondents nor the Fifth Circuit have identified even a single instance in which the government imposed *any* adverse consequences in retaliation. Indeed, Twitter ceased enforcement of its COVID-19 misinformation policy in Novem-

ber 2022, yet suffered no adverse consequences from the federal government. C.A. ROA 22,536.

c. *Authority.* A speaker's authority may be relevant context because threats or inducements are more (or less) likely to be coercive if the speaker actually has (or lacks) the authority to carry out the threat or grant the inducement. But that is not how the Fifth Circuit understood the relevant authority; instead, it relied on generalized law-enforcement or regulatory authority.

For example, the Fifth Circuit held that because the FBI is "the lead law enforcement, investigatory, and domestic security agency for the executive branch," its "message[s]" are "'*inherently coercive*.'" J.A. 54 (citation omitted). Similarly, the court held that the White House "clearly" has authority over social-media companies because it "wields significant power in this Nation's constitutional landscape," including by "direct[ing] an army of federal agencies that create, modify, and enforce federal regulations." J.A. 53-54. That cannot be right. "Agencies are permitted to communicate in a non-threatening manner with the entities they oversee without creating a constitutional violation." *O'Handley*, 62 F.4th at 1163. Democracies could not function were it otherwise.

The Fifth Circuit's reasoning, if taken seriously, would mean that White House personnel and anyone in the FBI—not to mention every other law-enforcement agency in the country—could never ask *anyone* for *anything* without the request's being deemed coercive, and thereby transforming the recipient into a state actor if it took the requested action. This Court has already rejected that premise in other contexts. For example, *Colorado* v. *Connelly*, 479 U.S. 157 (1986), held "that coercive police activity is a necessary predicate to

the finding that a confession is not 'voluntary.'" *Id.* at 167. And *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), held that consent to a police search cannot "be coerced, by explicit or implicit means, by implied threat or covert force." *Id.* at 228. Those holdings would be nonsensical if all law-enforcement requests were inherently coercive. And if requests to a *criminal suspect* are not always coercive, *a fortiori* the same is true of communications with sophisticated businesses.

The Fifth Circuit's contrary view—that all messages from the FBI are "'inherently coercive'"—led it to find coercion despite acknowledging that the FBI "alerted [platforms] to misinformation" in ways that were not "threatening" and did not "reference adverse consequences." J.A. 62-63 (citation omitted). Indeed, the court did not identify any specific FBI request to remove content in the first place. The court described only efforts to share information and flag activity to which the platforms could apply their own policies. See J.A. 14-15 (stating that the FBI "shared" information, "tipped the platforms off," "alerted the platforms," and conducted "flagging operations"). Similarly, unrebutted testimony makes clear that the FBI did not ask platforms to change their policies—as respondents themselves acknowledged below. See C.A. ROA 16,640 (respondents' proposed statement of facts asserting that "the FBI repeatedly inquired of the social-media platforms *whether* their policies would allow for or require the censorship of hacked materials," even if the FBI did not itself "urge[] the platforms to change their terms of service to address hacked materials"); see also *id.* at 10,355 (FBI official's testimony).

But even if the FBI had made such requests, the fact that the social-media companies agreed that they did

not want to host content posted by foreign malign actors on their platforms—an eminently reasonable course of action—would not itself have transformed the companies' decisions into the government's. And it certainly would not have had that transformative effect merely because the FBI is a law-enforcement agency.

d. *Adverse consequences.* The Fifth Circuit described the fourth factor as asking "whether the speaker 'refers to adverse consequences that will follow *if the recipient does not accede to the request.*'" J.A. 56 (emphasis added; citation omitted). But the court effectively ignored the italicized phrase in its application of this factor, finding it satisfied (J.A. 56-57) based on generic references to proposed legislative changes and antitrust reforms that were untethered from any specific request for content moderation. See pp. 30-34, *supra*. The court cited no precedent suggesting that such general references to potential legislative changes can transform other communications into coercive threats.

* * *

The Fifth Circuit's unmooring of the four-factor test from the ultimate coercion inquiry rendered that test profoundly malleable. The court approvingly cited (*e.g.*, J.A. 39-45, 51-59) other decisions applying the same factors, yet arrived at very different results. In the court's view, for example, the White House Director of Digital Strategy "clearly" "wields significant power" over social-media companies, but a United States Senator is "'removed from the relevant levers of power.'" J.A. 53-54 (quoting and attempting to distinguish *Kennedy* v. *Warren*, 66 F.4th 1199, 1210 (9th Cir. 2023)). And while statements like "'you are hiding the ball'" and "you are not 'trying to solve the problem'" reflect "hyper-critical phraseology" that violates the court's tone threshold,

J.A. 51, the Senator's "chastis[ing]" a company "for 'peddling misinformation about COVID-19 vaccines and treatments'" and thereby causing "countless illnesses and deaths," *Kennedy*, 66 F.4th at 1207-1208, poses no tone problem, see J.A. 51. This Court should reject the Fifth Circuit's novel theory of coercion as both unsound and unworkable.

2. The Fifth Circuit erred in finding significant encouragement based only on mere entanglement

The Fifth Circuit also adopted an impermissibly broad definition of "significant encouragement," holding that it can be established merely by a government official's "entanglement in a party's independent decision-making." J.A. 36.

a. As an initial matter, the Fifth Circuit's "entanglement" standard is incompatible with this Court's precedents defining the "joint action" theory of state action. In those decisions, the Court has used the word "entwinement" (akin to "entanglement") to describe such joint action. For example, in *Brentwood Academy* v. *Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), the Court held that a school athletic association, though "nominally private," should be considered a state actor because of "the pervasive entwinement of public institutions and public officials in its composition and workings." *Id.* at 298. But as the Fifth Circuit recognized here, a plaintiff cannot show that sort of "joint action" unless the government is "deeply intertwined with the private actor as a whole." J.A. 36 n.11.

Yet the Fifth Circuit stated that its conception of "entanglement" for "significant encouragement" purposes requires a much lower "level of integration" than required by the "joint action test." J.A. 36 n.11. Ac-

cording to the court, "entanglement" could constitute "significant encouragement" even when it is limited to "one facet of the private actor's operations." *Ibid.* At the same time, the court did not identify any other elements required to satisfy its conception of the "significant encouragement" test. If accepted, therefore, the Fifth Circuit's formulation would render this Court's joint-action test superfluous because the watered-down "significant encouragement" test would always be satisfied first.

b. The Fifth Circuit's application of its novel "entanglement" standard further illustrates that standard's flaws. For example, the court reasoned that White House officials "significantly encouraged the platforms to moderate content" because they "monitored" the platforms' "moderation activities"; because they "repeatedly communicated their concerns, thoughts, and desires to the platforms"; and because the platforms "invited the officials to meetings, roundups, and policy discussions" and sometimes "complied with the officials' requests." J.A. 59-60. Similarly, the court held that "CDC was entangled in the platforms' decision-making processes" because "the platforms asked CDC officials to decide whether certain claims were misinformation," which led to a working relationship in which "the platforms came to *heavily rely* on the CDC" to provide public-health information that informed the platforms' content-moderation decisions. J.A. 65-66. And the court reasoned that CISA engaged in significant encouragement because "CISA officials affirmatively *told* the platforms whether the content they had 'switchboarded' was true or false," J.A. 68, which in turn "ap-

parently led to moderation polices being altered and content being removed or demoted," J.A. 15-16.[8]

The Fifth Circuit cited no precedent for its conclusion that if private companies communicate with and choose to follow advice from the government (including advice they solicit), the companies thereby become state actors. Government officials are free to express their views without violating the First Amendment or creating state action. See *Summum*, 555 U.S. at 468. And this Court has emphasized that "[a]ction taken by private entities with the mere approval or acquiescence of the [government] is not state action." *American Manufacturers*, 526 U.S. at 52. The Fifth Circuit's contrary view would subject a wide range of private conduct to constitutional standards ordinarily applicable only to the government. And it would obliterate the settled principle that the government can permissibly "attempt[] to convince" a private party to undertake actions that the government believes will advance the public interest. *O'Handley*, 62 F.4th at 1158; see *Penthouse*, 939 F.2d at 1016.

III. THE LOWER COURTS' INJUNCTION IS INEQUITABLE

"An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter* v. *NRDC, Inc.*, 555 U.S. 7, 32 (2008). Here, the injunction is unnecessary to prevent irreparable injury to respondents, is overbroad, and will irreparably harm the government and the public.

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[8] The Fifth Circuit cited no evidence to support its assertion that CISA "affirmatively" provided information about the veracity of content. The record contains only one incident where a CISA employee provided his understanding of an official statement from Pennsylvania—and that was only after the platform asked him for his views. See C.A. ROA 13,421-13,424.

A. Although First Amendment injuries may be irreparable when they occur, *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality opinion), a plaintiff seeking a preliminary injunction still must make "a clear showing," *Winter*, 555 U.S. at 22, that such injuries are "imminent," *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 74 (2020) (per curiam) (Kavanaugh, J., concurring). Neither the district court nor the Fifth Circuit substantiated any finding that respondents face ongoing or imminent First Amendment injuries. The Fifth Circuit found that respondents "are likely to suffer an irreparable injury" because "their First Amendment interests are either threatened or impaired." J.A. 72-73. But that is conclusory, and the court did not cite anything in the record to support the conclusion that an injunction is necessary to prevent any imminent First Amendment injury to respondents. The court stated (J.A. 73) that "the officials' challenged conduct has not stopped," but that is not a finding that *these respondents* are likely to suffer imminent harm as a result of that conduct.

B. Because a federal court's "constitutionally prescribed role is to vindicate the individual rights of the people appearing before it," "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill* v. *Whitford*, 138 S. Ct. 1916, 1933-1934 (2018). Principles of equity reinforce that constitutional limit: Injunctive relief may "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); see *United States* v. *Texas*, 599 U.S. 670, 702-703 (2023) (Gorsuch, J., concurring in the judgment).

The injunction here flouts those principles. Despite the denial of respondents' motion for class certification, the injunction covers communications with and about *all* social-media platforms (not just those used by respondents, see J.A. 281 n.2) regarding content moderation with respect to *all* posts by *any* person (not just respondents) on *all* topics (including national security and criminal matters, which even the district court recognized were improper to include, see J.A. 283-284). Cf. *Lewis*, 518 U.S. at 357 (even when "a plaintiff demonstrate[s] harm from one particular inadequacy," courts are not "authorized to remedy *all* inadequacies").

The Fifth Circuit attempted to justify that sweeping relief on the ground that an injunction may incidentally benefit nonparties "if such breadth is necessary to give prevailing parties the relief to which they are entitled." J.A. 82 (citation omitted). But the court did not find—and on this record could not have found—that this injunction's breadth was needed to provide full relief to respondents. Instead, the court reasoned that "[t]he harms that radiate from [the government's alleged] conduct extend far beyond just [respondents]" and affect "every social-media user." *Ibid.* That is a non sequitur. Whether a defendant's conduct also might have harmed nonparties has no bearing on whether more limited relief would adequately redress *the plaintiffs*' cognizable injuries.

C. If permitted to take effect, the injunction would impose grave harms on the government and the public because it could chill vital governmental communications. See *Nken* v. *Holder*, 556 U.S. 418, 435 (2009) (harms to government and public "merge").

Given the Fifth Circuit's view that any request from a law-enforcement agency is inherently coercive, see

J.A. 62-63, the FBI would need to tread carefully in its interactions with social-media companies, potentially eschewing communications that protect national security or public safety. For example, in the early stages of an investigation, law-enforcement officials may be uncertain whether a post involves unprotected criminal activity (such as a true threat). But the injunction leaves them guessing what quantum of certainty they must possess before reaching out, potentially leading to disastrous delays. The injunction also could preclude otherwise lawful reciprocal exchanges of information to determine whether a crime occurred, including disclosures under 18 U.S.C. 2702.

Or suppose the White House Press Secretary says that the President condemns the role that social media has played in harming teenagers' mental health, calls on platforms to exercise greater responsibility, and mentions the possibility of legislative reforms. Such statements might be viewed as coercion or significant encouragement under the Fifth Circuit's novel understanding of those concepts. The court's reasoning likewise suggests that CDC or CISA would risk contempt if they simply answered platforms' inquiries about matters within their respective expertise, if the platforms later rely on the answers in making content-moderation decisions. Cf. J.A. 65-68.

Respondents have protested that those examples are hypotheticals. Cf. 10/20/23 Order 3-4 (Alito, J., dissenting from grant of application for stay). But it is hardly speculative that Executive Branch officials will speak on those and other topics of public concern. Indeed, the Surgeon General recently appeared on a popular podcast to discuss the risks that social media poses to chil-

dren.[9] And the White House recently condemned as "'repugnant'" and "'evil'" certain speech that was circulating online, which "TikTok sought to block." Sapna Maheshwari, *Bin Laden Videos Go Viral on App*, N.Y. Times, Nov. 17, 2023, at A12. Even the potential that the lower courts might construe the injunction to limit the Executive Branch's communications on issues of public consequence could chill those communications. Such an "intrusion by a federal court into the workings of a coordinate branch of the Government" would irreparably harm the Executive Branch and raise serious separation-of-powers concerns. *INS* v. *Legalization Assistance Project*, 510 U.S. 1301, 1306 (1993) (O'Connor, J., in chambers).

Those separation-of-powers concerns are especially salient given the Fifth Circuit's focus (*e.g.*, J.A. 2, 16, 23) on "regular contact" between the government and platforms. Governments and private parties have long worked together, especially in times of crisis. For example, during the Ebola crisis, "CDC conduct[ed] daily and weekly calls and webinars to provide a forum for partners to have questions answered."[10] Here, the social-media platforms themselves have said they value continued engagement with the government, noting that "[s]haring information between tech companies, governments and law enforcement * * * can be particularly critical in disrupting malicious foreign campaigns by sophisticated threat actors." Meta, *Adversarial*

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[9] See Emily Oster, *How to Weigh the Risks of Social Media: A conversation with the surgeon general* (Nov. 16, 2023), parentdata.org/weigh-risks-social-media.

[10] Obama White House Archives, *Fact Sheet: Progress in Our Ebola Response at Home and Abroad* (Feb. 11, 2015), perma.cc/LE9J-FKB5.

Threat Report 17 (Nov. 2023), perma.cc/Z6HZ-LJWW. Given the Fifth Circuit's evident disapproval of regular contact, the injunction could chill those collaborative relationships as well.

All of the harms described above are aggravated by the injunction's broad, general terms. Cf. Fed. R. Civ. P. 65(d). The injunction relies on contestable legal terminology to describe its prohibitions: The government may not "coerce or significantly encourage" platforms with respect to "protected free speech." J.A. 80. The legal meaning of "coercion" and "significant encouragement" in this context is at the very heart of the parties' dispute, and the definition of "protected free speech" has been hotly debated since the Founding. Yet the Fifth Circuit's decision compels thousands of government officials to parse those concepts and tailor their speech accordingly, lest they violate the injunction's terms.

This Court has observed that even the "fear of being sued" can "'dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties.'" *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982) (brackets and citation omitted). The fear of being held in contempt is no less crippling. See *Schmidt* v. *Lessard*, 414 U.S. 473, 476 & n.2 (1974) (per curiam). And it is especially inequitable to grant sweeping injunctive relief imposing those harms on the government and the public in a suit brought by a few social-media users whose claimed injuries consist primarily of years-old incidents.

CONCLUSION

This Court should reverse the judgment of the court of appeals in relevant part and direct that the district court's preliminary injunction, as modified by the court of appeals, be vacated in its entirety.

Respectfully submitted.

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