No. 23-411

IN THE

Supreme Court of the United States

VIVEK H. MURTHY, ET AL.,
Petitioners,

v.

MISSOURI, ET AL.,
Respondents.

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

BRIEF OF NETCHOICE, THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, CHAMBER OF PROGRESS, AND THE CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*

This *amicus* brief is jointly submitted by the non-profit trade associations and public policy research organizations NetChoice, the Computer & Communications Industry Association (CCIA), Chamber of Progress, and the Cato Institute.[1] Through litigation and advocacy, *amici* challenge efforts that would undermine free expression online.

NetChoice is a national trade association of online businesses that works to protect free expression and promote free enterprise online. Toward those ends, NetChoice is engaged in litigation, *amicus curiae* work, and political advocacy. NetChoice is currently a plaintiff litigating six federal lawsuits over state laws that chill free speech or stifle commerce on the internet, including two pending before this Court, *Moody* v. *NetChoice LLC et al.* (No. 22-277) (cert. granted Sept. 29, 2023), and *NetChoice LLC et al.* v. *Paxton*, No. 22-555 (cert. granted Sept. 29, 2023). Joined by the other *amici* here, NetChoice also filed *amicus* briefs in the pending cases *Lindke* v. *Freed*, No. 22-611, and *O'Connor-Ratcliffe* v. *Garnier*, No. 22-324, which raise questions related to those presented here. In federal and state courts, NetChoice fights to ensure the internet stays innovative and free.

CCIA is an international, not-for-profit association representing a broad cross-section of communications, technology, and internet industry firms that collectively employ more than 1.6 million

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[1] Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA—co-plaintiff with NetChoice in the *Moody* and *Paxton* cases—believes that open, competitive markets and original, independent, and free speech foster innovation.

Chamber of Progress is a tech-industry coalition devoted to a progressive society, economy, workforce, and consumer climate. Chamber of Progress backs public policies that will build a fairer, more inclusive country in which the tech industry operates responsibly and equitably, and in which all people benefit from technological leaps. Chamber of Progress seeks to protect internet freedom and free speech, to promote innovation and economic growth, and to empower technology customers and users.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and issues the annual *Cato Supreme Court Review*.

The First Amendment prohibits the government from censoring, compelling, or otherwise abridging speech. It also protects private digital services' decisions about what user content to publish or remove. *Amici* submit this brief in support of neither

party to urge a decision that safeguards these critical protections.

SUMMARY OF ARGUMENT

Amici take no position on the narrow question this case presents: Whether petitioners' communications with social media websites and other digital services about those services' content moderation decisions violated the First Amendment. But because this question intersects with related issues of compelled speech raised in *Moody* and *Paxton*, and overlaps with questions that the *amici* briefed in the pending *Lindke* and *O'Connor-Ratcliffe* cases, *amici* file this brief to highlight two points regarding digital services' rights.

First, the government cannot bypass the First Amendment's prohibition against laws compelling private speech by seeking to compel speech through informal and indirect means. The Court recently reaffirmed that "the government may not compel a person to speak its own preferred messages" or "force an individual to include other ideas with his own speech that he would prefer not to include." *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 586-87 (2023). But these protections would be meaningless if governments could compel private speech—or impede content moderation—by informal or indirect cajoling or coercion. A clear rule is needed to prevent such a loophole.

Second, irrespective of whether petitioners are found to have unconstitutionally compelled social media services to censor respondents' speech, the Court should make clear that those digital services themselves are not state actors and may not be held liable for the government's actions. The First

Amendment "prohibits only *governmental* abridgment of speech." *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1928 (2019). Digital services—like Facebook and X in this case—are "private entit[ies]" that "may * * * exercise editorial discretion over the speech and speakers in the forum[s]" they provide. *Id.* at 1930. They do not become instruments of the state when they are compelled to remove content in response to government take-down requests. Indeed, jawboning inflicts a First Amendment injury on the services by interfering with their rights to editorial discretion. Any rule that suggests litigants may seek recourse from the digital services would mean they get hit coming and going; such lawsuits, and potential liability, would compound the websites' First Amendment injury. And such a rule would diminish focus on government officials whose conduct may have violated the First Amendment, which is where the focus belongs.

ARGUMENT

I. The Government May Not Use Informal Means To Compel Speech It Could Not Compel Directly.

The First Amendment unquestionably prohibits government rules, penalties, and orders that "force an individual" to speak the government's "preferred messages." *303 Creative*, 600 U.S. at 586-87. Such government action "co-opt[s]" free-thinking individuals, *NIFLA* v. *Becerra*, 138 S. Ct. 2361, 2376 (2018), and thus "invades the sphere of intellect and spirit" that "the First Amendment * * * reserve[s] from all official control," *W. Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). See also, *e.g., Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S.

557, 573-74 (1995); *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 256 (1974).

The First Amendment's prohibition against compelled speech—a fundamental tenet of our constitutional law—applies categorically. *Tornillo*, for instance, held that "intrusion into the function of editors" in and of itself violates the First Amendment. 418 U.S. at 258. "[A]ny * * * compulsion to publish," the Court ruled, "is unconstitutional," period. *Id.* at 256. *303 Creative* reaffirmed this point, holding that the First Amendment bars application of a state law to compel speech without reference to whether the law or its application survives any kind of scrutiny. 600 U.S. at 603; see also *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124, 128 (1991) (Kennedy, J., concurring) (reasoning that tiers-of-scrutiny analysis "[b]orrowed" from other contexts is misapplied to "raw censorship," which is categorically "forbidden by the text of the First Amendment").

This "foundational" protection, *303 Creative*, 600 U.S. at 585, would be meaningless if governments could simply re-channel official censorship into informal coercion of private actors. This Court has thus expressly held that "indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes," *Am. Commc'ns Ass'n* v. *Douds*, 339 U.S. 382, 402 (1950), and that the First Amendment "protect[s] not only against heavy-handed frontal attack, but also * * * more subtle governmental interference." *Bates* v. *City of Little Rock*, 361 U.S. 516, 523 (1960). Courts must therefore "look through forms" and prohibit

even "informal" government action whose "substance" abridges First Amendment freedoms. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 67 (1963).

In this case, failing to establish a clear rule prohibiting the government from informally impeding or preventing digital services' content moderation practices would violate that precept by exposing the digital services to the same constitutional injuries that *amici* NetChoice and CCIA seek to avert as the plaintiffs in *Moody* and *Paxton*. *Moody* and *Paxton* concern state statutes forcing digital services to disseminate speech they would not otherwise publish, in violation of the First Amendment. See generally Br. for Resps., *Moody* v. *NetChoice, LLC*, No. 22-277 (U.S. filed Dec. 2, 2023); Pet. Br., *NetChoice, LLC* v. *Paxton*, No. 22-555 (U.S. filed Dec. 2, 2023). The NetChoice/CCIA cases address the same problem as this one, but from a different vantage point: *Moody* and *Paxton* seek relief from laws *formally* compelling digital services' speech, whereas the respondents in this action seek relief from alleged *informal* government action claimed to have the same effect.

The Court's opinion in this case, whatever its disposition, should therefore set clear boundaries limiting the informal actions governments may take to compel private publication decisions. Existing opacity in the governing law (see Section II, *infra*) predisposes governments to test constitutional limits. See *Interstate Cir., Inc.* v. *City of Dallas*, 390 U.S. 676, 685 (1968) ("Vague standards * * * encourage erratic administration whether the censor be administrative or judicial."). "Precision" is necessary to deter zealous government censorship

and avoid inadvertently chilling digital services' exercise of "our most precious freedoms." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

II. When Jawboning Infringes Online Speech, The Focus For Redress Must Be The Government, Not Coerced Providers.

The Court should make clear that the government is responsible when it "jawbones" a private entity by coercing that entity to enforce the government's own editorial preferences. In such cases, the entity itself suffers a First Amendment injury through the government's interference with the entity's editorial choices—in addition to being exposed to potential civil liability for those forced actions. But the Court should also make clear that not all interactions between the government and digital services regarding displayed content rise to the level of coercion. And the Court should clarify that a litigant bringing a claim against the government for jawboning need not prove that the service's discretion has in fact been commandeered. The test for jawboning instead should evaluate solely the government's actions—and leave the service out of it.

A. The government is responsible when it coerces a private party to restrict speech that the government itself cannot reach.

This Court has long recognized a claim against the government when the government commands a private entity to censor speech on the government's behalf. In *Bantam Books*, for example, this Court held that a Rhode Island commission violated publishers' First Amendment rights where the

commission sought "to intimidate the various book and magazine wholesale distributors and retailers and to cause them, by reason of such intimidation and threat of prosecution" to stop carrying certain publications for sale. 372 U.S. at 64. The commission's use of "informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" showed that it "deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Id.* at 67. This was enough to support the publishers' case against the commission—irrespective of the involvement of the booksellers as a tool of the government's censorship.

Bantam Books and its progeny permit claims against the government when officials try to launder constitutional violations through private entities—without requiring a predicate claim against that private entity. *Amici* here do not intend to endorse or advocate for a specific test for distinguishing between governmental input and governmental coercion; it may well be, for example, that not all government expressions of disapproval or support of content moderation policies rise to the level of coercion to support a claim under *Bantam Books*. Indeed, "our system of government requires that elected officials be able to express their views and rally support for their positions." *Kennedy* v. *Warren*, 66 F.4th 1199, 1208 (9th Cir. 2023). "What matters is the distinction between attempts to convince and attempts to coerce." *Okwedy* v. *Molinari*, 333 F.3d 339, 344 (2d Cir. 2003).

The courts of appeals accordingly have distilled the coercion principles from *Bantam Books* into a multi-factor test to evaluate the interaction between

the government and a private party it attempts to commandeer. See, *e.g.*, *Nat'l Rifle Ass'n of Am.* v. *Vullo*, 49 F.4th 700, 715 (2d Cir. 2022), *cert. granted in part*, No. 22-842, 2023 WL 7266997 (U.S. Nov. 3, 2023); *Kennedy*, 66 F.4th at 1207 (applying test from *Vullo*). Courts consider "(1) word choice and tone; (2) the existence of regulatory authority; (3) whether the speech was perceived as a threat[;] and, perhaps most importantly, (4) whether the speech refers to adverse consequences." *Vullo*, 49 F.4th at 715 (citations omitted). Evaluating this non-exclusive list of relevant circumstances enables courts to distinguish between unlawful coercion and the appropriate exchange of ideas. It protects publishers from inappropriate pressure from the government about what speech to disseminate—and liability stemming from the government's improper pressure.

In addition to *Bantam Books*, the Fifth Circuit relied in this case on a separate standard, from *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982), to consider whether the government exerted "such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Ibid.*; see Pet. (Stay) App. 206a-208a. While *Bantam Books* considered the government's responsibility for actions by a party it influences, *Blum* considered a private party's liability for doing what the government pressured it to do. Applying a "substantial encouragement" test, the Court in *Blum* found that the government had not compelled a private entity's decisions regarding the transfer of nursing-home patients. Rather, the doctors and nursing-home administrators made the decisions, and there was "no suggestion that those decisions were influenced in any degree" by the state's subsequent adjustment of benefits after transfer or

discharge. *Id.* at 1005. Nor did the governing regulations "authorize[] [state] officials to approve or disprove decisions." *Id.* at 1010.

This Court has never used *Blum* to evaluate claims that the government commanded a private party to censor speech by another—and indeed, *Blum* did not involve the First Amendment at all. *Bantam Books*, where this Court found a violation of the First Amendment through the government's pressure on a private party, thus is a closer fit for the issues in this case. But if the Court imports *Blum*'s "significant encouragement" test here, it should make clear that *Blum*'s standard, like the standard in *Bantam Books*, requires some sort of *compulsion* by the government over the private party's decision. Feedback on a website's editorial decisions is not compulsion. Nor is reporting offensive content directly to the digital service, be it through the website's dedicated reporting system, backchannel communications, or otherwise. Indeed, *Blum*, by its terms, requires "such significant encouragement * * * that the choice must in law be deemed to be that of the State." 457 U.S. at 1004. To constitute compulsion, the degree of interaction must essentially supplant the private party's judgment with the government's. This robust standard must be read to complement *Bantam Books* and should not be watered down in the context of online speech. See *Brown* v. *Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (""The First Amendment's [protections] do not vary' when a new and different medium for communication appears.").

B. Digital services forced to follow the government's direction on editorial decisions themselves suffer a First Amendment injury and must not be held liable.

Whichever test this Court uses to evaluate jawboning of social media websites, it should make clear that, when the government crosses the line, the government alone is responsible—not the website it unlawfully jawboned.

First, where the government successfully coerces a private website to do its bidding, the website itself experiences an injury. This Court has consistently recognized that government interference with editorial decisions inflicts a First Amendment injury on the editor—regardless of the nature of the editor's services. See, *e.g.*, *Tornillo*, 418 U.S. at 256 (newspaper editorial page); *Halleck*, 139 S. Ct. at 1933 (cable programming); *Ark. Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 683 (1998) (candidate forum); *Hurley*, 515 U.S. at 570 (parade participation); *PG&E Co.* v. *Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11-12 (1986) (newsletter inserts). The rule can be no different for online digital services; those entities make decisions about what content to disseminate (and not to disseminate), and governmental interference inflicts an injury on their First Amendment rights to make those decisions.

Second, and more generally, a private website cannot be liable for actions it was forced by the government to take. In such cases, the private party is "left with no choice of [its] own" as to the conduct in question. *Peterson* v. *City of Greenville*, 373 U.S. 244, 248 (1963) (holding city, and not private establishment, liable for discriminatory ordinance

enforced by private establishment at city's behest). The private party thus cannot be considered a "*willful*[] participant" in the government's unconstitutional activity, as "compulsion by the state negates the presence of willfulness." *Harvey* v. *Plains Twp. Police Dep't*, 421 F.3d 185, 195-96 (3d Cir. 2005) (citation omitted) (emphasis added). The state-action doctrine thus carves out an exception where the government compels a private party to do its bidding: In those circumstances, "compelled participation by a private actor may fall outside of the contours of state action," while the government remains liable. *Id.* at 195. See also *Sutton* v. *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 838 (9th Cir. 1999) ("[I]n a case involving a private defendant, the mere fact that the government compelled a result does not suggest that the government's action is 'fairly attributable' to the private defendant.").

It follows from this principle that, for the government to be held liable for its attempted coercion, the law must not require a predicate finding that a private party has in fact been commandeered. Indeed, in *Bantam Books* itself, the Court held that the government's coercion violated the publisher's First Amendment rights without requiring any finding that the coerced booksellers engaged in state action. And in *Backpage.com, LLC* v. *Dart*, 807 F.3d 229, 231 (7th Cir. 2015), the Seventh Circuit further reasoned that governmental coercion need not even be successful for the targeted speaker to have a claim against the government: "[S]uch a threat is actionable and thus can be enjoined even if it turns out to be empty—the victim ignores it, and the threatener folds his tent." The Court thus should hold that aggrieved speakers may

sue the government *regardless* of whether the government succeeds in jawboning the private party.

This rule makes sense, in addition to being juridically sound. Requiring a predicate showing that the state has succeeded in effecting a particular result would wrongly heighten the obstacles for users of jawboned services to proceed against the government. Erecting such an impediment for litigants is both unjust and contrary to *Bantam Books*. In addition, such a requirement would embroil the jawboned service in the speaker's claim against the government, risking unnecessary, costly, and intrusive discovery into the service's editorial decisions and processes. See *Herbert* v. *Lando*, 441 U.S. 153, 177 (1979) (explaining the importance of courts "exercis[ing] appropriate control over the discovery process" when litigants seek discovery about editorial decisions).

Permitting jawboning claims *irrespective* of successful governmental coercion, by contrast, would deter governmental intermeddling in private editorial activity more broadly. While, as stated in Section II.A above, *amici* do not advocate for any specific rule delineating when the government is prohibited from communicating with services about the content those services disseminate, *amici* strongly oppose governmental efforts to push the government's own editorial preferences upon private services. The Court should strike a balance, allowing the government to interact with digital services regarding the content those services publish but at the same time enabling private parties to bring suit when the government goes too far.

CONCLUSION

The Court should ensure that its decision does not permit the government to do indirectly what it cannot do directly—undermine digital services' rights to curate and disseminate content. And the Court should clarify that there is no requirement of a predicate showing of state action for a jawboning claim against the government. Finally, the Court should explain that claims arising from jawboning must be brought against the government, rather than the jawboned private entity, consistent with longstanding precedent and to ensure the free flow of ideas online.

Respectfully submitted.

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