No. 23-411

IN THE
Supreme Court of the United States

VIVEK H. MURTHY, U.S. SURGEON GENERAL, ET AL.

Petitioners,

v.

MISSOURI, ET AL.

Respondents.

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

BRIEF OF AMICUS CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

Amicus the Reporters Committee for Freedom of the Press ("Reporters Committee") is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, *amicus curiae* support, and other legal resources to protect the newsgathering and publication rights of journalists around the country.

[1] Pursuant to Supreme Court Rule 37, counsel for *amicus curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than the *amicus curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The relationship between the government and the free press in this country is "cooperative, competitive, antagonistic and arcane," as Max Frankel, who was then the Washington bureau chief for *The New York Times*, told the district court as the Nixon Administration was seeking to halt publication of the Pentagon Papers. Aff. of Max Frankel ¶ 3, *United States v. N.Y. Times Co.*, 328 F. Supp. 324 (S.D.N.Y. 1971) (No. 71 Civ. 2662), 1971 WL 224067. Routinely, the government will attempt to sway journalists to cover one story and abandon another, or to frame an issue this way rather than that way—efforts that, if taken too far, could cross the line into "informal censorship." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). But public officials also serve as vital sources of information for the press, and often the same conversations in which the government works to caution or cajole provide "leverage for journalists" to solicit disclosures about matters of core public concern. David E. Sanger, *Leaning on Journalists and Targeting Sources, for 50 Years*, N.Y. Times (June 9, 2021), https://perma.cc/4HBF-72W4.

This case implicates the intensely fact-sensitive balance the First Amendment strikes between those two dynamics. On the one hand, the First Amendment "erects a virtually insurmountable barrier" around a publisher's exercise of editorial judgment, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring), and because "[t]he Constitution deals with substance, not shadows," *Cummings v. Missouri*, 71 U.S. (4 Wall.)

277, 325 (1866), the government may not rely on indirect threats to regulate the press when direct regulation would be forbidden. But the line between illicit coercion and permissible efforts at persuasion must be drawn with great care. A hair-trigger standard would chill the ordinary and necessary flow of information from government sources, both official and off the record, to the news media. And as this Court has cautioned further, when courts are too quick to attribute private publishers' decisions to malign government influence, they risk "eviscer[ating]" the press's own rights "to exercise editorial control over speech and speakers on their properties or platforms." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1932 (2019). If routine interactions between journalists and public officials sufficed to conclude that a news organization engages in state action—and is therefore "subject to First Amendment constraints," *id.* at 1933—when it decides which sources to credit in its coverage, or which perspectives deserve space in the op-ed section, then the Constitution would entitle the unhappy, would-be speakers left on the sidelines to apply for an injunction requiring equal treatment. That result would turn the First Amendment on its head. *See Tornillo*, 418 U.S. at 258.

Amicus takes no position on the particular result the U.S. Court of Appeals for the Fifth Circuit reached on these facts. But because the Fifth Circuit relied on considerations that could just as well characterize routine interactions between the government and the Fourth Estate, *amicus* respectfully urges this Court to closely tether its analysis to the circumstances of this particular case.

A too-sensitive test for coercion could have two negative consequences. First, it could lead to the chilling of the free flow of information from government sources to the news media. Second, it could license plaintiffs to pursue burdensome fishing expeditions for what they believe to be evidence of collusion between journalists and public officials. *Cf.* Carlie Porterfield, *RFK Jr. Sues BBC and Other Media Outlets over COVID 'Censorship'*, Forbes (Jan. 13, 2023), https://perma.cc/DB6X-XESL (noting that some of the same parties that sought to intervene in this case have sued news organizations directly, alleging a conspiracy to suppress their perspectives).

Both results would threaten rather than promote the editorial autonomy of a free press. *Amicus* urges this Court, in answering the questions presented, to limit any holding to the facts and context of this particular case to avoid jeopardizing that important constitutional value.

ARGUMENT

I. The First Amendment forbids true coercion but expects a free flow of information from government to the press.

Across the country, reporters interact with public officials thousands of times each day. *See* Robinson Meyer, *How Many Stories Do Newspapers Publish Per Day?*, The Atlantic (May 26, 2016), https://perma.cc/GQS2-TVLF. Many of those interactions are utterly routine, as journalists look to official press releases, to government agencies with their various areas of expertise, to open meetings and

hearings, and to other credible state sources in order "to inform citizens about the public business." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975). But because our Constitution enshrines—in Alexander Bickel's famous phrase—an "unruly contest" between the government and the press over the public's right to know, it should be no surprise that many of those interactions are adversarial too. Alexander M. Bickel, The Morality of Consent 87 (1975).

It is also true that government officials with agendas of their own, seeking to influence the content or tenor of the day's news, have overstepped the ground rules of that contest—resorting to the express or implied "threat of invoking legal sanctions" in violation of the First Amendment. *Bantam Books*, 372 U.S. at 67. As Robert Caro has described, President Lyndon B. Johnson dangled approval of a merger between Texas National Bank and Houston's National Bank of Commerce—run by *Houston Chronicle* president John Jones—as carrot and stick to secure favorable coverage from the *Chronicle*. *See* Robert A. Caro, The Passage of Power 523–27 (2012). The Nixon Administration, for its part, conspired to use the threat of antitrust litigation against ABC, CBS, and NBC as a "sword of Damocles" in an effort to coerce the networks into providing more favorable coverage. Walter Pincus & George Lardner, Jr., *Nixon Hoped Antitrust Threat Would Sway Network Coverage*, Wash. Post (Dec. 1, 1997), https://perma.cc/C42R-HKN8. The temptation to try to intimidate the press in order to shape the news has not faded with time or the transition from one White House to the next. *See generally* Sonja R. West,

Presidential Attacks on the Press, 83 Mo. L. Rev. 915 (2018).

It can be easy, against this backdrop, to think that the more sensitive the First Amendment's nose for illicit coercion, the better the press and public are served. But the reality is more nuanced. For one, if government officials feared liability for even routine contacts with the news media, the chilling effect would itself work First Amendment harm by "limiting the stock of information from which members of the public may draw," *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978), because "the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired," *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981).

In addition, the dangerous implication of any conclusion that an editorial choice was improperly influenced by the government is that the party adversely affected by that decision—a would-be op-ed contributor, say, who believes his submission condemning vaccines was rejected because a newspaper is beholden to the CDC—could sue the *press* for a violation of the First Amendment. *See Chi. Joint Bd. v. Chi. Trib. Co.*, 435 F.2d 470, 473 (7th Cir. 1970) (suit by union alleging First Amendment violation—and right to have its editorial advertisement printed—in light of "a special relationship between the defendants' newspapers and the State"). As a result, if unlawful coordination between government and the press could adequately be alleged by pointing to ordinary journalistic interactions, the Constitution could be abused as a sword rather than a shield: a basis for gadflies to

enforce a supposed right-of-access to the opinion pages, *contra Tornillo*, 418 U.S. at 258, or subject news organizations to lawsuits and discovery demands seeking evidence of imagined state influence on editorial decisionmaking.

For these reasons, crafting the line between coercion and persuasion requires fact-sensitive care.

a. A too-sensitive test for coercion would chill the free flow of information to the press and public.

The complicated tug-of-war between the government and the press over the public's right to know is nowhere more pronounced than in the context of national security reporting. In important respects, interactions between reporters and public officials in that context are marked by the same considerations on which the Fifth Circuit relied in reaching its decision below. Those contacts are, for one, typically conversations with "law enforcement, investigatory, and domestic security agenc[ies] for the executive branch," J.A. 63, agencies that necessarily enjoy "inherent authority" over members of the press and public, *id.* Officials may well use strong language to warn of the consequences of publishing government secrets, including, and especially, the risk of "killing people." J.A. 51. And those interactions necessarily unfold against the background reality that the Executive has never forsworn the possibility of prosecuting members of the news media under the Espionage Act for publishing classified information. *See* Memorandum from Thomas E. Kauper to John W. Dean III, Criminal Prosecution for Disclosure of

Classified Information Relating to Defense Department Vietnam Study (July 28, 1971), https://perma.cc/MW3Z-HFTJ; *see also* Memorandum from Att'y Gen. William French Smith to President Ronald Reagan, Report of the Interdepartmental Group on Unauthorized Disclosures of Classified Information ("Willard Report") C-5 (Mar. 31, 1982), https://perma.cc/F8GZ-Z8CU.

But even taking those considerations into account, it would undermine the interests of both the press and the public if the government felt it could not—consistent with the First Amendment—have any contact with a news outlet about that publication's decision whether to run national security secrets. At many leading news organizations, "No article on a classified program gets published until the responsible officials have been given a fair opportunity to comment." Dean Baquet & Bill Keller, *When Do We Publish a Secret?*, N.Y. Times (July 1, 2006), https://perma.cc/RB7E-6NFS. And for good reason. Not only does the press want the information necessary to "think hard about the human consequences of those decisions" to print newsworthy secrets, Sanger, *supra*, but also those conversations—in which the government must "make the case to reporters and editors why a certain set of facts will truly put lives or operations in jeopardy"—can give news organizations an opportunity to push for further disclosures in the public interest, *id.* Even on occasions where agencies with significant enforcement power vehemently object to the publication of newsworthy information, then, it is preferable by far for journalists to know the government's perspective rather than not—so long as

the ultimate decision "to publish or not to publish" truly and freely "falls to editors," not to the government. Baquet & Keller, *supra*.

None of that is to say that the government's conduct in such exchanges never crosses the constitutional line. Some cases look clear cut, as when CIA Director William Casey told *The Washington Post*'s Ben Bradlee that he would "recommend that you be prosecuted under the intelligence statute" if *The Post* were to run a story "describing information given to the Soviet Union by accused spy Ronald Pelton," which led the paper to hold publication and, when it ultimately published, omit certain details. Jay Peterzell, *Can the CIA Spook the Press?*, Colum. Journalism Rev., Sept.–Oct. 1986, at 29; *see also* Lucas A. Powe, Jr., The Fourth Estate and the Constitution 155 (1992) (quoting Bradlee explaining the decision to hold back certain information and calling the threat of prosecution a "red light you go through very slowly"). Other interactions are more ambiguous, as when White House Counsel Don McGahn contacted *The New York Times* to express concern that a forthcoming article on North Korea's missile program "could include classified information, might harm the national security of the United States, and would come at a particularly sensitive time for U.S.-China relations." Sanger, *supra*. The message contained no express threat—but coming directly from the White House after *The Times* had already had "extensive discussion[s]" with national security and intelligence officials, it nevertheless prompted debate within the newsroom over whether the President would take legal action to block or punish publication. *Id.*

The point, though, is not to relitigate whether any particular past interaction between government and the press has complied with the First Amendment; rather, the experience of national-security reporting demonstrates that the analysis must be sensitive to context. If the bare fact that a law enforcement agency expressed its objections to publication or warned that lives would be at risk were enough to establish a constitutional violation, conversations between government and the press that—from the news media's own perspective—serve important First Amendment interests would be chilled. *Cf.* Naomi Nix & Cat Zakrzewski, *U.S. Stops Helping Big Tech Spot Foreign Meddling Amid GOP Legal Threats*, Wash. Post (Nov. 30, 2023), https://perma.cc/43YF-VMXZ (noting that the government has refrained from contacts with social media firms beyond those prohibited by the injunction at issue here to avoid liability). This Court should avoid a broad ruling to limit that risk, which would jeopardize "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

b. A too-sensitive test for coercion would undermine the press's own First Amendment editorial rights.

The balance the First Amendment strikes in this context must likewise take stock of the fact that the press's "exercise of editorial control and judgment" would be jeopardized by an approach that tacks too far in either direction. *Tornillo*, 418 U.S. at 258. And

while the prospect of "government tampering . . . with news and editorial content" may be the more obvious risk, *id.* at 259 (White, J., concurring), this Court has rightly warned that a too-elastic approach to the state-action inquiry—one that would subject private institutions' decisionmaking to the limits of the First Amendment—would likewise "eviscerate . . . private entities' rights to exercise editorial control over speech and speakers on their properties or platforms," *Halleck*, 139 S. Ct. at 1932.

If, for instance, a reporter's routine contact with experts at the Centers for Disease Control & Prevention to better understand and report on the safety of vaccines were enough to subject a newspaper to the First Amendment's mandate of viewpoint-neutrality—requiring that their stories likewise incorporate voices assailing the dangers of mRNA—then the press would be put to an intolerable choice: forgo consulting sources in government or forgo the "editorial control and judgment" that the Constitution promises news organizations. *Tornillo*, 418 U.S. at 258. Or to frame the same problem differently, to make it too easy to allege collusion between the government and the press to suppress a given perspective would give vexatious litigants the means to attempt to strong-arm their way into the pages of newspapers. *See O'Handley v. Padilla*, 579 F. Supp. 3d 1163, 1186–87 (N.D. Cal. 2022), *aff'd*, 62 F.4th 1145 (9th Cir. 2023) (noting that Twitter's own First Amendment rights would be impaired by plaintiff's bid to have his account reinstated on the basis of alleged coordination with the government).

The Fifth Circuit's analysis below was, in that respect, troublingly broad with respect to the CDC specifically. The panel acknowledged that the CDC lacked any direct or indirect authority to coerce the social media firms but concluded that the agency was nevertheless "entangled in the platforms' decision-making." J.A. 65. In particular, the Fifth Circuit emphasized that the platforms asked the CDC "whether [certain] claims were true or false" and looked to CDC "advisories" and "guidance" in shaping their own editorial decisions. J.A. 65–67. But it should go without saying that journalists routinely speak to experts in government in order to evaluate the veracity of newsworthy information, and often relay government data directly to the public. *See, e.g.*, Wilson Andrews & Lisa Waananen Jones, *The Times Switches to C.D.C. Covid Data, Ending Daily Collection*, N.Y. Times (Mar. 22, 2023), https://perma.cc/H9AU-72MY. And news organizations consider, too, CDC guidance expressly directed towards the press when reporting on topics like suicide that raise sensitive public health concerns. *See Newsroom Resources*, Ctrs. for Disease Control & Prevention (last updated Mar. 25, 2021), https://perma.cc/3HJR-KPD2 (collecting guidance for the press for writing about suicide, traumatic brain injuries, bullying, and sexual violence).

The Fifth Circuit's analysis on this specific point, taken too literally, would invite the risk that plaintiffs who feel excluded from public discourse will point to routine interactions of that kind in a bid to force news organizations to accommodate their competing perspectives. Indeed, some of the same parties that sought to intervene in this case, *see*

Kennedy Plaintiffs' Motion to Intervene, *Murthy v. Missouri*, No. 23-411 (Oct. 26, 2023), have sued the press directly, alleging a conspiracy to suppress their views about COVID and COVID vaccines, *see* Complaint, *Children's Health Def. v. Wash. Post Co.*, No. 2:23-cv-00004 (N.D. Tex. Jan. 10, 2023). Other litigants likewise have not hesitated to allege unlawful coordination between news outlets and the government in bids to punish the press for excluding their perspective. *See, e.g.*, *Malone v. WP Company, LLC*, No. 3:22-cv-00046, 2023 WL 6447311, at *6 (W.D. Va. Sept. 29, 2023) (in defamation suit, plaintiff alleged that *The Washington Post* "coordinated [a] false narrative with the Biden Administration" to suppress his views on vaccines); *Project Veritas v. Leland Stanford Junior Univ.*, No. 21-cv-1326, 2022 WL 1555047, at *2 (W.D. Wash. May 17, 2022) (in defamation suit, plaintiff alleged "a coordinated effort between *The New York Times*" and the Election Integrity Partnership, a nonprofit entity identified in the district court's original injunction in this case, to suppress claims of voting fraud).

This Court should be careful not to provide litigants another tool to tax the press for exercising the editorial judgment the Constitution protects. This Court has already rejected in the strongest terms efforts to enforce "compulsory access" to news organizations' coverage and editorial content, *Tornillo*, 418 U.S. at 258—but even if such suits will predictably fail on the merits, making it too easy to allege a conspiracy runs the risk of burdensome and expensive discovery into the press's editorial process in search of imagined covert government influence. Such bids to "subject[] the editorial process to private

or official examination," *Herbert v. Lando*, 441 U.S. 153, 174 (1979), would, themselves, undermine the First Amendment rights of the press to "exercise . . . editorial control and judgment," *Tornillo*, 418 U.S. at 258.

CONCLUSION

It is critical that the test for government coercion in these cases be calibrated properly. To construe coercion too narrowly could allow "informal censorship" of the press to escape judicial notice, *Bantam Books*, 372 U.S. at 67; to construe it too loosely could impair news organizations' rights "to exercise editorial control over speech and speakers on their properties or platforms," *Halleck*, 139 S. Ct. at 1932. Without taking a position on the specific balance to be struck in this particular proceeding, *amicus* urges the Court to tether the analysis closely to the specific facts and context of the case before it to avoid endangering those constitutional values.

Respectfully submitted,

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