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.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF INSTITUTE FOR FREE SPEECH AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICUS CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to protecting the First Amendment rights of speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties and advancing free speech.

The Institute files this brief to urge the Court to adopt a bright-line prohibition against the government soliciting third parties to remove the otherwise lawful political speech of another. Such a bright-line rule is necessary to protect the kind of speech that sits at the First Amendment's core.

SUMMARY OF ARGUMENT

Government officials violate the First Amendment when they secretly solicit a third party to suppress the lawful political speech of another. Doing so violates the axiomatic principle that the government "may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden" from doing. *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (quotation omitted). The government's solution

[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* or its counsel have made a monetary contribution to the preparation or submission of this brief.

to wrong speech is more speech—not behind-the-scenes censorship. And when it comes to the political speech at the core of the First Amendment, a bright-line rule preventing the government from using its outsized voice to suppress dissenting views is necessary to give the First Amendment the breathing room it needs to survive.

A clear, robust rule that prohibits the government from targeting lawful political speech has the added benefit of easy administration. It applies to limited facts—the government's surreptitious effort to silence political speech by contacting a third party who is not a speaker. Within those limited facts, it does not require the court to decide whether a particular email or phone call was enough to become coercive. And it does not rely on a malleable, multifactor standard that gives courts too much discretion, which leads to unpredictability at the expense of chilling—or silencing—core political speech.

Nor is there any merit to the government's claim that the government-speech doctrine allows the state to solicit censorship so long as the government uses non-coercive words to do so. While the government must at times speak, it has no constitutional right to indirectly censor the speech of others. Indeed, the entire point of *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), is that government speech often poses a unique threat that private speech does not—because it is spoken with the coercive power of the government implicitly behind it. Thus, government speech must be carefully constrained. And to suggest that government

speech aimed at silencing the citizenry is protected by the Constitution is to turn the First Amendment on its head. The Constitution protects private actors from censorship—it does not protect the government from criticism.

This case can largely be resolved on this test. The record below showed that public officials routinely "flagged content for removal" and, for example, informed social media companies that "'removing bad information' is 'one of the easy, low-bar things you guys [can] do to make people like me think you're taking action.'" *Missouri v. Biden*, 83 F.4th 350, 362, 364 (5th Cir. 2023). These requests specifically aimed to silence speech about some of the most "divisive" political issues over the past few years. *Id.* at 359. While other cases involving other kinds of speech might raise difficult questions about when the government puts too much pressure on private parties, the Court need not resolve those here. In this case, the federal government targeted specific, lawful political speech it disfavored, and it deployed an extensive, clandestine plan to remove it from public view and debate. If the First Amendment means anything, it must prevent this kind of interference in the marketplace of political ideas.

ARGUMENT

I. Absent the narrowest of circumstances, the First Amendment prohibits the government from privately soliciting removal of lawful political speech from the public discourse.

The Court should hold that the government violates the First Amendment when it privately solicits a third party to remove another person's lawful political speech from the public discourse. This bright-line rule prevents most of the problematic jawboning in cases like this without interfering with any legitimate interest the government may have. And adopting a clear, robust rule against interfering with political speech gives the First Amendment the "breathing space" it needs "to survive." *See Citizens United v. FEC*, 558 U.S. 310, 329 (2010).

A. Adopting a bright-line rule best protects lawful political speech from indirect censorship.

1. The ordinary rule is that the government "may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood*, 413 U.S. at 465 (quotation omitted). The government, of course, cannot ban political speech that it dislikes. *See Citizens United*, 558 U.S. at 339–41. So nor should the government be allowed to "induce, encourage or promote

private persons" to do the same. *See Norwood*, 413 U.S. at 465.

But the law has not evolved so cleanly. Since this Court's decision in *Bantam Books*, the courts of appeals have resolved questions about government pressure with squishy, multifactor balancing tests that turn largely on judicial discretion. Those tests have lured courts into weighing things like "tenor" and "tone" to decide whether this word or that word transforms persuasion into coercion. *See, e.g.*, *Kennedy v. Warren*, 66 F.4th 1199, 1209–10 (9th Cir. 2023). Under this approach, the government is free to encourage private persons to suppress the speech of others so long as the government's words are not too threatening or too intimidating. *See id.* While this may be useful in some circumstances, it has no place when it comes to preventing the government from directly soliciting third parties to suppress core political speech.

2. "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). In fact, "a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). That's because "the whole concept of" a representative democracy "depends upon the ability of the people to make their wishes known to their representatives." *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). "Discussion of public issues," in other words, is "integral to the

operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

Political speech thus "occupies the core of the protection afforded by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995). To that end, "[t]his Court's cases have provided heightened judicial protection for political speech." *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2359 (2020) (Breyer, J., dissenting) (collecting cases). That includes speech discussing "political issues," *Meyer v. Grant*, 486 U.S. 414, 425 (1988), and speech "critical of a potential [political] candidate," *Citizens United*, 558 U.S. at 393. When core speech—that is, political speech—is at issue, "the importance of First Amendment protections is 'at its zenith.'" *Meyer*, 486 U.S. at 425

For this reason, the Court has rightly rejected rules that "require[ ] intricate case-by-case determinations to verify whether political speech is [protected]." *Citizens United*, 558 U.S. at 329. The pitfalls of such an approach are obvious. "Vague standards . . . encourage erratic administration whether the censor be administrative or judicial." *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 685 (1968). Parties will wind up in court arguing about whether "two words" in one particular paragraph of one particular letter "crossed the line between persuasion and coercion." *See Kennedy*, 66 F.4th at 1208. And "archetypical political speech [is] chilled in the meantime." *Citizens United*, 558 U.S. at 329. Yet when it comes to political speech, even the

mere possibility of such indirect censorship "is unacceptable." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

In fact, indirect censorship creates unique problems that courts should be extra careful to guard against. Because the speech belongs to someone else, third parties lack the same self-interest to defend that speech against the government's suppression efforts. Even mild encouragement from a government official to remove another person's speech will have an outsized effect on a third party who has no personal stake in the matter. What's more, the speaker might never know that the government instigated the censorship in the first place. That makes the government's tactics more difficult to challenge, as the person most interested in doing so is left in the dark.

This is not a hypothetical problem. It has already prevented at least one plaintiff in a similar case from pursuing his claim. *See Changizi v. Dep't Health & Hum. Servs.*, 82 F.4th 492, 498 (6th Cir. 2023) (dismissing a suit because the plaintiff could not allege details about the government's "behind-the-scenes communication" with a social-media company). Thus, the inherent problems with an imprecise test about government coercion are magnified when the government's conduct is aimed a third party.

The better approach—at least for core political speech—is to stop the government from trying to remove it at all. If the government dislikes political speech circulating online, it is free to counter that speech with its own. After all, "[t]he remedy for speech

that is false is speech that is true." *United States v. Alvarez*, 567 U.S. 709, 728 (2012). "The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." *Id.* (citing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). But the government has no legitimate interest in asking, much less demanding, that private parties *suppress* the lawful political speech of another.

3. This approach expands upon the path laid out in *Bantam Books*. There, the Court considered whether the government could use tools of "coercion, persuasion, and intimidation" to censor unwanted, arguably obscene, speech when it otherwise lacked the formal power to sanction. 372 U.S. at 66–67. The case centered on a Rhode Island commission that routinely notified book publishers of materials the commission found obscene. *Id.* at 62. But the commission could only "recommend" prosecution to the Attorney General—it could not initiate any formal sanction itself. *See id.* at 62, 66. Still, facing the possibility of prosecution and the wrath of the commission, the publishers would dutifully remove the books from circulation after receiving the commission's letters, even though some of the books were not "obscene" under the First Amendment and thus not books for which the publishers could be prosecuted at all.

The commission defended itself on the grounds that the publishers acted voluntarily because the commission "did not regulate or suppress obscenity but simply exhorted booksellers and advised them of their

legal rights." *Id.* at 67 (cleaned up). That sounds familiar. *See* Pet.Br. at 29 ("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."). But this Court rejected the argument as "untenable" in light of the commission's "deliberate[]" plan to suppress lawful speech through "informal censorship." 372 U.S. at 66–67. That the commission itself could not prosecute or otherwise punish the publishers made no difference. The commission's "persuasion" implicitly backed by the power of the state could "sufficiently inhibit the circulation of publications to warrant injunctive relief" under the First Amendment. *Id.* at 67. There is no value in suppressing political speech through such "persuasion."

Bantam Books thus adopted a broad view of impermissible jawboning in a context much less sensitive than, as in this case, the government suppressing political speech. The Court focused on how the commission *used* both "coercion" and "persuasion" to "deliberately set about to achieve the suppression of publications deemed 'objectionable.'" *Id.* at 67. The commission targeted specific speech for removal and sought to have book publishers do what the commission could not do itself: suppress it. That indirect path toward censorship violated the First Amendment—whether accomplished by inducement, encouragement, persuasion, or coercion. *See id.*; *see also Norwood*, 413 U.S. at 465.

It is significant that the government has some leeway to ban "obscenity" that fits a narrow definition. *See*

Miller v. California, 413 U.S. 15, 19 (1973). That means the government officials in *Bantam Books* (might) have had a legitimate interest in providing honest advice about whether distributing a particular publication could violate the law. 372 U.S. at 66. So it mattered that the record included evidence showing the commission's "deliberate[]" plan to "suppress[]" constitutionally protected speech, rather than to provide good-faith legal advice. *See id.* at 66–67.

The government has no similar interest in suppressing core political speech. *See Simon & Schuster, Inc. v. Members of the N.Y. St. Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring). The case for prohibiting such government "persuasion" is, therefore, much stronger when public officials target core political speech. Courts have no need to consider whether the circumstances surrounding the government censorship requests were too forceful or intimidating. Because the government has no business regulating the content of political speech in the first place, it cannot use third parties to accomplish that "constitutionally forbidden" goal. *Norwood*, 413 U.S. at 465.

B. The Court can bar the government from asking third parties to suppress lawful political speech without interfering with legitimate government speech.

A narrow rule that targets the government's clandestine efforts to remove lawful political speech

prevents nearly all the First Amendment harm in this case. And it does so without requiring the Court to scrutinize how much pressure is too much pressure when the government targets less valuable speech.

1. Start with this case. The government repeatedly targeted the kind of political speech that lies at the heart of the First Amendment and asked platforms to remove it. "[S]ome White House officials," for example, "communicated frequently" about the platforms removing or demoting "vaccine-related content," Pet.Br. at 6–7, in the middle of a government-backed campaign to encourage more vaccination, *see, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 663–64 (2022). It's no surprise that the Biden Administration—having staked its political campaign on competently "respond[ing] to the pandemic" and "leveraging the government's power . . . to roll out a Covid vaccine"—viewed vaccine resistance as a political liability that must be stopped. *See* Alex Ruoff, *Biden Team Hones Strategy to Win Public Trust in Covid Vaccine*, Bloomberg Government (Oct. 16, 2020), available at https://perma.cc/5DBH-4JWE. In fact, no one understands the politics of this issue better than Petitioner Vivek Murthy, who, before being appointed as Surgeon General, worked as "a key advisor to the Biden campaign on COVID-19." *See* Allison Aubrey, *Coronavirus Is A Key Campaign Issue: What's Joe Biden's Plan?*, NPR (Oct. 28, 2020), available at https://perma.cc/W89C-PL6A. Speech about the Covid vaccine was (for at least a period of time) a political issue as divisive as any other—and it admittedly

undermined the Biden Administration's policy of trying to get as many people as possible vaccinated as quickly as possible.

Nor could anyone say the government officials merely wanted to communicate their viewpoint or provide educational information for the platforms to consider. These officials "flagged content *for removal*." *Missouri*, 83 F.4th at 364 (emphasis added). They asked the platforms to "deplatform[ ]" and "downgrad[e]" speech they did not like. *Id.* at 361. In one example, an official told a platform that "'removing bad information' is 'one of the easy, low-bar things you guys [can] do to make people like me think you're taking action.'" *Id.* at 362. The government's requests were clear: take down the speech that's causing the White House problems.

Just as in *Bantam Books*, the Biden Administration "deliberately set about to achieve the suppression" of disfavored speech, 372 U.S. at 67, which "had the intended result of suppressing millions of protected free speech postings by American citizens," *Murthy v. Missouri*, 144 S. Ct. 7, 8 (2023) (Alito, J., dissenting from grant of application for stay) (*quoting Missouri*, 83 F.4th at 392). Biden's former campaign advisor, Petitioner Murthy, was placed into the government, where he used his greatly empowered voice to target its political adversaries for censorship. Such tactics are precisely what the First Amendment exists to prevent.

The government resists claims of censorship by pointing out that platforms only removed about half the material the FBI flagged—so how coercive could

it be? Pet.Br. at 39. But the efficacy rate of the government's tactics is not a constitutional shield. The First Amendment, of course, does not allow the government to censor 50 percent of the political speech it disfavors. And the platforms themselves seem to tacitly admit that the government's take-down requests "compelled" them "to remove content." NetChoice *Amicus* Br. at 4. Yet the success rate tells only part of the story because government censorship always leads to the same outcome: Disfavored speakers begin to self-censor, and so the amount of speech that doesn't appear at all is unknowable—and likely much larger than the amount of speech the government successfully took down.

2. The government worries about protecting its ability to communicate its own views about whether speech is accurate or dangerous. But a ruling focused on the government's private requests for third parties to remove lawful political speech from their platforms does not require the Court to resolve thornier questions about when other kinds of government communications cross the line. Nor does it prevent the government from communicating about the kinds of speech that this Court has already recognized fall outside the protection of the First Amendment. Put simply, this bright-line rule protects a substantial amount of core political speech from improper interference without upsetting the other well-established boundaries of the First Amendment.

Consider just a "few examples" from the government's brief, Pet.Br. at 5, to see why these hypotheticals can be easily disposed of:

- The government identifying "false statements about the time, place, and manner of elections" without making a recommendation about how the platforms should respond (*id.* at 6): this is not lawful political speech, *see, e.g.*, *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1889 n.4 (2018), and lacks a request for removal.
- The government informing platforms about foreign terrorist propaganda appearing on their platform (*id.* at 5): this is not protected political speech, *see Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2086–87 (2020), and lacks a request for removal.
- The government responding to a third party soliciting the government's views on the veracity of specific claims (*id.* at 6): while this could implicate political speech, responding to genuine questions about the truth of certain speech does not amount to requesting removal of speech.

None of these examples involve the government soliciting the removal of lawful, core political speech and thus would not be per se barred under a bright-line rule.

That's not to say communications that do not specifically request that third-party speech be removed or

censored by a private actor could never give rise to a First Amendment violation. Under *Bantam Books*, the government can also violate the First Amendment when using indirect pressure to censor third-party speech. In such cases, a more holistic approach makes sense. For example, an apparently innocuous inquiry from a regulator is typically more threatening than the same inquiry from a single legislator who lacks any unique power. Repeated requests or intimations of retaliation, even if not accompanied by specific requests for removal of material, also move the needle.[2] A private party that faces "unrelenting pressure" will almost certainly "bend to the government's will" at some point. *See Missouri*, 83 F.4th at 371. But when government officials contact third parties to specifically request or demand that they suppress the otherwise lawful political speech of others, those line-drawing questions about persuasion and intimidation need not be resolved.

Nor does a narrow rule in this case prevent the government from pursuing legitimate interests by communicating with third parties. *Amicus*'s approach does not rewrite the ordinary rules about what kinds of speech the First Amendment does not protect. Government officials, for example, are free to ask platforms to remove speech that poses a specific, imminent threat

[2] For example, a contact to inform a party about a factually inaccurate post on the party's website would not violate a bright-line rule prohibiting the government from requesting the removal of another party's content. However, renewed or repeated inquiries, even without a specific request for removal, may still be found to constitute unconstitutional pressure to censor.

to someone's life, as such speech falls outside the protection of the First Amendment regardless of government requests to remove it. *Virginia v. Black*, 538 U.S. 343, 359 (2003). That differs from generalized concerns about safety, such as worries about the effects of vaccine resistance.

Likewise, in the national security context this Court has recognized that the government has a legitimate interest in prohibiting a narrow category of speech that poses "direct, immediate, and irreparable damage to our Nation or its people." *New York Times v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring). The government may, for example, be permitted to request that a third party remove real-time information about a covert military operation. But it cannot request removal of speech generally critical of the government's foreign or military policy simply because it might undermine support for the war effort and therefore, in the government's eyes, harm national security. And in all events, the government cannot solicit the removal of speech because it disagrees with the speaker's viewpoint.

II. The government-speech doctrine does not give cover to public officials who speak to suppress political speech.

Petitioners rely on the government-speech doctrine to sidestep any First Amendment worries. As the government sees it, soliciting one person to take down the political speech of another cannot violate the First

Amendment because the government has just as much right to speak as anyone else. Pet.Br. at 23–25. But this Court "exercise[s] great caution before extending [its] government-speech precedents," *Matal v. Tam*, 582 U.S. 218, 235 (2017), and it has never applied the doctrine so expansively. For good reason. Doing so turns the First Amendment on its head.

The Free Speech Clause protects private speakers from the government. U.S. Const. amend. I. It does not operate inversely. It does not protect the government from censoring itself, nor does it provide the government with rights of its own. *See Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1599 (2022) (Alito, J., concurring). Rather, the Free Speech and Press Clauses are singularly focused on protecting the people from the state.

The government-speech doctrine does not say otherwise. Rather, the rule states only that the government need not abide by principles of viewpoint neutrality when speaking for itself. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009). "[T]he doctrine is based on the notion that governmental communication—and the exercise of control over those charged by law with implementing a government's communicative agenda—do not normally 'restrict the activities of . . . persons acting as private individuals.'" *Shurtleff*, 142 S. Ct. at 1599 (Alito, J., concurring). But this Court has never held "that governmental entities have First Amendment rights." *Id.* So while much of government speech falls outside the scope of the First

Amendment, it is not "in the literal sense exempt" from constitutional scrutiny. *Id.* And the government cannot use its own speech as a "means [to] restrict[ ] private expression in a way that 'abridges' the freedom of speech." *Id.*

This Court recognized in *Bantam Books* that the weight of the government's words looms large and thus should not be used to "deliberately" suppress the speech of others. 372 U.S. at 67. Censoring disfavored speech is not the government expressing its own viewpoint, and using speech as a "means" to do so thus falls outside the government-speech doctrine. *Shurtleff*, 142 S. Ct. at 1599 (Alito, J., concurring). Put simply, the government does not get to engage in viewpoint discrimination against private speech on private platforms by hiding behind its own speech as the tool of suppression.

One last point. No one contends that the government cannot speak about "disinformation" or other political views it disagrees with. The government is free to push back on "speech that is false" with its own "speech that is true." *Alvarez*, 567 U.S. at 728. In fact, government officials regularly maintain their own social media accounts that they use to communicate with the public. But the dynamic changes when the government speaks privately to exert influence on third parties so that they will remove the speech of another. Not only does it prevent the speaker from knowing who was behind the censorship, but it also makes the pressure behind the government's voice even stronger.

After all, a third party has much less incentive to resist censorship than the speaker himself.

This point distinguishes what the government did here from the string of examples it provides of past presidents criticizing the media or other kinds of speakers. Pet.Br. at 24. Of course a president or other public official can communicate his or her views to the public. And of course those views can include "criticiz[ing] protected speech." *Id.* at 25. But missing from the government's historical survey of critical speech is any example of a public official urging one private party to suppress the specific political speech of another. What the government here did was unprecedented, and the Court should treat it as such. Applying a clear rule prohibiting the government from privately soliciting third parties to remove the political speech of others does not undermine the government's ability to communicate its own message. The government-speech doctrine is inapposite.

CONCLUSION

The First Amendment forbids the government from deliberately using its voice to control and remove political speech it doesn't like—be it about elections, foreign wars, cultural wars, or the origins of a pandemic. This Court should, at a minimum, hold that government officials violate the First Amendment

when they privately solicit third parties to suppress the lawful political speech of another.

Respectfully submitted,

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