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 NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS


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## INTEREST OF AMICUS CURIAE[1]

The National Institute of Family and Life Advocates (NIFLA) is a national legal network for pro-life pregnancy resource centers and medical clinics. Its purpose is to provide legal training, consultation, and education to its 1,770 member centers, over 1,400 of which operate as medical clinics providing medical services, such as ultrasound confirmation of pregnancy to mothers contemplating abortion, and STI testing and treatment. The mission of NIFLA and its members is to provide alternatives to abortion for women by offering life-affirming services.

This case involves whether the First Amendment authorizes public officials to encourage and pressure private actors to suppress speech on matters of public concern. Here, the speech involved COVID-19 and the 2020 election. But it could have just as easily been pro-life speech. Sadly, many public officials regard pro-life speech with open hostility and have violated the First Amendment rights of pro-life advocates—including NIFLA's members—by suppressing that speech. *E.g.*, *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 138 S.Ct. 2361 (2018); *Frederick Douglass Found., Inc.* v. *Dist. of Columbia*, 82 F.4th 1122 (D.C. Cir. 2023). NIFLA is keenly interested in protecting itself and its members from viewpoint-based censorship like that here.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person other than amicus curiae, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

In *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 67–68 (1963), this Court held that when the government coerces a private actor to suppress speech the First Amendment protects, it is accountable for the censorship as if it had suppressed the speech directly. That holding rests on the twin premises that (1) private conduct the government directly or indirectly compels is really the government's conduct, and (2) because First Amendment freedoms are especially susceptible to subtle invasion, they "must be ringed about with adequate bulwarks." *Id.* at 66. The Court has since made clear that it's not just coercion that offends the Constitution. The government's substantial encouragement of private censorship does too. Government censorship by private proxy jeopardizes free expression just as much as formal censorship.

*Bantam Books* was clear that when it comes to rooting out such schemes of "informal censorship," *id.* at 67, the law is concerned with the substance of what the government's conduct conveyed, not merely its form. So identifying coercion requires courts to look at what the government said and ask what it conveyed to the person on the receiving end. Likewise, identifying significant encouragement requires the same searching inquiry of government inducements. Government efforts to coerce or encourage come in forms both bold and subtle. As with all state-action questions, context is king.

The context here is extraordinary. Officials across five Executive Branch offices formed a vast bureaucratic apparatus with a single purpose: enticing and threatening social media companies to censor speech on core matters of public concern because the

Executive Branch did not like it. On topics ranging from the origins of COVID-19 and the efficacy of vaccines to the authenticity of a laptop computer belonging to the President's son, an army of officials surveilled the content of social media posts, obtained direct access to the companies' employees, demanded the companies block or suppress offending content, commanded the companies to alter their internal policies to censor more content, monitored the companies' content-moderation activities, followed up to ensure compliance, and participated in deciding content-moderation policy. The social media companies responded to these thinly veiled threats and inducements "with total compliance." *Missouri* v. *Biden*, 83 F.4th 350, 363 (5th Cir. 2023) (per curiam).

Little wonder why. The Administration's communications left no doubt that compliance was not optional. Publicly, officials from the President down accused the companies of fomenting "an urgent public health threat" and actually "killing people." *Ibid.* Privately, they "stress[ed] the degree to which [their demands] need[ed] to be resolved immediately" and ensured the companies knew their concerns were "shared at the highest (and I mean highest) levels" of the White House. *Id.* at 360, 362. The Fifth Circuit rightly recognized the companies' content-moderation decisions "were not made in accordance with independent judgments guided by independent standards." *Id.* at 388. They were the Administration's.

If the Administration's censorship campaign is left unchecked, more official campaigns of informal censorship will follow. The Court should affirm and make clear that coercion and encouragement claims require courts to do what the Fifth Circuit did here—analyze all the facts in context.

## ARGUMENT

### I. Public officials chip away at the freedoms to think, speak, and listen by using private proxies to suppress disfavored ideas.

The Framers recognized that "the freedom to think and speak is among our inalienable human rights" and that "an uninhibited marketplace of ideas" is indispensable to "test and improve our own thinking both as individuals and as a Nation." *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 584 (2023) (quotation omitted). To shield both from a government convinced it has a monopoly on truth, the First Amendment ensures "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chi.* v. *Mosley*, 408 U.S. 92, 95 (1972). Still, officials eager to squelch dissent often "test these foundational principles." *303 Creative*, 600 U.S. at 585. More and more, these tests come from officials who, aware they can't ban speech outright, browbeat and cajole private actors to do the dirty work of censorship for them.

#### A. Public officials increasingly use their office to coerce or encourage private parties to censor disfavored ideas.

No government official could order a social media platform to censor a speaker just because the official disapproves of the speech. The First Amendment denies government the power to "weigh[ ] the value of a particular category of speech against its social costs and then punish[ ] that category of speech." *Brown* v. *Ent. Merchs. Ass'n*, 564 U.S. 786, 792 (2011). That applies when government coerces or encourages private actors to censor speech, too. Where the Bill of Rights is concerned, "[w]hat cannot be done directly cannot

be done indirectly." *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (quotation omitted).

So government officials are forbidden to "induce, encourage[,] or promote private persons" to suppress protected speech. *Norwood* v. *Harrison*, 413 U.S. 455, 465 (1973) (citation omitted). Indeed, this Court has made clear that official coercion of private censorship threatens free expression just as much as direct censorship. See *Bantam Books*, 372 U.S. at 66. And as coercion and encouragement come in forms "either overt or covert," *Brentwood Acad.* v. *Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (quotation omitted), this Court scrutinizes them rigorously, piercing "through forms to the substance" and favoring private speech over government statements seeking to suppress it, *Bantam Books*, 372 U.S. at 67.

Yet many officials have become emboldened to ignore those warnings because the Second, Ninth, and Tenth Circuits have become exceedingly deferential to officials who jawbone private parties into suppressing speech. *E.g.*, *Kennedy* v. *Warren,* 66 F.4th 1199 (9th Cir. 2023); *O'Handley* v. *Weber*, 62 F.4th 1145 (9th Cir. 2023); *VDARE Found.* v. *City of Colo. Springs*, 11 F.4th 1151 (10th Cir. 2021); *Nat'l Rifle Ass'n of Am.* v. *Vullo*, 49 F.4th 700 (2d Cir. 2022). As the Nation's politics reach a boiling point, some officials are willing to push the First Amendment envelope to silence the other side, presuming judicial correction will come too late to matter. Officials of all stripes are increasingly flexing the muscle of public office to intimidate private companies to suppress ideas they abhor. See generally Will Duffield, *Jawboning Against Speech*, CATO INST. (Sept. 12, 2022), bit.ly/41NEhjb.

For instance, in 2018, California formed an "Office of Election Cybersecurity" with a mandate to surveil social media and censor disfavored narratives about California's elections. *O'Handley*, 62 F.4th at 1154. Its stated priority was to insert itself into social media companies' content-moderation decisions by "*working closely* with [them] to be proactive so when there's a source of misinformation, *we can contain it*." *Ibid.* (emphasis added). After the 2020 election, the agency had been so successful at "containing" disfavored messages that it boasted it was responsible for having close to 300 "erroneous or misleading" posts "promptly removed" from social-media platforms. *Ibid.*

An example was a political commentator who posted on Twitter: "[a]udit every California ballot" to "protect the integrity of th[e] state's elections" and prevent election fraud. *Ibid.* Although he posted a week *after* the election—when any threat to its integrity had passed—the agency leveraged its close relationship and sent a private message to Twitter, blasting the commentator for "blatant disregard to how our voting process works and creat[ing] disinformation and distrust." *Ibid.* Twitter correctly understood that the agency wanted the commentator punished and, relying on its "Civic Integrity Policy," immediately complied. See *id.* at 1155–56.

Similarly, in June 2022, a group of 21 legislators led by Senator Mark Warner and Representative Elissa Slotkin pressured Google to limit the ways people find pro-life pregnancy centers. Press Release, Warner, Slotkin, Colleagues Urge Action on Misleading Search Results About Abortion Clinics (June 17, 2022), bit.ly/421J6WB. Noting they were "especially concern[ed]" after seeing the leaked draft of *Dobbs* v.

*Jackson Women's Health Org.*, 597 U.S. 215 (2022), the legislators sought Google's "immediate attention," demanding that it throttle this content and prepare a response describing each step the company would take to address the legislators' concerns. Google complied, and Senator Warner took credit. Press Release, Following New Investigation, Warner & Slotkin Press Google on Misrepresentation in Ads Targeted to Users Searching for Abortion Services (Nov. 22, 2022), bit.ly/3tH5jwc. Months later, he and Representative Slotkin were at it again, sending Google another letter implying it had not lived up to its commitments and pressing for a "more expansive, proactive approach" to suppressing pro-life content. *Ibid.*

In 2021, Senator Elizabeth Warren browbeat Amazon to stop advertising books about COVID, accusing it of "unethical, unacceptable, and potentially unlawful" conduct and demanding it answer questions so she could "fully understand Amazon's role in facilitating misinformation." *Kennedy*, 66 F.4th at 1204–05. In 2018, banks and insurers began cutting ties with the NRA after New York's financial services regulator, who held Second Amendment advocacy in contempt, implied regulatory consequences if they didn't. *Vullo*, 49 F.4th at 706. And in 2017, a hotel cancelled the conference of a group advocating less immigration after a city mayor wrote the hotel that the city would not condone "hate speech" and was "steadfast in its commitment to the enforcement of Colorado law" protecting individuals from "intimidation" and "harassment." *VDARE*, 11 F.4th at 1157. Similar examples abound. Duffield, *supra.*

The problem is unrelenting. Just days ago, House Judiciary Committee Chairman Jim Jordan released documents indicating that the Administration

pressured Amazon to censor books about COVID-19 vaccines that it claimed contained "propaganda" or "misinformation." Victor Nava, *Amazon 'Censored' COVID-19 Vaccine Books after 'Feeling Pressure' from Biden White House: Docs*, N.Y. POST (Feb. 5, 2024), https://bit.ly/3OxB95I; Anders Hagstrom, *Email Trove Shows Amazon 'Censored' Vaccine Books after Pestering from White House, Jim Jordan Says*, FOX BUSINESS (Feb. 6, 2024), https://bit.ly/3SqKFZH. It seems there's no end to governments' efforts to stifle speech.

Besides being disturbingly pervasive, these government efforts to cajole private actors to squelch speech share significant commonalities. To begin, they prove the continuing validity of *Bantam Books*'s observation that free speech is "vulnerable to gravely damaging yet barely visible encroachments." 372 U.S. at 66. The California election "misinformation" agency had the offending commentator punished by way of private message. And here, the Administration's most damaging efforts to coerce the social media companies to censor happened behind closed doors. Had circumstances been different, no one might have known.

These cases also show that official entanglement in private censorship is growing deeper roots. As this case vividly illustrates, social media users can be forgiven if they regard those platforms as a digital panopticon because they know the government may be watching. Thus, they are put to the Hobson's choice of modifying what they say for fear of being punished. Jonathon W. Penney, *Understanding Chilling Effects*, 106 MINN. L. REV. 1451, 1480, 1487 (2022). The incentive to self-censor is huge.

Finally, these examples show how low-key communications are just as effective at strong-arming private actors to suppress speech as explicit threats. Neither Senator Warner nor Senator Warren explicitly demanded that Google or Amazon do anything; they made "requests" or asked for "cooperation." Nor did they explicitly threaten adverse consequences. They obliquely cited laws or mentioned "potentially unlawful" activity. The mere fact that powerful public officials were coupling the significant authority of office with vague and implicit threats was sufficient to coerce compliance.

Of course, no one disputes that public officials can try to persuade private actors that someone's speech is wrong: Counter-speech is the classic First Amendment answer. See *United States* v. *Alvarez*, 567 U.S. 709, 726 (2012). But when an official pressures or entices a private actor to censor, the risk of undue influence flowing from the official's status *as an official* looms large. As a matter of persuasion, there's no legitimate reason for an Administration official to tell a social media company that censoring posts has attention at the "highest (and I mean highest) levels" of the White House. *Missouri*, 83 F.4th at 362. The purpose of such statements is to use the power of office to make the recipient think refusal is not an option.[2] Mischaracterizing such communications as mere

[2] This risk of undue influence is precisely why, for example, all manner of public officials must abide by rules ensuring that public office is not leveraged for private gain. *E.g.*, 5 C.F.R. 2635.702(a) (2023) (employees of executive agencies); Judicial Conference of the United States, *Code of Conduct for United States Judges*, Canon 2.B (2019); United States House of Reps., Comm. on Ethics, *Congressional Standards*, *Intervening with Nongovernmental Parties*, bit.ly/494H5eB.

attempts to "persuade" gives officials—both those involved and those watching—a green light to censor.

### B. Official censorship by private proxy is a danger to First Amendment freedoms.

"First Amendment interests are fragile interests," *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 380 (1977), entitled to "special constitutional solicitude" in service of individual dignity and the marketplace of ideas, *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981). But when officials jawbone private actors to suppress speech, courts often excuse it by reading words literally instead of in context and deferring to a "right" of "government speech." *E.g.*, *Kennedy*, 66 F.4th at 1209; *Vullo*, 49 F.4th at 717; *VDARE*, 11 F.4th at 1165. This case is an opportunity to reset first principles in coercion and encouragement cases so they line up with the real world in which politics is zero-sum, citizens respond to incentives, and officials carry a big stick. Solicitude is necessary because central First Amendment principles are at stake.

*Officials often target matters of public concern*. Official attempts to coerce censorship are often leveled at speech on matters of public concern. Take this case. It is hard to think of any issues of greater political consequence in recent years than the government's response to the COVID pandemic and the 2020 presidential election. Speech on those subjects lies "at the heart of the First Amendment's protection." *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (quotation omitted). So when courts mistake unlawful coercion or significant encouragement for permissible persuasion, they grant officials license to target and suppress "expression

situated at the core of our First Amendment values." *Texas* v. *Johnson*, 491 U.S. 397, 411 (1989).

*Officials often target unpopular speech.* Censoring officials doubtless think they're on the right side of history. The Administration here warned that offending posts were "killing people." *Missouri*, 83 F.4th at 363. But controversial speech is "where the First Amendment's protections are most needed." *Lawson* v. *Murray*, 515 U.S. 1110, 1115 (1995) (Scalia, J., concurring). The Court should be wary of "an unfortunate tendency by some to defend First Amendment values only when they find the speaker's message sympathetic." *303 Creative,* 600 U.S. at 602.

*Vague content-moderation policies open the door to censorship by officials.* Social media platforms set the stage for officials to censor by adopting vague and subjective content-moderation policies. According to the 2023 Viewpoint Diversity Score Business Index, which measures corporate respect for free speech and religious liberty, most of the largest social media companies have unclear or imprecise speech restrictions that allow thinly veiled censorship based on speech content.[3] To take two examples, Facebook and YouTube each prohibit and censor, among other things, "hate speech," "misinformation," and "behavior ... that often overlap[s] with the spread of misinformation."[4] While the policies provide some

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[3] Viewpoint Diversity Score, *2023 Business Index*, https://bit.ly/3MDe2qb.

[4] Meta, Inc., *Facebook Community Standards, Hate Speech*, bit.ly/42mXBEr; Meta, Inc., *Facebook Community Standards*, *Misinformation*, bit.ly/42lBBJY; YouTube, *How Does YouTube Protect the Community from Hate and Harassment?*,

examples of the forbidden speech, the general category of prohibited conduct is infinitely malleable. Even Facebook admits that, with respect to "misinformation," "there is no way to articulate a comprehensive list of what is prohibited."[5]

It is no surprise, then, that stories of anodyne but disfavored views being squelched on social media are commonplace. In August 2021, YouTube suspended Senator Rand Paul for making the now fairly debated claim that cloth masks don't prevent COVID infection.[6] Twitter suspended former *New York Times* reporter Alex Berenson for making posts critical of COVID vaccines.[7] And it likewise suspended actor James Woods for reposting a parody ad allegedly encouraging men not to vote in an election.[8] Other stories abound.

Deeply troublesome policies exist across the social media landscape. Coupling them with the expansive power of government enables officials to target disfavored speech in ways they never could directly and in ways that evade public accountability.

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https://bit.ly/3zZYSE5; X, *Hateful Conduct*, https://bit.ly/3o5m29b.

[5] Meta, Inc., *Facebook Community Standards, Misinformation*, supra n.4.

[6] Rebecca Shabad, *YouTube Suspends Sen. Rand Paul Over a Video Falsely Claiming Masks Are Ineffective*, NBC NEWS (Aug. 11, 2021), https://bit.ly/47XTboM.

[7] Robby Soave, *How the CDC Became the Speech Police*, REASON MAG. (Mar. 2023), https://bit.ly/3u8l2EV.

[8] Amy Forliti, A*ctor James Woods Bashes Twitter after Getting Locked Out*, AP NEWS (Sept. 23, 2018), https://bit.ly/42rlACy.

*This targeting chills protected speech.* Because government inducement of private censorship happens in the shadows and is effectuated through vague content moderation policies, the risk of chilling protected expression looms large. It's easy to see how any social media company (concerned about how a public official will react) and any social media user (concerned about being shut off from social media platforms or essential services) will restrict their speech. *E.g.*, *Missouri*, 83 F.4th at 382–83; *Volokh* v. *James*, 656 F. Supp. 3d 431, 445 (S.D.N.Y. 2023). To prevent officials from causing the "'self-censorship' of speech that could not be proscribed," attempts to coerce or encourage private censorship require careful scrutiny. *Counterman* v. *Colorado*, 600 U.S. 66, 75 (2023).

## II. The Court should reaffirm that the First Amendment prohibits all official efforts—overt and covert—to encourage or coerce private actors to suppress free speech.

The Fifth Circuit's state-action holding was right. The Administration embarked on an unprecedented effort to surveil and suppress speech on matters of immense public concern. It did so largely in secret, enmeshing itself in the content-moderation decisions of private companies. This Court should affirm the Fifth Circuit's opinion and make clear that (1) state action principles apply more flexibly when free-speech rights are at stake, (2) the government-speech doctrine does not insulate official exhortations to suppress individual speech from full First Amendment scrutiny, and (3) all courts must do what the Fifth Circuit did here—"look through forms to the substance" to ferret out official coercion or encouragement of censorship. *Bantam Books*, 372 U.S. 67.

### A. State-action principles apply more flexibly when government coercion or encouragement of private censorship is alleged.

State action cases can raise hard problems about how to guarantee that government is not on the hook for private conduct and, at the same time, that constitutional rights are not impaired when government inserts itself into the private sphere. See generally *Brentwood Acad.*, 531 U.S. at 295–96. Those hard questions typically arise when the government acts for a proper purpose. So when the government designates a nonprofit entity to run a cable channel (legitimate purpose) and the nonprofit, without government involvement, engages in viewpoint discrimination (incidental effect), the discrimination is not the government's. *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1929–30 (2019). Likewise, when the government regulates medical care (legitimate object) and a medical provider botches compliance without government involvement (incidental effect), the problem is not of the government's making. *Blum* v. *Yaretsky*, 457 U.S. 991, 1004–08 (1982).

None of that is true when the government exhorts private parties to suppress protected speech. In that case, the government's action—censorship of protected speech—is illegitimate. See *supra* Argument I.A. And the effect on First Amendment rights is not incidental: It is the direct effect of the government's exhortations. Because First Amendment interests are fragile and afforded special protection, see *supra* Argument I.B, courts should be especially flexible in making the "normative judgment" about whether the

private censorship is "fairly attributable" to the state. *Brentwood Acad.*, 531 U.S. at 295.

*Government exhortations to suppress protected speech evade any requirement of justification.* If the government wants to directly regulate individual speech based on content, the First Amendment requires it to either (1) satisfy strict scrutiny or (2) show that the speech is unprotected. *Reed* v. *Town of Gilbert*, 576 U.S. 155, 165 (2015); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382–83 (1992). But when the government causes a private actor to squelch protected speech, it sidesteps *any* burden of justification *at all*.

For example, the Administration in this case marshalled a massive government apparatus—a virtual Ministry of Truth—to censor speech it disliked on a massive scale. A flexible interpretation of state-action principles ensures government is held to account.

*Government exhortations to suppress speech can evade the Court's chilling precedents.* When the Court has limited permissible government regulation of unprotected speech because of its likelihood of chilling protected speech, it has done so because ambiguity about whether the law proscribes the speech incentivizes people to self-censor. *E.g.*, *Counterman*, 600 U.S. at 75; *Phila. Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 777 (1986). The chilling effect here has a different source—the fear that access to a social media platform, bank account, or other important service will be cut off by a private actor. See *supra* Argument I.B. That kind of chill lies outside the current doctrine. Being more flexible about bringing such exhortations within the ambit of the First Amendment reduces that risk.

*Government exhortations to suppress speech foreclose judicial review of official censorship.* When the government directly regulates speech, citizens can test it in court. Not so when government leans on private parties: That conduct "provides no safeguards whatever against the suppression of ... constitutionally protected matter." *Bantam Books*, 372 U.S. at 70. It is instead "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." *Ibid.* A broad interpretation of state-action requirements ensures that official schemes of "informal censorship," *id.* at 71, do not evade judicial scrutiny.

*Government exhortations to suppress speech are uniquely damaging to the marketplace of ideas.* Had the Administration overtly censored public debate over the COVID lab-leak theory or Hunter Biden's laptop, it would have immediately been held to account in court. But because it mounted an informal censorship campaign, it successfully suppressed speech contradicting its preferred narratives on a massive scale.[9] And it is deeply troubling that the Administration's narratives were wrong. The idea that COVID originated in a Wuhan lab was not a conspiracy theory, and Hunter Biden's laptop was not Russian disinformation.[10] The public was starved of

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[9] See Caroline Mala Corbin, *Government Speech and First Amendment Capture*, 107 VA. L. REV. ONLINE 224, 226 (2021), https://bit.ly/3urU6jk.

[10] See Luke Broadwater, *Officials Who Cast Doubt on Hunter Biden Laptop Face Questions*, N.Y. TIMES (May 16, 2023), https://bit.ly/493IZfS; Michael R. Gordon, *FBI Director Says Covid Pandemic Likely Caused by Chinese Lab Leak*, WALL ST. J. (Feb. 28, 2023), bit.ly/3S3jg0W.

information on topics that needed to be debated and discussed. A robust state-action doctrine would have prevented this.

### B. The government-speech doctrine does not shield official efforts to suppress disfavored ideas from First Amendment scrutiny.

Considering the Administration's unprecedented micro-management of private content moderation decisions and its all-but-explicit threats of reprisal, the Fifth Circuit's finding of state action should have been easy. But it was made unnecessarily hard because the court, like some others, assumed it had to balance the plaintiffs' First Amendment right to speak against a government "right" to advocate for the censorship of their speech. *Missouri*, 83 F.4th at 374. The court began the state-action analysis by putting a thumb on the scale in favor of shielding informal government efforts to censor.

The Second, Ninth, and Tenth Circuits have done likewise and, thus, have perceived a need to "draw fine lines" separating protected government attempts to "persuade" private actors to censor speech from prohibited government attempts to coerce or encourage them to do so. *E.g.*, *Vullo*, 49 F.4th 715. Such line-drawing slants toward immunizing official exhortations to censor from First Amendment scrutiny.

For example, these courts recently used the government-speech doctrine (1) to justify narrowly parsing the literal terms of government statements to find them non-coercive, and (2) to indulge—or, in the Second Circuit's case, even conduct extra-record research to support—the most innocent explanation for government conduct. *E.g.*, *Kennedy*, 66 F.4th at 1209

(dismissing reference to legal liability as an attempt to coerce); *O'Handley*, 62 F.4th at 1158 (finding statement non-coercive because it did not explicitly threaten consequences); *Vullo*, 49 F.4th at 717 & n.14 (conducting "research" to support government's justification that "a business's response to social issues can directly affect its financial stability"); *VDARE*, 11 F.4th at 1164–65 (dismissing official's stated "commitment to the enforcement of Colorado law" as a mere "statement of Colorado law"). Drawing a false equivalence between protected speech and government suppression efforts, these holdings grant "government speech" advocating censorship the special solicitude that is supposed to protect individual speech.

That's the wrong starting point. This Court has never held that government enjoys a "right" to advocate for the suppression of individual speech. *Shurtleff* v. *City of Bos.*, 596 U.S. 243, 268 (2022) (Alito, J., concurring) (citing *United States* v. *Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 210–11 (2003)). For good reason: that would turn constitutional priorities upside down. The Bill of Rights guarantees individual liberty against government interference, not government censorship against individual interference. "The Free Speech Clause … constrains governmental actors and protects private actors," *Halleck*, 139 S. Ct. at 1926, not the other way around.

Granting equal treatment to *both* government speech suppression *and* individual expression sanctions the kind of "informal censorship" this Court has condemned. *Bantam Books*, 372 U.S. at 67–68. From a First Amendment perspective, whether the government's advocacy of speech suppression can be pigeonholed into a category of mere "persuasion" that somehow differs from "coercion" or "encouragement,"

*Missouri*, 83 F.4th at 374, is beside the point. Either way, the purpose and effect of the "government speech" are the same: to conscript private actors to conduct censorship the First Amendment prohibits the government from conducting on its own.

However one labels government advocacy of private censorship, treating that advocacy as equivalent to protected individual speech endorses unconstitutional censorship. *E.g.*, *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2297–2301 (2019). The legal question does not require separating "persuasion" from "coercion" or "significant encouragement." It simply requires, like all state-action questions, determining if the private censorship is "fairly attributable" to the government. *Brentwood Acad.*, 531 U.S. at 295–96.

The government-speech doctrine does not justify judicial deference to government exhortations to suppress speech. It ensures that the First Amendment's protections do not hamstring government's ability to speak publicly for legitimate priorities and programs. *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 467 (2009). When the government promotes or espouses a government priority, the First Amendment doesn't stop it from taking sides or require that it make space for dissenting views. *E.g.*, *Matal* v. *Tam*, 582 U.S. 218, 234 (2017).

But the government-speech doctrine is grounded in the practical realities of governing. "When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say." *Shurtleff*, 596 U.S. at 251–52. Then "imposing a requirement of viewpoint-neutrality ... would be paralyzing" because government can't

simultaneously advocate its own priorities and dissent from them too. *Matal*, 582 U.S. at 234. "How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials had to voice the perspective of those who oppose this type of immunization?" *Walker* v. *Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207–08 (2015). And if the policy is wrongheaded, the political process provides a remedy: vote the officials out. See *id.* at 207.

Consistent with that framework, this Court has applied the government-speech doctrine to shield officials from the demands of viewpoint neutrality when they administer government programs. For example, the government generally need not make space for all comers when it decides what flags to fly on its buildings, what monuments to erect in its parks, or what private programs to subsidize. *E.g.*, *Shurtleff*, 596 U.S. at 251–52; *Summum*, 555 U.S. at 467–69; *Rust* v. *Sullivan*, 500 U.S. 173 (1991). But to say the First Amendment grants government a special protection to exhort private censorship is a different matter. See *Rust*, 500 U.S. at 193 ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.") (quotation omitted). "[V]irtually every government action that regulates private speech" would qualify as "government speech," but "plainly that kind of action cannot fall beyond the reach of the First Amendment." *Shurtleff*, 596 U.S. at 269 (Alito, J., concurring).

As this Court has warned, the government-speech doctrine "is susceptible to dangerous misuse" because it risks allowing government to "silence or muffle the expression of disfavored viewpoints." *Matal*, 582 U.S.

at 235. Squelching speech the government dislikes—whether by encouragement or coercion—is not a legitimate governmental aim. Tolerating speech one dislikes "is life under the First Amendment." *Barr* v. *Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2366 (2020) (Gorsuch, J., concurring). As the Government concedes, public officials are capable of responding to ideas they think are bad. Gov't. Br. at 23–25. But what it fails to identify is any example of the First Amendment tolerating public officials lobbying or prodding private parties to censor speech they dislike. *Ibid.* Government counter-speech—not indirect suppression—is the solution.

Nor does anything about the rationale for the government-speech doctrine imply a government right to advocate the censorship of private speech. While demanding viewpoint neutrality might paralyze everyday government efforts to pursue a policy, the same can't be said of government efforts to convince private actors to suppress speech. A private speaker engaged in private speech makes no demands of government, and treating that speech neutrally—*i.e.*, not censoring it—presents no difficulties for government. And when the government convinces private actors to suppress speech, the next election is no remedy; the speaker's right is irreparably damaged the moment it is suppressed. See *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality op.).

There may be circumstances in which a public official perceives some urgent need to restrict speech based on its content. Gov't Br. at 4. In those situations, it should do that the constitutionally permitted way: show that the speech is unprotected or that the restriction is narrowly tailored to a compelling government interest. *E.g.*, *Williams-Yulee* v. *Fla. Bar*,

575 U.S. 433, 445 (2015); *Ginsberg* v. *New York*, 390 U.S. 629, 635 (1968). But government officials cannot be allowed to use the government-speech doctrine to censor through third parties and then excuse that behavior as mere government efforts to "persuade."

The Constitution generally—and the First Amendment especially—exists to restrain official conduct, not excuse it. THE FEDERALIST NO. 51 at 269 (James Madison) (George W. Carey & James McClelland ed., 2001) (government officials are not angels). This Court should make clear that when a public official speaks as a public official, the First Amendment does not allow her to exhort—let alone directly or indirectly encourage or coerce—private actors to suppress free speech. So there is nothing to "balance" against an individual's right to free speech.

### C. The Court should require lower courts to "look through forms to the substance" and conduct a whole-context analysis.

In holding that the Administration coerced and encouraged social media censorship, the Fifth Circuit rightly "look[ed] through forms to the substance" and saw that what the Administration had done was to "set about to achieve the suppression of publications it deemed 'objectionable.'" *Bantam Books*, 372 U.S. at 67–68. It considered all relevant facts in context; it pierced through the literal terms of the Administration's statements and saw a concerted effort to force the companies' hands; and it did not uncritically defer to the Administration's explanation that it only "sought to mitigate the hazards of online misinformation." *Missouri*, 83 F.4th at 360, 382–90.

With coercion, the Fifth Circuit considered a four-factor test used by the Second Circuit that looks to

"(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." *Id.* at 378 (quoting *Vullo*, 49 F.4th at 715). It viewed that test as "a helpful, non-exclusive tool," not an end-all-be-all for determining coercion. *Ibid.* But as often happens with multi-factor tests, the Second and Ninth Circuits have treated these factors as the whole analysis. *Kennedy*, 66 F.4th 1207–12 (stating that the factors are not exclusive but evaluating only them); *Vullo*, 49 F.4th at 715 (identifying only those four factors, treating them as exclusive, and considering only two). The Court should reaffirm the need for a rigorous assessment of all facts in context and clarify that multi-factor tests are insufficient.

### 1. Whether an official has coerced or encouraged private censorship is a fact- and context-specific inquiry.

The rote application of formalistic tests for coercion and substantial encouragement is irreconcilable with this Court's state-action precedents. Those precedents make clear that coercion and substantial encouragement are not always—or even primarily—explicit and direct, and that any consideration of those questions requires a holistic approach.

Start with coercion. *Bantam Books* was *not* a case of direct or explicit coercion. The state commission had no lawful authority over book distributors—no power to supervise their businesses, enforce the obscenity laws, or sanction noncompliance with its requests. See 372 U.S. at 59–60, 68–69. Its letters did not claim otherwise or explicitly command

distributers to take any action; it requested their "cooperation" and reminded them of its duty to recommend prosecution of those who dealt in obscenity. *Id.* at 62. On paper, the commission's assertion that it was "simply exhort[ing] booksellers and advis[ing] them of their legal rights" and not implicitly suppressing protected speech seemed quite clear, *id.* at 66, and it may have survived the four-factor punch-list used in various circuits.

But this Court rejected the commission's justifications. It "look[ed] through forms to the substance" and saw that what the commission had really done was "set about to achieve the suppression of publications deemed 'objectionable'." *Id.* at 67–68. Among other things, the commission (1) used official stationery, (2) invoked its official charge to educate and investigate regarding obscenity, (3) identified specific publications it wanted off shelves, (4) prompted monitoring of the distributors, and (5) made "thinly veiled threats" that prosecution would follow. *Id.* at 62–63, 67–68. Thus, the Court discredited the commission's assertion that it merely intended to "advis[e] the distributors of their legal rights and liabilities" and concluded that it was engaged in "a scheme of state censorship effectuated by extralegal sanctions." *Id.* at 72.

This whole-context analysis makes clear that evaluating a coercion claim requires close examination of all facts and careful attention to how the recipient would understand the government's words and actions. After all, it will be the unusual official who explicitly demands that a private party censor speech or explicitly threatens a consequence. Officials are usually smarter than that. The statement's form—such as the literal meaning of the words and the justification for its assertions—are far less important

than the practical reality of "what the statement conveys." *Counterman*, 600 U.S. at 74 (quotation omitted).

The same is true of substantial encouragement. Officials are typically savvy enough to avoid the explicit appearance of direct control over a private party's conduct. That's doubtless why, here, the Administration's most intrusive efforts to take down posts, block accounts, and manage content-moderation decisions happened out of public view. That's also why this Court's precedents recognize that even "covert" encouragement, if substantial, constitutes state action. *Brentwood Acad.*, 531 U.S. at 296. So whether the theory of state action is coercion or significant encouragement, the ultimate question is always a "necessarily fact-bound inquiry." *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 939 (1982); *Blum*, 457 U.S. at 1004 (explaining that "the factual setting of each case will be significant"). Thus, when determining whether the state can be deemed responsible for private conduct, this Court has rejected "rigid simplicity," *Brentwood Acad.*, 531 U.S. at 295, of the kind that multi-factor tests necessarily produce.

In any case where coercion or substantial encouragement is alleged, then, there are "a host of facts" and "range of circumstances" that "could point toward the State behind an individual's face." *Id.* at 295–96. A court reviewing such allegations is duty-bound to consider them all.

**2. Any formalistic test for coercion or encouragement may distract from the ultimate question.**

A multi-factor analysis is destined to miss the forest for the trees. Coercion hinges on how an official's

statement would reasonably be understood by those to whom it was communicated, see *Bantam Books*, 372 U.S. at 69, and significant encouragement depends on whether there is such a "close nexus" between the government and the private party that the government is, for practical purposes, "responsible" for the private party's decision, see *Blum*, 457 U.S. at 1004. Chopping these fact-dependent questions into component pieces and focusing only on those pieces mistakes the factors for the ultimate issues and results in the unjustified rejection of valid claims of coercion and significant encouragement. To see how, consider the following aspects of the multi-factor coercion test used in many of the circuits.

*The test wrongly excludes threats implied by context.* A threat need not be explicit to be understood (correctly) as a threat. "I'm going to make you an offer you can't refuse" is not by itself threatening. But if the context is Vito Corleone saying it with Luca Brasi in tow, the listener knows he has no real choice. Depending on the context, a facially neutral statement can readily and legitimately be understood as a threat. *E.g.*, *Counterman*, 600 U.S. at 74.

Statements by public officials aren't any different. Take the statement here that an Administration official believed one social media platform "was encouraging vaccine hesitancy" and that the concern was "shared at the highest (and I mean highest) levels" of the White House. *Missouri*, 83 F.4th at 362. Those words are not explicitly threatening. They could just mean that officials, including the President, worried that a lot of social media content led people not to take the COVID vaccine. But in light of the Administration's overall relationship with the social media companies—the repeated requests that the companies

censor posts and accounts, the public hectoring, the refusal to relent, and more—this statement would obviously be understood as a threat of Presidential reprisal if the platform didn't get with the program.

The Fifth Circuit correctly looked to the whole context and got the point. See *id.* at 382. But the multi-prong test as applied in places like the Second Circuit easily could have overlooked it. That test instructs courts to consider "word choice and tone" and "whether the speech refers to adverse consequences." Read literally, the Administration official's statement was not overtly hostile and did not overtly reference adverse consequences. Other courts applying the four-factor test would have stopped with the language and ignored the context that makes it coercive. E.g., *Vullo*, 49 F.4th at 717 (dismissing coercion claim because "even assuming some may have perceived the remarks as threatening, [they] were written in an even-handed, nonthreatening tone" and did not explicitly refer to consequences).

But under *Bantam Books*, a court is supposed to "look past forms to the substance" and determine how an official's statement would be "reasonably understood" by a recipient, 372 U.S. at 67–68, not look exclusively at the form of the statement and ask whether its words are explicitly threatening. By looking only to form (words used) and ignoring substance (what, in context, they communicated), the four-factor test wrongly requires an official to explicitly threaten adverse consequences before her statements can be recognized as coercive.

*The test fails to account for the nature and extent of an official's authority over a private party.* When an official with significant power or discretion over a

private actor's interests says, "Jump," the private actor is likely to respond, "How high?" That's how incentives work. The President has immense power and discretion that, depending on its exercise, can meaningfully affect Facebook's and Twitter's fortunes. So it was entirely logical that those companies met White House insistence that they censor private speech with "total compliance," *Missouri*, 83 F.4th at 363. Accord *Bantam Books,* 372 U.S. at 68 ("People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings").

Yet, by its terms, the four-factor test inquires only into "the existence of regulatory authority." By asking only whether such *regulatory* authority *exists*, it invites courts to shunt aside (1) *other types of authority* that might make the speaker's statements more likely to be coercive and (2) *the extent of the speaker's authority*. Officials without direct regulatory authority over a private party may wield immense "soft power"—such as the power to refer a private party for investigation or prosecution, promulgate adverse legislation, or otherwise adversely affect a private party's business. *E.g.*, *Bantam Books*, 372 U.S. at 68. And even among officials with direct regulatory authority, the scope and object of their authority can be highly material.

Here, because the Administration officials so overtly "leaned into the inherent authority of the President's office," the Fifth Circuit correctly recognized that it is "not ... necessary that an official have direct power over the recipient" of a statement and that "a generalized, non-descript means to punish the recipient may suffice." *Missouri*, 83 F.4th at 384–85. But other courts have not been so disciplined in considering the "existence of regulatory authority" and

have prematurely dropped the ball without considering the nature or extent of the government official's authority. *E.g.*, *Kennedy*, 66 F.4th at 1210 (stopping analysis after concluding U.S. Senator "lack[ed] ... unilateral regulatory authority); *Vullo*, 49 F.4th 717 (noting the existence of regulatory authority but not considering or weighing it).

That is hardly the complete assessment of the "range of circumstances" the state action inquiry demands. *Brentwood Acad.*, 531 U.S. at 295. Indeed, with laws and regulations that leave much to interpretation, some regulators enjoy considerably more discretion to reward and punish than others. The nature and extent of a regulator's authority is just as relevant to coercion, if not more so, than the mere fact that regulatory authority exists. Mechanically applying multi-factor tests fails to account for this reality.

*The test over-emphasizes how a private party reacts to an official's statements.* By focusing on "whether the speech was perceived as a threat," the four-factor test counts a private party's mere silence about why it censored a speaker against finding coercion. Here, that's not an issue because the direct evidence that the social media companies felt compelled to do the Administration's bidding—"they sent emails and assurances" kowtowing to its demands—was so clear. *Missouri*, 83 F.4th at 383–84. But in cases without direct evidence that a private party subjectively felt threatened—even though it complied with the official's "request"—the test's focus on the *absence* of such evidence can be dispositive. *E.g.*, *O'Handley*, 62 F.4th at 1158–59 (dismissing complaint where allegations did not exclude the possibility that "any decision that Twitter took in response was the result of its own independent judgment" and stating that "the fact that

Twitter complied ... is immaterial"); *Vullo*, 49 F.4th at 717 (dismissing complaint even assuming that "some may have perceived the remarks as threatening" but not commenting further).

The four-factor test's implicit demand that plaintiffs cough up direct evidence that a private party felt threatened is at odds with human nature. A coerced private party is highly unlikely to admit it. It is natural to expect that a representative of a credit card company might sign an affidavit saying the company didn't feel threatened by a sheriff's demand that it cut ties with a disfavored speaker. After all, captives don't typically out their captors precisely because of what the captors can do to them.

Far more probative is the fact that a private actor—like the social media companies here—quickly and completely complied with the official's demand. In those circumstances, "[t]he causality is obvious." *Backpage.com, LLC* v. *Dart*, 807 F.3d 229, 233 (7th Cir. 2015). By narrowly focusing on whether a private actor said it perceived an official's statement as a threat, courts applying the multi-factor test often brush past dispositive evidence.

* * * *

Multi-factor tests like those in use throughout the circuits wrongly focus on the tiles instead of the mosaic. They authorize courts to ignore probative facts, encourage them to over-weigh marginally relevant ones, and invite *ad hoc* judgments about whether any particular fact fits on the punch-list. Worse still, such tests encourage more attempts at censorship by private proxy. If the Court identifies factors, it should make clear that they must be used the way the Fifth Circuit did—as non-exhaustive, non-binding tools—

and that the relevant inquiry in all cases demands a rigorous examination of all the facts taken in their context.

## CONCLUSION

The Fifth Circuit's decision should be affirmed.

Respectfully submitted,

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