No. 23-411

In the
Supreme Court of the United States

VIVEK H. MURTHY, 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 *AMICI CURIAE* CHARLIE KIRK, DAVID HARRIS, JR., AND ROBBY STARBUCK IN SUPPORT OF RESPONDENTS

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## INTEREST OF THE AMICI*

As the campaign to censor online expression was being conducted by the federal Government parties here (the "Government") through manipulation of major social media platforms, the internet content of Amici Charlie Kirk, David Harris Jr., and Robby Starbuck was being blocked, demoted, and targeted on those same platforms.

Charlie Kirk is a prominent conservative political commentator and the founder of Turning Point USA, a student-oriented nonprofit organization that communicates conservative values to millions of young people. He has a significant presence in the conservative media. Kirk was detrimentally targeted by name because of his views and the huge size of his social media-following in the same anti-disinformation report that Government agency parties, consulted as a resource during efforts to shut-down lawful viewpoints on internet platforms. *See infra* Section I.A.2. n.2.

David Harris Jr. is an author, speaker, and leader in the conservative and pro-life movement. He too has a very large online-following and was also negatively targeted by name because of his views and the size of his social media-following in that same anti-disinformation report consulted by the Government agency party. *Id*.

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* No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from Amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Robby Starbuck is a conservative podcast host and was a political candidate for Congress in 2022. His online opinions have been amplified by highly visible figures including Elon Musk and President Donald J. Trump, but like other Amici, he was also blocked and demoted on the same big platforms.

## SUMMARY OF THE ARGUMENT

The Government petitioners ("the Government") engaged in an audacious campaign to use large social media platforms to block or demote online domestic viewpoints like those of the private respondents ("private plaintiffs") that ran counter to the policies of the White House and its Executive Branch agencies.

The private plaintiffs have standing because their censored viewpoints are at the very center of the Government's censorship target: dissent against COVID-19 related mandates, and certain political and election procedure issues. Second, the timing and nature of the discriminatory outcome is directly traceable to the actions of the Government as it enlisted social media giants to do its bidding. For instance, private plaintiff Hoft was targeted by name in an anti-disinformation report that one Government agency party consulted during the fashioning of the censorship enterprise.

The Government's use of private tech platforms for suppressive purposes further satisfies this Court's standing rule because it made an *appreciable difference* in the platforms blocking and demoting conduct against private plaintiffs whose opinions were the *whole reason* it was targeted by the Government.

Missouri and Louisiana ("States") have standing, among other reasons, because their legitimate constitutional interest in a fully informed electorate was infringed by the politically one-sided censorship effort of the Government.

The significant encouragement provided by the Government to giant social media platforms created state action under the precedents of the Court, as officials and agencies burrowed into the operations of the platforms both directly, and through private "partner" intermediaries, to urge suppression of citizen expression online. Platforms complied, even modifying content moderation processes. In addition to this symbiotic relationship parasitically imposed on Silicon Valley platforms by the White House, Executive Branch departments and agencies, the vehemence and persistence of the Government demands, coupled with its federal power and less-than-subtle implied threats, show outright coercion.

This is not a "government speech" case. The Government did not simply inform the platforms, it utilized them as *tools* for control of online citizen dissent, thus violating the First Amendment. The Government covertly used mammoth companies to do what the Government could not do directly or openly. While this is not a close free speech question, even if it were, the Court should favor freedom of speech as it has done in the past.

The Government does not directly argue that this censorship campaign was justified because of some dire threat to the Republic caused by online "misinformation" or "disinformation" of citizens; yet, the record shows such thinking was likely at the root of this unconstitutional campaign from the start, and

continues. Similar illegal Government initiatives will continue unless restrained by this Court.

## ARGUMENT

### I. THE PLAINTIFFS HAVE STANDING

#### A. The Individual Plaintiffs Have Standing

The Government concedes a standing-sufficient *injury* by "removal or demotion of" the private plaintiffs' online content. Pet'r Br. 17. The Fifth Circuit noted, "The [Government] officials do not contest that these past injuries occurred." J.A. 20.

However, the Government argues that standing fails for two reasons: that "those injuries" cannot be traced "to the government," and regardless, the past incidents do not support prospective relief. Pet'r Br. 13. Both arguments are meritless.

##### 1. *The Censored Topics Are Traced to the Bulls-Eye of the Government's Target*

The topics of the private plaintiffs that were adversely treated lay at the center of the Government's censorship target, namely, criticism of COVID-19 lockdowns and vaccine mandates, among several other issues of public importance such as dissent over election procedures.

The Circuit Court found that campaign targeted "content [that] touched on a host of divisive topics like the COVID-19 lab-leak theory, pandemic lockdowns, vaccine side-effects, election fraud, and the Hunter Biden laptop story," J.A. 3, and "misinformation trends in the lead-up to federal elections," J.A. 14.

*Bhattacharya, Kulldorff, Kheriaty and Hines– COVID Issues*

The topics at the core of the censored posts of these private plaintiffs correlate with a major target of the Government's efforts to suppress, namely, dissenting opinions on COVID-19 policies. Bhattacharya and Kulldorff were suppressed for online statements "critical of the government's COVID-related policies such as lockdowns" and "mask requirements." Kheriaty was also adversely suppressed "due to his views on vaccine mandates and lockdowns," and so was Hines, regarding "views on vaccine and mask mandates." J.A. 17-18.

The Government agencies increasingly scolded the big tech platforms for allowing dissenting content that disagreed with the Administration positions, demanding to know "'what actions [the platform has] been taking to mitigate' vaccine hesitancy," urging an "end [to] the platform's 'shell game,'" and voicing "grave[] concern[]" that "the platform was 'one of the top drivers of vaccine hesitancy.'" J.A. 5.

*Respondent Hoft – Election Related Content Suppressed*

Missouri-based Gateway Pundit's owner Hoft was not just censored over COVID issues but also for criticizing election procedures.

The Circuit Court found, "Hoft—founder, owner, and operator of news website The Gateway Pundit—submitted a sworn declaration averring that The Gateway Pundit's Twitter account was suspended and then banned for its tweets about

vaccine mandates and election fraud, its Facebook posts concerning COVID-19 and election security were either banned or flagged as false or misinformation, and a YouTube video concerning voter fraud was removed." J.A. 20.

As elections neared, that effort was "ramped up" by a coordinated Government and Election Integrity Project (EIP) effort. J.A. 177. Hoft was targeted by the Government's CISA office (Cybersecurity and Infrastructure Security Agency) that reported his posts to Twitter for censorship. J.A. 177-78.

2. *The Timeline Supports Traceability*

The Government contends that online post suppression had begun a few "months earlier" than the start of the Government's coordination with the platforms, beginning around October 2020 or earlier. Pet'r Br. 18-19. They argue that prevents "traceability" back to Government conduct, noting the Fifth Circuit's observation that the White House and Surgeon General offices "began communicating" with social media platforms around January 2021 with Joe Biden's incoming Administration. Pet'r Br. 18.

However, the White House and the Surgeon General offices are *only* two among a legion of departments, agencies and officials involved in this suppressive campaign and enjoined by the Fifth Circuit. *See* J.A. 82-84.

Second, the Government agencies and officials were pushing the platforms to censor during the lead-up to the 2020 election and before.

One example is the Department of Homeland Security's CISA unit, the tip of the federal censorship spear.[1] The Fifth Circuit noted CISA's actions in fashioning itself into a kind of bureau of truth for online expression:

> *CISA's role went beyond mere information sharing* [with the platforms]. Like the CDC for COVID related claims, CISA told the platforms whether certain *election-related claims were true or false*. CISA's actions apparently led to moderation policies being altered and content being removed or demoted by the recipient platforms.

J.A. 15-16 (emphasis added). "CISA used its frequent interactions with social-media platforms to push them to adopt more restrictive policies on censoring election-related speech." J.A. 68.

CISA's contacts with private non-governmental (NGO) entities and involvement with the platforms in the creation of the censorship scheme started before 2021, and was active in the months before the 2020 election, when the private plaintiffs and other public users were being suppressed.

CISA was key to shaping this scheme as early as September 2019:

> On September 4, 2019, Facebook, Google, Microsoft, and Twitter along with . . . CISA

[1] The District Court found DHS's CISA likely violated the First Amendment. The Fifth Circuit, on rehearing, agreed, adding DHS and CISA to the injunction. *See* J.A. 13-14, 61.

> held a meeting to discuss *election issues*. [FBI's] Chan attended, along with Director Krebs, Masterson, and [CISA staffer] Scully. Social media's trust and safety on content-moderation teams were also present. The focus of the meeting was to discuss with the social-media companies the spread of "disinformation."

J.A. 160 (emphasis added). CISA was central to the suppressive campaign, working on "Mis, Dis, and Malinformation" (MDM) "[p]rior to President Biden taking office, including "switchboard work" shuttling complaints about online content that CISA "would in turn share the information with the social media companies." J.A. 169-170.

Researchers Stamos and DiResta doubled as both chiefs of the anti-disinformation NGO, Stanford Internet Observatory (SIO), and as insiders at DHS's CISA.

"Stamos and DiResta of the [SIO] briefed [CISA's] Scully about [] EIP['s] [and SIO's] report, 'The Long Fuse**,**' in late Spring or *early Summer of 2021*," J.A. at 174 (emphasis added), that targeted by name online "spreaders" of misinformation.[2] Scully reviewed copies of that report with Stamos and

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[2] That report, coauthored by Stamos and DiResta's SIO office, Election Integrity Partnership, *The Long Fuse: Misinformation and the 2020 Election* (2021), https://stacks.stanford.edu/file/druid:tr171zs0069/EIP-Final-Report.pdf, made numerous attacks against Hoft's Gateway Pundit posts, *id*. at 56, 85, 92, 94, 154, 188, 197, and labeled Amicus Kirk as a "repeat spreader" of misinformation, *id*. at 188; *see also id*. at 54, 56, 79, 86, 187, along with Harris, Jr., *id*. at 192.

DiResta who both worked within CISA, with DiResta as "Subject Matter Expert" for CISA's Cybersecurity Advisory Committee, MDM Subcommittee, and Stamos on the CISA Cybersecurity Advisory Committee; Stamos identified CISA as one of EIP's "partners in government," an effort targeting "large following political partisans who were spreading misinformation intentionally." J.A. 174.

3. *The Traceability Causation Test Is Satisfied*

For standing purposes, a strict but-for causation test is not employed. Rather, the test is only whether government misconduct has made an "appreciable difference" in the injury alleged by the plaintiffs. *See Allen v. Wright*, 468 U.S. 737, 758 (1984) (alleged discrimination injury would have been "fairly traceable" to IRS's failure to threaten removal of tax exemption against discriminatory private schools if there had been "*enough* racially discriminatory private schools receiving tax exemptions . . . for withdrawal of those exemptions to make an *appreciable difference* in public school integration") (emphasis added).

This commonsense causation metric in *Allen* required only a feasible connection between government conduct and the alleged injury, not exacting precision.

*The Government Made an "Appreciable Difference" in Suppressing Speech*

"*From the beginning*," the Fifth Circuit found, "the platforms cooperated with the White House" on COVID and other issues. J.A. 5. And "once White House officials began to demand more from the platforms, they seemingly *stepped-up their efforts to appease the officials*." J.A. 6 (emphasis added). This constitutes an "appreciable difference."

The compliances by the platforms to Government demands were continuous.

When there was confusion, the platforms called to "'clear up' any 'misunderstanding[s]'" and provide data to the Government detailing their moderation activities. J.A. 6. When in doubt, they met with the officials, tried to "partner" with them, and assured them that they were actively trying to "remove the most harmful COVID-19 misleading information." J.A. 6. Their responses bordered on "capitulation." J.A. 6.

*Government Action Was "Aimed at" Plaintiffs*

When the state deliberately aims at people, or at viewpoints it wants to disenfranchise, and uses third-party private entities to accomplish that, a precise causal connection is not required for standing.

The Constitution does not permit the State to aid discrimination, even if there is no "precise causal relationship" between the alleged government involvement and the discriminatory effect on plaintiff citizens, particularly where the record shows a "significant tendency [of the government] to facilitate,

reinforce, and support private discrimination." *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973) (state aid to racially discriminatory schools).

This same approach should prevail here, in a viewpoint discrimination context.[3]

Further, where citizens are the ones being *aimed at*, the task of establishing standing should be easier. *Virginia v. Amer. Booksellers Ass'n*, 484 U.S. 383, 392 (1988) (standing found where the contested and allegedly illegal law at issue was "*aimed directly* at plaintiffs") (emphasis added).

4. *Redressability Exists*

The redressability requirement is also satisfied here because the injunction imposes "a sanction that effectively abates that conduct and prevents its recurrence." *Friends of Earth, Inc. v. Laidlaw Env't Servs., Inc.,* 528 U.S. 167, 185-86 (2000). The Government contends that the proposed injunction "would impose grave harms on the government and the public because it could chill vital governmental communications." Pet'r Br. 47.

However, the Government has no right to be free of a "chilling effect."[4]

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[3] Conservative and right-wing content was targeted, as the district court found. J.A. 201-02. "What is really telling is that virtually all of the free speech suppressed was 'conservative' free speech." J.A. 201.

[4] The chilling effect doctrine does not apply. As Justice Stewart put it, "The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government." *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring).

Further, the continuing pattern of Government misconduct has been seamless. As in *Friends of Earth*, here also, the "unlawful conduct . . . was occurring at the time the complaint was filed." 528 U.S. at 184.

Also, as in *Friends of Earth*, when weighing "the reasonableness of [the] fear" of ongoing injury due to continuing illegal conduct, there is "nothing 'improbable' about the" concern that, absent the injunction, continued Government-instigated suppression of online expression will continue. *Id.*

B. The States Have Standing

In addition to the states' asserted basis for standing recognized by the Fifth Circuit, J.A. 28-31 (suppression of official state positions posted online, and impaired lines of communication from their citizens), there is another basis: the interest of the States in an informed electorate for the execution of good governance.

In that respect, states here have greater standing than the showing affirmed by the Court in *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

The injuries to the States' sovereign interests here transcend the kind of indirect economic harm that was found sufficient for standing in *Nebraska* due to injury to a state-created third-party entity. Here, there is a dagger to the heart of the States' governance based on elections which in turn wholly depend on an informed electorate. The agenda by the Government to suppress online political opinions during election cycles is the tip of that dagger.

"There can be no question about the legitimacy of the State's interest in fostering informed and

educated expressions of the popular will in a general election" and "in voter education," *Anderson v. Celbrezze*, 460 U.S. 780, 796 (1983); *see also id*. at 796 n.21 (reflecting on the relevance of voter information to the Founders' rejection of a popular vote process for the presidency and choosing the electoral college system instead, a factor elevating the standing interests of the States in this case).

A federal censorship scheme that deliberately sequesters certain citizen ideas from public consumption directly undermines the goal of an informed electorate, a goal that is a "legitimate [state] interest." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 n.79 (1973) (citing *Katzenbach v. Morgan*, 384 U.S. 641, 655 (1966)).

Moreover, "[i]t is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign." *Republican Party v. White*, 536 U.S. 768, 782 (2002) (quoting *Brown v. Hartlage*, 465 U.S. 45, 60 (1982)) (internal quotation marks omitted).

Given the ubiquity of the big platforms reach and influence in shaping public opinion by the mere act of permitting, or else blocking, election-related communications, the States were necessarily impacted during the Presidential, congressional, and state elections in 2020 and the midterm elections in 2022.

## II. STATE ACTION EXISTS

### A. Because of the Court's Jurisprudence

The polestar for state action here has been well-stated: "[i]t is also axiomatic that a state may not

induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (quoting *Lee v. Macon Cnty. Bd. of Educ.,* 267 F. Supp. 458, 475-76 (M.D. Ala. 1967)).

Regardless whether the tactic used against private platforms is one of strong encouragement or of coercion, either form of leverage is a constitutional violation if the goal is one that the government itself is "constitutionally forbidden to accomplish." *Id.*

Where state action has forged a joint coordination between government and private third parties toward a speech-suppressive goal, and that coordinated effort causes harm to private plaintiffs, the question is *not*, as the Government suggests, only whether the government "compelled" those third party actions. Pet'r Br. 23-30. To the contrary, compulsion is not always necessary. "The fact that the Government has *not compelled* a private party to perform [the alleged unconstitutional act] does not, by itself, establish" lack of state action. *See Skinner* v. *Ry. Lab. Execs. Ass'n*, 489 U.S. 602, 615 (1989).

Similarly, the Government mistates the state action test in *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019), by intimating that proving a private intermediary was "compelled" is a necessity. Pet'r Br. 2 (citing *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1933).

To the contrary, *Halleck* merely listed government compulsion as but one "example" how state action can be satisfied, and refrained from further explanation because the issue there was whether a private television entity was performing a "public function"

sufficient to create state action. 139 S. Ct. at 1928. But public function is not at issue here.

True, the Fifth Circuit used the "compelled" language in this case, but did so only in applying the coercion test. *See* J.A. 46; *see also* Pet'r Br. 10, 35. While compulsion is obviously *sufficient* to prove state action, it is not essential.

The best that the government can provide for the supposed *compulsion-only* test is a quote from *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 171 (1970); Pet'r Br. 36.

Yet, contrary to the government's intimation that under *Adickes* coercive compulsion is always necessary, the Court expressly qualified its ruling, stating that it was rendered "*[w]ithout deciding* whether *less substantial involvement of a State* might satisfy the state action requirement" for the constitutional violation at issue. *Adickes*, 398 U.S. at 171 (emphasis added).

1. *Significant Encouragement*

The Fifth Circuit found correctly that both *significant encouragement* as well as *coercion* were separately and sufficiently used by the Government to create state action: "[T]he district court did not err in determining that several officials—namely the White House, the Surgeon General, the CDC, the FBI, and CISA—likely coerced *or significantly encouraged* social-media platforms to moderate content, rendering those decisions state actions." J.A. 69-70 (emphasis added).

Government use of significant encouragement against a private entity is sufficient to invoke state action. *Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982) ("[O]ur precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power *or* has provided such *significant encouragement*, either *overt or covert*, that the choice must in law be deemed to be that of the State") (emphasis added).

In *Skinner*, the Court analyzed the incentives that the federal government used to leverage private railroads to conduct and report the results of drug tests administered to employees pursuant to the 1970 Federal Railroad Safety Act. 489 U.S. 602. Railway labor groups sued on the grounds that the resulting rules violated the employees' rights to be free of unreasonable search and seizure under the Fourth Amendment. *Id*. at 612.

The question was whether the rules on their face showed a sufficient nexus of government encouragement to, and participation with, private railroads in the drug testing practice to implicate constitutional rights. *Id*. at 614-15. Holding that a sufficient nexus existed, the Court found that "[t]he Government has *removed all legal barriers* to the testing . . . and indeed has made plain not only its *strong preference* for testing, but also its *desire to share the fruits* of such intrusions." *Id*. at 615 (emphasis added).

The Court recognized three aspects of state action relevant to this case. First, the government influenced the private action by protecting it legally ("removed" legal incumbrances).

Here, the first *Skinner* factor is present. Both lower courts found that public demands by the

Government for big tech platforms to stop citizen "misinformation" on their sites were linked to Government power to carry out *or-else* threats, like calling for the amending of Section 230 to strip immunity protections for the platforms, as well as possible antitrust enforcement against the tech companies. Resp. to Appl. for Stay of Inj. 25. Section 230 provides a broad, extraordinary grant of protection to the platforms from many forms of legal liability. While Congress is the one to do the amending, it would be naïve to think that a push from the White House or federal agencies for revisions of 230, or calls for regulation or increased Department of Justice investigations, would not incentivize the platforms to cooperate with the Government.

Any potential White House or federal agency pile-on would have been predictably viewed by the big platforms as a foreboding tipping point. Early in the Biden Administration in 2021, a consensus was already building among some think tanks that a "federal agency is necessary to oversee Big Tech."[5] Even before that, influential voices were saying the same thing, like a major Silicon Valley investor

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5 Tom Wheeler, *A Focused Federal Agency Is Necessary to Oversee Big Tech*, Brookings (Feb. 10, 2021), https://www.brookings.edu/articles/a-focused-federal-agency-is-necessary-to-oversee-big-tech/. *See also* Erin Simpson and Adam Conner, *How to Regulate Tech: A Technology Policy Framework for Online Services*, American Progress (Nov. 16, 2021), https://www.americanprogress.org/article/how-to-regulate-tech-a-technology-policy-framework-for-online-services/; Cheri Pruitt-Bonner, *Government Agencies Have Big Plans For Tech Legislation In 2022*, The Plug (Dec. 29, 2021) https://tpinsights.com/government-agencies-have-big-plans-for-tech-legislation-in-2022/.

calling for regulation during the lead-up to the 2020 election.[6]

The second *Skinner* element is met because the Government made clear its "preference" for disadvantaging certain online content, constantly telling, sometimes yelling, those preferential demands to the platforms. *See infra* (2) "Coercion."

Third, like *Skinner*, the Government stood to benefit in a self-interested way in the specific outcome, here by silencing its critics ("a [] desire to share the fruits"), 489 U.S. at 615. Nor does the Court's opinion in *Blum*, 457 U.S. 991, undermine a finding of regulatory coercion and significant state encouragement. Like *Skinner*, *Blum* is another prism through which to identify when private regulated parties are responsible for the subject conduct rather than the state as in *Blum*, or when, as in this case, the state is the initiating and guiding force behind manipulating the platforms.

In *Blum*, although nursing homes in the state were regulated, *id*. at 1004, decisions to discharge or

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[6] Roger McNamee, *Big Tech Needs to be Regulated. Here are 4 Ways to Curb Disinformation and Protect Our Privacy*, Time (July 29, 2020, 10:05 AM), https://time.com/5872868/big-tech-regulated-here-is-4-ways/. The Trump Administration had previously launched investigations into tech platforms. *See* Russell Brandom, *The Regulatory Fights Facing Every Major Tech Company*, The Verge (Mar. 3, 2020, 9:20 AM), https://www.theverge.com/2020/3/3/21152774/big-tech-regulation-antitrust-ftc-facebook-google-amazon-apple-youtube. Of course, as of the 2020 election there was no guarantee whether a Biden Administration would continue, increase, or discontinue altogether those efforts; hence, federal agencies had feasible leverage against the platforms continuing into and after the 2020 election.

transfer patients "ultimately turn[ed] on medical judgments made by private parties," *id*. at 1008. The private decision-makers in *Blum* were the "review committee (URC) of physicians whose functions included periodically assessing whether each patient [was] receiving the appropriate level of care, and thus whether the patient's continued stay in the facility [was] justified." *Id*. at 994-95.

A major distinction between this case and *Blum* is the intervening medical judgement of *licensed* doctors who were bound by their own independent, professional obligations and subject to licensing oversight of outside medical boards. This Court found that "[t]hose decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Id*. at 1008.

Conversely, in this case there were no intervening independent professional standards at play concerning the censoring of citizens. While the platforms had their own noticeably ambiguous terms of service, they can hardly be compared to the judgment of medical boards; and even those terms of service were modified under pressure from the Government. *See infra* (2) Coercion, *Facebook*.

2. *Coercion*

The record separately shows coercive tactics by the Government used against all the major platforms. Below are just a few examples.

*Twitter*

In January 2021, the White House was already emailing this platform, flagging a problematic tweet and "wondering if we can get moving on the process for having it removed ASAP," asking Twitter to "keep an eye out for tweets that fall in this same ~ genre." J.A. 638. The tweet was by Robert F. Kennedy, Jr., a critic of COVID policies of the Administration and a one-time Democratic challenger to President Biden, later running as an independent.[7] Two weeks later, the same White House official followed up with a morning email to Twitter pressing harder in getting the tweet removed, writing, "Cannot stress the degree to which this needs to be resolved immediately"; in two hours Twitter bulleted back its compliance to the White House: "Update for you — account is now suspended." J.A. 641.

*Facebook*

A series of emails in early 2021 between Facebook and White House staff discussed Facebook's supposed complicity in "vaccine hesitancy" because of content on its platform. Facebook sent an evening email to the White House, J.A. 657, writing,

> We obviously have work to do to gain your trust. . . . We are also working to get you useful information that's on the level. That's

[7] Cristina Corujo and Kathryn Farrell, *Robert F. Kennedy Jr. Announces He's Ending Democratic Primary Campaign to Run as Independent*, CBS News (Oct. 9, 2023, 4:48 PM), https://www.cbsnews.com/amp/news/robert-f-kennedy-jr-campaign-democratic-party-independent/.

> my job and I take it seriously — I'll continue to do it to the best of my ability, and *I'll expect you to hold me accountable.*

J.A. 658 (emphasis added).

Minutes later in a White House email response to that email, J.A. 655, subject line "You are hiding the ball," the official complained—clearly about content *not demoted* by Facebook—that

> It would be nice to establish trust. . . . [I]nteractions with Facebook are not straightforward and the problems are worse—like you are trying to meet a minimum hurdle instead of trying to solve the problem . . . We *have urgency* and don't sense it from you all. 100% of the questions I asked have never been answered and weeks have gone by.
>
> Internally we have been *considering our options on what to do about it.*

J.A. 657 (emphasis added).

Some six weeks later Facebook emailed the White House with an apology for not "demoting," i.e. throttling the visibility and reach of vaccine related posts earlier, even though the posts "don't violate our community standards":

> I wanted to send you a quick note on the three pieces of vaccine content that were seen by a high number of people before we demoted them. *Although they don't violate our community standards, we should have*

> *demoted them before they went viral* and this has exposed gaps in our operational and technical process.

J.A. 714 (emphasis added).

In that email, Facebook *admitted changing user content review processes after White House criticism*, describing how it was modifying its vaccine content reviews and "making a number of changes starting next week, including setting up more dedicated monitoring for Covid vaccine content on the cusp of going viral, applying *stronger demotions* to a *broader set of content*," noting that "the *stronger demotions in particular should deliver real impact*." J.A. 714-15 (emphasis added).

The White House also identified "the 'three' widest reach posts" it disliked, complained that a specific one was "still up and seems to have gotten pretty far. And it's got 365k shares with four comments. We've talked about this in a different context, but how does something like that happen?" J.A. 712.

*Google / YouTube*

The pressure from the White House on these platforms was similar. In 2021, the White House sent an email to Google urging action on "vaccine hesitancy":

> [W]e want to be sure that you have a *handle on vaccine hesitancy generally and are working toward making the problem better*. This is a concern that is shared *at the highest* (and I mean highest) *levels of the WH*, so we'd

> like to continue a good-faith dialogue about what is going on under the hood here.

J.A. 709 (emphasis added). The White House also demanded to know "perhaps more critically, to what degree is content from people who have been given a 'strike' still being recommended and shown in prominent search positions?" J.A. 710.

In the same email the White House staffer zeroed-in on the need for Google to demote certain posts, writing:

> Won't come as a shock to you that we're *particularly interested in your demotion efforts*, which I don't think we have a good handle on (and, based on the below, it doesn't seem like you do either). Not to sound like a broken record, *but how much content is being demoted, and how effective are you at mitigating reach, and how quickly*?

J.A. 712 (emphasis added). The White House email continued with a chastisement: "Seems like your 'dedicated vaccine hesitancy' policy *isn't stopping the disinfo dozen*— they're being deemed as not dedicated—so it feels like that problem likely carries over to groups." J.A. 713 (emphasis added).

This reference to "the disinfo dozen" is emblematic of the way that the joint campaign of Government plus its closest NGO censorship "partners" viewed citizen online commenters who dissented from the Government narrative, treating them as malign spreaders of mis-disinformation (virtually, enemies of the state), especially if they had large numbers of followers. In fact, two of our Amici with large

followings were disparaged in this way. *See supra* p. 8 and note 2.

B. Because the Executive Branch's Censorship Scheme Was Deliberate

The Government's plan to transform private platforms into covert state censorship actors was intentional, not incidental.

Pragmatically, the big private tech companies had something the Government agencies did not have: the technical capacity either to instantly make dissenting online posts on their ubiquitous platforms disappear, or to throttle their degree of visibility to the public.

Also, strategically the third-party platforms could do overtly what the Executive Branch could only do covertly. One example from the record illustrates this. The collaboration between a Department of Homeland Security (DHS) agency CISA, and a special online portal (EIP) created to transmit content complaints directly to platforms to reduce dissenting citizen posts, proves the point.

Complaints demanding deletion or other adverse treatment against citizen online posts during the 2020 election cycle and onward were funneled by CISA to the big platforms through a special digital portal – the Election Integrity Partnership (EIP) – a system created by the Government's NGO "partner" the Stanford Internet Observatory ("SIO") and SIO's leaders, Stamos and DiResta. *See* J.A. 174.

One Government agency within the Department of Homeland Security (DHS), the Cybersecurity and Infrastructure Security Agency (CISA), enlisted the leadership of that NGO into its operations. "DiResta serves as 'Subject Matter Expert' for CISA's

Cybersecurity Advisory Committee, MDM Subcommittee, and Stamos serves on the CISA Cybersecurity Advisory Committee." J.A. 174.

This close collaboration among Government and private NGOs to censor citizens included Government intern staff being jointly shared with the key NGO intermediary to the platforms, SIO; "CISA interns . . . worked for the Stanford Internet Observatory." J.A. 172.

CISA was a major state actor in this suppression campaign. "CISA would . . . forward the information [from others regarding alleged online misinformation] to the applicable social media platforms." J.A. 173. Also, SIO, Stamos, and DiResta worked closely on this project with CISA; "Stamos identified the EIP's 'partners in government' as CISA, [and] DHS." J.A. 174.

Clearly, DiResta is an authoritative source for his admission that the Government censorship scheme was to avoid the appearance of federal involvement in a venture that from the start raised "very real First Amendment questions":

> According to DiResta [of the Sanford Internet Observatory (SIO), an entity that helped to operate the Election Integrity Project], the EIP, was designed *to "get around unclear legal authorities, including very real First Amendment questions" that would arise if CISA or other Government agencies were to monitor and flag* information for *censorship on social media.*

J.A. 176 (emphasis added).

The Fifth Circuit rightly noted the audacious nature of the Government's plan: "[T]he Supreme Court has rarely been faced with a coordinated campaign of this magnitude orchestrated by federal officials that jeopardized a fundamental aspect of American life." J.A. 70-71.

This was wildly outside the bounds of ordinary non-state action coordinated activities. The goal was *not* about providing neutral social services to the public with the aid of NGOs, or working with contractors on infrastructure projects. Rather, the goal was stopping certain kinds of lawful citizen online communications. For that, the Executive Branch needed private platforms to do its bidding.

The Government plan was not merely to use "government speech" to educate or enlighten platforms as a matter of public interest; it was to stop dissenting voices on COVID, vaccines, election processes, and political issues under the guise of "mis/dis-information." The third-party platforms were treated more as objects to utilize, rather than as subjects to inform.

### C. Because of the Symbiosis Between Government and the Platforms

A state action "symbiosis" existed between the Government and the platforms, where the Government and its agencies insinuated themselves into the inner-most operations of the platforms, including their content moderation practices, focusing on viewpoints politically contrary to the Administration or the Executive Branch agencies.

Metaphors have been abundant in state action rulings. In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 301 (2001), both the majority as well as the dissent appear to have agreed, at least in theory, that a *symbiotic relationship* between government and private entities can create state action. *Compare id.* at 305 (Thomas, J., dissenting), *with id.* at 301 n.4 (the majority's reference to "symbiosis").

Basic biology says that the general idea behind symbiosis involves a close codependent relationship between the parasite, here the Government, as well as the host, here the platforms, with mutual benefits to each.

In this case the Government burrowed itself into the decision-making of the massive online platforms. The benefit to the Executive Branch and its agencies was the suppression of dissenting opinions politically inconvenient to the Government. The benefit to the host platforms were avoiding pressure by Executive Branch pressure on Congress to repeal or amend Section 230, as well as protection from prosecution or investigation from the Justice Department or other agencies like the FTC to prosecute or investigate the platforms. Those obvious negative outcomes to the platforms, were euphemistically referred to by the White House as "considering our options." *See supra* Section II.A.2 (Facebook).

## III. THE FIRST AMENDMENT WAS VIOLATED

### A. The Whole Point of the Scheme Was Censorship

The Court has not hesitated to rein-in state targeting of viewpoints or of specific speakers. *See 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2313 (2023) (finding government had illegally "compelled speech" where "coercive '[e]liminati[on]' of dissenting 'ideas' about marriage constitutes Colorado's 'very purpose'" in applying its law against the plaintiff); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (Free Exercise Clause violated when the City intentionally targeted a religious group).

The Government does not defend censorship of *disinformation*. It touches on it only indirectly, mentioning the threat from "foreign governments such as Russia, China, and Iran us[ing] the platforms in 'influence operations' that 'spread disinformation[ and] sow discord.'" Pet'r Br. 4. Nevertheless, here *domestic speech* was targeted by the Government. *Infra* Section III.C. and note 8.

The Court has been vigilant in looking behind the surface of regulations or practices, asking whether they are in pursuit of "legitimate" goals, or whether they seek "to suppress unpopular ideas or information." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

The record shows the latter, not the former. The actions of the Government paint a picture of a new and troubling type of federal orthodoxy fashioned for American citizens to follow in their online opinions. The unconstitutionality of that has been clear for decades:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

*West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642 (1943).

### B. Fighting Mis/Dis-information Does Not Bypass the First Amendment

The issue is not whether certain online information is false, but whether the Government or the American populus should be the one to decide matters of public concern like politics, or elections.

Yet, free speech protection extends even to statements that are demonstrably false. *United States v. Alvarez*, 567 U.S. 709 (2012) (noting a reluctance to carve out new exceptions to the First Amendment and that, regardless, restrictions on false statements are limited to only knowing or reckless falsities).

Wisely, the Court has refused to hold citizens liable for defaming the government itself. *Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966). The right to voice dissenting views challenging the policies of government is quintessential free expression. In other words,

> Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for

> government operations must be free, lest criticism of government itself be penalized.

*Id*. at 85.

The concerted censorship campaign here, under the rubric of fighting misinformation or disinformation, does not qualify for a new pass from First Amendment free speech guarantees.

Perhaps most disconcerting of all is the pressure applied to the platforms to enforce the Government's new role as arbiter of truth, imposing a *new federal orthodoxy* upon citizen speech online. That plan clashes with the Court's clear declaration that government may not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Bd. of Ed.,* 319 U.S. at 642.

### C. Supposed Malign Lies Do Not Justify Domestic Censorship

One Amicus supporting the Government warns against "restricting the ability of the government and social media companies to counter *foreign* malign influence together." Br. United States Sen. Mark Warner 28 (emphasis added).

To the contrary, this case shows the White House and various Executive Branch agencies deputizing social media platforms to censor *domestic* American users, as both lower courts determined.[8]

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[8] The Fifth Circuit noted domestic censorship. J.A. 15. The District Court found domestic online content was targeted by the FBI, J.A. 165, 172, by CISA, J.A. 175, and the EIP portal used by the Government to send complaints to the platforms, J.A. 184, 188.

The Government misunderstands the illegality of forced control of public opinion. In 2021 DHS's CISA chief, Jen Easterly described America's "most critical infrastructure as our cognitive infrastructure," requiring, apparently with federal help, the "building [of] that resilience to misinformation and disinformation."[9] Easterly also saw dissent over elections as problematic: "[w]e now live in a world," she said, "where people talk about alternative facts, post-truth, which I think is really, really dangerous if you get to pick your own facts, and it's particularly corrosive when you talk about matters of election security."[10]

Admittedly, government can play a pedagogical role in promoting civic values. What it may not do, however, is mandate citizens to consider only the government's set of "facts."

### D. Schemes to Shut Down "Disinformation" Were Fatally Flawed from the Start

Scholars call anti-disinformation programs a "wicked problem" because distilling a simple remedy for alleged bad ideas on the internet "is often inaccurate and overlooks the complexities of the problem"; it ignores the reality that "disinformation proliferates as a natural byproduct of underlying

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[9] Ken Klippenstein and Lee Fang, *Leaked Documents Outline DHS's Plans to Police Disinformation*, The Intercept (Oct. 31, 2022), https://theintercept.com/2022/10/31/social-media-disinformation-dhs/.

[10] Maggie Miller, *Cyber Agency Beefing up Disinformation, Misinformation Team*, The Hill (Nov. 10, 2021), https://thehill.com/policy/cybersecurity/580990-cyber-agency-beefing-up-disinformation-misinformation-team/.

societal factors as much as from concerted bad actors," and in the end creates a potential backlash because of government and media betraying the public trust.[11]

"[P]ursuing the objective of 'combatting disinformation' can yield self-contradictory results," with data suggesting that academicians are three times more interested in "combatting" disinformation than actually understanding it, all in the pursuit of an "agenda of combating 'dangerous information' that *may be indifferent as to whether that information is true or false*."[12]

The failure of this suppress-public-expression-to-rescue-it approach is illustrated by another study. Conspiracy theories, oft-condemned in Washington, are much more likely to occur in nations riddled with corruption than in countries guided by government transparency and the rule of law.[13] Some COVID and election theories, previously condemned as "conspiracies," have been shown to be arguably factual, or at least worthy of debate.[14]

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[11] Gavin Wilde, *The Problem With Defining "Disinformation"*, Carnegie Endowment for International Peace (Nov. 10, 2022), https://carnegieendowment.org/2022/11/10/problem-with-defining-disinformation-pub-88385.

[12] Tim Hayward, *The Problem of Disinformation* 1-3 n.1 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4502104 (emphasis added).

[13] Sinan Alper, *There Are Higher Levels of Conspiracy Beliefs in More Corrupt Countries*, 53 Eur. J. Soc. Psych. 503, 504 (2023), https://onlinelibrary.wiley.com/doi/10.1002/ejsp.2919.

[14] Our FBI director testified that COVID-19 "most likely" came from the Wuhan lab. Michaeleen Doucleff, *What Does the Science Say About the Origin of the SARS-CoV-2 Pandemic?*, NPR (Feb. 28, 2023, 6:18 PM), https://www.npr.org/sections/goatsandsoda/2023/02/28/1160162845/what-does-the-science-say-about-the-origin-of-the-sars-cov-2-pandemic. Voter fraud is a sad reality. Such fraud "perpetrated

There is no legitimate, let alone compelling reason for the Government's anti-disinformation campaign.

## IV. THE GOVERNMENT'S USE OF MARKET DOMINANT PLATFORMS IS A PERNICIOUS THREAT TO FREE SPEECH

The Government admits that "[s]ocial-media platforms allow billions of people to share content instantaneously around the globe," Pet'r Br. 3 (citing *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 480 (2023)), and notes "[t]he unprecedented scale and speed of social-media communications," Pet'r Br. 3.

But conversely, those facts, plus the mammoth ubiquity of these large platforms, make the case *against the Government* even stronger.

The control that big platforms already exercise over speech has not been lost on members of this Court. *Biden v. Knight First Amend. Instit. of Colum. Univ.*, 141 S. Ct. 1220 (2021) (Thomas, J., concurring). The implications are staggering for news, public opinion, and elections.

"The size of the platforms, such as Google and Facebook, dwarf local TV and radio stations," and are eclipsing journalism.[15] They supply the primary news for 40% of Americans aged 18-29 and 22% of those 30-

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using absentee ballots" was referenced in *Crawford v. Marion County Election Board*, 553 U.S. 181, 195-96 (2008). The impact of fraud may be debatable, but not its reality.

[15] *Big Tech is a Threat to Local Journalism*, National Association of Broadcasters, https://www.nab.org/bigtech/ (last visited Feb. 6, 2024).

49.[16] During the 2020 election cycle, 72% of U.S. voting-age citizens were regularly using some form of social media.[17]

The Court has recognized that "repression of [speech] by private interests" can occur just as harmfully from market dominant communication companies as from government censorship. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

Here, there is something even worse. The Government wielded its immense power to leverage massive private platforms to enforce its choice of winners and losers on the most important civic issues of the day. It created a toxic duopoly of power—state and Silicon Valley—over public opinion and freedom of speech.

## V. THE ANTI-DISINFORMATION MARCH CONTINUES TOWARD A FEDERAL ORTHODOXY

An injunction is warranted because the Administration's effort to block alleged "disinformation" into the 2024 election is marching

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[16] Owen Foster and Pete Markiewicz, *How Younger Voters Will Impact Elections: How Legacy Media and Social Media Impact Old and Young Voters*, Brookings (May 15, 2023), https://www.brookings.edu/articles/how-younger-voters-will-impact-elections-how-legacy-media-and-social-media-impact-old-and-young-voters/.

[17] Peter Suciu, *Social Media Could Determine the Outcome of the 2020 Election*, Forbes (Oct. 26, 2020, 8:00 AM), https://www.forbes.com/sites/petersuciu/2020/10/26/social-media-could-determine-the-outcome-of-the-2020-election/.

onward. CISA's new lead official, a "disinformation" expert, will be coordinating "the agency's election security efforts."[18]

In 2023, the State Department announced its work with the White House's effort to fight "malign actors" who use technology to "undermine democracy."[19] In a "Democracy" Summit, the State Department promoted Google's new "prebunking" campaign (the "Jigsaw" project), to combat disinformation;[20] prebunking is an effort to discredit certain ideas in the mind of the public by *inoculating* citizens against them before they gain traction.[21] In addition to being a new version of prior restraint, it is oddly reminiscent of state indoctrination.

In Spring of 2023, the U.S. Director of National Intelligence reaffirmed the Administration's commitment to ridding America of "disinformation," suggesting that the problem was not just abroad, but also "at home," describing "the Intelligence Community" as "a critical ally in the fight against authoritarianism . . . to protect against *the primary*

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[18] Derek B. Johnson, *CISA Shakes up Election Security Leadership Ahead of 2024 Election*, SC Media (June 30, 2023), https://www.scmagazine.com/news/cisa-election-security-leadership-2024-elections.

[19] *Private Sector Commitments to Advance Democracy*, U.S. Dep't of State (Mar. 29, 2023), https://www.state.gov/private-sector-commitments-to-advance-democracy/.

[20] *Id*.

[21] *See* University of Cambridge et al., *A Practical Guide to Prebunking* Misinformation 19 (2022), https://interventions.withgoogle.com/static/pdf/A_Practical_Guide_to_Prebunking_Misinformation.pdf.

*tools of digital authoritarianism* which are censorship, *misinformation and disinformation*."[22]

This increase in government control over the levers of information to crush "disinformation" continues. With the challenging digital phenomenon of Artificial Intelligence, the White House signed an Executive Order in October 2023 to deal with it.[23] But among the provisions of the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, E.O. 14110, is the entrenched concern once again over "disinformation" as a force that can "exacerbate social harms." Exec. Order No. 14,110, 88 Fed. Reg. 75,191, § 1 (Oct. 20, 2023).

We cannot predict all, or even most, of the future abuses to constitutional governance if this campaign continues. But past conduct is a good teacher. Unless enjoined, it will certainly continue.

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[22] Avril Haines, Director of National Intelligence, Remarks at the Carnegie Endowment for International Peace (Apr. 25, 2023), https://www.dni.gov/index.php/newsroom/speeches-interviews/speeches-interviews-2023/3687-digital-authoritarianism-a-growing-threat-at-the-carnegie-endowment-for-international-peace (emphasis added).

[23] *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, The White House (Oct. 30, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/.

## CONCLUSION

The Court should affirm the ruling of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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