No. 23-411

In the

Supreme Court of the United States

VIVEK 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

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF RESPONDENTS

Jay R. Carson
Counsel of Record for Amicus Curiae
Robert D. Alt
David C. Tryon
Alex M. Certo
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, OH 43215
(614) 224-4422
J.Carson@BuckeyeInstitute.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae The Buckeye Institute respectfully submits its brief in support of the Appellees. The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The Buckeye Institute performs timely and reliable research on key issues, compiles and synthesizes data, formulates free-market policy solutions, and presents them for implementation in Ohio and replication nationwide. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization as defined by I.R.C. § 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and frequently supports the First Amendment rights of individuals and a free press. In this case, the actions of the government raise significant concerns that the executive branch has engaged in—and unless enjoined will continue to engage in—censorship in violation of the First Amendment. This censorship harms people and nonprofits like The Buckeye Institute, who often assert positions that are different than those espoused by the government.

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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, aside from *amicus curiae* made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

> And he found a new jawbone of an ass, and put forth his hand, and took it, and slew a thousand men therewith.
>
> And Samson said, With the jawbone of an ass, heaps upon heaps, with the jaw of an ass have I slain a thousand men.

Judges 15:15-16 (King James).

The biblical story of Samson slaying a thousand men with the jawbone of an ass is meant to convey his divinely endowed strength. He could eviscerate an army, singlehandedly, wielding only a happenstance and improbable weapon. In the early 1960s, the term "jawboning" entered the political lexicon to describe a President's ability to accomplish similar a feat of political strength—commanding regulatory policy—through the seemingly innocuous tool of public and private statements. Derek E. Bambauer, *Against Jawboning*, 100 Minn. L. Rev. 51, 57 (2015) (defining jawboning and noting the term's biblical origin). And while Samson's prowess on the battlefield of Lehi was considerable—as the record below shows—his supernatural strength pales in comparison to the executive branch's power to smite the speech, stories, and ideas of political philistines with whom it disagrees.

As the district court's order makes clear, by jawboning—that is wheedling, cajoling, and in some cases, threatening regulated entities—the executive branch essentially commandeered private actors to censor speech on the government's behalf. Even if the government were always right, that monopoly would

not justify governmental infringement on free speech. But, as demonstrated in Section V., the government is not always right, or even consistent. And fortunately, the First Amendment precludes such infringement on our free speech. See Section VI.

ARGUMENT

I. Will No one Rid Me of These Turbulent Tweets?

A. Henry II and the Power of Royal Suggestion

Had Twitter been available to Thomas à Becket—Archbishop of Canterbury and Lord Chancellor to King Henry II in the 1160s—the separation of church and state that would become a cornerstone of liberal democracies might have emerged centuries earlier. Still, limited to quill and scroll and horseback delivery, Becket and his defense of church independence against royal prerogative achieved the medieval equivalent of going viral. The King was enraged by, among things, Becket's insistence that church authorities, rather than the Crown, had exclusive jurisdiction to try criminal cases against clergy. And although the King theoretically enjoyed absolute power, because Becket was a papal legate, the King was nevertheless politically constrained in what direct action he could take against Becket. So, like a White House staffer frustrated by a stream of vaccine hesitant tweets, J.A. at 5, Henry reportedly complained to four of his knights —"will no one deliver me this turbulent priest?" *See* Robert Dodsley, *The Chronicle of the Kings of England, from*

William the Norman to the Death of George III 27 (1821).[2]

The knights, eager to earn favor or avoid reprobation from their King—a man with significant power to influence their lives and fortunes—stepped in to solve Henry's problem by murdering Becket in Canterbury Cathedral. *Id.*; Lloyd de Beer & Naomi Speakman, *Who killed Thomas Becket?*, The British Museum (Apr. 22, 2021).[3] Just as Henry II was constrained in his ability to deal with Becket directly, American presidents are constrained by both the First Amendment and the political backlash that would attend any direct government action that could be viewed as an attempt to silence critics. The use of "government speech" the King with a fig leaf of plausible deniability. After all, he did not actually order Becket's murder. He simply vented his royal frustration over an actor who was spreading disinformation and encouraging behavior that the King deemed unhealthy for the body politic.

B. The Government's Platform Moderation Regime is not Government Speech; it is Censorship.

In the same way, government agencies here "encouraged" social media platforms to do their bidding under the guise of "responsible content moderation." Indeed, based on the record below, the

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[2] https://archive.org/details/chroniclekingse00saddgoog.

[3] https://www.britishmuseum.org/blog/who-killed-thomas-becket.

government did far more than suggest or encourage content moderation, it demanded it.

For example, a White House official, communicating privately with a social media platform to "remove [a]n account immediately," stating that "he could not stress the degree to which this needs to be resolved immediately." J.A. at 4. From this example—and the many others cited by the Fifth Circuit—three troubling truths emerge.

First, the government intervention goes far beyond mere suggestions or benign government speech. There are demands for information interlaced with demands for specific action. The government evaluates the platforms on how much "measurable impact" its moderation policies have in achieving the government's aims and demands that the platforms do better through "stronger interventions." *Id.* at 5. This pattern of demands for information, followed by demands for action, evaluation of that action, and demand for "stronger 'interventions'" when the platform did not meet the government's metrics amounts to government control of the platform.

Second, while some of the jawboning pronouncements were made publicly, most were made privately and out of the public view. The Fifth Circuit discussed the special relationship between the platforms and the White House, noting that some platforms made employees available to the government on a regular basis and "another gave the officials access to special tools like a 'Partner Support Portal' which 'ensure[d]' that the government's requests were 'prioritized automatically.'" *Id.* at 5–6. The intimacy apparent between the government and

the platforms indicates that this is not just a matter of the government communicating with the public at large or even to certain regulated industries.

Instead, the government sought to keep its private conversations with the platforms private. In *Changizi v. Department of Health and Human Servs.*, 602 F. Supp.3d 1031 (S.D. Ohio 2022), plaintiff Mark Changizi alleged what are essentially the facts found by the trial court in this case—that the government improperly acted to censor his Twitter posts through exactly this kind of back-channel communication. The government defendants, most of whom are defendants in this case as well, were fully aware of the special relationship that existed between the government and the platforms at that time and indeed, made demands on Twitter to downgrade posts like Changizi's. Yet in the government's motion to dismiss and brief opposing Changizi's preliminary injunction motion, the government shrugged off the suggestion of special communications as imaginings of tin-foil hat conspiracists, noting how Mr. Changizi had no evidence of such communications or government pressure. See, e.g., Def. Mem. in Opp. to Mot. for Prelim. Inj. and in Support of Mot. to Dismiss at 198-99, 204-05, 220-222, *Changizi*, 602 F. Supp.3d 1031 (No. 2:22-cv-1776), ECF No. 31. To be clear, it is entirely appropriate for a lawyer representing the government to argue that a complaint fails to provide enough actionable facts to state a claim or that the plaintiff has failed to carry his evidentiary burden to obtain injunctive relief. But it does not reflect well on the government officials who knew Changizi's claims were true, but remained silent, instead arguing that general pronouncements from the President or his

press secretary could not reasonably be interpreted as a pressure campaign to urge platforms to censor content.

Third, while the government seeks to characterize its actions as attempts to address "disinformation," the uncontested evidence at the district court showed that the government's efforts were not aimed at providing accurate information, but at silencing certain speakers. The government dubbed a group of problematic influencers "the disinfo dozen," who—at the government's urging—were deplatformed across Facebook. J.A. at 12. This is not the government offering counterargument, trying to correct public misperceptions, or speaking to the general public about health issues. It is instead—like Henry II's complaint to his knights—the identification of specific political opponents to be silenced. By targeting specific speakers, the government let the mask slip. Whatever legitimate interest the government might have in speaking freely to citizens, de-platforming disfavored individuals and organizations does not advance it.

Plainly the government cannot censor by proxy by inducing, encouraging, or pressuring "private persons to accomplish what it is constitutionally forbidden from accomplishing." *Norwood v. Harrison*, 413 U.S. 455, 465 (1973); *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring) ("The government cannot accomplish through threats of adverse government action what the Constitution prohibits it from doing directly."). The Fifth Circuit's decision—citing at length the host of undisputed email

communications from the White House—demonstrates the pressure and unsubtle threats that the White House employed to control, limit, and ban social media posts that it did not like.

II. Academic Views of Jawboning

Three law review articles—all written before the pandemic and the other topics at issue here—have ably presented the arguments for and against executive jawboning and merit consideration in evaluating the need for a preliminary injunction here. The consensus of these articles is that even if the use of the executive branch's threats might sometimes be appropriate—or at least constitutionally tolerable—jawboning third parties to engage in extra-constitutional action is not.

First, in 2015, Tim Wu, a senior advisor to the Federal Trade Commission and Columbia Law Professor—with a political cynicism that would make Machiavelli blush—wrote an article extolling the supposed virtues of governance though executive jawboning aptly titled *Agency Threats*. Tim Wu, *Agency Threats*, 60 Duke L. J. 1841 (2011). Professor Wu posits that "[t]he use of threats instead of law can be a useful choice—not simply a procedural end run." *Id.* at 1842. "Threat regimes," he suggests, "are important and are best justified when the industry is undergoing rapid change—under conditions of 'high uncertainty.' Highly informal regimes are most useful, that is, when the agency faces a problem in an

environment in which facts are highly unclear and evolving." *Id.*

In addition to being useful when the facts are unclear, "[t]he greatest advantage of a threat regime is its speed and flexibility." *Id.* at 1851. Regulation by threat is expedient because "a threat is extant the moment it is made—its final shape, so to speak, is immediately apparent." *Id.* He downplays the obvious due process concerns, ensuring readers that "the argument that rule by threat is a means of avoiding judicial review may be overstated." *Id*. at 1843. In his view, "[t]hreats are, by their nature, just that: threats to enforce or enact a rule, not binding actions in the usual sense of that word. Regulated entities that are unhappy with a de facto regime can and do test the threats, forcing the agency to use its more formal powers and therefore invoke judicial review." *Id.*

Jawboning social media companies and the resulting social media, however, does not just affect the regulated entities. It impacts the "customers" who purchase advertising from social media who have different interests than the end-users who use the social media product to communicate. Many advertisers would likely have no qualms with social media companies removing posts with which the majority of social media users might disagree. A "stultifying conformity" of thought may be "destructive to a free society" and to the social media users with a minority view, but it is not necessarily bad for advertisers. *See Speiser v. Randall,* 357 U.S. 513, 532 (1958) (Black, J., concurring) (discussing

impact of unconstitutional loyalty oaths on free expression and civil discourse).

Professor Wu closes his defense of agency threats by noting the sound governance practices of Vito Corleone in "The Godfather," who used threats accented by the occasional enforcement action to achieve his aims. Wu, *supra*, at 1847. While the comparison is made tongue-in-cheek, it is nevertheless apt. In fairness to Professor Wu, his article focuses on encouraging private actors to accept or self-impose regulatory burdens that—unlike here—do not offend the Constitution. Professor Wu assumes, perhaps naively, that regulatory threats would be used only to accomplish legitimate regulatory goals. Yet even Professor Wu acknowledges that the Executive branch would abuse its power if an agency used "threats to take actions that Congress has specifically barred, or to accomplish objectives for which it would otherwise lack delegated authority." *Id*. at 1854. Jawboning to accomplish objectives that would facially violate the First Amendment—like content-based censorship—presents an even more egregious abuse. The practices described in the trial court's order call to mind not Vito Corleone—but his son Michael—who begins with noble intentions, but once in power, succumbs to the temptation to abuse it.

Jerry Brito, a lawyer and Senior Research Fellow at George Mason University's Mercatus Institute published a response to Professor Wu's article arguing forcefully that jawboning third parties into submission by threats of new or greater regulation replaces the rule of law with the rule of men. Jerry Brito, *"Agency Threats" & the Rule of Law:*

An Offer You Can't Refuse, 37 Harv. J.L. & Pub. Pol'y 553 (2014). The fatal flaw of governance by jawboning is human nature:

> [H]aving ejected the rule of law in an attempt to secure "speed and flexibility," [Wu] is forced to recreate a stand-in of that very same rule of law through "guidelines" and "lists" made to prevent the predictable consequences of the rule of men. As much as one would like to have omniscient, benevolent angels for regulators, unfortunately only "fallible men" are available.

Id. at 568. As the fifth section of this brief explains, the government is far from omniscient.

In *Against Jawboning*, Professor Derek Bambauer directly addresses the constitutional hazards of jawboning in relation to speech regulation on internet platforms. Bambauer, *supra*. Using the example of a state attorney general subpoena to Google meant to lend aid to the motion picture industry's crackdown on video piracy, Professor Bambauer notes that what Professor Wu saw as the exception in executive jawboning efforts—seeking to enforce results that lie beyond an executive's legal capacity—is, in reality, the norm. The state attorney general involved "sought to coerce the company based on threatened action at the edges of or wholly outside their legal authority." *Id.* at 55. The constitutional concern "is not simply the motivation; state officials advocate for interest groups constantly," but that the attorney general "threatened Google despite lacking

authority over the subject matter of his investigation." *Id.* at 55.

Why would any company accede to threats— or euphemistically, "suggestions"— from the government if it knows that the government lacks any legal authority to enforce them? "Cost and uncertainty," Professor Bambauer answers:

> As to cost, even a subpoena that was ultra vires—beyond the official's power—would cause Google to incur potentially significant expense. . . . And the potential costs were more than pecuniary—the MPAA planned to allocate budget to media outreach efforts designed to harm Google's reputation. Even false accusations can wound.

Id. at 56. According to Professor Bambauer, "The cost-benefit calculus is clear: it makes sense to censor anything questionable." *Id.* at 86.

III. The Unhappy Bipartisan History of Censorship by Proxy

Although the issues raised in this case allege for the most part a Democratic presidential administration exerting influence on social media platforms to ban or limit speech by individuals and organizations perceived to be on the right, jawboning at the expense of constitutional rights is a bipartisan activity that spans the ideological spectrum. The

temptation to abuse executive power is perennial and ecumenical.

Years ago, executive-branch jawboning helped initiate industry blacklisting—most notably in Hollywood—of persons suspected of harboring communist sympathies. To be sure, legislative jawboning by members of the House Un-American Activities Committee and Senator Joseph McCarthy played a significant role in feeding anticommunist paranoia. But the movements roots stem from an executive pronouncement. With the Soviet Union's assertion of dominance over Eastern Europe and communism on the march worldwide, American policy makers became increasingly concerned over Soviet attempts to influence and subvert what they saw as American values through subtle propaganda and the infiltration of American government and private institutions. In December 1947—more than two years before Senator Joseph McCarthy made his first public allegations of widespread communist infiltration of the federal government—the U.S. Attorney General published the "Attorney General's List of Subversive Organizations" (AGLOSO). *See* Robert Justin Goldstein, *Prelude to McCarthyism: The Making of a Blacklist*, Prologue Magazine, (Fall 2006).[4] The list imposed no direct sanctions on any of the organizations named. But

> as various scholars wrote contemporaneously and subsequently, AGLOSO, which was massively publicized in the media, became what

[4]https://www.archives.gov/publications/prologue/2006/fall/agloso.html.

> amounted to "an official blacklist." In the public mind it came to have "authority as *the* definitive report on subversive organizations," understood as a "proscription of the treasonable activity of the listed organizations" and the "litmus test for distinguishing between loyalty and disloyal organizations and individuals."

Id. Notably, the list was never accompanied by any proof that any of the organizations on it had engaged in any criminal activity or sought to "subvert" the American government.

It was instead a list of the usual suspects. The list served its purpose of dissuading citizens from joining or associating with the groups on it. That same year, the House Un-American Activities Committee, which had formed in 1938, began investigating communist subversion in the motion picture industry. Like King Henry's knights, and social media executives receiving criticism from the White House, Hollywood took the hint. The studio heads agreed among themselves not to hire actors and screenwriters who exercised their constitutional rights to decline to cooperate with the committee as well as anyone with alleged ties to "subversive organizations." Because the studios were acting as private entities, simply trying to act "responsibly," and enforcing their private preference to hire only patriotic Americans, there was no need for actual evidence of any ties to subversive

groups like the one named on the AGLOSO. Rumor and hearsay were sufficient.

The Red Scare of the 1950s highlights the insidious nature of government censorship by proxy. Blacklisting—like the de-platforming and shadow banning at issue here—operates in the dark. Individuals may never be aware that they have been blacklisted or their tweets shadow banned. Blacklisted screenwriters did not receive notice that they had been blacklisted or the opportunity to contest that designation in any type of hearing. They simply saw opportunities disappear. Private entities like the Hollywood studios of the 1950s and social media companies of today have no duty to explain their actions. This lack of transparency allows the censors, both government and the private parties to engage in gaslighting—they simply deny that there are any restrictions in place or any communications between the executive branch and the private party which might disclose governmental pressure or even collusion. *See, e.g.*, *Changizi*, 602 F. Supp.3d at 1046 ("HHS contends that Plaintiffs' complaint is 'bereft of factual support for the conclusory allegation that any remedial actions that Twitter has taken (or may again take) against Plaintiffs were (or will be) attributable to Defendants, rather than the "independent" and "legitimate discretion" of Twitter.'").

Indeed, the Congressional investigation into the government's censorship by proxy only recently unearthed email exchanges between White House officials and Amazon.com showing the White House pressured Amazon to redirect customers searching certain keywords that might be associated with

vaccine hesitancy or skepticism to a Centers for Disease Control and Prevention (the "CDC") website. Victor Nava, *Amazon 'censored' COVID-19 vaccine books after 'feeling pressure' from Biden White House:docs*, N.Y. Post (Feb. 6, 2024).[5] Amazon's internal communications show that company executives understood this "government speech" was a call for—at the very least—censorship of search results, asking chillingly, "Is the Admin asking us to remove books, or are they more concerned about search results/order (or both)?" *Id.*

IV. The Allure and Dangers of Censorship by Proxy

Jawboning on internet speech issues by "recruiting proxy censors" is particularly effective—and thus particularly dangerous—because it targets the "weakest link in the chain of communication." Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, & the Problem of the Weakest Link*, 155 U. Pa. L. Rev. 11, 27 (2006). Targeting social media platforms works because, "[i]t provides a mechanism for the exercise of authority over otherwise ungovernable conduct. . . . [The practical] cost of monitoring and sanctioning disfavored communications is largely externalized onto the intermediaries who are the subjects of direct regulation." *Id.* As Professor Bambauer explains, "[I]t is far easier and more effective to impose controls upon an intermediary than upon a host of dispersed speakers who may be difficult to identify, located

[5] https://nypost.com/2024/02/05/news/amazon-censored-covid-19-vaccine-books-after-feeling-pressure-from-biden-white-house-docs/.

outside the regulators' jurisdiction, or judgment-proof." Bambauer, *supra*, at 85–86.

Jawboning targeting intermediaries is especially pernicious here because "platforms such as Google, Twitter, Facebook, and Instagram are the new gatekeepers for online content." *Id*. Because those entities serve both as gatekeepers and repositories of online activity, they can consign unwanted information or unfavored options to the Orwellian "memory hole." For all practical purposes, "Material de-listed from Google's search results or deleted from a Twitter feed simply disappears . . . ." *Id.* at 60.

Pressuring regulated entities for "moderation" of internet speech, when coupled with human nature and the natural incentives of power, creates a perilously slippery slope. Plainly, the executive branch is tasked with protecting the nation's security and by extension its health. An administration may see an urgent need to take action and engage in some benign jawboning to get assistance from social media platforms. The executive branch may grow to see its policies relating to the crisis as not only correct, but essential. Proceeding from the messianic notion that its policies are the only hope for the nation, the executive may come to the conclusion that its re-election as similarly crucial.

Jawboning is also insidious because the more it is practiced, the easier it becomes. Like a paperclip that is repeatedly bent, gaining the acquiescence of the regulated parties becomes easier and easier until finally, no resistance is offered. Indeed, the frequent meetings and familiarity documented in the trial court's order points to a kind of regulatory Stockholm

Syndrome. The social media platforms often *want* to cooperate—or at least avoid unnecessary conflict—with the White House. The Fifth Circuit noted numerous times that the platforms were, for the most part, happy to assist the government, even going beyond their existing content moderation policies to throttle down or deplatform disfavored speech. *E.g.,* J.A. at 309 ("From the beginning, the platforms cooperated with the White House." * * * "The platforms responded with total compliance").

From the government's viewpoint, third parties' willingness to assist provides political cover. Even in the 1950s, an act of Congress or Executive Order banning potential communist subversives from working in certain private industries where they could implant Marxist or other "unamerican" ideas in the national psyche would have faced legal challenges and been seen as politically heavy-handedness. But if the government simply provided information, industry leaders who wished to appear responsible or patriotic might act on their own initiative. Simply put, "When the government can indirectly threaten or compel private actors to fall in line with its preferences, there is a threat to the constitutionally protected liberty to exchange information that is checked poorly, if at all, by standard First Amendment doctrine." Derek E. Bambauer, *Orwell's Armchair*, 79 U. Chi. L. Rev. 863, 898–99 (2012).

V. The Government has a poor history of identifying misinformation—and often reverses itself.

"When I want your opinion I'll give it to you."
-- Laurence J. Peter[6]

The conduct documented by the trial court and the Fifth Circuit would present significant First Amendment and public policy concerns even if the government was always right. But of course, the government is a collection of imperfect human beings who make mistakes, may be misinformed themselves, or may be tempted to put personal political or policy goals ahead of disinterested scientific inquiry. As such, the government has no monopoly on truth.

Throughout the COVID-19 pandemic and the instant litigation, the government has portrayed itself as the guardian of scientific truth. Nate Hochman, *Trust the Science?*, Nat'l Rev. (Nov. 29, 2021)[7] ("[T]hey're really criticizing science because I[, Anthony Fauci,] represent science."). A regrettable history of errors—see *infra* at V., A.—should give the reader pause in accepting such claims. Even more disturbingly, the government now wishes to label, suppress, ban, eliminate and censor divergent views as misinformation, disinformation, or mal-information.

But no government, scientist, doctor, expert, or organization has a monopoly on knowledge. In fact,

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[6] Author of *The Peter Principal* where he observes that people in a hierarchy tend to rise to "a level of respective incompetence."
[7] https://www.nationalreview.com/corner/trust-the-science/.

the government has a long history, and more importantly, a recent history of disseminating inaccurate or misleading information.

A. The Federal Government's COVID Misinformation

The CDC has long been considered a source of unbiased and legitimate source of medical information. The federal government used the public's trust in the CDC to impose strong, and even draconian, restrictions on the American public—and even worldwide. Those who disagreed with the CDC were often vilified as purveyors of "misinformation" and generally denounced. Dr. Anthony Fauci, the former director of the U.S. National Institute of Allergy and Infectious Diseases was similarly held up as the ultimate expert. He even tried to refute criticisms by proclaiming that "attacks on me . . . are attacks on science." Carlie Porterfield, *Dr. Fauci on GOP Criticism: 'Attacks on Me, Quite Frankly, Are Attacks on Science'*, Forbes (Dec. 10, 2021).[8] But as it relates to COVID-19, Anthony Fauci and the CDC have a poor record. The government has changed its "facts" and even been deceptive—at the same time it deprecated any who disagreed. Here are a few examples.

1. Covid 19 Origins: From bats to labs. The CDC and Dr. Fauci initially—in 2020—insisted that "[the scientific evidence] is very, very strongly leaning toward [the fact that COVID-19] could

[8] https://www.forbes.com/sites/carlieporterfield/2021/06/09/fauci-on-gop-criticism-attacks-on-me-quite-frankly-are-attacks-on-science/?sh=717612345429.

> not have been artificially or deliberately manipulated . . . . Everything about the stepwise evolution over time strongly indicates that [this virus] evolved in nature and then jumped species . . . ." Nsikan Akpan & Victoria Jaggard, *Fauci: No scientific evidence the coronavirus was made in a Chinese lab*, Nat'l Geographic (May 4, 2020).[9] Others claimed it originated in a lab in China. Jack Brewster, *A Timeline of The COVID-19 Wuhan Lab Origin Theory*, Forbes (May 24, 2020).[10] Around the same time as Dr. Fauci's claims, President Trump stated that "he has a 'high degree of confidence' the virus came from a lab in Wuhan." *Id.*
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> The Select Subcommittee on the Coronavirus Pandemic found that Dr. Fauci and "[f]ormer NIH Director Dr. Francis Collins were directly involved in the drafting, publication, and public promotion of Proximal Origin — a paper written to suppress the COVID-19 lab-leak hypothesis." *Hearing Wrap Up: Suppression of the Lab Leak Hypothesis Was Not Based in Science*, Comm. on Oversight & Accountability (Jul. 12, 2023).[11] According to the Select

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[9] https://www.nationalgeographic.com/science/article/anthony-fauci-no-scientific-evidence-the-coronavirus-was-made-in-a-chinese-lab-cvd.

[10] https://www.forbes.com/sites/jackbrewster/2020/05/10/a-timeline-of-the-covid-19-wuhan-lab-origin-theory/?sh=58800c455aba.

[11] https://oversight.house.gov/release/hearing-wrap-up-suppression-of-the-lab-leak-hypothesis-was-not-based-in-science/.

Subcommittee, the paper's conclusions "rest on insufficient evidence, draw inaccurate assumptions, and have never been proven or verified by the wider scientific community," in order to "advance the preferred narrative of senior government officials . . . ." *Id.* Eventually, government agencies conceded that COVID-19 might have originated in a China virus lab. Julian Barnes, *Lab Leak Most Likely Caused Pandemic, Energy Dept. Says*, N.Y. Times (Feb. 26, 2023).[12] "Though the hypothesis of a lab leak as the origin of a pandemic that has killed more than 1.1 million Americans is no longer dismissed today as a 'conspiracy theory,' *the damage to democratic discourse has been done."* Robert E. Moffit, *How Fauci and NIH Leaders Worked to Discredit COVID-19 Lab Leak Theory,* Heritage Found. (Jul 18, 2023)[13] (emphasis added). On February 28, 2023, FBI director Wray stated that "[t]he FBI has for quite some time now assessed that the origins of the pandemic are most likely a potential lab incident in Wuhan." Adam Sabes, *FBI director says COVID pandemic 'most likely' originated from Chinese lab*, Fox News, (Feb. 28, 2023).[14]

Fauci and Collins even denied that the government funded gain of function research at

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[12] https://www.nytimes.com/2023/02/26/us/politics/china-lab-leak-coronavirus-pandemic.html.

[13] https://www.heritage.org/public-health/commentary/how-fauci-and-nih-leaders-worked-discredit-covid-19-lab-leak-theory

[14] https://www.foxnews.com/politics/fbi-director-says-covid-pandemic-most-likely-originated-chinese-lab

the Wuhan, China lab. Ed Browne, *Fauci Was 'Untruthful' to Congress About Wuhan Lab Research, New Documents Appear to Show*, News Week (Sept. 9, 2021).[15] However, documents obtained via FOIA requests showed "that NIH grants supported the construction of mutant SARS-related coronaviruses that involved blending different types together. The result was a lab-generated virus that could infect human cells . . . ." *Id.* And Dr. Fauci "knew by January 2020 that his agency was funding gain-of-function research of novel coronaviruses in Wuhan, China." David Zimmerman, *Fauci Knew NIH Funded Wuhan's Gain-of-Function Research as Pandemic Began, Email Reveals*, Nat'l Rev. (September 5, 2023).[16]

2. Masks don't work; yes, they do; no, they don't. On March 8, 2020, it was reported: "When it comes to preventing coronavirus, public health officials have been clear: Healthy people do not need to wear a face mask to protect themselves from COVID-19." Brit Mccandless Farmer, *March 2020: Dr. Anthony Fauci talks with Dr Jon LaPook about COVID-19*, CBS News (Mar. 8, 2020).[17] Anthony Fauci asserted: "'There's no reason to be walking around with a mask' . . . ."

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[15]https://www.congress.gov/117/meeting/house/114270/documents/HHRG-117-GO24-20211201-SD004.pdf.

[16] https://www.nationalreview.com/news/fauci-knew-nih-funded-wuhans-gain-of-function-research-as-pandemic-began-email-reveals/

[17] https://www.cbsnews.com/news/preventing-coronavirus-facemask-60-minutes-2020-03-08/.

> *Id.* "While masks may block some droplets, Fauci said, they do not provide the level of protection people think they do." *Id.* U.S. Surgeon General Jerome Adams similarly asserted "[y]ou can increase your risk of getting it by wearing a mask if you are not a health care provider . . . ." Ben Schreckinger, *Mask mystery: Why are U.S. officials dismissive of protective covering?*, Politico (Mar. 30, 2020).[18] Adams even tweeted: "Seriously people — STOP BUYING MASKS!" . . . "They are NOT effective in preventing general public from catching #Coronavirus . . . ." *Id.*
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> Then, in June 2020, Fauci reversed himself. He said "he has 'no doubt' that Americans who aren't wearing face masks, especially in large crowds, are increasing the risk of spreading the coronavirus." Berkeley Lovelace Jr. & Noah Higgins-Dunn, *Dr. Anthony Fauci says Americans who don't wear masks may 'propagate the further spread of infection'*, CNBC (June 5, 2020).[19] He later admitted that he was spreading misinformation when he said masks don't work, but he justified his deception, not because he was wrong on the science, but because "[h]e [ ] acknowledged that masks were initially not recommended to the general public *so that first responders wouldn't feel the strain*

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[18] https://www.politico.com/news/2020/03/30/coronavirus-masks-trump-administration-156327.

[19] https://www.cnbc.com/2020/06/05/dr-anthony-fauci-says-americans-who-dont-wear-masks-may-propagate-the-spread-of-infection.html.

of a shortage of PPE." Alexandra Kelley, *Fauci: why the public wasn't told to wear masks when the coronavirus pandemic began*, The Hill (June 16, 2020)[20] (emphasis added). The federal government then demanded that everyone wear masks and some state governments required it. Kaia Hubbard, *These States Have COVID-19 Mask Mandates*, U.S. News (Mar. 28, 2022).[21] It turns out that scientists have long disputed masks' effectiveness. *See, e.g.,* Youlin Long, et al., *Effectiveness of N95 respirators versus surgical masks against influenza: A systematic review and meta-analysis*, 13 J. Evid. Based Med. 93, 96 (2020)[22] (finding "no statistically significant differences in preventing laboratory-confirmed influenza, laboratory-confirmed respiratory viral infections, laboratory-confirmed respiratory infection, and influenza-like illness using N95 respirators and surgical masks").

3. COVID-19 vaccines will prevent infection and transmission; no they don't. The official narrative from November 2020, until at least May of 2021, was that the new COVID-19 vaccines would prevent infection and transmission. Skeptics were blocked, banned, silenced and attacked in media outlets. *See, e.g.,* Kari Campeau, *Who's a Vaccine Skeptic?*

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[20] https://thehill.com/changing-america/well-being/prevention-cures/502890-fauci-why-the-public-wasnt-told-to-wear-masks/.
[21] https://www.usnews.com/news/best-states/articles/these-are-the-states-with-mask-mandates.
[22] https://onlinelibrary.wiley.com/doi/epdf/10.1111/jebm.12381.

Framing Vaccine Hesitancy in Post-Covid News Coverage, 40 Written Commc'n 976 (2023) (finding New York Times articles "established nonvaccination as a product of individual wrong belief, portrayed vaccine skeptics as gullible, ignorant, and/or selfish, and framed nonvaccination as a problem of individuals' wrong beliefs"). Dr. Fauci assured the public that the release of the vaccines would mark the end of the pandemic. Fauci proclaimed that "the Pfizer-BioNTech and Moderna vaccines are so effective they could 'crush' the COVID-19 pandemic" and explained that he is "'very encouraged . . . by the extraordinary level of efficacy' of the two vaccines [and] . . . they've been found to be up to 95 per cent effective in preventing the COVID-19 . . . and almost 100 per cent effective in preventing the serious form of the disease . . . ." Brandie Weikle, *Fauci confident vaccines can 'crush' COVID — if vaccine hesitancy doesn't get in the way*, CBC (Dec. 12, 2020).[23] Those who questioned this assessment were labeled "anti-vaxers" or "vaccine skeptics."

Fauci's statements later proved false. For example, "[a]bout three-fourths of people infected in a Massachusetts Covid-19 outbreak [in July 2021] were fully vaccinated . . ." per the CDC. Berkeley Lovelace Jr., *CDC study shows 74% of people infected in Massachusetts Covid*

[23] https://www.cbc.ca/radio/whitecoat/fauci-confident-vaccines-can-crush-covid-if-vaccine-hesitancy-doesn-t-get-in-the-way-1.5832956.

outbreak were fully vaccinated, CNBC (July 30, 2021).[24] Indeed, in testimony before the House Select Subcommittee on the Coronavirus Crisis, Dr. Deborah Birx, who had served as the White House COVID-19 coordinator, revealed how flimsy those early statements of "fact" were. They were not facts. They were, at best, hopes. Dylan Housman, *Birx: Biden Admin Was 'Hoping,' Not Lying, When It Said Vaccines Would Stop COVID Spread*, Daily Caller (June 23, 2022).[25]

4. Fully vaccinated people cannot transmit the virus; actually, they can. The government initially insisted that everyone should be vaccinated, and in May 2021, Dr. Fauci explained that "fully vaccinated people can go without masks even if they have an asymptomatic case of COVID-19 *because the level of virus is much lower in their nasopharynx, the top part of their throat that lies behind the nose, than it is in someone who is unvaccinated*" and promised that for vaccinated people, "it [is] extremely unlikely — not impossible but very, very low likelihood — that they're going to transmit it . . . ." Joseph Choi, *Fauci: Vaccinated people become 'dead ends' for the coronavirus*, The Hill (May 16,

[24] https://www.cnbc.com/2021/07/30/cdc-study-shows-74percent-of-people-infected-in-massachusetts-covid-outbreak-were-fully-vaccinated.html.

[25] https://dailycaller.com/2022/06/23/deborah-birx-joe-biden-covid-coronavirus-vaccine/.

2021)[26] (emphasis added). But just two months later, the CDC contradicted Dr. Fauci on both accounts, explaining that "the people who were vaccinated *were growing just as much virus in their noses as those who weren't vaccinated*. So what this study shows is that *people who are immunized can transmit the virus and possibly just as much as those who aren't immunized*." Michaeleen Doucleff, *Vaccinated People Can Spread The Delta Variant, CDC Research Indicates*, NPR (July 30, 2021)[27] (emphasis added).

B. Other Government Misinformation

The instances of governmental mis- or disinformation could fill volumes, but here are a few that—at least arguably—changed the course of history.

1. Japanese Americans present a national security risk and must be interned. In one of the most stunning and impactful examples of government disinformation, immediately after the Japanese attack on Pearl Harbor, the United States government forced millions of Japanese-Americans into internment camps. President Roosevelt's executive order 9066 authorizing this regrettable action was based, at least in part, on statements by Frank Knox, Roosevelt's Secretary of the Navy. He blamed

[26] https://thehill.com/homenews/sunday-talk-shows/553773-fauci-vaccinated-people-become-dead-ends-for-the-coronavirus/.
[27] https://www.npr.org/2021/07/30/1022909546/vaccinated-people-can-spread-the-delta-variant-cdc-research-indicates.

Pearl Harbor on "effective fifth column work," scapegoating Japanese-Americans. Jeffery Burton, et al., *A Brief History of Japanese American Relocation During World War II*, Nat'l Park Serv.[28] But the U.S. Government now admits this was disinformation—it "had no factual basis, but fed the growing suspicions about Japanese Americans." *Id.*

2. Tuskegee Syphilis Study. In 1932, the U.S. Public Health Service and the Tuskegee Institute began a study involving "600 Black men – 399 with syphilis, 201 who did not have the disease." *The Syphilis Study at Tuskegee Timeline*, CDC.[29] The men were promised medical treatment for "bad blood," though the men were never told what disease the government was testing. *Id.* The men's "informed consent was not collected." *Id.* "Researchers had not informed the men of the actual name of the study, i.e. 'Tuskegee Study of Untreated Syphilis in the Negro Male,' its purpose, and potential consequences of the treatment or non-treatment that they would receive during the study." *About the USPHS Syphilis Study*, Tuskegee University.[30] By "1943, penicillin was the treatment of choice for syphilis and becoming widely available . . . ."

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[28] https://www.nps.gov/articles/historyinternment.htm, (last visited Aug. 1, 2023).

[29] https://www.cdc.gov/tuskegee/timeline.htm, (last visited Aug. 7, 2023).

[30] https://www.tuskegee.edu/about-us/centers-of-excellence/bioethics-center/about-the-usphs-syphilis-study, (last visited Aug. 7, 2023).

The Syphilis Study at Tuskegee Timeline, *supra*. Nonetheless, the study would continue for another 30 years without the participants in the study being offered treatment. *Id.*

3. Iraq has Weapons of Mass Destruction. On September 9, 2002, the International Institute for Strategic Studies released a report concluding "that Saddam Hussein could build a nuclear bomb within months if he were able to obtain fissile material." *Saddam Hussein's Development of Weapons of Mass Destruction*, The White House.[31] Just a day prior, "national security adviser Condoleezza Rice told CNN: 'We don't want the smoking gun (of Iraq's weapons of mass destruction or WMD) to be a mushroom cloud.'" Gregg Zoroya, *Whatever happened to Iraq's weapons of mass destruction?*, USA Today (Feb. 14, 2019).[32] On Feb. 5, 2003, U.S. Secretary of State Colin Powell told members of the U.N. Security Council that "Saddam Hussein has chemical weapons," he "has used such weapons," and he "has no compunction about using them again — against his neighbors, and against his own people." Jack Mitchell, *20 years ago, the U.S. warned of Iraq's alleged 'weapons of mass*

[31] https://georgewbush-whitehouse.archives.gov/infocus/iraq/decade/sect3.html, (last visited Aug. 2, 2023).

[32] https://www.usatoday.com/story/opinion/2019/02/14/iraq-war-weapons-of-mass-destruction-saddam-hussein-ask-usa-today/2871170002/.

destruction', NPR (Feb. 3, 2023).[33] Powell stated that these "facts and conclusions [are] based on solid intelligence," and "backed up by sources — solid sources." *Id.* Believing that Iraq was hiding these weapons of mass destruction, on March 19, 2003, the United States and its allies launched Operation Iraqi Freedom. *Iraq and Weapons of Mass Destruction*, Nat'l Sec. Archive (Feb. 11, 2004).[34] Yet, the United States never found those supposed weapons of mass destruction. Nomaan Merchant, *Iraq WMD failures shadow US intelligence 20 years later*, AP (Mar. 23, 2023).[35] This government misinformation led to the deaths of thousands of individuals. *Id.*

VI. The remedy to supposed wrong speech is more speech.

Free speech includes the right to hear speech—even wrong speech. "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] . . . necessarily protects the right to receive . . . .' This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (internal citations omitted). Moreover, insisting one's own views

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[33] https://www.npr.org/2023/02/03/1151160567/colin-powell-iraq-un-weapons-mass-destruction.

[34] https://nsarchive2.gwu.edu/NSAEBB/NSAEBB80/.

[35] https://apnews.com/article/iraq-war-wmds-us-intelligence-f9e21ac59d3a0470d9bfcc83544d706e.

are correct without exposing them to contrary views is both arrogant and fruitless.

Rather, allowing others the "liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming [the truth of our view] and on no other terms [can we] have any rational assurance of being right." John Stuart Mill, *On Liberty* 37–38 (3d. ed. 1864). The free exchange of ideas—or even assertions of facts—promotes verifiable truth finding. "In the realm of protected speech, the [government] is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *First Nat. Bank of Bos. v. Bellotti,* 435 U.S. 765, 784–85 (1978).

The counterspeech doctrine holds that the best response to allegedly harmful or misleading speech is not suppression, but more speech that counters and challenges it. Counterspeech refers to any form of speech that opposes or challenges a message that one does not agree with. Nadine Strossen, *HATE: Why We Should Resist It with Free Speech, Not Censorship* 158 (2018). Justice Brandeis famously said, "If there be time to expose through discussion, the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Indeed, the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). "The core of the

marketplace of ideas concept is the notion that truth more easily is discovered when ideas are allowed to be freely expressed." Erik Forde Ugland, *Hawkers, Thieves and Lonely Pamphleteers: Distributing Publications in the University Marketplace*, 22 J.C. & U.L. 935, 940 (1996).

In 2012, the Court again referenced the counterspeech doctrine when it held unconstitutional the Stolen Valor Act, a law which Congress had found profoundly important to protect our veterans' honor by making it a federal crime to lie about receiving military decorations or medals. *United States v. Alvarez*, 567 U.S. 709 (2012). The Court noted that "suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse." *Id.* at 728. Thus, the First Amendment's protection of even false speech "comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *Id.* at 718.

The theory of our Constitution is "that the best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more

difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.

Even if the government believes that the "misinformation" is harmful to public health, the government should not suppress it. In *Lorillard Tobacco Co. v. Reilly*, Justice Thomas affirmed that if the government is concerned that information spread by private parties is harmful, it should counteract that speech with "more speech, not enforced silence." 533 U.S. 525, 586 (2001) (Thomas, J., concurring).

Despite the strong First Amendment protections for free speech, the government now seeks to return to a variance of the discredited speech equalization doctrine, with the twist of eliminating—instead of equalizing—speech. Rather than "we are from the government and we are here to help," see *News Conference – I'm Here To Help*, Ronald Reagan Presidential Foundation & Institute[36], the new mantra is we are from the government and for your own good, "the following [ ] persons [are banned] from speaking . . . ." *Austin v. Michigan Chamber of Com.*, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting),

[36] See *News Conference – I'm Here To Help*, Ronald Reagan Presidential Foundation & Institute, https://www.reaganfoundation.org/ronald-reagan/reagan-quotes-speeches/news-conference-1/ (last visited Aug. 1, 2023).

overruled by Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

The government has argued that social media has "presented significant hazards, including the spread of harmful misinformation." Mot. to Stay at 4. "The federal government [ ] has sought to mitigate these hazards, including by calling [social media companies'] attention to them . . . ." *Id.* But, "the interest touted by the [government] is the impermissible one of altering political debate by muting the impact of certain speakers." *Austin*, 494 U.S. at 703–04 (Kennedy, J., dissenting). Indeed, "[t]he premise of our Bill of Rights . . . is that there are some things—even some seemingly desirable things—that government cannot be trusted to do." *Id.* at 692–93.

Fortunately, the Court rejected *Austin's* short-lived theory that government should be in business of equalizing speech. But the government's position here is far more egregious than the *Austin* equalization doctrine because the government is the powerful entity speaking and wishes to suppress the speech of far less powerful persons. The First Amendment stands as a bulwark against the government's position that it can squelch public discourse, whether through direct influence or less obvious methods such as jawboning.

CONCLUSION

As President Truman's Committee on Civil Rights explained decades ago, "[i]f the people are to govern themselves their only hope of doing so wisely lies in the collective wisdom derived from the fullest

possible information, and in the fair presentation of differing opinions." President's Committee on Civil Rights, *To Secure These Rights: The Report of the President's Committee on Civil Rights* 47 (1947).[37]

Accordingly, amicus curiae The Buckeye Institute urges the Court to affirm the trial court's Order.

Respectfully submitted,

Jay R. Carson
Counsel of Record for Amicus Curiae
Robert D. Alt
David C. Tryon
Alex M. Certo
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, OH 43215
(614) 224-4422
J.Carson@BuckeyeInstitute.org

[37] https://www.trumanlibrary.gov/library/to-secure-these-rights#47.