No. 23-411

In The
Supreme Court of the United States

VIVEK MURTHY, SURGEON GENERAL, ET AL.,
Petitioners,

v.

STATE OF MISSOURI, STATE OF LOUISIANA, DR. JAYANTA BHATTACHARYA, DR. MARTIN KULLDORFF, DR. AARON KHERIATY, JILL HINES, AND JIM HOFT,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether respondents have Article III standing.

2. Whether the government's challenged conduct transformed private social-media companies' content-moderation decisions into state action and violated respondents' First Amendment rights.

3. Whether the terms and breadth of the preliminary injunction are proper.

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its president, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States. One of the purposes of the Institute is to advance the preservation of the freedoms our nation affords its citizens – in this case, the rights under the First Amendment to freedom of speech and freedom from government censorship.

SUMMARY OF THE ARGUMENT

The facts of this case are positively Orwellian. Government officials, under the purported guise of attempting to prevent the spread of "misinformation" and "disinformation," have coerced social media platforms into removing – or "deplatforming" – what the Government considers to be undesirable

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[1] Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae*, its members, or its counsel made a monetary contribution intended to fund this brief's preparation or submission.

viewpoints under the threat of punitive retaliation. This is anathema to the First Amendment, and the Court should therefore uphold the injunction issued by the Fifth Circuit.

Amicus Curiae writes separately on the second question presented to address the broader concerns raised by the federal Government's underlying conduct. This case is not just about suppression of viewpoints concerning the efficacy of COVID-19 vaccines and safety measures or Hunter Biden's laptop. Rather, this case illustrates a disturbing trend of government action to silence any viewpoints with which it disagrees. As such, this case highlights that it is not only Respondents' First Amendment rights that have been trampled. Far from it. An untold number of our country's citizens' speech has suffered the same fate over the past few years – in favor of the Government's preferred viewpoint – and this will almost certainly continue absent a ruling from this Court that such conduct is impermissible.

ARGUMENT

The Federal Government's Conduct Violates the First Amendment

Last year, an estimated 4.9 billion people used social media worldwide. Belle Wong, *Top Social Media Statistics and Trends of 2024*, FORBES (May 18, 2023), https://www.forbes.com/advisor/business/social-media-statistics/. Over the past couple of decades, social media websites, including those at issue in this case, have become the go-to platforms for personal and political engagement. Indeed, as this Court itself has recognized, "the most important

places (in a spatial sense) for the exchange of views . . . is cyberspace—the vast democratic forums of the Internet in general, and social media in particular." *Packingham v. North Carolina*, 582 U.S. 98, 104-05 (2017) (cleaned up). Congress likewise acknowledged the vast democratic forums of the internet and noted in Section 230 of the Communications Decency Act of 1996 that "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse," 47 U.S.C. § 230(a)(3), which is what Section 230 sought to preserve by eliminating the need and responsibility of internet companies to censor and regulate lawful speech posted on their platforms.

Further, demonstrating the shift from the traditional news media of the past, the Pew Research Center found that "[d]igital news has become an important part of Americans' news media diets, with social media playing a crucial role in news consumption." Jacob Liedke & Luxuan Wang, *Social Media and News Fact Sheet*, PEW RESEARCH CENTER, (Nov. 15, 2023), https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet/. In fact, "half of U.S. adults get news at least sometimes from social media." *Id.* Likewise, our country's politicians and citizens have increasingly turned to social media to engage in political and other protected discourse. In other words, social media websites have increasingly become the modern-day equivalent of the Speaker's Corner. Accordingly, while social media companies themselves are private actors, speech posted to social media platforms should be entitled to at least the same First Amendment protections from Government interference as if the same speech were made on the National Mall.

While social media has undoubtedly allowed individuals greater access to information, one unfortunate byproduct is how the Government has responded to views it opposes on those platforms. While the Government may not be publicly burning books, its efforts to suppress disfavored opinions exist, albeit in a much more subtle – although equally pernicious – form. As the record below makes clear, the Government seeks to silence the viewpoints with which it disagrees by proxy – through having the social media companies remove the speech which the Government disfavors. These are not polite requests from the Government. As the record below makes clear, should social media companies not comply, they may find themselves at risk of reprisals. *See* J.A. 16-17 (noting the officials "threatened them [social media companies]—directly and indirectly—with legal consequences if they did not comply").

Thus, as this case aptly demonstrates, the modern-day Speaker's Corner is under entrenched attack from Government officials who seek to have speech censored when they disagree with the speaker's viewpoint. The First Amendment forbids this "egregious form of content discrimination in which the government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). The fact that the actual suppression is ultimately carried out by a private actor (here, the social media company) makes no difference as it is "axiomatic that [Government] may not induce, encourage or promote private persons to accomplish what [the Government] is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 413

U.S. 455, 465 (1973). That this is happening in the shadows only makes it worse.

In considering the facts of this case, it is important to be clear what this case is and is not about. This is not a case about "culture wars" between left and right, Democrat and Republican. It is not about the merits of the validity of arguments regarding the efficacy of the COVID-19 vaccine or reporting about Hunter Biden's laptop. It is also not about the First Amendment rights solely of Respondents and other well-known individuals, such as Alex Berenson, Tucker Carlson, and Robert F. Kennedy Jr. To be sure, they have legitimate grievances, but the issue is far more pervasive and requires a deeper view to see just how serious the threats are to the First Amendment liberties of all Americans.

Put simply, this case is about "arguably . . . the most massive attack against free speech in United States' history." J.A. 87. As the Fifth Circuit noted, "[f]or the last few years—at least since the 2020 presidential transition—a group of federal officials has been in regular contact with nearly every American social-media company about the spread of 'misinformation' on their platforms." J.A. 2. Again, this issue is far broader than the COVID-19 vaccine and Hunter Biden's laptop. The record below is replete with facts showing that the government plans "to censor information" on numerous other topics, including "climate change, gender discussions, abortion, and economic policy," as well as "racial justice, the United States' withdrawal from Afghanistan, and the nature of the United States' support of Ukraine." J.A. 117, 180. If that were not

enough, the District Court found that Government officials asked social media platforms to block the efforts of Robert F. Kennedy, Jr. – a candidate for President – to communicate with the public and that the platforms have complied. *Missouri v. Biden*, 2023 WL 4335270, *5, *9, *40 (W.D. La. July 4, 2023). As Justice Alito noted in dissenting from the denial of Mr. Kennedy's motion to intervene, "[o]ur democratic form of government is undermined if Government officials prevent a candidate for high office from communicating with voters, and such efforts are especially dangerous when the officials engaging in such conduct are answerable to a rival candidate." *Murthy v. Missouri*, 601 U.S. ___, ___ (2023) (Alito, J., dissenting) (slip op., at 2).

Against this background, it is clear how the central issue in this case – whether the government may coerce social media companies into removing disfavored speech based on viewpoint – affects all Americans, young and old, liberal or conservative, whether directly or indirectly, and regardless of whether they know it or (as is often the case) do not. *See* J.A. 82 (the harms "impact[] every social media user."). Significantly, the government does not dispute that it has asked social media companies to take down material containing certain viewpoints. And it is not in dispute that, as the House Committee on Oversight and Accountability stated last year, social media companies "are powerful entities that have the potential to influence public opinion and behavior." *The Cover Up: Big Tech, the Swamp, and Mainstream Media Coordinated to Censor Americans' Free Speech*, HOUSE COMMITTEE ON OVERSIGHT & ACCOUNTABILITY (Feb. 8, 2023), https://oversight.house.gov/release/comer-big-tech-

wields-unchecked-power-to-suppress-the-constitutional-speech/. Indeed, not only do social media companies have the potential to influence public opinion and behavior, they actively do so – at the federal Government's behest. As the district court held and the Fifth Circuit affirmed, the Government conducted "a broad pressure campaign designed to coerce social-media companies into suppressing speakers, viewpoints, and content disfavored by the government." J.A. 82; *see also id.* at 17 (describing pressure as "unrelenting"). Unsurprisingly, in this environment, social media companies are left with little choice but to comply. *See id.* at 116 ("Facebook . . . reported to the White House that it 'labeled' and 'demoted' posts suggesting natural immunity to a COVID-19 infection is superior to vaccine immunity.").

This conduct cannot be squared with any fair reading of the First Amendment. First, who is to determine what is "misinformation" or "disinformation"? Certainly not the Government. Indeed, the First Amendment exists for this very reason – to prevent the government from mandating what is and what is not a permissible viewpoint. *See Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015) ("it is well established that the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic" (cleaned up)). This Court has explained that "Government discrimination among viewpoints—or the regulation of speech based on the specific motivating ideology or the opinion or perspective of

the speaker—is a more blatant and egregious form of content discrimination." *Id.* at 168 (cleaned up).

Second, surely the response to "misinformation" and "disinformation" should be simply more speech. As Justice Brandeis wrote nearly a century ago: "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. 367, 377 (1927) (Brandeis, J., concurring). The words ring as true today as they did in 1927. The American public can be trusted to draw their own conclusions in the marketplace of ideas.

The effects of the Government's conduct are even more troubling when one considers that the Government has no obligation to inform those whose speech has been suppressed. Not that any notification would justify such censorship, as viewpoint discrimination does not become permissible simply because the Government informs the victim about it. Rather, the issue is that First Amendment protections are being eviscerated in the dark and in silence. Put simply, "[b]y working through intermediaries, government can suppress speech quickly, without broad support, and potentially without alerting anyone of its involvement." Will Duffield, *Jawboning against Speech: How Government Bullying Shapes the Rules of Social Media*, CATO POLICY ANALYSIS no. 934, p.5 (Sept. 12, 2022), https://www.cato.org/sites/cato.org/files/2022-09/PA_934.pdf.

Of course, the Government has no legitimate justification for any of this. And to justify viewpoint

discrimination, the Government must satisfy strict scrutiny. *See Reed*, 576 U.S. at 171 ("content-based restrictions on speech . . . can stand only if they survive strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest" (internal quotation marks omitted)). That standard cannot be met either under the facts of this case or the numerous other examples discussed in the record. The Government's purported justification here is limited to the nebulous concept that censorship is required to prevent the spread of "misinformation" and "disinformation." But what constitutes "misinformation" or "disinformation" is often incapable of meeting any objective standard, leaving it to a case-by-case determination by the same Government officials who oppose the viewpoints in question.

This explanation runs headfirst into bedrock First Amendment protections. Speech does not become unprotected simply because it contains what the Government contends is "misinformation" or "disinformation" – and certainly not when the Government is the arbiter of what constitutes "misinformation" or "disinformation." Even if the censored speech is actually false, rather than just "malinformation" disfavored by the Government, this Court has held that "falsity alone may not suffice to bring the speech outside the First Amendment." *United States v. Alvarez*, 567 U.S. 709, 719 (2012) (finding the Stolen Valor Act of 2005 to infringe upon speech protected by the First Amendment). This Court explained that "[a]bsent from those few [historic and traditional] categories where the law

allows content-based regulation of speech is any general exception to the First Amendment for false statements." *Id.* at 718. Thus, this Court "reject[ed] the notion that false speech should be in a general category that is presumptively unprotected." *Id.* at 722. Indeed, "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.

As noted in *Alvarez*, "[o]ur constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *Id.* at 723 (citing G. ORWELL, NINETEEN EIGHTY–FOUR (1949) (Centennial ed. 2003)). But unfortunately, despite this Court's warning if it were to sustain the law at issue in *Alvarez*, the federal Government has nevertheless sought to exercise "a broad censorial power unprecedented in this Court's cases or in our constitutional tradition," creating "an endless list of subjects the National Government or the States could single out." *Id.* at 723.

What is of great concern is that the "list of subjects" even includes topics of medicine and public health by professionals in those fields. As this Court has recognized, "[p]rofessionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields." *Nat'l Institute of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2374-75 (2018) (hereinafter "*NIFLA*"). But "when the government polices the content of professional speech, it can fail to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," and "the people lose when the government is the one deciding which

ideas should prevail." *Id.* (internal quotation marks omitted). Indeed, "throughout history, governments have manipulated the content of doctor-patient discourse to increase state power and suppress minorities." *Id.* at 2374 (cleaned up) (quoting Paula Berg, *Toward a First Amendment Theory of Doctor–Patient Discourse and the Right To Receive Unbiased Medical Advice*, 74 B.U.L. REV. 201, 201-02 (1994)). Just as the state of California was not allowed to "co-opt the licensed facilities to deliver its message for it" in *NIFLA*, *id.* at 2376, neither should the federal Government here be able to essentially co-opt social media companies and platforms to censor disfavored viewpoints which oppose or contradict the Government's preferred narrative and message.

As Justice Kennedy's concurrence noted in *NIFLA*,

> it is not forward thinking to force individuals to be an instrument for fostering public adherence to an ideological point of view they find unacceptable. It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come.

Id. at 2379 (Kennedy, J., concurring) (cleaned up).

The First Amendment protects the right to "receive information and ideas," *Kleindiensy v. Mandel*, 408 U.S. 753, 762 (1972), not the right to receive only what the Government considers to be the "correct" information and ideas. Unsurprisingly, the federal Government is unable to cite to any law that allows it to engage in viewpoint discrimination through coercion of third parties. And coercion it is, make no mistake. Notwithstanding, even presuming such a hypothetical law were to be passed, it would be struck down. There is no compelling interest in silencing the views of Respondents at issue here (or indeed in the other areas in the record), and the Government's coercive approach is far from the least restrictive means to implement any such purported interest were one even to exist.

Finally, the Government's communications with social media companies here is not mere permissible government speech. As Justice Alito explained in his concurrence in *Shurtleff v. Boston*, "not all governmental activity that qualifies as 'government speech' in this literal and factual sense is exempt from First Amendment scrutiny" because "the Free Speech Clause itself may constrain the government's speech under certain conditions, as when a government seeks to compel private persons to convey the government's speech." *Shurtleff v. Boston*, 142 S.Ct. 1583, 1598-99 (2022) (Alito, J., concurring) (internal quotation marks omitted). Thus,

> government speech in the literal sense is not exempt from First Amendment attack if it uses a means that restricts

> private expression in a way that "abridges" the freedom of speech, as is the case with compelled speech. Were it otherwise, virtually every government action that regulates private speech would, paradoxically, qualify as government speech unregulated by the First Amendment. Naked censorship of a speaker based on viewpoint, for example, might well constitute "expression" in the thin sense that it conveys the government's disapproval of the speaker's message. But plainly that kind of action cannot fall beyond the reach of the First Amendment.

Id. at 1599 (Alito, J., concurring). Therefore, the government speech doctrine should be no defense for the Government in this case.

The effects of the federal Government's actions in this case to the whole of the country are obvious. So too are the consequences of letting such conduct continue.[2]

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[2] The public is increasingly aware of – and presumably concerned about – the issues raised in this case. For example, even back in 2020, a Pew Research Center survey found that nearly three-quarters of U.S. adults say it is very (37%) or somewhat (36%) likely that social media sites intentionally censor political viewpoints which they find objectionable. Emily A. Vogels, et al., *Most Americans Think Social Media Sites Censor Political Viewpoints*, PEW RESEARCH CENTER (Aug. 19, 2020),

CONCLUSION

For the foregoing reasons, and those described by Respondents, the Court should affirm the judgment of the Fifth Circuit. *Amicus Curiae* further respectfully submits that, in light of the significance of the issue, the Court not only uphold the injunction, but also make clear that governmental coercion of social media companies to suppress private speech based on viewpoint is wholly incompatible with the First Amendment.

Respectfully submitted,

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https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/.