No. 22-1199

IN THE

# Supreme Court of the United States

ROGAN O'HANDLEY,

*PETITIONER*,

*V.*

SHIRLEY N. WEBER, IN HER OFFICIAL CAPACITY AS CALIFORNIA SECRETARY OF STATE; & TWITTER INC.,

*RESPONDENTS.*

*On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit*

## BRIEF OF JUSTIN HART AND THE LIBERTY JUSTICE CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF THE AMICI CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental constitutional rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

Justin Hart, represented by the Liberty Justice Center, is currently litigating a similar case, *Hart v. Meta Platforms, Inc., et al,* No. 23-15858 (9th Cir.). In that case, Hart alleges that the federal government directed social media companies to rewrite their algorithms and adjust their misinformation policies in order to censor COVID-19 social media posts that did not align with the government's preapproved views. Hart further alleges that the social media companies' new policies and algorithms implemented at the direction of the government resulted in 20 million pieces of content being removed from the Internet, including Hart's COVID-19 posts.

## SUMMARY OF ARGUMENT & INTRODUCTION

This Court's First Amendment state-action censorship jurisprudence must be brought into the twenty-first century to take into account the full arsenal of government censors and technological advances that

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amici funded its preparation or submission. Counsel for all parties received timely notice of Amici's intent to file this brief.

exist today. It is no longer the case that the federal government is trying to censor *specific individuals*. Rather, the government is now trying to censor *disfavored viewpoints* that do not align with the government's message. It then casts a wide net using algorithms to censor those disfavored viewpoints, and thus ensnares specific individuals along the way based on their social-media content. And employing sophisticated technology, such as altering algorithms, allows the federal government in tandem with social-media companies to censor disfavored viewpoints – expressed by specific individuals – on a mass scale.

Consequently, the Ninth Circuit's approach of requiring plaintiffs to demonstrate that they were *individually named and targeted* by the government fails to account for today's mass-censorship technology. Denying and ignoring the reality of technological advances in the twenty-first century allows this unconstitutional censorship by the government and social-media companies to go on without the limitation that the First Amendment should provide.

## ARGUMENT

### The Ninth Circuit's rudimentary application of "State Action" fails to account for sophisticated censorship methods – such as algorithms – that do not require targeting a specific individual.

This Court has held that private parties engage in state action when they work with government officials to deprive individuals of their constitutional rights. *Lugar v. Edmonson Oil Co.,* 457 U.S. 922, 942 (1982).

The extension of liability to private parties includes actions they take with the government to violate the First Amendment. *See, e.g., Janus v. AFSCME, Council 31,* 138 S. Ct. 2448, 2464 (2018).

The Ninth Circuit does not explicitly disagree. *See, e.g., Franklin v. Fox,* 312 F.3d 423, 445 (9th Cir. 2002) (state action found where "state officials and private parties have acted in concert effecting a particular deprivation of constitutional rights"); *Ohno v. Yasuma,* 723 F.3d 984, 996 (9th Cir. 2013) (joint action found "where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party").

But this Court has also held that a plaintiff alleging joint action must show that the state "has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982). This Court went on to imply that a plaintiff would have to show that the government "dictate[d] the decision . . . in a particular case." *Id.* at 1010. The Ninth Circuit has therefore interpreted "the choice" to mean a specific action taken by the defendants specifically targeting the plaintiff. *See, e.g., Brunette v. Humane Soc'y of Ventura Cty.,* 294 F.3d 1205, 1212 (9th Cir. 2002) (plaintiff must show an agreement between the state and private party "to violate [the plaintiff's] rights in particular"), *Mathis v. Pac. Gas & Elec. Co.,* 75 F.3d 498, 502 (9th Cir. 1996) (not enough to show the private party was driven by "a generalized federal concern").

This outdated particularity requirement is derailing a number of cases similar to petitioner's. *Amici,* Justin Hart and his counsel, brought a similar case, before the same district court judge, *Hart v. Facebook,* No. 23-15858 (9th Cir.); 3:22-cv-737 (N.D. Cal.). The facts that gave rise to *Hart* and the district court's disposition of the case are similar to those here. There, Hart alleged the federal government demanded that private actors – Facebook and Twitter – have engaged in stricter censorship than their policies to shut down content related to COVID-19 that the government deemed "misinformation."

Hart's suit was dismissed by the same district court judge who dismissed O'Handley's suit below. *Hart v. Facebook,* No. 3:22-cv-737, 2022 U.S. Dist. LEXIS 81820 (May 5, 2022) ("*Hart I*"). Per the Ninth Circuit, "to prove a conspiracy between private parties and the government under § 1983, an agreement or 'meeting of the minds' to violate constitutional rights must be shown." *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983). According to the trial court, this "meeting of the minds" must target the plaintiff's speech *specifically*. *Hart I* at *19. And therein lies the problem.

Indeed, in today's modern technological world, according to the Ninth Circuit's application, the government and social media companies can simply design a new algorithm code and censor *disfavored views* on a mass scale, and *specific individuals* are caught up in the rubble. Even though the government may have access to these algorithm codes to target disfavored views in general and does not have to resort to methods employed during the McCarthy era for example that arguably chill speech – such as haling people

before Congress in hearings to determine if specific individuals harbor disfavored viewpoints – the Ninth Circuit clings to this "particularity censorship model" when analyzing whether private social media companies' actions can be attributed to the government.

In the aftermath of *Hart,* the same judge ruled against yet another similarly situated plaintiff in *Rogalinski v. Meta Platforms,* No. 22-cv-02484, 2022 U.S. Dist. LEXIS 142721 (Aug. 9, 2022), in part because the plaintiff "fail[ed] to allege that the government ever had any focus specifically on him." 2022 U.S. Dist. LEXIS 142721 at *12.

The *Hart* plaintiff attempted to amend his complaint with additional facts demonstrating the close collusion between the federal government and the social media platforms' use of algorithms to achieve their mutual goal. No. 3:22-cv-737 (N.D. Cal.) Dkt. 112. Hart also produced evidence that the federal government was able to interact with and rewrite Twitter's code. *Id.,* Dkt. 120. But the court denied Hart's motion to amend, citing the very decision being appealed here. *Hart v. Facebook Inc.,* No. 3:22-cv-737, 2023 U.S. Dist. LEXIS 81098 (May 9, 2023) ("*Hart II*"), *10 (citing *O'Handley v. Weber,* 62 F.4th 1145, 1159 (9th Cir. 2023)).

A troubling pattern emerges. No plaintiff can succeed under the current regime, which requires plaintiffs to show that their speech was specifically targeted, because that's not how online censorship works in 2023. To be sure, there may be high-profile exceptions where specific individuals were targeted by the government, such as Alex Berenson or former

President Trump. But most censorship now is done via altering algorithms to target disfavored views. In fact, Hart produced evidence that the federal government was upset with the social media platforms because the platforms' algorithms, intended to screen out disfavored COVID-19-related "misinformation," were also screening out "valid" public health messaging. No. 3:22-cv-737 (N.D. Ca.) Dkt. 112-1 at ¶ 75; Dkt. 112-2 at 161-62.

But this doesn't matter as long as the plaintiff must show that he was specifically, individually targeted for censorship according to the Ninth Circuit. In other words, if the plaintiff is unable to produce a piece of paper showing a government official scribbled his name targeting him specifically, he is unable to proceed with his case at the Rule 12 stage. The government could overtly bully Twitter into altering its algorithm code to delete all instances of the hashtag #gayrights, for example, and no Twitter user would have standing to assert their First Amendment rights because they weren't individually targeted, despite their viewpoints being targeted for mass censorship using algorithms.

That can't be right. And if that is the case, then the First Amendment simply does not exist on the Internet, despite this Court's recognition that the Internet is a "dynamic, multifaceted category of communication" that "includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue." *Reno v. American Civil Liberties Union,* 521 U. S. 844, 870 (1997).

Fortunately for the First Amendment, one case has moved forward, and its implications are explosive. *Missouri v. Biden* No. 3:22-cv-01213 (W.D. La.). The court there found the plaintiffs had "plausibly alleged injury-in-fact, causation, and redressability." *State of Mo. v. Biden,* No. 3:22-cv-01213, 2022 U.S. Dist. LEXIS 131135 (W.D. La. July 12, 2022) at *11-12. The court further observed that if those plaintiffs did not have standing, "when would anyone ever have standing to address these claims?" *Id.* at *12. The answer the federal government wants to hear is "never," and the Ninth Circuit agrees.

Recently, the *Missouri* court issued a sweeping injunction barring various government officials from undertaking the actions California federal courts have all but said no plaintiff has standing to stop. *Missouri v. Biden,* No. 3:22-cv-01213, 2023 U.S. Dist. LEXIS 114585 (W.D. La. July 4, 2023). The order enjoins the Department and Secretary of Health and Human Services, the National Institute of Allergy and Infectious Diseases, the Surgeon General, the Centers for Disease Control, the Federal Bureau of Investigation, the Department of Justice, the Department of Homeland Security, the Department of State, those agencies' various employees, and various White House employees, from, among other things, "meeting with social-media companies for the purpose of . . . inducing in any manner the removal, . . . suppression, or reduction of content," "specifically flagging content or posts on social-media platforms," "pressuring[] or inducing in any manner social-media companies to change their guidelines," and "threatening . . . social-media companies in any manner to remove . . . postings containing

protected free speech." 2023 U.S. Dist. LEXIS 114585 at *209-216.

The *Missouri* court was correct in its decision, and its reasoning exposes the Ninth Circuit's inherent flaws on this issue. This Court can restore the First Amendment protections for individuals whose viewpoints have been targeted by the government for mass censorship by using social media companies' sophisticated algorithms. This case provides an ideal vehicle.

## CONCLUSION

For the foregoing reasons, the petition should be granted, and the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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