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, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PETITIONER

John J. Bursch
Erin M. Hawley
Alliance Defending Freedom
440 First Street, NW
Suite 600
Washington, DC 20001
(202) 393-8690
jbursch@ADFlegal.org
ehawley@ADFlegal.org

Rory T. Gray
Alliance Defending Freedom
1000 Hurricane Shoals Rd.
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
rgray@ADFlegal.org

Edward M. Wenger
Counsel of Record
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC
2300 N Street NW, Suite 643
Washington, DC 20037
(202) 737-8808
emwenger@holtzmanvogel.com

Andrew Pardue
Caleb Acker
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, VA 20169
(540) 341-8808
apardue@holtzmanvogel.com
cacker@holtzmanvogel.com

Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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INTEREST OF AMICUS CURIAE[1]

Alliance Defending Freedom (ADF) is the world's largest legal organization committed to protecting religious freedom, free speech, marriage and family, parental rights, and the sanctity of life. ADF regularly defends students, adults, and organizations in cases before this Court and courts throughout the Nation, particularly those involving the right to free speech. *E.g.*, *Uzuegbunam* v. *Preczewski*, 592 U. S. ___ (2021) (2021); *Thompson* v. *Hebdon*, 589 U. S. ___ (2019) (per curiam); *Nat. Inst. of Family & Life Advocates* v. *Becerra*, 585 U. S. ___ (2018); *Reed* v. *Town of Gilbert*, 576 U. S. 155 (2015). Since its founding in 1994, ADF has also played an indirect role in many other free-speech cases, especially those involving the expressive rights of university students. *E.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Bd. of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217 (2000). And it was counsel last Term for the prevailing party in *303 Creative LLC* v. *Elenis*, 600 U. S. ___ (2023).

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

Counsel for Amicus Curiae inadvertently failed to notify all counsel of record at least 10 days before filing as required by Rule 37.2. Counsel for Amicus Curiae acted to rectify this omission immediately upon discovering it by notifying counsel for all parties. Should the Court desire to construe this as a motion for leave to file, Counsel for Amicus Curiae sought the position of the parties as to that question. Petitioner takes no position. Respondents filed a motion to request an extension to respond, and the Court granted that motion.

Given ADF's strong interest and deep experience in litigating cases to ensure that the First Amendment's protections remain robust and that any exceptions remain narrow and well-defined, ADF offers the following to aid the Court's analysis here.

INTRODUCTION & SUMMARY OF THE ARGUMENT

In *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 67–68 (1963), this Court acknowledged that governments sometimes deploy "informal censorship" to squelch unapproved expression which they cannot prohibit through traditional state action without violating the First Amendment. Given the State's leviathan "persuasive" power over media distributors, platforms, and publishers, exercise of this implicit authority to restrict the expression of American citizens often nets the same result from the perspective of the censored. For that reason, this Court has not hesitated to fix its gaze beyond "forms to the substance" of a State's efforts, and it has recognized that subtle tactics like the use of official government letterhead or ominous "reminders" of legal obligations—along with consequent legal repercussions—can just as quickly chill speech. *Id.* The specter of non-stop government monitoring can also goad media providers into preventing speech from blooming outside of state-preferred boundaries

Substance, elucidated by context and not form, rightly dominated for decades the way in which lower courts examined First Amendment challenges to these sorts of scenarios. But as some governments' recent pressure campaigns have intensified, the Second, Tenth, and now Ninth Circuits have broken away

from the erstwhile circuit consensus. Treating *Bantam Books*'s egregious facts as a threshold to be met instead of an egregious outlier, the Ninth Circuit and its two sister circuits have regressed to the once-scrapped form-over-substance approach, focusing instead on formal regulatory power and searching in vain for "clear" or express threats.

This case is a paradigm of informal censorship. The State of California surveilled Twitter, slapped the "misinformation" label on Mr. O'Handley's tweet, yapped to Twitter about it (through an official State account), monitored how Twitter responded, and succeeded in muzzling Mr. O'Handley through Twitter's suspension of his account. All these actions arose under the auspices of a California law that empowers the Office of Election Cybersecurity to not only "monitor" misinformation online but to "counteract" and "mitigate" it. Cal. Elec. Code § 10.5(b)(2), (c)(8). By pressuring Twitter to suppress Mr. O'Handley's speech, the State failed the *Bantam Books* test.

The Court need not decide whether Twitter slipped into state-actor territory to decide this case. Instead, it can (and should) take the case and reaffirm *Bantam Books*'s commonsense holding in the context of government officials who censor their constituents through social media companies. Otherwise, circuit courts beyond the Second, Ninth, and Tenth will likely empower would-be State agency puppet-masters to use a private company to quell speech they disfavor. And the millions of citizens living in the three wayward circuits will face continuing government muzzling for expressing views that incumbent officials dislike.

To be certain, *the State* acted here to muzzle an American citizen for choosing to share his political opinions to more than one million other individuals who chose to follow him for his political opinions. First Amendment freedom of political expression is not the invertebrate principle that the Ninth Circuit's opinion makes it out to be. The Court should take this opportunity to make that point clear.

ARGUMENT

I. *Bantam Books* correctly instructed courts to weigh the substance, placed in context, of potentially coercive State action.

The First Amendment inquiry would certainly be easier if "every wolf c[ame] as a wolf." *Morrison* v. *Olson*, 487 U. S. 654, 699 (1988) (Scalia, J., dissenting). But government censorship often dons the sheep's clothing. This Court recognized that notion explicitly three-score years ago. Because this threat is, and will continue to be, present for as long as political rabble-rousers irritate government officials, the Court instructed lower courts to consider *all* relevant factors tending to indicate subtle threats of government speech suppression. This approach asks whether the government's action would be "reasonably understood" as ultimately coercive or threatening in nature. See *Bantam Books*, 372 U. S., at 68.

The caselaw has evolved since this Court decided *Bantam Books* in 1963. When analyzing government action intended to result in *third-party* censorship of another's expression, "lower courts have drawn a sharp line between government officials' 'attempts to convince and attempts to coerce' intermediaries not to distribute a third party's speech." *Kennedy* v. *Warren*,

66 F. 4th 1199, 1207 (CA9 2023) (quoting *Okwedy* v. *Molinari*, 333 F. 3d 339, 344 (CA2 2003) (per curiam)). For a time, the lower courts complied with the *Bantam Books* baseline in making that analysis, looking at factors in an organic, holistic way; they did not elevate some factors to quasi-dispositive status while ignoring others, and instead rightly focused on the objective, reasonable-understanding test. And those courts identified conduct as coercive even when it was less extreme than the government action in *Bantam Books*. In other words, the conduct in *Bantam Books* represented an egregious outlier—not a triggering threshold.

But as state and federal government officials have become more aggressive in pressuring social-media platforms to remove speech, three circuits have drifted from looking at contextual, reasonable indicators to instead over-rely on a few specific factors. In particular, these courts require proof that a government has clearly levied an accusation of a legal violation or expressly threatened legal action.

This case is an ideal vehicle for the Court to remind the lower courts what *Bantam Books* requires: a holistic and organic analysis of all relevant factors to determine whether the most reasonable construction of the government action is that it is coercive.

A. Courts must look past form to substance, or State censorship will metastasize.

In *Bantam Books*, New York publishers and their wholesale distributor challenged a state government commission's practice of investigating publications and denouncing them as "objectionable for sale" based on obscenity. 372 U. S., at 61. The commission had issued notices on official letterhead to distributors; the notices specified the particular speech officials found objectionable, explained why that speech violated the law, noted that the government was tracking the the objectionable publications' distribution, and implicitly asked the distributor to cease and desist. *Id.* The commission's pressure campaign succeeded: the distributor obliged and suppressed the speech the government sought to censor. *Id.*

All this even though the commission possessed no formal regulatory authority over the third-party distributor to "regulate or suppress obscenity." *Id.*, at 66. The commission's "vague and uninformative" statutory mandate did not empower the commission to do anything more than "to educate the public concerning any book . . . or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth as defined [in other sections], and to investigate and recommend the prosecution of all violations of said sections." *Id.*, at 59–60, 71. In other words, the commission's threats were not backed by a specific statutory grant or the power to sanction.

Nevertheless, this Court easily found coercion. It "look[ed] through forms to the substance" and recognized the most reasonable conclusion: the

commission's "informal censorship" through "informal sanctions" (legal threats and "other means of coercion, persuasion, and intimidation") violated the First Amendment. *Id.*, at 67. The government speech did not have to take the form of express threats to be "reasonably understood" as threats. *Id.*, at 68. And, in keeping with that more objective construction of the government's actions, the Court did not credit the government's assertions of its own subjective intent behind the speech it directed at the distributor. *Id.*, at 68–69.

This established a fairly straightforward and logical rule. Courts should try to figure out whether government speech is actually an attempt to coerce. And in so doing, they should commonsensically look to all relevant factors, including:

- Deployment of government imprimatur, *i.e.*, use of official letterhead;
- Invocation of the agency's own legal duties to monitor speech;
- Pointing to specific speech, explaining why that speech violated the law, and requesting that speech be silenced;
- Actual effect of the government speech to chill the distributor's speech; and
- Continued policing and monitoring of the distributor.

The unnecessary factors, meanwhile, included:

- Explicit threats;
- Formal regulatory power over the contacted distributor;
- Subjective intent of the government actor; and
- Independent action by the distributor to take down the speech.

The task is to take *all* of those into account, asking how the distributor would "reasonably" understand them.

B. Lower courts used to get this right, but the Second, Ninth, and Tenth Circuits' errors have created a circuit split.

For decades, the circuits followed this Court's direction in *Bantam Books*, examining all factors to determine how the government's speech would reasonably be interpreted. For example, in *Backpage.com, LLC* v. *Dart*, 807 F. 3d 229, 230–232 (CA7 2015), the Seventh Circuit found coercion where there was use of official letterhead, a reference to a federal money laundering statute, a request that the companies take down funding for certain ads because those ads violated laws, and a request for "follow up" with the government. The court endorsed the district court's conclusion that these factors, together, would "reasonably be seen as implying that the companies would face some government sanction—specifically, investigation and prosecution—if they did not comply." *Id.*, at 236.

That was a sensible conclusion. It did not matter that, as in *Bantam Books*, the Sheriff in *Backpage*

lacked formal authority over the companies. In fact, his connection to the referenced federal statute was more tenuous than the *Bantam Books* commission's reference to its own statute. Yet the Seventh Circuit held that reference "ominous" and important. See *id.*, at 234. This is a good reminder that conduct need not rise to the particularly egregious level of *Bantam Books* to be coercive and thus violative of the First Amendment.

The Seventh Circuit also noted that the two companies in *Backpage*—Visa and Mastercard—were big companies with strong incentives to acquiesce when faced with smaller governmental urging. After all, the loss of one individual client means little to a gargantuan corporation when weighed against potential legal liability or negative press. *Id.*, at 236. This too was relevant. The Seventh Circuit, therefore, did exactly as this Court directed and asked whether a reasonable understanding of the government's actions, given all the context, was that it was coercive.

The Second Circuit, for a while, accurately stated and applied the same test: "[I]t is necessary to consider the entirety of the defendants' words and actions in determining whether they could reasonably be interpreted as an implied threat." *Zieper* v. *Metzinger*, 474 F. 3d 60, 66 (CA2 2007). In *Okwedy* v. *Molinari*, for example, the court held that invocation of a formal title combined with an implication about a potential effect on the contacted entity's bottom line were sufficient (taken together) to conclude that the distributor "could reasonably have believed that [the government officer] intended to use his official power to retaliate against it if it did not respond positively to his entreaties." 333 F. 3d 339, 344 (CA2 2003). In

accord with this Court's guidance, the Second Circuit saw no need for the government to have direct regulatory control over the speech platform at issue (billboards), nor was there any need for an explicit legal threat. *Id*. What mattered was whether the government speech created an inference that state power would be used to negatively impact the distributor. *Id*.

Other circuit decisions were of a piece. *E.g.*, *Blankenship* v. *Manchin*, 471 F. 3d 523, 529 (CA4 2006) (using "full context" of the government speaker's speech to determine whether it was a "reasonable reading of [the speaker's] remarks to view them as a threat of imminent adverse regulatory action"). Until quite recently, no court modified its application of *Bantam Books* by prioritizing some factors over others or by focusing on the absence of a clear allegation or threat.

The Second and Tenth Circuits forged a new—and mistaken—path. As governments in the cyber age began exercising their "powers of persuasion" more aggressively, those two circuits loosened their *Bantam Books* inquiry. In *NRA of America* v. *Vullo*, 49 F. 4th 700 (CA2 2022), for example, the Second Circuit decided to create a new, four-factor test: "(1) word choice and tone; (2) the existence of regulatory authority; (3) whether the speech was perceived as a threat; and, perhaps most importantly, (4) whether the speech refers to adverse consequences." *Id*., at 715 (citations omitted).

That test was a ruse. The Second Circuit elevated the fourth factor—reference to adverse consequences—to be dispositive. Since the answer to that

question was no in *Vullo*, the Second Circuit held there was no coercion. *Id.*, at 716–717. By "refer," the court apparently meant *explicitly* refer, considering that any reasonable person would know exactly what Vullo—who, as Superintendent of the New York State Department of Financial Services, *did* have direct regulatory authority over the entities her department contacted—was threatening adverse consequences when she referenced potential "risks" to the very companies she had the power to regulate. *See id.*

Long forgotten are the warnings of *Bantam Books* and other cases that coercion does *not* require a direct or express threat. The Second Circuit's dispositive criterion—whether the government speech "references" adverse consequences—is a proxy for asking whether the government speech contains an explicit threat. This contravenes *Bantam Books*.

Vullo followed a case in which the Tenth Circuit had likewise abandoned the plain application of *Bantam Books*. In *VDARE Foundation* v. *City of Colorado Springs*, 11 F. 4th 1151 (CA10 2021), the court found no coercion even though a letter from the City's mayor to a resort asking them to cancel a conference (i) directly addressed the resort, (ii) came in the form of an official mayoral statement, (iii) specifically described the expression to be suppressed, which the City considered "hate speech," (iv) directly invoked the city's nondiscrimination law, and (v) explicitly threatened to pull law enforcement protection from the conference. *Id.*, at 1157.

Because the mayor disclaimed formal regulatory authority over the resort, the Tenth Circuit held that nothing in the statement plausibly threatened the

resort with legal sanctions. *Id.*, at 1164. The Tenth Circuit ignored relevant factors from *Bantam Books* and elevated one factor—absence of formal regulatory authority—that *Bantam Books* eschewed. Dissenting Judge Hartz saw what was happening. He faulted his colleagues for failing to rely on common sense when examining the mayor's statement. *Id.*, at 1175–1177.

So both the Second and Tenth Circuits escalate *Bantam Books* as a threshold that triggers the First Amendment: if the government's conduct is any less egregious than it was in *Bantam Books*, it must not be coercive. "Implied threats" must be as painfully obvious, clear, and thinly veiled as they were in *Bantam Books* to cross that line from persuasion to coercion.

Now, the Ninth Circuit has followed the Second and Tenth down the wrong path. But it was not always this misguided. In *American Family Assn., Inc.* v. *City & Cty. of San Francisco*, 277 F. 3d 1114 (CA9 2002), the court articulated the correct test and applied it well, holding that San Francisco officials did not violate the First Amendment when they criticized religious groups' advertisements and asked television stations not to broadcast the ads. *Id.*, at 1119–1120, 1125. In so doing, the Ninth Circuit held that "public officials may criticize practices that they would have no constitutional ability to regulate, so long as there is no actual or threatened imposition of government power or sanction." *Id.*, at 1125. The court correctly refrained from modifying "threatened imposition" with "express" or "clear." Instead, the Ninth Circuit looked holistically in determining that "there was no sanction or threat of sanction if the Plaintiffs continued to urge conversion of homosexuals or if the television stations

failed to adhere to the Defendants' request and aired the advertisements." *Id.* None of the *Bantam Books* factors were present at all.

That did not last. This year, the Ninth Circuit moved decisively away from the required contextual approach, instead adopting the Second Circuit's *Vullo* test: "the Second Circuit has formulated a useful non-exclusive four-factor framework that examines: (1) the government official's word choice and tone; (2) whether the official has regulatory authority over the conduct at issue; (3) whether the recipient perceived the message as a threat; and (4) whether the communication refers to any adverse consequences if the recipient refuses to comply." *Kennedy* v. *Warren*, 66 F. 4th 1199, 1207 (CA9 2023). Applying those factors, the Ninth Circuit held there was no coercion because there was an "absence of a clear allegation of legal violations or threat of specific enforcement actions," which, according to the court, distinguished cases like *Backpage*. *Id.*, at 1209.

What the court meant by "clear" is explicit threats or legal allegations at the same level of the thinly veiled threats arising in *Bantam Books*. Just like the Second and Tenth Circuits, the Ninth Circuit transformed *Bantam Books* from an outlier that established a contextual, commonsensical test to a threshold hurdle that prevents any constitutional remedy for less egregious (but nonetheless coercive) government action. The Ninth Circuit's invocation of the adjective "non-exclusive" to describe its list does not change the fact that the court—following the Second Circuit—adopted a wooden four-factor test that focuses on whether a threat or allegation is "clear." That error led to the petition here.

II. The Ninth Circuit's new test conflicts with this Court's instructions in *Bantam Books*.

The Ninth Circuit's error persists. Like the state agency in *Bantam Books*, the State here, though "limited to informal sanctions . . . deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." 372 U. S., at 67. Therefore, the Ninth Circuit should have "look[ed] through forms to the substance and recognize[d] that informal censorship may sufficiently inhibit the circulation of [speech] to warrant injunctive relief." *Id.* But it did not.

If this error stands uncorrected, millions of citizens in three circuits are at risk of government censorship through social medial companies. Moreover, it is likely that other circuits will similarly adopt deferential "*Bantam Books* lite" review to state action, effectively requiring an explicit threat before injunctive relief may issue. But the First Amendment is not infringed by express threats alone, and the Office of Election Cybersecurity's state action in this case should be deemed unconstitutional consistent with this Court's longstanding precedent.

A. Mr. O'Handley's speech would not have been suppressed without initial action by California.

As an initial matter, the Ninth Circuit correctly determined that Mr. O'Handley had standing to sue the Secretary of State, and that "state action exists insofar as officials in her office flagged [Mr.] O'Handley's November 12, 2020, post." *O'Handley* v. *Weber*, 62 F. 4th 1145, 1161 (CA9 2023). After all, "[i]t is possible to draw a causal line from the OEC's flagging of the November 12th post to [Mr.] O'Handley's suspension from the platform, even if it is one with several twists and turns." *Id.*, at 1161–1162. Construing all facts in favor of Mr. O'Handley (as is required at the motion-to-dismiss stage), the Ninth Circuit agreed that it is plausible that he would not have had his speech suppressed by Twitter if the State had not first brought his account to Twitter's attention. *Id.*, at 1162.

Nevertheless, the Ninth Circuit affirmed dismissal of Mr. O'Handley's First Amendment claim because, although "a State may not compel an intermediary to censor disfavored speech," it can permissibly "ask an intermediary not to carry content they find disagreeable." *Id.*, at 1163. This misconstrued the applicable test: a court's inquiry should *not* end with a mere finding that the State made an explicit request to censor. Per *Bantam Books*, context is paramount. And the context here tracks many of the facts that were deemed constitutionally suspect by this Court in *Bantam Books*.

First, a reminder of which factors are *not* relevant under *Bantam Books*. According to the Ninth Circuit,

the dispositive fact was that "Twitter acted in accordance with its own content-moderation policy when it limited other users' access to [Mr.] O'Handley's posts and ultimately suspended his account." *Id.*, at 1156. This is a red herring. It is irrelevant whether Twitter acted in accordance with the company's content-moderation policy when the company had taken no action against Petitioner *until after* it received a direct communication from the State concerning Mr. O'Handley's account. The bookseller in *Bantam Books* could have lawfully concluded—in the absence of outreach from the State—that certain titles were obscene and then opted not to sell them. But that didn't matter to the *Bantam Books* Court. What matters is that the State prompted the censorship. By evaluating this case as if Twitter acted independently, the Ninth Circuit assumed facts not in evidence and ignored facts that were—such as California spending millions of dollars to find and delete speech officials did not like, effectively subsidizing Twitter's own censorship team with government employees and public dollars.

The Ninth Circuit also found it relevant that the Office of Election Cybersecurity did "not threaten adverse consequences if the intermediary refuse[d] to comply," under the assumption that such an explicit threat would transform the message from a lawful "attempt[] to convince" into an impermissible "attempt[] to coerce." *Id.*, at 1158. But this incorrectly assumes that only an explicit threat can constitute unconstitutional coercion. Again, that relegates *Bantam Books* to being a threshold, not an outlier.

To commit this error, the Ninth Circuit relied on the recent Second Circuit's decision in *Vullo* while

ignoring an earlier Second Circuit case (joined by then-Judge Sotomayor) holding that even when state actors "may not have expressly told [an individual] that he faced punishment for his actions," the context surrounding the government's request "could have reasonably suggested to someone in [the individual]'s position that there might be legal consequences if he failed to accede to the government's request that he remove [the offending content]." *Zieper*, 474 F. 3d, at 66–67.[2] This is what it means to "look through forms to . . . substance." *Bantam Books*, 372 U. S., at 67.

The extent of the State's regulatory authority is also relevant. Here, California's Office of Election Cybersecurity wields greater statutory authority than did the Rhode Island agency in *Bantam Books*. The Rhode Island Commission to Encourage Morality in Youth had but two statutory responsibilities: "to educate the public concerning any [material] containing obscene, indecent or impure language . . . and to investigate and recommend the prosecution of all violations." *Id.*, at 59–60. The Office of Election Cybersecurity possesses the power "[t]o monitor and *counteract* false or misleading information regarding the electoral process that is published online or on other platforms and that may . . . cause confusion and disruption of the orderly and secure administration of elections," and it may also act to "*mitigate* the false or misleading information." Cal. Elec. Code § 10.5(b)(2), (c)(8) (emphases added). The power to "counteract" and "mitigate" is a broader scope of authority than the

[2] Accord, *e.g.*, *Rossignol* v. *Voorhaar*, 316 F. 3d 516, 526 (CA4 2003) (reversing a lower court decision finding no First Amendment violation where state officials "came off real intimidating" even though they "made no explicit threats").

relatively limited power to "educate," "investigate," and "recommend."

In other words, when the Office of Election Cybersecurity privately messaged Twitter to "flag" Mr. O'Handley's tweet as "disinformation," Pet. for Cert. 7, it was not merely "monitoring" information but instead was taking direct action under color of state law to "counteract" the alleged disinformation and "mitigate" its effect. Because the Office of Election Cybersecurity's outreach to Twitter was "performed under color of state law," it "constituted [an] act[] of the State within the meaning of the Fourteenth Amendment." *Bantam Books*, 372 U. S., at 68. Hence, "[i]t is not as if this were not regulation by the State of [California]," even if the State had no power to levy criminal sanctions against Twitter for noncompliance. *Id.*

In fact, the practical limits on the State's power support Mr. O'Handley's allegations of a First Amendment violation. Because the State itself had no authority to remove posts that it deems objectionable, the State had to discreetly pressure Twitter to accomplish its goal. In short, the Office of Election Cybersecurity here wielded a bigger stick than did the agency in *Bantam Books*, even if it spoke more softly while pursuing its goal. And California knew it did not need to speak more loudly, because there were direct channels between government officials and Twitter for precisely this censorial purpose.

There are numerous other similarities between this case and *Bantam Books*. In *Bantam Books*, the state agency "notif[ied] a distributor on official Commission stationary that certain designated

[publications] distributed by him had been reviewed by the Commission and had been declared . . . objectionable." *Id.,* at 61. Here, the Office of Election Cybersecurity notified Twitter via a direct message that certain posts by Mr. O'Handley had been reviewed by the Agency, which had determined that they "created disinformation and distrust [about elections] among the general public." Pet. for Cert. 7. In other words, the Office of Election Cybersecurity reviewed Mr. O'Handley's speech and then informed the distributor of that speech that it had been declared by the State as objectionable. Or, to put it another way, an agency of the California Secretary of State—the ombudsman of elections—saw speech about elections it did not like and then sought to censor it. The First Amendment does not mean much if a state can do *that*.

In *Bantam Books*, the distributor's "reaction on receipt of a notice was to take steps to stop further circulation of copies of the listed publications." 372 U. S., at 63. Here, Twitter's reaction on receipt of the State's notice was to take steps to stop further circulation of Mr. O'Handley's speech—first by labeling his posts as misinformation, and then finally by suspending his account. It matters not that Twitter would have suffered no legal consequences if it had ignored the Office of Election Cybersecurity's request; the *Bantam Books* bookseller was also technically "'free' to ignore the Commission's notices, in the sense that his refusal to 'cooperate' would have violated no law," and yet the Court there still identified a First Amendment violation. *Id.*, at 68. Here, "a threat was perceived and its impact was demonstrable." *Rattner*

v. *Netburn*, 930 F. 2d 204, 210 (CA2 1991). Effects matter.

Finally, in *Bantam Books*, "a local police officer usually visited [the distributor] shortly after [his] receipt of a notice to learn what action he had taken." 372 U. S., at 61. In the 21st Century, house calls are no longer necessary to monitor the compliance of private companies with governmental demands. Instead, the Office of Election Cybersecurity simply assigned Mr. O'Handley's "objectionable" post a case number ("Case#0180994675"), classified it as "an 'orange' level threat in the Office's internal documents," and maintained an internal spreadsheet on which it tracked Twitter's favorable actions in response to its request. Pet. for Cert. 6–7. The Office was no less interested in monitoring compliance than the Rhode Island commission in *Bantam Books*—it was just capable of accomplishing the same end from behind the comfort of a computer screen.

B. This Court Need Not Decide When a Private Entity Becomes a State Actor to Resolve This Case in Petitioner's Favor.

The Court can resolve this case in Mr. O'Handley's favor by relying solely on *Bantam Books*, which remains good law despite its inconsistent application in the lower courts. The Court need not wade into the broader question of when private entities become state actors subject to the First Amendment's restrictions, and Mr. O'Handley has not requested that the Court address that question. See Pet. for Cert. 34 ("The petition . . . is limited to the State's role, and thus avoids the often

fact-dependent inquiry about when the First Amendment limits the conduct of private actors.").

But the narrowness of the question presented does not diminish the impact of this case. If the Ninth Circuit's decision is allowed to stand, then California and other states in three circuits will be emboldened in their efforts to coerce private companies via backchannels to banish disfavored speech from public consumption.

The only question presented here is whether *California*, by privately messaging Twitter to flag Mr. O'Handley's post as "disinformation," violated the First Amendment. Twitter's subsequent suspension of Mr. O'Handley's account is evidence that the State's threat was accurately perceived by the recipient and had the desired effect.

Significantly, the State had no other purpose for privately contacting Twitter *except* to censor Mr. O'Handley's tweet; it was not merely sharing an opinion with no expectation of a response. Although it is indisputable that "[g]enerating public pressure to motivate others to change their behavior is a core part of public discourse," and that government officials may permissibly engage in such speech, *Warren*, 66 F. 4th at 1208, that is *not* what occurred here. Simply put, this it not a government-speech case. The "real question in government-speech cases" is "whether the government is *speaking* instead of regulating private expression." *Shurtleff* v. *City of Boston*, 596 U. S. ___, ___ (2022) (Alito, J., concurring) (slip op., at 1). Here, there are ways that the State could have expressed its position without coercion. For example, it could have tweeted a statement from the official "@CASOSVote"

account disputing the information in Mr. O'Handley's post and encouraging members of the public who shared that opinion to make their voices heard. That's the way the marketplace of ideas is supposed to work.

Instead, the State reached out to Twitter through a private channel to flag the alleged "disinformation." This message was therefore meant for Twitter's eyes only; there was no public messaging component (*i.e.*, speech), because pressure was exerted by the State privately. Mr. O'Handley's tweet was flagged outside of the public's view and assigned an internal "threat" level. Then, the State privately tracked Twitter's compliance with its request until Mr. O'Handley was removed from the forum. Mr. O'Handley was not even aware of the State's involvement until he filed a public records request. Pet. for Cert. 6. And on top of this, the State knew full well that Twitter, just like Visa and Mastercard in *Backpage*, was a massive company that had little incentive not to cave to the State and sacrifice one individual customer to avoid any potential liability.

Consider the consequences. According to the Ninth Circuit, it is permissible for a State to use a private company to silence the disfavored speech of an American citizen while disguising its role as the instigator of the event. Every action that the State took in this case occurred in the shadows, and the implication of its outreach was clear. The Office of Election Cybersecurity's message was directed to Twitter and to Twitter alone, under the auspices of the Office's statutory mandate to "counteract" and "mitigate" speech that it alone deemed disinformation. That message, backed by the force of state law, was discreetly communicated with an expectation of

favorable action which, in fact, occurred. The First Amendment cannot, and under *Bantam Books* does not, condone such censorship by proxy.

CONCLUSION

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

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Edward M. Wenger
Counsel of Record
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
2300 N Street NW, Suite 643
Washington, DC 20037
(202) 737-8808
emwenger@holtzmanvogel.com

Andrew Pardue
Caleb Acker
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, VA 20169
(540) 341-8808
apardue@holtzmanvogel.com
cacker@holtzmanvogel.com

John J. Bursch
Erin M. Hawley
Alliance Defending Freedom
440 First Street, NW, Suite 600
Washington, DC 20001
(202) 393-8690
jbursch@ADFlegal.org
ehawley@ADFlegal.org

Rory T. Gray
Alliance Defending Freedom
1000 Hurricane Shoals Rd.
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
rgray@ADFlegal.org

Counsel for Amicus Curiae