No. 22-1199

In the Supreme Court of the United States

ROGAN O'HANDLEY,

Petitioner,

v.

SHIRLEY N. WEBER, CALIFORNIA SECRETARY OF STATE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR THE CALIFORNIA SECRETARY OF STATE

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QUESTION PRESENTED

1. Whether the facts alleged in petitioner's complaint state a plausible First Amendment claim under *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

2. Whether the facts alleged in the complaint state a plausible claim that the Secretary of State unlawfully retaliated against petitioner for engaging in protected speech.

PARTIES TO THE PROCEEDING

The petition correctly identifies the parties to the proceeding, *see* Pet. ii, except that respondent Twitter, Inc. has since been merged into "X Corp." and no longer exists. This brief continues to refer to "Twitter" for ease of understanding.

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STATEMENT

1. Twitter is a social media company with more than 300 million monthly active users. Pet. App. 6. It has adopted a set of policies called the Twitter Rules, which govern what its users may post on the platform. *Id.*; *see* C.A. E.R. 312-318.

The Twitter Rules include a "Civic Integrity Policy." Pet. App. 6, 34-35; C.A. E.R. 290-310. That policy informs users that they "may not use Twitter's services for the purpose of manipulating or interfering in elections or other civic processes." Pet. App. 6. It also warns that Twitter may "label or remove false or misleading information intended to undermine public confidence in an election," including "disputed claims that could undermine faith in the process itself, such as unverified information about election rigging, ballot tampering, vote tallying, or certification of election results." C.A. E.R. 291, 302. During the period at issue in this case, Twitter had a "five-strike" enforcement protocol, which provided for sanctions of increasing severity for repeated violations of the Civic Integrity Policy, culminating in permanent suspension of the user's account after the fifth violation. Pet. App. 9-10.

Twitter "created several channels that enabled" third parties "to assist in enforcement of the policy by reporting suspected violations." Pet. App. 7. For instance, any Twitter user could report potential policy violations "by clicking on the 'Report Tweet' icon and selecting the option '[i]t's misleading about a political election or other civic event.'" *Id.*; C.A. E.R. 292-293, 303-304, 309. Twitter also established a "Partner Support Portal," allowing government agencies and certain non-governmental organizations to "flag concerns directly to Twitter," including "technical issues with

[their] account[s] and content on the platform that may violate [Twitter's] policies." C.A. E.R. 473; Pet. App. 7. State election officials nationwide could seek access to the Portal, and officials in at least 38 States sought and obtained access as of August 2020. C.A. E.R. 471; Pet. App. 7.

California's Secretary of State was among those officials. Pet. App. 7. The Office of Elections Cybersecurity (OEC) reports to the Secretary. *Id.* A provision in the state Elections Code charges OEC with coordinating with local officials to prevent "cyber incidents that could interfere with the security or integrity of elections," and with "monitor[ing] and counteract[ing] false or misleading information regarding the electoral process that is published online or on other platforms and that may suppress voter participation or" interfere with "the orderly and secure administration of elections." Cal. Elec. Code § 10.5(b)(1), (2); Pet. App. 108. But that provision does not create any sanctions or vest any government official with enforcement authority over private parties. *See* Cal. Elec. Code § 10.5; Pet. App. 28, 30.

2. Petitioner Rogan O'Handley is an attorney and political commentator. Pet. App. 128-129. He posts on social media, including on Twitter, under the name "DC_Draino." *Id.* at 128. On November 12, 2020, petitioner posted the following tweet:

> Audit every California ballot
>
> Election fraud is rampant nationwide and we all know California is one of the culprits
>
> Do it to protect the integrity of that state's elections

Id. at 131.

On November 17, an employee of the Secretary of State sent a message to Twitter about petitioner's tweet. Pet. App. 132. The message stated:

> Hi, [w]e wanted to flag this Twitter post . . . [f]rom user @DC_Draino. In this post user claims California of being a culprit of voter fraud, and ignores the fact that we do audit votes. This is a blatant disregard to how our voting process works and creates disinformation and distrust among the general public.

Id.; C.A. E.R. 449. "Twitter subsequently appended commentary asserting that [petitioner's] claim about election fraud was disputed" and "added a 'strike'" to his account. Pet. App. 132-133. Petitioner alleges that Twitter "had never before suspended [his] account or given him any strikes." *Id.* at 133. Other than the November 17 message, the complaint does not allege any communications between the Secretary of State and Twitter about petitioner, his account, or his tweets.

In January and February 2021, petitioner accrued four additional strikes "in response to his repeated posts insinuating that the 2020 presidential election had been rigged." Pet. App. 10, 134-137. For example, Twitter issued petitioner a strike for a January 21 tweet stating: "We are captives under a government we didn't elect [¶] It was forced upon us [¶] That is by definition a dictatorship." *Id.* at 135. After petitioner's fifth strike, Twitter informed petitioner that his account "ha[d] been suspended for violating the Twitter Rules. Specifically, for: Violating our rules about election integrity." *Id.* at 138.

Petitioner filed this suit in June 2021. Pet. App. 111. While the proceedings in the lower courts were ongoing, Twitter was acquired by X Holdings I, Inc., a company owned and controlled by Elon Musk. In November 2022, Musk announced that Twitter would reinstate certain accounts that had previously been suspended for violating Twitter's content-moderation policies.[1] Twitter restored petitioner's account in December 2022. Pet. App. 25.

3. Petitioner's complaint named Twitter and the current California Secretary of State as defendants (among others) and advanced a variety of claims. Pet. App. 116-118, 141-151. As to the First Amendment, the complaint alleged that the defendants "jointly acted in concert to abridge [his] freedom of speech" and "acted with the intent to retaliate against" him. *Id.* at 142. Petitioner sought damages, a declaratory judgment, and "entry of a [p]ermanent [i]njunction stating that the Secretary of State and the OEC may not censor speech." *Id.* at 151-152.

The district court dismissed petitioner's complaint with prejudice. Pet. App. 104. The court first dismissed the federal constitutional claims against Twitter, reasoning that petitioner had not plausibly alleged that Twitter's interactions with the OEC transformed Twitter into a state actor. *Id.* at 50-63. Next, the court held that petitioner lacked standing to pursue claims against the state defendants because the causal link between "Twitter's decision to suspend [petitioner's] account" and "the State's flagging of a single . . . post three months earlier" was "tenuous."

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[1] *See Elon Musk says Twitter to provide 'amnesty' to some suspended accounts starting next week*, Reuters, Nov. 24, 2022, https://tinyurl.com/ycxwy78c.

Id. at 76. The court also determined that Twitter's actions were not "fairly attributable to" the State, *id.* at 78-79; that the state defendants named in their personal capacities were entitled to qualified immunity, *id.* at 84; and that the Eleventh Amendment barred any claim against the Secretary of State for damages, *id.* at 73 n.19.

4. Petitioner appealed only the dismissal of his claims against Twitter and the Secretary of State. Pet. App. 11. The court of appeals affirmed in a unanimous opinion written by Judge Watford. *Id.* at 5-31.

a. Applying the framework established in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), the court of appeals held that Twitter was not a state actor. Pet. App. 11-23. That framework first considers whether the alleged constitutional violation was caused by "the exercise of some right or privilege created by the State." *Lugar*, 457 U.S. at 937. Here, the court held that Twitter "did not exercise a state-created right when it limited access to [petitioner's] posts or suspended his account." Pet. App. 12.

"[F]or the sake of completeness," Pet. App. 14, the court of appeals also addressed the second part of the *Lugar* framework, which asks whether "the party charged with the deprivation [is] a person who may fairly be said to be a state actor." *Lugar*, 457 U.S. at 937. The court of appeals held that petitioner had failed to allege facts to satisfy that inquiry, either on the theory that there was a sufficient "nexus" between Twitter and the State, or on the theory that they had engaged in "joint action." Pet. App. 15; *see id.* at 15-23; *Lugar*, 457 U.S. at 939.

In reaching those conclusions, the court noted that petitioner "ha[d] not alleged facts plausibly suggesting

that the OEC pressured Twitter into taking any action against him." Pet. App. 18. Petitioner "ha[d] alleged that an OEC official flagged one of his tweets and, at most, requested that Twitter remove the post"—a request that "Twitter was free to ignore." *Id.* at 16. While encouragement may include the "use of positive incentives [that] can overwhelm the private party and essentially compel the party to act in a certain way," the OEC "[had] offered Twitter no incentive for taking down the post that it flagged." *Id.* "Even construing the facts alleged in the light most favorable to [petitioner], the OEC did nothing more than make a request with no strings attached." *Id.*

b. Turning to the First Amendment claim against the Secretary of State, the court of appeals began by holding that petitioner had established "standing to seek injunctive relief against Secretary Weber." Pet. App. 23. It reasoned that petitioner "suffered a concrete injury when Twitter limited other users' ability to access his posts and then later suspended his account." *Id.* at 24. It was "less obvious whether those injuries are traceable to the Secretary of State's conduct"—given "the distance between Secretary Weber's actions and [petitioner's] alleged injuries"—or "whether a court c[ould] provide effective injunctive relief" to redress those injuries. *Id.* But the court nevertheless held those requirements of the standing inquiry to be satisfied at that stage of the proceedings. *See id.* at 24-25.

Proceeding to the merits, the court held that the complaint failed to state a claim. Pet. App. 27-29. In the court's view, petitioner "assert[ed] two theories supporting his First Amendment claim" against the Secretary. *Id.* at 27. The first, which rested on *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), alleged

"that the OEC abridged his freedom of speech when the agency pressured Twitter to remove disfavored content." *Id.* In *Bantam Books* and subsequent cases, courts have "draw[n] a line between coercion and persuasion: The former is unconstitutional intimidation while the latter is permissible government speech." *Id.* Here, the court recognized that "the complaint's allegations do not plausibly support an inference that the OEC coerced Twitter into taking action against O'Handley." Pet. App. 28; *see also id.* at 15-18. The court rejected petitioner's argument that "intimidation is implicit when an agency with regulatory authority requests that a private party take a particular action." *Id.* at 28. It explained that "the OEC's mandate gives it no enforcement power over Twitter"; in any event, "the existence or absence of direct regulatory authority is not necessarily dispositive." *Id.* (internal quotation marks omitted).

Petitioner's second theory "alleg[ed] that the OEC engaged in impermissible retaliation against his protected political expression." Pet. App. 27. To state such a claim, a plaintiff must allege (among other things) that "he was subjected to adverse action . . . that would chill a person of ordinary firmness from continuing to engage in the protected activity." *Id.* at 28. The court recognized that adverse actions are typically "exercises of governmental power that are regulatory, proscriptive, or compulsory in nature." *Id.* at 29. A message from a government employee "[f]lagging a post that potentially violates a private company's content-moderation policy does not fit this mold." *Id.* While the Secretary of State's office responded to "what it saw as misinformation about the 2020 election by sharing its views directly with Twitter rather than by speaking out in public," that choice

did not "dilute its speech rights or transform permissible government speech into problematic adverse action." Pet. App. 29.

ARGUMENT

The court of appeals correctly held that petitioner's complaint did not state a plausible First Amendment claim. The gravamen of the complaint is that an employee of the Secretary of State sent a message alerting Twitter that one of petitioner's tweets violated Twitter's own policies. Neither that message nor any of the other allegations in the complaint comes close to establishing the type of government coercion necessary to state a claim under *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). Contrary to petitioner's characterization, the decision below did not decide any broad issues about the government speech doctrine that would warrant consideration by this Court. And intervening developments—including recent content-moderation policy changes at Twitter and the restoration of petitioner's Twitter account—raise threshold questions that would at a minimum complicate plenary review.

1. Petitioner first contends that the Secretary of State violated the First Amendment by coercing Twitter into removing his protected speech. *See* Pet. 16-19. The court of appeals correctly applied this Court's precedent in rejecting that claim. None of the out-of-circuit cases discussed in the petition establishes any genuine conflict with the decision below over the governing legal standard. And there is no need to hold this case for any pending petition presenting similar issues—because, as the Fifth Circuit recently indicated, the outcome of *this* case should remain the same regardless of how the Court disposes of those matters.

a. In *Bantam Books,* a state commission sent notices directing book distributors to stop selling to minors certain publications that the Commission had declared to be objectionable. 372 U.S. at 61. The notices typically reminded distributors of the Commission's duty to "recommend to the Attorney General prosecution of purveyors of obscenity" and "either solicited or thanked" the distributors, "in advance, for [their] 'cooperation' with the Commission." *Id.* at 62. The notices also informed distributors that lists of the objectionable publications had been circulated to local police departments; police officers usually followed up with the distributors shortly after receipt of the notices to determine whether the distributors had complied. *Id.* at 62-63.

This Court held that those "informal sanctions"—specifically "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation"—went "far beyond advising the distributors of their legal rights and liabilities" and violated the First Amendment. *Bantam Books*, 372 U.S. at 67, 71-72. While the distributors were nominally "'free' to ignore the Commission's notices, in the sense that [their] refusal to 'cooperate' would have violated no law," it was apparent that "compliance with the Commission's directives was not voluntary." *Id.* at 68; *see also id.* ("People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around.").

Petitioner's allegations are not remotely similar to the facts in *Bantam Books.* While *Bantam Books* involved official conduct that was impermissibly coercive, petitioner does not allege that the Secretary of State or her employees engaged in any threatening

conduct at all. Petitioner instead alleges that an employee in the Secretary of State's office contacted Twitter about his tweet, and expressed the view that the tweet contained incorrect information about California's election administration. Pet. App. 132. There is "no intimation" in the complaint that the November 17 message—or any other action by the Secretary of State—suggested that "Twitter would suffer adverse consequences if it refused the request" or that Twitter would "receive benefits if it complied." *Id.* at 18. Petitioner's allegations are thus a far cry from the "thinly veiled threats" in *Bantam Books,* which were "phrased virtually as orders" and "invariably followed up by police visitations." 372 U.S. at 68.

It is not surprising that the complaint fails to allege facts establishing coercion (or even to use the word "coercion"): The complaint and petitioner's district court briefing were focused on an alleged conspiracy between Twitter and the state defendants. *E.g.*, Pet. App. 140. Petitioner did not cite *Bantam Books* or advance a coercion theory in any of his district court filings. Even on appeal, petitioner did not cite *Bantam Books* in his opening brief, and his reply brief contended that "[w]hether the State . . . threatened to coerce Twitter is irrelevant," before arguing in the alternative that his allegations could create a "reasonable inference" of "implicit[]" coercion. C.A. Dkt. 54 at 15, 16.

b. Petitioner contends that the decision below is "contrary to decisions in other courts of appeals" applying *Bantam Books*. Pet. 20. But none of the other cases cited in the petition creates a genuine conflict.

Like the decision below, the cases cited by petitioner examine all of the relevant circumstances in a particular case to distinguish "official coercion" from

"permissible attempt[s] at mere persuasion." *Backpage.com v. Dart*, 807 F.3d 229, 237-238 (7th Cir. 2015), *cert. denied*, 137 S. Ct. 46 (2016); *see id.* at 230-237; *VDARE Found. v. City of Colo. Springs*, 11 F.4th 1151, 1161-1168 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 1208 (2022); *Okwedy v. Molinari*, 333 F.3d 339, 344-345 (2d Cir. 2003) (per curiam), *cert. denied*, 549 U.S. 1206 (2007); *R.C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85, 88-89 (3d Cir. 1984); *Hammerhead Enter., Inc. v. Brezenoff*, 707 F.2d 33, 38-40 (2d. Cir. 1983).

None of the cited cases holding that the government engaged in impermissible coercion featured facts comparable to those alleged here. In *Okwedy*, for example, a local official sent a letter to a media company that had contracted with plaintiffs to post billboards denouncing homosexuality in neighborhoods with large gay populations. He "invoked his official authority as 'Borough President of Staten Island'"; emphasized that the company "owns a number of billboards on Staten Island and derives substantial economic benefits from them"; and "call[ed] on" the company to meet with "[his] legal counsel." *Id.* at 341, 342. Like the decision below in this case, the Second Circuit recognized "the distinction between attempts to convince and attempts to coerce." *Id.* at 344. On the facts in *Okwedy*, it held that a jury could reasonably conclude that the "letter contained an implicit threat" of economic retaliation if the media company "did not respond positively to his entreaties." *Id.* at 344; *see also Rattner v. Netburn*, 930 F.2d 204, 210 (2d Cir. 1991) (village trustee's statements could be reasonably interpreted as including a "veiled threat of boycott or reprisal").

The Seventh Circuit's decision in *Backpage* also involved facts establishing impermissible coercion. A sheriff wrote to credit card companies, requesting that the companies "immediately cease and desist" ties with a website that hosted adult advertisements. 807 F.3d at 231. The sheriff's letter "intimated" that the companies "may be criminal accomplices" of the website and "could be prosecuted for processing payments made by purchasers of the ads." *Id.* 232; *see also id.* at 231 (letter also implied that the sheriff was "organizing a boycott"). In holding that these "dire threats" constituted impermissible coercion under *Bantam Books*, *id.* at 235, the court contrasted the sheriff's letter with a hypothetical and "more temperate" letter, sent "by a person who was not a law-enforcement officer," that did not "contain[] legal threats," *id.* at 233. The November 17 message to Twitter resembles the "temperate" letter that the Seventh Circuit implied would be constitutional—not the threatening letter that it held to be unconstitutional.

On facts more similar to those at issue here, where there was no "actual or threatened imposition of governmental power or sanction," other circuits have rejected claims invoking *Bantam Books*. *E.g.*, *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1015 (D.C. Cir. 1991); *see also VDARE Found.*, 11 F.4th at 1164 (affirming dismissal of First Amendment claim where "nothing in the City's [s]tatement plausibly threaten[ed] [the intermediary] with legal sanctions"); *R.C. Maxwell*, 735 F.2d at 89 (letter that expressed "distaste" for large billboards, and that noted potential future regulation, but was "devoid . . . of any enforceable threats," was not coercive); *Hammerhead*, 707 F.2d at 38-40 (letter that made a "well-reasoned and sincere entreaty" to stores to refrain from carrying a board game satirizing public assistance programs, and

that "refer[red] to no adverse consequences" was not coercive).

Indeed, it appears that petitioner's real concern is not with the court of appeals' understanding of *Bantam Books*, but with its application of the "motion-to-dismiss ground rules" to the particular factual allegations in his complaint. Pet. 17 (citing *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993)); *see id.* at 17-18, 23. But petitioner is incorrect that the court of appeals "ignored" (*id.* at 17) his allegations. None of petitioners' allegations asserts that the Secretary of State threatened any adverse consequence if Twitter took no action in response to the November 17 message.[2] The court of appeals properly considered that omission in performing its gatekeeping function under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 545 (2007). *See* Pet. App. 18, 28. And petitioner's contention that the court of appeals erred in applying settled pleading standards would not be a compelling basis for plenary review in any event. *See* S. Ct. R. 10.

c. Petitioner also contends that "this petition should be held for" the pending petition in *National Rifle Association v. Vullo*, No. 22-842, "if the Court grants that case." Pet. 12. But there would be no need

[2] In this Court, petitioner invokes for the first time a recently enacted state law (AB 587) that he describes as a tool for "punish[ing]" social media companies "for not censoring speech that the California government does not like." Pet. 4-5. That is not a fair description of the law: it merely requires companies to disclose certain information about their terms of service and content moderation activities on a semi-annual basis; the Secretary has no authority to enforce it. *See* Cal. Bus. & Prof. Code §§ 22676, 22677, 22678(3)(b), (c). And that law cannot affect petitioner's arguments here in any event, since it was enacted after the district court dismissed petitioner's complaint.

for a hold even in the event that the Court granted plenary review in *Vullo*. In petitioner's telling, the court of appeals' decision in this case relied heavily on the Second Circuit's analysis in *Vullo*. *See id.* at 9-10, 19-20. In fact, the decision below cited *Vullo* just once, as a "*see, e.g.*," authority for the proposition that, even assuming the Secretary of State had "enforcement power" over Twitter, "[a]gencies are permitted to communicate in a non-threatening manner with the entities they oversee without creating a constitutional violation." Pet. App. 28. That is not a groundbreaking proposition—it has been settled since the day this Court decided *Bantam Books*. *See* 372 U.S. at 71-72 ("[W]e do not mean to suggest that private consultation between law enforcement officers and distributors prior to the institution of a judicial proceeding can never be constitutionally permissible").

And because the facts alleged in *Vullo* are materially different from those alleged by petitioner here, any further proceedings in *Vullo* should not affect the outcome of this case. The complaint in *Vullo* alleges impermissible coercion under *Bantam Books* based on conduct and statements by a state official with direct "regulatory authority over the target audience." *Nat'l Rifle Ass'n v. Vullo*, 49 F.4th 700, 717 (2d. Cir. 2022). The official allegedly released multiple guidance letters and a press statement urging banks and insurance companies "to consider the risks . . . that might arise from doing business" with certain advocacy organizations, and asking the "companies to 'join' other companies that had discontinued their associations" with such organizations. *Id.* at 706. The complaint also alleged that, in meetings with a regulated insurer, the official discussed an array of legal infractions by the insurer but emphasized that she "was less interested in pursuing the infractions of which she

spoke, so long as [the insurer] ceased providing insurance to gun groups, especially the NRA." *Id.* at 718 (internal quotation marks omitted). Whatever the constitutional implications of those allegations, the complaint here does not allege anything similar.[3]

d. Finally, the recent decision in *Missouri v. Biden*, No. 23-30445, 2023 WL 5821788 (5th Cir. Sept. 8, 2023), which the Fifth Circuit handed down after this petition was filed, does not weigh against denying this petition.

The Fifth Circuit affirmed (in part) an unprecedented preliminary injunction that would restrict officials at the White House, the Office of the Surgeon General, the CDC, and the FBI in their conduct and communications with and about social-media platforms. *Missouri*, 2023 WL 5821788, at *31-33. The State of California joined an amicus brief in that case supporting the federal defendants. *See* Br. for States of New York *et al.*, *Missouri v. Biden*, No. 23-30445 (5th Cir. July 28, 2023). And the federal government recently filed an emergency application seeking a stay of the injunction pending its forthcoming petition for a writ of certiorari. *See* Appl. for Stay of Inj., *Murthy*

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[3] The other pending matters discussed by petitioner (Pet. 11-13, 32) present "[d]istinct" questions (*id.* at 32), which also should not affect the outcome of this case. *See O'Connor-Ratcliff v. Garnier*, No. 22-324 (cert. granted Apr. 24, 2023) (whether public officials engaged in state action by blocking other individuals from accessing their social media accounts); *Lindke v. Freed*, No. 22-611 (cert. granted Apr. 24, 2023) (same); *Moody v. NetChoice*, No. 22-277, 143 S. Ct. 744 (2023) (calling for the views of the United States Solicitor General about the constitutionality of state statute barring social media companies from making certain content-moderation decisions and requiring disclosure of information about those decisions); *NetChoice v. Paxton*, No. 22-555, 143 S. Ct. 744 (2023) (same).

v. Missouri, No. 23A243 (Sept. 14, 2023) (*Murthy* Appl.)

Although that application characterizes the Fifth Circuit's decision as "conflict[ing] with the decision[]" of the Ninth Circuit in this case, *Murthy* Appl. at 15, neither the *Missouri* decision nor the prospect of further proceedings in that case provides a persuasive basis for granting or holding this petition. As the federal government acknowledges, "at a high level of generality," the legal standards identified by the Fifth Circuit "align . . . with its sister circuits." *Id.* *Compare, e.g.*, *Missouri*, 2023 WL 5821788, at *15 (addressing the need to "distinguish[] coercion from persuasion"), *with* Pet. App. 27 (discussing the constitutional "line between coercion and persuasion"). To the extent that the Fifth Circuit's explication or application of those standards "is irreconcilable with" how other circuits have analyzed similar issues, *Murthy* Appl. 16, that is a reason for this Court to conduct plenary review of the Fifth Circuit's outlier decision—not this one.

And even if the Fifth Circuit's view of the law were adopted by this Court, it would not produce a different outcome in this case. The Fifth Circuit closely reviewed the factual allegations in *O'Handley*. *See Missouri*, 2023 WL 5821788, at *22. It "contrast[ed]" the allegations here with the facts it perceived in *Missouri*. *Id.* And it concluded—just like the Ninth Circuit did—that the official conduct in this case "was 'far from the type of coercion' seen in cases like *Bantam Books*." *Id.*; *see id.* at *23 (California officials were "simply flagging posts with 'no strings attached'"). Under these circumstances, there would be no benefit to holding this petition pending further proceedings in *Missouri*.

2. Petitioner next asks the Court to grant certiorari to address the contours of the "government speech doctrine," arguing that the decision below "dramatically expanded" the scope of that doctrine. Pet. 25. Petitioner characterizes the decision as adopting an "unbounded" rule—"agnostic to where or how or why the government is speaking"—that makes "'government speech in the literal sense' exempt from First Amendment scrutiny." *Id.* at 27 (quoting *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1599 (2022) (Alito, J., concurring)); *see also id.* at 2 (arguing that the court of appeals declared a "'First Amendment free' zone of government speech"). That argument badly misunderstands the court of appeals' analysis.

The court of appeals did not hold that the November 17 message was "immun[e]" from First Amendment scrutiny, Pet. 27, as "protected government speech," *id.* at 2 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009)). Instead, the court *applied* First Amendment scrutiny. It first assessed petitioner's complaint under the standard governing *Bantam Books* claims. Pet. App. 27-28. Only after concluding that the complaint contained no allegations of coercion did the court hold that the November 17 message represented "permissible government speech" and not "unconstitutional intimidation." *Id.* at 27.

The court of appeals next turned to petitioners' retaliation claim. Pet. App. 28-29. Contrary to petitioner's assertion, the court did not hold that "state officials' speech . . . was protected 'government speech' and thus could not be the basis for a First Amendment retaliation claim." Pet. 25. Instead, it applied a three-part test, examining whether the complaint ade-

quately alleged that: petitioner "engaged in constitutionally protected activity"; "as a result, he was subjected to adverse action by" respondents; and "there was a substantial causal relationship between the constitutionally protected activity and the adverse action." Pet. App. 28; *see Hous. Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1260 (2022) (describing similar inquiry).

Ultimately, the court of appeals concluded that the complaint failed to state a retaliation claim because there were no allegations plausibly suggesting an "adverse action." Pet. App. 29. As the court recognized, adverse actions are typically "exercises of governmental power that are regulatory, proscriptive, or compulsory in nature and have the effect of punishing someone for his or her speech." *Id.*; *cf. Laird v. Tatum*, 408 U.S. 1, 11 (1972). And "[f]lagging a post that potentially violates a private company's content-moderation policy does not fit this mold," but instead is "a form of government speech." Pet. App. 29. That reference to "government speech" represents the conclusion of the court's First Amendment analysis, not its starting point: only after scrutinizing the complaint and finding no plausible allegation of an adverse action did the court hold that the November 17 message "could not be the basis for a First Amendment retaliation claim." Pet. 25.

Petitioner takes issue with the court of appeals' closing observation that the decision of the Secretary of State's staff to "shar[e] its views directly with Twitter rather than speaking out in public" did not "dilute its speech rights or transform permissible government speech into problematic adverse action." Pet. App. 29; *see* Pet. 26-27. But that statement only reflects that the nonpublic nature of the November 17 message to

Twitter did not (without more) establish an "adverse action." Petitioner's assertion that the court of appeals created "a license to go behind closed doors to discriminate on the basis of viewpoint" (Pet. 30) cannot be squared with what the court actually held. *See* Pet. App. 28-29.

3. Petitioner also asserts that this case would be "an excellent vehicle." Pet. 33. That is incorrect. Even setting aside the highly case-specific nature of petitioners' First Amendment claims, he fails to grapple with changes in the factual circumstances since he filed this suit that would render it a particularly unsuitable vehicle for further merits review.

Petitioner's central grievance in this case concerns Twitter's decisions to limit access to his tweets and to suspend his account. His complaint asserts that "Twitter's ban" caused a "direct and detrimental impact" on his "ability to make a living" because he "lost his platform to communicate with his followers." Pet. App. 139. Although he originally sought damages, *see id.* at 152, he is no longer seeking review of the dismissal of his claims against Twitter, *see* Pet. 34; he did not appeal the district court's ruling that the individual state defendants were entitled to qualified immunity, *see* Pet. App. 11; and he conceded below that the Eleventh Amendment bars any damages claim against the Secretary of State, *see id.* at 73 n.19. So the only remedy that petitioner continues to seek is for injunctive relief. Pet. 8.

Since petitioner filed his complaint, however, Twitter was purchased by a new owner who describes himself as a "free-speech absolutist."[4] He explained that

[4] @elonmusk, Twitter (Mar. 4, 2022, 9:15 PM), https://tinyurl.com/mr2nmzxc.

he took Twitter private to obviate pressure on the company "from advertisers and shareholders" to take down content "that is potentially offensive . . . or could be deemed abusive."[5] After the acquisition, Twitter restored the accounts of "users that previously had been banned for posting hate speech, inciting violence or engaging in other behavior that violated its policies."[6] Twitter has also removed the five-strike enforcement protocol from its publicly-facing "Civic Integrity Policy" webpage and has reported that it no longer intends to enforce the policy for claims about the 2020 election.[7]

As to petitioner, Twitter restored his account in December 2022. Pet. App. 25. Petitioner has been actively tweeting to his one million followers ever since, often multiple times a day.[8] His tweets address a range of controversial topics, from the 2020 election to characterizations of the current President as a "child

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[5] Rodriguez et al., *Elon Musk Contends Censorship, Not Abuse, Is Twitter's Problem*, Wall Street J., Apr. 15, 2022, https://tinyurl.com/2s49a2up.

[6] De Avila et al., *Twitter Under Elon Musk Abandons Covid-19 Misinformation Policy*, Wall Street J., Nov. 29, 2022, https://tinyurl.com/3jym5kua.

[7] *Compare* X Corp, *Civic integrity policy*, https://help.twitter.com/en/rules-and-policies/election-integrity-policy (last visited Sept. 25, 2023) *with* C.A. E.R. 293-294; *see also* Dale, *Twitter says it has quit taking action against lies about the 2020 election*, CNN, Jan. 28, 2022, https://tinyurl.com/4n7p6ese.

[8] @DC_Draino, Twitter, https://twitter.com/DC_Draino (last visited Sept. 25, 2023).

predator[]."[9] Petitioner identifies no basis for concluding that there is a realistic possibility that Twitter will suspend his account again or limit access to his tweets.

Before it could reach the merits of petitioner's First Amendment claims, this Court would have "to assure [itself] that jurisdiction is proper" under the present circumstances. *Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008). Although the court of appeals rejected the Secretary of State's jurisdictional arguments, *see* Pet. App. 23-25, those arguments and the intervening developments discussed above at least present substantial questions that would complicate review. Among other potential jurisdictional issues, petitioner must establish a threatened injury that is "certainly impending" and not merely "possible." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). An allegation of "past exposure to" the challenged conduct is not independently sufficient to establish standing. *O'Shea v. Littleton*, 414 U.S. 488, 495-496 (1974); *see City of Los Angeles v. Lyons*, 461 U.S. 95, 101-108 (1983). It is not apparent that petitioner could carry his burden under the current circumstances. At a minimum, the lack of any present controversy about petitioner's ability to communicate with his followers over Twitter would make this case a poor vehicle for plenary review.

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[9] @DC_Draino, Twitter, (Aug. 19, 2023, 7:31 PM), https://tinyurl.com/3zw4taeb; *see* @DC_Draino, Twitter, (Aug. 14, 2023 6:31 PM), https://tinyurl.com/umr7pdbr.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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