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 UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TWITTER INC.'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the complaint plausibly alleged a First Amendment violation based on the California Secretary of State's flag of a single Tweet to Twitter.

2. Whether the California Secretary of State's communication identifying a Tweet as potential misinformation constitutes permissible government speech.

CORPORATE DISCLOSURE STATEMENT

X Corp. is the successor in interest to named respondent Twitter, Inc. Twitter, Inc., has been merged into X. Corp and no longer exists. X Corp. is a privately held corporation. Its parent corporation is X Holdings Corp. No publicly traded corporation owns 10% or more of the stock of X Corp. or X Holdings Corp.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND RULES

OTHER AUTHORITIES

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INTRODUCTION

This petition seeks review of the Ninth Circuit's straightforward application of settled law to a narrow set of alleged facts: Whether California's decision to "flag" a single Tweet to Twitter without any accompanying threat or other form of intimidation violated the First Amendment in light of Twitter's decision to suspend the underlying account months later. Pet. App. 27-29.[1]

[1] As indicated above (p. ii), Twitter, Inc. has been merged into X Corp. and no longer exists. For the convenience of the Court

O'Handley's petition is even narrower than the Ninth Circuit's decision. He seeks review regarding his First Amendment claim against the state, not Twitter, *see* Pet. 34, and challenges only the court's application of the coercion theory of state action, not its application of significant-encouragement or joint-action theories, *see* Pet. 13-25. He even implicitly concedes that the Ninth Circuit identified the correct legal standard for coercion, *compare* Pet. 2 (relying on *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963)), *with* Pet. App. 27 (same).

The Ninth Circuit's decision below on that narrow issue applied this Court's ruling in *Bantam Books*, which indicates that not all "private consultation" or "informal contacts" from the government regarding the distribution of certain content violates the First Amendment. 372 U.S. at 71-72. The Ninth Circuit correctly construed "*Bantam Books* and its progeny" to hold that governmental coercion is barred by the Constitution. Pet. App. 27. But the Ninth Circuit held that O'Handley's allegations did not "plausibly support an inference that the OEC coerced Twitter into taking action against O'Handley" because OEC's communication to Twitter regarding O'Handley's account was, based on the relevant context, "non-threatening." Pet. App. 27-28. The other circuit court decisions O'Handley identifies in an attempt to manufacture a split all apply the same legal standard for coercion. And they have all applied that rule to reach the same conclusion—against any finding of coercion—when reviewing facts analo-

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and consistency with the opinions in this case, however, respondent X Corp. will continue to refer to the corporate entity and the platform as "Twitter."

gous to those alleged here. There is thus no division of authority that would warrant this Court's review, only the consistent application of an established legal rule to varying facts.

Even if the petition presented a question worthy of review, this case would be the wrong vehicle to address it. O'Handley lacks standing to maintain his only remaining challenge because he seeks *prospective* equitable relief, *see* Pet. App. 151, but O'Handley's alleged injury stems from the state's single, *past* report to Twitter, prior to its acquisition by new management.

Finally, this Court should not hold this petition for either *National Rifle Association of America* v. *Vullo*, 49 F.4th 700 (2d Cir. 2022), or *Missouri* v. *Biden*, __ F.4th __, 2023 WL 5821788 (5th Cir. Sept. 8, 2023), because resolution of the questions presented in those cases would not affect the outcome of this case. As *Missouri* explained in discussing O'Handley's facts, regardless of how coercion is measured, merely "flagg[ing] content" "falls on the 'attempts to convince,' not attempts to coerce,' side of the line" where, as here, they contain no "threats of adverse consequences." 2023 WL 5821788, at *27. If the Court does hold this petition, however, any subsequent remand should be limited only to O'Handley's First Amendment claim against the state as that is the only claim raised in the petition. *See* Pet. 34. Because O'Handley has not sought review of the Ninth Circuit's holdings with respect to Twitter, those determinations are final and may not be included within the scope of any remand.[2]

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[2] Though the petition does not challenge the Ninth Circuit's decision affirming dismissal of all claims against Twitter, Twitter nonetheless retains an interest in its resolution because

STATEMENT

A. The Twitter Platform

Twitter operates a global communications platform that allows hundreds of millions of people to share views and follow current events. Pet. App. 6. At the time of the events giving rise to this lawsuit, the company had adopted and enforced a set of policies, called the Twitter Rules, governing what its users could post on the platform. One such rule was the Civic Integrity Policy, which prohibited using "Twitter's services for the purpose of manipulating or interfering in elections or other civic processes." *Id.* The Civic Integrity Policy warned users that Twitter would remove posts that violated the policy's terms, and that users would be suspended if they repeatedly violated the policy. Pet. App. 6-7. Twitter created several channels that enabled users, non-profits, and government actors to assist in enforcement of the policy by reporting suspected violations. Pet. App. 7.

One such channel was the Partner Support Portal. Pet. App. 7. The Portal provided an expedited channel for local and state election officials to flag concerns directly to Twitter, including content that may violate Twitter's policies. *Id.* Twitter granted access to the Portal to election officials from at least 38 states, including the California Secretary of State. Twitter reviewed reports it received through the Portal, individually determining that some reported Tweets violated

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O'Handley's challenge to the resolution of the First Amendment claim against the state could implicate the reasoning underlying the panel's similar resolution of the claim against Twitter.

its rules and that others did not. *Id.* Twitter sometimes labeled or removed the reported content, and sometimes declined to take any enforcement action against the reported content. Pet. App. 37; ER 450-454 (Complaint, Ex. 9).

B. Twitter's Content Moderation Actions Towards O'Handley

Petitioner Rogan O'Handley is an attorney and political commentator who operates a Twitter account. Pet. App. 8. Over the course of several months following the November 2020 federal election, he posted Tweets regarding California's processing of ballots that Twitter determined violated its Civic Integrity Policy. Pet. App. 8-9. O'Handley's first relevant Tweet was posted on November 12, 2020, shortly after the election, stating: "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." Pet. App. 8; Pet. App. 131. Twitter added a label to this Tweet by displaying text immediately below stating that the Tweet's claim about election fraud is "disputed." Pet. App. 9.

In January 2021, in the aftermath of the January 6 attack on the U.S. Capitol, Twitter "aggressively increase[d] … enforcement action" against "misleading and false information surrounding the 2020 US presidential election." Pet. App. 9. As part of this approach, Twitter instituted a five-strike protocol under which it imposed escalating sanctions for each subsequent violation of its Civic Integrity Policy. Pet. App. 9-10. If a user received five strikes, Twitter permanently suspended the user's account. Pet. App. 10. Pursuant to this new protocol, Twitter issued four more strikes against O'Handley in early 2021 in response to Tweets

claiming the 2020 presidential election had been rigged. Pet. App. 9-10. After the fifth strike, Twitter suspended O'Handley's account on February 22, 2021. Pet. App. 10.

While this case was pending before the Ninth Circuit, Twitter was acquired by X Holdings I, Inc., a corporation majority-owned and controlled by Elon Musk. Twitter has since made significant changes to its policies following Mr. Musk's acquisition, including creating a general amnesty program to reinstate certain previously suspended accounts. Elon Musk (@elonmusk), Twitter (Nov. 24, 2022, 2:58 PM), https://twitter.com/elonmusk/status/1595869526469533701. Pursuant to that program, Twitter reinstated O'Handley's account in December 2022. Pet. App. 25.

C. O'Handley's Allegations Concerning California Election Officials

In 2018, California formed the Office of Elections Cybersecurity (OEC) within the Secretary of State's office "[t]o monitor and counteract false or misleading information regarding the electoral process that is published online or on other platforms and that may suppress voter participation or cause confusion and disruption of the orderly and secure administration of elections." Cal. Elec. Code § 10.5(b)(2). During the 2020 election, the OEC communicated with social media companies, including Twitter, by flagging potentially erroneous or misleading posts regarding elections. Pet. App. 7-8.

On November 17, 2020, nearly three months before Twitter permanently suspended O'Handley's account, OEC allegedly sent Twitter through the Portal the following message regarding his November 2020 Tweet:

> Hi, We wanted to flag this Twitter post: https://twitter.com/DC_Draino/status/1237073866578096129 from user @DC_Draino. In this post user claims California [sic] 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.

Pet. App. 9. The complaint does not allege that Twitter replied to this message. *Id.* Nor does it allege that OEC communicated with Twitter about O'Handley on any other occasion—much less about any of his other, months-later Tweets that allegedly led Twitter to impose his second through fifth strikes and ultimately suspend his account permanently. *Id.*

D. Procedural History

O'Handley filed this lawsuit in June 2021, alleging, among other things, that the Secretary of State and Twitter violated the First Amendment when Twitter suspended O'Handley's account months after the state's identification of one of his Tweets as potentially violating Twitter's policies. Pet. App. 141, 151. Specifically, the complaint relied on a theory of joint action—i.e., that Twitter conspired with the state defendants to violate his First Amendment rights. Pet. App. 140 (Complaint ¶¶99, 101-123). O'Handley's complaint sought injunctive relief against the state defendants barring them from "censor[ing] speech," and damages against all Defendants. Pet. App. 151-152.

All defendants moved to dismiss the complaint. Regarding state action, O'Handley argued only that

Twitter's content-moderation decisions could be attributed to the state "by virtue of the joint action and nexus [state-action] tests." Pet. App. 78. O'Handley did not rely on any coercion theory of state action in opposing dismissal.

The district court dismissed all claims against both Twitter and the state. As to Twitter, it concluded that the state's single communication did not evince joint action, conspiracy, or an unconstitutional "nexus" between state officials and Twitter. Therefore, Twitter could not be deemed a state actor subject to constitutional liability. Pet. App. 50-63. As to the state officials, the district court held that O'Handley lacked standing to pursue his claims because Twitter's suspension of O'Handley's account was not fairly traceable to the state's one-off report to Twitter. Pet. App. 77-78. The court also concluded that O'Handley failed to state a First Amendment claim against state officials because, as with Twitter, the complaint failed to plausibly allege state action. The district court did not otherwise reach the merits of O'Handley's First Amendment claim.

The court also addressed O'Handley's damages claim against the state officials. With respect to Weber, who was sued in her official capacity, the court noted that O'Handley failed to respond to the State defendants' argument that the Eleventh Amendment bars any claim for damages. Pet. App. 72-73. With respect to the remaining state defendants, sued in their individual capacities, the district court concluded that the doctrine of qualified immunity precludes O'Handley's claim for money damages. Pet. App. 84.

O'Handley appealed. O'Handley again argued that Twitter's suspension of his account was state action

under the joint action and nexus tests. C.A. Appellant's Opening Br. 30-31 (Apr. 25, 2022). As to coercion, O'Handley contended that "whether the State also threatened to coerce Twitter is irrelevant" to his First Amendment claim. C.A. Appellant's Reply Br. 15-16 (Sept. 14, 2022). For the first time on reply, however, O'Handley attempted to repackage his joint action allegations in support of a coercion theory. *See id.* O'Handley did not challenge the district court's conclusions regarding the availability of damages from the state defendants.

The Ninth Circuit affirmed the district court's opinion regarding the merits, but reversed its standing conclusion. The Ninth Circuit first held that Twitter could not be held liable under the First Amendment. O'Handley's conspiracy and joint action theories of state action failed because he had not plausibly alleged "Twitter removed his posts to advance the OEC's purported censorship goals as opposed to Twitter's own mission of not allowing users to leverage its platform to mislead voters." Pet. App. 19.

Regarding the state defendants, the Ninth Circuit reversed the district court holding as to standing, explaining that O'Handley's suspension was fairly traceable to the OEC's report because the complaint alleged that Twitter began imposing disciplinary actions on O'Handley only after that communication. Pet. App. 25. The court also held that the relief O'Handley seeks—a court order prohibiting Weber from censoring speech in the future—could redress his injuries now that Twitter reinstated O'Handley's account in December 2022. *Id.* The court did not consider the distinct question of whether O'Handley had shown he was likely to suffer future injury from the state official's single

flag—a necessary prerequisite for standing to seek prospective injunctive relief.

The Ninth Circuit next analyzed whether the complaint stated a First Amendment claim against the state defendants under coercion and retaliation theories. The coercion theory, the Ninth Circuit observed, rests on *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963), which "draw[s] a line between coercion and persuasion. The former is unconstitutional intimidation while the latter is permissible government speech." Pet. App. 27. Applying that rule, the Ninth Circuit concluded that the state's communication was lawful because it did not threaten any adverse consequence if Twitter chose not to take action against the reported Tweet, but left to Twitter the decision whether and what action to take. Pet. App. 15-23, 27-29. The court dismissed the retaliation theory because the complaint had not alleged the state took an adverse action against O'Handley. O'Handley did not file a petition for rehearing.

REASONS FOR DENYING THE PETITION

The state-action question raised in the petition is neither a question worthy of this Court's review nor even a question that this Court could resolve here given the present posture of the case. The petition should be denied.

First, the petition does not challenge the legal standard applied below, only the conclusion reached under the particular facts alleged. O'Handley agrees that the Ninth Circuit identified and applied the correct legal standard for a claim of government coercion—the standard articulated by this Court in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1962). O'Handley con-

tends only that the Ninth Circuit's application of that standard reached the wrong result. No review is warranted of the Ninth Circuit's fact-bound application of settled law.

Second, and relatedly, the petition does not identify any division of circuit authority, only the consistent application of settled law to different facts. The mere fact that different courts have reached different conclusions on the basis of different alleged facts does not create a division of authority. Because the Ninth Circuit here applied the same standard for establishing state action based on coercion that is applied across the circuits, no review is warranted.

Third, even if the petition presented a question worthy of review, this Court likely would not be able to reach it because there is substantial doubt regarding O'Handley's standing. O'Handley seeks review only of the First Amendment claim against the Secretary of State in her official capacity, and thus the only available relief is declaratory and injunctive relief against the state. To obtain such relief, O'Handley would have needed to allege a realistic threat of future injury from the challenged conduct. Here, that would require plausible allegations of a realistic threat *both* that the state will again report O'Handley's Twitter content to Twitter *and* that Twitter would respond to any such report by suspending O'Handley's account. O'Handley did not plead any such facts.

Finally, this Court should not hold this petition for *National Rifle Association* v. *Vullo*, 49 F.4th 700 (2d Cir. 2022), *Missouri* v. *Biden*, 2023 WL 5821788 (5th Cir. Sept. 8, 2023), or any other case. Even if the Court granted certiorari in those cases and, in so doing, changed the standard applied in identifying unconstitu-

tional coercion, that would not affect the outcome of this case because the complaint alleged only conspiracy and coordination; it did not even attempt to allege any coercion. Only in his reply brief on appeal did O'Handley attempt to shoehorn his allegations into a novel and expansive theory of government coercion: any communication by any state actor with any regulatory authority constitutes coercion, regardless of whether it contains or implies a threat. That unprecedented theory was not adopted by *Vullo*, *Missouri*, or any other court of appeals. This Court's articulation of a coercion standard in those cases would thus not have any effect on O'Handley's claim.

I. THE STATE-ACTION QUESTION PRESENTED IS NOT WORTHY OF CERTIORARI

The petition seeks review of the fact-bound application of settled state-action law, not a legal question worthy of this Court's review. O'Handley does not dispute that the Ninth Circuit applied the proper legal test for identifying governmental coercion. Specifically, the Ninth Circuit held that O'Handley failed to allege a First Amendment violation because OEC's communication to Twitter contained "no intimation that Twitter would suffer adverse consequences if it refused the request." Pet. App. 18; *accord* Pet. App. 27-28 (citing *Bantam Books*). And O'Handley agrees that the test is whether a state actor made a "'threat … invoking legal sanctions.'" Pet. 14 (quoting *Bantam* Books, 372 U.S. at 67).

The petition instead contends that the "Ninth Circuit misapplied *Bantam Books*" to the facts of this case. Pet. 16. While O'Handley claims (Pet. 16-19) that the Ninth Circuit drew the wrong inferences from certain facts and failed to give proper weight to others, this

Court "rarely grant[s] [a petition for *certiorari*] when the asserted error consists of … the misapplication of a properly stated rule of law" to the facts at hand. S. Ct. R. 10; *accord Kyles* v. *Whitley*, 514 U.S. 419, 460 (Scalia, J., dissenting) ("[F]act-specific case[s] in which the court below unquestionably applied the correct rule of law and did not unquestionably err [are] precisely the type of case in which [this Court is] *most* inclined to deny certiorari.") Because this petition "does not quarrel with the legal standard applied" but challenges only the lower court's "factbound" conclusions, there is no question worthy of this Court's review. *Packwood* v. *Senate Select Committee on Ethics*, 510 U.S. 1319, 1321 (1994) (Rehnquist, C.J., in chambers).

II. This Case Does Not Implicate Any Division Of Authority

The circuits are aligned in their approach to distinguishing permissible government speech from conduct that violates the First Amendment on a coercion theory. Lower courts have consistently drawn a line between governmental "attempts to convince," which are permissible, and "attempts to coerce," which are not. *Okwedy* v. *Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (per curiam); *accord, e.g.*, *Kennedy* v. *Warren*, 66 F.4th 1199, 1207 (9th Cir. 2023); *Backpage.com, LLC* v. *Dart*, 807 F.3d 229, 230 (7th Cir. 2015); *R.C. Maxell Co.* v. *Borough of New Hope*, 735 F.2d 85, 89 (3d Cir. 1984). And, consistent with this Court's holding in *Bantam Books*, 372 U.S. at 64, 67, lower courts agree that distinguishing between the two sides of that line "turn[s] on" one key, highly contextual question: whether the state actor's conduct reasonably conveyed a "threat[] to employ coercive state power to stifle protected speech." *See National Rifle Ass'n of Am.* v. *Vullo*, 49

F.4th 700, 714 (2d Cir. 2022), *petition for cert. filed*, No. 22-842 (U.S. Feb. 7, 2023) (quotation marks omitted); *accord*, *e.g.*, *VDARE Found.* v. *City of Colorado Springs*, 11 F.4th 1151, 1164 (10th Cir. 2021); *Penthouse Int'l, Ltd.* v. *Meese*, 939 F.2d 1011, 1015 (D.C. Cir. 1991); *Trotman* v. *Board of Trs. of Lincoln Univ.*, 635 F.2d 216, 228-229 (3d Cir. 1980). *See also Bantam Books*, 372 U.S. at 64, 67 (holding that "threat of prosecution" for continued distribution of books violated First Amendment).[3]

O'Handley's purported circuit "conflict" (Pet. 20-25) is nothing but the consistent application of that settled law to varied facts. O'Handley points primarily (Pet. 20-21) to the Second Circuit's decisions in *Okwedy* and *Rattner* v. *Netburn*, 930 F.2d 204 (2d Cir. 1991), but the Second Circuit in those cases applied precisely the same test as the Ninth Circuit here. Indeed, that O'Handley points (Pet. 19-20) to the Second Circuit's more recent decision in *Vullo* as falling on the Ninth Circuit's side of the purported split *with the Second Circuit* undercuts the petition's premise. The reality is that each case applied the same settled law to distinct facts.

In *Okwedy*, the Second Circuit applied the *Bantam Books* standard, asking whether the defendant government official's conduct could "reasonably be

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[3] The petition seeks review only of the Ninth Circuit's application of the coercion test for state action, *see* Pet. 16-17, and purports to identify a circuit split only with respect to that same test, *see* Pet. 21 (stating that "the line between permissible government speech and impermissible coercion is blurred in the courts of appeals"). O'Handley does not assert any split regarding the joint-action or encouragement tests for state action.

interpreted as intimating that some form of punishment or adverse regulatory action w[ould] follow the failure to accede to the official's request." 333 F.3d at 343 (quotation marks omitted); *accord* Pet. App. 15-16 (government officials may not "threaten adverse action to coerce a private party into performing a particular act"). *Okwedy* reached a different result than the decision below only because of its facts. That case concerned a letter from a Borough president to a media company, on official letterhead, stating that the message displayed on a particular billboard the company owned was "offensive" and "not welcome in our Borough." 333 F.3d at 341-342. The letter concluded by ominously noting that the media company "own[ed] a number of billboards on Staten Island and derive[d] substantial economic benefit from them," and "call[ed] on" the company to contact the Borough President's "legal counsel." *Id.* at 342. The Second Circuit held that dismissal was improper under those particular facts because "a jury could find that [the] letter contained an implicit threat of retaliation" based primarily on the reference to the company's financial interests in its Staten Island billboards. *Id.* at 344.

O'Handley points also to *Rattner*, but there too the Second Circuit simply applied the same *Bantam Books* test to different facts. *Rattner* concerned statements from a village administrator to the local Chamber of Commerce regarding recent publications in the Chamber's newspaper. 930 F.2d at 205-206. The administrator criticized the publications, stated that the publications "raise[d] significant questions and concerns about the objectivity and trust which we are looking for from our business friends," asked for a list of "those members [of the Chamber of Commerce] who supported" the publications, and "stated that he had made a list of

approximately 40 local businesses at which he regularly shopped." *Id.* at 206. The court held on those facts that the statements could be "interpret[ed] as intimating that some form of punishment or adverse regulatory action w[ould] follow" if the paper continued to run the publications at issue, including a boycott of local businesses supporting the publications. *Id.* at 209.

Contrary to O'Handley's suggestion (Pet. 21), the fact that the Second Circuit in both *Okwedy* and *Rattner* faulted the district courts for failing to draw inferences in the plaintiffs' favor does not create a conflict with the decision below. In *Okwedy* and *Rattner*, there were statements that could reasonably be construed as intimating a threat of economic retaliation: the Borough president in *Okwedy* referenced the media companies' economic interest in other billboards in the borough, and the village administrator in *Rattner* referenced a list of local businesses at which he shopped in connection with his request for information about which local businesses supported certain publications. Here, by contrast, the OEC simply "flag[ged]" one of O'Handley's Tweets and explained its understanding of why that single Tweet purportedly "creates disinformation and distrust." Pet. App. 9. OEC's message did not request any specific follow-up action, and did not, on the specific facts of this case, intimate any adverse consequence to Twitter. There were, in short, no reasonable inferences of coercion to be drawn on the facts alleged.

Finally, the Fifth Circuit's recent decision in *Missouri* v. *Biden*, 2023 WL 5821788 (5th Cir. Sept. 8, 2023), applied the same rule for coercion that is applied across the circuits. Indeed, the Fifth Circuit repeatedly relied upon decisions of the Ninth and Second Circuits, expressly noting that its decision "tracks with

other federal courts," *id. at* *15, including the Ninth Circuit's decision in this case, *see id.* at 22; *see also id.* at *17-18 (relying on Ninth and Second Circuit precedent to establish state-action standards). And with respect to governmental actors who—like the state here—only "flagged content for social-media platforms," the Fifth Circuit found no coercion. *Id.* at *27. Relying in part on the decision below, the Fifth Circuit held that communications merely "flagg[ing] content" "fall[] on the 'attempts to convince,' not attempts to coerce,' side of the line" where, as here, they contain no "threats of adverse consequences." *Id.* The Fifth Circuit thus did not create a split with the decision below regarding the coercion theory of state action.

III. This Case Is A Poor Vehicle Because There Is A Serious Question Regarding O'Handley's Standing For The Sole Claim Pressed By The Petition

This Court has an "independent obligation to assure that standing exists" before reaching the merits of this case. *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 499 (2009). If the petition were granted, this Court would likely determine that O'Handley's alleged past injury is insufficient to support standing for the requested relief.

O'Handley appears to lack standing because he seeks review only of the First Amendment claim against the Secretary of State in her official capacity, Pet. i, 34, and the only relief relevant to that claim is O'Handley's request for declaratory and injunctive relief (e.g., a declaration that California Election Code § 10.5 is unconstitutional as applied to him and an order barring the Secretary of State from enforcing it against him in certain ways). Pet. App. 143, 151. In order to pursue such injunctive relief, a plaintiff must show he

or she is "likely to suffer future injury" from the challenged conduct. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983). But O'Handley's only alleged injury lies in the past: the complaint stated that "Twitter's ban" on O'Handley's Twitter account "impact[ed] … Mr. O'Handley's ability to make a living" as a political commentator. Pet. App. 139. Because "standing is not dispensed in gross" and "plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek," *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2208 (2021), this allegation of past injury cannot justify injunctive or declaratory relief.

Instead, O'Handley's standing to seek the only relief now available requires specific "factual allegations of [future] injury." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Such a showing depends on the possible future acts of two third-parties: (1) whether the state would again report O'Handley's Twitter content to Twitter and (2) whether Twitter would respond to any such report by again suspending O'Handley's Twitter account. Because O'Handley did not allege a realistic probability that both of those events will occur, "[n]othing supports the requested injunctive relief except [O'Handley's] generalized interest in deterrence, which is insufficient for purposes of Article III." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 108-109 (1998).

The panel below did not directly address the likelihood of any future injury to O'Handley. Instead, after concluding that O'Handley's past injury was traceable to the state's report, the panel concluded that O'Handley's past injury would be redressed by the injunctive relief sought because O'Handley's Twitter account had been reinstated. Pet. App. 24-25. However,

the determinative question regarding prospective injunctive relief is not whether it will redress past injury but whether it is necessary to prevent likely future injury—a question the Ninth Circuit did not address. Now, because O'Handley seeks limited review of only his claim against the state, and the only relief available for that claim is prospective injunctive relief, his standing now turns entirely on that question.[4]

A. O'Handley's Complaint Did Not Allege Any Threat That The State Will Again Target His Social Media Content

O'Handley's allegation that California, in the past, identified and reported one of his Tweets to Twitter "does nothing to establish a real and immediate threat" that the state will do so again. *Lyons*, 461 U.S. at 105. Rather, to plead standing for injunctive relief requires specific, plausible allegations that the plaintiff is "realistically threatened by a repetition of" the challenged conduct. *Id.* at 109.

Here, as in *Lyons*, the only concrete allegation linking O'Handley's claimed injury (harm from the suspension of his Twitter account, *see* Pet. App. 139) to the injunctive relief sought (an order barring the government from "work[ing] to take down the speech of private speakers," Pet. App. 151) is the allegation that the

[4] Notably, while the Ninth Circuit found standing based on the reinstatement of O'Handley's account, other courts have found similar claims to be moot based on similar facts. *See Trump* v. *Twitter*, 2023 WL 1997921, at *2 (N.D. Cal. Feb. 14, 2023) (finding claim for injunction against Twitter to be moot based on reinstatement of plaintiff's account). Here, however, because O'Handley seeks an injunction against the state, not Twitter, the pertinent question is of standing, not mootness.

state, on one occasion in the past, "flag[ged]" one of O'Handley's Tweets as "disinformation." Pet. App. 132. While the complaint alleged a general past practice of the state reporting misinformation to Twitter prior to its recent acquisition (i.e., that the state had "working relationships and dedicated reporting pathways at each major social media company," Pet. App. 119), such generalized allegations that the state "routinely" engaged in the kind of conduct being challenged "falls far short of the allegations that would be necessary to establish a case or controversy between these parties." *Lyons*, 461 U.S. at 106. Just as in *Lyons*, O'Handley would have had to specifically allege "why [he]," in particular, "might be realistically threatened by" the state's purportedly unlawful conduct *in the future*. *Id.* He failed to do so.

B. Any Future Injury Would Depend On Intervening Decisions By Twitter

"[W]here a causal relation between injury and challenged action depends upon the decision of an independent third party," standing is "'substantially more difficult to establish.'" *California* v. *Texas*, 141 S. Ct. 2104, 2117 (2021) (quoting *Lujan*, 504 U.S. at 562). Here, O'Handley seeks an injunction barring the state from "work[ing] to take down the speech of private speakers," Pet. App. 151, but his only alleged injury is from "Twitter's ban" of his account, Pet. App. 139. In other words, the likelihood that O'Handley will suffer the same alleged injury in the future depends on whether—if the state again reported his content to Twitter—Twitter would respond by again suspending his account.

The complaint does not allege "facts showing that" Twitter's decisions in the future "will be made in such

manner as to produce causation," *Lujan*, 504 U.S. at 562. With regards to the causal nexus between the state's report and O'Handley's injury, the complaint alleged only that "[u]pon information and belief," the state's report was "[t]he trigger" for Twitter's suspension of O'Handley's account. Pet. App. 140. That says nothing of the likelihood that Twitter would respond in the same way in the future, a question that rests on a "highly attenuated chain of possibilities." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). Twitter's actions could depend on, among other things, the Secretary of State's policies and priorities, the nature of the content reported, external events and circumstances, and Twitter's own platform policies at the time. The speculative nature of any future harm is highlighted by the particular historical context of the past conduct at issue: prior Twitter management's heightened enforcement in the wake of the January 6 attack. *See supra* pp. 5-6.

Recent policy changes at Twitter further underscore the speculative nature of any future injury. While this case was pending before the Ninth Circuit, Twitter was acquired by X Holdings I, Inc., a corporation majority-owned and controlled by Elon Musk. Twitter has made significant changes to its policies since the acquisition, including creating a general amnesty program to reinstate certain previously suspended accounts. Twitter reinstated O'Handley's account pursuant to that policy in December 2022. Pet. App. 25. These developments are not themselves determinative; standing is assessed "at the outset" of the litigation. *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 796 (2021). But they demonstrate the extent to which any future injury—and thus O'Handley's standing to seek

injunctive relief—has always depended upon uncertain future contingencies.[5]

IV. THIS PETITION SHOULD NOT BE HELD

The Court should not hold this petition for *National Rifle Association of America* v. *Vullo*, 49 F.4th 700 (2d Cir. 2022), *Missouri* v. *Biden*, 2023 WL 5821788 (5th Cir. Sept. 8, 2023), *O'Connor-Ratcliff* v. *Garnier* (U.S. No. 22-324), *Lindke* v. *Freed* (U.S. No. 22-611), or either *Moody* v. *NetChoice, LLC* (U.S. No. 22-277) or *NetChoice, LLC* v. *Paxton* (U.S. No. 22-555) (collectively, "the *NetChoice* cases").

O'Handley contends that the "petition should be held for *Vullo* if the Court grants that case," Pet. 12, but resolution of the state-action issues presented in *Vullo* would not change the outcome of this case. The Second Circuit in *Vullo* held that certain statements regarding the provision of insurance products to the National Rifle Association ("NRA") did not violate the NRA's free speech rights because they did not "cross the line between an attempt to convince and an attempt to coerce." 49 F.4th at 717; *accord id.* at 719. Even if this Court were to review that determination and, in so doing, change the standard applied in identifying

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[5] Indeed, not only has O'Handley's Twitter account been reinstated, Twitter is now sharing advertising revenue generated through O'Handley's account with O'Handley. *See* DC_Draino (@DC_Draino), Twitter (July 13, 2023) (O'Handley Tweeting that he is "now being paid to post" on Twitter and stating "[t]hank you @elonmusk for spending $44B to save free speech in America"), https://twitter.com/DC_Draino/status/1679583004790775808.
Thus, unlike the individual plaintiffs in *Missouri* v. *Biden*, 2023 WL 5821788, at *8 (5th Cir. Sept. 8, 2023), O'Handley has not and cannot allege any realistic threat of future harm.

unconstitutional coercion, that would not affect the outcome of this case because the complaint here did not allege any coercion whatsoever. As discussed *supra* pp. 7-9, O'Handley pleaded only that the state and Twitter willfully coordinated and conspired to remove his Twitter content, *see* Pet. App. 140-144, and argued that coercion was "irrelevant" to his claims, C.A. Appellant's Reply Br. 15. Only in his reply brief on appeal did O'Handley attempt to shoehorn his joint action allegations into a coercion theory, arguing that *any* communication by a government official with a private actor over whom it has any regulatory authority amounts to coercion so long as the private actor takes action that is consistent with the government's communication. *See id.* C.A. Appellant's Reply Br. 15-16. That expansive and novel theory of government coercion was not adopted by *Vullo*, or any other court of appeals.

For the same reasons, this Court also should not hold the petition for *Missouri* v. *Biden*. There, the Fifth Circuit found that certain executive officials coerced platforms into removing the plaintiffs' posts because, in the Fifth Circuit's view, the context, content, and tone of various governmental communications could reasonably be construed as threats to take certain actions or face adverse consequences. 2023 WL 5821788, at *23. Even if the Court affirmed that determination, it would in no way endorse the more expansive theory of state action O'Handley argues this Court should adopt: that any communication by a state actor with any regulatory authority constitutes coercion, *irrespective* of whether it can be construed to contain a threat of sanction. In sum, this case was not pleaded as a coercion case, includes no allegations regarding coercion, and thus its resolution will not be

altered by any new articulation of what is required to allege a coercion theory of state action.

The petition does not squarely ask this Court to hold this petition for *O'Connor-Ratcliff* v. *Garnier* (U.S. No. 22-324), *Lindke* v. *Freed* (U.S. No. 22-611) or the *NetChoice* cases, but cites them as relevant to the issues presented here. To the extent O'Handley suggests this petition should be held for any of those cases, there is no basis to do so.

With respect to *Garnier* and *Freed*, as the petition concedes (Pet. 32), those cases present "[d]istinct" issues, the disposition of which would have no bearing on this case. *Garnier* and *Freed* both concern whether a public official engages in state action subject to the First Amendment by blocking a private citizen from the official's personal social media account when the official uses the account for public functions. By contrast, there is no dispute that the OEC's report to Twitter constitutes state action; rather, the question raised by the petition is whether that communication amounts to unlawful coercion that violates the First Amendment. There is therefore no reason to hold this petition for *Garnier* or *Freed*.

Nor should the petition be held for the *NetChoice* cases, should the Court grant certiorari in those cases. The outcome in the *NetChoice* cases would have no bearing on the issues presented here. As the petition acknowledges, those cases seek to resolve the question whether the state has the power to "regulate speech on social media companies through legislation." Pet. 12. Those cases do not raise the issue presented here: whether government actors unconstitutionally coerce a private social media company into taking specific action against an individual when they flag that individual's

content for review without any accompanying threat or other form of intimidation.

In all events, if the Court grants certiorari in any of these cases, and holds this petition pending a decision, any subsequent remand in this case should be limited to the Ninth Circuit's resolution of O'Handley's First Amendment claim against the state. As discussed, *supra* p. 3, the petition intentionally seeks certiorari on only O'Handley's First Amendment claim against the state, and that is thus the only live claim that could be remanded. *Cf. Abdul-Muhammad* v. *Kempker*, 486 F.3d 444, 445 (8th Cir. 2007) (per curiam) (noting that parties who do not join petitions filed with the Supreme Court do not qualify for any subsequent relief from the Court's decision). Because O'Handley did not seek review of the Ninth Circuit's holding with respect to Twitter, the Ninth Circuit's judgment as to Twitter is final and cannot now be revisited. *Cf. Kemp* v. *United States*, 142 S. Ct. 1856, 1860 (2022) ("For someone who … does not petition this Court for certiorari, a judgment becomes final when the time to seek certiorari expires.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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