No. 22-1199

In the
Supreme Court of the United States

ROGAN O'HANDLEY,

Petitioner,

v.

SHIRLEY WEBER, in her official capacity as California Secretary of State, & TWITTER INC.,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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California is home to major social media companies including Twitter. It is also home to the Secretary of State's Office of Election Cybersecurity. That state agency's Orwellian mission is this: "monitor and counteract false or misleading information" that is "published online." Cal. Elec. Code §10.5(b). The agency got started with the help of $35 million to spend on "Misinformation Daily Briefings." App.123, 126. (¶¶42, 57-61). It worked. According to the Secretary, when the agency identified "erroneous or misleading" information for Twitter and Facebook, the companies censored it 98 percent of the time. App.127 (¶64). At least one such case involved Petitioner Rogan O'Handley's Twitter account. App.131-33 (¶¶74-81). The agency is still at work today. And yet, the courts below decided Mr. O'Handley's First Amendment challenge was *implausible*.

Respondents offer no constitutional defense of the State's censorship agency. The Secretary does not even acknowledge the agency in the argument section of her brief. *See, e.g.*, Cal.BIO.10 (describing conduct as that taken by "an employee"). Respondents instead contend that the petition should be denied as fact-bound. It is not. And they contrive a redressability problem. None exists. Certiorari is warranted to clarify that the State of California is not a law unto itself. And it cannot evade First Amendment scrutiny by laundering its censorship scheme through Twitter and other social media companies.

I. The decision below immunizes California's censorship agency and is "irreconcilable" with others.

A. The decision below is "irreconcilable" with the Fifth Circuit's recent decision.

The U.S. Solicitor General says the decision below is "irreconcilable" with the Fifth Circuit's recent decision enjoining federal officials' social media censorship scheme in *Missouri v. Biden*, --- F.4th ---, 2023 WL 5821788 (5th Cir. Sept. 8, 2023). *See* Stay App.16, *Murthy v. Missouri*, No. 23A243. That's right. And that irreconcilability is yet another reason for granting certiorari here. There is no way to reconcile the dismissal with prejudice in this case—involving a California agency with a state-law mission to censor ordinary Americans' online speech—and the preliminary injunction in that case, just as there is no way to reconcile the dismissal with cases in other circuits, Pet.21-25.

1. Respondents disagree with the Solicitor General's view that the cases are "irreconcilable." They rely on the Fifth Circuit's attempt to square the two. The Fifth Circuit described the cases as "strikingly similar" and then quoted the Ninth Circuit's rationale that California's message to censor O'Handley's speech was "'purely optional'" with "'no strings attached.'" *Biden*, 2023 WL 5821788, at *22 (quoting *O'Handley*, 62 F.4th at 1158). But for two reasons, the comparison falls apart if one looks beyond the Ninth Circuit's retelling of the facts alleged in the complaint.

First, the Fifth Circuit's comparison repeats the Ninth Circuit's version of the facts in this case,

presented by the defendants, rather than the complaint's actual allegations. The complaint alleges that a California agency existed to tell social media companies to censor speech. *See* App.113, 118-22, 126-28, 131-33, 140-41 (¶¶2, 19-36, 59-61 64-65, 74-81, 99-100; Cal. Elec. Code §10.5; *see* Pet. 5 & n.1 (collecting other state laws). The complaint alleges that the agency gave its censorship directives government case numbers and tracked the social media companies' compliance. *See* App.127, 132-33 (¶¶64, 75, 80). And the complaint alleged, with evidence from a public records request, how Mr. O'Handley's own Twitter account first came within the agency's crosshairs, and his speech was punished for the first time as a result. *See* App.131-33 (¶¶74-81). The Ninth Circuit's conclusion that such allegations were dismissable (with prejudice!) was willfully blind to that censorship scheme. It beggars belief that the California Secretary of State can erect a censorship agency, the agency then censors political speech successfully, and the censored are told that they cannot plausibly state a First Amendment claim to move beyond the motion-to-dismiss stage. Whether Twitter listened or not cannot absolve *the State*. *See Bantam Books, Inc., v. Sullivan*, 372 U.S. 372 U.S. 58, 66, 68 (1963) (rejecting state supreme court's rationale that book distributor was "'free' to ignore the Commission's notices"). That is because the *State*'s "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828 (1995). This country's "constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (plurality op.).

Second, the Fifth Circuit's comparison also does not grapple with the cases' differing postures: The district court dismissed Mr. O'Handley's First Amendment challenge with prejudice. Because he had no opportunity to move past the motion-to-dismiss stage, Mr. O'Handley never had the opportunity to adduce further evidence in discovery. The Fifth Circuit, on the other hand, affirmed in part a preliminary injunction "based directly on the evidence adduced during preliminary discovery," *Biden*, 2023 WL 5821788, at *10, which included depositions of high-ranking federal officials, hundreds of emails between federal officials and social media companies, and more from social media companies, *Missouri v. Biden*, No. 3:22-CV-01213, 2023 WL 4335270, at *67 (W.D. La. July 4, 2023), *aff'd in part,* 2023 WL 5821788. That "great deal of discovery" yielded "necessary evidence to pursue" that case. *Id.* It took "several months to obtain" and "was unobtainable except through discovery." *Id.* Despite the Fifth Circuit's best efforts, there is no squaring a case that never had the chance to move beyond the motion-to-dismiss stage with a case whose resolution depended on "a great deal of discovery." *Id.* Likewise, *Bantam Books* claims in the Seventh and Second Circuit turned on discovery and credibility determinations. *See Backpage.com v. Dart*, 807 F.3d 229, 233 (7th Cir. 2015); *Hammerhead Enterprises, Inc. v. Brezenoff*, 707 F.2d 33, 38-39 (2d Cir. 1983). But in the Ninth Circuit, Mr. O'Handley had no similar opportunity.

All that to say, the Fifth Circuit's recent decision only confirms that review is warranted here. This is the simple case, where state officials unabashedly

acting "under color of" California law, 42 U.S.C. §1983, evaded First Amendment scrutiny. Left undisturbed, the decision below creates a First Amendment–free zone for the country's largest state to continue operating a state agency tasked with censoring political speech.

2. For similar reasons, Respondents also overstate the supposed uniformity in the lower courts between "'attempts to convince'" and "'attempts to coerce.'" Twitter.BIO.13; Cal.BIO.10-12. Those decisions mostly involved letters from public officials. It necessarily follows that if one-off letters are sufficient in most of those cases to state plausible First Amendment claims, then so is California's establishment of an entire state agency, funded with $35 million for "Misinformation Daily Briefings" and tracking Twitter's compliance with government case numbers and threat levels. *See* App.123, 126-27, 132-33 (¶¶41-42, 58-61 64, 75, 80). The Secretary responds (at 13) that no "adverse consequence[s]" were "threatened." But that ignores not only the preceding allegations but also *Bantam Books*. There, it did not matter that the distributor "was 'free' to ignore the Commission's notices" or that "his refusal to 'cooperate' would have violated no law" or that the commission had no "power to apply formal legal sanctions." 372 U.S. at 66, 68. A similar scheme of censorship is at play here, established by state law. If the complaint's allegations about the uncontroverted existence of that state censorship agency were not sufficient to overcome a motion to dismiss, then the "convincing" versus "coercing" sorting that Respondents laud is not sorting anything at all.

That question about the applicable test and how it ought to apply is ultimately a legal question in this posture. The petition does not present the fact-intensive inquiry of whether Mr. O'Handley ought to ultimately win based on weighing evidence—evidence he should have been permitted to adduce in discovery. *Compare, e.g.*, *Backpage.com*, 807 F.3d at 233 (relying on evidence produced in discovery including internal Visa discussions about responding to the sheriff's letter); *Hammerhead*, 707 F.2d at 39 (rejecting claim after bench trial); *Rattner v. Netburn*, 930 F.2d 204, 210 (2d Cir. 1991) (refusing to weigh evidence about the threatening nature of letter until trial). Rather, the question is whether California can shut down, at step one, a constitutional challenge by declaring it *implausible* as a matter of law that its state censorship agency violated the First Amendment.

B. The Court's clarification about *Bantam Books*' 21st-century application is needed now.

The book distributors of *Bantam Books*' time have been supplanted with social media platforms. Those platforms "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). There is a split of authority regarding how states may regulate those platforms, and this Court has granted review. *Moody v. NetChoice*, No. 22-277, 2023 WL 6319654 (U.S. Sept. 29, 2023); *NetChoice v. Paxton*, No. 22-555, 2023 WL 6319650 (U.S. Sept. 29, 2023). There is a split of authority regarding how government officials may act on those platforms, and this Court has granted review. *See*

O'Connor-Ratcliff v. Garnier, No. 22-324, 143 S. Ct. 1779 (2023); *Lindke v. Freed*, No. 22-611, 143 S. Ct. 1780 (2023). And there is now a split of authority regarding how government officials may act behind closed doors with those platforms, and this Court should grant review of that question in this case too. *See* U.S. Stay App.16, *Murthy v. Missouri*, No. 23A243 (calling decision below "irreconcilable" with Fifth Circuit's preliminary injunction of federal officials). It makes no sense to clarify the First Amendment rules for states' public-facing acts with respect to social media companies, while permitting states as big as California to continue speech-defying conduct in secret.

Respondents disagree, contending that the petition should be denied because the First Amendment claim should fail on the merits. In their words, the complaint's allegations "are not remotely similar to the facts in *Bantam Books*," Cal.BIO.9-10, and there are "no reasonable inferences of coercion to be drawn on the facts alleged," Twitter.BIO.16. These arguments, better than any others, illustrate Respondents' rewriting of the facts alleged. From the beginning, Mr. O'Handley's complaint challenged California's censorship agency's acts as unconstitutional. As alleged in the complaint, the California Secretary of State had created a "partnership" with Twitter to route the State's censorship directives to Twitter and make them first in the "queue"; the State gave those directives government case numbers and threat levels; the State tracked Twitter's compliance and touted its 98-percent success rate with major social media companies including Twitter; and all of that worked with respect to Mr. O'Handley's own Twitter account. *See*

App.113, 118-22, 126-28, 131-33, 140-41 (¶¶2, 19-36, 59-61 64-65, 74-81, 99-100).

Respondents argue that Mr. O'Handley did not say "coercion" enough times in the courts below. *See* Cal.BIO.10; Twitter.BIO.23. That again ignores the thrust of Mr. O'Handley's complaint—that the State of California used "'private persons,'" namely Twitter and other social media companies, "'to accomplish what it is constitutionally forbidden to accomplish'" directly. *Norwood v. Harrison*, 413 U.S. 455, 465 (1973). And as the Secretary acknowledges (at 10) and Twitter omits (at 23), Mr. O'Handley *did* argue below that the complaint's allegations about the Office's censorship directives were sufficient to support a reasonable inference of coercion.

More fundamentally, Respondents' rejoinder reduces the First Amendment claim to wordplay. The confusion to be resolved is about what state actions are unconstitutional, not what name to give them. *Bantam Books* used various labels simultaneously—not only "threat[s] [to] invoke[e] legal sanctions" but also "other means of *coercion, persuasion, and intimidation*" are sufficient to warrant injunctive relief against state actors. 372 U.S. at 67 (emphasis added). Since then, for First Amendment claims, courts have used various labels and multi-part tests to identify unconstitutional state action. *See, e.g.*, *Nat'l Rifle Ass'n of America v. Vullo*, 49 F.4th 700, 715 (2d Cir. 2022) (four-factor test); *Biden*, 2023 WL 5821788, at *12 ("coerced *or* significantly encouraged" (emphasis added)); *Hammerhead*, 707 F.2d at 39 (concluding stores were not "influenced"); *see also Brentwood Academy v. Tenn. Secondary School Athletic Ass'n*,

531 U.S. 288, 295-96 (2001) (acknowledging that state-action "criteria lack rigid simplicity"). Ultimately, the first question presented is whether, whatever the label, the complaint's allegations about the California censorship agency state a plausible First Amendment claim. They do. Just as this Court repudiated the "system of informal censorship" through private parties in *Bantam Books*, 372 U.S. at 69, 71, California's 21st-century scheme of cyber-censorship presents a more than plausible First Amendment violation today.

C. The Court's clarification about government speech is warranted.

The Secretary offers little defense of the Ninth Circuit's invocation of the government speech doctrine, and Twitter offers none at all. The Ninth Circuit used the government speech doctrine as a cudgel to eradicate any line between constitutional "convincing" and unconstitutional "coercing." As the Secretary acknowledges (at 18), the Ninth Circuit invoked the government speech doctrine to backfill its conclusion that the Office's censorship directive to Twitter was constitutional. If it weren't, the Ninth Circuit reasoned, then that "would prevent *government officials* from exercising their own First Amendment rights." App.29 (emphasis added).

The Secretary says the invocation of the government speech doctrine was no big deal because it "represents the conclusion of the court's First Amendment analysis, not its starting point." Cal.BIO.18. But it makes no difference whether the government speech doctrine was the starting point or the end point. Either way, the Ninth Circuit has expanded that

doctrine to cloak the California agency's closed-door directives to Twitter with government-speech immunity, and presumably any agency official too. Now in California, even though "the State cho[o]se[s] to counteract what it saw as misinformation … by sharing its views directly with Twitter rather than by speaking out in public," that "does not dilute its speech rights or transform permissible government speech into problematic adverse action." App.29.

Respondents make no attempt to reconcile the Ninth Circuit's expanded rule with that from other circuits. Zero. For all the reasons presented in the petition, the Ninth Circuit's invocation of the government speech doctrine exemplifies all too well how that doctrine is "susceptible to dangerous misuse" and why this Court "exercise[s] great caution before extending" it. *Matal v. Tam*, 582 U.S. 218, 235 (2017). Because the Ninth Circuit has failed to heed that warning, California has now entered a world where government action "regulat[ing] private speech," "paradoxically, qualif[ies] as government speech unregulated by the First Amendment." *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1599 (2022) (Alito, J., concurring). And while other circuits have applied the government speech doctrine to *public* speech that adds to the marketplace of ideas, *see* Pet. 27-29, the Ninth Circuit applied it here simply because someone from the government was speaking *privately* to Twitter.

II. There is no redressability problem.

Respondents contend there is a "serious question" about whether Mr. O'Handley can continue seeking injunctive relief because his "central grievance" is something that occurred "in the past" related to

"Twitter's decisions to limit access to his tweets and suspend his account." Twitter.BIO.17-18; Cal.BIO.18-19. And they say Elon Musk's acquisition of Twitter ought to make this case go away. Twitter.BIO.21; Cal.BIO.19-20. These redressability arguments border on the frivolous.

The California Office of Election Cybersecurity continues to exist for the purpose of policing ordinary Americans' political speech, including Mr. O'Handley's. This petition challenges *that* state agency's actions. There is nothing "speculative" (Twitter.BIO.21) about the agency's continuing mission to "monitor" and "counteract" what the agency perceives to be misinformation. Cal. Elec. Code §10.5. Indeed, California has doubled down, telling Twitter and other companies to "do more to rid your platforms of the dangerous disinformation, misinformation, conspiracy theories, and threats" and promising "[t]he California Department of Justice will not hesitate to enforce" state laws, both new and old.[1] Today, Twitter's failure to report how the company removes, demonetizes, or deprioritizes so-called "[d]isinformation" is punishable by $15,000-civil penalties or a court-ordered shut-down of the company. Cal. Bus. & Prof. Code §§22677, 22678.

Unsurprisingly, the courts of appeals are aligned *against* Respondents' redressability arguments.

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[1] Letter from Cal. Attorney General at 4, 8 (Nov. 3, 2022), perma.cc/GC42-XCX4 (citing Cal. Civ. Code §52.1(b), Cal. Elec. Code §§18302, 18502, 18540, 18543, and Cal. Gov. Code §84504.6 and attaching "addendum" with a "non-exclusive list of relevant election-related laws").

Compare App.25 (rejecting traceability and redressability arguments), *with Biden*, 2023 WL 5821788, at *8 (rejecting similar arguments and clarifying that plaintiffs "are challenging ... the government's *interference*"). Those contrived redressability arguments only highlight Respondents' failure to grapple with the state agency's unconstitutional role, and they are no reason to deny the petition.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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