No. 23-411

IN THE

Supreme Court of the United States

VIVEK H. MURTHY, SURGEON GENERAL, ET AL.,

PETITIONERS,

V.

MISSOURI, ET AL.,

RESPONDENTS.

On Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

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

M.E. Buck Dougherty III
Counsel of Record
James J. McQuaid
LIBERTY JUSTICE CENTER
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
(312) 637-2280
bdougherty@libertyjustice-center.org

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INTEREST OF THE AMICI CURIAE[1]

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

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

SUMMARY OF ARGUMENT & INTRODUCTION

No one disputes that the government has been communicating with social media companies in the pursuit of censorship (what it calls stopping "misinformation," Pet. Br. 7). The question is whether these

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

communications amounted to state action under the First Amendment. But while the parties focus on how the government "monitors and demands reports on the platforms' content-moderation policies, pushes them to adopt more restrictive policies, [and] relentlessly flags ordinary Americans' core political speech for censorship" (Resp. to Gov't 3rd Supp. Br. 1), *amici* believe that the Court could also find state action in the training that the White House and CDC have provided to the social media companies.

Because of this training, and the benefit to the government derived from it, the government's argument that the social media companies are "merely respond[ing] to information, persuasion, or criticism from government officials [and] not state actors" must fail. Pet. Br. 14.

ARGUMENT

I. The Biden Administration provided training to the Social Media Companies to make them more effective censors.

The symbiotic relationship between Facebook and the Biden Administration began barely one month after the President had been sworn in. In February 2021, Facebook's Payton Iheme emailed the CDC's Carol Crawford with an offer of $15 million in free advertisement on Facebook's platform. Dkt. 112-2 in 3:22-cv-737-CRB (N.D. Cal.) at 2-5.

In March 2021, Iheme shared Facebook's survey data on vaccine uptake with Crawford, and indicated

that Facebook would share its findings "regularly moving forward to help inform your teams and strategies." *Id.* at 62. She also asked Crawford to "set up a meeting to discuss the findings and receive your feedback." *Id.* at 149. By then, Facebook was also sharing insights from its proprietary CrowdTangle platform, which it used to monitor activity on its other platforms such as Instagram. *Id.* at 158.

Concurrently, however, other interactions between Facebook and the government were not so cordial. Rob Flaherty (White House Director of Digital Strategy) and Andrew Slavitt (interim administrator of the Centers for Medicare and Medicaid Services), exchanged a blistering series of emails with an unknown Facebook employee. *Id.* at 538-40. Flaherty lit into the Facebook contact, complaining that he'd been "asking you guys pretty directly, over a series of conversations, for a clear accounting of the biggest issues you are seeing on your platform when it comes to vaccine hesitancy." *Id.* at 539. He complained that he'd asked for data on the impact of "borderline content" "point blank, and got instead, an overview of how the algorithm works . . . and a 45-minute meeting that seemed to provide you with more insights than it provided us." *Id.* He continued to badger Facebook, stating that he was "gravely concerned that your service is one of the top drivers of vaccine hesitancy – period," and "we want to know that you're not playing a shell game with us when we ask you what is going on." *Id.* Slavitt joined in, complaining that "interactions with Facebook are not straightforward," and "you are trying to meet a minimum hurdle instead of trying to solve the problem." *Id.* at 538. "Internally we have been considering what to do about it," he threatened. *Id.* Facebook's representative

expressed contrition and promised to do better, stating: "We obviously have work to do to gain your trust," and "I'll expect you to hold me accountable." *Id.* at 539.

In April, the CDC's Crawford emailed Facebook's Iheme to complain that the Wyoming Department of Health's "valid public health messaging" was being screened out by Facebook's algorithms alongside "postings by sources of vaccine misinformation," and wanted to know how to "ensure that verifiable information sources are not blocked." *Id.* at 161-62.

To make them more effective censors, in May, the CDC began conducting training sessions for Facebook and Twitter officers, such as Iheme (Facebook) and Todd O'Boyle (Twitter). *Id.* at 14-41. Also by that time, Crawford was flagging examples of misinformation on Facebook's platforms (Facebook and Instagram) for Iheme and her team to review. *Id.* at 10.

The training sessions included "example" posts of the sort of "misinformation" the government sought to suppress. For example, the government asked the social media platforms to "Be On the Lookout for: Statements, pictures, posts, or messages containing misinformation that COVID-19 vaccines cause 'shedding'" such as an example post that said "Keep your gene altering spike protein shedding experimental jab 6 feet away from me." *Id.* at 17. The government also asked Facebook and Twitter to "Be On the Lookout" for "messages containing misinformation that a 2-year-old died after receiving the vaccine," *Id.* at 18; "Potential Misinformation" about the Vaccine Adverse Event Reporting System, *Id.* at 19; misinformation about "the safety of COVID-19 vaccine ingredients," *Id.* at 28;

misinformation about "vaccine ingredients and related side effects," *Id.* at 29; "A rumor" "regarding COVID-19 vaccines effects [sic] on male fertility," *Id.* at 30; and (at a cancelled session) "misinformation that spike proteins from vaccines have an effect on fertility or other harmful effects," *Id.* at 37. Crawford asked that "contextual information" "be added to posts about VAERS," *id.* at 14, and provided the social media companies with data on "the Influence of Information Sources on Vaccine-Hesitant Adults," *Id.* at 95-101.

The Biden Administration then hosted a press conference explaining exactly what benefit they hoped to gain from this training. Surgeon General Murthy acknowledged that "health misinformation didn't start with COVID-19," but claimed that what makes it important to address now is "the speed and scale at which health misinformation is spreading" due to "[m]odern technology companies" "enable[ing] misinformation to poison our information environment."[2] He then instructed the social media companies "to operate with greater transparency and accountability," "to monitor misinformation more closely," and to "consistently take action against misinformation super-spreaders on their platforms." *Id.*

Then-Press Secretary Jennifer Psaki followed up on Murthy's remarks, explaining that the government was "in regular touch with these social media platforms" via "members of our senior staff," "flagging problematic posts," and proposing "four key" changes to the social media platforms. *Id.* These changes

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[2] https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/15/press-briefing-by-press-secretary-jen-psaki-and-surgeon-general-dr-vivek-h-murthy-july-15-2021/

included "creat[ing] a robust enforcement strategy," "tak[ing] faster action against harmful posts," and "promot[ing] quality information sources in their feed algorithm." *Id.* She also stated "We engage with [the social media companies] regularly and they certainly understand what our asks are." *Id.*

And they remained in regular touch. A month later, Facebook's Clegg emailed Surgeon General Murthy with another fawning report. Clegg stated that "Facebook takes its responsibility . . . extremely seriously," and that it was "eager to continue working towards our shared goal of helping more people get vaccinated and limiting the spread of harmful misinformation." *Id.* at 167.

II. This training constitutes state action and a First Amendment violation.

This Court has held that private parties engage in state action when they work with government officials to deprive individuals of their constitutional rights. *Lugar v. Edmonson Oil Co.,* 457 U.S. 922, 942 (1982). The extension of liability to private parties includes actions they take with the government to violate the First Amendment. *See, e.g., Janus v. AFSCME, Council 31,* 138 S. Ct. 2448 (2018).

State action occurs where "the State is sufficiently involved to treat" the conduct that harms the plaintiff "as state action. This may occur if the State creates the legal framework governing the conduct, . . . if it delegates authority to private sector, . . . or sometimes if it knowingly accepts the benefits derived from

unconstitutional behavior." *Nat'l Collegiate Ath. Ass'n v. Tarkanian,* 488 U.S. 179, 192 (1988).

Substantial cooperation and independence exist, and give rise to state action,[3] where the government provides a private entity with training and records. *Tsao v. Desert Palace,* 698 F.3d 1128, 1140 (9th Cir. 2012). In *Tsao*, for example, private casino security guards had attended a training course given by the Las Vegas Municipal Police Department ("LVMPD"). *Id.* After participating in this training, the security guards were permitted to issue summonses to trespassers at the casino, a power normally held exclusively by the state. *Id*. The LVMPD also frequently shared records regarding suspected trespassers with casino security they had trained. *Id*.

Following her arrest for trespass by casino security guards trained by the LVMPD, Laurie Tsao, a professional card counter, sued the casino for wrongful arrest. *Id*. at 1131 n. 1, 1138. The Ninth Circuit applied *Gorenc v. Salt River Project Agric. Improvement &*

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[3] As the government points out, state action exists "when the private entity performs a traditional, exclusive public function." Pet. Br. 25, citing *Manhattan Cmty. Access Corp. v. Halleck,* 139 S. Ct. 1921, 1928 (2019). To be clear, it is *not* amici's position that social media censorship falls into this category. Amici are simply taking the government at its word when it argues that that the Fifth Circuit's injunction prohibiting such censorship "could chill vital governmental communications." *Id.* at 47. The government cannot make such a claim and then turn around and argue that those communications are not in service of a public function. And indeed it does not; it merely implies such an argument by observing that the Fifth Circuit did not firmly state that "moderating speech . . . is a traditional, exclusive public function." *See Id.* at 25.

Power Dist., 869 F.2d 503, 507 (9th Cir. 1989) and *Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 725 (1961), and held that, "[b]y training [casino] security guards, providing information from the records department, and delegating the authority to issue citations," LVMPD had "so far insinuated itself into a position of interdependence with [the casino] that it must be recognized as a joint participant in the challenged activity." *Tsao*, 698 F.3d at 1140.

Here, as in *Tsao,* by training Iheme, O'Boyle, and possibly others in content moderation on COVID-19 misinformation, providing CDC slides and records on "authoritative information," and authorizing Facebook and Twitter to use specific CDC-approved language as "contextual information" to add "to posts" when making moderation decisions, Crawford, Murthy, Flaherty, and Biden so far insinuated the federal government into a position of interdependence with Facebook and Twitter that it must be recognized as a joint participant in the decisions to restrict Hart's valid public health messages on private platforms that access the Internet.

Moreover, here, as there, the state has "knowingly accept[ed] the benefits derived from unconstitutional behavior." *Nat't Collegiate Athletic Ass'n v. Tarkanian,* 488 179, 192 (1988), *see also Tsao,* 698 F.3d at 1140. Having trained the social media companies to better censor dissenting speech, the government benefits from having voices that have opposed its COVID-19 measures and opinions silenced.

CONCLUSION

For the foregoing reasons the decision of the Fifth Circuit should be upheld.

Respectfully submitted,

M.E. Buck Dougherty III
Counsel of Record
James J. McQuaid
LIBERTY JUSTICE CENTER
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
(312) 637-2280
bdougherty@libertyjustice-
center.org

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