No. 23-411

In the
Supreme Court of the United States

VIVEK H. MURTHY, U.S. SURGEON GENERAL, ET AL.,
PETITIONERS,
v.
STATE OF MISSOURI, ET AL.,
RESPONDENTS.

On Writ of Certiorari Issued to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE LIBERTY COUNSEL IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a nonprofit public interest legal organization that advances religious freedom, freedom of speech, and the sanctity of human life. Liberty Counsel engages in strategic litigation to protect the freedom of speech of pastors, service members, counselors, and ordinary Americans from all walks of life. Liberty Counsel attorneys have represented clients before the United States Supreme Court, federal courts of appeals, and federal and state trial courts nationwide. Attorneys also have spoken or testified before Congress on matters relating to government infringement on First Amendment rights.

Liberty Counsel litigated extensively regarding COVID-19 restrictions on places of worship, including before this Court. See, *e.g.*, *Harvest Rock Church, Inc.* v. *Newsom*, 141 S. Ct. 889 (2020); *Harvest Rock Church, Inc.* v. *Newsom*, 141 S. Ct. 1289 (2021). Liberty Counsel also litigated against government mandates imposed on servicemembers in every branch, federal contractors, federal employees, and health care providers. Liberty Counsel and our clients have experienced first-hand the cold hand of censorship exercised by social media at the behest of the federal government.

Freedom of speech is a natural right and is one of the inalienable rights affirmed by the United States

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[1] Pursuant to Rule 37.6, Amicus affirms that no counsel for a party authored this brief in whole or in part, and that no person other than Amicus or its counsel contributed money intended to fund preparing or submitting this brief.

Constitution. As a staunch defender of the First Amendment, Liberty Counsel has an interest in ensuring that government agencies do not censor constitutionally protected speech. Such a concern is especially implicated during historic crises such as the COVID-19 pandemic, which saw a rise in totalitarian violations of constitutional rights under the guise of "public health."

SUMMARY OF ARGUMENT

"[C]ertain segments of time are of special significance for the preservation of the basic liberties of expression and inquiry because the most serious threats to those liberties tend to be concentrated in abnormal periods." Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L. Rev. 449, 450 (1985). The COVID-19 pandemic was one such "abnormal period." Instead of safeguarding Americans' First Amendment right to freely discuss the government's response to the pandemic in the marketplace of ideas, the Biden Administration engaged in a concerted effort to shut down debate, stifle doctors who questioned the prevailing orthodoxy about mandatory mRNA vaccines and threaten social media companies that did not censor content the White House disfavored. Such a dystopian response is anathema to the First Amendment and at odds with this Court's jurisprudence. Accordingly, this case presents the opportunity for the Court to emphasize the First Amendment's role as a model safeguard against government censorship—especially during national emergencies and times of social unrest.

The Biden Administration's crusade to censor protected expression is not an isolated campaign; it is emblematic of a broader global trend aiming to suppress speech deemed by authorities to be "misinformation" and "conspiracy theories." Triggered by the COVID-19 pandemic, governments and corporate powers worldwide carried out censorship campaigns against alternative opinions—even from expert epidemiologists—that criticized the official response to the pandemic. The rise of this "Censorship Industrial Complex" draws a chilling parallel with historical instances of government censorship. Such government-patrolled speech, as carried out by regimes like Nazi Germany, invariably leads to severe violations of human rights.

The Fifth Circuit correctly found that the Biden Administration's pressuring of social media companies to censor disfavored speech, and the resulting suppression, constitutes state action that violates the First Amendment. See *Missouri* v. *Biden*, 83 F.4th 350, 381 (5th Cir. 2023). The foundational principle of the First Amendment prohibits government punishment of speech based on its content or impact. Any collaboration resulting in the censorship of disfavored speech constitutes unconstitutional viewpoint discrimination. Even if the White House did not directly engage in censorship, the palpable chilling effect resulting from its pressure campaign raises serious concerns, compelling individuals to self-censor out of fear of government reprisal, account deactivation, and doxing.

The United States is a global leader in democracy and human rights, and the First Amendment is the

world's exemplar and preeminent safeguard against government censorship. As such, it is imperative for this Court to reaffirm the need for a robust marketplace of ideas, free from government coercion, and acknowledge that, in times of heightened intolerance, the First Amendment must be exercised to prevent governmental attempts to systematically stifle dissent. For these reasons, the Court should uphold the First Amendment as a vanguard against government censorship and accordingly affirm the decision below.

ARGUMENT

I. The White House's censorship of protected expression is a symptom of a broader global crusade to suppress politically unpopular speech.

The Fifth Circuit concluded that "numerous federal officials coerced social-media platforms into censoring certain social-media content, in violation of the First Amendment." *Missouri* v. *Biden*, 83 F.4th 350, 359 (5th Cir. 2023). The White House's censorship campaign reflects a troubling global trend of governments and their allies employing social media censorship as a tool to control narratives, silence opposition, and curtail the flow of information.

A. The use of the Internet and social media to share and discuss news has made such platforms attractive targets for governments and regulators to censor disagreeable speech.

For most people, social media platforms have become their primary source of news and main way of

communicating with the public. Indeed, Facebook, YouTube, Instagram, and Twitter have become in large part "the modern public square." *Packingham* v. *North Carolina*, 582 U.S. 98, 107 (2017). These platforms provide "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Id.* "They allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" *Id.* (quoting *Reno* v. *Am. C.L. Union*, 521 U.S. 844, 870 (1997)).

Unfortunately, the expansion of speech through online platforms has been met with increased government censorship. For example, authorities in India and Turkey have seized the power to remove political content from social media. See Nitish Pahwa, *Twitter Blocked a Country*, Slate Magazine (Apr. 1, 2023)[2]; Perry Stein, *Twitter Says It Will Restrict Access to Some Tweets before Turkey's Election*, Wash. Post (May 13, 2023)[3]. The Bundestag (the German parliament) and the Supreme Court in Brazil have criminalized political speech. See, *e.g.*, Lisa Hanel, *Germany Criminalizes Denying War Crimes, Genocide*, Deutche Welle (Nov. 25, 2022)[4]; Mauricio Sava-

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[2] Available at slate.com/technology/2023/04/twitter-blocked-pakistan-india-modi-musk-khalistan-gandhi.html.

[3]Available at www.washingtonpost.com/technology/2023/05/13/turkey-twitter-musk-erdogan.

[4] Available at https://www.dw.com/en/germany-criminalizes-denying-war-crimes-genocide/a-63834791.

rese & Joshua Goodman, *Crusading Judge Tests Boundaries of Free Speech* (Jan. 25, 2023).[5]

And in other countries, proposed or actual laws such as Ireland's "Hate Speech" Bill, Scotland's Hate Crime Act, the United Kingdom's Online Safety Bill, and Australia's "Misinformation" Bill threaten to chill speech. See, *e.g.*, Maighna Nanu, *Irish People Could Be Jailed for "Hate Speech", Critics of Proposed Law Warn*, The Telegraph (June 17, 2023)[6]; Helen Joyce, *Scotland's New Hate Crime Act Will Have a Chilling Effect on Free Speech*, The Economist (Nov. 8, 2021)[7]; Natasha Lomas, *Security Researchers Latest to Blast UK's Online Safety Bill as Encryption Risk*, TechCrunch (July 5, 2023)[8]; Nabil Al-Nashar, *Millions of Dollars in Fines to Punish Online Misinformation under New Draft Bill*, ABC News (June 25, 2023).[9]

But the most significant threat to free speech today comes not from government efforts to directly censor content that its citizens create; instead, "the biggest threat comes from collaborations between governments and commercial platforms to manage user

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[5] Available at https://apnews.com/article/jair-bolsonaro-brazil-government-af5987e833a681e6f056fe63789ca375.

[6] Available at https://www.telegraph.co.uk/world-news/2023/06/17/irish-people-jailed-hate-speech-new-law/.

[7] Available at https://www.economist.com/the-world-ahead/2021/11/08/scotlands-new-hate-crime-act-will-have-a-chilling-effect-on-free-speech.

[8] Available at techcrunch.com/2023/07/05/uk-online-safety-bill-risks-e2ee.

[9] Available at www.abc.net.au/news/2023-06-25/fines-to-punish-online-misinformation-under-new-draft-bill/102521500.

content (e.g., entering into an agreement whereby the platform identifies and removes certain content at the government's behest)." Jonathan Peters & Brett Johnson, *Conceptualizing Private Governance in A Networked Society*, 18 N.C. J. L. & Tech. 15, 34 (2016); *accord* Ronald Deibert & Rafal Rohozinski, *Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace* 11–12 (Ronald Deibert et al. eds., 2012) (arguing that hybrid-public content governance is becoming the new norm for controlling the public discourse); Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. Pa. L. Rev. 11 (2006) ("Rather than attacking speakers or listeners directly, governments have sought to enlist private actors within the chain as proxy censors to control the flow of information.").

For example, in a study of thirty-seven countries, researchers identified a variety of censorship tactics employed by governments, including increased website blocking and filtering; content manipulation; imprisoning bloggers; punishing ordinary users; and coercing website owners to remove content. See Ian Brown & Douwe Korff, *Social Media and Human Rights*, in *Human Rights and a Changing Media Landscape* 175, 177 (2011).

Some authoritarian governments block entire search engines or force them to blacklist certain queries—all to limit access to content that does not support the government's official version of reality. See Ryan Singel, *Google, China and Censorship: A Wired.com FAQ*, Wired (Apr. 2, 2010) (discussing

how, until 2010, Google agreed to censor its results in Mainland China).[10]

A widely used form of governmental censorship is coercion—or censorship by pressure. In such an instance, government officials contact the operator of a social media platform and pressure them to remove content. Pressure tactics include threatening legal action, withdrawing government contracts or licenses, or even banning specific companies from operating in the country. See John G. Browning, *Democracy Unplugged: Social Media, Regime Change, and Governmental Response in the Arab Spring*, 21 Mich. St. Int'l. L. Rev. 63, 78–79 (2013).

This tactic is effective: Online platforms are "likely to heed government pressure to ensure that they can continue to operate." Peters & Johnson, 18 N.C. J. L. & Tech. at 34 (citing Ethan Zuckerman, *Intermediary Censorship*, in *Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace* 71 (Ronald Deibert et al. eds., 2012)).

Because of the staggering amount of speech that is expressed over social media, employees who develop and enforce the platforms' "content moderation" rules have greater "power over who gets heard around the globe than any politician or bureaucrat." Jeffrey Rosen, *The Delete Squad: Google, Twitter,*

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[10] Available at http://www.wired.com/2010/04/google-china-and-censorship-a-wiredcom-faq.

Facebook and the New Global Battle over the Future of Free Speech, The New Republic (Apr. 29, 2013).[11]

B. The recent rise of the Censorship Industrial Complex has drawn an eerie parallel to notorious instances of government censorship of speech.

The Fifth Circuit found that since 2021, "a group of federal officials has been in regular contact with nearly every major American social-media company about the spread of 'misinformation' on their platforms." *Missouri* v. *Biden*, 83 F.4th at 359. "In their concern, those officials—hailing from the White House, the CDC, the FBI, and a few other agencies—urged the platforms to remove disfavored content and accounts from their sites." *Ibid*. And, critically, "the platforms seemingly complied." *Ibid*.

The federal government's efforts to censor and suppress free speech is not an isolated incident. Across the world, government authorities, social media companies, universities, and nongovernmental organizations ("NGOs") have coalesced into a "Censorship Industrial Complex"—a large-scale campaign to censor speech about topics of urgent public importance and to attack protected speech as "misinformation," "disinformation," and "conspiracy theories." See *The Censorship Industrial Complex: Hearing Before H. Select. Comm. on the Weaponization of*

[11] Available at http://www.newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules.

the Federal Government Complex, 118th Cong. (2023) (statement of Michael Shellenberger).[12]

Alarmingly, this Censorship Industrial Complex has skyrocketed since the COVID-19 pandemic. For example, world leaders issued a declaration pronouncing that the pandemic "accelerated the transformation of the digital ecosystem" and so declared "the importance to counter disinformation campaigns." The White House, *G20 Bali Leaders' Declaration* (Nov. 16, 2022).[13] The United Nations Educational, Scientific and Cultural Organization (UNESCO) released a blueprint for "dealing with dis- and mis-information, hate speech, and conspiracy theories." UNESCO, *Guidelines for the Governance of Digital Platforms* 3 (2023).[14] And the Mitre Corporation, which manages federally funded research and development centers, issued a "playbook" setting forth "best practices" to "monitor and combat misinformation and disinformation related to the COVID-19 vaccine." Mitre Corp., *COVID-19 Health Communication Playbook* (2022).[15]

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[12] Available at https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/shellenberger-testimony.pdf.

[13] Available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/16/g20-bali-leaders-declaration.

[14] Available at https://unesdoc.unesco.org/ark:/48223/pf0000387339.

[15] Available at https://web.archive.org/web/20220303224954/https:/covidhealthcomm.org.

At the forefront of the Censorship Industrial Complex is the World Health Organization (WHO), the United Nations agency responsible for international public health. Using alarmist language, WHO has decried the threat of an "infodemic," which it describes as "*too much information* including false or misleading information in digital and physical environments during a disease outbreak." World Health Org., *Infodemic* (emphasis added).[16] As part of its war on "misinformation" and "falsehoods," WHO has entrenched itself with tech companies "to remain one step ahead." World Health Org., *Combatting Misinformation Online*.[17] For example, WHO works with social media platforms to ensure its content policies "are fit for purpose." *Id.* In fact, WHO boasts that it worked with YouTube "to ensure no medical misinformation related to the virus proliferates on their platform," which "led to the removal of 850,000 YouTube videos related to harmful or misleading COVID-19 misinformation from February 2020 to January 2021." *Id.* WHO also boasts that social media platforms granted it access to the platform's "fast track reporting systems," which allowed WHO "to flag misinformation," thereby "speeding up the reporting and removal of content that breaks policy." *Id.*

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[16] Available at https://www.who.int/health-topics/infodemic#tab=tab_1 (last accessed Feb. 5, 2024).

[17] Available at https://www.who.int/teams/digital-health-and-innovation/digital-channels/combatting-misinformation-online (last accessed Feb. 5, 2024).

WHO's crusade against "misinformation" has not receded since the pandemic's end. It has announced new projects "to prevent and overcome the harmful impacts caused by infodemics." World Health Org., *supra* note 15. One such project is the Orwellian "EARS" program, an artificially intelligent "social listening tool" to help health authorities "quickly identify *rising narratives* and '*information voids*' that interfere with people getting the information *they need* to make good health choices." *Id.* WHO does not explain how it identifies the type of information that people may or may not "need." Nor does it explain how it determines whether someone makes a "good health choice." And it does not address how its "social listening tool" complies with the freedoms of speech and expression.

Critically, the Censorship Industrial Complex does not rely on direct government censorship but on more subtle methods, such as content flagging, visibility filtering, labeling, and manipulating search engine results. As the Twitter Files revealed and confirmed by the factfinding below, tech companies often perform censorial "content moderation" in coordination with government agencies. See Matt Taibbi, *The Censorship-Industrial Complex*, The Twitter Files (Apr. 12, 2023).[18] And the European Union's Digital Services Act will soon formalize this relationship by giving platform data to "vetted researchers" from NGOs and academia, relegating Americans' speech rights to the discretion of these

[18] Available at https://twitterfiles.substack.com/p/the-censorship-industrial-complex.

unelected and unaccountable entities. See European Commission, *The Digital Services Act*.[19]

The rise of the Censorship Industrial Complex is but another example in historical government efforts to censor protected speech. The first federal attempt to censor speech occurred with the passage of the Alien and Sedition Act of 1798. That infamous law

> made it a crime, punishable by a $5,000 fine and five years in prison, 'if any person shall write, print, utter or publish * * * any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress * * *, or the President * * *, with intent to defame * * * or to bring them * * * into contempt or disrepute; or to excite against them * * * the hatred of the good people of the United States.'

New York Times Co. v. *Sullivan*, 376 U.S. 254, 273–74 (1964) (quoting Sedition Act of 1798, 1 Stat. 596) (first four omissions in original).

As this Court explained in *New York Times,* after its passage the Act "was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison." 376 U.S. at 274. The Court observed that "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Id.* at 276 (footnote

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[19] Available at http://tinyurl.com/yenjccsy (last accessed Feb. 5, 2024).

omitted). Indeed, Congress repaid fines levied under the Act. See *id.* (citing Act of July 4, 1840, ch. 45, 6 Stat. 802, accompanied by H.R. Rep. No. 86 (1840)). And President Thomas Jefferson pardoned those convicted and sentenced under the Act, see *id.*, later commenting: "I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." Letter from Thomas Jefferson to Abigail Smith Adams (July 22, 1804).[20]

The following century saw the rise of another form of censorship in the "Comstock Laws." The federal Comstock Act of 1873, named after Anthony Comstock, the United States Postal Inspector and founder of the New York Society for the Suppression of Vice, was a criminal statute directed at "the suppression of Trade in and Circulation of obscene Literature and Articles of immoral Use." See *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 70 (1983) (quoting Act of March 3, 1873, ch. 258, § 2, 17 Stat. 599 (1873)). The Act prohibited importation of and use of the mails for transporting, among other things, "every article or thing intended or adapted for any indecent or immoral use." *United States* v. *Chase*, 135 U.S. 255, 257 (1890). By criminalizing the importation and use of the postal service for items intended for "indecent or immoral use," the Comstock Laws restricted the distribution of infor-

[20] Available at https://founders.archives.gov/documents/Jefferson/01-44-02-0122.

mation, limiting freedom of expression and contributing to widespread censorship.

Federal censorship arguably reared its head again in the Twentieth Century, most visibly during the so-called "Red Scare." "The McCarthy era saw the rise of efforts by state and federal governments in the United States to persuade private parties to control speakers and publishers whom the accepted free speech jurisprudence placed beyond the reach of official prosecution." Kreimer, 155 U. Pa. L. Rev. at 41. Leveraging the Nation's fears of the Soviet Union, Senator Joseph McCarthy accused various civic institutions of perpetuating communist propaganda. During the 1950s, public libraries faced intense pressure to censor materials perceived as disseminating Communist ideas. See generally Jennifer E. Steele, *A History of Censorship in the United States*, 5 J. Intellectual Freedom & Privacy 1 (2020) (citing Wayne A Wiegand, *Part of Our Lives: A People's History of the American Public Library* (2015)). Overall, the pervasive fear of being accused of being a communist sympathizer led to widespread self-censorship. Cf. *Columbia Broad. Sys., Inc.* v. *Democratic Nat. Comm.*, 412 U.S. 94, 155 (1973) (discussing how McCarthyism "put the saddle of the federal bureaucracy on the backs of publishers").

Government-patrolled speech is not just limited to the suppression of political speech—it often leads to violations of human rights. Historical accounts have described how the Nazi regime pressured doctors into committing horrific acts of medical criminality. See generally Michael H. Kater, *Doctors Under Hitler* 111–126 (1989) (describing the infiltration of Na-

zi ideology into the study of medical science at universities); Robert N. Proctor, *Nazi Doctors, Racial Medicine, and Human Experimentation*, in *The Nazi Doctors and the Nuremberg Code* 17–31 (George J. Annas & Michael A. Grodin eds., 1992) (describing the complicity of the medical profession in implementing racial policies); Robert J. Lifton, *The Nazi Doctors: Medical Killings and the Psychology of Genocide* 30 (1986) (describing a manual advocating that doctors embrace a public duty to maintain racial purity).

And recently, some studies have concluded that the COVID-19 lockdowns were responsible for human rights abuses. See, *e.g.*, Lawrence O. Gostin et al., *Human Rights and the COVID-19 Pandemic: A Retrospective and Prospective Analysis*, 401 The Lancet 154 (Jan. 14, 2023) (noting that, from the pandemic's beginning, "governments have violated civil and political rights—from suppressing information and silencing truth-tellers to detaining critics and using intrusive surveillance to control them" and that "[a]uthoritarian leaders used the crisis to grab power." (citations omitted))[21]; Ben Odigbo et al., *COVID-19 Lockdown Controls and Human Rights Abuses*, Emerald Open Research (2023) (documenting "significant cases of human rights abuses" in countries that implemented COVID-19 lockdowns).[22]

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[21] Available at https://www.thelancet.com/action/showPdf?pii=S0140-6736%2822%2901278-8.

[22] Available at https://www.emerald.com/insight/content/doi/10.1108/EOR-04-2023-0005/full/html.

C. The COVID-19 pandemic sparked a mass of government censorship campaigns across the world.

In the aftermath of the COVID-19 pandemic, journalists, congressional investigators, and others have documented the explosion of "a network of over 100 government agencies and nongovernmental organizations that work together to urge censorship by social media platforms and spread propaganda about disfavored individuals, topics, and whole narratives." Alex Gutentag, *US Military Contractors Used Counterterrorism Tactics Against the American People, New Documents Show*, Public (Dec. 4, 2023).[23] See also Matt Taibbi, *The Censorship-Industrial Complex*, The Twitter Files (Apr. 12, 2023).[24]

For example, a whistleblower recently provided a trove of documents showing that U.S. and U.K. military contractors developed and used "Adversarial Misinformation and Influence Tactics and Techniques" to crack down on "disinformation" about COVID-19. See Gutentag, note 23.

And in the case below, the district court judge found that the federal government collaborated with social platforms to engage in widespread censorship of medical experts and public intellectuals who questioned the mainstream response to the pandemic. See *Missouri* v. *Biden*, --- F. Supp. 3d ----, 2023 WL

[23] Available at https://public.substack.com/p/us-military-contractors-used-counterterrorism.

[24] Available at https://twitterfiles.substack.com/p/the-censorship-industrial-complex.

4335270, at *44 (W.D. La. July 4, 2023). In fact, Respondents presented 20,000 pages of evidence of a vast censorship enterprise that violated the First Amendment rights of millions of Americans. Within the district court's 155-page opinion, eighty-six pages of background facts show email chains, meetings, phone calls and even "public pressure campaigns" from the White House and other federal agencies coercing social media companies to suppress and censor content opposing "official" government narratives. *Missouri* v. *Biden*, 2023 WL 4335270, at *2.

While reading the factual findings of this disturbing pattern of censorship, one would assume this happened in Communist China or was lifted from Orwell's *1984*. But this government-coordinated censorship occurred in America, at the highest levels of government. What makes matters worse is that the Biden administration and government agencies not only intentionally deceived the public—they have staunchly defended its actions and continue to do so before this Court. See Brief for the Petitioners, at 14 (arguing that government officials "must be free * * * to persuade" private entities).

II. The Biden Administration's pressuring of social media companies to censor disfavored speech violates the First Amendment.

The First Amendment protects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Ariz. Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 755 (2011) (cleaned up). Relying on this Court's precedents, the Fifth Circuit correctly found that the Biden administration—through intimidation, threats, and even commandeering decision-making processes—coerced social media platforms into censoring protected speech. *Missouri* v. *Biden*, *supra*, 83 F.4th at 381.

Put simply, the federal government used its power to silence opposition and engaged in unprecedented censorship, not unlike the government propaganda machine of the Soviet Union. But "the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." *Turner Broad. Sys., Inc.* v. *F.C.C.*, 512 U.S. 622, 641–42 (1994). Under this Court's precedents, the Biden administration's state action to pressure social media platforms to censor protected speech cannot stand.

A. The First Amendment prohibits the government from singling out speech for control or penalty because of the messages the speech express, or because of the effect of such messages.

The First Amendment prohibits government entities and actors from "abridging the freedom of speech, or of the press." U.S. Const. amend. I. "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner*, 512 U.S. at 641. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972). Indeed, the First Amendment "protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply 'misguided." *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 586 (2023) (quoting *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995)). As such, "[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right." *Turner*, 512 U.S. at 641.

In this case, the Biden administration's state action to coerce regulated social media platforms entities into suppressing or removing disagreeable speech reveals that the White House sought not "to advance a legitimate regulatory goal" but to sup-

press controversial information or "manipulate the public debate through coercion rather than persuasion." See *Turner*, 512 U.S. at 641. But "[t]o permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government consorship [sic]." *Mosley*, 408 U.S. at 95–96. That is why the Biden administration's actions cannot pass muster under the First Amendment.

B. Any collaboration between the government and social media platforms to censor disfavored speech is viewpoint discrimination.

The district court found that, "[u]sing the 2016 election and the COVID-19 pandemic, the Government apparently engaged in a massive effort to suppress disfavored conservative speech." *Missouri* v. *Biden*, --- F. Supp. 3d ----, 2023 WL 4335270, at *44 "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). "Viewpoint discrimination is thus an egregious form of content discrimination." *Ibid.*

The government simply may neither police nor censor subjects that it deems inappropriate for public discussion. See *Rosenberger*, 515 U.S. at 828–829; accord *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 392 (1992) ("St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the

other to follow Marquis of Queensberry rules."). Yet the evidence here is irrefutable: The Biden administration collaborated with—and ultimately pressured—social media platforms to censor disfavored speech. See *Missouri* v. *Biden*, 83 F.4th at 381–82 (finding that "the White House, acting in concert with the Surgeon General's office, likely (1) coerced the platforms to make their moderation decisions by way of intimidating messages and threats of adverse consequences, and (2) significantly encouraged the platforms' decisions by commandeering their decision-making processes, both in violation of the First Amendment"). As the Fifth Circuit recognized, Respondents "adduced extensive evidence that social-media platforms have engaged in censorship of certain viewpoints on key issues and that the government has engaged in a years-long pressure campaign designed to ensure that the censorship aligned with the government's preferred viewpoints." *Id.* at 370. Under this Court's precedents, censoring private speech to ensure that it aligns with the government's preferred narrative is textbook viewpoint discrimination.

In short, this case provides overwhelming evidence that the Biden administration engaged in unconstitutional viewpoint discrimination to such a catastrophic extent that it eroded core free speech principles in the digital age. The Court should affirm that the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. See *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983).

C. Even if the White House did not directly censor speech, its pressure campaign resulted in a palpable chilling effect.

A private entity such as a social media platform violates the First Amendment "if the government coerces or induces it to take action the government itself would not be permitted to do, such as censor expression of a lawful viewpoint." *Biden* v. *Knight First Amendment Institute at Columbia Univ.*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring). "The government cannot accomplish through threats of adverse government action what the Constitution prohibits it from doing directly." *Id.*

Even if the White House did not engage in direct viewpoint discrimination, the pressure it placed on social media platforms to censor disfavored speech created an environment of self-censorship, where individuals refrained from expressing their thoughts or opinions, fearing potential consequences such as account suspension or deactivation, doxing, or even legal repercussions. Accord *Sec'y of State of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947, 964 (1984) ("By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech."). The fear of being targeted for expressing disfavored ideas stifles the free exchange of alternative perspectives, undermining the essence of a democratic society that values open dialogue in the marketplace of ideas.

III. The Court must affirm that the First Amendment prohibits the government from regulating controversial or unpopular speech, especially during national crises or social unrest.

The First Amendment "protects expression and association without regard * * * or to the truth, popularity, or social utility of the ideas and beliefs which are offered." *Nat'l Ass'n for Advancement of Colored People* v. *Button*, 371 U.S. 415, 444–45 (1963). "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). This freedom becomes even more significant during times of national crises or social unrest, when alternative perspectives and voices are essential to ensure leaders are fully informed to make critical decisions that impact the health and safety of millions.

A. The First Amendment is the world's exemplar and preeminent safeguard against government censorship.

The United States is a global leader in democracy and human rights, and the First Amendment is the gold standard for protecting right to free speech. When the federal government is permitted to do violence to the First Amendment, the ramifications extend beyond our borders. Cf. Ronald D. Rotunda & John E. Nowak, 5 Treatise on Const. L. § 20.6(f) ("Once we allow the government any power to restrict the freedom of speech, we may have taken a

path that is a 'slippery slope,' particularly because a central value of the free press, speech, and assembly lies in 'checking' the abuse of power by public officials.").

Given that "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803), this Court should affirm that the First Amendment protects and nourishes a robust marketplace of ideas on social media platforms, free from government coercion. Accord *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2302–03 (2019) (Alito, J., concurring) ("At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination.").

B. The Court should affirm that in adjudicating First Amendment disputes, courts must consider that the First Amendment's safeguards are most needed during "the worst of times."

"Times of crisis will almost invariably lead to greater and more vociferous participation in public discourse than times of calm." Brett G. Johnson, *What Is "Robust" Public Debate? An Analysis of the Supreme Court's Use of the Word "Robust" in First Amendment Jurisprudence*, 23 Comm. L. & Pol'y 335, 340 (2018). Accordingly, "[i]n adjudicating First Amendment disputes, courts must heed that "the overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox

ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically." Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L. Rev. 449, 449–50 (1985). "The first amendment, in other words, should be targeted for the worst of times." *Ibid*.

Thus, the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" that this Court has recognized applies even during national emergencies and times of social unrest. *New York Times*, *supra*, 376 U.S. at 270. Indeed, fundamental principes of free speech justify the need to protect open discourse and the perils of silencing dissenting opinions during national emergencies. Applying these principles to the context of government censorship during a pandemic underscores the troubling consequences of censoring "misinformation" and "conspiracy theories" for the sake of "public health."

First, if any opinion is censored, then the government's action raises the possibility that the silenced opinion might be true. See John Stuart Mill, *On Liberty* 98 (1859). This underscores the fallibility of assuming the absolute correctness of prevailing views. For example, the Fifth Circuit noted the grievous censorship of epidemiologists Dr. Jay Bhattacharya and Martin Kulldorf: "[T]heir article, the Great Barrington Declaration, which was critical of the government's COVID-related policies such as lockdowns, was 'deboosted' in Google search results and removed from Facebook and Reddit," and that "their roundtable discussion with Florida Governor Ron

DeSantis concerning mask requirements in schools was removed from YouTube." *Missouri* v. *Biden*, 83 F.4th at 367. In the context of the COVID-19 pandemic, the Biden administration's censorship campaign likely hindered the exploration of alternative and potentially valid strategies on how to respond to and mitigate the pandemic.

Second, even if a censored opinion is erroneous, it often contains a portion of the truth. See Mill, *On Liberty* at 98. Considering the complexity of responding to a worldwide pandemic, alternative viewpoints from medical and scientific experts on how to address the crisis undoubtedly would have been beneficial to shaping a more comprehensive response to the pandemic. In other words, suppressing dissent deprives both the public and decisionmakers access to information that could lead to more effective solutions.

Third, adverse opinions are often necessary to uncover the whole truth. See Mill, *On Liberty* at 98. In the context of a pandemic, diverse perspectives on mitigation measures, treatment options, and governmental responses would have contributed to a more comprehensive understanding of an unprecedented public health crisis. *Cf.* John Milton, *Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (1644) ("[T]hough all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and falsehood grapple; whoever knew truth put to the worse in a free and open encounter?"). Silencing dissent impedes the discovery

of workable public health strategies and even viable medical interventions.

Fourth, even if the purported consensus upheld by the CDC, WHO, and the Biden Administration were entirely true, unless it is vigorously contested, it risks being held as an infallible orthodoxy. Cf. Rotunda & Nowak, 5 Treatise on Const. L. § 20.6(f) ("Line drawing in such an abstract area is always difficult and especially so when a government's natural inclination is moving the line towards more suppression of criticism and unpopular ideas. Thus, even if one could distinguish between illegitimate and legitimate speech, it may still be necessary to protect all speech in order to afford real protection for legitimate speech."). As the last few years have shown, government censorship during the pandemic led to the acceptance of a particular narrative without providing for the necessary scrutiny that is standard in the medical and scientific fields.

Finally, censoring speech on matter of great public importance often has the opposite effect:

> [O]ne of the reasons that government should not suppress speech is that free speech is a safety valve. Just as the ancient Romans eventually learned that executing Christians did not suppress Christianity, modern governments should realize that forbidding people to talk about certain topics does not encourage public stability. It only creates martyrs. Punishing people for speech does not discourage the speech; it only drives it underground, and encourages conspiracy. In the

> battle for public order, free speech is the ally, not the enemy.

Rotunda & Nowak, 5 Treatise on Const. L. § 20.6(g).

In short, the First Amendment was most needed during the COVID-19, a historical period where "intolerance of unorthodox ideas" was widespread and governments systematically stifled dissent. Blasi, 85 Colum. L. Rev. at 449–50. By stifling dissent and alternative opinions about potential responses to the pandemic, the Biden administration suppressed potentially life-saving information, hindered the public's right to information about a complex global issue, and fostered a rigid orthodoxy that ultimately proved misguided—and even pernicious.

The assertion that the "conventional" public health response led by WHO and the CDC was misguided and even pernicious is not mere hyperbole. Just this week, a Florida statewide grand jury impaneled to investigate whether pharmaceutical manufacturers and other medical engaged in "criminal activity or wrongdoing" with respect to their involvement in the development, approval or marketing of COVID-19 vaccines released a scathing report against the federal health agencies. See First Interim Report, *In re Twenty-Second Statewide Grand Jury*, No. SC22-170 (Fla. 2023).[25] The report, which drew its conclusions from the sworn testimonies of "numerous doctors,

[25] Available at https://www.flgov.com/wp-content/uploads/2024/02/22nd-Statewide-Grand-Jury-First-Interim-Report.pdf.

professors and scientists with a broad range of viewpoints," *id.* at 3, reported multiple omissions, mistruths, and actual disinformation perpetuated by government officials at federal agencies such as the CDC and National Institutes of Health (NIH). For example, the grand jury found that "some of the officials in these agencies were acutely aware that * * * mask mandates—if not masks themselves—have little to no efficacy in stopping or slowing the spread of SARS-CoV-2 virus." *Id.* at 26. Yet social media platforms censored speech that echoed similar conclusions. See *Missouri* v. *Biden*, 83 F.4th at 371 (noting that one platform removed a video by the Louisiana Department of Justice showing Louisiana citizens testifying at the State Capitol and questioning the efficacy of COVID-19 vaccines and mask mandates).

In fact, the grand jury concluded that "many public health recommendations and their attendant mandates *departed significantly* from scientific research that was contemporaneously available to everyone: Individuals, scientists, corporations and governments alike." First Interim Report 30 (emphasis added). The grand jury continued: "Often this research was ignored by institutional policymakers. Occasionally it was even attacked." *Ibid.* As the grand jury observed, "It is a sad state of affairs when something as simple as following the science constitutes an act of heresy, but here we are." *Ibid.*

At bottom, instead of doing violence to the First Amendment, the federal government should have upheld it. Cf. Blasi, 85 Colum. L. Rev. at 450 ("[C]ertain segments of time are of special significance for the preservation of the basic liberties of ex-

pression and inquiry because the most serious threats to those liberties tend to be concentrated in abnormal periods.").

CONCLUSION

The Fifth Circuit's judgment should be affirmed.

Respectfully submitted.

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