No. 23-411

IN THE

Supreme Court of the United States

VIVEK H. MURTHY, U.S. SURGEON GENERAL, ET AL.,
Petitioners,
v.
MISSOURI, ET AL.,
Respondents.

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

BRIEF OF THE COALITION FOR INDEPENDENT TECHNOLOGY RESEARCH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Coalition for Independent Technology Research ("CITR") is a fiscally sponsored project of Aspiration, a Washington nonprofit public benefit corporation. CITR is a non-partisan organization, whose membership is comprised of research organizations, academics, and journalists. Those members study emerging digital technologies, including social media, and their social and political impacts. A list of CITR's current membership can be found here: https://independenttechresearch.org/members/.

CITR's core purpose is to advance, defend, and sustain the right to ethically study the impact of technology on society. This encompasses protecting technology research from efforts at obstruction, interference and cooption by *both* the government *and* the technology companies that are often the subject of that research. CITR believes that technology is changing society in ways that are essential for the public—as well as the government and the social media platforms themselves—to understand, and that independent research in that area is critical to that understanding.

CITR submits this *amicus curiae* brief in support of Petitioners to express its view that the Court of Appeals' ruling in this case—in particular, its

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[1] No counsel for a party authored any part of this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. In addition to contributions from CITR's members, the preparation of this brief was funded in part by the Tech Justice Law Project.

expansive view of the circumstances under which public-private interactions can constitute state action, subject to constitutional constraints and judicial oversight—threatens to imperil independent research in the digital technology area. That expansive view of what counts as state action undermines the ability of researchers to seek information from both government and technology companies, to share the results of their research with government officials and technology platforms, and to freely make technological and policy recommendations to them. CITR files this brief to ensure that these core First Amendment rights are not a casualty of the ruling below.

SUMMARY OF THE ARGUMENT

CITR agrees that there are real reasons to be concerned about the outsized influence that large technology companies have on our discourse. Such concerns are, in fact, a principal reason that CITR's members study social media companies and their impacts.

CITR also agrees that government actors may not, consistent with the First Amendment, threaten private parties in order to coerce them into suppressing or excluding disfavored speech. *See, e.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66-67 (1963) (First Amendment rights violated by threats by government officials designed to prevent sale of certain books). Like direct restraints on speech, such indirect efforts by officials to suppress speech are inconsistent with any commitment to free and open debate and inquiry. However, the Court of Appeals' ruling in this case extended well beyond those circumstances, and did so in a manner that, if left undisturbed, will

significantly inhibit communications vital to conducting and disseminating technology research and sharing accumulated expertise with both government and the platforms.

Under the First Amendment, researchers enjoy the freedom to study the political and social effects of digital technologies and to publish the results of their research—regardless of whether it aligns with, or is highly critical of, technology companies or government policy. That research frequently depends on the willingness of government officials to share information with researchers. Their research and expertise, in turn, contributes to a better informed citizenry and more informed policy-making. All of those activities—researching social media platforms, communicating with the platforms, government, and the public about that research, and making recommendations to each—are squarely protected under the Constitution.

The decision by the court below threatens those activities, however. It does so by providing doctrinal support for characterizing routine and non-coercive interactions between researchers and government as state action, permitting researchers to be—falsely—branded as arms of the state. The result is to expose all manner of their private speech to constitutional constraints, as well as to invite unwarranted judicial scrutiny and micro-management of that speech. That is itself contrary to the First Amendment. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1934 (2019) (warning that "[e]xpanding the state-action doctrine beyond its traditional boundaries would expand government control while restricting individual liberty and private enterprise").

The effect of the Court of Appeals' ruling will be—and has already been—to infringe on CITR members' rights in at least two key respects. First, it has chilled government officials and technology companies from engaging in routine interactions with them, causing those otherwise-willing speakers to steer well beyond what is strictly required by the injunction at issue to avoid any even arguable violation.

Second, the ruling also exposes researchers in this space to burdensome litigation, as well as invasive and unbounded legislative targeting, by lending doctrinal credence to the false notion that non-coercive interactions between researchers and government somehow convert independent researchers into tools of the state. Indeed, several CITR members have already been sued on that basis in the same District Court in which this action originated, while others have been haled before Congress to be confronted about their research.

The great irony of this case is that the goal that animated Respondents' lawsuit—to better understand the power of social media companies, their interaction with government, and the ramifications for public debate—will be directly undermined if the Court of Appeals' ruling is affirmed and CITR's members are effectively unable to conduct and publish independent research into those very subjects. CITR respectfully requests that this Court preserve researchers' freedom to inquire, to gain understanding, and to engage with relevant stakeholders by adhering to its prior precedents limiting the conduct that can constitute state action.

ARGUMENT

I. THE FIRST AMENDMENT AFFORDS INDEPENDENT RESEARCHERS THE RIGHT TO SEEK INFORMATION FROM GOVERNMENT OFFICIALS AND SOCIAL MEDIA COMPANIES AND TO MAKE RECOMMENDATIONS TO BOTH BASED ON THEIR RESEARCH.

Academic and scientific inquiry, including especially research addressing matters of public concern, lie at the very heart of the First Amendment's protections. This Court has long held that scholars "must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."). This Court has likewise emphasized that "speech on public issues"—here, speech about hugely influential social media platforms—"occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

These broad First Amendment protections encompass two specific rights of particular relevance to this case and the work of CITR's members. First, researchers have a right to study social media platforms and to engage in speech with and about those platforms. That includes the right to collect data

about the platforms, to study how information moves across those platforms, and to address the impact of their technologies on public discourse. In recent years, for example, researchers have studied patterns of political ad purchasing on social media, including by foreign powers, and other efforts by foreign powers to use social media to influence the United States electorate.[2]

Researchers, of course, also have the related right to disseminate the results of their research and to opine about the technology companies' conduct, including (a) to criticize their content moderation policies, (b) to forcefully urge them to change those policies, and (c) to propose technological innovations for doing so. Such vigorous speech by private parties to and about other private parties is squarely protected by the First Amendment. *See, e.g.*, *Bose Corp. v. Consumer Union*, 466 U.S. 485, 503-04 (1984) ("The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.").

Second, researchers also enjoy a First Amendment right to speak with the government about

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[2] *See, e.g.*, *How Ad Observatory Works*, NYU Ad Observatory, https://adobservatory.org/ (last visited Dec. 21, 2023) (providing description of ad purchasing research); Renee DiResta *et al.*, *The Tactics & Tropes of the Internet Research Agency*, New Knowledge (Oct. 2019), *available at* https://www.intelligence.senate.gov/sites/default/files/documents/NewKnowledge-Disinformation-Report-Whitepaper.pdf (report provided to the Senate Select Committee on Intelligence based on data the committee provided to the authors).

their work. That includes a bundle of related rights, including to request information from government agencies, to receive that information, to share it with the public, and to advance policy recommendations—*i.e.*, to petition—to government officials. *See, e.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 757 (1976) (First Amendment protects not only the right to speak, but the concomitant "right to receive information and ideas" (internal marks omitted)). And, as part of those interactions, the government is, of course, free to agree or disagree with those recommendations, and to promote its own policy choices. *See Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000) (government has the right "to advocate and defend its own policies").

In fact, a substantial amount of research regarding social media platforms involves information sharing with, and making recommendations to, both government and the platforms. Maintaining open lines of communication between independent researchers, government, and industry is critical to producing quality, independent research, which in turn informs both the policies adopted by the platforms and the desirability of various potential regulations. Among other things, it allows researchers to receive valuable information to which they would often not otherwise have access and it allows government—and the public—to benefit from the researchers' expertise. This exchange is both a cornerstone of evidence-based policymaking and essential to democratic governance. *See Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

For instance, one area in which researchers

make recommendations to social media platforms involves strategies for detecting and eliminating the distribution of child sexual abuse material online.[3] Researchers likewise provide tips to government about the online dissemination of child-sex-abuse images.[4] Similarly, the Center on Human Trafficking at Montclair State University has arranged with the Department of Homeland Security to receive anonymized data regarding human trafficking, which the Center then uses (along with other information) to develop a web-based application and website to assist local law enforcement in identifying and combatting such trafficking.[5]

In addition, many technology research labs that conduct research about content moderation, especially platform censorship, have a history of notifying companies about overly restrictive policies that, even though they are content-neutral, constrain speech.[6]

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[3] *See* Stanford Internet Observatory, *An update on the SG-CSAM ecosystem*, Stanford Univ. Cyber Policy Ctr. (Sept. 21, 2023), https://cyber.fsi.stanford.edu/news/update-sg-csam-ecosystem.

[4] *See generally* Carlos Gonzales, *Creating Impact: A Year on Stop Child Abuse – Trace An Object*, bellingcat.com (Apr. 22, 2020), https://www.bellingcat.com/news/uk-and-europe/2020/04/22/creating-impact-a-year-on-stop-child-abuse-trace-an-object/.

[5] *See* Glob. Ctr. on Human Trafficking, *Global Center on Human Trafficking Partners with Department of Homeland Security*, Montclair State Univ. (Jan. 30, 2023), https://www.montclair.edu/chss/2023/01/30/global-center-on-human-trafficking-partners-with-department-of-homeland-security/.

[6] *See generally* Robyn Caplan, *Networked Governance*, 24 Yale J.L. & Tech. 541, 547-50 (2022) (describing the range of topics, including the development of content-moderation policies, on which the platforms rely on input from external stakeholders such

Similarly, technology researchers, particularly in the "open source" community, regularly consult with and advise both government agencies and private technology companies about cybersecurity issues and their response to specific cybersecurity events.[7]

Other technology researchers focus on preserving election integrity, including by tracking the spread of false voting information online. For instance, in advance of the 2020 election, the Stanford Internet Observatory, a CITR member, partnered with three other research organizations to form the Election Integrity Partnership.[8] The partnership's purpose was to create "a coalition of research entities who would focus on supporting real-time information exchange" regarding the spread of potentially misleading claims about election processes and procedures.[9]

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as academic researchers); *see also How Stakeholder Engagement Helps Us Develop the Facebook Community Standards*, Meta (updated Jan. 18, 2023), https://transparency.fb.com/en-gb/policies/improving/stakeholders-help-us-develop-community-standards/.

[7] *See, e.g.*, *Partnerships lead to safer technology*, Carnegie Mellon University CyLab, https://www.cylab.cmu.edu/partners/index.html (last visited Dec. 21, 2023).

[8] *See Announcing the EIP*, Election Integrity Project (July 27, 2020), https://www.eipartnership.net/2020/announcing-the-eip; Ctr. for Informed Pub., Dig. Forensic Research Lab, Graphika, & Stanford Internet Observatory, *The Long Fuse: Misinformation and the 2020 Election* ("*The Long Fuse*") at 1-5, Election Integrity P'ship (2021), *available at* https://stacks.stanford.edu/file/druid:tr171zs0069/EIP-Final-Report.pdf.

[9] *The Long Fuse* at 2.

As the Election Integrity Partnership disclosed in a report published online, part of its work during the 2020 election involved using the researchers' expertise to analyze and evaluate claims of potential election misinformation brought to it by state election officials, as well as by private parties.[10] If the Election Integrity Partnership determined, based on its own independent judgment, that the social media content flagged for it violated the content policies of the social media platform on which it was published, the partnership would bring the content to the platform's attention. The platform would, in turn, make its own determination, based on its own independent judgment, of whether to act on the information provided to it.[11] That work, which was narrowly focused on counteracting the spread of inaccurate rumors and information about subjects like how to vote by mail or the date of the election, depended on the researchers' ability to exchange information and recommendations with both government officials and the platforms.

These are just a small number of such examples. What they underscore is that the open exchange of information, ideas, and proposals between researchers and government, on the one hand, and researchers and industry, on the other, is essential to addressing some of the most complicated issues we currently face as a society. And, more to the point, those interactions indisputably involve the intertwined freedoms of speech, association, and petition that are at the core of the First Amendment. As explained below, affirming

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[10] *Id.* at 12-13.

[11] *Id.* at 17.

the Court of Appeals' ruling would imperil such critical First Amendment-protected activity.

II. THE COURT OF APPEALS' RULING, IF AFFIRMED, WILL INHIBIT THE ABILITY OF TECHNOLOGY RESEARCHERS TO PERFORM CRITICAL WORK IN THE PUBLIC INTEREST.

In its ruling, the Court of Appeals acknowledged that an injunction that *directly* prohibited communications between government and researchers would violate the First Amendment. Specifically, the Court vacated the portion of the District Court's injunction that barred communications between the government-defendants and research organizations—including the Election Integrity Partnership discussed above, *see supra* at 9-10, and "any like project or group"—relating to content-moderation decisions. J.A. 78-79. The Court of Appeals properly recognized that an injunction that prevented such communications may well "implicate private, third-party actors that are not parties in this case and that may be entitled to their own First Amendment protections." J.A. 79.

Simply vacating that portion of the injunction does not fully solve the problem, however. The Court of Appeals' ruling, and the very broad injunction it left in place, will still have the effect of inhibiting and burdening constitutionally protected communications between researchers, platforms, and the government. The ruling substantially loosens the proof needed to demonstrate that private-public interactions have crossed the line from information sharing and attempts at mutual persuasion into state action. If the ruling is affirmed, it will continue to chill vital

research and the private/public interactions on which such research so often depends.

In its analysis of the state-action issue, the Court of Appeals correctly recited the general principle, as articulated in *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), that a private party's conduct constitutes state action "when [it] is coerced or significantly encouraged by the government to such a degree that its 'choice' . . . 'must in law be deemed to be that of the State.'" J.A. 32-33 (quoting *Blum*, 457 U.S. at 1004). The Court further recognized that the "significant encouragement" from the government necessary to convert any resulting private conduct into state action cannot consist of mere "persuasion." J.A. 33. Rather, "for encouragement," the "government must exercise some active, meaningful control, over the private party's decision." J.A. 34. Those limitations are consistent with what, prior to the Court of Appeals and District Court decisions in this case, had been the basic understanding of the law in this area—namely, that, "so long as the [private party] is free to disagree with the government and to make its own independent judgment about whether to comply with the government's request," interactions between government and private parties do not convert private conduct into state action. *O'Handley v. Weber*, 62 F.4th 1145, 1158 (9th Cir. 2023).

In applying these principles to the actual conduct at issue, however, the Court of Appeals blew past those limits. Even based on the Court's own descriptions, many of the interactions between the government agencies and the social media platforms that it held converted the platforms' conduct into state action appear to have involved nothing more than

routine information sharing and back-and-forth regarding a subject matter of mutual interest and concern—namely, the potential use of the platforms to spread false information about elections and public health.

For instance, with respect to the CDC, the Court of Appeals acknowledged that the agency "do[es] not possess any clear authority over the platforms" to force them do anything against their will. J.A. 65. Nonetheless, the Court held that the CDC's interactions with the platforms effectively rendered them arms of the state in making their content moderation decisions. The Court reached that conclusion because "the CDC garnered an extensive relationship with the platforms," which included both the CDC flagging certain posts as concerning, and the "platforms [seeking] answers from the officials as to whether certain controversial claims were 'true or false' and whether related posts should be taken down as misleading." J.A. 13-14, 65-67.

Likewise, with respect to the FBI, the Court of Appeals acknowledged that, despite the FBI's status as a law enforcement agency, there was nothing in the record to indicate that its "messages" to the platforms "were . . . threatening in tone or manner." J.A. 62. Nonetheless, the Court held that the FBI's interactions with the platforms also had the effect of rendering them arms of the state because (a) FBI "officials regularly met with the platforms," and shared relevant information garnered from "ongoing investigations," (b) as a consequence, some platforms "changed their 'terms of service,'" including "to be able to tackle content that was tied to hacking operations," and (c) the FBI flagged certain posts for the platforms as

containing election misinformation, such as "stat[ing] incorrect poll hours and mail-in voting procedures," and that, as a result, the "posts [were] *taken down 50% of the time*." J.A. 14-15 (emphasis added).

In other words, even though the platforms rejected fully *half* of the FBI's take-down requests, the Court of Appeals concluded that the platforms were not, in fact, exercising their independent judgment to sometimes agree with and sometimes reject the government's conclusions about what counted as election misinformation. Rather, that .500 "batting average" was taken as conclusive evidence that the FBI was, in fact, the one pulling the strings, rendering those instances in which the platforms removed flagged content government suppression of speech, rather than a private party's exercise of editorial control over its own forum. This is in stark contrast to how the state-action doctrine has previously been applied, including in this precise context. *See, e.g.*, *O'Handley,* 62 F.4th at 1160 (removal of posts was not state action, even where requested by government, because social media company "never took its hands off the wheel").

Perhaps the most alarming aspect of the Court of Appeals' analysis was its treatment of the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency ("CISA"), which the Court excluded from its original injunction, but ultimately added back in following a rehearing petition. *See Missouri v. Biden*, 80 F.4th 641, 682 (5th Cir. 2023) (original panel decision, in which CISA's interactions with platforms were held to "fall[] on the 'attempts to convince,' not 'attempts to coerce,' side of the line"), *withdrawn and substituted*, 83 F.4th 350

(5th Cir. 2023). CISA, like the CDC, does not possess any even theoretical coercive authority over the social media platforms. The activities that the Court nonetheless flagged as constitutionally objectionable involved almost exclusively information-sharing by the agency—specifically, allegedly "act[ing] as an intermediary" for third-party researchers "by forwarding flagged content from them to the platforms," and "shar[ing]" information with the platforms about "whether certain election-related claims were true or false." J.A. 15-16, 67-68.[12] On that basis, the Court of Appeals concluded that "CISA likely significantly encouraged the platforms' content-moderation decisions and thereby violated the First Amendment." J.A. 68. It did so even though there was nothing in any of the interactions between CISA and the platforms that could even arguably be characterized as a threat to them of any kind.

If the Fifth Circuit's analysis is adopted by this Court, the result will be to permit routine and innocuous interactions with government agencies—even with agencies, such as the CDC and CISA, that do not possess any coercive authority—to be alchemized into state action if enough of them are cobbled together. That will inhibit research in the

[12] The factual accuracy of this aspect of the Fifth Circuit's holding—specifically, the assertion that third-party researchers flagged social media content for CISA as potentially containing misinformation, and that CISA, in turn, "served as an intermediary" by sharing that information with the social media platforms—is very much in dispute. Even assuming such interactions had occurred, however, they would not transform private conduct, whether on the part of the researchers or the platforms, into state action.

public interest in at least two specific ways.

First, if affirmed by this Court, the Court of Appeals' ruling will chill the government from sharing information with private parties, including researchers, out of concern that doing so might be deemed to convert whatever the private party does with that information into state action, subject to judicial regulation. As this Court has counseled, "[p]rohibitions on speech have the potential to chill, or deter, speech outside their boundaries," including because of "concern[s] about . . . becoming entangled in the legal system." *Counterman v. Colorado*, 143 S. Ct. 2106, 2114-15 (2023). Leaving the Court of Appeals' ruling undisturbed will introduce all manner of ambiguity into determining when government speech crosses the line separating (permitted) persuasion from (prohibited) compulsion. The result will be "self-censorship" by government in order to "steer[] wide of the unlawful zone," *id.* at 2115 (cleaned up), which will violate the constitutional right of researchers to seek and obtain information from the government vital to their research.

This, in fact, is already happening. For instance, news reports have confirmed that, out of fear of violating the injunction, the federal government has stopped alerting the platforms about evidence of unlawful attempts by foreign actors to influence election campaigns—even though the injunction is stayed and doing so is expressly permitted under its terms in any event.[13] This is a very real consequence of

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[13] *See, e.g.*, Naomi Nix & Cat Zakrzewski, *U.S. stops helping Big Tech spot foreign meddling amid GOP threats*, Wash. Post (Nov. 30, 2023), https://www.washingtonpost.com/technology/2023/

the rulings in this case, and will inhibit much-needed evidence-based research into the social media ecosystem.

Second, and even more significantly, if left undisturbed, the Court of Appeals' ruling will discourage researchers from sharing their expertise with both government and private parties. The specific fear will be that, even though such activities are constitutionally protected, engaging in them will nonetheless expose researchers to burdensome litigation premised on the theory that the researchers are "act[ing] as an intermediary" between government and the platforms, making their recommendations somehow a form of state action.[14]

This is not just a theoretical concern. Two of the plaintiffs in this lawsuit—Jill Hines and Jim Hoft—also brought a parallel First Amendment lawsuit in the same District Court against digital technology

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11/30/biden-foreign-disinformation-social-media-election-interference/.

[14] Nor should it make a difference that many researchers, including a number of CITR members, receive government funding to support their research. They do so on the condition that the research remains independent, even if the results undermine the goals of the government agency providing those funds. In any event, this Court has repeatedly held that such government funding does not convert the recipient of that funding into a state actor. *See, e.g.*, *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542-44 (1987) (extensive congressional funding of United States Olympic Committee did not covert organization into state actor); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41 (1982) (private school was not a state actor, despite receiving "virtually all" its income from "government funding").

researchers, including members of the Election Integrity Partnership discussed above. *See Hines v. Stamos*, No. 3:23-cv-571 (W.D. La.).[15] A central claim in that lawsuit is that, when the Election Integrity Partnership flagged specific social media posts for platforms as potentially violating their content policies, it was acting as an arm of the federal government, since, according to the lawsuit, some of those posts had been initially flagged for the group by CISA.[16] In addition, many digital technology researchers, including some CITR members, are being investigated by congressional committees based on similar claims about federal agencies' supposed use of researchers as conduits for their own purportedly censorious ambitions.[17]

Under the state-action doctrine, at least as it

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[15] More recently, two media companies and the State of Texas sued the Department of State and others based on lists generated by *private research entities* that identified certain news media outlets as unreliable. *See The Daily Wire, LLC v. Dep't of State*, No. 6:23-cv-00609 (E.D. Tex.).

[16] As noted above, it was state election officials and various private entities, not CISA, that flagged social media posts for the Election Integrity Partnership prior to its highlighting such content for the platforms. *See supra* at 10. But, even if CISA did play that role, that would not remotely render the Election Integrity Partnership's subsequent conduct state action.

[17] *See, e.g.*, Ltr. from Hon. Jim Jordan, Chairman of Committee on the Judiciary to John B. Bellinger III, Esq. (June 1, 2023), *available at* https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2023-06-01-jdj-to-bellinger-re-stanford.pdf?_gl=1*zro86a*_ga*ODE4NzMzNzc5LjE3MDI0Mjc5NTA.*_ga_1818ZEQW81*MTcwMjQyNzk1MC4xLjEuMTcwMjQyODIwNS4wLjAuMA.

existed prior to the Court of Appeals' ruling in this case, it was obvious that a private party could not be subjected to a First Amendment claim simply because another private party agreed with its *recommendation* that a social media post be taken down. That held true even where the private party's take-down recommendation was preceded by a recommendation from government that the post be reviewed as potentially containing harmful misinformation. *See, e.g.*, *Blum*, 457 U.S. at 1008 (no state action where decisions in question "ultimately turn[ed] on medical judgments made by private parties"); *O'Handley*, 62 F.4th at 1158 (no state action where government requested certain social media content be taken down and "Twitter complied with the request under the terms of its own content-moderation policy and using its own independent judgment").

Under the Court of Appeals' analysis, that is no longer clear. Affirming its ruling would lend doctrinal credence to the notion that a series of patently non-coercive interactions can, nonetheless, give rise to state action.

The effect of increased exposure to such expansive claims—and the resulting litigation and Congressional targeting—on the First Amendment rights of researchers cannot be overstated. The ability of researchers to share their expertise through exchanging information with the government and the platforms, and making technological and policy recommendations to each, will be chilled and placed at risk if the Court of Appeals' analysis is adopted. And, to the extent that any litigation against researchers is successful, even if only preliminarily, the result will be to expose their research to judicial oversight and

micro-management. That would be a significant impairment of their First Amendment rights.

These broad effects, in which diluting the standards for demonstrating state action in the First Amendment context itself threatens First Amendment rights, are precisely the evil this Court warned about in *Halleck*. There, this Court cautioned that "[e]xpanding the state-action doctrine beyond its traditional boundaries," especially in the First Amendment context, "would expand governmental control while restricting individual liberty and private enterprise." *Halleck*, 139 S. Ct. at 1934. That is because, if ordinary interactions with government "sufficed to transform a private entity into a state actor, a large swath of private entities in America would be suddenly turned into state actors and be subject to a variety of constitutional constraints on their activities." *Id.* at 1932. This case confirms that wisdom, and reversal is warranted on that basis.

CONCLUSION

CITR reiterates that it is sympathetic to concerns about the effects of concentrated power—whether in government or private social media companies—on public discourse. Indeed, its members have devoted their careers to studying the ramifications of that power. But, in this case, the cure is far worse than the disease. The ruling below threatens to convert all manner of routine, valuable, and non-coercive interactions between government and private parties into state action, subject to constitutional constraints and judicial micro-management. The result will be to inhibit vital research, including research into the very concerns

about the power of social media companies that animated this litigation in the first place. The Court of Appeals' decision should be reversed and the underlying injunction vacated.

Respectfully submitted,

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