No. 23-411

IN THE
Supreme Court of the United States

VIVEK H. MURTHY, Surgeon General, et al.,
Petitioners,

v.

State of MISSOURI, et al.
Respondents.

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

BRIEF FOR STATES OF NEW YORK, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAIʻI, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND WISCONSIN, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Miscellaneous Authorities*

Government Sources

*All websites last visited December 22, 2023.

Miscellaneous Authorities **Page(s)**

Government Sources (cont'd)

Miscellaneous Authorities **Page(s)**

Government Sources (cont'd)

Miscellaneous Authorities **Page(s)**

Government Sources (cont'd)

Miscellaneous Authorities **Page(s)**

Government Sources (cont'd)

Miscellaneous Authorities **Page(s)**

Government Sources (cont'd)

Miscellaneous Authorities **Page(s)**

Government Sources (cont'd)

Miscellaneous Authorities **Page(s)**

Government Sources (cont'd)

Other Sources

Miscellaneous Authorities **Page(s)**

Other Sources (cont'd)

Miscellaneous Authorities **Page(s)**

Other Sources (cont'd)

INTERESTS OF AMICI CURIAE

Since the advent of social media, government and private companies have often shared information and engaged in dialogue about best practices in mitigating the spread of harmful content on social-media platforms. In this lawsuit brought by respondents Missouri, Louisiana, and several individuals, the U.S. District Court for the Western District of Louisiana (Doughty, J.) issued a sweeping preliminary injunction barring thousands of federal officials from participating in this important discourse. On appeal, the Fifth Circuit largely maintained the terms of the district court's injunction and upheld the district court's core holding that many of the federal defendants had either "coerced" or "significantly encouraged" social-media platforms to "censor" protected speech.

Amici States of New York, Arizona, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin, and the District of Columbia (collectively "Amici States") submit this brief in support of petitioners, the federal agencies and officials subject to the preliminary injunction. Amici urge this Court to reverse the Fifth Circuit's decision. That decision treats virtually any governmental communication aimed at persuading or helping social-media platforms to remove harmful content, protect vulnerable users, or address threats to public safety as inherently coercive and therefore unconstitutional—a result that cannot be reconciled with this Court's long-standing precedents. And the decision effectively bars large swaths of the federal government from communicating—no matter how

innocuously—with social-media companies about content moderation.

Amici States have a substantial interest in protecting their residents from the dangers to residents' safety and health that the spread of harmful content on social-media platforms can sometimes pose. Critical to this interest is Amici States' ability to share information and engage in dialogue with social-media companies about potential health and safety hazards and other matters of public concern. For example, Amici States have long collaborated with platforms like Facebook (now Meta), TikTok, and Snapchat on developing best practices to protect minors against online predators, inappropriate conduct, and cyberbullying, and have called on such platforms to adopt more robust parental controls. Amici States also routinely work with social-media companies to help identify harmful content that violates the platforms' own policies, such as posts containing the video footage from the May 2022 mass shooting in Buffalo, New York, which spread online for weeks after the attack. Amici States submit this brief to offer their unique perspective on the nature and importance of such information-sharing and dialogue and to highlight the potential harms that the Fifth Circuit's broad injunction may inflict on state and local governments.

As Amici States' experience confirms, maintaining open lines of communication between the government and social-media companies on topics such as extremist violence, child safety, and consumer protection is mutually beneficial, furthers the public interest, and fully comports with the First Amendment. In treating the exchange of information about harms and best practices as inherently coercive, or as an improper entanglement, the Fifth Circuit has disabled the government from

participating in an important process of acquiring information and debating policy—a process that often entails persuasion but not coercion. By failing to properly distinguish between permissible persuasion and impermissible coercion (or significant encouragement), the Fifth Circuit has made a critical error; in purporting to protect First Amendment values, the Fifth Circuit has significantly restricted the federal government's essential role in participating in the marketplace of ideas. This will impoverish, rather than protect, robust debate on matters of vital public importance.

SUMMARY OF ARGUMENT

I. Pointing to routine, mutually beneficial communications between social-media companies and federal government officials, the Fifth Circuit wrongly concluded that the private content-moderation decisions of social-media companies were attributable to the federal government under the theory that federal officials had purportedly coerced or significantly encouraged those decisions. The Fifth Circuit's decision failed to properly distinguish between impermissible coercion and permissible efforts to persuade. If upheld, the decision below could chill the ability of government, including Amici States, to express important policy views and to engage productively with private industry.

First, in concluding that petitioners had coerced or significantly encouraged the content-moderation decisions of social-media companies, the Fifth Circuit erroneously focused on the mere existence of background law-enforcement authority of certain federal agencies over the social-media companies—rather than on any actual threats to *use* such authority if the companies did not make the content-moderation decisions at issue.

But this Court's precedents make clear that the mere existence of government authority does not amount to coercion when the government simply recommends or attempts to persuade private actors to undertake a particular course of action.

Amici States' experience as regulators and law enforcers further demonstrates the error in the Fifth Circuit's reasoning. Using their plenary police powers, States enact and enforce many different types of laws and regulations in their respective jurisdictions. The First Amendment leaves ample space for productive, noncoercive relationships and communications between regulated entities and the States, notwithstanding these substantial regulatory powers. If adopted, the Fifth Circuit's focus on the mere existence of *some* regulatory authority could discourage States from engaging in such important and productive dialogue with industry, lest they succeed in persuading industry to take a particular action and be deemed to have coerced that action by virtue of their government authority.

Second, the Fifth Circuit also erred in applying a novel "significant encouragement" standard to conclude that petitioners' issuance of nonbinding guidance and provision of information to social-media companies transformed the companies' content-moderation decisions into actions attributable to the federal government. The court then compounded its error by focusing on the fact that the social-media companies sometimes, but not always, found the guidance persuasive or useful in making their content-moderation decisions. Treating such purported "entanglement" as the basis for attributing private decisions to the government lacks legal support and does not comport with Amici States' experience. States, including Amici States, routinely issue nonbinding guidance to, and exchange information with,

entities that they regulate. Such collaborative efforts are critical to good governance, are noncoercive, and are frequently mutually beneficial. The point of issuing such guidance or information is to encourage, persuade, or assist. The Fifth Circuit's ruling, if allowed to stand, risks chilling this important exchange of information and States' efforts to promote their programs and policy views.

II. The Fifth Circuit's decision is inconsistent with Amici States' substantial experience engaging collaboratively with social-media companies to address potentially harmful content on their platforms. For decades, States and social-media companies have shared information and participated in important discourse about safeguarding the well-being of children, consumers, and others from online dangers and threats. These collaborative efforts take many forms, such as States helping to flag content that violates the social-media companies' own content-moderation policies or reflects economic scams; discussing best practices regarding the use of social media by children; exchanging information about social-media trends that encourage users to engage in acts that threaten public safety; and calling attention to disinformation about state-administered programs or democratic processes.

As this experience shows, communication between government and social-media companies contributes to important public discourse, can be persuasive without being coercive, and is frequently mutually beneficial. If permitted to stand, the Fifth Circuit's decision threatens to undermine these important efforts, by both social-media companies and Amici States, to protect the safety and security of social-media users.

ARGUMENT

I. THE FIFTH CIRCUIT'S SWEEPING INJUNCTION IMPROPERLY EXPANDS GOVERNMENT LIABILITY AND CHILLS GOVERNMENT SPEECH.

As this Court has long recognized, "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *accord Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Rather, the government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004. In applying this test, courts are careful to distinguish between the government's "'attempts to convince and attempts to coerce.'" *See Kennedy v. Warren*, 66 F.4th 1199, 1207 (9th Cir. 2023) (quoting *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (per curiam)). This distinction is important because "when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015). Indeed, such speech "is the very business of government." *National Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring).

Here, the Fifth Circuit erred in concluding that the federal government was not engaged merely in permissible persuasion and instead violated the First Amendment by coercing or significantly encouraging the private content-moderation decisions of social-media companies. In particular, the Fifth Circuit improperly relied on novel and sweeping factors that ignore the

settled distinction between permissible government persuasion and unlawful coercion.

Amici States write to highlight two of these expansive and erroneous factors. First, the Fifth Circuit incorrectly found coercion or significant encouragement based on federal agencies or officials generally having "some authority" to regulate or enforce the law (Pet. App. 229a, 233a), despite the absence of specific threats to use any such authority to impose adverse consequences on the social-media companies for declining to agree with the government's position on the content-moderation decisions at issue. Second, the Fifth Circuit improperly relied on federal agencies or officials having provided nonbinding guidance or information to social-media companies—sometimes at the companies' request—in concluding that this practice was problematic merely because the companies found such guidance or information to be persuasive or useful in formulating and enforcing their own content-moderation decisions. (*See, e.g.*, Pet. App. 230a-231a, 234a, 236a.)

Inferring coercion or improper "significant encouragement" from either of these factors not only lacks any legal basis but is contrary to Amici States' substantial experience as sovereigns with law-enforcement and regulatory powers. And use of either of these factors to find a First Amendment violation based on the mere exchange of ideas between States and industry could threaten the ability of state and local governments to freely express policy views on issues of public importance and to share information and nonbinding guidance with private industry.

A. State Experience Shows That the Fifth Circuit Erred in Relying on the Mere Existence of Regulatory Authority to Find Coercion.

"Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government." *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 544 (1987). Accordingly, to find the coercion required to attribute otherwise private conduct to the government, courts have consistently looked not only to the existence of regulatory authority but also to the more important consideration of whether the government actually threatened to use such authority to impose "adverse consequences" if the recipient elected not to accede to the government's request. *Kennedy*, 66 F.4th at 1211; *see id.* at 1212 ("A First Amendment problem arises only if the official intimates that she will use her authority to turn the government's coercive power against the target if it does not change its ways."); *see also Backpage.com LLC v. Dart*, 807 F.3d 229, 232 (7th Cir. 2015) (county sheriff cited federal money-laundering statute, "thereby intimating that the [targets] could be prosecuted" unless they complied with the sheriff's demand).

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), is particularly illustrative. There, this Court held that the Rhode Island Commission to Encourage Morality in Youth engaged in unconstitutional censorship, *id.* at 64, by sending notices to publishers and distributors listing publications that the Commission found "to be objectionable for sale," *id.* at 61. In so doing, the Court focused not on the Commission's general powers, which were "limited to informal sanctions." *Id.* at 67. Rather, the focus was on the threatening nature of the Commission's actions: advising publishers of the Commission's

duty to recommend prosecution of purveyors of obscenity to the Attorney General; reminding publishers that a list of objectionable publications had been "circulated to local police departments"; and dispatching a police officer to follow up on the Commission's notices. *Id.* at 62-63.

Here, the Fifth Circuit improperly relied on a general backdrop of federal regulatory or law-enforcement authority as sufficient to establish coercion. For example, in concluding that the Federal Bureau of Investigation "coerced the platforms into moderating content" (Pet. App. 232a), the Fifth Circuit emphasized that "the FBI wielded *some* authority over the platforms" (Pet. App. 233a). Indeed, the Fifth Circuit effectively placed dispositive weight on the mere existence of the FBI's general law-enforcement authority, as it found coercion despite recognizing that there was nothing "plainly threatening in tone or manner" about any of the FBI's meetings with the social-media companies, alerts about misinformation on their platforms, or requests to remove content. (Pet. App. 232a). Similarly, the Fifth Circuit put great emphasis on the general "inherent authority of the President's office" (Pet. App. 227a), in concluding that requests by White House officials and the Surgeon General to take down certain misinformation were coercive (Pet. App. 228a). And the court concluded that these efforts to persuade were impermissible because federal officials had previously announced *in a different context*, namely at two press conferences, their general policy views about considering social-media-related statutory reforms. *See* Pet. Br. 31-32.

The Fifth Circuit's focus on the mere existence of regulatory authority as proof of government coercion does not comport with the Amici States' extensive

experience as regulators and law enforcers. States, unlike the federal government, enjoy plenary police powers. *Torres v. Lynch*, 578 U.S. 452, 458 (2016). Pursuant to these police powers, States have broad authority to enact legislation, to regulate "for the public good," *Bond v. United States*, 572 U.S. 844, 854 (2014), and "to promote the health, safety, and general welfare of their people," *Mountain Timber Co. v. Washington*, 243 U.S. 219, 238 (1917). For example, States enact and enforce criminal laws,[1] issue regulations applicable to law-enforcement agencies and personnel,[2] set standards for medical care,[3] and adopt public-health measures.[4] States also establish education standards,[5] regulate family-law matters,[6] and determine procedures for and

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[1] *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 618 (2000); *United States v. Turkette*, 452 U.S. 576, 586 n.9 (1981).

[2] *See, e.g.*, *Kelley v. Johnson*, 425 U.S. 238, 247 (1976); N.Y. Div. of Crim. Just. Servs., *Model Policies and Standards for Law Enforcement* (n.d.). (Full URLs appear in the Table of Authorities.)

[3] *See Washington v. Glucksberg*, 521 U.S. 702, 716 (1997); *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977).

[4] *See, e.g.*, *New Orleans Gas Co. v. Louisiana Light Co.,* 115 U.S. 650, 661 (1885); Mass. Dep't of Pub. Health, *Department of Public Health Regulations & Policies* (2023); Cal. Dep't of Pub. Health, *California School Immunization Law* (last updated Mar. 23, 2023).

[5] *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 398 (1923); Mass. Dep't of Elementary & Secondary Educ., *Education Laws & Regulations* (last updated Feb. 23, 2021).

[6] *See, e.g.*, *Haaland v. Brackeen*, 599 U.S. 255, 276-77 (2023).

oversee elections.[7] In addition, States proactively regulate in the areas of consumer, investor, and environmental protection, to name a few examples.[8]

In light of States' broad regulatory and law-enforcement authority, the Fifth Circuit's expansive definition of coercion risks stifling communication and dialogue between government and industry. States will nearly always have "*some* authority" over a private business or entity (*see* Pet. App. 233a). If the mere existence of such authority, without a threat to *use* it, sufficed to find, or significantly weighed in favor of finding, coercion, many state communications with industry could be misconstrued as coercion simply because private entities find those communications persuasive and decide to act upon them. This possibility could chill States from discussing and promoting their policy views, thus stifling large swaths of government speech. *See Walker*, 576 U.S. at 208. And the result would be to silo government and industry, limiting discourse and the exchange of information between them about issues of significant concern—the precise harm identified in the application for stay of the injunction pending appeal, *see* Application for a Stay of the Inj. Issued by the U.S. Dist. Ct. for the W.D. of La. at 36-38, No.

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[7] *See, e.g.*, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 13-15 (2013); *Newberry v. United States*, 256 U.S. 232, 258 (1921); Me. Dep't of the Sec'y of State, Bureau of Corps., Elections & Comm'ns, *Ranked-Choice Voting (RCV)* (n.d.).

[8] *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 551-52 (2001); *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 277 (1977); *Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643, 653 (1950) (Douglas, J., concurring); N.Y. Dep't of Env't Conservation, *Chemical and Pollution Control* (n.d.); N.Y Off. of Att'y Gen., *Investor Protection Frequently Asked Questions* (2023); Minn. Dep't of Com., *Securities Offerings* (2023).

23A243 (Sept. 2023), which this Court granted, *see Murthy v. Missouri*, 2023 WL 6935337 (Mem.) (Oct. 20, 2023) (granting stay).

B. State Experience Shows That the Fifth Circuit Erred in Relying on Information-Sharing and Nonbinding Guidance to Find "Significant Encouragement."

The Fifth Circuit further erred by relying on the federal government's issuance of nonbinding guidance and information-sharing as evidence that the government had engaged in impermissible "significant encouragement." And it did so by applying a novel and amorphous "entanglement" standard for identifying undue encouragement. (*E.g.*, Pet. App. 209a.)

For example, the court below concluded that the Centers for Disease Control and Prevention (CDC) was too involved in the social-media companies' content-moderation decisions because it had issued nonbinding advisories "about misinformation 'hot topics' to be wary of" and responded to specific requests by the companies for nonbinding guidance or information. (Pet. App. 235a-236a). Likewise, the court concluded that the FBI had entangled itself in the social-media companies' content-moderation decisions by alerting them to instances of foreign actors trying to spread election-related misinformation through the platforms and asking the companies to address such issues. (Pet. App. 233a-234a.) And the court concluded that, in both cases, the federal government had entangled itself in private decision-making merely because the platforms found the nonbinding guidance, information-sharing, or requests to be helpful or persuasive in formulating or enforcing their own content-moderation policies or decisions. (Pet. App. 234a, 236a.)

If upheld, this vague and sweeping "entanglement" standard could have significant adverse consequences for Amici States. "A government entity has the right to 'speak for itself.'" *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (quoting *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000)). Indeed, "[i]t is the very business of government to favor and disfavor points of view" on matters of public concern. *Finley*, 524 U.S. at 598 (Scalia, J. concurring). Accordingly, States often issue nonbinding guidance, share ideas about best practices, and provide information to private industry. For instance, many Amici States routinely publish nonbinding guidance or share suggested best practices with healthcare institutions and providers about emerging or pressing public-health issues, such as sexually transmitted diseases,[9] opioid abuse,[10] and e-cigarettes.[11] In fact, both Missouri and

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[9] *See, e.g.*, Mass. Exec. Off. of Health & Hum. Servs., Bureau of Infectious Disease & Lab'y Scis., Clinical Alert, *Multi-Drug Non-Susceptible Gonorrhea in Massachusetts* (Jan. 19, 2023) (guidance for treating novel strain of gonorrhea); Letter from Johanne E. Morne, Deputy Dir., Cmty. Health, N.Y. Dep't of Health, to Providers (Jan. 25, 2022) (guidance for detecting and preventing congenital syphilis).

[10] *See, e.g.*, N.Y. Dep't of Health, *Availability of Naloxone in Pharmacies* (rev. Feb. 2023) (offering free online training for community pharmacists to safely dispense drug to reverse opioid overdoses); Or. Health Auth., Pub. Health Div., *Reducing Opioid Overdose and Misuse* (n.d.) (publishing clinical guidelines for proper opioid prescribing); Pa. Dep't of Health, *Prescribing Guidelines* (2023) (same).

[11] *See, e.g.*, Mich. Dep't of Health & Hum. Servs., *What Providers Need to Know About E-Cigarettes and Asthma* (May 2020) (guidance for how providers can help combat rising

(*continues on next page*)

Louisiana, the respondent States here, offer such public-health guidance and training, and did so during the COVID-19 pandemic.[12]

Many Amici States also work collaboratively with private employers to help ensure that their workplace policies comply with state and federal laws. New York and California, for example, have published model sexual-harassment policies or trainings that employers may choose to adopt, though they are not required to do so.[13] And Amici States like New York, California, Massachusetts, and the District of Columbia also offer consultation services to employers seeking guidance on topics ranging from layoffs to workplace health and safety.[14]

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e-cigarette use); Cal. Dep't of Pub. Health, Health Advisory, *Vaping Associated Pulmonary Injury (VAPI)* (Oct. 1, 2019) (guidance for diagnosing, reporting, and treating vaping-associated pulmonary injury); Haw. Dep't of Health, Disease Outbreak Control Div., *Severe Respiratory Illness Associated with E-cig/Vaping – Resource for Clinicians* (n.d.) (suggested "algorithm to assist clinicians in recognizing and reporting new cases" of lung injury associated with vaping).

[12] *See, e.g.*, La. Dep't of Health, *COVID-19 Vaccination – Provider Training* (n.d.); Mo. Dep't of Health & Senior Servs., *Missouri Interim Guidance on Crisis Capacity Strategies for Personal Protective Equipment* (Apr. 7, 2020).

[13] *See* N.Y. State, *Sexual Harassment Prevention Model Policy and Training* (n.d.); N.Y. Dep't of Lab., *Consultation Services* (n.d.); Cal. Civ. Rights Dep't, *Sexual Harassment Prevention Training: Information for Employers* (Nov. 2022).

[14] Cal. Dep't of Indus. Relations, *Cal/OSHA Consultation Service Overview* (Jan. 2023); D.C. Off. of Emp. Servs., *Occupational Safety and Health* (2022); Mass. Dep't of Lab. Standards, *OSHA Consultation Summary* (n.d.); N.Y. Dep't of Lab., *Consultation Services*, *supra*.

Furthermore, state and local law-enforcement agencies often alert private entities of potential unlawful or dangerous activities by employees, clients, agents, or third-party actors (such as hackers). Such information-sharing allows those private entities to make more informed decisions about what steps they might want to take to address potential problems—such as freezing bank accounts that might be subject to fraudulent activity, altering their own internal policies or procedures, or providing alerts to clients or customers.

As one example, States often alert regulated entities to potential cybersecurity threats to consumers. For instance, at the outbreak of the COVID-19 pandemic, the Office of the New York Attorney General notified website domain-name registrars about a proliferation of suspicious domain names connected to phishing and other malware-dissemination schemes.[15] As another example, New York and New Jersey law-enforcement agencies, in collaboration with federal authorities, regularly work with the financial industry to identify and eliminate money-laundering activities and other illegal conduct connected to financial institutions.[16] Similarly, the New York Division of Homeland Security provides trainings to, and shares information with, private companies as part of the Division's broader counter-terrorism efforts.[17]

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[15] *See* Press Release, N.Y. Off. of Att'y Gen., Attorney General James Asks GoDaddy and Other Online Registrars to Halt and De-list Domain Names Used for Coronavirus-Related Scams and Fake Remedies (Mar. 20, 2020).

[16] *See* U.S. Immigr. & Customs Enf't., *El Dorado Task Force* (last updated Jan. 12, 2021).

[17] *See* N.Y. Div. of Homeland Sec. & Emergency Servs., Off. of Counter Terrorism, *Public Safety Unit* (n.d.).

As this state experience demonstrates, and as precedent confirms, a government agency's issuance of nonbinding guidance or provision of information to private entities does not constitute such significant encouragement that those entities' independent decisions are attributable to the State. *See, e.g.*, *Blum*, 457 U.S. at 1004 (observing that even States' "approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible"); *United States v. International Bhd. of Teamsters*, 156 F.3d 354, 360 (2d Cir. 1988) ("[T]he receipt of information and assistance from federal authorities does not render the recipient's subsequent, independently rendered *decision* using such information 'fairly attributable' to the government." (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982))). Rather, such collaboration is a routine and vital aspect of good governance. And nonbinding guidance and information-sharing does not become coercive or constitute impermissible "significant encouragement" merely because private entities ultimately find it helpful or persuasive, as the Fifth Circuit erroneously concluded. To the contrary, the government is "entitled to promote a program, to espouse a policy, or to take a position," *Walker*, 576 U.S. at 208. And the government is entitled to do so in ways that are successful; the very point of providing information or guidance is to persuade the recipients to consider and act on that information or guidance—though the recipients may ultimately decline.

Indeed, private entities may follow a government agency's nonbinding guidance, make decisions based on government-provided information, or agree to nonbinding requests not because of coercion or "entanglement" (whatever that means) but rather because they conclude

that doing so is in their own interest. The objectives of government and the private entities that they regulate are often aligned. For example, empirical evidence indicates that shareholders, employees, and customers of public companies, along with the communities in which they operate, increasingly expect corporations to operate their businesses in a socially responsible manner. *See, e.g.*, Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 Va. L. Rev. 1163, 1185-86 (2022); *see also* Hillary A. Sale, *The New "Public" Corporation*, 74 L. & Contemp. Probs. 137, 138 (2011). Public companies now expend significant resources to align their conduct to the expectations of these stakeholders. *See* Fairfax, *supra*, at 1186. In addition, corporations may benefit from proactive and regular engagement with regulators, which can help build trust with government entities and improve the prospect of mutual cooperation in times of regulatory crisis. *See* Stavros Gardinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 Vand. L. Rev. 1401, 1447-48 (2020).

A conclusion that nonbinding guidance and information-sharing violate the First Amendment would deter state and local governments from advocating for their own positions and would eliminate guidance and information that private industry may find useful—and may want or actively request. (*See* Pet. Br. at 6, 11, 44 (describing requests from social-media companies for information or recommendations from CDC).) The First Amendment does not require such a disruptive result.

II. STATES, SOCIAL-MEDIA COMPANIES, AND THE PUBLIC ALL BENEFIT FROM OPEN DISCOURSE ON ISSUES AFFECTING PUBLIC HEALTH AND SAFETY.

For nearly two decades, States have worked with social-media companies to make online platforms safer and more secure for all users. Many Amici States have productively engaged in such communication and information-sharing with social-media platforms to address the proliferation of potentially harmful content—ranging from extremist videos to viral challenges encouraging users to engage in dangerous and potentially criminal activities. In Amici States' experience, fostering such open discourse about content moderation—so that companies can develop and effectively enforce their *own* policies against content that undermines public health and safety—has been critical to these efforts. The decision below, if permitted to stand, would chill such mutually beneficial information-sharing and dialogue, and would irreparably harm the public interest.

Prominent social-media companies, such as Meta and Twitter (now X), have lauded the benefits of such information-sharing and discourse between government and social-media companies as productive, mutually beneficial, and noncoercive.[18]

This ongoing collaboration makes sense and does not implicate any First Amendment concerns. Indeed,

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[18] *See* Mark Zuckerberg, *The Internet Needs New Rules*, Wash. Post (Mar. 30, 2019) (calling for a "more active role for governments and regulators" to address "harmful content, election integrity, privacy and data portability"); @TwitterSafety, *Twitter* (Sept. 30, 2020, 8:26 PM) (thanking the FBI for providing intelligence about Iran-based Twitter accounts that were attempting "to disrupt the public conversation" during the 2020 presidential debates).

although social-media companies have in place content-moderation policies and mechanisms, posts that violate these policies can—and often do—rapidly proliferate notwithstanding the platforms' best efforts to remove them. This lag between the amplification of such content (which is largely algorithmic) and its removal (which often requires human intervention) can be particularly acute for content targeting vulnerable users, such as children, and in times of public crisis.[19]

For example, New York recently worked with social-media platforms in the wake of the Buffalo, New York, mass shooting to identify posts containing live video footage and other graphic images of the attack,[20] which claimed the lives of ten people.[21] The shooting was perpetrated by an 18-year-old white male, who selected a local grocery store in Buffalo as his target because of its predominantly Black clientele.[22] Shortly before the attack, the shooter posted a link to a livestream video and the contents of his manifesto, purporting to justify

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[19] *See e.g.*, U.S. Surgeon Gen., Advisory, *Social Media and Youth Mental Health* 4 (2023) (reporting that "[e]xtreme, inappropriate, and harmful content continues to be easily and widely accessible by children and adolescents" and "can be spread through direct pushes, unwanted content exchanges, and algorithmic designs"); Caitlin Chin-Rothmann, Ctr. for Strategic & Int'l Studies, *Social Media Platforms Were Not Ready for Hamas Misinformation* (Oct. 12, 2023) (detailing social-media companies' struggles to detect and remove disinformation about ongoing Israel-Hamas conflict); Billy Perrigo, *A Game of Whack-a-Mole*, Time (Mar. 15, 2019) (same, with respect to footage of Christchurch, New Zealand, mass shooting).

[20] *See* N.Y. Off. of Att'y Gen., *Investigative Report on the Role of Online Platforms in the Tragic Mass Shooting in Buffalo on May 14, 2022*, at 35-36 (Oct. 18, 2022).

[21] *Id.* at 1.

[22] *See id.* at 9.

the violence he was about to commit, on the online platform Discord.[23] He then began livestreaming the attack on another online platform, Twitch, which users could access by clicking the link he had posted on Discord.[24]

Although Twitch quickly responded to several user reports by taking down the livestream less than two minutes after the shooter opened fire,[25] copies of the video and still images continued to proliferate and circulate online for weeks after the attack, despite social-media companies' best efforts to remove the content.[26] In response, the Office of the New York Attorney General performed its own search across various social-media platforms for such posts and reported the content to the respective platforms, where appropriate.[27] These efforts—and the State's subsequent report outlining the role online platforms played in the shooting[28]—fostered important public dialogue about the dangers of social media in promoting extremist violence and the role social-media companies may play in combatting these harmful effects.[29]

This example shows that the Fifth Circuit missed the mark in reasoning that the fact that government officials might make repeated reports or requests to

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[23] *Id.*

[24] *Id.* at 32-33.

[25] *Id.* at 33; *see also* Nathan Grayson, *How Twitch Took Down Buffalo Shooter's Stream in Under Two Minutes*, Wash. Post (May 20, 2022).

[26] N.Y. Off. of Att'y Gen., *Investigative Report*, *supra*, at 35-36.

[27] *Id.*

[28] *See id.* at 23-33.

[29] *See, e.g.*, Aaron Katersky & Bill Hutchinson, *Buffalo Mass Shooting Suspect "Radicalized" by Fringe Social Media: NY Attorney General*, ABC News (Oct. 18, 2022).

social-media companies is inherently coercive. (*See, e.g.*, Pet. App. 221a, 223a.) The nature of social-media platforms, on which the same or similar content rapidly and repeatedly gets copied and reposted, means that reports flagging content often need to be repeated to be useful to companies that want to know about such content and want to make best efforts to respond based on their own content-moderation policies and decisions.

Amici States also have a vital interest in safeguarding the well-being of children on social-media platforms and have long worked with companies to protect the safety and mental health of young users. Since the mid-2000s, States—including both Amici States and the respondent States here—have engaged in open dialogue with platforms regarding best practices for protecting minors against online predators and inappropriate content. In 2008, 49 States and the District of Columbia entered into agreements with MySpace and Facebook to adopt important reforms.[30] MySpace, for example, committed to retaining "a contractor to better identify and expunge inappropriate images," and to "[i]mplement changes making it harder for unknown adults to contact children."[31] The platform further pledged to "organize, with support of the Attorneys General, an industry-wide Internet Safety Technical Task Force" dedicated to "finding and developing . . .

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[30] *See* Press Release, Ariz Off. of Att'y Gen., Terry Goddard Announces Agreement with MySpace to Adopt Multiple Safety Measures (Jan. 14, 2008); Press Release, Ariz. Off. of Att'y Gen., Terry Goddard Announces Agreement with Facebook to Better Protect Kids (May 8, 2008).

[31] Press Release, Ariz Off. of Att'y Gen., Terry Goddard Announces Agreement with MySpace, *supra*.

online safety tools."[32] Facebook likewise agreed to more than 40 new safeguards, including limiting older users' ability to search online for subscribers under 18,[33] and removing "groups for incest, pedophilia, cyberbullying and other violations of the site's terms of services."[34]

New York reached a similar agreement with Ask.fm, a social-networking site popular among teenagers, in 2014. The State worked with Ask.fm to combat the rise of "cyberbullying and other harmful content" on the site—a problem fueled, in part, by its anonymous question-and-answer format.[35] The parties' discussions ultimately resulted in Ask.fm agreeing to substantially revamp its safety policies, including creating a new online safety center, committing to reviewing user complaints within 24 hours, and removing users who had repeatedly violated the site's terms of service.[36] Both the State and the social-media platform lauded the productive and mutually beneficial nature of these discussions: the chief executive officer of Ask.com emphasized that New York was "a like-minded partner with a similar vision," and New York stated that it hoped the discussions would serve as "a useful model for other companies in the digital space."[37]

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[32] Fox Interactive Media & Conn. Off. of Att'y Gen. et al., Joint Statement on Key Principles of Social Networking Social Networking Sites Safety 2 (Jan. 14, 2008).

[33] *Facebook and U.S. States Agree to Safeguards*, N.Y. Times (May 8, 2008).

[34] Press Release, Ariz Off. of Att'y Gen., Terry Goddard Announces Agreement with Facebook, *supra*.

[35] *See* Press Release, N.Y. Off. of Att'y Gen., A.G. Schneiderman and IAC Announce New Safety Agreement to Protect Children and Teens on Newly Acquired Ask.FM Site (Aug. 14, 2014).

[36] *Id.*

[37] *Id.*

In recent years, the importance of open dialogue between government and social-media companies concerning the safety and mental health of young users has grown ever more important, as social-media engagement among children continues to skyrocket. Today, an estimated 95 percent of youth between the ages of 13 and 17 report using a social-media platform, with "more than a third" reporting that "they use social media 'almost constantly.'"[38] Critically, studies have repeatedly shown that increased social-media use among adolescents is correlated with worse mental-health outcomes, including depression, poor body image, and even suicidal ideation.[39]

These findings are of particular concern to Amici States and have prompted the States to engage in discussions with social-media companies about the platforms' role in mitigating the harmful effects of social media on children. For example, upon learning that Facebook intended to launch a version of Instagram for children ages 13 and younger, 44 States and Territories—including many among Amici States and the respondent States here—explained their concerns about the dangers such a platform would create for children.[40] A multistate coalition of 44 attorneys general led by Mississippi and North Carolina likewise called on

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[38] U.S. Surgeon Gen., Advisory, *Social Media and Youth Mental Health*, *supra*, at 4.

[39] *Id.* at 6-10 (surveying scientific literature); *see also* 5Rights Found., *Pathways: How Digital Design Puts Children at Risk* 86 (July 2021) (reporting that Instagram targeted children as young as 13 with content relating to eating disorders, extreme diets, sexualized imagery, body shaming, self-harm, and suicide).

[40] Letter from Att'ys Gen. to Mark Zuckerberg, Chief Exec. Officer, Facebook, Inc. (May 10, 2021).

TikTok and Snapchat to "provide an adequate opportunity for parental control within the platform."[41] This feedback was helpful: upon taking into consideration the views of governmental entities and other important stakeholders, Facebook announced that it would pause the development of its intended Instagram Kids service so that it could "work with parents, experts, policymakers, and regulators" to explore whether the platform would be in the best interests of the target demographic.[42] And Snapchat stated that it was "currently developing new tools for parents that will provide them with more insight and visibility into how their children are engaging on snapchat and ways to report troubling content."[43]

This state experience further demonstrates that open discussion and dialogue between government agencies and private entities is often mutually beneficial and does not become coercive merely because such discussions are fruitful or result in the private actors ultimately agreeing to undertake certain steps. Indeed, it is unsurprising that persuasion is possible when the technology surrounding social-media platforms is rapidly changing, information about the effects of such changes—including on young users—is rapidly evolving, and new-public health challenges are rapidly emerging.

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[41] Nat'l Ass'n of Att'ys Gen., *NAAG Urges TikTok and Snapchat to Give Parents More Control* (Mar. 29, 2022).

[42] *See* Adam Satariano & Ryan Mac, *Facebook Delays Instagram App for Users 13 and Younger*, N.Y. Times (Oct. 4, 2021).

[43] *New York, Other States Ask Snapchat, TikTok to Give Parents More Control Over Apps*, News12 New Jersey (Apr. 1, 2022).

In addition to safeguarding the well-being of children on social-media platforms, Amici States also have a substantial interest in protecting other vulnerable populations from scams and other predatory content online. New York, for example, has engaged in information-sharing with companies such as Amazon to specifically address issues of consumer protection. At the beginning of the COVID-19 pandemic, New York flagged Amazon listings by third-party sellers that offered products related to the COVID-19 crisis, including hand-sanitizer, at extremely inflated prices.[44] Amazon, in turn, "proactively shar[ed] information" with state regulators about sellers that it suspected of engaging in price gouging.[45] As a result of this information-sharing, Amazon was able to more effectively identify problematic listings,[46] and the New York Attorney General successfully recouped restitution from certain third-party sellers who engaged in price gouging of hand sanitizer.[47]

Amici States also have worked proactively to mitigate and warn the public about social-media trends that encourage users to engage in acts that threaten public safety. Pennsylvania, for instance, has issued a

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[44] *See* N.Y. Off. of Att'y Gen., Consumer Alert, Attorney General James Stops Three Amazon Sellers from Price Gouging Hand Sanitizer and Recoups Funds for New Yorkers (Nov. 17, 2020); *see also* Amazon, *Price Gouging Has No Place in Our Stores* (Mar. 23, 2020) (explaining that Amazon "proactively reached out to . . . every state attorney general in the country" and "created a special mechanism" for state attorneys general to escalate consumer complaints).

[45] Amazon, *Price Gouging Has No Place in Our Stores*, *supra*.

[46] *See id.*

[47] *See* N.Y. Off. of Att'y Gen., Attorney General James Stops Three Amazon Sellers from Price Gouging, *supra*.

consumer alert to warn residents about a viral TikTok challenge that "encourages viewers to steal a Kia or Hyundai vehicle using household items" and urged "owners to take steps to protect themselves if they are vulnerable."[48] And Connecticut has invited TikTok to discuss best practices in curbing the spread of challenges encouraging school-aged children to engage in "lawlessness, self-harm and reckless, dangerous pranks."[49] The Connecticut Attorney General shared with TikTok educators' reports of "stolen school property, clogged toilets, and excessive vandalism believed to be associated with the 'Devious Licks' challenge,'" which encouraged youth to film themselves stealing or destroying school property, along with reports of a newly trending challenge entitled, "Slap a Teacher."[50] And he called on the company to share its plans for addressing the spread of these challenges moving forward.[51]

Finally, Amici States have a strong interest in addressing disinformation about state-administered programs and democratic processes on social-media platforms. Amici States like Michigan, for example, have issued advisories to caution the public against the proliferation of false information about unemployment benefits on social-media platforms.[52] Massachusetts

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[48] Pa. Off. of Att'y Gen., Consumer Alert, Kia and Hyundai Cars at Risk of Being Stolen Due to TikTok Trend (Mar. 16, 2023).

[49] Press Release, Conn. Off. of Att'y Gen., Attorney General Tong Seeks TikTok Leadership Meeting to Discuss Harm to Mental and Physical Safety of Connecticut Students and Educators (Oct. 4, 2021).

[50] *Id.*

[51] *Id.*

[52] *See* Mich. Dep't of Att'y Gen., *Avoid Unemployment Scams on Social Media* (2023).

has used Twitter's own mechanism to report Tweets that violated the platform's terms and conditions for posts that contained false or misleading information about the electoral process.[53] And Washington also undertook similar efforts, by devoting resources to preventing election misinformation online and in social media.[54]

The examples above illustrate that dialogue between government and social-media companies about matters within States' unique expertise contributes to important public discourse and is frequently mutually desired and beneficial. Indeed, in the experience of Amici States, such information-sharing has not been coercive; instead, it has been helpful in ensuring that social-media companies make fully informed decisions about their own content-moderation policies. These communications thus play an important role in protecting the safety and well-being of all social-media users. The Fifth Circuit's decision sets a harmful precedent, which, if allowed to stand, could chill the ability of state and local governments to productively communicate and exchange information with social-media companies—a result that would substantially undermine *both* the platforms' and the governments' efforts to ensure that social media is safe and secure for all users.

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[53] *See* Aff. of Debra O'Malley ¶ 5 (Oct. 29, 2020), *Ayyadurai v. Galvin*, No. 1:20-cv-11889 (D. Mass.), ECF No. 15-1.

[54] *See* Press Release, Wash. Sec'y of State, Secretary of State Steve Hobbs Applauds New Laws Improving Washington's Elections (May 19, 2023).

CONCLUSION

The decision of the U.S. Court of Appeals for the Fifth Circuit should be reversed, and the preliminary injunction vacated.

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