No. 23-411

In the Supreme Court of the United States

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

Petitioners,

v.

MISSOURI, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE LOUDER WITH CROWDER, LLC IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE[1]

With over nine million cumulative subscribers across its social media channels, LOUDER WITH CROWDER, LLC ("Louder With Crowder"), the Amicus Curiae herein, is one of the largest political daily shows on the internet. Led by its host, Steven Crowder, Louder With Crowder provides a unique blend of comedy and political analysis. Louder With Crowder is the number-one show of its kind in average number of viewers for the 18-49 year-old demographic, beating out leaders in both cable news and late-night comedy. Since the beginning of the daily show in 2016, Louder With Crowder has continually amassed viewership and reached a landmark achievement of one billion views on YouTube by March 2020.

The age of the internet has transformed societal discourse. Social media companies are the new public square with approximately 90% of the United States population actively participating in the public square.[2]

Petitioners (the "Federal Government") engaged in a far-reaching unconstitutional censorship campaign orchestrated to circumvent the First Amendment by

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] Shewale, Rohit, *Social Media Users-Global Demographics 2023*, DEMANDSAGE.COM, September 12, 2023 https://www.demandsage.com/social-media-users/ (accessed November 24, 2023).

pressuring Information Content Providers as defined by 47 U.S.C. § 230, like YouTube, Facebook, Twitter and other internet platforms that allow third-parties like Louder With Crowder to publish content (hereinafter referred to as "Social Media Platforms") (Third-party content publishers or Information Content Providers as defined in 47 U.S.C. § 230 are hereinafter referred to as "the Publisher"), to remove content that the Federal Government finds objectionable-content that is protected First Amendment speech.

For years, Louder With Crowder has been a primary target of Social Media Platforms to test the bounds of censorship *vis-a-vis* content moderation, wherein practices such as demonetization[3] have been used as a punitive measure against conservative viewpoints.[4] Louder With Crowder has been the subject of congressional hearings, and addressed publicly by executive management of Social Media Platforms.[5] In fact, Louder With Crowder has been singled out for rebuke even when content was found to not be violative of Social Media Platforms' community standards, owing to its conservative stance on numerous

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[3] Merriam-Webster.com Dictionary, *"Demonetize": to block (online content) from earning revenue (as from advertisements)*, Merriam-Webster, https://www.merriam-webster.com/dictionary/demonetize (accessed 28 Jan. 2024.)

[4] Senate Judiciary Subcommittee Hearing, *Hearing on Google Search Function and Competition*, CSPAN (September 15, 2020, 01:29:00), https://www.c-span.org/video/?475763-1/google-search-function-competition

[5] Recode, *YouTube CEO Susan Wojcicki | Full interview | Code 2019*, YOUTUBE (June 10, 2019, 09:15), https://www.youtube.com/watch?t=555&v=jkzx9V55ptk&feature=youtu.be

topics at issue in the matter herein.[6] Indeed, platform demonetization was even seen by liberal legislators as a weak concession, who instead called for an outright platform ban of Louder With Crowder.[7]

Additionally, Louder With Crowder's host, Steven Crowder, is specifically labeled as a "repeat [spreader] of false and misleading narratives" in a report titled THE LONG FUSE. MISINFORMATION AND THE 2020 ELECTION published by the Election Integrity Partnership (EIP).[8] Said EIP report is an exhibit entered into the lower court's record on this matter. EIP is an organization established in 2020 that provided election-related research to the Cybersecurity and Infrastructure Security Agency (CISA), a Federal Government agency at the center of this matter. Specifically, EIP provided CISA with reports to fill information gaps created by CISA's lack of resources to monitor and report on perceived disinformation. The extent of EIP and CISA's relationship ran so deep where EIP is alleged to have been "completely intertwined" with CISA.[9]

Therefore, Louder With Crowder submits this Amicus Brief in support of the right to publish Constitutionally protected speech in the public square.

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6 *See* Footnote 4

7 BlazeTV, *Sen. Mazie Hirono Says YouTube 'Dragged Its Feet' on Banning Steven Crowder*, YOUTUBE (July 17, 2019), https://www.youtube.com/watch?v=pZKioeIDM68

8 *Missouri v. Biden*, 3:22-cv-01213-TAD-KDM, Dkt 134-4 pp. 12-15, Exhibit C, pp. 191; *see also id.* Dkt. 134-1, pp. 12-15 (The Election Integrity Partnership ("EIP")).

9 *Id.*, Dkt. 293, p.113 (Memorandum Ruling On Request For Preliminary Injunction).

SUMMARY OF ARGUMENT

Social Media Platforms are today's public square and are thus subject to Constitutional constraints. The undeniable influence of Social Media Platforms is bolstered by the ever-increasing participation by Government on Social Media Platforms. By recognizing the distinctive role Social Media Platforms play in shaping public discourse, this Court can safeguard the resilience and adaptability of First Amendment principles in the face of contemporary communication challenges.

The Federal Government violated the First Amendment by coercing Social Media Platforms to violate 47 U.S.C. § 230 of the Communications Decency Act of 1996. Although the Federal Government cannot encourage private individuals to achieve what is constitutionally prohibited, the current matter illustrates the Federal Government's use of non-governmental corporations to bypass Constitutional restrictions by exploiting 47 U.S.C. § 230's immunity clause and violating the Constitution's separation of powers.

The Federal Government, through coercion and joint participation, transformed Social Media Platforms into state actors. First, the Federal Government coerced Social Media Platforms to censor lawful speech under threat of regulatory retaliation; and second, Social Media Platforms became state actors through their joint participation in the Federal Government's censorship campaign. This resulted in Social Media Platforms and the Federal Government becoming so pervasively entwined so as to transform Social Media Platforms into an arm of the Federal Government.

Social Media Platforms' algorithmic censorship creates an environment ripe for the content moderation abuse that led to the Federal Government running afoul of the First Amendment and disrupting the balance Congress sought with Section 230. The use of algorithms to moderate content raises problems in and of itself, but the issues inherent with algorithmic censorship are compounded by the surreptitious nature of these algorithms, shielding them from public scrutiny and review.

Finally, algorithmic censorship by Social Media Platforms, as implemented at the direction or coercion of the Federal Government in this matter, constitutes a prior restraint on free speech.

ARGUMENT

I. SOCIAL MEDIA PLATFORMS ARE TODAY'S PUBLIC SQUARE AND ARE THUS SUBJECT TO CONSTITUTIONAL CONSTRAINTS.

The evolving landscape of communication has thrust Social Media Platforms into the forefront of public discourse. The impact Social Media Platforms have on the dissemination of information, public dialogue, and individual expression is undeniable.[10] By acknowledging the unique role Social Media Platforms play in shaping the public discourse, this Court can

10 *See Supra* Footnote 2 above.

ensure that the principles enshrined in the First Amendment remain resilient and adaptable to the challenges presented by contemporary means of communication.

This Court has long recognized the existence of public forums as places for the free exchange of ideas by the public that are protected by the First Amendment. In *Hague v. Committee for Industrial Organization*, this Court stated,

> [w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

307 U.S. 496, 515-516 (1939).

Social Media Platforms were designed for the public to exchange ideas and have become modern-day public forums and the agora of the digital age, akin to the sidewalks and parks of the physical world. Moreover, the fact that Social Media Platforms are privately owned is not an absolute barrier to mandating that they be subject to constitutional constraints. In *Marsh v. Alabama*, the Court recognized that it is possible for certain privately-owned spaces to be imbued with public attributes. 326 U.S. 501, 507 (1946).

The Court underscored the vital importance of social media as a platform for sharing ideas and engaging in public discourse. In *Packingham v. North Carolina*, the Court stated that, "[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general,

and social media in particular." *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017) (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997)).

Perhaps and most importantly, the presence of government on Social Media Platforms affirms that they are the modern-day public squares. In *Packingham*, the Court stated,

> [Social Media Platform] users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'

Packingham v. North Carolina, 582 U.S. at 104-105 (quoting *Reno*, 521 U.S. at 870).

The active presence of the U.S. federal government on these platforms, disseminating information, and engaging with the public, bolsters the argument that these Social Media Platforms have transcended mere private ownership and have taken on a public function.

Therefore, as Social Media Platforms continue to be the dominant forum for public discourse[11], the extension of Constitutional scrutiny is not only warranted but essential. By applying Constitutional principles to the digital age, we can strike a balance between the need for Social Media Platform regulation

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11 *See Supra* Footnote 2 above.

and the preservation of our cherished right to free expression.

II. THE FEDERAL GOVERNMENT VIOLATED THE FIRST AMENDMENT BY COERCING SOCIAL MEDIA PLATFORMS TO VIOLATE 47 U.S.C. § 230 OF THE COMMUNICATIONS DECENCY ACT OF 1996.

In *Norwood v. Harrison*, this Court made it clear that "[i]t is . . . axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." 413 U.S. 455, 465 (1973).

The matter before the Court is a classic example of the Federal Government using non-governmental corporations to circumvent Constitutional restrictions. *See Railway Employees' Dept. v. Hanson,* 351 U.S. 225 (1956) (Holding that the enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction). Constitutional violations herein include the Federal Government "proscribing speech . . . because of disapproval of the ideas expressed" which is a form of content-based discrimination. *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992). As the Social Media Platforms are not parties herein, the issue is whether the government can be held responsible for the Social Media Platforms' decisions. Indeed, the Federal Government's attempts to coerce Social Media Platforms to violate 47 U.S.C. § 230 of the Communications Decency Act of 1996 (hereinafter referred to as "Section 230") raise profound First Amendment concerns. Specifically, the Federal Government's censorious actions (A) undermine and exploit Section 230's immunity

clause, and (B) violate the separation of powers as established by the Constitution.

A. The Federal Government Undermined and Exploited the Section 230 Immunity Afforded to Social Media Platforms.

Section 230 provides Social Media Platforms with immunity from liability for content created by the third-party Publishers like Louder With Crowder, thus fostering an environment conducive to free expression. This was affirmed by *Zeran v. America Online, Inc.*, which recognized that online platforms should not be treated as the Publishers of third-party content. "[Section 230] precludes courts from entertaining claims that would place a computer service provider in a publisher's role." *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

A narrow exception permits Social Media Platforms to engage in content moderation without rising to the level of becoming the Publisher. Per 47 U.S.C. § 230(c)(2)(A), commonly known as the Good Samaritan clause of Section 230, a Social Media Platform maintains its immunity and status as a Interactive Computer Service for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." 47 U.S.C. § 230(c)(2)(A).

As affirmed by *Zeran*, "[i]n line with this purpose, Section 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions." *Id.* at 331. As alleged by Respondents, the Federal Government threatened

to reform and/or remove Section 230 protections from Social Media Platforms if they refused to comply with the Federal Government's censorship campaign.[12] Demand for compliance with this censorship campaign was also linked to a threat of a "robust anti-trust program" targeting Social Media Platforms.[13] Contrary to Petitioner's assertions, the Federal Government's actions in this matter are not merely an exercise of the Federal Government's own First Amendment right in speaking for itself. For the threat to suffice as coercion, all that is required is that the government's words or actions "can reasonably be interpreted" as an implied threat by the Social Media Platforms by "intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request[.]" *Hammerhead Enterprises, Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983). "Similarly, claimants who can demonstrate that the distribution of items containing protected speech has been deterred by official pronouncements might raise cognizable First Amendment issues." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 (1963).

This coercion by the Federal Government undermines the essence of Section 230's platform immunity afforded to Social Media Platforms because the censorship campaign sought to remove lawful speech that fell well outside of the limited editorial exception established by the Good Samaritan clause of Section 230. Notable examples of the speech censored and/or

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[12] *See Missouri v. Biden*, No. 3:22-CV-01213 Dkt. 293. p.8 (Memorandum Ruling On Request For Preliminary Injunction).

[13] *See Missouri v. Biden*, No. 3:22-cv-01213-TAD-KDM, Dkt. 266, Exs. 129-176, p. 374 (Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction).

suppressed by the Federal Government include facts about the COVID vaccines,[14] opinions by subject matter experts on COVID[15] and a satirical image of the first lady.[16]

Free speech is perhaps the most sacred of rights and is paramount to the principle that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Certainly, Congress did not intend for these examples of Publisher content to fall within the limited editorial exception of Section 230. Section 230's limited editorial exception is for content that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[17] Political and/or medical viewpoints are inherently not "obscene, lewd, lascivious, filthy, excessively violent or harassing." More importantly, these same viewpoints do not fall under the seemingly catch-all provision of "otherwise objectionable" content. The wording of 47 U.S.C. § 230(c)(2)(A) calls for the application of the maxim *ejusdem generis*, which states that when "gen-

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14 Jordan, Jim (@Jim_Jordan), TWITTER, July 28, 2023, 11:03AM https://x.com/Jim_Jordan/status/1684957672892715008?s=20 (accessed December 31, 2023).

15 Zweig, David (@davidzweig), TWITTER, Dec 26, 2022, 8:43AM), https://x.com/davidzweig/status/1607386635678765057?s=20 (accessed December 31, 2023)

16 *See Missouri v. Biden*, 3:22-cv-01213-TAD-KDM, Dkt. 266 Exhibits A — Document #174, Attachment #1 pp. 59-67.

17 47 U.S.C. § 230(c)(2)(A)

eral words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001). In applying *ejusdem generis* to 47 U.S.C. § 230(c)(2)(A), the general words "otherwise objectionable" must relate to the preceding terms enumerated, "obscene, lewd, lascivious, filthy, excessively violent or harassing." This is further codified by the express intent of Section 230, which states "[t]he internet and interactive computer services offer a forum for a true diversity of political discourse."[18] As such, the very nature of the content targeted by the Federal Government's censorship campaign falls well-outside the scope of content Congress intended to permit Social Media Platforms to censor when drafting 47 U.S.C. § 230(c)(2)(A).

Furthermore, Section 230 requires that, to be permissible, any censorious action taken by Social Media Platforms be both "voluntary" and in "good faith." Content moderation, as practiced by Social Media Platforms, is neither a "voluntary" action nor an action made in "good faith" as per 47 U.S.C. § 230(c)(2)(A). The essence of "voluntary" is action taken of one's own free will.[19] When Social Media Platforms censor permissible Publisher content, whether at the behest of or via coercion by the Federal Government, the action cannot be said to be voluntary. Likewise, these censorious acts cannot be said to be

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[18] 47 U.S.C. § 230(a)(3)

[19] "*Voluntary*" Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/voluntary (accessed November 24, 2023).

made in good faith when made in response to threats of regulatory retaliation by the Federal Government for non-compliance; ergo, Social Media Platforms cannot be acting in good faith when taking censorious actions that are primarily motivated by their own business interests rather than made pursuant to the clear intent of Congress as articulated in Section 230. Clear examples of this can be seen in leaked internal communications wherein the White House is pressuring Social Media Platforms to, among other things, expand their policies to censor more viewpoints and content Publishers,[20] expanding censorship to include more "borderline" content[21], brainstorm more creative ways to increase censorship after criticism from the White House,[22] and limit reach of content that displeased the White House, despite the content not violating any policy.[23] Notably, all of the pressure stemming from the White House targeted either conservative Publishers or conservative viewpoints.[24]

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[20] Jordan, Jim (@Jim_Jordan), TWITTER, (July 27, 2023, 11:03AM), https://x.com/Jim_Jordan/status/1684595401863614464?s=20 (accessed December 28, 2023).

[21] Jordan, Jim, TWITTER, (Nov 30, 2023, 7:44AM), https://x.com/Jim_Jordan/status/1730221200830251298?s=20 (accessed December 28, 2023).

[22] Jordan, Jim (@Jim_Jordan), TWITTER, (July 27, 2023, 11:03AM), https://x.com/Jim_Jordan/status/1684595399808466944?s=20 (accessed December 28, 2023).

[23] Jordan, Jim, (@Jim_Jordan), TWITTER, (July 27, 2023, 11:03AM), https://x.com/Jim_Jordan/status/1684595394515214336?s=20 (accessed December 28, 2023).

[24] *See Missouri v. Biden*, No. 3:22-CV-01213 154, Dkt. 293, p. 154.

Therefore, the threats of legal reform and imposition of editorial mandates by the Federal Government's censorship campaign forced Social Media Platforms to cease functioning as content platforms and instead assume the role of the content Publisher, jeopardizing the delicate balance struck by Section 230.

B. In Circumventing Congress' Intent Behind Section 230, the Federal Government has Violated the Separation of Powers as Articulated in the Constitution.

The Federal Government's actions in coercing Social Media Platforms to censor lawful speech fall outside Constitutional bounds and raise separation of powers concerns. This Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), established the framework for evaluating executive power.

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.

Id. at 637-38 (Jackson, J. concurring).

As the actions of the Federal Government were contrary to Congress' specific, unambiguous and expressed will behind Section 230, the Federal Government's attempts to force Social Media Platforms to

curate content fall into the zone where the President's power is at its lowest. Congress, in enacting Section 230, intended to promote a robust online environment for free expression, with the express purpose of Section 230 being, in relevant part,

> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media, (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation, and (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services[.]

47 U.S.C. § 230(b).

Therefore, in threatening Social Media Platforms with a potential loss of their Section 230 immunity for non-compliance with the censorship campaign, the Federal Government's actions exceed Constitutional authority and contravene the explicit Congressional intent of Section 230.

III. The Federal Government, Through Coercion and Joint Participation, Transformed Social Media Platforms into State Actors.

Section 230 immunity and the Good Samaritan provision were not intended to create a loophole to permit government-induced censorship that violates the First Amendment whether through coercion or joint participation. Therefore, the Federal Government, in coercing Social Media Platforms to censor lawful

speech, transformed Social Media Platforms into state actors, thereby subjecting them to Constitutional constraints.

It is well established that the Court had been hesitant to declare private entities as state actors. In *Manhattan Cmty Access Corp. v. Halleck*, this Court held that Manhattan Neighborhood Network, a private, nonprofit corporation designated by New York City to operate public access channels, was not a state actor for purposes of the First Amendment because it did not exercise a "traditional, exclusive public function." *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1928, 1930 (2019).

In *CBS v. Democratic Nat'l Committee*, 412 U.S. 94 (1973), the Court considered whether a radio station that had a license from the government to broadcast over airwaves in the public domain needed to comply with the First Amendment when it sold airtime to third parties. The radio station had a policy of refusing to sell airtime to persons seeking to express opinions on controversial issues. *Id.* at 98. The Court concluded that the radio station was not engaged in governmental action when it enforced this policy. *Id.* at 120.

However, the facts herein differ significantly from prior matters to such a degree as to warrant an independent analysis of whether or not Social Media Platforms have been transformed into state actors. To wit: (A) The Federal Government coerced Social Media Platforms to censor lawful speech under threat of regulatory retaliation and (B) Social Media Platforms became state actors through their joint participation in the Federal Government's censorship campaign.

A. The Federal Government Coerced Social Media Platforms to Censor Lawful Speech Under Threat of Regulatory Retaliation.

In *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956), state action was identified in closed-shop agreements between private unions and employers, which mandated all employees join the union. This determination of state action was made based on the existence of a statute passed by Congress that granted immunity to the private actor from liability under state law in connection with these closed-shop agreements. "The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." *Id.* at 351 (emphasis added). In this matter, Section 230 was a statute passed by Congress that similarly conferred immunity to Social Media Platforms.

In *Skinner v. Railway Lab. Execs. Ass'n*, 489 U.S. 602 (1989), the court identified state action in the actions of private parties, specifically the drug testing of company employees. The determination that state action was present was predicated on the enactment of federal regulations providing immunity to railroads from liability when conducting such tests. *Id.* at 489.

In both of the aforementioned cases, similarly to Section 230, the Federal Government did not prescribe any mandates on Social Media Platforms; rather, it preempted state law, shielding Social Media Platforms from legal action when they participated in the activities advocated by Congress.[25] Section 230 is the reward

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[25] Ramaswamy, Vivek and Rubenfeld, Jed, *Save the Constitution from Big Tech*, THE WALL STREET JOURNAL, Jan 11, 2021.

and the threat to review Social Media Platforms' immunity is the punishment. Congressmen have repeatedly issued explicit threats to social-media giants if they failed to censor speech those lawmakers disfavored.[26]

In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), this Court considered a situation where a private company book distributor followed state regulations in screening and refusing to distribute certain publications. The company's actions were in response to the guidance and direction of a state commission that sought to prevent the distribution of materials deemed objectionable. *Id.* at 62-63. The Court in *Bantam* held that when a private entity acts as an agent of the government in enforcing regulations that suppress speech, the private entity becomes subject to constitutional restrictions, particularly those arising from the First Amendment.

> It is true that appellants' books have not been seized or banned by the State, and that no one has been prosecuted for their possession or sale. But though the Commission is limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable,' and succeeded in its aim.

Id. at 66-67.

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[26] Romm, Tony, *The Technology 202: Lawmakers Plan to Ratchet Up Pressure on Tech Companies' Content Moderation Practices*, WASHINGTON POST, April 9, 2019.

Herein as in *Bantam*, the Federal Government coerced Social Media Platforms to execute its censorship campaign under the threat of reviewing Social Media Platforms' immunity under Section 230. *Bantam* made it clear that the mere threat of retaliatory action by the government for non-compliance is sufficient to coerce private parties to comply with governmental demand. The court in *Bantam* stated:

> It is true . . . Silverstein was 'free' to ignore the Commission's notices, in the sense that his refusal to 'cooperate' would have violated no law. But it was found as a fact . . . that Silverstein's compliance with the Commission's directives was not voluntary. People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around, and Silverstein's reaction, according to uncontroverted testimony, was no exception to this general rule.

Id. at 68

Although distinct from *Bantam* in that no threats of criminal action were made by the Federal Government against Social Media Platforms, removing Section 230 immunity enjoyed by Social Media Platforms would be tantamount to regulating them out of existence. Without Section 230 immunity, Social Media Platforms would be forced to moderate all content published by third-party Publishers in order to avoid liability—an impossible task—thus making the threat thereof sufficient to warrant compliance and meet the threshold established under *Bantam*.

B. The Federal Government Converted Social Media Platforms Into State Actors Through Its Joint Participation Censorship Campaign.

The Federal Government is not only accountable for private conduct it coerced or significantly encouraged, but also for private conduct in which it actively participated as a "joint participant" with Social Media Platforms. *See Burton v. Wilmington Parking Auth*, 365 U.S. 715, 725 (1961).

Joint activity occurs whenever the government has "so far insinuated itself" into private affairs as to blur the line between public and private action. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974). To become "pervasively entwined" in a private entity's workings, the government need only "significantly involve itself in the private entity's actions and decision-making"; it is not necessary to establish that "state actors . . . literally 'overrode' the private entity's independent judgment." *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 751, 753 (9th Cir. 2020). "Pervasive intertwinement" exists even if the private party is exercising independent judgment. *See West v. Atkins*, 487 U.S. 42, 52, n.10 (1988); *see also Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1454 (10th Cir. 1995) (holding that a "substantial degree of cooperative action" can constitute joint action).

The existence of joint participation between the Federal Government and Social Media Platforms may be best highlighted by the fact that the Federal Government's censorship campaign was not viewpoint neutral. Although viewpoint neutrality would not have rendered the Federal Government's censorship campaign Constitutional, the record in this case is clear that the Federal

Government targeted specific content hostile to its political views to bolster its own desired outcomes. Not all COVID-19 content was targeted for censorship. Not all content regarding the 2020 election was targeted for censorship. Rather, as the lower court stated in its decision to enjoin the Federal Government from perpetuating its censorship campaign,

> [o]pposition to COVID-19 vaccines; opposition to COVID-19 masking and lockdowns; opposition to the lab-leak theory of COVID-19; opposition to the validity of the 2020 election; opposition to President Biden's policies; statements that the Hunter Biden laptop story was true; and opposition to policies of the government officials in power. All were suppressed. It is quite telling that each example or category of suppressed speech was conservative in nature. This targeted suppression of conservative ideas is a perfect example of viewpoint discrimination of political speech.

Missouri v. Biden, No. 3:22-CV-01213 154, Dkt. 293, p. 154.

With regard to the Constitutional constraints placed on the government's ability to regulate speech in relation to the facts of this matter, the Court in *CBS v. Democratic Nat'l Committee* perhaps stated it best:

> Government has no business in collating, dispensing, and enforcing, subtly or otherwise, any set of ideas on the press. Beliefs, proposals for change, clamor for controls, protests against any governmental regime are protected by the First Amendment against governmental ban or control.

412 U.S. at 155-56.

Therefore, in light of the Federal Government's coercion of, and subsequent compliance by Social Media Platforms with the censorship campaign, Social Media Platforms and the Federal Government were so pervasively entwined so as to transform Social Media Platforms into an arm of the Federal Government and thus, rendered state actors subject to the same Constitutional constraints.

IV. SOCIAL MEDIA PLATFORMS' ALGORITHMIC CENSORSHIP CREATES AN ENVIRONMENT RIPE FOR THE CONTENT MODERATION ABUSE THAT LED TO THE FEDERAL GOVERNMENT RUNNING AFOUL OF THE FIRST AMENDMENT AND DISRUPTING THE BALANCE CONGRESS SOUGHT WITH SECTION 230.

It is well established that Social Media Platforms are permitted to moderate content and that Section 230 attempts to strike a balance between content moderation and free expression. Social Media Platforms moderate their content by establishing terms of service presented to third party Publishers that define the parameters of acceptable content and subsequently by reviewing Publisher content for compliance. Due to the vast amounts of third-party Publisher content published on Social Media Platforms, Publisher content is reviewed via algorithms[27] designed to identify content violative of their respective terms of service.

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27 "*Algorithm*" a process or set of rules to be followed in calculations or other problem-solving operations, especially by a computer. Oxford English Dictionary, OXFORD UP, July 2023, https://doi.org/10.1093/OED/1019775631 (accessed November 23, 2023).

Terms of service, which are publicly accessible, broadly define the parameters of violative content, often with vague and nebulous catch-all provisions.[28] However, the coding or parameters programmed into the algorithms that enforce the terms of service are not public and are continuously and frequently updated. The result is that third party Publisher content deemed violative, is either rendered invisible to the public unbeknownst to the Publisher (also known as "Shadow Banning"[29]), or outright removed. When content is targeted for removal by Social Media Platforms, Publishers are first alerted to terms of service violations only after the content has already been removed with

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[28] For example, YouTube Terms of Service, *Medical Misinformation Policy* December 15, 2023 https://support.google.com/youtube/answer/13813322 (accessed December 31, 2023). States that it does not allow content that "poses a serious risk of egregious harm by spreading medical misinformation that contradicts local health authorities' or the WHO's guidance . . . ." However, in the same policy, YouTube admits that the "medical misinformation policies are subject to change in response to changes to guidance from health authorities or WHO. There may be a delay between new LHAs/WHO guidance and policy updates, and our policies may not cover all LHA/WHO guidance related to specific health conditions and substances."

[29] "*Shadow Banning*"-a practice used in online moderation that prevents a user's content from being seen by others—either partially or totally—without the user being notified or aware of it. Shadow banning allows the user to continue to use the site seemingly as normal. https://www.dictionary.com/e/slang/shadow-banning/ (accessed November 24, 2023).

The practice of Shadow Banning was confirmed by Bari Weiss in an exposé dubbed "The Twitter Files, Part 2". Weiss, Bari, *Thread: The Twitter Files Part Two*, Dec 8, 2022 https://x.com/bariweiss/status/1601007575633305600? s=20 (accessed December 27, 2023).

little detail on what drove the censorious action.[30] As a result, Publishers are left to guess what is and is not deemed acceptable by the Social Media Platform algorithms, resulting in self-censorship and a subsequent chilling effect on speech. *See Baggett v. Bullitt*, 377 U.S. 360 (1964) (Holding loyalty oaths violated the First Amendment rights of employees, who would be unable to determine what they were swearing to.). *See also Lamont v. Postmaster General,* 381 U.S. 301 (1965) (Holding a regulation requiring individuals who wished to receive communist literature to sign up at the post office violated the First Amendment. Although the program included no sanctions against recipients, the Court said it would chill individuals who wanted the material.).

Moreover, the Federal Government's coercion of Social Media Platforms in this matter demonstrates that the non-public nature of censorious algorithms fosters an environment ripe for abuse. In other words, but for the non-public nature of Social Media Platform algorithms, efforts by the Federal Government to mandate the particular content that would trigger the algorithm would have been publicly visible in this matter. For example, if the Federal Government clandestinely coerced a Social Media Platform to amend its algorithm to identify and censor a particular Publisher like Louder With Crowder, or content from any Publisher

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[30] Crowder, Steven. TWITTER, May 16, 2023 https://pbs.twimg.com/media/FwTEpvmWwAA8h3p?format=jpg&name=large (accessed December 31, 2023). An image of an email sent to Louder With Crowder by YouTube indicating that content has been removed with no particularity as to the reasons the content violated the terms of service, despite the content in question having covered a variety of topics.

containing the word "covid," or a phrase like "how the 2020 Election was stolen," the covert nature of the algorithm leaves the public in the dark of this change, yet still subject to all of the censorious effects of the amended algorithm. Accordingly, content moderation mechanisms and practices, as employed by Social Media Platforms, raise novel First Amendment issues that will continue to appear given the breadth of social media use by both the Federal Government and the public.

A. The Troublesome Nature of Algorithms.

The use of software algorithms to censor Publisher content (hereinafter referred to as "Algorithmic Censorship") is a practice employed by the Social Media Platforms. Algorithmic Censorship censors Publisher content by removing or reducing/eliminating the visibility of certain content ("Shadow Banning") by employing software to render initial decisions on content censorship without any further human review, prior to, immediately, or shortly after the Publisher publishes it on the Social Media Platform(s). In short, Algorithmic Censorship is (i) a pre-programmed set of instructions, (ii) that render instantaneous censorship decisions, (iii) on Publisher content, (iv) prior to any human evaluation of said content. Algorithmic Censorship is designed and implemented by Social Media Platforms to identify and suppress certain third-party Publisher content based on particular topics, viewpoints (political, medical, etc.), or the actual Publisher of the content.[31]

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[31] Busch, Kristen E., *Social Media Algorithms: Content Recommendation, Moderation, and Congressional Considerations*,

The fact that Social Media Platforms censor speech by employing an automated non-human actor is troubling. Much like the decisions of this Court are too critical to ever be trusted to an algorithm, a decision as solemn as censoring speech in the public square should ideally demand careful scrutiny on a case-by-case basis. Algorithmic Censorship is the antithesis of careful scrutiny and is tantamount to a free speech spring gun.[32] When the content Publisher opens the digital door to discussion on topics that Social Media Platforms have targeted with their algorithms, the content Publisher's speech is in the direct line of fire of Social Media Platforms' digital automated spring gun. Much like a spring gun, the decision on whether to censor user content was made by a non-human mechanism incapable of consideration as to the context of the censored speech. In fact, Social Media Platforms admit that their Algorithmic Censorship of content may in fact target legitimate speech.[33] As Twitter stated in one of its blog posts,

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CONGRESSIONAL RESEARCH SERVICE, (July 27, 2023), https://sgp.fas.org/crs/misc/IF12462.pdf (accessed Dec 27, 2023).

[32] Reference is made to the famous spring gun case of *Katko v. Briney*, 183 N.W.2d 657 (1971), only to the extent that the censorious algorithms employed by Social Media Platforms are analogous to a spring gun that is installed for the purpose of indiscriminately attacking anyone entering a doorway without consideration of context or circumstance. Similarly, the algorithms at issue herein are designed to attack anyone entering into discussion on a specific topic without consideration to the context of the censored speech.

[33] Bond, Shannon, *Facebook, YouTube Warn of More Mistakes As Machines Replace Moderators*, NPR, (March 31, 2020), https://www.npr.org/2020/03/31/820174744/facebook-youtube-warn-of-

> Increasing our use of machine learning and automation to take a wide range of actions on potentially abusive and manipulative content. We want to be clear: while we work to ensure our systems are consistent, they can sometimes lack the context that our teams bring, and this may result in us making mistakes.[34]

YouTube, the Social Media Platform most censorious to Louder With Crowder's published content, stated its automated systems "are not always as accurate or granular in their analysis of content as human reviewers."[35] It warned that more content may be removed, "including some content that does not violate our policies."[36] Additionally, a 2020 report found that Facebook's content moderation algorithm erroneously censors approximately 300,000 user publications every day.[37]

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more-mistakes-as-machines-replace-moderators (accessed Nov 24, 2023).

[34] Gadde, Vajaya and Derella, Matt, *An Update on Our Continuity Strategy During COVID-19*, TWITTER (Apr 1, 2020), https://blog.twitter.com/en_us/topics/company/2020/An-update-on-our-continuity-strategy-during-COVID-19 (accessed Nov 24, 2023).

[35] *Actions to Reduce the Need for People to Come into Our Offices*, YOUTUBE, (March 16, 2020(https://blog.google/inside-google/company-announcements/update-extended-workforce-covid-19/ (accessed Nov 24, 2023).

[36] *See* Footnote 34.

[37] Barrett, Paul M. "*Who Moderated the Social Media Giants?*", NYU STERN, CENTER FOR BUSINESS AND HUMAN RIGHTS, June 2020 https://static1.squarespace.com/static/5b6df958f8370af3217d4178/t/5ed9854bf618c710cb55be98/1591313740497/NYU+

Finally, it is worth noting that although Social Media Platforms allow Publishers to appeal[38] Algorithmic Censorship decisions, such a remedy is of little to no value. As mentioned, Louder With Crowder has a substantial subscriber base on the Social Media Platforms to which it publishes content. Louder With Crowder's data analytics provided to it by the respective Social Media Platforms demonstrate that most consumption of its published content occurs within the first 24-48 hours of its publishing. Moreover, Louder With Crowder's published content is typically news-related in nature, which in and of itself has a short shelf life of interest to the audience. Therefore, it is irrelevant if, after human review, the content has been restored.

B. Requiring Transparency of Social Media Platform Algorithms is a Failsafe to First Amendment Abuse.

Despite the aforementioned problems inherent with employing algorithms to moderate content, the utility of an automated mechanism to moderate content is unavoidable as the vast amounts of Publisher content on Social Media Platforms is too voluminous

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Content+Moderation+Report_June+8+2020.pdf (accessed Dec 27, 2023).

38 *Appeal Community Guidelines Actions*, GOOGLE/YOUTUBE, https://support.google.com/youtube/answer/185111?hl=en (accessed Dec 31, 2023); *see also Our Range of Enforcement Options*, TWITTER https://help.twitter.com/en/rules-and-policies/enforcement-options (accessed Dec 31, 2023).

Appeal a Facebook Content Decision to the Oversight Board, FACEBOOK https://www.facebook.com/help/346366453115924/?helpref=uf_share (accessed Dec 31, 2023).

to be manually reviewed by humans.[39] However, the software or coding that defines the parameters of the algorithm behind the Algorithmic Censorship is not publicly available nor reviewable.[40] The algorithm is constantly changing outside the view of the public leading to the types of abuses seen in this matter. By requiring the transparency of the parameters of these algorithms, this Court can establish a failsafe against future potential abuses.

Denying the Publishers and the public at large the ability to review the algorithm leaves the Publishers in the precarious position of having to guess what is deemed to be acceptable content on any given day. As Social Media Platforms operating at the direction or coercion of the Federal Government should be subject to the government's constitutional limitations on censoring speech, the lack of transparency and objective standards of the Social Media Platforms' Algorithmic Censorship render them ambiguously vague potentially leading to arbitrary enforcement. In *Connally v. General Construction Co,* the Court established that vagueness exists if "men of common intelligence must necessarily guess at its meaning and differ as to its application." 269 U.S. 385, 391 (1926). In *Smith v.*

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[39] Busch, Kristen E. *Social Media Algorithms: Content Recommendation, Moderation, and Congressional Considerations*, CONGRESSIONAL RESEARCH SERVICE. July 27, 2023. https://sgp.fas.org/crs/misc/IF12462.pdf (accessed Dec 27, 2023).

[40] Pan, Christina A., et al., *Algorithms and the Perceived Legitimacy of Content Moderation*, STANFORD UNIVERSITY HUMAN-CENTERED ARTIFICIAL INTELLIGENCE, Dec 2022. https://hai.stanford.edu/sites/default/files/2022-12/HAI%20Policy%20Brief%20-%20Algorithms%20and%20the%20Perceived%20Legitimacy%20of%20Content%20Moderation.pdf (accessed Dec 31, 2023).

California, 361 U.S. 147 (1959), the Court affirmed the necessity of providing individuals with fair notice of what is prohibited. Lastly, in *Packingham v. North Carolina*, 582 U.S. 98 (2017), in acknowledging the importance of the internet as a modern public forum, this Court stressed that restrictions on speech in the digital age must be narrowly tailored and clear to avoid chilling lawful expression. The Court must therefore, at the very least, require that content Publishers and the public be granted access to the full parameters of any algorithm employed which results in censorship of speech.

It is often said that sunlight is the best disinfectant. By requiring that the parameters of Social Media Platform algorithms be publicly available, this Court can remedy many of the inherent issues caused by employing algorithms to moderate content.

Firstly, transparent algorithms would prevent the types of abuses we see by the Federal Government in this matter. With transparent algorithms, none of the Federal Government's unconstitutionally censorious demands could have been fulfilled outside of the watchful eye of the public. Secondly, content Publishers no longer have to surmise where the boundaries of acceptable content lie on any given day. Thirdly, the aforementioned errors caused by algorithms can be mitigated by the public assisting Social Media Platforms in identifying and correcting erroneous algorithmic parameters. Fourthly, the delicate balance sought by Congress in Section 230 is more likely to be struck when everyone has access to the algorithm's parameters and can thus debate them. As seen in this matter, under the current structure, only the Federal Government was putting its weight on the scale of this debate and,

but for leaked communications, the public would never have known.[41] Lastly, requiring the parameters of algorithms to be transparent does not prevent Social Media Platforms from enabling, or making available to Publishers or the public, the "technical means to restrict access to any material" as consistent with 47 U.S.C. § 230(c)(2)(B).

Therefore, requiring transparency of algorithmic parameters would not curtail content moderation, would honor the balance sought by Congress in Section 230, and would facilitate robust debate about the limits of censorship, resulting in a more equitable balance between free expression and good faith content moderation.

V. Algorithmic Censorship by Social Media Platforms When Implemented at the Direction or Coercion of the Federal Government Constitutes a Prior Restraint on Free Speech.

When the Federal Government coerces Social Media Platforms to employ Algorithmic Censorship, an unconstitutional prior restraint on free speech has occurred. *See Near v. Minnesota*, (establishing that the government may not prohibit speech before the

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41 Jordan, Jim, *The YouTube Files Part 1,* https://x.com/Jim_Jordan/status/1730221179632226337?s=20 (accessed Dec 27, 2023).

Jordan, Jim, *The Facebook Files Part 1*, https://x.com/Jim_Jordan/status/1684595375875760128?s=20 (accessed Dec 31, 2023).

Jordan, Jim, *The Facebook Files Part 2.* https://x.com/Jim_Jordan/status/1684957660515328001?s=20 (accessed Dec 31, 2023).

Taibbi, Matt, *Thread: The Twitter Files*, (December 2, 2022), https://x.com/mtaibbi/status/1598822959866683394? s=20 (accessed December 27, 2023).

speech happens absent exceptional circumstances). This Court has consistently held that prior restraints on speech are presumptively unconstitutional. In *Near v. Minnesota*, the Court stated,

> [t]he liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press . . .

283 U.S. 697, 713-14 (1931) (internal quotation omitted).

In *Near*, the Court established that the government bears a heavy burden of justifying any prior restraint on speech. The mere potential for harm does not meet this burden, and censorship must be based on specific, articulable grounds that pose a serious and imminent threat. *See New York Times Co. v. United States,* 403 U.S. 713, 725-26 (1971) (Holding " . . . the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.).

In discussing the extremely limited exceptions that permit prior restraint of speech, the Court in *Near* stated in the context of the nation at a time of war. *Id.* at 716. In highlighting these extremely narrow limitations, the Court in *Near* further stated that,

> "[t]he exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution,

> has meant, principally, although not exclusively, immunity from previous restraints or censorship."

Id.

Therefore, the Federal Government's communication with Social Media Platforms to censor speech amounts to a form of prior restraint, as it involves the suppression of content before or shortly after it is published or disseminated through Algorithmic Censorship. Although there is no overt ordinance or statute retraining the speech, the retaliatory threat by the Federal Government directed at Social Media Platforms is tantamount to same. The government must meet the stringent *Near* standard to justify such restraint, and mere concerns or generalized fears of harm as articulated by the Federal Government in its communication with Social Media Platforms do not suffice. *See New York Times Co. v. United States,* 403 U.S. 713, 725-26 (1971).

In *R.A.V. v. City of St. Paul*, the Court emphasized that prior restraints can take various forms, including content-based restrictions designed to suppress particular viewpoints. 505 U.S. 377 (1992). *See also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (Holding content-based regulations are presumptively invalid). Algorithmic Censorship, by targeting specific content based on its ideological or political nature, falls squarely within the realm of unconstitutional prior restraint. Notable examples germane to the issues before this Court include

the so-called "Twitter Files,"[42] "Facebook Files"[43] and "YouTube Files"[44] revelations. The leaked internal communications between the Social Media Platforms and the Federal Government confirmed the existence of Algorithmic Censorship targeting specific viewpoints on COVID-19 and the legitimacy of the 2020 presidential election because they either contradicted the White House's positions or caused the White House perceived reputational harm.[45]

Moreover, the prospect of Algorithmic Censorship creates a chilling effect on free expression. Users, aware that their content might be automatically censored based on certain criteria, may self-censor to avoid the risk of suppression. This self-censorship undermines the robust marketplace of ideas essential for a functioning democracy. In the aforementioned *Bantam Books, Inc. v. Sullivan*, the Court reaffirmed that prior restraints not only prevent expression but also induce self-censorship, stifling the free exchange of ideas. 372 U.S. 58, 63-64. Algorithmic censorship, by its very

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[42] Taibbi, Matt (@mtaibbi), *Thread: The Twitter Files*," December 2, 2022 https://x.com/mtaibbi/status/1598822959866683394?s=20 (accessed December 27, 2023).

[43] Jordan, Jim (@Jim_Jordan), *The Facebook Files, Part 1*, https://x.com/Jim_Jordan/status/1684595375875760128?s=20 (accessed December 27, 2023).

[44] Jordan, Jim, *The Youtube Files Part 1,* https://x.com/Jim_Jordan/status/1730221179632226337?s=20 (accessed December 27, 2023).

[45] *See*, for example, this exchange indicating that the White House was pressuring Facebook to remove posts that included a satirical image that was contrary to the White House's COVID messaging. Jordan, Jim, TWITTER, July 27, 2023. https://x.com/Jim_Jordan/status/1684595380770541568? s=20 (accessed December 27, 2023).

nature, encourages users to curtail their expression to conform to the implied parameters set by the Social Media Platform algorithms.

Therefore, Algorithmic Censorship of constitutionally protected Publisher content by Social Media Platforms, when implemented at the direction or coercion of the Federal Government, constitutes a prior restraint on free speech.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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