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 OF NATIONAL RELIGIOUS BROADCASTERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

National Religious Broadcasters (NRB) is a nonpartisan association of Christian broadcasters united by their shared purpose of proclaiming Christian teaching and promoting biblical truths. NRB's 1,487 members reach a weekly audience of approximately 141 million American listeners, viewers, and readers through radio, television, the Internet, and other media.

Since its founding in 1944, NRB has worked to foster excellence, integrity, and accountability in its membership. NRB also works to promote its members' use of all forms of communication, to ensure they may broadcast their messages of hope through fully realized First Amendment guarantees. NRB believes that religious liberty and freedom of speech together form the cornerstone of a free society.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person other than amicus curiae, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

> *When a question of policy is "before the house," free men choose to meet it not with their eyes shut, but with their eyes open. To be afraid of ideas, any idea, is to be unfit for self-government. Any such suppression of ideas about the common good, the First Amendment condemns with its absolute disapproval. The freedom of ideas shall not be abridged.*
>
> *Alexander Meikeljohn*[2]

SUMMARY OF ARGUMENT

Constitutional litigation often involves various forms of judicial balancing tests. In most cases involving freedom of speech, the ultimate balancing test requires a higher standard than in cases involving rights that are considered non-fundamental in character. In fundamental rights cases, the government must prove that its interest is both "compelling" and narrowly tailored. *See*, *e.g.*, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018). In non-fundamental rights cases, the government program need only show that its actions are rationally related to a "legitimate" governmental interest. *See*, *e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

The higher standard for fundamental rights necessarily imposes a greater restriction on governmental action. Governmental action that fails the test of "legitimacy" can never be "compelling."

The plaintiffs here are citizens and officials, suing on behalf of their states, who use social media

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[2] Alexander Meiklejohn, *Free Speech And Its Relation to Self-Government* 17 (1948).

communications to deliver messages on controversial topics. Starting at the White House and spiraling down through a myriad of federal agencies and officers, the Biden Administration has sought to suppress messages that they deem to be misinformation.

The Administration's effort to suppress speech has ranged in degrees of coerciveness from mere suggestions up to efforts that can fairly be described as threats and intimidation. Some speakers were banned from social media sites. Some messages were removed. Some speakers and messages had their ideas suppressed by sophisticated algorithms that limit the reach of targeted messages.

Using a standard developed by the Second Circuit, the Fifth Circuit below found that some suppression efforts crossed a constitutional line while others did not.[3] Your amicus suggests a different approach.

This Court should rule that the government of the United States may never seek to suppress protected speech. The degree of coercion employed to accomplish the suppression should not matter. It is

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[3] *Missouri v. Biden*, 83 F.4th 350, 377 (5th Cir. 2023) (per curiam). The Fifth Circuit's approach to coercion by government officials was derived, in part, from *National Rifle Ass'n of America v. Vullo*, 49 F.4th 700 (2d Cir. 2022). While the NRA decision is troublesome on its face, it is inaptly applied in this context. Property rights were at stake in that case when a government official urged one business not to do business with gun advocates. But this present case involves First Amendment values of a different constitutional rank. The suppression of protected speech can neither constitute a legitimate government purpose nor be construed as mere "government speech."

simply illegitimate for the government of the United States to seek to suppress protected speech.

ARGUMENT

One of the most important, and eloquent, statements ever issued by this Court was written by Justice Jackson in *West Virginia State Board of Education v. Barnette*:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

319 U.S. 624, 642 (1943).

This passage describes two rules, not one. First, government cannot prescribe what shall be orthodox "in politics, nationalism, religion, or other matters of opinion." This list is comprehensive and clearly includes all subjects at issue in this case. This phrase is followed by the important conjunction "or," which identifies the second rule: "no official, high or petty can . . . force citizens to confess by word or act their faith therein." The first rule bans any creation of a government orthodoxy. The second rule prohibits the government from coercing adherence to a viewpoint.

The first rule is the one applicable here. No government official may legitimately construct a rule of orthodoxy on any matter of public concern.

In this case, the White House and the administration do not seek to force a pledge of fidelity

espousing the official viewpoint. Rather, the most powerful agencies from the most powerful government on the planet seek to suppress messages that are deemed heretical in the government's eyes.

The constitutional rule should be the same no matter which arrow is chosen from the quiver of tyranny. Compelled oaths or intentional suppression of protected speech, or any related tactics, are constitutionally illegitimate in this nation.

It is important to emphasize at the outset that the rule your amicus seeks is limited to the subject of protected speech. There is no effort by the government to contend that the speech that they sought to suppress was unprotected by the First Amendment. Nor could such a claim be taken seriously. There is no suggestion that the Administration confined its suppression efforts to speech that incited imminent lawless action, constituted defamation, or published obscenity. These are the recognized and limited categories of unprotected speech. *Counterman v. Colorado*, 600 U.S. 66, 78 (2023).

Here the government seeks to accomplish a form of censorship by using third party intermediaries rather than by enacting laws with direct enforcement. "What the state may not do directly it may not do indirectly." *Bailey v. State of Alabama*, 219 U.S. 219, 244 (1911). It is obvious that if the government adopted laws censoring the same content, such measures would be found to be unconstitutional in the judicial equivalent of the speed it takes an email to travel from coast to coast. "If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less

inadequate." *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

The government's claim is that its actions were appropriate because they only "'sought to mitigate the hazards of online misinformation' by 'calling attention to content' that violated the 'platforms' policies,' a form of permissible government speech." *Missouri v. Biden*, 83 F.4th 350, 360 (5th Cir. 2023).

This justification cannot withstand even the most meager examination. Of course, the government can speak. In this context, the government may and did issue press releases, give interviews, hold press conferences, publish articles and position papers, and promote its views on all of the subjects at issue in this case. Those are the appropriate means available to the government to respond to speech it views as hazardous misinformation. On the other hand, the First Amendment absolutely bars the government from seeking to suppress protected speech. This is not an acceptable response in our constitutional republic.

The White House can tell social media outlets, "Here's our position, we encourage you to promote it." What it cannot do is to meticulously monitor social media to discover instances of voices carrying messages contrary to the White House position and then suggest, ask, cajole, demand, or insist that social media outlets ban or suppress the voices or viewpoints the government does not favor.

The government's objective here was the suppression of speech, and that can never be a legitimate government interest. In light of the First Amendment, speech suppression can never be considered mere "government speech;" it is unconstitutional action.

"Don't print that" is no more speech than a bank robber saying, "Give me everything in the till." If aimed at protected speech, government may never even suggest to a social media outlet or other publisher that such speech should be suppressed. And the facts in this case clearly demonstrate that those wielding governmental authority did not limit themselves to mere suggestions. But from a constitutional perspective, the degree of coercion should not matter. The Constitution is not satisfied even if only mild actions are used by government to suppress protected speech.

I. Historical Comparisons Affirm the Tyrannical Nature of Government Efforts to Suppress Protected Speech.

The Sedition Act of 1798

The Sedition Act of 1798, 1 Stat. 596, made it a crime:

> if any person shall write, print, utter or publish * * * any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress * * *, or the President * * *, with intent to defame * * * or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.

Sullivan, 376 U.S. at 273–74.

James Madison and Thomas Jefferson famously spearheaded the opposition to this Act in the Virginia and Kentucky Resolutions of 1798 and 1799 respectively. In the Virginia Resolution, the General

Assembly of that Commonwealth adopted Madison's language calling out the violation of the First Amendment:

> "(The Sedition Act) exercises * * * a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto—a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." 4 Elliot's Debates on the Federal Constitution (1876), pp. 553–554.

Id. at 274.

Upon full review of the contemporary and later historical critiques of the Act, this Court concluded that "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Id.* at 276.

II. Suppression of Abolitionist Literature

One of the historical incidents referenced in this Court's discussion of the Sedition Act of 1798 bears further consideration. The Court referenced Senator John Calhoun's critique of the constitutionality of the Sedition Act in a report made in 1836. *Sullivan*, 376 U.S. at 276. The matter under debate in that session of Congress bears considerable resemblance to the censorial acts of the White House and other agencies in this case.

Calhoun's comments arose in the context of an effort to prohibit the distribution of abolitionist literature.

Beginning in the 1830s, southern concern over abolition literature reached a fever pitch. In the wake of the Nat Turner uprising, which the Governor of Virginia blamed in part on incitement by abolitionist newspapers, the pro-slavery forces strenuously attempted to eradicate the offending publications. Virginia and Tennessee enacted laws banning material "calculated to incite" rebellion among the slaves; the maximum punishment for a black offender under the Virginia statute was death. Most southern states already had broader, if less draconian, statutes prohibiting abolitionist literature.

Despite these statutes, abolitionists in the North continued to flood the South with newspapers and pamphlets. The legislatures of South Carolina, North Carolina, Virginia, Georgia, Mississippi, Alabama, and Kentucky called on their northern counterparts to enact censorship statutes. When these appeals failed, the Southerners sought to have the U.S. Postal Service cease delivery of abolitionist publications. After a mob in Charleston looted the local post office, the Postmaster General asked President Jackson for relief. In his December 1835 message to Congress, Jackson proposed a bill to prohibit from the mail all discussion of slavery. David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1713–14 (1991).

While arguing that the abolitionist literature was odious and was within the power of the states to punish, Calhoun rejected the concept of federal jurisdiction over any aspect of slavery. He proclaimed:

> It would indeed have been but a poor triumph for the cause of liberty, in the great contest of 1799, had the sedition law been put down on principles that would have left Congress free to suppress the circulation, through the mail, of the very publications which that odious act was intended to prohibit. The authors of that memorable achievement would have had but slender claims on the gratitude of posterity, if their victory over the encroachment of power had been left so imperfect.

Id. at 1715.

Calhoun proposed an alternative; he sought to ban the delivery of abolitionist mail by the Post Office in such states where the literature was illegal. His alternative bill was defeated for a variety of reasons. Senators John Davis and Daniel Webster argued that involving the federal government in any selection of what could be mailed to the public violated the First Amendment. *Id.*

III. Free Speech Advocacy in the Post World War I Era

The White House's actions to suppress social media speech can be aptly described as elitist fears of "an uninformed mob." Ironically, the advent of modern free speech advocacy can be traced, at least in substantial part, to very similar fears in the wake of the Sedition Act of 1918 and its enforcement in the post-World War I era.

> The popularity of the Klan, the efforts to stamp out evolutionism, the prohibition movement, and other developments suggested to one commentator midway

> through the 1920s that the "process of destroying the Bill of Rights," begun during the war, was "only now reaching its height." In these circumstances, institutionalizing free speech appealed to many in the national elite. The distinguished jurist, Charles Evans Hughes, and liberal pundit Walter Lippmann were moved to warn of the growth of "the intolerant spirit" in the United States and to proclaim the critical need to challenge the moral authority and limit the power of majorities.
>
> ....
>
> The reform-minded were also troubled by the irrationality and power of the masses. Efforts to order society along scientifically sound lines laid out by experts required an acceptance of innovation and new ideas. But, many of America's progressives had more reason than ever to doubt the capacity of the average man to understand the complexities of modern society or accept the intellectual leadership they were being offered. Progress demanded a value system that subordinated the judgment of the masses to that of the experts. Intellectuals, as historian Warren Sussman reminded us, found in the villager and the farmer those "most opposed to the high culture and social reform they most desired."

Richard W. Steele, *Fear of the Mob and Faith in Government in Free Speech Discourse, 1919-1941*, 38 AM. J. LEGAL HIST. 55, 59–60 (1994) (footnotes omitted).

While "[e]litist fears provided fertile ground for the growth of a new civil libertarianism," this movement rejected both the calls for an absolutist view of free speech protections as well as the "laissez fair dogma of conservative libertarianism." *Id.* at 60. The elites considered themselves to be the minority needing protection from the censorious majority.

Zechariah Chaffee, Jr., a law professor at Harvard, was a key thought-leader for this movement. For him, "uninhibited expression was principally a means of maintaining political equilibrium" and "ensuring freedom from majoritarian dictated conformity." *Id.* at 61.

Seeing free speech as a means of holding the benighted masses at bay was, at best, a utilitarian view of the First Amendment. Such advocates supported protections for free speech to assist their efforts to "subordinated the judgment of the masses to that of the experts." *Id.* at 60.

IV. Coming Full Circle

Some key thought-leaders coming from today's political left take the same utilitarian approach only with the opposite outcome vis-à-vis the First Amendment. Adam Liptak, the New York Times Supreme Court reporter, quotes two leading progressive law professors who, using a utilitarian approach, have now jettisoned their support for the view that free speech is for all.

> "When I was younger, I had more of the standard liberal view of civil liberties," said Louis Michael Seidman, a law professor at Georgetown. "And I've gradually changed my mind about it. What I have come to see is that

> it's a mistake to think of free speech as an effective means to accomplish a more just society." To the contrary, free speech reinforces and amplifies injustice, Catharine A. MacKinnon, a law professor at the University of Michigan, wrote in "The Free Speech Century," a collection of essays to be published this year. "Once a defense of the powerless, the First Amendment over the last hundred years has mainly become a weapon of the powerful," she wrote. "Legally, what was, toward the beginning of the 20th century, a shield for radicals, artists and activists, socialists and pacifists, the excluded and the dispossessed, has become a sword for authoritarians, racists and misogynists, Nazis and Klansmen, pornographers and corporations buying elections."[4]

See also, Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219 (2018); Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past As Prologue*, 118 COLUM. L. REV. 2057, 2057 (2018) ("Although the Supreme Court's conservative First Amendment judicial activism has raised doubts about whether constitutional protection for free speech can serve progressive ends, this Essay identifies a silver lining to the deregulatory use of the First Amendment.").

This utilitarian view of the First Amendment has come full circle. Free speech is only a means to the

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[4] Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html

desired ends. It can be jettisoned when it fails to deliver the desired progressive ends.

Those who wish to "subordinate the judgment of the masses to that of the experts" now occupy the White House and a host of federal agencies. They now employ Orwellian double-speak to claim that their suppression of the views and voices of their critics constitutes permissible government speech.

CONCLUSION

The plaintiffs in this case seek an injunction to stop government action. They do not seek to control the acts of social media outlets. No injunction would ever be warranted if the government says, "Please print our side of the story." However, an absolute barrier must be erected which prohibits government from ever saying, "Do not print an opposing view." Whether it acts directly or indirectly, no American government may ever seek to suppress protected speech.

Respectfully submitted,

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