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* CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENTS

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Constitutional Counsel Group
1628 N. Main St. #289
Salinas, CA 93906
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that freedom of speech is critical to a functioning republic. Under our Constitution, government officials simply have no role in policing the speech of private citizens. The Center has previously appeared before this Court as *amicus curiae* and counsel in several cases addressing these issues, *303 Creative LLC v. Elenis*, 143 S.Ct. 2298 (2023); *Americans for Prosperity Foundation v. Bonta*, 141 S.Ct. 2373 (2021); and *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018), to name a few.

SUMMARY OF ARGUMENT

This term the Court is looking at censorship in three cases in addition to the instant action. In *NRA v. Vullo*, No. 22-842, the Court is reviewing whether actions taken by a state actor to convince third parties to refuse to do business with the NRA based on the NRA's speech activity is constitutional. In *Moody v. Netchoice* (No. 22-277) and *Netchoice v. Paxton* (No. 22-555), the Court is considering the constitutionality of state laws that require massive social media platforms to refrain from viewpoint discrimination and to

[1] In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

publicize when they censor private speech.[2] This action is perhaps the most important. It involves the direct question of whether federal government officials can work with the massive social media platforms to censor the voices of American citizens with whom those officials disagree. This censorship was intended to shut down debate on matters of public health and to interfere with an election for the President of the United States. It does not matter if the government officials "coerced" the social media platforms or merely entered into a partnership for the purpose of censoring unwanted viewpoints. The First Amendment bars government action interfering with the freedom of speech of American citizens.

The original understanding of the First Amendment was that the protection of the freedom of speech was necessary to protect republican government. The controversy over The Sedition Act only served to emphasize that intent. The framers understood that a free republic could not continue to exist if government officials could censor critics of government policy. The framers would have been shocked at the conduct of government officials in this case working to suppress opposing viewpoints and interfere in elections.

This purpose of the First Amendment was affirmed in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). There, this Court described as a "fixed star in our constitutional constellation" the precept that "no official, high or petty, can

---

[2] The record in these two cases does not include the involvement of the federal government officials in the censorship activities of the massive social media platforms that is the subject of the state laws under review. The record in this case discloses that involvement.

prescribe what shall be orthodox … in … matters of opinion." Yet that is exactly what happened in this case. Government officials pressured massive social media companies to suppress ideas and even truthful information that run counter to the government-backed narrative. Reporters Matt Taibbi, Michael Shellenberger, and Bari Weiss, who were given access to the "Twitter Files," have written about how government officials pressured Twitter to suppress unwanted viewpoints and even deplatform some speakers. *See*, *e.g.*, Julia Shapero, *Former NYT columnist Bari Weiss releases 'Twitter Files Part Two'*, The Hill, December 8, 2022[3]; Joseph A. Wulfsohn, *Twitter Files Part 6 reveals FBI's ties to tech giant: "As if it were a subsidiary"*, Fox News, December 16, 2022[4]. Official investigations of Twitter were launched after Elon Musk gave these reporters access to internal Twitter communications showing the extent of the participation of government officials in suppressing unwanted viewpoints. Those investigations were meant as punishment for pulling back the curtain showing that government officials were involved in the censorship. *See The Weaponization of the Federal Trade Commission An Agency's Overreach to Harass Elon Musk's Twitter*, Interim Staff Report of the Committee on the Judiciary and the Select Subcommittee on the Weaponization of the Federal Government, March 7, 2023 at 2 ("The strong inference from these facts is that Twitter's rediscovered focus on free speech is being met with politically motivated attempts to thwart Elon

---

[3] https://thehill.com/policy/technology/3768087-former-nyt-columnist-bari-weiss-releases-twitter-files-part-two/ (last visited February 7, 2024).

[4] https://www.foxnews.com/media/twitter-files-part-6-reveals-fbis-ties-tech-giant (last visited February 7, 2024).

Musk's goals."). This suppression of political viewpoints by the government is ongoing.

The United States argues that this public-private partnership for the purpose of censorship is protected from First Amendment scrutiny by the "government speech doctrine." Application for a Stay of the Injunction Issued by the United States District Court for the Western District of Louisiana (Application for Stay) at 3. But secret communications with social media platforms to facilitate censorship tells no one anything about the government's viewpoint. The entire point of these behind-the-scenes discussions is to make unwanted viewpoints to simply disappear. These government officials used the social media platforms for censorship of opinions with which they disagreed so that the government did not have to engage in a debate on the merits.

ARGUMENT

I. The Free Speech Clause Cannot Tolerate Efforts by Government Officials to Censor American Citizens.

A. Constitutional guarantees of speech and press freedoms were meant to protect free elections.

America was founded on the notion that the people are sovereign, and that government serves their interests. Declaration of Independence, 1 Stat. 1 (government derives its powers "from consent of the governed."); *see* Alexander Hamilton, Federalist No. 84 (Clinton Rossiter ed. 1961) at 512 (the provision in the constitution prohibiting titles of nobility ensure that "there can never be serious danger that the government will be any other than that of the people."); St.

George Tucker, View of the Constitution of the United States with Selected Writings (Liberty Fund 1999) at 31-32. James Wilson argued that this provision of the Declaration of Independence was the foundation of the Constitution. James Wilson, Pennsylvania Ratifying Convention, 1787, *reprinted in* The Founders' Constitution, vol. 1 at 62; *see* James Wilson, Of Government, The Legislative Department, of Citizens and Aliens, Lectures on Law, 1791, *reprinted in* The Founders' Constitution, vol. 1 at 72. Because of this, James Madison argued that it is public opinion that "sets the bounds" of government. James Madison, Public Opinion, 1791, *reprinted in* The Founders' Constitution, vol. 1 at 73. The essence of this popular sovereignty is not only that power is derived from the people but more importantly that those who exercise that power are answerable to the people. *West Virginia v. EPA*, 142 S.Ct. 2587, 2617 (2022) (Gorsuch, J., concurring).

The concept of the people as sovereign requires that the people be allowed to participate in selecting their representatives. *Id.* Madison saw this as essential. James Madison, Federalist No. 39, *supra* at 241. He noted that the Constitution was to be approved by the "supreme authority in each State—the authority of the people themselves." *Id.* at 243. The people as sovereigns ratified the Constitution and that same Constitution preserves the sovereignty of the people. *Id.* This sovereignty is exercised by the people at the ballot box in choosing their representatives. *Id.* at 241.

Because the foundation of the nation is the sovereignty of the people, freedom to communicate opinions is a fundamental pillar of a free government that,

when "taken away, the constitution of a free society is dissolved." Benjamin Franklin, *On Freedom of Speech and the Press*, Pennsylvania Gazette, November 17, 1773 (reprinted in 2 The Life and Writings of Benjamin Franklin (McCarty & Davis 1840) at 431). Republican government requires a right to vote and free elections require the freedom of speech. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 410-11 (2000) (Thomas, J., dissenting) ("I begin with a proposition that ought to be unassailable: Political speech is the primary object of First Amendment protection."). This necessary freedom to exchange ideas and opinions was enshrined in the First Amendment. *NAACP v. Button*, 371 U.S. 415, 431 (1963) ("Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights").

Freedom of Speech is not a right granted by the Constitution. Rather it is a natural right. The First Amendment's guaranty of free speech "undertakes to give no rights, but it recognizes the rights mentioned as something known, understood, and existing." Thomas Cooley, The General Principles of Constitutional Law (Little, Brown, & Co. 1880), at 272.

This freedom is critical to protecting free elections and preserving the peoples' status as the true sovereigns in our system of government. *NAACP*, 371 U.S. at 431; *see*, *e.g.*, *West Virginia*, 142 S.Ct. at 2617 (Gorsuch, J., concurring) ("the Constitution sought to ensure 'not only that all power [w]ould be derived from the people,' but also 'that those [e]ntrusted with it should be kept in dependence on the people.'" (quoting

Alexander Hamilton, Federalist No. 11 at 85)); *Republican Party of Minnesota v. White*, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring) ("Free elections and free speech are a powerful combination: Together they may advance our understanding of the rule of law and further a commitment to its precepts."); *Nixon*, 528 U.S. at 411 (Thomas, J., dissenting) ("The Founders sought to protect the rights of individuals to engage in political speech because a self-governing people depends upon the free exchange of political information.").

Congress quickly tested this limit on its power with the enactment of the Sedition Act. The question for the new country was whether the free speech and press guarantees only protected against prior restraint, as was the case in England, or whether they guaranteed the type of liberty envisioned by Madison and others who argued for a freedom to share ideas with fellow citizens.

In the Sedition Act of 1798 Congress outlawed publication of "false, scandalous, and malicious writings against the Government, with intent to stir up sedition." The supporters of the law argued that it was needed to carry out "the power vested by the Constitution in the Government." *History of Congress*, February 1799 at 2988. Opponents rejected that justification as one not countenanced by the First Amendment. In an earlier debate over the nature of constitutional power, Madison noted "'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.' 4 Annals of Congress, p. 934 (1794)." *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964).

The Virginia Resolutions of 1798 also condemned the act as the exercise of "'a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto.'" *Id.* at 274. The particular evil in the Sedition Act, according to the Virginia General Assembly, was that it was "'levelled [sic] against the right of freely examining public characters and measures, and of free communication among the people thereon.'" *Id.*

The Sedition Act expired by its own terms in 1801 and the new Congress refused to extend or reenact the prohibitions. For his part, Jefferson pardoned those convicted and fines were reimbursed by an act of Congress based on Congress' view that the Sedition Act was unconstitutional. *Id.* at 276.

This Court in *New York Times Co.*, noted 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.* More important than the "court of history," is the apparent political judgment at the time that the enactment was inconsistent with the Constitution. Where one Congress attempted to insulate itself from criticism, the subsequent Congress immediately recognized that attempt as contrary to the First Amendment. Congress and the President did not merely allow the law to lapse—they took affirmative action to undo its effects through repayment of fines and pardons. This is the clearest indication we have of that the people intended the First Amendment's speech and press clauses to be much broader than a simple bar on prior restraints. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J. concurring) (evidence of original

understanding of the Constitution can be found in the "practices and beliefs held by the Founders").

The First Amendment prohibits government from attempting to silence citizens, especially on matters relating to elections. In this case, officials of the federal government worked with massive internet platforms to censor Americans in order to affect the outcome of elections.

B. The petitioners' censorship efforts were designed to affect the outcome of elections.

The record establishes that government actors worked to censor private citizens as a means of affecting an election. As the record in this case reveals, FBI officials met in secret with representatives of the social media platforms with the purpose of convincing the platforms to suppress "disinformation, especially from "Russian actors." Application for Stay, *supra* at 60a. But the real goal was to suppress the spread of factual information (the contents of Hunter Biden's laptop, among other things) by American citizens to other American citizens. *Id*. at 62a-63a. All of this was specifically meant to affect the 2020 presidential election. *See id*. at 62a-64a.

Government officials claimed that their censorship requests were meant to counter "Russian interference." At the same time, however, they admitted that there was no evidence of such foreign involvement. Matt Taibi, Twitter Files Thread: The Spies Who Loved Twitter, December 24, 2022 ¶¶ 37-38.[5]

---

[5] https://www.racket.news/p/twitter-files-thread-the-spies-who (last visited February 5, 2024).

It wasn't just the FBI. The social media platforms ended up developing a formal system for taking in censorship requests from "every corner of government." Matt Taibi, My Statement to Congress, March 9, 2023.[6] Those government agencies also worked with "quasi-private entities (some taxpayer-funded) to make a list of American citizens whose opinions were labeled "misinformation," "disinformation," or "malinformation" which meant that information was "true by inconvenient." *Id.*

C. Government efforts to censor American citizens social media posts violates the Free Speech Clause of the First Amendment.

Respondents note that "compulsion" and "coercion" were used by government actors to "encourage" the social media platforms to grant the censorship requests (or demands). But a test of compulsion is unworkable. Ultimately such a test depends on discerning the subjective motivation of the social media platforms in agreeing to censor the citizens tagged by government officials. That motivation should not matter, however. For First Amendment purposes, it makes no difference whether the government compelled, threatened, or merely invited the censorship.

Would it make a difference if the social media platforms approached the federal government to invite them to nominate viewpoints for censorship? Similarly, would it make a difference if the federal government merely sent a request to the social media

---

[6] https://www.racket.news/p/my-statement-to-congress (last visited February 5, 2024).

platforms to censor any posts critical of the federal officers' preferred candidate? In either instance, the censorship would not have taken place but for the federal officers' action. That "but for" connection proves that the government was the one that abridged the speech rights of American citizens.[7]

No matter whether there was a credible threat of official action against the social media platforms, or the social media companies just concluded that cooperation with censorship requests was a more cost-effective way than campaign contributions of purchasing favorable treatment from regulators, there was still official government action to block the political speech of American citizens. The First Amendment forbids all government actions that abridge political speech of citizens.

II. The government speech doctrine does not protect secret efforts to censor speech of American citizens.

The United States argues that federal officials working with massive social media platforms to censor the speech of Americans is just an example of "government speech." This censorship activity does not fit within this Court's precedents on government speech.

---

[7] As disclosed in the record in this case, the government was deeply involved the censorship of citizens that provoked the state laws under consideration by this Court in *Moody v. Netchoice*, No. 22-277 and *Netchoice v. Paxton*, No. 22-555. That government involvement does not appear in the record of those cases and the United States failed to disclose that involvement in its amicus brief. Nonetheless, even without that "but for" connection, the social media platforms in those cases can be classified as common carriers in which case even censorship without government involvement could be prohibited by the states.

It does not matter whether government officials are "coercing" or using other methods in seeking to convince the social media platforms to censor the speech of American citizens. Neither activity fits within the government speech doctrine.

As Justice Alito put it in his opinion concurring in the judgment in *Shurtleff v. City of Boston*, 596 U.S. 243 (2022), "the real question in government-speech cases [is]: whether the government is *speaking* instead of regulating private expression." *Id.* at 262 (emphasis in original) (Alito, J., concurring in the judgment). Thus, for the government speech doctrine to apply, at a minimum the government must be speaking. The doctrine is meant to protect the ability of the government to advance ideas in the public square. *See Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000).

To invoke the doctrine, there must be some public speech by the government. If the public cannot perceive that government is speaking, then the doctrine cannot apply. *See Matal v. Tam*, 582 U.S. 218, 238 (2017) (rejecting the argument that government issued trademark could be government speech because, among other things, the expression in the trademark is not perceived by the public as government expression).

One reason that the First Amendment does not regulate government speech is that the government will ultimately be accountable to the electorate "for its advocacy." *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (quoting *Southworth*, 528 U.S. at 235). For that accountability to happen, however, the electorate must know what the government is advocating.

In this case, any "government speech" took place in secret. That communication consisted of efforts to compel or convince social media platforms to censor the truthful speech and opinions of American citizens. As noted above, this included suppressing truthful information about the contents of Hunter Biden's laptop for the purpose of affecting the outcome of the 2020 presidential election. *See* Application for Stay, *supra* at 62a-64a.

It strikes one as more than a little odd that officials of the executive department would be working behind the scenes to suppress information that would be harmful to the election of the *rival candidate* to the current incumbent. It could only have been intended support the election of that *rival candidate*. Obviously, these actions cannot be meant to express administration policy – a necessary precondition for application of the government speech doctrine. Just as important, however, the "speech" (working to convince the social media platforms to suppress the speech of American citizens) was done in secret. There is no way that the electorate could hold the government responsible for its conduct. *See Pleasant Grove*, 555 U.S. at 468; *Southworth*, 528 U.S. at 235.

Instead of publicly expressed government speech, this case concerns a secret censorship project. It was meant to censor the factually correct speech of American citizens and to alter the outcome of a presidential election.

Secret meetings to convince social media platforms to censor speech does not fall under the umbrella of "government speech." Instead, it is an abridgment of speech and is in violation of the First Amendment.

CONCLUSION

In this case, government was not speaking. Instead, it was regulating private expression. *See Shurtleff*, 596 U.S. at 262 (Alito, concurring in the judgment). "Political speech is the primary object of First Amendment protection." *Nixon*, 528 U.S. at 410-11 (Thomas, J., dissenting). Here, government officials ignored the First Amendment and set out to censor the political speech of American Citizens. This Court should reinstate the injunction imposed by the District Court.

February 2024 Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Constitutional Counsel Group
1628 N. Main St. #289
Salinas, CA 93906
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae