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 *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, NATIONAL COALITION AGAINST CENSORSHIP, AND FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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Snyder v. Phelps, 562 U.S. 443 (2011) 3

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CONG. REGISTER, June 8, 1789, vol. 1, reprinted in Neil H. Cogan, THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS (Oxford Univ. Press 1997) 31, 32

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Lucy Kafanov, *7 Republican AGs Write to Target, Say Pride Month Campaigns Could Violate Their State's Child Protection Laws,* CNN (July 8, 2023), https://www.cnn.com/2023/07/08/business/target-attorneys-general-pride-month/index.html..24

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Letter from Atty's Gen. to Brian C. Cornell, Chairman and CEO, Target Corp. (July 5, 2023), https://content.govdelivery.com/attachments/INAG/2023/07/06/file_attachments/2546257/Target%20Letter%20Final.pdf 24, 25

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Press Release, Att'y Gen. Andrew Bailey, Att'y Gen. Bailey Directs Letter to Advertisers Amidst Media Matters Investigation, https://ago.mo.gov/attorney-general-bailey-directs-letter-to-advertisers-amidst-media-matters-investigation/.................................... 26, 27

Jacob Sullum, *Was Amazon 'Free to Ignore' White House Demands that it Suppress Anti-Vaccine Books?*, REASON, Feb. 7, 2024, https://reason.com/2024/02/07/was-amazon-free-to-ignore-white-house-demands-that-it-suppress-anti-vaccine-books/ 19

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INTEREST OF *AMICI CURIAE*[1]

The **Foundation for Individual Rights and Expression (FIRE)** is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights on college campuses nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases that implicate expressive rights. In June 2022, FIRE expanded its public advocacy beyond the university setting and now defends First Amendment rights both on campus and in society at large. *See, e.g.*, Brief of FIRE as *Amicus Curiae* in Support of Petitioners in No. 22-555 and Respondents in No. 22-277, *NetChoice v. Paxton*, Nos. 22-555 & 22-277 (2023); Brief of FIRE as *Amicus Curiae* in Support of Petitioner and Reversal, *Counterman v. Colorado*, 600 U.S. 66 (2023).

In lawsuits across the United States, FIRE seeks to vindicate First Amendment rights without regard to the speakers' political views. These cases include matters involving state attempts to regulate the internet and social media platforms, both formally

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel contributed money intended to fund preparing or submitting this brief.

and informally. *See, e.g.*, *NetChoice, LLC v. Bonta*, No. 22-CV-08861-BLF, 2023 WL 6135551 (N.D. Cal. Sept. 18, 2023); *Volokh v. James*, 656 F. Supp. 3d 431 (S.D.N.Y. 2023)*; see also* Brief of FIRE in Support of Petitioner, *Nat'l Rifle Ass'n of Am. v. Vullo*, No. 22-842 (2024); Brief of FIRE as *Amicus Curiae* in Support of Petitioner, *Lindke v. Freed*, No. 22-611 (2023); Brief of FIRE as *Amicus Curiae* in Support of Respondent, *O'Connor-Ratcliffe v. Garnier*, No. 22-324 (2023).

The **National Coalition against Censorship (NCAC)**, founded in 1974, is an alliance of more than 50 national non-profit educational, professional, labor, artistic, religious, and civil liberties groups united in their commitment to freedom of expression. NCAC, through direct advocacy and education, has long opposed government attempts to censor or criminalize protected expression. The positions advocated in this brief do not necessarily reflect the views of NCAC's member organizations.

The **First Amendment Lawyers Association** is a bar association comprised of over 150 attorneys whose practices emphasize defense of Freedom of Speech and of the Press and advocate against all forms of government censorship. Since its founding, its members have been involved in many of the nation's landmark free expression cases and have frequently addressed First Amendment issues *amicus curiae*.

INTRODUCTION

It's not always easy being a First Amendment advocate. In this country, the guarantee of freedom of expression extends to all manner of speech and speakers, ranging from political extremists, *National Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 43–44 (1977), to religious fanatics, *Snyder v. Phelps*, 562 U.S. 443, 454 (2011), and to speech of no apparent "value," *United States v. Stevens*, 559 U.S. 460, 477–80 (2010). Defending them can be uncomfortable, but as Judge King wrote in upholding the First Amendment rights of the Westboro Baptist Church, "judges defending the Constitution 'must sometimes share [their] foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply. It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people.'" *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009) (citation omitted). The glory of the First Amendment, and the essential condition for it to endure, is its political and ideological neutrality.

Other times—as in this case—being a First Amendment advocate can be a source of consternation because it requires you to share your foxhole with political opportunists. They see free speech principles as nothing more than tools they can cynically exploit for temporary partisan advantage and their head-spinning inconsistencies mock notions of neutrality.

The Attorneys General (AGs) of Missouri and Louisiana claim to be "lead[ing] the way in the fight to defend our most fundamental freedoms"[2] yet they simultaneously engage in various kinds of censorial pressure tactics of their own that are not unlike the ones they disingenuously condemn here. And while the government plaintiffs in this case describe their political opposition's use of *informal* measures to steer the public debate as "arguably . . . the most massive attack against free speech in United States' history,"[3] they are at the same time asking this Court in the *NetChoice* cases to approve *formal* state control of online platforms' moderation decisions, saying it presents *no First Amendment question at all*.[4] Unbelievable.

But being a hypocrite doesn't necessarily make a person wrong. In this case, plaintiffs successfully

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[2] *See e.g.*, Press Release, Att'y Gen. Andrew Bailey Obtains Court Order Blocking the Biden Administration from Violating First Amendment, https://ago.mo.gov/missouri-attorney-general-andrew-bailey-obtains-court-order-blocking-the-biden-administration-from-violating-first-amendment/ (Bailey Press Release).

[3] Brief of Respondents, *Murthy v. Missouri*, No. 23-411, at 2 (Resp. Br.) (citation omitted).

[4] *See generally* Brief of Missouri, Ohio, 17 other States, and the Arizona Legislature in Support of Texas and Florida in *Moody v. NetChoice*, No. 22-277 and *NetChoice v. Paxton*, No. 22-555 at 3 (2024) ("freedom of speech is a freedom States were created to secure") (Missouri *NetChoice* Br.).

documented a coercive pattern of threats and excessive entanglements involving various executive branch officials and internet companies that coopted the latter's private editorial decisions in violation of the First Amendment. The Fifth Circuit correctly held that these informal actions directed toward suppressing speech were unconstitutional and it set forth a workable test for determining when pressure by government actors crosses the line. *Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023). It should be upheld.

Far from being a reason to question whether to support the Respondents in this case, their inconsistent behavior and situational approach to First Amendment interpretation stand as monuments for why this Court must use this case to reinforce principles that will bind *all* government actors, including the state AGs who brought this case.

Beyond that holding, the issues raised here, and the actions of the government plaintiffs, have significant implications for this Term's other important cases that present related or interconnected issues. The Court has agreed to address jawboning as an informal pressure tactic government actors use to evade constitutional scrutiny, *Nat'l Rifle Ass'n of Am. v. Vullo*, No. 22-842; the extent to which state governments may regulate social media platforms' private moderation decisions,

NetChoice v. Paxton, and *NetChoice v. Moody*, Nos. 22-555 & 22-277 (2023); and when public officials' use of personal social media accounts for government business becomes state action subject to constitutional rules, *Lindke v. Freed* and *O'Connor-Ratcliffe v. Garnier*, Nos. 22-611 and 22-324. The AGs' actions and their self-serving arguments reinforce why this Court should share the Framers' distrust of government when it addresses the constellation of issues teed up this Term.

SUMMARY OF ARGUMENT

This case arose from allegations that the Biden White House and various Executive Branch agencies had inserted themselves into the content moderation decisions of social media platforms and pressured them to censor speech and particular speakers they dislike. But it just as easily could have been brought against the Trump Administration, which was famous for bullying internet and media companies. [5] The Fifth Circuit acknowledged that many of the questionable pressure tactics had their origins in the previous

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[5] In 2020, for example, former President Trump—angered by Twitter's decision to append fact-checks to his posts—promised "big action" against the company and other social media platforms, threatening to "strongly regulate" or "close them down." Cristiano Lima and Meridith McGraw, *Trump to Sign Executive Order on Social Media amid Twitter Furor*, POLITICO (May 27, 2020), https://www.politico.com/news/2020/05/27/trump-executive-order-social-media-twitter-285891; *see also Pen Am. Ctr., Inc. v. Trump*, 448 F. Supp. 3d 309 (S.D.N.Y. 2020).

administration, *Biden*, 83 F.4th at 370, including threats to strip away internet platforms' immunity shield provided by Section 230 of the Communication Decency Act, 47 U.S.C. § 230.[6]

The point is, the First Amendment problems addressed in this case are significant regardless of who is attempting to pull the levers behind the scenes. Although much attention has focused on the power of "Big Tech," it is a bad idea for government officials to huddle in back rooms with corporate honchos to decide which social media posts are "truthful" or "good" while insisting, Wizard of Oz-style, "pay no attention to that man behind the curtain."[7] No matter how concerning it may be when private decisionmakers employ opaque or unwise moderation policies, allowing government actors to surreptitiously exercise control is far worse.

The state AGs who brought this case proclaim the "Government must keep its hands off the editorial decisions of Internet service providers" and "may not tell Internet service providers how to exercise their

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[6] After publicly advocating Section 230's repeal, former President Trump issued an executive order demanding the National Telecommunications and Information Administration file a petition with the Federal Communications Commission to "expeditiously propose regulations to clarify" the statute. Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020), *repealed by* Exec. Order No. 14,029, 86 Fed. Reg. 27,025 (May 14, 2021).

[7] The Wizard of Oz (Metro-Goldwyn-Mayer 1939).

editorial discretion about what content to carry or favor."[8] Their position is correct, even if they advocate *precisely the opposite* in this Term's *NetChoice* cases. And they oppose the Biden Administration's jawboning tactics at issue here while *simultaneously* making threats of their own to suppress the speech of advocacy groups and other businesses. *See infra* Section II (citing examples). In other words: *Jawboning for me but not for thee!*

Such hypocrisy does not detract from the AG's arguments in this case, but unwittingly supports them. The First Amendment must prohibit informal behind-the-scenes censorship schemes regardless of whether they are concocted by a Biden Administration, a Trump Administration, or by the AGs themselves.

The Fifth Circuit correctly recognized that informal censorship can operate either by coercion or "significant encouragement" when government gets entangled with private decisionmaking. *Biden*, 83 F.4th at 375. It adopted and refined a test articulated by the Second Circuit in *National Rifle Association of America v. Vullo* (also before the Court this Term) which considers the government speaker's word choice and tone, whether the speech was perceived as

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[8] Resp. Br. at 32 (quoting *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 435 (D.C. Cir. 2017) (Kavanaugh., J., dissenting from denial of rehearing *en banc*)).

a threat, the existence of regulatory authority, and whether the speech refers to adverse consequences. *Id.* at 378–81. For "significant encouragement," the Fifth Circuit applied this Court's reasoning from *Blum v. Yaretsky* to hold government actors may be held liable for censorship decisions of private parties where the officials' overt or covert actions intertwine with those decisions. *Id.* at 380. It then found that the record in this case satisfied both tests. *Id.* at 381–82.

The Fifth Circuit fashioned an appropriately tailored injunction as a remedy by significantly narrowing and clarifying the order that the district court had issued. *Id.* at 395–97. The court confined the injunction to government actors and limited its scope to the conduct that violates the First Amendment according to *Blum* and *Bantam Books v. Sullivan* (as refined by *Vullo* and other circuit court cases). *Id.* This Court should uphold the remedy as both proportionate and justified.

Getting the correct answer in this case is extraordinarily important given the interconnected mosaic of First Amendment issues the Court is considering this Term. A common thread running through these cases is whether the government actors may evade constitutional review by strategically claiming they are doing something other than speech regulation. The Court should not let them get away with it.

ARGUMENT

I. This Court Should Affirm the Fifth Circuit's Holding That Executive Branch Agencies Violated the First Amendment by Interfering With Private Moderation Decisions.

The Fifth Circuit held plaintiffs were likely to succeed on their claims that the White House and other federal offices violated the First Amendment by intruding into private platforms' moderation decisions. However, the government defendants (Petitioners here) reframed the issue presented as whether "the government's challenged conduct transformed private social-media companies' content-moderation decisions into state action and violated respondents' First Amendment rights." Pet'rs' Br. at I.

That misstates the issue. This is a case where federal officials used both carrot and stick tactics to achieve indirectly what the Constitution prohibits directly: governmental control over social media moderation decisions. The Petitioners—all governmental actors—were the defendants below, not the social media companies, and the Fifth Circuit had no occasion to address the question as the Petitioners have reimagined it. Based on the facts in the record and the decision below on review, the actual question for this Court is whether *government actors* violate the First Amendment when they engage in coercive

behavior or excessive cooperation to coopt private platforms' moderation decisions.[9] And on that issue the Fifth Circuit got it right.

A. The Fifth Circuit Correctly Defined Two Types of Unconstitutional Informal Censorship.

The court below identified two distinct forms of unconstitutional informal censorship: First, it applied the line of cases beginning with *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71 (1963), that prohibits intimidation tactics that create a "system of informal censorship." And second, it applied a line of cases beginning with *Blum v. Yaretsky*, 457 U.S. 991, 1003–04 (1982), that explains when government actors may be "liable for the actions of private parties" where there is a "close nexus" that provided "such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." The Fifth Circuit's analysis of both forms of informal censorship has much to commend it and this Court should adopt it.

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[9] Given that this question was the sole grounds for decision below, and thus the basis for the scope of the preliminary injunction Petitioners challenge, it is, at the very least, a "subsidiary question fairly included" in the second question presented. Sup. Ct. R. 14.1(a); *accord Yee v. Escondido*, 503 U.S. 519, 535 (1992). FIRE's *amicus* brief addresses questions two and three granted for review.

1. Bullying and Intimidation.

The government generally is "entitled to say what it wants to say—but only within limits." *Backpage.com, LLC v. Dart*, 807 F.3d 229, 235 (7th Cir. 2015). Like any exercise of official power, government speech can be curtailed when it intrudes on individual rights. The Fifth Circuit acknowledged it can be difficult to distinguish between persuasion (which is permissible) and coercion (which is not) but observed that coercion may take various forms and "may be more subtle." *Biden*, 83 F.4th at 377.

To help identify when government speech crosses the line into impermissible coercion, the Fifth Circuit adopted—with some refinements—a four-factor test articulated by the Second and Ninth Circuits in *National Rifle Association of America v. Vullo*, 49 F.4th 700 (2d Cir. 2022), and *Kennedy v. Warren*, 66 F.4th 1199 (9th Cir. 2023). It also drew heavily on the Seventh Circuit's decision in *Dart*, 807 F.3d 229. Biden, 83 F. 4th at 385–86, 397. The Second Circuit's articulation of this test considers "(1) the speaker's word choice and tone; (2) whether the speech was perceived as a threat; (3) the existence of regulatory authority; and . . . (4) whether the speech refers to adverse consequences." *Biden*, 83 F.4th at 378

(quoting *Vullo*, 49 F.4th at 715) (internal quotation marks omitted).[10]

The Fifth Circuit elaborated on the test by providing important guidance on the four factors, incorporating other circuits' approaches to applying *Bantam Books*. Drawing on the record in this case, the court observed that "'an interaction will tend to be more threatening if the official refuses to take 'no' for an answer and pesters the recipient until it succumbs,'" because the analysis considers "the overall 'tenor' of the parties' relationship." *Biden*, 83 F.4th at 381 (quoting *Warren*, 66 F.4th at 1209) (cleaned up). In determining whether a state actor's speech was perceived as a threat backed by regulatory authority, the court noted that "the sum" of it "is more than just power," *id.* at 379, because the "'lack of direct authority' is not entirely dispositive" in determining whether the speech was threatening, *id.* (quoting *Warren*, 66 F.4th at 1210).

While "a message is more likely to be coercive if there is *some* indication that the [private] party's

[10] *Amici* have endorsed the four-factor test originally set forth by the Second Circuit in *Vullo* as refined by the other circuit decisions as a way to reaffirm and make more precise the *Bantam Books* principles. *See* Brief of *Amici Curiae* Foundation for Individual Rights and Expression, National Coalition Against Censorship, The Rutherford Institute and First Amendment Lawyers Association in Support of Petitioners and Reversal at 28–34, *Nat'l Rifle Ass'n of Am. v. Vullo*, No. 22-842 (2024) (FIRE *Vullo* Br.).

decision resulted from the threat," *id.* at 381, it is not required in every case—a threat can be actionable "even if it turns out to be empty—the victim ignores it, and the threatener folds his tent." *Dart*, 807 F.3d at 231. Recognizing the subtlety of the interactions, the court reinforced that an "official does not need to say 'or else,'" but merely "some message—even if unspoken—that can be reasonably construed as intimating a threat." *Biden*, 83 F.4th at 379–80 (quoting, in part, *Warren*, 66 F.3d at 1211–12) (internal quotation marks omitted).[11]

2. "Significant Encouragement" of Censorship.

The Fifth Circuit found that "significant encouragement" requires "that the government must exercise some active, meaningful control over the private party's decision." *Biden*, 83 F.4th at 374. That requires "*some* exercise of *active* (not passive), *meaningful* (impactful enough to render them responsible) *control* on the part of the government over the private party's challenged decision." *Id.* at 375. In practice, this means significant encouragement—and thus, a close nexus—is demonstrated by "(1) entanglement in a [private]

[11] It is worth noting that none of these factors—and nothing in the *Bantam Books* line of cases—has anything to do with the question of when a private party "becomes" a state actor, as Petitioners' reframed question suggests. Rather, the four factors help separate attempts to convince from attempts to coerce.

party's independent decision-making or (2) direct involvement in carrying out the decision itself." *Id.*

This analysis reveals the essential flaw with Petitioners' formulation of the question presented. The question is not whether a private party effectively "becomes" a state actor when coopted by the State; it is whether the state actors have a sufficiently "close nexus" to private decisions so as to become "*responsible*" for them, contrary to the First Amendment. *Blum*, 457 U.S. at 1004. As this Court explained in *Blum*, "[t]his case is obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so as to make it 'state' action for purposes of the Fourteenth Amendment." *Id.* at 1003. Here, the defendants are government actors who inserted themselves into private editorial decisions.

B. The Fifth Circuit Properly Applied the Tests for Coercion and Encouragement to Enjoin Government Intrusions into Private Editorial Decisions.

On a voluminous record compiled at the district court, the Fifth Circuit found that various executive agencies had become so involved in day-to-day moderation decisions of social media companies that they provided "significant encouragement" to censorship. *See, e.g.*, *Biden*, 83 F.4th at 390. When

that didn't work, they got what they wanted through threats and intimidation. *See, e.g.*, *id.* at 381–82. The Fifth Circuit held that the levels of encouragement and coercion revealed in the record violate the First Amendment. *Id.* at 392. This Court should affirm on the same grounds.

Coercion. Various officials from the White House and the FBI took coercive actions that satisfy the four-factor test set forth by the Fifth Circuit. With respect to word choice and tone, White House officials issued "urgent, uncompromising demands to moderate content" and used "foreboding, inflammatory, and hyper-critical phraseology" when social media companies failed to moderate content in the way they requested or as quickly as officials desired. *Biden*, 83 F.4th at 382–83. Demands to remove specific posts "ASAP," the use of words and phrases like "you are hiding the ball," and officials warning they are "gravely concerned," *id.* at 383, made clear the threats to social media companies were "phrased virtually as orders." *Id.* (quoting *Bantam Books*, 372 U.S. at 68). And officials repeatedly "refuse[d] to take 'no' for an answer and pester[ed]" the social media companies until they "succumb[ed]." *Warren*, 66 F.4th at 1209. More ominously, they "threatened—both expressly and implicitly—to retaliate against inaction." *Biden*, 83 F.4th at 382.

The record contains copious evidence that the social media platforms understood communications from the White House and FBI agents to be threats and acted accordingly. For example, a social media platform expressly agreed to "adjust [its] policies" to reflect the changes sought by officials. *Id*. at 384. And several social media platforms "t[ook] down content, including posts and accounts that originated from the United States, in direct compliance with" a request from the FBI that they delete "misinformation" on the eve of the 2022 congressional election. *Id.* at 389. When the White House and FBI "requested" the platforms to jump, they ultimately, if reluctantly, asked how high.

As to whether the officials had authority over social media platforms, the Fifth Circuit found the enforcement authority is self-evident. The President of the United States, and by extension his officials in the White House, direct all federal enforcement nationwide, whether directly or indirectly via appointment of cabinet secretaries and other officials. They can, and often do, pick up the phone and contact the Department of Justice to recommend investigation and prosecution of particular individuals and companies.

As "executive official[s] with unilateral power," their threatening missives to platforms were "inherently coercive." *Warren*, 66 F.4th at 1210.

Likewise, FBI officials are often the first line of federal enforcement when it comes to criminal investigations, and the FBI has frequently investigated "disinformation regarding the results of . . . elections" in the years leading up to the 2022 midterm elections. *See, e.g.*, FBI & CISA, *Public Service Announcement: Foreign Actors and Cybercriminals Likely to Spread Disinformation Regarding 2020 Election Results* (Sept. 22, 2020), https://www.ic3.gov/Media/Y2020/PSA200922. As the "lead law enforcement, investigatory, and domestic security agency for the executive branch," the FBI clearly "wielded *some* authority over the platforms." *Biden*, 83 F.4th at 388. And "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." *Bantam Books*, 372 U.S. at 68.

Finally, both the White House and the FBI threatened "adverse consequences" to social media platforms if they failed to comply. *Warren*, 66 F.4th at 1211. When social media platforms' content moderation was too slow for the White House's liking, officials publicly accused them of "killing people," and privately threatened them with antitrust enforcement, repeal of Section 230 immunities, and other "fundamental reforms" to make sure the platforms were "held accountable." *Biden*, 83 F.4th at 382, 385, 364. Beyond these express threats, both White House and FBI officials' statements contained

implied threatened consequences because those officials are backed by the "awesome power" wielded by the federal executive branch. *Id.* at 385.

For example, White House officials frequently alluded to the President's potential involvement should social media platforms not moderate content to their satisfaction. *Id.* at 386 (*e.g.*, commenting their "concern[s] [were] shared at the highest (and I mean highest) levels of the [White House]"). And as a federal enforcement agency that conducts various internet investigations, the FBI "has tools at its disposal to force a platform to take down content." *Id.* at 388–89.

Viewing these facts in context, White House and FBI officials "deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in [their] aim." *Bantam Books*, 372 U.S. at 67. The Fifth Circuit was correct: Under the *Vullo* test and under *Bantam Books*, that is unlawful coercion.[12]

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[12] Information continues to emerge about how widespread these efforts were across a range of media. Documents released as part of a congressional investigation suggest the Administration also pressured online bookseller Amazon.com to suppress books skeptical of COVID-19 vaccines. *See* Jacob Sullum, *Was Amazon 'Free to Ignore' White House Demands that it Suppress Anti-Vaccine Books?*, REASON, Feb. 7, 2024, https://reason.com/2024/02/07/was-amazon-free-to-ignore-white-house-demands-that-it-suppress-anti-vaccine-books/.

Significant encouragement. The record also contained substantial evidence that officials from the White House, FBI, Centers for Disease Control (CDC), and Cybersecurity and Infrastructure Security Agency (CISA) all engaged in unlawful "significant encouragement" by placing persistent pressure on platforms to change their moderation policies. Various government officials became so entangled with social media platform moderation policies that they were able to effectively rewrite the platforms' policies from the inside.

One platform informed the Surgeon General it was "implementing a set of jointly proposed policy changes from the White House and the Surgeon General" after being "called on . . . to address" the issue several times. *Biden*, 83 F.4th at 387. Another platform informed the White House it was "making a number of changes" to its misinformation moderation policies specifically because those policies are "a particular concern" for the administration. *Id.*

The FBI successfully pressured several platforms to alter their moderation policies "to capture 'hack-and-leak' content after the FBI asked them to do so (and followed up on that request)." *Id.* at 389. The CDC embedded themselves so deeply within social media platforms' vaccine moderation teams that at one point, one platform even "asked the CDC to double check and proofread" its vaccine misinformation

labels. *Id.* at 390. And in addition to working closely with the FBI to "push the platforms to change their moderation policies to cover 'hack-and-leak' content," CISA also pushed platforms "to adopt more restrictive policies on censoring election-related speech." *Id.* at 391.

These examples go far beyond mere suggestion or detached advice, offered at arm's length. The degree of "entanglement" with platforms' "decision-making" resulted in various officials practically rewriting the platform's policies. *Id.* at 375, 387. In some cases, government officials had "direct involvement in carrying out" the policy changes they demanded. *Id.* at 375. The degree of coercion and entanglement was such that these officials became "responsible" for the social media platforms' private editorial decisions. *Blum*, 457 U.S. at 1004. That satisfies *Blum*'s "close nexus" test, and it fails the First Amendment.

C. The Fifth Circuit Properly Tailored Injunctive Relief.

The Fifth Circuit issued an appropriately tailored injunction to curb the government's unlawful coercion and deep entanglement in the platforms' operations. Citing *Dart*, 807 F.3d at 239, the court modified the district court's original injunction "to target the coercive government behavior with sufficient clarity to provide the officials notice of what activities are proscribed." *Biden*, 83 F.4th at 397. It modified the

scope of the injunction to remove non-governmental actors and some governmental actors, substantially narrowed its reach, and clarified vague provisions. *Id.* at 394–99.[13]

The new, more specific terms of that prohibition explain that those officials subject to it may not "coerce or significantly encourage social-media companies" to alter their content moderation policies and provides specific examples. *Id.* at 397.

The Fifth Circuit's injunction is thus expressly limited to the specific conduct this Court held violates the First Amendment in *Blum* and *Bantam Books*. It provides officials with notice of exactly what type of conduct they may not pursue, while allowing them to engage in all other lawful communications with social media platforms. And it excludes officials who were not proven to have violated the First Amendment. In light of the "broad pressure campaign" undertaken by

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[13] For example, the court vacated prohibitions on engaging in "any action 'for the purpose of urging, encouraging, pressuring, or inducing' content moderation," on "'following up with social-media companies' about content-moderation," on partnering with "private, third-party actors that are not parties" and "may be entitled to their own First Amendment protections," because those prohibitions were vague and captured significant legal speech that did not "cross[] the line into coercion or *significant* encouragement." *Biden*, 83 F.4th at 395–96. The court further tailored a prohibition on "threatening, pressuring, or coercing social-media companies in any manner to [moderate speech]." *Id.* at 396.

federal officials in this case to "suppress[] speakers, viewpoints, and content disfavored by the government," *Biden*, 83 F.4th at 398, this injunction is both proportionate and justified.

II. This Case is Interrelated With Other First Amendment Matters Before the Court This Term.

The major First Amendment cases before the Court this Term not only raise issues in common with this case, but the parties in this case, by their actions and arguments, underscore how this and the other cases should be decided.

A. Government Coercion in Violation of the First Amendment: *NRA v. Vullo.*

Vullo presents this Court with essentially the same question presented here: When does government speech violate the First Amendment because of threats to coerce private parties to limit their speech? This case adds the element of excessive cooperation that may have the same effect as bullying and provides a more specific application of the general principle in the context of social media platforms.

FIRE's *amicus* brief in *Vullo* urged the Court to reaffirm the principle established in *Bantam Books,* that the government generally is "entitled to say what it wants to say—but only within limits." *Dart*, 807

F.3d at 235. It explained that informal censorship actions are nothing more than tactics by which state actors seek to bypass First Amendment scrutiny and evade the rule of law. *See* FIRE *Vullo* Br. at 5–6, 24–28. Such unconstitutional schemes have been used at all levels of government by both political parties. *Id.* at 10–21 (citing examples).

Particularly relevant here are the actions of the government plaintiffs in this case—you know, the people who say the Biden Administration's informal pressure tactics are "arguably . . . the most massive attack against free speech in United States' history." Resp. Br. at 2. Ironically, these same officials actively and repeatedly issue threats and use their official authority to suppress speech they oppose.

And they are oblivious to the irony. *The day after* declaring victory against bully-pulpit censorship in the district court below, Attorney General Bailey signed a letter along with six other state AGs threatening Target Corporation for the sale of LBGTQ-themed merchandise as part of a "Pride" campaign, warning ominously that doing so might violate state obscenity laws.[14] The merchandise that

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[14] Letter from Atty's Gen. to Brian C. Cornell, Chairman and CEO, Target Corp. (July 5, 2023), https://content.govdelivery.com/attachments/INAG/2023/07/06/file_attachments/2546257/Target%20Letter%20Final.pdf (Letter from Atty's Gen.); *see* Lucy Kafanov, *7 Republican AGs Write to Target, Say Pride Month Campaigns Could Violate Their State's Child*

raised their ire included such things as t-shirts labeled "Girls Gays Theys" and what the letter described as "anti-Christian designs," such as one with the phrase "Satan Respects Pronouns." The group further suggested the retail chain's "directors and officers may be negligent in undertaking the 'Pride' campaign, which negatively affected Target's stock price."

Say what you will about Target's merchandising decisions, the claim that gay or gender-themed apparel could violate any state's obscenity law would embarrass a first-year law student. The chief law enforcement officers of the seven states at least acknowledged deep in a footnote that the obscenity laws they cited "may not," in fact, "be implicated by Target's recent campaign." Letter from Atty's Gen., *supra*, n.14, at 3 n.3. But the point was not to make a coherent legal argument—it was to get Target's leadership to think long and hard about the risks the company might run by expressing messages powerful government officials didn't like.

Does any of this sound familiar? It should.

Protection Laws, CNN (July 8, 2023), https://www.cnn.com/2023/07/08/business/target-attorneys-general-pride-month/index.html.

This past December, Attorney General Bailey announced a fraud investigation into the advocacy group Media Matters because it had criticized the social media company X for allegedly placing advertisements adjacent to extremist or neo-Nazi content, thus causing a number of advertisers to withdraw from the platform.[15] Bailey was joined by Louisiana's Attorney General (the other state plaintiff in this case) in sending follow-up letters to the advertisers to alert them to Missouri's investigation and urging them to ignore the claims made by Media Matters.[16]

Although the attorneys general tried to frame their actions as a *defense* of free speech, their explanations rang hollow given their nakedly partisan objectives and coercive tactics. They described Media Matters as an organization dedicated to "correcting conservative misinformation in the U.S. Media," but with a "true purpose" of "suppressing speech with which it

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[15] Letter from Att'y Gen. Andrew Bailey to Angelo Carusone, President and CEO, Media Matters for America (Dec. 11, 2023), https://ago.mo.gov/wp-content/uploads/2023.12.11-Notice-of-Investigation-MMFA-Final.pdf.

[16] Press Release, Att'y Gen. Andrew Bailey, Att'y Gen. Bailey Directs Letter to Advertisers Amidst Media Matters Investigation, https://ago.mo.gov/attorney-general-bailey-directs-letter-to-advertisers-amidst-media-matters-investigation/. (Bailey/Landry Press Release). *See*, *e.g.*, Letter from Att'y Gen. Andrew Bailey and Louisiana Att'y Gen. Jeffrey Landry to Robert Iger, CEO, Disney (Dec. 14, 2023).

disagrees." Bailey/Landry Press Release. Bailey wrote that "the progressive mob demands immediate action" based on the Media Matters critique of X, and the resulting advertising boycotts hurt what he called "the last platform dedicated to free speech in America."[17] In short, they were simply flexing state muscle to take sides in a culture war dispute.

Whether or not Media Matters' claims about X have merit, it was only the state officials who were using government authority to suppress speech with which they disagreed. And, unfortunately, it is far from the first time state attorneys' general have employed threats and investigatory demands to suppress online speech. *E.g.*, *Google, Inc. v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016) ("This lawsuit, like others of late, reminds us of the importance of preserving free speech on the internet . . . .") (citing *Dart*, 807 F.3d 229).

Accordingly, the AGs' claim that threatening private speakers was in the service of "free speech" fooled no one. Walter Olson, writing for the Cato Institute, observed that "the most risible bit of the

[17] Bailey/Landry Press Release*; see also* Mike Masnick, *Missouri AG Announces Bullshit Censorial Investigation Into Media Matters Over Its Speech*, TECHDIRT (Dec. 13, 2023), https://www.techdirt.com/2023/12/13/missouri-ag-announces-bullshit-censorial-investigation-into-media-matters-over-its-speech/.

letter—better than satire, really—[was] Bailey['s] claims to be standing up for free speech by menacing his private target with legal punishment for *its* speech."[18] And tech writer Mike Masnick was even more blunt, calling Bailey a "hypocrite," who is "literally admitting that he's doing this investigation to protect ExTwitter." Masnick, *supra* note 17.

Comparing the Media Matters letter to the arguments the AGs are advancing in this case, he noted "it's quite incredible how Bailey's views are so different depending on the type of speech." *Id.* When a government official criticizes speech he likes, it is censorship, but "[w]hen a private entity says stuff he dislikes, he'll mobilize the vast investigatory powers of his state to intimidate and threaten them into silence." *Id.*

Advocates frequently are told they should "show not tell" the reasons a court should buy their arguments, and here the government plaintiffs have effectively done so, if perhaps inadvertently. Their actions underscore not only why this Court must limit informal censorship in *Vullo*, but also why it is imperative that the AGs prevail in this case—to

[18] Walter Olson, *Missouri AG Investigates Private Group's Advocacy*, CATO INSTITUTE BLOG (Dec. 15, 2023), https://www.cato.org/blog/missouri-ag-investigates-private-groups-advocacy.

secure rulings that will limit government pressure tactics of all kinds—including their own.

B. State Control of Social Media Moderation Decisions: *NetChoice v. Paxton* and *NetChoice v. Moody*.

The *NetChoice* cases present the question of whether states may impose direct control over social media platforms' private moderations decisions, while this case asks whether government actors may constitutionally achieve the same ends through use of informal pressure. FIRE's *amicus* brief in these cases identified the "overriding issue" as "whether the government or private actors shall have the predominant role" in oversight of social media platforms' moderation decisions, and it urged the Court to strike down state regulation as a violation of the First Amendment. Brief of *Amicus Curiae* Foundation for Individual Rights and Expression in Support of Petitioners in No. 22-555 and Respondents in No. 22-277, *NetChoice, LLC v. Paxton*, No. 22-555, at 3, 6–9 (2023).

The same principles dictate restricting the use of informal governmental pressure in this case. The government cannot do indirectly what the Constitution prohibits directly. *Bantam Books*, 372 U.S. at 67. *See generally* FIRE *Vullo* Br. 5–6, 24–28. In this regard, Missouri's Attorney General has described the federal government's cajoling and

pressure tactics as "the biggest violation of the First Amendment in our nation's history" and called for "a wall of separation between tech and state to preserve our First Amendment right to free, fair, and open debate," *see* Bailey Press Release, while simultaneously urging this Court to approve formal state control over social media moderation decisions. *See generally* Missouri *NetChoice* Br. at 11–23.

This suggests the state AGs driving this case believe the First Amendment permits them to do *directly* what it prohibits other government actors from doing *indirectly*. In fact, they argue not just that the First Amendment *permits* state regulation of private speakers, but that state regulation is *necessary* for free speech to exist. *Id.* at 3 ("freedom of speech is a freedom States were created to secure [and] it is the duty of States to secure that freedom from private abridgment"). This argument—that regulation *is* free speech—is distinctly Orwellian. *See* George Orwell, 1984, at 7 (New York: Harcourt, Brace & Company 1949) ("War is Peace, Freedom is Slavery, Ignorance is Strength").

Missouri's view of the First Amendment echoes claims of various would-be censors from across the political spectrum through time. President Kennedy's FCC Chairman Newton Minow called network executives the real censors and described government content regulation as "the very reverse of censorship."

See Robert Corn-Revere, THE MIND OF THE CENSOR AND THE EYE OF THE BEHOLDER: THE FIRST AMENDMENT AND THE CENSOR'S DILEMMA 161–62 (Cambridge Univ. Press 2021). Dr. Frederic Wertham, the liberal anti-comic book crusader of the 1950s, angrily denied that his calls to ban comics violated the First Amendment, saying, among other things, that "true freedom is regulation." *Id.* at 121, 246. And former New York Mayor Rudy Giuliani, who unsuccessfully tried to shut down museum exhibits that offended him, proclaimed in a 1994 speech: "Freedom is about authority. Freedom is about the willingness of every single human being to cede to lawful authority a great deal of discretion about what you do." *Id.* at 9; *see also Brooklyn Inst. of Arts & Sci. v. City of New York*, 64 F. Supp. 2d 184 (E.D.N.Y 1999).

James Madison would disagree. When he introduced the resolution to adopt a bill of rights on June 8, 1789, Madison explained that for both the federal constitution and those of the states, "the great object" of a bill of rights was "to limit and qualify *the powers of government*." PENNSYLVANIA PACKET, June 16, 1789 (reporting on congressional session) (emphasis added); *see also* CONG. REGISTER, June 8, 1789, vol. 1 at 429–36 (reprinted in Neil H. Cogan, THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 53–57 (Oxford Univ. Press 1997)). Far from seeing state governments as

the guardians of individual rights, Madison said "I think there is more danger of those powers being abused by the state governments than by the government of the United States," and they should be constrained by the "general principle[] that laws are unconstitutional which infringe the rights of the community." Accordingly, he said "it is proper that every government should be disarmed of powers which trench upon . . . the equal right of conscience, freedom of the press, or trial by jury." *Id.* at 56 (reprinting account from CONG. REGISTER, June 8, 1789) ("[T]he state governments are as liable to attack those invaluable privileges as the general government is, and therefore ought to be cautiously guarded against.").[19]

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[19] Missouri asserts state legislative authority is necessary to secure rights against "private abridgment" based on a natural rights theory that the right to free speech "predate[ed] government itself" and that the states were instituted to protect speech from encroachment by private parties. Missouri *NetChoice* Br. at 2. The argument stitches together cherry-picked references from a law review article that refers to James Madison's remarks introducing the Bill of Rights. *See id.* (citing Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 264 (2017) (citing Madison's notes reflecting his speech in Congress)). Not only is this revisionist theory debunked by Madison's actual words (as reported in contemporary accounts), the article on which Missouri relies noted Madison's skepticism toward relying on the states to protect free speech. *See* 127 YALE L.J. at 303 n.255 ("Madison also singled out the freedom of the press in a set of three rights that would apply against state governments, again suggesting an intent to treat speech and press freedoms differently.").

In short, the AGs' effort to reconcile their contradictory positions in this and the *NetChoice* cases is unsupportable. But it is not unprecedented. From time to time, others have attempted to justify speech regulations by advancing various destroy-the-village-in-order-to-save-it First Amendment theories that posit government regulation as the answer to keeping speech free. When that happens this Court's answer has been to brusquely shrug them off.

In *Reno v. ACLU*, 521 U.S. 844 (1997), for example, the government had defended the Communications Decency Act by arguing "the unregulated availability of 'indecent' and 'patently offensive' material" was "driving countless citizens away from the medium" and thus stifling their speech. *Id.* at 885. The Court unanimously rejected the argument as "singularly unpersuasive" because "governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it." *Id.* It concluded "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." *Id.*

The same conclusion applies in the *NetChoice* cases, just as it does here. The First Amendment was the product of the Framers' deep distrust in government even when its powers were "defined and limited." As Madison explained, a Bill of Rights was needed because "instances may occur[] in which those

limits may be exceeded." PENNSYLVANIA PACKET, June 16, 1789 (remarks of Mr. Madison). The Constitution's Framers were right to be distrustful, as Missouri and Louisiana's wildly inconsistent positions vividly illustrate. Such political opportunism trashes the First Amendment's promise of neutrality, and it underscores why the Court must limit state power.

C. Public Officials' Use of Personal Social Media Accounts to Conduct Government Affairs: *Lindke v. Freed* and *O'Connor-Ratcliffe v. Garnier.*

Two of the cases on this Term's docket raise the question of when social media platform use becomes state action. Importantly, they do not ask whether the *platforms* become state actors; they ask when *government officials* are acting under color of state law. *Lindke v. Freed*, No. 22-611 (2023); *O'Connor-Ratcliffe v. Garnier*, No. 22-324 (2023). The same is true here: The proper question focuses on constitutional limits imposed on *government actors* in their interactions with private platforms.

FIRE's *amicus* briefs in *Lindke* and *O'Connor-Ratcliffe* explained the reasons why public officials' actions should be subject to First Amendment rules when they use their social media accounts to conduct public affairs, and proposed a test to apply in such cases. Brief of FIRE as *Amicus Curiae* in Support of Petitioner at 23–26, *Lindke v. Freed*, No. 22-611

(2023) (FIRE *Lindke* Br.); Brief of FIRE as *Amicus Curiae* in Support of Respondent, *O'Connor-Ratcliffe v. Garnier* at 17–19, No. 22-234 (2023) (FIRE *Garnier* Br.). The purpose of the proposed tests in both cases was to prevent public officials using personal social media accounts to evade constitutional requirements when they conduct government business. The ultimate point is that "[p]oliticians cannot have it both ways—they cannot use private social media accounts to conduct public business and then claim their decision to cut off discussion is a matter of private choice." FIRE *Lindke* Br. at 4.

Likewise here, the government cannot claim its "unofficial" efforts to induce or coerce social media platforms lack the force of state action. While government speakers may claim to be acting only informally or without the authority of the state, it is necessary "to look through forms to the substance" to keep the government within constitutional bounds. *Bantam Books*, 372 U.S. at 67. In that regard, the Fifth Circuit's multi-part test in this case sets clear boundaries to limit unconstitutional jawboning efforts, much like the Ninth Circuit's "purposes and appearances" test in *Garnier* helps identify when public officials' use of social media is subject to constitutional rules. FIRE *Garnier* Br. at 17–19.

CONCLUSION

The through-line of all these cases before the Court this Term is the abuse of governmental power. Political actors use the First Amendment as a club when convenient, then ignore it when it gets in the way of their own ambitions. But the great virtue of the First Amendment is its neutrality. This Court should send the same clear message in this case as in the others on the docket this Term: The First Amendment is not a weapon for government actors to wield in the culture wars.

February 9, 2024

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