No. 23A243

In the Supreme Court of the United States

VIVEK H. MURTHY, U.S. SURGEON GENERAL, ET AL.,
Applicants,

v.

MISSOURI, ET AL.,
Respondent.

TO THE HONORABLE SAMUEL ALITO, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT

Opposing Application for a Stay of the Injunction Issued by the United States District Court for the Western District of Louisiana

BRIEF OF *AMICUS CURIAE* MICHAEL BENZ, EXECUTIVE DIRECTOR, FOUNDATION FOR FREEDOM ONLINE, IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO STAY APPLICATION

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INTERESTS OF AMICUS AND RULE 37.6 DISCLOSURE

Amicus curiae Michael Benz is the Executive Director of Foundation for Freedom Online (FFO), a non-profit watchdog dedicated to protecting digital liberties and restoring the free and open Internet.[1]

Previously, Mr. Benz served as Deputy Assistant Secretary for International Communications and Information Technology in the Bureau of Economic and Business Affairs for the U.S. Department of State. That role included formulating and negotiating U.S. policy on cyber issues and interfacing with private industry and civil society institutions in the technology space.

Mr. Benz, through his journalism, policy analyses, research, and other activities with the FFO, as well as his experience in government, is a national expert on how the government, agencies, non-profits, and large internet platforms work together to censor the speech of Americans. He has an interest in ensuring Americans are free to speak without the government working with the private sector to silence them.

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[1] No proposed *amicus* is a publicly held corporation, and no amicus has any publicly held parent corporations. No counsel for any party authored any part of this brief, and no person other than *amici*, their members, or their counsel made any monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Under this Court's nexus test for state action, if the government coerces or significantly encourages "a private party to censor speech or take other action," *Norwood v. Harrison*, 413 U.S. 455, 465 (1973), then the private party's action "must in law be deemed to be that of the State," *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

When determining whether private conduct constitutes state action, "the factual setting of each case will be significant." *Blum*, 457 U.S. at 1004; *Crissman v. Dover Downs Ent., Inc.*, 289 F.3d 231, 233–34 (3d Cir. 2002). The Department of Justice, however, makes a novel legal argument seeking unprecedented, blanket protection from liability. It argues because "[a] central dimension of presidential power is the use of the Office's bully pulpit to seek to persuade Americans -- and American companies -- to act in ways that the President believes would advance the public interest," the government's threats towards and collusion with social media firms do not render their censorship state action. Stay Appl. at 3.

While the Department of Justice may be right that presidents use the "bully pulpit" to "engag[e] with the press to promote [their] policies and shape coverage of [their] Administration," *id.*, no president or government official has claimed the power to pressure telegraph companies to refuse to deliver lawful telegraph messages or telephone companies to disconnect individuals conducting lawful conversations.

Yet that is precisely what the lower courts found the Defendants did here: federal government agencies pressured private firms not to "promote" ideas or "persuade the American public" but to take away Americans' right to talk to one

another on the internet. Stay Appl. at 12 (internal quotations omitted). The government's "unrelenting pressure" forced the platforms "to act and take down users' content." *Missouri v. Biden,* No. 23-30445, 2023 WL 5821788, at *6 (5th Cir. Sept. 8, 2023) ("*Fifth Cir.*"). Colluding with private entities to deprive Americans of their right to use social media—which this Court has described as "the modern public square," *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017)—is hardly, as the United States claims, "seek[ing] to persuade." Stay Appl. at 3. Silencing is not persuading.

To target American citizens, the government has engaged in a complex online censorship regime coordinated by and with myriad administrative agencies and nominally third-party non-profit and academic groups. Government agencies funded these groups, outsourced data collection and analysis tasks necessary to censor individuals to them, coordinated censorship with the platforms, and pressured and coerced the platforms into compliance. The House of Representatives Committee on Homeland Security describes this process as "censorship laundering." *Censorship Laundering: How the U.S. Department of Homeland Security Enables the Silencing of Dissent* YOUTUBE (May 11, 2023), https://tinyurl.com/4brda4az.

This process has its origins in 2017 to counter alleged foreign-based bot or troll farm posts on social media said to originate from hostile national state intelligence services, but from fall 2019 onward, the government agencies re-directed this entire infrastructure from censoring "foreign, inauthentic" online speech to censoring "domestic, authentic" online speech. *The Censorship Industrial Complex U.S. Government Support For Domestic Censorship And*

Disinformation Campaigns, 2016 - 2022, Testimony Before the H. Comm. on the Weaponization of the Fed. Gov't, 118th Cong. 21 (testimony of Michael Shellenberger (quoting Kate Starbird, *Censor Targeted "Everyday People" Discussion Election, Radical Bias*, Rumble (September 19, 2023)), https://tinyurl.com/mpd65csb. Government fostered a nexus between agencies and private third parties to avoid First Amendment constraints. This brief outlines how this nexus and censorship apparatus developed and continues to function.

The bureaucratic structures that support and enable state censorship are legally significant for two reasons. First, the case requires the Court to determine the line between government coercion/ unlawful encouragement and acceptable government speech. The many tests that the circuit courts have adopted in drawing this line demonstrate the difficulty of the determination. But, all the tests courts use look, in some way, to the scale and intensity of government censorship efforts. Here, the vast network of focused bureaucratic power aimed at American citizens' ability to talk to each other demonstrates that this case falls on the side of unlawfulness.

Second, the government claims that "a continued stay pending further proceedings in this Court would impose no cognizable harm on respondents." Stay Appl. at 6. This claim assumes that the harm from this case only affects respondents. It does not; this case affects our nation's ability to self-govern and implicates the constitutional rights of the individual plaintiffs as well as all Americans. Continued government censorship will affect millions of Americans and, above all, squash the free speech necessary to preserve democracy.

The Department of Justice's application omits mention of the government's silencing of respondents, such as the leading epidemiologists Jayanta Bhattacharya of Stanford University and Martin Kulldorff, formally of Harvard University. As authors of the Great Barrington Declaration, they advocated for COVID-19 public health responses that proved correct—and if they had been adopted, would have saved American lives over both and long and short term and avoided wasteful, injurious shutdowns. But government censorship ensured that they were not heard, skewing the policy debate.

The young Americans who suffered adverse reactions to vaccines they were forced to take or those who now face incurable cancers due to delayed screenings, the children whose education has been irreparably marred due to scientifically unsupportable school shutdowns, and the millions of Americans whose businesses and livelihoods were destroyed through draconian closings that no reasonable epidemiological evidence could justify—or even voters who might have switched their 2020 presidential vote if they knew something about Hunter Biden's laptop—might differ with the Department of Justice's assessment that there is no "cognizable harm" resulting from government's continued suppression of speech.

ARGUMENT

I. Both the encouragement and coercion tests look to the strength and urgency of government involvement

The lower courts found that the Applicants/Defendants were state actors under the nexus test. Under this test, the Court requires that if the government coerces or encourages, with sufficient urgency, a private party to censor speech or take other action, *Norwood*, 413 U.S. at 465, then the private party's action "must in law be deemed to be that of the State." *Blum,* 457 U.S. at 1004.

The test for determining when government coerces or unduly encourages varies among the circuits. This Court's precedent, however, has set forth certain guidelines. Fundamentally, there must be such a "close nexus" between the parties that the government is practically "responsible" for the challenged decision. *Id.* In addition, the Court has set forth numerous types of encouragement that do *not* qualify as state action. For instance, the State of New York's Department of Social Service, by setting the "adjustment of benefits" but not the medical decision to "discharge or transfer of patients to lower levels of care," did not become a state actor in hospital discharge decisions. *Id.* at 1005. Similarly, in *Rendell-Baker v. Kohn,* 457 U.S. 830, 839-43 (1982), the Court found that a private school—which the government funded and at which it placed students—had not engaged in state action when it dismissed an employee, allegedly without due process. This result occurred because "in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters." *Id.* at 841 (1982). The Court found there was not "significant encouragement" by the Government in *American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999). This case involved a Pennsylvania workers'

compensation statute that authorized but did not require insurers to withhold payments for the treatment of work-related injuries pending a "utilization" review of whether the treatment was reasonable and necessary. *Id.* The Supreme Court found the requirement did not constitute the type of encouragement sufficient for state action. *Id.*

Working with this precedent, the courts of appeals have forwarded numerous tests for the "close nexus" required for undue encouragement. *Blum*, 457 U.S. at 1004. They differ, but all require some evaluation of the extent and nature of the government's efforts. For instance, the Fifth Circuit understands the test as meaning that "there must be 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." *Fifth Cir.*, 2023 WL 5821788 at *31. The Ninth Circuit asks "whether the government's encouragement is so significant that we should attribute the private party's choice to the State, out of recognition that there are instances in which the State's use of positive incentives can overwhelm the private party and essentially compel the party to act in a certain way." *O'Handley v. Weber*, 62 F.4th 1145, 1158 (9th Cir. 2023). Interestingly, the Second Circuit and Tenth Circuit state that the nexus is not demonstrated if "the officials do not threaten adverse consequences if the intermediary refuses to comply." *O'Handley,* 62 F.4th at 1158; *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003). The First Circuit states the test as whether the state uses "coercive power or has provided such a substantial degree of encouragement that the private party's decision to engage in the challenged

conduct should fairly be attributed to the state." *Jarvis v. Vill. Gun Shop, Inc.*, 805 F.3d 1, 12 (1st Cir. 2015).

Similarly, the coercion nexus test looks to whether there was a clear threat of government enforcement against an individual for exercising First Amendment rights. In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), the Court ruled unconstitutional the actions of the Rhode Island Commission to Encourage Morality. This state-created entity sought to stop the distribution of books, which it deemed obscene, to children. *Id.* at 59. It sent the defendant, a book distributor, a list of undesirable books and demanded him to stop selling them to "eliminate the necessity of our recommending prosecution to the Attorney General's department." *Id.* at 62 n.5. At the Commission's instigation, police officers ascertained the books were removed. *Id.* at 68. The Court concluded that Sullivan and the other booksellers were enmeshed in a "system of informal censorship," which was "clearly [aimed] to intimidate" the recipients through "threat of [] legal sanctions and other means of coercion." *Id.* at 67. The distributors were deemed state actors. *Id.* at 64, 67, 71–72.

But both the encouragement and coercion tests require some judicial attempt to evaluate— in a rough sense, measure—the government's involvement with private effort. The encouragement must be of "substantial degree," *Jarvis*, 805 F.3d at 12, to make private action public or "deliberately set about to achieve the suppression of publications" through threat, *Bantam Books*, 372 U.S. at 67.

Ultimately, the nexus test, either encouragement or coercion versions, turns on the true nature of government requests. Are they requests, or are they more like the proverbial mafia henchman who, seeking protection money from a small

local merchant, exclaims, "You've got nice business here. Wouldn't it be a shame if something happened to it?" This difficult distinction requires careful attention to specific facts and contexts. The district court, the tribunal closest to the facts and most sensitive to context, having decided various motions and held hearings for well over a year in this case, found unlawful encouragement and persuasion.

II. How government launders censorship through its web of private sector and civil society partners in the internet censorship "industry"

The Department of Justice offers a novel legal argument for determining whether government speech constitutes unlawful encouragement or coercion under the nexus test. The Department argues that there was no nexus because one cannot claim "officials from the White House, the Surgeon General's office, and the FBI coerced social-media platforms to remove content despite the absence of even a single instance in which an official paired a request to remove content with a threat of adverse action." Stay Appl. at 4. In short, to satisfy the nexus test, there must be a clear and specific threat for each act of censorship.

To support this interpretation, the Department of Justice argues that under *Blum,* plaintiffs must show government has "compelled that 'specific conduct.'" *Id.* at 24 (quoting *Blum*, 457 U.S. at 1004). Actually, *Blum* does *not* say that. Fully quoted, it states the following:

> The complaining party must also show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.

Blum, 457 U.S. at 1004 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)) (emphasis in original).

Under *Blum,* there must be a "close nexus" between the government and private actor that allows the private actor to be "'fairly treated as that of the State itself.'" 457 U.S. at 1004 (quoting *Jackson*, 419 U.S. at 351). After all, the mafia henchman doesn't waive a gun and "compel specific conduct," i.e., a precisely quoted monthly protection fee. Rather, his threat is more subtle and contextual. Government also censors in a subtle way—through a nexus of government, internet platforms, and non-profit organizations that emerged around 2017. That is why *Blum* warns: "the factual setting of each case [involving determinations of state action] will be significant." 457 U.S. at 1004. Only through examining this factual setting can the Court decide whether the platform's actions can be "fairly treated as that of the State itself." *Id*.

III. The factual setting of platforms' state action: the internet censorship nexus

For most of the internet's history, online content moderation – the process by which moderators on a website or forum stepped in to manually remove or reduce certain kinds of speech on that site – was largely known as a periodic, part-time hobbyist task. Much content moderation was done on a volunteer basis for the first 25 years of the internet, often without pay. Sarah T. Roberts, *Content Moderation* 2-6 (Yale Univ. Press 2017). Other than for certain compensated services for removing inauthentic spam content or unlawful or pornographic posts, there was no "career path" for individuals desiring to take down lawful internet comments. *Id.* There was no need. The internet worked fine without it.

This changed with the response by U.S. national security and intelligence agencies, such as the FBI, the DHS, and the CIA, to events of the 2016 U.S. Presidential election cycle. Since the 2016 election's aftermath, content moderation has evolved into a booming, lucrative, professional, 200,000-strong, $13 billion growth industry. The Brainy Insights, *Content Moderation Solutions Market Size by Component (Solutions and Services), Deployment Type (On-Cloud and Premises), Organization Type, Application, Global Industry Analysis, Share, Growth, Trends, and Forecast 2023 to 2032* (2023). Under the rubric of fighting "disinformation" and "misinformation," a sprawling network of administrative agencies, private for-profit and non-profit groups, and government-funded academic centers has sprung up, like a cottage industry, to work with the platforms to silence speech the government doesn't like. As the district court found, there is "evidence of a massive effort by Defendants, from the White House to federal agencies, to suppress speech based on its content. Defendants' alleged suppression has potentially resulted in millions of free speech violations." *Missouri v. Biden*, No. 3:22-CV-01213, 2023 WL 4335270, at *68 (W.D. La. July 4, 2023) ("*Dist. Ct.*"), *aff'd in part*, *rev'd in part*, No. 23-30445, 2023 WL 5821788 (5th Cir. Sept. 8, 2023).

Journalist Michael Shellenberger names this nexus of government and private groups and organizations the "censorship industrial complex." *The Censorship Industrial Complex U.S. Government Support For Domestic Censorship And Disinformation Campaigns, 2016 - 2022 Before the H. Comm. on the Weaponization of the Fed. Gov't*, 118th Cong. 21 (testimony of Michael Shellenberger) (March 9, 2023). Many censorship jobs would not exist without

government money; many censorship organizations would not exist without government outsourcing; many censorship policies would not be put in place without government coordination; and many censorship policy implementation decisions without government coercion.

The "censorship industrial complex" is just another name for the government's internal framework: the "Whole-of-Society" response to countering misinformation. It is described in the DHS Public-Private Analytic Exchange Program Report: Combatting Targeted Disinformation Campaigns A Whole-of-Society Issue (October 2019). As described there, the "Whole-of-Society" framework involves not just government but a multitude of private actors through formal and informal partnerships of all the major social media platforms, plus a vast web of private sector firms such as technology developers focused on online monitoring and automated content moderation, university centers working to combat misinformation, and speech-flagging fact-checker organizations (to help platforms downrank disfavored speech and news sources). *Id.*

At the same time, government agencies fund research to make online monitoring and censorship more effective through artificial intelligence and other technologies. For instance, the National Science Foundation made numerous grants to universities totaling around $40 million to research the science of stopping viral ideas and "misinformation." Mike Benz, *Biden's National Science Foundation Has Pumped Nearly $40 Million Into Social Media Censorship Grants and Contracts* (Nov. 22, 2022), https://tinyurl.com/yc8zmxdh.

Rather than constitute an outlandish conspiracy theory, as petitioners posit, these features of government censorship are all facts in this case. First,

efforts to monitor the influence of foreign powers on the flow of information on the internet before 2016 led to the current censorship mechanisms. Mike Benz, Foundation for Freedom Online Report, *DHS Censorship Agency Had Strange First Mission: Banning Speech That Casts Doubt On 'Red Mirage, Blue Shift' Election Events* (Nov. 9, 2022), https://tinyurl.com/2k4cfbdz. Reflecting that understanding, the district court states that:

> Defendants assert that the FBI Defendants' specific job duties relate to foreign influence operations, including attempts by foreign governments to influence U.S. elections. Based on the alleged foreign interference in the 2016 U.S. Presidential election, the FBI . . . through their meetings and emails with social-media companies . . . w[as] attempting to prevent foreign influence in the 2020 Presidential election. . . . [T]he FBI had a 50% success rate regarding social media's suppression of alleged misinformation.

Dist. Ct., 2023 WL 4335270 at *50.

This view that government interest in censoring internet speech started with concern about foreign "misinformation" or "disinformation" is common among all Defendants, not just the FBI. The district court observes that many of the "[d]efendants argue the Russian social-media postings prior to the 2016 Presidential election caused social-media companies to change their rules with regard to alleged misinformation." *Id.* at *55. This historical claim reasonably explains from where the demand for the content-moderation industry originated.

Second, the facts of this case demonstrate how, after 2016, the effort to prevent foreign influence turned to domestic speakers under the guise of "misinformation" or "disinformation." During COVID and the 2020 election, there was remarkable coordination between government, platforms, and academic and non-profit groups to censor speech labeled as misinformation or disinformation.

For example, the District Court found consistent and complex coordination between the White House, the Surgeon General, and the CDC. "From May 28, 2021, to July 10, 2021, a senior Meta executive reportedly copied [senior White House officials and] Surgeon General Murthy ("Murthy"), alerting them that Meta was engaging in censorship of COVID-19 misinformation according to the White House's 'requests' and indicating 'expanded penalties' for individual Facebook accounts that share misinformation." *Id.* at *6. Murthy worked closely with the platforms to censor individuals he deemed disseminating "misinformation" as well as "collaborat[ing] and partner[ing] with the Stanford University Internet Observatory and the Virality Project." *Id.* at *16. CDC Chief of the Digital Branch Carol Y. Crawford also worked closely with the platforms to censor Americans, reviewing data analyses from the platforms and engaging in weekly coordination efforts to direct platforms' censorship activities. *Id.* at *18-20.

And the government did not simply use the bully pulpit to attempt to "persuade" social media firms to adopt certain policy views—as the Department of Justice claims. It conspired to deprive individuals of their rights to talk to their fellow citizens. Twitter's discovery responses indicated that White House officials wanted to know why the well-known health journalist Alex Berenson had not been "kicked off" Twitter. *Id.* at *9. White House Senior COVID-19 Advisor Andrew Slavitt suggested Berenson was "the epicenter of disinfo that radiated outwards to the persuadable public." *Id.* After that, Berenson was suspended on July 16, 2021, and was permanently de-platformed on August 28, 2021. *Id.*

Third, the government played a key role in creating policies for social media to follow. For instance, "[a]t a joint press conference between Psaki and Murthy to

announce the Surgeon General's Health Advisory on Misinformation," Psaki asked Facebook to "consistently take action against misinformation super-spreaders on their platforms." *Id.* at *11 (internal quotations omitted). Psaki further stated, "We are in regular touch with these social-media platforms, and those engagements typically happen through members of our senior staff, but also members of our COVID-19 team," and "We're flagging problematic posts for Facebook that spread disinformation." *Id.*

Fourth, the government used non-profits and groups in academe to monitor internet traffic and develop tools to censor Americans. For instance, in a call between Facebook executive Nick Clegg and Murthy, Murthy told Clegg he wanted Facebook to do more to censor misinformation on its platforms. *Id.* at *14. The district court also observed that "Murthy . . . requested Facebook share data with external researchers about the scope and reach of misinformation on Facebook's platforms to better understand how to have external researchers validate the spread of misinformation." *Id.*

According to the district court, "one of the 'external researchers' that the Office of Surgeon General likely had in mind was Renee DiResta from the Stanford Internet Observatory, a leading organization of the Virality Project." *Id.* The Virality Project (https://www.viralityproject.org/) is a program at Stanford University that studies how ideas are transmitted on the web.

The Office of the Surgeon General collaborated and partnered not only with the Virality Project but also with the Stanford University Internet Observatory, another group involved with developing techniques to track and classify internet traffic. *Id.* at *16. Murthy participated in the January 15, 2021 launch of the

Virality Project. *Id.* In his comments, Murthy told the group, "We're asking technology companies to operate with great transparency and accountability so that misinformation does not continue to poison our sharing platforms and we knew the government can play an important role, too." *Id.* Murthy mentioned his coordination with DiResta at the Virality Project and "expressed his intention to maintain that collaboration." *Id.* "He claimed that he had learned a lot from the Virality Project's work and thanked the Virality Project for being such a great 'partner.'" *Id.*

Similarly, the Cybersecurity and Infrastructure Security Agency ("CISA"), a component of the Department of Homeland Security, admitted to being a "switchboard" during the 2020 election cycle, forwarding government complaints about disinformation to social media companies. *Id.* at *32. It saw its role broadly. Like many of the other Defendants, the evidence shows that the CISA Defendants met with social media companies to both inform and pressure them to censor content protected by the First Amendment. They also apparently encouraged and pressured social media companies to change their content-moderation policies and flag disfavored content. *Id.* at *32-36.

But, CISA went further. As the district court found, CISA Defendants believed they had a mandate to control "cognitive infrastructure," which CISA defined as the process by which citizens acquire knowledge. *Id.* at *36. The CISA Defendants engaged with Stanford University and the University of Washington to form the Election Integrity Project (EIP), whose purpose was to allow state and local officials to report alleged election misinformation so it could be forwarded to social media companies. *Id.* at *33. According to DiResta, head of EIP, the EIP was

designed "to get around unclear legal authorities, including very real First Amendment questions that would arise if CISA or the other government agencies were to monitor and flag information for censorship on social media." *Id.* at *34. Alex Stamos, Facebook's former chief security officer, who became one of the EIP leaders stated that its purpose was "fill the gaps of the things the government cannot do itself." Atlantic Council, *Alex Stamos Explains How Universities Fill the Gaps of What the Government Cannot Do*, YOUTUBE (June 25, 2021), https://www.youtube.com/watch?v=EcQlhX3WRtk.

Fifth, the government paid for much of the assistance it received from these academic and third-party groups. Again, as the district court found, when CISA began having communications with the EIP, CISA connected the EIP with the Center for Internet Security ("CIS"), a CISA-funded non-profit that channels reports of disinformation from state and local government officials to social media platforms. *Dist. Ct.*, 2023 WL 4335270 at *33. The CISA interns who originated the idea of working with the EIP also worked for the Stanford Internet Observatory, a related Stanford University organization. *Id.* at *33-35. CISA had meetings with Stanford Internet Observatory officials, and eventually, both sides worked together to provide state and local officials with more support to monitor and report on disinformation that affects their jurisdictions. *Id.* at *33.

Sixth, the factual findings here undermine the claims of the Department of Justice that the government did not threaten the social media firms—only made requests of them. Rather, the findings demonstrate a close nexus of intertwined organizations that put multiple velvet gloves on the government's censoring mailed fist. The Department of Justice claims that "The court acknowledged that

the FBI's communications were not 'threatening in tone or manner' and did not 'reference adverse consequences.'" Stay Appl. at 25. But the FBI was not casually requesting takedowns; the FBI had a 50% success rate in its request to the platforms to remove alleged misinformation, *Dist. Ct.*, 2023 WL 4335270 at *50, which is a much higher success rate, one suspects, than any random individual's requests would achieve.

Further, as the district court found, the FBI engaged in deception with the social media firms:

> The FBI had Hunter Biden's laptop in their possession since December 2019 but deceptively warned social-media companies to look out for a Russian "hack and dump" operation by the Russians prior to the 2020 election. Even after Facebook specifically asked whether the Hunter Biden laptop story was Russian disinformation, Dehmlow of the FBI refused to comment, resulting in the social-media companies' suppression of the story.

Id. at *50-51. Obviously, deception is a form of manipulation equally as effective as a threat and equally as qualifying as state action.

Similarly, the Department of Justice attempts to dismiss White House threats of antitrust investigation and removal of Section 230 protection as "off the cuff." Stay Appl. at 27. Few statements made at a White House press conference are "off the cuff." *Id.* Like most important public political statements, White House press secretaries' comments are typically pregnant with meaning, often signaling political intention with plausible deniability.

Once again, stuck in incorrect *quid pro quo* requirement for the nexus test, the Department of Justice claims that "the record shows that platforms routinely declined to remove content flagged by federal officials, yet neither respondents nor the Fifth Circuit suggested that any federal official imposed any sanction in

retaliation for platforms' refusal to act as the government requested." Stay Appl. at 27. Some threats can be voiced in *sotto voce*—because, in the context of the censorship nexus outlined here, they speak loudly. The Court cannot ignore this mode of exercising government power.

IV. The remedy is suitable

Injunctive relief may "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The government claims that this means any injunctive relief must be "limited to government actions targeting respondents' social-media accounts and posts." Stay Appl. at 35. The Fifth Circuit's injunction, which prohibits censorship more broadly, is therefore too burdensome.

But, of course, the First Amendment extends to the right to receive information—and thus should apply to all users. Certainly, if a telephone company unlawfully cut off one user, his rights would be taken away, but so would the rights of those who wished to speak to the de-platformed user. Complete relief ends censorship for all.

The injunction eliminates the power of a censorship structure that has grown among the platforms, government agencies, and private and education organizations. It is that nexus that threatens First Amendment rights and democratic self-governance—and which the Fifth Circuit's injunction appropriately remedies. Indeed, as the extent of this government censorship continues to be revealed, as with so-called Facebook files Congress released just last summer, Philip Hamburger & Jenin Younes, *The Biden Administration's Assault on Free Speech: Emails paint a picture of a White House running*

roughshod over First Amendment protections, Wall Street Journal (July 28, 2023), https://tinyurl.com/5n87p2m2, the injunction is essential.

CONCLUSION

The Application should be denied. The Fifth Circuit's opinion correctly found state action and First Amendment violations. Its injunction was appropriate to prevent continued violations of Americans' free speech rights.

Dated: September 20, 2023

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