No. 23-411

In the
Supreme Court of the United States

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

v.

STATE OF MISSOURI, STATE OF LOUISIANA, DR. JAYANTA BHATTACHARYA, DR. MARTIN KULLDORFF, DR. AARON KHERIATY, JILL HINES, AND JIM HOFT,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS

ELIZABETH B. MURRILL
LA Attorney General
Counsel of Record
J. BENJAMIN AGUIÑAGA
Solicitor General
TRACY SHORT
Ass't Attorney General
D. JOHN SAUER
Sp. Ass't Attorney General
1885 N. Third St.
Baton Rouge, LA 70802
(225) 326-6766
MurrillE@ag.louisiana.gov
Counsel for Louisiana

ANDREW BAILEY
MO Attorney General
JOSHUA M. DIVINE
Solicitor General
TODD A. SCOTT
Senior Counsel
CHARLES F. CAPPS
Counsel
207 W. High St.
P.O. Box 899
Jefferson City, MO 65102
(573) 751-8870
Joshua.Divine@ago.mo.gov
Counsel for Missouri

Additional counsel listed on inside cover

February 2, 2024

JOHN J. VECCHIONE
JENIN YOUNES
ZHONETTE BROWN
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 918-6905
John.Vecchione@ncla.legal
Counsel for Dr. Jayanta Bhattacharya, Dr. Martin Kulldorff, Dr. Aaron Kheriaty, and Jill Hines

JOHN C. BURNS
Burns Law Firm
P.O. Box 191250
St. Louis, MO 63119
(314) 329-5040
John@burns-law-firm.com
Counsel for Jim Hoft

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page(s)

Other Authorities

INTRODUCTION

This Court "has rarely," if ever, "faced … a coordinated campaign of this magnitude orchestrated by federal officials that jeopardized a fundamental aspect of American life." J.A.70-71. The federal Petitioners ("Defendants") "have engaged in a broad pressure campaign designed to coerce social-media companies into suppressing speakers, viewpoints, and content disfavored by the government." J.A.82. "The harms that radiate from such conduct extend far beyond just the" Respondents ("Plaintiffs"); those harms "impact[] every social-media user." J.A.82. Defendants' conduct fundamentally transforms online discourse and renders entire viewpoints on great social and political questions virtually unspeakable on social media, "the modern public square." *Packingham* v. *North Carolina*, 582 U.S. 98, 107 (2017); J.A.275-76.

Having trampled the free-speech rights of "millions" of Americans, J.A.71, Defendants now complain that this Court cannot stop them because the *government* must be allowed to speak freely. This argument flips the First Amendment on its head. "The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors." Pet.Br.22 (quoting *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1926 (2019)). Defendants would have this Court protect the government's campaign to constrain private actors. The government can speak freely on any topic it chooses, but it cannot pressure and coerce private companies to censor ordinary Americans.

This Court recently cautioned that "the government-speech doctrine" is "susceptible to dangerous misuse," and could allow "government [to]

silence or muffle the expression of disfavored viewpoints." *Matal* v. *Tam*, 582 U.S. 218, 235 (2017). That is what the government is doing here.

"It is … axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood* v. *Harrison*, 413 U.S. 455, 465 (1973). Defendants would eviscerate this venerable instruction and allow all manner of government inducement, encouragement, subtle and overt pressure, and conspiracy with private actors to escape First Amendment scrutiny. Defendants' cramped theory of state action ignores centuries of jurisprudence and contradicts the standards that the government routinely imposes on private parties. It would make the First Amendment, the most fundamental and most fragile liberty, the *easiest* of rights to violate.

The Court should affirm the Fifth Circuit's injunction and put an end to "arguably … the most massive attack against free speech in United States' history." J.A.87.

STATEMENT OF THE CASE

The district court's 103 pages of factual findings, supported by 591 footnotes, J.A.89-192, are not clearly erroneous. *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 577 (1985). The Fifth Circuit did not hold any finding erroneous; it adopted and summarized them. The government's brief never utters the words "clear error." These unrebutted findings demonstrate "a broad pressure campaign designed to coerce social-media companies into suppressing speakers, viewpoints, and content disfavored by the government." J.A.82.

A. The White House, Office of Surgeon General, and CDC.

At 1:04 a.m. on January 23, 2021, the White House flagged an anti-vaccine tweet by Robert F. Kennedy, Jr. ("RFK Jr.") and instructed Twitter to "get moving on the process for having it removed ASAP." J.A.637. "And then," the White House added, "if we can keep an eye out for tweets that fall in this same ~genre that would be great." J.A.637.

This demand did not arise in a vacuum. The Administration's "transition and campaign teams" had already been using a "Partner Support Portal" with Twitter that "prioritized" such demands "automatically." J.A.640. Twitter urged the White House to use that Portal for censorship requests, because "[i]n a given day last week …, [Twitter] had more than four different people within the White House reaching out for issues." J.A.640.[1]

Thus began a campaign of "unrelenting pressure from the most powerful office in the world" to "bend [social-media platforms] to the government's will." J.A.27. The White House—acting in "close cooperation" with the Surgeon General's Office, J.A.4[2]—badgers platforms for detailed reports on how they are censoring disfavored viewpoints. *See, e.g.,* J.A.648, 665-666, 670-71; J.A.671 (demanding "some assurances, based in data, that you are not doing the

---

[1] At least *twenty* White House officials were communicating with Twitter about misinformation and censorship, ROA.16860, yet Plaintiffs received documentary discovery from only *one* of them, J.A.637-765—just the tip of the iceberg.

[2] *See, e.g.,* J.A.119, 120, 121, 122, 123, 128, 129, 211; ROA.15170-71, 15229-30, 15231, 15243, 15319-23, 15567, 15580, 15645-48, 15244, 15307-08, 15314-15, 15316, 15327-28, 15644.

same thing again here"); J.A.679; J.A.686 (demanding "a 24 hour report-back on what behavior you're seeing"); J.A.709 (demanding "a good-faith dialogue about what is going on under the hood" of YouTube's censorship policies); J.A.712; J.A.732-33.

Defendants demand specific changes to platforms' content-moderation policies and enforcement practices. *See, e.g.,* J.A.715 ("Facebook should end group recommendations for groups with a history of COVID-19 or vaccine misinformation"); J.A.716 (pushing Facebook to "[m]onitor[] events that host anti-vaccine and COVID disinformation"); ROA.16870-71 (detailed set of policy demands).

Defendants demand the censorship of specific posts and accounts—especially those viewed as the most effective critics of the government's viewpoint, such as prominent vaccine skeptic Alex Berenson; then-Fox News host Tucker Carlson; Robert F. Kennedy Jr.; and the so-called "Disinformation Dozen," 12 speakers whom the White House views as responsible for 73 percent of misinformation on social media. J.A.637 (RFK Jr.); J.A.680-81, 695-704 (Fox News hosts Tucker Carlson and Tomi Lahren); ROA.16866-67 (Alex Berenson); J.A.713-716 ("Disinformation Dozen"); *see also, e.g.,* J.A.723; J.A.758.

In the process, the White House insists that platforms should view themselves as "partners," on the same "team," and benefiting from the government's "help." J.A.660 ("we want to know how we can help"); J.A.664 ("we're looking out for your gameplan on tackling vaccine hesitancy"); J.A.666 ("hoping we can be partners here, even if it hasn't worked so far"); ROA.2838 (discussing "ways the White House … can partner [with Twitter] in product

work"); J.A.684 ("we can hopefully partner together"); J.A.730 (Facebook assures the White House that "we are 100% on the same team here"); *see also* J.A.210.

But this is no equal "partnership." The White House issues peremptory demands, "phrased virtually as orders." J.A.51. For example, it tells platforms to remove posts "ASAP." J.A.637. After not receiving answers quickly, the White House snaps, "These questions weren't rhetorical," J.A.696; and on another occasion, "I want an answer on what happened here and I want it today." J.A.740. When it does not get its way, the White House accuses platforms of bad faith—stating that "[t]his would all be a lot easier if you would just be straight with us," J.A.659-660; accusing platforms of "playing a shell game with us," J.A.660; snapping, "[y]ou are hiding the ball," J.A.661; and accusing them of "highly scrubbed party line answers," J.A.657; *see also* J.A.666, 734.

The White House subjects platforms to relentless sarcasm and abuse. J.A.670-71 ("Really couldn't care less about … the product safari…."); J.A.681 ("if 'reduction' means 'pumping our most vaccine hesitant audience with [T]ucker Carlson saying it doesn't work' then . . . I'm not sure it's reduction!"); J.A.700-701 ("Big reveal call with FB and WH today. No progress since we spoke. Sigh."); J.A.722 ("Not sure what else there is to say"); ROA.15576 ("not even sure what to say at this point"); J.A.722 ("I don't know why you guys can't figure this out."); J.A.724 ("Hard to take any of this seriously…"); J.A.745 ("Total Calvinball.").

When such "foreboding, inflammatory" language fails, J.A.51, the White House resorts to both explicit and thinly veiled threats. The White House told one platform, viewed as insufficiently cooperative, that "[i]nternally, we have been considering our options on

what to do about it." J.A.657. It told another that "[t]his is a concern that is shared at the highest (and I mean highest) levels of the WH." J.A.709. It threatened a platform that "we'll be in the barrel together here" if it did not bend to the White House's will. J.A.711. To another, it sent a list of regulatory proposals for censorship and stated, "spirit of transparency – this is circulating around the [White House] and informing thinking." ROA.16870. The White House accuses platforms of "killing people," ROA.692; and of being responsible for "political violence" and "insurrection"—an accusation freighted with the threat of criminal investigation. J.A.647 (charging Facebook with "political violence spurred by Facebook groups"); J.A.671 (accusing Facebook of "an insurrection which was plotted, in large part, on your platform"); J.A.698 ("Not for nothing but last time we did this dance, it ended in an insurrection.").

The White House and Surgeon General's Office focus heavily on censoring *truthful* information that does not violate platform policies—*i.e.*, "borderline content," or "things that are dubious, but not provably false." J.A.648, 659. They push for the suppression of "sensational" stories and "general skepticism." J.A.664. This includes "often-true content" involving "personal experiences," such as "true but shocking claims or personal anecdotes, or discussing the choice to vaccinate in terms of personal and civil liberties or concerns related to mistrust in institutions," J.A.668-69, 687—*i.e.*, core political speech. Platforms regularly assure the White House that they suppress such "borderline" content at the government's request. J.A.710, 714, 731.

The White House and Surgeon General also conduct endless meetings with platforms involving

similar pressure for censorship. J.A.697 ("we've gone a million rounds on this in other contexts so pardon what may seem like déjà vu"); J.A.711 ("We speak with other platforms on a semi-regular basis. We'd love to get in this habit with you. Perhaps bi-weekly?"); J.A.700 ("Big reveal call with FB and WH today"); *see also* ROA.692-93. These meetings involve specific censorship demands. *Compare* ROA.2838 (calendar invite for meeting with Twitter on "vaccine misinfo"), *with* ROA.16866-67 (White House pressed Twitter on "why Alex Berenson hasn't been kicked off from the platform").

In mid-2021, the White House and Surgeon General escalated their pressure on platforms, focusing on the "Disinformation Dozen." J.A.716. In late April, the White House demanded the removal of these speakers, and on May 1, 2021, Facebook respectfully refused, acknowledging that "our position on this continues to be a particular concern for [the White House]," but protesting that their accounts "do not violate our policies or have ceased posting violating content." J.A.716-17.

The White House immediately ramped up the pressure. At a May 5, 2021, press conference, the White House Press Secretary demanded that platforms "stop amplifying untrustworthy content, disinformation, and misinformation, especially related to COVID-19, vaccinations, and elections." ROA.609. She then immediately suggested that platforms could face a "robust anti-trust program," followed immediately by another demand that platforms do "more … to ensure that this type of misinformation; disinformation … is not going out to the American public." ROA.609. (Mark Zuckerberg has described anti-trust enforcement as an

"existential threat." ROA.458.) The next day, May 6, the White House emailed Facebook again to suppress the "Disinformation Dozen." J.A.713 ("Seems like your 'dedicated vaccine hesitancy' policy isn't stopping the disinfo dozen…").

This reference to a "robust anti-trust program" arose in a highly charged context. Before his election, President Biden repeatedly called for repeal of Section 230 of the Communications Decency Act—a "hidden subsidy worth billions of dollars," ROA.26463—if platforms did not censor disfavored speech; and he threatened civil liability, and even criminal prosecution of Mark Zuckerberg personally, if Facebook did not censor more political speech. ROA.16426-16428. The incoming Administration reemphasized these threats during the transition. ROA.16428. Once in power, these threats became far more ominous and coercive, as the Administration's political allies in Congress—in the majority in 2021—repeatedly make similar threats. ROA.16419-29; J.A.209-10.

The White House's wrath "reached a boiling point in July of 2021." J.A.10. On July 15, the White House emailed Facebook stating, "Are you guys fucking serious? I want an answer on what happened here and I want it today." J.A.740. The same day, the White House and Surgeon General held a joint press conference to announce the Surgeon General's "Health Advisory on Misinformation." J.A.113. At the press conference, the Surgeon General accused platforms of spreading "poison" by not censoring misinformation, J.A.10, and demanded that they be held "accountable," ROA.628, 666—a word that Murthy's Office "agree[s] … carries with it the threat of consequences." J.A.125; *see also* ROA.15587,

15592, 15606. The White House Press Secretary demanded "that [platforms] create a robust enforcement strategy that bridges their properties," and censor the Disinformation Dozen, "12 people who are producing 65 percent of anti-vaccine misinformation on social media platforms." ROA.633. She demanded "faster action against harmful posts." ROA.634. She asserted that "[w]e're flagging problematic posts for Facebook that spread disinformation," ROA.633," and that "[w]e engage with them regularly and they certainly understand what our asks are," ROA.634.

The next day, July 16, President Biden publicly stated that Facebook and other platforms are "killing people" by not censoring misinformation. ROA.692. Four days later, the White House Communications Director pointedly clarified that the Administration was considering "whether these companies should be *held liable for publishing false information*," including "amending the Communications Decency Act, or Section 230 of the act," stating, "We're reviewing that, and certainly they should be held accountable. *And I think you've heard the president speak very aggressively about this*." ROA.734 (emphases added).

"The platforms responded with total compliance." J.A.11. They scrambled to get back into the White House's good graces, asking "how we get back to a good place," and assuring the White House that "we are 100% on the same team here." J.A.730. Facebook assured the Surgeon General that it was "keen to … deescalate and work together collaboratively," ROA.15316; and it met with Murthy's office to "better understand … *what the White House expects from us on misinformation going forward*." ROA.15315 (emphasis added). Facebook promptly deplatformed

the "Disinformation Dozen" and removed dozens of accounts associated with them. ROA.15322, 15327-28. "A few hours after Biden's comment, Twitter suspended [Alex Berenson's] account for the first time," and deplatformed him soon thereafter. ROA.16867; J.A.115.

The platforms capitulated to virtually all White House demands going forward, and "began taking down content and deplatforming users they had not previously targeted." J.A.12. In a series of follow-up meetings and communications with the Surgeon General's Office, platforms agreed to virtually all federal demands for increased censorship. ROA.15322-23, 15329-31, 15568, 15569, 15580-82. Facebook provided detailed reports of everything it was doing to comply with the White House's demands. ROA.2710-12. These assurances continue throughout the preliminary-injunction discovery period. *E.g.*, ROA.15644.

"Still, the White House kept the pressure up." J.A.12. "Officials continuously expressed that they would keep pushing the platforms to act. And, in the following year, the White House Press Secretary stressed that, in regard to problematic users on the platforms, the 'President has long been concerned about the power of large' social media companies and that they 'must be held accountable for the harms they cause.'" J.A.12; ROA.784-85. Linking the demand for censorship to the threat of specific legal consequences, she "continued that the President 'has been a strong supporter of fundamental reforms to achieve that goal, including reforms to [S]ection 230, enacting antitrust reforms, requiring more transparency, and more.'" J.A.12; ROA.785.

In early 2021, in tandem with the White House, the CDC launched a multi-prong campaign to induce the platforms to censor COVID-related "misinformation." J.A.132-46; ROA.16529-16567. The CDC received biweekly reports of "misinformation" circulating on Facebook, ROA.11384-88; J.A.133; and had weekly meetings with Facebook and other platforms, where the CDC requested reports about how they were censoring misinformation. ROA.11259:17-21; ROA.11501; J.A.134-37. The CDC sent lists of specific posts, slide decks, and tables of content that it sought to censor, ROA.2809-12, 17034-95; J.A.134-37, 141-44; and it organized "BOLO" ("Be On the Lookout") meetings with multiple platforms to flag specific posts and themes. ROA.2748, 2751-52; J.A.142-44. *See also* ROA.2809-12, 2815-16, 17034-95.

After the White House's escalation of pressure in July 2021, platforms responded by treating the CDC as the final authority on what could and could not be posted on their platforms. "Facebook content-mediation officials would contact [the CDC] to determine whether statements made on Facebook were true or false," and "Facebook would remove and/or censor claims the CDC itself said were false." J.A.138. For example, on July 26, 2021—within one week of the White House's July 15-20 pressure campaign—Facebook asked the CDC to identify whether vaccine-related claims "are false and can lead to harm," ROA.2805—*i.e.*, the platform's exact criteria for removing them. *See* ROA.2801-05; ROA.11466.

A long series of similar inquiries followed, extending throughout the discovery period. *See, e.g.*, ROA.2754-57 (childhood vaccines and vaccine side effects); ROA.2759-60 (vaccines for young children);

ROA.2762-65 (natural immunity, "vaccines contain the mark of the beast," impacts on pregnant and menstruating women, vaccines were developed using aborted fetal tissue, blood clots, heart problems, and other side effects); ROA.2772-73 (claims about the Omicron variant, and claims that vaccines do not prevent COVID infection); ROA.2776-77 (vaccine side effects and impact on breastfeeding women); ROA.2778-79 (side effects, breastfeeding, and effectiveness of vitamin therapy); ROA.2780-81 (side effects of vaccines on children).

Platforms ask the CDC "which of the … listed claims … have been debunked … *so we can remove the appropriate ones*," ROA.2762 (emphasis added); describe the CDC's input as "incredibly helpful" in getting "ready to remove anticipated misinformation claims immediately," ROA.2783; and ask for input "by end of week so we can execute quickly," ROA.2783. Platforms tell the CDC, "*as a result of our work together*, … we immediately updated our policies globally to remove additional false claims about the COVID-19 vaccine…." ROA.2778 (emphasis added).

B. The FBI and CISA.

The White House, Surgeon General, and CDC did not write on a blank slate. By 2021, the platforms had already been under intense federal pressure for years to censor disfavored viewpoints. By 2020, such censorship efforts were already spreading "across the federal enterprise." ROA.848.

In 2017, the FBI began coordinating secret meetings in Silicon Valley between "senior" federal staffers and the content-moderation officers of major platforms. ROA.10266-72. In the meetings, staffers threatened platforms with potential "legislation" impacting them, to push for greater censorship.

ROA.10268. The platforms reported to the FBI that these meetings subjected them to "a lot of pressure," ROA.10266-67, and platforms responded to this "pressure" by cooperating with the FBI's demands for censorship of specific accounts and posts, ROA.10265.

"Around this same time," the FBI and CISA "began having extensive contact with social-media companies via emails, phone calls, and in-person meetings." J.A.247. CISA and the FBI host regular large-group meetings with seven major social-media platforms to discuss censorship. ROA.14392-94. These so-called "USG-Industry" meetings "began in 2018 and continue to this day." J.A.170. The FBI also conducts regular *bilateral* meetings with the content-moderation teams of seven major platforms; these meetings continue to this day. J.A.159; ROA.10188:4-7, 10188:23-10189:4. Likewise, CISA conducts "five sets of recurring meetings with social-media platforms that involve[] discussions of misinformation, disinformation, and/or censorship of speech on social media." J.A.178; ROA.14392-94.

The FBI and CISA pepper platforms with demands to remove specific speakers and content. In 2018, CISA began "switchboarding," *i.e.*, soliciting reports of election-related "disinformation" from state and local officials and forwarding them to platforms for censorship. J.A.169-70; ROA.13219:1-25, 13225:19-13226:2. CISA's "switchboarding activities began in 2018," J.A.170; continued on a large scale during the 2020 election, J.A.176-77; ROA.13368:9-13370:11; and stopped only just after CISA was sued in this case, J.A.170; ROA.13224:1-13225:15.

At the same time, the FBI began submitting encrypted mass-censorship demands to platforms, with lengthy lists of speakers and content, "one to five

times per month." J.A.166; ROA.10245:17-10247:19. As the district court found, platforms became "far more aggressive" in complying with FBI demands to "tak[e] down disfavored accounts and content in the 2018 and 2020 election cycles" due to federal "pressure," including the threat of "potential legislation." J.A.167-68.

These efforts supposedly address "foreign" influence, but federal officials actually target *domestic* speech on a massive scale. CISA "forwards reports of information to social-media platforms without determining whether they originated from foreign or domestic sources." J.A.175; ROA.16677. By 2020, the speech targeted by CISA's efforts was "all domestic"—"the vast, vast majority … is domestic." J.A.165; *see also* J.A.186; J.A.187-89; ROA.16677; ROA.16681; ROA.16722; ROA.16724-16725; ROA.16727. Likewise, for many reports, "[t]he FBI made no attempt to distinguish whether those reports of election disinformation were American or foreign." J.A.165. And, when it does try, the FBI's accuracy in identifying "foreign" speech is abysmal; in a single incident, the FBI misidentified as "foreign" "929,000 tweets [that] were political speech by American citizens." J.A.167. Moreover, the FBI targets supposedly "foreign" messages re-posted by thousands of Americans—such as a "secure-the-border" post that 134,943 people "liked," and a pro-Second Amendment post that 96,678 people "liked." J.A.164; ROA.10588; ROA.10591. The FBI also targets supposedly "foreign" websites on which dozens of American speakers have posted. J.A.165; ROA.16651-16653; ROA.10620.

In 2020, the FBI and CISA pushed platforms to adopt policies for censoring "hacked materials," which

were promptly employed to suppress the New York Post's Hunter Biden laptop story shortly before the 2020 election. "[T]he FBI previously received Hunter Biden's laptop on December 9, 2019, and knew that the later-released story about Hunter Biden's laptop was not Russian disinformation." J.A.162-63; J.A.218. Nevertheless, "the FBI and other federal officials repeatedly warned industry participants to be alert for 'hack and dump' or 'hack and leak' operations." J.A.161. Senior CISA officials echoed the FBI's warnings. ROA.16643. The FBI had no investigative basis for these warnings, ROA.16643; ROA.10323; ROA.10341; yet it badgered platforms to adopt such policies, ROA.10323-24, 10355. The FBI and CISA's pressure "induced" platforms to adopt policies to censor supposed "hacked materials." ROA.10354-55. Then, when the laptop story broke, the FBI refused to confirm that the laptop was not a Russian hack, as it had long known, inducing platforms to censor it. ROA.10363-64; J.A.163. Both Facebook's Mark Zuckerberg and Twitter's Yoel Roth attributed the censorship to federal influence. ROA.10902-03, 10960.

In 2020, CISA launched a colossal mass-surveillance and mass-censorship project calling itself the "Election Integrity Partnership" (and later, the "Virality Project"). CISA enlisted the Stanford Internet Observatory to create a three-way collaboration among government, research agencies, and platforms to monitor and censor American citizens' election-related speech in real-time. J.A.172-78; J.A.183-92; J.A.222-25; *see also* ROA.13659-13950; ROA.16669-16685, ROA.16703-16753. Backed by the might of CISA, EIP researchers pushed platforms to adopt more restrictive content-

moderation policies for election-related speech in the summer of 2020, and then aggressively pushed them to enforce those new policies. ROA.16707-16708.

Using a team of "120 analysts" putting in "12-hour to 16- to 20-hour days" and cutting-edge technology, ROA.16714, the EIP monitors hundreds of millions of social-media posts in real-time and pushes platforms to censor them on a massive scale. In four months in 2020 alone, the EIP monitored 859 million tweets on Twitter and tracked 22 million as potential misinformation. J.A.186; *see also* ROA.16719; ROA.13858-13859. And Twitter is just one of *nine* platforms under federal pressure through the EIP, which operates in *every* election cycle. J.A.185.

The EIP targets "emerging narratives" that can encompass hundreds of thousands or millions of posts. ROA.13688. These include claims like "mail-in voting is insecure" and "conspiracy theories about election fraud are hard to discount." J.A.177.

The EIP and its COVID-related version, the "Virality Project," involve extremely tight federal-private collaboration, with dozens of points of contact and cooperation. J.A.172-78; J.A.183-92; J.A.222-25. "CISA and the EIP were completely intertwined." J.A.224. In addition, the White House and Surgeon General's Office collaborate closely with the Virality Project. J.A.709; ROA.13974-75; 15304-05. The EIP "continued to operate during the 2022 election cycle," and will "continue its work in future elections." J.A.172, 188.

SUMMARY OF ARGUMENT

I. All Plaintiffs have standing. Defendants inflict ongoing injury on Plaintiffs in multiple ways. They pressure platforms to censor Plaintiffs' specific posts and accounts. They pressure platforms to censor the

specific topics and viewpoints on which Plaintiffs speak. See, e.g., J.A.89, 213. They pressure platforms to adopt moderation policies and enforcement practices that are applied against Plaintiffs. They pressure platforms to silence other speakers whose content Plaintiffs follow, regularly read, and re-post, violating Plaintiffs' right to "speak and listen." *Packingham*, 582 U.S. at 104.

These injuries are part of an ongoing course of conduct that Defendants continue to this day. As both lower courts held, Defendants' conduct causes Plaintiffs' specific censorship injuries. These injuries afflict both the individual Plaintiffs and the States, who have sovereign interests in posting their own speech and in following the speech of their citizens on social media, especially political speech. And these injuries are virtually certain to recur during the pendency of the case, as Defendants' unconstitutional conduct is ongoing, and they admit that they have no plans to relent.

II. Defendants are violating the First Amendment through their conduct. Defendants use "unrelenting pressure" to push social-media companies to "suppress[] millions of protected free speech postings by American citizens." J.A.17, 71. This conduct constitutes significant encouragement, as it involves deep government entanglement in private decisionmaking based on relentless pressure from federal officials, including "the most powerful office in the world." J.A.27. It also constitutes coercion, because federal officials employ a battery of explicit and implicit threats and pressure to "bend" platforms "to the government's will." J.A.27.

Defendants are also engaged in joint action with platforms. Even if platforms are not coerced, federal

officials conspire with platforms through endless private meetings and communications reflecting extensive, direct federal involvement in specific decisions. Defendants are also pervasively entwined in platforms' moderation policies and enforcement practices, as they have insinuated themselves to become deeply embedded in both the strategy and minutiae of silencing disfavored viewpoints.

III. The other equitable factors favor the injunction. "[I]njunctions protecting First Amendment freedoms are always in the public interest," *Christian Legal Soc'y* v. *Walker*, 453 F.3d 853, 859 (7th Cir. 2006), and Defendants' conduct violates the rights of "millions" of Americans, J.A.71. Defendants openly admit that they have no intention of ceasing their unconstitutional conduct—indeed, they express the firm intention to continue if allowed to do so—and so the likelihood of ongoing and repeated injuries to Plaintiffs is overwhelming.

IV. The Fifth Circuit's injunction is not overbroad. It prevents Defendants only from coercing and significantly encouraging the suppression of protected speech, both of which the First Amendment already forbids. Extending the injunction across platforms and speakers is imperative to grant complete relief.

ARGUMENT

I. All Plaintiffs Have Standing.

"To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likelihood' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 157–58 (2014). "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy

requirement." *Rumsfeld* v. *F. for Acad. & Institutional Rts.*, 547 U.S. 47, 52 n.2 (2006). Here, all Plaintiffs have standing. *See also* Stay Opp.13-22.

A. Direct Censorship Injuries.

All Plaintiffs suffer specific content-moderation decisions traceable to federal officials, including to each set of Defendants. "[A] birds-eye view shows a clear connection between Defendants' actions and Plaintiffs injuries." J.A.247.

Examples abound. Plaintiff Jill Hines was censored when she re-posted Robert F. Kennedy Jr.'s content after the White House pressured platforms to silence him. J.A.793-94. The White House and Surgeon General pressured Facebook to "end group recommendations for groups with a history of COVID-19 or vaccine misinformation," and Facebook dutifully reported that it had "removed all health groups from our recommendations feature on Facebook" and "remove[d] accounts that may discourage vaccination from search features," ROA.9396; J.A.715-716; Hines' group Health Freedom Louisiana suffered direct consequences. J.A.630 ("People that regularly interacted with our page were never heard from again."); J.A.630-31 (Hines' groups were deplatformed on Facebook in July 2021, soon after the White House pressured Facebook to suppress such groups). After the July 2021 pressure campaign, "Facebook … reported to the White House that it 'labeled' and 'demoted' posts suggesting natural immunity to a COVID-19 infection is superior to vaccine immunity." J.A.116. Hines' and other Plaintiffs' speech on natural immunity is extensively censored. J.A.588-89, 590, 595, 599, 601-02, 621, 624.

For its part, the FBI pushed platforms to adopt "hacked materials" policies that were used to censor

the Hunter Biden laptop story, J.A.15, 64-65; J.A.159, 161-164, 218-19; Plaintiff Jim Hoft's content about that topic was censored based on those new policies, J.A.608. CISA's "tracking spreadsheet" of censorship reports to platforms specifically notes Hoft's content. ROA.17016. The Election Integrity Partnership—with which CISA is "completely intertwined," J.A.224—pushes platforms to censor hundreds of thousands of posts containing Hoft's content. J.A.186-87. "Defendants even appear to be currently involved in an ongoing project that encourages and engages in censorship activities specifically targeting Hoft's website." J.A.242. Similarly, the CISA-launched Virality Project—coordinating closely with the White House and Surgeon General's Office, J.A.108, 120-21, 126-27—specifically targets Hines' group, Health Freedom Louisiana, for censorship. J.A.190-91.

Likewise, the CDC pressures platforms to censor speech raising concerns about COVID vaccines' impact on menstruation and pregnant women, ROA.11397, 11442-43, 17039; J.A.145; Hines' speech on this topic is censored accordingly, J.A.630. Facebook reports to the CDC that "as a result of our work together," Facebook "immediately updated our policies globally to remove … false claims about the COVID-19 vaccine for children," ROA.11457; both Hines' and Louisiana's speech questioning vaccine recommendations for children are then censored, J.A.789-90; J.A.635-36. The CDC repeatedly pushes the platforms to censor speech allegedly mischaracterizing VAERS data, ROA.2717-18, 2813, 11454, 17042, 17068, 17072-73; J.A.139-40; Hines' frequent speech on this topic is extensively censored, J.A.629-30. The CDC pressures platforms to silence speech raising concerns about vaccine-related injuries

and side effects, *see, e.g.,* ROA.17042-47; Plaintiffs' speech on this topic is extensively censored, J.A.629, 775, 787-88. After publicly disagreeing with the CDC and other federal health officials, Drs. Bhattacharya and Kulldorff faced "a relentless *covert* campaign of social-media censorship of [their] dissenting view from the government's preferred message." J.A.585; J.A.584-87, J.A.598-99.

In each case (among many others), there is a demonstrable "causal and temporal link between Defendants' actions and the social-media companies' censorship decisions." J.A.248. In each case, the platforms "capitulat[ed] to state-sponsored pressure" and "fell in line" with federal demands. J.A.60, 124; *see also* J.A.27, 211, 243. "[T]he instant case paints a full picture. A drastic increase in censorship, deboosting, shadow-banning, and account suspensions directly coincided with Defendants' public calls for censorship and private demands for censorship." J.A.246-47. Given this evidence, the district court rightly held that "Plaintiffs' theory of … causation … demonstrates a high likelihood of success as to establishing Article III traceability." J.A.247. The government cannot engage in wholesale coercion to suppress speech and then disclaim responsibility when its plan succeeds.

Moreover, traceability in this context requires only that "third parties will likely react in predictable ways." *Dep't of Commerce* v. *New York*, 139 S. Ct. 2551, 2566 (2019) (quoted in J.A.24). That is so here. "[F]aced with unrelenting pressure from the most powerful office in the world, social-media platforms did, and would continue to, bend to the government's will." J.A.27. Under intense pressure, "the platforms" predictably "respond[] with total compliance,"

J.A.11—"the predictable effect of Government action on [their] decisions," *Dep't of Commerce*, 139 S. Ct. at 2566.

Likewise, "state officials have suffered, and will likely continue to suffer, direct censorship on social media." J.A.28; J.A.239-40; J.A.28-29. "Regardless of the source of the right, the State Plaintiffs sustain a direct injury when the social-media accounts of state officials are censored due to federal coercion." J.A.29. The States have thus "demonstrated direct censorship injuries that satisfy the requirements of Article III as injuries in fact." J.A.239.

B. The Right To Listen.

Separately, the First Amendment protects the right to "speak and listen" on social media. *Packingham*, 582 U.S. at 104. Defendants regularly silence speakers whom Plaintiffs follow, engage with, and re-post on social media. For example, the White House pressured platforms to silence Alex Berenson, Tucker Carlson, Robert F. Kennedy Jr., and other members of the "Disinformation Dozen," such as Children's Health Defense, Sherri Tenpenny, and Rizza Islam. J.A.12, 106-07, 107-08, 111-12, 114. "The public and private pressure from the White House apparently had its intended effect. All twelve members of the 'Disinformation Dozen' were censored." J.A.114. "Twitter suspended Berenson's account within a few hours of President Biden's July 16, 2021 comments." J.A.115.

The individual Plaintiffs *follow* these speakers on social media, frequently reviewing, re-posting, and engaging with their content. *See, e.g.,* J.A.767 (Bhattacharya follows Alex Berenson, RFK Jr., Tucker Carlson); J.A.774 (Kheriaty follows "Alex Berenson, Tucker Carlson, Robert F. Kennedy, Jr.,"

and "Rizza Islam"); J.A.778 (Hoft follows "Tucker Carlson, Alex Berenson, Robert F. Kennedy, Jr., … the New York Post … Children's Health Defense"); J.A.782-84 (Hines follows "Robert F. Kennedy Jr., Children's Health Defense … Tucker Carlson … Alex Berenson," and many other members of the "Disinformation Dozen"); *see also* Intervention Resp.4-14. Hines was censored in reposting RFK Jr.'s content discussing Tucker Carlson's criticism of the federal government. J.A.793-94.

The individual Plaintiffs also listen to and re-post speech on *topics* silenced by federal officials, such as the Hunter Biden laptop story, questions about vaccine efficacy and side effects, and election-related speech targeted by CISA, among many others. *See supra*.

The Government admits that the First Amendment protects the "right to receive information and ideas," Pet.Br.21, but it contends that a violation of this right does not confer Article III standing unless there is "some" additional, unspecified "connection to the speaker." *Id.* This novel requirement lacks support in case law. The First Amendment is violated when the government prevents a listener from receiving information and ideas: "where a speaker exists…, the protection afforded is to the communication, to its source and to its recipients both." *Va. State Bd. of Pharm.* v. *Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976) (citing nine cases). The "First Amendment right to 'receive information and ideas,' … 'necessarily protects the right to receive.'" *Id.* at 757 (quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-63 (1972)). "If there is a right to [speak], there is a reciprocal right to receive the [speech], *and it may be asserted by these*

[listeners]." *Id.* (emphasis added). Violating that right to listen itself constitutes Article III injury. J.A.73 (quoting *Opulent Life Church* v. *City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012)); *see also United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1587 (2020) (Thomas, J., concurring).

Second, even if an amorphous "some connection" requirement existed, it would be easily satisfied here. Plaintiffs' declarations repeatedly assert "identifiable and particularized harm[s]," Pet.Br.21, from being denied access to the silenced speakers and speech. Plaintiffs assert the interest in commenting on, engaging with, and re-posting the content of the censored speakers. J.A.774-76, 778, 782, 784. Such activity is just as concrete as "plan[ning] to 'hear, speak, and debate with'" the silenced speaker, which the government concedes satisfies its own test. Pet.Br.21 (quoting *Kleindienst*, 408 U.S. at 762).

Further, the scientist Plaintiffs—Bhattacharya, Kulldorff, and Kheriaty—emphasize that following others' speech is essential to their scientific inquiry. Bhattacharya needs to "understand the landscape of opinions expressed by influential people in this setting," and he "need[s] to know this to perform [his] job, which is to research public health policies…" J.A.767. Kulldorff and Kheriaty agree. J.A.771, 774. Each scientist, like Kheriaty, "repost[s], retweet[s], [and] comment[s] on the contributions of others." J.A.774; J.A.775-76.

Hoft engages with others' speech as part of his economic "livelihood," including "reposting, retweeting, or reposting with comments the content that others post…. Simply put, [his] life work consists of publicly sharing and discussing ideas, opinions, facts, and theories…." J.A.778. For Hines, "[t]he

ability to re-share scientific articles, commentaries, videos, and legislative testimonies is vital to our goal of educating the public and those individuals in the legislature that represent us." J.A.782; J.A.784, 794.

The government objects that, under this theory, "anyone could sue whenever" a speaker was silenced by government, "even if the plaintiff had no connection to the aggrieved party other than the desire to hear him." Pet.Br.21-22. From the standpoint of protecting fragile First Amendment freedoms, it is not clear why that would be a bad outcome. In fact, this Court routinely expresses the *opposite* concern—*i.e.*, that First Amendment violations "may too often go unremedied" because those with diffuse injuries, such as readers and listeners, are "not likely to sustain sufficient economic injury to induce [them] to seek judicial vindication of [their] rights." *Bantam Books* v. *Sullivan*, 372 U.S. 58, 64 n.6 (1963); *Dombrowski* v. *Pfister*, 380 U.S. 479, 486-87 (1965). In any event, Plaintiffs here assert a host of specific, concrete interests no less particularized than the desire to "hear, speak, and debate with" the silenced speakers. Pet.Br.21 (quoting *Kleindienst*, 408 U.S. at 762).

So do the States. Federal censorship disrupts the States' sovereign interest in being able to hear the undistorted voices of their own citizens, which is crucial to formulating policies and messages that are responsive to their citizens' actual concerns. J.A.613-18, 633-36. "It is very important for [Missouri and Louisiana officials] to have access to free public discourse on social media on these issues so [they] can understand what [their] constituents are actually thinking, feeling, and expressing about such issues, and so [they] can communicate properly with them."

J.A.634. State officials follow citizens' speech on social media "on a daily or even hourly basis" to ensure that the States are crafting messages and policies that are responsive to their citizens' true concerns. J.A.614. In fact, "the CDC's own witness explained that if content were censored and removed from social-media platforms, government communicators would not 'have the full picture' of what their citizens' true concerns are." J.A.31. Moreover, federal censorship stifles, not just social-media speech, but attempts to organize like-minded citizens to petition their state governments—as it frequently does to Hines, J.A.629-32, injuring both Hines and Louisiana at once.

The States' sovereign interest in hearing the voices of their own citizens, especially on great political and social questions, is well established. "Our representative democracy only works if we protect the 'marketplace of ideas.' This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will." *Mahanoy Area Sch. Dist.* v. *B. L.*, 141 S. Ct. 2038, 2046 (2021). "[I]t it is only through free debate and free exchange of ideas that government remains responsive to the will of the people…." *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949). James Madison stressed that "the representative ought to be acquainted with the interests and circumstances of his constituents." THE FEDERALIST NO. 56; *Utah Republican Party* v. *Cox*, 892 F.3d 1066, 1085 (10th Cir. 2018).

Thus, preventing States from hearing the speech of their citizens on matters of great public concern is a sovereign injury to the State itself. *See Borough of Duryea, Pa.* v. *Guarnieri*, 564 U.S. 379, 395-97 (2011).

"Every legislator has a right to be informed of the views and wishes of all parties interested in the enactment of a law," so interfering with a constituent's ability to petition the legislature is "an infringement of the rights of the people and of their representatives." *Story* v. *Jersey City & B.P.P.R. Co*., 16 N.J. Eq. 13, 20-21 (N.J. Ch. 1863).

C. Additional Censorship Injuries.

All Plaintiffs, moreover, self-censor their social-media speech to avoid more severe penalties. J.A.590-91, 602, 610, 624, 630-31, 768, 771, 775, 783, 797. The government dismisses self-censorship as self-inflicted injury to avoid "hypothetical future harm that is not certainly impending." Pet.Br.20 (quoting *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 416 (2013)). But, after enduring social-media censorship for years, Plaintiffs attest that, without self-censorship, it is virtually certain that they will suffer more severe penalties. J.A.590-91, 602, 610, 624, 630-31, 768, 771, 775, 783, 797. Hines' assessment is typical: "My personal Facebook page, and the Facebook pages of both Health Freedom Louisiana and Reopen Louisiana, are all under constant threat of being completely deplatformed." J.A.630. "Plaintiffs' self-censorship" is "grounded in the very real censorship injuries they have previously suffered …, which are 'evidence of the likelihood of a future injury.'" J.A.21. "[T]his chilling … is, itself, a constitutionally sufficient injury." J.A.21 (citing *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972)).

In addition, as the district court found, Plaintiffs suffer ongoing effects of past censorship, which are traceable to Defendants and redressable. "Plaintiffs' request for an injunction is not solely aimed at addressing the initial imposition of the censorship

penalties but rather at preventing any continued maintenance and enforcement of such penalties." J.A.243. An injunction ending "the government's interference with those social-media companies' independent application of their policies," J.A.23, will grant Plaintiffs relief from ongoing penalties arising from "the government-coerced *enforcement* of those policies," J.A.25.

D. Defendants' Other Arguments Lack Merit.

The government disputes traceability on the ground that "the content moderation that injured [Plaintiffs] began long before most of the government conduct at issue here." Pet.Br.18. This argument is "wholly unpersuasive." J.A.246. It ignores half of Plaintiffs' case—extensive federal censorship efforts beginning long *before* 2021. "Government officials began publicly threatening social-media companies with adverse legislation *as early as 2018*. In the wake of COVID-19 and the 2020 election, the threats intensified and became more direct." J.A.247. In fact, federal censorship efforts began in 2017, accelerated in 2020 with the onset of COVID-19 and the 2020 Presidential election, and then rapidly accelerated *again* in early 2021. *See supra*. Accordingly, Plaintiffs' censorship injuries begin before 2021, accelerate in 2021, and continue through the preliminary-injunction hearing on May 5, 2023, to this day. *See* J.A.586-87, 599-601, 607-08, 609-10, 615-17, 621-23, 629-31, 635 (censorship injuries traceable to Defendants occurring in 2021 and 2022); J.A.787-95, 798, 801 (similar injuries through 2023).

The government argues that Plaintiffs fail to show the "real and immediate threat of repeated injury." Pet.Br.19 (quoting *O'Shea* v. *Littleton*, 414 U.S. 488, 495-96 (1974)). On the contrary, the evidence of

ongoing and future harm is overwhelming. First, Plaintiffs identify numerous federally-traceable injuries occurring continuously over years, right up to the preliminary-injunction hearing. J.A.787-95. Such "'[p]ast wrongs are evidence' of the likelihood of a future injury." J.A.19. Second, it is undisputed that the challenged conduct continues to this day. "Per the officials, their back-and-forth with the platforms continues to this day." J.A.12. "[T]here is no evidence to suggest that the government's meddling has ceased. To the contrary, … they continue to be in regular contact with social-media platforms concerning content-moderation issues today." J.A.23. "[T]he record shows, and counsel confirmed at oral argument, that the officials' challenged conduct has not stopped." J.A.73. CISA "continues to communicate regularly with social-media platforms" and its censorship meetings with them "continue to this day." J.A.170. The federally-entwined EIP "continue[s] its work in future elections." J.A.188. At oral argument, the government candidly admitted that "it is not the government's argument that … this … will never happen again." ROA.26804.

In fact, the government's censorship efforts are expanding to new topics. They plan to pressure platforms "to censor misinformation" on "climate change, gender discussions, abortion, and economic policy," J.A.117; and "the origins of the COVID-19 pandemic, the efficacy of COVID-19 vaccines, racial justice, the United States' withdrawal from Afghanistan, and the nature of the United States' support of Ukraine," J.A.180. "The threat of future censorship is significant, and the history of past censorship provides strong evidence that the threat of further censorship is not illusory or speculative."

J.A.243; *see also* J.A.250-52. As the FBI says, "we've never stopped." J.A.261. "It is not imaginary or speculative that the Defendants will continue to use this power. It is likely." J.A.263.

Finally, the government contends that the States lack First Amendment rights. Pet.Br.22. As the government admits in the same breath, *id.* n.1, this argument erroneously conflates Article III injury with the merits. This Court "has made clear that the government … has a 'right' to speak on its own behalf." J.A.29 (citing cases). "[R]egardless of the source of the right, the State Plaintiffs sustain a direct injury when the social-media accounts of state officials are censored due to federal coercion." J.A.29. Given the Article III injuries to the States' sovereign interests—both their own speech and their right to receive their citizens' speech—the States may also assert the First Amendment rights of their audiences and the citizens they would listen to.

In fact, third-party standing requirements are "quite forgiving" "[w]ithin the context of the First Amendment." *Kowalski* v. *Tesmer*, 543 U.S. 125, 130 (2004). The usual "close relationship" and "hindrance" are not required—and, if they were, they are satisfied here. *See id.*; *Dombrowski*, 380 U.S. at 486-87; *N.J. Bankers Ass'n* v. *Att'y Gen.*, 49 F.4th 849, 860 (3d Cir. 2022). The Court applied this very reasoning to uphold third-party standing in *Bantam Books*. 372 U.S. at 64 n.6. In addition, third-party standing applies "when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights." *Kowalski*, 543 U.S. at 130 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 510 (1975)). Here, federal censorship of the States' speech (*i.e.*, a restriction "against the litigant")

violates the "third parties' rights," *id.*, of those who would hear the States' messages.

II. Defendants Violate the First Amendment.

Defendants use "unrelenting pressure" to push social media companies to "suppress[] millions of protected free speech postings by American citizens"; the "disfavored" speech goes "well beyond COVID-19"; they target "nearly every major American social-media company"; and they successfully press those companies to remove constitutionally protected content that does "not run afoul of [the companies'] policies." J.A.2, 8, 17, 22, 71, 201-02, 262. Their "conduct has not stopped," and their actions "impact[] every social-media user." J.A.73, 82.

These efforts unite the three forms of government action most repugnant to the First Amendment: viewpoint discrimination, *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943); targeting core political speech, *McIntyre* v. *Ohio Elec. Comm'n*, 514 U.S. 334, 346-47 (1995); and *de facto* prior restraint, *Neb. Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976).

Defendants insist that the "unrelenting pressure" is mere "persuasion," and that the platforms themselves are exclusively responsible for censorship. Not so. It is "axiomatic that [Government] may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood*, 413 U.S. at 465. Nor may Government act as a "joint participant" in such conduct. *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961).

A. Significant Encouragement.

The government is responsible for private conduct it induces through "significant encouragement" or

"coerci[on]." *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). The government becomes responsible by "provid[ing] such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* Sufficient "encouragement, endorsement, and participation" is present even where "Government [did] not compel[]" the conduct but "did more than adopt a passive position toward" it. *Skinner* v. *Ry. Lab. Execs.' Ass'n*, 489 U.S. 602, 615-16 (1989). It is "firmly stitched into our constitutional fabric" that officials who "in any way act to compel or encourage" conduct "plainly provide[] the state action essential" to a federal claim. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 151-52, 158 (1970); *see also, e.g., Rawson* v. *Recovery Innovations, Inc.*, 975 F.3d 742, 753 (9th Cir. 2020) (state action where "the state significantly involves itself in the private parties' actions and decisionmaking at issue").

In the First Amendment context, this means that "Government must keep its hands off the editorial decisions of Internet service providers," and "may not tell Internet service providers how to exercise their editorial discretion about what content to carry or favor." *United States Telecom Ass'n* v. *FCC*, 855 F.3d 381, 435 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing *en banc*).

"If there were ever a case where the 'significant encouragement' theory should apply, this is it." J.A.201. All Defendants do far more than "adopt a passive position toward" platforms' censorship, *Skinner*, 489 U.S. at 616, and they do *anything but* "keep [their] hands off [platforms'] editorial decisions," *U.S. Telecom*, 855 F.3d at 435 (Kavanaugh, J., dissenting from denial of rehearing *en banc*). The record overflows with examples of Defendants "telling

[platforms] what content to favor." *Id.*; *e.g.*, J.A.721 (Facebook must stop "presenting [opposing viewpoints] alongside, at level"). Defendants do so privately and with great specificity, down to the level of particular posts and speakers and the details of platforms' content-moderation policies. *E.g.*, J.A.637; ROA.16182-83; J.A.110 (listing "demands that the White House had made in a recent meeting," including "do not distribute or amplify vaccine hesitancy" and "end [certain] group recommendations" (quoting J.A.715)). Defendants have deliberately insinuated themselves and are deeply "entangle[d] in the platforms' policies and "independent decisionmaking." J.A.36.

The demands are "unrelenting." J.A.209; *e.g.*, J.A.697; J.A.712; J.A.640; ROA.13266:21-13267:6 (platform's "concern[] about too much … duplicate reporting coming in" and "overwhelming the platforms"); ROA.13368:9-13370:11, 13375:12-13377:21 (CISA officials took shifts "switchboard[ing]" on nights and weekends); ROA.17407-96. When platforms resist, *e.g.*, J.A.754-58, junior officials badger them for weeks, J.A.746-58 (fifteen emails over more than two weeks), before escalating to senior officials who drag senior social-media executives into petty disputes, J.A.745-56.

When persistence fails, officials resort to pressure. Their techniques include sarcasm, abuse, accusations of bad faith, and veiled (and unveiled) threats. *See supra*; J.A.664-71, 721-24. These efforts are highly effective. Bullied and exhausted platforms agree to "expand the list of [allegedly] false claims that [they] remove," J.A.646; start censoring "often-true content," J.A.668; "demote[]" disfavored posts "[a]lthough they don't violate our community standards," J.A.714;

deplatform particular speakers, *e.g.*, ROA.2711; and suppress particular posts, *e.g.*, J.A.701-06. They submit to Defendants' supervision and oversight, filing "bi-weekly covid content report[s]" with the White House and Surgeon General, *e.g.*, ROA.3975; ROA.2663; consenting to being held "accountable" for meeting censorship goals, J.A.658; and installing the CDC as the *de facto* censor of health claims, *see, e.g.*, ROA.11447, 11463-66; ROA.3787; ROA.2662; ROA.2758-65.

Faced with extraordinary, unrebutted factual findings, Defendants try to reduce significant encouragement to compulsion by inducement rather than by threat. Pet.Br.23-28. Defendants argue that recognizing noncoercive entanglement as significant encouragement, as *Adickes* and *Skinner* do, "would render this Court's joint-action test superfluous." Pet.Br.43-44. Not so. Significant encouragement is targeted at "specific conduct," *Frazier* v. *Bd. of Trs. of Nw. Miss. Reg'l Med. Ctr.*, 765 F.2d 1278, 1286 (5th Cir. 1985), whereas joint participation is more like conspiracy: officials can be liable for all decisions furthering the conspiracy despite being specifically involved in only some. It is *Defendants* who make significant encouragement superfluous, by reducing it to just a form of coercion.

There are many other problems with Defendants' cramped notion of significant encouragement. It is inconsistent with this Court's precedents, *see Skinner*, 498 U.S., at 615; *Adickes*, 398 U.S., at 152; with those of the Courts of Appeals, *e.g., Kach* v. *Hose*, 589 F.3d 626, 649 (3d Cir. 2009) (recognizing "encouragement short of compulsion" as sufficient); *Rayburn ex rel. Rayburn* v. *Hogue*, 241 F.3d 1341, 1348 (11th Cir. 2001) (same); *Frazier*, 765 F.2d at 1286 (same); and

with other areas of law, *e.g., Rosemond* v. *United States*, 572 U.S. 65, 73 (2014) (accomplice liability). And it would lead to absurd results, such as allowing government to pay private employers $50 a month not to hire racial minorities, or offer $50 bounties to landlords who conduct warrantless searches, provided that these "positive incentives" do not "overwhelm the private party and essentially compel" the conduct. Pet.Br.30.

Defendants insist that limiting significant encouragement to compulsion is necessary to protect *government* speech. *Id.* at 23-25. But a doctrine that encompasses "encouragement short of compulsion," provided that it is targeted at "specific conduct," *Frazier*, 765 F.2d at 1286, leaves ample room for government to participate in the marketplace of ideas by advocating *in the abstract* for censorship and other unconstitutional practices—if it so wishes. The doctrine merely bars government from pressuring private actors to perform *particular acts* that would be unlawful if performed directly by government.

The same distinction applies to private speech. The First Amendment protects abstract advocacy of unlawful conduct, *Brandenburg* v. *Ohio*, 395 U.S. 444, 448-49 (1969) (per curiam), but not encouragement with "intent to bring about a particular unlawful act," *United States* v. *Hansen*, 599 U.S. 762, 771 (2023). Thus, the First Amendment protects "abstract advocacy" of even horrible ideas, such as legalizing child pornography, but not "the recommendation of a particular piece of purported child pornography." *United States* v. *Williams*, 553 U.S. 285, 299-300 (2008).

So too, a government official may advocate for horrible ideas like racial discrimination in the

abstract, but he may not encourage a restaurant owner to adopt a racially discriminatory policy or eject a patron on account of race. *Adickes*, 398 U.S. at 151-52, 157-58. The President may use the bully pulpit to offer general criticism of muckraking journalism, but he may not pressure a private employer to retaliate against an employee who engaged in such speech. *Dossett* v. *First State Bank*, 399 F.3d 940, 944-45, 949-50 (8th Cir. 2005). And a government official may assert in an op-ed, "Censorship is socially beneficial," but he may not pressure social-media companies to adopt specific speech-restrictive policies or censor particular posts or speakers. *See United States* v. *Stein*, 541 F.3d 130, 148 (2d Cir. 2008) (finding significant encouragement where officials "steered [a private employer] toward [the challenged policy] and then supervised its application in individual cases").

This makes sense. The official who publishes an op-ed advocating in the abstract for censorship is advocating for an idea in the marketplace of ideas. He lacks the mental state and proximate causal connection to any particular acts of censorship persuaded readers might perform. *See Hansen*, 599 U.S. at 771-73, 778-79. In contrast, the official who pressures someone to perform a particular act of censorship is not advocating in the marketplace of ideas, but trying to "encourage or promote private persons to accomplish what [he] is constitutionally forbidden to accomplish." *Norwood*, 413 U.S. at 465. The resulting choice may be "deemed [by law] to be" his own, *Blum*, 457 U.S. at 1004, because in effect it *is* his own: the act of censorship is something that he intentionally brought about, albeit through an intermediary. *Bantam Books*, 372 U.S. at 67 (government "deliberately set about to achieve

[private booksellers'] suppression of [particular] publications" and "succeeded in its aim"); *accord Newberry* v. *United States*, 256 U.S. 232, 294 (1921).

Defendants' own examples prove the point. The example of a military officer encouraging a young person to enlist, Pet.Br.28, is inapposite because serving in the military is not something the Constitution forbids Government officials to do directly. But imagine instead that the officer encouraged the person to demonstrate his fitness by beating a passerby wearing an anti-military T-shirt. Surely, that officer violates the First Amendment. *See Rivera* v. *Rhode Island*, 402 F.3d 27, 34 (1st Cir. 2005). Defendants *agree* that "it would be absurd to claim that encouraging [the beating] is the equivalent of forcing" it. Pet.Br.28. Thus, significant encouragement is not reducible to compulsion.

As for Defendants' suggestion that Plaintiffs' remedy lies in the ballot box, Pet.Br.23, the First Amendment says otherwise. Moreover, most communications cited above occurred behind closed doors. It is only through court-mandated discovery that these documents were released to the public. If this Court abandoned its duty "to enforce federal rights vigorously," *Smith* v. *Wade*, 461 U.S. 30, 55 n.23 (1983), it would "draw [a] blueprint[] showing how to avoid the First Amendment's guarantee of freedom[] of speech" with no accountability, legal or democratic, *Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205, 215 (1964) (Black, J., concurring in the judgment).

B. Coercion.

Likewise, the Fifth Circuit rightly held that the White House, Surgeon General's Office, and FBI engage in coercion. "[T]hreats of adverse government

action" constitute coercion. *Biden* v. *Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 (2021) (Mem.) (Thomas, J. concurring); *see also, e.g., Backpage.com* v. *Dart*, 807 F.3d 229, 231 (7th Cir. 2015); *Okwedy* v. *Molinari*, 333 F.3d 339, 341-44 (2d Cir. 2003).

Sometimes threats are unmistakable. After accusing Facebook of "play[ing] a shell game," White House officials warned: "Internally we have been considering our options on what to do about it." J.A.657-60. But threats can also be "veiled" and "implicit," *Rattner* v. *Netburn*, 930 F.2d 204, 210 (2d Cir. 1991), as when a mobster remarks "Nice business you've got there. Would be a shame if something happened to it." *See Bantam Books*, 372 U.S. at 67-68 (1963) (looking "through forms to the substance" to identify "informal censorship" by "thinly veiled threats"). Ultimately, "[t]he existence of a threat depends not on 'the mental state of the author,' but on 'what the statement conveys' to the person on the other end." *Counterman* v. *Colorado*, 600 U.S. 66, 74 (2023) (quoting *Elonis* v. *United States*, 575 U.S. 723, 733 (2015)).

Here, the Fifth Circuit rightly held it "readily apparent" that the White House and Surgeon General's Office coerce platforms into censorship. J.A.51 (citing, *inter alia*, J.A.660-61, 712-13, 721-24); *see also* J.A.655-57. Alternatively, the Fifth Circuit rightly held that the White House and Surgeon General's Office engage in subtler forms of coercion. In reaching this conclusion, the Fifth Circuit considered, as non-exclusive factors, (1) officials' language and tone, (2) officials' references to consequences, (3) officials' authority, and (4) platforms' reactions. J.A.42.

Defendants' attacks on these factors are meritless. "[L]anguage," "tone," and references to consequences are plainly relevant to what a statement conveys, *United States* v. *Houston*, 792 F.3d 663, 670 (6th Cir. 2015), as is the speaker's power over the recipient, *see Bantam Books*, 372 U.S. at 68. And how the recipient reacts is often the best evidence of what the statement conveys to him. *See id.* at 63-64 (holding it "particularly relevant" that the statements' "effect" was "to intimidate"). Contrary to Defendants' suggestion, Pet.Br.38, this Court *has* relied on the recipient's reaction when determining whether a statement constitutes a threat, *Watts* v. *United States*, 394 U.S. 705, 707-08 (1969) (per curiam), and this reliance does not transform the inquiry into a subjective test, *United States* v. *Fulmer*, 108 F.3d 1486, 1499-500 (1st Cir. 1997).

Further, each of the factors points to coercion here. As to language and tone, Defendants' "demands to moderate content" are "urgent" and "uncompromising." J.A.49; J.A.637; J.A.740; J.A.696. Officials "monitor[]" platforms' compliance," J.A.5; *cf. Bantam Books*, 372 U.S. at 63 ("A local police officer usually visited [the bookseller] shortly after [his] receipt of a notice to learn what action he had taken."); and send "follow-up messages of condemnation" when it is lacking, J.A.50; *e.g.*, J.A.697-98; J.A.745 ("[H]ow on earth is [this post] not confusing enough for it to at least have a label?"); J.A.708. Officials express their displeasure with anger, J.A.745; J.A.712 ("[H]ow does something like that happen?"); ROA.15308 (Surgeon General's "tense," "angr[y]" meetings with platforms); sarcasm, J.A.697; J.A.681; and profanity, J.A.740.

As to authority and references to consequences, the White House is "the most powerful office in the

world," J.A.27, and White House officials frequently couple censorship demands with references to adverse legal action that the White House has the power to initiate or influence. *E.g.*, J.A.609; J.A.112 (finding that the White House "linked the threat of a 'robust anti-trust program' with the White House's censorship demand"); *see also* J.A.709 ("a concern that is shared at the highest (and I mean highest) levels of the WH").

Perhaps most telling is how platforms react—with "total compliance." J.A.11. Immediately after the White House and Surgeon General's threats of July 15-20, 2021, Twitter suspended Alex Berenson, ROA.16183; and Facebook pleaded with officials for guidance on "what the White House expects from us on misinformation going forward," ROA.2689-90; *see also* J.A.730. Eight days later, a Facebook executive submitted to Murthy a report of Facebook's actions "this past week to adjust policies on what we are removing with respect to misinformation, as well as steps taken to further address the 'disinfo dozen.'" ROA.3798-99. After Murthy "identified 4 specific recommendations for improvement," the executive promised "a regular cadence of meetings . . . to update you on our progress." ROA.3798-99. One month later, the executive reported that Facebook had "removed over 20 million pieces of content" and "over 3,000 accounts, Pages, and groups" for "COVID- and vaccine-related misinformation"; completely deplatformed the "disinformation dozen" and dozens of related accounts; and taken a host of other steps, including "experiment[ing]" with algorithms "to demote content that we predict will contain low quality information." ROA.2711.

Defendants' suggestion that platforms did all this because they were *persuaded* by the government's eloquence defies credulity. Vastly more plausible, and certainly not clearly erroneous, is the district court's finding that Defendants' "pressure," which included "the threat of 'legal consequences' if [platforms] do not censor misinformation more aggressively," "had its intended effect." J.A.111, 114. "[W]hat [Defendants'] statement[s] conveyed to the [platforms]" was that adverse government action would follow unless the platforms acceded to Defendants' demands, *Counterman*, 600 U.S. at 74, and fear of such action is what motivated platforms' sudden and "total compliance," J.A.11.

It is no reply to protest that the White House cannot *unilaterally* impose some of the consequences it threatened, such as legislative reforms. Pet.Br.37. The same was true in *Bantam Books*, where the commission had no direct enforcement authority. 372 U.S. at 66-68. Nonetheless, this Court concluded, "it was found as a fact—and the finding, being amply supported by the record, binds us—that [the distributor's] compliance with the Commission's directives was not voluntary"; rather, those directives, "phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulation of the listed publications…." *Id.* at 68. So too here, "many of the officials' asks were 'phrased virtually as orders,'" J.A.51 (quoting *Bantam Books*, 372 U.S. at 68); officials "followed up to ensure compliance," J.A.60; and this "unrelenting pressure had the intended result of suppressing" the targeted speech, J.A.201. "People do not lightly disregard" "thinly veiled threats," *Bantam Books*, 372 U.S. at 68,

especially when they come from "the most powerful office in the world," J.A.27. "[T]he President wields awesome power," and "[t]he officials were not shy to allude to that understanding…." J.A.57.

The Fifth Circuit also rightly held that the FBI coerces platforms' censorship. Besides subjecting platforms to regular censorship demands backed by its "clear [enforcement] authority," J.A.62; *see, e.g.*, ROA.10245:17-10252:9, 10297:7-18, the FBI coordinated with powerful congressional staffers who met with platforms warning them that they would face adverse legislative consequences unless they censored more aggressively, ROA.10266:7-10270:9. FBI agents conferred with the staffers before and after the meetings to share intelligence on the platforms and offer their "opinion about [the] potential legislation" staffers were using to threaten the platforms. ROA.10268:20-10270:9. Again, the platforms' reaction is telling: they experienced "a lot of pressure" in these meetings, ROA.10267:2, and that "pressure" drove the platforms' compliance with the FBI's subsequent demands for specific censorship actions. ROA.10264:18-10265:3, 10266:15-10267:2. Further, through incessant demands, the FBI "refuses to take 'no' for an answer and pesters the recipient until it succumbs." J.A.52 (quotation omitted).

Separately, the FBI and CISA waged a successful campaign to induce platforms to adjust their content-moderation policies for alleged "hack-and-leak" incidents. ROA.10323:23-10327:6, ROA.10330:6-11, ROA.10353:13-10354:17. The FBI "likely misled social-media companies into believing the Hunter Biden laptop story was Russian disinformation, which resulted in suppression of the story a few weeks prior to the 2020 Presidential election." J.A.219. Such

deception "is just another form of coercion," J.A.219, and it caused platforms to make decisions "subject to commandeered moderation policies," J.A.65.

C. Joint Participation.

Government is also responsible for private conduct in which it jointly participates, either through conspiracy, *Dennis* v. *Sparks*, 449 U.S. 24, 28-29 (1980), or through "pervasive entwinement" in the private entity's "composition and workings," *Brentwood Acad.* v. *Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298 (2001). The district court found that there was no conspiracy because the platforms were victims of unconstitutional coercion. J.A.229. But if the Court disagrees with the finding of coercion, state action still exists, because there is overwhelming evidence of conspiracy.

Public-private conspiracies to violate constitutional rights operate like their ordinary civil and criminal counterparts. Participants must share the same "general conspiratorial objective" but need not know "the details" of its implementation or the identities of everyone involved. *Rudd* v. *City of Norton Shores*, 977 F.3d 503, 517 (6th Cir. 2020). Each participant in the conspiracy "is liable . . . for the wrongful acts of the other conspirators committed within the scope of the conspiracy." *Proffitt* v. *Ridgway*, 279 F.3d 503, 507 (7th Cir. 2002). Because "conspirators rarely formulate their plans in ways susceptible of proof by direct evidence," a conspiracy is often proved "by circumstantial evidence." *Crowe* v. *Lucas*, 595 F.2d 985, 993 (5th Cir. 1979).

This is the rare case where the conspirators *did* "formulate their plans in ways susceptible of proof by direct evidence." *Id.* The record demonstrates numerous, recurring, and ongoing meetings where

Defendants discussed particular ideas and speakers with platforms, followed promptly by platforms' suppression of those ideas and speakers, *e.g.*, ROA.16182-83; ROA.3798-99; ROA.11484, ROA.17034-49, ROA.11389; ROA.10330:6-11. Emails explicitly memorialize agreements reached during these meetings to censor speech. *E.g.*, ROA.3787 ("As discussed," the platform will expand "our current misinfo policies for COVID-19 vaccines . . . based on the conversation we had last week with the CDC"); J.A.668-69 (listing "commitments" "[p]er our discussion"); ROA.11463 (listing "updates we made as a result of our work together"). Defendants and platforms describe themselves as "partnering," J.A.711, "work[ing] together," ROA.3799, engaged in "joint efforts," ROA.2690, and "100% on the same team" in suppressing alleged misinformation, J.A.730. *See* J.A.215. One email enumerates a lengthy list of censorship actions that Facebook was taking expressly in furtherance of "our shared goal of . . . limiting the spread of [allegedly] harmful information." ROA.2710-11.

Having conspired with platforms to deprive Americans of their First Amendment rights, Defendants are responsible for all actions that platforms took in furtherance of the conspiracy. *Proffitt*, 279 F.3d at 507.

D. Pervasive Entwinement.

A second form of joint participation is "pervasive entwinement." *Brentwood Acad.*, 531 U.S. at 298. When government involvement with a private entity's decisionmaking in an area becomes sufficiently "pervasive," *all* "decisions [in that area] may be considered to bear the imprimatur of the state." *Roberts* v. *La. Downs, Inc.*, 742 F.2d 221, 228 (5th Cir.

1984); *accord Horvath* v. *Westport Libr. Ass'n*, 362 F.3d 147, 154 (2d Cir. 2004); *see also Burton*, 365 U.S. at 720, 725 (state action where the government "so far insinuated itself" into private entity's decisionmaking).

Defendants have extensive involvement in platforms' decisionmaking about content moderation. *See Stein*, 541 F.3d at 148 (finding entwinement where officials "intervened in [the private firm's] decisionmaking, expressing their disappointment" at some decisions and "ma[king] plain their strong preference as to what the firm should do" (brackets omitted)). For example, in addition to switchboarding censorship requests and organizing five sets of recurring censorship-related meetings with platforms, *see* ROA.14392-94, CISA launched and works hand-in-glove with the Election Integrity Partnership to censor election-related speech, J.A.224 ("CISA and the EIP were completely intertwined."). The EIP's purpose is to fill the "massive gap" in government's capabilities to influence platforms' content-moderation decisions directly due to limited resources and "very real First Amendment questions." ROA.14196. The EIP was CISA's idea, ROA.13678, and the EIP was formed "in consultation with CISA," ROA.13679 ("Meeting with CISA to present EIP concept"). *See also* ROA.13251:5-21, ROA.13254:3-20; ROA.13261:5-13263:10.

The EIP refers election-related speech to platforms for censorship via "tickets," ROA.13684, many sourced from "tips" supplied by the CISA-funded Center for Internet Security, copying CISA, *e.g.*, ROA.17413, 17419, 17422, 17432; ROA.13431:18-13432:25. CISA and the EIP "coordinate[]" on "what they [a]re reporting to platforms." ROA.13414:7-12. CISA

sometimes contacts platforms directly to reinforce the EIP's censorship requests. *E.g.*, ROA.17490, 17494. Overlapping CISA-EIP personnel flag content to platforms on behalf of both CISA and EIP. ROA.13370:20-13373:18, ROA.13383:21-13384:10, ROA.13385:14-22; ROA.17490, 17494. The EIP even provides online chat space for real-time collaboration between government officials and platforms on censorship decisions. ROA.13706.

Through the EIP and VP, CISA and other federal officials are intertwined in platforms' censorship decisions on a staggering scale. Across four months of 2020, the EIP monitored 859 million posts on Twitter alone. ROA.13858-59. The EIP's "tickets" encompassed nearly 22 million tweets, ROA.13859, including speech by Hoft in 29,207 original tweets and over 840,000 retweets, ROA.13865. This content was *not* limited to "false election information, such as posts that stated incorrect poll hours," Pet.Br.11, but targeted core political speech, such as "mail-in voting is insecure" and "conspiracy theories about election fraud are hard to discount," ROA.14265-66; *see also* ROA.17412-14 (CISA flagging post for questioning whether "[e]very eligible ballot is counted every election"). "CISA and the EIP [a]re completely intertwined," J.A.224, and the EIP's goal is to shift entire "narratives." ROA.13887.

The prospect of Government having the power secretly to distort the marketplace of ideas and shift entire narratives contradicts our nation's "profound . . . commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). CISA correctly recognized that the First Amendment forbids it to wield this power directly. What CISA and

other Defendants fail to recognize—or refuse to accept—is that the First Amendment also forbids them to wield this power indirectly. *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) ("[W]hat cannot be done directly cannot be done indirectly.").

E. Defendants' Other Arguments Lack Merit.

Defendants' claim that the Fifth Circuit's holding entails sweeping liability for *platforms*, Pet.Br.15-16, 35-36, sounds a false alarm. The platforms' liability for the government's misconduct, if any, is a "different question" not before the Court. *George* v. *Edholm*, 752 F.3d 1206, 1216 (9th Cir. 2014). Holding the government liable does not necessarily entail that the platforms are also liable. *See id.*; *Harvey* v. *Plains Twp. Police Dep't*, 421 F.3d 185, 196 & n.13 (3d Cir. 2005); *Sutton* v. *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 838 (9th Cir. 1999). Here, the district court held that platforms "cooperated due to coercion." J.A.229. "[A] private actor is not engaged in state action simply because she is compelled to take an action by a state actor," though "it seems entirely proper to find that the *state actor* engaged in state action, including whatever actions the private party was compelled to undertake." *Harvey*, 421 F.3d at 196 n.13 (emphasis added).

Finally, if the government's artificially straitened view of *Blum* and other cases is correct, those cases are insufficient to protect First Amendment rights, and the Court should revisit them. If, as the government contends, *Blum* and its progeny consider only whether the private action has been converted to government action, and treat government coercion as the sole mechanism for accomplishing that conversion, that scheme offers an artificially narrow

conception of state action and weakens the freedom of speech by allowing the government to censor Americans so long as it acts through private entities without overt coercion. *See generally* Philip Hamburger, *Courting Censorship*, 4 J. FREE SPEECH L. 195 (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4646028. The First Amendment does not require a strict showing of explicit coercion, but capaciously protects the freedom of speech from any "abridging" (*i.e.*, diminishing) of that freedom. *Id.* § III.B. The First Amendment thus makes clear that the government cannot avoid unconstitutionality simply by avoiding prohibiting or overt coercion in its privatized suppression. *See id.* § III.D-G.

III. The Equities Strongly Favor the Injunction.

The Fifth Circuit rightly concluded that the other equitable factors favor a preliminary injunction. As to the likelihood of irreparable harm to Plaintiffs, Defendants concede that they will persist in the challenged conduct unless enjoined. *See* ROA.26804 ("[I]t is not the government's argument that . . . this . . . will never happen again"); ROA.10421:8-10 ("[W]e've never stopped."). Defendants merely question whether "*these respondents* are likely to suffer imminent harm as a result of that conduct." Pet.Br.46.

The answer is "yes." Communications dating up to the end of written discovery reveal ongoing efforts to pressure platforms to adopt censorship policies affecting both Plaintiffs' own speech and the speech of those whom they follow. *E.g.*, ROA.2662-63 (June 22, 2022) (Facebook bowing to White House pressure to expand censorship policies "in coordination with the CDC" to cover claims about children's COVID-19

vaccines); J.A.789-92 (Hines censored on children's COVID-19 vaccines); J.A.635-36 (Louisiana official censored on children's COVID-19 vaccines). Indeed, mere days before the preliminary-injunction hearing, Hines and Hoft experienced fresh censorship of the kind that Defendants continuously demand of platforms. *See* J.A.786-802. And not only do Defendants "have plans to continue" their censorship activities, but their efforts are "expanding." J.A.251; *see, e.g.*, ROA.2840 (describing CISA's "burgeoning MDM effort"); ROA.17016 (CISA and EIP reporting Hoft's content for censorship); ROA.10327:1-11, ROA.10433:23-10434:6 (CISA- and FBI-hosted meetings with platforms "are continuing"); *see also* J.A.170 (CISA "continues to communicate regularly with social-media platforms . . . about changes to their censorship policies or to their enforcement actions"); J.A.242. "Additionally, past decisions to suppress speech result in ongoing injury as long as the speech remains suppressed, and the past censorship experienced by individual [Plaintiffs] continues to inhibit their speech in the present." J.A.252.

As to the other factors, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976), and "injunctions protecting First Amendment freedoms are always in the public interest," *Walker*, 453 F.3d at 859. Defendants' conduct inflicts "millions of free speech violations," J.A.264, likely "impact[ing] every social-media user," J.A.82.

Defendants offer two countervailing interests, both unpersuasive. First, Defendants worry that the prospect of sanctions for violating the injunction might chill officials' conduct in hypothetical

borderline cases. Pet.Br.47-48. But the same concern applies to any form of legal accountability for constitutional violations, including § 1983 and *Bivens*. *See* Pet.Br.50 (citing *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982)). The solution is not to eliminate accountability but to create a buffer protecting against liability for objectively reasonable mistakes. The law creates many such buffers in other contexts. In the injunction context, as relevant here, the buffer is the rule that "civil contempt should not be resorted to where there is a fair ground of doubt as to the wrongfulness of the defendant's conduct." *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (cleaned up); *see also Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 15 (1945).

Second, Defendants complain that the injunction might prevent officials from speaking on "topics of public concern." Pet.Br.48-50. But the Fifth Circuit's injunction merely forbids officials to "*coerce or significantly encourage* social-media companies to remove, delete, suppress, or reduce" protected speech. J.A.80 (emphasis added). The First Amendment already prohibits them from doing exactly that, *Blum*, 457 U.S. at 1004, so it is hard to see how the injunction prohibits any *legitimate* government speech.

Moreover, as explained above, nothing in the injunction—or the First Amendment—bars officials from advocating for censorship in the abstract. J.A.80. They are barred from "link[ing]" their advocacy to "threat[s]," J.A.112, or making their advocacy concrete by pressuring or encouraging a platform to adopt specific censorship policies or to censor particular posts or speakers. Likewise, nothing in the injunction or the First Amendment bars officials from sharing their opinion on matters of

public health. They are merely barred from pressuring or jointly participating with platforms to censor *other people's* opinions. These distinctions are not hard to grasp, and they impose no significant burden on Defendants beyond what the First Amendment already requires.

IV. The Injunction Is Not Overbroad.

Finally, the injunction is properly tailored. "[T]he scope of injunctive relief is dictated by the extent of the violation established," *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979), and may be as broad as "necessary to provide complete relief to the Plaintiffs," *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2446 n.13 (2018) (Sotomayor, J., dissenting). The injunction here "may be broad, but breadth is warranted" where there is a "record of continuing and persistent violations." *United States* v. *Philip Morris USA Inc.*, 566 F.3d 1095, 1137 (D.C. Cir. 2009).

Defendants complain that the injunction extends to "*all* social-media platforms." Pet.Br.47. But Defendants' *misconduct* extends to all major social-media platforms. For example, the FBI and CISA meet regularly with at least seven platforms, J.A.158-59; and the EIP works with nine, J.A.185; ROA.13693. Hoft's "accounts have experienced censorship on all major social-media platforms." J.A.605. In addition, social-media content (including Plaintiffs' content) is routinely *cross-posted* across various platforms, thus facing censorship across platforms. Further, Plaintiff States have a sovereign interest in following their citizens' "activity and mentions on multiple social media platforms," which they do "on a daily or even hourly basis." J.A.614-15; J.A.634.

Next, Defendants complain that the injunction extends to "*all* posts by *any* person." Pet.Br.47. But

Defendants' activities have the "result of suppressing millions of protected free speech postings by American citizens," including "millions of Missourians and Louisianans" whose speech the States have a sovereign interest in hearing. J.A.201, 237. The record includes numerous examples of speech by nonparties suppressed at Defendants' behest that the individual Plaintiffs have a First Amendment right to access. J.A.701-08; J.A.782-83. "[T]he fact that such extensive examples of suppression have been uncovered through limited discovery suggests that [they] could merely be a representative sample of more extensive suppressions." J.A.238. Finally, Defendants ignore that censoring nonparties' "re-posting, re-tweeting, or otherwise amplifying [Plaintiffs'] content," J.A.610; *e.g.*, ROA.13865, indirectly censors Plaintiffs themselves. Given "the extent of the violation established," *Califano*, 442 U.S. at 702, limiting the injunction to "just respondents[']" posts, Pet.Br.47, would not provide complete relief. To the extent that the injunction "advantage[s] nonparties, that benefit [i]s merely incidental." *Trump*, 138 S. Ct. at 2427 (Thomas, J., concurring).

Finally, Defendants complain that the injunction extends to "*all* topics" with no carveouts for unprotected speech. Pet.Br.47. But the Fifth Circuit correctly explained that "no carveouts are needed" because its injunction extends only to "protected free speech." J.A.81.

On all these points, Defendants misapprehend both Plaintiffs' injuries and the fundamentally interconnected nature of online discourse. Plaintiffs avidly post, comment, and re-post social-media speech by the speakers and on the topics that Defendants pressure platforms to silence. By silencing speakers

and entire viewpoints across social-media platforms, Defendants systematically injure Plaintiffs' ability to participate in free online discourse.

CONCLUSION

The Fifth Circuit's judgment should be affirmed.

February 2, 2024

Respectfully submitted,

ELIZABETH B. MURRILL
LA Attorney General
Counsel of Record
J. BENJAMIN AGUIÑAGA
Solicitor General
TRACY SHORT
Ass't Attorney General
D. JOHN SAUER
Sp. Ass't Attorney General
1885 N. Third St.
Baton Rouge, LA 70802
(225) 326-6766
MurrillE@ag.louisiana.gov
Counsel for Louisiana

ANDREW BAILEY
MO Attorney General
JOSHUA M. DIVINE
Solicitor General
TODD A. SCOTT
Senior Counsel
CHARLES F. CAPPS
Counsel
207 W. High St.
P.O. Box 899
Jefferson City, MO 65102
(573) 751-8870
Joshua.Divine@ago.mo.gov
Counsel for Missouri

JOHN J. VECCHIONE
JENIN YOUNES
ZHONETTE BROWN
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 918-6905
John.Vecchione@ncla.legal
Counsel for Dr. Jayanta Bhattacharya, Dr. Martin Kulldorff, Dr. Aaron Kheriaty, and Jill Hines

JOHN C. BURNS
Burns Law Firm
P.O. Box 191250
St. Louis, MO 63119
(314) 329-5040
John@burns-law-firm.com
Counsel for Jim Hoft