No. 23-411

In the Supreme Court of the United States

VIVEK H. MURTHY, ET AL., PETITIONERS,

v.

MISSOURI, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR STANFORD UNIVERSITY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS*

The Leland Stanford Junior University was founded in 1891 by Leland and Jane Stanford, in memory of their son.[1] In the words of Jane Stanford, the moving spirit of the founders was the "love of humanity and a desire to render the greatest possible service to mankind." The university's "chief object" was "the instruction of students with a view to producing leaders and educators in every field of science and industry." Today, Stanford enrolls nearly 17,000 students between the undergraduate, graduate and professional schools, who study in virtually all areas of the liberal arts and sciences.

In furtherance of its mission to support cutting-edge research in critical areas of study, Stanford created the Stanford Internet Observatory (SIO), a cross-disciplinary program that studies abuse on social media and other information technologies, including child exploitation and harassment. Together with other academic and research institutions, SIO founded the Election Integrity Partnership (EIP) and the Virality Project (VP), collaborative projects that tracked and studied misinformation, disinformation, and rumors concerning U.S. elections and COVID-19 vaccines, respectively. Stanford academics, researchers, and students participated in EIP and VP, contributing their time and talents to the organizations' efforts to better understand how misinformation, disinformation, and rumors spread online, and producing state-of-the-art academic research in this emerging field.

[1] No party or counsel for a party made a monetary contribution to the preparation or submission of this brief. No counsel for a party authored this brief in whole or in part.

Stanford was not named as a defendant in this lawsuit, but assertions about the conduct of SIO researchers and Stanford students appear throughout the underlying complaint, which alleges that Stanford personnel conspired with federal officials to censor speech on social media. Stanford researchers and students likewise feature prominently in the district court's preliminary injunction decision below. The court found that SIO's, EIP's, and VP's "actions are relevant" to this lawsuit, despite not being parties, "because government agencies have chosen to associate, collaborate, and partner with these organizations." J.A. 226. And the district court enjoined the government from "collaborating, coordinating, partnering, switchboarding, and/or jointly working with the Election Integrity Partnership, the Virality Project, [or] the Stanford Internet Observatory … for the purpose of urging, encouraging, pressuring, or inducing in any manner removal, deletion, suppression, or reduction of content posted with social-media companies containing protected free speech." J.A. 282.

On appeal, the Fifth Circuit correctly vacated this provision of the district court's injunction, recognizing that the injunction "may implicate private, third-party actors that are not parties in this case and that may be entitled to their own First Amendment protections." J.A. 382. Even after respondents requested rehearing to affirm the injunction against SIO, EIP, and VP, the court of appeals declined to do so. J.A. 78-79.

In parallel with this suit, Stanford has been named as a defendant in a separate lawsuit brought by two of the respondents here, Jill Hines and Jim Hoft, which is pending before the same district court. See *Hines* v. *Stamos*, No. 3:23-cv-571 (W.D. La.). That lawsuit seeks to hold Stanford liable for violating the plaintiffs' First and Fourteenth Amendment rights (notwithstanding the fact that

Stanford is not a state actor), and it seeks to enjoin Stanford and its researchers from communicating with the government and with social media platforms about misinformation on the Internet.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a question about when otherwise private conduct becomes state action in the context of content moderation on social media platforms. Respondents claim that the content moderation decisions of private social media platforms became state action by virtue of alleged government "coercion" or "significant encouragement." Respondents also claim (both in this case and a related case two of them filed against Stanford) that Stanford, its researchers, and its students engaged in state action in violation of respondents' constitutional rights when they researched, identified, and spoke to the government and social media platforms about misinformation online.

The government explains how the Fifth Circuit's decision finding government "coercion"—thus transforming otherwise private conduct by social media platforms into state action—is incorrect and threatens the government's ability to speak on matters of public concern. The government also correctly explains that respondents lack standing.

Stanford submits this brief to highlight another critical problem with respondents' limitless state-action theory and the district court's decision to embrace it: private research universities like Stanford and their researchers are not state actors subject to constitutional constraints just because they speak to the government about their research. Indeed, the underlying research by Stanford, its communications with the government, and its flagging potentially violative content to social media platforms are all conduct that is itself protected by the First Amendment.

The Fifth Circuit correctly vacated the provision of the district court's injunction that prohibited the government from talking to Stanford, acknowledging that it implicated Stanford's own First Amendment rights. But Stanford anticipates that respondents will continue pressing in this Court their expansive theory of state action, their factual misrepresentations about Stanford's research work, and their attempts to curtail Stanford and its researchers' First Amendment rights.

In deciding this case, this Court, like the Fifth Circuit, should reject respondents' factual misrepresentations and efforts to interfere with the Stanford Internet Observatory's First Amendment-protected work researching online narratives and communicating their findings to the government and social media platforms. Private universities engage in core academic work like this every single day, and they have long shared their research findings and views with the government and other media outlets. This Court should decline to adopt any state-action theory under which communications or collaboration with the government turn a private research institution's work into state action, potentially chilling vitally important research and policy discussion on issues of great public concern.

STATEMENT

1. Founded in 2019, the Stanford Internet Observatory (SIO) is a non-partisan, cross-disciplinary program of research, teaching, and policy engagement that studies abuse in current information technologies, with a focus on potentially harmful information on social media. SIO was created to learn about the abuse of the Internet in real time, to develop the premier curriculum on trust and safety, and to translate research discoveries into training and policy innovations for the public good. SIO studies and publishes research on, among other subjects, the

prevalence of online child sexual abuse, promotion of self-harm, and influence campaigns by foreign state and non-state actors.

Beginning in 2020, SIO partnered with other academic and research organizations to convene the Election Integrity Partnership (EIP) and Virality Project (VP). The primary purpose of these programs was to conduct research about informational trends on the Internet, specifically related to U.S. elections and the COVID-19 vaccines. These programs operated transparently and publicly, publishing blogposts, weekly briefings, academic papers, and investigative reports related to election and vaccine misinformation, disinformation, rumors, and propaganda.

EIP was founded in 2020 as a non-partisan research project to document false and misleading online narratives about the 2020 election, to provide a basis for further academic research about online misinformation dynamics and responses, and to provide election officials with reports about what was happening online in their jurisdictions. EIP's analysis relating to the 2020 election was focused on demonstrable falsehoods about the time, place, and manner of voting; threats intended to deter voting; incitement to tamper with or disrupt election processes, such as through the impersonation of an election official; and efforts to delegitimize valid election results without evidence. For example, EIP analyzed false reports about poll closures, procedures for online voting, discarded ballots, and bomb threats. EIP did not study alleged falsehoods about specific candidates, parties, or partisan political issues.

VP was established in 2021 for the primary purpose of studying the most widespread online narratives regarding the effectiveness and safety of the COVID-19 vaccines. VP collected data between February and August

2021, during the initial rollout of the COVID-19 vaccine. VP's work focused on tracking online narratives related to the COVID-19 vaccines' safety, efficacy, necessity, development, and distribution, as well as conspiracy theories surrounding the vaccines. VP's goal was to facilitate awareness for public health officials and medical professionals seeking to communicate accurate information to the public in response to online misinformation.

EIP and VP were expressly non-partisan; and neither EIP nor VP received any government funding for their activities involving the 2020 election or the COVID-19 vaccines. EIP coordinated with the Elections Infrastructure Information Sharing & Analysis Center (EI-ISAC), a non-partisan nonprofit organization that worked with state and local election officials from both major political parties. And EIP's final report on the 2020 election explained how "partisans on both sides" spread the "popular misinformation narrative[]" that "the election had been 'stolen' before it even took place." C.A. ROA 13,726. Although EIP identified more instances of misinformation from right-leaning social-media accounts, especially claims that the election was rigged or stolen (see C.A. ROA 13,863-13,881), its final report also documented instances of "misinformation originating and spreading almost solely via left-leaning accounts" (C.A. ROA 13,862). See, *e.g.*, C.A. ROA 13,726, 13,730-13,731, 13,749-13,750, 13,866, 13,870-13,871. Likewise, VP communicated its findings in public blogposts and reports, which were made available to federal, state, and local public health officials without regard to politics or party. And VP documented vaccine-related narratives from across the political spectrum. C.A. ROA 13,973, 14,004, 14,032-14,033. Both EIP and VP were research projects, not political advocacy projects.

EIP and VP instituted numerous safeguards to ensure that their work was carried out according to the highest academic standards and in an unbiased manner so that their research findings would be valid and useful. At Stanford, most of the research for the EIP and VP was conducted by Stanford undergraduate and graduate students, with supervision by SIO staff. Stanford student researchers received training on how to apply objective criteria for evaluating claims or narratives and were clearly instructed that partisan political issues or candidates were outside the scope of the projects. Stanford students and staff also used recognized academic techniques to minimize potential researcher-bias, including applying multiple tiers of analyst review and comparing results of different student analysts to ensure reliability.

EIP and VP used an internal ticketing system to log content for timely analysis as well as future research. EIP tickets were primarily created by undergraduate students, but certain external organizations, including EI-ISAC, could submit potential misinformation to EIP for review. C.A. ROA 13,687-13,694, 13,704. No government entity submitted EIP tickets except for the State Department's Global Engagement Center, which submitted a small number of tickets (fewer than 20), primarily involving suspected Russian misinformation. See C.A. ROA 13,718. VP tickets functioned similarly but were created exclusively internally; no government entity created tickets. See C.A. ROA 13,985-13,987. Both EIP and VP tickets could be shared externally—including with social media platforms or with groups like EI-ISAC (in EIP's case)—by "tagging" the outside organization in the ticket (thereby sharing portions of the ticket with the tagged organization). C.A. ROA 13,695, 13,703, 13,987.

EIP and VP did not censor or target anyone's speech. The vast majority of EIP's and VP's work consisted of

researching and analyzing online information and publishing interim reports and a final report about this research. In limited cases, EIP and VP escalated some instances of potentially violative content to the social media platforms, so that the platforms could take appropriate action according to their own policies. But the social media platforms were the sole decisionmakers. EIP and VP had no power to change platforms' policies, take down posts, or suspend users.

Of the 639 tickets in EIP's final dataset, "363 tickets tagged an external partner organization to either report the content, provide situational awareness, or suggest a possible need for fact-checking or a counter-narrative." C.A. ROA 13,713. When tickets tagged a social media platform, they "contained a list of URLs containing the potentially violative content being spread—for example, the URL for a Facebook post or YouTube video." C.A. ROA 13,715. "[P]latforms took action on 35% of URLs that [EIP] reported to them. 21% of URLs were labeled, 13% were removed, and 1% were soft blocked. No action was taken on 65%." C.A. ROA 13,716. And even when the platforms did take some action, they most often simply affixed labels to posts—like "Get the facts about mail-in ballots," or "Learn how voting by mail is safe and secure"—with links to trusted sources of information. C.A. ROA 13,893.

Likewise, only a small number of VP tickets were ever flagged to any platform. Of the 911 tickets in VP's final dataset, only "174 were referred to platforms for potential action." C.A. ROA 13,987. This process enabled VP to give platforms "situational awareness of high-engagement material that appeared to be going viral, so that these partners could determine whether something might merit a rapid public or on-platform response (such as a label)." C.A. ROA 13,987. In other words, EIP and VP merely alerted platforms to instances of viral claims that

potentially violated their policies; the platforms always had the final say about if or how to respond.

2. The operative complaint in this case names only federal agencies and officials as defendants, but it includes significant allegations about EIP's and VP's work. Respondents allege that EIP was "[b]acked by the authority of the federal government, including DHS, CISA, the State Department, and State's Global Engagement Center [GEC]," and that EIP "successfully sought and procured extensive censorship of core political speech by private citizens." J.A. 524, ¶ 408. And respondents allege that EIP "set up a concierge-like service in 2020 that allowed federal agencies like [CISA] and [GEC] to file 'tickets' requesting that online story links and social media posts be censored or flagged by Big Tech." J.A. 523, ¶ 405. Respondents similarly allege that Stanford and the other founders of EIP "collaborated on the Virality Project, which tracks and analyzes purported COVID-19 vaccine misinformation and social media narratives related to vaccine hesitancy." J.A. 527, ¶ 421 (internal quotation marks omitted).

In May 2023, months after filing their suit against the government, respondents Jill Hines and Jim Hoft filed a separate suit against three of the institutions that created the EIP and VP, including Stanford, as well as several individual researchers, including two Stanford staff members. The case, captioned *Hines* v. *Stamos*, No. 23-cv-571 (W.D. La.), asserts that, by recommending changes to social media platforms' content moderation policies and identifying potentially violative content to the platforms, EIP and VP conspired with the government to violate the plaintiffs' civil rights in violation of 42 U.S.C. § 1985(3), acted under color of state law to violate the plaintiffs' civil rights in violation of 42 U.S.C. § 1983, and violated the plaintiffs' First Amendment rights.

Because private actors cannot violate the First Amendment, the lawsuit seeks to cast the private institutions and researchers that make up EIP and VP as state actors. It alleges that EIP and VP "collaborate closely with federal, state, and local government officials to monitor and censor disfavored viewpoints on social media." Am. Compl. ¶ 1, *Hines* v. *Stamos*, No. 23-cv-571 (W.D. La.), ECF No. 77 ("*Hines* Am. Compl."). As to EIP, the plaintiffs allege that "federal and state-level government officials serve as … 'trusted partners,' 'stakeholders,' and 'flaggers' of misinformation for the EIP." *Id.* ¶ 74. As to VP, the plaintiffs similarly allege that that VP "include[d] federal agencies and state public health officials as key 'stakeholders'" who "provided tips, feedback, and requests to assess specific incidents and narratives." *Id.* ¶ 300.

The lawsuit seeks to certify a massive class action of essentially all social-media users on all social-media platforms, covering, by the plaintiffs' own estimate, at least "hundreds or thousands of speakers" and "millions of followers." *Id.* ¶ 424. The plaintiffs request compensatory and punitive damages, and seek to enjoin the defendants from continuing their research and from communicating their findings to the public, social media platforms, and the government. *Id.*, Prayer for Relief C-H.

ARGUMENT

I. The First Amendment Protects Academic Institutions' Rights To Conduct Research and To Communicate Their Findings to the Public and the Government

The Fifth Circuit correctly vacated the provision of the district court's injunction that prohibited the government from "collaborating, coordinating, partnering, switchboarding, and/or jointly working with the Election Integrity Partnership, the Virality Project, [or] the

Stanford Internet Observatory … for the purpose of urging, encouraging, pressuring, or inducing in any manner removal, deletion, suppression, or reduction of content posted with social-media companies containing protected free speech." J.A. 282; see J.A. 79, 382. The court of appeals stated that such an injunction "may implicate private, third-party actors that are not parties in this case and that may be entitled to their own First Amendment protections." J.A. 79, 382.

Indeed, it did. Stanford *is* entitled to its own First Amendment protection when it talks to the government and social media companies about its research into misinformation online (and any other topic). This Court should reaffirm that courts cannot enjoin academic institutions from—or impose civil liability on them for—engaging in a robust dialogue with the public, private actors, and the government on matters of exceptional public concern.

A. Universities like Stanford—perhaps more than any other civic institutions—embody the "marketplace of ideas" in American life, *Healy* v. *James*, 408 U.S. 169, 180 (1972), and play a "crucial role … in the dissemination of ideas in our society," *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 195 (1990). Academic freedom is "a special concern of the First Amendment," not only because of its value to teachers and students, but because of its "'vital role in [our] democracy.'" *Keyishian* v. *Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (quoting *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957)). To protect that vital role, this Court has emphasized, time and time again, "[t]he essentiality of freedom in the community of American universities." *Keyishian*, 385 U.S. at 603 (1967) (quoting *Sweezy*, 354 U.S. at 250); see *Whitehill* v. *Elkins*, 389 U.S. 54, 60 (1967) (same); *Healy*, 408 U.S. at 180-181 ("[W]e break no new

constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom").

Academic freedom at Stanford means that the university's faculty, scholars, researchers, and students are free to investigate all manner of subjects, free to collaborate with other scholars and organizations, and free to communicate their findings to the public, to private enterprise, and to the government. Those freedoms empower Stanford to educate its students, contribute to the public good, and address today's most pressing societal challenges, like the integrity of U.S. elections and public-health responses to the COVID-19 pandemic.

As respondents themselves acknowledge, these are "matters of great public concern." Resp. to Appl. for Stay of Injunction 22. And it is well settled that Stanford's speech on such topics "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder* v. *Phelps*, 562 U.S. 443, 452 (2011) (cleaned up). "Political speech regarding a public election lies at the core of matters of public concern protected by the First Amendment." *Wiggins* v. *Lowndes County*, 363 F.3d 387, 390 (5th Cir. 2004). And speech about COVID-19 vaccines is part of an ongoing "public debate" regarding safe and effective responses to the COVID-19 pandemic. *Snyder*, 562 U.S. at 458. Accordingly, Stanford's speech—to the public, to social media platforms, and to the government—concerning misinformation related to elections and COVID-19 vaccines "is entitled to special protection." *Snyder*, 562 U.S. at 452 (cleaned up).

The ability of academic research programs like SIO, EIP, and VP to speak freely with government actors in particular is vital to their work. It allows them to disseminate valuable research findings to policymakers and apply academic expertise to real-world problems, and it

enables them to learn from election and public-health officials with boots-on-the-ground experience. Moreover, non-governmental institutions like SIO, EIP, and VP are often best able to apply cutting-edge research and technology to respond to emergent challenges. The open exchange of ideas between academic institutions and government (whether relating to elections, COVID-19 vaccines, foreign interference, or any other subject of national importance) allows for a diversity of perspectives and approaches in addressing complex challenges. It promotes effective and evidence-based policymaking. And it provides unique educational opportunities for students to gain valuable practical experience and prepare for future careers in these areas of critical importance.

B. Respondents' theory of the case threatens to undermine this important work. The injunction that they won in the district court below—and that they seek in *Hines* v. *Stamos*—threatens Stanford's ability to fulfill its core mission of advancing knowledge, educating students, and serving the public good. It would limit universities', students', and faculty's ability to participate in the democratic processes by speaking with government officials. It would limit government actors from drawing on private resources and expertise to address today's greatest societal challenges. It would limit the input of subject-matter experts and researchers into matters of undeniable public concern, leading to less-informed and less-effective policymaking. And it would limit students' access to valuable pedagogic, academic, and career opportunities. This is not a hypothetical threat: Respondents in the parallel litigation against Stanford and others seek to permanently enjoin two universities, several researchers, and other organizations from speaking to the public, to social media platforms, and to the government on these important topics. See *Hines* Am. Compl., Prayer for Relief C.

Respondents, like the district court below, ignore SIO's, EIP's, and VP's First Amendment rights, instead characterizing their speech as "censorship" (*e.g.*, J.A. 184, 188-191, 222) and their policy recommendations as "call[s] for expansive censorship of social-media speech" (J.A. 188). That characterization is fundamentally wrong. At no time did EIP or VP ever censor speech or call for the censorship of speech. Nor did EIP or VP ever take down social-media posts or apply labels to posts or have any power to do so. Indeed, very little of EIP's and VP's time was spent interacting with social media platforms or the government in any capacity. Instead, EIP's and VP's work was overwhelmingly devoted to researching and analyzing online information and publishing reports about their research.[2] That work included identifying false or misleading narratives and countering or contextualizing them in public reports, blogposts, and social-media posts—classic counter-speech.

But even when EIP and VP flagged violative content to the platforms (just as numerous individuals do every day), the platforms—not EIP or VP—always exercised ultimate control over their policies and content-moderation decisions. In the overwhelming majority of cases, the platforms either did nothing (65%) or simply applied a label to the post (21%). C.A. ROA 12,939. Only 13% of flagged posts were ever removed. *Ibid.* And even when a post plainly violated a platform's policies, the platforms often applied, on a case-by-case basis, "a variety of 'newsworthiness' exceptions, which allowed some high-profile repeat spreaders … to evade bans." C.A. ROA 13,114.

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[2] Take, for example, VP's Weekly Briefing #23 from June 2, 2023, *available at* https://bit.ly/3toCHaT, which identifies viral traditional and social media narratives surrounding the COVID-19 vaccines. All of VP's weekly briefings were posted publicly and remain available on VP's website, viralityproject.org.

Simply put, the platforms treated EIP's and VP's notifications as simply that: notifications, which they were free to—and most often did—ignore. In this regard, EIP's and VP's limited interactions with social media platforms are no different than professors and students writing letters to the editor requesting retractions or corrections. Such interactions do not violate anyone's First Amendment rights. Indeed, they are *protected by* the First Amendment: The letter writer has a First Amendment right to write the letter, and the editor has a First Amendment right to act (or not) on the request.

EIP's and VP's speech to social media platforms about content on those platforms is not censorship; it is protected speech and counter-speech on matters of utmost public concern. Such conduct is "core political speech" for which "the importance of First Amendment protections is at its zenith." *Meyer* v. *Grant*, 486 U.S. 414, 422, 425 (1988) (internal quotation marks omitted). The Court should make clear, in reversing the decision below and the injunction entered by the district court, that Stanford, its faculty, its researchers, and its students enjoy their own First Amendment rights and that they cannot be enjoined from, or punished for, speaking to the public, to social media platforms, or to the government about misinformation on the Internet.

II. Private Universities Do Not Become State Actors By Engaging with the Government About Their Research

The Court is asked in this case to decide when the government's involvement with a private actor transforms private conduct into state action subject to constitutional constraints. This Court's analysis will therefore implicate not only what the government can say to private actors, but what private institutions, like universities, can do in collaboration with the government. Indeed, in a separate but related lawsuit, two respondents here (Jill Hines

and Jim Hoft) explicitly seek to hold Stanford and its researchers liable under 42 U.S.C. § 1983 and § 1985(3), and directly under the First Amendment, for their communications with federal and state officials about misinformation online. This should worry the Court because, as described above, private research institutions frequently communicate or collaborate with the government when studying pressing issues. *Supra* Section I. Accordingly, this Court should exercise caution to ensure that its decision does not chill important research and academic work by private institutions.

In particular, the Court should not embrace the district court's legal analysis of SIO's, EIP's, and VP's supposed intertwinement with the government. The district court adopted respondents' theory below (and plaintiffs' theory in *Hines* v. *Stamos*) that Stanford and the other members of EIP and VP are so "completely intertwined" with a slew of government agencies that their conduct can be imputed to the government. See J.A. 224. The court came to that conclusion based on findings that a few Stanford students interned at CISA, that a Stanford researcher held a role on a CISA advisory committee (alongside dozens of other people), that EIP's final report identified CISA as a "partner in government," that EIP later received a grant from the National Science Foundation, and that Stanford hosted a virtual townhall with the Surgeon General's Office about COVID-19. See J.A. 184-190, 222-226.

The court's findings about Stanford contain numerous factual errors. Among many other errors, the court invented quotations, stated that EIP had flagged 22 million tweets when the real number was roughly 0.01% of that, and stated that Stanford had flagged respondent Jill Hines's posts when there was no evidence that it did. See *infra* Section III. But even putting those errors aside,

Stanford's contacts with the government come nowhere close to the kind of pervasive entanglement this Court has found legally sufficient to transform private academic institutions into state actors. This Court has held that a private party may be a state actor "when it is 'entwined with governmental policies,' or when government is 'entwined in [its] management or control.'" *Brentwood Acad.* v. *Tennessee Sec. Sch. Athletic Assn.*, 531 U.S. 288, 296 (2001) (quoting *Evans* v. *Newton*, 382 U.S. 296, 299, 301 (1966)). But to "justify characterizing an ostensibly private action as public instead," plaintiffs must demonstrate "pervasive entwinement to the point of largely overlapping identity." *Id.* at 303. Such entwinement exists only when it is so pervasive that, "[t]here would [have been] no recognizable [private institution], legal or tangible, without the [government] officials, who d[id] not merely control but overwhelmingly perform[ed] all but the purely ministerial acts by which the [private institution] exist[ed] and function[ed] in practical terms." *Brentwood Acad.*, 531 U.S. at 300. Certainly, "the mere perception of governmental control is insufficient" to meet this high bar. *P.R.B.A. Corp.* v. *HMS Host Toll Roads, Inc.*, 808 F.3d 221, 226 (3d Cir. 2015) (citing *San Francisco Arts & Athletics, Inc.* v. *U.S. Olympic Comm.*, 483 U.S. 522, 545 n.27 (1987)). Nor does "mere cooperation … rise to the level of merger required for a finding of state action." *Marie* v. *American Red Cross*, 771 F.3d 344, 364 (6th Cir. 2014).

As the government's opening brief explains (at 43-45), the Fifth Circuit's interpretation of state action to include mere "entanglement in a party's independent decision-making" (J.A. 36) is totally out of step with these precedents. And, troublingly, it would sweep in private conduct done at the mere encouragement of, or in consultation with, government officials. Indeed, the Fifth Circuit cited as entanglement the fact that "CISA officials

affirmatively *told* the platforms whether the content they had 'switchboarded' was true or false." J.A. 68. And the district court cited the fact that social media platforms solicited CDC's views on the veracity of specific claims. J.A. 138-139. None of this comes close "to the point of largely overlapping identity." *Brentwood Acad.*, 531 U.S. at 303.

Academic institutions engage in all manner of collaboration with the government. Universities like Stanford operate government-owned and funded laboratories that research everything from particle physics to new vaccines to crop yields to nuclear energy. Government officials give lectures and participate in panel discussions at universities, and academics and researchers likewise present their research and findings to government officials and often serve in positions in government or on government advisory committees. Students regularly complete university-funded internships at government agencies like CISA or the Department of Justice. These examples only scratch the surface. But this Court's cases make clear that the mere fact that universities, researchers, and students collaborate with the government on projects that are of both academic and societal importance does not render all of that private conduct state action. The Court should therefore be careful not to embrace any aspect of the Fifth Circuit's decision that would convert academic collaboration with the government—of the sort that academic institutions engage in all the time—into state action.

III. This Court Should Not Accept Respondents' Factual Misrepresentations About Stanford's Work

The Fifth Circuit did not accept any of the district court's factual findings about the EIP and VP that underlay the now-vacated portion of the district court's injunction. Those findings are no longer operative in light of the vacatur, and they were clearly erroneous when issued. Stanford highlights here some of the most obvious errors

and urges the Court not to take at face value the district court's description of the record.

Respondent Jill Hines. The court made specific (and erroneous) factual findings about respondent Jill Hines that are not supported by the record. The court stated that "Plaintiff Hines of the Health Freedom Louisiana was flagged by the Virality Project to be a 'medical freedom influencer' who engages in the 'tactic' of 'organized outrage' because she created events or in-person gatherings to oppose mask and vaccine mandates in Louisiana." J.A. 190-191.

That statement is false. There is no evidence—not in the record, not anywhere—that anyone involved with VP ever "flagged" Jill Hines or Health Freedom Louisiana, ever shared any of their posts with a social media platform, or even read their posts. The only source the court cited for this finding is VP's final report (see J.A. 191 n.610), which identifies the *concept* of "health freedom" as "[o]ne of the primary long-standing themes of anti-vaccine distribution narratives." C.A. ROA 14,009. But nowhere does the report mention Jill Hines or Health Freedom Louisiana or any of their posts, much less describe them as "medical freedom influencers" who engaged in any particular tactics. Nor do any of the numerous briefings, blog posts, reports, and other materials published by VP. Indeed, even Hines herself does not claim that VP flagged her or her organizations' posts. See J.A. 626-632, 786-795; C.A. ROA 1311-1316. This erroneous finding is especially concerning to Stanford because Jill Hines is a plaintiff in the parallel lawsuit, despite the fact that her posts were never flagged by VP.

EIP's design and purpose. Four times in its opinion, the district court claimed that SIO research manager Renée DiResta stated that "the EIP was designed to 'get around unclear legal authorities, including very real First

Amendment questions' that would arise if CISA or other government agencies were to monitor and flag information for censorship on social media." J.A. 176; see J.A. 184, 222, 226, 294. But DiResta did not state that EIP was designed to "get around" anything; these are words the district court attributed to her without any basis in the record at all. The transcript that the district court cited to support its repeated misquotation contains no such language. DiResta did observe: "*There were* unclear legal authorities, including very real First Amendment questions" related to the government's interaction with online speech. C.A. ROA 14,196 (emphasis added). She merely acknowledged the uncontroversial proposition that *private* institutions and persons (like Stanford and its researchers) can take actions that the government would not have the capacity or, in some cases, legal authority to take.[3]

The court's repeated misquotation of DiResta's statement is particularly material because it was a key basis for its finding that EIP was "designed" to "get around" the First Amendment. That finding is categorically false. EIP was designed as a nonpartisan, nonpolitical academic research project. And its purpose was to research and analyze misinformation regarding U.S. elections and to make its findings widely available through reports and peer-reviewed academic articles. Private institutions routinely carry out research projects and countless other

[3] The district court also claimed that DiResta "ha[s] [a] role[] in CISA" because "she serves as 'Subject Matter Expert' for CISA's Cybersecurity Advisory Committee." J.A. 174. That is inaccurate and misleading. DiResta does not have a role in CISA. She is simply listed, among dozens of other people, as an independent expert who may be available to brief one of CISA's advisory committees on subjects within her expertise.

activities that the government does not have the capacity to engage in; that is a feature, not a bug, of our democracy.

Flagging "millions of social-media posts" and "almost twenty-two million" tweets. The court fundamentally misunderstood the number of social-media posts EIP flagged as misinformation to social media platforms. The court stated that "[t]he tickets and URLs encompassed millions of social-media posts, with almost twenty-two million posts on Twitter alone." J.A. 186. That is false. EIP shared a mere 4,832 URLs with *all* social media platforms. C.A. ROA 13,715. The 22 million tweet number was EIP's estimate, calculated *after* the project completed, of how many total tweets across all of Twitter even *mentioned* one of the narratives EIP studied—for example, how many total tweets mentioned "Dominion," a popular false narrative. C.A. ROA 13,859. These 22 million tweets could have been supportive of the narrative, a refutation, or just a discussion. See C.A. ROA 13,859. Only a tiny fraction (~0.01%) of these total tweets were part of a ticket or were flagged as containing prospective misinformation in the leadup to the election. C.A. ROA 13715. And, as described above, only a fraction of the URLs EIP shared with social media platforms resulted in any action being taken at all. C.A. ROA 13,716.

Flagging "truthful reports" and "exaggeration." The district court fundamentally misunderstood what EIP classified as mis- and disinformation. The court stated that "EIP sometimes treats as 'misinformation' truthful reports that the EIP believes 'lack broader context.'" J.A. 186. That is incorrect. EIP defined misinformation as "information that is false"—*i.e.*, not truthful—"but not necessarily intentionally false," whereas disinformation is "false or misleading information that is purposefully seeded and/or spread for an objective." C.A. ROA 13,921. The phrase "lack broader context" appeared once in

EIP's final report, not in a general description of what EIP considered misinformation but in a single incident involving a "poll watcher [who] was wrongfully denied entry to a Pennsylvania polling station." C.A. ROA 13,861. EIP described that incident as misinformation in its final report because it was used by partisan actors to "falsely claim that this was evidence of illegal actions taking place in the polling station" that were "politically motivated," when in fact the poll watcher was not denied entry for political reasons. *Ibid.* Although EIP noted that a video of the incident "lacked broader context," what made it misinformation was its use to support "false" claims. *Ibid.*

The court also pointed to the Gateway Pundit, "one of the top misinformation websites" identified by EIP. J.A. 186. The court stated that "EIP did not say that the information [shared by Gateway Pundit] was false," only that Gateway Pundit engaged in "exaggeration." *Ibid.* That is plainly incorrect. For one, exaggeration—especially intentional exaggeration to create a false narrative—is a type of falsehood. See *Exaggerate*, Oxford English Dictionary, www.oed.com ("To magnify *beyond the limits of truth*; to represent something as greater *than it really is*." (emphasis added)). In any event, EIP in fact identified many instances of "false" information published and shared by Gateway Pundit. See, *e.g.*, C.A. ROA 13,734, 13,768, 13,770, 13,830. EIP's assessment was clear: "[Gateway Pundit] spread *false* narratives of election fraud built upon *misinterpretations* of statistics and was active in spreading the *false* Dominion conspiracy theory." C.A. ROA 13,872-13,873 (emphasis added). The court did not identify a single piece of evidence supporting its erroneous finding that EIP flagged posts that EIP regarded as "truthful." J.A. 186.

"Targeting . . . domestic speakers." The court asserted that EIP stated that it was "not targeting foreign

disinformation, but rather 'domestic speakers.'" J.A. 187-188. This is yet another invented quotation. The source the court purports to quote (EIP's final report) does not use the term "domestic speakers"—not on the page the court cited, not anywhere.

More fundamentally, neither EIP nor VP "target[ed]" "speakers" of any sort. EIP and VP collected and analyzed instances of misinformation, disinformation, and rumors from across the Internet regardless of the source or speaker. Once it concluded its data collection (*after* the 2020 election), EIP performed an aggregate analysis of the sources of the narratives it identified. Through that analysis, EIP concluded that "much of the misinformation in the 2020 election was pushed by authentic, domestic actors," as opposed to anonymous, fictitious, or foreign actors. C.A. ROA 13,889, 13,911. Likewise, VP determined, after concluding its data collection, that foreign actors' reach "appeared to be far less than that of domestic actors." C.A. ROA 13,959. But that *post hoc* analysis does not mean that EIP or VP was "targeting … domestic speakers." All it shows is that, based on the projects' subsequent analysis, domestic actors spread most of the instances of misinformation EIP and VP catalogued. And there is nothing nefarious about a domestic research organization studying domestic speech about matters of public concern.

SIO's and EIP's contacts with CISA. The district court put great emphasis on CISA's "relationships with researchers at Stanford University" and other institutions. J.A. 172. But its findings are not supported by the record and rely on mischaracterizations of key facts. CISA did not "c[ome] up with the idea of having some communications with the EIP." *Ibid.* Prior to EIP's founding, Stanford students interning for CISA had noted to SIO's director, Alex Stamos, that there were gaps in

the government's ability to respond to election-related misinformation. C.A. ROA 13,678. Stamos then developed the concept for the EIP and reached out to CISA to explain the project. C.A. ROA 13,288; contra J.A. 172. CISA referred SIO to the nonprofit Center for Internet Security (CIS), which operated EI-ISAC and received reports of misinformation from state and local election officials. C.A. ROA 13,264. And SIO staff and CISA officials had a few conversations during the leadup to the 2020 and 2022 elections "particularly when [SIO and EIP] were putting out public reporting about what they were seeing." C.A. ROA 13,254.

But there is no basis for the court's finding that "CISA and the EIP were completely intertwined." J.A. 224. That finding is based primarily on the fact that a few Stanford student researchers had internships at CISA. J.A. 225. But if some student interns were enough to support finding "complete[] intertwine[ment]" (J.A. 224), then every academic institution would qualify. The University of Texas Law School is not "completely intertwined" with the Department of Justice because it provides numerous legal interns who may work on matters of interest to both DOJ and legal scholars at UT.

The district court also stated that "CISA served as a mediating role between CIS and EIP to coordinate their efforts in reporting misinformation to [social media] platforms." J.A. 174. That too is incorrect. CISA did not coordinate EIP's flagging of potentially violative material to the platforms, never gave EIP instructions about how the project should be conducted, and never pressured or directed EIP's conduct in any way. Indeed, the very sources the court cited make that clear. CISA official Brian Scully (cited throughout the district court's decision) testified that CISA did not share tips about instances of misinformation with EIP, did not have general access to EIP

tickets identifying instances of misinformation, and did not "coordinate" EIP's contacts with social media platforms. See C.A. ROA 13,320-13,324. EIP's decisions about what to escalate to social media platforms were made completely independently.

Far from being "completely intertwined" (J.A. 224), the record demonstrates that CISA's *actual* arms-length relationship with Stanford—which was like CISA's relationships with many academic institutions (C.A. ROA 13,248-13,249)—was entirely normal and entirely above board. As Scully explained, "if there's an academic research [institution] that puts out a report that we think is of interest, … we try to have conversations with them to try to understand what their research findings are." C.A. ROA 13,249. Such conversations, like those reflected in the record here, are neither uncommon nor untoward.[4]

VP's contacts with the federal government. In determining that VP was closely intertwined with federal government actors, the court put great weight on the fact that

[4] The district court's finding that EIP was "partially-funded by the United States National Science Foundation [NSF] through grants" also does not support a finding of intertwinement. J.A. 183. In fact, EIP did not receive any government grants for its work in the 2020 election, nor did VP. The SIO was awarded one five-year grant from NSF totaling $748,437 to support research into the spread of misinformation online during real-time events, but SIO did not receive any grant money until 2022, long after the 2020 election and after VP concluded its work. More importantly, NSF is not CISA. It is a nonpartisan, independent agency that gives around $8 billion in grants to 2,000 research institutions each year, representing 24% of federal funding of academic research. The NSF grant process is transparent and gives the government no capability to direct research results, so even if EIP 2020 or VP had received NSF funding, that funding would not support a finding that EIP or VP is intertwined with the government. Nor does NSF funding reduce the First Amendment rights of Stanford's researchers to publish their results, brief government agencies, or refer policy violations to platforms.

SIO and the Office of the Surgeon General (OSG) co-hosted a "virtual townhall event" regarding the launch of OSG's COVID-19 health advisory. But the court's key findings lack support in the record. Most fundamentally, the court misunderstood the very purpose of this town-hall. It was not the "launch of the Virality Project" (J.A. 126), which had launched months earlier, but a virtual town hall announcing OSG's health advisory. Indeed, the event did not occur on "January 15, 2021" (*ibid.*) but on July 15, 2021—well after VP's launch. Senior advisor to the Surgeon General Eric Waldo (whom the court cited) expressed skepticism that planning the event amounted to any *meaningful* "partnership." See C.A. ROA 14,863 ("Renee DiResta would have been part of the planning process for the launch event. So that's—that might be one of the definitions of partnership."). And he disclaimed any knowledge about whether the event had taken "many months" to plan. *Ibid.*; contra J.A. 127.

The problem with the court's discussion of the launch event is not just that it contains numerous factual errors. The problem is that the court placed such emphasis on one public event—which SIO simply cohosted—that had nothing to do with the "censorship" plaintiffs complain about.[5] It is a red herring. The court failed to recognize evidence that VP operated independently from the government. VP was not funded by the government; government entities did not create VP tickets, nor did VP convey to social media platforms any requests from federal government

[5] SIO research manager Renée DiResta spoke for only a few minutes to introduce and thank Surgeon General Murthy. Surgeon General Murthy moderated the panel discussion, which featured doctors and volunteers whose communities had been impacted by COVID-19. See Stanford Cyber Policy Center, *Confronting Health Misinformation: A Discussion with the Surgeon General*, *available at* https://www.youtube.com/watch?v=GUCdoXapOl0.

agencies or officials. Rather, the overwhelming majority of VP's interactions with entities outside the project, including at social media companies and in the government, was through the distribution of VP's *publicly available* weekly reports, which are freely available to this day through its website. See *supra* note 2.

EIP's and VP's contacts with GEC. The district court similarly mischaracterized SIO's, EIP's, and VP's contacts with the Department of State's Global Engagement Center (GEC). According to the district court, "GEC works through the CISA-funded EI-ISAC and works closely with the Stanford Internet Observatory and the Virality Project." J.A. 183. That is wrong. GEC did not "work[] closely with the Stanford Internet Observatory and the Virality Project" (*ibid.*), nor was it "intertwined with the VP, EIP, and Stanford Internet Observatory" (J.A. 226). In fact, GEC sent EIP only 17 tickets over the course of the entire 2020 election. And GEC sent *zero* tickets to VP. More broadly, the record simply does not support the court's conclusion that GEC "work[ed] closely" with either project, much less that "GEC w[as] intertwined with the VP, EIP, and Stanford Internet Observatory." *Ibid.*

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The district court's injunction—plagued by numerous errors of law and fact—violated the First Amendment rights of Stanford and its researchers, and has cast a chill across academia as an example of political targeting of disfavored speech by state governments and the federal judiciary. In reversing the judgment below, the Court should reaffirm the First Amendment's highest protections for Stanford's research and speech on matters of public concern, and it should make clear that academic institutions do not become state actors when they communicate or collaborate with government officials.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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DECEMBER 2023