

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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VIVEK H. MURTHY, SURGEON GENERAL, )  
ET AL., )  
  ) Petitioners, )  
  ) v. ) No. 23-411  
MISSOURI, ET AL., )  
  ) Respondents. )  
- - - - -

Pages: 1 through 125  
Place: Washington, D.C.  
Date: March 18, 2024

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4           ET AL.,                                )

5                                Petitioners,                )

6                                v.                                ) No. 23-411

7           MISSOURI, ET AL.,                    )

8                                Respondents.                )

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11                                Washington, D.C.

12                                Monday, March 18, 2024

14                                The above-entitled matter came on for  
15 oral argument before the Supreme Court of the  
16 United States at 10:04 a.m.

18                                APPEARANCES:

19                                BRIAN H. FLETCHER, Principal Deputy Solicitor General,  
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21                                of the Petitioners.

22                                J. BENJAMIN AGUINAGA, Solicitor General, Baton Rouge,  
23                                Louisiana; on behalf of the Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 23-411, Murthy versus Missouri.

Mr. Fletcher.

ORAL ARGUMENT OF BRIAN H. FLETCHER  
ON BEHALF OF THE PETITIONERS

MR. FLETCHER: Thank you, Mr. Chief Justice, and may it please the Court:

The government may not use coercive threats to suppress speech, but it is entitled to speak for itself by informing, persuading, or criticizing private speakers.

Like Bantam Books, this case should be about that fundamental distinction between persuasion and coercion. But, unlike Bantam and the case that you'll hear next, this is not a typical suit where a speaker challenges government actions affecting its own speech. Instead, two states and five individuals are trying to use the Article III courts to audit all of the executive branch's communications with and about social media platforms.

That problem has infected every step

1 of this case. Respondents don't have standing  
2 at all because they have not shown an imminent  
3 threat that the government will cause a platform  
4 to moderate their posts in particular. But the  
5 lower court still reviewed a vast range of  
6 speech by different officials to different  
7 platforms about different topics at different  
8 times without asking whether it had anything to  
9 do with Respondents.

10 And the courts then entered a  
11 universal injunction restricting speech about  
12 any content posted on any platform by anyone and  
13 binding thousands of officials, including  
14 presidential advisors speaking to the public and  
15 FBI agents trying to protect the nation from  
16 foreign threats.

17 Even apart from the Article III  
18 problem, that injunction rests on two  
19 fundamental legal errors. First, the Fifth  
20 Circuit radically expanded the state action  
21 doctrine by holding that even concededly  
22 non-coercive communications, like the CDC's  
23 public health advice, can transform private  
24 platforms' editorial choices into state action.  
25 And, second, the Fifth Circuit mistook

1 persuasion for coercion. It held that the FBI's  
2 communications are inherently coercive because  
3 the FBI is a law enforcement agency, a theory  
4 that even Respondents don't defend in this  
5 Court, and it held that White House officials  
6 engaged in coercion because they used strong  
7 language or referred in a general way to legal  
8 reforms in response to press questions.

9           If this Court reaches the merits, it  
10 should reaffirm that government speech crosses  
11 the line into coercion only if, viewed  
12 objectively, it conveys a threat of adverse  
13 government action. And because no threats  
14 happened here, the Court should reverse.

15           I welcome the Court's questions.

16           JUSTICE THOMAS: Mr. Fletcher, is the  
17 coercion/encouragement framework of Bantam Book  
18 the only way to look at this case?

19           MR. FLETCHER: So I think there are  
20 two ways to look at this case. I think one of  
21 them is the coercion inquiry, which we think  
22 comes from Bantam Books. You can think of that  
23 as an aspect of state action because, when  
24 private parties are compelled to act, as the  
25 Court said in Halleck, they become state actors.

1 We think that's the right way to think about  
2 this case.

3 Respondents and the lower courts have  
4 also proposed a different way, the state action  
5 way. They've suggested that, even absent  
6 coercion, the government's speech, if it  
7 encourages, in some colloquial sense, private  
8 action, it can turn that private action --

9 JUSTICE THOMAS: Do we -- do we --

10 MR. FLETCHER: -- into state action.

11 JUSTICE THOMAS: Just to -- so I  
12 understand your argument, do we normally apply  
13 state action doctrine in cases involving the  
14 government or private parties?

15 MR. FLETCHER: Both, I think. You  
16 know, in some state action cases, you're asking  
17 -- someone is suing a private party and alleging  
18 that that private party is bound by the contours  
19 of the First Amendment or other constitutional  
20 provisions because they're state actors. You  
21 see some suits like that that look like this,  
22 suits against the platforms, suits against  
23 Stanford University, which is referenced in its  
24 amicus brief here. But you also see suits  
25 against the government based on conduct by

1 private parties. That was the case in Blum, and  
2 that's the theory that Respondents are pursuing  
3 here.

4 JUSTICE THOMAS: Are there any First  
5 Amendment cases?

6 MR. FLETCHER: Any First Amendment  
7 cases? I'm sorry, that are --

8 JUSTICE THOMAS: Using, employing  
9 state action doctrine?

10 MR. FLETCHER: Off -- and suing the  
11 government? Off the top of my head, I can't  
12 think of one. And I --

13 JUSTICE THOMAS: So they're usually  
14 things like Medicare or government contracts or  
15 relationships like that?

16 MR. FLETCHER: Yeah, and I think what  
17 that gets at is that it's very unusual. We  
18 don't think it's possible for the government,  
19 through speech alone, to transform private  
20 speakers into state actors. We think these  
21 cases usually are and ought to be viewed through  
22 the Bantam Books-type framework where there's a  
23 problem if the government is engaged in  
24 coercion, but if it stays on the persuasion side  
25 of the line and all we're talking about is



1 government speech, then there's no state action  
2 and there's also no First Amendment --

3 JUSTICE THOMAS: So --

4 MR. FLETCHER: -- problem.

5 JUSTICE THOMAS: -- one final  
6 question. You continue to refer back to --  
7 refer to government speech. Just for my  
8 edification, what's the constitutional basis for  
9 -- for government speech?

10 MR. FLETCHER: Yeah. So the Court has  
11 said I think that the government is entitled to  
12 speak for itself. It's not a right that comes  
13 from the First Amendment. It's a feature of our  
14 constitutional democracy. As the Court has  
15 said, the government couldn't function if it  
16 couldn't express points of view. In Walker, the  
17 Court explained, for example, that the  
18 government has to be able to run a vaccination  
19 campaign at times of public health crisis. I  
20 think that's a major part of what was going on  
21 here. So the Court hasn't located it in any  
22 specific constitutional provision. It's just  
23 part of democratic governance.

24 JUSTICE SOTOMAYOR: Can you explain to  
25 me what exactly is the injunction doing?

1 Meaning how is it affecting your speech, the  
2 government's speech? There's a lot of  
3 defendants.

4 MR. FLETCHER: Yeah.

5 JUSTICE SOTOMAYOR: There's a lot of  
6 agencies. I know that our case law says an  
7 injunction just can't tell you to violate the  
8 law. And so this injunction might have that  
9 problem inherent in it. But the Fifth Circuit  
10 injunction is what's before us, correct?

11 MR. FLETCHER: Correct.

12 JUSTICE SOTOMAYOR: And it says to  
13 encourage or significantly -- to coerce --  
14 that's a legal term.

15 MR. FLETCHER: Yeah.

16 JUSTICE SOTOMAYOR: Or significantly  
17 encourage. And you're questioning whether --  
18 what the meaning of significant encouragement --

19 MR. FLETCHER: Yeah.

20 JUSTICE SOTOMAYOR: -- is. And I'm  
21 not sure I know exactly what the Fifth Circuit  
22 meant, but we can figure that out. So let's  
23 just use to coerce social media companies to  
24 remove, delete, suppress, or reduce, including  
25 through altering their algorithms, posted social

1 media content containing protected speech.

2 How is that harming the government? I  
3 want some specifics.

4 MR. FLETCHER: I'm happy to do that,  
5 and I'll say first just to be clear, because  
6 this Court has stayed the injunction,  
7 fortunately, it's not harming the government  
8 now, but there were times when we were getting  
9 --

10 JUSTICE SOTOMAYOR: Well, what are you  
11 anticipating?

12 MR. FLETCHER: Exactly, right. So I  
13 think the problem with that -- we don't say that  
14 the government can coerce private speakers.  
15 That is prohibited by the First Amendment. But  
16 the problem with the Fifth Circuit's injunction  
17 saying don't coerce or significantly encourage  
18 is that it comes at the end of 80 pages of legal  
19 analysis holding that the government had done  
20 those things by -- for example, when the FBI  
21 would send communications to the platforms  
22 saying, for your information, it has come to our  
23 attention that the following URLs or email  
24 addresses or other selectors are being used by  
25 maligned foreign actors like Russian

1 intelligence operatives to spread disinformation  
2 on your platforms, do with it what you will.

3 That, the -- the -- the Fifth Circuit  
4 held, is coercive because the FBI is a powerful  
5 law enforcement agency. And I think, if the  
6 injunction were put in place, the FBI would have  
7 to think very hard about whether it could  
8 continue to do that.

9 Similarly, I think both the Fifth  
10 Circuit and my friends have really said that the  
11 crux of what they claim was coercion here was  
12 what happened in July of 2021 when the Surgeon  
13 General, the White House Press Secretary, and  
14 the President himself made statements  
15 criticizing the platforms' practices on  
16 misinformation and false statements about COVID  
17 vaccines and calling on them to do better.

18 I think it's really troubling, the  
19 idea that those sorts of classic bully pulpit  
20 exhortations, public statements urging actors to  
21 behave in different ways, might be deemed to  
22 violate the First Amendment. And I think, if  
23 the injunction were to go into effect and the  
24 President or his senior advisors -- the  
25 President isn't enjoined, but if his senior

1 advisors, the press secretary or someone else,  
2 wanted to talk to the public about other  
3 problems, like the circulation of anti-Semitic  
4 or Islamophobic content on the social media  
5 platforms or the effects they might be having on  
6 children's mental health or national security  
7 issues, like the anti-Semitic Osama Bin Laden  
8 letter that was trending on TikTok at the end of  
9 last year that we reference towards the end of  
10 our brief, I think all of those things could be  
11 done only under the shadow of the injunction.

12           And that comes around to the other  
13 point that you made, which is that this  
14 injunction, especially read in light of the  
15 opinion comes before -- that becomes before it,  
16 is extremely vague. And I think having that  
17 sort of vague injunction with these contestable  
18 legal terms that have been interpreted very  
19 broadly as applied to past conduct hanging over  
20 the heads of all of these government officials  
21 doing all of these things is a real problem and  
22 I think especially so when you're talking about  
23 entering such an injunction at the behest of two  
24 states and five individual social media users  
25 whose main complaints are about the moderation

1 of posts about COVID-19 many years ago that they  
2 haven't really even shown were traceable to the  
3 government to begin with, we think.

4 And we certainly don't think that they  
5 have shown that they face the sort of imminent  
6 threat of future injury that's required to  
7 satisfy Article III.

8 JUSTICE ALITO: Mr. Fletcher, let me  
9 follow up on that. If even one of the  
10 plaintiffs has standing, then we're required to  
11 get to the merits. So let me ask you about  
12 Ms. Hines, and as you just mentioned, she must  
13 have faced an imminent threat of future injury  
14 at the time when the complaint was filed, and  
15 that injury must be traceable to the actions of  
16 the government.

17 So, in the first part of that,  
18 imminent threat of future injury, her Facebook  
19 personal account was restricted at the time when  
20 the complaint was filed.

21 So why isn't that sufficient to show a  
22 threat of -- an imminent threat of future  
23 injury?

24 MR. FLETCHER: We're not disputing  
25 that when the private platforms moderated the

1 plaintiffs' pages or their posts, that's an  
2 injury in some sense. We haven't disputed that.  
3 They suffered that injury. We've disputed the  
4 traceability question --

5 JUSTICE ALITO: Okay. Fine.

6 MR. FLETCHER: -- and then the  
7 redressability question.

8 JUSTICE ALITO: Okay. Right. So, on  
9 traceability, traceability is basically a  
10 question of causation, right?

11 MR. FLETCHER: Agreed.

12 JUSTICE ALITO: All right. Both --  
13 the district court found that the injury was  
14 traceable to the government's actions, and the  
15 -- the Fifth Circuit accepted that finding,  
16 reviewed it, and accepted it.

17 So that's two lower courts. We don't  
18 usually reverse findings of fact that have been  
19 endorsed by two lower courts. And you haven't  
20 attempted to show that it was clear -- that that  
21 finding is clearly erroneous.

22 MR. FLETCHER: So, respectfully,  
23 Justice Alito, I disagree with that. I think  
24 that the Fifth Circuit and the district court  
25 applied too loose a notion of traceability.

1 They didn't try to say this post or any post or  
2 any action against Ms. Hines was traceable to  
3 any action by the government.

4 They did what the red brief calls a  
5 bird's eye view of traceability. They said the  
6 government is talking to the platforms a lot.  
7 The platforms are doing moderation, and so we'll  
8 just assume that all of that moderation is  
9 traceable to the government.

10 JUSTICE ALITO: Well, do you think  
11 that it's necessary to identify a single  
12 government action and then trace it to a single  
13 consequence? Do you think that's required?

14 MR. FLETCHER: No, but I think you  
15 have to trace some government action to some  
16 consequence that befell you. Maybe I just could  
17 be specific about this because we challenge this  
18 in our opening brief, and the red brief comes  
19 back at pages 19 to 21 and offers up what I take  
20 to be their best examples of traceable harm, and  
21 I invite you to go look at the pages of the  
22 record that they're citing because often what  
23 you find is that they're citing moderation of  
24 their content that happened either before the  
25 challenged government actions to which they're



1 referring or long after.

2 JUSTICE ALITO: All right. I -- I  
3 have looked at that.

4 On the issue of causation, under Mt.  
5 Healthy, are they required to show anything more  
6 than the government's action was a motivating  
7 factor?

8 MR. FLETCHER: I don't know the answer  
9 to that in all cases, and I'm -- I'm reluctant  
10 to make sort of broad statements about what the  
11 traceability requirement demands in different  
12 circumstances.

13 I will say here we're not disputing  
14 that. We're saying that they haven't shown any  
15 causal connection between the --

16 JUSTICE ALITO: Has no effect  
17 whatsoever?

18 MR. FLETCHER: Right. And -- and the  
19 reason --

20 JUSTICE ALITO: Both the lower courts  
21 were wrong on that?

22 MR. FLETCHER: I -- I think they were  
23 because, again, they did this blunderbuss  
24 approach where they said the government is  
25 talking to the platforms about moderation and

1 the platforms are moderating content.

2 But the platforms were moderating this  
3 content long before the government was talking  
4 to them. They had powerful business incentives  
5 to do the same thing. The acts of moderation  
6 were consistent with the platforms' own  
7 policies, and this is, I think, another telling  
8 fact. In those red brief examples that we  
9 talked about on pages 19 to 21, some of them  
10 involved platforms like LinkedIn that wasn't  
11 even the subject of the challenged White House  
12 and Solicitor General -- or, excuse me, Surgeon  
13 General's office communications with the  
14 platforms.

15 JUSTICE KAGAN: Do -- do you think  
16 that there are any factual findings with respect  
17 to standing that we are required to give clear  
18 error review to?

19 MR. FLETCHER: I think findings of  
20 historical fact, absolutely. We're not fighting  
21 that. So the idea of that pieces of content  
22 were moderated, that the government made certain  
23 statements, and if there had been findings that  
24 said Facebook deleted this post because of these  
25 communications by the government, that would be

1 a factual finding of historical fact, but there  
2 just aren't such findings is our --

3 JUSTICE KAGAN: Right. I mean, that's  
4 what I was really getting at. Are there  
5 findings that you concede, you know, that one,  
6 you have to apply clear error review to? That  
7 one, you have to do the same?

8 MR. FLETCHER: We do. And I -- I  
9 can't give you a list because there's a lot of  
10 facts in this case, but we agree historical  
11 factual findings count. What we say don't count  
12 are findings that are really characterizations,  
13 which is a lot of what my friends are relying  
14 on, findings that are about the application of  
15 law to facts, which in this constitutional realm  
16 we think get de novo review, and then findings  
17 that are premised on erroneous legal standards.

18 JUSTICE GORSUCH: So -- so, Mr.  
19 Fletcher, I -- I -- I just want to nail down  
20 what your views are on -- on the legal standards  
21 on traceability. You're not disputing that a  
22 motivating factor is enough.

23 MR. FLETCHER: We haven't made that  
24 argument here, that's right.

25 JUSTICE GORSUCH: Okay. And then, on

1 redressability, what's your view of the legal  
2 standard the Court should be applying?

3 MR. FLETCHER: I think, again, it has  
4 to be some showing that I think likely to  
5 redress the jury is the standard from Lujan, so  
6 it doesn't have to be certain, but you have to  
7 make some showing that an injunction against the  
8 government will stop the platforms from doing  
9 what they want.

10 JUSTICE GORSUCH: In Massachusetts  
11 versus EPA, we said likely to some extent. Does  
12 that strike you as correct?

13 MR. FLETCHER: I -- I -- I think, in  
14 the context of Mass. versus EPA, maybe where  
15 you're talking about a problem of degrees. You  
16 know, here, where the concern is are the  
17 platforms going to moderate my posts or not and  
18 are they going to do it because of the  
19 government or not and will an injunction against  
20 the government stop Facebook and --

21 JUSTICE GORSUCH: To some degree. Is  
22 that an -- an acceptable standard to the  
23 government?

24 MR. FLETCHER: I -- I guess I --

25 JUSTICE GORSUCH: I just -- I just

1 want to know what my yardstick that I'm supposed  
2 to measure these allegations against and there's  
3 not a lot in your brief about it.

4 So I take likely from Lujan.

5 MR. FLETCHER: Yeah.

6 JUSTICE GORSUCH: I take to some  
7 extent from Massachusetts versus EPA. And I  
8 take the statement in Larson that it doesn't  
9 have to redress every injury.

10 MR. FLETCHER: Agreed.

11 JUSTICE GORSUCH: You agreed with all  
12 of that?

13 MR. FLETCHER: Except that the to some  
14 extent I think was there, the state's injury was  
15 about rising sea levels, and so "to some extent"  
16 means it doesn't have to solve the problem, it  
17 has to help it a little bit.

18 JUSTICE GORSUCH: And do you agree --

19 MR. FLETCHER: This is more discrete  
20 acts of content moderation.

21 JUSTICE GORSUCH: But do you agree  
22 with that standard, though, that -- that to some  
23 extent, if -- if they could show that -- that  
24 their injury would be remedied to some extent by  
25 an injunction, that that would be enough?

1                   MR. FLETCHER: Correct. So, if  
2 they're likely to face moderation on 10 posts  
3 and an injunction against the government would  
4 make it eight, that's enough.

5                   JUSTICE GORSUCH: Yeah. Okay. And  
6 then just flipping back to the traceability, I'm  
7 sorry, I forgot to ask, substantial motivating  
8 factor obviously means it doesn't have to be a  
9 proximate cause.

10                  MR. FLETCHER: Agreed.

11                  JUSTICE GORSUCH: Okay. Thank you.

12                  JUSTICE ALITO: Mr. Fletcher, when I  
13 read all of the emails exchanged between the  
14 White House and other federal officials on  
15 Facebook in particular but also some of the  
16 other platforms, and I see that the White House  
17 and federal officials are repeatedly saying that  
18 Facebook and the federal government should be  
19 partners, we're on the same team, officials are  
20 demanding answers, I want an answer, I want it  
21 right away, when they're unhappy, they -- they  
22 curse them out.

23                  There are regular meetings. There is  
24 constant pestering of -- of Facebook and some of  
25 the other platforms and they want to have

1 regular meetings, and they suggest why don't you  
2 -- they suggest rules that should be applied and  
3 why don't you tell us everything that you're  
4 going to do so we can help you and we can look  
5 it over.

6           And I thought: Wow, I cannot imagine  
7 federal officials taking that approach to the --  
8 the -- the print media, our representatives over  
9 there. If you -- if you did that to -- to them,  
10 what do you think the reaction would be?

11           And so I thought: You know, the only  
12 reason why this is taking place is because the  
13 federal government has got Section 230 and  
14 antitrust in its pocket and it's -- to mix my  
15 metaphors, and it's got these big clubs  
16 available -- available to it, and so it's  
17 treating Facebook and these other platforms like  
18 they're subordinates.

19           Would you do that to The -- to The New  
20 York Times or The Wall Street Journal or the  
21 Associated Press or any other big newspaper or  
22 wire service?

23           MR. FLETCHER: So there's a lot packed  
24 in there. I want to give you one very specific  
25 answer first and then step back out to the

1 proper context.

2           So specifically you mentioned  
3 demanding an answer right away and cursing them  
4 out. The only time that happens is in an email  
5 that's about the President's own Instagram  
6 account. It's not about moderating other  
7 people's content.

8           JUSTICE ALITO: Okay. We'll put that  
9 aside. There's all the rest.

10          MR. FLETCHER: So --

11          JUSTICE ALITO: Constant meetings,  
12 constant emails, we want answers.

13          MR. FLETCHER: Right.

14          JUSTICE ALITO: We're partners, we're  
15 on the same team.

16                Do you think that the print media  
17 regards themselves as being on the same team as  
18 the federal government, partners with the  
19 federal government?

20          MR. FLETCHER: So potentially in the  
21 context of an effort to get Americans vaccinated  
22 during a once-in-a-lifetime pandemic. And I  
23 really think that piece of context, it doesn't  
24 change the First Amendment principles, but it's  
25 relevant to how they apply here.



1                   And I think it's important to  
2 understand that at this time, this was a time  
3 when thousands of Americans were still dying  
4 every week and there was a hope that getting  
5 everyone vaccinated could stop the pandemic.

6                   And there was a concern that Americans  
7 were getting their news about the vaccine from  
8 these platforms, and the platforms were  
9 promoting, not just posting --

10                   JUSTICE ALITO: Well, I -- I --

11                   MR. FLETCHER: -- but promoting, bad  
12 information.

13                   JUSTICE ALITO: I understand all that.  
14 And I know the objectives were good, but -- but,  
15 once again, they were also getting their news  
16 from the print media and the broadcast media and  
17 cable media, and I just can't imagine the  
18 federal government doing that to them. But  
19 maybe I'm naive. Maybe that goes on behind the  
20 scenes. I don't know. But I -- I -- it struck  
21 me as wow, this is not what I understand the  
22 relationship to be. That's all.

23                   MR. FLETCHER: Well, and -- but I -- I  
24 do. I think this is important because I had the  
25 same reaction that you do, that these emails

1 look unusual. I think the idea that there would  
2 be back and forth between the government and the  
3 media isn't unusual at all.

4 When the White House Press Secretary  
5 on July 16th is asked about this by the press at  
6 the time, what she says is, of course, we talk  
7 to the platforms just the way we talk to all of  
8 you when we have concerns about what you're  
9 doing, when we have information that you might  
10 find helpful.

11 Now there's an intensity of the back  
12 and forth here and there's an anger that I think  
13 is unusual, but the context for that I think is  
14 that these platforms were saying publicly, we  
15 want to help, we think we have a responsibility  
16 to give people accurate information and not bad  
17 information, and we're doing everything we can  
18 to meet that goal.

19 That's where this language of  
20 partnership comes from. It's not just from the  
21 White House. It's these platforms, which are  
22 powerful sophisticated entities, saying we're  
23 doing the best we can.

24 And the anger, I think really most of  
25 the anger when you read the emails -- and I

1 appreciate that you have because I think you  
2 have to look at them in context -- the anger is  
3 when the officials think that the platforms are  
4 not being transparent about the scope of the  
5 problem or aren't giving information that's  
6 available.

7 JUSTICE ALITO: Let me ask you one --  
8 one more question and -- and then I'll stop at  
9 least for now. You make a big point in both  
10 your brief and your reply that states don't have  
11 First Amendment rights.

12 Are you saying that they may have a  
13 free speech right, but it comes from someplace  
14 else, or they don't have free speech rights? Do  
15 you think that the federal government could  
16 prohibit a governor or the top-ranking public  
17 health official in a state from speaking to the  
18 residents?

19 MR. FLETCHER: No, I don't think it  
20 could. And I want to be clear we're not denying  
21 that they have speech rights. We're saying that  
22 those things like the federal government's  
23 speech rights come from the structure of our  
24 Constitution, not from the First Amendment.

25 This is a First Amendment case. And I

1 think, really, what's happening here is that  
2 these states, which were the motivating factor  
3 behind the suit, the only plaintiffs in the  
4 initial complaint, are really trying to  
5 represent and to litigate the First Amendment  
6 rights of their citizens on their citizens'  
7 behalf. We think that's an end run around the  
8 limit on parens patriae standing, just like the  
9 one the Court rejected in Brackeen.

10 JUSTICE ALITO: All right. Thank you.

11 JUSTICE KAVANAUGH: Do you think on  
12 the anger point, I guess I had assumed, thought,  
13 experienced government press people throughout  
14 the federal government who regularly call up the  
15 media and -- and berate them.

16 Is that -- I mean, is that not --

17 MR. FLETCHER: I -- I -- I don't want  
18 --

19 JUSTICE KAVANAUGH: -- your  
20 understanding? You said the anger here was  
21 unusual. I guess I wasn't --

22 MR. FLETCHER: So that --

23 JUSTICE KAVANAUGH: -- wasn't entirely  
24 clear on that from my own experience.

25 MR. FLETCHER: That's fair.

1 (Laughter.)

2 MR. FLETCHER: I guess I don't want to  
3 endorse "berate," but I guess I will say I bet  
4 this is not the first time that there has been  
5 profanity or intemperate language in exchanges  
6 between White House or agency communications  
7 staff and members of the press.

8 JUSTICE ALITO: Well, I -- I don't  
9 know whether our public information officer is  
10 here today, but maybe she should take a note  
11 about this so whenever --

12 (Laughter.)

13 JUSTICE ALITO: -- whenever they write  
14 something that we don't like, she can call them  
15 up and curse them out and say, why don't you --  
16 you know, why don't we be partners? We're on  
17 the same team. Why don't you show us what  
18 you're going to write beforehand? We'll edit it  
19 for you, make sure it's accurate.

20 MR. FLETCHER: So, Justice Alito, this  
21 is why I want to be careful here. I'm  
22 acknowledging the reality that this happens and  
23 that it's -- it may be commonplace. I'm not  
24 saying it's a good thing or a great thing or a  
25 thing to be celebrated. But, fundamentally, I'm

1 saying the First Amendment isn't a civility  
2 code.

3           It is an important protection, it's a  
4 critical protection against actual coercion, but  
5 I think it's important to police that line, and  
6 I think this case, the sort of sprawling audit  
7 of all of these communications, shows the danger  
8 of allowing parties, especially parties without  
9 real direct injuries, to come into court and to  
10 challenge these sorts of regular  
11 back-and-forths.

12           JUSTICE KAVANAUGH: On the -- on the  
13 partners point, though, that does strike me as  
14 unusual. I mean, how -- what do you think about  
15 that?

16           MR. FLETCHER: So that, I think, is  
17 traceable to the unusual feature here of this is  
18 not the government where the platforms were  
19 saying we don't want to deal with you about  
20 this, and the government is calling them up and  
21 saying, no, we're partners, let's be partners.  
22 You could imagine a situation like that where  
23 there might be a problem. You might start to  
24 think that that starts to shade into coercion.

25           But, here, it's an open door. The

1 platforms are saying publicly, because they're  
2 getting public criticism about this from other  
3 people too, from the press, from the World  
4 Health Organization, from others, they're saying  
5 publicly we want to do our part. We recognize  
6 we have a responsibility, that we're a source of  
7 information for people, and we want to be a  
8 source of good information.

9           And so, when the White House calls and  
10 says we have some concerns about this, they say  
11 we agree. You know, that's a good point you  
12 make over here. We disagree with you over here.  
13 We're not going to go this far, but we agree  
14 with you.

15           JUSTICE GORSUCH: Mr. --

16           JUSTICE JACKSON: And, Mr. Fletcher,  
17 whether or not that ultimately becomes a First  
18 Amendment violation -- I mean, I appreciate the  
19 coercion point, and that's sort of the  
20 government's first point with respect to the  
21 merits of this.

22           But I'm -- I'm interested in your view  
23 that the context doesn't "change the First  
24 Amendment principles." I mean, I understood our  
25 First Amendment jurisprudence to require

1 heightened scrutiny of government restrictions  
2 of speech but not necessarily a total  
3 prohibition when you're talking about a  
4 compelling interest of the government to ensure,  
5 for example, that the public has accurate  
6 information in the context of -- of a  
7 once-in-a-lifetime pandemic.

8           So I'm -- I'm just interested in the  
9 government sort of conceding that if there was  
10 coercion, then we automatically have a First  
11 Amendment violation.

12           MR. FLETCHER: So I'm not conceding  
13 that that would be the case. I could imagine  
14 that in times of pandemic, if there were actual  
15 restrictions, maybe those would be justified.  
16 But our position here, because we think it's the  
17 position consistent with the facts, is that  
18 there wasn't any coercion to begin with.

19           JUSTICE GORSUCH: Mr. Fletcher --

20           MR. FLETCHER: Yes, Justice Gorsuch?

21           JUSTICE GORSUCH: -- on -- on that  
22 point, you mentioned coercion -- you mentioned  
23 coercion repeatedly in terms of threats. Can  
24 there also be coercion in your view in terms of  
25 inducements?



1           MR. FLETCHER: We think there can. I  
2 think often a threat or an inducement is sort of  
3 the flip side, one or the other. I think, in  
4 the next case, you could construe it either way,  
5 threat of prosecution, offer of leniency.

6           So we acknowledge that it could be  
7 both, but it has to be a threat or an inducement  
8 of some concrete government action, not just  
9 more government speech.

10          JUSTICE GORSUCH: And,  
11 hypothetically -- and I'm not saying this  
12 happened here -- but would a threat or an  
13 inducement with respect to antitrust actions  
14 qualify as coercion?

15          MR. FLETCHER: Sure.

16          JUSTICE GORSUCH: And a threat or an  
17 inducement with respect to Section 230 qualify?

18          MR. FLETCHER: So I think that one's  
19 harder for two reasons. One is that these are  
20 executive branch officials who don't have the  
21 ability to unilaterally enact 230 reform. I  
22 think the question is --

23          JUSTICE GORSUCH: But they -- they  
24 have a power to influence that.

25          MR. FLETCHER: Influence that, but the

1 question is would --

2 JUSTICE GORSUCH: And is that -- would  
3 that be enough to say we're going to -- if you  
4 don't do X, we are going to change our position  
5 on Section 230?

6 MR. FLETCHER: So potentially yes as  
7 to legislation. 230, if I could just get this  
8 out, though --

9 JUSTICE GORSUCH: Sure.

10 MR. FLETCHER: -- I think is different  
11 because 230 is about content moderation. It's  
12 -- it's -- it's about this very issue. And I  
13 think a government official has to be able to  
14 say I support Section 230 reform because I'm  
15 concerned about these things, and also, in the  
16 meantime, I think platforms should be doing  
17 better.

18 JUSTICE GORSUCH: I understand that,  
19 but in terms of advocating for a change of  
20 Section 230, that could be coercion in your  
21 view?

22 MR. FLETCHER: If it were framed as a  
23 threat.

24 JUSTICE GORSUCH: Okay. And how --

25 MR. FLETCHER: Our position is that

1 wasn't done here.

2 JUSTICE GORSUCH: And how about -- how  
3 about saying you're killing people? Could that  
4 be coercion in some circumstances, that if you  
5 don't change your moderation policies, you're --  
6 you're responsible for killing people?

7 MR. FLETCHER: So I think that one is  
8 much harder. That's a statement that President  
9 Biden made off the cuff to the press.

10 JUSTICE GORSUCH: I'm not -- I'm not  
11 -- listen, I'm not talking about the  
12 context-specific issues, and I understand you  
13 have arguments there, but could that in some  
14 circumstances, an accusation by a government  
15 official that unless you change your policies,  
16 you're responsible for killing people, could  
17 that be coercion?

18 MR. FLETCHER: So I find it hard to  
19 imagine a situation where that sort of public  
20 statement could be. I'll acknowledge, as you  
21 say, context matters a ton, and so I don't want  
22 to say it's impossible. All I'm saying is it  
23 didn't happen here.

24 The President said this to the public  
25 in the middle of a pandemic, and then three days

1 later -- I think this is important -- he  
2 clarified. He said, I'm not saying Facebook is  
3 killing people. I'm saying the people spreading  
4 misinformation are.

5           And when he was asked will you hold  
6 the platforms accountable, he was explicitly  
7 asked this, will you hold them accountable if  
8 they don't do better, he said, I'm not looking  
9 to hold anyone accountable. I just want  
10 everyone to look in their mirror and imagine --  
11 look in the mirror and imagine what would happen  
12 if this misinformation was going to their loved  
13 ones. I think it's clear that this was  
14 exhortation, not threat.

15           CHIEF JUSTICE ROBERTS: Thank you, Mr.  
16 Fletcher.

17           How are we supposed to evaluate that  
18 question in what the -- what -- the level at  
19 which coercion kicks in? I mean, if you're  
20 trying to coerce or get a particular result out  
21 of a media outlet, is it enough to say, you  
22 know, if you don't do this, we're going to move  
23 your reporter's cubicle down the hall? Or --  
24 how do you evaluate when it constitutes coercion  
25 in this context?

1           MR. FLETCHER: So let me start with I  
2 think Bantam Books has been the lodestar for the  
3 lower courts that have mostly coalesced, with  
4 some errors in application like this case,  
5 around the idea of the question is, is it a  
6 threat or a statement that a reasonable person  
7 would understand, viewed objectively and in  
8 context, as an implicit or explicit threat of  
9 some adverse government action?

10           Now, as to the cubicles question, I  
11 sort of don't know if there are some adverse  
12 government actions that are so trivial that they  
13 don't count. I guess I think something like  
14 that seems less likely to be a coercive threat.

15           But -- but, in general, I think our  
16 position is, if there's something that the  
17 government is saying that we're going to  
18 exercise government power in some way unless you  
19 change your speech in some way or stop  
20 distributing the speech of others, if it's  
21 reasonably understood as that sort of a threat,  
22 that's a First Amendment problem.

23           CHIEF JUSTICE ROBERTS: Well, but,  
24 under Bantam -- Bantam Books, it presumably is  
25 in context, what you're talking about, a

1 reasonable person. I mean, if there is, as a  
2 regular basis, the kind of back and forth  
3 between a spokesman and -- and a member of the  
4 media, what a reasonable person might view as --  
5 as coercive might not in that context, you know  
6 -- you know, maybe the press secretary yells on  
7 a regular basis, and if their, you know, volume  
8 increases enough, that might be viewed as  
9 coercion.

10 MR. FLETCHER: So I think that points  
11 out the context sensitivity. And I think, as is  
12 usually the case when the Court says it's a  
13 reasonable person test, it's a reasonable person  
14 with knowledge of all the facts, and I think  
15 that would include the prior course of dealing  
16 between the relevant government official and the  
17 relevant recipient.

18 I think, here, that really strongly  
19 reinforces the idea that there -- there wasn't  
20 coercion. These were sophisticated parties.  
21 They routinely said no to the government. They  
22 were open about it. They didn't hesitate to do  
23 it. And when they said no to the government,  
24 the government never engaged in any sort of  
25 retaliation. Instead, it engaged in more

1 speech. Ultimately, the President and the Press  
2 Secretary and the Surgeon General took to the  
3 bully pulpit. We just don't think that's  
4 coercive.

5 CHIEF JUSTICE ROBERTS: Thank you.  
6 Justice Thomas?

7 JUSTICE THOMAS: Mr. Fletcher, back to  
8 my point about coercion, couldn't you simply do  
9 the -- censor someone or prevent others'  
10 speeches, speech by others, by agreeing with the  
11 platforms, as opposed to coercing the platforms?

12 MR. FLETCHER: I guess I'm not sure  
13 what you mean by "agreeing with the platforms."

14 JUSTICE THOMAS: Well, you just work  
15 together, said: Look, we're right; they're  
16 wrong. Let's work together. You know, we're on  
17 the same team. Let's work together to make sure  
18 that this misinformation doesn't gain sort of  
19 any following.

20 MR. FLETCHER: So I think, as long as  
21 the platforms are exercising their own  
22 independent judgment, that's what the First  
23 Amendment protects. It says we don't want the  
24 government messing with --

25 JUSTICE THOMAS: So you're saying that

1 you can't -- the government can't censor by  
2 coordinating with private parties to exclude  
3 others' speech?

4 MR. FLETCHER: I'm saying that when  
5 the government persuades a private party not to  
6 distribute or promote someone else's speech,  
7 that's not censorship; that's persuading a  
8 private party to do something that they're  
9 lawfully entitled to do, and there are lots of  
10 contexts where government officials can persuade  
11 private parties to do things that the officials  
12 couldn't do directly.

13 So, for example, you know, recently  
14 after the October 7th attacks in Israel, a  
15 number of public officials called on colleges  
16 and universities to do more about anti-Semitic  
17 hate speech on campus. I'm not sure and I doubt  
18 that the government could mandate those sorts of  
19 changes in enforcement or policy, but public  
20 officials can call for those changes.

21 The government can encourage parents  
22 to monitor their children's cell phone usage or  
23 Internet companies to watch out for child  
24 pornography on their platforms even if the  
25 Fourth Amendment would prevent the government



1 from doing that directly.

2 All of those are contexts where the  
3 government can persuade a private party to do  
4 something that the private party's lawfully  
5 entitled to do, and we think that's what the  
6 government is doing when it's saying to these  
7 platforms, your platforms and your algorithms  
8 and the way that you're presenting information  
9 is causing harm and we think you should stop,  
10 and the platforms are --

11 JUSTICE THOMAS: So you -- you really  
12 don't see any difference between the government  
13 coordinating with the platforms to exclude other  
14 speech and persuading the platforms to do this,  
15 to not engage or permit other speech?

16 MR. FLETCHER: I -- I guess I'm not  
17 seeing it. And I think that what happened here  
18 was definitely on the -- if you do think there  
19 is a difference between those two things, I  
20 guess my argument here would be that what  
21 happened is on the persuasion side of the line  
22 because you do see that back and forth of the  
23 platforms throughout the process saying no  
24 repeatedly when they disagree with what the  
25 government is asking them to do, and I think

1 that that tells you that what was happening here  
2 is what the First Amendment protects, which is  
3 private speakers making independent judgment  
4 informed by, maybe even influenced by, the  
5 government but deciding themselves.

6 JUSTICE THOMAS: So there's no  
7 difference between the platforms meeting and  
8 working out an arrangement not to permit certain  
9 speech and the platforms working with the  
10 government to do the exact same thing? There's  
11 no difference?

12 MR. FLETCHER: Well, I think, if -- if  
13 the platforms entered into some agreement  
14 amongst themselves, that might raise issues  
15 under different provisions of the law, that  
16 the -- the modest point I'm making is just that  
17 the government doesn't violate the First  
18 Amendment when it persuades another -- a speaker  
19 to not distribute speech by someone else.

20 That's Penthouse versus Meese, Judge  
21 Silberman's decision there. That's what happens  
22 when the White House Press Secretary calls up  
23 The New York Times and says that was a bad  
24 op-ed, you shouldn't run op-eds like that  
25 anymore. I think that's commonplace.

1 CHIEF JUSTICE ROBERTS: Justice Alito?

2 JUSTICE ALITO: On the traceability  
3 causation question, under Mt. Healthy, if the  
4 plaintiffs show that the government's actions  
5 were a motivating factor, it is not their  
6 obligation, isn't this true, to show that they  
7 would not -- that the platforms would not have  
8 done what they did were it not for what the  
9 government did? It would be the defendants'  
10 obligation to show that?

11 MR. FLETCHER: So I confess, Justice  
12 Alito, I'm not sure that the Court has ever  
13 gotten through how that -- whether that  
14 burden-shifting inquiry applies in the context  
15 of traceability as opposed to in a Mt. Healthy  
16 merits-type inquiry.

17 I guess what I'd say is the Court has  
18 been pretty emphatic that when your injury is  
19 attributable to independent choices by private  
20 actors, that's not traceable. And our  
21 submission is that that's what happened here.

22 JUSTICE ALITO: Well, wouldn't it be  
23 very strange to have a stricter standard on the  
24 merits, a less -- a less defendant-friendly  
25 standard on the merits than at the standing

1 stage? It seems -- it seems odd.

2 Let me get one last question really  
3 quickly. You've never argued that this case is  
4 moot?

5 MR. FLETCHER: We have not, no.

6 JUSTICE ALITO: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Sotomayor?

9 JUSTICE SOTOMAYOR: Counsel, you don't  
10 do a lot with Clapper, and it seems that Clapper  
11 really does change all of the cases in terms of  
12 requiring a heightened traceability standard,  
13 does it not?

14 MR. FLETCHER: So I -- I think Clapper  
15 does -- is very instructive here. We do cite  
16 and rely on it. We think it's relevant to  
17 traceability.

18 We think it's perhaps most relevant at  
19 the -- sort of the future injury question  
20 because I think -- I think we're right about  
21 traceability of all of the past moderation of  
22 their content that they talk about, but I think  
23 we're on even stronger ground in saying that the  
24 vast majority of the things they're talking  
25 about are about COVID-19 or unusual

1 idiosyncratic stories from the 2020 election,  
2 and their burden is to show that they face an  
3 imminent threat -- that's from Lyons, that's  
4 from O'Shea -- that the injury is going to  
5 recur. That's Clapper II.

6 And what Clapper also says -- and this  
7 is instructive -- is that to the extent they're  
8 censoring themselves, which is what they say, in  
9 the absence of such an imminent threat of actual  
10 government-caused harm, that's not enough for --

11 JUSTICE SOTOMAYOR: Could you go back  
12 to Ms. Hines's 90-day suspension? I'm not sure  
13 -- this record is enormous, but do we know  
14 exactly what was censored for that 90 days?

15 MR. FLETCHER: So that's the problem.  
16 I don't think we do or, if we do, I --

17 JUSTICE SOTOMAYOR: I was looking for  
18 it and couldn't find it.

19 MR. FLETCHER: And when I tried to go  
20 through the red brief, pages 19 to 21, and  
21 connect up the dots here, one of the things  
22 that's hard is that there's not a lot of  
23 specifics about even the dates on when things  
24 happened.

25 I guess I will say, when the dates are

1 provided, though, they don't line up. The very  
2 first example on page 19 of the red brief is,  
3 I -- I think it's Ms. Hines, she gets her  
4 retweet of Robert F. Kennedy, Junior, suppressed  
5 by Twitter and she says, that's an indication  
6 that my harms are traceable to the government  
7 because the government was talking about Robert  
8 F. Kennedy, Junior. But she doesn't say that  
9 the government's statements happened between  
10 January and July of 2021, and the moderation of  
11 her retweet happened in April of 2023.

12           Years later, after Twitter had been  
13 sold, after it had abandoned the COVID-19  
14 moderation policies that are at issue here, I  
15 think that's a strong indication that there is a  
16 real traceability problem, and it just gets  
17 worse when you look to the forward-looking  
18 injury that they have to establish.

19           JUSTICE SOTOMAYOR: Thank you.

20           CHIEF JUSTICE ROBERTS: Justice Kagan?

21           JUSTICE KAGAN: On the coercion  
22 question, is there anything that we have to  
23 review on clear error, or is it all legal?

24           MR. FLETCHER: I -- I'd give you the  
25 same answer I gave before. I think historical

1 fact, the statement was made, it was not made.  
2 If there were specific factual findings beyond  
3 that again of historical facts, we'd acknowledge  
4 there clear error, but things like this was  
5 pressure, this was coercion, we think those are  
6 characterizations.

7 And then the ultimate standard, the  
8 ultimate First Amendment standard of was viewed  
9 objectively and in context this communicating a  
10 threat, we think that's either law or maybe more  
11 probably law to facts that gets de novo review  
12 the way it usually does in the constitutional  
13 realm.

14 JUSTICE KAGAN: And on the past harm,  
15 future harm question that you were just talking  
16 about, I take it, if no future harm, that's  
17 independently sufficient, is that right?

18 MR. FLETCHER: Correct.

19 JUSTICE KAGAN: And would there be any  
20 difficulties with confining a holding to that if  
21 we were to find for you?

22 MR. FLETCHER: I -- I don't think so  
23 at all. I think, in some ways, that's the  
24 narrowest, easiest way to resolve this case, is  
25 to say this is an action for injunctive relief,

1 they have to show that they faced an imminent  
2 threat of future harm. We don't have to  
3 adjudicate the parties' disputes about the past  
4 harm. We just have to show that they haven't  
5 met that burden.

6 JUSTICE KAGAN: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Gorsuch?

9 JUSTICE GORSUCH: On that question, in  
10 your view, when is the time that we should be  
11 considering that? Probably not today it seems,  
12 right?

13 MR. FLETCHER: Correct. Yeah.

14 JUSTICE GORSUCH: It would be the time  
15 that the Court in the first instance issued the  
16 PI. Is that -- is that your view?

17 MR. FLETCHER: So I -- I think it  
18 might be even earlier than that just to be  
19 candid with that.

20 JUSTICE GORSUCH: Might be the  
21 complaint?

22 MR. FLETCHER: Might be the complaint,  
23 so the complaint for the states is I think May  
24 of 2022, the individuals get added in August of  
25 2022. The place where I think I know for sure



1 that the PI matters, though, is whether they've  
2 shown a likelihood of irreparable harm which  
3 above and beyond standing is a requisite for  
4 injunctive relief. I think that has to be shown  
5 --

6 JUSTICE GORSUCH: That is at the PI  
7 time?

8 MR. FLETCHER: -- at the PI. Exactly.

9 JUSTICE GORSUCH: Okay. So that's the  
10 relevant date?

11 MR. FLETCHER: Yeah.

12 JUSTICE GORSUCH: Okay. And then,  
13 when we're looking at coercion, is it in your  
14 mind a relevant consideration that the industry  
15 is very concentrated and -- and that, therefore,  
16 coordination problems that otherwise might be  
17 difficult with the media, which are very  
18 diverse, might not be present in some cases?

19 MR. FLETCHER: So, again, context  
20 matters. And I think, in some ways, the fact  
21 that these are very large, very powerful  
22 corporations cuts against a finding of coercion  
23 because they are very sophisticated, they didn't  
24 have any problem, they weren't shy about saying  
25 no to the government.

1                   I -- I hesitate to say, though, that  
2                   it suggests that you should change the First  
3                   Amendment standards. I think the Knight brief  
4                   is --

5                   JUSTICE GORSUCH: I'm not suggesting  
6                   that. The Knight brief does discuss this and  
7                   says it might be a relevant factor that there's  
8                   such a concentration that it makes coordination  
9                   between government entities and private entities  
10                  easier.

11                  MR. FLETCHER: So -- but I --

12                  JUSTICE GORSUCH: Do you -- do you  
13                  disagree with that?

14                  MR. FLETCHER: I -- I -- I'm not sure  
15                  whether or not I agree with that, but I -- I  
16                  think the -- the point is that for our purposes,  
17                  the constitutional line is between coercion and  
18                  not coercion.

19                  JUSTICE GORSUCH: No, I understand  
20                  that.

21                  MR. FLETCHER: And so the -- the  
22                  question --

23                  JUSTICE GORSUCH: But in the context-  
24                  specific inquiries we've discussed --

25                  MR. FLETCHER: Right.

1 JUSTICE GORSUCH: -- you've pointed  
2 out one way in which concentration might make it  
3 less susceptible to coercion. Do we have to  
4 account for the possibility as well that in some  
5 circumstances -- and I'm not -- again, not  
6 case-specific -- it might make -- may make  
7 coercion easier?

8 MR. FLETCHER: So, if that were true,  
9 you would have to account for it. The reason  
10 I'm resisting is because I think the concerns  
11 about concentration in the industry go more to  
12 the potential effects of coercion if it happened  
13 than about whether or not coercion happened at  
14 all.

15 I get that. I'm sensitive to that,  
16 and the point that I was trying to draw from the  
17 Knight brief was the First Amendment isn't the  
18 answer to problems of concentration in this  
19 industry.

20 JUSTICE GORSUCH: No. I -- I -- I  
21 take --

22 MR. FLETCHER: That's how they're --

23 JUSTICE GORSUCH: -- I take that  
24 point.

25 MR. FLETCHER: Yeah.

1 JUSTICE GORSUCH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Kavanaugh?

4 JUSTICE KAVANAUGH: Just so I  
5 understand, your key legal argument is, I think,  
6 but correct me if I'm wrong, that coercion does  
7 not encompass significant encouragement or  
8 entanglement and that it would be a mistake to  
9 so conclude because traditional, everyday  
10 communications would suddenly be deemed  
11 problematic?

12 MR. FLETCHER: Exactly right, and --  
13 and, really, that what the lower courts have  
14 done here, I think, is to go beyond the coercion  
15 test and sort of to openly say we're going to  
16 open up this state action encouragement or --  
17 and that, I think, risks turning the platforms  
18 and lots of other entities that are interacting  
19 with the government into state actors and  
20 restricting their editorial choices under the  
21 First Amendment.

22 JUSTICE KAVANAUGH: And by coercion,  
23 you mean threat of legal consequences or --

24 MR. FLETCHER: Adverse government  
25 action. I -- I --

1 JUSTICE KAVANAUGH: Adverse government  
2 action, okay.

3 Then, on the killing people  
4 hypothetical or -- not hypothetical -- the  
5 statement, I mean, that raises kind of national  
6 security analogies. I don't know what your  
7 experience is or if you've looked into this, but  
8 it's probably not uncommon for government  
9 officials to protest an upcoming story on  
10 surveillance or detention policy and say, you  
11 know, if you run that, it's going to harm the  
12 war effort and put Americans at, you know, risk.

13 MR. FLETCHER: I -- I can't profess to  
14 have had personal experience with that. I know  
15 it has happened. The Knight brief talks about  
16 some examples. And I think that's an example of  
17 a valuable sort of interchange as long as it  
18 stays on the persuasion side of the line. I  
19 think plat- -- newspapers want to know if their  
20 publishing a story might put lives at risk. And  
21 they don't have to listen to the government, but  
22 that's information that they can consider in  
23 exercising their editorial judgment.

24 JUSTICE KAVANAUGH: But if they tack  
25 onto that: And if you publish the story, we're

1 going to pursue antitrust action against you?

2 MR. FLETCHER: A huge problem, yeah.

3 JUSTICE KAVANAUGH: Right. Okay. And  
4 then you haven't really described what you think  
5 the common interactions are. I mean, what --  
6 what -- what do you think those are?

7 MR. FLETCHER: At issue in the  
8 complaint or looking forward?

9 JUSTICE KAVANAUGH: No, just in  
10 general.

11 MR. FLETCHER: Yeah.

12 JUSTICE KAVANAUGH: You're speaking on  
13 behalf of the United States. Again, my  
14 experience is the United States, in all its  
15 manifestations, has regular communications with  
16 the media to talk about things they don't like  
17 or don't want to see or are complaining about  
18 factual inaccuracies. I'd be interested in what  
19 you want to describe about that.

20 MR. FLETCHER: Yeah. So I think  
21 that's absolutely right, and I won't profess to  
22 give you a comprehensive overview. We've looked  
23 at this very carefully in the context of these  
24 defendants because we've a couple times been  
25 under the shadow of this injunction, and so we

1 wanted to understand exactly what would be at  
2 stake there.

3           And so I think it comes into a couple  
4 of different buckets. One of them is engagement  
5 on matters of public policy, and I think that's  
6 what was going on here. I think childhood  
7 mental health, anti-Semitic speech, Islamophobic  
8 speech online are in that category. Those are  
9 issues where the White House, the Surgeon  
10 General, others, might want to make their views  
11 known, to use the bully pulpit to call on the  
12 platforms to do more.

13           Another is the national security  
14 space. I think the record is clearest there on  
15 the FBI providing these foreign malign influence  
16 selectors to the platforms for the platforms to  
17 take action if appropriate or briefing them on  
18 foreign threats or about terrorist activity  
19 happening on the platforms.

20           There's also a domestic law  
21 enforcement side of things, child exploitation,  
22 other things like that. The platforms are a  
23 vector for those sorts of activities, and the  
24 government communicates with them about that.

25           There's also election integrity

1 issues, false statements about the times,  
2 places, or manners of elections, saying the  
3 polls have closed early, don't bother coming to  
4 vote, in an effort to suppress people's vote.  
5 Or Democrats vote on Wednesday; Republicans vote  
6 on Tuesday. Those sorts of schemes are of  
7 concern to the law enforcement entities.

8           And then I think there's also the  
9 CDC's interactions, which involve providing  
10 advice, you know: By the way, we're seeing a  
11 lot of this information circulating on your  
12 platform. It's not true or it's misleading  
13 about something that we've put out. Or even  
14 just answering the platform's questions.

15           I think one of the flavors you get  
16 from the amicus briefs on our side of the case  
17 is there are a lot of valuable ways where the  
18 government has information or expertise that it  
19 can offer to private speakers, and it would be a  
20 shame to chill that.

21           JUSTICE KAVANAUGH: Thank you.

22           CHIEF JUSTICE ROBERTS: Justice  
23 Barrett?

24           JUSTICE BARRETT: So this might be a  
25 question about the distinction or the interplay



1 between Bantam Books and just state action more  
2 generally. In Justice Thomas's questioning of  
3 you towards the end, he was talking about the  
4 distinction between encouragement and coercion.

5 So what if Facebook said -- and this  
6 is counterfactual; it's not what happened in  
7 this case -- but what if Facebook said, you know  
8 what, we're partners, we're on the same team,  
9 this is a once-in-a-lifetime pandemic, and we  
10 think it would be most efficient and most  
11 helpful for the public good for us to just turn  
12 over our content moderation to you?

13 That's not coercion. That's voluntary  
14 on Facebook's part, but wouldn't it be state  
15 action then?

16 MR. FLETCHER: So, to me, it starts to  
17 veer over, and, obviously, with all the caveats,  
18 state action is incredibly context-specific. I  
19 don't want to be definitive.

20 JUSTICE BARRETT: Sure.

21 MR. FLETCHER: But, to me, that starts  
22 to verge more over into the joint action. We're  
23 doing something together. The government is  
24 doing things. It's actually making decisions.  
25 It's not just advising or persuading the

1 platforms.

2 I think the rubric may -- that well be  
3 state act action, but the rubric would be I  
4 think more sound in the joint action cases than  
5 under significant encouragement, which has never  
6 been just us trying to persuade you to do  
7 something.

8 JUSTICE BARRETT: How do we consider  
9 the relationship between those two things?  
10 Because I agree with you Bantam Books is about  
11 coercion and drawing the line there. But,  
12 clearly, there are some times when things veer  
13 into the joint action space where we would say  
14 that maybe there was state action. And there's  
15 a dispute in this case -- it kind of comes up in  
16 the next one too -- about which framework is the  
17 right one. What advice do you have?

18 MR. FLETCHER: Yeah. So, again, I  
19 think, if I were the Court, I would want to be  
20 cautious about making too definitive  
21 pronouncements. I would say that here, what's  
22 challenged is the persuasion, exhortation, bully  
23 pulpit provision of advice, provision of  
24 information, and that when those things are at  
25 issue, the main yardstick is going to be Bantam

1 Books. The main concern is going to be have you  
2 crossed the line from just really trying to  
3 persuade to trying to threaten and that Bantam  
4 is the right way to draw that line.

5 I think there are a lot of different  
6 amicus briefs from a lot of different parties,  
7 like the Chamber and NetChoice, they all agree  
8 that's the right line in this context.

9 I think you could reserve and say it  
10 would be a very different question if you're  
11 talking about the government and the platforms  
12 acting together, turning over operational  
13 control, integrating their operations. That's a  
14 different case and might present hard state  
15 action issues, but it's just really not the kind  
16 of issue here.

17 JUSTICE BARRETT: And not alleged  
18 here?

19 MR. FLETCHER: Exactly right, yeah.

20 JUSTICE BARRETT: Okay. My other  
21 question is about the findings of fact and clear  
22 error. So you were pretty insistent with  
23 Justice Kagan that we really, to address the  
24 standing point, don't have to review any of the  
25 district court's factual findings for clear

1 error.

2 I just want to make sure that that's  
3 right because I'm thinking about things you  
4 talked about with -- I think it was Justice  
5 Alito, the interchange with the expletives, you  
6 know, we're getting mad, we want answers now,  
7 you know, are you, whatever, serious?

8 MR. FLETCHER: Yeah.

9 JUSTICE BARRETT: And that was  
10 actually about his own Facebook account. Or  
11 there was another change that was -- exchange  
12 that was actually about somebody impersonating  
13 the President's granddaughter on Twitter.

14 MR. FLETCHER: Yeah.

15 JUSTICE BARRETT: So, if the lower  
16 courts, which I think they did, kind of  
17 conflated some of those threats with threats  
18 that were designed to be -- threats related to  
19 the pandemic and that kind of suppression,  
20 wouldn't that then be clear error, or do you  
21 think that's application of facts to law or  
22 what?

23 MR. FLETCHER: So I apologize. I  
24 didn't mean to say that there -- there's no  
25 clear error here at all. I just meant to say it

1 would be findings of historical fact. And I  
2 think the ones that you --

3 JUSTICE BARRETT: And those count.

4 MR. FLETCHER: And those -- those  
5 count. Those do get clear error review. But I  
6 think we pointed out places on the -- on the  
7 salient ones where they just are clearly  
8 erroneous, they're just demonstrably inaccurate,  
9 in the two cases that you just identified.

10 So, there, we -- we might agree clear  
11 error applies, but to the extent that the lower  
12 courts were suggesting, and, really, more the  
13 district court than the Fifth Circuit, but a  
14 little bit the Fifth Circuit too, that things  
15 were said to speakers that weren't said, that  
16 the Press Secretary said words she never said,  
17 our argument there would just be that those are  
18 clear error.

19 JUSTICE BARRETT: So, in considering  
20 traceability, you would say that maybe there are  
21 some things that we would review for clear error  
22 because the erroneous -- assuming that you're  
23 right, the erroneous conclusions about  
24 traceability depended partly on factual errors  
25 and then partly on applications of law to fact?

1                   MR. FLETCHER: And an incorrect legal  
2 standard, yeah.

3                   JUSTICE BARRETT: Okay. Thanks.

4                   CHIEF JUSTICE ROBERTS: Justice  
5 Jackson?

6                   JUSTICE JACKSON: So I guess I didn't  
7 perceive there to be such a sharp distinction  
8 between Blum and Bantam Books. The government  
9 seems to be arguing here that Bantam Books is  
10 the way to go, that Blum is not the right test.  
11 And I appreciate that Blum uses significant  
12 encouragement, but I think it says the question  
13 is whether the government "has provided such  
14 significant encouragement, either overt or  
15 covert, that the choice must in law be deemed  
16 that of the state."

17                   That it's sort of suggesting in the  
18 same way that Bantam Books is that it's really  
19 about coercion, as opposed to just  
20 encouragement. So am I wrong to think there's  
21 really not that much difference between the two?

22                   MR. FLETCHER: So I don't think you're  
23 wrong there. I think we say that that's the way  
24 you ought to read the "significant  
25 encouragement" language, that it's positive

1 incentives of government action that overwhelm  
2 the private party's choice and make it really  
3 the government's choice, not the private  
4 party's. You can just view that as the flip  
5 side of the sort of coercive threats from Bantam  
6 Books.

7 I think the reason why you may have  
8 sensed me today and us in our briefs resisting  
9 Blum is because the lower courts and my friends  
10 on the other side have really tried to turn that  
11 "significant encouragement" language into  
12 something quite different, into circumstances  
13 where the government encourages in some  
14 colloquial sense by urging or persuading or, you  
15 know, really strongly advocating something. And  
16 we just don't think that's what Blum means or  
17 what this Court's state action cases have ever  
18 said.

19 JUSTICE JACKSON: Okay. I understand  
20 that. And even if we have a world in which  
21 significant encouragement is verboten, is there  
22 something different to the government providing  
23 information?

24 MR. FLETCHER: Yes.

25 JUSTICE JACKSON: I mean, I'm a little

1 worried about the Respondents' -- what I think  
2 could be taken away from their view, which is  
3 that in situations in which the government has  
4 information that may be unique to the  
5 government's knowledge but that it feels  
6 important for the public to have, that that  
7 somehow becomes prohibited if, as a result of  
8 that information, these companies decide they're  
9 going to do something different with respect to  
10 content moderation.

11 MR. FLETCHER: That's our big concern  
12 too. And that's exactly what the lower courts  
13 found crossed the line, the FBI providing  
14 information about covert foreign actors on  
15 platforms, the CDC providing information or even  
16 answering questions about matters of public  
17 health. I think it would be very troubling to  
18 say that those things are impermissible or  
19 create state action.

20 JUSTICE JACKSON: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Mr. Aguinaga.

24

25



1 ORAL ARGUMENT OF J. BENJAMIN AGUINAGA

2 ON BEHALF OF THE RESPONDENTS

3 MR. AGUINAGA: Good morning, Mr. Chief  
4 Justice, and may it please the Court:

5 Government censorship has no place in  
6 our democracy. That is why this 20,000-page  
7 record is stunning. As the Fifth Circuit put  
8 it, the record reveals unrelenting pressure by  
9 the government to coerce social media platforms  
10 to suppress the speech of millions of Americans.

11 The district court, which analyzed  
12 this record for a year, described it as arguably  
13 the most massive attack against free speech in  
14 American history, including the censorship of  
15 renowned scientists opining in their areas of  
16 expertise.

17 And the government's levers of  
18 pressure are anathema to the First Amendment.  
19 Behind closed doors, the government badgers the  
20 platforms 24/7, it abuses them with profanity,  
21 it warns that the highest levels of the White  
22 House are concerned, it ominously says that the  
23 White House is considering its options, and it  
24 accuses platforms both of playing total  
25 Calvinball and of hiding the ball, all to get

1 the platforms to sensor more speech. Under this  
2 onslaught, the platforms routinely cave.

3 Now, last month, in the NetChoice  
4 cases, the platforms told you that it's  
5 incredibly important that they create their own  
6 content moderation policies. But this record  
7 shows that they continually depart from those  
8 policies because of unrelenting government  
9 pressure.

10 Indeed, as Facebook recently disclosed  
11 in an internal email to former UK deputy prime  
12 minister Nick Clegg, the reason Facebook did  
13 that was "because we were under pressure by the  
14 administration. We shouldn't have done it."

15 Now my friend says all this is  
16 constitutional because the government has the  
17 right to persuade using the bully pulpit. But  
18 the government has no right to persuade  
19 platforms to violate Americans' constitutional  
20 rights, and pressuring platforms in back rooms  
21 shielded from public view is not using the bully  
22 pulpit at all. That's just being a bully.

23 I welcome the Court's questions.

24 JUSTICE THOMAS: Counsel, the -- I  
25 know your argument is basically a Bantam Books

1 argument, but do you need coercion in order to  
2 -- do you think that's the only way you could  
3 make your case, or could coordination accomplish  
4 the same thing; that is, the government is  
5 censoring by joint actions with the platforms as  
6 opposed to coercing the platforms?

7 MR. AGUINAGA: Your Honor, we don't  
8 need coercion as a theory. That's why we led  
9 with encouragement in our red brief. And I  
10 would point the Court to what it said in  
11 Norwood, which is the Court -- or the government  
12 cannot induce, encourage, and promote private  
13 actors to do directly what the government can't  
14 itself do directly.

15 And that's, I think, the principle  
16 that's guiding here, which is regardless of the  
17 means that the government tries to use to  
18 pressure -- to pressure the platforms to commit  
19 censorship against third parties, the  
20 Constitution really doesn't care about that.  
21 It's the fact that what the government is trying  
22 to accomplish is the suppression of speech.

23 And I would say, Your Honor, I mean,  
24 that's exactly how you addressed this question  
25 in Bantam Books. You asked, did the government

1 set out to deliberately suppress speech? The  
2 answer in that case was absolutely yes, and  
3 that's absolutely the answer in this case here.

4 And I guess, you know, I -- I would  
5 say, you know, when this Court considered Bantam  
6 Books, one of the key things about the analysis  
7 in Bantam Books was that it was an obscenity  
8 case, and, you know, the Court struggled with  
9 whether the states had the right to police the  
10 line between legitimate speech and illegitimate  
11 speech. And that was why you were talking about  
12 coercion in that case. You were asking whether  
13 the states went too far --

14 JUSTICE JACKSON: Can I --

15 JUSTICE SOTOMAYOR: I -- I'm sorry.

16 The reason we were asking about coercion is  
17 because the private parties could have chosen on  
18 their own to censor that speech. They could  
19 have said we think it's obscene, I'm not going  
20 to be involved in this.

21 The only issue became when that choice  
22 was overridden by the government. And so I -- I  
23 don't -- I think you're -- you're cite -- you're  
24 mixing sort of situations and -- and confusing  
25 legal doctrines.

1                   MR. AGUINAGA: No, Your Honor. The  
2 fundamental principle, and this comes from  
3 Norwood and it's central to this Court's First  
4 Amendment cases, its Fourth Amendment cases,  
5 that the government can't do indirectly what  
6 it's prohibited from doing directly. And that's  
7 what you see happening in Bantam Books. That's  
8 what you see happening in a case like this  
9 because time and again there were times where  
10 the social media platforms had policies that  
11 didn't go far enough in censoring the speech  
12 that the -- that the government wanted them to  
13 censor.

14                   JUSTICE JACKSON: But whether or not  
15 the government can do this -- this is something  
16 I took up with Mr. Fletcher -- depends on the  
17 application of our First Amendment  
18 jurisprudence, and there may be circumstances in  
19 which the government could prohibit certain  
20 speech on the Internet or otherwise.

21                   I mean, do you -- do you -- do you  
22 disagree that we would have to apply strict  
23 scrutiny and determine whether or not there is a  
24 compelling interest in how the government has  
25 tailored its regulation?

1                   MR. AGUINAGA: Certainly, Your Honor.  
2     I think, at the end of every First Amendment  
3     analysis, you'll have the strict scrutiny  
4     framework in which, you know, in some national  
5     security hypos, for example, the government may  
6     well be able to demonstrate a compelling  
7     interest, may well be able to demonstrate narrow  
8     tailoring, but the --

9                   JUSTICE JACKSON: All right. So --  
10    so -- so not every situation will -- in which  
11    the government engages in conduct that  
12    ultimately has some effect on free -- on -- on  
13    speech necessarily becomes a First Amendment  
14    violation, correct?

15                  MR. AGUINAGA: Maybe not necessarily,  
16    Your Honor. I guess the top-line question I  
17    would ask is, has the government set out to  
18    abridge the freedom of speech? And in this  
19    case, you see that time and time again because,  
20    if you control F --

21                  JUSTICE JACKSON: But that's not the  
22    test for First Amendment violations.

23                  MR. AGUINAGA: Your Honor, this flows  
24    from the plain text of the First Amendment,  
25    right?

1 JUSTICE JACKSON: No, I understand.  
2 But we have a -- we have a test for a  
3 determination of whether or not the First  
4 Amendment is actually violated. So, in certain  
5 situations, you know, the government can  
6 actually require that speech be suppressed if  
7 there's a compelling interest, right?

8 MR. AGUINAGA: It can, Your Honor.  
9 And I guess what I would say is that the courts  
10 below never got to strict scrutiny because the  
11 government never raised this. This has never  
12 been litigated. The question in this case is  
13 whether at the front end the government itself  
14 has undertaken actions --

15 JUSTICE JACKSON: It's the coercion,  
16 it's the state action, right? That's the  
17 question in this case?

18 MR. AGUINAGA: And I would urge the  
19 Court to address the state action issue just  
20 like you addressed it in Bantam Books. You used  
21 that term four times in Bantam Books. In  
22 Footnote --

23 JUSTICE KAGAN: I mean, can I just  
24 understand because it seems like an extremely  
25 expansive argument, I must say, encouraging

1 people basically to suppress their own speech.  
2 So, like Justice Kavanaugh, I've had some  
3 experience encouraging press to suppress their  
4 own speech.

5           You just wrote about editorial. Here  
6 are the five reasons you shouldn't write another  
7 one. You just wrote a story that's filled with  
8 factual errors. Here are the 10 reasons why you  
9 shouldn't do that again.

10           I mean, this happens literally  
11 thousands of times a day in the federal  
12 government.

13           MR. AGUINAGA: Yeah, and I would say  
14 in the mine-run case that you're describing to  
15 me, it's the government going after the speaker  
16 itself and trying to get them to change their  
17 speech.

18           What's so pernicious here is that you  
19 don't see any of these facts in this record  
20 unless we get discovery, which is when -- when  
21 Rob Flaherty, who's Deputy Assistant to the  
22 President, sends an email to Facebook or to  
23 Twitter and complains that they're not doing  
24 enough to censor what they view as vaccine  
25 hesitancy speech, America never sees that.



1                   And the third party, people like Jill  
2 Hines and -- and Jim Hoft, whose speech wishes  
3 to express the kinds of viewpoints that the  
4 White House is targeting, they never know that  
5 that's happening behind the scenes.

6                   And I think it makes a difference,  
7 Justice Kagan, that you have an intermediary  
8 here who really has no incentive to itself  
9 defend Jim Hoft's speech or to defend Jill  
10 Hines's speech. In The New York Times's  
11 hypothetical, you have a story, a publication  
12 that itself is familiar with those kinds of --

13                   JUSTICE KAVANAUGH: Well, what about  
14 op-eds?

15                   JUSTICE KAGAN: I mean --

16                   JUSTICE BARRETT: Don't you think --

17                   JUSTICE KAVANAUGH: What about op-eds?

18                   MR. AGUINAGA: Your Honor, with  
19 op-eds, you know, if it's third-party speech  
20 that -- that has that issue --

21                   JUSTICE KAVANAUGH: That happens too,  
22 right?

23                   MR. AGUINAGA: And I guess there are a  
24 number of ways I would think about that, Your  
25 Honor. One is if the newspaper declines to run

1 an op-ed because the government asked, that  
2 op-ed author can go to any number of other  
3 publications and it has an outlet.

4 It's not the same here because, if I'm  
5 on Twitter and I wish to express a viewpoint  
6 that the government wishes to censor and Twitter  
7 bows to that pressure, then --

8 JUSTICE KAGAN: But if one --

9 MR. AGUINAGA: -- I lose my account.

10 JUSTICE KAGAN: -- if --

11 MR. AGUINAGA: I --

12 CHIEF JUSTICE ROBERTS: I was just  
13 going to say, first, I have no experience  
14 coercing anybody.

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: But -- but,  
17 second, I mean, the government is not monolithic  
18 either. I suspect, when there's pressure put on  
19 one of the platforms or certainly one of the  
20 other media outlets, they have people they go  
21 to, probably in the government, to say: Hey,  
22 they're trying to get me to do this, and that  
23 person may disagree with what the government's  
24 trying to do. It's not monolithic. And that  
25 has to dilute the concept of coercion

1 significantly, doesn't it?

2 MR. AGUINAGA: Your Honor, I -- I'm  
3 not sure I agree with that. And I guess I'd get  
4 back to one of the earlier points I made, which  
5 is, you know, whether you call this coercion, if  
6 that's the label you attach, you call it  
7 encouragement, you call it promotion, you call  
8 it inducement, whatever it is, if the government  
9 is attempting to abridge the speech rights of a  
10 third party, that has to be unconstitutional  
11 because that falls within the plain text of the  
12 First Amendment.

13 And so, you know, this is Bantam Books  
14 of the 21st Century. You haven't had a case  
15 with social media platforms like this where  
16 third-party speech is so at risk of being  
17 censored.

18 CHIEF JUSTICE ROBERTS: Well, but how  
19 do you -- I mean, how do you analyze a situation  
20 where, you know, maybe EPA is trying to coerce a  
21 platform about something, and the Army Corps of  
22 Engineers is trying to coerce them the other  
23 way? I mean, you can't just sort of pick and  
24 choose which part of the government you're  
25 concerned about.

1 MR. AGUINAGA: Your Honor --

2 CHIEF JUSTICE ROBERTS: I mean,  
3 obviously, it's different when you're talking  
4 about what the president is saying in  
5 particular, but other than that, I think it's a  
6 very -- more a fluid situation than anything  
7 else.

8 MR. AGUINAGA: It is fluid, Your  
9 Honor, but I would say that when you have, as we  
10 have, plaintiffs in this case who wished to  
11 express certain viewpoints that have been  
12 specifically targeted by -- targeted by the  
13 government, you know, it's not at least fluid in  
14 these facts.

15 And this is not a case just about  
16 COVID. It's a case about election integrity.  
17 It's a case the district court has a finding  
18 about how the government wishes to --

19 JUSTICE KAGAN: So, I mean, what about  
20 that? I mean, you know, take a -- an example  
21 where -- I mean, these platforms, they're  
22 compilers of speech, and some part of the  
23 government, let's call it part of the law  
24 enforcement arm of the government, says you  
25 might not realize it, but you are hosting a lot

1 of terrorist speech, which is going to increase  
2 the chances that there's going to be some  
3 terrible harm that's going to take place, and we  
4 want to give you this information, we want to  
5 try to persuade you to take it down.

6 Are -- are -- the government can't do  
7 that?

8 MR. AGUINAGA: The government can  
9 absolutely do that, Justice Kagan.

10 JUSTICE KAGAN: They're taking --

11 MR. AGUINAGA: Terrorist activity,  
12 criminal --

13 JUSTICE KAGAN: -- they're -- they're  
14 asking them to take down the speech.

15 MR. AGUINAGA: Terrorist activity,  
16 criminal activity, that is not protected speech.  
17 Absolutely, the government can inform the -- the  
18 --

19 JUSTICE KAGAN: Well, that might --  
20 might be protected speech. I mean, terrorists  
21 engage in, you know, things that come under the  
22 First Amendment. I mean, let's say they're just  
23 recruiting people for their organizations.

24 MR. AGUINAGA: Your Honor, if it's  
25 First Amendment speech, protected speech, then I

1 think we're in an entirely different world. I  
2 mean, that's the case where -- and this comes up  
3 in the FBI findings that the district court made  
4 because what was happening is they were -- the  
5 FBI was sending Teleporter encrypted messages to  
6 the platforms, identifying what the government  
7 represents was foreign actors. The district  
8 court found the government was not  
9 distinguishing between whether it was domestic  
10 or foreign conduct.

11 And the way this issue arises is when  
12 maybe you have a foreign actor who tweets, you  
13 know, I love Biden, and there are 20 million  
14 people who wish to retweet that, repost that,  
15 with their own comments, saying, heck, yeah, I  
16 love Biden too. When an American does that,  
17 that's First Amendment protected speech, Your  
18 Honor. And so, when the government comes in and  
19 tries to take down every single post that  
20 contains the core that they say was foreign  
21 speech, but they're also taking down the -- the  
22 added speech by Americans, that's a square First  
23 Amendment issue, Your Honor.

24 JUSTICE KAGAN: So back in -- this --  
25 this -- this still happens now -- decades ago,

1 it happened all the time, which is somebody from  
2 the White House got in touch with somebody from  
3 The Washington Post and said this will -- this  
4 will just harm national security, and The  
5 Washington Post said, okay, whatever you say.

6 I mean, that was all -- we didn't know  
7 enough, but that was -- that was coercion?

8 MR. AGUINAGA: Your Honor, I -- I  
9 thought I understood the government this morning  
10 to say that might be a First Amendment issue.  
11 And I think what I would say is, if there's a  
12 national security interest, maybe the government  
13 can satisfy strict scrutiny in that  
14 circumstance. What I would also say is we  
15 probably wouldn't have a lawsuit based on that  
16 because I don't know how we would get  
17 prospective injunctive relief based on a  
18 fleeting offhand, you know, reach-out from the  
19 White House to --

20 JUSTICE BARRETT: But that's --

21 JUSTICE KAGAN: I guess what I'm just  
22 trying to suggest is that there's all kinds of  
23 things that can appear on these platforms that  
24 do all kinds of different harms, and -- and the  
25 inability of government that you're suggesting

1 to -- to reach out to these platforms and say we  
2 want to give you information that you might not  
3 know about on this, and we want to give you our  
4 perspective on what harms this is doing, and --  
5 and, you know, we want to be able to answer  
6 questions that you have because we really do  
7 think that it would be a good thing if you on  
8 your own chose to take this speech down.

9 MR. AGUINAGA: And, Your Honor, if  
10 those were the facts in this case, then I think  
11 it would be a much harder case for me. I think  
12 --

13 JUSTICE KAGAN: Well, now I don't know  
14 what your standard is. You just told me that  
15 that was -- that was good enough for you.

16 MR. AGUINAGA: No --

17 JUSTICE KAGAN: That was coercion.

18 MR. AGUINAGA: No, Your Honor,  
19 because, you know, in that circumstance, you  
20 have a platform who is reaching out -- or the  
21 government reaching out just to -- to identify  
22 what it views as the right state of the law,  
23 right state of facts.

24 The government -- I mean this Court  
25 has made clear for -- for a while, since its



1 plurality opinion in Alvarez, that if the  
2 government thinks there's false speech out  
3 there, the remedy for that is true speech.  
4 Nothing prohibits the government from going to  
5 that platform and saying we've seen a lot of  
6 false information about election activity and  
7 COVID and vaccines and the like. Nothing  
8 prohibits the government from saying here's a  
9 list of everything we say is true, that is true  
10 in our view, and you should amplify our speech,  
11 and anytime that false speech arises, you should  
12 put our posts right there next to it saying this  
13 is the government's view on this issue.

14           The problem here -- and this is -- you  
15 know, I think you see this in the summer of 2021  
16 after the White House goes nuclear on the  
17 platforms -- is that the platforms themselves  
18 reverse course on their own policies. And you  
19 see this in ROA 15322, this is one of the -- in  
20 my view, one of the hottest docs in the -- in  
21 the JA because you've got this email from Nick  
22 Clegg, who is, you know, former deputy prime  
23 minister of the UK, and after all of this  
24 pressure for months and months and months, he  
25 sends this email to Vivek Murthy, the Surgeon

1 General, and he says: Dear Vivek, thanks for  
2 taking the time to meet. I wanted to make sure  
3 you saw the steps we took past -- this past week  
4 to adjust policies on what we're removing to  
5 take steps to further address the Disinfo Dozen.  
6 We've removed 39 profiles, pages, groups,  
7 Instagram accounts. We're continuing to make  
8 other accounts harder to find.

9 I mean, this is an example of  
10 platforms moving beyond what their own policies  
11 required because they felt pressure to take more  
12 action and to censor more speech. And, Your  
13 Honor, if that's -- I mean, if that's not the  
14 clearest example of the government doing --

15 JUSTICE BARRETT: So, counsel --

16 JUSTICE SOTOMAYOR: I'm sorry. Tell  
17 me where -- where you have in the record that --  
18 the 39 accounts that were taken out, that any of  
19 them related to any of the Petitioners here.

20 MR. AGUINAGA: Sure, Your Honor. So  
21 what I was quoting --

22 JUSTICE SOTOMAYOR: Give me -- give me  
23 that cite again.

24 MR. AGUINAGA: What I was quoting to  
25 you right now is ROA 15322, and what that email

1 from Nick Clegg mentions is the so-called  
2 Disinformation Dozen. This is a group of people  
3 that the government thought was responsible for  
4 the majority of so-called health misinformation  
5 on social media.

6 Now, in paragraphs 5 and 6 of each of  
7 the supplemental declarations in the Joint  
8 Appendix, each of our individual plaintiffs  
9 specifically identifies the fact that they  
10 follow members of the so-called Disinformation  
11 Dozen, they repost their posts, they engage with  
12 their speech.

13 And so, when the government -- or when  
14 the platforms here, in response to the pressure,  
15 are taking down content and accounts related to  
16 those individuals called the Disinformation  
17 Dozen, that is necessarily impacting our  
18 plaintiffs' right to engage with their speech,  
19 to add their own comments --

20 JUSTICE SOTOMAYOR: Not that they've  
21 taken down any of their posts, but they took  
22 down someone else's posts? That's what this is  
23 saying?

24 MR. AGUINAGA: That's what I was  
25 quoting to you right now, Your Honor, the --

1 JUSTICE SOTOMAYOR: That, I'm not sure  
2 how that shows traceability or redressability.

3 MR. AGUINAGA: In the same vein, I  
4 think you --

5 JUSTICE SOTOMAYOR: And I don't think  
6 we've ever dispensed standing on the basis of  
7 injury to another, injury to you but not to  
8 another.

9 MR. AGUINAGA: So, Justice Sotomayor,  
10 let me give you Jill Hines one more time. Look  
11 at JA 7 -- 793 to 794. This is the tweet  
12 that -- or it was a screenshot of a tweet that  
13 Mr. Fletcher mentioned. And this is censorship  
14 four times over because this is a tweet in April  
15 2023. It's on the eve of the preliminary  
16 injunction hearing. And what she says is: This  
17 Facebook post that I posted was taken down by  
18 Facebook. She got a warning for it as a  
19 violation of the community standards.

20 What was that post? It was a  
21 screenshot of Robert F. Kennedy, Junior, who is  
22 a member of the so-called Disinformation Dozen.  
23 What was the RFK tweet talking about? It was  
24 talking about Tucker Carlson, whom the  
25 administration was obsessed with. Look at JA

1 701 to 708.

2 JUSTICE SOTOMAYOR: I'm sorry, the RFK  
3 tweet, the -- there's only a record of the White  
4 House asking Twitter to remove a tweet on -- and  
5 not particularly this one from R -- RFK. That  
6 doesn't help Hines's claim that the White House  
7 asked Facebook to remove anything.

8 MR. AGUINAGA: It does, Your Honor,  
9 because -- and this is a good example of the  
10 interrelationship between the various media  
11 platforms -- you have cross-posting. So what  
12 happened in this example is Jill Hines took a  
13 screenshot of a tweet, and then she moved that  
14 over to Facebook and posted that as her own  
15 Facebook post. And so, when she did that, she  
16 moved RFK's tweet.

17 And I was going to describe what was  
18 in that tweet. He was talking about Tucker  
19 Carlson, that the White House specifically  
20 targeted, in the Joint Appendix, and that --

21 JUSTICE SOTOMAYOR: You know, I -- I  
22 have such a problem with -- with your brief,  
23 counselor. You omit information that changes  
24 the context of some of your claims. You  
25 attribute things to people who it didn't happen

1 to. At least in one of the defendants, it was  
2 her brother that something happened to, not her.  
3 I don't know what to make of all this because  
4 you're -- you have a -- I'm not sure how we get  
5 to prove direct injury in any way.

6 MR. AGUINAGA: So, Justice Sotomayor,  
7 let me start by apologizing if any aspect of our  
8 brief was not as forthcoming as it should have  
9 been. I -- I will take full responsibility for  
10 that. I apologize for that, Justice Sotomayor.

11 What I would add to the second part of  
12 your question is I think Jill Hines is the best  
13 standing for case -- for our case in multiple  
14 ways. I think one of the ways you look at her  
15 standing is you look at JA 715 to 716. This is  
16 an email to Facebook where the government, the  
17 White House, specifically asks Facebook to not  
18 distribute so-called vaccine hesitancy content  
19 and also to target health groups that do that.  
20 So that's JA 715 to 716.

21 Then you go down earlier in the JA to  
22 JA 631 to 632. This is Jill Hines's  
23 allegations. And what she says is, two months  
24 later -- so the email I described from you -- to  
25 you from the White House was in May -- two

1 months later in July and then a couple of months  
2 later in September, Jill Hines had two health  
3 groups in Louisiana that were blocked by  
4 Facebook.

5           And I think this is one of the  
6 scariest examples in the record of what is at  
7 stake here, which is those groups were political  
8 action groups. Louisiana had a legislative  
9 session in progress. And what Jill Hines was  
10 trying to do is mobilize people to support  
11 certain bills and other legislative materials  
12 that were then pending in the state legislature.

13           But, because the government moved its  
14 pressure and put a thumb on the scales, you  
15 know, a couple of months before and then, lo and  
16 behold, once Jill Hines tries to use the exact  
17 kinds of groups that the government targeted,  
18 she can't. They're pulled down. Her political  
19 organization is stymied. And that's, you know,  
20 all over the record, and that's just one  
21 fraction of -- of the kinds of harm that's at  
22 stake here.

23           JUSTICE BARRETT: So, counsel --

24           JUSTICE KAGAN: That -- that's your  
25 best --

1 JUSTICE BARRETT: -- can I ask you --

2 JUSTICE KAGAN: No, go ahead.

3 JUSTICE BARRETT: I -- I want to go  
4 back to actually your interchange with Justice  
5 Kagan about the standards because I have to  
6 confess it left me very confused. It sounded  
7 like you were articulating different standards  
8 depending on -- a different legal standard  
9 depending on different factual circumstances.

10 For example, when Justice Kagan gave  
11 you the hypothetical of pressure being placed on  
12 The New York Times or The Washington Post not to  
13 run a particular op-ed, it seemed like you  
14 backed off and said, well, significant  
15 encouragement wouldn't be enough there because  
16 the person who wrote the op-ed can go to another  
17 news outlet.

18 You also made the point that this is  
19 just different because social media is such a  
20 concentrated industry, which is a point that  
21 Justice Gorsuch was asking Mr. Fletcher about.

22 So can you clarify? Did I -- did I  
23 misunderstand? Because it seems to me that as a  
24 matter of law, the same legal standard would  
25 have to apply across all of these areas.



1                   MR. AGUINAGA: I think that's right,  
2 Your Honor. And I apologize if I wasn't clear  
3 earlier.

4                   I guess the top-line legal standard I  
5 would start with was this Court's line at 635 in  
6 Norwood, which is the Court can't do indirectly  
7 what it's constitutionally prohibited from doing  
8 directly.

9                   The second line in response to that  
10 is, well, what sorts of indirect mechanisms can  
11 the government use that would run afoul of that  
12 rule?

13                   I think one potential mechanism is  
14 coercion. Another one is encouragement. This  
15 Court also has used the term induced --

16                   JUSTICE BARRETT: Just plain vanilla  
17 encouragement, or does it have to be some kind  
18 of, like, significant encouragement? Because  
19 encouragement would sweep in an awful lot.

20                   MR. AGUINAGA: I think that's right,  
21 Your Honor. And so let me give you two answers  
22 to that. The top-line answer is, I mean, I'm a  
23 First Amendment purist and so I would say even  
24 mild encouragement, but we don't need that to  
25 win in this case because we are so far afield

1 from whatever that -- that threshold is.

2 So, if you want to say substantial  
3 encouragement like the Fifth Circuit said and  
4 like Blum said, absolutely. That's a standard  
5 that works.

6 But I guess what I -- I don't --

7 JUSTICE BARRETT: Well, let me just --  
8 let me just ask you then, let me give you a  
9 hypothetical. Let's say that you get doxed and  
10 so do numerous other members in Louisiana state  
11 government. You're doxed, and somebody is  
12 posting online about how people should really  
13 rally and do something about this. People  
14 should rally and you should be harmed, okay?

15 The FBI sees these posts and calls the  
16 social media outlet, like X, Facebook, whatever,  
17 and says we really encourage you to take these  
18 down because these are significantly threatening  
19 and we see some people may be responding to  
20 them.

21 That's -- that's a problem?

22 MR. AGUINAGA: So my first question,  
23 Your Honor, is whether that would be protected  
24 speech, those tweets would be protected speech,  
25 Your Honor, under this Court's --

1 JUSTICE BARRETT: Okay. Let's just  
2 assume -- let's assume that everything that's  
3 said, I was trying to make it so that they --

4 MR. AGUINAGA: Yes, they are.

5 JUSTICE BARRETT: -- stop short of  
6 actually being illegal in and of themselves.

7 MR. AGUINAGA: Your Honor, so I think,  
8 you know, as I say, I'm a purist on the First  
9 Amendment, so my answer would be yeah, like,  
10 that --

11 JUSTICE BARRETT: So the FBI can't  
12 make -- do you know how often the FBI makes  
13 those kinds of calls?

14 MR. AGUINAGA: And that's why -- and  
15 that's why I have backup answer, Your Honor,  
16 which is, if you think there needs to be more,  
17 the FBI absolutely can identify certain  
18 troubling situations like that for the platforms  
19 and let the platforms take action.

20 I think we're -- you know, the hypos  
21 are very important, but when you look at what's  
22 happening in this case, for example, with  
23 respect to the FBI, what they're doing is not --  
24 there's no emergency, nothing of the sort.  
25 They're just identifying hundreds of accounts --

1 JUSTICE BARRETT: But that's just kind  
2 of falling back on, well, this case is  
3 different, this case is different, and so a  
4 different legal standard should apply, but, you  
5 know, what we say in this case matters for other  
6 cases too.

7 MR. AGUINAGA: It does, Your Honor.  
8 And, you know, if that -- I guess what I would  
9 say in response to that, and I'm very sensitive  
10 obviously given the facts of the hypo to the  
11 outcome, but if what the FBI is doing is trying  
12 to persuade an inter -- a speech intermediary to  
13 take down a private third party's speech, I  
14 mean, that is the -- that is covered by the  
15 plain text of Norwood, and that's, I mean, an  
16 abridgement of speech.

17 And I -- you know, I --

18 JUSTICE JACKSON: So I think -- I  
19 think that part of the reason why you might be  
20 running into all of these difficulties with  
21 respect to the different factual circumstances  
22 is because you're not focusing on the fact that  
23 there are times in which the government can,  
24 depending on the circumstances, encourage,  
25 perhaps even coerce, because they have a

1 compelling interest in doing so.

2           And so that's why I keep coming back  
3 to the actual underlying First Amendment issue,  
4 which we can isolate in this case and just talk  
5 about -- about coercion, but I think there --  
6 that you have to admit that there are certain  
7 circumstances in which the government can  
8 provide information, encourage the platforms to  
9 take it down, tell them to take it down.

10           I mean, what about -- what about the  
11 hypo of someone posting classified information?  
12 They say it's my free speech right, I believe  
13 that I -- you know, I got access to this  
14 information and I want to post it.

15           Are you suggesting that the government  
16 couldn't say to the platforms, we need to take  
17 that down?

18           MR. AGUINAGA: No, Your Honor, because  
19 I think that would be a great example where  
20 strict scrutiny would cut in the government's  
21 favor if it could show --

22           JUSTICE JACKSON: All right. So what  
23 do we -- what do we do then in a situation in  
24 which -- I mean, I suppose, in this case, we're  
25 asking -- the government's point is we didn't

1       coerce. And I appreciate, you know, the debate  
2       about that.

3                   But you just seemed to suggest that as  
4       a blanket matter, the government doesn't have  
5       the ability to, you know, encourage or require  
6       this kind of censorship. And I don't know that  
7       that's the case.

8                   MR. AGUINAGA: So, Your Honor, I guess  
9       this goes to the bully pulpit as well as I  
10      understand that the bully pulpit has never been  
11      used to target the object of suppressing a third  
12      party's speech.

13                   You can use it to coerce behavior.  
14      You can use it to coerce companies to take  
15      certain actions. But, when the government is  
16      identifying a specific viewpoint and specific  
17      content that it wishes to wholly eliminate from  
18      public discourse, that's, I think, when the  
19      First Amendment problem arises.

20                   And so I -- I -- I guess -- I'm  
21      struggling to find an example in the Court's  
22      cases or in history where the Court or anybody  
23      else has said: The government, by virtue of  
24      being the government, can use its power to  
25      pressure speech intermediaries to eliminate

1 entire viewpoints and -- and -- and content from  
2 the public discourse.

3 And I think, I mean, that's -- that's,  
4 Your Honor --

5 JUSTICE JACKSON: Can I give you a  
6 hypothetical?

7 MR. AGUINAGA: Sure.

8 JUSTICE JACKSON: Suppose someone  
9 started posting about a new teen challenge that  
10 involved teens jumping out of windows at  
11 increasing elevations. This is the challenge.  
12 And kids all over the country start doing this.  
13 There's an epidemic, children are seriously  
14 injuring or even killing themselves in  
15 situations.

16 Is it your view that the government  
17 authorities could not declare those  
18 circumstances a public emergency and encourage  
19 social media platforms to take down the  
20 information that is instigating this problem?

21 MR. AGUINAGA: Your Honor, the  
22 government absolutely can use the pulpit to say  
23 publicly, here's what we recognize to be a  
24 public health issue, emergency. This is  
25 obviously extremely terrible, and the public

1 shouldn't tolerate this. The platforms, we see  
2 it's going on on the platforms, you know.

3 JUSTICE JACKSON: But they can't call  
4 the platforms and say, listen, we really think  
5 you should be taking this down because look at  
6 the problems that it's causing?

7 MR. AGUINAGA: If it's protected  
8 speech, Your Honor, then I think we get closer.  
9 But, like, look, if you think that that's --  
10 that's clearly the way you're asking the  
11 question, I -- I understand the instinct that  
12 that may -- you know, may not be a First  
13 Amendment issue.

14 I guess what I'd fall back on, Your  
15 Honor, is that at least where the government  
16 itself, there is no emergency like this, there's  
17 nothing and without --

18 JUSTICE JACKSON: No. My hypothetical  
19 is there is an emergency. My hypothetical is  
20 that there is an emergency, and I guess I'm  
21 asking you, in that circumstance, can the  
22 government call the platforms and say: This  
23 information that you are putting up on your  
24 platform is creating a serious public health  
25 emergency, we are encouraging you to take it



1 down?

2 MR. AGUINAGA: I -- I was with you  
3 right until that last comment, Your Honor. I  
4 think they absolutely can call and say this is a  
5 problem, it's going rampant on your platforms,  
6 but the moment that the government tries to use  
7 its ability as the government and its stature as  
8 the government to pressure them to take it down,  
9 that is when you're interfering with the third  
10 party's speech rights.

11 CHIEF JUSTICE ROBERTS: Well, even if  
12 you --

13 MR. AGUINAGA: And, remember, the  
14 third --

15 CHIEF JUSTICE ROBERTS: Go ahead,  
16 finish your --

17 MR. AGUINAGA: Your Honor, I was just  
18 going to say even -- remember that the third  
19 party here is completely absent from the  
20 conversation. The third party whose speech is  
21 being targeted and ultimately censured is absent  
22 from this discussion.

23 CHIEF JUSTICE ROBERTS: Well, you  
24 don't think -- well, do you think that simply  
25 Justice Jackson's hypotheticals ended by saying

1 we encourage you to take it down, is that rise  
2 to the level of coercion that you think is  
3 problematic?

4 MR. AGUINAGA: Your Honor, if the test  
5 is coercion and that's the test that this Court  
6 applies, I think I might have a harder case  
7 saying that's coercion. I think it's -- by its  
8 definition, it's maybe easier addressed as a  
9 substantial encouragement case.

10 But if -- you know, whether -- as I  
11 said earlier, regardless of the label that you  
12 apply, whether it's coercion, whether it's  
13 encouragement, or joint participation and  
14 conspiracy, at the end of the day, if what the  
15 government is trying to do is to eliminate  
16 viewpoints from public discourse, that I think  
17 --

18 CHIEF JUSTICE ROBERTS: Well, again,  
19 under my colleague's hypothetical, it was not  
20 necessarily eliminate viewpoints, it was to  
21 eliminate instructions, let's say, about how to  
22 engage in some game that is seriously harming  
23 children around -- around the country, and they  
24 say we -- we encourage you to stop that.

25 I mean, is it -- that violates the

1 Constitution?

2 MR. AGUINAGA: Your Honor, I agree as  
3 a policy matter, it might be great for the  
4 government to be able to do that, but the moment  
5 that the government identifies an entire  
6 category of content that it wishes to not be in  
7 the modern public sphere, that is a First  
8 Amendment problem.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Justice Thomas?

12 Justice Alito?

13 JUSTICE ALITO: Well, Mr. Aguinaga, I  
14 think some of your most recent colloquy with my  
15 colleagues have gotten off into questions that I  
16 didn't take it from your brief we -- you think  
17 we actually need to decide in this case.

18 So I thought your principal argument  
19 was that whatever coercion means, it -- what  
20 happened here is sufficient and that coercion  
21 doesn't mean only -- it doesn't apply only when  
22 the government says do this, and if you don't do  
23 this, there are going to be legal consequences  
24 when it says that in this same breath, but that  
25 it's a more flexible standard and you have to

1 take into account the whole course of the  
2 relationship regarding this matter.

3 That's what I -- I took to be your  
4 principal argument. Did I understand that  
5 correctly?

6 MR. AGUINAGA: That's correct, Your  
7 Honor. And there's an entire volume -- I mean  
8 we have got 20,000 pages in this record of the  
9 government persistently going back to platforms  
10 again and again, pushing them to adjust their  
11 policies, change their policies, do more  
12 censoring.

13 And I think that's what makes this  
14 case so unique, is that you not only have this  
15 vast repetition of communications, but it's  
16 all -- again, the bulk of it is behind closed  
17 doors. And that's what's so pernicious about  
18 this, is that if we don't have a remedy in this  
19 case, then it's hard to see how there will ever  
20 be a remedy for a future plaintiff who turns out  
21 to be censored but it's difficult for that  
22 person to even identify whether that censoring  
23 actually happened.

24 JUSTICE ALITO: And you got all this  
25 information only through discovery; is that

1 correct?

2 MR. AGUINAGA: That's correct, Your  
3 Honor.

4 JUSTICE ALITO: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Sotomayor?

7 Justice Kagan?

8 JUSTICE KAGAN: Could we go back to  
9 the standing question? And -- and if I ask you  
10 for the single piece of evidence -- and maybe  
11 this is the -- the piece that you were  
12 describing earlier, I just wanted to make clear  
13 what your answer was. The single piece of  
14 evidence that most clearly shows that the  
15 government was responsible for one of your  
16 clients having material taken down, what is that  
17 evidence? And, you know, what does it say about  
18 how the government was responsible?

19 MR. AGUINAGA: Sure, Your Honor. So  
20 as I say, I think Jill Hines is the best example  
21 for us on standing. To give you one more  
22 example, look at page --

23 JUSTICE KAGAN: Yeah, but even on that  
24 one, I guess I just didn't understand, in what  
25 you were saying, how you drew the link to the

1 government. I mean, we know that there's a lot  
2 of government encouragement around here. We  
3 also know that there's -- the platforms are  
4 actively content moderating, and they're doing  
5 that, irrespective of what the government wants.

6 So how do you decide that it's  
7 government action as opposed to platform action?

8 MR. AGUINAGA: Your Honor, I think the  
9 clearest way -- and if I understand -- so let me  
10 answer your question directly, Your Honor.

11 The way -- the link that I was drawing  
12 there was a temporal one. If you look at JA 715  
13 to 717, that's a May 2021 e-mail. Two months  
14 later after that e-mail, calls were targeting  
15 health groups just like Jill Hines's group. She  
16 experiences the first example of that kind of  
17 group being --

18 JUSTICE KAGAN: Yeah, so in two  
19 months, I mean, a lot of things can happen in  
20 two months. So that decision two months later  
21 could have been caused by the government's  
22 e-mail, or that government e-mail might have  
23 been long since forgotten, because, you know,  
24 there are a thousand other communications that  
25 platform employees have had with each other,

1 that -- a thousand other things that platform  
2 employees have read in the newspaper.

3 I mean, why would we point to one  
4 e-mail two months earlier and say it was that  
5 e-mail that made all the difference?

6 MR. AGUINAGA: Your Honor -- and I  
7 would say a thousand other e-mails between the  
8 White House and Facebook in those two months. I  
9 mean, that's the volume of this interaction,  
10 this back and forth, between the platform and  
11 the government. And it's all --

12 JUSTICE KAGAN: The specific --

13 MR. AGUINAGA: -- about the same  
14 topic.

15 JUSTICE KAGAN: But if it's  
16 encouragement -- I mean, let's even take that  
17 this was something that the -- that the  
18 government was continually pressing the --  
19 encouraging the platforms to do. I mean, until  
20 you can show that there's something about --  
21 overbearing the platform's will, which, you  
22 know, seems sort of hard to overbear Facebook's  
23 work -- will from what I can gather from the  
24 world, but, you know, how do you say it's the  
25 government rather than Facebook?

1                   MR. AGUINAGA: Your Honor, I guess  
2 what I -- what I would say is we're in -- the  
3 context in which these -- these communications  
4 arise, Facebook e-mails are attempting -- they  
5 say -- they use terms like "partner," they're  
6 trying to work with the government.

7                   And, you know, like, you could say the  
8 same thing about how do you know it's Facebook,  
9 not the government, how do you know it's the  
10 government, not Facebook? You could ask it  
11 either way. I think what we do know --

12                   JUSTICE KAGAN: Well, you're exactly  
13 right.

14                   MR. AGUINAGA: I think what we do know  
15 --

16                   JUSTICE KAGAN: And you could say that  
17 about pretty much everything that's in your  
18 brief, that there's just nothing where you can  
19 say, okay, the government said take down that  
20 communication.

21                   The government is making some broad  
22 statements about the kinds of communications it  
23 thinks harmful. Facebook has a lot of opinions  
24 on its own about various kinds of communications  
25 it thinks harmful.



1           I guess if you're going to use  
2           standard ideas about traceability and  
3           redressability, I guess what I'm suggesting is I  
4           don't see a single item in your briefs that  
5           would satisfy our normal tests.

6           MR. AGUINAGA: So, Your Honor, look at  
7           Jill Hines, and I'll give you one more example.  
8           Look at page 20 of the red brief. This is the  
9           Jim Hoft example, because we know that his name  
10          and the Gateway Pundit specifically appear in  
11          the tracking spreadsheet that CISA uses, that  
12          the FBI uses as well. And we also know that the  
13          EIP, the Election Integrity Partnership, that  
14          works with CISA, and the government -- the  
15          district court found this a million times. It  
16          said that it looks like they have a coordinated  
17          effort out to get Jim Hoft.

18          I mean, I think that's our -- our  
19          second best example on direct traceability, Your  
20          Honor. So if you're not satisfied with Jill  
21          Hines look at Jim Hoft, look at page 20 of the  
22          red brief.

23          JUSTICE KAGAN: Thank you.

24          CHIEF JUSTICE ROBERTS: Justice  
25          Gorsuch?

1 JUSTICE GORSUCH: You -- you've spoken  
2 with Justice Kagan about your best examples on  
3 traceability. How about redressability, given  
4 that by the time the PI came around, we're in  
5 '23?

6 MR. AGUINAGA: Your Honor, so we had  
7 two second supplemental declarations that are at  
8 the end of the Joint Appendix that are from Jim  
9 Hoft and from Jill Hines that identify the  
10 specific posts that they had posted on Twitter  
11 and Facebook during the pending preliminary  
12 injunction proceedings.

13 One of the ones we talked about was JA  
14 74 -- 793 and 794, which is the -- the Jill  
15 Hines Facebook post referencing RFK, referencing  
16 Tucker Carlson, referencing vaccines. It's --  
17 it's turtles all the way down. And that is an  
18 example, and all of these are examples, of  
19 injuries that postdate lot of the earlier  
20 filings in this case.

21 And so, you know, when you talk about  
22 redressability, Your Honor, this injunction is  
23 an order to the government not to continue  
24 engaging in the sorts of censorship that led to  
25 these kinds of censorship decisions.

1 JUSTICE GORSUCH: Now I'd like to talk  
2 just briefly about remedy. This is another  
3 example of a universal injunction. And the  
4 district court enjoined behavior by platforms  
5 that your clients didn't use and enjoined  
6 actions with respect to non-parties, not  
7 affecting your clients.

8 We've seen an epidemic of these  
9 lately. What do we do about it?

10 MR. AGUINAGA: So a couple of  
11 responses to that, Justice Gorsuch.

12 I think one reason the breadth of the  
13 injunction is what it is, is what the Fifth  
14 Circuit explained in JA 81 to 83, which is the  
15 breadth of the government's enterprise in this  
16 case was extremely broad.

17 I mean, when it's identifying -- I had  
18 this colloquy with Justice Kagan about whether  
19 you can identify them calling out Jill Hines  
20 specifically. The reason it's hard for me to do  
21 that is because they weren't cutting at that --  
22 at that level in the weeds. What they were  
23 taking is broader strokes like vaccines are safe  
24 for -- for children, calling that claim true,  
25 and then having the platforms go out and censor

1 contrary claims.

2 And so the reason you see the breadth  
3 of the injunction being the way it is, Your  
4 Honor, it's a product of what the government  
5 did. Now, if you --

6 JUSTICE GORSUCH: No, that's --

7 MR. AGUINAGA: -- if you have concerns  
8 --

9 JUSTICE GORSUCH: -- what -- we hear  
10 that in every universal injunction case, but  
11 your clients are your clients. They're the only  
12 ones complaining. And it's their case. It's  
13 their controversy. And, normally, our remedies  
14 are tailored to those who are actually  
15 complaining before us and not to those who  
16 aren't, right?

17 MR. AGUINAGA: Your Honor, and if you  
18 have that concern, we're completely fine if you  
19 want to limit the injunction to the five  
20 platforms as to which we were able to get  
21 preliminary discovery. That's completely fine  
22 with us. If you want to limit just to the seven  
23 plaintiffs, also completely fine, Your Honor.

24 I think the most important takeaway in  
25 this case is that the Court has to say something

1 in our favor on the merits. The government  
2 can't just run rampant pressuring the platforms  
3 to censor private speech.

4 JUSTICE GORSUCH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Kavanaugh?

7 JUSTICE KAVANAUGH: On Bantam Books, I  
8 read that to refer to coercion and not to  
9 significant encouragement.

10 MR. AGUINAGA: I think that's right,  
11 Your Honor, although if you look at page 66 to  
12 67, this Court used the term "coercion"  
13 alongside the term "persuasion" and  
14 "intimidation." I mean, I think there is some  
15 flexibility in those terms, and you could -- you  
16 can imagine a world in which you can call  
17 persuasion another variety of encouragement.

18 As I say, I'm not wedded to any label,  
19 we're not wedded to any label, but I do agree  
20 that the word "encouragement" doesn't appear in  
21 Bantam Books, Your Honor.

22 JUSTICE KAVANAUGH: And one thing that  
23 I think I want to square up with you is if  
24 someone calls and -- or contacts the social  
25 media company and says what you have there, this

1 post, has factually erroneous information, so  
2 not a viewpoint that we disagree with, factually  
3 erroneous information, and the social media  
4 company says, we'll take a look at that and --  
5 and you still think that's significant  
6 encouragement that qualifies as coercion, if  
7 they take it down in response to concluding that  
8 it, in fact, is factually erroneous?

9 MR. AGUINAGA: No, Your Honor. If  
10 there's no ask from the government, if the  
11 government's just saying here's our view of the  
12 statement --

13 JUSTICE KAVANAUGH: Okay. And we  
14 think it should be -- it should be taken down,  
15 it's up to you, but we think it should be taken  
16 down.

17 MR. AGUINAGA: I think that's a harder  
18 case for me. I guess, you know, if you think it  
19 is a close case decide it under the First  
20 Amendment.

21 JUSTICE KAVANAUGH: I don't know if --  
22 that's the question here. You can't -- you  
23 can't just claim the mantle.

24 Yeah. What -- what do you think the  
25 -- when you say it's a "harder case," why do you

1 think it's a harder case?

2 MR. AGUINAGA: Because I understand  
3 the instinct, Your Honor, that just asking very,  
4 very politely or saying very, very politely we  
5 think you should take it down, that that  
6 shouldn't be a First Amendment problem but the  
7 reality is that when somebody like the FBI or  
8 somebody lying a deputy assistant to the  
9 president makes a statement like that, that  
10 statement carries force.

11 That's just the reality. My dear  
12 mother is a saint and if she makes a statement  
13 -- same statement to Twitter their -- they don't  
14 know anything about her, they don't care, but  
15 they do care if it is the government.

16 JUSTICE KAVANAUGH: Why is that? Is  
17 it your assumption that anyone in those  
18 circumstances is always implicitly threatening  
19 adverse consequences?

20 MR. AGUINAGA: No, Your Honor, and  
21 this is where Bantam Books, I think, is good for  
22 us because it says you look through the forms to  
23 the substance. And so you look at the substance  
24 of the communication and say, well, is what the  
25 government doing here, is it trying to

1 effectively suppress a third-party's speech?

2 And so if the forms cut one ways but  
3 the substance --

4 JUSTICE KAVANAUGH: The hypo was about  
5 factually inaccurate.

6 MR. AGUINAGA: Right, factually  
7 inaccurate information. If the government says  
8 our view of that is that it is false, they can  
9 absolutely say that. But, if they do more and  
10 they say you need to take this down --

11 JUSTICE KAVANAUGH: You should take it  
12 down?

13 MR. AGUINAGA: -- you should take it  
14 down --

15 JUSTICE KAVANAUGH: That's a problem?

16 MR. AGUINAGA: -- First Amendment  
17 issue, Your Honor. I mean, I think that --

18 JUSTICE KAVANAUGH: Factually  
19 inaccurate about --

20 MR. AGUINAGA: Is that --

21 JUSTICE KAVANAUGH: -- something the  
22 troops are doing, U.S. troops are doing, and,  
23 you know, you should take that down, it's  
24 factually inaccurate, it's harming the war  
25 effort, it's not accurate, and you're just



1 running post after post describing what's going  
2 on in an inaccurate way, and it's up to you, but  
3 why -- why -- why should you be publishing that  
4 inaccurate information?

5 MR. AGUINAGA: Yeah, and the north  
6 star for the government in that situation is  
7 more speech. Publish the true speech that they  
8 think should counter what they view as false  
9 speech. The government is not helpless here.  
10 It has tools at its disposal, and censorship has  
11 never been the default remedy for a perceived  
12 First Amendment violation.

13 JUSTICE KAVANAUGH: What do you do  
14 with the fact that the platforms say no all the  
15 time to the government?

16 MR. AGUINAGA: Your Honor, it doesn't  
17 matter. I think Judge Posner made this -- this  
18 point in Backpage versus Dart, which is you  
19 could have a threatener who threatens the  
20 recipient, the recipient says no, and so the  
21 threatener packs their tent and walks away.  
22 That's still a First Amendment violation even  
23 though the recipient refused to comply.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice --

1 Justice Barrett?

2 JUSTICE BARRETT: Just picking up on  
3 Justice Kavanaugh's question about what makes  
4 something threatening and is it just something  
5 inherent in the nature of a person, the person  
6 on the other end of the line being a government  
7 official, so Bantam Books points out that the  
8 speech, the threat, the encouragement, if  
9 that's, you know, what we can posit for this  
10 purpose, comes from someone with the authority  
11 to impose a sanction.

12 Is that important in your view?

13 MR. AGUINAGA: Your Honor, it -- I  
14 mean, it is and it isn't. We think it's a  
15 relevant fact that if somebody like an FBI agent  
16 that is meeting regularly with the platforms is  
17 making these kinds of requests, that that's a  
18 fact that you have to take into consideration.

19 Justice Sotomayor has a panel, a  
20 procuring panel decision called Okwedy versus  
21 Molinari in the Second Circuit that addressed  
22 this issue about authority, and the issue in  
23 that case was that the borough president of  
24 Staten Island didn't have authority to take down  
25 a particular billboard, but the Court still said

1 that the fact that the recipient thought that  
2 the borough president might be able to use  
3 whatever authority he did have to cause trouble  
4 for the billboard owner, that was enough.

5 So, if -- if -- if the speaker has  
6 that kind of authority, Your Honor, I think  
7 that's a critical fact that you have to take  
8 into account because, as I say, if it's somebody  
9 that Twitter doesn't know from Adam that's  
10 making the request, they're just going to ignore  
11 it. But if it's somebody --

12 JUSTICE BARRETT: Well, I mean, if  
13 it's a staff or even if it's somebody on the  
14 Hill, I mean, you know, people who work on the  
15 Hill don't have control over DOJ, or if it's a  
16 staffer in the White House, you know, mentioning  
17 230 or maybe that's what's in the platform's  
18 mind, but, you know, no authority to bring an  
19 antitrust suit or to try to change 230 or  
20 advocate for 230 changes. That doesn't matter?

21 MR. AGUINAGA: Your Honor, I mean,  
22 what I would say is on the facts of this case,  
23 if you have the Deputy Assistant to the  
24 President making that kind of statement, sure --

25 JUSTICE BARRETT: No, no, no.

1 MR. AGUINAGA: -- he can't -- he can't  
2 make that -- he can't change --

3 JUSTICE BARRETT: Let's say it's low  
4 level, not Deputy Assistant to the President.  
5 Let's just call it somebody, a low-level  
6 staffer.

7 MR. AGUINAGA: Two people -- two  
8 people below him, two people below him, they  
9 can't unilaterally reform 230 or promulgate  
10 rulemakings, but they can engage in a process  
11 that itself is punishment basically. I mean,  
12 imagine being on the receiving end of Rob  
13 Flaherty for six months on end and these --  
14 receiving these kinds of emails. In some ways,  
15 it's the adverse consequences that were  
16 threatened and/or actually carried out. Was the  
17 process --

18 JUSTICE BARRETT: So we should focus  
19 less on authority or authority can kind of drop  
20 out. The point is, if it comes from the  
21 government, and so there might be some  
22 conceivable way in which the government could  
23 follow through in some sort of punitive way,  
24 that -- that's the relevant inquiry?

25 MR. AGUINAGA: Your Honor, I think

1 that is certainly one way you can look at the  
2 analysis, absolutely.

3 JUSTICE BARRETT: Okay. Thanks.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Jackson?

6 JUSTICE JACKSON: So my biggest  
7 concern is that your view has the First  
8 Amendment hamstringing the government in  
9 significant ways in the most important time  
10 periods.

11 I mean, what would -- what would you  
12 have the government do? I've heard you say a  
13 couple times that the government can post its  
14 own speech, but in my hypothetical, you know,  
15 kids, this is not safe, don't do it, is not  
16 going to get it done.

17 And so I guess some might say that the  
18 government actually has a duty to take steps to  
19 protect the citizens of this country, and you  
20 seem to be suggesting that that duty cannot  
21 manifest itself in the government encouraging or  
22 even pressuring platforms to take down harmful  
23 information.

24 So can you help me? Because I'm  
25 really -- I'm really worried about that because

1 you've got the First Amendment operating in an  
2 environment of threatening circumstances from  
3 the government's perspective, and you're saying  
4 that the government can't interact with the  
5 source of those problems.

6 MR. AGUINAGA: And, Your Honor, I  
7 understand that instinct, and I guess what I'd  
8 tell you is our position is not that the  
9 government can't interact with the platforms  
10 there. They can and they should in certain  
11 circumstances like that that present such  
12 dangerous issues for society and especially  
13 young people.

14 But the way they do that has to be in  
15 compliance with the First Amendment, and I think  
16 that means they can give them all the true  
17 information that the platform needs and ask to  
18 amplify that and ask --

19 JUSTICE JACKSON: Right. But you're  
20 just -- you're just saying that. I guess I  
21 thought when you say the way they do that is  
22 consistent with the First Amendment is that they  
23 have to show that they have a compelling  
24 interest to do what they're doing. In other  
25 words, you -- you want us to take the line --

1 MR. AGUINAGA: I see.

2 JUSTICE JACKSON: -- to be between  
3 compulsion and encouragement and what we're  
4 looking at is the government can't compel, maybe  
5 they can encourage. I'm wondering whether  
6 that's not really the line.

7 The line is does the government,  
8 pursuant to the First Amendment, have a  
9 compelling interest in doing things that result  
10 in restricting the speech in this way? That  
11 test, I think, takes into account all of these  
12 different circumstances, that we don't really  
13 care as much about how much the government is  
14 compelling or maybe we do but in the context of  
15 tailoring and not as sort of a freestanding  
16 inquiry that's overlaid on all of this. Does  
17 that make sense?

18 MR. AGUINAGA: It does, Your Honor.  
19 And I apologize for missing your guidance  
20 earlier.

21 So the way I think about that is I --  
22 I've been discussing the standard and I thought  
23 we've all been discussing the standard on the  
24 front end of the analysis which is is there a  
25 First Amendment violation? Is there an

1 abridgement of speech?

2 I guess I would conceptually think of  
3 strict scrutiny, narrow tailoring, compelling  
4 interest as coming at the back end to say yes,  
5 maybe in the ordinary case, the government  
6 shouldn't have been permitted to undertake the  
7 kind of suppression of free speech that it did,  
8 but in this unique circumstance it actually had  
9 a compelling interest, and it used narrowly  
10 tailored means to accomplish that issue.

11 I mean, I think that's the fail-safe  
12 if you're concerned with the breadth of our  
13 arguments, that's one fail-safe which is no  
14 matter how broad the standard the Court adopts  
15 there is always going to be strict scrutiny at  
16 the end of the line to save the government in  
17 times where it desperately needs to do the  
18 things you're outlining.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel. Rebuttal, Mr. Fletcher.

22 REBUTTAL ARGUMENT OF BRIAN H. FLETCHER

23 ON BEHALF OF THE PETITIONERS

24 MR. FLETCHER: Thank you, Mr. Chief  
25 Justice. I'd like to start with a few points on



1 standing and then address the merits and then  
2 try to step back and talk about the bigger  
3 picture.

4           So first on standing I have to start  
5 with the clarification about Jill Hines' e-mails  
6 at pages 793 to 794 of the Joint Appendix. I  
7 had misunderstood the cross posting issue my  
8 friend alluded to earlier. I thought this was a  
9 moderation by Twitter not by Facebook. I  
10 appreciate his clarification and because we've  
11 been insistent on the lower court's turning  
12 square corners on the facts here I wanted to  
13 make sure I did that too. I don't think that  
14 changes the fundamental point though because  
15 we're still talking about an act of moderation  
16 in April 2023, years after the last White House  
17 or any government speech targeting Mr. Kennedy's  
18 content which happened back in 2021.

19           And that, Justice Kagan, I think  
20 points out the problem that you highlighted,  
21 which is that they are trying to draw the  
22 connection between the government's acts here  
23 and the moderation that harmed them through  
24 timing. And the timing just isn't very good.  
25 So I want to talk about the two best examples

1 that he gave you, the one being Ms. Hines'  
2 groups on Facebook and this is discussed at page  
3 630 of the Joint Appendix.

4 Justice Kagan, you pointed out that  
5 her groups were moderated at least two and four  
6 months after the relevant exchange between  
7 Facebook and the government. But it's actually  
8 worse than that. The May 2021 e-mail from  
9 Facebook to the government says we've already  
10 taken action on health groups to remove them  
11 from our recommendation feature. It wasn't  
12 reporting on something it would do in the  
13 future. It was reporting on something that was  
14 already done. And it's even not clear from the  
15 e-mail that Facebook was doing that because of  
16 any request from the government. It was a  
17 report of its own action.

18 And then his next best example is Mr.  
19 Hoft and the appearance of Mr. Hoft on a  
20 spreadsheet that the Department of Homeland  
21 Security's CISA sub-agency maintains. This  
22 appears at Record on Appeal 17,016. And the  
23 problem with that is twofold. First, this is a  
24 tracking spreadsheet that monitors information  
25 sent from election officials to the platforms.

1 This shows that the report was made by the  
2 Election Integrity Partnership, a private  
3 entity. It wasn't a referral that was made by  
4 CISA, the federal agency. CISA was just noting  
5 the existence of the referral. And, second, as  
6 far as I'm aware, there's no indication in the  
7 record that the referenced piece of content was  
8 actually taken down at all.

9 So I think that points up that what  
10 they haven't shown is any injury traceable to  
11 the government, let alone an imminent risk of  
12 future injury.

13 Second, on the merits, I think it's  
14 instructive to start with what my friend called  
15 one of the hottest documents. This is Record on  
16 Appeal 15,322, the e-mail exchange between  
17 Surgeon General Murthy and someone at Facebook.  
18 Because this is coming in that critical July  
19 2021 period. And what starts that e-mail  
20 exchange is not any concern about the private  
21 e-mail exchanges, the stuff that happened behind  
22 closed doors, antitrust reform, Section 230.  
23 It's Facebook reaching out and saying we wanted  
24 to get in touch because of the President's  
25 statements about us, the reference to killing

1 people, and because of the Surgeon General's  
2 health advisory on what platforms could be  
3 doing, to be doing more along with others in  
4 society.

5           And I think what that highlights is  
6 that, to the extent that the government had  
7 influence on the platforms here, and we  
8 acknowledge there are indications that it did,  
9 it's influence of the classic bully pulpit sort  
10 of President Reagan condemning pornography --  
11 or, excuse me, President Bush condemning  
12 pornography, President Reagan condemning media  
13 about drugs and violence, Teddy Roosevelt  
14 condemning muckrakers. Part of our  
15 constitutional tradition is that presidents and  
16 their close advisors have the ability, the  
17 authority to, in a non-coercive way, to speak  
18 their mind and call on the public to act. And  
19 we think that's what was happening here.

20           And, finally, if I could just step  
21 back and -- you know, my friend started by  
22 saying that this is a massive attack on free  
23 speech. The lower courts called it a  
24 coordinated censorship campaign. I want to be  
25 clear, if those things had happened, they would

1 be reprehensible. It would be a huge problem.  
2 But we would think that before validating those  
3 sorts of charges against senior government  
4 officials and career employees spanning two  
5 different administrations, the lower courts  
6 would insist on a rigorous analysis of the facts  
7 and the law. And with all respect to the lower  
8 courts, we don't think that's happened here. We  
9 don't think that's supported.

10           The easiest way for this Court to  
11 resolve this case is on standing, on the for --  
12 lack of forward-looking injury ground, Justice  
13 Kagan, that you and I discussed earlier. But to  
14 the extent that the Court does get to the  
15 merits, we'd urge you to make clear that  
16 government officials do not violate the First  
17 Amendment when they flag false information or  
18 malign foreign actors when they answer questions  
19 about public health advice or when they speak to  
20 the public on matters of public concern the way  
21 the President and the Surgeon General did.

22           The First Amendment is a critical  
23 bulwark against government coercion, and that's  
24 important, but it is also important that Article  
25 III courts stay within the bounds of Article III

1 and don't enjoin or chill legitimate and  
2 productive interactions between the government  
3 and the public.

4 We'd ask you to reverse. Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 The case is submitted.

8 (Whereupon, at 11:47 a.m., the case  
9 was submitted.)

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