No. 23-411

In The

Supreme Court of the United States

VIVEK H. MURTHY, Surgeon General, et al.,

Petitioners,

v.

STATE OF MISSOURI, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF THE "TWITTER FILES" JOURNALISTS: MATT TAIBBI, MICHAEL SHELLENBERGER, LEE FANG, DAVID ZWEIG, LEIGHTON WOODHOUSE, ALEX GUTENTAG IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICUS* AND RULE 37.6 DISCLOSURE[1]

Amici curiae are independent journalists who publish their work online. Some of them operate large Substack publications that have hundreds of thousands of subscribers. This group of journalists has differed among themselves about the appropriateness of the government's Covid-19 response from 2020 to 2022. Of those critical of the government's response during this period, some were censored or flagged on social media platforms.

After Elon Musk acquired Twitter, these journalists gained access to select internal Twitter documents and released them on the platform in installments known as the "Twitter Files." This reporting shed light on Twitter's decision to block links to the New York Post's Hunter Biden laptop story and, later, to suspend former president Donald Trump from the platform. It also uncovered new information about Twitter's "visibility filtering" practices, the FBI's extensive communications with the platform's Trust and Safety Team to direct and control censorship decisions, and other government agencies' involvement in content moderation decisions.

Due to their experiences on social media and their examination of the Twitter Files and other documents,

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution to fund the preparation or submission of the brief.

these journalists have an interest in censorship on social media, as well as professional insights into the nature of this censorship. Like all contemporary independent journalists, they rely on online platforms for their livelihood, and platform censorship has threatened their ability to earn a living. Platform censorship prevents journalists from doing their jobs, not only because their work is suppressed on social media, but because sources on social media are also censored.

SUMMARY OF ARGUMENT

In enjoining Defendants' censoring of Americans' online speech, the Fifth Circuit found the existence of a "coordinated campaign . . . orchestrated by federal officials that jeopardized a fundamental aspect of American life." *Missouri v. Biden*, 83 F.4th 350, 392 (5th Cir. 2023). DOJ dismisses the federal government's collusion with the platforms to censor Americans as "general, off-the-cuff statements," DOJ Br. at 32-33, that were simply "communications . . . in which officials and platforms often educated and informed each other . . . as all parties articulated and pursued their own goals and interests." DOJ Br. at 34.

DOJ's description is false, contradicted by voluminous evidence *amici* have exposed, as well as evidence that has come to light through discovery in this case and others. *Amici* document how federal officials engaged with the platforms in elaborate, bureaucratized

joint action with the purpose to "take down" Americans' speech.

DOJ claims that it defends nothing more than the President's use of the "bully pulpit to shape private conduct and influence the public on the issues of the day—including by criticizing private speech." DOJ Br. at 24. But, this Court's precedent does not allow the federal government to use private parties as instruments to strip Americans of their First Amendment rights, nor will depriving Americans of their constitutional rights advance the "public interest." DOJ Br. at 45.

It can never be forgotten that the federal government's censorship hurt the public interest. The experts the Defendants sought to silence, such as Stanford University's Dr. Jay Bhattacharya, a Plaintiff in this case, expressed views that were contrary to the federal government's official positions but were consistent with many European countries' policies and standard epidemiology. Public health professionals disagreed at the time, and will continue to disagree about the best courses of action during the pandemic. Given the bankrupted businesses, persisting education deficits from closed schools, and political acrimony, not to mention the still unenviable United States Covid mortality and excess death rates (the latter an indicator of deaths from not just Covid but also Covid policies), Bhattacharya's and other so-called contrarian voices that challenged some of these policies were at minimum a needed part of the public conversation, and arguably vindicated. This case presents a stark reminder

of why we have a First Amendment and why it cannot tolerate government-sponsored viewpoint-based censorship: because the truth is arrived at through free and open debate, *not* through government actors, whether elected or appointed, determining what the truth is.

The case's facts demonstrate the myriad, subtle ways the administrative state can "abridg[e] . . . the freedom of speech, or of the press." U.S. Const. amend. I. Without the constitutional restraints of Congressional oversight and judicial review that the Founders envisioned, administrative agencies have vast freedom to abridge Americans' free speech. For instance, the Cybersecurity and Infrastructure Security Agency (CISA), an agency within the Department of Homeland Security (DHS), has re-defined its mission from protecting Americans from foreign computer hacking to silencing American citizens and journalists who criticize government policy. With their bottomless stores of inducements and incentives, federal agencies can abridge speech directly or use third-party cut-outs.

Oblivious to this existential threat to free speech, DOJ seeks to protect the federal government's ability to abridge citizens' and journalists' free speech. DOJ urges this Court to adopt a highly restrictive state action test that blesses agency coercion. Overreading *Blum v. Yaretsky*, DOJ's proposed test permits government influence over private actors only until it rises to coercion equivalent to criminal duress. Having no support in precedent, DOJ's state actor test ignores how federal agencies with vast powers and expanding jurisdictions, when combined with private "partners,"

can easily extinguish constitutional rights. Federal agencies, unmoored by a meaningful state actor test, intentionally targeted individuals through private sector cut-outs, working in a constitutional no-man's land and abridging their critics' speech in a way repugnant to the Constitution.

ARGUMENT

Historians generally agree that in 1170 Henry II, with knights nearby, spoke something similar to "Will no one rid me of this turbulent priest?" W.L. WARREN, HENRY II 508-9 (1973). Four of the knights answered in the affirmative by riding to Canterbury and assassinating Archbishop Becket.

Accepting that his question constituted what would now be termed state action, in May 1172 Henry II "acknowledged that he was the cause of the archbishop's death and that what was done was done on his account." ANNE J. DUGGAN, THOMAS BECKET: FRIENDS, NETWORKS, TEXTS, AND CULT 274 (2007). In July 1174, he again publicly confessed his sins at Canterbury, receiving five blows from a rod from each of the numerous bishops present and three blows from each of the 80 Canterbury monks. *Id*. at 279.

State action need not work through orders or decrees. Government can command with whispered questions. Context is determinative. The Twitter Files journalists have shown that the government created a context in which its "requests" to the social media

platforms were threats—a conclusion reached by the District Court and affirmed by the Fifth Circuit. And, these threats came directly from the government and its cut-outs in academe and the nonprofit sector.

The Twitter journalists' reporting illuminates a broad constitutional context: the administrative state, with its bottomless supply of carrots and sticks, unrestrained by the limits on federal power the Founders envisioned. The Twitter Files show how agencies redefined their statutory purposes so as to censor Americans' speech. For instance, CISA, on its own, changed its statutory mission from protecting American computers against foreign hacking to protecting what its director termed "cognitive infrastructure." This term appears to refer to Americans' thoughts and opinions, which CISA "protected" by censoring speech it deemed harmful.

In this context of agencies expanding their own power and using their vast resources to enlist private citizens to their cause, DOJ's crimped state actor test is bizarre. It eliminates liability for the foreseeable consequences of intentional government actions—and at the same time only provides for liability if the government "overwhelm[s] the [private party's] . . . independent judgment." DOJ Br. at 14. This test, with no precedential support, makes the state actor test akin to the nearly impossible-to-prove criminal defense of duress, that requires "threats or conditions that a person of ordinary firmness . . . [be] unable to resist." *United States v. Bailey*, 444 U.S. 394, 410 (1980). Particularly in the context of claims that the government

intentionally deprived First Amendment rights, the Court should not abandon standards applicable to any other intentional tort.

The state actor doctrine must not undermine the First Amendment's core promise of free speech and press. The federal government's unprecedented influence—through coercion, entwinement, pressure, and joint participation—in determining who is heard and who is silenced violates this fundamental promise.

I. The federal government censored speech directly and through an elaborate network of cut-outs in academe and the private sector

Despite Defendants' claims that they merely alerted social media companies to dangerous content, they, in fact, actively pressured companies to change their policies and target specific users and messages. Many journalists who questioned the government's policies were deplatformed, diminishing their ability to earn a livelihood.

A. Direct government censorship

1. White House forces Meta to change its vaccine hesitancy policy

In a draft email to Meta CEO Mark Zuckerberg and COO Sheryl Sandberg, obtained through subpoena by the House Judiciary Committee, Rosa Birch, the company's Director of Strategic Response, explained why Facebook should follow expert advice and allow

vaccine hesitant content to remain on the platform in April 2021. Despite some disagreement and "continued pressure from external stakeholders, including the White House," Birch said, many vaccine communication experts believed that vaccine hesitancy should not be censored. Alex Gutentag, Leighton Woodhouse & Michael Shellenberger, *Pressure on Facebook and White House For Greater Censorship Came From News Media*, SUBSTACK, Aug. 8, 2023, http://tinyurl.com/5n8w7e8u.

Believing censorship to be counterproductive, Birch argued that vaccine censorship would "1/ prevent hesitant people from talking through their concerns online and 2/ reinforce the notion that there's a cover-up." *Id.* Birch wrote that a large and strong body of research showed the importance of "open dialogue," access to information, and creating "an open and safe space for people to have vaccine-related conversations." *Id.* Birch stated that censorship might "risk pushing [the vaccine hesitant] further toward hesitancy by suppressing their speech and making them feel marginalized by large institutions." *Id.*

Repeated pressure from Biden Administration officials over the spring and summer of 2021 forced Meta to change its policy about censoring expressions of "vaccine hesitancy." In April 2021, Facebook Director of Global Affairs, Nick Clegg wrote that Andy Slavitt, Senior Advisory to President Biden's Covid-19 Response Team, had attended a meeting with misinformation researchers organized by Rob Flaherty, Biden's Digital Director. At this meeting, Clegg wrote, "the consensus was that FB [Facebook] is a

'disinformation factory,' and that YT [YouTube] has made significant advances to remove content leading to vaccine hesitancy whilst we have lagged behind." Email from Nick Clegg to [REDACTED] (April 2021), reproduced in Jim Jordan (@Jim_Jordan), Twitter (July 27, 2023), http://tinyurl.com/47nh2ezk.

Slavitt, Clegg wrote, was also "outraged" that the company had not removed a humorous meme. *Id.* "Given what is at stake here," Clegg concluded, "it would also be a good idea if we could regroup to take stock of where we are in our relations with the WH [White House], and our internal methods too." Jim Jordan (@Jim_Jordan), Twitter (July 27, 2023), http://tinyurl.com/2wn4x23x.

Later in July 2021, Clegg determined that the company needed to capitulate to the White House demands. "Sheryl is keen that we continue to explore some moves that we can make to show that we are trying to be responsive to the WH [White House]," Clegg wrote. Jenin Younes, *Partners in Crime: As the Biden administration stands trial in Missouri, we continue to learn how the government and Big Tech created a whole-of-system censorship campaign*, TABLET (Aug. 20, 2023), http://tinyurl.com/4bek72kv. "Given the bigger fish we have to fry with the Administration—data flows etc—that doesn't seem like a great place for us to be, so grateful for further creative thinking on how we can be responsive to their concerns." Jim Jordan (@Jim_Jordan), Twitter (Dec. 1, 2023), http://tinyurl.com/32vdwuzy.

By "data flows," Clegg was referring to the European Union (EU)'s demand pursuant to its General Data Protection Regulation (GDPR) that Facebook stop transferring user data to places outside Europe. Facebook's entire business model, of course, depends upon the ability to transfer this data for analysis and advertisement targeting. And, on July 10, 2023, the Biden Administration announced a deal allowing the transfer of EU data to American companies, the "EU-US Data Privacy Framework." The White House, Press Release, Statement from President Joe Biden on EU Adoption of Adequacy Decision for U.S.-EU Data Flows (July 10, 2023), http://tinyurl.com/27euywc8.

But, Clegg's "bigger fish" comment reveals Facebook's understanding that the survival of its business model in Europe depended on the Biden administration's action—and the Biden administration would not act unless Facebook censored vaccine hesitancy.

2. White House threats to eliminate Section 230 liability protections coerced platforms to censor critics of the federal government's Covid-19 response

In July 2021, White House communications director Kate Bedingfield said the Biden Administration was considering legislative and other action to reform Section 230 of the Communications Decency Act, 47 U.S.C. § 230, to hold the social media platforms liable for misinformation on their platforms.

Betsy Klein, *White House Reviewing Section 230 Amid Efforts to Push Social Media Giants to Crack Down on Misinformation*, CNN POLITICS (July 20, 2021), http://tinyurl.com/4hfb9vks.

"We're reviewing that, and certainly they should be held accountable," Bedingfield said about whether Section 230 protection should apply to platforms that allowed users to post alleged misinformation. Jessica Bursztynsky, *White House Says Social Media Networks Should Be Held Accountable for Spreading Misinformation*, CNBC (July 20, 2021), http://tinyurl.com/yeuu7ak7. Like relief from GDPR's data restrictions, Section 230 is vital to the platforms' business model. Without it, they are liable for all of their users' unlawful speech. The Biden administration held the Damocles sword over their head. And, the Administration's intimidation, often couched in profane threats, demonstrates the power they wielded. Pl. Supp. Br., *Missouri v. Biden*, No. 3:22-cv-01213 at 5 (W.D. La. Jan. 11, 2023), http://tinyurl.com/4vr7pasn.

The White House appears to have exerted similar pressure on Twitter. One of the first meeting requests the Biden administration had with Twitter executives was about Covid. "The focus was on 'anti-vaxxer accounts,'" wrote David Zweig, and especially Alex Berenson, a former New York Times journalist. David Zweig (@davidzweig), Twitter (Dec. 26, 2022), http://tinyurl.com/4u8x38a6. Direct communications uncovered in Berenson's lawsuit against Twitter showed that a White House official met with Twitter and specifically singled out Berenson for suspension. Alex

Berenson, *The White House Privately Demanded Twitter Ban Me Months Before the Company Did So*, UNREPORTED TRUTHS (Aug. 12, 2022), http://tinyurl.com/43ww724m.

In the summer of 2021, Biden stated that social media companies were "killing people" by failing to police misinformation on their platforms about COVID-19 vaccines. *Biden: Social Media Platforms 'Killing People' With Misinfo*, ASSOCIATED PRESS (July 16, 2021), http://tinyurl.com/yc22c8ks. In apparent response to that statement, hours later Berenson was temporarily suspended from Twitter and permanently banned the next month.

Platforms' content moderation staff knew that White House pressure dictated platform censorship policies. In one Facebook exchange, Clegg asked why the platform had removed claims that Covid was man-made from the platform. Responded an employee, "[b]ecause we were under pressure from the administration and others to do more and it was part of the 'more' package." Ryan Tracy, *Facebook Bowed to White House Pressure, Removed Covid Posts*, WALL ST. J. (July 28, 2023), http://tinyurl.com/v6hmpskw.

B. The government uses public-private partnerships to outsource censorship

Government officials from numerous agencies worked with a network of private groups for the purpose of evading the First Amendment's limit on government action. These government partnerships silenced

citizens and journalists critical of government policies. It is "axiomatic" that the government "may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 413 U.S. 455, 465 (1973). Yet, that is precisely what the government did.

1. The origin of government partnerships to censor speech

After the election of Donald Trump in 2016, federal agencies repurposed tactics intended to combat foreign threats and illegal content, such as child exploitation, to target *domestic* political speech. In February 2016, Renée DiResta, a former CIA fellow, met with tech companies in the Obama White House to discuss ISIS propaganda spreading on social media.

But DiResta recognized that techniques used for foreign threats could be used for domestic ones too. "We kept saying this was not a one-off. This was a toolbox anyone can use," DiResta told the New York Times. "We told the tech companies that they had created a mass way to reach Americans." Sheera Frenkel, *She Warned of 'Peer-to-Peer Misinformation.' Congress Listened*, N.Y. Times (Nov. 12, 2017), http://tinyurl.com/bmufzb6z. DiResta's implicit advice was that "peer-to-peer disinformation" from domestic sources could pose the same security threat as foreign influence campaigns.

The next year, in April 2017, Rand Waltzman, Deputy Chief Technology Officer and Senior Information Scientist at the Rand Corporation, testified before

the Senate Armed Services Committee's Cybersecurity Subcommittee. To fight Russian "disinformation," Waltzman suggested the country would need a "whole-of-nation approach," which he defined this way: "A whole-of-nation approach is a coordinated effort between national government organizations, military, intelligence community, industry, media, research organizations, academia and citizen organized groups. A discreet US Special Operations Force could provide individual country support as well as cross country coordination." Rand Waltzman, *The Weaponization of Information: The Need for Cognitive Security* 4-5 (RAND Corp., 2017), https://www.rand.org/pubs/testimonies/CT473.html.

Waltzman proposed the creation of a "Center for Cognitive Security," funded by the federal government. But, to avoid an appearance of government influence, work would be funneled to "a combination of private foundation funding and support from international non-partisan non-governmental organizations (e.g. the United Nations)." *Id*. at 8. Waltzman concluded, "It is said that where there is a will, there is a way. At this point, ways are available. The question is, do we have the will to use them?" *Id*.

In November 2019, DOD joined DOJ, DHS, the Director of National Intelligence, the FBI, the NHS, and CISA to announce a "whole-of-government" approach to election disinformation. Dep't of Homeland Sec., *Joint Statement from DOJ, DOD, DHS, DNI, FBI, NSA, and CISA on Ensuring Security of 2020 Elections* (Nov. 5, 2019), http://tinyurl.com/4es7yarj. The next year, in

April 2020, DOD stated that it was working with the State Department and other partners to "curb" foreign disinformation about Covid-19. Jim Garamone, *DOD Works to Eliminate Foreign Coronavirus Disinformation*, DOD NEWS (April 13, 2020), http://tinyurl.com/259j9jdh.

Consistent with the "whole-of-government" approach, CISA determined that "cognitive infrastructure" was part of its mandate. It established a Center for Countering Foreign Intelligence Task Force (CFITF), which later became its Mis-, Dis-, and Malinformation (MDM) Team. Committee on the Judiciary and the Select Subcommittee on the Weaponization of the Federal Government U.S. House of Representatives, Interim Staff Report, *Weaponization of CISA: How A "Cybersecurity" Agency Colluded with Big Tech and "Disinformation" Partners to Censor Americans* 1-2 (June 26, 2023), http://tinyurl.com/2s3z34fz (*Interim Staff Report*, *The Weaponization of CISA*).

CISA's expansion of its mission is remarkable, having no relation to its statutory mission. Congress gave the agency an explicit, focused purpose: "leading cybersecurity and critical infrastructure security programs, operations, and associated policy; and carrying out DHS's responsibilities concerning chemical facility antiterrorism standards." Cybersecurity and Infrastructure Security Agency Act of 2018, Pub. L. No. 115-278, § 2, 132 Stat. 4168, 4168 (Nov. 18, 2018).

2. CISA's censorship efforts

In establishing public-private partnerships, CISA and its partners appear to have followed DiResta's warnings about "peer-to-peer disinformation" by censoring domestic speech with tools developed for combating foreign security threats. The result was a constellation of non-government actors flagging social media posts and monitoring private individuals for the government in order to pressure and coerce the social platforms to censor citizens and journalists.

a. CISA and the University of Washington's Center for an Informed Public (CIP)

The University of Washington's Center for an Informed Public (CIP), directed by Professor Kate Starbird, is, according to its website, an academic center for research about misinformation and disinformation as well as applying that research into "policy, technology design, curriculum development, and public engagement."

CIP participated in partnerships with the Stanford Internet Observatory (SIO), along with groups outside of academe such as Graphika, a research firm that studies "disinformation," and the Atlantic Council's Digital Forensic Research Lab (DFRLab), another research organization that studies "disinformation." These partnerships identified alleged "misinformation" and sent reports to social media companies, often with explicit recommendations or suggestions

for companies to take action on the content. Alex Gutentag & Michael Shellenberger, *New Documents Reveal US Department of Homeland Security Conspiracy to Violate First Amendment and Interfere in Elections*, SUBSTACK (Nov. 7, 2023), http://tinyurl.com/2jp2jy9e (*Gutentag & Shellenberger, New Documents*).

Starbird also served as Chair of CISA's Protecting Critical Infrastructure from Misinformation and Disinformation Subcommittee, also called the MDM Subcommittee, and was well-aware that her work with CISA pushed legal limits. "It's only a matter of time," wrote Suzanne Spaulding, a former assistant general counsel for the CIA, "before someone realizes we exist and starts asking about our work." *Interim Staff Report, The Weaponization of CISA, supra*, at 2. Both Spaulding and Starbird were members of CISA's MDM Subcommittee.

"Yes. I agree," Starbird responded, "We have a couple of pretty obvious vulnerabilities." *Id.* at 31.

CIP wrote that "UW personnel funded by Kate Starbird's NSF CAREER grant did participate in post-election period analysis of EIP data for the partnership's final report and for subsequent peer-reviewed publications." Center for an Informed Public, University of Washington, Press Release, Addressing false claims and misperceptions of the UW Center for an Informed Public's research (Mar. 16, 2023), http://tinyurl.com/mwsdr42d. As its public records show, NSF gave Starbird additional grants to study election misinformation and Covid misinformation while CIP

participated in EIP and VP. *See* http://tinyurl.com/3x89ssj2, http://tinyurl.com/59ef3st7, http://tinyurl.com/3mcjhc32.

b. CISA and Stanford University

Stanford University founded the Stanford University Internet Observatory (SIO), a cross-disciplinary program that studies abuse on social media and other information technologies. SIO, in turn, led the Election Integrity Partnership (EIP) and the Virality Project (VP), collaborative projects that tracked and studied misinformation, disinformation, and rumors concerning U.S. elections and COVID-19 vaccines, respectively. Stanford Br. at 1.

With CIP and other groups, SIO partnered with CISA to flag alleged disinformation through EIP and VP. The EIP used "Jira," a project management software, to alert the platforms of speech EIP found objectionable. CISA personnel had access to this database. Committee on the Judiciary and the Select Subcommittee on the Weaponization of the Federal Government, Interim Staff Report, *The Weaponization of "Disinformation" Pseudo-Experts and Bureaucrats: How the Federal Government Partnered with Universities to Censor Americans' Political Speech* at 53-54 (Nov. 6, 2023), http://tinyurl.com/48yvd72w/ (*Interim Staff Report, Pseudo-Experts and Bureaucrats*).

CISA created EIP as a government cut-out, not a serious research endeavor. Stanford has claimed that the idea for EIP "came from four students that the

Stanford Internet Observatory (SIO) funded to complete volunteer internships at [CISA]," but that is not true. *Interim Staff Report*, *Pseudo-Experts and Bureaucrats, supra*, at 38; Gutentag & Shellenberger, *New Documents*, *supra*. In an internal email sent on July 21, 2020, Graham Brookie, the Senior Director of the Atlantic Council's DRFLab, wrote to a colleague to say the following: "I know the Council has a number of efforts on broad policy around the elections, but we just set up an election integrity partnership at the request of DHS/CISA and are in weekly comms to debrief about disinfo." Josh Christenson, *New emails show DHS created Stanford 'disinfo' group that censored speech before 2020 election*, N.Y. POST, Nov. 6, 2023, http://tinyurl.com/47tm9a8b.

Brookie's acknowledgment also contradicts the testimony of the SIO's Director, Alex Stamos who told Congressional investigators that the idea for EIP was his. *Interim Staff Report, Pseudo-Experts and Bureaucrats, supra*, at 38.

Stanford University asserts that "there is no basis for the [district] court's finding that 'CISA and the EIP were completely intertwined.' " Stanford Br. at 24. But, in fact, there was virtually no separation between CISA and Stanford employees in 2020. According to DiResta, without the EIP, "there were unclear legal authorities, including very real First Amendment questions" around government-led efforts to flag and report online content. National Cybersecurity Summit 2021: Day 4 Livestream, YouTube at 47:24 (Oct. 27, 2021), http://tinyurl.com/2bktt4bd. EIP was needed to

analyze and report false narratives and effectively get around these First Amendment questions.

CISA officials, Stanford researchers and administrators, and social media executives worked together in secret to censor protected political speech, particularly that of conservatives and Republicans. To mention a few examples of the evidence of this joint endeavor that the Twitter journalists' investigative reporting has uncovered:

- On September 30, 2020, an EIP staffer said that Stamos and Krebs were texting each other "with some regularity." *Gutentag & Shellenberger, New Documents, supra.*
- At least one Stanford intern was in a Signal group with, Brian Scully, the head of CISA's Countering Foreign Influence Task Force (CFITF Team) and Twitter executives. *Id.*
- CISA officials and personnel from EIP were often on emails together, and CISA's personnel had access to Jira, EIP's database used to flag and report social media posts to Twitter, Facebook, and other platforms. *Id.*
- At least four students involved with EIP were technically employed as interns by CISA during EIP's activities and used their government email accounts to communicate with CISA officials. *Interim Staff Report*, *Pseudo-Experts and Bureaucrats, supra*, at 38.
- One Stanford student worked as a DHS intern "inside the EIP network." *Id.* at 45.

- CISA was not supposed to have involvement in EIP's flagging activities, but numerous Jira tickets mention CISA, and CISA referenced EIP Jira codes when switchboarding, the process in which CISA officials forwarded "misinformation" reports to platforms.[2]

- An email from a Colorado official was addressed to "EI-ISAC, CISA and Stanford partners," and directly referring to EIP. CISA's Scully also appears to have done much more than "switchboarding," engaging in conversations to determine if content could be censored. Alex Gutentag & Michael Shellenberger, *US Government Officials Sought To Censor Narratives and Interfere In 2020 Election, Newly Released Emails Show*, SUBSTACK, Nov. 29, 2023, http://tinyurl.com/pssbp5fh (*Gutentag & Shellenberger, Officials Sought to Censor*).

- In November 2020 Stamos told a Reddit employee, "It would be great if we could get somebody from Reddit on JIRA, just like Facebook, Google, Twitter, TikTok, Instagram, CISA, EI-ISAC . . . " *Interim Staff Report*, *Pseudo-Experts and Bureaucrats, supra*, at 91.

Stanford University has represented to this Court that "EIP and VP did not censor or target anyone's speech. . . . In limited cases, EIP and VP escalated

[2] The United States House Judiciary Select Subcommittee on the Weaponization of the Federal Government released the Jira tickets on November 6, 2023. *See* http://tinyurl.com/yt5vd26h. (*Jira Database*).

some instances of potentially violative content to the social media platforms." Stanford Br. at 7-8. But, the SIO's director, Alex Stamos, contradicts this claim. In an email to Nextdoor, an online social networking service for neighborhoods, Stamos wrote that EIP would "provide a one-stop shop for local election officials, DHS, and voter protection organizations to report potential disinformation for us to investigate and to refer to the appropriate platforms if necessary." Michael Shellenberger, *Secret Government Censorship Sold as "Cybersecurity" Undermines National Security*, SUBSTACK (Dec. 13, 2023), http://tinyurl.com/mr298hca. Similarly, the platforms regularly told VP that they were addressing the content it flagged, responding with comments like, "[t]hanks for flagging this. We have actioned the content," or "[t]hanks for escalating to us—our team is looking into this now." Alex Gutentag & Andrew Lowenthal, *Stanford Group Helped US Government Censor Covid Dissidents and Then Lied About It*, SUBSTACK (Nov. 10, 2023), http://tinyurl.com/bdhu6x29 (*Gutentag & Lowenthal, Stanford Group Helped US Government Censor*).

Stanford University also now represents that "EIP was designed as a nonpartisan, nonpolitical academic research project" with the "purpose . . . to research and analyze misinformation regarding U.S. elections." Stanford Br. at 20.

But, VP's reports did not involve disinformation—typically defined as "[t]he dissemination of deliberately false information, esp. when supplied by a government or its agent to a foreign power or to the media."

Disinformation, OXFORD ENGLISH DICTIONARY (2d ed. 2023) –and often reflected political bias. For instance, after Krispy Kreme announced it would give free donuts to people who got vaccinated, many memes emerged mocking this marketing ploy. VP alerted platforms about "criticism against Krispy Kreme's vaccine for donut promo" and labeled such criticism as "general anti-vaccination." Michael Shellenberger (@shellenberger), Twitter (Dec. 12, 2023), http://tinyurl.com/ms7wckwt. VP also flagged scientific studies, including a pre-print of an Israeli study that found natural immunity to be as protective as vaccination. "Please note this Israeli narrative claiming that Covid-19 immunity is equivalent to vaccination immunity," VP wrote to Twitter and Facebook, including the link to a tweet from Congressman Thomas Massie. *Id.*

Based on available Jira records, VP and EIP flagged elected Republican officials several times, but never flagged elected Democrats. Michael Shellenberger & Alex Gutentag, *Government-Funded Stanford Group Successfully Urged Censorship Of Republicans But Not Democrats For Equivalent Claims*, SUBSTACK (Nov. 16, 2023), http://tinyurl.com/yc3tz98u.

VP also flagged a Lancet research article about the absolute risk reduction of Covid vaccines, calling it an "alleged authoritative source." In the field of the Jira ticket listing actions taken, "Facebook—Label" appears, indicating that Facebook labeled the article. VP also flagged a PDF of consolidated data from the Vaccine Adverse Event Reporting System (VAERS), a

national vaccine safety reporting system co-managed by the CDC and the Food and Drug Administration. VAERS data is publicly available and another example of true content. *Jira Database, supra*.

Stanford University states that "EIP did not receive any government grants for its work in the 2020 election, nor did VP." Stanford Br. at 25 n.4. But, in 2021, NSF gave the Stanford Internet Observatory a five-year $750,000 grant to study misinformation while VP was ongoing. U.S. NATIONAL SCIENCE FOUNDATION, *Collaborative Research: SaTC: CORE: Large: Rapid-Response Frameworks for Mitigating Online Disinformation* (July, 25, 2021), http://tinyurl.com/mr37tyft. This grant was for collaboration with the University of Washington's (CIP), a partner in EIP and VP, and NSF gave CIP $2.25 million to study misinformation while participating in VP. *See* http://tinyurl.com/4dzh3e5p.

c. CISA and the Center for Internet Security (CIS)

The CISA-funded non-profit Center for Internet Security (CIS) runs the Multi-State Information Sharing and Analysis Center (MS-ISAC) and the Elections Infrastructure Information Sharing and Analysis Center® (EI-ISAC®), which provide cybersecurity election advice to local, state, and federal authorities. With CISA and EIP, CIS engaged in mass flagging because, internal communications suggest, one of its goals was to target entire narratives.

CIS has previously claimed that its definition of election mis- and disinformation did not include "content that is polarizing, biased, partisan or contains viewpoints expressed about elections or politics," "inaccurate statements about an elected or appointed official, candidate, or political party," or "broad, non-specific statements about the integrity of elections or civic processes that do not reference a specific current election administration activity." *Interim Staff Report, Weaponization of CISA*, *supra*, at 23.

But DHS emails reveal that CISA and CIS did, in fact, consider such content to be subject to censorship, reporting political speech to social media companies, including jokes, hyperbole, and the types of "viewpoints" and "non-specific statements" that CIS once claimed it would not censor. The clear intent of the CISA, CIS, and EI-ISAC reporting system was to get content removed, and officials knew this.

In one example, the Kentucky Assistant Secretary of State sent a misinformation report to CIS asking, "Any chance we can get this post taken down?" The post was an instance of "inaccurate statements about an elected or appointed official," namely, a county clerk, and qualified as the type of speech that CIS said it would not flag. Despite this, CIS sent it to CISA's Brian Scully who forwarded it to Facebook. *Gutentag & Shellenberger, Officials Sought to Censor, supra.*

In another example, CIS flagged a tweet by New York Times reporter, Reid Epstein, who tweeted that because vote-counting machines ran out of ink,

absentee ballot results in Green Bay, Wisconsin were delayed. CISA, in turn, informed Twitter. Stacia Cardille, then a senior Twitter legal executive, thanked the CISA employee, and the tweet was shadow-banned, rendered inaccessible to all users. Later reporting showed that Epstein was correct. Lee Fang, *Homeland Security Agency Cited Inaccurate Allegation to Censor New York Times Journalist*, SUBSTACK (Feb. 5, 2024), http://tinyurl.com/yc4x2jx4.

III. The impact on journalism

"That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society." *Houchins v. KQED, Inc.*, 438 U.S. 1, 17 (1978) (Stewart, J., concurring). Government's actions impeded journalists' ability to publish on social media—a now essential function of the profession—either in the form of sharing articles or through social media posts that serve as a crucial contemporary form of journalism and reporting. Because platforms like Twitter sometimes removed or labeled reports of data (for instance, once labeling a post that simply displayed the CDC's own data), journalists could not report on verifiable or true content. These are a few experiences:

- Virality Project (VP) flagged David Zweig in June 2021, for an accurate claim that the World Health Organization (WHO) did not recommend vaccinating children. *JIRA Database, supra.*

- Alex Gutentag was permanently suspended from Twitter for citing Pfizer's data from its vaccine trial for children under 5—content that was nearly identical to content from Pfizer's own press release. Jennifer Sey (@JenniferSey), Twitter (June 15, 2022), http://tinyurl.com/bdzx6saa. Twitter later reversed the decision.

- In another case, a user was permanently banned from Twitter for posting a Wall Street Journal article by Alyssia Finley and a direct quote from the article. Jessica Hockett, *Here We Go Again*, SUBSTACK, July 6, 2022, http://tinyurl.com/3evpdhb3.

In these instances journalists were penalized by policies heavily shaped by government actors. This activity created a major chilling effect for journalists online, as retaining a platform on social media is critical to sharing one's work and gaining professional opportunities (not to mention the public's ability to be informed). What's more, the more established a journalist is and the greater their following, the more they stand to lose by reporting in a manner that may run afoul of government-coerced platform policies. This significantly interferes with the press by diminishing incentives for experienced, skilled, and respected journalists from doing what their job requires: namely, investigating and writing about controversial government policies.

In addition to this chilling effect, the government's prior restraint on scientists prevented willing

journalists from collecting information essential to accurate reporting. VP appears to have played a major role in a significant case of Covid-related censorship. On March 15, 2021, then-Harvard professor of medicine Martin Kulldorff tweeted, "[t]hinking that everyone must be vaccinated is as scientifically flawed as thinking that nobody should. COVID vaccines are important for older high-risk people, and their care-takers. Those with prior natural infection do not need it. Nor children."

"Dear Twitter Team," a flagger from VP wrote in response to Kulldorff's post, "[t]his Tweet directly contradicts CDC's advice."

"Thanks team—we're looking into this," a senior Twitter Trust & Safety policy specialist responded.

Twitter then labeled Kulldorff's tweet as misleading and he was temporarily suspended from the platform. Internally, the VP identified Kulldorff, a world renowned biostatistician, as a "repeat offender." *Jira Database, supra*.

Last, government censorship did not result only in removed accounts or deleted stories but also led the platforms to be ever more timid in bringing public attention to government threats and pressures—to which they became ever more compliant. For instance, a CIA official-turned-Twitter executive told to Twitter Attorney Stacia Cardille that in the past he would have overlooked government requests to take down accounts promoting InfoBRICS, but "our window on that is closing, given that government partners have

become more aggressive on attribution and reporting on it." Matt Taibbi (@mtaibbi), Twitter, Jan. 3, 2023, http://tinyurl.com/msbc28ww.

The platforms feared government-associated non-profits too. Twitter executive, Carlos Monje, now serving as Under Secretary of Transportation for Policy at the U.S. Department of Transportation, expressed fear of criticizing The Alliance for Securing Democracy (ASD), a nonpartisan initiative housed at the German Marshall Fund, in which many former intelligence officials and politically connected individuals have leadership roles. Referring to Hamilton 68, ASD's controversial dashboard that purported to track Russian influence on-line, Monje wrote "I also have been very frustrated in not calling out Hamilton 68 more publicly, but understand we have to play a longer game here." Warned another Twitter executive, "We have to be careful in how much we push back on ASD publicly." Matt Taibbi, *Move Over, Jayson Blair: Twitter Files Expose Next Great Media Fraud*, SUBSTACK, Jan. 27, 2023, http://tinyurl.com/2p8r3fa5.

IV. ***Bantam Books*** **controls state action determinations when the government intentionally targets individuals' constitutional rights**

DOJ urges the Court not only to apply the wrong precedent, *Blum v. Yaretsky*, 457 U.S. 991 (1982), but to expand government protections under the state actor doctrine to grant de facto immunity to the

government's intentional use of third-party cut-outs to strip away Americans' constitutional rights. DOJ ignores both precedent and the constitutional context in which the administrative state works today.

The Court should stick to the precedents developed in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), for *intentional* deprivations of civil rights. In these situations, it only need be shown that "[p]rivate persons, jointly engaged with state officials in the prohibited action." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970); *see also Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

A. The federal government has too much power to eliminate citizens' First Amendment rights; the state actor doctrine should not expand this power

The Constitution protects free speech not only through specific limits found in the First Amendment but also through structural limits on government power. The opposition to the First Amendment expressed by James Wilson, one of the major forces in the Constitutional Convention, illustrates the importance of these structural limits. Because the federal government had only enumerated powers and the Commerce Clause's original reach was limited, he claimed "the proposed [constitutional] system possesses no influence whatever upon the press." James Wilson, Speech at a Public Meeting in Philadelphia (Oct. 6, 1787), *in*

13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION AND THE BILL OF RIGHTS 340 (1981).

The expansion of the Commerce Clause and the administrative state in the 20th Century has rendered Wilson's view no longer true. He envisioned a world where only legislation or judicial action could limit constitutional rights. And, legislatures and courts have constitutionally mandated procedures that require accountability, slowing and shortening the reach of federal powers. Philip Hamburger, *Courting Censorship*, 4 J. FREE SPEECH L. 195 (forthcoming 2024), available at SSRN 4646028 (2023). But, as this case shows, the government can wield vast administrative powers to limit citizens' constitutional rights, without congressional or judicial oversight and other limits upon which Wilson relied.

CISA illustrates how an agency unmoored from explicit congressional delegation or oversight and free from judicial scrutiny can erode Americans' freedoms. CISA has a no-nonsense congressional grant of authority: guard American computer infrastructure against foreign hacking. Its statutory purpose is "leading cybersecurity and critical infrastructure security programs, operations, and associated policy; and carrying out DHS's responsibilities concerning chemical facility antiterrorism standards." Cybersecurity and Infrastructure Security Agency Act of 2018, *supra*, § 2. The legislative history echoes the statute: CISA "will be structured to best work with partners at all levels of government . . . in order to make our cyber and

physical infrastructure more secure." H.R. Rep. No. 115-454 at 2 (2017).

But, without congressional approval or oversight, CISA changed its mandate from protecting physical infrastructure to protecting what its director has termed "cognitive infrastructure." *Interim Staff Report, Weaponization of CISA*, *supra*, at 1. Americans learned protecting "cognitive infrastructure" means CISA's power to control what people think—what they post and read on social media. Without a congressional vote or hearing, CISA took it upon itself to expand its mission to control our national discourse. Congress did not authorize nor courts review CISA's illicit inducements and other purportedly voluntary arrangements and coordination efforts. These "sub-administrative" acts lack even barebone protections of the administrative process, such as notice-and-comment rulemaking or judicial review. Hamburger, *Courting Censorship*, *supra*.

B. *Bantam Books* applies to government's intentional deprivations of civil rights

DOJ's overreading *Blum* baffles because it not only ratifies the immunity agencies receive for their "sub-administrative" efforts but expands it. In contrast to *Bantam Books*, the government in *Blum* did not intend to harm any particular person's constitutional rights. The *Blum* plaintiffs simply alleged that the New York State health authorities violated constitutional due process when they adopted certain Medicare

regulations relating to patient discharge from high-skilled nursing care. But, the *Blum* plaintiffs sued the government for harms they allegedly suffered from decisions made by state-funded and regulated hospitals. Conscious of the burdens of making every regulated private entity receiving government subsidies implicated in procedural due process violations, the Court adopted a restrictive state actor test: a private party's action "must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. at 1004. To impute private parties' actions as due process violations, there must be an identity between the government and the private party.

What is stunning is that not only does DOJ argue that *Blum* applies here, but DOJ embroiders *Blum* to render state action equivalent to duress in criminal law, a test that in practice would be impossible to meet. DOJ urges this Court to adopt the rule that government's "positive inducements" only render a private party if they "overwhelm the recipient's independent judgment." DOJ Br. at 14.

This rule, for which DOJ provides no support, appears to come from the law of duress. This Court has quoted with approval the Model Penal Code § 2.09(1): duress requires that an "actor must succumb to a force or threat that a person of reasonable firmness in his situation would have been unable to resist." *Bailey*, 444 U.S. at 411 n.8. If the state action doctrine requires government to place private actors under duress, the doctrine would completely undermine this Court's rule in *Norwood*: it is "axiomatic" that the US government

cannot use private cut-outs to achieve its intended purposes. 413 U.S. at 465.

But the *Blum* test, regardless of DOJ's interpretation, does not apply to the *intentional targeting* of individuals' constitutional rights. In an intentional tort setting—which is how deprivation of constitutional rights is characterized under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the governmental tortfeasor bears responsibility for causing the harm he or she intends. If the government intends to strip American citizens of their rights, then there is no need for *Blum*'s identity test because the government is already a full partner in the wrongdoing.

Normal principles of causation should apply for implicating private actors' misdeeds to the government. For instance, the "innocent instrumentality" doctrine in criminal law holds an actor responsible for a crime if "with the requisite mens rea . . . [he or she] uses an innocent human instrumentality to commit it." JOSHUA DRESSLER, CRIMINAL LAW 57 (2d ed. 2010). Here, the government used the platforms as "innocent instruments" inducing them to perform acts for which it was lawful for them to perform, i.e., censor or deplatform. But, these acts were unlawful if implicated to their true cause, the government.

Similarly, in tort law, if a manufacturer makes a defective product, it is liable as proximate cause even though it did not perform any act that directly causes an injury in the completed tort. This classic principle is illustrated in *Codling v. Paglia*, 298 N.E.2d 622, 627

(N.Y. 1973). Chrysler—not the driver—was liable for resulting injuries when one of its cars' steering wheels froze, resulting in a head-on collision.

Contrary to DOJ's reliance on *Blum*, this Court uses a standard approach to causation in its cases involving intentional deprivation of constitutional rights. In these cases, the Court has repeatedly ruled that the government is responsible for deprivations of First Amendment rights when it "deliberately set about to achieve the suppression of publications deemed 'objectionable.'" *Bantam Books*, 372 U.S. 67-69. In *Bantam Books*, this Court declared unconstitutional a New York state's censorship board's threat to a book distributor. Rather than requiring explicit and specific threats that "overwhelmed" the distributor, DOJ Br. at 14, the Court found that "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" against book distributors were enough to make the distributor's decision to pull the books "not voluntary." *Id*. at 69. There was no application of *Blum*'s identity test.

Similarly, in *Burton v. Wilmington Parking Auth.*, as in this case, there was no doubt about the private party's discrimination. 365 U.S. 715 (1961). Because the state, with that knowledge, had "so far insinuated itself into a position of interdependence with [the private party] . . . it must be recognized as a joint participant in the challenged activity." *Id*. at 725.

CONCLUSION

For the foregoing reasons, the Court should affirm the Fifth Circuit's judgment.

Respectfully submitted,

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