No. 23-411

In the Supreme Court of the United States

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

v.

MISSOURI, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* ADVANCING AMERICAN FREEDOM INC.; AMERICAN FAMILY ASSOCIATION ACTION; GARY L. BAUER, PRESIDENT, AMERICAN VALUES; ANGLICANS FOR LIFE; CENTER FOR POLITICAL RENEWAL; CENTER FOR URBAN RENEWAL AND EDUCATION (CURE); CENTER OF THE AMERICAN EXPERIMENT; CHARLIE GEROW; CHRISTIANS ENGAGED; INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS; JAMES DOBSON FAMILY INSTITUTE; IN SUPPORT OF RESPONDENTS (*AMICI CURIAE* CONTINUED ON INSIDE COVER)

J. Marc Wheat
Counsel of Record
Timothy Harper (Admitted in DC)
Advancing American Freedom, Inc.
801 Pennsylvania Avenue, N.W.
Suite 930
Washington, D.C. 20004
(202) 780-4848
MWheat@advancingamericanfreedom.com
Counsel for Amici Curiae

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TIM JONES, FMR. SPEAKER, MISSOURI HOUSE, CHAIRMAN, MISSOURI CENTER-RIGHT COALITION; JENNY BETH MARTIN, HONORARY CHAIRMAN, TEA PARTY PATRIOTS ACTION, INC.; MOUNTAIN STATES LEGAL FOUNDATION; NATIONAL APOSTOLIC CHRISTIAN LEADERSHIP CONFERENCE; NATIONAL CENTER FOR PUBLIC POLICY RESEARCH; SETTING THINGS RIGHT; 60 PLUS ASSOCIATION; STUDENTS FOR LIFE OF AMERICA; THE JUSTICE FOUNDATION; TRADITION, FAMILY, PROPERTY, INC.; RICHARD A. VIGUERIE, AMERICAN TARGET ADVERTISING, INC.; YANKEE INSTITUTE; AND YOUNG AMERICA'S FOUNDATION

QUESTIONS PRESENTED

1. Whether respondents have Article III standing.

2. Whether the government's challenged conduct transformed private social-media companies' content-moderation decisions into state action and violated respondents' First Amendment rights.

3. Whether the terms and breadth of the preliminary injunction are proper.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

STATEMENT OF INTEREST OF *AMICI CURIAE*

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including the uniquely American idea that all men are created equal and endowed by their Creator with unalienable rights to life, liberty, and the pursuit of happiness. AAF has an interest in the continued freedom of organizations and individuals to advocate for their beliefs, whether political, social, or otherwise, without fear of government censorship.[1]

Amici American Family Association Action; Gary L. Bauer, President, American Values; Anglicans for Life; Center for Political Renewal; Center for Urban Renewal and Education (CURE); Center of the American Experiment; Charlie Gerow; Christians Engaged; International Conference of Evangelical Chaplain Endorsers; James Dobson Family Institute; Jenny Beth Martin, Honorary Chairman, Tea Party Patriots Action, Inc.; Mountain States Legal Foundation; National Apostolic Christian Leadership Conference; National Center for Public Policy Research; Richard A. Viguerie, American Target Advertising, Inc.; Setting Things Right; 60 Plus Association; Students for Life of America; The Justice Foundation; Tim Jones, Fmr. Speaker, Missouri House, Chairman, Missouri Center-Right

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

Coalition; Tradition, Family, Property, Inc.; Yankee Institute; and Young America's Foundation are individuals and organizations that believe in the importance of Freedom of Speech and which are concerned about government overreach that infringes on those rights.

INTRODUCTION

Governments are "instituted among Men" to secure the rights of the people to "life, liberty, and the pursuit of happiness," rights with which people are "endowed by their Creator." *The Declaration of Independence* para. 2 (U.S. 1776). Recognizing the danger governments themselves pose to the very rights they are created to protect, the Framers of the American Constitution designed the structure of the federal government to limit the centralization of power which they believed "would be an end of everything."[2] The First Congress then adopted, and the states ratified, the Bill of Rights, enumerating and explicitly protecting certain of the rights the Constitution was designed to secure.

The issue at the heart of this case is whether the government can circumvent its constitutional limitations by asking a private party to do what the government could not. In this case, a laundry list of Federal officials and agencies used the power of office to censor speech related to the COVID-19 pandemic that they deemed misinformation. Specifically,

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[2] Montesquieu, *Spirit of the Laws*, § 11.6 (Thomas Nugent trans. 1752) (1748). As Thomas Jefferson wrote, "The concentrating [of powers] in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one . . . An elective despotism is not the government we fought for." Thomas Jefferson, *Notes on the State of Virginia*, Query XIII, 128-29 (1853).

beginning in early 2021, Government representatives communicated with Facebook, X (then called Twitter), YouTube, and Google regarding posts on their platforms relating to COVID-19. *Missouri v. Biden*, 83 F.4th 350, J.A. 4 (5th Cir. 2023) *cert. granted*, No. 23-411, 2023 WL 6935337 (S. Ct. Oct. 20, 2023). Those communications included flagging posts the Government had deemed "misinformation," requesting and receiving information about the companies' moderation activities, and asking that the reach of certain posts be throttled or that they be taken down altogether. *Id.* at J.A. 4-6. For example, "[i]n one email, a White House official told a platform to take a post down 'ASAP,' and instructed it to 'keep an eye out for tweets that fall in the same [] genre.'" *Id.* at J.A. 4 (alterations in original).

Those officials may have believed that they were acting in the best interests of the public by restricting information and arguments they thought to be dangerous. But there is no common good exception to the Constitution's limitations on government power. Nor do good intentions ensure either the legitimacy or the efficacy of the adopted policy; far from it.[3] Such officious meddling brings to

[3] "Of all tyrannies, a tyranny sincerely exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience. They may be more likely to go to Heaven yet at the same time likelier to make a Hell of earth." C.S. Lewis, *God in the Dock*, (1970), *reprinted in* The Collected Works of C.S. Lewis 270, 499 (Inspirational Press 1996).

mind this Court's dark precedent, *Buck v. Bell*, 274 U.S. 200, 207 (1927): "Three generations of imbeciles are enough." Some questions are not for the government to decide. Where the government seeks to impose its view of the truth on the people by silencing those with whom it disagrees, it violates the First Amendment whether it silences them directly or through a proxy.

SUMMARY OF THE ARGUMENT

The purpose of government is to secure the rights with which all people have been "endowed by their Creator." *The Declaration of Independence* para. 2 (U.S. 1776). To protect against the government's infringement of the very rights it exists to protect, the Constitution limits government power. In this case, government officials sought to circumvent those limitations by using a private party to accomplish what it could not directly: the silencing of speakers with whom it disagreed.

The Fifth Circuit correctly applied the state action doctrine, thus finding that under that test the social media companies' censorship of certain speakers and ideas constituted government action subject to First Amendment protections. However, the state action doctrine is insufficiently protective of individual rights to the extent that the government can succeed in its attempt to harm the rights of the people by colluding with a private party.

To ensure that the fundamental rights of the people are sufficiently protected, this Court should adopt a test, as almost all the circuit courts have in

the context of the Fourth Amendment,[4] that protects those rights against infringement by a private party where that infringement was instigated by the government, with or without coercion.

Only by ensuring that the rights of the people are secured against both direct and indirect abridgement by the government can the government fulfill its purpose. This principle exists already in the context of the Fourth Amendment. For these reasons, this Court should rule for Respondents and hold that the Government in this case violated the First Amendment protected Free Speech rights of Respondents.

ARGUMENT

I. The State Action Doctrine Insufficiently Protects the Fundamental Rights of the People from Government Overreach.

The protections of the First Amendment generally restrict only actions of the state, not those of private parties. As this Court has written, "[t]he text and original meaning of those Amendments, as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech." *Manhattan Comm. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) (emphasis in original). However, under the state action doctrine a private party may be found to have been acting as an arm of the government and thus to be subject to the

[4] See Section III(A) *infra* pp. 9-12.

constitutional restrictions on government power. This doctrine is intended to "protect[] a robust sphere of individual liberty." *Id.*

The Court has found that private actors can be deemed to have engaged in state action in "a few limited circumstances," namely "(i) when the private entity performs a traditional, exclusive public function, (ii) when the government compels the private entity to take a particular action, or (iii) when the government acts jointly with the private entity." *Id.* (citations omitted). The most relevant in this case is the second, alternatively formulated as the close nexus test.

To apply that test, the court must identify "the specific conduct of which the plaintiff complains," *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (internal quotation marks omitted) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). Having identified that conduct, a close nexus exists between the state and the private actor if "the State 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.'" *Id.* (quoting *Blum*, 457 U.S. at 1004).

The Fifth Circuit applied this test and rightly found that the government's efforts in this case to induce social media companies to remove some ideas or speakers from their platforms were so pervasive that resulting censorship of those speakers by those companies constituted state action, triggering First Amendment review. *Missouri v. Biden*, 83 F.4th 350.

However, despite being intended to "protect a robust sphere of individual liberty," the application of the state action doctrine subjects rights to the will of private entities. Under the state action doctrine, a government official who wants to silence speech needs only a willing private party with some control over the distribution of the speaker's speech. As long as it does not cross the line into coercion, the doctrine says, the Government can have Americans' speech suppressed merely by asking a private party to do so. The rights of the people should not depend on the willingness of powerful private entities to say "no" to the government that regulates and taxes them.[5]

Though the Fifth Circuit rightly found that the government had crossed the line into significant encouragement and even coercion in this case such factors should not be a prerequisite for judicial protection. The precedent of this Court and all but one of the circuit courts of appeals in the Fourth Amendment context represent a better approach to

[5] The threat to rights posed by designing bureaucrats in this case is not unique. In New York, state officials sought to undermine the ability of Second Amendment advocacy organizations to operate in the state by asking the insurance companies and banks to cease doing business with such organizations. *National Rifle Ass'n v. Vullo*, No. 21-636 (2d Cir. Sept. 22, 2022), *cert. granted*, (Nov. 3, 2023) (No. 22-842). Similarly, Amazon may have censored books after "feeling pressure from the White House." Representative Jim Jordan (@Jim_Jordan), X (Feb. 5, 2024 5:44 PM)
https://twitter.com/Jim_Jordan/status/1754637204146581783.

protecting the rights of the people against private interference induced by the government.[6]

II. The Rights Recognized by the First Amendment Deserve Protection Against Government Use of Third Parties Just as the Rights Recognized by the Fourth Amendment Have Received Such Protection in the Circuit Courts.

The rights protected by the Constitution are not suggestions or aspirations. They are limitations on government power. The government should not be allowed to abridge the rights it could not directly infringe merely by asking a private party to do its dirty work. This Court and most of the circuit courts have recognized this important principle in the context of the Fourth Amendment's protection against unreasonable searches and seizures. The rights protected by the First Amendment deserve the same security.

A. A majority of the circuit courts, applying this Court's precedent, have recognized the importance of protecting Americans against unreasonable searches and seizures conducted by private parties in some cases.

In *Skinner v. Railway Labor Executives' Association*, this Court held that drug tests conducted by railroads in compliance with federal regulations did implicate the Fourth Amendment. 489 U.S. 602, 617 (1989). In reaching that holding, the Court explained, "Whether a private party should be deemed an agent

[6] See Section II(A) *infra* pp. 9-12.

or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved 'in light of all the circumstances.'" *Id.* at 614-15 (citations omitted) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971)).

Applying that precedent, ten of the eleven circuit courts have adopted standards to ensure that the rights protected by the Fourth Amendment are safe from government infringement via a third party. Rather than reviewing such cases under the standard state action test, these courts ask whether a private party was acting as a state agent when engaging in activity later alleged to be a violation of the Fourth Amendment.

With slight variation, seven of the eleven circuits apply the same nonexclusive two-part test to determine whether a private party's search is subject to the Fourth Amendment. As described by the Third Circuit, this two-pronged test asks, "(1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the private citizen performing the search intended to assist law enforcement or acted to further her or his own legitimate and independent purposes." *United States v. Kramer*, 75 F.4th 339, 342-43 (3d Cir. 2023).[7] The

[7] The courts that have adopted some version this approach are the Third, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh. *See, e.g.*, *United States v. Kramer*, 75 F.4th 339, 342-43 (3rd Cir. 2023); *United States v. Jarrett*, 338 F.3d 339, 344 (4th Cir. 2003); *United States v. Johnlouis*, 44 F.4th 331, 337 (5th Cir. 2022); *United*

Sixth Circuit applies a very similar test, replacing the first prong with whether the government "instigated, encouraged, or participated in the search." *United States v. Booker*, 728 F.3d 535, 543 (6th Cir. 2013).

The First and Eighth Circuits have adopted three-pronged tests. The Eighth uses the same two prongs as the majority of courts but adds a third; "whether the citizen acted at the government's request." *United States v. Highbill*, 894 F.3d 988, 992 (8th Cir. 2018). The First Circuit determines "whether a private party is acting as a government agent when conducting a search," by assessing "all of the attendant facts and circumstances." *United States v. Rivera-Morales*, 961 F.3d 1, 8 (1st Cir. 2020) (citing *United States v. Silva*, 554 F.3d 13, 18-19 (1st Cir. 2009)). In making this assessment, the First Circuit finds that "three factors are especially relevant." *Id.* Those are, "the extent of the government's role in instigating or participating in the search, its intent and the degree of control it exercises over the search and the private party, and the extent to which the private party aims primarily to help the government or to serve its own interests." *Id.* (quoting *Silva*, 554

States v. Bebris, 4 F.4th 551, 561 (7th Cir. 2021) (finding that the two prong test is used to determine whether there was "some exercise of governmental power over the private entity, such that the private entity may be said to have acted on behalf of the government rather than for its own private purposes."); *United States v. Rosenow*, 50 F.4th 715, 731 (9th Cir. 2022); *United States v. Koerber*, 10 F.4th 1083, 1114 (10th Cir. 2021), *cert. denied*, — U.S. —, 143 S. Ct. 326, 214 L.Ed.2d 145 (2022); *United States v. Steiger*, 318 F.3d 1039, 1045 (11th Cir. 2003).

F.3d at 18-19).[8] Thus, the precedent of almost every circuit reflects the need to protect the rights ensured by the Fourth Amendment from private action at the direction of the state.

B. This Court should extend to the First Amendment the principle embodied by a majority of the circuit courts' approach to the Fourth Amendment.

The rights recognized by the First Amendment deserve the same degree of protection as the Fourth Amendment. They are not "second-class right[s]." *McDonald v. Chicago*, 561 U.S. 742, 780 (2010) (noting that the City of Chicago "in effect, ask us to treat the right recognized in *Heller* [under the Second Amendment] as a second-class right."). Adopting a similar approach for the First Amendment would ensure that the rights it protects are secured against overreaching bureaucrats.

In assessing these cases, this Court should consider not whether there was compulsion but rather whether the government has asked a private party to restrict the speech of a third party in a way that, if the government did the same thing directly, would violate the First Amendment. Requiring government compulsion before courts will intervene to protect rights from private interference leaves too much power to the government to interfere with the rights of the people. Nor would removing the coercion requirement be without precedent. In *Skinner*, the

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[8] Only the Second Circuit departs significantly from the pattern followed by the rest of the circuits, applying a close nexus test like the one applied by this Court in the state action context. *United States v. DiTomasso*, 932 F.3d 58, 67-68 (2d Cir. 2019).

Court noted, "The fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one." *Skinner*, 489 U.S. at 615. Thus, just as coercion is not a prerequisite for protection in the Fourth Amendment context, so it should not be where First Amendment rights are at stake.

Rather than looking for coercion, this Court should consider whether the government has asked or directed a private party to limit the ability of a third party to exercise its First Amendment rights. If it has so directed, the government should have the burden of proving that its request was not the cause of any subsequent censorship. If it cannot make that showing, then the request itself should be subject to strict scrutiny, the applicable test for restrictions on speech. *See Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015) (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech.")). Thus, only those requests that are narrowly tailored to serve a compelling government interest should be upheld.

III. The Government May Not Use its Ability to Speak as a Shield for its Efforts to Limit the Freedoms of the People.

Rather than engaging in normal government speech, in this case the Government used its speech to silence those with whom it disagreed, and thus violated the First Amendment. The government can

generally "speak for itself." *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000). Government speech does not "normally trigger the First Amendment rules designed to protect the marketplace of ideas." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). However, when the government uses its speech to censor other speakers, it should face First Amendment review.

This Court has found that "The Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech." *Id*. at 208 (citing *Pleasant Grove v. Summum*, 555 U.S. 460, 468 (2009)).[9] Government speech also crosses the First Amendment line when it is used to silence other speakers or ideas. "[T]he First Amendment rules designed to protect the marketplace of ideas," *Walker*, 576 U.S. at 207), must not lie dormant merely because the tool the Government uses to constrict that marketplace is its own speech.

Similarly, as the Government argues in its brief,[10] this Court has said that the primary limitation on government speech is not the First Amendment but rather "the ballot box." *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022). Of course, for the ballot box to

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[9] Similarly, "government speech must comport with the Establishment Clause," and "[t]he involvement of public officials in advocacy may be limited by law, regulation, or practice." *Summum*, 555 U.S. at 468.

[10] Brief for Petitioner at 23, *Murthy v. Missouri*, No. 23-411 (2024).

act as an effective check on government overreach, the people must be able to speak and be heard by those who want to hear them.[11] The ballot box will do little good as a check on government speech if the government successfully suppresses ideas with which it disagrees.

If the government need not coerce a private party before that party's actions may be considered that of the state, when would the government cross the line from constitutionally permissible government speech into speech suppression? That determination would best be made based on the totality of the circumstances, the approach already adopted by this Court and the circuit courts for determining whether the Fourth Amendment has been violated by a private actor. Factors that would suggest that the line has been crossed could include the degree to which the government speech was public, was directed at a particular private party, and was about a specific speaker or group of speakers.

A public statement that a particular view is dangerous or even that particular speakers are dangerous, for example, is very different from private and direct correspondence with a particular social media company asking that a specific post, speaker, or idea be censored on their platform. In the case of the former, voters can assess the government's claims for

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[11] The Court has also recognized a First Amendment right of recipients to hear speech. *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 756 (1976) ("where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both.").

themselves, and social media companies and other speech platforms are less likely to take such statements as requests for censorship. On the other hand, where, as here, the government requests, privately and directly, that a private party censor a third party, the lack of transparency and targeted nature of the communication poses a much greater danger of censorship and provides much less opportunity for voter response.

Citing the D.C. Circuit, the government says that "[g]overnment officials may 'vigorously criticize a publication' or speaker 'for any reason they wish.'" Brief for Petitioner at 24 (quoting *Penthouse International, Ltd. v. Meese*, 939 F.2d 1011, 1015 (D.C. Cir. 1991) (cert. denied, 503 U.S. 950 (1992)). The government points to statements from previous Presidents as examples of aggressive government speech that were nonetheless constitutionally permissible. However, none of these examples involve the President in question demanding that some speaker or message be silenced, let alone making such demands in secret. Instead, they involve Presidents expressing their own views on issues of public importance. President Theodore Roosevelt, for example, criticized the news media as "one of the most potent forces for evil." Brief for Petitioner at 24. Whether the government can criticize speakers with which it disagrees is not at issue in this case. The government officials in this case are not being challenged because they criticized respondents or their speech, but because those officials suppressed the speech of their fellow citizens.

CONCLUSION

For the foregoing reasons, this Court should rule in favor of Respondents and affirm the Fifth Circuit's judgment.

Respectfully submitted,

J. Marc Wheat
Counsel of Record
Advancing American Freedom, Inc.
801 Pennsylvania Avenue, N.W.
Suite 930
Washington, D.C. 20004
(202) 780-4848
MWheat@advancingamericanfreedom.com

Counsel for Amici Curiae