No. 23-411

IN THE

Supreme Court of the United States

VIVEK H. MURTHY, ET AL.,
Petitioners,
v.
MISSOURI, ET AL.,
Respondents.

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

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Rules

Other Authorities

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Pursuant to Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF"), respectfully submits this *amicus curiae* brief in support of Respondents.[1]

INTEREST OF *AMICUS CURIAE*

AFPF is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF is interested in this case because protection of the freedoms of expression and association, guaranteed by the First Amendment, is essential for an open and diverse society, and because government may not circumvent constitutional limits by using a surrogate to do what the government may not do directly.

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief. Counsel for all parties were timely notified of *amicus's* intent to file this brief.

SUMMARY OF ARGUMENT

To some extent it was inevitable. As the administrative state has grown and multiplied its workforce of ambitious and opinionated individuals, their viewpoints were certain to spill over into the private sphere. When those officials and employees speak on their own behalf, there is no constitutional impediment. But when they wield the power of government to impose an approved viewpoint and censor private speech, the First Amendment must apply the brakes.

This is the second of two cases before the Court this term that address the same issue: to what extent can government do indirectly what it cannot do directly to limit speech rights. This case, like *NRA v. Vullo*, No. 22-842, should be controlled by *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), which held that the successful efforts of a Rhode Island commission to remove books with disfavored content from bookstores violated the publishers' First Amendment rights.

Here, government officials acted through a variety of social media platforms to censor a broad range of speech that challenged the government's viewpoint. Plaintiffs rightly do not seek to impose constitutional liability on the platforms, focusing, as they should, on the government's actions. Like in *Vullo*, the question is whether the government violated the Constitution, not whether the private intermediaries did.

But the holding below, although largely favorable to the plaintiffs, was based on unnecessarily applying two discrete lines of precedent: 1) the *Bantam Books* line of precedent that asks only whether the government actor unconstitutionally influenced an intermediary to censor a downstream speaker; and

2) the state actor doctrine that asks whether constitutional liability can be transferred from the state to a private entity or vice versa. The state actor doctrine may have been the proper rubric had the platforms themselves been defendants. But since they were not, that analysis was inapposite.

Although the distinction between these legal models was not dispositive below, to avoid improperly burdening future litigants that seek to defend their rights against government use of surrogates, this Court should be clear that *Bantam Books* controls.

ARGUMENT

I. THE WHO'S WHO OF GOVERNMENT DEFENDANTS EXPOSES AN EXECUTIVE BRANCH MEDDLING IN PRIVATE SPEECH.

This case demonstrates the risk of an administrative state that seeks to evade constitutional limits and impose its singular view on the country.

This case is not about an individual government employee expressing a personal opinion to a private business. Nor is it about a small group of government employees sharing their opinions at a weekend soccer game or on their own social media accounts. It instead represents a wide-spread and often coordinated effort to influence the information private speakers—both hosts and users—could convey and receive on social media platforms. It also is not confined to a particular administration or a small set of insignificant topics. The claims and evidence on which this case rests span 2018–2021, *e.g.*, App. 170, 626, 628, 630. Topics include healthcare and elections but could easily

extend to, well, healthcare and elections—but from a different perspective.

The defendants in this case present a Who's Who of government officials across sundry functions and with varying degrees of menace, including "(1) the President; (2) his Press Secretary; (3) the Surgeon General; (4) the Department of Health and Human Services; (5) the HHS's Director; (6) Anthony Fauci in his capacity as the Director of the National Institute of Allergy and Infectious Diseases; (7) the NIAID; (8) the Centers for Disease Control; (9) the CDC's Digital Media Chief; (10) the Census Bureau; (11) the Senior Advisor for Communications at the Census Bureau; (12) the Department of Commerce; (13) the Secretary of the Department of Homeland Security; (14) the Senior Counselor to the Secretary of the DHS; (15) the DHS; (16) the Cybersecurity and Infrastructure Security Agency; (17) the Director of CISA; (18) the Department of Justice; (19) the Federal Bureau of Investigation; (20) a special agent of the FBI; (21) a section chief of the FBI; (22) the Food and Drug Administration; (23) the Director of Social Media at the FDA; (24) the Department of State; (25) the Department of Treasury; (26) the Department of Commerce; and (27) the Election Assistance Commission [and] a host of various advisors, officials, and deputies in the White House, the FDA, the CDC, the Census Bureau, the HHS, and CISA." *Missouri v. Biden,* 83 F.4th 350, 359 n. 2 (5th Cir.).

While some of these defendants were not enjoined, the shear breadth of activity straddling seemingly unrelated officials, ranging from law enforcement to subject matter specialists to the White House is astounding. As a government of limited authority,

what is the source of such overweening power? The expansion of an ambitious administrative state spreading its power thinly over a broad surface to maximum effect raises constitutional concerns.

As Professor Sunstein foresaw, "[m]any of the most vexing questions in constitutional law result from the rise of the modern regulatory state, which has allowed government to affect constitutional rights, not through criminal sanctions, but instead through spending, licensing, and employment. . . . It is here that constitutional law promises to receive its most serious tests in the next generation."[2] Here, of course, there was no criminal sanction. Nor was there any regulation or statute that could be squarely challenged. Instead, this broad attack on speech was accomplished through mundane, day-to-day badgering by bureaucrats until public discourse was steered in the government's preferred direction.

Bureaucrats do not sit in *parens patriae* over the American people's thought processes and this Court has long acknowledged that the government may not censor speech simply to protect listeners from messages it does not want them to hear. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."); *Texas v. Johnson,* 491 U.S.

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[2] Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 Boston University Law Review 593 (1990) (analyzing the effects of presuming waiver of constitutional objections through voluntary participation in a government benefit program).

397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Whether driven by good intentions or political motivation, the extent of infringing activity challenged here demonstrates the power of the administrative state to impose immense viewpoint discrimination that places the First Amendment at bay.

II. THE GOVERNMENT'S ACTION IS PROHIBITED UNDER *BANTAM BOOKS*.

It is well-established that the government may not do indirectly what it is constitutionally forbidden to do directly.[3] Laundering speech infringement through a third party violates this precept of constitutional law.

Were the government to censor or compel content directly, it would run up against a strong line of precedent, requiring it to demonstrate a compelling government interest, and narrow tailoring that employs the least restrictive means to further the articulated interest. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000). It is thus quite difficult for the government to directly compel or restrict content and the presumption is that any such

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[3] *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (It is "axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."). *See also Cummings v. Missouri*, 71 U.S. 277, 288, (1866) ("The legal result must be the same, if there is any force in the maxim, that what cannot be done directly cannot be done indirectly; or as Coke has it, in the 29th chapter of his Commentary upon Magna Charta, '*Quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud*.'").

attempt violates the Constitution. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional."). This strict standard cannot be evaded by relying on an intermediary to do the dirty work, as *Bantam Books* demonstrates.

The straightforward approach is complicated if the state actor doctrine is applied where it is not needed, shifting the focus from the government's activity—which is bound by the Constitution—to the intermediary's activity—which is not. This shift in focus in no way changes what the government official did. But it allows the government to shield its unconstitutional activity behind a private entity that lacks any constitutional duties. The presumption of unconstitutionality for content-based censorship and the associated burden on the government to satisfy strict scrutiny vanish, making the government the protected party that cannot be reached unless the surrogate is proven liable for infringement. This legal framework places the burden on the plaintiff to prove a different set of elements, including the state of mind of the surrogate—even if the surrogate is not a defendant and not subject to the remedy.

A. The First Amendment Protects Against Content-Based Restrictions Regardless of Intent.

Bedrock First Amendment law applies regardless of whether government officials believe they are acting in the public interest. In fact, government intent simply does not matter. *Reed*, 576 U.S. at 165 ("We have thus made clear that illicit legislative intent is not the *sine qua non* of a violation of the First

Amendment, and a party opposing the government need adduce no evidence of an improper censorial motive.") (cleaned up). A law that is content based is subject to strict scrutiny regardless of the government's benign motive. *Id.* at 165.

Moreover, "good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty. The existence of a permissible purpose cannot sustain an action that has an impermissible effect." *Norwood*, 413 U.S. at 466 (citing *Wright v. Council of City of Emporia*, 407 U.S. 451, 462 (1972)).

This framework would hold, for example, even if the Town of Gilbert requested a local Boy Scout Troop to go around town removing non-conforming signs and the Boy Scouts, eager to support the town, did as requested. Indeed, in *Norwood*, the Court demonstrated how intermediary action does not cut off constitutional liability in the Equal Protection context by holding that "the Constitution does not permit the State to aid discrimination . . . A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination." *Norwood*, 413 U.S. at 465–66.[4]

So too under the First Amendment where content-based censorship is forbidden even if a private party is used to facilitate the censorship as a middleman.

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[4] Notably, the holding in *Norwood* was driven by the provision of funding and not any directive by the state that the recipient schools discriminate, unlike here where the unconstitutional direction came directly from government officials and did not spring from a private party.

B. Under *Bantam Books*, the Government May Not Use a Private Intermediary to Censor Speech.

Although new technologies present novel fact patterns, the dispositive legal issue has been before this Court before. In *Bantam Books*, which exemplifies government efforts to use an intermediary to censor speech, this Court provided the model on which this case and *Vullo* should be decided.

In *Bantam Books*, appellants were four New York publishers of paperback books that were exclusively distributed in Rhode Island by Max Silverstein & Sons. 372 U.S. at 61. The Rhode Island Commission to Encourage Morality in Youth repeatedly notified Silverstein that he was distributing books that the Commission deemed "objectionable". *Id*. at 60–61. In response, because he wanted to avoid becoming involved in a court proceeding with a "duly authorized" government actor, Silverstein stopped filling pending orders, refused new orders, and even had his field staff pick up unsold copies from retailers and return them to the publishers. *Id*. at 63.

Silverstein was neither a plaintiff nor a defendant in *Bantom Books*.[5] Nevertheless, the publishers

[5] Silverstein, as the distributor, could presumably have defended his own First Amendment rights. But the intermediary party does not have to be a speaker. For example, in *Backpage.com, LLC v. Dart*, the intermediary parties were the Visa and Mastercard credit-card companies, which had been asked by a sheriff to stop allowing their credit cards to be used to place ads on Backpage.com. *Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015). Both companies stopped allowing their credit

themselves were able to vindicate their own rights against the government without involving the intermediary as a party in the case. *Id.* at n.6 ("Appellants' standing has not been, nor could it be, successfully questioned."). This was so because "the direct and obviously intended result of the Commission's activities was to curtail the circulation in Rhode Island of books published by appellants," even though the "Commission's notices were circulated only to distributors." *Id.*

Likewise, resolution of the publishers' merits claims did not require them to prove anything more about the distributor beyond that he did not voluntarily change his business practices away from his previously beneficial practice to the one demanded by the government. Instead, the Court focused solely on the government, holding the activities of the Commission were unconstitutional because its "operation was in fact a scheme of state censorship effectuated by extralegal sanctions," *Id.* at 72, in which "the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Id.* at 67. Such a "system of prior administrative restraints," came before the Court "bearing a heavy presumption against its constitutional validity." *Id.* at 70.

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cards to be used to purchase ads anywhere on Backpage's website. *Id.* at 232.

C. Resolution of this Case Under *Bantam Books* Does Not Involve State Actor Doctrine.

The question presented here asks "Whether the government's challenged conduct transformed private social-media companies' content-moderation decisions into state action and violated respondents' First Amendment rights." The direct answer is no. But that answers the wrong question—a red herring that distracts from whether the *government* violated the Constitution. The question instead should read: Whether the government's challenged conduct violated respondents' First Amendment rights. For it is the government's activity alone that matters.

State actor analysis by contrast applies in two scenarios, neither of which are present here. The first is when "the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so as to make it 'state' action for purposes of the Fourteenth Amendment" thus subjecting the private-party defendant to constitutional limitations and a constitutional remedy. *Blum v. Yaretsky*, 457 U.S. 991, 1003, (1982) citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). In this scenario, the private actor must be, (1) a defendant, and (2) acting as the state. There are no private defendants in this case, so this scenario does not apply.

The second scenario is when the plaintiff "seeks to hold the State liable for the actions of private parties" even if the state was not involved in the challenged decision. *Blum*, 457 U.S. at 1004. In this scenario, the

government must, (1) be a defendant, and (2) have not performed the alleged violative act. Here, the government was involved—indeed requested (or demanded) the challenged removal of content—so this scenario does not apply either.

Thus the question of whether constitutional liability could flow from a private party to the government or vice versa is not relevant in this case where the legally-relevant criteria are limited to whether the government violated the Constitution via its own actions and whether the remedy sought addresses those alleged violations.

Section 1983 cases, such as *Polk County v. Dodson*, provide examples of the first type of relationship, in which the plaintiff seeks to impose constitutional liability on a private party under the theory that the private party acts under the imprimatur of the state and thus should bear state burdens. 454 U.S. 312 (1981). In *Dodson*, the question was whether a public defender acts "under color of" state law within the meaning of section 1983 when representing an indigent defendant in a state criminal proceeding. *Id.* at 314. The Court concluded that he did not because the public defender was not acting under color of state law when performing a lawyer's traditional functions as counsel. *Id.* at 324–25. This is because the lawyer's decisions were "framed in accordance with professional canons of ethics, rather than dictated by any rule of conduct imposed by the State." *Blum*, 457 U.S. at 1009 (discussing *Dodson*). *See also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (lawsuit against public officials and a class of private insurers and self-insured employers under § 1983 required determining whether the specific conduct of

which the plaintiff complained was attributable to the state before private parties could be liable); *Rendell-Baker v. Kohn*, 457 U.S. 830, 830 (1982) (§ 1983 lawsuit against private school that received public funds alleging violation of First, Fifth, and Fourteenth Amendment rights); *Jackson v. Metro. Edison Co.*, 419 U.S. at 345 (§ 1983 claim against a privately owned and operated utility corporation that held a certificate of public convenience issued by the Pennsylvania Utility Commission).

Blum v. Yaretsky, presents an example of the second scenario in which the plaintiff seeks to hold the state liable for the actions of a private party. In *Blum*, a class of Medicaid patients sought to hold the State of New York responsible under the Due Process Clause of the Fourteenth Amendment for medical decisions by nursing homes that were reimbursed via the Medicaid program. 457 U.S. at 993–94, 96. The challenged decisions did not originate with state officials but with privately owned and operated nursing homes. *Id*. at 1003. But the lawsuit sought to hold state officials liable for those decisions and the remedy sought would have required the State to adopt regulations that would prohibit private conduct. *Id*. at 1003. Thus, the remedy would have been imposed on the state, which was not responsible for the challenged decisions, and not on the private actors.

Only where one of these scenarios is alleged should state actor doctrine come into play. Where the alleged constitutional harm may be established and remedied without imposing liability or any mandate on the intermediary entity (or holding the government responsible for its behavior as well as the government's own activity), do the myriad of "state

actor" characteristics become relevant to resolution of the controversy.

Neither of those situations is present here nor in *Vullo*. In both cases, the defendants are not private parties, so the first type of state actor nexus does not apply. Moreover, neither case involves attempting to hold the government liable for independent acts of private parties. In both cases liability is alleged to arise from government officials' unconstitutional actions; there is no attempt to impute liability from a third party and, therefore, the second type of state actor analysis does not apply. In both cases plaintiffs seek to hold only government defendants responsible for their own unconstitutional acts—no state actor analysis is needed.

D. Unnecessary Application of State Actor Doctrine Opens the Door to Indirect Government Censorship.

Conflating the two lines of precedent has real world and legally indefensible outcomes.

Contrast two scenarios in which an assortment of shops have agreed to display political ads in their storefront windows for a candidate challenging the incumbent in the forthcoming election. In both cases, the incumbent calls the shops and demands they remove the ads from their windows. Some shop owners obey, and some do not; some inform the challenger of the demand, and some do not. But a material proportion of the political ads disappear from public view. The candidate files suit against the incumbent official challenging the take-down demands. In the first case, the court applies *Bantam Books*, focusing on the incumbent, who as a

government official has constitutional duties and limitations. That is an easy case under *Bantam Books*.

In the second case, the court focuses on the shop owners, asking whether they are state actors. The shop owners are not named defendants, not exposed to liability, not subject to the remedy sought, and, as private parties, have no constitutional duties or limitations. But the challenger candidate would be burdened with proving the mental state of each shop owner so the court could decide whether they had perceived the government communication as coercive or merely persuasive. *Blum*, 457 U.S. at 1004. The easy case has become difficult.

In each case, the first mover was a government official. In each case, the Constitution applies to the action for which the remedy is sought—the takedown request by the government. And, in each case, the challenger candidate is harmed. There is, in fact, no difference in behavior by the incumbent government official, the shop owners, or the challenger candidate. But the legal outcome is different.

This shift in focus away from the government official's action to the mental state of an intermediary creates a difference in legal outcome that is not founded in the Constitution.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Fifth Circuit, clarifying that the basis for decision is *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

Respectfully submitted,

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