23-411

In the
Supreme Court of the United States

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

v.

STATE OF MISSOURI, ET AL.
Respondent.

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

BRIEF OF AMERICAN FREE ENTERPRISE CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Formed in 2022, the American Free Enterprise Chamber of Commerce ("AmFree") is a 501(c)(6) organization that represents hard-working entrepreneurs and businesses across all sectors. AmFree's members are vitally interested in the preservation of free markets, innovation, and the continued viability of our republic.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The emergence of social media has had an important democratizing effect on how people produce, distribute, and consume not only news, but all types of information. Twitter, Facebook, YouTube, and other similar platforms have become one of the primary way Americans learn about politics, policy, science, and contemporary events. This is perhaps the most important shift in communication since the advent of mass media itself, and it comes with effects both good and bad.

This shift has disrupted centralized control, raised new voices, and spurred creative thinking. Our new system—where information from all corners can be amplified and disseminated—has brought us closer to the "marketplace of ideas" that motivated First Amendment jurisprudence in the twentieth century.

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

It has also dramatically increased the speed of transmission and availability of information.

Because of this, many assumed that the internet would end forever governmental attempts to control speech. As President Clinton famously quipped, censoring the internet would be "sort of like trying to nail Jello to the wall." *Clinton on Firewall and Jello*, C-SPAN (Mar. 9, 2000), https://www.c-span.org/video/?c4893404/user-clip-clinton-firewall-jello.

That hasn't been the case, of course. The shift towards social media communication has opened new and different modes of control and suppression. In the West, most of these tools are not directly controlled by the government, but by private technology companies. As Justice Thomas has observed, today, "the right to cut off speech lies most powerfully in the hands of private digital platforms." *Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. 1220, 1227 (2021) (mem.) (Thomas, J., concurring).

This isn't all bad, by any means—it is good that business and government have tools for stopping the spread child pornography and fraud, for example. But, like any power, it can be abused.

And the risk of abuse is very high indeed. Accompanying the emergence of social media has been the rise of today's "vast and varied federal bureaucracy." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.,* 561 U.S. 477, 499 (2010). The federal government, particularly the Executive Branch, "now wields vast power and touches almost every aspect of daily life." *Id.* The nexus of these two developments has naturally raised concerns about the government using its regulatory powers to censor speech by targeting platforms rather

than users directly. *See, e.g.*, Alan Z. Rozenshtein, *Silicon Valley's Speech: Technology Giants and the Deregulatory First Amendment*, 1 J. Free Speech L. 337, 363–64 (2021).

The events in this case are perhaps the most dramatic demonstration to date of why those concerns are well founded. As the Court of Appeals explained, high-level federal officials engaged in "a coordinated campaign" to suppress the expression of disfavored views on important public issues. *Missouri v. Biden*, 83 F.4th 350, 392 (5th Cir. 2023). The "unrelenting pressure" these officials applied to social media companies "had the intended result of suppressing millions of protected free speech postings by American citizens." *Id.* (cleaned up). Accordingly, the court below found that plaintiffs were likely to succeed in showing that the government "coerced" or "significantly encouraged" the abridgement of their protected speech, and the court therefore issued a preliminary injunction. *Id.* at 392, 397.

The government thinks this goes too far. The Solicitor General argues that "the government is entitled to forcefully 'advocate and defend its own policies'" and "was seeking to inform or persuade—not to coerce." Br. of Pet'rs 38, 39 (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth,* 529 U.S. 217, 229 (2000)). This ignores two crucial qualifications.

First, even if the government was, in fact, only seeking to persuade (an untenable claim here), the Court of Appeals was correct that requests from the White House, the FBI, and other executive agencies are "inherently coercive." *Missouri*, 83 F.4th at 384 (cleaned up). The executive "wields significant power in this Nation's constitutional landscape," including

"direct[ing] an army of federal agencies that create, modify, and enforce federal regulations." *Id.* For a highly regulated entity like a social media company, displeasing regulators can unleash a host of unpleasant possibilities that are better avoided. The "or else" is implicit.

Second, while it is certainly true that the "government can permissibly 'attempt[ ] to convince' a private party to undertake actions that the government believes will advance the public interest," Br. of Pet'rs 45 (quoting *O'Handley v. Weber*, 62 F.4th 1145, 1158 (9th Cir. 2023)), the abridgement of protected speech is never in the public interest. The government's parade of horribles ignores this basic reality, instead wandering far afield in search of a problem not presented here. *See id.* at 47–48. Fundraising to support a terrorist organization or grooming and sexually exploiting a minor aren't instances of protected speech—they're crimes. *See id.* at 3–4.

And even if, as the government insists, "the Fifth Circuit's decision compels thousands of government officials to parse . . . and tailor their speech" along some rather fine doctrinal lines, *id.* at 50, that is no defense for what the government did here. Moreover, as this Court has noted, "[i]f men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021); *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020); *Rock Island, A. & L. R. Co. v. United States*, 254 U.S. 141, 143 (1920); *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting).

That is not to say this Court shouldn't bring greater clarity to the constitutional inquiry. It should. This Court's First Amendment jurisprudence was largely articulated in a pre-social media era. As a result, the Court of Appeals was trying to prevent egregiously unconstitutional behavior by stitching together two separate circuit court tests designed for very different applications. The result is a little awkward and may leave government officials unsure as to when their actions violate the First Amendment.

This Court should take a somewhat different approach. Instead of balancing factors to determine if government pressure rises to the level that a private party effectively becomes an arm of the state, the Court should instead fashion a clearer rule: The government abridges protected speech whenever it asks a private party to abridge protected speech.

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Regardless of how the test is structured, the most important thing is that it have real teeth. While it is easy to see the risks of invading the government's core prerogatives, for some it may be harder to recognize the dangers that the government's "unrelenting pressure" to suppress "misinformation" has on public understanding of what was true in the first place. As the record here shows, the government has worked hard to silence dissenting opinions and inconvenient facts in an effort to reduce resistance to its preferred policies. This wasn't limited to COVID-19, but has spanned a host of significant and controversial subjects, including the "lab-leak theory, pandemic lockdowns, vaccine side-effects, election fraud,[ ] the Hunter Biden laptop story," and climate change. *Mis-*

souri, 83 F.4th at 359. In identifying mis- and dis-information fit for censorship, the government was often wrong about the facts, or, in some instances, deliberately sought to mislead the public. However well-intentioned they may have been, the government's censorship campaign dramatically slowed the development of public knowledge and of effective policy. A manufactured consensus of this sort also corrodes our constitutional structure, electoral accountability, public trust in government, and—sadly, but often deservedly—public trust in scientific inquiry itself.

Spurred by the effectiveness of the government's anti-"misinformation" campaign, a host of voices have emerged calling for new and expanded definitions of "misinformation." With respect to discussions of climate science and policy, for example, the Center for Countering Digital Hate has called on the government and social media companies to work together to block not just incorrect information, but any "narratives that seek to undermine the climate movement."[2] In other words, inconvenient truths must be suppressed.

This effort is especially pernicious because it seeks to meddle with scientific inquiry. In science, perhaps even more than politics, the "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of . . . truth." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

At least as far as we know, these calls have not yet been backed by the full might of the federal government. But the government's actions here show

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[2] Ctr. for Countering Digital Hate, *The New Climate Denial* 33 (Jan. 2024), https://perma.cc/YV23-VNC3.

that they certainly could be in the future. This Court should not permit that result. The course that the Court charts in this case will have an outsized impact on what the future of speech and the development of human knowledge look like in the twenty-first century. As we explain below, this is not a hard case, but it is a very important one.

ARGUMENT

I. The Government May Not Ask Someone Else to Suppress Protected Speech.

The First Amendment enshrines a principle that is in the "nature of Republican Government, . . . that the censorial power is in the people over the Government, and not in the Government over the people." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964) (quoting 4 Annals of Congress 934 (1794)). Perhaps the most pernicious form of government censorship is content-based, meaning it "target[s] speech based on its communicative content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Such actions "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.*

Traditionally, unconstitutional content-based censorship arose in a dyadic mode. A speaker tried to voice some banned message, and the government tried to stop it. *See* Jack M. Balkin, *Free Speech in the Algorithmic Society*, 51 U.C. Davis L. Rev. 1149, 1153 (2018). But social media has complicated this picture. *Id.* at 1193. The primary regulator of speech is no longer the government, but the digital platforms through which people speak. The government has

adapted by using its regulatory tools to indirectly censor speech by targeting the private platforms rather than users directly.

That is precisely what happened here. As the Court of Appeals explained, the "coordinated campaign" of "'unrelenting pressure' from certain government officials likely 'had the intended result of suppressing millions of protected free speech postings by American citizens.'" *Missouri*, 83 F.4th at 392.

But pre-social media Supreme Court doctrine left the lower courts in an awkward position. While the First Amendment prohibits the "'restrict[ion of] speech of some elements of our society in order to enhance the relative voice of others,'" *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 657 (1994), it "prohibits only *governmental* abridgment of speech," *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). The only exceptions to this limitation emerge "(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.*

These are not always easy barriers to overcome. Most judges are reluctant to say that a private party has been transformed into a government actor. Consequently, several circuits have invented complex tests—like the four-factor test for coercion employed by the Court of Appeals—that err on the side of finding no government coercion and thus no unconstitutional government action.

That misses the point entirely. The "government action" that plaintiffs here object to is not their censorship by social media companies—who are not named defendants in this case—but the attempts by the federal government to persuade and coerce the social media companies to silence their protected speech. This Court has been clear that "[t]he Constitution deals with substance, not shadows," and "[w]hat cannot be done directly cannot be done indirectly." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866)); *see also Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.,* 570 U.S. 205, 214 (2013). Indeed, 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) (cleaned up).

Current doctrine can mask this truth and encourage the government to jawbone private entities into doing what the government cannot while remaining in the gray zone short of explicit coercion. This is the view the government repeatedly espouses here. The Solicitor General defends the government's calls for censorship by saying that the "government can permissibly attempt to convince a private party to undertake actions that the government believes will advance the public interest," and suggests that to establish government action a plaintiff must affirmatively prove that the action was one that the company "would not otherwise have taken in the exercise of its broad and legitimate discretion as an independent company." Br. of Pet'rs 18, 45 (cleaned up).

This is a red herring. As others have pointed out, when the government "improperly pressure[s] private companies into restricting content, then the companies' own right of editorial discretion has already been violated and they are in fact *victims*, not *perpetrators*, of unconstitutional government overreach." Br. of U.S. Chamber of Com. as Amicus Curiae 2. The government can try to persuade people of many things, but it may not lean on individuals or corporate entities to do what the government itself is forbidden from doing.[3]

II. "Disinformation" Has Become Shorthand for Disfavored Policy Positions.

The "vast and varied federal bureaucracy"—first under President Donald Trump, and then in an expanded fashion under President Joe Biden—has pushed social media companies "'to do more'" to censor speech that the government identified as disinformation. *Missouri v. Biden*, No. 3:22-CV-01213, 2023 WL 4335270, at *13 (W.D. La. July 4, 2023). This is content-based discrimination that violates the First Amendment as explained above. But what is striking about the catalog of the government's conduct in the record here, and in voluminous Twitter Files and Facebook Files, is just how often the government was wrong about the underlying facts.

Start with censorship related to COVID-19. One early view flagged as disinformation was the "lab-leak" theory, which suggested that COVID-19—a novel coronavirus first detected in Wuhan, China—

[3] This does not mean that joint action involving a willing private participant can launder the government's unconstitutional efforts to censor speech.

may have originated in a virology lab in Wuhan that had received $600,000 in grant money from the National Institutes of Health to support a project studying novel bat coronaviruses.[4] High level federal officials sent emails and gave public talks urging social media platforms to censor posts espousing the lab-leak theory.[5] Facebook and other social media companies dutifully complied.[6]

As the basis for this denial, many federal officials pointed to the now infamous "Proximal Origins" article published in *Nature Medicine* that concludes, "[W]e do not believe that any type of laboratory-based scenario is plausible."[7] But, as subsequently revealed by the House Committee on Oversight and Reform, this was not actually the view shared by the authors at that time.[8] Just weeks before the paper was published, one of the five authors, Dr. Edward Holmes, explained that he was "60-40" in favor of the lab-leak theory, and another author, Dr. Robert Garry, explained "I really can't think of a plausible natural sce-

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[4] Lori Robertson & Jessica McDonald, *Fauci and Paul, Round 2*, FactCheck.org (July 22, 2021), https://perma.cc/5XQF-Y9AH.

[5] *Missouri v. Biden*, 2023 WL 4335270, at *23–24.

[6] *See, e.g.*, Guy Rosen, VP of Integrity, Meta, *An Update on Our Work to Keep People Informed and Limit Misinformation About COVID-19*, Meta (Apr. 16, 2020), https://perma.cc/S7EP-22BP.

[7] Kristian G. Andersen et al., *The Proximal Origin of SARS-CoV-2*, 26 Nature Medicine 450, 452 (2020), https://doi.org/10.1038/s41591-020-0820-9.

[8] Letter from H. Comm. on Oversight and Reform to Dr. Kristian Andersen (Feb. 3, 2022), https://perma.cc/5S2N-Y3LS.

nario. . . . I just can't figure out how this gets accomplished in nature. . . . Of course, in the lab it would be easy."[9]

The reason the authors nevertheless published the paper saying the opposite is because they were urged to do so by top federal officials concerned about the fallout from blaming China for the pandemic. In February 2020 the director of the U.S. National Institute of Allergy and Infectious Diseases, Anthony Fauci, and the director of the National Institutes of Health, Francis Collins, organized a teleconference with a handful of scientists including four of the five authors of Proximal Origins. During the call the scientists discussed the possibility of the lab-leak theory and decided that, while it was certainly plausible that the virus was "engineered and released into the environment by humans," "further debate" about such accusations "'would unnecessarily distract top researchers from their active duties and do unnecessary harm to science in general and science in China in particular.'"[10]

Despite the widespread censorship on social media, the evidence of a lab leak eventually mounted too high to be ignored. In March 2021, former Centers for Disease Control and Prevention Director Robert Redfield said publicly that he thought the lab-leak theory was the "most likely."[11] He subsequently received

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[9] *Id.*

[10] Jimmy Tobias, *Evolution of a Theory*, The Intercept (Jan. 19, 2023), https://perma.cc/N47F-6XUG.

[11] Zachary Basu, *Ex-CDC Director Says He Believes Coronavirus Originated in Wuhan Lab*, Axios (Mar. 26, 2021), https://www.axios.com/2021/03/26/wuhan-lab-coronavirus-cdc-director.

death threats from other scientists.[12] Later that year, British and American security services suggested that the theory was "feasible."[13] Eventually even Fauci conceded that a lab-leak shouldn't be ruled out as a possibility.[14] And when the government changed its tune and the pressure stopped, Facebook changed its policy.[15]

A similar pattern emerged around other hot-button policy issues. YouTube removed a video of a roundtable discussion between Florida Governor Ron DeSantis and scientists and doctors from Harvard, Oxford, and Stanford because some of the panelists suggested that children should not be required to

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[12] Zachary Basu, *Ex-CDC Director Says He Received Death Threats After Backing Lab-Leak Theory*, Axios (June 3, 2021), https://www.axios.com/2021/06/03/lab-leak-theory-redfield-vanity-fair.

[13] Larisa Brown, *Covid: Wuhan Lab Leak is 'Feasible' Say British Spies*, The Sunday Times (May 30, 2021), https://perma.cc/96CW-GGDU.

[14] Kelly McLaughlin & Aylin Woodward, *Fauci: We Need to Keep an 'Open Mind' About the Lab-leak Theory of the Coronavirus Pandemic's Origins*, Bus. Insider (June 3, 2021), https://www.businessinsider.com/covid-lab-leak-theory-fauci-says-to-keep-open-mind-2021-6.

[15] *See, e.g.,* Guy Rosen, *supra* note 6 (updating policy on May 26, 2021) ("[W]e will no longer remove the claim that COVID-19 is man-made or manufactured from our apps. We're continuing to work with health experts to keep pace with the evolving nature of the pandemic and regularly update our policies as new facts and trends emerge."); Ryan Tracy, *Facebook Bowed to White House Pressure, Removed Covid Posts,* Wall St. J. (July 28, 2023), https://www.wsj.com/articles/facebook-bowed-to-white-house-pressure-removed-covid-posts-2df436b7.

wear masks because "they don't need it."[16] But meta-studies have since confirmed this view was correct, and YouTube changed its policy.[17]

The government has similarly targeted speech about climate change and climate policy.[18] In July 2020, Facebook censored Michael Shellenberger for pointing out that weather-related disasters have become less deadly and less costly over time.[19] Shellenberger was correct.[20]

Facebook likewise censored a video of John Stossel in which he claimed that though "climate change has made things worse," increasing damage

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[16] Kirby Wilson & Allison Ross, *YouTube Removes Video of DeSantis Pandemic Roundtable with Atlas, Other Panelists*, Mia. Herald (Apr. 12, 2021), https://www.miamiherald.com/news/politics-government/state-politics/article250611599.html.

[17] *See* Tom Jefferson et al., *Physical Interventions to Interrupt or Reduce the Spread of Respiratory Viruses*, Cochrane Database of Systematic Reviews (Jan. 30, 2023), https://doi.org/10.1002/14651858.CD006207.pub6 (concluding that "[w]earing masks in the community probably makes little or no difference to the outcome of influenza-like illness (ILI)/COVID-19 like illness compared to not wearing masks"); Matt Halprin & Jennifer Flannery O'Connor, *On Policy Development at YouTube,* YouTube: Inside YouTube (Dec. 1, 2022), https://perma.cc/X2EF-7GHX ("Later, as [government] guidance shifted to ease mask and social distancing restrictions, we updated our policies around content that questioned the efficacy of masks and social distancing.").

[18] *See Missouri*, 2023 WL 4335270, at *13, *68.

[19] Letter from Michael Shellenberger, Founder & President, Env't Progress, to Mark Zuckerberg, Facebook (July 2, 2020), https://perma.cc/P5TG-5LZJ.

[20] *See* Hannah Ritchie & Pablo Rosado, Our World in Data, https://perma.cc/Y64V-2S89 (last accessed Feb. 8, 2024).

from forest fires is caused primarily by poor forest management.[21] Stossel was correct.[22]

Facebook also censored Bjorn Lomborg for reporting that an article published in the medical journal *Lancet* found that warmer global temperatures save lives.[23] Lomborg was correct. While heat-related deaths have marginally increased, they have been more than offset by reductions in cold-related deaths, and warming has reduced temperature-related mortality on net by about 166,000 deaths per year.[24]

What unifies each of these examples of censorship is not something controversial about the scientific data itself, but about the policies that some feared this data would justify. In each instance, the censored opinion was targeted because it didn't support the government's chosen policy approach. If masks were not effective, how could the government justify its masking guidelines? If weather-related deaths are de-

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[21] John Stossel, *Facebook Bizarrely Claims Its 'Fact-Checks' Are 'Opinion'*, N.Y. Post (Dec. 13, 2021), https://perma.cc/THS6-GAK9.

[22] Paul F. Hessburg et al., *Wildfire and Climate Change Adaptation of Western North American Forests: A Case for Intentional Management*, 31 Ecological Applications, no. 8, article e02432, Aug. 2, 2021, https://doi.org/10.1002/eap.2432.

[23] Bjorn Lomborg, *The Heresy of Heat and Cold Deaths*, Lomborg.org, https://perma.cc/YX7F-CXFW (last accessed Feb. 8, 2024).

[24] Qi Zhao et al., *Global, Regional, and National Burden of Mortality Associated with Non-optimal Ambient Temperatures from 2000 to 2019: A Three-Stage Modelling Study*, 5 Lancet Planetary Health, July 2021, at E415, https://doi.org/10.1016/S2542-5196(21)00081-4.

creasing, how can the government justify its characterization of climate change as the "only existential threat humanity faces"?[25] Rather than try to answer these points on the merits to explain why their policies were nevertheless justified, or modifying those policies, censors seem to have adopted the mantra that "if you're explaining, you're losing."

Despite a series of very public blunders, the federal government has continued to push social media companies to be even *more* aggressive in their censorship. At an Axios event entitled "A Conversation on Battling Misinformation," held on June 14, 2022, White House National Climate Advisor Gina McCarthy blamed social-media companies for allowing "misinformation" and "disinformation" about climate change, saying, "We have to get together; we have to get better at communicating, and frankly, the tech companies have to stop allowing specific individuals over and over to spread disinformation." *Missouri*, 2023 WL 4335270, at *68. And as McCarthy made clear, the climate "disinformation" she had in mind was not just claims "denying the problem," but any claim that might "seed[ ] doubt about the costs associated with [green energy] and whether they work or not."[26]

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[25] Jordan Fabian & Akayla Gardner, *Biden Says Climate Change Poses Greater Threat Than Nuclear War*, Bloomberg (Sept. 10, 2023), https://www.bloomberg.com/news/articles/2023-09-10/biden-says-climate-change-poses-greater-threat-than-nuclear-war.

[26] Editorial Bd., *Climate-Change Censorship: Phase Two*, Wall St. J. (June 13, 2022), https://www.wsj.com/articles/climate-censorship-phase-two-gina-mccarthy-social-media-biden-white-house-11655156191.

As an example of this new "disinformation," McCarthy cited the week-long power outage in Texas in February 2021 following Winter Storm Uri. "The first thing we read in the paper was" that the blackouts occurred "because of those wind turbines," she said. "That became the mantra." *Id.* McCarthy didn't seem to care that the wind turbines failing *was* a but-for cause of the blackouts.[27] What mattered to her was the narrative.

In suggesting this broadened definition of "disinformation," which is itself "disinformation," McCarthy was only echoing a shift in strategy that groups like Climate Action Against Disinformation have been advocating. That group has pushed social media companies and governments to adopt a new "universal definition" of "climate disinformation" that would encompass *any* content that "[u]ndermines the existence or impacts of climate change, the unequivocal human influence on climate change, and the need for corresponding urgent action according to the IPCC scientific consensus and in line with the goals of the Paris Climate Agreement."[28] Included in this definition "are subtler narratives" like "Renewable energy doesn't work," "Environmentalists are hysterical," and "Net Zero is bad for the economy."[29]

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[27] Michael Buschbacher & Taylor Myers, *FERC Gaslights America*, Am. Conservative (Sept. 6, 2022), https://perma.cc/BUZ6-8VEM.

[28] *Misinformation and Disinformation are Major Threats to Climate Action*, Climate Action Against Disinformation, https://perma.cc/8DRU-G83P (last accessed Feb. 8, 2024)

[29] *What Is Climate Disinformation?*, Glob. Witness (May 27, 2022), https://perma.cc/P3PF-YUWY.

These statements aren't "disinformation," they're opinions about public policy that lie at the core of what the First Amendment was designed to protect. A decision for the government here would invite an even greater scale of censorship on these—and doubtless many other—topics. This Court should decisively reject that possibility.

III. Censorship Threatens the Scientific Enterprise.

The tacit premise in the efforts described above is the view that ordinary citizens are not fit to make decisions when there is an important scientific component. Instead, citizens and policymakers alike must learn to "follow the science." But this is a category error. The scientific enterprise deals with trying to figure out what *is* not what *ought to be*. And while policymakers are typically justified in reliance on rules of thumb and conventional wisdom, this is not how good scientists approach their vocation. The very basis of scientific inquiry is challenging conventional wisdom and presumptions, and the greatest discoveries and progress often come from breaking established paradigms.

In *The Structure of Scientific Revolutions*, Thomas Kuhn demonstrated that science largely progresses, not through a steady accumulation of new knowledge, but instead through a series of dramatic paradigm shifts. *See generally* Thomas S. Kuhn, *The Structure of Scientific Revolutions* (1962). Within a dominant paradigm, the conventional understanding reigns with only small refinements over time. It is only when scientists point out larger anomalies, which contradict common wisdom entirely, that cracks in the

paradigm start to show. These cracks, in turn, lead to scientific revolutions, where competing new paradigms vie for dominance.

At the core of this process is the public sharing of views deemed "heretical" that conflict with the current paradigm. Consider, for example, Dr. Barry Marshall. In the 1970s and '80s, the scientific consensus was that gastritis and peptic ulcers were caused by some combination of stress, spicy food, and stomach acid.[30] Treatments followed accordingly.

Marshall suspected that the current treatment regime was so often unsuccessful because ulcers were not caused by stress, but by persistent colonization in the stomach by the common bacteria *Helicobacter pylori*. After a series of experiments, Marshall became convinced he was correct. But when he tried to present his findings at conferences, he was ridiculed, and when he tried to publish his research, his article was denied.[31]

Frustrated, Marshall took a more dramatic approach. In 1984, he had a baseline endoscopy performed, then prepared and drank a vial of *H. pylori*. Over the next week he developed halitosis, then vomiting, and when he had a repeat endoscopy performed on day eight, discovered massive gastritis which, when a biopsy was taken, revealed a colony of the bacteria. His work transformed the treatment of stomach ulcers, was the foundation of the subsequent discovery

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[30] Martin B. Van Der Weyden et al., *The 2005 Nobel Prize in Physiology or Medicine,* 183 Med. J. of Austl. 612 (2005), https://www.mja.com.au/journal/2005/183/11/2005-nobel-prize-physiology-or-medicine#0_i1091639.

[31] *Id*.

of the link between *H. pylori* and stomach cancer, and earned Marshall the 2005 Nobel Prize in Medicine.[32]

This isn't a story of a plucky scientist squaring off against an irrationally hidebound scientific establishment. Marshall's colleagues were *right* to be skeptical of his initial findings. At that time there was very little reason to believe that he was correct, and substantial accumulated knowledge suggesting he was wrong. For every Barry Marshall there are a thousand crackpots. But there are some Barry Marshalls. And science doesn't work if they aren't heard.

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It is often reasonable for policymakers to defer to the reigning paradigm and wait for new developments to mature. But it is imperative that they do not squelch those developments by imposing whatever orthodoxy seems most expedient at the moment. The record here shows how the government does not always discern correctly between truth and falsehood. And even if we were truly governed by enlightened bureaucrats, that still would not justify the kinds of censorship the government defends here.

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[32] *Id.*

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

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