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 *Amicus Curiae* of America's Future, Free Speech Coalition, Free Speech Def. and Ed. Fund, Gun Owners of America, Gun Owners Fdn., Gun Owners of Cal., Tennessee Firearms Assn., Public Advocate, U.S. Constitutional Rights Legal Def. Fund, Leadership Institute, DownsizeDC.org, Downsize DC Fdn., The Western Journal, and Conservative Legal Def. and Ed. Fund, in Support of Respondents

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INTEREST OF THE *AMICI CURIAE*[1]

America's Future, Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Inc., Tennessee Firearms Association, Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, Leadership Institute, DownsizeDC.org, Downsize DC Foundation, The Western Journal, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Most of these *amici* filed an *amicus* brief in this case in the Fifth Circuit on August 7, 2023.

STATEMENT OF THE CASE

On May 5, 2022, Missouri, Louisiana, and five individual Plaintiffs filed suit against President Biden and a large number of officials in his administration. The lawsuit alleged a large-scale government "Censorship Enterprise" that partnered with Big Tech social media companies to censor and suppress speech

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

about major topics. The Plaintiffs alleged that the Biden Administration had pressured social media companies to promote government-approved speech and censor speech critical of the administration and its policies, including with regard to COVID, election interference, and posts critical of Biden personally. *Missouri v. Biden*, 2023 U.S. Dist. LEXIS 114585, at *5-6 (W.D. La. 2023) ("*Missouri I*").

On July 4, 2023, the district court issued a comprehensive opinion and a preliminary injunction forbidding most of the government Defendants from "urging, encouraging, pressuring, or inducing in any manner social-media companies to remove, delete, suppress, or reduce posted content protected by the Free Speech Clause of the First Amendment to the United States Constitution." *Id.* at *214-215.

On appeal, the Fifth Circuit affirmed the preliminary injunction as to the White House, the Surgeon General, the Centers for Disease Control ("CDC"), the Federal Bureau of Investigation ("FBI"), and the Cybersecurity and Infrastructure Security Agency ("CISA"). *See Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023) ("*Missouri II*"). The Court of Appeals reviewed the extensive record and findings of the district court, and agreed with the district court that "federal officials ran afoul of the First Amendment by coercing and significantly encouraging 'social-media platforms to censor disfavored [speech],' including by 'threats of adverse government action' like antitrust enforcement and legal reforms." *Id*. at 373.

This Court granted the federal government's application for a stay of the injunction and treated the application as a petition for a writ of certiorari, granting that as well. *Murthy v. Missouri*, 144 S. Ct. 7 (Oct. 20, 2023). Justice Alito, joined by Justices Thomas and Gorsuch, dissented from the stay of the injunction, noting that, "Government censorship of private speech is antithetical to our democratic form of government, and therefore today's decision is highly disturbing." *Id*. at 8 (Alito, J., dissenting).

SUMMARY OF ARGUMENT

If the First Amendment's prohibition on the government "abridging freedom of speech" is to mean anything, it must mean that the government cannot censor public speech by threatening the entities that control the forums where the public gathers to discuss the important topics of the day. The government challenges the individual Respondents' standing for their failure to demonstrate that censorship by platforms was fairly traceable to the Government. Traceability was obvious when candidate Biden, who repeatedly threatened platforms to revoke their Section 230 immunity, demanded that Facebook remove ads critical of his actions as Vice President, which Facebook then took down. The threats to hold platforms "accountable" for distributing content with which he disagreed continued during his Presidency, resulting in numerous platforms censoring stories disputing the government's narrative about COVID, the Hunter Biden laptop, and many other topics. The record contains undisputed evidence that, as repeal of Section 230 was discussed, government agents secretly

communicated demands coercive demands that platforms censor opposing views. Based on this long track record of coercion, and how it continues, injunctive relief is fully justified.

The government asserts a "government speech" defense, but that doctrine does not immunize government from issuing secret threats and directives to platforms with directions to censor opposing views. Government has worked to suppress distribution of opposing views on the Internet since its early days, beginning with the Clinton White House Counsel's office warning journalists against promoting of disfavored stories. Now, platforms continue to run interference for the Biden Administration, such as Google's demonetizing sites critical of President Biden's Ukraine war policy. The most recent technique is Pentagon and State Department funding of NewsGuard, which literally "red lights" conservative websites using its "misinformation meter" to discourage advertising.

The most egregious application of the Biden Administration's censorship techniques was the FBI's successful work to facilitate the election of Joe Biden to the Presidency. The Fifth Circuit succinctly explained: "The FBI ... likely misled social-media companies into believing the Hunter Biden laptop story was Russian disinformation which resulted in the suppression of the story a few weeks prior to the 2020 Presidential election. Thus, Plaintiffs are likely to succeed in their claims that the FBI exercised "significant encouragement" over social media platforms such that the choices to be that of the

Government." Petitioners' Brief attempts to whitewash this illegal activity. It characterizes FBI warnings about "hack and dump" operations from foreign "state-sponsored actors" that would **spread misinformation** through their site as good law enforcement. The truth is that there were state-sponsored actors working to **stop the spread of accurate information** — but they worked for the FBI.

ARGUMENT

I. THE INDIVIDUAL PLAINTIFFS HAVE STANDING.

A. Traceable Harm.

Petitioners first assert that Respondents have not shown that "platforms' past moderation of their social-media posts" are "**fairly traceable** to the government." Brief for the Petitioners ("Pet. Br.") at 17 (emphasis added). The government then attempts to set the bar to meet that "fairly traceable" standard about as high as it could be set, denying that Respondents have demonstrated:

- any **particular** act of enforcement affecting respondents
- was attributable to any **particular** conduct
- by any **particular** government official. [*Id*. at 18 (emphasis added).]

The government elevates the "fairly traceable" standard to demand exacting particularity, but cites

no authority for such a test. Since these communications between the Biden administration and the social media platforms occurred in secret, it is remarkable that Respondents were able to assemble such a detailed record on which the district court was able to base its findings. By any reasonable standard, the censorship decisions by the platforms were "fairly traceable" to the government's pattern of coercion.

1. Before Inauguration Day.

The government points out that the social media companies had already **adopted** "content-moderation policies" **before** Biden took office on January 6, 2021, as if that fact would immunize the government from having pressured the platforms to **apply** those policies to censor Respondents **after** he took office. *Id*. at 17. However, injury did not flow from the adoption of such policies, but rather the application of those policies to Respondents.

In addition, Respondents asserted that threats against social media were launched before January 6, 2021 by candidate Biden and his campaign.[2] That early pressure developed the playbook that has been used continuously since then, often centered on threatening to remove Section 230 liability protection for the social media platforms. On December 16, 2019, candidate Biden sat down for an interview with the *New York Times* Editorial Board, when he was asked:

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[2] Plaintiffs' Second Amended Complaint at para. 191-196 (hereinafter "Complaint").

> [I]n October, your campaign sent a letter to Facebook regarding an ad that falsely claimed that you blackmailed Ukranian officials to not investigate your son. I'm curious, did that experience, dealing with Facebook and their power, did that change the way that you see the power of tech platforms right now? ["Joe Biden: Former Vice President of the United States," Editorial Board, *New York Times* (Jan. 17, 2020).]

Candidate Biden's response to a series of related questions sent shockwaves through that industry:

> No, I've never been a fan of Facebook.... The idea that it's a tech company is that **Section 230 should be revoked**, immediately should be revoked, number one.... It is propagating falsehoods they know to be false, and we should be setting standards not unlike the Europeans are doing.... **Zuckerburg finally took down those ads** that Russia was running. All those bots about me. They're no longer being run.... Putin doesn't want me to be president. [Emphasis added.]

The *New York Times* article about the interview adds an explanatory note about the ad being referenced by candidate Biden: "In October, a 30-second ad appeared on Facebook accusing Mr. Biden of blackmailing Ukrainian government officials. The ad, made by an independent political action committee, said: 'Send Quid Pro Joe Biden into retirement.' Mr. Biden's campaign wrote a letter calling on Facebook to

take down the ad." Facebook initially resisted,[3] but as candidate Biden said, they eventually succumbed to his pressure. *See* "Joe Biden," *New York Times*, *supra*.

This statement by candidate Biden demonstrates coercion with a high degree of the type of particularity which the government believes necessary: a **particular** threat by the Democrat candidate for President of the United States (contained in a letter from the campaign to Facebook) to impose a **particular** sanction (remove liability protection from Facebook) that candidate Biden admitted directly led to Facebook initially refusing, but finally removing, **particular** content (ads critical of candidate Biden or favorable to candidate Trump). This causal tie between threat and censorship was not just attested to, but bragged about, by candidate Biden.

2. After Inauguration Day.

Respondents' complaint alleged that various social media platforms responded to pressure from the Biden campaign by suppressing so-called election "disinformation" from the Trump campaign well before Inauguration Day, and that same tactic was used after Inauguration Day, only now with the force of law behind President Biden's threats.

It is fortunate that Respondents were allowed to conduct significant discovery, especially since such

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[3] *See* L. Feiner, "Facebook Rejects Biden Campaign's Request to Remove Trump Ads Containing False Information," *CNBC* (Oct. 9, 2019) (linking to both letters).

discovery was resisted at every turn,[4] but in the end, Respondents made a compelling case that government officials repeatedly demanded that the platforms censor, and the platforms frequently complied. Although it may be possible to characterize early government pressure on social media platforms as just permissible "government speech,"[5] it was not long before the administration lost patience with any independent decision-making by the platforms and began to demand compliance and threaten punishment for failure to comply.

The platforms attempted a conciliatory approach to Biden's campaign and his incoming administration, with one telling Murthy's office, "'[w]e think there's considerably more we can do in partnership with you and your teams to drive behavior.'" *Missouri II* at 362. But, as the court below noted, the platforms' own efforts to avoid offending the Biden Administration were wholly insufficient. The Biden Administration was utterly unsatisfied with the platforms' existing efforts and demanded changes.

One White House official "sent Facebook a Washington Post article detailing the platform's alleged failures to limit misinformation with the statement '[y]ou are hiding the ball.' A day later, a second official replied that they felt Facebook was not

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[4] *See, e.g.*, Joint Statement on Discovery Disputes, *State of Missouri v. Biden*, Case No. 3:22-cv-01213, Dkt. 71, pp. 2, 10-16 (W.D. La. Aug. 31, 2022).

[5] *See* Section II, *infra*.

'trying to solve the problem.'" *Id.* at 361. The official then threatened that the White House was "'[i]nternally ... considering our options on what to do about it.'" *Id.* The Fifth Circuit noted specific instances in which "Facebook recognized that a popular video **did not qualify for removal under its policies** but promised that it was being 'labeled' and 'demoted' anyway after the officials flagged it," and "stated that although a group of posts did not 'violate our community standards,' it 'should have demoted them before they went viral.'" *Id.* at 362 (emphasis added). Yet, "[s]till, White House officials felt the platforms were not doing enough. One told a platform that it 'remain[ed] concerned' that the platform was encouraging vaccine hesitancy, which was a 'concern that is shared at the highest (and I mean highest) levels of the [White House].'" *Id.*

Another official told one platform:

> it is "[h]ard to take any of this [content moderation] seriously when you're actively promoting anti-vaccine pages." The platform subsequently "removed" the account "entirely" from its site ... and told the official that "[w]e clearly still have work to do." The official responded that "removing bad information" is "one of the easy, low-bar things you guys [can] do to make people like me think you're taking action."... "I don't know why you guys can't figure this out." [*Id.*]

Finally, as the Fifth Circuit noted, "[t]he officials' frustrations reached a boiling point in July of 2021."

Id. The threats became plain and overt. Consider this progression in intensity:

> - Murthy publicly "labeled social-media-based misinformation an 'urgent **public health threat**[]' that was 'literally costing ... lives.' He ... issued a public advisory 'calling out social media platforms'....
> - The next day, President Biden said that the platforms were '**killing people**' by not acting on misinformation.
> - Then, a few days later, a White House official said they were **'reviewing' the legal liability of platforms** — noting '**the president speak[s] very aggressively** about' that — because '**they should be held accountable**.'" [*Id.* at 363 (emphasis added).]

The platforms got the message, and they surrendered. They agreed to make changes to their existing content-moderation policies to specifically target speakers the White House demanded be targeted.

> First, they **capitulated** to the officials' allegations. The day after the President spoke, Facebook asked what it could do to **'get back to a good place' with the White House**. It sought to 'better understand ... **what the White House expects from us** on misinformation going forward.' Second, the platforms **changed their internal policies**. Facebook reached out to see 'how we can be more transparent,' comply with the officials'

> requests, and 'deescalate' any tension.... Third, the platforms began taking down content and **deplatforming users they had not previously targeted**. For example, Facebook started removing information posted by the "disinfo dozen" — a group of influencers **identified as problematic by the White House** — despite earlier representations that **those users were not in violation of their policies**. [*Id.* at 363 (emphasis added).]

Yet even this was not enough. The White House press secretary threatened that the "'President has long been concerned about the power of large' social media companies and that they 'must be held accountable for the harms they cause.'" *Id.* at 364. She resurrected candidate Biden's 2019 threats, noting that the President "'has been a strong supporter of fundamental reforms to achieve that goal, including reforms to [S]ection 230 [and] enacting antitrust reforms....'" *Id.*

Whenever the government even hints at the removal of section 230 immunity, it strikes fear in the hearts of platforms. Without section 230, censored websites could file suit against the platforms directly. Thus, platforms have been willing to do most anything asked of them by government to maintain that immunity, making them highly vulnerable to government demands to censor opponents or promote its agenda. The platforms have no downside when they implement government directives to censor — and even here, suit was brought only against the

government for its role. The district court explained that threat as follows:

> Defendants have threatened adverse consequences to social-media companies, such as reform of Section 230 immunity..., antitrust scrutiny/enforcement, increased regulations, and other measures.... **Section 230 of the Communications Decency Act shields social-media companies from liability** for actions taken on their websites.... [And] Mark Zuckerberg, ... the owner of Facebook, has publicly stated that the threat of antitrust enforcement is **"an existential threat" to his platform**. [*Missouri I* at *12 (emphasis added).]

B. Threat of Repeated Injury.

The government argues that even if its statements are viewed as threats, the individual Respondents cannot show that the campaign will continue, justifying injunctive relief. The government dismisses the admission that the officials "'continue[] to be in regular contact with social-media platforms'" (Pet. Br. at 19) as insignificant. But the Fifth Circuit noted that the ongoing contact "concern[s] content-moderation issues." *Missouri II* at 369.

The government relies on *O'Shea v. Littleton*, 414 U.S. 488 (1974), for the proposition that the individual Respondents lack standing to seek injunctive relief without demonstrating that there is a continuing threat. *See* Pet. Br. at 19. The government presents

this quotation from *O'Shea*: "**Past exposure** to illegal conduct does not **in itself** show a present case or controversy regarding injunctive relief." *Id*. (emphasis added). However, the government omits the rest of this Court's statement "... if unaccompanied by any **continuing, present** adverse effects." *O'Shea* at 495-496 (emphasis added). This fact was the subject of a finding in district court, which was relied on and repeated in the Fifth Circuit to establish the predicate for the standing of the individual Respondents: Biden officials' "back-and-forth with the platforms continues to this day." *Missouri II* at 364. This Court in *O'Shea* also went on to confirm that the evidence adduced by the individual Respondents can demonstrate standing: "[o]f course, **past wrongs are evidence** bearing on whether there is a **real and immediate threat** of repeated injury." *O'Shea* at 496 (emphasis added).

Perhaps the most telling evidence of the government's intent to continue threatening social media platforms is its ongoing opposition to injunctions forbidding this behavior. The Fifth Circuit enjoined only "'actions, formal or informal, to coerce or significantly encourage social-media companies to remove, delete, suppress, or reduce ... posted social-media content containing protected free speech.'" *Missouri II* at 397. Yet the government came to this Court seeking to end the injunction against "'threatening, pressuring, or coercing.'" *See Murthy v. Missouri*, 144 S. Ct. 7 (2023). The intent of the Biden Administration going forward could not be more clear.

Moreover, the Biden re-election campaign has recently hired one of these same government officials,

"Rob Flaherty, the former White House director of digital strategy, whose combative emails to social media firms have become part of [this] Republican-led federal court case and a congressional investigation" to head up its "strategy to fight misinformation on social media in the 2024 race."[6] Flaherty's "aggressively worded messages have made him the target of conservative allegations that the White House and other Biden officials wrongly pressured private companies to take down internet speech," and he now heads the Biden re-election campaign's social media "misinformation" division. *Id.*

The government seeks to convince this Court to require the individual Respondents to show more than repeated threats to obtain injunctive relief. In essence, it asks this Court to "'turn a blind eye to the context in which [the] policy arose.'" *McCreary County v. ACLU*, 545 U.S. 844, 866 (2005). The best evidence of what the government will do in the future is the Petitioners' Brief which argues that the government has the unqualified right to speak as it has to "persuade" the platforms to censor. Had the government admitted that they had abused their powers and would not do so again, that might provide a better predicate to demonstrate there was no need for injunctive relief. However, since the government does not believe it did anything wrong, it is likely to continue.

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[6] R. Kern, "Biden's campaign set to counterpunch on misinformation," *Politico* (Sept. 20, 2023).

C. Self-Censorship.

Petitioners are dismissive of Respondents' acts of self-censorship, citing this Court's decision in *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), for the proposition that Article III standing cannot be "manufactured" by self-inflicted harm based on "fears of hypothetical future harm that is not certainly impending." Pet. Br. at 20 (citing *Clapper* at 416). **Self-harm** is a different concept from **self-censorship**. *Clapper* addressed a different circumstance where plaintiffs chose to "incur[] certain costs as a reasonable reaction to a risk of harm" from being surveilled which the Court viewed as "not certainly impending." Here, the individual Respondents do not base standing on a decision to spend money to protect against a **generalized threat to all persons** engaged in international communications that may not materialize; they base standing on the harm they suffered from a **specific threat** from government.

Here, the court of appeals found the Respondents' claims of self-censorship were well-founded and were not imaginary or speculative. It stated, "the fears motivating the Individual Plaintiffs' self-censorship, here, are far from hypothetical. Rather, they are grounded in the very real censorship injuries they have previously suffered.... Supported by this evidence, the ... self-censorship is a cognizable, ongoing harm ... and therefore constitutes injury-in-fact." *Missouri II* at 368. Instead of responding to the court of appeals' determinations, the Petitioners attempt to

brush it off with an inapplicable quotation from *Clapper*.

D. Right to Receive Information.

The individual Respondents have standing because they "have asserted violations of their First Amendment right to ... listen freely without government interference." *Missouri I* at *162. As this Court has declared, the First Amendment "embraces the right to distribute literature ... and necessarily protects the right to receive it." *Martin v. Struthers,* 319 U.S. 141, 143 (1943).

The government addresses the question of the Respondent States' right to receive information, but ignores the right of the individual Respondents to do so. The individual Respondents alleged that they are "both speakers and users of social media."[7] They have alleged that they desire to receive specific messages from specific speakers, such as former President Trump, which were suppressed by Petitioners.[8] Thus, the individual Respondents meet even the criteria specified by the government: being "recipients of speech who had some connection to the speaker and thus suffered some identifiable and particularized harm from the challenged act." Pet. Br. at 21.

Accordingly, the individual Respondents have standing not only as suppressed speakers, but also as

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[7] Complaint at para. 502.

[8] *See, e.g.,* Complaint at para. 432-33.

listeners[9] desiring to receive specific information from specific speakers, which was suppressed by the government's pressure campaign against the social media platforms.

II. THE GOVERNMENT SPEECH DEFENSE DOES NOT IMMUNIZE GOVERNMENT FROM COERCING CENSORSHIP.

Although it is not disputed that "the government can speak for itself" (*Board of Regents v. Southworth*, 529 U.S. 217, 229 (2000)) and "is entitled to say what it wishes ... and to select the views that it wants to express" (*Pleasant Grove City v. Summum*, 555 U.S. 460, 467-468 (2009) (citations omitted)), that general proposition provides the government no defense. A different issue is at play here — the ability of the government to censor dissident voices through indirect means.

The government has a formidable toolbox of powers to control online speech, including the authority to take down U.S.-registered sites under the little known Prioritizing Resources and Organization for Intellectual Property Act of 2008 (Pro-IP Act), Pub. L. 110-403. That law has reportedly been used "to

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[9] The House Judiciary Committee recently released emails demonstrating White House pressure on Amazon to suppress "anti-vax books" leading to Amazon changing its algorithm to avoid promoting such books. *See* T. O'Neil, "Amazon Bowed to White House Pressure," *The Daily Signal* (Feb. 5, 2023).

seize hundreds of sites."[10] Other governments also have broad powers to control the Internet directly. "The Iranian government was among the first to block websites, as it did in 2009 during the Green Movement."[11] This case does not involve such direct acts which in the United States can be challenged in court, but a more insidious type of indirect censorship conducted in secret. The government speech doctrine is not so broad to sanction government threats and coercion designed to censor First Amendment rights.

The government cites *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963), for the proposition that "[c]oercion giving rise to state action requires an **express or implicit 'threat** of invoking legal sanctions.'" Pet. Br. at 26 (emphasis added). Actually, the test stated in *Bantam Books* is whether the government "**deliberately set about** to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Bantam Books* at 67 (emphasis added.) *Bantam Books* does not always require that plaintiffs show a "threat of invoking legal sanctions." Rather, a showing of such a threat is one of the ways a plaintiff can prove the government's coercion. *Bantam Books* stated: "the threat of invoking legal sanctions **and other means** of coercion, persuasion, and intimidation" provides evidence of the government's deliberate intent to suppress

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[10] J. Sanchez, "FBI Reminds Us Government Already Has MegaPower to Take Down Websites," *CATO (*Jan. 20, 2012).

[11] S. Carpenter, "Internet shutdowns are a political weapon. It's time to disarm," *Techcrunch.com* (Oct. 30, 2021).

objectionable speech. *Id.* at 67 (emphasis added). Thus, there are "other means of coercion, persuasion, and intimidation" on which a claim can be based — not just the threat of legal sanctions.

Petitioners also incorrectly read *Counterman v. Colorado*, 600 U.S. 66 (2023), claiming that "[i]n the analogous context of 'true threats,' this Court has relied on an objective test and, in criminal cases, the speaker's subjective perception — not the recipient's perception." Pet. Br. at 38. Thus, the government argues, "the Fifth Circuit's singular focus on the platforms' perceptions was misplaced." *Id.* Such a conclusion cannot be drawn from the *Counterman* decision. First, *Counterman* is a criminal case where a defendant was charged with making threatening statements. The Court's discussion revolved around whether the First Amendment permits criminalizing threatening speech and, if so, what standard applies before punishment is permitted. There is little that is "analogous" between First Amendment limits on the ability to criminalize threatening speech and First Amendment limits on government efforts to compel or proscribe political speech. Second, as a criminal case, the *Counterman* decision properly focuses on the *mens rea* of the speaker. There is nothing in *Counterman* that instructs that the perception of the recipient of the government threat is irrelevant in a non-criminal context.

The test enunciated by the Fifth Circuit is appropriate here: "(1) the speaker's 'word choice and tone'; (2) 'whether the speech was perceived as a threat'; (3) 'the existence of regulatory authority'; and,

'perhaps most importantly, (4) whether the speech refers to adverse consequences.'" *Missouri II* at 378. This is consistent with the test used by the Second and Ninth Circuits, as the court below noted. *See id.* at 380. Applying those four factors, the Fifth Circuit properly found the government's actions in this case constituted coercion.

III. THE GOVERNMENT HAS A LONG TRACK RECORD OF INTERNET AND SOCIAL MEDIA CENSORSHIP.

Petitioners assert: "[e]ven if respondents had identified past instances of content moderation that were fairly traceable to the government, that would not confer standing to seek prospective relief ... a plaintiff must establish a 'real and immediate threat of repeated injury.'" Pet. Br. at 19. From this, it is not entirely clear if Petitioners are asserting that the government's efforts to pressure social media platforms have ended or only that the Respondents have failed to demonstrate on the record that they are continuing. In truth, not only are government's coercive activities continuing, but Respondents have also explained that they are increasing:

> the government's censorship efforts are expanding to new topics. They plan to pressure platforms "to censor misinformation" on "climate change, gender discussions, abortion, and economic policy," J.A.117; and "the origins of the COVID-19 pandemic, the efficacy of COVID-19 vaccines, racial justice, the United States' withdrawal from

> Afghanistan, and the nature of the United States' support of Ukraine," J.A.180. [Brief of Respondents at 29.]

A. From the Beginning of the Internet.

During the early days of the Internet, the Clinton White House prepared a 331-page document analyzing the mechanism by which "right wing," anti-Clinton stories originated and were circulated.[12] We know that "[w]ith research provided by the Democratic National Committee, the White House Counsel's office produced the report...." *Id*. It traces numerous anti-Clinton stories, including those involving: the 1993 death of White House deputy counsel Vince Foster; Gennifer Flowers' allegations of an affair with Bill Clinton; Paula Jones' claims of sexual harassment; activities at the Mena Airport; the Whitewater controversy; and many more. This 1995 White House report begins:

> The Communication Stream of Conspiracy Commerce refers to the mode of communication employed by the **right wing** to convey their **fringe stories** into legitimate subjects of coverage by the mainstream media. This is how the stream works. First, well funded right wing[ers] underwrite conservative newsletters and newspapers such as the Western Journalism Center, the

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[12] *See* J. Harris & P. Baker, "White House Memo Asserts a Scandal Theory," *Washington Post* (Jan. 10, 1997); *see also* H. Gold, "The Clintons' 'conspiracy commerce' memo," *Politico* (Apr. 18, 2014).

> American Spectator and the Pittsburgh Tribune Review. Next, the stories are reprinted on the **internet** where they are bounced all over the world. From the internet, the stories are bounced into the **mainstream media**.... Congressional committees will look into the story. After Congress looks into the story, the story now has ... legitimacy....
>
> The **internet** ... allows an extraordinary amount of **unregulated data and information** to be located in one area and available to all. The **right wing** has seized upon the internet as a means of communicating its ideas to people. ["The Communication Stream of Conspiracy Commerce," *Clinton Library* (1997) at 1-3 (unnumbered) (emphasis added).]

Clinton White House Press Secretary Michael McCurry explained why this document was prepared and circulated to the mainstream media: "This is an effort ... to really help journalists understand that they shouldn't be used by those who are really concocting their own conspiracies and their own theories and then peddling them elsewhere."[13]

In 1995, the reach of the Internet was limited, so the Clinton White House could restrict distribution of stories by instructing its allies in the mainstream media not to report on negative stories. Today, the reach of the Internet is vast, and additional censorship

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[13] J. Harris & P. Baker, *supra*.

tactics had to be developed. Whether then or now, the government's affinity for censorship remains unchanged.

B. Google Demonetization.

It has been estimated that about one-third of advertising revenue on the Internet is controlled by Google (which shares the same parent company as YouTube), and if a website speaks on a prohibited topic, Google can and has suspended that website's ability to earn advertising revenue. In 2020, Google demonetized advertising on widely respected news and commentary websites *Zero Hedge* and *The Federalist* for reporting on stories that it claimed to be conspiracy theories. *See* C.D. Golden, "Tucker Carlson: Google and Big Tech Are Now the Chief Threat to Our Liberties," *The Western Journal* (June 17, 2020). Google explained its decision by invoking the standard list of left-wing invectives:

> We have strict publisher policies that govern the content ads can run on and explicitly prohibit derogatory content that promotes hatred, intolerance, violence or discrimination based on race from monetizing.... When a page or site violates our policies, we take action. In this case, we've removed both sites' ability to monetize with Google.[14]

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[14] A.M. Fraser, "Google bans website ZeroHedge from its ad platform over comments on protest articles," *NBC News* (June 16 2020). For the past two years, Google's Publisher Policies have demonetized sites dissenting from the Biden Administrations

Conservative websites work hard to self-censor to ensure that certain keywords and topics are not used that have been known to trigger Google's wrath.[15] A word whispered to Google can result in the end of a profitable website. Indeed, individual Respondents below have demonstrated decreased traffic to their sites after being "'deboosted'" by Google. *Missouri II* at 367.

C. NewsGuard.

The federal government has updated its censorship tactics. It now partners with a for-profit company, NewsGuard, to "rate" websites which contain speech disfavorable to the government. NewsGuard describes itself as a "company that scores news websites on trust and **works closely with government agencies** and major corporate advertisers."[16] Investigative journalist Lee Fang has studied and explains NewsGuard's operations:

> NewsGuard's core business is a **misinformation meter**, in which websites

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military support for the Ukraine: "Due to the war in Ukraine, content that exploits, dismisses, or condones the war is ineligible for monetization until further notice." Google Publisher Policies, *Google* (March 23, 2022).

[15] *See* N. LaJeunesse, "Topics That Will Get Your YouTube Video Immediately Demonetized," *Creator Handbook* (Dec. 1, 2023).

[16] L. Fang, "In the Name of 'Fake News,' NewsGuard extorts sites to follow the government narrative," *New York Post* (Dec. 10, 2023).

> are rated on a scale of 0 to 100 on a variety of factors, including headline choice and whether a site publishes "false or egregiously misleading content...." The ratings are not just a scarlet letter, but a **cudgel to coerce conformity**. NewsGuard works closely with corporate advertisers and the data-brokers that serve as the backbone of the online ecosystem.... In an email to one of its government clients, NewsGuard touted that its ratings system of websites is used by advertisers, "which will **cut off revenues** to fake news sites." But perhaps the greatest danger is posed by NewsGuard's extensive **ties to the government**. [*Id*. (emphasis added).]

Not only are there ties to the government, there is also funding from the government. "The left-wing news site ... Consortium News was targeted after NewsGuard received a $749,387 Defense Department contract in 2021 to identify 'false narratives' relating to the war between Ukraine and Russia, as well as other forms of foreign influence."[17] Additionally, NewsGuard previously worked with the State Department's Global Engagement Center and currently works with the Department of Defense's Cyber Command. *See id.*

The Media Research Center has found that the State Department and the Department of Homeland

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[17] L. Fang, "NewsGuard: Surrogate the Feds Pay to Keep Watch on the Internet and Be a Judge of the Truth," *RealClearInvestigations* (Nov. 15, 2023).

Security use, teach, and encourage the use of ratings from NewsGuard.[18] NewsGuard has demonstrated bias against conservative and right-leaning news outlets and websites, while showing bias in favor of left-leaning news sites.[19]

With NewsGuard, the Biden Administration has taken a major step forward in concealing its censorship efforts. No longer do Biden Administration agents need to secretly whisper, and then shout if necessary, into the ears of its counterparts at the social media sites to have content removed. Rather, government funds and partners with a corporate entity — rather like a public-private partnership — to provide ratings which the social media sites use, eliminating the need for direct communications between government and the platforms that can be exposed through discovery and have proven impossible to defend.

IV. THE FBI COERCED SOCIAL MEDIA PLATFORMS TO SUPPRESS THE HUNTER BIDEN LAPTOP STORY TO ADVANCE THE POLITICAL FORTUNES OF THE PRESIDENTIAL CANDIDATE IT FAVORED.

The most egregious and politically significant instance of government coercion against social media

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[18] T. Kilcullen, "Inside the Biden Admin's New Strategy to Censor, Push Leftist Activism Into American Classrooms," *Newsbusters* (Jan. 17, 2024).

[19] J. Vazquez, "Even Worse! MRC Exposes NewsGuard for Leftist Bias Third Year in a Row," *Newsbusters* (Dec. 12, 2023).

platforms was the FBI's successful censoring of the Hunter Biden laptop story in its effort to defeat President Trump's re-election bid. After its review of the facts, the district court found:

> The FBI ... likely misled social-media companies into believing the Hunter Biden laptop story was Russian disinformation, which resulted in suppression of the story a few weeks prior to the 2020 Presidential election. Thus, Plaintiffs are likely to succeed in their claims that the FBI exercised "significant encouragement" over social-media platforms such that the choices of the companies must be deemed to be that of the Government. [*Missouri I* at *144.]

Based on those facts, the circuit court concluded:

> We find that the FBI, too, likely (i) coerced the platforms into moderating content, and (ii) encouraged them to do so by effecting changes to their moderation policies, both in violation of the First Amendment. [*Missouri II* at 388.]

In view of the shocking behavior of the FBI, it is not surprising that there is not one mention in the Brief of Petitioners of the words "Hunter Biden" or "laptop." The government seeks to characterize the FBI's actions as helpful, informative, and benign. The government describes the FBI's role in the abstract, rather than the role it played here in coercing

platforms to censor the Hunter Biden laptop story, as follows:

- The FBI "sometimes 'provides social media platform with notice, for whatever action they deem appropriate, that foreign terrorists or those promoting terrorism are using their platforms.'" Pet. Br. at 5.

- "When FBI intelligence reveals that a social-media account appears to be controlled by a 'covert foreign malign actor,' the FBI may share account details 'that will enable social media companies to conduct their own independent investigation into whether there is a violation of their terms of service.'" *Id*. at 5-6.

- The government criticized the Fifth Circuit's understanding that the platforms receiving warnings about "foreign threats," would have perceived that input as threats because of the law-enforcement powers of the FBI. *Id*. at 11.

The government first flatly asserts that the Fifth Circuit's injunction impaired "the FBI's ability to assess threats to the Nation's security" (*id*. at 15), which is flatly incorrect. This injunction did nothing to prevent **assessing threats** — or any other law enforcement activity. It only prevented **making threats** to platforms. The Fifth Circuit made clear that "[b]ecause the modified injunction does not proscribe Defendants from activities that could include legal conduct, no carveouts are needed." *Missouri II* at

397. The government asserted that the Fifth Circuit did not conclude that administration officials "threaten[] platforms with adverse consequences if they failed to moderate conduct." Pet. Br. at 30. And, the government asserted that the FBI warnings about "'hack and dump' operations from 'state-sponsored actors' that would spread misinformation through their sites" (*id*. at 39), leading to the sites taking down content, showed no coercion. *See also id*. at 40-42, 48.

Petitioners offer this Court a sanitized version of the facts — not one word about the subject matter of the FBI's warning or any comment on the FBI's motive for giving the laptop warning. The circuit court, however, concluded: "Twitter continues to enforce a robust general misinformation policy [on] the Hunter Biden laptop story." *Missouri II* at 368. An examination of the historical context to the FBI's efforts to suppress the Hunter Biden laptop story conclusively demonstrates that Petitioners' justification for the FBI's warnings to the platforms is both misleading in the extreme and wholly untethered to the facts.

On Wednesday, October 14, 2020, just 20 days before the 2020 general election, the *New York Post* broke the election story of the century under the headline "Smoking-gun email reveals how Hunter Biden introduced Ukrainian businessman to VP dad"[20]:

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[20] *See* E. Morris & G. Fonrouge, "Smoking-gun email reveals how Hunter Biden introduced Ukrainian businessman to VP dad," *New York Post* (Oct. 14, 2020) (emphasis added).

> **Hunter Biden introduced his father, then-Vice President Joe Biden**, to a top executive at a Ukrainian energy firm less than a year before the elder Biden **pressured government officials in Ukraine into firing a prosecutor who was investigating the company**, according to emails obtained by The Post.
>
> The **never-before-revealed meeting** is mentioned in a message of appreciation that Vadym Pozharskyi, an adviser to the board of Burisma, allegedly sent Hunter Biden on April 17, 2015, about a year after Hunter joined the Burisma board at a reported salary of up to **$50,000 a month**....
>
> The blockbuster correspondence — which **flies in the face of Joe Biden's claim** that he's "never spoken to my son about his overseas business dealings" — is contained in a massive trove of data recovered from a **laptop computer**. [*Id.*]

Anyone who read the story could tell it had the potential to alter the outcome of the election. The reason that it did not have that effect was that the story's distribution to the American electorate was **suppressed by an FBI plot** to disparage it as "Russian disinformation." The corrupt nature of the FBI's actions on this matter is now clear, because "the FBI previously received Hunter Biden's laptop on December 9, 2019, and knew that the later-released story about Hunter Biden's laptop was not Russian

disinformation." *Missouri I* at *83; *see also id.* at *144.[21]

The FBI also knew that a copy of the laptop had been provided to Trump attorney Rudy Giuliani, who likely would release it before the election. To counteract such an accurate but damaging story, the FBI took on the job of a Democrat public relations firm to pre-condition social media companies to expect such a story. "In the Industry meetings, the FBI raised concerns about the possibility of 'hack and dump' operations during the 2020 election cycle." *Id.* at *79. "The FBI pressured Twitter to suppress The Post's blockbuster scoop about Hunter Biden's laptop by warning it could be part of a Russian 'hack and leak' operation — even while knowing the concern was unfounded," according to Twitter records released after Elon Musk bought the company.[22]

"FBI Special Agent Elvis Chan [reached out] to Twitter's then-Head of Site Integrity, Yoel Roth,

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[21] FBI duplicity was revealed and compounded when FBI whistleblowers revealed that the agents were instructed not to investigate the Biden laptop crimes before the Presidential election. *See* B. Bernstein, "FBI Officials Told Agents Not to Investigate Hunter Biden Laptop ahead of 2020 Election, Whistleblower Says," *Yahoo!News* (Aug. 25, 2022). Meanwhile, a nonprofit organization which actually studied the contents of the Hunter Biden laptop published a detailed analysis cataloging 459 crimes. *See* M. Devine, "The 634-page report on Hunter Biden's laptop — and 459 alleged crimes," *New York Post* (Oct. 26, 2022).

[22] J. O'Neill, "FBI pressured Twitter, sent trove of docs hours before Post broke Hunter laptop story," *New York Post* (Dec. 19, 2022).

through Teleporter, a one-way communications channel from the FBI to Twitter." *Id.* "Roth subsequently admitted in a sworn declaration that the feds had primed him to view any reporting on Hunter Biden's laptop as a 'Russian "hack and leak" operation.'" *Id.*

At best, the FBI likely performed the "dirtiest trick" ever played in American Presidential politics, and then sought to cover it up.[23] It is difficult to see how FBI actions did not constitute election interference under 18 U.S.C. § 595, which makes it a crime for a person employed in an agency of government to "use[] his official authority for the purpose of interfering with, or affecting" a Presidential election. This was no small matter — this disinformation campaign almost certainly defeated President Trump and elected Joe Biden. Subsequent polling revealed that "[n]early four of five Americans who've been following the Hunter Biden laptop scandal believe that 'truthful' coverage would have changed the outcome of the 2020 presidential election."[24]

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[23] *See* S. Delouya, "Elon Musk confirmed the firing of Twitter deputy general counsel James Baker for allegedly interfering in the publication of the Twitter files," *Business Insider* (Dec. 6, 2022) ("In a tweet, Musk said Twitter's deputy general counsel, James Baker, was dismissed from the company 'in light of concerns about Baker's possible role in suppression of information important to the public dialogue.'").

[24] B. Golding, "79% say 'truthful' coverage of Hunter Biden's laptop would have changed 2020 election," *New York Post* (Aug. 26, 2022).

The FBI suppression strategy was enhanced when then-Biden campaign aide, now-Secretary of State Antony Blinken, mobilized intelligence community officials by contacting former CIA deputy director Mike Morell and asking for help to bury the story.[25] Morell agreed. He crafted a carefully worded letter stating that the *New York Post*'s information "has all the classic earmarks of a Russian information operation."[26] As the House Weaponization of Government Subcommittee has now revealed, Morell **sent it to the CIA for review**, stating "[t]his is a rush job, as it need [sic] to get out as soon as possible," hoping it would be released to the press before the second presidential debate on October 22, 2020.[27] At his request, 51 former intelligence officials signed the letter.[28] When Morell couldn't get his selected reporters at the *Associated Press* or *Washington Post* to run with his

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[25] E. Stauffer, "Did the spies who covered for Hunter Biden's laptop interfere in the 2020 election?" *Washington Examiner* (Apr. 25, 2023).

[26] N. Bertrand, "Hunter Biden story is Russian disinfo, dozens of former intel officials say," *Politico* (Oct. 19, 2020).

[27] "Interim Joint Staff Report: The Hunter Biden statement: How senior intelligence community officials and the Biden campaign worked to mislead American voters," *House Weaponization Subcommittee* at 23 (May 10, 2023); *see also* House Judiciary Committee Press Release "Testimony Reveals FBI Employees Who Warned Social Media Companies about Hack and Leak Operation Knew Hunter Biden Laptop Wasn't Russian Disinformation" (July 20, 2023).

[28] *See* N. Bertrand, *supra*.

concocted letter, he tried again, and finally *Politico* picked up the "story"[29]:

> Morell told the committee he received a phone call from Steve Ricchetti, chairman of the Biden campaign, following the debate to thank him for writing the letter. Morell also admitted that "one of his two goals in releasing the statement was to help then-Vice President Biden in the debate and to assist him in winning the election."[30]

Twitter and Facebook quickly complied by suppressing the story. *See Missouri I* at *83-84. The government's brief attempts to simply shift responsibility for suppressing the story onto the Big Tech giants. However, the court below would have none of that, finding that the FBI likely:

> misled social-media companies into believing the Hunter Biden laptop story was Russian disinformation, which resulted in suppression of the story a few weeks prior to the 2020 Presidential election. Thus, Plaintiffs are likely to succeed in their claims that the FBI exercised "significant encouragement" over social-media platforms such that the choices of the companies must be deemed to be that of the Government. [*Missouri I* at *144.]

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[29] House Weaponization Subcommittee, Interim Joint Staff Report at 40, 42.

[30] *See* E. Stauffer, *supra*.

In January 2017, Senator Charles Schumer (D-NY) mocked then-President-Elect Trump for criticizing intelligence officials who had been falsely claiming that Russia was behind hacking designed to interfere with the 2016 election. Schumer explained: "Let me tell you: You take on the intelligence community — they have six ways from Sunday at getting back at you...."[31] We now know that both Trump and Schumer were right. The Russians were not behind election interference,[32] and the FBI got back at Trump by stopping his bid for re-election.

The district court did the American people a great favor, first by permitting necessary discovery, and also by its careful, methodical presentation of the evidence supporting its injunction. The challenge brought here by Missouri, Louisiana, and the five individual Respondents to blatant corruption within the FBI and intelligence community, as well as other departments and agencies of government, likely will be the last opportunity for the American people to have any confidence that, unlike 2020, the next presidential election will be decided by the People, without the Deep State tipping the scales for its preferred candidate. The Russian "hack and dump" "law enforcement" rationale for "warning" news outlets was

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[31] D. Chaitin, "Schumer warns Trump: Intel officials 'have six ways from Sunday at getting back at you'," *Washington Examiner* (Jan. 3, 2017).

[32] Z. Cohen, "Special counsel John Durham concludes FBI never should have launched full Trump-Russia probe," *CNNPolitics* (updated May 16, 2023).

a complete fabrication for an unquestionably illegal political act of censorship, which should not be tolerated.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be affirmed.

Respectfully submitted,

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