No. 23-411

In the Supreme Court of the United States

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

v.

STATE OF MISSOURI, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents ask this Court to rewrite the "constitutional boundary between the governmental and the private," *Manhattan Community Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1928 (2019), by affirming a sweeping and unprecedented injunction based on sweeping and unprecedented understandings of Article III standing, the state-action doctrine, and the proper scope of equitable relief. Respondents insist that *any* person can establish standing to challenge *any* action affecting *any* speech by *any* third party merely by asserting a desire to hear it—a proposition that would effectively abolish Article III's limits in free-speech cases. Respondents seek to transform private social-media platforms' editorial choices into state action subject to the First Amendment. And respondents do not deny that the injunction installs the district court as the overseer of the Executive Branch's communications with and about the plat-

forms, muzzling senior officials' speech to the public and exposing thousands of employees to contempt should the court conclude that their statements run afoul of the Fifth Circuit's novel and vague standards.

As they did at the stay stage, respondents try to defend that startling result by invoking the district court's factual findings—which they assert are "unrebutted," Resp. Br. 2—to substantiate their allegations of widespread government censorship. But the government vigorously disputed the district court's findings below, and the Fifth Circuit declined to rely on many of them—presumably because they are unsupported or demonstrably wrong. Gov't Br. 9. Respondents' presentation to this Court paints a profoundly distorted picture by pervasively relying on those debunked findings.

Respondents still have not identified any instance in which any government official sought to coerce a platform's editorial decisions with a threat of adverse government action. Nor can respondents point to any evidence that the government ever imposed any sanction when the platforms declined to moderate content the government had flagged—as routinely occurred. Instead, respondents principally argue that government officials transformed private platforms into state actors subject to First Amendment constraints merely by speaking to the public on matters of public concern or seeking to influence or inform the platforms' editorial decisions. The Court should reject that radical expansion of the state-action doctrine, which would "eviscerate certain private entities' rights to exercise editorial control over speech and speakers on their properties or platforms." *Halleck*, 139 S. Ct. at 1932.

A. Respondents Lack Article III Standing

Respondents brought a sprawling lawsuit seeking to undertake "a broad-scale investigation, conducted by themselves as private parties armed with the subpoena power of a federal district court," *Laird* v. *Tatum*, 408 U.S. 1, 14 (1972), into all of the federal government's interactions with social-media platforms. Gov't Br. 16-17. But respondents have not established any Article III injury traceable to the government and redressable by injunctive relief—much less injuries that could support their sweeping claims.

1. Respondents assert (Br. 19-22) that they suffered "direct" injuries because the government purportedly caused platforms to moderate content respondents had posted. But the Fifth Circuit did not find that any particular government action caused a platform to do anything to any content posted by respondents that the platform would not have done in "its 'broad and legitimate discretion' as an independent company," *Changizi* v. *HHS*, 82 F.4th 492, 497 (6th Cir. 2023) (citation omitted); see Gov't Br. 17-18.

Seeking to plug that gap, respondents cite (Br. 19-21) various instances in which the platforms moderated their content—most of which involve COVID-19-related content posted at the height of the pandemic. But respondents make little effort to connect those acts by the platforms to any specific action by the government. They do not, for example, suggest that government officials specifically targeted their content. Instead, they urge a "birds-eye view" of traceability, Resp. Br. 19 (citation omitted), under which they presume that the relevant acts of content moderation are traceable to government officials merely because those officials made

general statements about content moderation at around the same time, see *id.* at 21.

That generalized approach fails. The platforms have strong independent business incentives to moderate content, see C.A. ROA 18,445-18,453; the platforms actually *did* moderate respondents' COVID-19-related content starting in 2020, long before the bulk of the government actions challenged here, see Gov't Br. 18-19; and each cited moderation decision is consistent with the platforms' independent application of their own policies, see, *e.g.*, J.A. 787-794 (Hines); J.A. 797-801 (Hoft). Especially given that context, respondents' bare timing-based speculation does not establish traceability. Cf. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42-43 (1976).

Respondents thus err in invoking (Br. 21-22) *Department of Commerce* v. *New York*, 139 S. Ct. 2551 (2019), which addressed a challenge to the inclusion of a question on the census that had "historically" depressed response rates in a manner that would have harmed the plaintiffs. *Id.* at 2566. In that context, the Court relied on "the predictable effect of Government action on the decisions of third parties" to support traceability. *Ibid.* Here, respondents have not offered any comparable evidence of causation.

In any event, even if respondents had established some past injuries fairly traceable to the government, they have not shown that they face any "real and immediate threat of repeated injury," *O'Shea* v. *Littleton*, 414 U.S. 488, 495-496 (1974), or that an injunction against *the government* would prevent *the platforms* from moderating their content in the future. Respondents principally complain about the moderation of posts related to the COVID-19 pandemic, Resp. Br. 3-12; see J.A.

580-636 (declarations), and that topic was the exclusive focus of the challenged communications by the White House, Surgeon General's Office, and Centers for Disease Control and Prevention (CDC), see J.A. 4-14. But the pandemic has substantially abated, and respondents cannot show that they will imminently suffer any harms from moderation of content about COVID-19 traceable to any future government action.

Respondents assert (Br. 28-29) that they face "ongoing and future harm" because "the challenged conduct continues to this day." But even taken at face value, respondents' assertions simply establish that some government officials continue to communicate with social-media platforms and that the platforms continue to engage in content moderation—not that the government is causing or will cause the platforms to moderate respondents' content in particular. And in any event, respondents are wrong to say that the conduct on which the Fifth Circuit focused continues "to this day." CDC stopped meeting with platforms about COVID-19-related falsehoods in March 2022, C.A. ROA 19,598; the Surgeon General's Office is no longer engaged in "direct communications with social media companies about ways to address health misinformation," *id.* at 19,481; the relevant White House officials have left the government, see J.A. 83 (describing Flaherty and Slavitt as "former[]" officials); and respondents cite no evidence of ongoing White House engagement with social-media platforms focused on COVID-19 falsehoods.

Respondents thus have not shown that they face an imminent risk that the government will cause a platform to take an action with respect to their content that the platform would not otherwise have taken. And for the same reason, respondents' assertion (Br. 27) that

they "self-censor their social-media speech to avoid more severe penalties" is a classic self-inflicted injury that cannot support Article III standing. Gov't Br. 20.

2. Even if respondents had established the requisite risk of future injury traceable to some government action, that would not give them standing to challenge actions affecting only *other* social-media users. "[A] litigant cannot, 'by virtue of his standing to challenge one government action, challenge other governmental actions that did not injure him.'" *FEC* v. *Ted Cruz for Senate*, 596 U.S. 289, 301 (2022) (citation omitted). The only theory of standing that would support the breadth of the claims respondents seek to assert—and the sweeping injunction granted below—is their theory (Br. 22-27) that they have Article III standing based on a claimed injury to their "right to listen" to *other* users.

If accepted, that theory would permit virtually every social-media user to sue over the moderation of any content posted by anyone on any social-media platform. Gov't Br. 21-22. Respondents do not dispute the point; they embrace it. Resp. Br. 25. But this Court has "repeatedly held that such a 'generalized grievance,' no matter how sincere, is insufficient to confer standing." *Hollingsworth* v. *Perry*, 570 U.S. 693, 706 (2013).

The Court should adhere to its traditional rule that only intended recipients of speech who have some connection to the speaker and suffer an identifiable and particularized harm from the challenged act may sue under a "right to listen" theory. Gov't Br. 21-22; see *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 442 (2021). Respondents contend (Br. 24-25) that because they are scientists and political pundits, they have a professional interest in what others say, but that generalized contention does not actually identify a particularized connection

to any speaker whose inability to speak on the platforms has caused them identifiable harm.

3. Finally, the respondent States lack standing—and their claims fail on the merits—because they do not have First Amendment rights at all. Gov't Br. 22 & n.1. Respondents note "that the government has a 'right' to speak on its own behalf." Resp. Br. 30 (citation and ellipsis omitted). But a government's entitlement to speak arises from the structure of our constitutional democracy, not the First Amendment. See *Pleasant Grove City* v. *Summum*, 555 U.S. 460 467-468 (2009). The States' asserted rights thus cannot support preliminary relief in this case, where respondents' claims rest solely on the First Amendment.

Respondents contend (Br. 30) that the States may "assert the First Amendment rights of their audiences and the citizens they would listen to." But that is just "a thinly veiled attempt to circumvent the limits on *parens patriae* standing." *Haaland* v. *Brackeen*, 599 U.S. 255, 295 n.11 (2023). It also is a thinly veiled attempt to circumvent the requirements of third-party standing, including that a plaintiff show a "close" relationship to the injured parties and a "hindrance" to those parties' bringing suit. *Kowalski* v. *Tesmer*, 543 U.S. 125, 129-130 (2004) (citation omitted). Respondents cannot make those showings here.

B. Respondents' First Amendment Claims Lack Merit

No one disputes that the government would have violated the First Amendment if it had used threats of adverse government action to coerce private social-media platforms into moderating content. See *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 67-68 (1963); Gov't Br. 23, 26-27. But no such threats occurred here. And respondents' primary argument is that coercion is irrelevant:

They insist (Br. 31-37) that federal officials transformed the platforms' editorial choices into state action merely by seeking to persuade or inform, and they advance (Br. 43-48) other broad state-action theories that the Fifth Circuit declined to adopt. This Court should reject those attempts to radically expand the state-action doctrine.[1]

1. The government did not coerce the platforms' content-moderation decisions through threats of adverse action

"Under this Court's cases, a private entity can qualify as a state actor" if the government "compels the private entity to take a particular action," *Halleck*, 139 S. Ct. at 1928, through an exercise of " coercive power," *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). Respondents concede that such coercion requires "[t]hreats of adverse government action." Resp. Br. 37-38 (citation omitted); see *Bantam Books*, 372 U.S. at 68. But respondents have not identified any such threats here—much less threats tied to any particular content-moderation decision that injured them. Instead, respondents' de-

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[1] Some amici fault "the parties" for framing this case in state-action terms, arguing that the focus should be on whether the government's own conduct violated the First Amendment under *Bantam Books*. Chamber of Commerce Amicus Br. 2-3; see, *e.g.*, Knight First Amendment Institute Amicus Br. 5-17; NetChoice Amicus Br. 7-10. But the *Bantam Books* standard overlaps with the coercive-threat aspect of the state-action inquiry, see Gov't Br. 26-27; *Biden* v. *Knight First Amendment Institute*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring), so respondents' claims would also fail under the alternative framing amici propose. And it is *respondents* who framed their claims in state-action terms and have advocated sweeping theories of state action that extend far beyond the coercion prohibited by *Bantam Books*. We agree with amici that those theories lack merit.

fense of the Fifth Circuit's holding that the White House, Surgeon General's Office, and FBI engaged in coercion rests almost entirely on statements taken out of context.

a. *White House*. Respondents repeat the district court's assertion that the former White House Press Secretary made a "threat of 'legal consequences' if platforms do not censor misinformation more aggressively." Resp. Br. 41 (quoting J.A. 111) (brackets omitted). But notwithstanding the internal quotation marks in that passage, the Press Secretary never uttered the words "legal consequences." See C.A. ROA 23,764-23,791. Instead, the words the district court attributed to her came from *respondents'* statement of facts. *Id.* at 26,476. Although we have highlighted this error before, see Gov't C.A. Br. 30; Gov't C.A. Reply Br. 9, respondents continue to repeat it.

The problem is not just the misquotation, but the absence of any statement in the relevant briefing that could plausibly be described as a threat of legal consequences. Respondents repeat the district court's assertion that the Press Secretary "linked the threat of a 'robust anti-trust program' with" a purported "censorship demand." Resp. Br. 40 (citation omitted). In fact, she did no such thing. When asked to respond to a Senator's comment that "'if the Big Tech oligarchs can muzzle the former President, what's to stop them from silencing you?'," the Press Secretary said (among other things) that the President "supports better privacy protections and a robust anti-trust program"—a natural response to a question about "'oligarchs.'" C.A. ROA 609. Like the other press statements on which the Fifth Circuit relied, see Gov't Br. 31-32, that response cannot plausibly be characterized as a threat of adverse action if the

platforms failed to take specific acts of content moderation. Deeming such general comments about important matters of public policy coercive would make it impossible for the President and his senior advisors to communicate with the public—or even to respond to press questions—on policy matters involving the platforms.[2]

Respondents also cherry-pick statements from email exchanges about COVID-19 between White House staffers and platforms in early 2021. But many of the statements respondents highlight—including the reference to "considering our options," Resp. Br. 5, 38 (quoting J.A. 657)—expressed frustration with a platform's perceived lack of candor, not its failure to moderate. See J.A. 657 ("100% of the questions I have asked have never been answered"). Similarly, the email referring to concern at the "highest" levels of the White House, Resp. Br. 6, 40 (quoting J.A. 709), asked for "a good faith dialogue about what is going on" and acknowledged that "removing content that is unfavorable to the cause of increasing vaccine adoption is not a realistic—

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[2] Wandering further afield, respondents assert (Br. 8) that in a 2019 interview with the New York Times, then-candidate Biden "threatened civil liability, and even criminal prosecution of Mark Zuckerberg personally, if Facebook did not censor more political speech." In fact, in response to a question about whether "criminal penalties" would be appropriate "[i]f there's proven harm that Facebook has done," Biden stated that Zuckerberg "should be submitted to civil liability and his company to civil liability, just like you would be here at The New York Times. Whether he engaged in something and amounted to collusion that in fact caused harm that would in fact be equal to a criminal offense, that's a different issue. That's possible." C.A. ROA 531. There is nothing "threaten[ing]" (Resp. Br. 8) in that anodyne response to a hypothetical question.

or even a good—solution." J.A. 709. And none of those communications mentioned any adverse action.[3]

Nor have respondents pointed to any evidence that the government took any adverse action against any platform for failing to moderate content flagged by the government—even though the platforms routinely did so. Gov't Br. 39; see J.A. 15 (FBI flags "led to posts being taken down 50% of the time"). Respondents maintain that although the platforms initially resisted, they responded with "'total compliance'" after purported "threats" delivered between July 15 and July 20, 2021. Resp. Br. 40 (citation omitted). That is doubly wrong: The platforms continued to choose not to remove content flagged by the White House, including the very next day. J.A. 731 (July 21 email); see, *e.g.*, J.A. 748, 754. And the supposedly pivotal event in respondents' narrative (Br. 8-9, 40) was not a threat of adverse action, but a series of public statements by the President, Press Secretary, and Surgeon General criticizing the platforms and calling on them to do more to prevent the spread of false information that was causing preventable deaths during a pandemic. The President and his senior aides are entitled to speak out on such matters of pressing public concern, and the President's

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[3] Although space does not permit a full treatment of the inaccuracies in respondents' account of the White House's communications, we offer one other example: As proof of supposedly "ominous and coercive" "threats," respondents recount that in July 2021, "the White House emailed Facebook stating, 'Are you guys fucking serious? I want an answer on what happened here and I want it today.'" Resp. Br. 8 (quoting J.A. 740). But that admittedly crude comment was asking for an answer about a "technical" problem affecting *the President's own Instagram account*—it had nothing to do with moderating other users' content. J.A. 742; see J.A. 740-742.

strong language does not transform his use of the bully pulpit into impermissible coercion. See Gov't Br. 23-25.

b. *Office of the Surgeon General*. The Fifth Circuit offered little explanation for its holding that the Surgeon General's Office engaged in coercive threats. Gov't Br. 35 n.7. Respondents' defense of that holding rests almost entirely on their assertion that during a July 2021 press conference, the Surgeon General threatened platforms with unspecified "consequences" by saying that they should be held "accountable." Resp. Br. 8-9 (citations omitted); see *id.* at 40. What he actually said—in response to a question asking whether "public figures and public companies that are helping spread misinformation about the vaccine should be held accountable"—was that "all of us have to ask: How we can be more accountable and responsible for the information that we share?" C.A. ROA 628. Again, respondents' characterization does not withstand a cursory examination of the record.

c. *FBI*. Respondents do not defend the Fifth Circuit's holding that the FBI's communications with the platforms were inherently coercive because the FBI is a law-enforcement agency. Gov't Br. 40. Instead, respondents offer a different theory—not accepted by the Fifth Circuit—that the FBI coerced platforms into moderating content because FBI personnel allegedly met "with powerful congressional staffers" and those staffers in turn met with social-media platforms, who supposedly "experienced 'a lot of pressure' in these meetings." Resp. Br. 42 (citation omitted). But no congressional staffer is a defendant here, and pressure from Legislative Branch staff—if it existed at all—would not justify a sweeping injunction against thousands of Executive Branch officials and employees.

Moreover, the very testimony on which respondents rely makes clear that the deponent "would not connect" those platform-staffer meetings to the platforms' independent decisions to "change[] their practices and bec[o]me more active in account takedowns." C.A. ROA 10,274.

2. This Court's precedents foreclose respondents' sweeping conception of "significant encouragement"

The Fifth Circuit badly erred in holding that "significant encouragement," *Blum*, 457 U.S. at 1004—and thus state action—requires only that the government be somehow entangled in a private party's decision. Gov't Br. 43-45. This Court should reject respondents' attempt to further dilute that lax standard.

a. Respondents assert that "significant encouragement" under *Blum* exists whenever the government does "more than adopt a passive position toward" a private party's conduct. Resp. Br. 32 (quoting *Skinner* v. *Railway Labor Executives' Association*, 489 U.S. 602, 615-616 (1989)) (brackets omitted). That contention is inconsistent with this Court's recent description of *Blum* as addressing situations "when the government *compels* the private party to take a particular action." *Halleck*, 139 S. Ct. at 1928 (emphasis added). And respondents' sweeping view of "significant encouragement" would nullify the Court's careful delineation of the "few limited circumstances" where a private entity can qualify as a state actor. *Ibid.*

"Government officials and agencies spend a great deal of time urging private persons and firms and other institutions to change their behavior." *Peery* v. *Chicago Housing Authority*, 791 F.3d 788, 790 (7th Cir. 2015). If the government created state action whenever an official "did more than adopt a passive position toward"

some private action, Resp. Br. 32 (citation omitted), those ubiquitous exhortations would transform private parties into state actors whenever they succeeded. Publishers, distributors, and theaters could face First Amendment challenges if they acted on a President's condemnation of books or movies glorifying drugs or violence, and electronic service providers would face Fourth Amendment challenges if they chose to scan user files following an exhortation to do more to combat child pornography. Cf. Gov't Br. 24.

Respondents cite no authority endorsing that extravagant view of state action. They rely on *Skinner*'s "did more than adopt a passive position" language, but the Court was not purporting to lay down a sweeping new standard for state action. Instead, that language must be understood in its context: a comprehensive regulatory scheme governing railroads that "removed all legal barriers to [employee drug] testing," that expressed the government's "desire to share the fruits" of the testing, that "mandated that the railroads not bargain away the authority to perform [the] tests," and that authorized punishing employees who refused to submit to testing. 489 U.S. at 615. Nothing in *Skinner* supports respondents' assertion that the government can transform a private entity into a state actor through mere speech urging it to act.

Respondents' reliance (Br. 32, 34) on *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970), likewise is misplaced. Respondents assert (Br. 34) that *Adickes* "recogniz[ed] noncoercive entanglement as significant encouragement." Quite the opposite: The Court repeatedly made clear that the relevant claim in *Adickes* involved "compulsion." 398 U.S. at 170. Indeed, because "the State * * * commanded the result by its law," the Court de-

clined to decide "whether less substantial involvement of a State might satisfy the state action requirement." *Id.* at 171.

Respondents also cite (Br. 32) a snippet of *Adickes*'s statement that "a State must not discriminate against a person because of his race or the race of his companions, or in any way act to compel or encourage racial segregation," 398 U.S. at 151-152. Respondents presumably intend to emphasize the "in any way" language, but that language should not be read divorced from its context of race discrimination, where this Court's decisions reflect a "narrow[er]" tolerance for state involvement. *Norwood* v. *Harrison*, 413 U.S. 455, 469 (1973).

Respondents assert (Br. 35) that viewing "significant encouragement" as requiring positive inducements that overwhelm the party's independent judgment would "lead to absurd results, such as allowing government to pay private employers $50 a month not to hire racial minorities." But such government payment programs could be directly challenged on their own terms irrespective of whether they overwhelmed a private party's independent judgment or otherwise required attributing a private party's choice to the government under state-action principles. The same cannot be said of government speech, which is what respondents challenge here. That is also why respondents' reliance (Br. 2, 31, 36) on *Norwood*, *supra*, is misplaced; the direct governmental subsidy to racially discriminatory schools there would violate the Fourteenth Amendment regardless of whether the subsidy overwhelmed the schools' independent judgment. See *Norwood*, 413 U.S. at 463-465.

More fundamentally, this case does not present any occasion to decide what sort of government payments or other inducements might in other circumstances give

rise to state action. Neither the lower courts nor respondents have suggested that any government official offered any such inducement here. Gov't Br. 30. Instead, respondents' "significant encouragement" argument rests on their unsupported assertion that the government can create state action merely through nonthreatening *speech*.

b. Respondents assert that the government may "participate in the marketplace of ideas" if it limits itself to "*abstract*" advocacy, but may not advocate "*particular acts*." Resp. Br. 35; see *id.* at 35-37. That restriction has no basis in this Court's precedents, which recognize that the Free Speech Clause simply "does not regulate government speech." *Pleasant Grove City*, 555 U.S. at 467. The government has the right to "speak for itself," *Board of Regents* v. *Southworth*, 529 U.S. 217, 229 (2000), whether its speech is abstract or specific.[4]

Respondents cite no authority supporting their proposed dichotomy between "abstract" and "particular" advocacy in this context. Their reliance on *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969) (per curiam), is misplaced because that decision holds that speech is unprotected under the First Amendment when it imminently incites particular *unlawful* acts. Even setting aside the fact that the government's entitlement to speak is not rooted in the First Amendment, the Court in *Brandenburg* did not purport to ascribe constitutional signifi-

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[4] Although the Free Speech Clause does not limit the government's speech, other constitutional limits may sometimes apply. Cf. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 572 n.2 (1975) (Rehnquist, J., dissenting) (explaining that even in the absence of First Amendment constraints, "[a] municipal auditorium which opened itself to Republicans while closing itself to Democrats would run afoul of the Fourteenth Amendment").

cance to the level of specificity used to encourage otherwise *lawful* actions, such as private platforms' content-moderation decisions.

Respondents' novel distinction between abstract and specific speech is also unworkable. President Roosevelt lambasted not all journalism, but only the muckraking variety; President Wilson complained about stories on a particular topic (the alleged presence of troops in Turtle Bay); and President Biden condemned specific videos about Osama Bin Laden that were circulating online. Gov't Br. 24, 49. Which of those statements were sufficiently "abstract" to pass muster? Conversely, why were all of the statements at issue here—including public comments by the President, the Surgeon General, and others about the general problem of COVID-19 falsehoods—too specific? Respondents do not provide any answers, and none are apparent.

c. Finally, respondents err in asserting that the government's noncoercive attempts to influence the platforms' content-moderations decisions accomplish indirectly "what [the government] is constitutionally forbidden to accomplish" directly. Resp. Br. 2 (quoting *Norwood*, 413 U.S. at 465). "[T]he Free Speech Clause prohibits only *governmental* abridgment of speech"; it "does not prohibit *private* abridgment of speech." *Halleck*, 139 S. Ct. at 1928. Social-media users have a First Amendment right to be free from governmental restrictions on their speech, but they have no First Amendment right to post content on private platforms that the platforms would prefer not to host. And as in other contexts, public officials may seek to persuade the platforms to exercise their editorial discretion in particular ways even though the government could not compel them to do so. As Judge Silberman put it, "officials

surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not have the statutory or even constitutional authority to regulate." *Penthouse International, Ltd.* v. *Meese*, 939 F.2d 1011, 1015 (D.C. Cir. 1991), cert. denied, 503 U.S. 950 (1992); see Gov't Br. 23-25.

3. Respondents' alternative theories of state action lack merit

This Court has explained that "a private entity can qualify as a state actor * * * when the government acts jointly with the private entity." *Halleck*, 139 S. Ct. at 1928. Respondents argue (Br. 43-47) that the government is liable for the private platforms' content-moderation decisions on a joint-action theory. The Fifth Circuit declined to accept that argument, and this Court should reject it as well.

a. The joint-action theory attributes private conduct to the government if nominally private entities are essentially in a joint venture with the government or serving as the government's agents (or vice versa). For example, in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), this Court held that a restaurant located in a state facility had engaged in state action when it refused service on the basis of a customer's race because the State had made itself economically "interdependen[t]" with the restaurant, which was an "integral and, indeed, indispensable part of the State's plan to operate" the facility. *Id.* at 723-725. In *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922 (1982), the Court found state action in the operation of a scheme wherein state officials would attach and seize disputed property based "on the *ex parte* application of one party to a private dispute." *Id.* at 942. And *Brentwood Academy* v. *Tennessee Secondary School Athletic Association*, 531 U.S.

288 (2001), involved a school athletic association where public schools made up 84% of the association's voting membership; a large portion of the association's funding had public sourcing; the state education board designated the association to organize public school athletics; and state officials served on the association's governing boards. See *id.* at 290-293. This Court held that the association, though "nominally private," was a state actor based on "the pervasive entwinement of public institutions and public officials in its composition and workings." *Id.* at 298.

At the same time, this Court has held that private entities are not state actors even if they are subject to an "extensive and detailed" regulatory scheme, *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974), or receive "virtually all" of their funding from the government, *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 840 (1982). Those decisions recognize the narrow limits on the joint-action theory, which serve "to assure that constitutional standards are invoked only when it can be said that the [government] is *responsible* for the specific conduct of which the plaintiff complains." *Blum*, 457 U.S. at 1004.

Here, respondents have not identified any relationship akin to the ones in *Burton*, *Lugar*, or *Brentwood* that would make the government responsible for the platforms' content-moderation decisions. Indeed, respondents assert (Br. 45-46) only that CISA was *indirectly* entwined with the platforms because of its alleged connection to a different private entity, the Election Integrity Partnership (EIP). That assertion is doubly wrong: CISA was not entwined with EIP, and EIP was not entwined with the platforms. See Stanford Amicus Br. 18-27 (highlighting respondents' factual er-

rors). CISA's connections to EIP are minimal: EIP was the "idea" of four Stanford students who had "complete[d] volunteer internships" at CISA and who "consult[ed] with CISA and other stakeholders" when forming EIP. C.A. ROA 13,678. "CISA did not send content to the EIP to analyze, and the EIP did not flag content to social media platforms on behalf of CISA." *Id.* at 19,869 (emphasis omitted); see *id.* at 19,696-19,698; Stanford Amicus Br. 14 ("[V]ery little of EIP's * * * time was spent interacting with social-media platforms or the government."). EIP, in turn, was not entwined with the platforms; to the contrary, respondents describe (Br. 45-46) only efforts by EIP to flag posts for the platforms, which would then reach their own judgments about how to respond. Stanford Amicus Br. 8, 14-15.[5]

b. Respondents briefly suggest (Br. 44) that joint action exists here because the government allegedly "conspired with platforms to deprive Americans of their First Amendment rights." Even the district court declined to adopt that theory, which lacks merit. Respondents again rely (Br. 44) on the fact that platforms engaged in content moderation while also talking to the government about content moderation, but that cannot establish a conspiracy given both the platforms' independent business incentives to moderate content, see p. 4, *supra*, and the frequency with which they declined to act on governmental requests, see p. 11, *supra*. Deeming that sometimes-collaborative, sometimes-contentious relationship to be a "conspiracy" that turns the platforms' conduct into state action would nullify

[5] Respondents' passing assertions (Br. 15-16, 20) about the Virality Project, another private entity, suffer from similar flaws. Stanford Amicus Br. 4-15, 18-27.

the careful limits on state action described above. Cf. *Dennis* v. *Sparks*, 449 U.S. 24, 28 (1980) (describing a "corrupt conspiracy" involving bribery).

* * *

The necessary implication of respondents' arguments is that the private platforms' editorial choices are state action subject to the First Amendment—potentially exposing the platforms to suits seeking to secure injunctions compelling them to restore content that they chose to delete. Gov't Br. 35-36; see Chamber of Commerce Amicus Br. 18. Despite relying extensively on state-action precedents, respondents claim (Br. 47) that "[h]olding the government liable does not necessarily entail that the platforms are also liable." But a necessary consequence of finding that a private entity is a state actor is that it is subject to the limits of the Constitution and to suits seeking to enforce those limits. See *Adickes*, 398 U.S. at 171 (allowing Fourteenth Amendment claims against a private party "compelled" and "commanded" to act by the government); cf. *Biden* v. *Knight First Amendment Institute*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring).

Of course, the *remedies* available against a private party engaged in state action might differ; for example, retrospective damages might not be available if the government compelled the private party to act. Cf. *Adickes*, 398 U.S. at 174 n.44 (expressing "no views concerning the relief that might be appropriate"). But respondents cannot escape the conclusion that their sweeping theory of state action would subject the private platforms to constitutional constraints and potential suits—a result that even respondents appear to recognize is untenable.

C. The Injunction Is Inequitable

The injunction flouts traditional equitable principles because it extends relief far beyond that required to redress any cognizable harm to respondents, and its vague terms would irreparably harm the government and the public by chilling a host of legitimate Executive Branch communications. Gov't Br. 45-50. It also would harm the platforms and their customers by precluding the companies from voluntarily seeking governmental input and collaboration to improve the products they offer. *E.g.*, *id.* at 44, 49; cf. Floor64 Amicus Br. 5-16.

Respondents have little to say in response. They assert (Br. 49) that they suffer imminent injury based on allegedly having "experienced fresh censorship" in the "days before the preliminary injunction hearing," but the cited declarations describe only instances of content moderation imposed by the platforms under their own policies, without any facts to link that private moderation to any governmental activity. See pp. 4-5, *supra*. Respondents also argue (Br. 51-52) that the injunction's sweeping breadth is appropriate because they might want to read the posts of others whose posts have been moderated, but that simply recycles their meritless "right to listen" theory of standing. See pp. 6-7, *supra*.

Finally, respondents do not even attempt to defend the propriety of using legally contestable terms like "coerce or significantly encourage" and "protected free speech" to describe the injunction's prohibitions; nor do respondents seriously dispute that use of such vague terms will inevitably chill core Executive Branch communications. Instead, respondents rely on the principle that civil contempt will not be imposed "where there is a fair ground of doubt as to the wrongfulness of the defendant's conduct." Resp. Br. 50 (quoting *Taggart* v.

Lorenzen, 139 S. Ct. 1795, 1801 (2019)). But that *additional* protection for enjoined parties does not excuse vagueness in the injunction itself—particularly where, as here, the injunction constrains thousands of government employees, restricts the ability of senior government officials to speak to the public on matters of great public concern, and installs the district court as the superintendent of all government communications with and about the platforms.

Respectfully submitted.

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