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

BRIEF FOR THE INTERNATIONAL CENTER FOR LAW & ECONOMICS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The International Center for Law & Economics ("ICLE") is a nonprofit, nonpartisan global research and policy center aimed at building the intellectual foundations for sensible, economically sound policy. ICLE promotes the use of law-and-economics methods and economic learning to inform policy debates.

ICLE has an interest in ensuring that First Amendment law promotes the public interest, the rule of law, and a rich marketplace of ideas. To this end, ICLE's scholars write extensively on social media regulation and free speech. *E.g.*, Int'l Ctr. for Law & Econ. Am. Br., *Moody* v. *NetChoice, LLC*, *NetChoice, LLC* v. *Paxton*, Nos. 22-277, 22-555 (Dec. 7, 2023); Ben Sperry, *Knowledge and Decisions in the Information Age: The Law & Economics of Regulating Misinformation on Social-Media Platforms*, 59 Gonzaga L. Rev. ___ (2024) (forthcoming); Geoffrey Manne, Ben Sperry & Kristian Stout, *Who Moderates the Moderators?: A Law & Economics Approach to Holding Online Platforms Accountable Without Destroying the Internet*, 49 Rutgers Computer & Tech. L. J. 26 (2022); Internet Law Scholars Am. Br., *Gonzalez* v. *Google LLC*, 21-1333 (Jan. 19, 2023); Ben Sperry, *An L&E Defense of the First Amendment's Protection of Private Ordering*, Truth on the Market (Apr. 23, 2021), https://bit.ly/49tZ7XD.

ICLE is concerned about government meddling in—and the resulting impoverishment of—the marketplace of ideas. That meddling is on display in this

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[1] No party or counsel for a party authored this brief in whole or in part. No one other than *amicus* or its counsel made a monetary contribution to fund preparation or submission of this brief.

case—and another case before the Court this Term. See No. 22-842, *Nat'l Rifle Ass'n of Am.* v. *Vullo* (state official coerced insurance companies not to partner with gun-rights organization to cover losses from gun use). But this case and *Vullo* merely illustrate a larger problem. See *Backpage.com, LLC* v. *Dart*, 807 F.3d 229 (7th Cir. 2015) (sheriff campaigned to shut down Backpage.com by pressuring Visa and Mastercard to stop processing Backpage transactions); Heartbeat Int'l, Inc. Am. Br. at 4–10, *Vullo*, *supra* (collecting examples); Will Duffield, *Jawboning Against Speech: How Government Bullying Shapes the Rules of Social Media*, Cato Inst. (Sept. 12, 2022) (collecting examples), bit.ly/41NEhjb; Victor Nava, *Amazon "censored" COVID-19 vaccine books after "feeling pressure" from Biden White House: docs*, New York Post (Feb. 5, 2024), https://bit.ly/3Sq5152. With this brief, ICLE urges the Court to enforce the Constitution to protect the marketplace of ideas from all such government intrusions.

SUMMARY OF ARGUMENT

I. The First Amendment protects a public marketplace of ideas free from government interference.

A. "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 577 (2011) (citation omitted). "Our representative democracy only works if we protect the 'marketplace of ideas.' This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need

for protection." *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. ___, 141 S. Ct. 2038, 2046 (2021).

Without a free marketplace of ideas, bad ideas persist and fester. With a free marketplace of ideas, they get challenged and exposed. When we think of the marketplace, we think of Justice Holmes dissenting in *Abrams* v. *United States*, 250 U.S. 616, 630 (1919). But the insight behind the concept dates back thousands of years, at least to the Hebrew Bible, and has been recognized by, among others, John Milton, the Founders, and John Stuart Mill. The insight is that the solution for false speech is true speech. The government may participate in the marketplace of ideas by speaking for itself. But it ruins the marketplace by coercing speech.

B. This Court has long stressed the danger of restricting speech on public health, where information can save lives. Several respondents here are elite professors of medicine who dissented from the scientific judgments of government officials. The professors were just the kind of professionals whose views the public needed to make informed decisions. Instead, the government pressured social media websites to suppress the professors' views, which the government –at least at the time—saw as outside the mainstream.

Government intervention like this undermines the scientific enterprise. The goal of science is not to follow the current consensus, but to challenge it with hard data. For that challenge to happen, the government must not interfere with the open marketplace of ideas, where the current consensus can always yield to a new and better one.

C. As the "purchasers" in the marketplace of ideas, the people—including respondents here—were

stripped of their First Amendment right to make informed decisions on crucial matters of public health. The right to speak includes a corresponding right to *receive* speech. Based on the record here, respondent states can likely show that petitioners trampled on their right to receive information and ideas published by websites. Similarly, respondent individuals will likely be able to show that *they* have been robbed of their right to hear other suppressed speakers.

II. Today, the marketplace of ideas is stocked, in part, by social media companies exercising editorial discretion. What distinguishes one site from another is what it will, and will not, publish. As commentators have noted, in the online world, content moderation *is* the product. Social media companies are what economists call multi-sided platforms, which connect advertisers with users by curating third-party speech. The better platforms become at curating speech, the more users engage, and the more valuable advertising becomes to advertisers and users alike.

At times, keeping users engaged requires removing harmful speech or even disruptive users. But platforms must strike a balance in their content-moderation policies—allowing enough speech to attract users, but not so much speech that users are driven away. Operating in the marketplace, social media companies are best placed to strike this balance.

Even if the online marketplace did not operate very efficiently (it does), it could not permissibly be controlled by the government. The First Amendment forbids any abridgement of speech, including speech on the internet. The way a website adjusts to the market shows what it thinks deserves "expression, consideration, and adherence," or is "worthy of

presentation" (phrases this Court has used to describe protected editorial discretion). Pressuring social media companies to take down content changes the content of the platforms' speech, intrudes on their editorial discretion, and violates the Constitution.

III. Given the record respondents have compiled, it is likely that they can show coercion by federal officials. The Fifth Circuit agreed, but its test for coercion fell short of the test applied in *Bantam Books*. The focus of *Bantam Books* is *not* on the subjective understanding of the private actor, but on what the state actors objectively did—namely, was it reasonably understood as attempting to coerce private action?

Here it was. Indeed, the allegations here include (a) many threats to have social media companies investigated, prosecuted, and regulated if they fail to remove disfavored speech, coupled with (b) extensive use of private meetings, emails, and digital portals to pressure social media companies to remove speech. That was attempted coercion, and it was unlawful.

The remedy for unlawful coercion is an injunction against, or in some cases, damages from, government actors. The court below focused the injunction on federal officials. That was correct. The marketplace of ideas—now freed from impermissible government intervention by the injunction—leaves its participants free to exercise their editorial discretion as they see fit. The judgment should be affirmed.

ARGUMENT

I. The First Amendment protects the marketplace of ideas from government meddling.

A. A marketplace offering only government-approved ideas is no marketplace, logically and as historically understood.

The First Amendment protects an open marketplace of ideas. "By allowing all views to flourish, the framers understood, we may test and improve our own thinking both as individuals and as a Nation." *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 143 S. Ct. 2298, 2311 (2023). "'[I]f there is any fixed star in our constitutional constellation,' it is the principle that the government may not interfere with 'an uninhibited marketplace of ideas.'" *Id*. (quoting *West Virginia Bd. of Ed*. v. *Barnette*, 319 U.S. 624, 642 (1943) and *McCullen* v. *Coakley*, 573 U.S. 464, 476 (2014)).

1. "[U]ninhibited" means uninhibited. "[T]he First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply 'misguided,' and likely to cause 'anguish' or 'incalculable grief.'" *303 Creative*, 143 S. Ct. at 2312 (quoting *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc*., 515 U.S. 557, 574 (1995) and *Snyder* v. *Phelps*, 562 U.S. 443, 456 (2011)). "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Sorrell*, 564 U.S. at 577 (citation omitted). Without zealous protection, unpopular speech may be "chill[ed]," "would-be speakers [may] remain silent," and "society will lose their contributions to the 'marketplace of ideas.'" *United States* v.

Hansen, 599 U.S. 762, 143 S. Ct. 1932, 1939–40 (2023) (quoting *Virginia* v. *Hicks*, 539 U.S. 113, 119 (2003)). Nor do speakers "shed their First Amendment protections by employing the corporate form to disseminate their speech." *303 Creative*, 143 S. Ct. at 2316.

When the marketplace of ideas is impoverished, it is not only "society" that loses (*Hansen*, 143 S. Ct. at 1939–40); it is democracy itself. "Our representative democracy only works if we protect the 'marketplace of ideas.' This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection." *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2046. "A democratic people must be able to freely generate, debate, and discuss * * * ideas, hopes, and experiences. They must then be able to transmit their resulting views and conclusions to their elected representatives[.] Those representatives can respond by turning the people's ideas into policies. The First Amendment, by protecting the marketplace and the transmission of ideas, thereby helps to protect the basic workings of democracy itself. *City of Austin* v. *Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 142 S. Ct. 1464, 1476–77 (2022) (Breyer, concurring) (internal citations and quotation marks omitted). In short, "[t]he First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Meyer* v. *Grant*, 486 U.S. 414, 421 (1988) (internal citation and quotation marks omitted).

2. *Without* a free marketplace of ideas, bad ideas flourish, unchallenged by competition. "[T]ime has upset many fighting faiths"; and "the ultimate good

desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market[.] That at any rate is the theory of our Constitution." *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). *With* a free marketplace, however, people enjoy the liberty to be wrong—even as their mistaken ideas tend to get exposed. For this reason, after the divisive presidential election of 1800, winner Thomas Jefferson urged toleration of dissenters. Even those in favor of changing our form of government, he urged, should be left "undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." First Inaugural Address (Mar. 4, 1801), https://bit.ly/42tAxUt.

Of course, neither Holmes nor Jefferson was the first to recognize that the best ideas emerge from the crucible of competition. Thousands of years before the American republic, the Hebrew Bible observed that "[t]he one who states his case first seems right, until the other comes and examines him." Prov. 18:17. Much later, John Milton and John Stuart Mill would sound similar themes. "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 279 n.19 (1964) (quoting Mill, On Liberty 15 (1947) and citing Milton, *Areopagitica*, Prose Works, Vol. II 561 (1959)).

In sum, "[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." *United States* v.

Alvarez, 567 U.S. 709, 727–28 (2012) (plurality). "And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right * * * to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates." *Id.* at 728. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

3. Of course, the government itself may participate in the marketplace of ideas. Government agencies concerned about health or election misinformation may use social media platforms to broadcast their message. Those agencies may even amplify and target their counter-speech through advertising campaigns tailored to those most likely to share or receive misinformation—including by creating their own apps or social media websites.

All these steps would combat alleged online misinformation in a way that *promotes* the marketplace of ideas rather than restricting it. What is more, presidents may always directly use the bully pulpit to advocate their views. Pet. Br. 24–25 (listing examples of presidential statements criticizing protected speech). What the government may *not* do, as petitioners necessarily concede, is "use its authority to suppress contrary views." *Id.* at 23. As the record shows, that is exactly what happened in this case.

4. Finally, protecting the marketplace of ideas from government interference of course does not guarantee that the best ideas win. To the contrary, the

marketplace will still see a "good deal of market failure"—if success is measured by the truth winning out. Ronald Coase, *The Market for Goods and the Market for Ideas*, 64 Am. Econ. Rev. 384, 385 (1974). But "that different costs and benefits must be balanced does not in itself imply who must balance them," much less how the balance should be struck. Thomas Sowell, Knowledge and Decisions 240 (1996).

In the First Amendment, the Founders struck the balance in favor of liberty. However flawed an open marketplace of ideas may be, they decided, it is better than censorship. "The liberal defense of free speech is not based on any claim that the market for ideas somehow eliminates error or erases human folly. It is based on a comparative institutional analysis in which most state interventions make a bad situation worse." Roger Koppl, Expert Failure 217 (2018).

B. As this Court instructs, it is especially crucial that the marketplace of ideas be uninhibited on matters of public health.

It is precisely this judgment of the Founders—that state interventions in the marketplace of ideas "make a bad situation worse" (Koppl, *supra*, at 217)—that petitioners here ignored. White House officials pressured websites to take down "[c]laims that have been 'debunked' by public health authorities." J.A. 98. So-called misinformation was *itself* dubbed an "urgent public health crisis." J.A. 113. Indeed, said the Surgeon General, "misinformation poses an imminent threat to the nation's health *and takes away the freedom to make informed decisions*." J.A. 125 (emphasis added). These assertions are dead wrong—backwards even. Public health is the *last* area in which the government should be deciding "which

ideas should prevail." *Nat'l Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2375 (2018) ("*NIFLA*"). "[T]his Court has stressed the danger of content-based regulations 'in the fields of medicine and public health, where information can save lives.'" *Ibid.* (quoting *Sorrell*, 564 U.S. at 566 (striking down statute restricting publication of pharmacy records)).

Several respondents here are professors of medicine at elite institutions who disagreed with the scientific judgments of government officials. In other words, they were just the kind of professionals whose views the public needed "to make informed decisions." J.A. 125. Instead, the government pressured social media websites to suppress these professionals' views, which the government at the time viewed as outside the mainstream.

"As with other kinds of speech, regulating the content of professionals' speech 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas[.]'" *NIFLA*, 138 S. Ct. at 2374 (quoting *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994)). "Take medicine, for example. Doctors help patients make deeply personal decisions, and their candor is crucial." *NIFLA*, 138 S. Ct. at 2374. Yet "[t]hroughout history, governments have 'manipulat[ed] the content of doctor-patient discourse' to increase state power and suppress minorities":

> For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception. In the 1930s, the Soviet government expedited completion of a construction project on the Siberian railroad by ordering doctors to both reject

> requests for medical leave from work and conceal this government order from their patients. In Nazi Germany, the Third Reich systematically violated the separation between state ideology and medical discourse. German physicians were taught that they owed a higher duty to the 'health of the Volk' than to the health of individual patients. Recently, Nicolae Ceausescu's strategy to increase the Romanian birth rate included prohibitions against giving advice to patients about the use of birth control devices and disseminating information about the use of condoms as a means of preventing the transmission of AIDS.

Ibid. (quoting Thomas Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right To Receive Unbiased Medical Advice*, 74 B. U. L. Rev. 201, 201–202 (1994) (footnotes omitted)).

None of this government interference makes sense if the goal is to discover the truth. And that is the goal of the scientific enterprise: to discover the truth by testing hypotheses. The goal is *not* to follow the current consensus. "The notion that scientists should agree with a consensus is contrary to how science advances—scientists challenge each other, ask difficult questions and explore paths untaken. Expectations of conformance to a consensus undercuts scientific inquiry. It also lends itself to the weaponization of consensus to delegitimize or deplatform inconvenient views, particularly in highly politicized settings." Roger Pielke, Jr., *The Weaponization of "Scientific Consensu*s," American Enterprise Institute (Feb. 5, 2024), https://bit.ly/3OBH3Tj.

We saw just this politicization during the recent pandemic. "Reputable scientists and physicians have

questioned—and in many cases debunked—the 'official' narratives on lockdowns, school closures, border testing, vaccine mandates, endless boosters, bivalent COVID shots, epidemic forecasting, natural immunity, vaccine-induced myocarditis, and more. * * * But it's become untenable for those in charge to defend many of their initial positions." Matt Strauss, Marta Shaw, J. Edward Les & Pooya Kazemi, *COVID dissent wasn't always misinformation, but it was censored anyway*, National Post (Mar. 1, 2023), https://bit.ly/3SQZ6Yb. Yet that did not stop many of those in charge, in the meantime, from using government power effectively to censor dissenters. That is what happened in this case. As one liberal member of Congress said of the "lab leak" theory of COVID's origin—itself a key exhibit in the shifting of accepted thinking about COVID—"If you take partisan politics and you mix that with science * * *, it's a toxic combination." Sheryl Gay Stolberg & Benjamin Mueller, *Lab Leak or Not? How Politics Shaped the Battle Over Covid's Origin*, New York Times (Mar. 19, 2023) (quoting U.S. Rep. Anna Eshoo).

In sum, "[p]rofessionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields. Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform. '[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market,' and the people lose when the government is

the one deciding which ideas should prevail." *NIFLA*, 138 S. Ct. at 2374–75 (quoting *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)). The people lost here.

C. A marketplace offering only government-approved ideas violates the rights of speakers *and* listeners, the overlooked "purchasers" in the marketplace.

The people's loss is constitutionally cognizable. As the "purchasers" in the marketplace of ideas, the people—including respondents here—were robbed of their First Amendment right to make informed decisions. After all, the right to speak includes a "reciprocal" right to *receive* speech. *Va. State Bd. of Pharm.* v. *Va. Citizens Consumer Council*, 425 U.S. 748, 757 (1976); see First Amend. and Internet Law Scholars Am. Br., *Moody* v. *NetChoice LLC*, *NetChoice LLC* v. *Paxton*, Nos. 22-277, 22-555, at 4–5 (Dec. 6, 2023) (collecting authorities). "To suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker. It is just as criminal to rob a man of his right to speak and hear as it would be to rob him of his money." Frederick Douglass, *Address: A Plea for Free Speech in Boston (1860)*, in Great Speeches by Frederick Douglass 48, 50 (2013) (quoted in First Amend. and Internet Law Scholars Am. Br, *supra*, at 4–5).

Stated differently, "[t]he First Amendment protects 'speech' and not just speakers." Eugene Volokh, Mark Lemley & Peter Henderson, *Freedom of Speech and AI Output*, 3 J. Free Speech L. 653, 656 (2023). As a result, "th[is] Court has long recognized First Amendment rights 'to hear' and 'to receive information and ideas.'" *Id.* at 657 & n.11 (citing, among other cases, *Kleindienst* v. *Mandel*, 408 U.S. 753, 762–

763 (1972) ("In a variety of contexts this Court has referred to a First Amendment right to receive information and ideas") (internal quotation marks omitted); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); *Thomas* v. *Collins*, 323 U.S. 516, 534 (1945) ("That there was restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say, there can be no doubt.")).

Based on the record respondents have built, Missouri and Louisiana can likely show that petitioners have trampled on their right to "hear" and to "receive information and ideas" published by websites. Volokh, *supra*, at 656–657; Resp. Br. 25–27. And by the same token, respondent individuals will likely be able to show that *they* have been robbed of their right to hear other suppressed speakers, "whom [respondents] follow, engage with, and re-post on social media." Resp. Br. 22. The judgment should be affirmed.

II. Websites stock the online marketplace of ideas by exercising editorial discretion.

By effectively forcing websites to take down certain content, the government here "alte[red] the content of [the websites'] speech." *NIFLA*, 138 S. Ct. at 2371 (internal citation omitted). Such laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015). "This stringent standard reflects the fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content." *NIFLA*, 138 S. Ct. at 2371 (internal

citation and quotation marks omitted). Nor is government control *necessary* in the competitive marketplace of ideas stocked by social media companies.

1. What distinguishes one site from another is what it publishes and refuses to publish. "[C]ontent moderation *is* the product." Thomas Germain, *Actually, Everyone Loves Censorship. Even You.*, GIZMODO (Feb. 22, 2023) (emphasis added), http://bit.ly/3Rge8pI. As private participants in the marketplace of ideas, social media firms set their own editorial policies and choose which ideas to publish. "The Free Speech Clause does not prohibit *private* abridgment of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) (emphasis in original). Even as they openly publish the speech of others, social media platforms do not "lose the ability to exercise what they deem to be appropriate editorial discretion," because then they would "face the unappetizing choice of allowing all comers or closing the platform altogether." *Id.* at 1931. In turn, *users* participate in the marketplace of ideas by choosing which social media website best meets their needs, including through its respective moderation policies.

Social media firms are what economists call "matchmakers" or "multi-sided" platforms. David Evans & Richard Schmalensee, Matchmakers: The New Economics of Multisided Platforms 10 (2016). "[M]atchmakers' raw materials are the different groups of customers that they help bring together. And part of the stuff they sell to members of each group is access to members of the other groups. All of them operate physical or virtual places where members of these different groups get together. For this

reason, they are often called multisided platforms." *Ibid*. Social media firms bring together advertisers and users—including both speakers and listeners—by curating third-party speech. Curating speech well keeps users engaged so advertisers can reach them.

At times, keeping users engaged requires removing harmful speech, or even removing users who break the rules. See David Evans, *Governing Bad Behavior by Users of Multi-Sided Platforms*, 27 Berkeley Tech. L.J. 1201, 1215 (2012). But a social media company cannot go too far in restricting speech that users value. Otherwise, users will visit the platform less or even abandon it for other companies in the "attention market"—which includes not only other platforms, but newspapers, magazines, television, games, and apps. Facing the prospect of fewer engaged users, advertisers will expect lower returns and invest less in the platform. Eventually, if too many customers flee, the social media company will fail.

Social media companies must also consider brand-conscious advertisers who may not want to be associated with perceived misinformation or other harmful speech. To take just one example, advertisers reportedly left X after that company loosened its moderation practices. Ryan Mac, Brooks Barnes & Tiffany Hsu, *Advertisers Flee X as Outcry Over Musk's Endorsement of Antisemitic Post Grows*, N.Y. Times (Nov. 17, 2023). In other words, platforms must strike a balance in their content-moderation policies. This balance includes creating rules discouraging misinformation if such speech drives away users or advertisers. As active participants in the marketplace, social media firms are best positioned to discover the best way to serve their users. See Int'l Ctr. for Law &

Economics Am. Br. at 6–11, *Moody* v. *NetChoice LLC*, *NetChoice LLC* v. *Paxton*, Nos. 22-277, 22-555 (Dec. 7, 2023). As competition plays out, though, consumers can deliver surprises—and platforms must adjust. This is the marketplace of ideas in action.

2. All these product changes happen without government intervention, which, again, would be forbidden in any event. After all, the First Amendment forbids any "abridg[ement]" of speech, no matter where that speech is "publish[ed]" or "disseminat[ed]"—including the online marketplace of ideas. *Reno* v. *ACLU*, 521 U.S. 844, 853 (1997); *303 Creative*, 600 U.S. at 594. The way a social media company adjusts to the market shows what it deems "deserving of expression, consideration, and adherence," or "worthy of presentation." *Turner*, 512 U.S. at 641; *Hurley*, 515 U.S. at 575. By forcing platforms to take down content, government coercion "alte[red] the content of [the platforms'] speech." *NIFLA*, 138 S. Ct. at 2371 (internal citation omitted).

When a company "exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity." *Arkansas Ed. Television Comm'n* v. *Forbes*, 523 U.S. 666, 674 (1997). "[E]ditorial control" encompasses the "choice of material," "decisions made as to limitations on the size and content," and "treatment of public issues[.]" *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974). Any governmental "compulsion to publish that which reason tells them should not be published"—or vice versa—"is unconstitutional." *Id.* at 256 (internal citation and quotation marks omitted).

III. The online marketplace of ideas was impoverished by federal coercion here, and the Court should affirm the injunction insofar as it binds federal officials.

1. Although social media companies are private actors with a right to editorial discretion, the facts adduced so far in this case, if ultimately established, show coercion by federal officials, and not the exercise of discretion by websites. Relying on an extensive record, "the district court concluded that the officials, via both private and public channels, asked the platforms to remove content, pressed them to change their moderation policies, and threatened them—directly and indirectly—with legal consequences if they did not comply. And it worked—that 'unrelenting pressure' forced the platforms to act and take down users' content." J.A. 16–17.

The Fifth Circuit agreed, holding that federal officials likely "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." J.A. 32 (internal citations and quotation marks omitted). In reaching this conclusion, the Fifth Circuit adopted a four-part test, ostensibly derived from *Bantam Books*, *Inc.* v. *Sullivan*, 372 U.S. 58 (1963), to tell when government actions aimed at private parties become coercive: "(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." J.A. 42 (internal citations and quotation marks omitted)

But the Fifth Circuit's test falls short of the test applied in *Bantam Books*. The focus of *Bantam Books* is *not* on the subjective understanding of the private actor, but on what the state actors objectively did—namely, was it reasonably understood as attempting to coerce private action. The *Bantam Books* test is about the efforts of the state actor to suppress speech, not whether the private actor is in some hyper-literal sense "free" to ignore the state actor. Surreptitious pressure in the form alleged by respondents is just as much an intervention into the marketplace of ideas as overt censorship.

Consider what happened in *Bantam Books*. A legislatively created commission notified book publishers that certain books and magazines were objectionable for sale or distribution. The commission had no power to sanction publishers or distributors, and there were no bans or seizures of books. 372 U.S. at 66–67. In fact, the book distributors were technically "free" to ignore the commission's notices. *Id.* at 68 ("It is true * * * that [the distributor] was 'free' to ignore the Commission's notices, in the sense that his refusal to 'cooperate' would have violated no law."). Nonetheless, this Court held, "the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Id.* at 67. Particularly important was that the notices could be seen as a threat of prosecution. See *id.* at 68–69 ("People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around[.] The Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped

the circulation of the listed publications[.] It would be naive to credit the State's assertion that these blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation.").

Ignoring this lesson of *Bantam Books*, petitioners focus on the subjective response of social media companies rather than the objective actions of the government. Petitioners emphasize that media companies did not always censor speech to the degree that federal officials asked. Br. 39. But under *Bantam Books*, that is not the question. The question is whether the government's communications could reasonably be seen as a threat. 372 U.S. at 68–69.

They could. Indeed, the allegations here include (a) many threats to have social media firms investigated, prosecuted, and regulated if they failed to remove disfavored speech, coupled with (b) extensive use of private meetings, emails, and digital portals to pressure firms to remove speech. Resp. Br. 2–16. As a result of this pressure, social media firms removed speech against their policies and changed their policies. *Ibid*. Much as in *Bantam Books*, government pressure suppressed lawful speech.

All this government coercion is a first-order infringement of speech and an impermissible intervention into the marketplace of ideas. It also destroys the business model of social media websites. As multisided platforms, these companies must carefully balance users, advertisers, and speech. Government intervention disrupts this careful balance. Again, the value proposition of social media websites is that they—as actors in the market—are best situated to curate forums attractive to their users. Destroying

these privately curated forums will chill speech for all Americans. The Court should find that respondents are likely to succeed on the merits of their First Amendment claim.

2. As noted, the government is free to use the bully pulpit to persuade—and even to argue publicly that certain content on social media platforms is misinformation that should be demoted or removed. Pet. Brief 23–25 (listing examples of presidential statements criticizing protected speech). But this does not mean the First Amendment allows coercing private actors into shutting down speech, which is what is shown by the facts adduced here.

3. The remedy for unlawful government coercion is an injunction against, or in specific cases, damages from, government actors. Here, the District Court and Fifth Circuit rightly focused the injunction against federal officials. That was correct. The marketplace of ideas, now freed from impermissible government intervention, leaves its participants free to exercise their editorial discretion as they see fit. There is no need to enjoin private actors; and, indeed, doing so would undermine the same freedom of expression that enjoining coercive *government* actors protects. On remand, the injunction should continue to make clear that social media companies may continue to engage in the marketplace of ideas by exercising editorial discretion. But the government may not press its thumb on the scale by compelling them to censor.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted.

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