

No. 23-411

IN RE

VIVEK H. MURTHY, SURGEON GENERAL, et al.,
Petitioners,

v.

MISSOURI, et al.,
Respondents.

ON WRIT OF CERTIORARI TO
OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF AMICI CURIAE FOUNDATION FOR
INDIVIDUAL RIGHTS AND EXPRESSION,
NATIONAL COALITION AGAINST
CENSORSHIP, AND FIRST AMENDMENT
LAWYERS ASSOCIATION IN SUPPORT OF
RESPONDENTS AND AFFIRMANCE**

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INTEREST OF AMICI CURIAE¹

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought³ the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights on college campuses nationwide through public advocacy, targeted litigation, and amicus curiae filings in cases that implicate expressive rights. In June 2022, FIRE expanded its public advocacy beyond the university setting and now defends First Amendment rights both on campus and in society at large. See, eg.,

and informally . See, eg., *NetChoice, LLC v. Bonta*, No. 22-CV-08861-BLF, 2023 WL 6135551 (N.D. Cal. Sept. 18, 2023); *Volokh v. James*, 656 F. Supp. 3d 431 (S.D.N.Y. 2023); see also Brief of FIRE in Support of

INTRODUCTION

, W · V Q R W D O Z D \ V H D V \ E H L Q J D) L U V W \$ P H Q G
 advocate. In this country, the guarantee of freedom of
 expression extends to all manner of speech and
 speakers, ranging from political extremists, National
 Socialist Party of Am. v. Village of Skokie , 432 U.S. 43,
 43 244 (1977), to religious fanatics, Snyder v. Phelps ,
 562 U.S. 443, 454 (2011), and to speech of no apparent
 ' Y D O ~~United~~ States v. Stevens

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documented a coercive pattern of threats and

NetChoice v. Paxton, and NetChoice v. Moody, Nos. 22-555 & 22-277 (2023)

personal social media accounts for government business becomes state action subject to constitutional rules, Lindke v. Freed and Ratcliffe v. Garnier, Nos. 22-611 and 22-324. The actions and their self-serving arguments reinforce government when it addresses the constellation of issues teed up this Term.

SUMMARY OF ARGUMENT

This case arose from allegations that the Biden White House and various Executive Branch agencies had inserted themselves into the content moderation decisions of social media platforms and pressured them to censor speech and particular speakers they dislike. But it just as easily could have been brought against the Trump Administration, which was famous for bullying internet and media companies.⁵ The Fifth Circuit acknowledged that many of the questionable pressure tactics had their origins in the previous

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administration, Biden, 83 F.4th at 370, including

WKUHDWV WR VWULS DZD\ LQWHUQHW SODWIRUP

shield provided by Section 230 of the Communication
Decency Act

ARGUMENT

I. 7 KLV & RXUW 6 KRXOG \$ IILUP WKH) LIWK & LUFXLV
Holding That Executive Branch Agencies
Violated the First Amendment by Interfering
With Private Moderation Decisions .

The Fifth Circuit held plaintiffs were likely to
succeed on their claims that the White House and
other federal offices violated the First Amendment by
LQWUXGLQJ LQWR SULDWH SODWIRUPV. PRO
decisions. However, the government defendants
(Petitioners here) reframed the issue presented as
ZKHWKHU WKH JRYHUQPHQW V FKDOOHQJHG
transformed private social - PHGLD FRPSDQLHV. FRQWHQW
moderation decisions into state action and violated presented

behavior or excessive cooperation to coopt private
S O D W I R U P V · P R G H U D A N D B R Q T H A T I S S I E V L R Q V
the Fifth Circuit got it right .

A. The Fifth Circuit Correctly
Defined Two Types of
Unconstitutional Informal
Censorship .

The court below identified two distinct forms of
unconstitutional informal censorship : First, it applied
the line of cases beginning with Bantam Books, Inc. v.
Sullivan , 372 U.S. 58, 71 (1963), that prohibits
L Q W L P L G D W L R Q W D F W L F V W K D W F U H D W H D ´ V \ V W
F H Q V R U X N D L S C O M D, it applied a line of cases
beginning with Blum v. Yaretsky , 457 U.S. 991, 1003²
04 (1982), that explains when government actors may
E H ´ O L D E O H I R U W K H D F W L R W D E R I S U L Y D W H S D U
there is D ´ F O R V H Q H S M R Y L G H D W ´ V X F K V L J Q L I L F D Q W
encouragement, either overt or covert, that the choice
must in law be deemed to be W K D W R I W K T H E 6 W D W H µ
) L I W K & L A F A Y S I W of both forms of informal
censorship has much to commend it and this Court
should adopt it .

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1. Bullying and Intimidation.

7 KH JRYHUQPHQW JHQHUDOO\ LV 'HQWLWOHG W
 it wants to say ³ EXW RQO\ ZLWKLQ OLPLWV μ
 Backpage.com, LLC v. Dart , 807 F.3d 229, 235 (7th
 Cir. 2015). Like any exercise of official power,
 government speech can be curtailed when it intrudes
 on individual rights. The Fifth Circuit acknowledged
 it can be difficult to distinguish between persuasion
 (which is permissible) and coercion (which is not) but
 observed that coercion may take various forms and
 ' P D \ E H P R U H Biden, 83 F. 4th at 377.

To help identify when government speech crosses
 the line into impermissible coercion , the Fifth Circuit
 adopted ³ with some refinements ³ a four-factor test
 articulated by the Second and Ninth Circuits in
 National Rifle Association of America v. Vullo , 49
 F.4th 700 (2d Cir. 2022), and Kennedy v. Warren , 66
 F.4th 1199 (9th Cir. 2023). It also drew heavily on the
 6 H Y H Q W K & L U F X L W Dart , 807 F.3d 229 L Q
 Biden, 83 F. 4th at 385 286, 397. 7 KH 6 H F R Q G & L U F X L W · V
 articulation R I W K L V W H V W F R Q V L G H U V ' W K H V S H D
 word choice and tone; (2) whether the speech was
 perceived as a threat; (3) the existence of regulatory
 authority; and . . . (4) whether the speech refers to
 D G Y H U V H F R Q V Biden, 83 F. 4th at 378

(quoting *Vullo*, 49 F.4th at 715) (internal quotation marks omitted).¹⁰

The Fifth Circuit elaborated on the test by providing important guidance on the four factors, incorporating *RWKHU FLUFXLWV* applied in *Bantam Books*. Drawing on the record in this case, the FRXUW REVHUYHG WKDW ‘¶DQ LQWHUDFWLRQ ZLW PRUH WKUHDWHQLQJ LI WKH RIILFLDO UHIXVHV WF an answer and pesters the recipient until it VXFFXPEV .µ EHFDXVH WKH DQDO\VLV FRQVLGH RYHUDOO ¶WHQRU. RI WKH Bide, UH UHODWLRQV F.4th at 381 (quoting *Warren*, 66 F.4th at 1209) (cOHDQHG XS ,Q GHWHUPLQLQJ ZKHWKHU D VWDY speech was perceived as a threat backed by regulatory DXWKRULW\ WKH FRXUW QRWHG WKDW ‘WKH VXPµ WKDQ MXVW. DMZHU EHFDXVH WKH ‘¶ODFN RI GLUH DXWKRULW\ . LV QRW HQWLUHO\ GLVSRVLWLYHµ L whether the speech was threatening , *id.* (quoting *Warren*, 66 F.4th at 12 10).

WKLOH ‘D PHVVDJH LV PRUH OLNHO\ WR EH FRH there is some LQGLFDWLRQ WKDW WKH >SULYDWH@ S

¹⁰ Amici have endorsed the four-factor test originally set forth by the Second Circuit in *Vullo* as refined by the other circuit deci(t)3 0 612 792 re W* n1 TJ r [ahe four

SDUW\·V LQG HSHQ-Q-@kigWbr (2) Filed L R Q
 LQYROYHPHQW LQ FDUU\LQJ R XW WKH GHFLVLRQ I

This analysis reveals the essential flaw with
 3 H W L W L f r o u t i o n of the question presented.
 The question is not whether a private party effectively

‘ E H F R P H V μ D V W D W o p t e d b y t h e S t a t e , K I H Q
 L V Z K H W K H U W K H V W D W H D F W R U V K D Y H D V X I I L F
 Q H [X V μ private decisions so as to become
 responsible μ I R t e m , contrary to the First
 Amendment. Blum , 457 U.S. at 1004. As this Court
 explained in Blum [t]his case is obviously different
 from those cases in which the defendant is a private
 party and the question is whether his conduct has
 sufficiently received the imprimatur of the State so as
 W R P D N H L W ¶ V W D W H · D F W L R Q I R U S X U S R V H V R I W
 Amend P H Q W . at 1003. Here, the defendants are
 government actors who inserted themselves into
 private editorial decisions.

B. The Fifth Circuit Properly
 Applied the Tests for Coercion
 and Encouragement to Enjoin
 Government Intrusions into
 Private Editorial Decisions.

On a voluminous record compiled at the district
 court, t he Fifth Circuit found that various executive
 agencies had become so involved in day-to-day
 moderation decisions of social media companies that

The record contains copious evidence that the social media platforms understood communications from the White House and FBI agents to be threats and acted accordingly. For example, a social media SODWIRUP H[SUHVVO\ DJUHHG WR 'DGMXVW >LWV reflect the changes sought by officials. Id. at 384. And VHYHUDO VRFLDO PHGLD SODWIRUPV 'W>RRN@ G including posts and accounts that originated from the 8QLWHG 6WDWHV LQ GLUHFV FRPSOLDQFH ZLWK IURP WKH)%, WKDW WKH\ GQDROHWKPHVLQIRUPDW eve of the 2022 congressional election. Id. at 389. When the White House and FBI 'UHTXHWHVHGµ platforms to jump, they ultimately, if reluctantly, asked how high.

As to whether the officials had authority over social media platforms, the Fifth Circuit found the enforcement authority is self-evident. The President of the United States, and by extension his officials in the White House, direct all federal enforcement nationwide, whether directly or indirectly via appointment of cabinet secretaries and other officials. They can, and often do, pick up the phone and contact the Department of Justice to recommend investigation and prosecution of particular individuals and companies.

\$V 'H[HFXWLYH RIILFLDO>V@ ZLWK XQLODWHU their threatening missives to platforms were 'LQKHUHQWO\ WFRPHU 6L F. #thpat 1210.

Likewise, FBI officials are often the first line of federal enforcement when it comes to criminal investigations, and the FBI has frequently of . . . HOHFWLRQV μ LQ WKH \H DUV OHDGLQJ XS WR midterm elections. See, e.g, FBI & CISA, Public Service Announcement: Foreign Actors and Cybercriminals Likely to Spread Disinformation Regarding 2020 Election Results (Sept. 22, 2020), <https://www.ic3.gov/Media/Y2020/PSA200922>. As the

‘OHDG ODZ HQIR UStigatory, @W domestic security agency for WKH H[HFXYWLYH EUDQFK μ WKH)%, FOHDUO\ ‘Zme D & W & RULW\ RYHU WKH SODWIRUPV Biden, 83 F.4th at 388. And ‘>S@HR SOH GR QRW OLJKWO\ disregard public officers - thinly veiled threats to institute criminal proceedings against them if they do QRW FRPH ~~Barack Obama~~ μ 372 U.S. at 68.

Finally , both the White House and the FBI WKUHDWHQHG ‘DGYHUVH FRQVHTXH QFHV μ WR VR platforms if they failed to comply. Warren , 66 F.4th at

:KHQ VRFLDO PHGLD SODWIRUPV. FRQW PRGHUDWLRQ ZDV WRR VORZ IRU WKH :KLWH +RXV RIILFLDOV SXEOLFO\ DFFXVHG WKHP RI ‘NLOOLQJ privately threatened them with antitrust enforcement, repeal of Section 230 immunities, and other

implied threatened consequences because those

RIILFLDOV DUH EDFNHG E\ WKH 'DZHVRPH SRZHU

by the federal executive branch. *Id.* at 385.

Significant encouragement . The record also contained substantial evidence that officials from the White House, FBI, Centers for Disease Control (CDC), and Cybersecurity and Infrastructure Security Agency (CISA) DOO HQJDJHG LQ XQODZIXO 'VLJQLILFD HQFRXUDJPHHQW μpeEistedODeEueJon platforms to change their moderation policies. Various government officials became so entangled with social media platform moderation policies that they were DEOH WR HIIHFWLYHO\ UHZULWH WKH SODWIRUPV the inside.

One platform informed the Surgeon General it was 'LPSOHPHQWLQJ D VHW RI MRLQWO\ SURSRVHG SR IURP WKH :KLWH +RXVH DQG WKH 6XUJHRQ *HQUH EHLQJ 'FDOOHG RQ the issue WeReadOne Biden , 83 F.4th at 387 . Another platform informed the

:KLWH +RXVH LW ZDV 'PDNLQJ D QXPEHU RI FKDQJ its misinformation moderation policies specifically EHFDXVH WKRVH SROLFLHV DUH 'D SDUWLFXODU the administration. Id.

The FBI successfully pressured several platforms WR DOWHU WKHLU PRGHUDWLRQ SROLFLHV 'WR F and-OHDN· FRQWHQW DIWHU WKH)%, DVNHG WKHP DQG IROORZHG XS RQId.WK389 the HTXHVW μ CDC embedded themselves so deeply within social

labels. Id. at 390. And in addition to working closely
ZLWK WKH)% , WR `SXVK WKH SODWIRUPV WR FKD
PRGHUDWLRQ SROLFL and V O M D N F R Y R I Q W J H K O W N u
CISA also pushed platforms to adopt more restrictive
policies on censoring election - UHODWHG ID S H H F K μ
391.

These examples go far beyond mere suggestion or
detached advice, offered DW DUP - V. T O H G W K
RI `HQWDQJOHPHQW μ ZLWK- P S O N L W U R U P V . `G H F L V L F
resulted in various officials practically rewriting the
SODWIRUP - V I d S R t O L F , B 8 7 V In some cases,
JRYHUQPHQW RIILFLDOV KDG `GLUHFV LQYROY
FDUU\LQJ RXW μ WKH S R O L F I D Q J H V W K H \
at 375. The degree of coercion and entanglement was
VXFK WKDW WKHVH RIILFLDOV EHFDPH `UHVSQRVL
VRFLDO PHGLD SOD W I L I P D e c i s i o n L Y D W H
Blum , 457 U.S. at 1004. That satisfies Blum - V `FORVH
QH[XV μ WHVW DQG LW IDLOV WKH)LUVW \$PHQGPH

C. The Fifth Circuit Properly
Tailored Injunctive Relief .

The Fifth Circuit issued an appropriately tailored
LQMXQFWLRQ WR FXUE E n l a w K u h o e r i c H U Q P H Q W . V
DQG GHHS HQWDQJOHPHQW LQ WKH SODWIRUPV .
Citing Dart , 807 F.3d at 239, the court modified the
GLVWULFW FRXUW - V R U L J L Q D O L Q M X Q F W L R Q `W
coercive government behavior with sufficient clarity
to provide the officials notice of what activities are
S U R V F U B i e n , 8 3 μ F . 4 t h at 397. It modified the

scope of the injunction to remove non-governmental actors and some governmental actors, substantially narrowed its reach, and clarified vague provisions. *Id.* at 394-399.¹³

The new, more specific terms of that prohibition explain that those officials subject to it may not engage in the use of official authority to restrict or interfere with the free speech of others. *Id.* at 397.

The new, more specific terms of that prohibition are limited to the specific conduct this Court held violated the First Amendment in *Blum* and *Bantam Books*. It provides officials with notice of exactly what type of conduct they may not pursue, while allowing them to engage in all other lawful communications with social media platforms. And it excludes officials who were not proven to have violated the First Amendment. In

Blum, the Court held that the government's prohibition on the use of official authority to restrict or interfere with the free speech of others was unconstitutional.

¹³ For example, the court vacated prohibitions on engaging in the use of official authority to restrict or interfere with the free speech of others. *Blum*, 391 U.S. 454, 464 (1968). The court further explained that those prohibitions were vague and captured significant legal speech. *Blum*, 391 U.S. at 464-466. The court further explained that those prohibitions were vague and captured significant legal speech. *Blum*, 391 U.S. at 464-466. The court further explained that those prohibitions were vague and captured significant legal speech. *Blum*, 391 U.S. at 464-466.

This past December , Attorney General Bailey announced a fraud investigation into the

GLVDJUBailey/Landry Press Release. Bailey wrote WKDW WKH SURJUHVVLYH PRE GHPDQGV LPPHGLD based on the Media Matters critique of X, and the resulting advertising boycotts hurt what he called WKH ODVW SODWIRUPe Speech First WHG WR \$PHULFD. In short, they were simply flexing state muscle to take sides in a culture war dispute.

:KHWKHU RU QRW OHGLD ODWWHUV. FODLPV DI have merit, it was only the state officials who were using government authority to suppress speech with which they disagreed. And, unfortunately, it is far from the first time VWDWH DWWRUQH\V. JHQHUDO KDY employed threats and investigatory demands to suppress online speech. E.g., Google, Inc. v. Hood, 822 F.3d 212, 220 (5th Cir. 2016) This lawsuit, like others of late, reminds us of the importance of preserving free speech on the internet FLWLQJ Dart , 807 F.3d 229).

Accordingly, the \$*V claim that threatening private speakers was LQ WKH VHUYLPH RI IUHH VSHHFKμ fooled no one. Walter Olson, writing for the Cato , QVWLWXWH REVHUYHG WKDW WKH PRVW ULVLE

¹⁷ Bailey/Landry Press Release ; see also Mike Masnick, Missouri AG Announces Bullshit Censorial Investigation Into Media Matters Over Its Speech , TECHDIRT (Dec. 13, 2023), <https://www.techdirt.com/2023/12/13/missouri-ag-announces-bullshit-censorial-investigation-into-media-matters-over-its-speech/>.

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letter ³ better than satire, really ³ [was] Bailey ✂}

S U H V V X U H W D F W L F V D V ' W K H E L J J H V W Y L R O D W L R
\$ P H Q G P H Q W L Q R X U Q D W E R O V H I G L M W U R U D μ D Q G

wall of separation between tech and state to preserve
our First Amendment right to free, fair, and open
G H E D W s e μ Bailey Press Release, while
simultaneously urging this Court to approve formal
state control over social media moderation decisions.
See generally Missouri NetChoice Br. at 11 ²³.

This suggests the state AGs driving this case
believe the First Amendment permits them to do
directly what it prohibits other government actors
from doing indirectly . In fact, they argue not just that
the First Amendment permits state regulation of
private speakers, but that state regulation is
necessary for free speech to exist. Id DW ' I U H H G R P R I
speech is a freedom States were created to secure
[and] it is the duty of States to secure that freedom
I U R P S U L Y D W H D E T h i s A r g u m e n t t h a t
regulation is free speech³ is distinctly [REDACTED]
George Orwell, 1984 , at 7 (New York: Harcourt, Brace
& Company 1949) (' : D U L V 3 H D F H) U H H G R P L V 6 O D Y H U \\
Ignorance is St U H Q J W

the guardians of individual ULJKWV ODGLVRQ VDLG ´, think there is more danger of those powers being abused by the state governments than by the JRYHUQPHQW RI WKH 8QLWHG 6WDWHV µ DQG WKH FRQVWUDLQHG E\ WKH ´JHQLDULDO SULQFLSOH>@ V unconstitutional which infringe the rights of the FRPPXQLW\ µ \$F RSDIOLQWOLV SURSHU WKDW every government should be disarmed of powers which trench upon . . . the equal right of conscience, IUHHGRP RI WKH SUHVV IR.Uat 66 ULDLDO E\ MXU\ µ (reprinting account from CONG. REGISTER, June 8, 1789 [T]he state governments are as liable to attack those invaluable privileges as the general government is, and therefore ought to be cautiously guarded against. µ¹⁹

¹⁹ Missouri asserts state legislative authority is necessary to VHFUXH ULJKWV DJDLQVW ´SULYD D WDWULDEULGJPHQW µ EDVHG rights theory WKDW WKH ULJKW WR IUHH VSHHFK ´SUHGDWH JRYHUQPHQW LW the States Dec. 1800. WKDW protect speech from encroachment by private parties. Missouri NetChoice Br. at 2. The argument stitches together cherry-picked references from a law review article that refers to James ODGLVRQ·V UHFDUJHG the Bill of Rights . Seeid. (citing Jud Campbell, Natural Rights and the First Amendment , 127 YALE L.J. FLWLQJ ODGLVRQ·V QRWHV UHIOHFWLQJ speech in Congress)). Not only is this revisionist theory debunked E\ ODGLVRQ·V DFWXDO ZRUGV DV UHSRUWHG LQ FRQW DFFRXQWV WKH DUWLFOH RQ ZKLFK OLVVRXUL UHOLHV QR skepticism toward relying on the states to protect free speech. See 127 YALE L.J. at 303 Q Madison also singled out the freedom of the press in a set of three rights that would apply against state governments, again suggesting an intent to treat VSHHFK DQG SUHVV IUHHGRP V GLIIHUHQWO\ µ

CONCLUSION

The through -line of all these cases before the Court this Term is the abuse of governmental power. Political actors use the First Amendment as a club when convenient, then ignore it when it gets in the way of their own ambitions. But the great virtue of the First Amendment is its neutrality. This Court should send the same clear message in this case as in the others on the docket this Term : The First Amendment is not a weapon for government actors to wield in the culture wars .

February 9, 2024

LEE ROWLAND
NATIONAL COALITION
AGAINST
CENSORSHIP