FIRE
Foundation for Individual Rights and Expression

House of Representatives
Committee on the Judiciary
Select Subcommittee on the Weaponization of the Federal Government
2138 Rayburn House Building
Washington, DC 20515

Representative Hageman,

Thank you for your follow-up questions regarding congressional AI regulation and oversight. Please see below for my responses. I have also attached two *amicus* briefs that FIRE has filed with the Supreme Court of the United States which I mention in my responses.

* * *

a. What do you recommend Congress does through legislation to prevent this government monopoly on AI, which poses the risk of endangering free speech and development before it begins?

I believe the government must use a light touch when regulating this emergent technology. Any action Congress takes through legislation should promote entry into the field of AI, not create barriers to that entry. That includes rejecting licensing or registration schemes (which would inherently privilege and entrench large existing companies) and avoiding excessive red tape that would harm the viability of open-source models.

Examples of "red tape" would include mandated testing and disclosure schemes, which require infrastructure to comply. Open-source models themselves improve transparency more than any disclosure model, but their frequently decentralized nature makes such compliance more difficult. Another example would be mandatory compliance with standards, limiting collaboration on open-source models by raising a barrier to their first publication.

Even the most precise attempts to impose legislative or regulatory guardrails on the development of AI are likely to have unintended adverse consequences on technology as a whole. LLM-based AI models are in their infancy, and attempts to regulate them will likely be imprecise and over-inclusive, subjecting a wide range of technologies to requirements intended to be imposed on generative AI and large language models.

As I noted during my opening statement:

> But the most chilling threat that the government poses in the context of emerging AI is regulatory overreach that limits its potential as a tool for contributing to human knowledge. A regulatory panic could result in a small number of Americans deciding for everyone else what speech, ideas, and even questions are permitted in the name of "safety" or "alignment."

There have been public calls to create a registry of AI models. Any attempt to require registration would create a threat to free expression. Though technically impressive (to say the least), AI's fundamental components are words and numbers—in other words, speech—compiled and arranged for broadest utility. To require registration of AI models would be akin to requiring registration of printing presses or computers.

Given these limitations and goals, Congress could encourage the development or voluntary adoption of standards in AI, such as transparency, interoperability standards, or NIST safety standards. It would also be consistent with these goals to create safety requirements for AI that are used by the government for sensitive purposes (such as national security) or in Class III medical devices, such as pacemakers and insulin pumps.

If we had prohibited the development of the Internet until someone had solved the problem of "misinformation" online, we probably would still be waiting for it to emerge. And when it finally did, we would not have prevented harm; we would only have ceded the space to our adversaries and surrendered all of the benefits. The public's fear of AI is likely influenced by how much of its potential we have yet to understand. It is precisely that lack of understanding that makes us ill-positioned to regulate AI in a way that doesn't harm its development and place the United States at a disadvantage.

b. What do you recommend Congress should focus on for oversight of AI?

Congress should discourage government interference with the development of AI. There is the risk that executive agencies could attempt to restrain AI, or impose entry barriers, through regulations, subregulatory guidance, or jawboning—that is, coercive pressure.

FIRE wrote about the dangers of censorship in the form of coercive government pressure via vague demands for cooperation in our *amicus* brief for the pending Supreme Court case *National Rifle Ass'n of America v. Vullo.*[1] Additionally, FIRE wrote about the dangers of

[1] Brief of *Amici Curiae* Found. For Individual Rts. And Expression, et al. in Support of Petitioner and Reversal, *Nat'l Rifle Ass'n of Am. v. Vullo,* No. 22-842 (2024).

jawboning in our *amicus* brief for the pending Supreme Court case *Murthy v. Missouri.*[2] Congress could mandate transparency in agency interactions related to AI to address these concerns.

To mitigate the potential harm of crimes enabled or enhanced by AI, Congress could ensure law enforcement agencies have the tools to combat those crimes as a whole, whether the crimes utilize AI or not. For example, a great deal of public attention has been focused on telephone fraud involving deepfake voices. Deepfake phone fraud is, however, not different in principle from traditional telephone scams, and does not require new laws to combat. To the extent that AI will enable telephone fraud on a greater scale, it is important to remember that there are laws on the books that allow law enforcement to investigate and mitigate this new wave of cases, and that allow prosecutors to put offenders behind bars. Additionally, as the awareness and proliferation of AI continues, better tools will evolve to combat any unique elements of such offenses.

* * *

Thank you again for the opportunity to share my thoughts. Please do not hesitate to contact me if you have any further questions.

Best,

Greg Lukianoff
President & CEO
Foundation for Individual Rights and Expression

Attachments: Brief of *Amici Curiae* Found. For Individual Rts. And Expression, et al. in Support of Petitioner and Reversal*, Nat'l Rifle Ass'n of Am. v. Vullo,* No. 22-842 (2024); Brief of *Amici Curiae* Found. For Individual Rts. And Expression, et al. in Support of Respondents and Affirmance, *Murthy v. Missouri*, No. 23-411 (2024)

[2] Brief of *Amici Curiae* Found. For Individual Rts. And Expression, et al. in Support of Respondents and Affirmance, *Murthy v. Missouri*, No. 23-411 (2024).

No. 22-842

IN THE

Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA,

Petitioner,

v.

MARIA T. VULLO,

Respondent.

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

BRIEF OF *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, NATIONAL COALITION AGAINST CENSORSHIP, THE RUTHERFORD INSTITUTE AND FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER AND REVERSAL

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QUESTION PRESENTED

Does the First Amendment allow a government regulator to threaten regulated entities with adverse regulatory actions if they do business with a controversial speaker, as a consequence of (a) the government's own hostility to the speaker's viewpoint or (b) a perceived "general backlash" against the speaker's advocacy?

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INTEREST OF *AMICI CURIAE*[1]

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 thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases implicating expressive rights. *E.g.*, Brief of FIRE *et al.* as *Amici Curiae* in Support of Respondents, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021); Brief of FIRE as *Amicus Curiae* in Support of Petitioner and Reversal, *Counterman v. Colorado*, No. 22-138, 600 U.S. 66 (2023).

The **National Coalition Against Censorship** (NCAC), founded in 1974, is an alliance of more than 50 national non-profit educational, professional, labor, artistic, religious, and civil liberties groups united in their commitment to freedom of expression. NCAC, through direct advocacy and education, has long opposed government attempts to censor or criminalize protected expression. The positions advocated in this brief do not necessarily reflect the views of NCAC's member organizations.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel contributed money intended to fund preparing or submitting this brief.

The **Rutherford Institute** is a nonprofit civil liberties organization. Founded in 1982 by its President, John Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been violated and educates the public about constitutional freedoms and human rights. The Rutherford Institute works to ensure that the government abides by the rule of law and is held accountable when it infringes Americans' rights.

The **First Amendment Lawyers Association**, comprised of attorneys whose practices emphasize defense of Freedom of Speech and of the Press, advocates against all forms of government censorship. Since its founding its members have been involved in many of the nation's landmark free expression cases and have frequently addressed First Amendment issues *amicus curiae*.

SUMMARY OF ARGUMENT

The United States is justifiably proud of its First Amendment jurisprudence, which provides that speech is presumptively protected from governmental control and requires any regulation of expression be narrow, precisely defined, and governed by due process. But those formal legal protections count for little if public officials can evade them simply by couching censorship demands as veiled threats and vague demands for cooperation.

The problem of informal censorship was well understood by the founding generation. Benjamin Edes and John Gill, firebrand publishers of the *Boston Gazette,* and principal opponents of the Stamp Act, were threatened with more than direct legal sanctions

for their incendiary words. On one occasion in 1757 they were summoned by Boston's selectmen, who were put off by the duo's writings that were said to "reflect grossly upon the receivd religious principles of this People which is verry Offensive." Noting the *Gazette* derived income from its printing business for the town, Boston's elders warned "if you go on printing things of this Nature you must Expect no more favours from us." Stephen D. Solomon, REVOLUTIONARY DISSENT 57–58 (St. Martin's Press 2016). The editors initially backed off, promising to "take more care for the future, & publish nothing that shall give any uneasiness to any Persons whatever." But in the following years the *Boston Gazette* would become a leading voice for the Revolution. *Id.* at 58–59.

Such experiences colored the Framers' conception of what it means to abridge the freedoms of speech and press, and it is well settled today that the First Amendment bars the government from withholding official business as a sanction for taking the "wrong" political position. *Bd. of Cnty. Comm'rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668 (1996); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996). But overt retaliation of this sort only scratches the surface of the indirect means public officials may use to bring the press and public to heel.

This case exemplifies the creative ways government actors may regulate speech without resort to "official" means. New York's superintendent of the Department of Financial Services, Maria Vullo, urged insurance and financial institutions to reconsider their ties to the National Rifle Association

(NRA) because doing business with such groups "sends the wrong message." This warning, backed by the Governor and accompanied by vague threats of regulatory and reputational risks, did the trick: The institutions cut off the NRA as the state requested.

Indirect and informal methods of censorship have proliferated in recent years, with examples from across the political spectrum. While New York leaned on businesses to cut ties with the conservative NRA, Florida's governor acted to revoke favorable tax status for what he called the "woke" Walt Disney Corporation because it had the temerity to oppose his education initiatives. State attorneys general have threatened retail stores for selling LGBTQ-themed merchandise, while governors have threatened "aggressive enforcement action" against both public and private colleges that fail to crack down on campus speech. Both then-President Trump and President Biden have threatened to revoke online platforms' immunity under Section 230 of the Communications Decency Act due to their displeasure over company policies.

These efforts occur at all levels of government and take myriad forms, but all are attempts to fly under the First Amendment's radar. Recognizing that coercion, persuasion, and intimidation can regulate speech every bit as much as formal regulations, this Court drew a line against informal censorship in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). But it has been 60 years since then, and the Court has not elaborated on the standards for recognizing and limiting off-the-books censorship.

This Court has forged strong substantive and procedural protections for freedom of expression, but those formal protections can be circumvented if informal speech restrictions are not kept in check. The First Amendment cannot become a Maginot Line. It is vital for this Court to reaffirm the principles set forth in *Bantam Books* but also to clearly articulate standards for drawing "the distinction between attempts to convince and attempts to coerce." *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003).

The Court should revisit this area, drawing on the analyses of the various circuit courts, and establishing that informal censorship can be recognized using a four-factor test that considers the government speaker's word-choice and tone; whether the speech was perceived as a threat; the existence of regulatory authority; and whether the speech references adverse consequences. It should reverse the decision below as a misapplication of the relevant test and make clear government officials cannot evade the rule of law by framing censorship demands as informal requests.

ARGUMENT

I. THIS CASE ILLUSTRATES THE DANGERS OF INFORMAL CENSORSHIP.

New York State officials punished the NRA for its advocacy by warning businesses that engaging with the group meant risking regulatory consequences. The tactic was successful—and unlawful.

The government generally is "entitled to say what it wants to say—but only within limits." *Backpage.com, LLC v. Dart*, 807 F.3d 229, 235 (7th

Cir. 2015). While the public has an interest in hearing the views of public servants and elected officials, the government "is not permitted to employ threats to squelch the free speech of private citizens." *Id.* Just as the First Amendment bars government officials from directly censoring disfavored or dissenting speakers, it likewise prohibits using indirect means to accomplish the same unconstitutional ends. Backdoor censorship is no more permissible than its formal counterpart.

Unfortunately, this case is but one instance of many. Government officials from either side of the political divide are all too willing to abuse their offices by "jawboning"—that is, "bullying, threatening, and cajoling"—those over whom they wield power into suppressing speech.[2] To preserve the First Amendment's essential limits on governmental overreach, these brazen efforts to evade constitutional constraints must fail.

A. New York Regulators Used Indirect Means to Achieve a Result the First Amendment Prohibits.

The First Amendment does not permit the government to censor speech via informal or indirect means. When government officials "invok[e] legal sanctions and other means of coercion, persuasion, and intimidation" to chill disfavored speech, they impose "a scheme of state censorship" just as unlawful as

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[2] Will Duffield, *Jawboning against Speech: How Government Bullying Shapes the Rules of Social Media*, CATO INSTITUTE (Sept. 12, 2022), https://www.cato.org/policy-analysis/jawboning-against-speech.

direct regulation. *Bantam Books*, 372 U.S. at 67, 72. Wielding the bully pulpit "not to advise but to suppress" violates the First Amendment. *Id.* at 72; *see also Dart*, 807 F.3d at 230–31.

But that's exactly what New York state officials did here. The Superintendent of the New York State Department of Financial Services used the power of her position to pressure insurance companies into ceasing business with the NRA because of its advocacy and views.

In the wake of the February 2018 mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida, Superintendent Vullo met with Lloyd's of London executives to "present[] [her] views on gun control and [her] desire to leverage [her] powers to combat the availability of firearms." *NRA of Am. v. Vullo*, 49 F.4th 700, 708 (2d Cir. 2022). She told them she believed the company's underwriting of NRA-endorsed insurance policies violated state law—but suggested the company could "avoid liability" if it ended dealings with the organization and joined her agency's "campaign against gun groups." *Id.* at 708.

Superintendent Vullo presented Lloyd's an unconstitutional choice: disassociate from the NRA's advocacy and advance the state's views, or face legal consequences. The company publicly broke ties with the NRA a few months later.

The Superintendent ensured other businesses got the message, too. In a pair of guidance letters, she instructed insurance companies and financial institutions—entities directly regulated by her agency—to "continue evaluating and managing their

risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations." *Id.* at 709. In other words: Think twice about the company you keep and the views they express.

To underscore the point, former New York State Governor Andrew Cuomo issued a press release announcing the letters and stating he had directed the agency to "urge insurers and bankers statewide to determine whether any relationship they may have with the NRA or similar organizations sends the wrong message to their clients and their communities who often look to them for guidance and support." *Id.* In the Governor's press release, Superintendent Vullo explicitly called for "all insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with the NRA, and to take prompt actions to manage these risks and promote public health and safety." *Id.*

The Superintendent's letters and statements sent an unmistakable signal to the entities her agency regulates: doing business with organizations holding the wrong views risks the state's ire. New York sought to punish the NRA for its advocacy by threatening to impose costs on its partners and actively campaigning for companies to sever ties. And as Superintendent Vullo told Lloyd's, the State would smile upon those who chose correctly.

Of course, the State's preferred outcome—an isolated NRA, abandoned by erstwhile partners because of the government's disapproval of its views—could not be achieved by direct restrictions.

New York cannot itself censor the NRA's advocacy. The First Amendment flatly prohibits the government from silencing speech based on viewpoint. *See, e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) ("The government may not discriminate against speech based on the ideas or opinions it conveys."). If "the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban," banning that book would be unconstitutional as a "classic example[] of censorship." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 337 (2010).

Nor may New York directly penalize private companies it regulates for associating with organizations expressing views the state doesn't like. When the government takes action to render association with a disfavored group "less attractive," it raises "First Amendment concerns about affecting the group's ability to express its message." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006). And "regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights." *La. Ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961).

Barred by the First Amendment's prohibition of direct censorship, New York resorted to indirect means. This case thus presents the Court an opportunity to reinforce that "'informal censorship' working by exhortation and advice" violates the First Amendment just as surely as more straightforward efforts. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 n.8 (1975) (quoting *Bantam Books*, 372 U.S. at 71). And such clarity is sorely needed. Government

officials in red and blue states alike have proven willing to evade the First Amendment by jawboning others into doing their censorial dirty work.

B. This is Far From an Isolated Example.

New York's tactics are not an anomaly. Government actors from across the country and the ideological spectrum seek to evade constitutional constraints using the same methods.

1. In March 2022, for example, Florida Governor Ron DeSantis signed legislation limiting instruction regarding sexual orientation and gender identity in the state's public schools. After an outcry by employees, Disney—one of the State's largest employers—publicly opposed the bill. In response, Governor DeSantis told supporters: "If Disney wants to pick a fight, they chose the wrong guy."[3]

The First Amendment constrains Governor DeSantis' ability to "fight" Disney via direct censorship. So—like Superintendent Vullo—he instead attempted to punish Disney indirectly for dissenting, using the power of his office to turn the screws.

Backed by Republican state legislators, Governor DeSantis stripped Disney of its special tax status and seized control of the board overseeing the special

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[3] Susan Milligan, *DeSantis Takes On Disney With Taxpayers in the Middle*, U.S. NEWS & WORLD REP. (Apr. 22, 2022), https://www.usnews.com/news/the-report/articles/2022-04-22/desantis-takes-on-disney-with-taxpayers-in-the-middle.

improvement district containing Walt Disney World.[4] "There's a new sheriff in town," the governor boasted.[5]

Florida lawmakers took action to protect Disney's tax status once it became clear that without it, local taxpayers would be on the hook for bond debt estimated at over a billion dollars.[6] Undeterred, Governor DeSantis next threatened to build "more amusement parks" or even "another state prison" next door to Disney's Magic Kingdom.[7]

One can debate the merits of Disney's tax status, the Florida's chief executive's power to appoint the board overseeing Disney's improvement district, and Florida's need for more amusement parks—or prisons. But those policy decisions have nothing to do with Disney's First Amendment right to criticize legislation without facing coercive pressure and retaliation from governmental officials. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (government "may

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[4] Kimberly Leonard, *DeSantis strips Disney World of its self-governing power in Florida: 'There's a new sheriff in town'*, BUSINESS INSIDER (Feb. 27, 2023), https://www.businessinsider.com/ron-desantis-control-disney-world-special-district-dont-say-gay-2023-2.

[5] *Id.*

[6] Winston Cho, *Disney to Keep Perks Under Florida Bill Allowing Gov. Ron DeSantis to Assume Control of Special Tax District*, HOLLYWOOD REPORTER (Feb. 7, 2023), https://www.hollywoodreporter.com/business/business-news/disney-to-keep-special-perks-under-florida-bill-allowing-gov-ron-desantis-to-assume-control-of-special-tax-district-1235320186.

[7] Steve Contorno, *DeSantis threatens retaliation over Disney's attempt to thwart state takeover*, CNN (Apr. 17, 2023), https://www.cnn.com/2023/04/17/politics/desantis-disney-takeover-florida/index.html.

not deny a benefit to a person on a basis that infringes his constitutionally protected interest, especially his interest in freedom of speech"); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech"). Governor DeSantis' ham-handed tactics are indirect attempts to accomplish what he could not do directly: silence a critic.

Disney filed a lawsuit against the governor and several of his appointees, alleging unconstitutional retaliation in violation of the First Amendment.[8] But Governor DeSantis had already claimed victory. "Since our skirmish last year, Disney has not been involved in any of those issues," he told reporters after the suit's filing. "They have not made a peep."[9]

2. Silencing dissent isn't the only aim of government officials attempting to censor via bank shot. They have also targeted speech about sexuality—despite its full First Amendment protection. For example, last July, attorneys general from Arkansas, Idaho, Indiana, Kentucky, Mississippi, Missouri, and South Carolina wrote Target, the national retail chain, to warn it about

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[8] Complaint, *Walt Disney Parks & Resorts U.S., Inc. v. DeSantis, et al.*, No. 4:23-cv-00163 (N.D. Fl. Apr. 26, 2023).

[9] Armando Tinoco, *Ron DeSantis Says Disney Has "Not Made A Peep" Since Skirmish Over "Don't Say Gay" Law: "The Party Is Over For Them"*, DEADLINE (May 6, 2023), https:// deadline.com/ 2023/05/ron-desantis-disney-not-made-a-peep-skirmish-dont-say-gay-law-party-is-over-1235358563.

selling pro-LGBTQ attire and donating to GLSEN, an advocacy organization for LGBTQ students.[10]

Writing in their capacities as "Attorneys General committed to enforcing our States' child-protection and parental-rights laws and our States' economic interests as Target shareholders," their letter warned Target's President and CEO about the company's "promotion and sale of potentially harmful products to minors, related potential interference with parental authority in matters of sex and gender identity, and possible violation of fiduciary duties by the company's directors and officers." Letter from Attorneys General to Brian C. Cornell, Chairman and CEO, Target Corp. (July 5, 2023), https://content.govdelivery.com/attachments/INAG/2023/07/06/file_attachments/2546257/Target%20Letter%20Final.pdf.

Noting pointedly that their states' "child-protection laws penalize the 'sale or distribution . . . of obscene matter,'" the attorneys general expressed particular "concern" about "LGBTQIA+ promotional products" available at Target, singling out T-shirts with the phrases "Girls Gays Theys" and "Satan Respects Pronouns." *Id*. The group further suggested the chain's "directors and officers may be negligent in undertaking the 'Pride' campaign, which negatively affected Target's stock price." *Id.*

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[10] Lucy Kafanov, *7 Republican AGs write to Target, say Pride month campaigns could violate their state's child protection laws*, CNN (July 8, 2023), https://www.cnn.com/2023/07/08/business/target-attorneys-general-pride-month/index.html.

The attorneys general could scarcely have been clearer about their distaste for Target's views, positing that the retailer's "Pride Campaign alienates whereas Pride in our country unites." *Id.* The letter suggested—with all the subtlety of a brick through the window—that "[i]t is likely more profitable to sell the type of Pride that enshrines the love of the United States." *Id.* And while the group admitted deep in a footnote that the state obscenity laws they cited "may not," in fact, "be implicated by Target's recent campaign," the letter's overarching purpose was as unmistakable as a brushback fastball, high and inside. *Id.*

Both Target's merchandise and charitable donations are lawful and fully protected by the First Amendment. Despite the thick insinuations and loaded citations, the attorneys general didn't mount a credible argument to the contrary. But they wanted Target's leadership to think long and hard about the risks the company might run by expressing messages powerful government officials didn't like. And just like Superintendent Vullo in her campaign against the NRA, they were willing to wield the power of their offices to chill speech.

The attorneys general should have known better—and not just because they serve as their states' chief law enforcement agents.

3. One of the letter's signatories, the Attorney General of Missouri, is leading a First Amendment challenge to the federal government's own efforts to jawbone social media companies into removing a range of conservative viewpoints from their platforms. And just the day before the group sent Target its

heavy-handed warning, a federal district court issued a preliminary injunction prohibiting several government agencies and officials from communicating in certain ways with social media platforms. *Missouri v. Biden*, No. 3:22-CV-01213, ___ F. Supp. 3d ___, 2023 WL 4335270, at *73 (W.D. La. July 4, 2023).

The United States Court of Appeals for the Fifth Circuit later narrowed the injunction, *Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023), and it is stayed by this Court, which will hear the case this Term. *Murthy v. Missouri*, 217 L.Ed.2d 178 (U.S. 2023). *Amici* look forward to addressing in separate briefing the unique and important First Amendment issues that case raises. For present purposes, however, the role of Missouri's Attorney General as both jawboning practitioner *and* opponent illustrates that the threat of informal governmental censorship is not limited to either side of our partisan divide.[11]

4. Former Superintendent Vullo is not the only New York State official willing to pressure private actors into suppressing controversial or simply unpopular expression. In December, congressional hearings on campus anti-Semitism, following Hamas' attack on Israel and the ensuing conflict, focused on students chanting the phrases "intifada" and "from the river to the sea," which some lawmakers

[11] To paraphrase the celebrated civil libertarian Nat Hentoff: "Jawboning for me, but not for thee." *See* Nat Hentoff, FREE SPEECH FOR ME—BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER (HarperCollins 1992).

characterized as calls for genocide.[12] Shortly thereafter, Governor Kathy Hochul sent a letter warning the presidents of all colleges and universities in New York—both public and private—that failing to discipline students "calling for the genocide of any group" would violate both state and federal law.[13] Governor Hochul threatened "aggressive enforcement action" against any institution failing to prohibit and punish such speech.

While many find the phrases deeply offensive, that alone does not remove them from constitutional protection. To be sure, colleges and universities can and should punish "calls for genocide" that fall into the narrowly defined categories of unprotected speech, including true threats, incitement, and discriminatory harassment. But absent more, phrases like "intifada" are protected speech, and blanket bans on "calls for genocide" would result in censorship.[14] The governor did not specify, nor could she, how institutions might enforce such bans without stifling protected political expression.

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[12] Annie Karni, *Questioning University Presidents on Antisemitism, Stefanik Goes Viral*, N.Y. TIMES (Dec. 7, 2023), https://www.nytimes.com/2023/12/07/us/politics/elise-stefanik-antisemitism-congress.html.

[13] Letter from Governor Kathy Hochul to New York State College and University Presidents (December 9, 2023), https:// www.governor.ny.gov/sites/default/files/2023-12/SchoolsV2.pdf.

[14] *See* Will Creeley & Eugene Volokh, *Opinion: The trouble with Congress or college presidents policing free speech on campuses*, L.A. TIMES (Dec. 10, 2023), https:// www.latimes.com/ opinion/story/2023-12-10/antisemitism-campus-speech-penn-president-liz-magill-resigns-harvard-mit.

Moreover, the private universities that received the Governor's warning are *protected* by the First Amendment's guarantee of associational rights and possess broad freedom to promulgate their own standards regarding student speech. Governor Hochul cannot commandeer private institutions by wielding the threat of "aggressive enforcement action" under state law to force censorship of protected expression. Doing so violates the First Amendment twice over.

C. Jawboning Tactics Take Varying Forms.

As the above examples illustrate, informal censorship can take many forms. That's the point—such tactics are not governed by statutory definitions, limits, or procedural requirements. They are by nature shadowy and vague. Given the power of their offices, government officials seeking to censor by other means may choose from a dismaying variety of methods.

1. Government officials issue threats. In 2020, for example, former President Donald Trump—angered by Twitter's decision to append fact-checks to his posts—promised "big action" against the company and other social media platforms, threatening to "strongly regulate" or "close them down."[15] He demanded federal agency action to weaken the protection against liability afforded the companies by Section 230 of the

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[15] Cristiano Lima and Meridith McGraw, *Trump to sign executive order on social media amid Twitter furor*, POLITICO (May 27, 2020), https://www.politico.com/news/2020/05/27/trump-executive-order-social-media-twitter-285891.

1996 Communications Decency Act,[16] even going so far as to issue an executive order demanding the National Telecommunications and Information Administration file a petition with the Federal Communications Commission to "expeditiously propose regulations to clarify" the statute.[17] After Commissioner Michael O'Rielly voiced skepticism—remarking in a speech that the First Amendment protects private companies, too—former President Trump withdrew his renomination.[18]

2. Government officials pound on the bully pulpit, demanding action by private entities against protected speech. In an October 12 letter to social media platforms, for example, New York Attorney General Letitia James demanded the companies "describe in detail" what the platforms are doing to "stop the spread of hateful content" related to the Israel-Hamas war and report back to her about their editorial policies and practices.[19] In response, *amicus*

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[16] Leah Nylen *et al.*, *Trump pressures head of consumer agency to bend on social media crackdown*, POLITICO (Aug. 21, 2020), https://www.politico.com/news/2020/08/21/trump-ftc-chair-social-media-400104.

[17] Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020), *repealed by* Exec. Order No. 14,029, 86 Fed. Reg. 27,025 (May 14, 2021).

[18] Ted Johnson, *White House Withdraws Nomination of FCC Commissioner Michael O'Rielly, Who Doubted Donald Trump's Executive Order on Social Media*, DEADLINE (Aug. 3, 2020), https://deadline.com/2020/08/donald-trump-fcc-michael-orielly-1203003221.

[19] Susanna Granieri, *New York AG Spars With FIRE Over Social Media Moderation of 'Hateful Content'*, FIRST AMENDMENT WATCH (Oct. 20, 2023), https://firstamendmentwatch.org/new-

FIRE—which represents social media platform Rumble in an ongoing challenge to a New York law that forces websites and apps to address "hateful" online speech—argued the demand violates a then- and still-extant federal district court injunction. *See Volokh v. James*, 656 F. Supp. 3d 431 (S.D.N.Y. 2023). The Attorney General rescinded the letter as to Rumble shortly thereafter.[20]

3. Government officials order punitive investigations into protected speech. In 2022, Florida officials launched an investigation into a performing arts center after a Christmas-themed drag performance.[21] Public records requests later revealed Governor DeSantis' chief of staff had tried to prevent the event from taking place at all, asking colleagues: "Is there any way to stop this from happening tomorrow?"[22] Although undercover state investigators present at the event had concluded no "lewd acts" took

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york-ag-spars-with-fire-over-social-media-moderation-of-hateful-content.

[20] FIRE, *VICTORY: A day after FIRE's intervention, New York rescinds letter demanding social media platform Rumble censor users over Israel-Hamas war* (Oct. 20, 2023), https://www.thefire.org/news/victory-day-after-fires-intervention-new-york-rescinds-letter-demanding-social-media-platform.

[21] Ana Ceballos and Kirby Wilson, *DeSantis administration investigating 'A Drag Queen Christmas' event in Broward*, TAMPA BAY TIMES (Dec. 28, 2022), https://www.tampabay.com/news/florida-politics/2022/12/28/desantis-administration-investigating-drag-queen-christmas-event-broward.

[22] C.J. Ciaramella, *Inside Ron DeSantis' Crackdown on Drag Shows*, REASON (Nov. 9, 2023), https://reason.com/2023/11/09/inside-ron-desantis-crackdown-on-drag-shows.

place in the performance,[23] the state still sought to revoke the liquor license of a Miami hotel that hosted it,[24] later imposing a $5,000 fine.[25] Meanwhile, a federal district court enjoined Florida's state law regulating drag performances, declaring it "dangerously susceptible to standardless, overbroad enforcement which could sweep up substantial protected speech." *HM Fla.-Orl, LLC v. Griffin*, No. 6:23-cv-950-GAP-LHP, 2023 WL 4157542, at *9 (M.D. Fla. June 23, 2023).

4. And if jawboning doesn't succeed in silencing speech, government officials may initiate sham prosecutions as a form of intimidation. Federal lawmakers argued the French film "Cuties"—a Sundance award-winning drama "about an 11-year-old Senegalese immigrant in France who joins other pre-teen girls in a school dance group called 'the cuties'"—constituted child pornography for which Netflix should face prosecution for streaming

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[23] Ana Ceballos and Nicholas Nehamas, *Florida undercover agents reported no 'lewd acts' at drag show targeted by DeSantis*, TAMPA BAY TIMES (Mar. 20, 2023), https://www.tampabay.com/news/florida-politics/2023/03/20/desantis-drag-show-lewd-liquor-license-complaint-lgbtq.

[24] Matt Lavietes, *DeSantis attempts to revoke Miami hotel's liquor license over drag show*, NBC NEWS (Mar. 15, 2023), https://www.nbcnews.com/nbc-out/out-politics-and-policy/desantis-attempts-revoke-miami-hotels-liquor-license-drag-show-rcna75077.

[25] Ana Ceballos, *Miami venue settles with Florida over drag show, will pay $5,000 fine*, TAMPA BAY TIMES (Nov. 29, 2023), https://www.tampabay.com/news/florida-politics/2023/11/29/hyatt-regency-miami-drag-queen-show-desantis-minors-settlement-fine.

domestically.[26] Netflix refused to be bullied out of streaming the film, the content of which was plainly protected by the First Amendment. But an enterprising Texas district attorney nevertheless sought and obtained a criminal indictment against the company. After years of litigation, the Fifth Circuit last month determined the prosecutor "had no hope of obtaining a valid conviction," concluding Netflix "has an obvious interest in the continued exercise of its First Amendment rights, and the State has no legitimate interest in a bad-faith prosecution." *Netflix, Inc. v. Babin*, 88 F.4th 1080, 1100 (5th Cir. 2023).

Netflix stood strong against jawboning and successfully fought back when its First Amendment rights were threatened. But not all on the receiving end of aggressive government coercion will be able to withstand it or to ultimately vindicate their rights. To ensure government officials are no more able to censor indirectly than they are directly, this Court should take this opportunity to clarify the line between persuasion and coercion.

II. THIS COURT MUST PROVIDE CLEAR GUIDANCE TO FORESTALL INFORMAL CENSORSHIP.

Some jawboning attempts succeed while others fail, yet all constitute unconstitutional attempts to evade the First Amendment and the rule of law. Clear

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[26] Juliegrace Brufke, *Republicans call for DOJ to prosecute Netflix executives for releasing 'Cuties'*, THE HILL (Sept. 18, 2020), https://thehill.com/homenews/house/517145-republicans-call-for-doj-to-prosecute-netflix-executives-for-releasing-cuties.

standards are essential to bolster the law's formal protections and to enable reviewing courts to recognize when government bullying goes too far.

A. This Court has Forged Strong First Amendment Protections Based on Clear Guidance and Strategic Protections.

Over the past ninety-three years, this Court has developed strong protections for freedom of expression as the essential liberty guaranteed by the Bill of Rights. *E.g.*, *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("the opportunity for free political discussion" is "a fundamental principle of our constitutional system"); *Near v. Minnesota*, 283 U.S. 697, 716–17 (1931) ("The conception of the liberty of the press in this country had broadened with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration."). This constitutional safeguard "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Consequently, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Securing these basic freedoms has required the Court to devise both substantive and procedural safeguards for speech. This begins with the understanding that the First Amendment

presumptively protects speech from government control unless it falls within certain limited and narrowly defined categories. *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 817 (2000); *United States v. Stevens*, 559 U.S. 460, 468–69 (2010). It continues with the recognition that "[l]aws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United*, 558 U.S. at 336. And it depends on strong due process requirements and judicial oversight to prevent government actors from exceeding the limits of their power. *E.g.*, *Freedman v. Maryland*, 380 U.S. 51, 57–58 (1965); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 65–67 (1989).

Notwithstanding these rulings, "[t]he recent history of Supreme Court First Amendment jurisprudence is a rogue's gallery of popular yet unconstitutional legislation." Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 52, 95 (2015). Fortunately, however, the Court has forestalled various attempts to dilute these formal protections. *See generally* Joel M. Gora, *Free Speech Still Matters*, 87 BROOKLYN L. REV. 195 (2021); Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J. L. & POL'Y 63, 64 (2016) ("the Roberts Supreme Court may well have been the most speech-protective Court in a generation, if not in our history"). For example, it rejected an attempt to expand the categories of unprotected speech as "startling and dangerous." *Stevens*, 559 U.S. at 470. And it has resisted efforts to "adjust the boundaries" of existing categories to give the government greater latitude to regulate speech. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794 (2011).

Most recently, the Court acknowledged the need to set precise limits for unprotected speech categories along with well-defined burdens of proof as a form of "strategic protection" for First Amendment rights, thus bolstering procedural safeguards. *Counterman v. Colorado*, 600 U.S. 66, 75–78 (2023). Such clarity is vital to avoid chilling expression "given the ordinary citizen's predictable tendency to steer 'wide of the unlawful zone.'" *Id.* (quoting *Speiser*, 357 U.S. at 527).

But as vital as these formal protections are, from the beginning this Court recognized that protecting First Amendment rights required it to evaluate the substance of government actions, not just the form those actions take. *Near*, 283 U.S. at 708. As this Court observed in *Bantam Books*, 372 U.S. at 67, "[w]e are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief."

B. Informal Censorship Schemes Circumvent Constitutional Limits.

One byproduct of strong First Amendment jurisprudence is that it creates powerful incentives for evasion, driving censorship efforts underground and off the books. As one response to this Court's rulings, "[f]ederal and state governments alike have found clever means to circumvent the restrictions that the First Amendment places upon their abilities to regulate speech because of its content, from funding to the use of putatively unrelated laws to a range of informal pressures." Bambauer, *supra* at 93–94.

Such workarounds ultimately led this Court to draw a line against informal censorship techniques in *Bantam Books*. At the same time this Court began to establish strong protections for literature in the mid-twentieth century, local governments immediately looked for ways to escape judicial scrutiny. In *Winters v. New York*, 333 U.S. 507, 508, 510 (1948), the Court struck down a state law prohibiting publications that contained, among other things, "pictures, or stories of deeds of bloodshed, lust or crime," holding "they are as much entitled to the protection of free speech as the best of literature." Not long thereafter, the Court struck down a Michigan law making it a crime to make available any book "tending to the corruption of the morals of youth," finding it "reduce[d] the adult population of Michigan to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

But the emergence of clear legal standards did little to blunt governmental desires to regulate what people could read. "Different communities used various measures, including having police or local prosecutors circulate blacklists as part of organized programs 'to drive certain publications from [the] community.' In some jurisdictions, officials obtained informal recommendations from interested organizations, while other communities established advisory committees or 'literature commissions' to identify suspect works." *See, e.g.*, Robert Corn-Revere, THE MIND OF THE CENSOR AND THE EYE OF THE BEHOLDER: THE FIRST AMENDMENT AND THE CENSOR'S DILEMMA 103 (Cambridge Univ. Press 2021).

Such was the case in Rhode Island, which established a Commission to Encourage Morality in Youth. The Commission lacked direct regulatory authority but could advise booksellers whether their wares "contain[ed] obscene, indecent or impure language, or manifestly tend[ed] to the corruption of the youth." *Bantam Books,* 372 U.S. at 59. Booksellers were free to ignore the "advice," but the Commission could recommend prosecution under state obscenity laws. And local police would pay follow-up visits to bookstores to see if they were selling any of the books on the Commission's list. *Id.* at 61–63.

Although the Court acknowledged no books had been "seized or banned by the State, and that no one has been prosecuted for their possession or sale," it nevertheless held Rhode Island's scheme was "a form of effective state regulation super-imposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary." *Id.* at 67, 69. The Commission lacked any enforcement authority and could only employ "informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" yet succeeded in its aim of suppressing publications it deemed "objectionable." *Id.* at 67. This, in turn, subjected "the distribution of publications to a system of prior administrative restraints[.]" *Id.* at 70.

Paradoxically, it is the *absence* of direct legal sanctions that makes informal censorship schemes a *worse* violation of the First Amendment. Because freedom of speech is vulnerable to "gravely damaging yet barely visible encroachments," this Court developed a body of law over the past century that has required the line between protected and unprotected

speech be "finely drawn" and subject to "the most rigorous procedural safeguards." *Id.* at 66.

But informal actions to suppress speech subvert the rule of law. Where the state acts using threats and intimidation, it may "obviat[e] the need to employ criminal sanctions," but it also "eliminate[s] the safeguards of the criminal process." *Id.* at 69–70. There are "no safeguards whatever against the suppression of nonobscene, and therefore, constitutionally protected, matter." *Id.* at 70. Such actions lack precise definitions of the speech to be restricted—or, in many cases, any definitions—which in the case of Rhode Island, left distributors "to speculate whether the Commission considers his publication obscene or simply harmful to juvenile morality." *Id.* at 71. And there was no provision "for judicial superintendence before notices issue or even for judicial review of the Commission's determinations of objectionableness." *Id.* Consequently, this Court found the "capacity for suppression of constitutionally protected publications" by informal pressures "is far in excess of that of the typical licensing scheme held constitutionally invalid[.]" *Id.*

And yet the situation is even worse than the *Bantam Books* Court may have realized. Unlike the Rhode Island Commission to Encourage Morality in Youth, which was created to exert *public* pressure on booksellers, in many cases the "[g]overnment frequently operates in private—behind closed doors, where countervailing forces and pressures are excluded." Bambauer, *supra*, at 103–04. That is the situation in *Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023), which is also being considered this Term. *Cert.*

granted sub nom, *Murthy v. Missouri*, 144 S. Ct. 7 (2023). Such backstage management "is inherently less open than formal rulemaking through legislation, adjudication, or administrative procedure," and for that reason often evades judicial review. Bambauer, *supra*, at 97–98, 103–04.

Accordingly, it is vital for this Court to reaffirm the principles set forth in *Bantam Books* but also to clearly articulate standards for drawing "the distinction between attempts to convince and attempts to coerce." *Dart*, 807 F.3d at 230 (quoting *Okwedy,* 333 F.3d at 344. Doing so is needed not just to preserve the First Amendment, but to set clear boundaries for government officials. *Bantam Books*, 372 U.S. at 75 (Clark, J., concurring) ("The Court in condemning the Commission's practice owes Rhode Island the duty of articulating the standards which must be met[.]"). Until now, however, the Court has not taken the opportunity to shed more light in this area.

C. This Court Must Articulate Clear Strategic Protections Against Informal Censorship.

Direct protections for free speech mean little if this Court does not remain vigilant against end-runs around the First Amendment. It must affirm that "acts and practices . . . performed under color of state law" that "directly and designedly" silence or impair speech violate the First Amendment. *Bantam Books*, 372 U.S. at 68. It matters not if they come as "[t]hreats of prosecution or of license revocation, or listings or notifications of supposedly" unlawful speech—all are unconstitutional. *Id.* at 67 n.8.

1. While *Bantam Books* established the guiding principles, this Court has not elaborated on them since, *see* Part II.B., *supra*, leaving lower courts to add flesh to the bone.[27] The Second Circuit, for example, which has had the most opportunities in this area, *see supra* note 27; *see also infra*, held *Bantam Books* forbids "comments of a government official . . . reasonably interpreted" as "intimating [] some form of punishment or adverse regulatory action will follow the failure to accede the official's request." *Brezenoff*, 707 F.2d at 39. The Ninth Circuit added that it does not matter that an informal censorship target might have independently taken the action a state actor seeks, coercion arises "[s]imply by commanding a particular result." *Carlin Comm'cns*, 827 F.2d at 1295 (quotation marks omitted).

The Seventh Circuit further elaborated that any risk assessment of adverse government action must consider whether a communication is coercion, *even if* that action would come not from the specific official making a threat "but [from] other enforcement agencies that he urges" on. *Dart*, 807 F.3d at 235. It also held "such a threat is actionable . . . even if it turns out to be empty—the victim ignores it, and the threatener folds his tent." *Id.* at 231; *accord Warren*, 66 F.4th at 1210 ("We do not require an intermediary to admit that it bowed to government pressure . . . to state a First Amendment claim."). And it is now more

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[27] *See*, *e.g.*, *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983); *Carlin Comm'cns, Inc. v. Mountain States Tel. & Tel.*, 827 F.2d 1291 (9th Cir. 1987); *Okwedy*, 333 F.3d at 339); *Zieper v. Metzinger*, 474 F.3d 60 (2d Cir. 2007); *Dart*, 807 F.3d at 229; *Vullo*, 49 F.4th at 700; *Kennedy v. Warren*, 66 F.4th 1199 (9th Cir. 2023); *Biden*, 83 F.4th at 350.

explicit that "an official does not need to say 'or else' if a threat is clear from the context." *Warren*, 66 F.4th at 1211-12 (citing *Dart*, 807 F.3d at 234).

Lower court decisions have also set forth indicia they use to identify unconstitutional informal censorship, including:

- whether state actors communicate primarily in their official capacity, *Rattner v. Netburn*, 930 F.2d 204, 205 (2d Cir. 1991); *Okwedy*, 333 F.3d at 341, 344; *Dart*, 807 F.3d at 231, 236;

- whether they invoke the target's "legal duty" or "obligations," cite specific laws to which it may be subject, or hint at the target's "potential susceptibility" to prosecution or "potential liability," *Dart*, 807 F.3d at 232, 236–37; *Okwedy*, 333 F.3d at 342–43;

- whether they imply the target will face economic or reputational harm, *id.*; *Dart*, 807 F.3d at 236; and

- whether the government actor makes or requires repeated or ongoing contact, demands a contact point for future interaction, or suggests no foreseeable endpoint to the pressure, *Zieper*, 474 F.3d at 67; *Dart*, 807 F.3d at 232, 236.

2. Drawing on these cases' common threads, this Court should adopt a more structured test to identify informal censorship to reinforce *Bantam Books*' command that "freedoms of expression must be ringed about with adequate bulwarks." 372 U.S. at 66. *Amici* submit that that standard should be the four-factor

test the Second Circuit misapplied in this case, App.25, as also adopted by the Ninth and Fifth Circuits with input from the lessons in *Dart*. *See Missouri v. Biden*, 83 F.4th at 378, 380–86; *Warren*, 66 F.4th at 1207, 1210–11; *but see also id.* at 1209 (distinguishing *Dart* from case at bar). The Court should, specifically, embrace the test as articulated in another case before it this Term, *Murthy v. Missouri*, No. 23-411 (on review of *Biden*, 83 F.4th at 380).

The test has much to commend it. It "starts with the premise that a government message is coercive . . . if it can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow [] failure to accede to the official's request," and employs four non-exclusive factors, none of which is independently dispositive, "namely (1) the speaker's 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 adverse consequences." *Biden*, 83 F.4th at 378 (quoting *Vullo*, 49 F.4th at 715) (internal quotation marks omitted).

The Fifth Circuit elaborated on the test with guidance on the various factors, which this Court should likewise adopt. That includes the insight that, in determining whether a state actor's speech is perceivable as a threat backed by regulatory authority, "the sum" of it "is more than just power." *Id.* Because, while "lack of power is certainly relevant" and "influences how [to] read" an official's message, the "lack of direct authority is not entirely dispositive." *Id.* at 379 (quoting *Warren*, 66 F.4th at 1209–10) (internal quotation marks omitted). Rather, the power of a government actor engaged in informal

censorship "need not be clearly defined or readily apparent, so long as it can be reasonably said that there is *some* tangible power lurking in the background." *Id.* (emphasis in original). Put bluntly, is the government actor in a position to make noncompliance hurt?

It is also "not required that the recipient bow to government pressure . . . if there is some indication the message was understood as a threat." *Id.* at 380 (quoting *Warren*, 66 F.4th at 1210–11). And as to adverse consequences, the court reinforces that an "official does not need to say 'or else,'" but merely "some message—even if unspoken—that can be reasonably construed as intimating a threat." *Id.* at 380–81 (quoting *Warren*, 66 F.3d at 1211–12) (internal quotation marks omitted).

3. Upon adopting the four-factor test and the associated guidance from lower courts, the Court should apply it to reverse the decision below. For although the test derives primarily from Second Circuit jurisprudence under *Bantam Books*, *see* App.25, the panel erred in its application here.[28]

The court acknowledged Vullo's regulatory authority over the insurers with whom she communicated, App.29, that the "'context' here was an investigation," App.31, and that she was "carrying out her regulatory responsibilities." App.32–33. And it assumed "some may have perceived [her industry-

[28] Unlike the Fifth and Ninth Circuits, the Second Circuit has never factored *Dart* into its analyses under *Bantam Books*, and in fact has never cited *Dart* at all—including in its most recently issued decision on review. This may help explain its misapplication of the test.

directed] remarks as threatening." App.29.[29] Yet it somehow concluded she "did not coerce Lloyd's (or the other entities in question) into severing ties with the NRA," and that the consent decrees simply "explained the violations of the law," and "explicitly permitted . . . business with the NRA, assuming . . . programs did not violate New York law," App.32.[30] So, while at least half of the four factors favored the NRA, and the court admitted parts of the analysis "present a close[] call," App.31, it barred NRA from even surviving the pleading stage. App.33–34. That outcome ignores this Court's admonition that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 (2007). Dismissing the First Amendment claim on such mixed grounds fails to keep "[t]he 'starch' in our constitutional standards," *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004), that proper application of any test evolved from *Bantam Books*

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[29] The court treated the guidance letters separately from Vullo's other activity, App.26–34, but it's unclear why. The letters went out "while the investigation" of NRA-endorsed insurance programs "was underway," App.7, 9, to all Department-regulated insurance entities, App.9-10, presumably including those who later entered the consent decrees. App.11. Separating those efforts disregards binding precedent that state actors should "make sure that the totality of their actions do not convey a threat." *Zieper*, 474 F.3d at 70–71.

[30] And even that seems inaccurate. While the consent decrees allowed the companies to serve NRA as an insured, they forbid not just underwriting programs that violate state law, but also "***any*** *agreement or program with the NRA* . . . in in ***any*** affinity-type insurance program involving ***any*** *line of insurance* coverage." App.11 n.8 (emphases added).

should yield. It is also at odds with the need noted at the outset for "strategic protection" against informal censorship.

To ensure that arguably coercive efforts by state actors do not unduly chill protected speech, courts must give the benefit of the doubt not to government officials, but to the speakers to whom they direct their potentially censorious remarks. As the panel failed to do so here, this Court must reverse the decision below.

CONCLUSION

It has been 60 years since the Court articulated the principles limiting informal censorship in *Bantam Books*. Yet government actors at all levels have only grown more creative in their efforts to evade First Amendment strictures, suggesting "[a]dministrative fiat is as dangerous today as it was then"—if not more so. *Bantam Books*, 372 U.S. at 74 (Douglas, J., concurring). To protect the rule of law and to preserve this Court's strong First Amendment jurisprudence, it should take this opportunity to flesh out the standards limiting jawboning.

January 16, 2024

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No. 23-411

IN THE

Supreme Court of the United States

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

Petitioners,

v.

MISSOURI, *et al.*,

Respondents.

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

BRIEF 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 CURIAE*[1]

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 thought—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, e.g.*, Brief of FIRE as *Amicus Curiae* in Support of Petitioners in No. 22-555 and Respondents in No. 22-277, *NetChoice v. Paxton*, Nos. 22-555 & 22-277 (2023); Brief of FIRE as *Amicus Curiae* in Support of Petitioner and Reversal, *Counterman v. Colorado*, 600 U.S. 66 (2023).

In lawsuits across the United States, FIRE seeks to vindicate First Amendment rights without regard to the speakers' political views. These cases include matters involving state attempts to regulate the internet and social media platforms, both formally

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel contributed money intended to fund preparing or submitting this brief.

and informally. *See, e.g.*, *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 Petitioner, *Nat'l Rifle Ass'n of Am. v. Vullo*, No. 22-842 (2024); Brief of FIRE as *Amicus Curiae* in Support of Petitioner, *Lindke v. Freed*, No. 22-611 (2023); Brief of FIRE as *Amicus Curiae* in Support of Respondent, *O'Connor-Ratcliffe v. Garnier*, No. 22-324 (2023).

The **National Coalition against Censorship (NCAC)**, founded in 1974, is an alliance of more than 50 national non-profit educational, professional, labor, artistic, religious, and civil liberties groups united in their commitment to freedom of expression. NCAC, through direct advocacy and education, has long opposed government attempts to censor or criminalize protected expression. The positions advocated in this brief do not necessarily reflect the views of NCAC's member organizations.

The **First Amendment Lawyers Association** is a bar association comprised of over 150 attorneys whose practices emphasize defense of Freedom of Speech and of the Press and advocate against all forms of government censorship. Since its founding, its members have been involved in many of the nation's landmark free expression cases and have frequently addressed First Amendment issues *amicus curiae*.

INTRODUCTION

It's not always easy being a First Amendment 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, 43–44 (1977), to religious fanatics, *Snyder v. Phelps*, 562 U.S. 443, 454 (2011), and to speech of no apparent "value," *United States v. Stevens*, 559 U.S. 460, 477–80 (2010). Defending them can be uncomfortable, but as Judge King wrote in upholding the First Amendment rights of the Westboro Baptist Church, "judges defending the Constitution 'must sometimes share [their] foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply. It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people.'" *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009) (citation omitted). The glory of the First Amendment, and the essential condition for it to endure, is its political and ideological neutrality.

Other times—as in this case—being a First Amendment advocate can be a source of consternation because it requires you to share your foxhole with political opportunists. They see free speech principles as nothing more than tools they can cynically exploit for temporary partisan advantage and their head-spinning inconsistencies mock notions of neutrality.

The Attorneys General (AGs) of Missouri and Louisiana claim to be "lead[ing] the way in the fight to defend our most fundamental freedoms"[2] yet they simultaneously engage in various kinds of censorial pressure tactics of their own that are not unlike the ones they disingenuously condemn here. And while the government plaintiffs in this case describe their political opposition's use of *informal* measures to steer the public debate as "arguably . . . the most massive attack against free speech in United States' history,"[3] they are at the same time asking this Court in the *NetChoice* cases to approve *formal* state control of online platforms' moderation decisions, saying it presents *no First Amendment question at all*.[4] Unbelievable.

But being a hypocrite doesn't necessarily make a person wrong. In this case, plaintiffs successfully

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[2] *See e.g.*, Press Release, Att'y Gen. Andrew Bailey Obtains Court Order Blocking the Biden Administration from Violating First Amendment, https://ago.mo.gov/missouri-attorney-general-andrew-bailey-obtains-court-order-blocking-the-biden-administration-from-violating-first-amendment/ (Bailey Press Release).

[3] Brief of Respondents, *Murthy v. Missouri*, No. 23-411, at 2 (Resp. Br.) (citation omitted).

[4] *See generally* Brief of Missouri, Ohio, 17 other States, and the Arizona Legislature in Support of Texas and Florida in *Moody v. NetChoice*, No. 22-277 and *NetChoice v. Paxton*, No. 22-555 at 3 (2024) ("freedom of speech is a freedom States were created to secure") (Missouri *NetChoice* Br.).

documented a coercive pattern of threats and excessive entanglements involving various executive branch officials and internet companies that coopted the latter's private editorial decisions in violation of the First Amendment. The Fifth Circuit correctly held that these informal actions directed toward suppressing speech were unconstitutional and it set forth a workable test for determining when pressure by government actors crosses the line. *Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023). It should be upheld.

Far from being a reason to question whether to support the Respondents in this case, their inconsistent behavior and situational approach to First Amendment interpretation stand as monuments for why this Court must use this case to reinforce principles that will bind *all* government actors, including the state AGs who brought this case.

Beyond that holding, the issues raised here, and the actions of the government plaintiffs, have significant implications for this Term's other important cases that present related or interconnected issues. The Court has agreed to address jawboning as an informal pressure tactic government actors use to evade constitutional scrutiny, *Nat'l Rifle Ass'n of Am. v. Vullo*, No. 22-842; the extent to which state governments may regulate social media platforms' private moderation decisions,

NetChoice v. Paxton, and *NetChoice v. Moody*, Nos. 22-555 & 22-277 (2023); and when public officials' use of personal social media accounts for government business becomes state action subject to constitutional rules, *Lindke v. Freed* and *O'Connor-Ratcliffe v. Garnier*, Nos. 22-611 and 22-324. The AGs' actions and their self-serving arguments reinforce why this Court should share the Framers' distrust of 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

[5] In 2020, for example, former President Trump—angered by Twitter's decision to append fact-checks to his posts—promised "big action" against the company and other social media platforms, threatening to "strongly regulate" or "close them down." Cristiano Lima and Meridith McGraw, *Trump to Sign Executive Order on Social Media amid Twitter Furor*, POLITICO (May 27, 2020), https://www.politico.com/news/2020/05/27/trump-executive-order-social-media-twitter-285891; *see also Pen Am. Ctr., Inc. v. Trump*, 448 F. Supp. 3d 309 (S.D.N.Y. 2020).

administration, *Biden*, 83 F.4th at 370, including threats to strip away internet platforms' immunity shield provided by Section 230 of the Communication Decency Act, 47 U.S.C. § 230.[6]

The point is, the First Amendment problems addressed in this case are significant regardless of who is attempting to pull the levers behind the scenes. Although much attention has focused on the power of "Big Tech," it is a bad idea for government officials to huddle in back rooms with corporate honchos to decide which social media posts are "truthful" or "good" while insisting, Wizard of Oz-style, "pay no attention to that man behind the curtain."[7] No matter how concerning it may be when private decisionmakers employ opaque or unwise moderation policies, allowing government actors to surreptitiously exercise control is far worse.

The state AGs who brought this case proclaim the "Government must keep its hands off the editorial decisions of Internet service providers" and "may not tell Internet service providers how to exercise their

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[6] After publicly advocating Section 230's repeal, former President Trump issued an executive order demanding the National Telecommunications and Information Administration file a petition with the Federal Communications Commission to "expeditiously propose regulations to clarify" the statute. Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020), *repealed by* Exec. Order No. 14,029, 86 Fed. Reg. 27,025 (May 14, 2021).

[7] The Wizard of Oz (Metro-Goldwyn-Mayer 1939).

editorial discretion about what content to carry or favor."[8] Their position is correct, even if they advocate *precisely the opposite* in this Term's *NetChoice* cases. And they oppose the Biden Administration's jawboning tactics at issue here while *simultaneously* making threats of their own to suppress the speech of advocacy groups and other businesses. *See infra* Section II (citing examples). In other words: *Jawboning for me but not for thee!*

Such hypocrisy does not detract from the AG's arguments in this case, but unwittingly supports them. The First Amendment must prohibit informal behind-the-scenes censorship schemes regardless of whether they are concocted by a Biden Administration, a Trump Administration, or by the AGs themselves.

The Fifth Circuit correctly recognized that informal censorship can operate either by coercion or "significant encouragement" when government gets entangled with private decisionmaking. *Biden*, 83 F.4th at 375. It adopted and refined a test articulated by the Second Circuit in *National Rifle Association of America v. Vullo* (also before the Court this Term) which considers the government speaker's word choice and tone, whether the speech was perceived as

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[8] Resp. Br. at 32 (quoting *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 435 (D.C. Cir. 2017) (Kavanaugh., J., dissenting from denial of rehearing *en banc*)).

a threat, the existence of regulatory authority, and whether the speech refers to adverse consequences. *Id.* at 378–81. For "significant encouragement," the Fifth Circuit applied this Court's reasoning from *Blum v. Yaretsky* to hold government actors may be held liable for censorship decisions of private parties where the officials' overt or covert actions intertwine with those decisions. *Id.* at 380. It then found that the record in this case satisfied both tests. *Id.* at 381–82.

The Fifth Circuit fashioned an appropriately tailored injunction as a remedy by significantly narrowing and clarifying the order that the district court had issued. *Id.* at 395–97. The court confined the injunction to government actors and limited its scope to the conduct that violates the First Amendment according to *Blum* and *Bantam Books v. Sullivan* (as refined by *Vullo* and other circuit court cases). *Id.* This Court should uphold the remedy as both proportionate and justified.

Getting the correct answer in this case is extraordinarily important given the interconnected mosaic of First Amendment issues the Court is considering this Term. A common thread running through these cases is whether the government actors may evade constitutional review by strategically claiming they are doing something other than speech regulation. The Court should not let them get away with it.

ARGUMENT

I. This Court Should Affirm the Fifth Circuit's 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 intruding into private platforms' moderation decisions. However, the government defendants (Petitioners here) reframed the issue presented as whether "the government's challenged conduct transformed private social-media companies' content-moderation decisions into state action and violated respondents' First Amendment rights." Pet'rs' Br. at I.

That misstates the issue. This is a case where federal officials used both carrot and stick tactics to achieve indirectly what the Constitution prohibits directly: governmental control over social media moderation decisions. The Petitioners—all governmental actors—were the defendants below, not the social media companies, and the Fifth Circuit had no occasion to address the question as the Petitioners have reimagined it. Based on the facts in the record and the decision below on review, the actual question for this Court is whether *government actors* violate the First Amendment when they engage in coercive

behavior or excessive cooperation to coopt private platforms' moderation decisions.[9] And on that issue 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 intimidation tactics that create a "system of informal censorship." And second, it applied a line of cases beginning with *Blum v. Yaretsky*, 457 U.S. 991, 1003–04 (1982), that explains when government actors may be "liable for the actions of private parties" where there is a "close nexus" that provided "such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." The Fifth Circuit's analysis of both forms of informal censorship has much to commend it and this Court should adopt it.

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[9] Given that this question was the sole grounds for decision below, and thus the basis for the scope of the preliminary injunction Petitioners challenge, it is, at the very least, a "subsidiary question fairly included" in the second question presented. Sup. Ct. R. 14.1(a); *accord Yee v. Escondido*, 503 U.S. 519, 535 (1992). FIRE's *amicus* brief addresses questions two and three granted for review.

1. Bullying and Intimidation.

The government generally is "entitled to say what it wants to say—but only within limits." *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 "may be more subtle." *Biden*, 83 F.4th at 377.

To help identify when government speech crosses the line into impermissible coercion, the Fifth Circuit adopted—with some refinements—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 Seventh Circuit's decision in *Dart*, 807 F.3d 229. Biden, 83 F. 4th at 385–86, 397. The Second Circuit's articulation of this test considers "(1) the speaker's 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 adverse consequences." *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 other circuits' approaches to applying *Bantam Books*. Drawing on the record in this case, the court observed that "'an interaction will tend to be more threatening if the official refuses to take 'no' for an answer and pesters the recipient until it succumbs,'" because the analysis considers "the overall 'tenor' of the parties' relationship." *Biden*, 83 F.4th at 381 (quoting *Warren*, 66 F.4th at 1209) (cleaned up). In determining whether a state actor's speech was perceived as a threat backed by regulatory authority, the court noted that "the sum" of it "is more than just power," *id.* at 379, because the "'lack of direct authority' is not entirely dispositive" in determining whether the speech was threatening, *id.* (quoting *Warren*, 66 F.4th at 1210).

While "a message is more likely to be coercive if there is *some* indication that the [private] party's

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[10] *Amici* have endorsed the four-factor test originally set forth by the Second Circuit in *Vullo* as refined by the other circuit decisions as a way to reaffirm and make more precise the *Bantam Books* principles. *See* Brief of *Amici Curiae* Foundation for Individual Rights and Expression, National Coalition Against Censorship, The Rutherford Institute and First Amendment Lawyers Association in Support of Petitioners and Reversal at 28–34, *Nat'l Rifle Ass'n of Am. v. Vullo*, No. 22-842 (2024) (FIRE *Vullo* Br.).

decision resulted from the threat," *id.* at 381, it is not required in every case—a threat can be actionable "even if it turns out to be empty—the victim ignores it, and the threatener folds his tent." *Dart*, 807 F.3d at 231. Recognizing the subtlety of the interactions, the court reinforced that an "official does not need to say 'or else,'" but merely "some message—even if unspoken—that can be reasonably construed as intimating a threat." *Biden*, 83 F.4th at 379–80 (quoting, in part, *Warren*, 66 F.3d at 1211–12) (internal quotation marks omitted).[11]

2. "Significant Encouragement" of Censorship.

The Fifth Circuit found that "significant encouragement" requires "that the government must exercise some active, meaningful control over the private party's decision." *Biden*, 83 F.4th at 374. That requires "*some* exercise of *active* (not passive), *meaningful* (impactful enough to render them responsible) *control* on the part of the government over the private party's challenged decision." *Id.* at 375. In practice, this means significant encouragement—and thus, a close nexus—is demonstrated by "(1) entanglement in a [private]

[11] It is worth noting that none of these factors—and nothing in the *Bantam Books* line of cases—has anything to do with the question of when a private party "becomes" a state actor, as Petitioners' reframed question suggests. Rather, the four factors help separate attempts to convince from attempts to coerce.

party's independent decision-making or (2) direct involvement in carrying out the decision itself." *Id.*

This analysis reveals the essential flaw with Petitioners' formulation of the question presented. The question is not whether a private party effectively "becomes" a state actor when coopted by the State; it is whether the state actors have a sufficiently "close nexus" to private decisions so as to become "*responsible*" for them, 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 to make it 'state' action for purposes of the Fourteenth Amendment." *Id.* 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, the Fifth Circuit found that various executive agencies had become so involved in day-to-day moderation decisions of social media companies that they provided "significant encouragement" to censorship. *See, e.g.*, *Biden*, 83 F.4th at 390. When

that didn't work, they got what they wanted through threats and intimidation. *See, e.g.*, *id.* at 381–82. The Fifth Circuit held that the levels of encouragement and coercion revealed in the record violate the First Amendment. *Id.* at 392. This Court should affirm on the same grounds.

Coercion. Various officials from the White House and the FBI took coercive actions that satisfy the four-factor test set forth by the Fifth Circuit. With respect to word choice and tone, White House officials issued "urgent, uncompromising demands to moderate content" and used "foreboding, inflammatory, and hyper-critical phraseology" when social media companies failed to moderate content in the way they requested or as quickly as officials desired. *Biden*, 83 F.4th at 382–83. Demands to remove specific posts "ASAP," the use of words and phrases like "you are hiding the ball," and officials warning they are "gravely concerned," *id.* at 383, made clear the threats to social media companies were "phrased virtually as orders." *Id.* (quoting *Bantam Books*, 372 U.S. at 68). And officials repeatedly "refuse[d] to take 'no' for an answer and pester[ed]" the social media companies until they "succumb[ed]." *Warren*, 66 F.4th at 1209. More ominously, they "threatened—both expressly and implicitly—to retaliate against inaction." *Biden*, 83 F.4th at 382.

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 platform expressly agreed to "adjust [its] policies" to reflect the changes sought by officials. *Id.* at 384. And several social media platforms "t[ook] down content, including posts and accounts that originated from the United States, in direct compliance with" a request from the FBI that they delete "misinformation" on the eve of the 2022 congressional election. *Id.* at 389. When the White House and FBI "requested" the 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.

As "executive official[s] with unilateral power," their threatening missives to platforms were "inherently coercive." *Warren*, 66 F.4th at 1210.

Likewise, FBI officials are often the first line of federal enforcement when it comes to criminal investigations, and the FBI has frequently investigated "disinformation regarding the results of . . . elections" in the years leading up to the 2022 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 "lead law enforcement, investigatory, and domestic security agency for the executive branch," the FBI clearly "wielded *some* authority over the platforms." *Biden*, 83 F.4th at 388. And "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." *Bantam Books*, 372 U.S. at 68.

Finally, both the White House and the FBI threatened "adverse consequences" to social media platforms if they failed to comply. *Warren*, 66 F.4th at 1211. When social media platforms' content moderation was too slow for the White House's liking, officials publicly accused them of "killing people," and privately threatened them with antitrust enforcement, repeal of Section 230 immunities, and other "fundamental reforms" to make sure the platforms were "held accountable." *Biden*, 83 F.4th at 382, 385, 364. Beyond these express threats, both White House and FBI officials' statements contained

implied threatened consequences because those officials are backed by the "awesome power" wielded by the federal executive branch. *Id.* at 385.

For example, White House officials frequently alluded to the President's potential involvement should social media platforms not moderate content to their satisfaction. *Id.* at 386 (*e.g.*, commenting their "concern[s] [were] shared at the highest (and I mean highest) levels of the [White House]"). And as a federal enforcement agency that conducts various internet investigations, the FBI "has tools at its disposal to force a platform to take down content." *Id*. at 388–89.

Viewing these facts in context, White House and FBI officials "deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in [their] aim." *Bantam Books*, 372 U.S. at 67. The Fifth Circuit was correct: Under the *Vullo* test and under *Bantam Books*, that is unlawful coercion.[12]

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[12] Information continues to emerge about how widespread these efforts were across a range of media. Documents released as part of a congressional investigation suggest the Administration also pressured online bookseller Amazon.com to suppress books skeptical of COVID-19 vaccines. *See* Jacob Sullum, *Was Amazon 'Free to Ignore' White House Demands that it Suppress Anti-Vaccine Books?*, REASON, Feb. 7, 2024, https://reason.com/2024/02/07/was-amazon-free-to-ignore-white-house-demands-that-it-suppress-anti-vaccine-books/.

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) all engaged in unlawful "significant encouragement" by placing persistent pressure on platforms to change their moderation policies. Various government officials became so entangled with social media platform moderation policies that they were able to effectively rewrite the platforms' policies from the inside.

One platform informed the Surgeon General it was "implementing a set of jointly proposed policy changes from the White House and the Surgeon General" after being "called on . . . to address" the issue several times. *Biden*, 83 F.4th at 387. Another platform informed the White House it was "making a number of changes" to its misinformation moderation policies specifically because those policies are "a particular concern" for the administration. *Id.*

The FBI successfully pressured several platforms to alter their moderation policies "to capture 'hack-and-leak' content after the FBI asked them to do so (and followed up on that request)." *Id.* at 389. The CDC embedded themselves so deeply within social media platforms' vaccine moderation teams that at one point, one platform even "asked the CDC to double check and proofread" its vaccine misinformation

labels. *Id.* at 390. And in addition to working closely with the FBI to "push the platforms to change their moderation policies to cover 'hack-and-leak' content," CISA also pushed platforms "to adopt more restrictive policies on censoring election-related speech." *Id.* at 391.

These examples go far beyond mere suggestion or detached advice, offered at arm's length. The degree of "entanglement" with platforms' "decision-making" resulted in various officials practically rewriting the platform's policies. *Id.* at 375, 387. In some cases, government officials had "direct involvement in carrying out" the policy changes they demanded. *Id.* at 375. The degree of coercion and entanglement was such that these officials became "responsible" for the social media platforms' private editorial decisions. *Blum*, 457 U.S. at 1004. That satisfies *Blum*'s "close nexus" test, and it fails the First Amendment.

C. The Fifth Circuit Properly Tailored Injunctive Relief.

The Fifth Circuit issued an appropriately tailored injunction to curb the government's unlawful coercion and deep entanglement in the platforms' operations. Citing *Dart*, 807 F.3d at 239, the court modified the district court's original injunction "to target the coercive government behavior with sufficient clarity to provide the officials notice of what activities are proscribed." *Biden*, 83 F.4th 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 394–99.[13]

The new, more specific terms of that prohibition explain that those officials subject to it may not "coerce or significantly encourage social-media companies" to alter their content moderation policies and provides specific examples. *Id.* at 397.

The Fifth Circuit's injunction is thus expressly limited to the specific conduct this Court held violates 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 light of the "broad pressure campaign" undertaken by

[13] For example, the court vacated prohibitions on engaging in "any action 'for the purpose of urging, encouraging, pressuring, or inducing' content moderation," on "'following up with social-media companies' about content-moderation," on partnering with "private, third-party actors that are not parties" and "may be entitled to their own First Amendment protections," because those prohibitions were vague and captured significant legal speech that did not "cross[] the line into coercion or *significant* encouragement." *Biden*, 83 F.4th at 395–96. The court further tailored a prohibition on "threatening, pressuring, or coercing social-media companies in any manner to [moderate speech]." *Id.* at 396.

federal officials in this case to "suppress[] speakers, viewpoints, and content disfavored by the government," *Biden*, 83 F.4th at 398, this injunction is both proportionate and justified.

II. This Case is Interrelated With Other First Amendment Matters Before the Court This Term.

The major First Amendment cases before the Court this Term not only raise issues in common with this case, but the parties in this case, by their actions and arguments, underscore how this and the other cases should be decided.

A. Government Coercion in Violation of the First Amendment: *NRA v. Vullo.*

Vullo presents this Court with essentially the same question presented here: When does government speech violate the First Amendment because of threats to coerce private parties to limit their speech? This case adds the element of excessive cooperation that may have the same effect as bullying and provides a more specific application of the general principle in the context of social media platforms.

FIRE's *amicus* brief in *Vullo* urged the Court to reaffirm the principle established in *Bantam Books,* that the government generally is "entitled to say what it wants to say—but only within limits." *Dart*, 807

F.3d at 235. It explained that informal censorship actions are nothing more than tactics by which state actors seek to bypass First Amendment scrutiny and evade the rule of law. *See* FIRE *Vullo* Br. at 5–6, 24–28. Such unconstitutional schemes have been used at all levels of government by both political parties. *Id.* at 10–21 (citing examples).

Particularly relevant here are the actions of the government plaintiffs in this case—you know, the people who say the Biden Administration's informal pressure tactics are "arguably . . . the most massive attack against free speech in United States' history." Resp. Br. at 2. Ironically, these same officials actively and repeatedly issue threats and use their official authority to suppress speech they oppose.

And they are oblivious to the irony. *The day after* declaring victory against bully-pulpit censorship in the district court below, Attorney General Bailey signed a letter along with six other state AGs threatening Target Corporation for the sale of LBGTQ-themed merchandise as part of a "Pride" campaign, warning ominously that doing so might violate state obscenity laws.[14] The merchandise that

[14] Letter from Atty's Gen. to Brian C. Cornell, Chairman and CEO, Target Corp. (July 5, 2023), https://content.govdelivery.com/attachments/INAG/2023/07/06/file_attachments/2546257/Target%20Letter%20Final.pdf (Letter from Atty's Gen.); *see* Lucy Kafanov, *7 Republican AGs Write to Target, Say Pride Month Campaigns Could Violate Their State's Child*

raised their ire included such things as t-shirts labeled "Girls Gays Theys" and what the letter described as "anti-Christian designs," such as one with the phrase "Satan Respects Pronouns." The group further suggested the retail chain's "directors and officers may be negligent in undertaking the 'Pride' campaign, which negatively affected Target's stock price."

Say what you will about Target's merchandising decisions, the claim that gay or gender-themed apparel could violate any state's obscenity law would embarrass a first-year law student. The chief law enforcement officers of the seven states at least acknowledged deep in a footnote that the obscenity laws they cited "may not," in fact, "be implicated by Target's recent campaign." Letter from Atty's Gen., *supra*, n.14, at 3 n.3. But the point was not to make a coherent legal argument—it was to get Target's leadership to think long and hard about the risks the company might run by expressing messages powerful government officials didn't like.

Does any of this sound familiar? It should.

Protection Laws, CNN (July 8, 2023), https://www.cnn.com/2023/07/08/business/target-attorneys-general-pride-month/index.html.

This past December, Attorney General Bailey announced a fraud investigation into the advocacy group Media Matters because it had criticized the social media company X for allegedly placing advertisements adjacent to extremist or neo-Nazi content, thus causing a number of advertisers to withdraw from the platform.[15] Bailey was joined by Louisiana's Attorney General (the other state plaintiff in this case) in sending follow-up letters to the advertisers to alert them to Missouri's investigation and urging them to ignore the claims made by Media Matters.[16]

Although the attorneys general tried to frame their actions as a *defense* of free speech, their explanations rang hollow given their nakedly partisan objectives and coercive tactics. They described Media Matters as an organization dedicated to "correcting conservative misinformation in the U.S. Media," but with a "true purpose" of "suppressing speech with which it

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[15] Letter from Att'y Gen. Andrew Bailey to Angelo Carusone, President and CEO, Media Matters for America (Dec. 11, 2023), https://ago.mo.gov/wp-content/uploads/2023.12.11-Notice-of-Investigation-MMFA-Final.pdf.

[16] Press Release, Att'y Gen. Andrew Bailey, Att'y Gen. Bailey Directs Letter to Advertisers Amidst Media Matters Investigation, https://ago.mo.gov/attorney-general-bailey-directs-letter-to-advertisers-amidst-media-matters-investigation/. (Bailey/Landry Press Release). *See*, *e.g.*, Letter from Att'y Gen. Andrew Bailey and Louisiana Att'y Gen. Jeffrey Landry to Robert Iger, CEO, Disney (Dec. 14, 2023).

disagrees." Bailey/Landry Press Release. Bailey wrote that "the progressive mob demands immediate action" based on the Media Matters critique of X, and the resulting advertising boycotts hurt what he called "the last platform dedicated to free speech in America."[17] In short, they were simply flexing state muscle to take sides in a culture war dispute.

Whether or not Media Matters' claims about X 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 state attorneys' general have 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 . . . .") (citing *Dart*, 807 F.3d 229).

Accordingly, the AGs' claim that threatening private speakers was in the service of "free speech" fooled no one. Walter Olson, writing for the Cato Institute, observed that "the most risible bit of the

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[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/.

letter—better than satire, really—[was] Bailey['s] claims to be standing up for free speech by menacing his private target with legal punishment for *its* speech."[18] And tech writer Mike Masnick was even more blunt, calling Bailey a "hypocrite," who is "literally admitting that he's doing this investigation to protect ExTwitter." Masnick, *supra* note 17.

Comparing the Media Matters letter to the arguments the AGs are advancing in this case, he noted "it's quite incredible how Bailey's views are so different depending on the type of speech." *Id.* When a government official criticizes speech he likes, it is censorship, but "[w]hen a private entity says stuff he dislikes, he'll mobilize the vast investigatory powers of his state to intimidate and threaten them into silence." *Id*.

Advocates frequently are told they should "show not tell" the reasons a court should buy their arguments, and here the government plaintiffs have effectively done so, if perhaps inadvertently. Their actions underscore not only why this Court must limit informal censorship in *Vullo*, but also why it is imperative that the AGs prevail in this case—to

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[18] Walter Olson, *Missouri AG Investigates Private Group's Advocacy*, CATO INSTITUTE BLOG (Dec. 15, 2023), https://www.cato.org/blog/missouri-ag-investigates-private-groups-advocacy.

secure rulings that will limit government pressure tactics of all kinds—including their own.

B. State Control of Social Media Moderation Decisions: *NetChoice v. Paxton* and *NetChoice v. Moody*.

The *NetChoice* cases present the question of whether states may impose direct control over social media platforms' private moderations decisions, while this case asks whether government actors may constitutionally achieve the same ends through use of informal pressure. FIRE's *amicus* brief in these cases identified the "overriding issue" as "whether the government or private actors shall have the predominant role" in oversight of social media platforms' moderation decisions, and it urged the Court to strike down state regulation as a violation of the First Amendment. Brief of *Amicus Curiae* Foundation for Individual Rights and Expression in Support of Petitioners in No. 22-555 and Respondents in No. 22-277, *NetChoice, LLC v. Paxton*, No. 22-555, at 3, 6–9 (2023).

The same principles dictate restricting the use of informal governmental pressure in this case. The government cannot do indirectly what the Constitution prohibits directly. *Bantam Books*, 372 U.S. at 67. *See generally* FIRE *Vullo* Br. 5–6, 24–28. In this regard, Missouri's Attorney General has described the federal government's cajoling and

pressure tactics as "the biggest violation of the First Amendment in our nation's history" and called for "a wall of separation between tech and state to preserve our First Amendment right to free, fair, and open debate," *see* 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.* at 3 ("freedom of speech is a freedom States were created to secure [and] it is the duty of States to secure that freedom from private abridgment"). This argument—that regulation *is* free speech—is distinctly Orwellian. *See* George Orwell, 1984, at 7 (New York: Harcourt, Brace & Company 1949) ("War is Peace, Freedom is Slavery, Ignorance is Strength").

Missouri's view of the First Amendment echoes claims of various would-be censors from across the political spectrum through time. President Kennedy's FCC Chairman Newton Minow called network executives the real censors and described government content regulation as "the very reverse of censorship."

See Robert Corn-Revere, THE MIND OF THE CENSOR AND THE EYE OF THE BEHOLDER: THE FIRST AMENDMENT AND THE CENSOR'S DILEMMA 161–62 (Cambridge Univ. Press 2021). Dr. Frederic Wertham, the liberal anti-comic book crusader of the 1950s, angrily denied that his calls to ban comics violated the First Amendment, saying, among other things, that "true freedom is regulation." *Id.* at 121, 246. And former New York Mayor Rudy Giuliani, who unsuccessfully tried to shut down museum exhibits that offended him, proclaimed in a 1994 speech: "Freedom is about authority. Freedom is about the willingness of every single human being to cede to lawful authority a great deal of discretion about what you do." *Id.* at 9; *see also Brooklyn Inst. of Arts & Sci. v. City of New York*, 64 F. Supp. 2d 184 (E.D.N.Y 1999).

James Madison would disagree. When he introduced the resolution to adopt a bill of rights on June 8, 1789, Madison explained that for both the federal constitution and those of the states, "the great object" of a bill of rights was "to limit and qualify *the powers of government*." PENNSYLVANIA PACKET, June 16, 1789 (reporting on congressional session) (emphasis added); *see also* CONG. REGISTER, June 8, 1789, vol. 1 at 429–36 (reprinted in Neil H. Cogan, THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 53–57 (Oxford Univ. Press 1997)). Far from seeing state governments as

the guardians of individual rights, Madison said "I think there is more danger of those powers being abused by the state governments than by the government of the United States," and they should be constrained by the "general principle[] that laws are unconstitutional which infringe the rights of the community." Accordingly, he said "it is proper that every government should be disarmed of powers which trench upon . . . the equal right of conscience, freedom of the press, or trial by jury." *Id.* at 56 (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.").[19]

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[19] Missouri asserts state legislative authority is necessary to secure rights against "private abridgment" based on a natural rights theory that the right to free speech "predate[ed] government itself" and that the states were instituted to 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 Madison's remarks introducing the Bill of Rights. *See id.* (citing Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 264 (2017) (citing Madison's notes reflecting his speech in Congress)). Not only is this revisionist theory debunked by Madison's actual words (as reported in contemporary accounts), the article on which Missouri relies noted Madison's skepticism toward relying on the states to protect free speech. *See* 127 YALE L.J. at 303 n.255 ("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 speech and press freedoms differently.").

In short, the AGs' effort to reconcile their contradictory positions in this and the *NetChoice* cases is unsupportable. But it is not unprecedented. From time to time, others have attempted to justify speech regulations by advancing various destroy-the-village-in-order-to-save-it First Amendment theories that posit government regulation as the answer to keeping speech free. When that happens this Court's answer has been to brusquely shrug them off.

In *Reno v. ACLU*, 521 U.S. 844 (1997), for example, the government had defended the Communications Decency Act by arguing "the unregulated availability of 'indecent' and 'patently offensive' material" was "driving countless citizens away from the medium" and thus stifling their speech. *Id.* at 885. The Court unanimously rejected the argument as "singularly unpersuasive" because "governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it." *Id.* It concluded "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." *Id*.

The same conclusion applies in the *NetChoice* cases, just as it does here. The First Amendment was the product of the Framers' deep distrust in government even when its powers were "defined and limited." As Madison explained, a Bill of Rights was needed because "instances may occur[] in which those

limits may be exceeded." PENNSYLVANIA PACKET, June 16, 1789 (remarks of Mr. Madison). The Constitution's Framers were right to be distrustful, as Missouri and Louisiana's wildly inconsistent positions vividly illustrate. Such political opportunism trashes the First Amendment's promise of neutrality, and it underscores why the Court must limit state power.

C. Public Officials' Use of Personal Social Media Accounts to Conduct Government Affairs: *Lindke v. Freed* and *O'Connor-Ratcliffe v. Garnier*.

Two of the cases on this Term's docket raise the question of when social media platform use becomes state action. Importantly, they do not ask whether the *platforms* become state actors; they ask when *government officials* are acting under color of state law. *Lindke v. Freed*, No. 22-611 (2023); *O'Connor-Ratcliffe v. Garnier*, No. 22-324 (2023). The same is true here: The proper question focuses on constitutional limits imposed on *government actors* in their interactions with private platforms.

FIRE's *amicus* briefs in *Lindke* and *O'Connor-Ratcliffe* explained the reasons why public officials' actions should be subject to First Amendment rules when they use their social media accounts to conduct public affairs, and proposed a test to apply in such cases. Brief of FIRE as *Amicus Curiae* in Support of Petitioner at 23–26, *Lindke v. Freed*, No. 22-611

(2023) (FIRE *Lindke* Br.); Brief of FIRE as *Amicus Curiae* in Support of Respondent, *O'Connor-Ratcliffe v. Garnier* at 17–19, No. 22-234 (2023) (FIRE *Garnier* Br.). The purpose of the proposed tests in both cases was to prevent public officials using personal social media accounts to evade constitutional requirements when they conduct government business. The ultimate point is that "[p]oliticians cannot have it both ways—they cannot use private social media accounts to conduct public business and then claim their decision to cut off discussion is a matter of private choice." FIRE *Lindke* Br. at 4.

Likewise here, the government cannot claim its "unofficial" efforts to induce or coerce social media platforms lack the force of state action. While government speakers may claim to be acting only informally or without the authority of the state, it is necessary "to look through forms to the substance" to keep the government within constitutional bounds. *Bantam Books*, 372 U.S. at 67. In that regard, the Fifth Circuit's multi-part test in this case sets clear boundaries to limit unconstitutional jawboning efforts, much like the Ninth Circuit's "purposes and appearances" test in *Garnier* helps identify when public officials' use of social media is subject to constitutional rules. FIRE *Garnier* Br. at 17–19.

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.

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Respectfully Submitted,

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