

IN THE
Supreme Court of the United States

VIVEK H. MURTHY, U.S. 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* ELECTION
OFFICIALS IN SUPPORT OF NEITHER PARTY**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Reaffirming the First Amendment’s Demanding State Action Requirement is Essential for Election Officials to Assist Social Media Platforms in Creating, Curating, and Moderating Content to Protect Elections.	3
II. The First Amendment Permits Government Officials to Communicate with Social Media Companies to Aid in the Platforms’ Creation, Curation, and Moderation of Content.	16
A. A Social Media Platform’s Content Curation Decision Is Subject to the First Amendment Only If It May Be Fairly Treated as a Decision Made by the Government Itself.	17
B. Mere Communications Between Government Officials and Social Media Platforms Do Not Render the Platforms’ Decisions to be State Action Under This Court’s Established Tests.	19

C. This Court Should Take Care Not to Obstruct or Chill Essential Governmental Communication with Social Media Platforms.....	23
CONCLUSION.....	27
APPENDIX – List of <i>Amici Curiae</i>	1a

TABLE OF AUTHORITIES

	Page
Cases	
<i>American Mfrs. Mut. Ins. Co. v. Sullivan</i> , 526 U.S. 40 (1999)	18
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INTEREST OF AMICI CURIAE¹

Amici, who are identified in the appendix, are a bipartisan group of current and former election officials. Their interest in this case arises from their mission to ensure voters have accurate, up-to-date information about elections. False information about elections has proliferated on social media in recent years, leading to voter confusion and sowing mistrust in the public about the integrity of the nation's elections. America's foreign adversaries continue to seek to interfere in elections to undermine American democracy, and the plague of voter deception grows ever more dangerous with rapid advances in generative artificial intelligence technology. Given their experience and expertise, election officials play an important role in dispelling public confusion about elections and election administration.

Election officials like *amici* must remain free to communicate with social media platforms to share accurate information about when, how, and where to vote; to correct false election information; and to address violent threats and intimidation directed at their own ranks. Likewise, election officials and government agencies should remain free to respond when social media companies seek input and assistance in promoting factual content about voting and election procedures and developing and implementing content-moderation policies designed to curb the spread of false information and other dangerous content on their platforms. *Amici* submit this brief to assist the Court in

¹ No counsel for any party has authored this brief in whole or in part, and no person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

crafting First Amendment doctrine that takes into account the interests of election officials and the public.

SUMMARY OF ARGUMENT

I. Election officials and the government agencies that support the administration and integrity of elections are repositories of accurate, critically important information about elections in the United States. For the same reason, they are uniquely well-situated to identify and help correct false and misleading posts about elections and election administrators that proliferate across social media networks. That flood of harmful content includes inaccurate information and outright lies about voting procedures and other aspects of election administration, both of which risk disenfranchising voters; intentional misinformation campaigns by foreign adversaries; and violent threats against election workers and officials paired with the public release of their personal information like home addresses.

Social media platforms rely on communicating with election officials to supply accurate information for the platforms' voluntary public education efforts, to correct false and misleading content, and to identify threatening content that violates the platforms' moderation policies. The integrity of American elections depends on those open lines of communication to ensure that platforms provide accurate information to the voting public.

II. The First Amendment permits private social media companies to decide what content to host on their platforms. In making those decisions, platforms are free to consult with government officials and, if they choose, to take those officials' suggestions. Such communications by government officials—even emphatic

ones—are an exercise of the government’s prerogative to voice its own views and are consistent with the First Amendment as long as the ultimate decision regarding content rests with the platforms themselves.

The Fifth Circuit’s expansive state action test incorrectly classifies benign, non-coercive governmental communication as “entanglement” that renders platforms’ content moderation decisions to be attributable to the government itself. This Court should preserve its robust state action requirement and clarify that government officials responsible for protecting the integrity of American elections remain free to communicate with social media platforms, both regarding the platforms’ efforts to curate content and apply their content moderation policies, and to advocate for the government’s view on responsible moderation policies and practices.

ARGUMENT

I. Reaffirming the First Amendment’s Demanding State Action Requirement is Essential for Election Officials to Assist Social Media Platforms in Creating, Curating, and Moderating Content to Protect Elections.

False information about elections on social media platforms poses a serious threat to the integrity of the American electoral system. Election officials and social media platforms communicate with each other about a range of legitimate and important topics relating to elections. Those communications are key to allowing the platforms to promote accurate information, correct false and misleading information being circulated online, and curb the dissemination of dangerous content that can threaten the safety of election workers, voters, and election infrastructure. The

Fifth Circuit’s expansive interpretation of what transforms private conduct into state action risks grave consequences by chilling or even prohibiting that indispensable work.

1. Election officials and others in government responsible for protecting the integrity of elections in the United States serve an important role in ensuring that voters have access to accurate information about when, where, and how to cast their ballots. Major technology companies, including social media platforms, have voluntarily established dedicated voter education efforts and rely on experts in election administration to inform those initiatives. For example, Google integrates “election information panels” into its search engine “to connect voters with accurate information about voter registration and how to vote.” Laurie Richardson, Google, *Our ongoing work to support the 2022 U.S. midterm elections* (Sept. 1, 2022), <https://blog.google/outreach-initiatives/civics/our-ongoing-work-to-support-the-2022-us-midterm-elections/>. That information comes from state election administrators, who provide it to a nonprofit organization that has partnered with Google to collect and “aggregate information about how [people] can vote in their state, along with key dates and deadlines, and guidance for options like voting early, in-person or by mail.” *Id.* Election officials also communicate directly with Google when there are changes to polling locations or election procedures in the months leading up to or on Election Day.

Similarly, in the months before the 2020 election, Meta announced “the largest voting information campaign in American history, with the goal of helping 4 million voters register . . . using Facebook, Instagram and Messenger” and a “Voting Information Center on

Facebook and Instagram, which will serve as a one-stop-shop to give people in the US the tools and information they need to make their voices heard at the ballot box.” Naomi Gleit, Meta, *Launching Our US 2020 Voting Information Center* (Aug. 13, 2020), available at <https://about.fb.com/news/2020/08/launching-voting-information-center/>. Meta explained that it “work[ed] closely with state election officials through November to ensure the centers [were] updated with the latest election information in each state.” *Id.* See also, e.g., Google, *Election Information Panels*, available at <https://support.google.com/youtube/answer/10047535?hl=en> (last visited Dec. 4, 2023).

Recognizing the valuable expertise that election officials can provide, social media companies initiate many of the communications between platforms and election officials. As Meta explained, it worked with “a range of partners” to prepare for the 2022 elections, “including state and local election officials, the federal Cybersecurity and Infrastructure Security Agency, and industry peers. This includes meeting regularly with the National Association of Secretaries of State and the National Association of State Elections Directors.” Nick Clegg, *How Meta Is Planning for the 2022 US Midterms* (Aug. 16, 2022), available at <https://about.fb.com/news/2022/08/meta-plans-for-2022-us-midterms/>. Similarly, X (formerly known as Twitter) “look[s] to trusted regional experts who can provide the most up-to-date, relevant, and credible information” in order to “prepare for elections” and “stay[s] in touch with national parties and state and local election officials to be sure they know how to report suspicious activity, abuse, and rule violations to us.” X, *Civic Integrity*, available at

<https://about.twitter.com/en/our-priorities/civic-integrity> (last visited Dec. 4, 2023).

Close collaboration between election officials and social media platforms is especially important in the American system of decentralized election administration. Election and voting procedures are largely established at the state and local level, with thousands of diverse jurisdictions adopting policies that vary widely. *See* National Conference of State Legislatures, *Election Administration at State and Local Levels* (Nov. 1, 2022), *available at* <https://www.ncsl.org/elections-and-campaigns/election-administration-at-state-and-local-levels> (“All told there are more than 10,000 election administration jurisdictions in the U.S. The size of these jurisdictions varies dramatically, with the smallest towns having fewer than a thousand registered voters and the largest jurisdiction in the country, Los Angeles County, with more than 5.5 million.”). As a result, social media platforms seeking to ensure the accuracy of information they provide to users about local matters—such as permissible methods of ballot return—must track thousands of separate jurisdictions with differing procedures that are governed by the jurisdiction’s own laws and regulations. That herculean task is heightened by frequent changes to election laws and procedures throughout the country.

Open lines of communication between election officials and social media platforms play a particularly important role when unexpected situations arise in elections that warrant rapid responses. In many elections, officials confront unforeseen contingencies like severe weather, ballot shortages, and technological issues on Election Day. *See, e.g.*, John Schroyer, *Waldo Canyon Fire: County Clerk prepping for election*, THE

DENVER GAZETTE (June 25, 2012), *available at* https://gazette.com/news/waldo-canyon-fire-county-clerk-prepping-for-election/article_001b0263-b04d-5dea-aad6-e89995b68473.html (reporting on issuance of emergency ballots and other changes to election procedures prompted by deadly wildfire in Colorado). Such events sometimes require last-minute modifications to voting procedures, like using emergency paper ballots while electronic voting machines are offline. Even mundane issues like problems with heating and plumbing can necessitate unanticipated changes to polling sites. Informing the voting public about such changes requires swift clarification to voters who may be unsure about where, when, and how they may vote. Social media platforms are often the primary—or sole—source of reliable real-time information, especially in the growing number of communities that lack traditional local news sources. *See* Brennan Center for Justice, *‘News Deserts’ Could Impact Midterm Elections* (Oct. 31, 2022), *available at* <https://www.brennancenter.org/our-work/analysis-opinion/news-deserts-could-impact-midterm-elections> (explaining that “millions of eligible voters have severely limited options for reputable local news sources or live in ‘news deserts’—counties with no local newspaper”). These communications are critically important, because public misunderstanding about changes to voting procedures risks disenfranchising voters who lack accurate and up-to-date information. *See, e.g.*, Brennan Center for Justice & First Draft, *Information Gaps and Misinformation in the 2022 Elections* (August 2022), *available at* <https://www.brennancenter.org/our-work/research-reports/information-gaps-and-misinformation-2022-elections>.

2. In addition to providing accurate voting information for social media platforms' educational programs, election officials can also be a critical resource for companies that seek to moderate false or misleading content posted on their platforms. Social media platforms have emerged as a significant vector of false information about election procedures and results. *See* PBS, *As 2022 midterms approach, disinformation on social media platforms continues* (Oct. 21, 2022), available at <https://www.pbs.org/newshour/politics/as-2022-midterms-approach-disinformation-on-social-media-platforms-continues>. That false information is corrosive to American democracy, undermining public confidence in the very foundation of our legal and political systems. *See* Brookings Institution, *Misinformation is eroding the public's confidence in democracy* (July 26, 2022), available at <https://www.brookings.edu/articles/misinformation-is-eroding-the-publics-confidence-in-democracy/> (“[T]he spread of false information about the voting systems on social media destabilizes the public’s trust in election processes and results.”). As that threat continues to intensify, election officials and social media platforms must retain their ability to communicate effectively on matters pertaining to the election process and voter protection.

Social media platforms, working in collaboration with election officials and federal agencies charged with securing elections, are uniquely positioned to prevent the harm that false information about elections can cause. Just like inaccurate or outdated information, the dissemination of false information about voting procedures poses a severe risk of

disenfranchising voters. *See, e.g.*, Department of Justice, *Social Media Influencer Douglass Mackey Convicted of Election Interference in 2016 Presidential Race* (Mar. 31, 2023), available at <https://www.justice.gov/usao-edny/pr/social-media-influencer-douglass-mackey-convicted-election-interference-2016> (announcing conviction of social media influencer who “conspired with other influential Twitter users . . . to use social media platforms, including Twitter, to disseminate fraudulent messages that encouraged” supporters of one of the presidential candidates “to ‘vote’ via text message or social media which, in reality, was legally invalid”). Purveyors of erroneous election information frequently propagate falsehoods about how, when, and where to vote, often targeting vulnerable communities. *See* Brennan Center for Justice, *Digital Disinformation and Vote Suppression*, (Sept. 2, 2020), available at <https://www.brennancenter.org/our-work/research-reports/digital-disinformation-and-vote-suppression>. Making matters worse, language minority groups typically lack adequate access to traditional news sources and may instead rely solely on social media for election information at much higher rates than other groups. *See* Stephanie Valencia, *Misinformation online is bad in English. But it’s far worse in Spanish.*, WASH. POST (Oct. 28, 2021), available at <https://www.washingtonpost.com/outlook/2021/10/28/misinformation-spanish-facebook-social-media/>. Election officials’ efforts to prevent the spread of false information about the election process is thus essential to preserving Americans’ right to vote.

Global political instability and emerging technologies compound these hazards. The National Intelligence Council explained that “[t]he growth of internet and social media use means foreign actors are more able to reach US audiences directly, while the tools for doing so are becoming more accessible,” assessing that groups backed by the Russian and Iranian governments as well as terror groups like Hezbollah “used social media personas, news websites, and US persons to deliver tailored content to subsets of the US population.” National Intelligence Council, *Intelligence Community Assessment: Foreign Threats to the 2020 Presidential Election*, at 1, 4 (Mar. 10, 2021), available at <https://www.odni.gov/files/ODNI/documents/assessments/ICA-declass-16MAR21.pdf>. Those threats will grow more acute as advanced technological tools like generative artificial intelligence make it possible to manufacture and distribute false information, such as deepfake audio and videos of candidates and election officials, at scale. See, e.g., Matt O’Brien, *U.S. lawmakers question Meta and X over AI-generated political deepfakes ahead of 2024 election* (Oct. 5, 2023), available at <https://www.pbs.org/newshour/politics/u-s-lawmakers-question-meta-and-x-over-ai-generated-political-deepfakes-ahead-of-2024-election>.

Finally, election officials are increasingly the target of online intimidation and threats of violence. According to a recent study, 11% of local election officials have received threats, including 41% who reported that the threat came through social media. See Brennan Center for Justice, *Local Election Officials Survey — April 2023*, at 13 (Apr. 25, 2023), available at <https://www.brennancenter.org/our-work/research-reports/local-election-officials-survey-april-2023> (“Election Officials Survey”). These threats are often

shockingly graphic. For example, the Colorado Secretary of State has received multiple death threats through Facebook and Instagram. Linda So & Jason Szep, *U.S. election workers get little help from law enforcement as terror threats mount* (Sept. 8, 2021), available at <https://www.reuters.com/investigates/special-report/usa-election-threats-law-enforcement>. An Instagram user commented on one of the Secretary's posts: "Patriots will take care of you. I would move and change your address... quickly. Guess who is going to hang when all the fraud is revealed? (*Hint ..look in the mirror)." *Id.* The same user commented on a childhood photo the Secretary posted for Father's Day: "Prepare for the gallows." *Id.* A Facebook user messaged her: "Watch your back. I KNOW WHERE YOU SLEEP, I SEE YOU SLEEPING. BE AFRAID." *Id.* These threats are not limited to high-profile elected officials. A deputy to a Republican City Commissioner in Philadelphia received multiple threats through Facebook, including: "EVERYONE WITH A GUN IS GOING TO BE AT YOUR HOUSE- AMERICANS LOOK AT THE NAME- ANOTHER JEW CAUGHT UP IN UNITED STATES VOTER FRAUD." *Id.* Like any citizen who is exposed to threats of violence, election officials who are the targets of such threats should not be dissuaded from flagging these types of posts for social media platforms and asking that the platforms take appropriate action to address them.

Election officials also grapple with the real-world effects of doxing—the publication of private information such as a home address with the intent to spur intimidation and violence. Georgia Secretary of State Brad Raffensperger testified before the House Select Committee to Investigate the January 6th Attack that his

family's personal information was posted online accompanied by threats of violence, that his wife received a barrage of sexualized text messages, and that right-wing extremists broke into the home where his late son's widow lived with their children. Eric Cortellessa & Brian Bennett, *'There is Nowhere I Feel Safe': Jan. 6 Panel Hears From Election Officials Trump Targeted*, TIME (June 21, 2022), available at <https://time.com/6189560/jan-6-hearing-election-workers-trump/>. Shaye Moss and her mother Ruby Freeman, who served together as election workers in Atlanta in 2020, have since been targeted by an extensive online campaign of abuse based on disproven lies that they manipulated election results. Moss testified to the Committee that violent threats had forced her family to flee their homes and that extremists had approached her elderly grandmother's home in an attempt to make a "citizen's arrest." Farnoush Amiri, *'Nowhere I feel safe': Election officials recount threats*, Associated Press (June 22, 2022), available at <https://apnews.com/article/capitol-siege-2022-mid-term-elections-georgia-election-recounts-5cffe294a372eb32dc68588784202314>; see also Robert Legare & Musa Ali, *In Giuliani defamation trial, Ruby Freeman says she received hundreds of racist messages after she was targeted online*, CBS News (Dec. 13, 2023), available at <https://www.cbsnews.com/news/rudy-giuliani-defamation-trial-election-worker-ruby-freeman-testifies/>. In the wake of harms like these, thousands of election workers have decided not to serve anymore, leaving election offices around the country dangerously understaffed. Peter Eisler & Linda So, *One in five U.S. election workers may quit amid threats*,

politics (Mar. 10, 2022), available at <https://www.reuters.com/world/us/one-five-us-election-workers-may-quit-amid-threats-politics-survey-2022-03-10/>. In this context, it is vital that election officials, law enforcement, federal agencies, and social media companies be free to communicate with each other freely and as rapidly as possible when threats and doxing appear on their platforms.

Recognizing that they lack subject-matter expertise and are thus institutionally ill-equipped to sift through the onslaught of inaccurate information and threats on their own, social media companies draw on information from election officials and government agencies that support elections in their efforts to combat these persistent problems on their platforms. Platforms also sensibly draw on input from outside experts—including academic institutions, non-profit organizations, and government—who track and identify false and misleading information.

3. Federal agencies can also play an essential role in supporting social media platforms' curation of election-related content. Specifically, the Cybersecurity Infrastructure and Security Agency ("CISA") and the Election Assistance Commission ("EAC") are charged with several duties relating to election administration and the protection of election infrastructure used in federal elections. As a result of these responsibilities, CISA and the EAC have unique expertise and knowledge about the types of election equipment and the security of election infrastructure used across the United States. CISA, for example, provides free testing to state and local election officials for election system vulnerabilities. Cybersecurity Infrastructure and Security Agency, *Election Security Services*, available

at <https://www.cisa.gov/election-security-services> (last visited Dec. 18, 2023). The EAC is the federal agency responsible for promulgating the Voluntary Voting System Guidelines and accrediting Voting System Testing Laboratories, which certify adherence to the guidelines. The majority of states use the EAC's testing program in some way to certify their equipment. Several states mandate certification to the standards established by the EAC's guidelines before voting systems can be used in federal elections. U.S. Election Assistance Commission, *State Requirements and the U.S. Election Assistance Commission Voting System Testing and Certification Program*, (Aug. 3, 2023), available at <https://www.eac.gov/sites/default/files/2023-08/State%20Requirements%20for%20Certification%202023.pdf>.

Like election officials, federal agencies that have responsibilities related to maintaining the security of elections have an interest in ensuring that voters have access to accurate information about the election process and election systems. And because of their broad expertise and resources, federal agencies are uniquely positioned to provide information and input to social media platforms seeking to implement and update policies designed to counter emerging threats and false election information. For example, CISA and the FBI provide election officials, platforms, and the public with nonclassified intelligence on foreign actors' efforts to manipulate American elections. See Federal Bureau of Investigation & Cybersecurity and Infrastructure Security Agency, *Foreign Actors Likely to Use Information Manipulation Tactics for 2022 Mid-term Elections* (Oct. 6, 2022), available at

information-activities_508.pdf (“These actors use publicly available and dark web media channels, online journals, messaging applications, spoofed websites, emails, text messages, and fake online personas on U.S. and foreign social media platforms to spread and amplify these false claims.”).

CISA also supported the Elections Infrastructure Information Sharing & Analysis Center (EI-ISAC) in collecting reports of false election information from election officials and transmitting those reports to social media platforms to facilitate swift and efficient action.² See Center for Internet Security, *Reporting Misinformation to the EI-ISAC*, available at https://www.eac.gov/sites/default/files/partners/EI_ISAC_Reporting_Misinformation_Sheet_102820.pdf (last visited Dec. 18, 2023). Meanwhile, election officials overwhelmingly believe that CISA can be helpful in dispelling false information about elections by promoting accurate information about election administration and technology. See Election Officials Survey at 25. Election officials also have asked the EAC to play an active role in helping to educate the public about election infrastructure to “combat inaccurate information about the administration of elections in the United States.” Letter from Nat’l Ass’n of State Election Directors to U.S. Election Commission (March 17, 2023), available at <https://www.nased.org/news/nasedletter031723> (asking the EAC to “create and lead an assertive, proactive communications strategy” to educate the public about certification standards for election equipment).

² EI-ISAC, which receives federal funding through CISA, is a division of the Center for Internet Security, an independent non-profit organization.

Critically, in information-sharing relationships between private companies, election officials, and federal agencies, social media platforms retain the ultimate decision about whether and how to act on information that officials provide, including information that officials report as false. As Meta explained, it “engage[s] with secretaries of state, elections directors, and national organizing bodies such as the National Association of Secretaries of State and the National Association of State Election Directors. Facebook works with these offices and organizations to help track violating content and false information related to elections and the census, so [Meta] teams can review and take appropriate action.” Meta, *Facebook’s Civil Rights Audit – Final Report* (July 8, 2020), available at <https://about.fb.com/wp-content/uploads/2020/07/Civil-Rights-Audit-Final-Report.pdf> (emphasis added). Preventing social media companies and election officials from communicating about the challenges posed by changing election laws and procedures, false information about elections, and other harmful content would dangerously impair the platforms’ efforts to remain a relevant and valuable resource for the public, undermining the strength and integrity of the American electoral system.

II. The First Amendment Permits Government Officials to Communicate with Social Media Companies to Aid in the Platforms’ Creation, Curation, and Moderation of Content.

The Fifth Circuit’s decision threatens these essential communications between government actors who support the administration of elections, including election officials, and social media platforms. Its ruling converts private companies’ decisions into state action solely based on government officials’ sharing of

information with the platforms, which the platforms were free to discount or disregard in making their own content moderation decisions. Neither the First Amendment nor this Court's cases support that nonsensical result.

A. A Social Media Platform's Content Curation Decision Is Subject to the First Amendment Only If It May Be Fairly Treated as a Decision Made by the Government Itself.

“The text and original meaning of [the First and Fourteenth] Amendments, as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech.” *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) (citations omitted). The First Amendment “safeguard[s] the rights of free speech” by imposing “limitations on state action, not on action by” private parties. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972). The First Amendment therefore “can be violated only by conduct that may be fairly characterized as ‘state action,’” and this Court's “cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924, 937 (1982).

The Court has long made clear that “state action may be found if, though only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’” *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419

U.S. 345, 351 (1974)). “The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.” *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Courts must therefore “avoid[] the imposition of responsibility on [governmental officials] for” private “conduct [they] could not control.” *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 191 (1988). Similarly, “[a]ction taken by private entities with the mere approval or acquiescence of the [government] is not state action.” *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (citations omitted). These requirements ensure that a private party’s conduct is subject to constitutional scrutiny only if its action—though taken under the guise of private action—is attributable to the government itself, as if the government itself had acted on its own behalf.

Consistent with these fundamental principles, “when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion over the speech and speakers in the forum.” *Halleck*, 139 S. Ct. at 1930. That limitation is essential to preserve “private entities’ rights to exercise editorial control over speech and speakers on their properties or platforms” that would otherwise be “eviscerate[d].” *Id.* at 1932. Accordingly, a private social media company that moderates content on its own platform is subject “to the constraints of the First Amendment” only in the exceptionally narrow circumstances where that platform’s content moderation decisions are ultimately attributable to the government itself. *Id.* at 1933.

B. Mere Communications Between Government Officials and Social Media Platforms Do Not Render the Platforms' Decisions to be State Action Under This Court's Established Tests.

This Court's cases demarcate the critical constitutional line between private editorial decisions and those that are ultimately attributable to the government and thus subject to the First Amendment. The Court has recognized a "range of circumstances that could point toward the State" as responsible for a private party's actions. *Brentwood Academy*, 531 U.S. at 295. Under any of this Court's demanding tests, government officials' non-coercive information-sharing with social media platforms does not convert the platforms' content moderation decisions into state action subject to constitutional constraints.

First, the "nominally private character" of a non-governmental entity may be "overborne by the pervasive entwining of public institutions and public officials in [the private actor's] composition and workings." *Id.* at 298. In finding that a "nominally private" athletic association of high schools was a state actor, the Court in *Brentwood Academy* relied on the substantial operational entanglement between the association and public officials. Public schools made up the overwhelming majority of the association's members, and the association's bylaws required that the committees controlling its administration and rulemaking process be composed of officials from its member schools. Accordingly, "[the] mechanism to produce rules and regulate competition" was "an organization overwhelmingly composed of public school officials who select representatives (all of them public officials at the time in question here), who in turn adopt and

enforce the rules that make the system work.” *Id.* at 299. In addition, members of the state’s board of education served ex officio on those committees, and the association’s employees were eligible for the state’s public employee pension fund. *Id.* at 300. In light of that “overwhelming” and “unmistakable” incorporation of public officials into the operations of the purportedly private association, the Court concluded that the “ostensibly private organization ought to be charged with a public character and judged by constitutional standards.” *Id.* at 302.

Second, absent such pervasive entwinement, a state actor “can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that” of the government official. *Blum*, 457 U.S. at 1004.³ The threat of adverse governmental action like criminal prosecution presents the most straightforward “exercise[] [of] coercive power.” For example, in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), this Court held that a private book distributor’s decision to “stop further circulation of copies” of publications disfavored by the government was state action. *Id.* at 63. The state agency sent the distributor a letter listing the “objectionable” materials and, “thank[ing] [him] in advance” for his compliance, stated that it had a “duty to recommend to the Attorney General prosecution of purveyors of obscenity.” *Id.* at 62. The Court explained that “[p]eople do not lightly disregard

³ A private party may also qualify as a state actor in other circumstances not alleged to be present here, including if the private party performs a “public function,” *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), or if the private party acts jointly with the government, *Lugar*, 457 U.S. at 941–942.

public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." *Id.* at 68. Because the government coerced the private book distributor into censoring the "objectionable" materials, that compelled decision qualified as state action.

This Court has also recognized that the government may be responsible for another party's actions through "significant encouragement" if it provides sufficiently great positive incentives for that conduct. For example, a "threat[] to withhold . . . existing [] funds" can "cross[] the line distinguishing encouragement from coercion." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 579-80 (2012). "The critical question [is] whether the government's encouragement is so significant that we should attribute the private party's choice to the State, out of recognition that there are instances in which the State's use of positive incentives can overwhelm the private party and essentially compel the party to act in a certain way." *O'Handley v. Weber*, 62 F.4th 1145, 1158 (9th Cir. 2023).

In evaluating the pervasive entwinement of the government into a private entity, the coercive threat of negative consequences, or the significant encouragement of overwhelming positive incentives, the ultimate inquiry is whether the private party's "choice must in law be deemed to be that" of government. *Blum*, 457 U.S. at 1004. This Court's cases thus reflect the core distinction between governmental persuasion and governmental coercion. "[T]he government can speak for itself" to "advocate and defend its own policies." *Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000). As a matter of constitutional principle and practical necessity, the government is "not barred by the Free Speech Clause

from determining the content of what it says.” *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). “[T]he very business of government [is] to favor and disfavor points of view on . . . innumerable subjects.” *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring).

For that reason, the First Amendment permits government officials to communicate with social media platforms regarding their content moderation decisions and policies. As the decision below recognized, “the state may advocate—even forcefully—on behalf of its positions.” *Missouri v. Biden*, 83 F.4th 350, 377 (5th Cir. 2023) (citing *Southworth*, 529 U.S. at 229). For example, government officials may seek to persuade a social media platform to address false information by “flagging” false or misleading posts for the platform’s review. See, e.g., *O’Handley*, 62 F.4th at 1153 (no state action where “state officials regularly flagged tweets with false or misleading information for Twitter’s review and . . . Twitter responded by almost invariably removing the posts in question”). Social media platforms may correspondingly rely on the government for information and expertise to inform their decisions on what content they wish to host on their private forums. Such communications—even emphatic ones—are consistent with the First Amendment as long as the ultimate decision regarding content rests with the platforms themselves.

C. This Court Should Take Care Not to Obstruct or Chill Essential Governmental Communication with Social Media Platforms.

The decision below held that government officials violated the First Amendment through their communications with social media platforms based on a novel expansion of the state action doctrine that finds no support in this Court's cases. The demanding state action requirement that this Court has embraced for decades ensures that election officials like *amici* may continue their essential work in assisting social media companies that seek to furnish voters with accurate information about the election process and correct the record when false information about elections appears on their platforms. This Court should clarify the state action requirement and, in so doing, ensure that government actors who support the administration and integrity of American elections, including election officials like *amici* and federal agencies like CISA and the EAC, are neither barred nor chilled from engaging in critical communications with social media platforms.

The Fifth Circuit reasoned that “to encourage a decision, the government must exert some meaningful, active control over the private party’s decision.” *Missouri*, 83 F.4th at 376. The court elaborated that “[e]ncouragement is evidenced by an exercise of active, meaningful control, whether by entanglement in the party’s decision-making process or direct involvement in carrying out the decision itself.” *Id.* at 377. Because there is no allegation here that governmental officials had any direct involvement in executing content moderation decisions, the decision below appears to have determined that respondents’ communications with

social media platforms amounted to “entanglement in a party’s independent decision-making.” *Id.* at 375.

The Fifth Circuit’s application of its entanglement test to CISA illustrates the test’s expansiveness. CISA is the federal government’s lead agency on cybersecurity and plays an essential role in overseeing our nation’s efforts to protect state and local election infrastructure from threats perpetrated by domestic and foreign actors. In its *sua sponte* decision on rehearing, the Fifth Circuit held that CISA “likely significantly encouraged the platforms’ content-moderation decisions and thereby violated the First Amendment” because “the platforms’ censorship decisions were made under policies that CISA has pressured them into adopting and based on CISA’s determination of the veracity of the flagged information.” *Missouri*, 83 F.4th at 391. On the Fifth Circuit’s view, because “CISA officials affirmatively told the platforms whether the content they had [flagged on behalf of non-governmental research organizations] was true or false,” when “the platforms acted to censor CISA-[flagged] content, they did not do so independently.” *Id.*⁴ Accordingly, under the Fifth Circuit’s entanglement test, a government official simply flagging content—and expressing the government’s view that the content contradicts

⁴ The record refers to CISA relaying NGO-flagged content as its “switchboarding operations.” Those efforts involved the agency’s officials “act[ing] as an intermediary for third parties by forwarding flagged content from them to the platforms. For example, during a federal election, CISA officials would receive ‘something on social media that [election officials] deemed to be disinformation aimed at their jurisdiction’ and, in turn, CISA would ‘share [that] with the appropriate social media compan[y].” *Id.* at 365.

verifiable facts—renders a social media platform’s moderation of that content to be state action.

Such minimal governmental involvement in content moderation decisions would not constitute state action under any test this Court has endorsed. It is plainly not coercive because CISA threatened no adverse consequences if the platforms declined to remove flagged content. Nor did CISA offer platforms a significant positive incentive in exchange for following its suggestions. And merely flagging false content—which any member of the public may also do, and which reserves for the platforms’ own employees every final decision—cannot plausibly constitute such “pervasive entwinement” of CISA’s officials in social media companies’ inner “composition and workings” to convert those platforms’ decision to be state action. *See Brentwood Academy*, 531 U.S. at 298. Indeed, CISA repeatedly explained in its correspondence with platforms “that it neither has nor seeks the ability to remove or edit what information is made available on social media platforms. CISA makes no recommendations about how the information [that] it is sharing should be handled or used by social media companies.” *Missouri v. Biden*, No. 3:22-cv-01213, ECF No. 71-8 at 7, 11, 14, 17, 37, 51, 81, 101 (W.D. La.). It is impossible to conclude that such benign information-sharing overwhelmed the “private character” of social media platforms, which often declined to moderate the content that CISA flagged for them. *See Brentwood Academy*, 531 U.S. at 298.

The Fifth Circuit’s expansive rule is already undermining the integrity of American elections by chilling critical communications between the federal government and social media platforms. For example, since the district court’s decision in this case, the “U.S.

government has stopped warning some social networks about foreign disinformation campaigns on their platforms, reversing a years-long approach to preventing Russia and other actors from interfering in American politics.” Naomi Nix & Cat Zakrzewski, *U.S. stops helping Big Tech spot foreign meddling amid GOP legal threats*, WASH. POST. (Nov. 30, 2023), available at <https://www.washingtonpost.com/technology/2023/11/30/biden-foreign-disinformation-social-media-election-interference/>. Social media platforms are forced to address these foreign threats blindly, without the benefit of intelligence that only federal agencies have the resources and authority to acquire.

The consequences for election officials will be similarly severe. The Fifth Circuit’s test would treat social media companies as state actors if they turn to election administrators to clear up confusion about the dates of elections and registration deadlines, moved polling locations in the event of natural disasters, and other crucial—and often fast-changing—content about government activity. *E.g.*, Melinda DeSlatte, *Hurricane Ida’s Damage Forces Louisiana Polling Place Changes*, Associated Press (Oct. 19, 2021), available at <https://apnews.com/article/hurricane-ida-elections-louisiana-voting-storms-a87adc844fb4f296020708f2229c92a3>; Florida Department of State, *Public Notice* (Oct. 6, 2020), available at <https://dos.fl.gov/communications/press-releases/2020/public-notice-secretary-of-state-laurel-m-lee-provides-update-about-voter-registration-in-florida/> (“Today, following a meeting with Governor Ron DeSantis, Secretary of State Laurel M. Lee issued a directive to re-open Florida’s voter registration deadline [due to online registration system difficulties].”); Allan Smith, *Ohio*

Primary Called Off at Last Minute Because of Health Emergency, NBC News, Mar. 16, 2020, available at <https://www.nbcnews.com/politics/2020-election/ohio-governor-calls-state-postpone-tuesday-s-primary-elections-n1160816> (“Gov. Mike DeWine said the state would not open polls because of the coronavirus outbreak. His comments come after a judge declined [earlier that day] to postpone the contest until June.”). It would treat social media companies as state actors if election officials flag blatantly inaccurate information about election procedures, policies, and results. And it would treat social media companies as state actors if election officials notify them when violent threats spread across their platforms.

Regardless how it resolves this case, this Court should preserve its robust state action requirement that permits government officials to communicate with social media platforms, both regarding the platforms’ efforts to curate content and apply their content moderation policies, and to advocate for the government’s view on responsible moderation policies and practices.

CONCLUSION

This Court should clarify the state action test to ensure that election officials may communicate effectively with social media platforms to assist them in sharing accurate information about elections and preventing the spread of falsehoods about the election process. *Amici* take no position on any other issue before the Court.

Respectfully submitted,

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December 26, 2023

APPENDIX

APPENDIX – LIST OF *AMICI CURIAE*

Seth Bluestein, *Philadelphia City Commissioner*

Kathy Boockvar, Secretary of the Commonwealth of Pennsylvania (former) (2019 – 2021)

Edgardo Cortés, Commissioner of the Virginia Department of Elections (former) (2014 – 2018)

Lisa Deeley, Chairwoman of the Philadelphia City Commissioners

Mark S. Earley, Leon County Supervisor of Elections

Neal Kelley, Registrar of Voters, Orange County, CA (Ret.) (2005 – 2022); Chairman, Committee for Safe and Secure Elections

Trey Grayson, Secretary of the Commonwealth of Kentucky (former) (2004 – 2011)

DeForest B. Soaries, Jr., Secretary of State of New Jersey (former) (1999 – 2002); Chairman, U.S. Election Assistance Commission (former) (2004 – 2005)

Chris Swope, Lansing City Clerk