No. 23-411

In the Supreme Court of the United States

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

v.

STATE OF MISSOURI, ET AL.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

The Chamber's members include social media companies and other businesses that interact with the government in the normal course of their operations. The way the courts below framed this case—asking whether the government's alleged conduct transformed private social media companies' decisions to remove or deprioritize content into "state action" subject to the First Amendment—could have major implications for the Chamber's members and their own First Amendment rights. The Chamber therefore has a vital interest in explaining how the Court can decide this case without dismantling the "critical boundary" that the state-action doctrine erects between government and private enterprise. *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1934 (2019).

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus*, its members, or its counsel, made a monetary contribution intended to fund the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises critical questions about how far the government can go in attempting to influence the actions of private publishers, including social media companies, that are deciding what speech to disseminate. The Chamber takes no position as to whether, on the record before this Court, the government here unconstitutionally pressured private social media services to remove plaintiffs' speech or otherwise violated the First Amendment. Rather, the Chamber urges the Court to apply the correct analytical framework in answering those questions—the framework of *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963), rather than the state-action framework applied by the courts below. Whatever approach it takes, however, the Court should strictly limit its decision to addressing the constitutionality of the "government's challenged conduct" (Application for Stay 40)—rather than suggesting that potential government overreach converts private publishers into state actors, whose own First Amendment rights could thereby be jeopardized.

If plaintiffs are correct that the government here improperly pressured private companies into restricting content, then the companies' own right of editorial discretion has already been violated and they are in fact *victims*, not *perpetrators*, of unconstitutional government overreach. Imposing liability on these companies would only compound that constitutional violation, punishing them for actions they were coerced to take and paving the way for remedies that would require them to prioritize speech that they might not, in exercising their own editorial judgment, find "worthy of presentation." *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 575 (1995).

I. The parties and court below have framed the merits question here as "[w]hether the government's challenged conduct transformed private social-media companies' content-moderation decisions into state action." Application for Stay 40; accord Response to Application 23; U.S. Br. i, 13, 14, 28, 40, 42; J.A. 69-70. Consistent with that framing, the parties' briefs have focused on state-action analysis and cases such as *Blum* v. *Yaretsky*, 457 U.S. 991 (1982). But that framing is mistaken.

The only defendants here are government officials and agencies, who are unquestionably state actors. And unlike in state-action cases such as *Blum*—which rejected a claim that private nursing homes acting in accordance with state law were state actors that had violated due process—plaintiffs here allege that federal officials *themselves* crossed the constitutional line between lawful persuasion and unlawful coercion, in violation of the First Amendment. Thus, there is no need to address whether the government's alleged coercion transformed the targets of that pressure (private media companies) into "state actors" whose own conduct would then potentially be governed by the First Amendment. Moreover, focusing on that issue threatens to blur the critical line between governmental abridgments of speech, which violate the First Amendment, and private editorial judgments not to publish others' speech, which do not—and indeed are *protected* by the First Amendment.

There is a more straightforward—and analytically sound—way to decide whether the government's conduct here was unconstitutional, and, if so, to impose an appropriate remedy without causing serious collateral consequences for the private companies that the government allegedly targeted. The sound approach

is to apply the framework of *Bantam Books*—a case structurally identical to this one. The parties have cited *Bantam Books*, but do not seem to recognize the full implications of that decision.

The Court in *Bantam Books* analyzed whether the government, in pressuring speech distributors (bookstores) to stop selling books that they disapproved of, violated the First Amendment rights of the publishers whose books were ultimately removed from the stores. 372 U.S. at 62-64. But in ruling that that the government crossed the line, the Court did not suggest that the bookstores became state actors subject to liability for deciding which books to carry. It held only that the government's pressure on the bookstores violated the publishers' First Amendment rights. *Id*. at 65-72.

Here, as in *Bantam Books*, plaintiffs maintain that the government pressured private speech distributors (social media companies) to remove content that the government disapproved of. And here, as in *Bantam Books*, the Court should simply analyze whether the government violated the First Amendment by improperly pressuring those private entities to remove disfavored speech. In other words, the question is not whether the government's alleged wrongdoing transformed the coerced private parties into state actors; it is whether the government's pressure itself violated the First Amendment. If the Court confines itself to that issue, it will apply the correct law while avoiding potentially serious collateral consequences for the private companies, including the potential erosion of their independent constitutional right to decide whether to carry plaintiffs' messages. Notably, the Court has another case before it this Term (*National Rifle Association* v. *Vullo* (No. 22-842)) in which the parties agree that *Bantam Books* should govern

whether alleged governmental pressure on private intermediaries violates the First Amendment rights of third parties. No one there even suggests that the private intermediaries are state actors. The same should be true here.

II. If the Court nevertheless treats this dispute as raising a state-action question, it should be especially careful to preserve the critical "line between governmental and private" action. *Halleck*, 139 S. Ct. at 1926. In particular, the Court should confirm that a finding that the government improperly strongarmed private parties to do its bidding warrants relief *only* against the government. This Court has never held that where a private party is improperly coerced by the government, such coercion, without more, justifies subjecting the private party to liability or injunctive relief. Issuing such relief would be inappropriate in any context, but doing so in this context would create especially serious constitutional problems.

That is because the targeted private social media services have a First Amendment right to exercise their editorial discretion free from governmental interference. The "Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property." *Id.* at 1931. On the contrary, the right to decide what speech to publish lies at the heart of the First Amendment freedoms of speech and of the press. Those freedoms protect private speakers whether the government is attempting to *restrict* them from publishing speech that they believe should be disseminated or instead to *compel* them to disseminate speech that they wish to avoid. Any other result "would expand governmental control while restricting individual liberty and private enterprise." *Id.* at 1934.

This Court should avoid that danger by confirming that governmental pressure on a private company—especially one exercising its own constitutional rights—does not subject that company to constitutional constraints, liability, or injunctive relief. If governmental pressure crosses the line into unconstitutional coercion or inducement, the *government* is the perpetrator and the only proper defendant; the proper remedy is simply to end the government's unconstitutional actions. But unconstitutional governmental pressure provides no basis for treating the strongarmed private publishers as state actors, much less for abridging their First Amendment right "to exercise editorial control over speech and speakers on their properties or platforms." *Halleck*, 139 S. Ct. at 1932.

ARGUMENT

I. *Bantam Books* provides the appropriate framework to assess whether the government violated the First Amendment here.

This Court should decide this case as what it is—a case against only the federal government. No online service provider or other private party is a defendant. Rather, plaintiffs—five individual users of social media and two States—claim that various federal officials, indisputably state actors, violated the First Amendment by improperly pressuring private social media services to remove certain speech from their platforms. The question here is thus very simple: Did the government's alleged pressure campaign cross the line from legitimate persuasion into improper coercion, in violation of the First Amendment? Answering that question does not require the Court to address when governmental action transforms a private party into an arm of the state.

A. This Court's decision in *Bantam Books* provides an established legal framework for addressing such claims, and that decision and its progeny rightly frame the issues without the need to apply any elaborate state-action analysis. *E.g.*, 372 U.S. at 65-72. The state-action analysis applied by the court below, in contrast, is a misfit for a case like this and fails to give the private constitutional interests at stake their full due.

In *Bantam Books*, a group of book publishers sued the members of a state commission that had notified various book distributors and retailers that "certain designated books" were "objectionable for sale," and that the commission had a "duty to recommend to the Attorney General prosecution of purveyors of obscenity." 372 U.S. at 61-63. On account of this veiled threat, the distributors and retailers stopped selling the targeted books, which the plaintiffs published. *Id.* at 64. Without analyzing the state-action status of the distributors and retailers, the Court held that the publishers had standing and a First Amendment remedy against the commission's members, even though it was the distributors' and retailers' actions that directly harmed the publishers' book sales. *Id.* at 65-72. "The threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" against book distributors were enough to violate the book publishers' First Amendment rights. *Id.* at 67.

The government says the Court in *Bantam Books* "found state action" because the "distributors' and retailers' decisions to stop selling the identified publications were the product of the agency's 'intimidation and threat of prosecution,' *converting them into state action*." U.S. Br. 26-27 (quoting 372 U.S. at 64) (emphasis added). The Court did no such thing. To be

sure, the defendants' "scheme of informal censorship" and "unlawful interference" with the publishers' speech was "state action," as the defendants were state commissioners acting "under color of state law." *Bantam Books*, 372 U.S. at 68 & n.9, 64 n.6. But the Court resolved the case simply by analyzing whether those officials engaged in unlawful intimidation. It did not begin to suggest that the distributors or retailers had become state actors, and nothing in its remedy interfered with those entities' rights to distribute (or not distribute) the plaintiffs' books as they saw fit.

The lower courts have applied *Bantam Books* in numerous First Amendment cases in which plaintiffs have challenged governmental efforts to limit speech through means other than direct restrictions. These cases draw a fundamental "distinction between attempts to convince and attempts to coerce." *Okwedy* v. *Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (per curiam); accord *Kennedy* v. *Warren*, 66 F.4th 1199, 1207-1212 (9th Cir. 2023); *Backpage.com, LLC* v. *Dart*, 807 F.3d 229, 235-239 (7th Cir. 2015); *Zieper* v. *Metzinger*, 474 F.3d 60, 65-67 (2d Cir. 2007); *Penthouse Int'l, Ltd.* v. *Meese*, 939 F.2d 1011, 1014-1018 (D.C. Cir. 1991); *RC Maxwell Co.* v. *Borough of New Hope*, 735 F.2d 85, 87-88 (3d Cir. 1984). As these decisions recognize, the First Amendment bars the government from coercing or otherwise improperly pressuring private parties to interfere with others' speech, while allowing the government to communicate with private platforms and offer its views on what speech should be published—to "advocate and defend its own policies." *Board of Regents* v. *Southworth*, 529 U.S. 217, 229 (2000).

For example, the Seventh Circuit in *Dart* stopped "a [government] campaign intended to crush [the website] Backpage's adult section * * * by demanding that

firms such as Visa and MasterCard prohibit the use of their credit cards to purchase any ads on Backpage." 807 F.3d at 230. On official letterhead, the defendant sheriff requested that the credit-card companies "cease and desist" allowing payments for Backpage ads. *Id.* at 231-32. The sheriff's letter contained threatening messages, and "Visa and MasterCard got the message and cut *all* their ties to Backpage." *Id.* at 232. Thus, the court found that Backpage had a First Amendment remedy against the sheriff for the ongoing government coercion of credit-card and financial-services companies—without any need for state-action analysis. *Id.* at 239.

B. The decision below, by contrast, held that some of the defendants "likely coerced or significantly encouraged social-media platforms to moderate content, *rendering those decisions state actions*." J.A. 69-70 (emphasis added); accord J.A. 48 (if "the coercion test is met," "the private party's resulting decision is a state action"). The parties frame the case the same way. Application for Stay 40; Response to Application 23; U.S. Br. 13-14. That framing is mistaken. The proper question here is not whether the government "transformed private social-media companies' content moderation decisions into state action"; it is simply whether "*the government's* challenged conduct * * * violated respondents' First Amendment rights." U.S. Br. i (emphasis added). If the government forces A to do something to B that the government is constitutionally barred from doing to B directly, the government has violated B's rights; and the Court can fully address the constitutional violation without declaring that the government has turned A into a state actor.

The court below was misled by the parties' focus on a largely irrelevant case—*Blum* v. *Yaretsky*, 457

U.S. 991 (1982). The plaintiffs there sought to hold the government responsible for decisions made by private nursing homes, based on their own medical judgment, without a hint of governmental pressure. There was no allegation that the government's own actions were unconstitutional. *Id.* at 1005. The plaintiffs' theory was that the nursing homes were both subject to state regulation and largely funded by the government, making them state actors whose discharge decisions were governed by the Due Process Clause. Not surprisingly, the Court held that the government is not responsible for the decisions of private parties subject to regulatory oversight. *Id.* at 1010-1012; accord *Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 57 (1999); *Halleck*, 139 S. Ct. at 1932-1933.

Here, by contrast, plaintiffs claim that the government's *own actions* violated their freedom of speech by pressuring private companies to refuse to carry plaintiffs' messages over the companies' online media platforms. (The private-law analogue would be tortious interference with contract.) And as in *Bantam Books*, that question can and should be answered without addressing whether the decisions of the private speech intermediaries who allegedly were direct targets of governmental pressure themselves became state actors subject to the First Amendment.

National Rifle Association v. *Vullo*, also now before the Court, presents similar questions in this way. See Pet. i-ii, 14 (No. 22-842). There, as here, the plaintiff alleges that the government violated its First Amendment rights indirectly, by pressuring private third-party intermediaries. But in *Vullo,* the courts below and the parties all agree that *Bantam Books*—not this Court's state action cases—provide the proper framework for addressing the alleged violation. That is so

even though the First Amendment rights of the allegedly coerced private intermediaries (insurance companies) in *Vullo* are not at issue, whereas the private parties allegedly coerced here are media entities with strong First Amendment rights of their own. See *infra* at 15-22. Thus, there is even more reason here to avoid suggesting that the government's alleged coercion transforms private parties into state actors.

C. Deciding this case under the *Bantam Books* framework not only is analytically sound, but also leaves appropriate room for communication between the government and private parties on matters of public concern. Much as online services may "pay greater attention to what a trusted civil society group ha[s] to say, [they are] equally free to prioritize communications from state officials in [their] review process." *O'Handley* v. *Weber*, 62 F.4th 1145, 1159 (9th Cir. 2023). In exercising their discretion, many platforms value and invite input from third parties, particularly trusted partners with special expertise, such as the Global Internet Forum to Counter Terrorism[2] or the National Center for Missing & Exploited Children[3]. That is exactly how persuading and sharing views should work in a free and democratic society. And the ability to solicit, receive, and implement feedback about content moderation is an important aspect of the online service providers' own First Amendment right to "exercise editorial discretion over the speech and speakers in the forum." *Halleck*, 139 S. Ct. at 1930; see *infra* at 18-20.

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[2] See https://gifct.org/.

[3] See https://www.missingkids.org/cybertiplinedata.

The key is that private parties must remain genuinely able to exercise independent judgment about whether to accept the government's attempts to persuade. Thus, it should come as no surprise that the Court's decision in *Bantam Books* left the book distributors free to decide, as a matter of their own independent judgment, whether to distribute the publishers' books. See also *Denver Area Educ. Telecommunications Consortium, Inc.* v. *FCC*, 518 U.S. 727, 816 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part) (explaining that, under the First Amendment, "the author of a book is protected in writing the book, but has no right to have the book sold in a particular bookstore without the store owner's consent").

There are—and must be—clear limits on the government's ability to use either carrots or sticks to influence the speech and editorial choices of private publishers. It is "obvious" that the government "may not unduly suppress free communication of views * * * under the guise of conserving desirable conditions." *Cantwell* v. *State of Connecticut*, 310 U.S. 296, 308 (1940); accord *Bantam Books*, 372 U.S. at 68; *O'Handley*, 62 F.4th at 1159. Whatever its tactics, the government must not be allowed to accomplish indirectly what it cannot accomplish via direct censorship. *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984); *Agency for Int'l Dev.* v. *All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013).

No matter how this case is ultimately resolved, the Court should apply the correct legal framework—one that respects the interests of all affected entities, especially given that no defendant here is asserting the First Amendment interests of private media entities whose online services are at stake in such cases.

II. Even under the parties' state-action framing of the question presented, liability must rest solely with the government.

If the Court applies the correct legal framework of *Bantam Books*, a holding that the federal government has violated plaintiffs' First Amendment rights by engaging in improper threats or coercive actions would warrant appropriate relief against the relevant governmental actors to end and prevent the unconstitutional governmental pressure. At the same time, such a holding would rightly avoid jeopardizing the First Amendment rights of the private social-media companies that the government allegedly coerced.

By contrast, if the Court analyzes this case as the parties suggest—by asking whether the government's actions transformed the social media companies into state actors—it is even more important that the Court carefully distinguish the government's conduct from that of the private entities that it seeks to influence. There is a fundamental and constitutionally significant difference between the compulsion inquiry in suits against the government and state-action analysis in suits against private entities, particularly private entities whose own constitutional rights are at stake. Thus, no matter how the Court resolves this case, it should take pains to maintain the critical line between these two strands of cases, which are "obviously different." See *Blum*, 457 U.S. at 1003 ("This 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.").

This is an issue of recurring importance: although the claims here are appropriately limited to federal agencies and officials, other plaintiffs have not been so restrained. The plaintiffs in numerous recent cases have brought First Amendment suits directly against private media entities, including online service providers, claiming that the companies were coerced or improperly pressured by the government into removing or restricting speech on their platforms—and thereby became state actors. The lower courts have consistently rejected such state-action theories, and this Court should do the same.[4]

In particular, the Court should make clear that if the government is found to have violated the First Amendment by compelling or otherwise unlawfully pressuring private publishers to make the government's preferred content-moderation choices, liability rests solely with the government. That result is consistent with existing precedent, which has never found that coercion alone justifies imposing liability on the coerced private parties. And a contrary rule

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[4] *E.g.*, *Rogalinski* v. *Meta Platforms, Inc.*, 2023 WL 7876519, *1 (9th Cir. Nov. 16, 2023); *Doe* v. *Google LLC*, 2022 WL 17077497, *2 (9th Cir. Nov. 18, 2022); *Kennedy* v. *Google LLC*, 2023 WL 5440787, *4 (N.D. Cal. Aug. 23, 2023); *Informed Consent Action Network* v. *YouTube LLC*, 582 F. Supp. 3d 712, 718-724 (N.D. Cal. 2022); *Kennedy* v. *Warren*, 2022 WL 1449678, *4-5 (W.D. Wash. 2022); *Hart* v. *Facebook Inc.*, 2022 WL 1427507, *8 (N.D. Cal. May 5, 2022); *Children's Health Def.* v. *Facebook Inc.*, 546 F. Supp. 3d 909, 933 (N.D. Cal. 2021); *Daniels* v. *Alphabet, Inc.*, 2021 WL 1222166, *6-7 (N.D. Cal. Mar. 31, 2021).

may incentivize the government to attempt to do indirectly—by unlawfully pressuring private speech platforms—what it cannot do directly.

Carefully adhering to this principle is even more important here because the private parties who allegedly were coerced have their *own* First Amendment rights that must be preserved. Opening the door to private liability or injunctive relief would unfairly punish the victims of unconstitutional government overreach by depriving them of their ability to exercise editorial discretion over the speech that appears on their platforms. That would compound, not remedy, the constitutional violation. One First Amendment violation does not warrant another.

A. Beginning with first principles, the Constitution generally "erect[s] no shield against merely private conduct." *Hurley*, 515 U.S. at 566 (internal quotation marks and alteration omitted). That principle applies fully to "the constitutional guarantee of free speech," which "is a guarantee only against abridgment by government, federal or state." *Hudgens* v. *NLRB*, 424 U.S. 507, 513 (1976); accord *Halleck*, 139 S. Ct at 1928. Preserving a clear line between governmental and private action is therefore critical. Norms that increase liberty when applied to the government decrease liberty when applied to private parties.[5]

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[5] Here again, *Blum* is inapposite and *Bantam Books* is right on point. In *Blum*, the private nursing homes had no constitutional right to make decisions regarding patient care, so the question of their rights simply did not arise. In *Bantam Books*, by contrast, the book distributors had a First Amendment right to decide what books to carry, and the Court's disposition of the case left them free to do so.

That is why, in cases actually involving the application of state-action doctrine to private entities, this Court has both made clear that such entities qualify as state actors only "in a few limited circumstances" and has rigorously enforced the "traditional boundaries" of state action. *Ibid.* "Careful adherence" to those stringent standards "preserves an area of individual freedom." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

It follows that the government's unlawful compulsion of a private party does not transform that private party into a state actor subject to liability. "In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action"—*i.e.*, "whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor." *Nat'l Collegiate Athletic Ass'n* v. *Tarkanian*, 488 U.S. 179, 192 (1988). But when the government compels or unfairly pressures a private party to take a particular action, it "has removed that decision from the sphere of private choice," and left the private defendant "with no choice of his own." *Peterson* v. *City of Greenville*, 373 U.S. 244, 248 (1963). And unless that critical distinction between these two situations is maintained in First Amendment cases, a finding of coercion or significant encouragement risks drastic consequences for the compelled private entities—*i.e.*, they may be involuntarily deemed "state actor[s] subject to First Amendment constraints on [their] editorial discretion." *Halleck*, 139 S. Ct. at 1928.

This Court has never found a private party liable under a theory of state action based solely on the government's coercion. The government (at 36) cites *Adickes* v. *S.H. Kress & Company*, which held that the plaintiff, who allegedly was denied service at a private lunch counter because of her companions' race, could state a § 1983 claim against the operator of that lunch counter if its "refusal to serve her was motivated by [a] state-enforced custom." 398 U.S. 144, 174 (1970). Yet the Court expressed "no views concerning the relief that might be appropriate if a violation is shown," and no views on "whether there are any defenses available" to the private defendant. *Id.* at 174 n.44. And as the lower courts have recognized, the coercion rule applies differently "in a case involving a private defendant." *Sutton* v. *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 838 (9th Cir. 1999). In such cases, "the mere fact that the government compelled a result does not suggest that the government's action is 'fairly attributable' to the private defendant." *Ibid.* After all, it is "the state action, not the private conduct, which is unconstitutional"—and where the government crosses the line from persuasion to compulsion, the "private party in such a case is 'left with no choice of his own' and consequently should not be deemed liable." *Ibid.* (citing *Peterson*, 373 U.S. at 248).

In those circumstances, private platforms are the *victim* of government coercion, and it makes no sense to subject them to liability if (as plaintiffs allege here) the government coerced or otherwise unlawfully pressured them to engage in the challenged conduct. See *Harvey* v. *Plains Twp. Police Dep't*, 421 F.3d 185, 196 (3d Cir. 2005) (private defendant acting in response to a police officer's order was not liable under § 1983).

Stated simply, if a private entity's conduct was "compelled against its will, principles of equity * * * dictate relief which would also shield [it] against such compulsion, rather than penalize [it] by imposing damages for surrendering." *Williams* v. *Hot Shoppes, Inc.*, 293 F.2d 835, 847 (D.C. Cir. 1961) (en banc) (Bazelon, J., dissenting); see also *Harvey*, 421 F.3d at 195-196 (liability for joint or concerted action requires "willful participation" and "compulsion by the state negates the presence of willfulness").

B. These principles are important in any case, but especially in cases where holding private companies liable threatens their First Amendment rights. This Court has warned against expansive theories of state action that would "eviscerate" private entities' "rights to exercise editorial control over speech and speakers on their properties or platforms." *Halleck*, 139 S. Ct. at 1932. Yet the approach of the court below risks exactly that. As the federal defendants put it, "the Fifth Circuit's holding that platforms' content-moderation decisions are state action would subject those private actions to First Amendment constraints—a radical extension of the state-action doctrine." Application for Stay 5; see also U.S. Br. 45 (arguing that the Fifth Circuit's view "would subject a wide range of private conduct to constitutional standards ordinarily applicable only to the government").

Decades of this Court's precedents across a host of contexts confirm that the Free Speech and Free Press Clauses protect private entities' editorial control over whether, and how, to publish or disseminate others' speech. *E.g.*, *Halleck*, 139 S. Ct. at 1930; *Hurley*, 515 U.S. at 575; *Pac. Gas & Elec. Co.* v. *Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality); *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974);

Bantam Books, 372 U.S. at 64 n.6. The principle that the First Amendment bars the government from compelling private companies either to remove content from their platforms or "to publish that which 'reason' tells them should not be published" (*Tornillo*, 418 U.S. at 256) applies both to positive law (*ibid.*) and to judicial remedies (*Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931)). As then-Judge Kavanaugh once put it, the government "may not * * * tell Twitter or YouTube what videos to post; or tell Facebook or Google what content to favor." *U.S. Telecomm. Ass'n* v. *FCC*, 855 F.3d 381, 435 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc); see Br. for Chamber of Commerce of United States 8-13 in *Moody* v. *NetChoice LLC*, *NetChoice* v. *Paxton* (Nos. 22-277, 22-555).

History confirms that the core functions of social media services—selecting, prioritizing, and publishing communications written by third parties—are as old as the printing press. Founding-era newspapers rarely engaged in original reporting, and only sometimes wrote original commentary. See generally Joseph Adelman, REVOLUTIONARY NETWORKS: THE BUSINESS AND POLITICS OF PRINTING THE NEWS, 1763-1789 3-11 (2019). Rather, they "compiled" third-party submissions deemed of interest to their readers, played an "active role in filtering" content (*id.* at 5), and often "refused to print anything that might countenance Vice, or promote Immorality." Benjamin Franklin, *Apology For Printers*, 10 June 1731, Founders Online, Nat'l Archives. Even those who took the narrowest view of the "liberty of the press" recognized that it encompassed the right "to publish * * * any thing and every thing *at the discretion of the printer only*." Report of the Minority on the Virginia Resolutions (Jan.

22, 1799) (emphasis added). "That principle still holds true" today. See *Halleck*, 139 S. Ct. at 1931 (citation omitted); see also Br. for Professors of Hist. 6-30 in *Moody* v. *NetChoice LLC*, *NetChoice* v. *Paxton* (Nos. 22-277, 22-555).

C. Where the government crosses the line between lawful persuasion and unlawful pressure or coercion of private media companies, therefore, there are *two* victims, not one. Such governmental conduct violates both the First Amendment rights of the speaker whose content the government seeks to suppress and those of the speech disseminator, whose rights of editorial control are abridged. The government's coercion of a private media entity does not justify converting the exercise of editorial discretion, which is protected by the First Amendment, into a violation of the First Amendment. And injunctions that order private publishers "to publish that which 'reason' tells them should not be published'" (*Tornillo*, 418 U.S. at 256) do not become lawful simply because the government has overreached in the other direction.[6]

Where private media companies have been coerced by the government, then, the proper remedy is merely to remove that coercion, freeing the private parties to speak and exercise their constitutionally protected editorial discretion as they see fit. It is not to impose

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[6] In cases involving alleged constitutional violations by the federal government, *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), and its progeny provide the only potential path to damages liability. But this Court has refused to extend *Bivens* liability to private corporations, even if undisputedly acting under color of law. *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68, 70-75 (2001).

new governmental coercion in the form of judicial restrictions on their independent judgments concerning what speech is "worthy of presentation." *Hurley*, 515 U.S. at 575. Indeed, since "all speech inherently involves choices of what to say and what to leave unsaid," it is bedrock law that "one who chooses to speak may also decide 'what not to say.'" *Id.* at 573; see also *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 138 S. Ct. 2361, 2371 (2018) (government compulsion of speech is "content-based regulation of speech"). This core First Amendment principle bars the government from interfering with the right of communications media to exercise editorial control over what speech they choose to disseminate. And where the government crosses that line, its transgressions should be curtailed without further violating the First Amendment.

The Ninth Circuit's decision in *Carlin Communications, Inc.* v. *Mountain States Telephone & Telegraph Company*, 827 F.2d 1291 (9th Cir. 1987), is instructive. There, a county prosecutor's threat forced a telephone utility to cut off service to an adult entertainment company. *Id.* at 1293. The utility later adopted a policy of refusing service to companies selling adult-entertainment messages, even if such messages were legal. *Ibid.* The company sued, challenging both the initial termination prompted by the prosecutor's threat and the later policy change. Although the court held that the prosecutor's compulsion rendered the utility's initial termination of service "state action," the court correctly concluded that it "d[id] not follow" that the utility "may never thereafter decide independently to exclude Carlin's messages from its 976 network. It only follows that the *state* may never *induce* Mountain Bell to do so." *Id.* at 1296-1297. The court thus vacated the district court's order enjoining

the utility to "restore Carlin's 976 service" and "from disconnecting Carlin on the basis of message content" (*id.* at 1293), explaining that, should "Mountain Bell not wish to extend its 976 service to Carlin, it is also free to do that." *Id.* at 1297. Thus, the proper outcome was that "Mountain Bell and Carlin may contract, or not contract, as they wish." *Ibid.*

In short, in setting the rules for what the government can do to influence or pressure private media entities when it comes to publishing third-party speech, the Court should confirm that government overreach neither deprives those private parties of their own First Amendment rights nor permits injunctive relief that would constrain their independent editorial choices. Maintaining this line is a critical check both on who can be sued for alleged constitutional violations in cases such as these, and on the remedies available against private entities in such cases. And it is vital in ensuring that application of state-action principles continues to "enforce[] a critical boundary between the government and the individual, and thereby protect[] a robust sphere of individual liberty." *Halleck*, 139 S. Ct. at 1934.

CONCLUSION

No matter how the Court ultimately resolves this case, it should apply the analytical framework of *Bantam Books* rather than the Court's state-action precedents. But even if the Court views this case through the lens of state action, it should confirm that when the government interferes with private speech choices, the remedy lies in restraining the government—not in further abridging the rights of the coerced private parties with injunctions that limit the exercise of their own First Amendment rights.

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