

No. 22-1199

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**In the  
Supreme Court of the United States**

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ROGAN O'HANDLEY,

*Petitioner,*

v.

SHIRLEY WEBER, in her official capacity as California  
Secretary of State, & TWITTER INC.,

*Respondents.*

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*On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit*

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**MOTION FOR LEAVE TO FILE BRIEF AS  
AMICI CURIAE AND BRIEF FOR THE STATE  
OF MONTANA AND 8 OTHER STATES AS  
AMICI CURIAE IN SUPPORT OF PETITIONER**

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**MOTION FOR LEAVE TO FILE  
BRIEF AS AMICI CURIAE  
IN SUPPORT OF PETITIONER**

Pursuant to Rule 21.2(b), the States of Montana, Alabama, Georgia, Idaho, Louisiana, North Dakota, South Dakota, South Carolina, and Texas respectfully request leave to submit a brief as amici curiae in support of the petitioner's petition for a writ of certiorari.

Rule 37.2(a) requires that amici notify all parties' counsel of their intent to file an amicus brief in support of a petition for certiorari at least ten days before the brief is due, and further that the due date is thirty days after a response is called for. A response was called for on July 26, 2023, requiring a response on August 25, 2023. On August 17, 2023, that deadline was extended to September 25, 2023. Due to an oversight, amici's counsel notified the parties of its intent to file this brief on August 17, 2023, eight days before the deadline for amicus briefs supporting petitioner. Counsel for all parties waived any objection to amici counsel's late notice. Given the extension of time for the response, granting leave to file will not prejudice any party, as Respondents will have ample time to respond to any points raised in this brief, if they see fit.

Amici States write in support of Petitioner here because the questions presented in the petition raise significant issues regarding the First Amendment implications of government officials' attempts to pressure social-media platforms' content-moderation decisions. In this brief, Amici States draw on their experience briefing and litigating similar cases across the country to inform this Court's consideration of the petition.

Accordingly, Amici States respectfully request that this Court grant them leave to file this amicus brief.

August 25, 2023

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... ii

INTEREST OF AMICI CURIAE ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT.....2

ARGUMENT..... 7

I. The Ninth Circuit’s Finding That No State Action Occurred Conflicts with the Holdings of This Court and Other Courts and Threatens First Amendment Values..... 7

II. Similar Mass-Flagging Operations To Censor Disfavor Viewpoints on Social Media Have Become Endemic Among State, Local, and Federal Government ..... 12

CONCLUSION ..... 21

## TABLE OF AUTHORITIES

### CASES

<i>Adickes v. S.H. Kress &amp; Co.</i> , 398 U.S. 144 (1970).....	8
<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58 (1963).....	7, 11
<i>Blum v. Yaretsky</i> , 457 U.S. 991 (1982).....	8
<i>Burton v. Wilmington Parking Auth.</i> , 365 U.S. 715 (1961).....	9
<i>Charles v. Johnson</i> , 18 F.4th 686 (11th Cir. 2021) .....	10
<i>Frazier v. Bd. of Trs.</i> , 765 F.2d 1278 (5th Cir. 1985) .....	9
<i>Gallagher v. Neil Young Freedom Concert</i> , 49 F.3d 1442 (10th Cir. 1995) .....	9, 10
<i>Kowalski v. Tesmer</i> , 543 U.S. 125 (2004).....	11
<i>Missouri v. Biden</i> , 2023 U.S. Dist. LEXIS 114585 (W.D. La. July 4, 2023).....	12, 13, 14, 15, 16, 17, 18, 19, 20
<i>Nat’l Coll. Ath. Ass’n. v. Tarkanian</i> , 488 U.S. 179 (1988).....	10
<i>Norwood v. Harrison</i> , 413 U.S. 455 (1973).....	7, 8
<i>O’Handley v. Weber</i> , 62 F.4th 1145 (9th Cir. 2023) .....	2, 3, 4, 5, 8, 10, 11

<i>Packingham v. North Carolina</i> , 582 U.S. 98 (2017).....	1, 6, 7
<i>Parks Sch. of Bus., Inc. v. Symington</i> , 51 F.3d 1480 (9th Cir. 1995) .....	10
<i>Rawson v. Recovery Innovations, Inc.</i> , 975 F.3d 742 (9th Cir. 2020) .....	9
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997).....	1
<i>Roberts v. La. Downs, Inc.</i> , 742 F.2d 221 (5th Cir. 1984) .....	9
<i>Sec’y of Md. v. Joseph H. Munson Co.</i> , 467 U.S. 947 (1984).....	11
<i>Skinner v. Ry. Lab. Execs. Ass’n</i> , 489 U.S. 602 (1989).....	8
<i>United States v. Alvarez</i> , 567 U.S. 709 (2012).....	5
<i>United States v. Mekjian</i> , 505 F.2d 1320 (5th Cir. 1975) .....	9
<i>United States v. Reed</i> , 15 F.3d 928 (9th Cir. 1994) .....	9

**INTEREST OF AMICI CURIAE**

*Amici Curiae* are the States of Montana, Alabama, Georgia, Idaho, Louisiana, North Dakota, South Dakota, South Carolina, and Texas (“Amici States”), which submit this brief in support of Petitioner.<sup>1</sup> Amici States share a fundamental interest in ensuring that the citizens of their States are allowed to express opinions on social media on matters of great social and political consequence without viewpoint-based meddling and interference from government officials, including government officials in other States like California. Each *amicus* has a constitutional provision reflecting a fundamental policy favoring freedom of speech without government interference. Each *amicus* has a quasi-sovereign interest in ensuring that the voices of a “substantial segment” of its citizens are not silenced on social media through the actions of government officials in other States. This Court has recognized that social media is the “modern public square,” and that platforms like Twitter “provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.” *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)). And social media platforms “allow a person with an Internet connection to ‘become a town crier with a voice that resonates farther than it could from any soapbox.’” *Id.* Amici have a strong interest in preserving this “modern public square” as a forum for free exchange of ideas on the

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<sup>1</sup> Amici States did not provide a 10-day notice pursuant to Rule 37.2(a). A motion for leave is included in this brief addressing this issue.



great social and political questions of the day, free from government-induced censorship.

### INTRODUCTION AND SUMMARY OF ARGUMENT

Suppose a major metropolitan area suffers a crime wave centered on a collection of large apartment complexes encompassing thousands of private apartments. Illegal activity occurs in many apartments rented from a few large corporate landlords. The police in this city develop good intelligence in real time on which apartments contain contraband and evidence of illegal activity. They know that the corporate landlords have provisions in every tenant's lease allowing the landlord to search for illegal activity and evict guilty tenants at will, but they also know that the landlords have neither the resources nor the economic incentive to engage in mass or frequent searches for contraband.

Rather than applying for innumerable search warrants, the police decide to team up with the landlords to find and seize the evidence more "efficiently." They create a new unit, called the "Office of Apartment Security," or "OAS," and proudly proclaim that it "work[s] closely with [private landlords] to be proactive so when there's [evidence of a crime], we can contain it." See *O'Handley v. Weber*, 62 F.4th 1145, 1154 (9th Cir. 2023). The police chief boasts that the OAS "work[s] in partnership with [landlords] to develop more efficient [search practices] for potential [evidence of crimes]." *Id.* In a just a few months, the OAS provides landlords with targeted information about exactly where and when evidence of criminal activity will be found, to induce them to conduct private

searches of “nearly 300” apartments suspected of containing contraband. *Id.*

The police—who, unlike the landlords, have good intelligence on where the contraband is to be found—set up a special communications channel with the landlords (they call it a “Partner Support Portal,” *id.*) to tip off the landlords in real time and tell them exactly where to search. The landlords, wanting to stay in the government’s good graces, comply with the scheme and promptly search apartments identified by the police. While ordinary tenant complaints languish for weeks, the police’s flagging of apartments receives lightning-fast responses from the landlords, who receive the police’s information and act immediately. In 98 percent of cases, they find evidence of illegal activity, turn over the evidence to police, and evict the offending tenants. *Cf. id.* The tenants are then prosecuted based on that evidence.

Every court confronted with these facts would find a systematic Fourth Amendment violation. And this case is the First Amendment equivalent of that scenario. Twitter and other major social-media platforms lack the incentives to engage in constant mass-surveillance of the billions of tweets and other posts appearing daily on their platforms. Twitter’s terms of service may technically prohibit many tweets, but a degree of underenforcement of those terms of service is unsurprising. Like the corporate landlords who do not constantly search their tenants’ apartments for contraband—even though they have the contractual authority to do so—Twitter and other platforms do not constantly monitor the content on their platforms to

remove every single piece of content that might violate any given term of service.

That's where the government steps up to the plate. Unlike the private platforms, the government has very powerful incentives to monitor certain kinds of social-media speech online and demand that private speech be taken down—namely, private speech that *criticizes the government and contradicts its preferred narratives*. If that speech arguably violates a platform's terms of service, the government has a golden opportunity to censor it by proxy. Accordingly, government agencies—like the California Secretary of State's office here—engage in systematic “flagging” of private speech to social-media platforms to induce them to remove content that Twitter and the other platforms may not care much about but that *government officials do not like*. And the government officials are happy to enjoy the fruits of these public/private flag-and-censor operations—*i.e.*, the silencing of private speech criticizing them or expressing viewpoints they disfavor.

Such “flagging” operations, like this one, are rife with viewpoint discrimination. The government officials invariably target the *viewpoints* they disfavor on matters of enormous public importance involving core political speech—such as claims that the 2020 presidential election was rigged or stolen, claims that COVID-19 leaked from a laboratory in China, claims that voting by mail is insecure and carries enhanced risks of fraud, claims that COVID vaccines are ineffective or have worrisome side effects, and many others. The tweet at issue derided the California Secretary of State's administration of elections in California, urged that the government was overlooking rampant fraud,

and demanded an audit of government operations. *Id.* at 1154. In other words, what the government targeted for silencing was criticism of itself. Small wonder that, of all the billions of tweets on Twitter, the tweet that most irked the California Secretary of State’s Office was core political speech *criticizing the California Secretary of State*.

Government officials routinely justify their push to suppress these viewpoints by describing the disfavored viewpoints as “misinformation” and “disinformation.” But letting the government decide what is true or false on great, hotly contested social and political questions—and then induce private companies to suppress supposedly “false” speech—is profoundly at odds with the First Amendment. “Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.” *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (plurality opinion). “[I]t is perilous to permit the state to be the arbiter of truth.... [T]he potential for abuse of power in these areas is simply too great.” *Id.* at 752 (Alito, J., dissenting).

Moreover, what the government views as “misinformation” all too often turns out to be true, or at least highly credible. “Even where there is a wide scholarly consensus concerning a particular matter, the truth is served by allowing that consensus to be challenged without fear of reprisal. Today’s accepted wisdom sometimes turns out to be mistaken.” *Id.* In cases of *government*-induced censorship, such “mistake[s]” occur with dizzying, embarrassing speed. In very recent days, government officials induced social-media platforms to censor claims that (1) the COVID-19 virus

leaked from a laboratory; (2) the New York Post’s story on the Hunter Biden laptop story was true; (3) the COVID-19 vaccines do not effectively prevent infection or transmission of the virus; and (4) voting by mail presents greater risks of fraud and abuse than in-person voting. The common thread is that all these claims are true, or at least eminently defensible. Now, as at every other time in history, government officials seeking to silence private speech are not motivated by *truth*. They care about *power*—preserving and expanding the power of the censors and those whose views they favor.

The California Secretary of State’s conduct here should not be viewed in isolation. In the past few years, government officials’ mass-flagging of disfavored speech on social-media platforms has become endemic across all levels of government. Federal and state agencies across the nation have engaged in such conduct for years. The White House, the FBI, the Department of Homeland Security’s Cybersecurity and Infrastructure Agency (“CISA”), the Centers for Disease Control (“CDC”), the National Institute for Allergy and Infectious Disease (“NIAID”), the National Association of Secretaries of State (“NASS”), and the National Association of State Election Directors (“NASED”)—all have engaged in such mass-flagging conduct, among many others. These government agencies induce platforms to silence untold millions of private voices on social media—the “modern public square.” *Packingham*, 582 U.S. at 107. They fundamentally distort online discourse by rendering entire viewpoints virtually unspeakable on social media. Such operations are unlawful attempts by government to dominate and control “perhaps the most powerful

mechanisms available to a private citizen to make his or her voice heard.” *Id.*

Government officials have no business sending booksellers lists of books to burn because the government officials disfavor the viewpoints expressed in them. *Cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). Likewise, they have no business sending social-media platforms lists of speakers and content to censor because they disfavor the viewpoints those speakers and content express. Such conduct is anathema to the First Amendment. The Court should grant certiorari and hold that the California Secretary of State’s mass-flagging operation here constitutes an egregious violation of the First Amendment.

#### ARGUMENT

##### **I. The Ninth Circuit’s Finding That No State Action Occurred Conflicts with the Holdings of This Court and Other Courts and Threatens First Amendment Values.**

State action occurs when a government official provides crucial information to induce a private party to engage in a search, and then enjoys the fruits of that private search, even in the absence of further encouragement and coercion. But, as noted below, Twitter’s cooperation with the California Secretary of State’s Office in 2020 occurred after *years* of pressure and coercion from government officials to cooperate in just such requests for censorship of election-related speech.

It is “axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.”

*Norwood v. Harrison*, 413 U.S. 455, 465 (1973). The California Secretary of State is “constitutionally forbidden” to suppress private speech on the basis of viewpoint, and thus it cannot “induce, encourage or promote” Twitter to do so. *Id.* In holding to the contrary, the Ninth Circuit adopted a test for “significant encouragement” that is virtually identical to coercion; it held that state “encouragement” occurs only where “the State’s use of positive incentives ... overwhelm[s] the private party and essentially compel[s] the party to act in a certain way.” *O’Handley*, 62 F.4th at 1158.

This test wrongly conflates encouragement with coercion—which, as the Ninth Circuit admitted, is already an independent test for state action. *See id.*; *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (state action occurs when the government “exercise[s] coercive power or ... provide[s] such significant encouragement, either overt or covert, that the choice must be in law be deemed to be that of the State”). In doing so, the Ninth Circuit erred and created a conflict with this Court’s precedents and those of many other courts.

No other court holds that “significant encouragement” must be identical to coercion. On the contrary, this Court has held that “a private party should be deemed an agent or instrument of the Government” when “the Government did more than adopt a passive position toward the underlying private conduct.” *Skinner v. Ry. Lab. Execs. Ass’n*, 489 U.S. 602, 614-15 (1989). In *Adickes v. S.H. Kress & Co.*, this Court found state action when a police officer merely “communicated his disapproval to a [restaurant] employee, thereby influencing the decision not to serve.” 398 U.S. 144, 152, 158 (1970). In the Fourth

Amendment context, the Fifth Circuit has held that when government officials “stand by watching with approval as the search [conducted by private parties] continues” there may be state action. See *United States v. Mekjian*, 505 F.2d 1320, 1327 (5th Cir. 1975); accord *United States v. Reed*, 15 F.3d 928, 932-33 (9th Cir. 1994). Indeed, the Fifth Circuit has explicitly stated that “encouragement *short of compulsion*” may constitute state action—directly contradicting the Ninth Circuit below. *Frazier v. Bd. of Trs.*, 765 F.2d 1278, 1286 (5th Cir. 1985).

In addition, even absent coercion or significant encouragement, state action may be found where there is joint participation of government officials in the private action. Joint participation occurs when the government “has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity.” *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961); see also *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 748 (9th Cir. 2020). “State action may manifest itself in a wide variety of forms, some of which do not fit neatly in any category.” *Roberts v. La. Downs, Inc.*, 742 F.2d 221, 224 (5th Cir. 1984). Joint participation applies whenever government officials are “so intimately involved with the decision ... that this action should be attributed to the state.” *Id.* This occurs when “the state plays some meaningful role in the mechanism leading to the disputed act.” *Frazier*, 765 F.2d at 1288. “[I]f there is a substantial degree of cooperative action between state and private officials, or if there is overt and significant state participation, in carrying out the deprivation of the plaintiff’s constitutional rights, state action is



present.” *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1454 (10th Cir. 1995) (cleaned up); see also *Charles v. Johnson*, 18 F.4th 686, 696 (11th Cir. 2021).

In fact, one hallmark of joint participation is when the government “knowingly accepts the benefits derived from unconstitutional behavior,” *Nat’l Coll. Ath. Ass’n. v. Tarkanian*, 488 U.S. 179, 192 (1988); accord *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1486 (9th Cir. 1995)—which Respondents did here by silencing speech criticizing them and their policies.

The Ninth Circuit’s holding here is at odds with all these authorities. By setting up a formal mass-flagging operation with Twitter and providing Twitter with specific information in real time about alleged violations of its policies, the California Secretary of State significantly encouraged Twitter to suppress First Amendment-protected speech of ordinary Americans on the basis of viewpoint. The government officials also jointly participated in the content-moderation decisions by insinuating themselves into the platforms’ content-moderation decisions, setting up a formal reporting structure and becoming directly involved in decisions about the destruction of Americans’ speech on matters of public concern.

In essence, the Ninth Circuit’s holding imposes a *higher* bar for showing state action in the First Amendment context than in other contexts where state action is challenged, including the Fourth Amendment. In the “OAS” example above, no court would say, “this case turns on the simple fact that the [landlords] acted in accordance with [their] own ... policy” when they searched the apartments at

the police's behest and seized evidence of crimes. *See O'Handley*, 62 F.4th at 1156. No court would hold that state action was absent just because the private landlords were "free to ignore" the OAS's requests. *Id.* at 1158. No court would hold that state action is absent because the police "did nothing more than make a request with no strings attached," while the landlords merely "us[ed] its own independent judgment." *Id.* No court would hold that state action may be found only if the police provide such "positive incentives [that] overwhelm the private party and essentially compel the party to act a certain way." *Id.* No court would hold that "this was an arm's-length relationship, and the [landlord] never took its hands off the wheel." *Id.* at 1160.

Or suppose the hypothetical changed slightly, and the scenario involved racist police flagging for private landlords and restaurants the occasions when disfavored racial minorities were being served on their properties to ensure that the private actors would enforce their private discrimination policies against those minorities, and asking the private actors to report back on whether and when they had excluded the disfavored minorities. This kind of close cooperation would raise grave concerns in the context of the Fourth and Fourteenth Amendments. And this Court recognizes that First Amendment rights, of all constitutional rights, are among the most fragile and most "vulnerable to gravely damaging yet barely visible encroachments." *Bantam Books*, 372 U.S. at 66; *see also*, e.g., *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984). The Ninth Circuit's decision adopting a

*higher* bar for First Amendment rights flouts this fundamental principle.

## **II. Similar Mass-Flagging Operations To Censor Disfavor Viewpoints on Social Media Have Become Endemic Among State, Local, and Federal Government.**

Moreover, this case should be viewed in its historical context. The California Secretary of State did not act in isolation. Recent evidence in parallel litigation involving the States of Louisiana and Missouri has revealed that mass-flagging operations like the one in this case are endemic at the federal, state, and local level. Government officials just can't seem to get enough of the power to silence disfavored viewpoints on social media.

In the Louisiana case, the Western District of Louisiana recently issued a historic preliminary injunction to prevent such federal mass-flagging operations. *Missouri v. Biden*, No. 3:22-cv-01213-TAD, -- F. Supp. 3d --, 2023 U.S. Dist. LEXIS 114585 (W.D. La. July 4, 2023), *appeal filed* (July 5, 2023). The district court made extensive factual findings supported by almost 600 citations of record evidence. *Id.* at \*6-111 & nn.6-598. Among other things, the district court found that such mass-flagging operations, like the California Secretary of State's here, are conducted by the White House, CISA, the FBI, CISA, the State Department's Global Engagement Center, the CDC, and state and local election officials across the nation through the CISA-launched so-called "Election Integrity Partnership." *See id.*

The California Secretary of State’s Office was not the only government agency with a “Partner Support Portal” for flagging disfavored speech; Twitter offered that courtesy to the White House and the CDC as well. *Id.* at \*14, \*65-66. The White House flagged content and pressured social-media platforms like Twitter and Facebook to censor content from its prominent critics like Tucker Carlson, Tomi Lahren, Alex Berenson, Robert F. Kennedy Jr., and many others. *Id.* at \*22-26, \*111. Senior White House officials badgered platforms to censor disfavored speakers and viewpoints, making public and private threats of adverse legal consequences against them if they did not comply. *See id.* When the platforms did not cooperate enough for their liking, senior White House officials made ominous statements like “[these concerns are] shared at the highest (and I mean highest) levels of the White House,” and “[i]nternally we [are] considering our options [about] what to do about” the platforms’ lack of cooperation on censorship. *Id.* at \*27, \*126.

Addressing disfavored speech about the COVID vaccines, the White House particularly targeted so-called “borderline” content, *i.e.*, *truthful* speech that contradicts the White House’s preferred narratives, such as “true but shocking claims or personal anecdotes”; “discussing the choice to vaccinate in terms of personal or civil liberties”; and “concerns related to mistrust in institutions or individuals,” *id.* at \*19, \*24—*i.e.*, core political speech. Both the CDC and the Surgeon General’s Office directly participated in these federal efforts to silence dissenting viewpoints regarding the COVID vaccines. *Id.* at \*38-66. Based on extensive findings, the Court held that the White House’s elaborate mass-flagging campaign was

successful: “Faced with unrelenting pressure from the most powerful office in the world, the social-media companies apparently complied.” *Id.* at \*132.

The White House’s operation was only one of several similar mass-flagging operations at the federal level. Particularly relevant here, federal national-security and law-enforcement agencies like the FBI and CISA have engaged in mass-flagging of core *election-related* speech for many years, since at least 2018. As the Western District of Louisiana found, this federal flagging of election-related speech occurs on a massive scale: “The FBI, along with Facebook, Twitter, Google/YouTube, Microsoft, Yahoo!, Wikimedia Foundation, and Reddit, participate in a Cybersecurity and Infrastructure Security Agency (‘CISA’) ‘industry working group.’ Representatives of CISA, the Department of Homeland Security’s Intelligence & Analysis Division (‘I&A’), the Office of Director of National Intelligence (‘ODNI’), the FBI’s FITF, the Dept[artment] of Justice National Security Division, and [FBI supervisor Elvis] Chan participate in these industry working groups.” *Id.* at \*78 (footnote omitted). “Chan also hosted bilateral meetings between FBI and Facebook, Twitter, Google/YouTube, Yahoo!/Verizon, Microsoft/LinkedIn, Wikimedia Foundation and Reddit, and the Foreign Influence Task Force.... The bilateral meetings are continuing, occurring quarterly, but will increase to monthly and weekly nearer the elections.” *Id.* at \*79 (footnotes omitted).

“For each election cycle, during the days immediately preceding and through election days, the FBI maintains a command center around the clock to receive and forward reports of ‘disinformation’ and

‘misinformation.’ The FBI requests that social-media platforms have people available to receive and process the reports at all times.” *Id.* at \*80-81. The FBI continuously flags “misinformation” on election-related speech “one to five times per month” by sending encrypted lists of disfavored speakers and content to seven major social-media platforms, asking those platforms to silence them. *Id.* at \*86.

FBI supervisor Elvis “Chan testified that the purpose and predictable effect of the tactical information sharing was that social-media platforms would take action against the content in accordance with their policies.” *Id.* at \*84. State government officials like Respondents here were directly involved in this election-speech censorship operation: “The FBI also shared ‘indicators’ with state and local government officials.” *Id.*

“‘Domestic disinformation’ was also flagged by the FBI for social-media platforms.” *Id.* at \*85. “During 2020, Chan estimated he sent out these [mass-flagging] emails from one to six times per month and in 2022, one to four times per month. Each email would flag a number that ranged from one to dozens of indicators [*i.e.*, speakers, accounts, or content]. When the FBI sent these emails, it would request that the social-media platforms report back on the specific actions taken as to these indicators....” *Id.* at \*86-87 (footnote omitted).

The federal national-security state is also deeply involved in pushing platforms to censor election-related speech. Senior CISA official Brian “Scully testified that during 2020, the [so-called “Mis, Dis, and Malinformation Team,” or “MDM Team,” at CISA] did

‘switchboard work’ on behalf of election officials. ‘Switchboarding’ is a disinformation-reporting system provided by CISA that allows state and local election officials”—like the California Secretary of State’s Officer here—“to identify something on social media they deem to be disinformation aimed at their jurisdiction. The officials would then forward the information to CISA, which would in turn share the information with the social-media companies.” *Id.* at \*89. “CISA has teamed up directly with the State Department’s Global Engagement Center (‘GEC’) to seek review of social-media content.” *Id.* at \*99. “Scully also testified that CISA engages with the CDC and DHS to help them in their efforts to stop the spread of disinformation.” *Id.* at \*100.

All this cooperation with social-media platforms comes at the point of a federal bayonet. The Western District of Louisiana found that, to pressure the platforms to comply with requests to silence disfavored speech about elections, “[g]overnment officials began publicly threatening social-media companies with adverse legislation as early as 2018.” *Id.* at \*176. “In the wake of COVID-19 and the 2020 election, the threats intensified and became more direct.” *Id.* “Around this same time, [senior federal officials] began having extensive contact with social-media companies via emails, phone calls, and in-person meetings.” *Id.* “This contact, paired with the public threats and tense relations between the Biden administration and social-media companies, seemingly resulted in an efficient report-and-censor relationship between [federal officials] and social-media companies.” *Id.*

Among other things, the court quoted dozens of coercive and pressuring statements directly from the White House, including demands, threats, abuse, and profane harassment. *Id.* at \*13-38, \*126-29; *see also*, *e.g.*, *id.* at \*32 (quoting an email to Facebook from Deputy Assistant to the President Rob Flaherty: “Are you guys fucking serious? I want an answer on what happened here and I want it today.”). The court found that senior federal officials repeatedly “linked” threats of adverse legal consequences to demands for censorship of disfavored viewpoints. *See, e.g.*, *id.* at \*31 (finding that a senior White House official “linked the threat of a ‘robust anti-trust program’ with the White House’s censorship demand”); *id.* at \*36 (finding that the same official “link[ed] these threats to social-media platforms’ failure to censor misinformation and disinformation”); *id.* at \*37 (holding that another White House official “explicitly tied these censorship demands with threats of adverse legislation”); *id.* (holding that the White House “again threatened social-media platforms with adverse legal consequences if the platforms did not censor aggressively enough”). “This seemingly unrelenting pressure by [federal officials] had the intended result of suppressing millions of protected free speech postings by American citizens.” *Id.* at \*121-22.

In fact, FBI supervisor Chan testified, based on personal observation and participation in nearly endless meetings with the platforms, that “pressure from Congress ... resulted in more aggressive censorship policies,” and that “congressional hearings placed pressure on the social-media platforms.” *Id.* at \*88. Chan revealed that, beginning in 2017, senior congressional staffers began arranging secret meetings with



the content-moderation officers of major platforms to pressure them to censor election-related speech by threatening them with “potential legislation.” *Id.* at \*79, \*88. Such “pressure” led to the suppressions of thousands of social-media accounts. *See id.*

These federal censorship activities are deeply intertwined with the censorship activities of state and local officials like Respondents here. Leading up to the 2020 election cycle, CISA—concerned that it faced “unclear legal authorities, including very real First Amendment questions” from its own mass-flagging operations, *id.* at \*96—launched the so-called “Election Integrity Partnership,” a collaboration among CISA, state and local election officials, academic researchers, and the platforms themselves. *Id.* at \*92-96, \*103-09, \*148-51. The EIP is a mass-surveillance and mass-flagging operation that uses 120 analysts and cutting-edge technology to review billions of social-media posts in real-time, flagging untold millions of posts for censorship. *See id.* Along with CISA, it involves the direct cooperation of state-level officials like Respondents here. “CISA directs state and local officials to [the Center for Internet Security] and connected the CIS with the EIP because they were working on the same mission and wanted to be sure they were all connected. CISA served as a mediating role between CIS and EIP to coordinate their efforts in reporting misinformation to social-media platforms, and there were direct email communications about reporting misinformation between EIP and CISA.” *Id.* at \*149.

This government-private censorship enterprise is fully integrated with state officials and state action. “CISA and the EIP were completely intertwined.” *Id.*

at \*150. Among other things, “the EIP was started when CISA interns came up with the idea; CISA connected the EIP with the CIS, which is a CISA-funded non-profit that channeled reports of misinformation from state and local government officials to social-media companies; CISA had meetings with Stanford Internet Observatory officials (a part of the EIP), and both agreed to ‘work together’; the EIP gave briefings to CISA; and the CIS (which CISA funds) oversaw the Multi-State Information Sharing and Analysis Center (‘MS-ISAC’) and the Election Infrastructure Information Sharing and Analysis Center (‘EI-ISAC’), both of which are organizations of state and local governments that report alleged election misinformation.” *Id.* at \*148-49.

“CISA directs state and local officials to CIS and connected the CIS with the EIP because they were working on the same mission and wanted to be sure they were all connected.” *Id.* at \*149. “CISA served as a mediating role between CIS and EIP to coordinate their efforts in reporting misinformation to social-media platforms, and there were direct email communications about reporting misinformation between EIP and CISA.” *Id.* Key academic researchers “of the EIP also have roles in CISA on CISA advisory committees.” *Id.* “EIP identifies CISA as a ‘partner in government.’” *Id.* “The CIS coordinated with EIP regarding online misinformation.” *Id.* “The EIP publication ... states the EIP has a focus on election misinformation originating from ‘domestic’ sources across the United States.” *Id.* “The EIP further disclosed it held its first meeting with CISA to present the EIP concept on July 9, 2020, and EIP was officially formed on July 26, 2020, ‘in consultation with CISA.’” *Id.* at \*150. “The

Government was listed as one of EIP's Four Major Stakeholder Groups, which included CISA, the GEC, and ISAC." *Id.*

These "completely intertwined" actions between government officials, researchers, and platforms led to the silencing of millions of expressions of core political speech on the basis of viewpoint.

These demonstrate that that the question here—*i.e.*, whether a state government agency can set up a mass-flagging operation to induce a social-media platform to silence ordinary Americans' First Amendment-protected speech on core political topics like election integrity—is one of the greatest First Amendment challenges facing our nation. As *Missouri v. Biden* found, such governmental mass-flagging operations—conducted under both explicit and implied government *pressure* on the platforms to comply with such requests—present "arguably the most massive attack against free speech in United States history." *Id.* at \*158.

**CONCLUSION**

This Court should grant the petition for writ of certiorari and reverse the Ninth Circuit's decision.

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