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IN THE SUPREME COURT OF THE UNITED STATES
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VIVEK H. MURTHY, SURGEON GENERAL,)
ET AL.,)
Petitioners,)
v.) No. 23-411
MISSOURI, ET AL.,)
Respondents.)
- - - - -

Washington, D.C.

Monday, March 18, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

BRIAN H. FLETCHER, Principal Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

J. BENJAMIN AGUIÑAGA, Solicitor General, Baton Rouge, Louisiana; on behalf of the Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 23-411, Murthy versus Missouri.

Mr. Fletcher.

ORAL ARGUMENT OF BRIAN H. FLETCHER

ON BEHALF OF THE PETITIONERS

MR. FLETCHER: Thank you, Mr. Chief Justice, and may it please the Court:

The government may not use coercive threats to suppress speech, but it is entitled to speak for itself by informing, persuading, or criticizing private speakers.

Like Bantam Books, this case should be about that fundamental distinction between persuasion and coercion. But, unlike Bantam and the case that you'll hear next, this is not a typical suit where a speaker challenges government actions affecting its own speech. Instead, two states and five individuals are trying to use the Article III courts to audit all of the executive branch's communications with and about social media platforms.

That problem has infected every step

1 of this case. Respondents don't have standing
2 at all because they have not shown an imminent
3 threat that the government will cause a platform
4 to moderate their posts in particular. But the
5 lower courts still reviewed a vast range of
6 speech by different officials to different
7 platforms about different topics at different
8 times without asking whether it had anything to
9 do with Respondents.

10 And the courts then entered a
11 universal injunction restricting speech about
12 any content posted on any platform by anyone and
13 binding thousands of officials, including
14 presidential advisors speaking to the public and
15 FBI agents trying to protect the nation from
16 foreign threats.

17 Even apart from the Article III
18 problem, that injunction rests on two
19 fundamental legal errors. First, the Fifth
20 Circuit radically expanded the state action
21 doctrine by holding that even concededly
22 non-coercive communications, like the CDC's
23 public health advice, can transform private
24 platforms' editorial choices into state action.
25 And, second, the Fifth Circuit mistook

1 persuasion for coercion. It held that the FBI's
2 communications are inherently coercive because
3 the FBI is a law enforcement agency, a theory
4 that even Respondents don't defend in this
5 Court, and it held that White House officials
6 engaged in coercion because they used strong
7 language or referred in a general way to legal
8 reforms in response to press questions.

9 If this Court reaches the merits, it
10 should reaffirm that government speech crosses
11 the line into coercion only if, viewed
12 objectively, it conveys a threat of adverse
13 government action. And because no threats
14 happened here, the Court should reverse.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: Mr. Fletcher, is the
17 coercion/encouragement framework of Bantam Book
18 the only way to look at this case?

19 MR. FLETCHER: So I think there are
20 two ways to look at this case. I think one of
21 them is the coercion inquiry, which we think
22 comes from Bantam Books. You can think of that
23 as an aspect of state action because, when
24 private parties are compelled to act, as the
25 Court said in Halleck, they become state actors.

1 We think that's the right way to think about
2 this case.

3 Respondents and the lower courts have
4 also proposed a different way, the state action
5 way. They've suggested that, even absent
6 coercion, the government's speech, if it
7 encourages in some colloquial sense private
8 action, it can turn that private action --

9 JUSTICE THOMAS: Do we -- do we --

10 MR. FLETCHER: -- into state action.

11 JUSTICE THOMAS: Just to -- so I
12 understand your argument, do we normally apply
13 state action doctrine in cases involving the
14 government or private parties?

15 MR. FLETCHER: Both, I think. You
16 know, in some state action cases, you're asking
17 -- someone is suing a private party and alleging
18 that that private party is bound by the contours
19 of the First Amendment or other constitutional
20 provisions because they're state actors. You
21 see some suits like that that look like this,
22 suits against the platforms, suits against
23 Stanford University, which is referenced in its
24 amicus brief here. But you also see suits
25 against the government based on conduct by

1 private parties. That was the case in Blum, and
2 that's the theory that Respondents are pursuing
3 here.

4 JUSTICE THOMAS: Are there any First
5 Amendment cases?

6 MR. FLETCHER: Any First Amendment
7 cases? I'm sorry, that are --

8 JUSTICE THOMAS: Using, employing
9 state action doctrine?

10 MR. FLETCHER: Off the -- and suing
11 the government? Off the top of my head, I can't
12 think of one. And I --

13 JUSTICE THOMAS: So they're usually
14 things like Medicare or government contracts or
15 relationships like that?

16 MR. FLETCHER: Yeah, and I think what
17 that gets at is that it's very unusual, and we
18 don't think it's possible for the government,
19 through speech alone, to transform private
20 speakers into state actors. We think these
21 cases usually are and ought to be viewed through
22 the Bantam Books-type framework, where there's a
23 problem if the government is engaged in
24 coercion, but if it stays on the persuasion side
25 of the line and all we're talking about is

1 government speech, then there's no state action
2 and there's also no First Amendment --

3 JUSTICE THOMAS: So --

4 MR. FLETCHER: -- problem.

5 JUSTICE THOMAS: -- one final
6 question. You continue to refer back to --
7 refer to government speech. Just for my
8 edification, what's the constitutional basis for
9 -- for government speech?

10 MR. FLETCHER: Yeah. So the Court has
11 said, I think, that the government is entitled
12 to speak for itself. It's not a right that
13 comes from the First Amendment. It's a feature
14 of our constitutional democracy. As the Court
15 has said, the government couldn't function if it
16 couldn't express points of view. In Walker, the
17 Court explained, for example, that the
18 government has to be able to run a vaccination
19 campaign at times of public health crisis. I
20 think that's a major part of what was going on
21 here. So the Court hasn't located it in any
22 specific constitutional provision. It's just
23 part of democratic governance.

24 JUSTICE SOTOMAYOR: Can you explain to
25 me what exactly is the injunction doing?

1 Meaning how is it affecting your speech, the
2 government's speech? There's a lot of
3 defendants.

4 MR. FLETCHER: Yeah.

5 JUSTICE SOTOMAYOR: There's a lot of
6 agencies. I know that our case law says an
7 injunction just can't tell you to violate the
8 law, and so this injunction might have that
9 problem inherent in it. But the Fifth Circuit
10 injunction is what's before us, correct?

11 MR. FLETCHER: Correct.

12 JUSTICE SOTOMAYOR: And it says to
13 encourage or significantly -- to coerce --
14 that's a legal term.

15 MR. FLETCHER: Yeah.

16 JUSTICE SOTOMAYOR: Or significantly
17 encourage. And you're questioning whether --
18 what the meaning of "significant encouragement"
19 --

20 MR. FLETCHER: Yeah.

21 JUSTICE SOTOMAYOR: -- is. I'm not
22 sure I know exactly what the Fifth Circuit
23 meant, but we can figure that out. So let's
24 just use to coerce social media companies to
25 remove, delete, suppress, or reduce, including

1 through altering their algorithms posted social
2 media content containing protected speech.

3 How is that harming the government? I
4 want some specifics.

5 MR. FLETCHER: I'm happy to do that,
6 and I'll say first just to be clear, because
7 this Court has stayed the injunction,
8 fortunately, it's not harming the government
9 now, but there were times when we were getting
10 --

11 JUSTICE SOTOMAYOR: Well, what are you
12 anticipating?

13 MR. FLETCHER: Exactly, right. So I
14 think the problem with that -- we don't say that
15 the government can coerce private speakers.
16 That is prohibited by the First Amendment. But
17 the problem with the Fifth Circuit's injunction
18 saying don't coerce or significantly encourage
19 is that it comes at the end of 80 pages of legal
20 analysis holding that the government had done
21 those things by -- for example, when the FBI
22 would send communications to the platforms
23 saying, for your information, it has come to our
24 attention that the following URLs or email
25 addresses or other selectors are being used by

1 malign foreign actors like Russian intelligence
2 operatives to spread disinformation on your
3 platforms, do with it what you will.

4 That, the -- the -- the Fifth Circuit
5 held, is coercive because the FBI is a powerful
6 law enforcement agency. And I think, if the
7 injunction were put in place, the FBI would have
8 to think very hard about whether it could
9 continue to do that.

10 Similarly, I think both the Fifth
11 Circuit and my friends have really said that the
12 crux of what they claim was coercion here was
13 what happened in July of 2021 when the Surgeon
14 General, the White House Press Secretary, and
15 the President himself made statements
16 criticizing the platforms' practices on
17 misinformation and false statements about COVID
18 vaccines and calling on them to do better.

19 I think it's really troubling, the
20 idea that those sorts of classic bully pulpit
21 exhortations, public statements urging actors to
22 behave in different ways, might be deemed to
23 violate the First Amendment. And I think, if
24 the injunction were to go into effect and the
25 President or his senior advisors -- the

1 President isn't enjoined, but if his senior
2 advisors, the press secretary or someone else,
3 wanted to talk to the public about other
4 problems, like the circulation of anti-Semitic
5 or Islamophobic content on the social media
6 platforms or the effects they might be having on
7 children's mental health or national security
8 issues, like the anti-Semitic Osama Bin Laden
9 letter that was trending on TikTok at the end of
10 last year that we reference towards the end of
11 our brief, I think all of those things could be
12 done only under the shadow of the injunction.

13 And that comes around to the other
14 point that you made, which is that this
15 injunction, especially read in light of the
16 opinion comes before -- that becomes before it,
17 is extremely vague. And I think having that
18 sort of vague injunction with these contestable
19 legal terms that have been interpreted very
20 broadly as applied to past conduct hanging over
21 the heads of all of these government officials
22 doing all of these things is a real problem and
23 I think especially so when you're talking about
24 entering such an injunction at the behest of two
25 states and five individual social media users

1 whose main complaints are about the moderation
2 of posts about COVID-19 many years ago that they
3 haven't really even shown were traceable to the
4 government to begin with, we think.

5 And we certainly don't think that they
6 have shown that they face the sort of imminent
7 threat of future injury that's required to
8 satisfy Article III.

9 JUSTICE ALITO: Mr. Fletcher, let me
10 follow up on that. If even one of the
11 plaintiffs has standing, then we're required to
12 get to the merits. So let me ask you about
13 Ms. Hines, and as you just mentioned, she must
14 have faced an imminent threat of future injury
15 at the time when the complaint was filed, and
16 that injury must be traceable to the actions of
17 the government.

18 So, in the first part of that,
19 imminent threat of future injury, her Facebook
20 personal account was restricted at the time when
21 the complaint was filed. So why isn't that
22 sufficient to show a threat of -- an imminent
23 threat of future injury?

24 MR. FLETCHER: We're not disputing
25 that when the private platforms moderated the

1 plaintiffs' pages or their posts, that's an
2 injury in some sense. We haven't disputed that
3 they suffered that injury. We've disputed the
4 traceability question --

5 JUSTICE ALITO: Okay. Fine.

6 MR. FLETCHER: -- and then the
7 redressability question.

8 JUSTICE ALITO: Okay. Right. So, on
9 traceability, traceability is basically a
10 question of causation, right?

11 MR. FLETCHER: Agreed.

12 JUSTICE ALITO: All right. Both --
13 the district court found that the injury was
14 traceable to the government's actions, and the
15 -- the Fifth Circuit accepted that finding,
16 reviewed it and accepted it.

17 So that's two lower courts. We don't
18 usually reverse findings of fact that have been
19 endorsed by two lower courts. And you haven't
20 attempted to show that it was clear -- that that
21 finding is clearly erroneous.

22 MR. FLETCHER: So, respectfully,
23 Justice Alito, I disagree with that. I think
24 that the Fifth Circuit and the district court
25 applied too loose a notion of traceability.

1 They didn't try to say this post or any post or
2 any action against Ms. Hines was traceable to
3 any action by the government.

4 They did what the red brief calls a
5 bird's eye view of traceability. They said the
6 government is talking to the platforms a lot.
7 The platforms are doing moderation, and so we'll
8 just assume that all of that moderation is
9 traceable to the government.

10 JUSTICE ALITO: Well, do you think
11 that it's necessary to identify a single
12 government action and then trace it to a single
13 consequence? Do you think that's required?

14 MR. FLETCHER: No, but I think you
15 have to trace some government action to some
16 consequence that befell you. Maybe I just could
17 be specific about this because we challenge this
18 in our opening brief, and the red brief comes
19 back at pages 19 to 21 and offers up what I take
20 to be their best examples of traceable harm, and
21 I invite you to go look at the pages of the
22 record that they're citing because often what
23 you find is that they're citing moderation of
24 their content that happened either before the
25 challenged government actions to which they're

1 referring or long after.

2 JUSTICE ALITO: All right. I -- I
3 have looked at that.

4 On the issue of causation, under Mt.
5 Healthy, are they required to show anything more
6 than the government's action was a motivating
7 factor?

8 MR. FLETCHER: I don't know the answer
9 to that in all cases, and I'm -- I'm reluctant
10 to make sort of broad statements about what the
11 traceability requirement demands in different
12 circumstances.

13 I will say here we're not disputing
14 that. We're saying that they haven't shown any
15 causal connection between the --

16 JUSTICE ALITO: It has no effect
17 whatsoever?

18 MR. FLETCHER: Right. And -- and the
19 reason --

20 JUSTICE ALITO: Both the lower courts
21 were wrong on that?

22 MR. FLETCHER: I -- I think they were
23 because, again, they did this blunderbuss
24 approach where they said the government is
25 talking to the platforms about moderation and

1 the platforms are moderating content.

2 But the platforms were moderating this
3 content long before the government was talking
4 to them. They had powerful business incentives
5 to do the same thing. The acts of moderation
6 were consistent with the platforms' own
7 policies, and this is, I think, another telling
8 fact. In those red brief examples that we
9 talked about on pages 19 to 21, some of them
10 involved platforms like LinkedIn that wasn't
11 even the subject of the challenged White House
12 and Solicitor General -- or, excuse me, Surgeon
13 General's office communications with the
14 platforms.

15 JUSTICE KAGAN: Do -- do you think
16 that there are any factual findings with respect
17 to standing that we are required to give clear
18 error review to?

19 MR. FLETCHER: I think findings of
20 historical fact, absolutely. We're not fighting
21 that, so the idea that pieces of content were
22 moderated, that the government made certain
23 statements. And if there had been findings that
24 said Facebook deleted this post because of these
25 communications by the government, that would be

1 a factual finding of historical fact, but there
2 just aren't such findings is our --

3 JUSTICE KAGAN: Right. I mean, that's
4 what I was really getting at. Are there
5 findings that you concede, you know, that one,
6 you have to apply clear error review to? That
7 one, you have to do the same?

8 MR. FLETCHER: We do. And I -- I
9 can't give you a list because there's a lot of
10 facts in this case, but we agree historical
11 factual findings count. What we say don't count
12 are findings that are really characterizations,
13 which is a lot of what my friends are relying
14 on, findings that are about the application of
15 law to facts, which in this constitutional realm
16 we think get de novo review, and then findings
17 that are premised on erroneous legal standards.

18 JUSTICE GORSUCH: So -- so, Mr.
19 Fletcher, I -- I -- I just want to nail down
20 what your views are on -- on the legal
21 standards. On traceability, you're not
22 disputing that a motivating factor is enough.

23 MR. FLETCHER: We haven't made that
24 argument here, that's right.

25 JUSTICE GORSUCH: Okay. And then, on

1 redressability, what's your view of the legal
2 standard the Court should be applying?

3 MR. FLETCHER: I think, again, it has
4 to be some showing that I think likely to
5 redress the injury is the standard from Lujan,
6 so it doesn't have to be certain, but you have
7 to make some showing that an injunction against
8 the government will stop the platforms from
9 doing what they want.

10 JUSTICE GORSUCH: In -- in
11 Massachusetts versus EPA, we said likely to some
12 extent. Does that strike you as correct?

13 MR. FLETCHER: I -- I -- I think, in
14 the context of Mass. versus EPA, maybe where
15 you're talking about a problem of degrees. You
16 know, here, where the concern is are the
17 platforms going to moderate my posts or not and
18 are they going to do it because of the
19 government or not and will an injunction against
20 the government stop Facebook and --

21 JUSTICE GORSUCH: To some degree. Is
22 that an -- an acceptable standard to the
23 government?

24 MR. FLETCHER: I -- I guess I --

25 JUSTICE GORSUCH: I just -- I just

1 want to know what my yardstick that I'm supposed
2 to measure these allegations against, and
3 there's not a lot in your brief about it.

4 So I take likely from Lujan.

5 MR. FLETCHER: Yeah.

6 JUSTICE GORSUCH: I take to some
7 extent from Massachusetts versus EPA. And I
8 take the statement in Larson that it doesn't
9 have to redress every injury.

10 MR. FLETCHER: Agreed.

11 JUSTICE GORSUCH: You agree with all
12 of that?

13 MR. FLETCHER: Except that the to some
14 extent I think was there, the state's injury was
15 about rising sea levels, and so "to some extent"
16 means it doesn't have to solve the problem, it
17 has to help it a little bit.

18 JUSTICE GORSUCH: And do you agree --

19 MR. FLETCHER: This is more discrete
20 acts of content moderation.

21 JUSTICE GORSUCH: But do you agree
22 with that standard, though, that -- that to some
23 extent, if -- if they could show that -- that
24 their injury would be remedied to some extent by
25 an injunction, that that would be enough?

1 MR. FLETCHER: Correct. So, if
2 they're likely to face moderation on 10 posts
3 and an injunction against the government would
4 make it eight, that's enough.

5 JUSTICE GORSUCH: Yeah. Okay. And
6 then just flipping back to traceability, I'm
7 sorry, I forgot to ask, substantial motivating
8 factor obviously means it doesn't have to be a
9 proximate cause.

10 MR. FLETCHER: Agreed.

11 JUSTICE GORSUCH: Okay. Thank you.

12 JUSTICE ALITO: Mr. Fletcher, when I
13 read all of the emails exchanged between the
14 White House and other federal officials on
15 Facebook in particular but also some of the
16 other platforms, and I see that the White House
17 and federal officials are repeatedly saying that
18 Facebook and the federal government should be
19 partners, we're on the same team, officials are
20 demanding answers, I want an answer, I want it
21 right away, when they're unhappy, they -- they
22 curse them out.

23 There are regular meetings. There is
24 constant pestering of -- of Facebook and some of
25 the other platforms and they want to have

1 regular meetings, and they suggest why don't you
2 -- they suggest rules that should be applied and
3 why don't you tell us everything that you're
4 going to do so we can help you and we can look
5 it over.

6 And I thought: Wow, I cannot imagine
7 federal officials taking that approach to the --
8 the -- the print media, our representatives over
9 there. If you -- if you did that to -- to them,
10 what do you think the reaction would be?

11 And so I thought: You know, the only
12 reason why this is taking place is because the
13 federal government has got Section 230 and
14 antitrust in its pocket and it's -- to mix my
15 metaphors, and it's got these big clubs
16 available -- available to it, and so it's
17 treating Facebook and these other platforms like
18 they're subordinates.

19 Would you do that to The -- to The New
20 York Times or The Wall Street Journal or the
21 Associated Press or any other big newspaper or
22 wire service?

23 MR. FLETCHER: So there's a lot packed
24 in there. I want to give you one very specific
25 answer first and then step back out to the

1 broader context.

2 So specifically you mentioned
3 demanding an answer right away and cursing them
4 out. The only time that happens is in an email
5 that's about the President's own Instagram
6 account. It's not about moderating other
7 people's content.

8 JUSTICE ALITO: Okay. We'll put that
9 aside. There's all the rest.

10 MR. FLETCHER: So --

11 JUSTICE ALITO: Constant meetings,
12 constant emails, we want answers.

13 MR. FLETCHER: Right.

14 JUSTICE ALITO: We're partners, we're
15 on the same team.

16 Do you think that the print media
17 regards themselves as being on the same team as
18 the federal government, partners with the
19 federal government?

20 MR. FLETCHER: So potentially in the
21 context of an effort to get Americans vaccinated
22 during a once-in-a-lifetime pandemic. I really
23 think that piece of context, it doesn't change
24 the First Amendment principles, but it's
25 relevant to how they apply here.

1 And I think it's important to
2 understand that at this time, this was a time
3 when thousands of Americans were still dying
4 every week and there was a hope that getting
5 everyone vaccinated could stop the pandemic.

6 And there was a concern that Americans
7 were getting their news about the vaccine from
8 these platforms, and the platforms were
9 promoting, not just posting --

10 JUSTICE ALITO: Well, I -- I --

11 MR. FLETCHER: -- but promoting, bad
12 information.

13 JUSTICE ALITO: -- I understand all
14 that and I know the objectives were good, but --
15 but, once again, they were also getting their
16 news from the print media and the broadcast
17 media and cable media, and I just can't imagine
18 the federal government doing that to them. But
19 maybe I'm naive. Maybe that goes on behind the
20 scenes. I don't know. But I -- I -- it struck
21 me as wow, this is not what I understand the
22 relationship to be. That's all.

23 MR. FLETCHER: Well, but I -- I do. I
24 think this is important because I had the same
25 reaction that you do, that these emails look

1 unusual. I think the idea that there would be
2 back and forth between the government and the
3 media isn't unusual at all.

4 When the White House Press Secretary
5 on July 16th is asked about this by the press at
6 the time, what she says is, of course, we talk
7 to the platforms just the way we talk to all of
8 you when we have concerns about what you're
9 doing, when we have information that you might
10 find helpful.

11 Now there's an intensity of the back
12 and forth here and there's an anger that I think
13 is unusual, but the context for that I think is
14 that these platforms were saying publicly, we
15 want to help, we think we have a responsibility
16 to give people accurate information and not bad
17 information, and we're doing everything we can
18 to meet that goal.

19 That's where this language of
20 partnership comes from. It's not just from the
21 White House. It's these platforms, which are
22 powerful sophisticated entities, saying we're
23 doing the best we can.

24 And the anger, I think really most of
25 the anger when you read the emails -- and I

1 appreciate that you have because I think you
2 have to look at them in context -- the anger is
3 when the officials think that the platforms are
4 not being transparent about the scope of the
5 problem or aren't giving information that's
6 available.

7 JUSTICE ALITO: Let me ask you one --
8 one more question and -- and then I'll stop at
9 least for now. You make a big point in both
10 your brief and your reply that states don't have
11 First Amendment rights.

12 Are you saying that they may have a
13 free speech right, but it comes from someplace
14 else, or they don't have free speech rights? Do
15 you think that the federal government could
16 prohibit a governor or the top-ranking public
17 health official in a state from speaking to the
18 residents?

19 MR. FLETCHER: No, I don't think it
20 could. And I want to be clear we're not denying
21 that they have speech rights. We're saying that
22 those things like the federal government's
23 speech rights come from the structure of our
24 Constitution, not from the First Amendment.

25 This is a First Amendment case. And I

1 think, really, what's happening here is that
2 these states, which were the motivating factor
3 behind the suit, the only plaintiffs in the
4 initial complaint, are really trying to
5 represent and to litigate the First Amendment
6 rights of their citizens on their citizens'
7 behalf. We think that's an end run around the
8 limit on parens patriae standing, just like the
9 one the Court rejected in Brackeen.

10 JUSTICE ALITO: All right. Thank you.

11 JUSTICE KAVANAUGH: Do you think on
12 the anger point, I guess I had assumed, thought,
13 experienced government press people throughout
14 the federal government who regularly call up the
15 media and -- and berate them.

16 Is that -- I mean, is that not --

17 MR. FLETCHER: I -- I -- I don't want
18 --

19 JUSTICE KAVANAUGH: -- your
20 understanding? You said the anger here was
21 unusual. I guess I wasn't --

22 MR. FLETCHER: So that --

23 JUSTICE KAVANAUGH: -- wasn't entirely
24 clear on that from my own experience.

25 MR. FLETCHER: That's fair.

1 (Laughter.)

2 MR. FLETCHER: I guess I don't want to
3 endorse "berate," but I guess I will say I bet
4 this is not the first time that there has been
5 profanity or intemperate language in exchanges
6 between White House or agency communications
7 staff and members of the press.

8 JUSTICE ALITO: Well, I -- I don't
9 know whether our public information officer is
10 here today, but maybe she should take a note
11 about this so whenever --

12 (Laughter.)

13 JUSTICE ALITO: -- whenever they write
14 something that we don't like, she can call them
15 up and curse them out and say, why don't you --
16 you know, why don't we be partners. We're on
17 the same team. Why don't you show us what
18 you're going to write beforehand. We'll edit it
19 for you, make sure it's accurate.

20 MR. FLETCHER: So, Justice Alito, this
21 is why I want to be careful here. I'm
22 acknowledging the reality that this happens and
23 that it's -- it may be commonplace. I'm not
24 saying it's a good thing or a great thing or a
25 thing to be celebrated.

1 But, fundamentally, I'm saying the
2 First Amendment isn't a civility code. It is an
3 important protection, it's a critical protection
4 against actual coercion, but I think it's
5 important to police that line, and I think this
6 case, the sort of sprawling audit of all of
7 these communications, shows the danger of
8 allowing parties, especially parties without
9 real direct injuries, to come into court and to
10 challenge these sorts of regular
11 back-and-forths.

12 JUSTICE KAVANAUGH: On the -- on the
13 partners point, though, that does strike me as
14 unusual. I mean, how -- what do you think about
15 that?

16 MR. FLETCHER: So that, I think, is
17 traceable to the unusual feature here of this is
18 not the government where the platforms were
19 saying we don't want to deal with you about
20 this, and the government is calling them up and
21 saying, no, we're partners, let's be partners.
22 You could imagine a situation like that where
23 there might be a problem. You might start to
24 think that that starts to shade into coercion.

25 But, here, it's an open door. The

1 platforms are saying publicly, because they're
2 getting public criticism about this from other
3 people too, from the press, from the World
4 Health Organization, from others, they're saying
5 publicly we want to do our part. We recognize
6 we have a responsibility, that we're a source of
7 information for people, and we want to be a
8 source of good information.

9 And so, when the White House calls and
10 says we have some concerns about this, they say
11 we agree. You know, that's a good point you
12 make over here. We disagree with you over here.
13 We're not going to go this far, but we agree
14 with you.

15 JUSTICE GORSUCH: Mr. --

16 JUSTICE JACKSON: And, Mr. Fletcher,
17 whether or not that ultimately becomes a First
18 Amendment violation -- I mean, I appreciate the
19 coercion point, and that's sort of the
20 government's first point with respect to the
21 merits of this.

22 But I'm -- I'm interested in your view
23 that the context doesn't "change the First
24 Amendment principles." I mean, I understood our
25 First Amendment jurisprudence to require

1 heightened scrutiny of government restrictions
2 of speech but not necessarily a total
3 prohibition when you're talking about a
4 compelling interest of the government to ensure,
5 for example, that the public has accurate
6 information in the context of -- of a
7 once-in-a-lifetime pandemic.

8 So I'm -- I'm just interested in the
9 government sort of conceding that if there was
10 coercion, then we automatically have a First
11 Amendment violation.

12 MR. FLETCHER: So I'm not conceding
13 that that would be the case. I could imagine
14 that in times of pandemic, if there were actual
15 restrictions, maybe those would be justified.
16 But our position here, because we think it's the
17 position consistent with the facts, is that
18 there wasn't any coercion to begin with.

19 JUSTICE GORSUCH: Mr. Fletcher --

20 MR. FLETCHER: Yes, Justice Gorsuch?

21 JUSTICE GORSUCH: -- on -- on that
22 point, you mentioned coercion -- you mentioned
23 coercion repeatedly in terms of threats. Can
24 there also be coercion in your view in terms of
25 inducements?

1 MR. FLETCHER: We think there can. I
2 think often a threat or an inducement is sort of
3 the flip side, one or the other. I think, in
4 the next case, you could construe it either way,
5 threat of prosecution, offer of leniency.

6 So we acknowledge that it could be
7 both, but it has to be a threat or an inducement
8 of some concrete government action, not just
9 more government speech.

10 JUSTICE GORSUCH: And,
11 hypothetically -- and I'm not saying this
12 happened here -- but would a threat or an
13 inducement with respect to antitrust actions
14 qualify as coercion?

15 MR. FLETCHER: Sure.

16 JUSTICE GORSUCH: And a threat or an
17 inducement with respect to Section 230 qualify?

18 MR. FLETCHER: So I think that one's
19 harder for two reasons. One is that these are
20 executive branch officials who don't have the
21 ability to unilaterally enact 230 reform. I
22 think the question is --

23 JUSTICE GORSUCH: But they -- they
24 have a power to influence that.

25 MR. FLETCHER: Influence that, but the

1 question is would --

2 JUSTICE GORSUCH: And is that -- would
3 that be enough to say we're going to -- if you
4 don't do X, we are going to change our position
5 on Section 230?

6 MR. FLETCHER: So potentially yes as
7 to legislation. 230, if I could just get this
8 out, though --

9 JUSTICE GORSUCH: Sure.

10 MR. FLETCHER: -- I think is different
11 because 230 is about content moderation. It's
12 -- it's -- it's about this very issue. And I
13 think a government official has to be able to
14 say, I support Section 230 reform because I'm
15 concerned about these things, and also, in the
16 meantime, I think platforms should be doing
17 better.

18 JUSTICE GORSUCH: I understand that,
19 but in terms of advocating for a change of
20 Section 230, that could be coercion in your
21 view?

22 MR. FLETCHER: If it were framed as a
23 threat.

24 JUSTICE GORSUCH: Okay. And how --

25 MR. FLETCHER: Our position is that

1 wasn't done here.

2 JUSTICE GORSUCH: And how about -- how
3 about saying you're killing people? Could that
4 be coercion in some circumstances, that if you
5 don't change your moderation policies, you're --
6 you're responsible for killing people?

7 MR. FLETCHER: So I think that one is
8 much harder. That's a statement that President
9 Biden made off the cuff to the press.

10 JUSTICE GORSUCH: I'm not -- I'm not
11 -- listen, I'm not talking about the
12 context-specific issues, and I understand you
13 have arguments there, but could that in some
14 circumstances, an accusation by a government
15 official that unless you change your policies,
16 you're responsible for killing people, could
17 that be coercion?

18 MR. FLETCHER: So I find it hard to
19 imagine a situation where that sort of public
20 statement could be. I'll acknowledge, as you
21 say, context matters a ton, and so I don't want
22 to say it's impossible. All I'm saying is it
23 didn't happen here.

24 The President said this to the public
25 in the middle of a pandemic, and then three days

1 later -- I think this is important -- he
2 clarified. He said, I'm not saying Facebook is
3 killing people. I'm saying the people spreading
4 misinformation are.

5 And when he was asked will you hold
6 the platforms accountable, he was explicitly
7 asked this, will you hold them accountable if
8 they don't do better, he said, I'm not looking
9 to hold anyone accountable. I just want
10 everyone to look in their mirror and imagine --
11 look in the mirror and imagine what would happen
12 if this misinformation was going to their loved
13 ones. I think it's clear that this was
14 exhortation, not threat.

15 CHIEF JUSTICE ROBERTS: Thank you, Mr.
16 Fletcher.

17 How are we supposed to evaluate that
18 question in what the -- what -- the level at
19 which coercion kicks in? I mean, if you're
20 trying to coerce or get a particular result out
21 of a media outlet, is it enough to say, you
22 know, if you don't do this, we're going to move
23 your reporter's cubicle down the hall? Or -- I
24 mean, how do you evaluate when it constitutes
25 coercion in this context?

1 MR. FLETCHER: So let me start with I
2 think Bantam Books has been the lodestar for the
3 lower courts that have mostly coalesced, with
4 some errors in application like this case,
5 around the idea of the question is, is it a
6 threat or a statement that a reasonable person
7 would understand, viewed objectively and in
8 context, as an implicit or explicit threat of
9 some adverse government action.

10 Now, as to the cubicles question, I
11 sort of don't know if there are some adverse
12 government actions that are so trivial that they
13 don't count. I guess I think something like
14 that seems less likely to be a coercive threat.

15 But -- but, in general, I think our
16 position is, if there's something that the
17 government is saying that we're going to
18 exercise government power in some way unless you
19 change your speech in some way or stop
20 distributing the speech of others, if it's
21 reasonably understood as that sort of a threat,
22 that's a First Amendment problem.

23 CHIEF JUSTICE ROBERTS: Well, but,
24 under Bantam -- Bantam Books, it presumably is
25 in context, what you're talking about, a

1 reasonable person. I mean, if there is, as a
2 regular basis, the kind of back and forth
3 between a spokesman and -- and a member of the
4 media, what a reasonable person might view as --
5 as coercive might not in that context, you know
6 -- you know, maybe the press secretary yells on
7 a regular basis, and if their, you know, volume
8 increases enough, that might be viewed as
9 coercion.

10 MR. FLETCHER: So I think that points
11 out the context sensitivity. And I think, as is
12 usually the case when the Court says it's a
13 reasonable person test, it's a reasonable person
14 with knowledge of all the facts, and I think
15 that would include the prior course of dealing
16 between the relevant government official and the
17 relevant recipient.

18 I think, here, that really strongly
19 reinforces the idea that there -- there wasn't
20 coercion. These were sophisticated parties.
21 They routinely said no to the government. They
22 were open about it. They didn't hesitate to do
23 it. And when they said no to the government,
24 the government never engaged in any sort of
25 retaliation. Instead, it engaged in more

1 speech. Ultimately, the President and the Press
2 Secretary and the Surgeon General took to the
3 bully pulpit. We just don't think that's
4 coercive.

5 CHIEF JUSTICE ROBERTS: Thank you.
6 Justice Thomas?

7 JUSTICE THOMAS: Mr. Fletcher, back to
8 my point about coercion, couldn't you simply do
9 the -- censor someone or prevent other speeches,
10 speech by others, by agreeing with the
11 platforms, as opposed to coercing the platforms?

12 MR. FLETCHER: I guess I'm not sure
13 what you mean by "agreeing with the platforms."

14 JUSTICE THOMAS: Well, you just work
15 together, said: Look, we're right; they're
16 wrong. Let's work together. You know, we're on
17 the same team. Let's work together to make sure
18 that this misinformation doesn't gain sort of
19 any following.

20 MR. FLETCHER: So I think, as long as
21 the platforms are exercising their own
22 independent judgment, that's what the First
23 Amendment protects. It says we don't want the
24 government messing with --

25 JUSTICE THOMAS: So you're saying that

1 you can't -- the government can't censor by
2 coordinating with private parties to exclude
3 other speech?

4 MR. FLETCHER: I'm saying that when
5 the government persuades a private party not to
6 distribute or promote someone else's speech,
7 that's not censorship; that's persuading a
8 private party to do something that they're
9 lawfully entitled to do, and there are lots of
10 contexts where government officials can persuade
11 private parties to do things that the officials
12 couldn't do directly.

13 So, for example, you know, recently,
14 after the October 7th attacks in Israel, a
15 number of public officials called on colleges
16 and universities to do more about anti-Semitic
17 hate speech on campus. I'm not sure and I doubt
18 that the government could mandate those sorts of
19 changes in enforcement or policy, but public
20 officials can call for those changes.

21 The government can encourage parents
22 to monitor their children's cell phone usage or
23 Internet companies to watch out for child
24 pornography on their platforms even if the
25 Fourth Amendment would prevent the government

1 from doing that directly.

2 All of those are contexts where the
3 government can persuade a private party to do
4 something that the private party's lawfully
5 entitled to do, and we think that's what the
6 government is doing when it's saying to these
7 platforms, your platforms and your algorithms
8 and the way that you're presenting information
9 is causing harm and we think you should stop,
10 and the platforms are --

11 JUSTICE THOMAS: So you -- you really
12 don't see any difference between the government
13 coordinating with the platforms to exclude other
14 speech and persuading the platforms to do this,
15 to not engage or permit other speech?

16 MR. FLETCHER: I -- I guess I'm not
17 seeing it. And I think that what happened here
18 was definitely on the -- if you do think there
19 is a difference between those two things, I
20 guess my argument here would be that what
21 happened is on the persuasion side of the line
22 because you do see that back and forth of the
23 platforms throughout the process saying no
24 repeatedly when they disagree with what the
25 government is asking them to do, and I think

1 that that tells you that what was happening here
2 is what the First Amendment protects, which is
3 private speakers making independent judgment
4 informed by, maybe even influenced by, the
5 government but deciding themselves.

6 JUSTICE THOMAS: So there's no
7 difference between the platforms meeting and
8 working out an arrangement not to permit certain
9 speech and the platforms working with the
10 government to do the exact same thing? There's
11 no difference?

12 MR. FLETCHER: Well, I think, if -- if
13 the platforms entered into some agreement
14 amongst themselves, that might raise issues
15 under different provisions of the law, that
16 the -- the modest point I'm making is just that
17 the government doesn't violate the First
18 Amendment when it persuades another -- a speaker
19 to not distribute speech by someone else.

20 That's Penthouse versus Meese, Judge
21 Silberman's opinion there. That's what happens
22 when the White House Press Secretary calls up
23 The New York Times and says that was a bad
24 op-ed, you shouldn't run op-eds like that
25 anymore. I think that's commonplace.

1 CHIEF JUSTICE ROBERTS: Justice Alito?

2 JUSTICE ALITO: On the traceability
3 causation question, under Mt. Healthy, if the
4 plaintiffs show that the government's actions
5 were a motivating factor, it is not their
6 obligation, isn't this true, to show that they
7 would not -- that the platforms would not have
8 done what they did were it not for what the
9 government did? It would be the defendants'
10 obligation to show that?

11 MR. FLETCHER: So I confess, Justice
12 Alito, I'm not sure that the Court has ever
13 gotten through how that -- whether that
14 burden-shifting inquiry applies in the context
15 of traceability as opposed to in a Mt. Healthy
16 merits-type inquiry.

17 I guess what I'd say is the Court has
18 been pretty emphatic that when your injury is
19 attributable to independent choices by private
20 actors, that's not traceable. And our
21 submission is that that's what happened here.

22 JUSTICE ALITO: Well, wouldn't it be
23 very strange to have a stricter standard on the
24 merits, a less -- a less defendant-friendly
25 standard on the merits than at the standing

1 stage? It seems -- it seems odd.

2 Let me get one last question really
3 quickly. You've never argued that this case is
4 moot?

5 MR. FLETCHER: We have not, no.

6 JUSTICE ALITO: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 JUSTICE SOTOMAYOR: Counsel, you don't
10 do a lot with Clapper, and it seems that Clapper
11 really does change all of the cases in terms of
12 requiring a heightened traceability standard,
13 does it not?

14 MR. FLETCHER: So I -- I think Clapper
15 does -- is very instructive here. We do cite
16 and rely on it. We think it's relevant to
17 traceability.

18 We think it's perhaps most relevant at
19 the -- sort of the future injury question
20 because I think -- I think we're right about
21 traceability of all of the past moderation of
22 their content that they talk about, but I think
23 we're on even stronger ground in saying that the
24 vast majority of the things they're talking
25 about are about COVID-19 or unusual,

1 idiosyncratic stories from the 2020 election,
2 and their burden is to show that they face an
3 imminent threat -- that's from Lyons, that's
4 from O'Shea -- that the injury is going to
5 recur. That's Clapper II.

6 And what Clapper also says -- and this
7 is instructive -- is that to the extent they're
8 censoring themselves, which is what they say, in
9 the absence of such an imminent threat of actual
10 government-caused harm, that's not enough for --

11 JUSTICE SOTOMAYOR: Could you go back
12 to Ms. Hines's 90-day suspension? I'm not sure
13 -- this record is enormous, but do we know
14 exactly what was censored for that 90 days?

15 MR. FLETCHER: So that's the problem.
16 I don't think we do or, if we do, I --

17 JUSTICE SOTOMAYOR: I was looking for
18 it and couldn't find it.

19 MR. FLETCHER: And when I tried to go
20 through the red brief, pages 19 to 21, and
21 connect up the dots here, one of the things
22 that's hard is that there's not a lot of
23 specifics about even the dates on when things
24 happened.

25 I guess I will say, when the dates are

1 provided, though, they don't line up. The very
2 first example on page 19 of the red brief is,
3 I -- I think it's Ms. Hines, she gets her
4 retweet of Robert F. Kennedy, Junior, suppressed
5 by Twitter and she says, that's an indication
6 that my harms are traceable to the government
7 because the government was talking about Robert
8 F. Kennedy, Junior.

9 But she doesn't say that the
10 government's statements happened between January
11 and July of 2021, and the moderation of her
12 retweet happened in April of 2023, years later,
13 after Twitter had been sold, after it had
14 abandoned the COVID-19 moderation policies that
15 are at issue here.

16 I think that's a strong indication
17 that there's a real traceability problem, and it
18 just gets worse when you look to the
19 forward-looking injury that they have to
20 establish.

21 JUSTICE SOTOMAYOR: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 JUSTICE KAGAN: On the coercion
24 question, is there anything that we have to
25 review on clear error, or is it all legal?

1 MR. FLETCHER: I -- I'd give you the
2 same answer I gave before. I think historical
3 fact, the statement was made, it was not made.
4 If there were specific factual findings beyond
5 that again of historical facts, we'd acknowledge
6 there clear error, but things like this was
7 pressure, this was coercion, we think those are
8 characterizations.

9 And then the ultimate standard, the
10 ultimate First Amendment standard of was, viewed
11 objectively and in context, this communicating a
12 threat, we think that's either law or maybe more
13 probably law to facts that gets de novo review
14 the way it usually does in the constitutional
15 realm.

16 JUSTICE KAGAN: And on the past harm,
17 future harm question that you were just talking
18 about, I take it, if no future harm, that's
19 independently sufficient, is that right?

20 MR. FLETCHER: Correct.

21 JUSTICE KAGAN: And would there be any
22 difficulties with confining a holding to that if
23 we were to find for you?

24 MR. FLETCHER: I -- I don't think so
25 at all. I think, in some ways, that's the

1 narrowest, easiest way to resolve this case, is
2 to say this is an action for injunctive relief,
3 they have to show that they faced an imminent
4 threat of future harm. We don't have to
5 adjudicate the parties' disputes about the past
6 harm. We just have to show that they haven't
7 met that burden.

8 JUSTICE KAGAN: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch?

11 JUSTICE GORSUCH: On that question, in
12 your view, when is the time that we should be
13 considering that? Probably not today it seems,
14 right?

15 MR. FLETCHER: Correct. Yeah.

16 JUSTICE GORSUCH: It would be the time
17 that the Court in the first instance issued the
18 PI. Is that -- is that your view?

19 MR. FLETCHER: So I -- I think it
20 might be even earlier than that just to be
21 candid with that.

22 JUSTICE GORSUCH: Might be the
23 complaint?

24 MR. FLETCHER: Might be the complaint,
25 so the complaint for the states is I think May

1 of 2022, the individuals get added in August of
2 2022. The place where I think I know for sure
3 that the PI matters, though, is whether they've
4 shown a likelihood of irreparable harm which
5 above and beyond standing is a requisite for
6 injunctive relief. I think that has to be shown
7 --

8 JUSTICE GORSUCH: That is at the PI
9 time?

10 MR. FLETCHER: -- at the PI. Exactly.

11 JUSTICE GORSUCH: Okay. So that's the
12 relevant date?

13 MR. FLETCHER: Yeah.

14 JUSTICE GORSUCH: Okay. And then,
15 when we're looking at coercion, is it in your
16 mind a relevant consideration that the industry
17 is very concentrated and -- and that, therefore,
18 coordination problems that otherwise might be
19 difficult with the media, which are very
20 diverse, might not be present in some cases?

21 MR. FLETCHER: So, again, context
22 matters. And I think, in some ways, the fact
23 that these are very large, very powerful
24 corporations cuts against a finding of coercion
25 because they are very sophisticated, they didn't

1 have any problem, they weren't shy about saying
2 no to the government.

3 I -- I hesitate to say, though, that
4 it suggests that you should change the First
5 Amendment standards. I think the Knight brief
6 is --

7 JUSTICE GORSUCH: I'm not suggesting
8 that. The Knight brief does discuss this and
9 says it might be a relevant factor that there's
10 such a concentration that it makes coordination
11 between government entities and private entities
12 easier.

13 MR. FLETCHER: So -- but I --

14 JUSTICE GORSUCH: Do you -- do you
15 disagree with that?

16 MR. FLETCHER: I -- I -- I'm not sure
17 whether or not I agree with that, but I -- I
18 think the -- the point is that for our purposes,
19 the constitutional line is between coercion and
20 not coercion.

21 JUSTICE GORSUCH: No, I understand
22 that.

23 MR. FLETCHER: And so the -- the
24 question --

25 JUSTICE GORSUCH: But in the context-

1 specific inquiries we've discussed --

2 MR. FLETCHER: Right.

3 JUSTICE GORSUCH: -- you've pointed
4 out one way in which concentration might make it
5 less susceptible to coercion. Do we have to
6 account for the possibility as well that in some
7 circumstances -- and I'm not -- again, not
8 case-specific -- it might make -- may make
9 coercion easier?

10 MR. FLETCHER: So, if that were true,
11 you would have to account for it. The reason
12 I'm resisting is because I think the concerns
13 about concentration in the industry go more to
14 the potential effects of coercion if it happened
15 than about whether or not coercion happened at
16 all.

17 I get that. I'm sensitive to that,
18 and the point that I was trying to draw from the
19 Knight brief was the First Amendment isn't the
20 answer to problems of concentration in this
21 industry.

22 JUSTICE GORSUCH: No. I -- I -- I
23 take --

24 MR. FLETCHER: That's how they're --

25 JUSTICE GORSUCH: -- I take your

1 point.

2 MR. FLETCHER: Yeah.

3 JUSTICE GORSUCH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Kavanaugh?

6 JUSTICE KAVANAUGH: Just so I
7 understand, your key legal argument is, I think,
8 but correct me if I'm wrong, that coercion does
9 not encompass significant encouragement or
10 entanglement and that it would be a mistake to
11 so conclude because traditional, everyday
12 communications would suddenly be deemed
13 problematic?

14 MR. FLETCHER: Exactly right, and --
15 and, really, that what the lower courts have
16 done here, I think, is to go beyond the coercion
17 test and sort of to openly say we're going to
18 open up this state action encouragement or --
19 and that, I think, risks turning the platforms
20 and lots of other entities that are interacting
21 with the government into state actors and
22 restricting their editorial choices under the
23 First Amendment.

24 JUSTICE KAVANAUGH: And by coercion,
25 you mean threat of legal consequences or do you

1 --

2 MR. FLETCHER: Adverse government
3 action. I -- I --

4 JUSTICE KAVANAUGH: Adverse government
5 action, okay.

6 Then, on the killing people
7 hypothetical or -- not hypothetical -- the
8 statement, I mean, that raises kind of national
9 security analogies. I don't know what your
10 experience is or if you've looked into this, but
11 it's probably not uncommon for government
12 officials to protest an upcoming story on
13 surveillance or detention policy and say, you
14 know, if you run that, it's going to harm the
15 war effort and put Americans at, you know, risk.

16 MR. FLETCHER: I -- I can't profess to
17 have had personal experience with that. I know
18 it has happened. The Knight brief talks about
19 some examples. And I think that's an example of
20 a valuable sort of interchange as long as it
21 stays on the persuasion side of the line. I
22 think plat- -- newspapers want to know if their
23 publishing a story might put lives at risk. And
24 they don't have to listen to the government, but
25 that's information that they can consider in

1 exercising their editorial judgment.

2 JUSTICE KAVANAUGH: But if they tack
3 onto that: And if you publish the story, we're
4 going to pursue antitrust action against you?

5 MR. FLETCHER: A huge problem, yeah.

6 JUSTICE KAVANAUGH: Right. Okay. And
7 then you haven't really described what you think
8 the common interactions are. I mean, what --
9 what -- what do you think those are?

10 MR. FLETCHER: At issue in the
11 complaint or looking forward?

12 JUSTICE KAVANAUGH: No, just in
13 general.

14 MR. FLETCHER: Yeah.

15 JUSTICE KAVANAUGH: You're speaking on
16 behalf of the United States. Again, my
17 experience is the United States, in all its
18 manifestations, has regular communications with
19 the media to talk about things they don't like
20 or don't want to see or are complaining about
21 factual inaccuracies. I'd be interested in what
22 you want to describe about that.

23 MR. FLETCHER: Yeah. So I think
24 that's absolutely right, and I won't profess to
25 give you a comprehensive overview. We've looked

1 at this very carefully in the context of these
2 defendants because we've a couple times been
3 under the shadow of this injunction, and so we
4 wanted to understand exactly what would be at
5 stake there.

6 And so I think it comes into a couple
7 of different buckets. One of them is engagement
8 on matters of public policy, and I think that's
9 what was going on here. I think childhood
10 mental health, anti-Semitic speech, Islamophobic
11 speech online are in that category. Those are
12 issues where the White House, the Surgeon
13 General, others, might want to make their views
14 known, to use the bully pulpit to call on the
15 platforms to do more.

16 Another is the national security
17 space. I think the record is clearest there on
18 the FBI providing these foreign malign influence
19 selectors to the platforms for the platforms to
20 take action if appropriate or briefing them on
21 foreign threats or about terrorist activity
22 happening on the platforms.

23 There's also a domestic law
24 enforcement side of things, child exploitation,
25 other things like that. The platforms are a

1 vector for those sorts of activities, and the
2 government communicates with them about that.

3 There's also election integrity
4 issues, false statements about the times,
5 places, or manners of elections, saying, you
6 know, the polls have closed early, don't bother
7 coming to vote, in an effort to suppress
8 people's vote. Or Democrats vote on Wednesday;
9 Republicans vote on Tuesday. Those sorts of
10 schemes are of concern to the law enforcement
11 entities.

12 And then I think there's also the
13 CDC's interactions, which involve providing
14 advice, you know: By the way, we're seeing a
15 lot of this information circulating on your
16 platform. It's not true or it's misleading
17 about something that we've put out. Or even
18 just answering the platform's questions.

19 I think one of the flavors you get
20 from the amicus briefs on our side of the case
21 is there are a lot of valuable ways where the
22 government has information or expertise that it
23 can offer to private speakers, and it would be a
24 shame to chill that.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

3 JUSTICE BARRETT: So this might be a
4 question about the distinction or the interplay
5 between Bantam Books and just state action more
6 generally. In Justice Thomas's questioning of
7 you, towards the end, he was talking about the
8 distinction between encouragement and coercion.

9 So what if Facebook said -- and this
10 is counterfactual; it's not what happened in
11 this case -- but what if Facebook said, you know
12 what, we're partners, we're on the same team,
13 this is a once-in-a-lifetime pandemic, and we
14 think it would be most efficient and most
15 helpful for the public good for us to just turn
16 over our content moderation to you?

17 That's not coercion. That's voluntary
18 on Facebook's part, but wouldn't it be state
19 action then?

20 MR. FLETCHER: So, to me, it starts to
21 veer over, and, obviously, with all the caveats,
22 state action is incredibly context-specific. I
23 don't want to be definitive.

24 JUSTICE BARRETT: Sure.

25 MR. FLETCHER: But, to me, that starts

1 to verge more over into the joint action. We're
2 doing something together. The government is
3 doing things. It's actually making decisions.
4 It's not just advising or persuading the
5 platforms.

6 I think the rubric may -- that well be
7 state act action, but the rubric would be I
8 think more sound in the joint action cases than
9 under significant encouragement, which has never
10 been just us trying to persuade you to do
11 something.

12 JUSTICE BARRETT: How do we consider
13 the relationship between those two things?
14 Because I agree with you Bantam Books is about
15 coercion and drawing the line there. But,
16 clearly, there are some times when things veer
17 into the joint action space where we would say
18 that maybe there was state action. And there's
19 a dispute in this case -- it kind of comes up in
20 the next one too -- about which framework is the
21 right one. What advice do you have?

22 MR. FLETCHER: Yeah. So, again, I
23 think, if I were the Court, I would want to be
24 cautious about making too definitive
25 pronouncements. I would say that here, what's

1 challenged is the persuasion, exhortation, bully
2 pulpit provision of advice, provision of
3 information, and that when those things are at
4 issue, the main yardstick is going to be Bantam
5 Books. The main concern is going to be have you
6 crossed the line from just really trying to
7 persuade to trying to threaten and that Bantam
8 is the right way to draw that line.

9 I think there are a lot of different
10 amicus briefs from a lot of different parties,
11 like the Chamber and NetChoice, they all agree
12 that's the right line in this context.

13 I think you could reserve and say it
14 would be a very different question if you're
15 talking about the government and the platforms
16 acting together, turning over operational
17 control, integrating their operations. That's a
18 different case and might present hard state
19 action issues, but it's just really not the kind
20 of issue here.

21 JUSTICE BARRETT: And not alleged
22 here?

23 MR. FLETCHER: Exactly right, yeah.

24 JUSTICE BARRETT: Okay. My other
25 question is about the findings of fact and clear

1 error. So you were pretty insistent with
2 Justice Kagan that we really, to address the
3 standing point, don't have to review any of the
4 district court's factual findings for clear
5 error.

6 I just want to make sure that that's
7 right because I'm thinking about things you
8 talked about with -- I think it was Justice
9 Alito, the interchange with the expletives, you
10 know, we're getting mad, we want answers now,
11 you know, are you, whatever, serious?

12 MR. FLETCHER: Yeah.

13 JUSTICE BARRETT: And that was
14 actually about his own Facebook account. Or
15 there was another change that was -- exchange
16 that was actually about somebody impersonating
17 the President's granddaughter on Twitter.

18 MR. FLETCHER: Yeah.

19 JUSTICE BARRETT: So, if the lower
20 courts, which I think they did, kind of
21 conflated some of those threats with threats
22 that were designed to be threats related to the
23 pandemic and that kind of suppression, wouldn't
24 that then be clear error, or do you think that's
25 application of facts to law or what?

1 MR. FLETCHER: So I apologize. I
2 didn't mean to say that there -- there's no
3 clear error here at all. I just meant to say it
4 would be findings of historical fact. And I
5 think the ones that you --

6 JUSTICE BARRETT: And those count?

7 MR. FLETCHER: And those -- those
8 count. Those do get clear error review. But I
9 think we pointed out places on the -- on the
10 salient ones where they just are clearly
11 erroneous, they're just demonstrably inaccurate,
12 in the two cases that you just identified.

13 So, there, we -- we might agree clear
14 error applies, but to the extent that the lower
15 courts were suggesting, and, really, more the
16 district court than the Fifth Circuit, but a
17 little bit the Fifth Circuit too, that things
18 were said to speakers that weren't said, that
19 the Press Secretary said words she never said,
20 our argument there would just be that those are
21 clear error.

22 JUSTICE BARRETT: So, in considering
23 traceability, you would say that maybe there are
24 some things that we would review for clear error
25 because the erroneous -- assuming that you're

1 right, the erroneous conclusions about
2 traceability depended partly on factual errors
3 and then partly on applications of law to fact?

4 MR. FLETCHER: And an incorrect legal
5 standard, yeah.

6 JUSTICE BARRETT: Okay. Thanks.

7 CHIEF JUSTICE ROBERTS: Justice
8 Jackson?

9 JUSTICE JACKSON: So I guess I didn't
10 perceive there to be such a sharp distinction
11 between Blum and Bantam Books. The government
12 seems to be arguing here that Bantam Books is
13 the way to go, that Blum is not the right test.

14 And I appreciate that Blum uses
15 significant encouragement, but I think it says
16 the question is whether the government "has
17 provided such significant encouragement, either
18 overt or covert, that the choice must in law be
19 deemed that of the state," that it's sort of
20 suggesting in the same way that Bantam Books
21 is that it's really about coercion, as opposed
22 to just encouragement.

23 So am I wrong to think there's really
24 not that much difference between the two?

25 MR. FLETCHER: So I don't think you're

1 wrong there. I think we say that that's the way
2 you ought to read the "significant
3 encouragement" language, that it's positive
4 incentives of government action that overwhelm
5 the private party's choice and make it really
6 the government's choice, not the private
7 party's. You can just view that as the flip
8 side of the sort of coercive threats from Bantam
9 Books.

10 I think the reason why you may have
11 sensed me today and us in our briefs resisting
12 Blum is because the lower courts and my friends
13 on the other side have really tried to turn that
14 "significant encouragement" language into
15 something quite different, into circumstances
16 where the government encourages in some
17 colloquial sense by urging or persuading or, you
18 know, really strongly advocating something. And
19 we just don't think that's what Blum means or
20 what this Court's state action cases have ever
21 said.

22 JUSTICE JACKSON: Okay. I understand
23 that. And even if we have a world in which
24 significant encouragement is verboten, is there
25 something different to the government providing

1 information?

2 MR. FLETCHER: Yes.

3 JUSTICE JACKSON: I mean, I'm a little
4 worried about the Respondents' -- what I think
5 could be taken away from their view, which is
6 that in situations in which the government has
7 information that may be unique to the
8 government's knowledge but that it feels
9 important for the public to have, that that
10 somehow becomes prohibited if, as a result of
11 that information, these companies decide they're
12 going to do something different with respect to
13 content moderation.

14 MR. FLETCHER: That's our big concern
15 too. And that's exactly what the lower courts
16 found crossed the line, the FBI providing
17 information about covert foreign actors on
18 platforms, the CDC providing information or even
19 answering questions about matters of public
20 health. I think it would be very troubling to
21 say that those things are impermissible or
22 create state action.

23 JUSTICE JACKSON: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Aguinaga.

2 ORAL ARGUMENT OF J. BENJAMIN AGUIÑAGA

3 ON BEHALF OF THE RESPONDENTS

4 MR. AGUIÑAGA: Good morning, Mr. Chief
5 Justice, and may it please the Court:

6 Government censorship has no place in
7 our democracy. That is why this 20,000-page
8 record is stunning. As the Fifth Circuit put
9 it, the record reveals unrelenting pressure by
10 the government to coerce social media platforms
11 to suppress the speech of millions of Americans.

12 The district court, which analyzed
13 this record for a year, described it as arguably
14 the most massive attack against free speech in
15 American history, including the censorship of
16 renowned scientists opining in their areas of
17 expertise.

18 And the government's levers of
19 pressure are anathema to the First Amendment.
20 Behind closed doors, the government badgers the
21 platforms 24/7, it abuses them with profanity,
22 it warns that the highest levels of the White
23 House are concerned, it ominously says that the
24 White House is considering its options, and it
25 accuses platforms both of playing total

1 Calvinball and of hiding the ball, all to get
2 the platforms to censor more speech. Under this
3 onslaught, the platforms routinely cave.

4 Now, last month, in the NetChoice
5 cases, the platforms told you that it's
6 incredibly important that they create their own
7 content moderation policies. But this record
8 shows that they continually depart from those
9 policies because of unrelenting government
10 pressure.

11 Indeed, as Facebook recently disclosed
12 in an internal email to former UK Deputy Prime
13 Minister Nick Clegg, the reason Facebook did
14 that was "because we were under pressure by the
15 administration. We shouldn't have done it."

16 Now my friend says all this is
17 constitutional because the government has the
18 right to persuade using the bully pulpit. But
19 the government has no right to persuade
20 platforms to violate Americans' constitutional
21 rights, and pressuring platforms in back rooms
22 shielded from public view is not using the bully
23 pulpit at all. That's just being a bully.

24 I welcome the Court's questions.

25 JUSTICE THOMAS: Counsel, the -- I

1 know your argument is basically a Bantam Book
2 argument, but do you need coercion in order to
3 -- do you think that's the only way you could
4 make your case, or could coordination accomplish
5 the same thing; that is, the government is
6 censoring by joint actions with the platforms as
7 opposed to coercing the platforms?

8 MR. AGUIÑAGA: Your Honor, we don't
9 need coercion as a theory. That's why we led
10 with encouragement in our red brief. And I
11 would point the Court to what it said in
12 *Norwood*, which is the Court -- or the government
13 cannot induce, encourage, and promote private
14 actors to do directly what the government can't
15 itself do directly.

16 And that's, I think, the principle
17 that's guiding here, which is, regardless of the
18 means that the government tries to use to
19 pressure -- to pressure the platforms to commit
20 censorship against third parties, the
21 Constitution really doesn't care about that.
22 It's the fact that what the government is trying
23 to accomplish is the suppression of speech.

24 And I would say, Your Honor, I mean,
25 that's exactly how you addressed this question

1 in Bantam Books. You asked, did the government
2 set out to deliberately suppress speech? The
3 answer in that case was absolutely yes, and
4 that's absolutely the answer in this case here.

5 And I guess, you know, I -- I would
6 say, you know, when this Court considered Bantam
7 Books, one of the key things about the analysis
8 in Bantam Books was that it was an obscenity
9 case, and, you know, the Court struggled with
10 whether the states had the right to police the
11 line between legitimate speech and illegitimate
12 speech. And that was why you were talking about
13 coercion in that case. You were asking whether
14 the states went too far --

15 JUSTICE JACKSON: Can I --

16 JUSTICE SOTOMAYOR: I -- I'm sorry.
17 The reason we were asking about coercion is
18 because the private parties could have chosen on
19 their own to censor that speech. They could
20 have said we think it's obscene, I'm not going
21 to be involved in this.

22 The only issue became when that choice
23 was overridden by the government. And so I -- I
24 don't -- I think you're -- you're cite -- you're
25 mixing sort of situations and -- and confusing

1 legal doctrines.

2 MR. AGUIÑAGA: No, Your Honor. The
3 fundamental principle -- and this comes from
4 Norwood and it's central to this Court's First
5 Amendment cases, its Fourth Amendment cases --
6 is that the government can't do indirectly what
7 it's prohibited from doing directly.

8 And that's what you see happening in
9 Bantam Books. That's what you see happening in
10 a case like this because time and again there
11 were times where the social media platforms had
12 policies that didn't go far enough in censoring
13 the speech that the -- that the government
14 wanted them to censor.

15 JUSTICE JACKSON: But whether or not
16 the government can do this -- this is something
17 I took up with Mr. Fletcher -- depends on the
18 application of our First Amendment
19 jurisprudence, and there may be circumstances in
20 which the government could prohibit certain
21 speech on the Internet or otherwise.

22 I mean, do you -- do you -- do you
23 disagree that we would have to apply strict
24 scrutiny and determine whether or not there is a
25 compelling interest in how the government has

1 tailored its regulation?

2 MR. AGUIÑAGA: Certainly, Your Honor.
3 I think, at the end of every First Amendment
4 analysis, you'll have the strict scrutiny
5 framework in which, you know, in some national
6 security hypos, for example, the government may
7 well be able to demonstrate a compelling
8 interest, may well be able to demonstrate narrow
9 tailoring, but the --

10 JUSTICE JACKSON: All right. So --
11 so -- so not every situation will -- in which
12 the government engages in conduct that
13 ultimately has some effect on free -- on -- on
14 speech necessarily becomes a First Amendment
15 violation, correct?

16 MR. AGUIÑAGA: Maybe not necessarily,
17 Your Honor. I guess the top-line question I
18 would ask is, has the government set out to
19 abridge the freedom of speech? And in this
20 case, you see that time and time again because,
21 if you control F --

22 JUSTICE JACKSON: But that's not the
23 test for First Amendment violations.

24 MR. AGUIÑAGA: Your Honor, this flows
25 from the plain text of the First Amendment,

1 right?

2 JUSTICE JACKSON: No, I understand.
3 But we have a -- we have a test for a
4 determination of whether or not the First
5 Amendment is actually violated. So, in certain
6 situations, you know, the government can
7 actually require that speech be suppressed if
8 there's a compelling interest, right?

9 MR. AGUIÑAGA: It can, Your Honor.
10 And I guess what I would say is that the courts
11 below never got to strict scrutiny because the
12 government never raised this. This has never
13 been litigated. The question in this case is
14 whether at the front end the government itself
15 has undertaken actions --

16 JUSTICE JACKSON: It's the coercion,
17 it's the state action, right? That's the
18 question in this case?

19 MR. AGUIÑAGA: And I would urge the
20 Court to address the state action issue just
21 like you addressed it in Bantam Books. You used
22 that term four times in Bantam Books. In
23 Footnote --

24 JUSTICE KAGAN: I mean, can I just
25 understand because it seems like an extremely

1 expansive argument, I must say, encouraging
2 people basically to suppress their own speech.
3 So, like Justice Kavanaugh, I've had some
4 experience encouraging press to suppress their
5 own speech.

6 You just wrote a bad editorial. Here
7 are the five reasons you shouldn't write another
8 one. You just wrote a story that's filled with
9 factual errors. Here are the 10 reasons why you
10 shouldn't do that again.

11 I mean, this happens literally
12 thousands of times a day in the federal
13 government.

14 MR. AGUIÑAGA: Yeah, and I would say,
15 in the mine-run case that you're describing to
16 me, it's the government going after the speaker
17 itself and trying to get them to change their
18 speech.

19 What's so pernicious here is that you
20 don't see any of these facts in this record
21 unless we get discovery, which is when -- when
22 Rob Flaherty, who's Deputy Assistant to the
23 President, sends an email to Facebook or to
24 Twitter and complains that they're not doing
25 enough to censor what they view as vaccine

1 hesitancy speech. America never sees that.

2 And the third party, people like Jill
3 Hines and -- and Jim Hoft, whose speech wishes
4 to express the kinds of viewpoints that the
5 White House is targeting, they never know that
6 that's happening behind the scenes.

7 And I think it makes a difference,
8 Justice Kagan, that you have an intermediary
9 here who really has no incentive to itself
10 defend Jim Hoft's speech or to defend Jill
11 Hines's speech. In The New York Times's
12 hypothetical, you have a story, a publication
13 that itself is familiar with those kinds of --

14 JUSTICE KAVANAUGH: Well, what about
15 op-eds?

16 JUSTICE KAGAN: I mean --

17 JUSTICE BARRETT: Don't you think --

18 JUSTICE KAVANAUGH: What about op-eds?

19 MR. AGUIÑAGA: Your Honor, with
20 op-eds, you know, if it's third-party speech
21 that -- that has that issue --

22 JUSTICE KAVANAUGH: That happens too,
23 right?

24 MR. AGUIÑAGA: And I guess there are a
25 number of ways I would think about that, Your

1 Honor. One is, if the newspaper declines to run
2 an op-ed because the government asked, that
3 op-ed author can go to any number of other
4 publications and it has an outlet.

5 It's not the same here because, if I'm
6 on Twitter and I wish to express a viewpoint
7 that the government wishes to censor and Twitter
8 bows to that pressure, then --

9 JUSTICE KAGAN: But if one --

10 MR. AGUIÑAGA: -- I lose my account.

11 JUSTICE KAGAN: -- if --

12 MR. AGUIÑAGA: I --

13 CHIEF JUSTICE ROBERTS: I was just
14 going to say, first, I have no experience
15 coercing anybody.

16 (Laughter.)

17 CHIEF JUSTICE ROBERTS: But -- but,
18 second, I mean, the government is not monolithic
19 either. I suspect, when there's pressure put on
20 one of the platforms or certainly one of the
21 other media outlets, they have people they go
22 to, probably in the government, to say: Hey,
23 they're trying to get me to do this, and that
24 person may disagree with what the government's
25 trying to do. It's not monolithic. And that

1 has to dilute the concept of coercion
2 significantly, doesn't it?

3 MR. AGUIÑAGA: Your Honor, I -- I'm
4 not sure I agree with that. And I guess I'd get
5 back to one of the earlier points I made, which
6 is, you know, whether you call this coercion, if
7 that's the label you attach, you call it
8 encouragement, you call it promotion, you call
9 it inducement, whatever it is, if the government
10 is attempting to abridge the speech rights of a
11 third party, that has to be unconstitutional
12 because that falls within the plain text of the
13 First Amendment.

14 And so, you know, this is Bantam Books
15 of the 21st Century. You haven't had a case
16 with social media platforms like this where
17 third-party speech is so at risk of being
18 censored.

19 CHIEF JUSTICE ROBERTS: Well, but how
20 do you -- I mean, how do you analyze a situation
21 where, you know, maybe EPA is trying to coerce a
22 platform about something, and the Army Corps of
23 Engineers is trying to coerce them the other
24 way? I mean, you can't just sort of pick and
25 choose which part of the government you're

1 concerned about.

2 MR. AGUIÑAGA: Your Honor --

3 CHIEF JUSTICE ROBERTS: I mean,
4 obviously, it's different when you're talking
5 about what the president is saying in
6 particular, but other than that, I think it's a
7 very -- more a fluid situation than anything
8 else.

9 MR. AGUIÑAGA: It is fluid, Your
10 Honor, but I would say that when you have, as we
11 have, plaintiffs in this case who wished to
12 express certain viewpoints that have been
13 specifically targeted by -- targeted by the
14 government, you know, it's not at least fluid in
15 these facts.

16 And this is not a case just about
17 COVID. It's a case about election integrity.
18 It's a case the district court has a finding
19 about how the government wishes to --

20 JUSTICE KAGAN: So, I mean, what about
21 that? I mean, you know, take a -- an example
22 where -- I mean, these platforms, they're
23 compilers of speech, and some part of the
24 government, let's call it part of the law
25 enforcement arm of the government, says you

1 might not realize it, but you are hosting a lot
2 of terrorist speech, which is going to increase
3 the chances that there's going to be some
4 terrible harm that's going to take place, and we
5 want to give you this information, we want to
6 try to persuade you to take it down.

7 Are -- are -- the government can't do
8 that?

9 MR. AGUIÑAGA: The government can
10 absolutely do that, Justice Kagan.

11 JUSTICE KAGAN: They're taking --

12 MR. AGUIÑAGA: Terrorist activity,
13 criminal --

14 JUSTICE KAGAN: -- they're -- they're
15 asking them to take down the speech.

16 MR. AGUIÑAGA: Terrorist activity,
17 criminal activity, that is not protected speech.
18 Absolutely, the government can inform the -- the
19 --

20 JUSTICE KAGAN: Well, that might --
21 might be protected speech. I mean, terrorists
22 engage in, you know, things that come under the
23 First Amendment. I mean, let's say they're just
24 recruiting people for their organizations.

25 MR. AGUIÑAGA: Your Honor, if it's

1 First Amendment speech, protected speech, then I
2 think we're in an entirely different world. I
3 mean, that's a case where -- and this comes up
4 in the FBI findings that the district court made
5 because what was happening is they were -- the
6 FBI was sending Teleporter encrypted messages to
7 the platforms, identifying what the government
8 represents was foreign actors. The district
9 court found the government was not
10 distinguishing between whether it was domestic
11 or foreign conduct.

12 And the way this issue arises is when
13 maybe you have a foreign actor who tweets, you
14 know, I love Biden, and there are 20 million
15 people who wish to retweet that, repost that,
16 with their own comments, saying, heck, yeah, I
17 love Biden too. When an American does that,
18 that's First Amendment protected speech, Your
19 Honor. And so, when the government comes in and
20 tries to take down every single post that
21 contains the core that they say was foreign
22 speech, but they're also taking down the -- the
23 added speech by Americans, that's a square First
24 Amendment issue, Your Honor.

25 JUSTICE KAGAN: So back in -- this --

1 this -- this still happens now -- decades ago,
2 it happened all the time, which is somebody from
3 the White House got in touch with somebody from
4 The Washington Post and said this will -- this
5 will just harm national security, and The
6 Washington Post said, okay, whatever you say.

7 I mean, that was all -- we didn't know
8 enough, but that was -- that was coercion?

9 MR. AGUIÑAGA: Your Honor, I -- I
10 thought I understood the government this morning
11 to say that might be a First Amendment issue.
12 And I think what I would say is, if there's a
13 national security interest, maybe the government
14 can satisfy strict scrutiny in that
15 circumstance.

16 What I would also say is we probably
17 wouldn't have a lawsuit based on that because I
18 don't know how we would get prospective
19 injunctive relief based on a fleeting offhand,
20 you know, reach-out from the White House to --

21 JUSTICE BARRETT: But that's --

22 JUSTICE KAGAN: I guess what I'm just
23 trying to suggest is that there's all kinds of
24 things that can appear on these platforms that
25 do all kinds of different harms, and -- and the

1 inability of government that you're suggesting
2 to -- to reach out to these platforms and say we
3 want to give you information that you might not
4 know about on this, and we want to give you our
5 perspective on what harms this is doing, and --
6 and, you know, we want to be able to answer
7 questions that you have because we really do
8 think that it would be a good thing if you on
9 your own chose to take this speech down.

10 MR. AGUIÑAGA: And, Your Honor, if
11 those were the facts in this case, then I think
12 it would be a much harder case for me. I think
13 --

14 JUSTICE KAGAN: Well, now I don't know
15 what your standard is. You just told me that
16 that was -- that was good enough for you.

17 MR. AGUIÑAGA: No --

18 JUSTICE KAGAN: That was coercion.

19 MR. AGUIÑAGA: No, Your Honor,
20 because, you know, in that circumstance, you
21 have a platform who is reaching out -- or the
22 government reaching out just to -- to identify
23 what it views as the right state of the law,
24 right state of facts.

25 The government -- I mean this Court

1 has made clear for -- for a while, since its
2 plurality opinion in Alvarez, that if the
3 government thinks there's false speech out
4 there, the remedy for that is true speech.
5 Nothing prohibits the government from going to
6 that platform and saying we've seen a lot of
7 false information about election activity and
8 COVID and vaccines and the like. Nothing
9 prohibits the government from saying here's a
10 list of everything we say is true, that is true
11 in our view, and you should amplify our speech,
12 and anytime that false speech arises, you should
13 put our posts right there next to it saying this
14 is the government's view on this issue.

15 The problem here -- and this is -- you
16 know, I think you see this in the summer of 2021
17 after the White House goes nuclear on the
18 platforms -- is that the platforms themselves
19 reverse course on their own policies. And you
20 see this in ROA 15322, this is one of the -- in
21 my view, one of the hottest docs in the -- in
22 the JA because you've got this email from Nick
23 Clegg, who is, you know, former Deputy Prime
24 Minister of the UK, and after all of this
25 pressure for months and months and months, he

1 sends this email to Vivek Murthy, the Surgeon
2 General, and he says: Dear Vivek, thanks for
3 taking the time to meet. I wanted to make sure
4 you saw the steps we took past -- this past week
5 to adjust policies on what we're removing to
6 take steps to further address the Disinfo Dozen.
7 We've removed 39 profiles, pages, groups,
8 Instagram accounts. We're continuing to make
9 other accounts harder to find.

10 I mean, this is an example of
11 platforms moving beyond what their own policies
12 required because they felt pressure to take more
13 action and to censor more speech. And, Your
14 Honor, if that's -- I mean, if that's not the
15 clearest example of the government doing --

16 JUSTICE BARRETT: So, counsel --

17 JUSTICE SOTOMAYOR: I'm sorry. Tell
18 me where -- where you have in the record that --
19 the 39 accounts that were taken out, that any of
20 them related to any of the Petitioners here.

21 MR. AGUIÑAGA: Sure, Your Honor. So
22 what I was quoting --

23 JUSTICE SOTOMAYOR: Give me -- give me
24 that cite again.

25 MR. AGUIÑAGA: What I was quoting to

1 you right now is ROA 15322, and what that email
2 from Nick Clegg mentions is the so-called
3 Disinformation Dozen. This is a group of people
4 that the government thought was responsible for
5 the majority of so-called health misinformation
6 on social media.

7 Now, in paragraphs 5 and 6 of each of
8 the supplemental declarations in the Joint
9 Appendix, each of our individual plaintiffs
10 specifically identifies the fact that they
11 follow members of the so-called Disinformation
12 Dozen, they repost their posts, they engage with
13 their speech.

14 And so, when the government -- or when
15 the platforms here, in response to the pressure,
16 are taking down content and accounts related to
17 those individuals called the Disinformation
18 Dozen, that is necessarily impacting our
19 plaintiffs' right to engage with their speech,
20 to add their own comments --

21 JUSTICE SOTOMAYOR: Not that they've
22 taken down any of their posts but that they took
23 down someone else's posts? That's what this is
24 saying?

25 MR. AGUIÑAGA: That's what I was

1 quoting to you right now, Your Honor, the --

2 JUSTICE SOTOMAYOR: That, I'm not sure
3 how that shows traceability or redressability.

4 MR. AGUIÑAGA: In the same vein, I
5 think you --

6 JUSTICE SOTOMAYOR: And I don't think
7 we've ever dispensed standing on the basis of
8 injury to another, injury to you but not to
9 another.

10 MR. AGUIÑAGA: So, Justice Sotomayor,
11 let me give you Jill Hines one more time. Look
12 at JA 7 -- 793 to 794. This is the tweet
13 that -- or it was a screenshot of a tweet that
14 Mr. Fletcher mentioned. And this is censorship
15 four times over because this is a tweet in April
16 2023. It's on the eve of the preliminary
17 injunction hearing. And what she says is: This
18 Facebook post that I posted was taken down by
19 Facebook. She got a warning for it as a
20 violation of the community standards.

21 What was that post? It was a
22 screenshot of Robert F. Kennedy, Junior, who is
23 a member of the so-called Disinformation Dozen.
24 What was the RFK tweet talking about? It was
25 talking about Tucker Carlson, whom the

1 administration was obsessed with. Look at JA
2 701 to 708.

3 JUSTICE SOTOMAYOR: I'm sorry, the RFK
4 tweet, the -- there's only a record of the White
5 House asking Twitter to remove a tweet on -- and
6 not particularly this one from R -- RFK. That
7 doesn't help Hines's claim that the White House
8 asked Facebook to remove anything.

9 MR. AGUIÑAGA: It does, Your Honor,
10 because -- and this is a good example of the
11 interrelationship between the various media
12 platforms -- you have cross-posting. So what
13 happened in this example is Jill Hines took a
14 screenshot of a tweet, and then she moved that
15 over to Facebook and posted that as her own
16 Facebook post. And so, when she did that, she
17 moved RFK's tweet.

18 And I was going to describe what was
19 in that tweet. He was talking about Tucker
20 Carlson, that the White House specifically
21 targeted, in the Joint Appendix, and that --

22 JUSTICE SOTOMAYOR: You know, I -- I
23 have such a problem with -- with your brief,
24 counselor. You omit information that changes
25 the context of some of your claims. You

1 attribute things to people who it didn't happen
2 to. At least in one of the defendants, it was
3 her brother that something happened to, not her.
4 I don't know what to make of all this because
5 you're -- you have a -- I'm not sure how we get
6 to prove direct injury in any way.

7 MR. AGUIÑAGA: So, Justice Sotomayor,
8 let me start by apologizing if any aspect of our
9 brief was not as forthcoming as it should have
10 been. I -- I will take full responsibility for
11 that. I apologize for that, Justice Sotomayor.

12 What I would add to the second part of
13 your question is I think Jill Hines is the best
14 standing for case -- for our case in multiple
15 ways. I think one of the ways you look at her
16 standing is you look at JA 715 to 716. This is
17 an email to Facebook where the government, the
18 White House, specifically asks Facebook to not
19 distribute so-called vaccine hesitancy content
20 and also to target health groups that do that.
21 So that's JA 715 to 716.

22 Then you go down earlier in the JA to
23 JA 631 to 632. This is Jill Hines's
24 allegations. And what she says is, two months
25 later -- so the email I described from you -- to

1 you from the White House was in May -- two
2 months later in July and then a couple of months
3 later in September, Jill Hines had two health
4 groups in Louisiana that were blocked by
5 Facebook.

6 And I think this is one of the
7 scariest examples in the record of what is at
8 stake here, which is those groups were political
9 action groups. Louisiana had a legislative
10 session in progress. And what Jill Hines was
11 trying to do is mobilize people to support
12 certain bills and other legislative materials
13 that were then pending in the state legislature.

14 But, because the government moved its
15 pressure, put a thumb on the scales, you know, a
16 couple of months before and then, lo and behold,
17 once Jill Hines tries to use the exact kinds of
18 groups that the government targeted, she can't.
19 They're pulled down. Her political organization
20 is stymied. And that's, you know, all over the
21 record, and that's just one fraction of -- of
22 the kinds of harm that's at stake here.

23 JUSTICE BARRETT: So, counsel --

24 JUSTICE KAGAN: That -- that's your
25 best --

1 JUSTICE BARRETT: -- can I ask you --

2 JUSTICE KAGAN: No, go ahead.

3 JUSTICE BARRETT: I -- I want to go
4 back to actually your interchange with Justice
5 Kagan about the standards because I have to
6 confess it left me very confused. It sounded
7 like you were articulating different standards
8 depending on -- a different legal standard
9 depending on different factual circumstances.

10 For example, when Justice Kagan gave
11 you the hypothetical of pressure being placed on
12 The New York Times or The Washington Post not to
13 run a particular op-ed, it seemed like you
14 backed off and said, well, significant
15 encouragement wouldn't be enough there because
16 the person who wrote the op-ed can go to another
17 news outlet.

18 You also made the point that this is
19 just different because social media is such a
20 concentrated industry, which is a point that
21 Justice Gorsuch was asking Mr. Fletcher about.

22 So can you clarify? Did I -- did I
23 misunderstand? Because it seems to me that as a
24 matter of law, the same legal standard would
25 have to apply across all of these areas.

1 MR. AGUIÑAGA: I think that's right,
2 Your Honor. And I apologize if I wasn't clear
3 earlier.

4 I guess the top-line legal standard I
5 would start with was this Court's line at 635 in
6 *Norwood*, which is the Court can't do indirectly
7 what it's constitutionally prohibited from doing
8 directly.

9 The second line in response to that
10 is, well, what sorts of indirect mechanisms can
11 the government use that would run afoul of that
12 rule?

13 I think one potential mechanism is
14 coercion. Another one is encouragement. This
15 Court also has used the term inducement --

16 JUSTICE BARRETT: Just plain vanilla
17 encouragement, or does it have to be some kind
18 of, like, significant encouragement? Because
19 encouragement would sweep in an awful lot.

20 MR. AGUIÑAGA: I think that's right,
21 Your Honor. And so let me give you two answers
22 to that. The top-line answer is, I mean, I'm a
23 First Amendment purist and so I would say even
24 mild encouragement, but we don't need that to
25 win in this case because we are so far afield

1 from whatever that -- that threshold is.

2 So, if you want to say substantial
3 encouragement like the Fifth Circuit said and
4 like Blum said, absolutely. That's a standard
5 that works.

6 But I guess what I -- I don't --

7 JUSTICE BARRETT: Well, let me just --
8 let me just ask you then, let me give you a
9 hypothetical. Let's say that you get doxed and
10 so do numerous other members in Louisiana state
11 government. You're doxed, and somebody is
12 posting online about how people should really
13 rally and do something about this. People
14 should rally and you should be harmed, okay?

15 The FBI sees these posts and calls the
16 social media outlet, like X, Facebook, whatever,
17 and says we really encourage you to take these
18 down because these are significantly threatening
19 and we see some people may be responding to
20 them.

21 That's -- that's a problem?

22 MR. AGUIÑAGA: So my first question,
23 Your Honor, is whether that would be protected
24 speech, those tweets would be protected speech,
25 Your Honor, under this Court's --

1 JUSTICE BARRETT: Okay. Let's just
2 assume -- let's assume that everything that's
3 said, I was trying to make it so that they --

4 MR. AGUIÑAGA: Yes, they are.

5 JUSTICE BARRETT: -- stop short of
6 actually being illegal in and of themselves.

7 MR. AGUIÑAGA: Your Honor, so I think,
8 you know, as I say, I'm a purist on the First
9 Amendment, so my answer would be yeah, like,
10 that --

11 JUSTICE BARRETT: So the FBI can't
12 make -- do you know how often the FBI makes
13 those kinds of calls?

14 MR. AGUIÑAGA: And that's why -- and
15 that's why I have my backup answer, Your Honor,
16 which is, if you think there needs to be more,
17 the FBI absolutely can identify certain
18 troubling situations like that for the platforms
19 and let the platforms take action.

20 I think we're -- you know, the hypos
21 are very important, but when you look at what's
22 happening in this case, for example, with
23 respect to the FBI, what they're doing is not --
24 there's no emergency, nothing of the sort.
25 They're just identifying hundreds of accounts --

1 JUSTICE BARRETT: But that's just kind
2 of falling back on, well, this case is
3 different, this case is different, and so a
4 different legal standard should apply. But, you
5 know, what we say in this case matters for other
6 cases too.

7 MR. AGUIÑAGA: It does, Your Honor.
8 And, you know, if that -- I guess what I would
9 say in response to that, and I'm very sensitive
10 obviously given the facts of the hypo to the
11 outcome, but if what the FBI is doing is trying
12 to persuade an intermediary -- a speech
13 intermediary to take down a private third
14 party's speech, I mean, that is the -- that is
15 covered by the plain text of Norwood, and
16 that's, I mean, an abridgement of speech.

17 And I -- you know, I --

18 JUSTICE JACKSON: So I think -- I
19 think that part of the reason why you might be
20 running into all of these difficulties with
21 respect to the different factual circumstances
22 is because you're not focusing on the fact that
23 there are times in which the government can,
24 depending on the circumstances, encourage,
25 perhaps even coerce, because they have a

1 compelling interest in doing so.

2 And so that's why I keep coming back
3 to the actual underlying First Amendment issue,
4 which we can isolate in this case and just talk
5 about -- about coercion, but I think there --
6 that you have to admit that there are certain
7 circumstances in which the government can
8 provide information, encourage the platforms to
9 take it down, tell them to take it down.

10 I mean, what about -- what about the
11 hypo of someone posting classified information?
12 They say it's my free speech right, I believe
13 that I -- you know, I got access to this
14 information and I want to post it.

15 Are you suggesting that the government
16 couldn't say to the platforms, we need to take
17 that down?

18 MR. AGUIÑAGA: No, Your Honor, because
19 I think that would be a great example where
20 strict scrutiny would cut in the government's
21 favor. They could show a --

22 JUSTICE JACKSON: All right. So what
23 do we -- what do we do then in a situation in
24 which -- I mean, I suppose, in this case, we're
25 asking -- the government's point is we didn't

1 coerce. And I appreciate, you know, the debate
2 about that.

3 But you just seemed to suggest that as
4 a blanket matter, the government doesn't have
5 the ability to, you know, encourage or require
6 this kind of censorship. And I don't know that
7 that's the case.

8 MR. AGUIÑAGA: So, Your Honor, I guess
9 this goes to the bully pulpit as well as I
10 understand that the bully pulpit has never been
11 used to target the object of suppressing a third
12 party's speech.

13 You can use it to coerce behavior.
14 You can use it to coerce companies to take
15 certain actions. But, when the government is
16 identifying a specific viewpoint and specific
17 content that it wishes to wholly eliminate from
18 public discourse, that's, I think, when the
19 First Amendment problem arises.

20 And so I -- I -- I guess -- I'm
21 struggling to find an example in the Court's
22 cases or in history where the Court or anybody
23 else has said: The government, by virtue of
24 being the government, can use its power to
25 pressure speech intermediaries to eliminate

1 entire viewpoints and -- and -- and content from
2 the public discourse.

3 And I think, I mean, that's -- that's,
4 Your Honor --

5 JUSTICE JACKSON: Can I give you a
6 hypothetical?

7 MR. AGUIÑAGA: Sure.

8 JUSTICE JACKSON: Suppose someone
9 started posting about a new teen challenge that
10 involved teens jumping out of windows at
11 increasing elevations. This is the challenge.
12 And kids all over the country start doing this.
13 There's an epidemic. Children are seriously
14 injuring or even killing themselves in
15 situations.

16 Is it your view that the government
17 authorities could not declare those
18 circumstances a public emergency and encourage
19 social media platforms to take down the
20 information that is instigating this problem?

21 MR. AGUIÑAGA: Your Honor, the
22 government absolutely can use the pulpit to say
23 publicly, here's what we recognize to be a
24 public health issue, emergency. This is
25 obviously extremely terrible, and the public

1 shouldn't tolerate this. The platforms, we see
2 it's going on on the platforms, you know.

3 JUSTICE JACKSON: But they can't call
4 the platforms and say, listen, we really think
5 you should be taking this down because look at
6 the problems that it's causing?

7 MR. AGUIÑAGA: If it's protected
8 speech, Your Honor, then I think we get closer.
9 But, like, look, if you think that that's -- if
10 that's clearly the way you're asking the
11 question, I -- I understand the instinct that
12 that may -- you know, may not be a First
13 Amendment issue.

14 I guess what I'd fall back on, Your
15 Honor, is that at least where the government
16 itself, there is no emergency like this, there's
17 nothing and without --

18 JUSTICE JACKSON: No. My hypothetical
19 is there is an emergency. My hypothetical is
20 that there is an emergency, and I guess I'm
21 asking you, in that circumstance, can the
22 government call the platforms and say: This
23 information that you are putting up on your
24 platform is creating a serious public health
25 emergency, we are encouraging you to take it

1 down?

2 MR. AGUIÑAGA: I -- I was with you
3 right until that last comment, Your Honor. I
4 think they absolutely can call and say this is a
5 problem, it's going rampant on your platforms,
6 but the moment that the government tries to use
7 its ability as the government and its stature as
8 the government to pressure them to take it down,
9 that is when you're interfering with the third
10 party's speech rights.

11 CHIEF JUSTICE ROBERTS: Well, even if
12 you --

13 MR. AGUIÑAGA: And, remember, the
14 third --

15 CHIEF JUSTICE ROBERTS: Go ahead,
16 finish your --

17 MR. AGUIÑAGA: Your Honor, I was just
18 going to say even -- remember that the third
19 party here is completely absent from the
20 conversation. The third party whose speech is
21 being targeted and ultimately censored is absent
22 from this discussion.

23 CHIEF JUSTICE ROBERTS: Well, you
24 don't think -- well, do you think that simply
25 Justice Jackson's hypothetical ended by saying

1 we encourage you to take it down, is that rise
2 to the level of coercion that you think is
3 problematic?

4 MR. AGUIÑAGA: Your Honor, if the test
5 is coercion and that's the test that this Court
6 applies, I think I might have a harder case
7 saying that's coercion. I think it's -- by its
8 definition, it's maybe easier addressed as a
9 substantial encouragement case.

10 But if -- you know, whether -- as I
11 said earlier, regardless of the label that you
12 apply, whether it's coercion, whether it's
13 encouragement, or joint participation and
14 conspiracy, at the end of the day, if what the
15 government is trying to do is to eliminate
16 viewpoints from public discourse, that I think
17 --

18 CHIEF JUSTICE ROBERTS: Well, again,
19 under my colleague's hypothetical, it was not
20 necessarily eliminate viewpoints. It was to
21 eliminate instructions, let's say, about how to
22 engage in some game that is seriously harming
23 children around -- around the country, and they
24 say we -- we encourage you to stop that.

25 I mean, is it -- that violates the

1 Constitution?

2 MR. AGUIÑAGA: Your Honor, I agree, as
3 a policy matter, it might be great for the
4 government to be able to do that, but the moment
5 that the government identifies an entire
6 category of content that it wishes to not be in
7 the modern public sphere, that is a First
8 Amendment problem.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas?

12 Justice Alito?

13 JUSTICE ALITO: Well, Mr. Aguinaga, I
14 think some of your most recent colloquy with my
15 colleagues have gotten off into questions that I
16 didn't take it from your brief we -- you think
17 we actually need to decide in this case.

18 So I thought your principal argument
19 was that whatever coercion means, it -- what
20 happened here is sufficient and that coercion
21 doesn't mean only -- it doesn't apply only when
22 the government says do this, and if you don't do
23 this, there are going to be legal consequences
24 when it says that in the same breath but that
25 it's a more flexible standards and you --

1 standard and you have to take into account the
2 whole course of the relationship regarding this
3 matter.

4 That's what I -- I took to be your
5 principal argument. Did I understand that
6 correctly?

7 MR. AGUIÑAGA: That's correct, Your
8 Honor. And there's an entire volume -- I mean,
9 we've got 20,000 pages in this record of the
10 government persistently going back to platforms
11 again and again, pushing them to adjust their
12 policies, change their policies, do more
13 censoring.

14 And I think that's what makes this
15 case so unique, is that you not only have this
16 vast repetition of communications, but it's
17 all -- again, the bulk of it is behind closed
18 doors. And that's what's so pernicious about
19 this, is that if we don't have a remedy in this
20 case, then it's hard to see how there will ever
21 be a remedy for a future plaintiff who turns out
22 to be censored, but it's difficult for that
23 person to even identify whether that censoring
24 actually happened.

25 JUSTICE ALITO: And you got all this

1 information only through discovery, is that
2 correct?

3 MR. AGUIÑAGA: That's correct, Your
4 Honor.

5 JUSTICE ALITO: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor?

8 Justice Kagan?

9 JUSTICE KAGAN: Could we go back to
10 the standing question? And -- and if I ask you
11 for the single piece of evidence -- and maybe
12 this is the -- the piece that you were
13 describing earlier. I just wanted to make clear
14 what your answer was. The single piece of
15 evidence that most clearly shows that the
16 government was responsible for one of your
17 clients having material taken down, what is that
18 evidence and, you know, what does it say about
19 how the government was responsible?

20 MR. AGUIÑAGA: Sure, Your Honor. So,
21 as I say, I think Jill Hines is the best example
22 for us on standing. To give you one more
23 example, look at page --

24 JUSTICE KAGAN: Yeah, but even on that
25 one, I guess I just didn't understand in what

1 you were saying how you drew the link to the
2 government. I mean, we know that there's a lot
3 of government encouragement around here. We
4 also know that there's -- the platforms are
5 actively content moderating, and they're doing
6 that irrespective of what the government wants.

7 So how do you decide that it's
8 government action as opposed to platform action?

9 MR. AGUIÑAGA: Your Honor, I think the
10 clearest way -- if I understand -- so let me
11 answer your question directly, Your Honor.

12 The way -- the link that I was drawing
13 there was a temporal one. If you look at JA 715
14 to 716, that's a May 2021 email. Two months
15 later after that email, calls were targeting
16 health groups just like Jill Hines's group. She
17 experiences the first example of that kind of
18 group being --

19 JUSTICE KAGAN: Yeah. So, in two
20 months, I mean, a lot of things can happen in
21 two months. So that decision two months later
22 could have been caused by the government's
23 email, or that government email might have been
24 long since forgotten because, you know, there
25 are a thousand other communications that

1 platform employees have had with each other,
2 that -- a thousand other things that platform
3 employees have read in the newspaper.

4 I mean, why would we point to one
5 email two months earlier and say it was that
6 email that made all the difference?

7 MR. AGUIÑAGA: Your Honor -- and I
8 would say a thousand other emails between the
9 White House and Facebook in those two months. I
10 mean, that's the volume of this interaction,
11 this back and forth, between the platform and
12 the government, and -- and it's all --

13 JUSTICE KAGAN: Yes, but if it's --

14 MR. AGUIÑAGA: -- about the same
15 topic.

16 JUSTICE KAGAN: -- but if it's
17 encouragement -- I mean, let's even take that
18 this was something that the -- that the
19 government was continually pressing the --
20 encouraging the platforms to do. I mean, until
21 you can show that there's something about --
22 overbearing the platform's will, which, you
23 know, seems sort of hard to overbear Facebook's
24 work -- will from what I can gather from the
25 world, but, you know, how do you say it's the

1 government rather than Facebook?

2 MR. AGUIÑAGA: Your Honor, I guess
3 what I -- what I would say is we're in -- the
4 context in which these -- these communications
5 arise, the Facebook emails are attempting --
6 they say -- they use terms like "partner,"
7 they're trying to work with the government.

8 And, you know, like, you could say the
9 same thing about how do you know it's Facebook,
10 not the government, how do you know it's the
11 government, not Facebook? You could ask it
12 either way. I think what we do know --

13 JUSTICE KAGAN: Well, you're exactly
14 right.

15 MR. AGUIÑAGA: I think what we do know
16 --

17 JUSTICE KAGAN: I mean, you can say
18 that about pretty much everything that's in your
19 brief, that there's just nothing where you can
20 say, okay, the government said take down that
21 communication.

22 The government is making some broad
23 statements about the kinds of communications it
24 thinks harmful. Facebook has a lot of opinions
25 on its own about various kinds of communications

1 it thinks harmful.

2 I guess, if you're going to use
3 standard ideas about traceability and
4 redressability, I guess what I'm suggesting is I
5 don't see a single item in your briefs that
6 would satisfy our normal tests.

7 MR. AGUIÑAGA: So, Your Honor, look at
8 Jill Hines, and I'll give you one more example.
9 Look at page 20 of the red brief. This is the
10 Jim Hoft example, because we know that his name
11 and the Gateway Pundit specifically appear in
12 the tracking spreadsheet that CISA uses, that
13 the FBI uses as well. And we also know that the
14 EIP, the Election Integrity Partnership, that
15 works with CISA, and the government -- the
16 district court found this a million times. It
17 said that it looks like they have a coordinated
18 effort out to get Jim Hoft.

19 I mean, I think that's our -- our
20 second-best example on direct traceability, Your
21 Honor. So, if you're not satisfied with Jill
22 Hines, look at Jim Hoft, look at page 20 of the
23 red brief.

24 JUSTICE KAGAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 JUSTICE GORSUCH: You -- you've spoken
3 with Justice Kagan about your best examples on
4 traceability. How about redressability, given
5 that by the time the PI came around, we're in
6 '23?

7 MR. AGUIÑAGA: Your Honor, so we had
8 two second supplemental declarations that are at
9 the end of the Joint Appendix that are from Jim
10 Hoft and from Jill Hines that identify the
11 specific posts that they had posted on Twitter
12 and Facebook during the pending preliminary
13 injunction proceedings.

14 One of the ones we talked about was JA
15 74 -- 793 and 794, which is the -- the Jill
16 Hines Facebook post referencing RFK, referencing
17 Tucker Carlson, referencing vaccines. It's --
18 it's turtles all the way down. And that is an
19 example, and all of these are examples, of
20 injuries that postdate lot of the earlier
21 filings in this case.

22 And so, you know, when you talk about
23 redressability, Your Honor, this injunction is
24 an order to the government not to continue
25 engaging in the sorts of censorship that led to

1 these kinds of censorship decisions.

2 JUSTICE GORSUCH: Then I'd like to
3 talk just briefly about remedy. This is another
4 example of a universal injunction, and the
5 district court enjoined behavior by platforms
6 that your clients didn't use and enjoined
7 actions with respect to non-parties, not
8 affecting your clients.

9 We've seen an epidemic of these
10 lately. What do we do about it?

11 MR. AGUIÑAGA: So a couple of
12 responses to that, Justice Gorsuch.

13 I think one reason the breadth of the
14 injunction is what it is is what the Fifth
15 Circuit explained in JA 81 to 83, which is the
16 breadth of the government's enterprise in this
17 case was extremely broad.

18 I mean, when it's identifying -- and I
19 had this colloquy with Justice Kagan about
20 whether you can identify them calling out Jill
21 Hines specifically. The reason it's hard for me
22 to do that is because they weren't cutting at
23 that -- at that level in the weeds. What they
24 were taking is broader strokes like vaccines are
25 safe for -- for children, calling that claim

1 true, and then having the platforms go out and
2 censor contrary claims.

3 And so the reason you see the breadth
4 of the injunction being the way it is, Your
5 Honor, it's a product of what the government
6 did. Now, if you --

7 JUSTICE GORSUCH: No, that's --

8 MR. AGUIÑAGA: -- if you have concern
9 --

10 JUSTICE GORSUCH: -- we hear that in
11 every universal injunction case. But your
12 clients are your clients. They're the only ones
13 complaining. And it's their case. It's their
14 controversy. And, normally, our remedies are
15 tailored to those who are actually complaining
16 before us and not to those who aren't, right?

17 MR. AGUIÑAGA: Your Honor, and if you
18 have that concern, we're completely fine if you
19 want to limit the injunction to the five
20 platforms as to which we were able to get
21 preliminary discovery. That's completely fine
22 with us. If you want to limit just to the seven
23 plaintiffs, also completely fine, Your Honor.

24 I think the most important takeaway in
25 this case is that the Court has to say something

1 in our favor on the merits. The government
2 can't just run rampant pressuring the platforms
3 to censor private speech.

4 JUSTICE GORSUCH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh?

7 JUSTICE KAVANAUGH: On Bantam Books, I
8 read that to refer to coercion and not to
9 significant encouragement.

10 MR. AGUIÑAGA: I think that's right,
11 Your Honor, although, if you look at page 66 to
12 67, this Court used the term "coercion"
13 alongside the term "persuasion" and
14 "intimidation." I mean, I think there is some
15 flexibility in those terms, and you could -- you
16 can imagine a world in which you can call
17 persuasion another variety of encouragement.

18 As I say, I'm not wedded to any label,
19 we're not wedded to any label, but I do agree
20 that the word "encouragement" doesn't appear in
21 Bantam Books, Your Honor.

22 JUSTICE KAVANAUGH: And one thing that
23 I think I want to square up with you is if
24 someone calls and -- or contacts the social
25 media company and says what you have there, this

1 post, has factually erroneous information, so
2 not a viewpoint that we disagree with, factually
3 erroneous information, and the social media
4 company says, we'll take a look at that and --
5 and -- you still think that's significant
6 encouragement that qualifies as coercion, if
7 they take it down in response to concluding that
8 it, in fact, is factually erroneous?

9 MR. AGUIÑAGA: No, Your Honor. If
10 there's no ask from the government, if the
11 government's just saying here's our view of the
12 statement --

13 JUSTICE KAVANAUGH: Okay. And we
14 think it should be -- it should be taken down,
15 it's up to you, but we think it should be taken
16 down.

17 MR. AGUIÑAGA: Yeah, I think that's a
18 harder case for me. I guess, you know, if you
19 think it's a close case, decide it in favor of
20 the First Amendment.

21 JUSTICE KAVANAUGH: What -- What --
22 what's -- oh, that's -- that's the question
23 here. You can't -- you can't just claim the
24 mantle. Yeah. What -- what do you think the --
25 when you say it's a "harder case," why do you

1 think it's a harder case?

2 MR. AGUIÑAGA: Because I understand
3 the instinct, Your Honor, that just asking very,
4 very politely or just saying very, very politely
5 we think you should take it down, that that
6 shouldn't be a First Amendment problem, but the
7 reality is that when somebody like the FBI or
8 somebody like a deputy assistant to the
9 president makes a statement like that, that
10 statement carries force.

11 That's just the reality. My dear
12 mother is a saint and if she makes a state --
13 same statement to Twitter, they're -- they don't
14 know her from Adam, they don't care, but they do
15 care if it's the government.

16 JUSTICE KAVANAUGH: And -- and why is
17 that? Is it your assumption that anyone in
18 those circumstances is always implicitly
19 threaded -- threatening adverse consequences?

20 MR. AGUIÑAGA: No, Your Honor, and
21 this is where Bantam Books, I think, is good for
22 us because it says you look through the form to
23 the substance. And so you look at the substance
24 of the communication and say, well, is what the
25 government doing here, is it trying to

1 effectively suppress a third-party's speech?

2 And so, if the forms cut one way, but
3 the substance cuts the other ways, then you look
4 at the substance.

5 JUSTICE KAVANAUGH: The hypo was about
6 factually inaccurate.

7 MR. AGUIÑAGA: Right, factual --
8 factually inaccurate information. And if the
9 government says our view of that is that it's
10 false, they can absolutely say that. But, if
11 they do more and they say you need to take this
12 down --

13 JUSTICE KAVANAUGH: You should take it
14 down?

15 MR. AGUIÑAGA: -- you should take it
16 down --

17 JUSTICE KAVANAUGH: That's a problem?

18 MR. AGUIÑAGA: -- First Amendment
19 issue, Your Honor. I mean, I think that --

20 JUSTICE KAVANAUGH: Factually
21 inaccurate about --

22 MR. AGUIÑAGA: Is that --

23 JUSTICE KAVANAUGH: -- something the
24 troops are doing, U.S. troops are doing, and,
25 you know, you should take that down, it's

1 factually inaccurate, it's harming the war
2 effort, it's not accurate, and you're just
3 running post after post describing what's going
4 on in an inaccurate way, and it's up to you, but
5 why -- why -- why should you be publishing that
6 inaccurate information?

7 MR. AGUIÑAGA: Yeah, and the north
8 star for the government in that situation is
9 more speech. Publish the true speech that they
10 think should counter what they view as false
11 speech. The government is not helpless here.
12 It has tools at its disposal, and censorship has
13 never been the default remedy for a perceived
14 First Amendment violation.

15 JUSTICE KAVANAUGH: What do you do
16 with the fact that the platforms say no all the
17 time to the government?

18 MR. AGUIÑAGA: Your Honor, it doesn't
19 matter. I think Judge Posner made this -- this
20 point in Backpage versus Dart, which is you
21 could have a threatener who threatens the
22 recipient, the recipient says no, and so the
23 threatener packs their tent and walks away.
24 That's still a First Amendment violation even
25 though the recipient refused to comply.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice --
3 Justice Barrett?

4 JUSTICE BARRETT: Just picking up on
5 Justice Kavanaugh's question about what makes
6 something threatening and is it just something
7 inherent in the nature of a person, the person
8 on the other end of the line being a government
9 official, so Bantam Books points out that the
10 speech, the threat, the encouragement, if
11 that's, you know, what we can posit for this
12 purpose, comes from someone with the authority
13 to impose a sanction.

14 Is that important in your view?

15 MR. AGUIÑAGA: Your Honor, it -- I
16 mean, it is and it isn't. We think it's a
17 relevant fact that if somebody like an FBI agent
18 that is meeting regularly with the platforms is
19 making these kinds of requests, that that's a
20 fact that you have to take into consideration.

21 Justice Sotomayor has a panel, a
22 procuring panel decision called Okwedy versus
23 Molinari in the Second Circuit that addressed
24 this issue about authority, and the issue in
25 that case was that the borough president of

1 Staten Island didn't have authority to take down
2 a particular billboard, but the court still said
3 that the fact that the recipient thought that
4 the borough president might be able to use
5 whatever authority he did have to cause trouble
6 for the billboard owner, that was enough.

7 So, if -- if -- if the speaker has
8 that kind of authority, Your Honor, I think
9 that's a critical fact that you have to take
10 into account because, as I say, if it's somebody
11 that Twitter doesn't know from Adam that's
12 making the request, they're just going to ignore
13 it. But if it's somebody --

14 JUSTICE BARRETT: Well, I mean, if
15 it's a staff or even if it's somebody on the
16 Hill, I mean, you know, people who work on the
17 Hill don't have control over DOJ, or if it's a
18 staffer in the White House, you know, mentioning
19 230 or maybe that's what's in the platform's
20 mind, but, you know, no authority to bring an
21 antitrust suit or to try to change 230 or
22 advocate for 230 changes, that doesn't matter?

23 MR. AGUIÑAGA: Your Honor, I mean,
24 what I would say is, on the facts of this case,
25 if you have the Deputy Assistant to the

1 President making that kind of statement, sure --

2 JUSTICE BARRETT: No, no, no.

3 MR. AGUIÑAGA: -- he can't -- he can't
4 make that -- he can't change --

5 JUSTICE BARRETT: Let's say it's low
6 level, not Deputy Assistant to the President.
7 Let's just call it somebody, a low-level
8 staffer.

9 MR. AGUIÑAGA: Two people -- two
10 people below him, two people below him, he --
11 they can't unilaterally reform 230 or promulgate
12 rulemakings, but they can engage in a process
13 that itself is punishment basically. I mean,
14 imagine being on the receiving ends of Rob
15 Flaherty for six months on end and these --
16 receiving these kinds of emails. In some ways,
17 it's the adverse consequences that were
18 threatened and/or actually carried out. Was the
19 process --

20 JUSTICE BARRETT: So we should focus
21 less on authority or authority can kind of drop
22 out. The point is, if it comes from the
23 government, and so there might be some
24 conceivable way in which the government could
25 follow through in some sort of punitive way,

1 that -- that's the relevant inquiry?

2 MR. AGUIÑAGA: Your Honor, I think
3 that is certainly one way you can look at the
4 analysis, absolutely.

5 JUSTICE BARRETT: Okay. Thanks.

6 CHIEF JUSTICE ROBERTS: Justice
7 Jackson?

8 JUSTICE JACKSON: So my biggest
9 concern is that your view has the First
10 Amendment hamstringing the government in
11 significant ways in the most important time
12 periods.

13 I mean, what would -- what would you
14 have the government do? I've heard you say a
15 couple times that the government can post its
16 own speech. But, in my hypothetical, you know,
17 kids, this is not safe, don't do it, is not
18 going to get it done.

19 And so I guess some might say that the
20 government actually has a duty to take steps to
21 protect the citizens of this country, and you
22 seem to be suggesting that that duty cannot
23 manifest itself in the government encouraging or
24 even pressuring platforms to take down harmful
25 information.

1 So can you help me? Because I'm
2 really -- I'm really worried about that because
3 you've got the First Amendment operating in an
4 environment of threatening circumstances from
5 the government's perspective, and you're saying
6 that the government can't interact with the
7 source of those problems.

8 MR. AGUIÑAGA: And, Your Honor, I
9 understand that instinct, and I guess what I'd
10 tell you is our position is not that the
11 government can't interact with the platforms
12 there. They can and they should in certain
13 circumstances like that that present such
14 dangerous issues for society and especially
15 young people.

16 But the way they do that has to be in
17 compliance with the First Amendment, and I think
18 that means they can give them all the true
19 information that the platform needs and ask to
20 amplify that and ask --

21 JUSTICE JACKSON: Right. But you're
22 just -- you're just saying that. I guess I
23 thought when you say the way they do that is
24 consistent with the First Amendment is that they
25 have to show that they have a compelling

1 interest to do what they're doing. In other
2 words, you -- you want us to take the line --

3 MR. AGUIÑAGA: I see.

4 JUSTICE JACKSON: -- to be between
5 compulsion and encouragement, and what we're
6 looking at is the government can't compel, maybe
7 they can encourage. I'm wondering whether
8 that's not really the line.

9 The line is does the government,
10 pursuant to the First Amendment, have a
11 compelling interest in doing things that result
12 in restricting the speech in this way? That
13 test, I think, takes into account all of these
14 different circumstances, that we don't really
15 care as much about how much the government is
16 compelling or maybe we do but in the context of
17 tailoring and not as sort of a freestanding
18 inquiry that's overlaid on all of this. Does
19 that make sense?

20 MR. AGUIÑAGA: It does, Your Honor.
21 And I -- I apologize for missing your guidance
22 earlier.

23 So the way I think about that is I --
24 I've been discussing the standard and I thought
25 we've all been discussing the standard on the

1 front end of the analysis, which is, is there a
2 First Amendment violation? Is there an
3 abridgement of speech?

4 I guess I would conceptually think of
5 strict scrutiny, narrow tailoring, compelling
6 interest as coming in at the back end to say
7 yes, maybe in the ordinary case, the government
8 shouldn't have been permitted to undertake the
9 kind of suppression of free speech that it did,
10 but in this unique circumstance, it actually had
11 a compelling interest, and it used narrowly
12 tailored means to accomplish that issue.

13 I mean, I think that's the fail-safe.
14 If you're concerned with the breadth of our
15 arguments, that's one fail-safe, which is no
16 matter how broad the standard the Court adopts,
17 there's always going to be strict scrutiny at
18 the end of the line to save the government in
19 times where it desperately needs to do the
20 things that you're outlining.

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Rebuttal, Mr. Fletcher.

25

1 REBUTTAL ARGUMENT OF BRIAN H. FLETCHER

2 ON BEHALF OF THE PETITIONERS

3 MR. FLETCHER: Thank you, Mr. Chief
4 Justice. I'd like to start with a few points on
5 standing and then address the merits and then
6 try to step back and talk about the bigger
7 picture.

8 So, first, on standing, I have to
9 start with a clarification about Jill Hines's
10 emails at pages 793 to 794 of the Joint
11 Appendix. I had misunderstood the cross-posting
12 issue that my friend alluded to earlier. I
13 thought that was a moderation event by Twitter,
14 not by Facebook. I appreciate his
15 clarification, and because we've been insistent
16 on the lower court's turning square corners on
17 the facts here, I wanted to make sure I did that
18 too. I don't think that changes the fundamental
19 point, though, because we're still talking about
20 an act of moderation in April 2023, years after
21 the last White House or any government speech
22 targeting Mr. Kennedy's content, which happened
23 back in 2021.

24 And that, Justice Kagan, I think
25 points out the problem that you highlighted,

1 which is that they're trying to draw the
2 connection between the government's acts here
3 and the moderation that harmed them through
4 timing, and the timing just isn't very good.
5 And so I want to talk about the two best
6 examples that he gave you, the one being
7 Ms. Hines's groups on Facebook, and this is
8 discussed at page 630 of the Joint Appendix.

9 Justice Kagan, you pointed out that
10 her groups were moderated at least two and four
11 months after the relevant exchange between
12 Facebook and the government. But it's actually
13 worse than that. The 2000 -- the May 2021 email
14 from Facebook to the government says, we've
15 already taken action on health groups to remove
16 them from our recommendation feature. It wasn't
17 reporting on something it would do in the
18 future. It was reporting on something that was
19 already done. And it's even not clear from the
20 email that Facebook was doing that because of
21 any request from the government. It was a
22 report of its own action.

23 And then his next best example is Mr.
24 Hoft and the appearance of Mr. Hoft on a
25 spreadsheet that the Department of Homeland

1 Security's CISA, a sub-agency, maintains. This
2 appears at Record on Appeal 17,016. And the
3 problem with that is twofold. First, this is a
4 tracking spreadsheet that monitors information
5 sent from election officials to the platforms.
6 This shows that the report was made by the
7 Election Integrity Partnership, a private
8 entity. It wasn't a referral that was made by
9 CISA, the federal agency. CISA was just noting
10 the existence of the referral. And, second, as
11 far as I'm aware, there's no indication in the
12 record that the referenced piece of content was
13 actually taken down at all.

14 So I think that points up that what
15 they just haven't shown is any injury traceable
16 to the government, let alone an imminent risk of
17 future injury.

18 Second, on the merits, I think it's
19 instructive to start with what my friend called
20 one of the hottest documents. This is Record on
21 Appeal 15,322, the email exchange between
22 Surgeon General Murthy and someone at Facebook
23 because this is coming in that critical July
24 2021 period, and what starts that email exchange
25 is not any concern about the private email

1 exchanges, the stuff that happened behind closed
2 doors, antitrust reform, Section 230. It's
3 Facebook reaching out and saying we wanted to
4 get in touch because of the President's
5 statements about us, the reference to killing
6 people, and because of the Surgeon General's
7 health advisory on what platforms could be doing
8 to be doing more along with others in society.

9 And I think what that highlights is
10 that to the extent that the government had
11 influence on the platforms here, and we
12 acknowledge there are indications that it did,
13 it's influence of the classic bully pulpit sort
14 of President Reagan condemning pornography --
15 or, excuse me, President Bush condemning
16 pornography, President Reagan condemning media
17 about drugs and violence, Teddy Roosevelt
18 condemning muckrakers. Part of our
19 constitutional tradition is that presidents and
20 their close advisors have the ability, the
21 authority to, in a non-coercive way, to speak
22 their mind and call on the public to act. And
23 we think that's what was happening here.

24 And, finally, if I could just step
25 back and -- you know, my friend started by

1 saying that this is a massive attack on free
2 speech. The lower courts called it a
3 coordinated censorship campaign. I want to be
4 clear, if those things had happened, they would
5 be reprehensible. It would be a huge problem.
6 But we would think that before validating those
7 sorts of charges against senior government
8 officials and career employees spanning two
9 different administrations, the lower courts
10 would insist on a rigorous analysis of the facts
11 and the law. And with all respect to the lower
12 courts, we don't think that's happened here. We
13 don't think that's supported.

14 We think the easiest way for this
15 Court to resolve this case is on standing, on
16 the for -- lack of forward-looking injury
17 ground, Justice Kagan, that you and I discussed
18 earlier. But, to the extent that the Court does
19 get to the merits, we'd urge you to make clear
20 that government officials do not violate the
21 First Amendment when they flag false information
22 or malign foreign actors when they answer
23 questions about public health advice or when
24 they speak to the public on matters of public
25 concern the way the President and the Surgeon

1 General did.

2 The First Amendment is a critical
3 bulwark against government coercion, and that's
4 important, but it is also important that Article
5 III courts stay within the bounds of Article III
6 and don't enjoin or chill legitimate and
7 productive interactions between the government
8 and the public.

9 We'd ask you to reverse. Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 The case is submitted.

13 (Whereupon, at 11:47 a.m., the case
14 was submitted.)

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1	<p>90 ^[1] 44:14 90-day ^[1] 44:12</p> <hr/> <p style="text-align: center;">A</p> <hr/> <p>a.m. ^[3] 1:16 3:2 125:13 abandoned ^[1] 45:14 ability ^[4] 32:21 93:5 96:7 123:20 able ^[8] 8:18 33:13 69:7,8 79:6 98:4 107:20 114:4 above ^[1] 48:5 above-entitled ^[1] 1:14 abridge ^[2] 69:19 74:10 abridgement ^[2] 91:16 119:3 absence ^[1] 44:9 absent ^[3] 6:5 96:19,21 absolutely ^[12] 17:20 53:24 67:3,4 76:10,18 89:4 90:17 94:22 96:4 111:10 116:4 abuses ^[1] 64:21 acceptable ^[1] 19:22 accepted ^[2] 14:15,16 access ^[1] 92:13 accomplish ^[3] 66:4,23 119:12 account ^[9] 13:20 23:6 50:6,11 59:14 73:10 99:1 114:10 118:13 accountable ^[3] 35:6,7,9 accounts ^[5] 81:8,9,19 82:16 90:25 accurate ^[4] 25:16 28:19 31:5 112:2 accusation ^[1] 34:14 accuses ^[1] 64:25 acknowledge ^[4] 32:6 34:20 46:5 123:12 acknowledging ^[1] 28:22 across ^[1] 87:25 act ^[4] 5:24 57:7 120:20 123:22 acting ^[1] 58:16 action ^[46] 4:20,24 5:13,23 6:4,8,8,10,13,16 7:9 8:1 15:2,3,12,15 16:6 32:8 36:9 47:2 51:18 52:3,5 53:4 54:20 56:5,19,22 57:1,7,8,17,18 58:19 62:4,20 63:22 70:17,20 81:13 86:9 90:19 101:8,8 121:15,22 actions ^[11] 3:20 13:16 14:14 15:25 32:13 36:12 42:4 66:6 70:15 93:15 106:7 actively ^[1] 101:5 activities ^[1] 55:1 activity ^[5] 54:21 76:12,16,17 80:7 actor ^[1] 77:13 actors ^[11] 5:25 6:20 7:20 11:1,21 42:20 51:21 63:17 66:14 77:8 124:22 acts ^[3] 17:5 20:20 121:2 actual ^[4] 29:4 31:14 44:9 92:3 actually ^[15] 57:3 59:14,16 70:5,7 87:4 90:6 98:17 99:24 107:15 115:18 116:20 119:10 121:12 122:13 Adam ^[2] 110:14 114:11 add ^[2] 82:20 85:12 added ^[2] 48:1 77:23 address ^[4] 59:2 70:20 81:6 120:5 addressed ^[4] 66:25 70:21 97:8</p>	<p>113:23 addresses ^[1] 10:25 adjudicate ^[1] 47:5 adjust ^[2] 81:5 99:11 administration ^[2] 65:15 84:1 administrations ^[1] 124:9 admit ^[1] 92:6 adopts ^[1] 119:16 adverse ^[7] 5:12 36:9,11 52:2,4 110:19 115:17 advice ^[5] 4:23 55:14 57:21 58:2 124:23 advising ^[1] 57:4 advisors ^[4] 4:14 11:25 12:2 123:20 advisory ^[1] 123:7 advocate ^[1] 114:22 advocating ^[2] 33:19 62:18 affecting ^[3] 3:20 9:1 106:8 afield ^[1] 88:25 afoul ^[1] 88:11 agencies ^[1] 9:6 agency ^[4] 5:3 11:6 28:6 122:9 agent ^[1] 113:17 agents ^[1] 4:15 ago ^[2] 13:2 78:1 agree ^[13] 18:10 20:11,18,21 30:11,13 49:17 57:14 58:11 60:13 74:4 98:2 108:19 Agreed ^[3] 14:11 20:10 21:10 agreeing ^[2] 38:10,13 agreement ^[1] 41:13 AGUIÑAGA ^[83] 1:22 2:6 64:2,4 66:8 68:2 69:2,16,24 70:9,19 71:14 72:19,24 73:10,12 74:3 75:2,9 76:9,12,16,25 78:9 79:10,17,19 81:21,25 82:25 83:4,10 84:9 85:7 88:1,20 89:22 90:4,7,14 91:7 92:18 93:8 94:7,21 95:7 96:2,13,17 97:4 98:2 99:7 100:3,20 101:9 102:7,14 103:2,15 104:7 105:7 106:11 107:8,17 108:10 109:9,17 110:2,20 111:7,15,18,22 112:7,18 113:15 114:23 115:3,9 116:2 117:8 118:3,20 Aguinaga ^[2] 64:1 98:13 ahead ^[2] 87:2 96:15 AL ^[2] 1:4,7 algorithms ^[2] 10:1 40:7 ALITO ^[30] 13:9 14:5,8,12,23 15:10 16:2,16,20 21:12 23:8,11,14 24:10,13 26:7 27:10 28:8,13,20 42:1,2,12,22 43:6 59:9 98:12,13 99:25 100:5 allegations ^[2] 20:2 85:24 alleged ^[1] 58:21 alleging ^[1] 6:17 allowing ^[1] 29:8 alluded ^[1] 120:12 alone ^[2] 7:19 122:16 alongside ^[1] 108:13 already ^[2] 121:15,19 altering ^[1] 10:1 although ^[1] 108:11</p>	<p>Alvarez ^[1] 80:2 Amendment ^[60] 6:19 7:5,6 8:2,13 10:16 11:23 23:24 26:11,24,25 27:5 29:2 30:18,24,25 31:11 36:22 38:23 39:25 41:2,18 46:10 49:5 50:19 51:23 64:19 68:5,5,18 69:3,14,23,25 70:5 74:13 76:23 77:1,18,24 78:11 88:23 90:9 92:3 93:19 95:13 98:8 109:20 110:6 111:18 112:14,24 116:10 117:3,17,24 118:10 119:2 124:21 125:2 America ^[1] 72:1 American ^[2] 64:15 77:17 Americans ^[6] 23:21 24:3,6 52:15 64:11 77:23 Americans' ^[1] 65:20 amicus ^[3] 6:24 55:20 58:10 amongst ^[1] 41:14 amplify ^[2] 80:11 117:20 analogies ^[1] 52:9 analysis ^[6] 10:20 67:7 69:4 116:4 119:1 124:10 analyze ^[1] 74:20 analyzed ^[1] 64:12 anathema ^[1] 64:19 and/or ^[1] 115:18 anger ^[6] 25:12,24,25 26:2 27:12,20 another ^[11] 17:7 41:18 54:16 59:15 71:7 83:8,9 87:16 88:14 106:3 108:17 answer ^[15] 16:8 21:20 22:25 23:3 46:2 50:20 67:3,4 79:6 88:22 90:9,15 100:14 101:11 124:22 answering ^[2] 55:18 63:19 answers ^[4] 21:20 23:12 59:10 88:21 anti-Semitic ^[4] 12:4,8 39:16 54:10 anticipating ^[1] 10:12 antitrust ^[5] 22:14 32:13 53:4 114:21 123:2 anybody ^[2] 73:15 93:22 anytime ^[1] 80:12 apart ^[1] 4:17 apologize ^[4] 60:1 85:11 88:2 118:21 apologizing ^[1] 85:8 Appeal ^[2] 122:2,21 appear ^[3] 78:24 104:11 108:20 appearance ^[1] 121:24 APPEARANCES ^[1] 1:18 appears ^[1] 122:2 Appendix ^[5] 82:9 84:21 105:9 120:11 121:8 application ^[4] 18:14 36:4 59:25 68:18 applications ^[1] 61:3 applied ^[3] 12:20 14:25 22:2 applies ^[3] 42:14 60:14 97:6 apply ^[8] 6:12 18:6 23:25 68:23 87:25 91:4 97:12 98:21 applying ^[1] 19:2 appreciate ^[5] 26:1 30:18 61:14</p>
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