Testimony of Will Creeley

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Before the United States Senate

Committee on Commerce, Science, and Transportation

"Shut Your App: How Uncle Sam Jawboned Big Tech Into Silencing Americans, Part II"

Chairman Cruz, Ranking Member Cantwell, and honorable members of the Committee,

Good morning, and thank you for the opportunity to testify today. My name is Will Creeley, and I am the Legal Director of FIRE — the Foundation for Individual Rights and Expression, a nonpartisan nonprofit dedicated to defending the rights of all Americans to free speech and free thought, the essential qualities of liberty.

I've spent nearly twenty years defending the First Amendment rights of speakers from every point on the ideological spectrum. At FIRE, we have one rule: If speech is protected, we'll defend it.

Typically, the censorship we fight is straightforward: The government punishes a speaker for saying things the government doesn't like. That's a classic First Amendment violation, a fastball down the middle. Unfortunately, that kind of textbook censorship isn't the only way government actors silence disfavored or dissenting speech.

Far too often, government officials from both sides of the partisan divide engage in "jawboning" — that is, they abuse the actual or perceived power of their office to threaten, bully, or coerce others into censoring speech. This indirect censorship violates the First Amendment just as surely as direct suppression.

This isn't new law. The First Amendment's prohibition against coerced censorship dates back decades, to the Supreme Court's 1963 ruling in *Bantam Books v. Sullivan*. In that case, the Court confronted a Rhode Island state

commission that sent threatening letters, "phrased virtually as orders," to booksellers distributing "objectionable" titles — with follow-up visits from police, to ensure the message had been received.

The Court held the commission's "operation was in fact a scheme of state censorship effectuated by extra-legal sanctions; they acted as an agency not to advise but to suppress." And in the decades since, courts have consistently heeded *Bantam Books*' call to "look through forms to the substance" of censorship, and to remain vigilant against both formal and informal schemes to silence speech.

But government officials regularly abuse their power to silence others, so the lesson of *Bantam Books* bears repeating. And in deciding *National Rifle Association of America v. Vullo* last year, the Supreme Court unanimously and emphatically reaffirmed it.

In *Vullo,* New York State officials punished the NRA for its views on gun rights by threatening regulatory enforcement against insurance companies that did business with the group and offering leniency to those who stopped. New York's backdoor censorship was successful — and unlawful.

This regulatory carrot-and-stick approach was designed to chill speech, and the Court reiterated that "a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf."

To be sure, the government may speak for itself, and the public has an interest in hearing from it. But it may not wield that power to censor. As Judge Richard

Posner put it: The government is "entitled to what it wants to say — but only within limits." Under no circumstances may our public servants "employ threats to squelch the free speech of private citizens."

So the law is clear: Government actors cannot silence a speaker by threatening "we can do this the easy way or we can do this the hard way," as the chairman of the Federal Communications Commission did last month. Nevertheless, recent examples of jawboning abound: against private broadcasters, private universities, private social media platforms, and more. The First Amendment does not abide mob tactics.

Despite the clarity of the law, fighting back against jawboning is difficult. Targeted speakers can't sue federal officials for monetary damages for First Amendment violations, removing a powerful deterrent. And as a practical matter, informal censorship is often invisible to those silenced.

That's particularly true in the context of social media platforms, as demonstrated by another recent Supreme Court case, *Murthy v. Missouri*.

Murthy involved coercive demands by Biden administration officials to social media platforms about posts related to Covid-19, vaccines, elections, and other subjects, resulting in the suppression of speech the administration opposed. But the Court held the plaintiffs lacked standing to sue, because the causal link between their deleted posts and the administration's pressure wasn't sufficiently clear.

Murthy illustrates a severe information disparity: Users whose speech is suppressed have no way to know if government actors put their thumb on the

scale. Only the government and the platforms have that knowledge, and usually neither want to share it.

That's why FIRE authored model legislation that would require the government to disclose communications between federal agencies and social media companies regarding content published on its platform, with limited exceptions. But transparency is not enough. Federal officials must be meaningfully deterred from jawboning, and held accountable when they do.

Jawboning betrays our national commitment to freedom of expression. Congress should take action to stop it.

Thank you for your time. I welcome your questions.

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No. 23-411

IN THE

Supreme Court of the United States

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

Petitioners,

v.

MISSOURI, *et al.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, NATIONAL COALITION AGAINST CENSORSHIP, AND FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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INTEREST OF *AMICI CURIAE*[1]

The **Foundation for Individual Rights and Expression (FIRE)** is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights on college campuses nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases that implicate expressive rights. In June 2022, FIRE expanded its public advocacy beyond the university setting and now defends First Amendment rights both on campus and in society at large. *See, e.g.*, Brief of FIRE as *Amicus Curiae* in Support of Petitioners in No. 22-555 and Respondents in No. 22-277, *NetChoice v. Paxton*, Nos. 22-555 & 22-277 (2023); Brief of FIRE as *Amicus Curiae* in Support of Petitioner and Reversal, *Counterman v. Colorado*, 600 U.S. 66 (2023).

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

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

and informally. *See, e.g.*, *NetChoice, LLC v. Bonta*, No. 22-CV-08861-BLF, 2023 WL 6135551 (N.D. Cal. Sept. 18, 2023); *Volokh v. James*, 656 F. Supp. 3d 431 (S.D.N.Y. 2023)*; see also* Brief of FIRE in Support of Petitioner, *Nat'l Rifle Ass'n of Am. v. Vullo*, No. 22-842 (2024); Brief of FIRE as *Amicus Curiae* in Support of Petitioner, *Lindke v. Freed*, No. 22-611 (2023); Brief of FIRE as *Amicus Curiae* in Support of Respondent, *O'Connor-Ratcliffe v. Garnier*, No. 22-324 (2023).

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

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

INTRODUCTION

It's not always easy being a First Amendment advocate. In this country, the guarantee of freedom of expression extends to all manner of speech and speakers, ranging from political extremists, *National Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 43–44 (1977), to religious fanatics, *Snyder v. Phelps*, 562 U.S. 443, 454 (2011), and to speech of no apparent "value," *United States v. Stevens*, 559 U.S. 460, 477–80 (2010). Defending them can be uncomfortable, but as Judge King wrote in upholding the First Amendment rights of the Westboro Baptist Church, "judges defending the Constitution 'must sometimes share [their] foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply. It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people.'" *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009) (citation omitted). The glory of the First Amendment, and the essential condition for it to endure, is its political and ideological neutrality.

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

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

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

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

This case arose from allegations that the Biden White House and various Executive Branch agencies had inserted themselves into the content moderation decisions of social media platforms and pressured them to censor speech and particular speakers they dislike. But it just as easily could have been brought against the Trump Administration, which was famous for bullying internet and media companies.[5] The Fifth Circuit acknowledged that many of the questionable pressure tactics had their origins in the previous

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

I. This Court Should Affirm the Fifth Circuit's Holding That Executive Branch Agencies Violated the First Amendment by Interfering With Private Moderation Decisions.

The Fifth Circuit held plaintiffs were likely to succeed on their claims that the White House and other federal offices violated the First Amendment by intruding into private platforms' moderation decisions. However, the government defendants (Petitioners here) reframed the issue presented as whether "the government's challenged conduct transformed private social-media companies' content-moderation decisions into state action and violated respondents' First Amendment rights." Pet'rs' Br. at I.

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

behavior or excessive cooperation to coopt private platforms' moderation decisions.[9] And on that issue the Fifth Circuit got it right.

A. The Fifth Circuit Correctly Defined Two Types of Unconstitutional Informal Censorship.

The court below identified two distinct forms of unconstitutional informal censorship: First, it applied the line of cases beginning with *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71 (1963), that prohibits intimidation tactics that create a "system of informal censorship." And second, it applied a line of cases beginning with *Blum v. Yaretsky*, 457 U.S. 991, 1003–04 (1982), that explains when government actors may be "liable for the actions of private parties" where there is a "close nexus" that provided "such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." The Fifth Circuit's analysis of both forms of informal censorship has much to commend it and this Court should adopt it.

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

1. Bullying and Intimidation.

The government generally is "entitled to say what it wants to say—but only within limits." *Backpage.com, LLC v. Dart*, 807 F.3d 229, 235 (7th Cir. 2015). Like any exercise of official power, government speech can be curtailed when it intrudes on individual rights. The Fifth Circuit acknowledged it can be difficult to distinguish between persuasion (which is permissible) and coercion (which is not) but observed that coercion may take various forms and "may be more subtle." *Biden*, 83 F.4th at 377.

To help identify when government speech crosses the line into impermissible coercion, the Fifth Circuit adopted—with some refinements—a four-factor test articulated by the Second and Ninth Circuits in *National Rifle Association of America v. Vullo*, 49 F.4th 700 (2d Cir. 2022), and *Kennedy v. Warren*, 66 F.4th 1199 (9th Cir. 2023). It also drew heavily on the Seventh Circuit's decision in *Dart*, 807 F.3d 229. Biden, 83 F. 4th at 385–86, 397. The Second Circuit's articulation of this test considers "(1) the speaker's word choice and tone; (2) whether the speech was perceived as a threat; (3) the existence of regulatory authority; and . . . (4) whether the speech refers to adverse consequences." *Biden*, 83 F.4th at 378

(quoting *Vullo*, 49 F.4th at 715) (internal quotation marks omitted).[10]

The Fifth Circuit elaborated on the test by providing important guidance on the four factors, incorporating other circuits' approaches to applying *Bantam Books*. Drawing on the record in this case, the court observed that "'an interaction will tend to be more threatening if the official refuses to take 'no' for an answer and pesters the recipient until it succumbs,'" because the analysis considers "the overall 'tenor' of the parties' relationship." *Biden*, 83 F.4th at 381 (quoting *Warren*, 66 F.4th at 1209) (cleaned up). In determining whether a state actor's speech was perceived as a threat backed by regulatory authority, the court noted that "the sum" of it "is more than just power," *id.* at 379, because the "'lack of direct authority' is not entirely dispositive" in determining whether the speech was threatening, *id.* (quoting *Warren*, 66 F.4th at 1210).

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

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

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

2. "Significant Encouragement" of Censorship.

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

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

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

This analysis reveals the essential flaw with Petitioners' formulation of the question presented. The question is not whether a private party effectively "becomes" a state actor when coopted by the State; it is whether the state actors have a sufficiently "close nexus" to private decisions so as to become "*responsible*" for them, contrary to the First Amendment. *Blum*, 457 U.S. at 1004. As this Court explained in *Blum*, "[t]his case is obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so as to make it 'state' action for purposes of the Fourteenth Amendment." *Id.* at 1003. Here, the defendants are government actors who inserted themselves into private editorial decisions.

B. The Fifth Circuit Properly Applied the Tests for Coercion and Encouragement to Enjoin Government Intrusions into Private Editorial Decisions.

On a voluminous record compiled at the district court, the Fifth Circuit found that various executive agencies had become so involved in day-to-day moderation decisions of social media companies that they provided "significant encouragement" to censorship. *See, e.g.*, *Biden*, 83 F.4th at 390. When

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

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

The record contains copious evidence that the social media platforms understood communications from the White House and FBI agents to be threats and acted accordingly. For example, a social media platform expressly agreed to "adjust [its] policies" to reflect the changes sought by officials. *Id.* at 384. And several social media platforms "t[ook] down content, including posts and accounts that originated from the United States, in direct compliance with" a request from the FBI that they delete "misinformation" on the eve of the 2022 congressional election. *Id.* at 389. When the White House and FBI "requested" the platforms to jump, they ultimately, if reluctantly, asked how high.

As to whether the officials had authority over social media platforms, the Fifth Circuit found the enforcement authority is self-evident. The President of the United States, and by extension his officials in the White House, direct all federal enforcement nationwide, whether directly or indirectly via appointment of cabinet secretaries and other officials. They can, and often do, pick up the phone and contact the Department of Justice to recommend investigation and prosecution of particular individuals and companies.

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

Likewise, FBI officials are often the first line of federal enforcement when it comes to criminal investigations, and the FBI has frequently investigated "disinformation regarding the results of . . . elections" in the years leading up to the 2022 midterm elections. *See, e.g.*, FBI & CISA, *Public Service Announcement: Foreign Actors and Cybercriminals Likely to Spread Disinformation Regarding 2020 Election Results* (Sept. 22, 2020), https://www.ic3.gov/Media/Y2020/PSA200922. As the "lead law enforcement, investigatory, and domestic security agency for the executive branch," the FBI clearly "wielded *some* authority over the platforms." *Biden*, 83 F.4th at 388. And "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." *Bantam Books*, 372 U.S. at 68.

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

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

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

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

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

Significant encouragement. The record also contained substantial evidence that officials from the White House, FBI, Centers for Disease Control (CDC), and Cybersecurity and Infrastructure Security Agency (CISA) all engaged in unlawful "significant encouragement" by placing persistent pressure on platforms to change their moderation policies. Various government officials became so entangled with social media platform moderation policies that they were able to effectively rewrite the platforms' policies from the inside.

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

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

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

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

C. The Fifth Circuit Properly Tailored Injunctive Relief.

The Fifth Circuit issued an appropriately tailored injunction to curb the government's unlawful coercion and deep entanglement in the platforms' operations. Citing *Dart*, 807 F.3d at 239, the court modified the district court's original injunction "to target the coercive government behavior with sufficient clarity to provide the officials notice of what activities are proscribed." *Biden*, 83 F.4th at 397. It modified the

scope of the injunction to remove non-governmental actors and some governmental actors, substantially narrowed its reach, and clarified vague provisions. *Id.* at 394–99.[13]

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

The Fifth Circuit's injunction is thus expressly limited to the specific conduct this Court held violates the First Amendment in *Blum* and *Bantam Books*. It provides officials with notice of exactly what type of conduct they may not pursue, while allowing them to engage in all other lawful communications with social media platforms. And it excludes officials who were not proven to have violated the First Amendment. In light of the "broad pressure campaign" undertaken by

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

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

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

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

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

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

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

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

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

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

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

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

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

Does any of this sound familiar? It should.

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

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

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

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

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

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

Whether or not Media Matters' claims about X have merit, it was only the state officials who were using government authority to suppress speech with which they disagreed. And, unfortunately, it is far from the first time state attorneys' general have employed threats and investigatory demands to suppress online speech. *E.g.*, *Google, Inc. v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016) ("This lawsuit, like others of late, reminds us of the importance of preserving free speech on the internet . . . .") (citing *Dart*, 807 F.3d 229).

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

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[17] Bailey/Landry Press Release*; see also* Mike Masnick, *Missouri AG Announces Bullshit Censorial Investigation Into Media Matters Over Its Speech*, TECHDIRT (Dec. 13, 2023), https://www.techdirt.com/2023/12/13/missouri-ag-announces-bullshit-censorial-investigation-into-media-matters-over-its-speech/.

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

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

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

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

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

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

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

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

pressure tactics as "the biggest violation of the First Amendment in our nation's history" and called for "a wall of separation between tech and state to preserve our First Amendment right to free, fair, and open debate," *see* Bailey Press Release, while simultaneously urging this Court to approve formal state control over social media moderation decisions. *See generally* Missouri *NetChoice* Br. at 11–23.

This suggests the state AGs driving this case believe the First Amendment permits them to do *directly* what it prohibits other government actors from doing *indirectly*. In fact, they argue not just that the First Amendment *permits* state regulation of private speakers, but that state regulation is *necessary* for free speech to exist. *Id.* at 3 ("freedom of speech is a freedom States were created to secure [and] it is the duty of States to secure that freedom from private abridgment"). This argument—that regulation *is* free speech—is distinctly Orwellian. *See* George Orwell, 1984, at 7 (New York: Harcourt, Brace & Company 1949) ("War is Peace, Freedom is Slavery, Ignorance is Strength").

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

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

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

the guardians of individual rights, Madison said "I think there is more danger of those powers being abused by the state governments than by the government of the United States," and they should be constrained by the "general principle[] that laws are unconstitutional which infringe the rights of the community." Accordingly, he said "it is proper that every government should be disarmed of powers which trench upon . . . the equal right of conscience, freedom of the press, or trial by jury." *Id.* at 56 (reprinting account from CONG. REGISTER, June 8, 1789) ("[T]he state governments are as liable to attack those invaluable privileges as the general government is, and therefore ought to be cautiously guarded against.").[19]

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[19] Missouri asserts state legislative authority is necessary to secure rights against "private abridgment" based on a natural rights theory that the right to free speech "predate[ed] government itself" and that the states were instituted to protect speech from encroachment by private parties. Missouri *NetChoice* Br. at 2. The argument stitches together cherry-picked references from a law review article that refers to James Madison's remarks introducing the Bill of Rights. *See id.* (citing Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 264 (2017) (citing Madison's notes reflecting his speech in Congress)). Not only is this revisionist theory debunked by Madison's actual words (as reported in contemporary accounts), the article on which Missouri relies noted Madison's skepticism toward relying on the states to protect free speech. *See* 127 YALE L.J. at 303 n.255 ("Madison also singled out the freedom of the press in a set of three rights that would apply against state governments, again suggesting an intent to treat speech and press freedoms differently.").

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

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

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

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

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

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

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

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

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

CONCLUSION

The through-line of all these cases before the Court this Term is the abuse of governmental power. Political actors use the First Amendment as a club when convenient, then ignore it when it gets in the way of their own ambitions. But the great virtue of the First Amendment is its neutrality. This Court should send the same clear message in this case as in the others on the docket this Term: The First Amendment is not a weapon for government actors to wield in the culture wars.

February 9, 2024

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IN THE

Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA,

Petitioner,

v.

MARIA T. VULLO,

Respondent.

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

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

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*[1]

The **Foundation for Individual Rights and Expression** (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases implicating expressive rights. *E.g.*, Brief of FIRE *et al.* as *Amici Curiae* in Support of Respondents, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021); Brief of FIRE as *Amicus Curiae* in Support of Petitioner and Reversal, *Counterman v. Colorado*, No. 22-138, 600 U.S. 66 (2023).

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

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

ARGUMENT

I. THIS CASE ILLUSTRATES THE DANGERS OF INFORMAL CENSORSHIP.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. This is Far From an Isolated Example.

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

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

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

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

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

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

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

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

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

[5] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Jawboning Tactics Take Varying Forms.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Informal Censorship Schemes Circumvent Constitutional Limits.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The test has much to commend it. It "starts with the premise that a government message is coercive . . . if it can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow [] failure to accede to the official's request," and employs four non-exclusive factors, none of which is independently dispositive, "namely (1) the speaker's word choice and tone; (2) whether the speech was perceived as a threat; (3) the existence of regulatory authority; and . . . (4) whether the speech refers to adverse consequences." *Biden*, 83 F.4th at 378 (quoting *Vullo*, 49 F.4th at 715) (internal quotation marks omitted).

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

January 16, 2024

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

Case No. 1:25-cv-11048 (ADB)
Leave To File Granted June 9, 2025

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan nonprofit that defends the rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended expressive rights on college campuses across the United States through public advocacy, targeted litigation, and *amicus curiae* filings.[2] While FIRE today defends First Amendment rights both on campus and in society at large,[3] FIRE continues to place special emphasis on defending the individual rights of students and faculty to freedom of expression, freedom of association, academic freedom, and due process of law. FIRE has a direct interest in this case because higher education plays a vital role in preserving free thought within a free society—and the judiciary's response to the federal government's unlawful coercion of Harvard University, one of our most prestigious institutions, will reverberate nationwide.

FIRE has an especially strong interest in this case given its longstanding role as a leading critic of Harvard's inconsistent and insufficient protection of free speech

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[1] Counsel for *amicus curiae* certify that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* made a monetary contribution to the brief's preparation or submission. Neither the plaintiff nor defendants oppose the filing of this brief.

[2] *See, e.g.*, *Texas A&M Queer Empowerment Council v. Mahomes*, No. 25-992, 2025 WL 895836 (N.D. Tex. Mar. 24, 2025); *Novoa v. Diaz*, No. 4:22-cv-324, ECF No. 44 (N.D. Fla., Nov. 17, 2022), *pending appeal sub nom.*, *Novoa v. Comm'r of Fla. State Bd. of Educ.*, No. 22-13994 (11th Cir. argued June 14, 2024); Brief of *Amicus Curiae* FIRE, *Univ. at Buffalo Young Ams. for Freedom v. Univ. at Buffalo Student Ass'n, Inc.*, No. 25-140 (2d Cir. filed Mar. 11, 2025).

[3] In 2022, FIRE expanded its advocacy beyond the university setting. In lawsuits across the United States, FIRE works to vindicate First Amendment rights without regard to speakers' views. *See, e.g.*, Brief of *Amici Curiae*, *Khalil v. Trump*, No. 2:25-cv-01963 (D.N.J.); *Trump v. Selzer*, No. 4:24-cv-449 (S.D. Iowa filed Dec. 17, 2024); *Volokh v. James*, No. 23-356 (2d Cir. argued Feb. 16, 2024).

and academic freedom. Harvard's repeated failure to honor student and faculty rights spurred FIRE's founding; civil liberties attorney Harvey Silverglate, a Harvard Law School alumnus and lecturer, co-founded FIRE following decades spent defending students punished for their speech before the university's Administrative Board.[4] And in the twenty-six years since, FIRE has regularly challenged Harvard to fulfill its promises of freedom of expression and academic freedom. FIRE's criticism of Harvard is well-deserved. Among other missteps, Harvard has maintained illiberal speech codes[5] and unfair disciplinary procedures,[6] pressured students to sign a civility pledge,[7] blacklisted members of independent student organizations,[8] and punished faculty for defending unpopular clients[9] and making unpopular

[4] *See* Benjamin Bell, *Attorney Harvey Silverglate fights with FIRE*, Boston Herald (Feb. 1, 2009), https://www.bostonherald.com/2009/02/01/attorney-harvey-silverglate-fights-with-fire. The 1999 book Silverglate co-authored with University of Pennsylvania professor Alan Charles Kors, *The Shadow University: The Betrayal of Liberty on America's Campuses*, detailed failures by Harvard and other institutions to protect student and faculty rights. Silverglate and Kors founded FIRE in response to the outcry of requests for help they received following its publication. *So to Speak podcast transcript: 20 years of FIRE with co-founder Harvey Silverglate*, FIRE, https://www.thefire.org/research-learn/so-speak-podcast-transcript-20-years-fire-co-founder-harvey-silverglate.

[5] *Harvard University: Speech Code Rating*, FIRE, https://www.thefire.org/colleges/harvard-university.

[6] *Harvard University: Due Process Ratings*, FIRE, https://www.thefire.org/colleges/harvard-university/due-process.

[7] Will Creeley, *In Unprecedented, Ill-Considered Move, Harvard Pressures Freshmen to Sign Civility Pledge*, FIRE (Sept. 1, 2011), https://www.thefire.org/news/unprecedented-ill-considered-move-harvard-pressures-freshmen-sign-civility-pledge.

[8] Ryne Weiss, *FIRE to Congress: Harvard blacklist policy shut down women's organizations*, FIRE (Oct. 8, 2018), https://www.thefire.org/news/fire-congress-harvard-blacklist-policy-shut-down-womens-organizations.

[9] Elizabeth Joseph & Jason Hanna, *The Harvard law professor representing Harvey Weinstein is being removed as a faculty dean*, CNN (May 13, 2019), https://www.cnn.com/2019/05/11/us/harvard-law-professor-ronald-sullivan-loses-deanship-harvey-weinstein.

arguments.[10] Harvard has finished dead last in FIRE's annual campus free speech rankings for two years running.[11]

But exactly none of Harvard's problems—problems *amicus* FIRE knows well—in any way excuse Defendants' unlawful, unconstitutional demands. FIRE has a strong interest in this case because the hostile federal takeover Defendants seek to impose will leave free speech at Harvard—and institutions across the United States—a dead letter. Freedom of expression and academic freedom cannot survive lawless government coercion. Permitting the government to dictate Harvard's decision-making would violate the First Amendment, threaten the vitality and independence of institutions nationwide, and teach tomorrow's leaders the wrong lesson about life in a free society.

INTRODUCTION

Wielding the threat of crippling financial consequences like a mobster gripping a baseball bat, the Trump administration seeks to coerce Harvard into abandoning its First Amendment rights and its autonomy as a private institution.

On April 11, citing concerns regarding anti-Semitism and ideological imbalance, the government sent Harvard a letter detailing sweeping demands that, if Harvard complied, would allow Harvard to "maintain [its] financial relationship

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[10] *See, e.g.,* Carole Hooven, *Why I Left Harvard*, The Free Press (Jan. 16, 2024), https://www.thefp.com/p/carole-hooven-why-i-left-harvard; Kenneth Roth, *I once ran Human Rights Watch. Harvard blocked my fellowship over Israel*, The Guardian (Jan. 10, 2023), https://www.theguardian.com/commentisfree/2023/jan/10/kenneth-roth-human-rights-watch-harvard-israel.

[11] *2025 College Free Speech Rankings expose threats to First Amendment rights on campus*, FIRE (Sept. 5, 2024), https://www.thefire.org/news/2025-college-free-speech-rankings-expose-threats-first-amendment-rights-campus.

with the federal government."[12] Many of the demands sought to control what Harvard's faculty and students think and say. They included (a) prohibiting the admission of international students who are "hostile" to "American values" or "supportive of terrorism or anti-Semitism"; (b) mandating viewpoint diversity among students and faculty, and hiring faculty and admitting students on the basis of viewpoint to reach that goal; (c) reforming departments and programs that "reflect ideological capture" or "fuel antisemitic harassment"; (d) ending "all diversity, equity, and inclusion (DEI) programs" and policies; and (e) ending recognition of pro-Palestinian student groups and disciplining student members of those groups.

To its lasting credit, Harvard refused to submit. In an April 14 response, Harvard made clear it would not "surrender its independence or relinquish its constitutional rights."[13] That same day, the government announced a freeze on billions of dollars in federal funding to Harvard.[14] So on April 21, Harvard filed this First Amendment lawsuit.[15]

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[12] Letter from Thomas E. Wheeler, Acting General Counsel, U.S. Dep't of Educ., et al., to Dr. Alan M. Garber, President, Harvard Univ., et al. (Apr. 11, 2025), *available at* https://www.harvard.edu/research-funding/wp-content/uploads/sites/16/2025/04/Letter-Sent-to-Harvard-2025-04-11.pdf. The government sent this letter by mistake. *See* Michael S. Schmidt & Michael C. Bender, *Trump Officials Blame Mistake for Setting Off Confrontation With Harvard*, N.Y. Times, Apr. 18, 2025, https://www.nytimes.com/2025/04/18/business/trump-harvard-letter-mistake.html.

[13] Letter from William A. Burk, Quinn Emanuel, et al., to Thomas E. Wheeler, Acting General Counsel, U.S. Dep't of Educ., et al. (Apr. 14, 2025), *available at* https://www.harvard.edu/research-funding/wp-content/uploads/sites/16/2025/04/Harvard-Response-2025-04-14.pdf.

[14] Press Release, U.S. Dep't of Educ., Joint Task Force to Combat Anti-Semitism Statement Regarding Harvard University (Apr. 14, 2025), https://www.ed.gov/about/news/press-release/joint-task-force-combat-anti-semitism-statement-regarding-harvard-university.

[15] Compl., ECF No. 1; *see also* Am. Compl. ECF. No. 59.

Far from relenting in its assault on Harvard's freedoms of speech and association and its institutional independence, the government has piled on the punishment. After Harvard filed this suit, the administration announced it would terminate additional research grants and disqualify Harvard from all federal funding moving forward.[16] On May 2, President Trump threatened to revoke Harvard's tax-exempt status.[17] And on May 22, the government prohibited Harvard from enrolling (or even maintaining current) international students "as a warning to all universities and academic institutions across the country,"[18] prompting Harvard to file another lawsuit.[19] And the campaign of retribution continues. The administration recently "convened officials from nearly a dozen agencies … to brainstorm additional punitive measures."[20] This flagrant abuse of power must end.

ARGUMENT

The federal government's coercion of Harvard violates longstanding First Amendment principles and will destroy universities nationwide if left unchecked. It is long settled that the government cannot force private actors to punish protected

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[16] Michael C. Bender, *All the Actions the Trump Administration Has Taken Against Harvard*, N.Y. Times, May 22, 2025, https://www.nytimes.com/2025/05/22/us/politics/harvard-university-trump.html.

[17] Donald J. Trump, Truth Social (May 2, 2025, 7:25 AM), https://truthsocial.com/@realDonaldTrump/posts/114437989795464761.

[18] Letter from Kristi Noem, Sec'y of Homeland Security, to Maureen Martin, Harvard Univ. (May 22, 2025), *available at* https://x.com/Sec_Noem/status/1925612991703052733; Sec'y Kristi Noem (@Sec_Noem), X (May 22, 2025, 2:01 PM), https://x.com/Sec_Noem/status/1925612991703052733.

[19] *See* Compl., *President and Fellows of Harvard College v. U.S. Dep't of Homeland Security*, No. 1:25-cv-11472 (D. Mass. May 23, 2025), ECF No. 1.

[20] Sophia Cai & Megan Messerly, *White House convenes meeting to brainstorm new Harvard measures*, Politico (May 30, 2025), https://www.politico.com/news/2025/05/30/white-house-convenes-meeting-to-brainstorm-new-harvard-measures-00376782.

expression. Nor may the government attempt to drive out disfavored ideas by dictating a university's decisions about speech, discipline, instruction, and admissions. And while the federal government need not fund institutions like Harvard, once it opts to do so, it cannot condition funding on censorship of those disfavored views. Ignoring these legal and constitutional safeguards seems not to trouble Defendants. But it should greatly concern this Court and all Americans who care about free speech, academic freedom, and our nation's future.

The federal government characterizes its demands of Harvard as necessary to address anti-Semitism on campus. But that worthy end cannot justify flatly unlawful and unconstitutional means. The same federal statute that governs institutional responses to allegations of anti-Semitism—Title VI—requires funding recipients like Harvard to receive notice, a hearing, and an opportunity to come into compliance voluntarily before the government can terminate funding. 34 C.F.R. § 100.6–100.9. These provisions reduce the risk of error and political bias and protect institutions against pressure from the federal government to censor students and faculty—pressure *amicus* FIRE has fought against for years.[21] They prohibit precisely the kind of repressive, capricious government overreach that now harms Plaintiffs. Yet despite the administration's professed interest in addressing campus anti-Semitism, it chose

[21] *See, e.g., Federal government mandates unconstitutional speech codes at colleges and universities nationwide*, FIRE (May 10, 2013), https://www.thefire.org/news/federal-government-mandates-unconstitutional-speech-codes-colleges-and-universities-nationwide; Adam Steinbaugh, *FIRE, First Amendment Allies Ask OCR to Reject Calls to Ban Anonymous Social Media Applications*, FIRE (Apr. 5, 2016), https://www.thefire.org/news/fire-first-amendment-allies-ask-ocr-reject-calls-ban-anonymous-social-media-applications.

to ignore the lawful statutory means by which it may do so. Instead, it instituted rule by fiat: arbitrarily declaring Harvard subject to punishment, cancelling hundreds of millions of dollars in grants and threatening worse to come, and forcing Harvard to file suit to ward off demands for unchecked federal authority over institutional decision-making.

The administration's railroading of Harvard ignores not only federal anti-discrimination law, but the First Amendment—in three specific ways.

First: The government cannot threaten consequences to pressure a private institution into censoring protected student and faculty speech and into refraining from its own protected expression. Just last year, the Supreme Court reaffirmed that the government cannot strongarm private actors into punishing speech that the First Amendment protects from state intrusion. *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 190 (2024). But jawboning—to such an extreme it might more accurately be called extortion—is exactly what the administration is doing to Harvard. The government is employing any means it can identify to bully Harvard into censoring disfavored or dissenting viewpoints. Not only would those actions be unconstitutional at a public university, they violate Harvard's free speech promises and its right as a private entity to set its own rules regarding speech. The government further demands that Harvard surrender control of academic decision-making and relinquish its right to make independent choices about discipline, hiring, and admissions—all of which violate longstanding precepts of academic freedom and institutional independence. *See, e.g., Bd. of Regents of the Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 239

(2000) (Souter, J., concurring) (noting long-recognized "autonomy that bars legislatures (and courts) from imposing conditions on the spectrum of subjects taught and viewpoints expressed" on campus).

Second: The government cannot intrude upon private institutions' right to make their own choices about speech. Again, just last year, the Supreme Court reemphasized the limits the Constitution places on the government in its interactions with private institutions. "On the spectrum of dangers to free expression," the Court wrote, "there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana." *Moody v. NetChoice, LLC*, 603 U.S. 707, 741–42 (2024). Defendants seek to do just that as they trample statutory and constitutional barriers to outlaw disfavored views on campus.

Third: The government cannot manipulate state funding to silence disfavored or dissenting viewpoints. The government may not be obligated to fund higher education in the first instance, but having chosen to do so, it must play by applicable constitutional rules. The Supreme Court long ago established that "even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas[,]'" *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (quoting *Regan v. Tax'n With Representation of Wash.*, 461 U.S. 540, 550 (1983)). If funding is "'manipulated' to have a 'coercive effect,'" the First Amendment demands judicial intervention. *Id.* (quoting with approval *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting)). Little could be more manipulative or coercive than revoking grants in an explicit attempt to override the expressive and

associational rights of a private institution of higher education, its students, and its faculty.

This case illustrates the grave threat to core First Amendment freedoms posed by expansive—and here, extralegal—conceptions of governmental power to address discrimination. Since 1999, *amicus* FIRE has advocated against overly broad and impossibly vague campus speech codes promulgated under federal anti-discrimination law. To that end, FIRE successfully led the charge against the Obama administration's attempt to pressure institutions to adopt a federal definition of "sexual harassment"—advanced as a national "blueprint"—that left protected speech subject to investigation and punishment.[22] And yet as misguided as that initiative was, it simply cannot be compared to the unprecedented scope and intensity of the unlawful shakedown Defendants mount here.

The government's aggression against Harvard is alarming not only because it is unlawful and unconstitutional, but because its plain aim is "suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995). Left unchecked, the administration will continue to deploy its willfully distorted conception of federal anti-discrimination law as a pretextual battering ram against institutional autonomy and continue its attempts to seize for itself power to control speech and instruction on our nation's campuses.

[22] *'Blueprint' No More? Feds Back Away from New Campus Speech Restrictions*, FIRE (Nov. 21, 2013), https://www.thefire.org/news/blueprint-no-more-feds-back-away-new-campus-speech-restrictions.

While the administration's aggression against Harvard is exceptional, Harvard is far from the only institution targeted—and the bullying campaign is driving some colleges to pursue appeasement.[23] The stakes are high: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). This Court must act now.

CONCLUSION

The administration's actions are indefensible violations of the First Amendment's protection of freedom of expression, freedom of association, and academic freedom. For that and all the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment.

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[23] Betsy Klein, *Universities quietly negotiating with White House aide to try to avoid Harvard's fate, source says*, CNN (May 31, 2025), https://www.cnn.com/2025/05/31/politics/universities-negotiate-trump-administration-harvard.

CERTIFICATE OF SERVICE

I certify that on June 9, 2025, I caused all registered counsel of record to be served through the Court's ECF system with a true and correct copy of this Brief.

Dustin F. Hecker, Esq.
Dustin F. Hecker, Esq.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
News Distortion Complaint	)	MB Docket No. 25-73
Involving CBS Broadcasting Inc.,	)	
Licensee of WCBS, New York, NY	)	

COMMENTS OF THE FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION

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March 7, 2025

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EXECUTIVE SUMMARY

This proceeding is a political stunt. Neither the Center for American Rights' (CAR) complaint nor this Commission's decision to reopen its inquiry accords with how the agency has understood and applied its broadcast regulations *ever*. To the contrary, the Commission has made clear it "is not the national arbiter of the truth," *Complaints Covering CBS Program "Hunger in America,"* 20 F.C.C.2d 143, 151 (1969), and it has strictly avoided the type of review sought here because "[i]t would involve the Commission deeply and improperly in the journalistic functions of broadcasters." *Complaint Concerning the CBS Program "The Selling of the Pentagon,"* 30 F.C.C.2d 150, 152 (1971). The staff's initial dismissal of CAR's complaint was obviously correct.

For the Commission to reopen the matter and to seek public comment turns this proceeding into an illegitimate show trial. This is an adjudicatory question, not a rulemaking, and asking members of the public to "vote" on how they feel about a news organization's editorial policies is both pointless and constitutionally infirm. Prolonging this matter is especially unseemly when paired with FCC review of a pending merger application involving CBS's parent corporation and the fact that President Trump is currently involved in frivolous litigation over the same *60 Minutes* broadcast. In this context, this proceeding is precisely the kind of unconstitutional abuse of regulatory authority the Supreme Court unanimously condemned in *NRA v. Vullo*, 602 U.S. 175 (2024). However, having solicited public comments, the FCC is obligated to respond to the statutory and constitutional objections raised on this record.

The CAR complaint rests on a fundamental misunderstanding of the Commission's limited role in regulating broadcast journalism and fails to grasp the basic elements of the news distortion policy as the FCC historically has defined and applied it. This agency has never asserted the authority to police news editing and has rightly observed that it would result in a "quagmire" even

to try. *Hunger in America*, 20 F.C.C.2d at 150. The news distortion policy simply does not involve itself with "a judgment as to what was presented, as against what should have been presented," *Network Coverage of the Democratic Nat'l Convention*, 16 F.C.C.2d 650, 657–58 (1969), yet that is CAR's sole complaint. And even if CBS's editorial decisions in *60 Minutes* fell within the range of activities governed by the news distortion policy, the CAR complaint is utterly deficient. It does not present any "extrinsic evidence" of news distortion as the policy requires, and the full unedited transcript of the interview in question shows the network's editing did not alter the substance of the answers given. CAR's complaint merely reflects its own editorial preferences, which cannot justify this inquiry.

Even if the FCC's news distortion policy somehow authorized the Commission to act as editor-in-chief, as CAR imagines, the Communications Act and the First Amendment prohibit such intrusion into journalistic decisions. The Act expressly denies to the FCC "the power of censorship" as well as the ability to promulgate any "regulation or condition" that interferes with freedom of speech. 47 U.S.C. § 326. The FCC accordingly has interpreted its powers narrowly so as not to conflict with the First Amendment. And whatever limited authority the Commission might have possessed in the era the news distortion policy was created has diminished over time with changes in technology. Any attempt in this proceeding to apply a more robust view of the Commission's public interest authority to include an ability to review and dictate individual news judgments would stretch the FCC's public interest mandate to the breaking point.

Ultimately, no FCC policy can override the First Amendment's fundamental bar against the government compelling editors and publishers "to publish that which 'reason tells them should not be published.'" *Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241, 256 (1974) (citation omitted). "For better or worse, editing is what editors are for; and editing is selection

and choice of material." *CBS, Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 120 (1973). The news distortion policy still exists only because of the exceedingly limited role the Commission has given it over the years, and this proceeding is not a vehicle for expanding its reach.

Finally, this proceeding itself is an exercise in unconstitutional jawboning. The Commission must heed the Supreme Court's recent reminder that the "'threat of invoking legal sanctions and other means of coercion … to achieve the suppression' of disfavored speech violates the First Amendment." *Vullo*, 602 U.S. at 180. The purpose and timing of this inquiry are both obvious and unjustifiable. Launching a politically fraught investigation based on such a paper-thin complaint in these circumstances is alone a compelling example of regulatory abuse. But to resurrect the flimsy complaint after it was fully and properly interred by staff dismissal, and to do so in support of the President's private litigation position, is all but a signed confession of unconstitutional jawboning. The Commission can begin to recover some dignity only by dropping the matter immediately.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
News Distortion Complaint	)	MB Docket No. 25-73
Involving CBS Broadcasting Inc.,	)	
Licensee of WCBS, New York, NY	)	

COMMENTS OF THE
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION

The Foundation for Individual Rights and Expression (FIRE) submits this comment in response to the Public Notice, *News Distortion Complaint Involving CBS Broadcasting Inc., Licensee of WCBS, New York, NY*, DA 25-107 (Med. Bur. Feb. 5, 2025) ("*Public Notice*").

I. INTRODUCTION

The *Public Notice* seeks comment on a complaint by the Center for American Rights (CAR) alleging "news distortion" by CBS Broadcasting Inc. (CBS) when it assertedly "edit[ed] its [*60 Minutes*] news program to such a great extent" that the "public cannot know what answer the Vice President actually gave to a question of great importance."[1] The Commission had dismissed the complaint on January 16, 2025, on grounds it failed to make a viable allegation of "intentional" or "deliberate" falsification, as opposed to merely an editorial judgment protected under the First Amendment.[2] However, on January 20, the Commission seated a new Chairman,[3] and on January 22, it reinstated CAR's complaint. After requesting and receiving an unedited

[1] Center for American Rights, Complaint Against WCBS-TV at 6 (FCC filed Oct. 16, 2024), https://drive.google.com/file/d/1kBqZo-10xBLE0Y1dhvBpzZnvcRUvH0H4/view ("CAR Complaint").

[2] Letter from Enforcement Bureau, FCC, to Daniel R. Suhr, Center for American Rights, GN Docket No. 25-11, at 2 (Jan. 16, 2025), docs.fcc.gov/public/attachments/DOC-408899A1.pdf ("*WCBS Dismissal*").

[3] Press Release, FCC, *Carr Issues Statement on Designation as Chairman of the FCC by President Trump* (Jan. 20, 2025), https://docs.fcc.gov/public/attachments/DOC-409001A1.pdf.

transcript and video of the interview from CBS, the Commission "determined that the public interest would be served by making the[m] available and by opening a docket to seek comment on the issues." *Public Notice* at 1.

As a nonpartisan nonprofit that defends the rights of all Americans to free speech and free thought, the essential qualities of liberty, FIRE is keenly interested in protecting the free press, including in the broadcast medium. Since 1999, FIRE has protected expressive rights on campuses nationwide, and in June 2022 expanded its advocacy beyond the university setting to defend First Amendment rights both on campus and in society at large. This has included, among others, two priorities this case implicates: First, a vigorous defense of speakers targeted by strategic litigation that aims to burden critical speech into silence.[4] Second, a principled support for a robust, open, and free press and proverbial public square, unhindered by the political whims of government officials.[5] FIRE thus seeks to ensure the FCC does not exceed the scope of its authority in encroaching on broadcasters' journalistic decisions. That editorial discretion is both their rightful

[4] *See*, *e.g.*, https://www.thefire.org/cases/trump-v-selzer-donald-trump-sues-pollster-j-ann-selzer-consumer-fraud-over-iowa-poll (FIRE's defense of pollster against allegations that an outlier poll amounts to "consumer fraud"); https://www.thefire.org/cases/adams-v-gulley-reddit-moderator-ordered-remove-posts-stop-criticizing-scientist-who (FIRE's defense of Reddit moderator ordered to remove posts, halt criticism of murder trial critic); https://www.thefire.org/cases/mastriano-v-gregory-politician-tries-silence-critics-his-academic-scholarship (FIRE's defense of historian sued over academic scholarship); https://www.thefire.org/cases/boren-v-gadwa-fire-defends-idaho-firewatcher-against-slapp (FIRE's defense of conservation officer sued for speaking out against a private airstrip permit).

[5] *See*, *e.g.*, https://www.thefire.org/defending-your-rights/legal-support/student-press-freedom-initiative (home page of FIRE's Student Press Freedom Initiative that defends and provides resources to student journalists); https://www.thefire.org/cases/city-clarksdale-v-delta-press-publishing-company-inc-et-al (FIRE's defense of local paper of record against prior restraint *ex parte* TRO obtained by city council requiring takedown of editorial criticizing it); https://www.thefire.org/research-learn/amicus-brief-support-petitioners-netchoice-v-paxton-and-respondents-moody-v (FIRE *amicus* brief in social media compelled speech case); https://www.thefire.org/research-learn/fire-comment-fcc-nprm-disclosure-and-transparency-artificial-intelligence-generated (FIRE comment on FCC's NPRM proposing disclosures for use of AI in political advertising).

domain and their constitutional right, as "[a] newsroom's decision about what stories to cover and how to frame them should be beyond the reach of any government official."[6]

II. BACKGROUND

On October 7, 2024, the CBS news program *60 Minutes* broadcast an interview with Vice President Kamala Harris, who was then a candidate for president. Excerpts of the same interview aired on another CBS program, *Face the Nation*, the day before. The respective programs used different portions of Harris's answer to the reporter's question about whether Israeli Prime Minister Benjamin Netanyahu was listening to the Biden-Harris administration. On October 16, 2024, CAR filed a complaint against WCBS over the *60 Minutes* broadcast, claiming an "act of significant and substantial news alteration" in alleged violation of the FCC's news distortion policy. CAR Complaint at 2. The complaint, one of three CAR filed against stations owned by major broadcasting networks in the late stages of the 2024 national election,[7] alleged CBS's edits satisfied the threshold for "news distortion" and, given the national election context, the Commission's requirement that violations involve "a significant matter." *Id*. at 4.

In response to the filing, then-Commissioner Carr downplayed the possibility of an FCC investigation if CBS were to release a full transcript of the *60 Minutes* interview. For example, he said, "I don't think this needs to be a federal case because I think CBS should release it … then

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[6] Press Release, FCC, *FCC Commissioner Carr Responds to Democrats' Efforts to Censor Newsrooms* (Feb. 22, 2021), https://docs.fcc.gov/public/attachments/DOC-370165A1.pdf.

[7] *See also* Center for American Rights, Complaint Against WPVI-TV (FCC filed Sept. 24, 2024), https://drive.google.com/file/d/1hjHObYh_CVwRcpZLGc1aHrozUbpBcBhT/view (alleging news distortion by WPVI-TV in connection with American Broadcasting Company (ABC) coverage of presidential debate); Center for American Rights, Complaint Against WNBC (FCC filed Nov. 4, 2024), https://drive.google.com/file/d/1P2eQRqp-UlkOiuYcsZYdMYi4Va3L2pwI/view (alleging violation of equal time requirements by WNBC, in connection with appearance of Vice President Harris on *Saturday Night Live* on National Broadcasting Company (NBC)).

that would inoculate, entirely, CBS from that FCC complaint."[8] In another, he told an interviewer "that's the best way forward here: release the transcript and there's no reason to have this before the FCC."[9]

After the election, then-President-elect Trump sued CBS over the Harris interview. He alleged unlawful acts of "election and voter interference through malicious, deceptive, and substantial news distortion," asserting a violation of the Texas Deceptive Trade Practices Act.[10] The lawsuit came against the backdrop of CBS parent company Paramount Global's proposed merger with Skydance Media, for which Commission approval of the transfer of CBS's FCC licenses is required,[11] and remains pending.

The Enforcement Bureau dismissed CAR's complaint against CBS (and those against ABC and NBC), noting the Communications Act has prohibited the Commission from engaging in the "power of censorship," or issuing regulations or conditions that "interfere with the right of free speech" from its founding. *WCBS Dismissal* at 1. Citing precedent that a news distortion complaint must include "extrinsic evidence that the Licensee took actions to engage in a deliberate and intentional falsification of the news," *id.* at 2, the Bureau held CAR's allegations insufficient to support an actionable enforcement matter. The Bureau noted the well-settled limitations on

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[8] Kristen Altus, *FCC Commissioner Urges CBS to Release the Transcript from Harris' '60 Minutes' Interview*, FOX BUSINESS NEWS (Oct. 22, 2024), https://www.foxbusiness.com/media/fcc-commissioner-cbs-release-transctipt-harris-60-minutes-interview.

[9] Glenn Beck (@glennbeck), X (Oct. 21, 2024, 3:18 PM), https://x.com/glennbeck/status/1848443828459504097.

[10] *See, e.g.*, Brooke Singman, *Trump Sues CBS News for $10 Billion Alleging 'Deceptive Doctoring' of Harris' '60 Minutes' Interview*, FOX NEWS (Oct. 31, 2024, 4:39 PM EDT), https://www.foxnews.com/politics/trump-sues-cbs-news-10-billion-alleging-deceptive-doctoring-harris-60-minutes-interview.

[11] Ted Johnson, *FCC Chairman Brendan Carr Suggests That Skydance-Paramount Merger Review Is Far from Finished*, DEADLINE (Feb. 27, 2025, 6:34 PM), https://deadline.com/2025/02/fcc-paramount-skydance-trump-1236303962/.

enforcement actions that amount to "second guess[ing]" broadcasters and their constitutionally protected role. *Id.*

Six days later, however, the Bureau issued an Order reinstating the complaints against CBS, ABC, and NBC, on the asserted ground that the dismissals were "issued prematurely based on an insufficient investigatory record for the station-specific conduct," such that "further consideration" is warranted.[12] Chairman Carr followed this by formally requesting the full unedited transcript of the *60 Minutes* interview. The network complied, then issued a press release announcing it had done so, posting the materials publicly and noting what the transcript and video showed: "Same question. Same answer. But a different portion of the response. When we edit any interview, whether a politician, an athlete, or movie star, we strive to be clear, accurate and on point."[13] The instant *Public Notice* followed, with the Commission publishing the transcripts as well. *See Public Notice* at 1.[14]

III. THIS PROCEEDING IS AN ILLEGITIMATE SHOW TRIAL

The *Public Notice* seeks comment on CAR's news distortion complaint because of what it calls "demonstrated interest in this ongoing FCC matter" and to "permit broader public participation and thereby serve the public interest." *Id.* But as noted above, this proceeding arises

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[12] *News Distortion Complaint Involving CBS Broadcasting Inc., Licensee of WCBS,* Letter Order, GN Docket No. 25-11, at 1 (Enf. Bur. Jan. 22, 2025), https://docs.fcc.gov/public/attachments/DA-25-85A1.pdf.

[13] *CBS News to Comply with FCC Demand for "60 Minutes" Transcript and Video,* CBS News (Jan. 31, 2025, 7:06 PM EST), https://www.cbsnews.com/news/cbs-news-fcc-60-minutes/; *see also 60 Minutes Publishes Transcripts, Video Requested by FCC*, CBS News (Feb. 5, 2025, 3:02 PM EST), https://www.cbsnews.com/news/60-minutes-publishes-transcripts-video-requested-by-fcc/ (clarifying the edits "ensure[d] that as much of the vice president's answers to 60 Minutes' many questions were included in our original broadcast while fairly representing those answers").

[14] *See also* Brendan Carr (@BrendanCarrFCC), X (Feb. 5, 2025, 3:09 PM), https://x.com/BrendanCarrFCC/status/1887232039021097265 (announcing "people will have a chance to weigh in").

from an allegation that WCBS violated an FCC policy with a *60 Minutes* broadcast, seeking some sort of sanction based on CBS's editorial policies (with which the complainant disagrees). The Commission is inexplicably treating this as a "permit-but-disclose" proceeding pursuant to the *ex parte rules*, which is designed for things like informal rulemakings or declaratory rulings, 47 C.F.R. § 1.1206(a)(1)-(13), and *not* for adjudications, 47 C.F.R. § 1.1208 (restricted proceedings). The general public is not a "party" to enforcement proceedings, 47 C.F.R. § 1.1202(d)(1)(iii), and generally lacks standing in such matters.[15]

Then what is the point of all this? By seeking public comment, is the Commission seriously asking viewers and listeners, along with politically energized partisans, to "vote" on whether they think CBS's editorial choices ran afoul of FCC policies? Any such submissions are meaningless in helping the agency decide whether CBS violated any policies or what remedies might lie.[16] No matter how many comments pour in or how vociferously they opine on the network's editorial

[15] *Cf. Parents Television Council, Inc. v. FCC*, 2004 WL 2931357, at *1 (D.C. Cir. 2004); *In re Viacom, Inc*., 21 FCC Rcd. 12223, 12226–27 (2006); *In re Emmis Commc'ns Corp.*, 21 FCC Rcd. 12219, 12221–22 (2006).

[16] As of March 7, 2025, over 7,640 comments had been submitted. Docket 25-73, https://www.fcc.gov/ecfs/search/search-filings/results?proceedings_name=25-73&sort=date_disseminated,DESC (last reviewed March, 7, 2025). They include such gems as Art Lukowski's comment that "edited interviews of Presidential candidates should be a crime as it misleads viewers and voters. NO EDITS"; Charles P. Hatter's proposal that "[t]here is an easy solution. An approved Artificial Intelligence program can monitor all broadcasters and affiliates including PBS, with heavy fines/suspensions for failure to abide by proper standards"; James Connell's conclusion that "CBS should lose their broadcast license [sic], and all involved parties at CBS should be subject to criminal investigations into election interference and prosecuted to the fullest extent of the law"; Mary Cummings' complaint that mainstream media outlets "have indoctrinated my adult children with their poison. CBS needs to have licensed [sic] pulled along with ABC, NBC, MSNBC, and CNN"; Julie Harrigan's opinion that "[e]diting is election interference"; Jerry Van Kooten's prescription that "[l]ost [sic] of license is just the first step"; Mick Gurgleballs' comment that "Brendan Carr is a partisan hack"; and this from Nestor Franco: "aahhhh my balls aaaaahh they're on fire." Remember FCC, you asked for this.

practices, they add *nothing* to the Commission's understanding of the law or the facts.[17] And, because this proceeding focuses entirely on a news program's editorial judgment, it runs headlong into the elementary rule that the right to "free speech [and] a free press … may not be submitted to vote; they depend on the outcome of no elections." *Barnette v. W. Va. Bd. of Educ*., 319 U.S. 624, 638 (1943)*; see Bd. of Regents of the Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) ("To the extent [a] referendum substitutes majority determinations for viewpoint neutrality it would undermine … constitutional protection ….").

Bottom line, the Commission's request for public comment lacks any legitimate regulatory rationale, but its *realpolitik* purpose is sadly transparent. This proceeding is designed to exert maximum political leverage on the CBS network at a time when President Trump is engaged in frivolous litigation against it over the same *60 Minutes* broadcast,[18] with the FCC using other regulatory approvals the network needs to exert added pressure.[19] This is not just unseemly, it is

[17] *See CBS Corp. v. FCC*, 663 F.3d 122, 135 & n.13 (3d Cir. 2010) (large and "unprecedented" number of complaints about Super Bowl halftime show had no bearing on whether broadcaster may have violated FCC rules).

[18] Amended Complaint, *Trump v. Paramount Global*, No. 2:24-cv-00236-Z (N.D. Tex. Feb. 7, 2025). Parallel to this proceeding, that lawsuit alleges CBS's editing of the *60 Minutes* broadcast constitutes fraud in violation of the Texas Deceptive Trade Practices Act. *Id.* at 1. Like the "news distortion" allegation here, the claim is preposterous. In the United States there is no such thing as a claim for "fake news." No court in any jurisdiction has ever held such a cause of action might be valid, and few plaintiffs have ever attempted even to bring such outlandish claims. Those who have done so were promptly dismissed. *E.g*., *Hollander v. CBS News, Inc*., 2017 WL 1957485, at *1 (S.D.N.Y. 2017) (dismissing wire fraud claims based on allegedly false and misleading news stories about candidate Donald Trump), *vacated and aff'd on other grounds sub nom. Hollander v. Garrett*, 710 Fed. Appx. 35 (2d Cir. 2018); *Wash. League for Increased Transparency & Ethics v. Fox News*, 2021 WL 3910574, at *1 (Wash. Ct. App. 2021) (dismissing claims under the Washington Consumer Protection Act against Fox News for allegedly false reporting about COVID-19). *Cf. Nat'l Inst. of Family and Life Advocs. v. Raoul*, 685 F. Supp. 3d 688, 695 (N.D. Ill. 2023) (enjoining application of Illinois Consumer Fraud Act to anti-abortion advocacy as "both stupid and very likely unconstitutional").

[19] The *Public Notice* noted that the allegations in the complaint are being incorporated by reference into MB Docket No. 24-275 regarding the proposed transfer of control of Paramount Global (parent company of the WCBS licensee) to Skydance Media. *Public Notice* at n.1.

precisely the sort of unconstitutional abuse of regulatory authority the Supreme Court unanimously condemned in *NRA v. Vullo*, 602 U.S. 175 (2024). The Court held that regulators violate the First Amendment when they use their official powers over certain transactions in ways designed "to suppress the speech of organizations that they have no direct control over." *Id.* at 197–98. Anyone who doesn't think that this is what is happening here simply has not been paying attention.[20]

There is a name for this kind of thing—it is called a show trial. When proceedings become a performative exercise conducted to further a political purpose, they forfeit any claim to legitimacy. Show trials tend to be retributive rather than corrective and are designed to send a message, not just to their unfortunate victims, but as a warning to other would-be transgressors.[21] There is a dark and deadly history of such showcase proceedings in authoritarian regimes around the world, ranging from Stalin's purges of perceived political opponents to China's trials of "rioters and counterrevolutionaries" after the 1989 Tiananmen Square protests. In our own country, similar tactics were employed during the Red Scare with investigations and hearings aptly described by the Chairman of the House Committee on Un-American Activities as "the best show the committee has had yet."[22] Those who staged the proceedings "were not seeking justice but staging a show trial to accuse, indict, and punish."[23] And while the stakes of a sham FCC proceeding obviously differ, the perversion of the rule of law is the same.

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[20] This has long been a problem at the FCC regardless of which political party is in power. *See* Robert Corn-Revere, *Regulation and the Social Compact*, *in* RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA 43–68 (Robert Corn-Revere ed., 1997).

[21] *Show Trial*, WIKIPEDIA, https://en.wikipedia.org/wiki/Show_trial (last visited Mar. 6, 2025).

[22] THOMAS DOHERTY, SHOW TRIAL: HOLLYWOOD, HUAC, AND THE BIRTH OF THE BLACKLIST viii (2018).

[23] *Id.* at x. Such tactics rarely look good in hindsight. "The legislative body that had lent the coercive power of the state to the Hollywood blacklist also suffered a swift decline in public esteem." *Id.* at 346.

Having opted to open this proceeding and to create a record, however, the FCC will be judged by the legal arguments made herein. As noted, commenters' likes or dislikes of CBS's editorial policies are irrelevant, but the FCC is obligated to address the constitutional and statutory points raised even if some on the Commission find them "politically awkward." *Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987). This is an adjudicatory proceeding, and the Commission is not free to overlook constitutional challenges to its authority. *Id.* at 873 (the FCC "may not simply ignore a constitutional challenge in an enforcement proceeding"); *see* 5 U.S.C. § 557(c) (in a formal adjudication, an administrative agency is obliged to consider and respond to substantial arguments a respondent presents in its defense). This is particularly true where "the Commission itself has already largely undermined the legitimacy of its own rule." *Meredith Corp.*, 809 F.2d at 873; *see also Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

The Commission's burden to establish *this* proceeding's legitimacy is heightened where its staff had previously found the complaint against WCBS facially defective and dismissed it. It explained CAR's complaint rested entirely on conclusory statements and lacked extrinsic evidence of deliberate and intentional falsification of the news. *See WCBS Dismissal* at 2–3. The staff further observed that the complaint against WCBS violated longstanding First Amendment principles, and that "the Commission does not—and cannot and will not—act as a self-appointed free-roving arbiter of truth in journalism." *Id.* at 2 (quoting *Free Press Emergency Petition for Inquiry into Broadcast of False Information on COVID-19*, Letter, 35 FCC Rcd. 3032, 3033 (MB & OGC 2020) (rejecting petition to investigate and sanction broadcasters for airing comments by President Trump and others alleged to be "false or scientifically suspect")); *cf.* Press Release, *supra*, note 6 (news release with Commissioner Carr's response to efforts to censor newsrooms, stating, "A

newsroom's decision about what stories to cover and how to frame them should be beyond the reach of any government official, not targeted by them.").

This proceeding therefore is a test—not of *60 Minutes* and its editorial practices, but of the seriousness of purpose of those who believe they now can sit in judgment thereof. "Federal officials are not only bound by the Constitution, they must also take a specific oath to support and defend it. U.S. Const. art. VI, cl. 3. To enforce a Commission-generated policy that the Commission itself believes is unconstitutional may well constitute a violation of that oath …." *Meredith Corp.*, 809 F.2d at 873; *see Vullo*, 602 U.S. at 180 ("Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors."). The Commission's performance will be subject not just to review by courts, but ultimately by the judgment of history. As former Chairman Dean Burch wrote in an early news distortion case, when the agency "acts in adjudicatory proceedings" and commissioners' roles are "quasi-judicial," the Commission "has an obligation beyond the mere absence of demonstrable bias; it must avoid even the appearance of bias." *Complaint Concerning the CBS Program "The Selling of the Pentagon,"* 30 F.C.C.2d 150, 154–55 (1971) (Separate Statement of Chairman Dean Burch). Anything less "diminishes the Commission's standing." *Id.* at 155.

IV. CAR'S COMPLAINT DOES NOT EVEN ALLEGE NEWS DISTORTION

The CAR Complaint not only "rests on a fundamental misunderstanding of the Commission's limited role in regulating broadcast journalism," *Free Press Emergency*, 35 FCC Rcd. at 3032, it fails to grasp even the basic elements of the news distortion policy. CAR's professed concern in its tissue-thin submission is that CBS edited the Harris interview to make the candidate seem more articulate than she is. Complaint at 3 ("CBS has taken a single question and transformed Harris' answer such that the general public no longer has any confidence as to what the Vice President actually said …."). That isn't news distortion under FCC policies—*and never*

was. CAR's complaint is nothing more than a nakedly political abuse of process that agency leadership is currently enabling.

A. The News Distortion Policy Does Not Empower the FCC to Police Editing

The mismatch between the news distortion policy as the Commission framed it and CAR's caricature of it is palpable. The FCC first articulated the policy's narrow focus in controversies surrounding the CBS documentaries *Hunger in America* and *The Selling of the Pentagon*, and in general network coverage of the 1968 Democratic National Convention. Some of the complaints in those cases were much like those made by CAR. Complaints alleged that "CBS 'coached' a doctor to 'make dramatic statements' on malnutrition in San Antonio" and that the filmed depiction "was not that of a baby dying of starvation but instead was of a baby born prematurely." *Complaints Covering CBS Program "Hunger in America*," 20 F.C.C.2d 143, 144 (1969). Some complained that network coverage of the turbulent DNC Convention "attempted to influence the course of the proceedings … stirring controversy where none existed." *Complaints Concerning Network Coverage of the Democratic Nat'l Convention*, 16 F.C.C.2d 650, 651 (1969). And in the Pentagon documentary, complainants charged "CBS slanted or deliberately distorted its presentation of persons interviewed on the program" by "splicing answers to a variety of questions as a way of creating a new 'answer' to a single question." *The Selling of the Pentagon*, 30 F.C.C.2d at 150, 153.

The Commission not only rejected each of these complaints, it stressed that allegations about the "accuracy" of editing did not warrant any further investigation. *Id.* at 152–54 ("[W]e do not propose to inquire of CBS as to" its editing of interviews and "further action by this Commission would be inappropriate …."); *see Democratic Nat'l Convention*, 16 F.C.C.2d at 660 ("[T]he actual disposition does not require extended treatment and comes within established

guidelines."); *Hunger in America*, 20 F.C.C.2d at 147, 150 (declining to hold a hearing on allegations about CBS coaching interviewees and making clear that "in the future, we do not intend to defer action on license renewals because of the pendency of complaints of the kind we have investigated here"). Instead, it reaffirmed the "general rule … that we do not sit to review the broadcaster's news judgment, the quality of his news and public affairs reporting, or his taste." *Democratic Nat'l Convention*, 16 F.C.C.2d at 654.

The guiding principle in each of these decisions is that allegations about misleading editing were not even the type of issue that might be considered news distortion. The Commission could not have been clearer on this point: "[W]hen we refer to appropriate cases involving extrinsic evidence, we do not mean the type of situation, frequently encountered, where a person quoted on a news program complains that he very clearly said something else." *Hunger in America*, 20 F.C.C.2d at 151. "Our point is that this licensing agency cannot and should not dictate the particular response to thousands of journalistic circumstances." *The Selling of the Pentagon*, 30 F.C.C.2d at 153. In short, "the judgment when to turn off the lights and send the cameras away is again not one subject to review by this Commission. We do not sit to decide: 'Here the licensee exercised good journalistic judgment in staying'; or 'Here it should have left.'" *Democratic Nat'l Convention*, 16 F.C.C.2d at 656. The news distortion policy simply does not involve itself with "a judgment as to what was presented, as against what should have been presented." *Id.* at 657–58. Yet that is what the CAR Complaint is about. In fact, it is the *only thing* it is about.

But this is where the Commission drew a bright line, precisely to forestall such bureaucratic meddling in news judgment. The agency decided to "err on the side of removing any possible doubt as to [its] position on these matters." *Id.* at 660. It explained that "for the Commission to review this editing process would be to enter an impenetrable thicket. On every single question of

judgment, and each complaint that might be registered, the Commission would have to decide whether the editing had involved deliberate distortion." *The Selling of the Pentagon*, 30 F.C.C.2d at 153–54. Doing so would "constitute a venture into a quagmire inappropriate for this Government agency." *Hunger in America*, 20 F.C.C.2d at 150. Accordingly, it concluded "in this democracy, no Government agency can authenticate the news, or should try to do so. We will therefore eschew the censor's role, including efforts to establish news distortions in situations where Government intervention would constitute a worse danger than the possible rigging itself." *Id.* at 151.

B. The CAR Complaint Is Fatally Deficient

Even if CBS's editorial decisions in *60 Minutes* fell within the range of activities governed by the news distortion policy, the CAR Complaint is woefully deficient. The Commission recognized long ago it cannot be "the national arbiter of the truth," *id.*, and its news distortion policy has an "extremely limited scope." *Galloway v. FCC*, 778 F.2d 16, 21 (1985). Investigation is warranted only "where extrinsic evidence has been presented to the Commission suggesting that a licensee has staged or culpably distorted the presentation of a news event." *Democratic Nat'l Convention*, 16 F.C.C.2d at 657.[24] When reviewing a complaint that a broadcaster has "deliberately distorted or slanted the news," the Commission considers two factors. *Galloway*, 778 F.2d at 20. First, the alleged distortion must be "deliberately intended to slant or mislead," as demonstrated by extrinsic evidence. *Id.* It is not enough for a complainant like CAR to simply "dispute the accuracy of a news report or to question the legitimate editorial decisions of the broadcaster." *Id.*

[24] As the Commission explained, the extrinsic evidence it contemplated was not about the news judgment in how to edit an interview. *Hunger in America*, 20 F.C.C.2d at 151. Rather it related to examples of fabrication, such as "where a 'yes' answer to one question was used to replace a 'no' answer to an entirely different question," *and not* "splicing answers to a variety of questions as a way of creating a new 'answer' to a single question." *The Selling of the Pentagon*, 30 F.C.C.2d at 153.

(internal citations omitted). Second, the alleged distortion "must involve a significant event and not merely a minor or incidental aspect of the news report." *Id.*

Applying these factors, the Commission "determines in the first instance whether the evidence submitted raises a substantial question of fact." *In re TVT License, Inc.*, 22 FCC Rcd. 13591, 13595 (2007). CAR's threadbare complaint fails at the threshold. The crux of its news distortion allegation is straightforward and baseless. During the interview, *60 Minutes* correspondent Bill Whitaker asked former Vice President Kamala Harris a question about the Biden Administration's relationship with Israeli Prime Minister Benjamin Netanyahu:

> MR. BILL WHITAKER: But it seems that Prime Minister Netanyahu is not listening. The *Wall Street Journal* said that he -- that your administration has repeatedly been blindsided by Netanyahu, and in fact, he has rebuffed just about all of your administration's entreaties.
>
> VICE PRESIDENT KAMALA HARRIS: Well, Bill, the work that we have done has resulted in a number of movements in that region by Israel that were very much prompted by, or a result of many things, including our advocacy for what needs to happen in the region. And we're not going to stop doing that. We are not going to stop pursuing what is necessary for the United States to be clear about where we stand on the need for this war to end.

CBS broadcast two excerpts of Vice President Harris' answer on two separate programs: On *Face the Nation*, CBS aired the first sentence of Harris' answer. On *60 Minutes*, CBS aired the last sentence of Harris' answer. The bare assertion in the CAR Complaint that this routine editing "transformed Harris' answer" into something it wasn't is more than a stretch. It does no more than express the complainants' own editorial preferences.

It is instructive to compare CAR's barebones allegations with, *e.g.*, the far more specific ones at issue in the *Galloway* news distortion complaint centering on a *60 Minutes* broadcast about insurance fraud. In that 1979 episode, *60 Minutes* aired interviews with subjects who admitted to participating in various aspects of insurance fraud. During discovery in a separate libel action, CBS produced unaired footage that revealed the interviews had been variously staged or edited,

and those outtakes formed the basis of the news distortion complaint. *Galloway*, 778 F.2d at 18. The complete recordings demonstrated that *60 Minutes* had edited or concealed various aspects of the interviews — one interviewee had "playacted" by recreating a confession while on camera, for example, and CBS rearranged another subject's answers with different questions for dramatic effect, omitting some answers. *Id.* at 19. But considering each instance, the U.S. Court of Appeals for the District of Columbia held the edits did not constitute actionable news distortion because they did not "affect the basic accuracy of the events reported." *Id.* at 20 (cleaned up). So too here. CAR does not contend — and cannot, given the transcript's release — that CBS's editing of the Vice President's answer affected the accurate portrayal of her response.

CBS's choice to air separate portions of a single answer to the same question on separate programs is a legitimate editorial decision about the newsworthy components of Harris' response, not an effort to deceive viewers. And CAR knows it. Ignoring the relevant agency standard, the complaint makes no argument that CBS's edits are "deliberately intended to slant or mislead," *id.* at 20, nor that the separate segments of Harris' answers contradict or misrepresent what she said in any material way. While the complaint argues the timing of the interview and the subject matter of Whitaker's question render Harris' answer "incredibly consequential," CAR fails to allege that CBS engaged in "deliberate distortion" of her reply, such as when "a 'yes' answer to one question was used to replace a 'no' answer to an entirely different question." *The Selling of the Pentagon*, 30 F.C.C.2d at 153. The complaint alleges only that CBS distorted the news by airing different clips on different shows. As explained above, this fails *even to allege* news distortion.

To engage viewers and communicate newsworthy information in a timely and concise manner, news broadcasts need editing. Here, CBS edited a 45-minute interview with Harris into a 20-minute segment — "part of the typical editing and cross-promotion process that takes place for

a big interview," like the one the network conducted with then-candidate Trump earlier that fall.[25] Editing interviews with newsmakers is standard practice, and this includes editorial discretion over broadcast interviews. When a network's edits do not "affect the 'basic accuracy' of the answer" given by an interviewee, they are not "significant enough to violate FCC rules." *Galloway*, 778 F.2d at 20 (cleaned up). As the transcript confirms, CBS's edits did not involve "substitution of an answer to another question," nor materially alter Harris' answer to Whitaker's question. *Id.* They therefore did not leave the public "deceived about a matter of significance." *Id.* And as CAR's complaint correctly acknowledges, "this Commission's long-standing precedent" makes plain that CBS "retains the right to exercise news judgment when editing its material," just as it did here. CAR's complaint likewise admits that exercising news judgment via editing "is normal in the context of a news magazine style show" like *60 Minutes*. CAR Complaint at 2-3. In sum, CAR is alleging CBS engaged in standard journalistic practice.

Were the Commission to entertain CAR's baseless complaint any further, it would impose an unreasonable and unworkable standard upon broadcasters. Of course, CBS is not the only network that edits interviews with politicians. During the campaign, for example, FOX repeatedly edited interviews with then-candidate Trump, editing answers to enhance coherence, eliminate digressions, and excise insults.[26] The network edited a separate interview on the program *MediaBuzz* to cut Trump's false claims about the outcome of the 2020 presidential election. Like

[25] David Bauder, *Trump's Complaints About '60 Minutes' Put a Spotlight on Editing at the Nation's Top Newsmagazine*, ASSOC. PRESS (Oct. 10, 2024), https://apnews.com/article/kamala-harris-trump-cbs-interview-edit-024c435a19fd37eee7a090ece76d925c.

[26] Brian Stelter & Liam Reilly, *Fox News Edited Trump's Rambling Answers and False Claims in Barbershop Interview, Full Video Shows*, CNN (Oct. 24, 2024), https://www.cnn.com/2024/10/24/media/fox-news-edit-trump-barbershop-interview/index.html.

CBS's decision to air different segments of the Harris interview on different programs, FOX's trimming of Trump does not constitute "news distortion."

As Chairman Carr stated in an interview with Fox News last fall, "the news distortion rule is a very, very narrow rule at the FCC. In almost every case, it doesn't apply because it could get into sort of editorial decisions that are protected by the First Amendment."[27] That means networks are free to decide to air interviews with lawmakers in their entirety, as ABC News did with its 22-minute interview of former President Joe Biden last summer,[28] or to edit them in the manner FOX and CBS did. And the First Amendment prevents the FCC from telling them otherwise.

V. THE FIRST AMENDMENT LIMITS THE FCC'S ABILITY TO REVIEW NEWS JUDGMENT

The *Public Notice* is premised on the conceit that compiling this record and investigating CBS for its news judgment is necessary to serve the "public interest." But this ignores that the Communications Act expressly withholds from government the power to "interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326. This denies to the FCC "the power of censorship" as well as the ability to promulgate any "regulation or condition" that interferes with freedom of speech. *Id.* These policies "were drawn from the First Amendment itself [and] the 'public interest' standard necessarily invites reference to First Amendment principles." *CBS, Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 121 (1973). Consequently, the Supreme Court has stressed that "the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area." *FCC v League of Women Voters of Cal.,*

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[27] Kristin Altus, *FCC Commissioner Urges CBS to Release the Transcript from Harris' '60 Minutes' Interview*, N.Y. POST (Oct. 23, 2024), https://nypost.com/2024/10/23/media/fcc-commissioner-brendan-carrm-urges-cbs-release-kamala-harris-60-minutes-interview-transcript/.

[28] Sahil Kapur, *A Defiant Biden, in Denial of the Polls and Calls to Step Aside: 3 Takeaways from the ABC Interview*, NBC NEWS (July 5, 2024), https://www.nbcnews.com/politics/2024-election/takeaways-biden-post-debate-interview-abc-news-rcna160292.

468 U.S. 364, 378 (1984). Although the Court historically interpreted the law to give some greater leeway to regulate broadcasting compared to traditional media, *e.g.*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the public interest standard has never permitted the level of intrusion into the editorial process that this proceeding represents.

A. The First Amendment Limits Regulation Under the Public Interest Standard

There is no basis for the FCC to assume the "public interest" mandate empowers it to dictate how a particular news broadcast should have been edited. From the beginnings of broadcast regulation, Congress and the FCC (and its predecessor agency, the Federal Radio Commission) appeared to approach regulation with the understanding that constitutional limitations prevent too great a reliance on specific programming mandates. One of the bills submitted prior to passage of the Radio Act of 1927 included a provision that would have required stations to comply with programming priorities based on subject matter. However, the provision was eliminated because "it was considered to border on censorship." *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 597 (1981). Similarly, the FRC sought to "chart a course between the need of arriving at a workable concept of the public interest in station operation, on the one hand, and the prohibition laid on it by the First Amendment to the Constitution of the United States … on the other." *Report and Statement of Policy re: Commission En Banc Programming Inquiry*, 44 F.C.C. 2303, 2313 (1960).

In 1960 the FCC emphasized that "[i]n considering the extent of the Commission's authority in the area of programming it is essential [first] to examine the limitations imposed upon it by the First Amendment to the Constitution and Section 326 of the Communications Act." *Id.* at 2306. After an extensive analysis of the meaning of the public interest, the FCC found that the required constitutional and statutory balance barred the government from implementing programming requirements that were too specific. It noted:

> [S]everal witnesses in this proceeding have advanced persuasive arguments urging us to require licensees to present specific types of programs on the theory that such action would enhance freedom of expression rather than to abridge it. With respect to this proposition we are constrained to point out that the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it. The protection against abridgment of freedom of speech and press flatly forbids governmental interference, benign or otherwise. The First Amendment while regarding freedom in religion, in speech, in printing and in assembling and petitioning the government for redress of grievances as fundamental and precious to all, seeks only to forbid that Congress should meddle therein.

Id. at 2308 (citation omitted).

Recognizing these limits, the Commission concluded it could not "condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program." *Id.* To do so, the Commission concluded, would "lay a forbidden burden upon the exercise of liberty protected by the Constitution." *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940)). To maintain a balance between a free competitive broadcast system, on the one hand, and the requirements of the public interest standard on the other, the Commission found that "as a practical matter, let alone a legal matter, [its role] cannot be one of program dictation or program supervision." *Id.* at 2309.

Over the years the FCC has attempted to balance the constitutional imperative of the First Amendment with the public interest aspirations of the Communications Act. It has found that while it may "inquire of licensees what they have done to determine the needs of a community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear." *Id.* at 2308. In particular, public interest "standards or guidelines should in no sense constitute a rigid mold for station performance, nor should they be considered as a Commission formula for broadcast services in the public interest." *Id.* at 2313. The Commission emphasized that it did "not intend to guide the licensee along the path of programming." On the contrary, "the

licensee must find his own path with the guidance of those whom his signal is to serve." *Id.* at 2316.

Recognizing this delicate balance, courts have noted that the Commission must "walk a 'tightrope'" to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act." *Democratic Nat'l Comm.*, 412 U.S. at 117; *Banzhaf v. FCC*, 405 F.2d 1082, 1095 (D.C. Cir.1968). The Supreme Court has described this balancing act as "a task of a great delicacy and difficulty," and stressed that "we would [not] hesitate to invoke the Constitution should we determine that the [FCC] has not fulfilled its task with appropriate sensitivity to the interest of free expression." *Democratic Nat'l Comm.*, 412 U.S. at 102.

The Court found that the Communications Act was designed "to maintain – no matter how difficult the task – essentially private broadcast journalism." *Id.* at 120. For that reason, licensees are held "only broadly accountable to public interest standards." *Id.* Thus, the Supreme Court quoted the *1960 En Banc Policy Statement* to emphasize that "although the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 650 (1994) ("*Turner I*") (citation and internal quotation omitted).

Specific program requirements generally are considered the most constitutionally suspect among those FCC broadcasting regulations impose. The D.C. Circuit has noted that the "power to specify material which the public interest requires or forbids to be broadcast … carries the seeds of the general authority to censor denied by the Communications Act and the First Amendment alike." *Banzhaf*, 405 F.2d at 1095. Public interest requirements relating to specific program content create a "high risk that such rulings will reflect the Commission's selection among tastes, opinions,

and value judgments, rather than a recognizable public interest" and "must be closely scrutinized lest they carry the Commission too far in the direction of the forbidden censorship." *Id.* at 1096.[29]

The Supreme Court has emphasized "the minimal extent" that the government may influence the programming provided by broadcast stations. It stressed that "the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations." *Turner I*, 512 U.S. 622, 650–52. Similarly, the D.C. Circuit expressly avoided approving "a more active role by the FCC in oversight of programming" because it would "threaten to upset the constitutional balance struck in *CBS v. DNC*." *Accuracy in Media v. FCC*, 521 F.2d 288, 296–97 (D.C. Cir. 1975); *see also Community-Service Broad. of Mid-America v. FCC*, 593 F.2d 1102, 1115 (D.C. Cir. 1978) (*en banc*) (FCC and courts have generally eschewed "program-by-program review" schemes because of constitutional dangers.).

Any attempt in this proceeding to apply a more robust view of the Commission's public interest authority to include an ability to review and dictate individual news judgments would stretch the FCC's mandate to the breaking point. Moreover, the constitutional standard governing broadcast regulation that permitted some greater latitude articulated in *Red Lion* was predicated on "'the present state of commercially acceptable technology' as of 1969." *News America Publ'g, Inc. v. FCC*, 844 F.2d 800, 811 (D.C. Cir. 1988) (quoting *Red Lion*, 395 U.S. at 388). Much has happened in the intervening five-and-a-half decades.[30]

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[29] *See also Public Int. Rsch. Grp. v. FCC*, 522 F.2d 1060, 1067 (1st Cir. 1975) ("[W]e have doubts as to the wisdom of mandating … government intervention in the programming and advertising decisions of private broadcasters."); *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169, 172 (D.C. Cir. 1968) ("[T]he First Amendment demands that [the FCC] proceed cautiously [in reviewing programming content] and Congress … limited the Commission's power in this area.").

[30] *See, e.g.*, *Meredith Corp.*, 809 F.2d at 867 ("[T]he Court reemphasized that the rationale of *Red Lion* is not immutable."); *see also Banzhaf*, 405 F.2d at 1100 ("[S]ome venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets.").

Since then, both Congress and the FCC have found the media marketplace has undergone vast changes. For example, the legislative history to the Telecommunications Act of 1996 suggested the historical justifications for the FCC's regulation of broadcasting require reconsideration. The Senate Report noted that "[c]hanges in technology and consumer preferences have made the 1934 [Communications] Act a historical anachronism." It explained that "the [Communications] Act was not prepared to handle the growth of cable television" and that "[t]he growth of cable programming has raised questions about the rules that govern broadcasters" among others.[31] The House of Representatives' findings were even more direct. The House Commerce Committee pointed out that the audio and video marketplace has undergone significant changes over the past 50 years "and the scarcity rationale for government regulation no longer applies."[32]

The FCC itself has reached similar conclusions over the years. In the mid-1980s, for example, the Commission "found that the 'scarcity rationale,' which ha[d] historically justified content regulation of broadcasting … is no longer valid."[33] Subsequently, an FCC staff report that took up where the 1987 Fairness Doctrine decision left off concluded that the spectrum scarcity rationale "no longer serves as a valid justification for the government's intrusive regulation of traditional broadcasting."[34] It added that "[p]erhaps most damaging to The Scarcity Rationale is

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[31] Telecommunications Competition and Deregulation Act of 1995, S. Rpt. 104-23, 104th Cong. 1st Sess. 2–3 (Mar. 30, 1995).

[32] Communications Act of 1995, H. Rpt. 104-204, 104th Cong. 1st Sess. 54 (July 24, 1995).

[33] *Meredith Corp.*, 809 F.2d at 867 (citing *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985) ("*1985 Fairness Doctrine Report*")); *see Syracuse Peace Council*, 867 F.2d at 660–66 (discussing *1985 Fairness Doctrine Report* and upholding FCC's decision to repeal the fairness doctrine).

[34] John W. Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* 8 (Media Bureau Staff Research Paper, Mar. 2005).

the recent accessibility of all the content on the Internet, including eight million blogs, via licensed spectrum and WiFi and WiMax devices."[35]

Given these many changes, *Red Lion*'s luster as controlling precedent has faded. In *Turner I*, for example, the Court rejected the government's bid to extend the principles of *Red Lion* to the regulation of cable television. After noting the Commission's "minimal" authority over broadcast content, the Court pointed out that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, *whatever its validity in the cases elaborating it*, does not apply in the context of cable regulation." *Turner I*, 512 U.S. at 637 (emphasis added). Lower courts have likewise expressed doubts about its vitality and have closely scrutinized efforts to regulate broadcast content. In *MPAA v. FCC*, 309 F.3d 796 (D.C. Cir. 2002), for example, the D.C. Circuit vacated the Commission's video description rules. The court interpreted the Commission's powers narrowly because any regulation of programming content "invariably raise[s] First Amendment issues." *Id.* at 805.[36]

Reviewing courts are most skeptical of the FCC's constitutional authority when it comes to regulating news programming. In *Radio-Television News Directors Association v. FCC*, 229 F.3d 269 (D.C. Cir. 2000) (per curium), for example, the D.C. Circuit ordered the Commission to repeal its personal attack and political editorial rules. The court held the FCC had the burden to justify rules that "interfere with editorial judgment of professional journalists and entangle the government in day-to-day operations of the media." *Id.* at 270. The court ordered the FCC not to

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[35] *Id.* at 11. The report also concluded that alternative rationales for broadcast content regulations are similarly flawed. *Id.* at 18–28. For a more comprehensive discussion of various justifications for broadcast content regulation, *see* RATIONALES & RATIONALIZATIONS, *supra* n.20.

[36] *See also Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (specific programming mandates raise serious First Amendment questions); *MD/DC/DE Broadcasters Ass'n. v. FCC*, 236 F.3d 13 (D.C. Cir. 2001) (same).

enforce the rules, noting it is "incumbent upon the Commission to 'explain why the public interest would benefit from rules that raise these policy and constitutional doubts.'" *Id.* (citation omitted).

In short, the FCC cannot assert authority over a particular editorial decision by making talismanic references to the "public interest" or the "public airwaves" and expect to be taken seriously. Even at its zenith, the FCC's authority over broadcast programming would not have permitted such an intensive intervention in news judgment, and what power it once possessed has been eclipsed.

B. The First Amendment Limits the News Distortion Policy

The news distortion policy cannot trump the bedrock constitutional rule that prohibits the government from compelling editors and publishers "to publish that which 'reason tells them should not be published.'" *Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241, 256 (1974) (citation omitted). Under the First Amendment the "choice of material to go into a news-paper"—or news broadcast—must be determined by "'editorial control and judgment,' not official decree." *Id.* at 258. As the Supreme Court explained in *CBS, Inc. v. Democratic National Committee,* "[f]or better or worse, editing is what editors are for; and editing is selection and choice of material." 412 U.S. at 120; *see also Moody v. NetChoice, LLC*, 603 U.S. 707, 733 (2024) ("However imperfect the private marketplace of ideas, here was a worse proposal—the government itself deciding when speech was imbalanced, and then coercing speakers to provide more of some views or less of others."). The CAR Complaint and this inquiry fly in the face of these elementary principles.

The news distortion policy was announced in 1969, the same year as *Red Lion*, not as a rule published in the Code of Federal Regulations, but as an FCC policy. *See Hunger in America*, 20 F.C.C.2d 143. Even then, at the public interest doctrine's height, the Commission

recognized the news distortion policy had to conform to First Amendment limits. And, as explained in the previous section, many of the FCC's content regulations have been strictly limited or abandoned since that time. For example, in 1984 the Supreme Court struck down a ban on editorializing by public broadcast stations. *League of Women Voters of Cal.,* 468 U.S. at 373. Three years later, the FCC eliminated the fairness doctrine because of the obvious tension between the First Amendment and "having government officials second-guess editorial judgments." *Syracuse Peace Council,* 867 F.2d at 660. The next year, it abandoned two remaining vestiges of the fairness doctrine—the personal attack and political editorial rules. *Radio-Television News Directors' Ass'n.,* 229 F.3d 269.

The news distortion policy still exists only because of the exceedingly limited role the Commission has given it over the years. For that reason, the FCC generally has lived up to this promise when called on to apply the policy.[37] Understandably, enforcement actions for news distortion dropped off precipitously after the Commission began to scale back its intervention into matters of broadcast content in the 1980s because of First Amendment concerns. The FCC has applied a "particularly high threshold" for intervention in the news distortion cases area "because news and comment programming are at the core of speech which the First Amendment is intended to protect." *Liability of NPR Phoenix, L.L.C. Licensee,* 13 FCC Red. 14,070,

[37] As a general matter, the FCC has been quite circumspect in its enforcement of the news distortion policy. One analysis of all such complaints filed with the agency during a 30-year period (1969-1999) found that it rejected complaints 90 percent of the time. *See* Chad Raphael, *The FCC*'s *News Distortion Rules: Regulation by Drooping Eyelid,* 6 COMM. L. & POL 485, 501 (Summer 2001) ("Of the 120 reported decisions on distortion in this period, the FCC found against broadcasters in 10% (12) of them."). This figure, while significant, vastly overstates the degree to which the Commission has been willing to regulate in this area, since the study used an expansive definition of a "finding" of news distortion and did not count unreported dismissals of complaints. It included complaints that resulted in "rhetorical rebukes of licensees," as in letters of admonishment. Tellingly, it identified only five cases in which news distortion complaints resulted in adverse licensing decisions, and those occurred only when "distortion was compounded by numerous other infractions." *Id.* at 502.

14,072 (Mass Media Bureau 1998); *see also Complaint of Denny Mulloy,* FCC 86-360, 1986 WL 290825 (Aug. 13, 1986).[38]

The agency has acknowledged "[i]t would be unwise and probably impossible for the Commission to lay down some precise line of factual accuracy—dependent always on journalistic judgment—across which broadcasters must not stray," and that "[a]ny presumption on our part would be inconsistent with the First Amendment" and "would involve the Commission deeply and improperly in the journalistic functions of broadcasters." *The Selling of the Pentagon,* 30 F.C.C.2d at 152. For example, in rejecting a complaint filed about a network news report by the CIA, the Commission noted it was being asked to "second-guess the journalistic judgment and editorial workings of ABC news" and stressed that "under no circumstances will the Commission engage in assessments of truth or falsity when considering whether news programming was deliberately distorted. Nor will it sit in judgment of the way particular news programming was handled." *Complaints of Cent. Intel. Agency,* 58 Rad. Reg. 2d (P&F) 1544, 1549 (1985). The FCC described such choices as "the very essence of the journalistic process." *Id.* Likewise, the FCC has also rejected a news distortion complaint alleging that major media organizations slanted the news at the CIA's request. *Complaint of Peter Gimpel,* 3 FCC Red. 4575 (1988).

This proceeding seeks to redefine the concept of news distortion to include editorial choices the FCC dislikes. Such a revisionist approach ignores the Commission's historically cautious practice designed to avoid interfering in editorial judgment. In its place, it proposes a far more

[38] *Serafyn v. FCC,* 149 F.3d 1213 (D.C. Cir. 1998), is not to the contrary. Although the court remanded the FCC's dismissal of a news distortion case to the agency, it did not propose "to determine just how much evidence the Commission may require or whether Serafyn has produced it." *Id.* at 1220. Nor did the court consider any First Amendment issues. It found only that the Commission failed to adequately explain its decision. *Id.* at 1219.

interventionist theory of government authority irreconcilable with the First Amendment. As the Supreme Court recently warned, "[o]n the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana." *Moody*, 603 U.S. at 741–42.

C. The First Amendment Limits Jawboning

The Commission can run afoul of the First Amendment even if it does not follow through on any of the prohibited regulatory acts described above. This inquiry alone—particularly in being conducted in support of other pressure tactics—is enough. As the Supreme Court just reaffirmed in *Vullo*, the "'threat of invoking legal sanctions and other means of coercion … to achieve the suppression' of disfavored speech violates the First Amendment." 602 U.S. at 180; *see Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). This is not the FCC's first rodeo when it comes to such tactics, and reviewing courts have been alert to the problem, especially when the Commission's abuse of authority is as transparent as it is here. *See* Glen O. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 119 (1967).

The D.C. Circuit has recognized the various ways a regulatory agency can put pressure on a regulated firm, "some more subtle than others." *MD/DC/DE Broadcasters Ass'n.,* 236 F.3d at 19. In particular, it has observed that the FCC "has a long history of employing … 'a variety of *sub silentio* pressures and "raised eyebrow" regulation of program content.… The practice of forwarding viewer or listener complaints to the broadcaster with a request for a formal response to the FCC, the prominent speech or statement by a Commissioner or Executive official, the issuance of notices of inquiry … all serve as means for communicating official pressures to the licensee.'" *Id.* (quoting *Community-Service Broad. of Mid-America*, 593 F.2d at 1116). In this regard, an

investigation "is a powerful threat, almost guaranteed to induce the desired conduct." *Id.*; *see Lutheran Church-Missouri Synod*, 141 F.3d at 353 (same).

Such concerns are particularly acute where the Commission's review is used to reinforce the government's ability to supervise content more intensively. Thus, in *Community-Service Broadcasting of Mid-America*, the D.C. Circuit struck down a statutory requirement that noncommercial broadcasters maintain an audio recording for 60 days of any program that discusses an issue of public importance. The majority invalidated the provision, holding it "places substantial burdens on noncommercial educational broadcasters and presents the risk of direct governmental interference with program content." *Community-Service Broad.*, 593 F.2d at 1105.[39]

Although the decision in *Community-Service Broadcasting* turned on equal protection grounds because of the special requirement for noncommercial broadcasters, Judge Skelly Wright emphasized that the taping requirement "in its purpose and operation serves to burden and chill the exercise of First Amendment rights by noncommercial broadcasters." *Id.* at 1110 (Wright, C.J.). He noted "the operation of the taping requirement serves to facilitate the exercise of 'raised eyebrow' regulation" because "it provides a mechanism, for those who would wish to do so, to review systematically the content of … programming." *Id.* at 1116. A chilling effect can exist even when a regulatory requirement "neither creates any new content restrictions … nor establishes any new mechanism for enforcement of existing standards" to the extent the measure has the purpose of exerting greater control over content. *Id.* at 1115.

[39] While that case was being litigated the FCC rejected a similar proposal that would have required commercial broadcasters to retain tapes of their programs. The Commission noted "the concern that the proposed rule might have a chilling effect on free speech and press cannot be easily dismissed" and deferred judgment on the constitutional issue because it was under review by the court in *Community-Service Broadcasting*. *See Petition for Rulemaking to Require Broadcast Licensees to Maintain Certain Program Records, Third Report & Order*, 64 F.C.C.2d 1100, 1113 (1977).

All of which brings us to the current show trial, which is hardly a model of subtlety. For the Commission to launch a politically fraught investigation based on such a paper-thin complaint in these circumstances would have been a compelling example of unconstitutional jawboning all on its own. But to resurrect the flimsy complaint after it was fully and properly interred by staff dismissal is all but a signed confession of unconstitutional behavior. The Commission must immediately dismiss the CAR Complaint.

CONCLUSION

The FCC should never have opened this proceeding. The initial staff decision dismissal of the CAR Complaint was well-grounded in precedent, plainly correct, and upended for no defensible purpose. This proceeding is an illegitimate show trial, and for the FCC to conduct it flies in the face of recent—and unanimous—Supreme Court authority barring unconstitutional jawboning. *Vullo*, 602 U.S. at 180. Even if the proceeding had a legitimate purpose under the Communications Act, the inquiry into particular editorial choices far exceeds the Commission's statutory and constitutional authority to regulate broadcast programming. This inquiry is a source of embarrassment for all concerned, and the Commission should terminate it forthwith.

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RIGHTS AND EXPRESSION

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