

No. 23-30445

**In the
United States Court of Appeals for the Fifth Circuit**

STATE OF MISSOURI; STATE OF LOUISIANA; AARON KHERIATY; MARTIN
KULLDORFF; JIM HOFT; JAYANTA BHATTACHARYA; JILL HINES,
Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR.; VIVEK H. MURTHY; XAVIER BECERRA; DEPARTMENT OF
HEALTH & HUMAN SERVICES; ANTHONY FAUCI, *ET AL.*,
Defendants-Appellants.

**On Appeal from the United States District Court
for the Western District of Louisiana**

**Brief *Amicus Curiae* of America's Future,
Free Speech Coalition, Free Speech Defense and Education Fund,
Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of
California, Tennessee Firearms Association, Public Advocate of the United
States, U.S. Constitutional Rights Legal Defense Fund, Leadership Institute,
One Nation Under God Foundation, DownsizeDC.org, Downsize DC
Foundation, Eagle Forum, Eagle Forum Foundation, The Western Journal,
and Conservative Legal Defense and Education Fund
in Support of Plaintiffs-Appellees**

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August 7, 2023
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Case No. 23-30445

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF MISSOURI, *et al.*,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., *et al.*,

Defendants-Appellants,

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

State of Missouri, *et al.*, Plaintiffs-Appellees

Joseph R. Biden, Jr., *et al.*, Defendants-Appellants

America's Future, Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Tennessee Firearms Association, Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, Leadership Institute, One Nation Under God Foundation, DownsizeDC.org, Downsize DC Foundation, Eagle Forum, Eagle Forum Foundation, The Western Journal, and Conservative Legal Defense and Education Fund, *Amici Curiae*.

William J. Olson, Jeremiah L. Morgan, Robert J. Olson, Rick Boyer, John I. Harris III, Patrick M. McSweeney, and Kurt B. Olsen are counsel for *Amici Curiae*.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and 5th Circuit Rule 28.2.1, it is hereby certified that *Amici Curiae* America's Future, Free Speech Coalition, Free Speech Legal Defense Fund, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Tennessee Firearms Association, Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, Leadership Institute, One Nation Under God Foundation, DownsizeDC.org, Downsize DC Foundation, Eagle Forum, Eagle Forum Foundation, and Conservative Legal Defense and Education Fund are

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INTEREST OF *AMICI CURIAE*¹

America’s Future, Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Tennessee Firearms Association, Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, Leadership Institute, One Nation Under God Foundation, DownsizeDC.org, Downsize DC Foundation, Eagle Forum, Eagle Forum Foundation, The Western Journal, and Conservative Legal Defense and Education Fund are nonprofit organizations which work to defend constitutional rights and protect liberties.

STATEMENT OF THE CASE

On May 5, 2022, Missouri, Louisiana, and five individual plaintiffs filed suit against President Biden and a large number of officials in his administration. The lawsuit alleged “a gargantuan federal ‘Censorship Enterprise’ ... [that] has stifled debate and criticism of government policy on social media about some of the most pressing issues of our time.” *Missouri v. Biden*, Plaintiffs’ Suppl. Br.

¹ All parties have consented to the filing of this brief *amicus curiae*. No party’s counsel authored the brief in whole or in part. No party or party’s counsel contributed money intended to fund preparing or submitting the brief. No person other than *amici*, their members, or their counsel contributed money intended to fund preparing or submitting this brief.

In Support of Injunction, Case 3:22-cv-01213, Doc. 212-2 at 2 (W.D. La. 2022).

The plaintiffs alleged that the Biden administration had pressured social media companies to promote government-approved speech and censor speech critical of the administration and its policies, including with regard to COVID, election interference, and posts critical of Biden personally. *Missouri v. Biden*, 2023 U.S. Dist. LEXIS 114585, at *5-6 (W.D. La. 2023) (“*Missouri*”).

On July 4, 2023, the district court issued an extraordinarily comprehensive opinion supporting issuance of a preliminary injunction forbidding most defendants from “urging, encouraging, pressuring, or inducing in any manner social-media companies to remove, delete, suppress, or reduce posted content protected by the Free Speech Clause of the First Amendment to the United States Constitution.” *Id.* at *214-215. Defendants’ motion for a stay was denied by the district court on July 10, 2023. *Missouri v. Biden*, 2023 U.S. Dist. LEXIS 118458 (W.D. La. 2023). On July 14, 2023, this Court administratively stayed the district court’s injunction, referring consideration of the government’s motion for a stay pending appeal to a merits panel of this Court.

ARGUMENT

I. THE GOVERNMENT'S DEFENSE IS GROUNDED IN AN ILLEGITIMATE VIEW OF ITS ROLE AND POWERS.

From the first sentence of its Brief for Appellants (“Aplt. Br.”), the national government claims powers and asserts responsibilities for its campaign to pressure social media to censor and suppress free speech that can be found nowhere in the Constitution.

One of the central obligations of government leaders, at any level, is to **protect the public** against innumerable threats: natural disasters, outbreaks of **disease, crime**, economic turmoil, and much more.... [O]ften, one of the government’s key roles is simply to provide the public with **accurate** and timely **information**, to **dispel false** rumors, and to explain what actions citizens and businesses can and should take to advance **the public good**. [Aplt. Br. at 1 (emphasis added).]

From this false premise that the national government has responsibility to prevent wrongdoing and harm, it logically concludes that it needs vast surveillance authority and near dictatorial powers to “protect” the people. That view is flawed for Biblical and constitutional reasons.

Consider first its claim of a duty to prevent crime. No government possesses the Biblical responsibility to prevent “crime,” as the role of government is “for the **punishment of evildoers**....” *1 Peter 2:14* (emphasis

added). Further, here the national government comes close to claiming a federal police power to defend the “health, welfare and safety” of its citizens, but there is no such federal power.² Not only can the national government not point to one word in the Constitution about **preventing** crime; there is very little authorizing the national government to **punish** any crime (except where it has plenary powers, such as the District of Columbia). *See Cohens v. Virginia*, 19 U.S. 264, 428 (1821) (it was “clear[] that Congress cannot punish felonies generally.”).³ If a government actually had a duty to prevent crime, it would require the creation

² Chief Justice Marshall’s opinion in *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824) asserted, quite logically: “The enumeration [of powers] presupposes something not enumerated.” Chief Justice Rehnquist relied on that principle when he described the Constitution’s deliberate “withholding from Congress a plenary police power that would authorize enactment of every type of legislation.” *United States v. Lopez*, 514 U.S. 549, 566 (1995). Though this issue was settled long ago, the government continues aggressively to assert the existence of such a power. *See e.g., Lane v. United States*, 612 F. Supp. 3d 659, 664-65 (N.D. Tex. 2020).

³ But for a flawed, expansive reading of the national power to regulate interstate commerce, there would be few crimes beyond those constitutionally authorized for counterfeiting, piracy, treason, and bribery. As to federal usurpation of state authority to create crimes, *see generally* ABA Foundation, “[Federalization of Criminal Law](#)” at 2 (1998) (“The federalization phenomenon is inconsistent with the traditional notion that prevention of crime and law enforcement in this country are basically state functions.”).

of an Orwellian surveillance state with arbitrary tyrannical authority needed to take action to do good without regard to due process or other limitations.⁴

As to its further claim of a power to instruct the American people on how to advance “the public good,” the national government has even less authority.

In the United States, the People — not the government — are sovereign. As

Chief Justice John Jay explained at the nation’s very beginning:

[T]he sovereignties in Europe, and particularly in England, exist on feudal principles. That system considers the Prince as the Sovereign, and the people as his Subjects; it regards his person as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a Court of Justice or elsewhere.... No such ideas obtain here; at the Revolution, **the sovereignty devolved on the people; and they are truly the sovereigns** of the country.... [*Chisholm v. Georgia*, 2 U.S. 419, 471 (1793) (emphasis added).]

In the United States, the government has no role to “explain what actions citizens and businesses can and should take to advance **the public good**,” but rather, the People make those decisions for themselves. The government appears to have forgotten what Madison explained so clearly, that: “the censorial power is in the

⁴ The 2002 movie “Minority Report” was based on the premise that the government had a duty to prevent crime, which led to a dystopian state which punished the innocent, and where government abuses were covered up to maintain the fiction of governmental infallibility.

people over the government, and not in the government over the people.” 4
Annals of Cong. 934 (1794).

Thus, upon examination, each of the presuppositions on which the Government’s claim to censorial powers is constructed is among those which Americans threw off “at the Revolution,” which the national government, itching for power, seeks to regain.

II. APPELLANTS GROSSLY MISCHARACTERIZE THE DISTRICT COURT’S INJUNCTION.

Appellants launch a frontal attack on the district court’s injunction for preventing the President from presenting administration positions to the American people. Specifically, Appellants complain it restricts “[a] central dimension of presidential power in the modern age [which] is the use of the office’s so-called ‘bully pulpit’ to seek to persuade Americans.” Aplt. Br. at 20. They cite press conferences by Presidents Kennedy and G.W. Bush to suggest that the injunction would prevent press conferences. They complain that the district court forbids “the White House ... to speak with platforms when they take issue with the accuracy of content that affects their interests” or “the White House press office ... to call a newspaper or television network to question the accuracy of a story.” *Id.* at 34. They argue that the order “[r]estrict[s] the

government’s expression of its views” and “remov[es] the government’s voice from the ‘marketplace of ideas.’” *Id.* at 21. In sum, they argue that the district court essentially “prohibit[s] all efforts by the government to persuade.” *Id.* at 25.

On every point, Appellants grossly distort the injunction. First, the district court’s order does not run against the President, binding only the White House press secretary and counsel, and other lower-level officials. *Missouri* at *211-212. Second, Appellant 17 times asserts it must be allowed to persuade, but the injunction never even uses the word “persuade,” as it only enjoins “urging, encouraging, pressuring, or inducing” social media to censor First Amendment-protected activities. *Id.* at *214-215. Third, to ensure its order would not be misunderstood, the district court did what the court had no obligation to do — set out a long list of the types of communications with social media companies which are not enjoined, such as “criminal efforts to suppress voting, to provide illegal campaign contributions, of cyber-attacks against election infrastructure, or foreign attempts to influence elections [or] threats that threaten the public safety or security of the United States,” as well as “government speech promoting government policies or views on matters of public concern.” *Id.* at *216.

Moreover, the record below demonstrates that Appellants’ “Censorship Enterprise” has not engaged in “legitimate efforts at persuasion” (Aplt. Br. at 2, 28). Rather, the district court found that the government’s efforts crossed the line to “coercion.” *Missouri* at *193.⁵ Even if this Court were to view the government’s threats of the loss of Section 230 protection and antitrust prosecution (Aplt. Br. at 29-30) as “pressuring,” the First Amendment’s prohibition would still apply. “[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.” *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). As the district court found, “[i]f there were ever a case where the ‘significant encouragement’ theory should apply, this is it.” *Missouri* at *122.

The censorial actions taken by the government can neither be ignored, nor excused, for they violate one of the nation’s a core principles that has never been better stated than it was by Justice Jackson seven decades ago:

⁵ *See also Missouri* at *121-22 (“Defendants used meetings and communications with social-media companies to pressure those companies to take down, reduce, and suppress the free speech of American citizens.... This seemingly **unrelenting pressure** by Defendants had the intended result of **suppressing millions of protected free speech postings** by American citizens....” (emphasis added)).

If 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 or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. [*W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added).]

III. **THE FBI'S SCHEME TO CENSOR THE HUNTER BIDEN LAPTOP STORY VIOLATED THE FIRST AMENDMENT, APPEARS TO HAVE CONSTITUTED CRIMINAL ELECTION INTERFERENCE, AND LIKELY CHANGED THE OUTCOME OF THE 2020 PRESIDENTIAL ELECTION.**

On Wednesday, October 14, 2020, just 20 days before the 2020 general election, the *New York Post* broke the election story of the century under the headline “Smoking-gun email reveals how Hunter Biden introduced Ukrainian businessman to VP dad.”⁶

Hunter Biden **introduced his father**, then-Vice President Joe Biden, to a top executive at a Ukrainian energy firm less than a year before the elder Biden **pressured government officials in Ukraine into firing a prosecutor** who was investigating the company, according to emails obtained by The Post.

The never-before-revealed meeting is mentioned in a message of appreciation that Vadym Pozharskyi, an adviser to the board of Burisma, allegedly sent Hunter Biden on April 17, 2015, about a year after Hunter joined the Burisma board at a reported salary of up to **\$50,000 a month**....

⁶ See E. Morris & G. Fonrouge, “[Smoking-gun email reveals how Hunter Biden introduced Ukrainian businessman to VP dad](#),” *New York Post* (Oct. 14, 2020) (emphasis added).

The blockbuster correspondence — which **flies in the face of Joe Biden’s claim** that he’s “never spoken to my son about his overseas business dealings” — is contained in a massive trove of data recovered from a **laptop computer**. [*Id.*]

Anyone who read the story could tell it had the potential to alter the outcome of the election. The reason that it did not have that effect was that the story’s distribution to the American electorate was suppressed by an FBI plot to disparage it as “Russian disinformation.” The corrupt nature of the FBI’s actions on this matter is now clear, because “the FBI previously received Hunter Biden’s laptop on December 9, 2019, and knew that the later-released story about Hunter Biden’s laptop was not Russian disinformation.” *Missouri* at *83; *see also id.* at *144.⁷

The FBI also knew that a copy of the laptop had been provided to Trump attorney Rudy Giuliani, who likely would release it before the election. To counteract such an accurate but damaging story, the FBI took on the job of a

⁷ FBI duplicity was revealed and compounded when FBI Whistleblowers revealed that the agents were instructed not to investigate the Biden laptop crimes before the Presidential election. *See* B. Bernstein, “[FBI Officials Told Agents Not to Investigate Hunter Biden Laptop ahead of 2020 Election, Whistleblower Says](#),” *Yahoo!News* (Aug. 25, 2022). Meanwhile, a nonprofit organization which actually studied the contents of the Hunter Biden laptop published a detailed analysis cataloging 459 crimes. *See* M. Devine, “[The 634-page report on Hunter Biden’s laptop — and 459 alleged crimes](#),” *New York Post* (Oct. 26, 2022).

Democrat public relations firm to pre-condition social media companies to expect such a story. “In the Industry meetings, the FBI raised concerns about the possibility of ‘hack and dump’ operations during the 2020 election cycle.” *Missouri* at *79. “The FBI pressured Twitter to suppress The Post’s blockbuster scoop about Hunter Biden’s laptop by warning it could be part of a Russian ‘hack and leak’ operation — even while knowing the concern was unfounded,” according to Twitter records released after Elon Musk bought the company.⁸ “FBI Special Agent Elvis Chan [reached out] to Twitter’s then-Head of Site Integrity, Yoel Roth, through Teleporter, a one-way communications channel from the FBI to Twitter.” *Id.* “Roth subsequently admitted in a sworn declaration that the feds had primed him to view any reporting on Hunter Biden’s laptop as a ‘Russian “hack and leak” operation.’” *Id.*

At best, the FBI likely performed the “dirtiest trick” ever played in American Presidential politics, and then sought to cover it up.⁹ It is difficult to

⁸ J. O’Neill, “[FBI pressured Twitter, sent trove of docs hours before Post broke Hunter laptop story](#),” *New York Post* (Dec. 19, 2022).

⁹ See S. Delouya, “[Elon Musk confirmed the firing of Twitter deputy general counsel James Baker for allegedly interfering in the publication of the Twitter files](#),” *Business Insider* (Dec. 6, 2022) (“In a tweet, Musk said Twitter’s deputy general counsel, James Baker, was dismissed from the company ‘in light of concerns about Baker’s possible role in suppression of information important

see how FBI actions did not constitute election interference under 18 U.S.C. § 595, which makes it a crime for a person employed in an agency of government to “use[] his official authority for the purpose of interfering with, or affecting” a Presidential election. This was no small matter — this disinformation campaign almost certainly defeated President Trump and elected Joe Biden. Subsequent polling revealed that “[n]early four of five Americans who’ve been following the Hunter Biden laptop scandal believe that ‘truthful’ coverage would have changed the outcome of the 2020 presidential election.”¹⁰

The FBI suppression strategy was enhanced when then-Biden campaign aide, Secretary of State Anthony Blinken, mobilized Intelligence Community officials by contacting former CIA deputy director Mike Morell, and asking for help to bury the story.¹¹ Morell agreed. He crafted a carefully worded letter stating that the *New York Post*’s information “has all the classic earmarks of a

to the public dialogue.’”).

¹⁰ B. Golding, “[79% say ‘truthful’ coverage of Hunter Biden’s laptop would have changed 2020 election](#),” *New York Post* (Aug. 26, 2022).

¹¹ E. Stauffer, “[Did the spies who covered for Hunter Biden’s laptop interfere in the 2020 election?](#)” *Washington Examiner* (Apr. 25, 2023).

Russian information operation.”¹² As the House Weaponization of Government subcommittee has now revealed, Morell **sent it to the CIA for review**, stating “[t]his is a rush job, as it need [sic] to get out as soon as possible,” hoping it would be released to the press before the second presidential debate on October 22, 2020.¹³ At his request, 51 former intelligence officials signed the letter.¹⁴ When Morell couldn’t get his selected reporters at the *Associated Press* or *Washington Post* to run with his concocted letter, he tried again, and finally *Politico* picked up the “story”:¹⁵

Morell told the committee he received a phone call from Steve Ricchetti, chairman of the Biden campaign, following the debate to thank him for writing the letter. Morell also admitted that “one of his two goals in releasing the statement was to help then-Vice

¹² N. Bertrand, “[Hunter Biden story is Russian disinfo, dozens of former intel officials say](#),” *Politico* (Oct. 19, 2020).

¹³ “[Interim Joint Staff Report](#): The Hunter Biden statement: How senior intelligence community officials and the Biden campaign worked to mislead American voters,” *House Weaponization Subcommittee* at 23 (May 10, 2023); *see also* House Judiciary Committee Press Release “[Testimony Reveals FBI Employees Who Warned Social Media Companies about Hack and Leak Operation Knew Hunter Biden Laptop Wasn’t Russian Disinformation](#)” (July 20, 2023).

¹⁴ *See* N. Bertrand, *supra*.

¹⁵ House Weaponization Subcommittee, [Interim Joint Staff Report](#) at 40, 42.

President Biden in the debate and to assist him in winning the election.”¹⁶

Twitter and Facebook quickly complied by suppressing the story.

Missouri at *83-84. The government’s brief attempts to simply shift responsibility for suppressing the story onto the Big Tech giants. However, the court below would have none of that, finding that the FBI likely:

mised social-media companies into believing the Hunter Biden laptop story was Russian disinformation, which resulted in suppression of the story a few weeks prior to the 2020 Presidential election. Thus, Plaintiffs are likely to succeed in their claims that the FBI exercised “significant encouragement” over social-media platforms such that the choices of the companies must be deemed to be that of the Government. [*Missouri* at *144.]

In January 2017, Senator Charles Schumer (D-NY) mocked then-President-Elect Trump for criticizing intelligence officials who had been falsely claiming that Russia was behind hacking designed to interfere with the 2016 election. Schumer explained: “Let me tell you: You take on the intelligence community — they have six ways from Sunday at getting back at you....”¹⁷ We now know that both Trump and Schumer were right. The Russians were not

¹⁶ See E. Stauffer, *supra*.

¹⁷ D. Chaitin, “[Schumer warns Trump: Intel officials ‘have six ways from Sunday at getting back at you’](#),” *Washington Examiner* (Jan. 3, 2017).

behind election interference,¹⁸ and the FBI got back at Trump by stopping his bid for re-election.

The district court did the American people a great favor with its careful, methodical presentation of the evidence supporting its injunction. The challenge brought here by Missouri, Louisiana, and five individual plaintiffs to blatant corruption within the FBI and Intelligence Community as well as other departments and agencies of government, likely will be the last opportunity for the American people to have any confidence that, unlike 2020, the next Presidential election will be decided by the People, without the Deep State tipping the scales for its preferred candidate.

IV. THE NATIONAL GOVERNMENT IS NOT A “TRUSTED SOURCE” OF INFORMATION, BUT RATHER A FREQUENT SOURCE OF DISINFORMATION AND MISINFORMATION.

Appellants paint a picture of the national government as being somehow empowered to serve the nation as a “trusted source,” working to ensure that the unwashed masses only receive accurate information about public policy issues, including public health, elections, and other important matters. *See generally* Aplt. Br. at 49. That representation cannot withstand scrutiny.

¹⁸ Z. Cohen, “[Special counsel John Durham concludes FBI never should have launched full Trump-Russia probe](#),” *CNNPolitics* (updated May 16, 2023).

In the COVID/health care context, the government below argued: “The Administration viewed social media as a powerful tool for promoting **accurate, authoritative** COVID-19 information, such as CDC guidance on vaccines.” Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction (Dkt. No. 22-cv-01213, Doc. 266 (“Opposition”)) at 23 (emphasis added). Appellants beatify Dr. Fauci: “[H]e worked tirelessly — maintaining 18-hour workdays — at the height of the pandemic. He has garnered numerous awards for leading the nation through an unprecedented public health crisis.” Opposition at 66.

In the elections context, “The ‘Election Security Rumor vs. Reality’ webpage was ‘designed to address common disinformation narratives by providing accurate information related to elections.’ [The Cybersecurity and Infrastructure Security Agency (“CISA”)] developed this website to provide **accurate information** about false election rumors spreading in the public domain.” Opposition at 79 (emphasis added).

But history proves the national government is anything but a disinterested entity acting to protect its citizens as *parens patriae*, or “parent of the nation.” In reality, the national government acts more as *pater patriae*, or “Father of the Fatherland,” a title given to Roman emperors who had dictatorial powers.

America's history is littered with examples of administrations and government actors creating knowingly false narratives to achieve their political and personal objectives or, even more basely, to cover up prior misdeeds by those same government officials.

In his descriptively titled book Why Leaders Lie, University of Chicago Professor John J. Mearsheimer chronicles some of the most infamous examples. President Lyndon Johnson concocted the false story of a “deliberate and unprovoked” attack on the Naval Destroyer USS Maddox by North Vietnam in an effort to entice America into fighting a war against North Vietnam.¹⁹ The Bush-Cheney administration falsely claimed there was “no doubt” that Saddam Hussein had weapons of mass destruction with “absolute certainty,” and that “we know where they are.” *Id.* at 51-52. As history has proved, he did not, and we did not. Thus, when Americans make the mistake to trust that the national government is telling the truth, it can lead to death and destruction. The practice

¹⁹ J. Mearsheimer, Why Leaders Lie: The Truth About Lying in International Politics at 48-49 (Oxford Univ. Press: 2011).

of lying by the national government has been so prevalent that it may soon be recognized as a separate branch of American Political Science scholarship.²⁰

Just a few further examples from both Republican and Democrat administrations should demonstrate that practice of lying by the national government is both ubiquitous and bi-partisan:

- Last century, President James Polk lied about the incident leading the United States to engage in war with Mexico.²¹
- In 1960, President Eisenhower tried to cover up U.S. spy plane flights over Russia by claiming that a downed U-2 spy plane flyer Francis Gary Powers was a civilian weather pilot who went missing. It became a propaganda disaster when Soviet leader Nikita Khrushchev produced the live pilot. Asked for his greatest regret as President, Eisenhower said, “The lie we told. I didn’t realize how high a price we were going to pay for that lie.”²²

²⁰ See generally Eric Alterman, When Presidents Lie: A History of Official Deception and Its Consequences (Viking Penguin: 2004); Helen Norton, The Government’s Speech and the Constitution (Cambridge University Press: 2019); Eric Alterman, Lying in State: Why Presidents Lie — And Why Trump Is Worse (Basic Books: 2020); The Washington Post Fact Checker Staff, Donald Trump and His Assault on Truth: The President’s Falsehoods, Misleading Claims, and Flat-Out Lies (Scribner Book Co.: 2020).

²¹ See P.W. Morgan, “The Undefined Crime of Lying to Congress: Ethics Reform and the Rule of Law,” 86 NW. U.L.REV. 177, 216-21 (1992).

²² G. Kessler, “[A Hierarchy of American Presidential Lies](#),” *Literary Hub* (June 10, 2020).

- President Richard Nixon famously claimed that “no one in the White House Staff, no one in this Administration ... was involved” in the Watergate break-in.²³
- President Bill Clinton claimed, “I wanna say one thing to the American people. I want you to listen to me. I’m gonna say this again. I did not have sexual relations with that woman, Miss Lewinsky. I never told anybody to lie, not a single time. Never. These allegations are false....”²⁴
- To sell his Affordable Care Act (Obamacare) to the people, on 37 occasions either President Barack Obama or a senior Obama aide claimed: “If you like your health care plan, you’ll be able to keep your health care plan.”²⁵

As Constitutional Law Professor Helen Norton noted in 2015,

“Government lies on certain topics or to certain audiences may be especially successful in manipulating listeners because they may be more likely to be believed and less amenable to rebuttal by counterspeech.”²⁶ In truth, the Biden Administration would seek to have no counterspeech at all. In light of history,

²³ R. Nixon, [The President’s News Conference](#), *The American Presidency Project* (Aug. 29, 1972).

²⁴ M. Yagoda, “Bill Clinton: The infamous moment US president denied affair with White House intern Monica Lewinsky,” *The Independent* (Dec. 19, 2018) (see also <https://www.youtube.com/watch?v=luLpdr4n8m4> at 1:09).

²⁵ “[Obama: ‘If you like your health care plan, you’ll be able to keep your health care plan’](#),” *Politifact* (undated).

²⁶ H. Norton, “[The Government’s Lies and the Constitution](#),” 91 *IND. L.J.* 73, 79 (Dec. 15, 2015).

the assumption that the national government is a reliable arbiter of truth has cost the lives and fortunes of countless Americans and non-Americans and led to worldwide injustice and tragedy.

V. THE BIDEN ADMINISTRATION CLAIMS TO BE STOPPING THREATS FROM FOREIGN MALIGN STATES, BUT ACTUALLY IS TARGETING THEIR DOMESTIC POLITICAL OPPONENTS.

The Government's Opening Brief seeks to give the impression that its primary mission is to protect Americans against foreign threats. *See* Aplt. Br. at 1 (“And **malign foreign states** or terrorist groups might seek to exacerbate panic, and undermine trust in the government, by spreading false information through social media.”) (emphasis added). *See also id.* at 6 (“For example, the FBI routinely shares with platforms intelligence regarding accounts that appear to be used by **foreign malign actors** to influence the American public or by terrorist organizations to recruit supporters.”) (emphasis added).

The district court studied the practices of the FBI²⁷ and CISA²⁸ and concluded: “no investigation was made to determine whether the censored information was foreign or produced by U.S. citizens.” *Missouri* at *146-48. The record further showed that what the FBI and others were targeting was domestic speech by U.S. citizens:

- “[T]he specific discussion of foreign-originating information is ultimately targeted at preventing domestic actors from engaging in this information.” *Id.* at *91.
- “The [Election Integrity Partnership] was not targeting foreign disinformation, but rather ‘domestic speakers.’” *Id.* at *107.
- “The Virality Project admits the speech it targets is primarily domestic, stating ‘Foreign ... actor’s reach appeared to be far less than that of domestic actors.’” *Id.* at *109.
- “The EIP publication, ‘The Long Fuse,’ states the EIP has a focus on election misinformation originating from ‘domestic’ sources across the United States.” *Id.* at *149.

²⁷ “‘Domestic disinformation’ was also flagged by the **FBI** for social-media platforms.... The FBI made **no attempt to distinguish** whether those reports of election disinformation were American or foreign.” *Id.* at *85 (emphasis added); *see also id.* at *141-42.

²⁸ “**CISA** forwards reports of information to social-media platforms **without determining** whether they originated from foreign or domestic sources.” *Id.* at *95 (emphasis added).

Shortly after taking office, President Biden directed his new national security team to conduct a review of government’s efforts to combat domestic terrorism and to develop a plan, which culminated with its June 15, 2021 issuance of a “National Strategy for Countering Domestic Terrorism.”²⁹

However, apparently because Biden’s political critics do not meet the statutory definition of “**domestic terrorism**,”³⁰ the Biden Administration coined a new sound-alike term — “**domestic violent extremism**” (“DVE”) with no statutory definition.³¹ However, the Department of Homeland Security has designated DVEs a “National Priority Area,” allowing additional resources to be

²⁹ See White House, [National Strategy for Countering Domestic Terrorism](#) (June 15, 2021).

³⁰ 18 U.S.C. § 2331(5). “domestic terrorism” means activities that
“(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
(B) appear to be intended—
(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
(C) occur primarily within the territorial jurisdiction of the United States....

³¹ See House Judiciary Committee Republican Staff Report, “[FBI Whistleblowers: What their disclosures indicate about the politicization of the FBI and Justice Department](#)” (Nov. 4, 2022).

used on this ambiguous “threat.”³² The Department of Justice budget request for 2022 asked for a remarkable \$100 million to address the previously unidentified threat of DVE.³³

The manufactured threat of DVE is a thin veneer used to cover the targeting of enemies of the incumbent regime, and the federal government’s efforts are showing results:

- Project Veritas revealed information from an FBI whistleblower involving the FBI’s “Domestic Terrorism Symbols Guide.” The document lists the Gadsden Flag and the term “2A” (for Second Amendment) as “extremist” symbols. It claims that “Militia Violent Extremists” “justify their existence with the Second Amendment, due to the mention of a ‘well regulated Militia,’ as well as the right to bear arms.” See Project Veritas, “[FBI Whistleblower LEAKS Bureau’s ‘Domestic Terrorism Symbols Guide’ on ‘Militia Violent Extremists’ Citing Ashli Babbitt as MVE Martyr](#)” (Aug. 2, 2022).
- Another whistleblower revealed that the FBI characterized a veteran-organized group called “American Contingency” as a “domestic violence extremist” group, continuing to do so even after concluding that the group “desires to assist Americans in preparing themselves for catastrophic events and not to overthrow the United States government.” See [letter from Rep. Jim Jordan to FBI Director Christopher Wray](#) (Sept. 14, 2022).

³² See White House, “[Fact Sheet: National Strategy for Countering Domestic Terrorism](#)” (June 15, 2021).

³³ DOJ, “[Attorney General Merrick B. Garland Remarks: Domestic Terrorism Policy Address](#)” (June 15, 2021).

When the FBI does not have a domestic threat, it knows how to create one:

- After indicting several people in a plot to kidnap Michigan Governor Gretchen Whitmer, it was revealed that it was primarily an operation created by the FBI, with undercover agents and other sources manipulating and persuading vulnerable individuals to participate in the fake kidnapping plot. *See House Judiciary Republican Staff Report at 14-16.*
- “Three men convicted in a post-9/11 terrorism sting have been ordered freed from prison by a judge who deemed their lengthy sentences ‘unduly harsh and unjust’ and decried the FBI’s role in radicalizing them in a plot to blow up New York synagogues and shoot down National Guard planes.” M. Sisak and J. Peltz, “[Judge Orders Release of 3 of ‘Newburgh Four’ and assails FBI’s role in a post-9/11 terror sting](#),” *ABC News* (July 27, 2023). U.S. District Judge Colleen McMahon ruled recently that the persons accused by the FBI of terrorism were “hapless, easily manipulated and penurious petty criminals,” but “the real lead conspirator was the United States.” *United States v. Williams*, 2023 U.S. Dist. LEXIS 129978, *4-5 (S.D.N.Y. 2023).

The political bias and agenda of the government was apparent as the court below concluded that “[t]he flagged content was almost entirely from political figures, political organizations, alleged partisan media outlets, and social-media all-stars associated with right-wing or conservative political views, demonstrating likely ‘viewpoint discrimination.’” *Missouri* at *152.

Now, the Biden Administration has fully weaponized the tools of the federal government to target political opponents, ranging from the parents of

children attending Loudoun County, Virginia schools to those he derisively calls “MAGA Republicans,” even naming the leading candidate for the Republican nomination for President as a domestic extremist.³⁴

The district court understood that the problem of government censorship doesn’t stop there. In the conclusion to the district court’s opinion was included this quotation from President Truman:

Once a government is committed to the principle of silencing the voice of opposition, it has only one place to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear. [*Missouri* at *208.]

VI. THE NATIONAL GOVERNMENT HAS A TRACK RECORD OF SUPPRESSING CRITICISM BY INDEPENDENT MEDIA.

During the early days of the Internet, the Clinton White House prepared a 331-page document analyzing the mechanism by which “right wing,” anti-Clinton stories originated and were circulated.³⁵ “With research provided by the

³⁴ See White House, “[Remarks by President Biden on the Continued Battle for the Soul of the Nation](#)” (Sept. 1, 2022) (“Donald Trump and the MAGA Republicans represent an extremism that threatens the very foundations of our republic.”).

³⁵ See J. Harris & P. Baker, “[White House Memo Asserts a Scandal Theory](#),” *Washington Post* (Jan. 10, 1997); see also H. Gold, “[The Clintons’ ‘conspiracy commerce’ memo](#),” *Politico* (Apr. 18, 2014).

Democratic National Committee, the White House Counsel's office produced the report...." *Id.* It traces numerous anti-Clinton stories including those involving: the circumstances concerning the 1993 death of White House deputy counsel Vince Foster, Gennifer Flowers' allegations of an affair with Bill Clinton, Paula Jones' claims of sexual harassment, activities at the Mena Airport, the Whitewater controversy, and many more. This 1995 report begins:

The Communication Stream of Conspiracy Commerce refers to the mode of communication employed by the **right wing** to convey their **fringe stories** into legitimate subjects of coverage by the mainstream media. This is how the stream works. First, right wing[ers] underwrite conservative **newsletters** and newspapers such as the Western Journalism Center, the American Spectator and the Pittsburgh Tribune Review. Next, the stories are reprinted on the **internet** where they are bounced all over the world. From the internet, the stories are bounced into the mainstream media.... **Congressional committees will** look into the story. After Congress looks into the story, the story now has ... legitimacy....

The **internet** ... allows an extraordinary amount of **unregulated data and information** to be located in one area and available to all. The **right wing** has seized up on the internet as a means of communicating its ideas to people. [["The Communication Stream of Conspiracy Commerce,"](#) *Clinton Library* (1997) at 1-3 (unnumbered) (emphasis added).]

Clinton White House Press Secretary Michael McCurry explained why this document was circulated to the mainstream media: "This is an effort ... to really help journalists understand that **they shouldn't be used** by those who are

really concocting their own conspiracies and their own theories and then peddling them elsewhere.”³⁶ In 1995, the reach of the Internet was limited, so the Clinton White House instructed the mainstream media not to report on negative stories. Today, the reach of the Internet is vast, so the Biden White House instructed social media not to report on negative stories. *See Ecclesiastes 1:9.*

VII. THE TREATMENT OF INDIVIDUAL JOURNALISTS, INCLUDING GONZALO LIRA, REVEALS THE GOVERNMENT’S WILLINGNESS TO PUNISH SPEECH WITH EGREGIOUS HUMAN RIGHTS ABUSES.

According to one study, in 1983, 90 percent of the American media was owned by 50 companies, but in 2011, that same 90 percent was controlled by just six companies: GE, News-Corp, Disney, Viacom, Time Warner, and CBS.³⁷ Social Media is even more concentrated, dominated by YouTube/Google, Twitter, and Facebook. Not content with being able to prevent its “narrative” on almost any issue from being challenged by these gargantuan entities, the national government has proceeded against individual journalists.

³⁶ T. Harris & P. Baker, *supra* (emphasis added).

³⁷ *See* A. Lutz, “[These 6 Corporations Control 90% Of The Media In America](#),” *Business Insider* (June 14, 2012).

The Biden Administration has followed the practice of the Obama-Biden Administration to use its range of governmental powers against U.S. journalists. In 2009, the national government seized emails and documents from former Fox News reporter James Rosen based on his reporting.³⁸ Beginning in 2011, the Justice Department sought to “push back” on reporting by journalist Sharyl Attkisson exposing the DOJ/ATF Fast and Furious scandal, including remotely accessing her computer and other electronic devices to discover her confidential sources.³⁹

Another move is now underway against Gonzalo Lira, a journalist and film maker, a dual citizen of Chile and the United States, who had traveled to Ukraine to report on the Russia-Ukrainian War.⁴⁰ His YouTube videos and Twitter posts often ran counter to the official narrative pushed by the U.S. and Ukraine governments.⁴¹ As a result, in late April 2023, he was arrested in Kharkiv,

³⁸ See R. Gallagher, “[Government Spying on Fox News Reporter Even Worse Than AP Case](#),” *Slate* (May 20, 2013).

³⁹ S. Attkisson, “[Attkisson v. DOJ and FBI for the Government Computer Intrusions: The Definitive Summary](#),” *Sharylattkisson.com* (Dec. 27, 2021).

⁴⁰ See M. Losonczy, “[American YouTuber Gonzalo Lira Attempts to Seek Asylum in Hungary After Prosecution in Ukraine](#),” *Hungarian Conservative* (Aug. 3, 2023).

⁴¹ See <https://twitter.com/GonzaloLira1968/status/1686140766685384704>.

Ukraine by the Ukrainian secret police, the Security Service of Ukraine (“SBU”), for the fabricated “crime” of producing Russian propaganda. He later reported having been denied legal counsel, beaten by inmates at the behest of guards, and extorted of funds while in prison. He was released on July 6, 2023, pending trial, after which he believed he would be sent to a work camp for 5 to 7 years, despite a serious heart condition.⁴² On July 31, 2023, to avoid a judicial death sentence, Lira tried to cross the border into Hungary to seek asylum, but apparently was arrested by the SBU and has not been heard from since.⁴³ No doubt, his release could be obtained with a phone call from Secretary Blinken, but the State Department recently disclaimed any knowledge of the event.⁴⁴ As former Congressman Ron Paul (R-TX) often explained: “It’s dangerous to be right when the government is wrong.”

CONCLUSION

The administrative stay should be lifted, and the district court’s injunction should be put back into effect. The practice of censorship by the national

⁴² See <https://www.youtube.com/watch?v=AW274f8s-ws>.

⁴³ See <https://twitter.com/MarkSleboda1/status/1686620016081342465>.

⁴⁴ See <https://www.youtube.com/watch?v=JahNvaKR17o>.

government must be brought to an end, before it destroys the very foundations of our constitutional republic.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of America's Future, *et al.* in Support of Plaintiffs-Appellees, was made, this 7th day of August, 2023, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

/s/ William J. Olson

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of America's Future, *et al.* in Support of Plaintiffs-Appellees complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,454 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as well as Circuit Rule 32.1, because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 21.0.0.184 in 14-point CG Times.

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Dated: August 7, 2023