No. 22-1199

IN THE
Supreme Court of the United States

ROGAN O'HANDLEY,
Petitioner,
v.
SHIRLEY WEBER, in her official capacity as California Secretary of State, & TWITTER INC., *Respondents*.

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

Brief *Amicus Curiae* of America's Future, Free Speech Coalition, Free Speech Def. and Ed. Fund, Gun Owners of America, Gun Owners Fdn., Gun Owners of Calif., Tenn. Firearms Assoc., Public Advocate of the U.S., U.S. Constitutional Rights Legal Def. Fund, and Conservative Legal Def. and Ed. Fund in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

America's Future, Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners of America, Gun Owners Foundation, Gun Owners of California, Tennessee Firearms Association, Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

In 2018, California established an "Office of Elections Cybersecurity" ("OEC") "[t]o monitor and counteract false or misleading information regarding the electoral process that is published online or on other platforms and that may suppress voter participation or cause confusion and disruption of the orderly and secure administration of elections." Cal.

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[1] It is hereby certified that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Elec. Code § 10.5(b)(2). The district court explained that: "The statute directed OEC to undertake three functions: (1) 'assess ... false or misleading information regarding the electoral process'; (2) 'mitigate the false or misleading information'; and (3) 'educate voters ... with valid information from election officials such as a county elections official or the Secretary of State.'" *O'Handley v. Padilla,* 579 F. Supp. 3d 1163, 1173 (N.D. Cal. 2022).

Petitioner Rogan O'Handley is an attorney licensed in California, who is also a paid political commentator. *Id.* at 1171. A week after the 2020 presidential election, O'Handley tweeted: "Audit every California ballot / Election fraud is rampant nationwide and we all know California is one of the culprits / Do it to protect the integrity of that state's elections." Soon thereafter, "'a Secretary of State agent or staff member'" emailed Twitter to shut down Petitioner's tweet:

> "Hi, We wanted to flag this Twitter post [link] From user @DC_Draino. In this post user claims California of being a culprit of voter fraud, and ignores the fact that we do audit votes. This is a blatant disregard to how our voting process works and creates disinformation and distrust among the general public." [*Id.* at 1175.]

In the days leading up to the January 2021 inauguration of President Joe Biden, Petitioner continued to send tweets questioning the accuracy of

the 2020 election. After four more such tweets, Twitter suspended Petitioner's account. *Id.* at 1176.

In 2021, Petitioner filed suit against Attorney General Alex Padilla, Twitter, and other defendants in the Northern District of California, alleging that the OEC had conspired with Twitter to censor and suppress his speech as "misinformation." He argued that the government's pressure causing Twitter to shut down his disfavored speech violated the First Amendment. The district court dismissed Petitioner's case with prejudice. It found that Petitioner lacked standing to sue Twitter, as the link between the OEC's request and Twitter's later decision to suspend Petitioner's account was too "tenuous." *Id.* at 1190.

The Ninth Circuit disagreed with the district court, finding that Petitioner had standing. *O'Handley v. Weber*, 62 F.4th 1145, 1161-1162 (9th Cir. 2023) ("*O'Handley*"). However, the Ninth Circuit found that the California government was "not responsible for any of Twitter's content-moderation decisions with respect to O'Handley." *Id.* at 1162. Accordingly, the Ninth Circuit upheld the district court's dismissal with prejudice.

SUMMARY OF ARGUMENT

California law vests in the Secretary of State and the Attorney General vast powers over not just how elections are conducted, but also creates numerous crimes that can be violated by those who may meddle in elections. The 2018 law creating the California Office of Election Cybersecurity was enacted to restrict

what Californians are permitted to say "regarding the electoral process" on social media, but, interestingly, do not apply to magazines, books, radio or television.

Using these powers, California pressured Twitter to censor and deplatform Petitioner for five tweets challenging the integrity of recent elections. California claims to be acting based on the highest motives to preserve faith in elections by protecting the public from hearing false and misleading information. The reality is that government officials censor to protect their power over the People — not to protect the People. In fact, the People would have greater faith in elections if California did not censor criticism about how those elections are being conducted. Censorship is counterproductive, since the act of censorship, once exposed, inspires distrust.

California assumes to itself the power to distinguish between truth and falsity, and to allow truth while censoring falsity — employing a power which Justice Kennedy has explained that no government may have. California even claims a censorial power over "misleading" information. It seems that California has forgotten what Madison instructed: "the censorial power is in the People over the government, not in the government over the People." 1 Annals of Cong. 434 (1789).

California defends its secret communications to its "partner" Twitter, using Twitter's "Partner Support Portal," urging Petitioner be censored, as a legitimate exercise of Government Speech. It is not. The Ninth Circuit went so far as to source the Government

Speech Doctrine in the First Amendment, which this Court has never done. The Ninth Circuit conflates rights with powers, and reaches the absurd conclusion that this narrow doctrine should be expanded to protect government's private communications to pressure social media companies to censor individual speech.

California denies that it did anything to pressure or coerce Twitter to censor Petitioner. The Ninth Circuit analyzed only one California election-related law before concluding that California had no power over Twitter, while ignoring the myriad other criminal and other laws which California could have employed if Twitter had disregarded California's "request." The iron fist in California's velvet glove has been revealed to a greater extent by a subsequent threatening letter from the California Attorney General to social media companies, and a law that will go into effect next year requiring reporting of what these companies are doing to censor wrong speech. The Ninth Circuit chose not to recognize the power that the California government has over business.

ARGUMENT

I. CALIFORNIA HAS NO AUTHORITY TO CENSOR "FALSE OR MISLEADING" SPEECH.

A 2018 California statute — the enactment of which began a series of events which led to the deplatforming of Petitioner on Twitter in 2021 — created an "Office of Elections Cybersecurity" with the

following stated task: "[t]o monitor and counteract false or misleading information regarding the electoral process that is published online or on other platforms and that may suppress voter participation or cause confusion and disruption of the orderly and secure administration of elections...." Cal. Elec. Code § 10.5(b)(2) (emphasis added). Broken down, this statute empowers the OEC to:

- "monitor" and
- "counteract"

two types of information "regarding the electoral process":

- "false ... information" or
- "misleading information"

which could have either of two effects:

- "may suppress voter participation" or which
- "may ... cause confusion and disruption of the orderly and secure administration of elections."

All of these provisions raise questions. First, one would have thought that the Office of the Secretary of State, with the authority to supervise elections, would have had the inherent authority to "**monitor**" what was being said about elections and make public pronouncements to correct errors. For example, if a political candidate seeking to suppress the vote in a given area advised voters that the polling places had moved, this statutory authority would not be required for the Secretary of State to **publicly** "**counteract**" that misinformation with the correct information. However, it does not appear that is what the legislature had in mind. The only plausible understanding of why this statute was enacted was to authorize, staff, and fund an office to **privately**

"**counteract**" whatever may be deemed to be misinformation by pressuring social media to censor misinformation.[2] This appears to be the position advanced in this litigation by California (*O'Handley* at 1154) and accepted by the Ninth Circuit (*id*. at 1163-64). Thus, from its enactment, this statute was on a collision course with the First Amendment — but only if the censored parties learned of California's secret communications urging Twitter to censor.

Before doing any "counteracting," the Secretary of State must first determine that speech is "false" or "misleading." However, such determinations are not a historic function of government. To be sure, the government has authority over fraud — but that is a very different matter.[3] There is no historic authority

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[2] The Attorney General's subsequent letter of November 3, 2022, made explicit threats of criminal prosecution to social media companies: "California codifies protections of its citizens' constitutional right to vote. Our state laws prohibit interference with voting rights through violence, threats, intimidation, and other coercive conduct.... Indeed, it is a **felony** to threaten to use any force, violence, or tactic of coercion or intimidation to compel any other person to vote or refrain from voting, vote for a particular person or measure, or because any person voted or refrained from voting. (Elec. Code, § 18540). California also prohibits knowingly distributing intentionally misleading information about the time, place, or manner of voting, and about voter eligibility (*see*, *e.g.*, Elec. Code, §§ 18302, 18543).... **The California Department of Justice will not hesitate to enforce these laws against any individual or group that violates them**." Rob Bonta Letter to Social Media Companies (Nov. 3, 2022) at 4 (emphasis added).

[3] The definition of "fraud" in Illinois is typical in requiring several elements be present — not just a false statement: "to prove a

for government to either criminalize or censor "false" statements.

This Court went to great lengths in *United States v. Alvarez*, 567 U.S. 709 (2012), to make clear the limits of government power to criminalize false speech, but the principles would appear to apply with almost as much vigor here with respect to regulating and censoring false speech. In *Alvarez*, a plurality of the Court determined that Congress could not criminalize falsely claiming to have been awarded the Congressional Medal of Honor. The Court's analysis began: "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id*. at 716 (citations omitted). "[R]estrictions on speech have been permitted, as a general matter, only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'" *Id*. at 717 (citations omitted). Those categories are:

> advocacy intended, and likely, to incite imminent lawless action ... speech integral to criminal conduct ... so-called "fighting words" ... child pornography ... fraud ... and speech

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defendant liable for fraud, the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false; further, the complainant must demonstrate that the defendant made the representation with the intent to mislead the listener, and succeeded in doing so." *See Madigan v. Telemarketing Associates*, 538 U.S. 600, 620 (2003). (citations omitted).

> presenting some grave and imminent threat the government has the power to prevent.... [*Id*. at 717-718.]

The Court explained that: "[t]hese categories have a historical foundation in the Court's free speech tradition. The vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules." Then the Court noted:

> **Absent** from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for **false statements**. This comports with the common understanding that some **false statements** are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee. [*Id*. at 718 (emphasis added).]

Alvarez's "claim to hold the Congressional Medal of Honor was false. There is no room to argue about interpretation or shades of meaning." *Id*. at 715. Thus, the Court had no reason to address "misleading" information. However, if the government has no authority over "false" information, it certainly has no authority over "misleading" information, as the California law claims.

Just this week, the nation was treated to the first debate among most of the Republican candidates for President, which demonstrated that, depending on

one's perspective, some of the discussion could be considered "false," and much more "misleading." Allowing the airing of truth, false, and misleading comment is essential so the sovereign in America, the People,[4] can decide these matters for themselves. Private entities such as CNN "fact checked" the points made by the eight candidates,[5] but there is no role here for government. Would anyone really trust the politicians currently serving in office to have both the power to fact check social media and to censor what is false and misleading speech in elections? As Justice Alito explained in *Knox v. SEIU*, 567 U.S. 298 (2012):

> The First Amendment creates "an open marketplace" in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference.... **The government may not prohibit the dissemination of ideas that it disfavors**, nor compel the endorsement of ideas that it approves. [*Id.* at 309 (emphasis added) (citations omitted).]

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[4] 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.... 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).

[5] CNN staff, "Fact check: The first Republican presidential debate of the 2024 election," *CNN Politics* (Aug. 24, 2023).

Lastly, it is not at all clear why Petitioner's censored Tweet which challenged election integrity could possibly trigger either of the two outcomes which are to be avoided: "suppress voter participation" and "cause confusion and disruption of the orderly and secure administration of elections." If most people already are suspicious that elections are not being run fairly, how would censoring criticism cause them to have greater confidence and be more likely to vote.[6] If elections are being manipulated, then the current situation is that they are not being administered in an "orderly and secure" manner. If exposure of election problems is suppressed, those problems will continue. It appears this statute was designed to achieve a quite different result — to prevent public criticism of how incumbent office holders administer elections so they can continue to run elections as they prefer without fear of public criticism.[7]

These threshold issues were never addressed by the courts below. The entire mission of the Office of

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[6] The American People understand what Joseph Stalin was reported to have said: "It's not the people who vote that count, it's the people who count the votes."

[7] Criticism of the operations of government is not a threat to democracy, it is essential to preserve self-government: "This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' '[Speech] concerning public affairs is more than self-expression; it is the essence of self government.' There is a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citations omitted).

Election Cybersecurity is constitutionally flawed. The California law presumes that if criticism of elections is permitted, it will destroy the People's confidence in elections. The opposite is true. If the People are not permitted to publicly criticize the integrity of elections, they will have no confidence in elections.

II. THE NINTH CIRCUIT ERRONEOUSLY GROUNDED THE GOVERNMENT SPEECH DOCTRINE IN THE FIRST AMENDMENT TO NEGATE FREE SPEECH BY INDIVIDUAL AMERICANS.

California defends against Petitioner's First Amendment claim on the ground that Petitioner's Free Speech rights cannot be viewed in a vacuum, since California also enjoys a right to government speech protected by the First Amendment. California seems to take the position that government speech is superior to and can be used to censor private speech, at least in this context. Thus, California's Free Speech rights trump Petitioner's Free Speech rights. This is a completely bogus argument which the Ninth Circuit accepts as if this case were a classic application of the so-called "Government Speech Doctrine." It does not. Rather, it is a radical expansion of that doctrine that, if accepted, would swallow whole the concept of Free Speech rights of individuals. The Ninth Circuit explains its view:

> Flagging a post that potentially violates a private company's content-moderation policy ... is a form of **government speech** that we have refused to construe as "adverse action"

> because doing so would prevent **government officials** from exercising **their own First Amendment rights**.... California has a **strong interest** in expressing its views on the integrity of its electoral process. [*O'Handley* at 1163 (emphasis added).]

To be sure, under the Government Speech Doctrine, the government is free to take positions on controversial public policy issues. For example, this Court sanctioned Title X regulations advancing pro-life principles based on the government's choice to make grants to fund some types of speech while forbidding its grantees use of government funds to advance other speech. *See Rust v. Sullivan*, 500 U.S. 173 (1991). However, cases in that line do not ground the Government Speech Doctrine in the First Amendment.

Yet the Ninth Circuit asserts that government officials must be allowed to exercise "their own First Amendment rights." In a different context, the application of the First Amendment to government speech was rejected by this Court in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). There, the placement of a monument in a public park was said not to be subject to scrutiny under the Free Speech Clause. Just as the government's speech cannot be challenged under the Free Speech Clause, it is not protected by that Clause.

Indeed, the Ninth Circuit's ruling that the First Amendment protects government speech is constitutionally indefensible, as it conflates powers and rights. Governments have **powers**, which are

always limited, but governments do not have what American revolutionaries fought and died to protect — individual "**rights**." Individual rights are protected by limitations on government powers. Justice Jackson famously explained that the purpose of the Bill of Rights was not to empower government, but rather to protect people from government, by putting certain matters beyond the reach of government:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them **beyond the reach of** majorities and **officials**.... One's right to life, liberty, and property, to **free speech**, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. [*W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (emphasis added).]

The government is free to advance what the Ninth Circuit describes as its "strong interest" in defending the integrity of elections, but it may not do so by causing individuals holding and advancing opposing views to be censored.

The remainder of the Ninth Circuit's analysis of the Government Speech Doctrine is also troublesome when it asserts:

> The fact that the State chose to counteract what it saw as misinformation about the 2020

> election by **sharing its views directly** with Twitter rather than by **speaking out in public** does not dilute its speech rights or transform permissible government speech into problematic adverse action. [*O'Handley* at 1163-64 (emphasis added).]

The general principle that the government may advance its views either privately or publicly is unremarkable. However, that generalization misses the point. California was not expressing its views about the excellent integrity of elections to Twitter. Rather, it was covertly conspiring to have a private party censor the opposing view — while implicitly threatening that private party if it failed to cooperate. And as this Court has noted, "'it is ... axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'" *Norwood v. Harrison*, 413 U.S. 455, 465 (1973).

The conspiratorial nature of California's role in the censorship of Petitioner by Twitter is revealed by the fact that the demand for Twitter to take down Petitioner was done in secret. It would be important to know all that California has done and still is doing to censor opposing voices in the nation's social media space, but the district court dismissed the case with prejudice, protecting California from any further embarrassing discovery. Even though the Ninth Circuit disagreed with the district court by concluding that Petitioner had standing, it did not return the case for further proceedings which would have permitted

discovery, but again dismissed Petitioner's claims with prejudice.

This Court has acknowledged that "the government-speech doctrine is ... a doctrine that is susceptible to dangerous misuse." *Matal v. Tam*, 582 U.S. 218, 235 (2017). Here, the doctrine is being misused to justify censoring of social media. And this case is not alone. *Missouri v. Biden,* now pending in the Fifth Circuit (Case No. 23-30445), also demonstrates the problem of government censorship of social media. There, the government is also contending that it has a right to "government speech," enabling it to communicate to Big Tech about messages it disfavors. *Missouri v. Biden,* 2023 U.S. Dist. LEXIS 114585, at *10 (W.D. La. 2023). However, there, the district court granted an injunction against the federal government defendants, noting that "[t]he closest factual case to the present situation is *O'Handley v. Weber*, 62 F.4th 1145 (9th Cir. 2023)." *Id.* at 119. In that case, it is the federal government pressuring social media companies to suppress disfavored speech. In this case, it is the State of California now expressly threatening social media companies to "do more to rid your platforms of the dangerous disinformation, misinformation, conspiracy theories, and threats that fuel political violence, spread fear and distrust, and ultimately chill our democratic process" and threatening that "[t]he California Department of Justice will not hesitate to enforce ... laws" imposing $15,000 per day penalties for failure to clear their "misinformation" enforcement policies with the state attorney general. Pet. Cert. at 4-5.

In *Missouri*, the federal government asserts: "the government can speak for itself, including to advocate and defend its own policies. When it does so, it is not barred by the Free Speech Clause from determining the content of what it says," the government now argues on appeal to the Fifth Circuit. *Missouri v. Biden*, Case No. 23-30445, Br. for Aplt. at 21 (Dkt. No. 60-1) (internal quotations omitted). In response, the plaintiff States correctly argued to the Fifth Circuit, the federal "[d]efendants distort state-action doctrine beyond recognition and utterly fail to refute the overwhelming evidence of coercion, significant encouragement, joint participation, and pervasive entwinement in platforms' content-moderation decisions." Br. for Plaintiffs-Appellees, *Missouri v. Biden*, Case No. 23-30445 (Dkt. No. 126-1), at 2.

An analysis performed by two University of Iowa law professors concluded in 2001 that:

> viewing government as a First Amendment right holder is not supported by, and is inconsistent with, the text of the First Amendment and the purposes underlying the text. Under the First Amendment, government is the outsider, the source of power and influence over the private speech marketplace whose actions the First Amendment was primarily intended to limit.[8]

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[8] R. Bezanson and W. Buss, "The Many Faces of Government Speech," 86 IOWA L. REV. 1377, 1508 (2001).

They correctly conclude: "there is no practical need or constitutional justification for treating government speech as speech protected by the First Amendment. Without any special First Amendment right the government possesses ample constitutional authority to act expressively."[9]

Without the need to claim First Amendment protection, what would motivate California to seek, and the Ninth Circuit to grant, such First Amendment protection to government speech? The answer appears to be that by claiming that its speech also has First Amendment protection, the government becomes able to override private, legitimate claims for violation of the First Amendment, such as that brought here by Petitioner. The Ninth Circuit's opinion on this point is freewheeling judicial policymaking, devoid of any foundation in the First Amendment's text, or the jurisprudence of this Court. Justice Alito explained, "the government-speech doctrine is not based on the view ... that governmental entities have First Amendment rights," and this Court has "neither accepted nor rejected" such a claim. *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1599 (2022) (Alito, J., concurring). This case presents a good vehicle for this Court to reject the recurring claim by government to First Amendment protection once and for all.

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[9] *Id*. at 1506.

III. THE NINTH CIRCUIT INCORRECTLY ASSUMED THAT TWITTER'S DEPLATFORMING INVOLVED NO STATE COERCION.

To bring his First Amendment challenge to Twitter's February 2021 deplatforming, Petitioner asserts that Twitter was functioning as a state actor working with the office of California Secretary of State Weber. California denies that assertion, taking the position that any injury Petitioner suffered was at the hands of Twitter, with no meaningful involvement of the State. To avoid application of the state action doctrine, California denies there was any coercion, and the Ninth Circuit accepted that view. *O'Handley* at 1160-61.

The Ninth Circuit explained that state action could be proven: "when government officials threaten adverse action to coerce a private party into performing a particular act." *O'Handley* at 1157. However, it concluded "[n]o equivalent threat by any government official is present in this case." *Id*. This conclusion demonstrates a remarkable lack of understanding of how business interacts with government in the real world.

The court below minimized the degree of coercion that was implicit in its demand that Petitioner be deplatformed using its special back-door access to the Twitter censors through the Partner Support Portal. Pet. Cert. at 5. The Ninth Circuit discussed only one state law at California's disposal (Cal. Elec. Code § 10.5, which created the Office of Elections

Cybersecurity), ignoring the myriad of California laws to which Twitter was also subject, which could have been used. (Those statutes were set out in an appendix to the November 3, 2022 letter from the Attorney General to Social Media Companies.[10]) In that way, the Ninth Circuit minimized the state's role as offering mere "suggestions" to Twitter. However, here is what California entered into its Partner Support Portal:

> Hi, We wanted to **flag** this Twitter post ... From user @DC_Draino. In this post user claims California of being a culprit of voter fraud, and ignores the fact that we do audit votes. This is a **blatant disregard** to how our voting process works and **creates disinformation and distrust** among the general public. [*O'Handley* at 1154 (emphasis added).]

It would be impossible to construe this language as anything but a clear government message to "take down" this post. But the Ninth Circuit thought Twitter was completely free to disregard this message

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[10] After the deplatforming occurred, and after the Attorney General's letter, California enacted a statute that will go into effect in 2024 which more fully reveals California's censorial plan over social media. This statute requires social media companies to report to the state attorney general the content of company "terms of service" regarding "[e]xtremism or radicalization ... [d]isinformation or misinformation," and "[h]ow the social media company would remove individual pieces of content, users, or groups that violate the terms of service...." Cal. Bus. & Prof. Code § 22677.

from the State of California: "Flagging a post that potentially violates a private company's content-moderation policy does not fit this mold" of compulsory actions. *Id*. at 1163. The Ninth Circuit found neither coercion nor retaliation because "the OEC's mandate gives it no enforcement power over Twitter." *O'Handley* at 1163. The impression that the court left is that California was powerless, with no authority to respond to a denial of its "request."

The court below ignored other laws enacted before the deplatforming such as a criminal law (effective in September 2020) making it a misdemeanor to tweet misinformation about voting by mail. *See* SB 739, criminal provisions codified at Cal. Elec. Code § 18302. The bill's sponsor, Senator Henry Stern, publicly described SB 739's effect as follows:

> "If you're putting out **tweets**, Facebook posts or using social and other types of media to intentionally mislead voters about their right and ability to vote by mail, that's now a crime, and it's my hope local **D.A.s and the state attorney general will go after violators the moment they see them**," Stern said. "In the midst of this worldwide pandemic, it is imperative that voters, especially those who are getting a vote-by-mail ballot for the first time, know their rights and are getting accurate, reliable information." ["New California Law Makes It a Misdemeanor to Spread Misinformation About Voting by Mail," *CBS News* (Sept. 21, 2020) (emphasis added.]

In that same article, then-Secretary of State Alex Padilla made similar threats: "The spread of misinformation and disinformation are enormous threats to our elections.... We need to discourage and **combat election disinformation** that could disenfranchise citizens. Our democracy depends on it." *Id.*

This November 3, 2022, letter from the Attorney General to Twitter and other social media companies expressly threatened that California would "not hesitate to enforce these laws." *See* Pet. Cert. at 18. "[T]hese laws" included "a string of other elections laws...." *Id.* Indeed, the AG's letter advised social media companies about other criminal statutes:

> **Our state laws prohibit interference with voting rights** through violence, threats, intimidation, and other coercive conduct (*see*, *e.g.*, Civ. Code, § 52.1(b); Elec. Code, §§ 18502, 18540). Indeed, **it is a felony** to threaten to use any force, violence, or tactic of coercion or intimidation to compel any other person to vote or refrain from voting, vote for a particular person or measure, or because any person voted or refrained from voting. (Elec. Code, § 18540). California also **prohibits knowingly distributing intentionally misleading information** about the time, place, or manner of voting, and about voter eligibility (*see*, *e.g.*, Elec. Code, §§ 18302, 18543). [AG Letter at 4 (emphasis added).]

The letter also had a seven-page addendum which listed a panoply — but "non-exclusive list" — of state statutes that the AG stated "should be dealt with immediately," and stated that the social media companies "have a duty to cooperate fully and expeditiously with law enforcement investigations" and "an obligation to cooperate with law enforcement in all circumstances."

- The California Political Cyberfraud Abatement Act. Cal. Elec. Code §§ 18320, *et seq*.
- Voter fraud or interference. Cal. Elec. Code §§ 18500, *et seq*.
- Corruption of voters. Cal. Elec. Code §§ 18520, *et seq*.
- Voter intimidation. Cal. Elec. Code §§ 18540, *et seq*.

Each of these criminal acts could conceivably take place online with social media posts on Twitter.

The Petition states that "these laws ... further confirm that the Office of Election Cybersecurity's misinformation reports to Twitter go beyond mere suggestions." Pet. Cert. at 19. It would be reasonable for Twitter to understand that the requests of the Secretary of State, backed up by the Attorney General's enforcement of dozens of laws that it enforces, are an implicit threat to prosecute the social media companies for violations of those laws if those platforms do not engage in censorship adequate to the California government's desires.

The court below clearly minimized the coercion alleged. When similar social media censorship by the national government was evaluated by a district court in *Missouri v. Biden*, that court issued an injunction against federal government actors for censorship through social media companies[11] by using the same "Partner Support Portal" with Twitter to expedite the flagging and take-down requests that they sent over. *See id*. at *131.

Although the Attorney General sent the letter after Petitioner was already deplatformed, the statutes cited were already in existence. Moreover, that letter is indicative of the state's coercive approach throughout, and it is reasonable to conclude that there were other threatening communications sent to Twitter around the time Petitioner's speech was censored. However, because his complaint was dismissed with prejudice by the district court, and again by the Ninth Circuit, Petitioner was never "able to conduct discovery and buttress his allegations...." Pet. Cert. at 18. In *Missouri v. Biden*, the district court allowed significant discovery, including depositions, and Missouri was able to uncover documents which confirmed coercion. The fact that California was successful in persuading the district court to deny discovery about coercion should not now be the basis for an assumption that such evidence does

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[11] The *Missouri* injunction is now on appeal in the Fifth Circuit. Some of these *amici* recently filed an *amicus curiae* brief in support of Missouri in the Fifth Circuit. *See* Brief *Amicus Curiae* of America's Future, *et al*. (Aug. 7, 2023), Fifth Circuit No. 23-30445.

not exist. Petitioner has shown enough to demonstrate meaningful coercion and sufficient state action.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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