No. 23-411

IN THE
Supreme Court of the United States

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

Petitioners,

v.

STATE OF MISSOURI, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF THE KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

The Knight First Amendment Institute at Columbia University ("Knight Institute" or "Institute") is a non-partisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. The Institute's aim is to promote a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government.

Amicus has a particular interest in this case because of the vital role social media platforms play as forums for public discourse. This case may have far-reaching implications for the platforms and their users, who have an interest in communicating and associating free from government coercion. It also implicates the public's interest in having and in hearing from a government empowered to attempt to shape public opinion through persuasion.

SUMMARY OF ARGUMENT

A large amount of the speech that is vital to our democracy now takes place on privately owned social media platforms. Millions of Americans use social media to debate public policy, organize social

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution to fund the prepration or submission of the brief. Sup. Ct. R. 37.6.

movements, hold political leaders accountable, and engage in other forms of protected expression. This case presents the question of when government efforts to pressure social media platforms to take down speech—often referred to as "jawboning"[2]—violate the First Amendment. The question is vitally important because, while the government must be able to contribute to public discourse, including by calling on speech intermediaries to be attentive to the public interest, the integrity of our democracy depends on public discourse being free from government coercion.

Yet the relevant First Amendment doctrine is in disarray. This Court has not addressed the constitutional framework that applies in jawboning cases since *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). And in the sixty years since the Court issued that opinion, the lower courts have not coalesced around a principled interpretation of it, with some courts even ignoring *Bantam Books* in favor of the state-action test from *Blum v. Yaretsky*, 457 U.S. 991 (1982).

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[2] *See* Derek E. Bambauer, *Against Jawboning*, 100 Minn. L. Rev. 51, 57 (2015) ("Legal scholarship borrowed the concept first to denote informal pressures by Presidents and agency heads on recalcitrant bureaucracies, and more recently to stand for suasion through informal contacts by regulators generally, including members of Congress."); Daphne Keller, *Six Things About Jawboning*, Knight First Amendment Inst. at Columbia Univ. (Oct. 10, 2023), https://perma.cc/U987-DKCA.

The Court should clarify the First Amendment limitations on jawboning. To that end, the Knight Institute submits this brief to make three points.

First, the Court should make clear that claims of unconstitutional jawboning should be evaluated under the coercion test from *Bantam Books*. In that case, the Court held that the First Amendment bars the government from coercing private speech intermediaries into suppressing speech it disfavors. At the same time, the Court implied that the First Amendment permits the government to attempt to persuade private actors into embracing its views. This approach—which draws the constitutional line between coercion and persuasion—is the correct way to analyze jawboning claims because it best accounts for the multiple First Amendment interests at stake. Specifically, it best accounts for (a) the interest of intermediaries and their users in communicating and associating free from government coercion; (b) the interest of the public in having and in hearing from a government empowered to attempt to shape public opinion through persuasion; and (c) the interest of the public in preventing the government from circumventing constitutional limits by acting informally or surreptitiously.

Second, this Court should clarify the factors relevant to determining whether government action in this context is coercive, and the constitutional interests underlying that inquiry. There is no sensible alternative to a totality-of-the-circumstances test for unconstitutional government jawboning. Whether any given governmental course of conduct was coercive necessarily depends on the

facts and the context. But the Court can—and should—guide the courts' application of the coercion test by explaining why the First Amendment requires us to distinguish persuasion from coercion. Specifically, the Court should direct lower courts to apply the test in light of the three First Amendment interests articulated above. Clarifying that these interests underlie the *Bantam Books* test would not resolve all uncertainty in the test's application, but it would result in a more principled application of that test.

Finally, the Court should resolve this case narrowly, without expecting jawboning doctrine to address all of the challenges created by the centralization of private power over public discourse. The major social media platforms' power to dictate what can be said and what will be heard online poses a serious threat to public discourse and, by extension, to our democracy. Jawboning doctrine can reduce the risk that the government will take advantage of this concentrated power by pressuring the platforms to suppress disfavored speech. But it would be a mistake for the Court to contort this doctrine to solve what is, in reality, a problem of excess concentration and lack of competition. As explained below, this problem should be addressed through legislative and judicial tools better suited to the task.

ARGUMENT

I. Claims of unconstitutional jawboning should be evaluated under the coercion test from *Bantam Books*.

This Court has only once addressed the claim that government officials violated the First Amendment by pressuring a speech intermediary into censoring speech the government disfavors. That case, *Bantam Books v. Sullivan*, has generally been understood to draw a distinction between government persuasion, which the First Amendment permits, and government coercion, which it proscribes. The *Bantam Books* test, understood in this way, is the correct one, because it best accounts for the First Amendment interests at stake in jawboning cases.

A. The coercion test best accounts for the First Amendment interests at stake.

In *Bantam Books*, this Court reviewed a challenge to the actions of a Rhode Island commission that was created to protect minors from obscene or offensive materials. 372 U.S. at 59–60. In pursuit of that goal, the commission sent notices to book distributors operating in the state, threatening them with prosecution for distributing material the commission deemed "objectionable." *Id.* at 61–64. It sent police officers to follow up on these notices. *Id.* at 63. And predictably, the distributors bent to the commission's will—they stopped filling new orders for the supposedly objectionable publications

identified by the commission, and they removed unsold copies of the publications from retailers' shelves. *Id.* at 63–64.

The Court held that this course of conduct violated the First Amendment because it amounted to a "system of informal censorship." *Id.* at 71. Although the commission employed only "informal sanctions," the Court observed, its means were coercive and "succeeded in its aim" of suppressing the offending publications. *Id.* at 67. The Court characterized the Commission's actions as effectively imposing a "prior restraint" on the speech of authors and publishers. *Id.* at 70–71.

Importantly, the Court in *Bantam Books* acknowledged that not all informal government communications with intermediaries about the speech they publish violate the First Amendment. The Court noted that government "consultation . . . genuinely undertaken with the purpose of aiding" an intermediary in determining how to comply with the law is permissible. *Id.* at 72. And it distinguished the facts in *Bantam Books* from those in *Standard Computing Scale Co. v. Farrell*, 249 U.S. 571 (1919), in which the Court held that a government "bulletin of specifications" did not constitute state action because it was "purely advisory" and "not coercive in purport." *Bantam Books*, 372 U.S. at 69 n.9. What made the actions of the commission in *Bantam Books* unconstitutional was the fact that they went "far beyond advising the distributors of their legal rights and liabilities" and tacitly threatened prosecution unless the distributors pulled specific books and magazines from circulation. *Id.* at 72.

Bantam Books has generally been understood to draw a distinction between government persuasion, which the First Amendment permits, and government coercion, which it proscribes. *See O'Handley v. Weber*, 62 F.4th 1145, 1163 (9th Cir. 2023) ("*Bantam Books* and its progeny draw a line between coercion and persuasion: The former is unconstitutional intimidation while the latter is permissible government speech." (citing *Am. Fam. Ass'n, Inc. v. City & County of San Francisco*, 277 F.3d 1114, 1125 (9th Cir. 2002)); *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) ("What matters is the distinction between attempts to convince and attempts to coerce."); *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230–31 (7th Cir. 2015) (same); *Kennedy v. Warren*, 66 F.4th 1199, 1204 (9th Cir. 2023) (analyzing whether U.S. senator's conduct "crossed a constitutional line dividing persuasion from intimidation").

This test is fundamentally correct because it best accounts for the three principal First Amendment interests implicated in jawboning cases.

First, jawboning cases implicate the right of speech intermediaries to independent editorial judgment in creating expressive communities, and the right of users to participate in these communities free from undue government pressure. Social media platforms now play a central role in the marketplace of ideas by hosting and curating the speech of hundreds of millions of individuals, who use the platforms to debate public policy, organize social movements, hold political leaders

accountable, and engage in other forms of protected expression.

The expressive communities that these platforms create reflect the platforms' own expressive decisions and the expressive and associational preferences of their users. Some platforms permit hate speech; others do not.[3] Some permit nudity; others do not.[4] Some cater to members of specific faiths; others cater to members of specific professional disciplines.[5] And on and on and on. The platforms make these decisions based in part on the anticipated preferences of their users, and users decide which platforms to spend time on based in part on the community and culture that each platform's editorial decisions cultivate.

As a general matter, the platforms and their users have a right to create and participate in these

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[3] *Compare Community Guidelines*, BitChute, https://perma.cc/DD6J-BUY3 (banning only hate speech that constitutes "incitement to hatred" in countries where it is unlawful), *with Hate Speech Policy*, YouTube Help, https://perma.cc/X4DG-7MT9 ("Hate speech is not allowed on YouTube.").

[4] *Compare Community Guidelines*, Tumblr, https://perma.cc/MPV8-84VK ("Nudity and other kinds of adult material are generally welcome."), *with Community Guidelines*, Instagram, https://perma.cc/6YV2-SVDM ("[W]e don't allow nudity on Instagram.").

[5] *Compare About ChristianMingle.com*, Christian Mingle, https://perma.cc/3B7T-E8LQ (an online dating network that "caters exclusively to Christian singles"), *with Sermo*, Sermo, https://perma.cc/RM5K-2HAX (a social network for physicians).

expressive and associational communities free from undue government interference. Outside of very narrow exceptions, it would be inconsistent with our conception of self-government to allow officials to dictate what speech individuals may create and consume in public discourse. We would not permit the government to decide what books may be sold, what civic communities may gather, and what rules private actors may set for their own communities in our analog speech environment. The same must be true in the digital equivalents of those communities.

Second, jawboning cases implicate the public's interest in having and in hearing from a government empowered to attempt to shape public opinion through persuasion.

The public has a constitutional interest in being able to elect a government that can govern, and an indispensable tool in governing is attempting to galvanize public opinion. As this Court has recognized, governing "necessarily [involves] tak[ing] a particular viewpoint and reject[ing] others." *Matal v. Tam*, 582 U.S. 218, 234 (2017). For this reason, the Court has repeatedly recognized that imposing a requirement of viewpoint neutrality on government speech "would be paralyzing"; indeed, it is difficult "to imagine how government could function" if it could not express its views, sometimes forcefully. *Id.*; *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207–08 (2015) (questioning how a state government could develop effective programs to encourage vaccinations if it also had to voice the

opposing perspective); *Matal*, 582 U.S. at 234–35 (noting that "the First Amendment did not demand that the government balance the message" of posters promoting the war effort during World War II with posters "encouraging Americans to refrain from . . . these activities").[6]

Members of the public also have a First Amendment interest in hearing what their government has to say. The public cannot engage with its government's views unless the government can express those views. This is true with respect to the government's positions on all matters of public policy, including very pertinently here the government's approach to online discourse and its potential regulation. Questions about these new forums and the role of regulation in governing them have become paramount. And it is crucial that the public understand the government's views—so that the public may weigh in, whether through its voice in public debate or its votes at the ballot box.

Government speech can also inform the independent editorial decisions of private actors. The government often has expertise that members of the public do not—for example, expertise in public health, national security, or the proliferation online of child sexual abuse material. Many individuals,

[6] Of course, to say that a democratically elected government must be allowed to attempt to shape public opinion is not to say that the government will always use that power wisely. *See, e.g.*, *'Group Think' Led to Iraq WMD Assessment*, Fox News (July 11, 2004), https://perma.cc/4WVK-KFZJ; Zeynep Tufekci, *Why Telling People They Don't Need Masks Backfired*, N.Y. Times (Mar. 17, 2020), https://perma.cc/7SS7-HA9M.

news organizations, or platforms understandably want to benefit from that expertise in making their own expressive decisions. In the years after 9/11, news organizations sometimes consulted the federal government in deciding whether to publish classified information that had been leaked to them—not to delegate the decision to the government, but to help inform their own decision-making.[7] More recently, some platforms have relied on the public-health expertise of the nation's public-health agencies in enforcing their own content-moderation policies, and on local and state election agencies in verifying the location of polling places and other information related to elections.[8]

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[7] *See, e.g.*, James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times (Dec. 16, 2005), https://perma.cc/K7GJ-ASC7 ("After meeting with senior administration officials to hear their concerns, the newspaper delayed publication for a year to conduct additional reporting. Some information that administration officials argued could be useful to terrorists has been omitted.").

[8] *See, e.g.*, *Harmful False or Deceptive Information*, Snapchat (Aug. 2023), https://perma.cc/W67P-XLAX (describing content promoting unsubstantiated medical claims as particularly likely to violate Snapchat's ban on false information and emphasizing that "while . . . medicine is ever-changing, and public health agencies may often revise guidance, such credible organizations are subject to standards and accountability and [Snapchat] may look to them to provide a benchmark for responsible health . . . guidance"); Tara Suter, *YouTube Announces New Policies to Target Medical Misinformation*, The Hill (Aug. 15, 2023), https://perma.cc/KR3J-JC5U (describing a 2023 YouTube policy of taking down content that contradicts the guidance of local health authorities or of the World Health Organization, including specific policies for content promoting cancer

Finally, jawboning cases implicate the interest in preventing the government from evading democratic accountability in the form of judicial oversight, counter-speech, and electoral change.

As Professor Genevieve Lakier has argued, the distinctive harm of jawboning that this Court recognized in *Bantam Books* is "the harm of constitutional evasion"—that is, the risk that the government will implement "a system of speech regulation outside the reach of the courts and, consequently, the First Amendment."[9] This risk of constitutional evasion, the Court said in *Bantam Books*, was the "the vice of the system." 372 U.S. at 69. The Rhode Island commission's threatening notices operated as a "form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary." *Id.* In bypassing the normal process for the exercise of the state's coercive power, Rhode Island had effectively "eliminated the safeguards" that typically constrain state power. *Id.* at 69–70. This informal "form of regulation," the Court concluded, "creates hazards to protected

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treatments proven to be harmful or ineffective); *Civic Integrity*, X, https://perma.cc/AC79-GH4Z ("We work alongside political parties, researchers, experts, and election commissions and regulators around the world. We also stay in touch with national parties and state and local election officials to be sure they know how to report suspicious activity, abuse, and rule violations to us. Key election stakeholders also have channels to directly escalate any issues or concerns to us.").

[9] Genevieve Lakier, *Jawboning as a Problem of Constitutional Evasion*, Knight First Amendment Inst. at Columbia Univ. (Oct. 13, 2023), https://perma.cc/85TG-EPWM.

freedoms markedly greater than those that attend reliance upon" the enactment of positive law. *Id.* at 70.

The risk of evasion extends beyond judicial accountability, to political and electoral accountability. When the government exercises coercive power informally and surreptitiously, it circumvents the safeguards against abuse that political and electoral contestation ordinarily provide.

* * *

Any test for determining whether the government has violated the First Amendment through its communications with a social media platform must account for at least these three constitutional interests. The Knight Institute respectfully submits that the coercion test from *Bantam Books* best does so, because it recognizes the interest of intermediaries and their users in communicating free from government coercion; the interest of the public in having and hearing from a government empowered to persuade; and the interest of the public in preventing the government from avoiding democratic accountability for its decisions.

B. The *Blum* test for state action is inapposite in typical jawboning cases.

Some courts, including the Fifth Circuit in this case, have analyzed jawboning claims under *Blum v.*

Yaretsky instead of *Bantam Books*. But *Blum* was about whether private action could be attributed to the state, whereas *Bantam Books* was about whether action concededly taken by the state violated the First Amendment. While there is some conceptual overlap between the two frameworks, *Bantam Books* supplies the appropriate test here and in most jawboning cases.

Blum was a case about the state-action doctrine—not the First Amendment. The test from *Blum* asks whether the government "has exercised coercive power or has provided such significant encouragement, either overt or covert, *that the choice in law must be deemed to be that of the state*." 457 U.S. at 1004 (emphasis added). This test, as with all tests of state action, is a stringent one, because one consequence of a finding of state action is that otherwise private actors may be held accountable to constitutional standards. In *Blum*, for instance, the question was whether private nursing homes were obligated, by virtue of their relationship with the government, to comply with the Constitution's requirement of due process before discharging patients.[10] *Id.*; *see also Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) (applying the state-action doctrine to determine whether a private company could be sued for violating the First Amendment); *West v. Atkins*, 487 U.S. 42, 43–44 (1988) (holding that a private

[10] Although the defendants in *Blum* were state officials, the injunction issued by the lower court also ran against the private nursing homes. *See Yaretsky v. Blum*, 629 F.2d 817, 819 (2d Cir. 1980), *rev'd*, 457 U.S. 991 (1982).

physician could be sued as a state actor because he provided treatment under color of state law).

Bantam Books, in contrast, appropriately recognizes that the First Amendment forbids the government from coercing private speech intermediaries even if "the choice in law" is not necessarily "deemed to be that of the state." This is as it should be, because the First Amendment interests at stake in jawboning cases are implicated by government coercion that falls short of that demanding line. Properly applied, for example, the coercion test from *Bantam Books* should encompass not just coercion that takes the form of a threat, but coercion that takes the form of an inducement. *Cf. O'Handley*, 62 F.4th at 1158 (observing that "positive incentives can overwhelm the private party and essentially compel the party to act in a certain way"); Genevieve Lakier, *Jawboning as a Problem of Constitutional Evasion*, Knight First Amendment Inst. at Columbia Univ. (Oct. 13, 2023), https://perma.cc/85TG-EPWM (arguing that "jawboning can violate the First Amendment not only when it threatens its target with legal harm . . . but also when it incentivizes them to act in a particular way").

Notwithstanding the rigidity of *Blum*'s test for state action, some courts have applied it exceedingly loosely in jawboning cases, resulting in a mishmash of confusing and, at times, contradictory tests.[11] The

[11] *See generally* Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 BYU L. Rev. 575 (2016).

Fifth Circuit in this case, for example, held that *Blum*'s test for state action was satisfied by the government's mere entanglement with a private party's editorial decision-making. *Missouri v. Biden*, 83 F.4th 350, 375, 377, 380, 387, 390 (5th Cir. 2023), *cert. granted sub nom. Murthy v. Missouri*, No. 23-411, 2023 WL 6935337 (Oct. 20, 2023). The Ninth Circuit, in contrast, recently interpreted the "significant encouragement" element of the *Blum* test as requiring a showing that "the State's use of positive incentives" had "overwhelm[ed] the private party and essentially compel[led] the party to act in a certain way." *O'Handley*, 62 F.4th at 1158. This doctrinal disarray is unsurprising given that the test for state action and the test for unconstitutional jawboning answer different questions for different purposes.

Relying on *Blum* in jawboning cases also risks undermining First Amendment rights in another way. As noted above, one consequence of a finding of state action is that private actors may be held liable as state actors. But this consequence poses a First Amendment problem of its own. Private actors deemed to be state actors could, in theory, be subject to damages liability or even an injunction. It would be anomalous, if not constitutionally troubling, however, to award damages against a platform for having been coerced by the government into suppressing the speech of its users. And it would be especially anomalous for a court to issue an injunction requiring a platform to republish user speech it would prefer not to republish. The mere risk of either form of liability might discourage platforms from voluntarily communicating with the

government in order to inform their own decisions about how to moderate user content. Either result would implicate the platforms' curatorial decisions and raise challenging constitutional questions about the interplay between the state-action doctrine and the First Amendment.

For all of these reasons, the better test in typical jawboning cases is the one this Court articulated in *Bantam Books*. To be sure, there might be jawboning cases that satisfy not just the coercion test from *Bantam Books* but also the state-action test from *Blum*. And it might be appropriate in some narrow subset of those cases to consider potential remedies against the private speech intermediary deemed to be a state actor. But the Court need not address that limited possibility in this case, which challenges conduct of the federal government.

II. The Court should clarify the factors relevant to the coercion test, and the constitutional interests underlying it.

There are two difficulties in applying the coercion test from *Bantam Books* that this Court should address in this case. First, coercion and persuasion exist along a spectrum. Second, many of the factors that lower courts have looked to in distinguishing between the two can cut either way depending on the context. The Court can address both of these difficulties by clarifying that courts must take into account the totality of the circumstances in deciding whether government conduct was coercive, and by explicitly directing courts to analyze the factors

relevant to coercion in light of the three primary constitutional interests at stake.

A. The coercion test must take into account the totality of the circumstances.

The coercion test must take into account the totality of the circumstances because the question of whether government conduct is coercive will depend on the specific facts and context of each individual case. The Court should say as much, to resolve any lingering doubt in the lower courts on this question.

The two circuits that have recognized the necessary comprehensiveness of the coercion inquiry are the Second and Ninth Circuits. Both have adopted a "non-exclusive four-factor framework," *Kennedy*, 66 F.4th at 1207, for distinguishing between coercion and persuasion.

The first factor considers word choice and tone, recognizing that, while the government may express its views forcefully, it generally may not issue threats and commands. *Kennedy*, 66 F.4th at 1207–08. The second factor "focuses on how the recipient understood the communication," *Id.* at 1210, recognizing that a subjective perception of coercion can be evidence of objectively coercive conduct. *See, e.g.*, *Backpage*, 807 F.3d at 233 (pointing to the subjective perception of coercion). The third factor looks to the presence or absence of regulatory authority, in recognition of the fact that government pressure is more likely to be coercive when it comes from an official in a position to retaliate through the

exercise of official responsibility. *See Kennedy*, 66 F.4th at 1210. Finally, the fourth factor considers whether the government referred—explicitly or implicitly—to adverse consequences for noncompliance, suggesting an attempt to coerce rather than persuade. *See id.* at 1211 ("Senator Warren's silence on adverse consequences supports the view that she sought to pressure Amazon by calling attention to an important issue and mobilizing public sentiment, not by leveling threats."); *Backpage*, 807 F.3d at 234.

It is appropriate for courts to consider these factors, but the Court should make clear that other factors might be relevant, too. Those factors might include: whether the government communicated privately or publicly, whether the speech intermediary was especially susceptible or resistant to coercion,[12] whether the government communication included affirmative disclaimers,[13] whether the communications involved factual statements without coercive force that are useful to platform decision-making, whether the government actors made threats that were related or unrelated to a removal request, whether the communications led platforms to act contrary to their own policies,[14]

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[12] Genevieve Lakier, *Informal Government Coercion and The Problem of "Jawboning,"* Lawfare (July 26, 2021), https://perma.cc/N7ER-ATJJ.

[13] David Greene, *In Jawboning Cases, There's No Getting Away from Contextual Analysis*, Knight First Amendment Inst. at Columbia Univ. (Nov. 7, 2023), https://perma.cc/RT2J-QMJ7.

[14] Keller, *supra* note 2.

and whether the speech intermediary frequently complied with the government's requests.[15] In this context, there is no escaping an inquiry that considers the totality of the circumstances.

B. The Court should articulate the constitutional interests underlying the coercion test, so that lower courts can apply the test in a more principled and consistent manner.

Even if the Court could articulate all of the factors relevant to the coercion test, the test would still be difficult to apply, because, as noted above, coercion and persuasion exist along a spectrum, and some of the factors relevant to the distinction might cut in both directions. The best way to address this challenge is to direct lower courts to apply the test in the service of the three constitutional interests at stake in jawboning cases. Doing so would result in more principled and consistent decision-making by the lower courts.

As discussed at length above, *see* Part I.A, the three constitutional interests implicated in jawboning cases are: (a) the interest of intermediaries and their users in communicating and associating free from government coercion; (b) the interest of the public in having and in hearing

[15] Enrique Armijo, *The Unambiguous First Amendment Law of Government Jawboning*, Knight First Amendment Inst. at Columbia Univ. (Oct. 4, 2023), https://perma.cc/7CTR-XYLU.

from a government empowered to attempt to shape public opinion through persuasion; and (c) the interest of the public in preventing the government from circumventing constitutional limits by acting informally or surreptitiously.

Keeping these constitutional interests in mind would help ground the application of the coercion test and allow for a more principled application of the relevant factors.

For example, one of the questions in this case is whether President Biden's public claim that the social media companies were "killing people" (because of their alleged failure to combat vaccine hesitancy on their platforms) was coercive.[16] The factors listed above do not answer this question on their own. On the one hand, the word choice was provocative, the platforms likely felt pressure to act as a result of the statement, and President Biden had broad authority to direct his administration to retaliate for noncompliance if he so decided. On the other hand, the statement did not threaten any adverse consequences, it did not refer to any specific posts to suppress, and it could easily have been understood as an effort to persuade the public of the moral culpability of the platforms rather than to strong-arm the platforms into taking any specific action. Based on the factors alone, it's not entirely clear whether the statement was coercive.

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[16] J.A. 460; *Missouri v. Biden*, 83 F.4th at 363, 383, 385 (discussing the "killing people" comment).

Analyzing the factors in light of the constitutional interests at stake would be more fruitful. President Biden's statement was public, thereby implicating the public's right to hear the views of its government and also largely mitigating the concern that government officials might evade constitutional accountability by acting informally or surreptitiously. The statement was also a moral condemnation that contributed to public discourse around the responsibility of the platforms for the speech they host and amplify. And relatedly, while the platforms likely felt pressured by the statement, that pressure was directed at influencing the platforms' independent editorial judgment rather than overcoming it through threats of retaliation. Analyzed in light of the constitutional interests at stake, President Biden's statement was very likely constitutional.

Another question in this case is whether the CDC's communications with the platforms—about whether certain claims concerning COVID-19 were true, false, or misleading—violated the First Amendment.[17] Here, the factors listed above suggest

[17] *Missouri v. Biden*, 83 F.4th at 389–90 (discussing the CDC's issuance of advisories on misinformation, advice on whether health-related claims were true, false, or misleading, and platforms' decisions to rely on CDC fact-checking); *see, e.g.*, Crawford Dep. at 106:9–107:3, 153:23–154:9, 155:12–20, 157:11–160:11, 161:13–162:1, *Missouri v. Biden*, 3:22-cv-01213 (W.D. La. Mar. 3, 2023) (ECF No. 205-1); Crawford Dep. Ex. 15 at 2–4, *Missouri v. Biden*, 3:22-cv-01213 (W.D. La. Mar. 3, 2023) (ECF No. 205-16) (an email chain between Facebook and CDC employees where Facebook employees described their internal thinking about their COVID misinformation policies and relative harms of different types of misinformation, and

that the communications were constitutional. The CDC's word choice and tone were not threatening or demanding, and it is doubtful that the platforms perceived their interactions with the agency as coercive. Rather, the platforms appear to have sought out or welcomed the government's public-health expertise in addressing health misinformation on their sites. Early on in the pandemic, many platforms independently revised their community standards to prohibit posts that included public-health misinformation and notified users that they would seek input in enforcing those policies from public-health authorities, including the CDC.[18] There is no indication that the CDC's

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asked specific, targeted questions about the accuracy of various claims); Crawford Dep. Ex. 26, *Missouri v. Biden*, 3:22-cv-01213 (W.D. La. Mar. 3, 2023) (ECF No. 205-26) (same); Crawford Dep. Ex. 9, *Missouri v. Biden*, 3:22-cv-01213 (W.D. La. Mar. 3, 2023) (ECF No. 205-10) (identifying specific examples of misinformation on vaccine shedding and microchips); Crawford Dep. Ex. 8, *Missouri v. Biden*, 3:22-cv-01213 (W.D. La. Mar. 3, 2023) (ECF No. 205-9) (email chain between CDC and Facebook employees planning to include Census officials in a meeting to discuss specific health-misinformation issues).

[18] Kang-Xing Jin, *Keeping People Safe and Informed About the Coronavirus*, Meta (Dec. 18, 2020), https://perma.cc/C63L-KD3A; *Facebook Is Removing Fake Coronavirus News "Quickly," COO Sheryl Sandberg Says*, CBS News (Mar. 18, 2020), https://perma.cc/L8JY-K84M; *Coronavirus: Staying Safe and Informed on Twitter*, X (Jan. 12, 2021), https://perma.cc/QQ7J-QWS6 (describing Twitter's since-discontinued search prompt feature that placed "credible, authoritative content" at the top of search results, which involved partnership with national public-health agencies and the WHO).

responses to the platforms' queries were threatening, or perceived as threatening. Moreover, the CDC does not have direct regulatory authority over the platforms, and there is no evidence that the agency suggested the platforms would face adverse consequences if they failed to heed its advice.

Analyzing these communications in light of the constitutional interests at stake leads to the same conclusion. The platforms seem to have independently made the decision to combat the spread of public-health misinformation on their sites by adopting policies against such content, and they voluntarily turned to the public-health authorities with the relevant expertise in their enforcement of those policies. The CDC, as noted above, offered its expertise without any implicit or explicit threat. And while the CDC's email communications with the platforms were not public, the agency's role in advising the platforms was, mitigating the concern of constitutional evasion.

Finally, another question in this case is whether an email exchange between White House officials and Facebook concerning the platform's efforts to combat misinformation was coercive. In one message, an official sent Facebook a news article alleging that it had failed to control misinformation and accusing it of "hiding the ball."[19] The next day, another official complained that the platform was not "trying to solve the problem" and warned that

[19] J.A. 659–61; *Missouri v. Biden*, 83 F.4th at 360–61, 382–83.

the White House was "[i]nternally . . . considering our options on what to do about it."[20]

Here, the factors suggest that this interaction may have been coercive. The officials' word choice and tone were accusatory and demanding, and their statement that the White House was "considering [its] options" could be read as an implicit threat of regulatory retaliation. The constitutional interests suggest the same. The officials' statements were private, meaning that they did not contribute to public discourse and that they risked allowing the officials to evade public, electoral, and judicial accountability. In addition, it does not appear that the officials attempted to inform the platform's exercise of editorial judgment; rather, the officials expressed frustration paired with an ambiguous reference to other "options." For these reasons, the interaction likely crossed the constitutional line.

III. We should not expect jawboning doctrine to address every challenge created by the centralization of private power over public discourse.

The centralization of private power over public discourse has exacerbated the problem of jawboning. Jawboning is now easier than ever before because, as explained below, government officials must pressure only a small number of companies to effectively silence disfavored views or speakers. In addition, the platforms are unreliable advocates for the free-speech interests of their users. It would be

[20] J.A. 656–57; *Missouri v. Biden*, 83 F.4th at 361, 385–86.

a mistake, however, for this Court to dramatically contort jawboning doctrine in an effort to solve the problems created by the centralization of platform power.

Platform concentration has exacerbated the problem of jawboning for at least two reasons.

First, the concentration of the platforms' power over public discourse means that government officials can successfully censor disfavored views and speakers by coercing only a small number of intermediaries. Because of their size and concentration, the platforms have become single points of failure. And as single points of failure, they are attractive and effective targets for government efforts to coerce the suppression of speech.

Second, the platforms are unreliable advocates for the interests of their users in speaking freely. Given the scale at which the platforms operate, their relationship to any individual user or individual comment—among the hundreds of millions or even billions on their sites—is attenuated. Moreover, the platforms rely heavily on the regulatory environment in which they operate. Without the immunity provided by Section 230, for example, the platforms would face crushing liability for their users' posts. The result of this reliance is that the platforms are likely to conform their content moderation policies and decisions to the anticipated

desires of regulators—a phenomenon that Daphne Keller has called "anticipatory obedience."[21]

Jawboning doctrine should be attentive to these new dynamics, but it would be a mistake for this Court to contort jawboning doctrine to solve the problems created by platform concentration. Jawboning doctrine necessarily deals in specific episodes of government pressure. Courts can rely on the framework set out in *Bantam Books* in determining whether a specific course of governmental conduct reached the threshold of unconstitutional coercion. But jawboning doctrine is ill-suited to addressing suppression that is said to stem not from specific and discrete government action but from the regulatory environment in which a speech intermediary operates. The difficulty is that a platform's response to its regulatory environment—or to any other systemic pressure—can be characterized either as a constitutionally protected exercise of its own editorial judgment *or* as a reflection of unconstitutional coercion inherent in the system. The difference between the two is dispositive, but jawboning doctrine is ill-suited to distinguishing between them.

This is not to say that the Court should ignore the ways in which concentration has made the risk of jawboning more acute. To the contrary, the Court should update jawboning doctrine to ensure that it

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[21] Daphne Keller, *Who Do You Sue? State and Platform Hybrid Power over Online Speech*, Hoover Working Group on National Security, Technology, and Law, Aegis Series Paper No. 1902 1, 2 (Jan. 29, 2019), https://perma.cc/N8X9-S4QQ.

effectively protects against coercion. *See* Part II. And in an appropriate case, the Court can consider directly whether specific regulations unconstitutionally impair the speech rights of platforms or their users.

Congress, of course, also has a role in addressing the ways in which concentration has heightened the risk of governmental coercion. One way Congress can do so is by imposing transparency requirements that would deter government jawboning or, at least, subject it to democratic oversight. For example, the Cato Institute has proposed legislation that would require federal officials "to publicly report attempts to suppress Americans' exercise of speech and associational rights."[22]

Congress should also tackle the problem of concentration *directly*. For example, Congress could require platforms to design their systems to be "interoperable," so that users could switch to competing services without losing their social networks. Congress could enact a privacy law that gives users greater control over their personal data, making it easier for users to switch between services and harder for platforms to obtain and monopolize access to the data that drives their profitability. And Congress could enact transparency laws that make

[22] Andrew M. Grossman & Kristin A. Shapiro, *Shining a Light on Censorship: How Transparency Can Curtail Government Social Media Censorship and More*, Cato Inst. (Nov. 26, 2023), https://perma.cc/8QEE-NYMD; *see also* Will Duffield, *Toward a Jawboning Transparency Act*, Knight First Amendment Inst. at Columbia Univ. (Oct. 19, 2023), https://perma.cc/WK7E-AX7G.

it easier for journalists, researchers, and the public to study the platforms and the effects they have on public discourse. If these proposals became law, there would presumably be more, smaller platforms that would be harder to coerce and more responsive to the interests of their smaller userbases.

While jawboning doctrine plays an important role in preventing government censorship, the Court should accept that the role of the doctrine is necessarily a limited one. It cannot be expected to address the problem of concentrated platform power, and it would be a mistake for this Court to distort the doctrine in pursuit of that goal.

CONCLUSION

For these reasons, the Court should hold that the coercion test from *Bantam Books* is the correct framework for analyzing jawboning claims; it should direct lower courts to consider the totality of the circumstances in applying that test; and it should clarify the constitutional interests at stake in these cases, to enable lower courts to apply the coercion test in a more principled and consistent manner.

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December 22, 2023