No. 22-3573

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK CHANGIZI, MICHAEL P. SENGER, and DANIEL KOTZIN,

Plaintiffs–Appellants.

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, VIVEK MURTHY, United States Surgeon General in his official capacity, and XAVIER BECERRA, Secretary of the Department of Health & Human Services, in his official capacity

Defendants-Appellees

On Appeal from the United States District Court for the Southern District of Ohio, Columbus Division
Honorable Edmund A. Sargus, Jr., District Judge
Case No. 2:22-cv-1776

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF NO PARTY AND REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations And Financial Interest

Sixth Circuit
Case Number: 22-3573 Case Name: Changizi v. Dep't of HHS

Name of counsel: Lawrence S. Ebner

Pursuant to 6th Cir. R. 26.1 Atlantic Legal Foundation
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on October 31, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/Lawrence S. Ebner
_____
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

The overarching issue in this case is whether the federal Appellees' alleged efforts to pressure Twitter and other social media to censor

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person—other than *amicus curiae* and its counsel—contributed money that was intended to fund preparing or submitting the brief.

individuals who "question the wisdom, efficacy, and morality of government responses to the pandemic, specifically lockdowns and mask and vaccine mandates," Compl. at 15, violate the First Amendment right to freedom of speech. The ongoing and future significance of this constitutional question, which implicates the relationship between the federal government and social media's role as a national (and international) public forum for exchange of countless types of information and points of view, transcends even the extraordinary circumstances created by the COVID-19 pandemic. It is an issue that goes to the heart of ALF's individual-liberty and sound-science advocacy missions.

Indeed, ALF long has been the nation's foremost advocate for reliance on sound science in all three branches of the federal government. ALF is filing this amicus brief because we believe that the public's right to criticize or question the scientific bases for the federal government's public health policies and messaging—*especially* during an unprecedented public health emergency that profoundly affects the social, educational, and economic fabric, and physical and psychological

well-being, of the entire nation—not only is constitutionally sacrosanct, but also vital to fostering sound science.

ALF urges the Court to reverse or vacate the district court's judgment dismissing this litigation, including its holding that the Appellants' First Amendment claim fails. The Court should note, however, that ALF is filing this amicus brief in support of *neither* the Appellants nor the Appellees. ALF is filing in support of neither side in order to emphasize that we take no position on the scientific validity or accuracy of the Appellants' COVID-19-related "tweets" concerning mitigation measures such as the closing of schools and businesses, the wearing of face coverings, and the risks and benefits of COVID-19 vaccines and therapeutics.

Although ALF's position on the law aligns with Appellants' position on the law, that consistency is not intended to endorse the content of Appellants' speech. Instead, the purpose of this brief is to discuss why the Court, as required by the First Amendment, should protect the public's right to openly challenge the scientific bases for the government's COVID-19 mitigation policies and messaging.

SUMMARY OF ARGUMENT

No reasonable person supports the use of social media to promulgate misinformation, especially concerning urgent matters of public health. The federal government, however, should not be permitted to violate the First Amendment, under the rubric of fighting health misinformation, by suppressing free speech that criticizes or questions the scientific bases for its nationwide public health policies and messaging. "It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects . . . ." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment). Silencing dissenting or cynical views may be politically expedient, but is particularly troubling during an unprecedented public health emergency where, as in the case of the COVID-19 pandemic, a series of mitigation measures (e.g., mandatory quarantines, social distancing, face coverings, and vaccines) necessarily precede sound and robust scientific research. Labeling criticism or skepticism of such pandemic mitigation measures as "misinformation" simply because it challenges the scientific bases for the government's

shifting, and often contradictory or inconsistent, public health policies and messaging, fundamentally conflicts with the manner in which scientific knowledge evolves.

The U.S. Surgeon General's March 2022 Request for Information (RFI), 44 Fed. Reg. 12,712 (March 7, 2022), which is directed to COVID-19-related "misinformation" that is posted on social media platforms such as Twitter, unconstitutionally chills freedom of expression. The RFI's self-serving definition of "misinformation" is so broad, the Executive Branch, by coercing social media to cooperate, can attempt to justify blatant, unconstitutional censorship of free speech by labeling as misinformation virtually any tweet or other online message that takes issue with the government's COVID-19 narrative at any particular point in time. Further, the RFI expressly—and ominously—enlists the aid of social media and other technology platforms in identifying, and sharing with the government, specific sources of supposed misinformation. As a practical matter, the RFI enables the Executive Branch to monitor and enforce social media's compliance with

the government's own views on what types of speech constitute COVID-19 misinformation.

The Supreme Court's well-established state-action doctrine prohibits the government from circumventing the Free Speech Clause by coercing, encouraging, and/or joining with social media companies in suppressing freedom of expression. Under the Court's state-action principles, social media are treated as state actors for First Amendment purposes insofar as the RFI, and/or the additional pressure tactics alleged in Appellants' Complaint, result in censorship of speech that the government is constitutionally barred from suppressing directly.

ARGUMENT

A. Use of social media to criticize or question the scientific bases for the federal government's COVID-19 mitigation policies and messaging fosters sound science

"[O]pen debate is an essential part of . . . scientific analyses." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993). Scientific knowledge is not static. Instead, "[s]cientific conclusions are subject to perpetual revision. . . . The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that

are incorrect will eventually be shown to be so, and that in itself is an advance." *Id.* at 597.

Discussing the meaning of "scientific . . . knowledge" as used in Federal Rule of Evidence 702, the Supreme Court in *Daubert* recognized that there are "important differences between the quest for truth in the courtroom and the quest for truth in the laboratory." *Id.* at 596-97. In so doing, the Court observed that "arguably, there are no certainties in science." *Id.* at 590. "'Indeed, scientists do not assert that they know what is immutably "true". . . .'" *Id.* (quoting Brief for Nicolaas Bloembergen *et al.* as *Amici Curiae* 9) (submitted to the Supreme Court by ALF). "'Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a *process* for proposing and refining theoretical explanations about the world that are subject to further testing and refinement.'" *Id.* (quoting Brief for American Association for the Advancement of Science *et al.* as *Amici Curiae* 7-8).

The universally accepted process of continually and progressively postulating, testing, and disproving hypotheses is the "scientific method," which the Supreme Court described as "generating hypotheses and

testing them to see if they can be falsified." *Id.* at 593; *see generally* The Editors of Encyclopaedia Britannica, s*cientific method*, Encyclopedia Britannica (Aug. 22, 2022) ("In a typical application of the scientific method, a researcher develops a hypothesis, tests it through various means, and then modifies the hypothesis on the basis of the outcome of the tests and experiments");[2] Joe G. Hollingsworth & Eric Lasker*, The Case Against Differential Diagnosis: Daubert, Medical Causation Testimony, and the Scientific Method,* 37 J. Health L. 85, 103 (2004) ("[T]he generation of testable hypotheses that are then subjected to the real world crucible of experimentation, falsification/validation, and replication . . . [is] a critical aspect of the application of the scientific method") (internal quotation marks omitted).[3]

In other words, "science is an honorably self-correcting process," not "a fixed set of facts in a textbook." H. Holden Thorp, *Public debate is good for science*, Science, Jan. 15, 2021, at 213. Dr. Thorp is Editor-In-Chief

[2] https://www.britannica.com/science/scientific-method.

[3] https://www.hollingsworthllp.com/uploads/23/doc/media.381.pdf.

of the highly respected *Science* journals, published by the American Association for the Advancement of Science. In an editorial focused on the COVID-19 pandemic, Dr. Thorp encouraged public debate, including through social media, on scientific issues "where a consensus has not emerged, such as whether and when to close schools or the usefulness of masks." *Id.* He explained as follows:

> When debates in any sector move beyond the halls of universities and government agencies, there is potential for misuse of information and public confusion. But *open debate can also foster communication among scientists and between the scientific community and the public*. *During the pandemic, open debate on research, health, and policy—whether on television, in newspapers, or on social media—widened public attention and encouraged more diverse voices*. If this trend spurs scientists to agree more quickly about the best solutions to our problems—and at the same time helps the public "see" the process of scientific discourse more clearly—then *this is good for everyone, including scientists*.
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> * * *
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> The days of . . . having a confidential debate about scientific issues are gone, and that's for the best because those gatherings were not diverse enough and *excluded a lot of important voices*. . . . What matters is getting to the right place in terms of the science—deciding what the question should be, the appropriate way of answering it, and the correct interpretation of the data. For many scientists

> public debate is a new frontier . . . . But rather than avoiding such conversations, *let the debates be transparent and vigorous, wherever they are held*. . . . [L]et everyone see the noisy, messy deliberations that advance science and lead to decisions that benefit us all.

Id. (emphasis added).

Stifling public debate—including on Twitter and other social media—about the validity, accuracy, or adequacy of the scientific evidence supporting the federal government's COVID-19 mitigation policies and messaging may serve political objectives and the administrative state, but it is fundamentally incompatible with, and detrimental to, the manner in which scientific knowledge evolves. Such freedom of expression is particularly necessary and potent during a public health emergency where, as in the case of a novel coronavirus such as COVID-19, the federal government promotes mitigation measures based on assumptions that have not yet been fully tested in accordance with the scientific method—and that subsequently turn out to be untrue. *See, e.g.* The White House, *Remarks by President Biden on Fighting the COVID-19 Pandemic* (Sept. 9, 2021) ("This is a pandemic of the unvaccinated. And it's caused by the fact that . . . we still have nearly 80

million Americans who have failed to get the shot.");[4] Jason Lemon, *Video of Biden Saying Vaccinations Prevent COVID Resurfaces After Infection*, Newsweek (July 21, 2022) (recounting President Biden's statement on July 21, 2021 to a CNN Town Hall that "You're not going to get COVID if you get these vaccinations.");[5] Joseph Choi, *Fauci: Vaccinated people become 'dead ends' for the coronavirus*, The Hill (May 16, 2021) (quoting Dr. Anthony Fauci's statement on Face the Nation that "When you get vaccinated . . . you become a dead end to the virus. And when there are a lot of dead ends around, the virus is not going anywhere.").[6] ALF does not provide these examples to oppose the government's efforts to address the pandemic, or to discourage the government from participating in the scientific discussion, but instead, to illustrate the need for sound scientific research, and to support speech that calls for such research.

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[4] Available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3.

[5] Available at https://www.newsweek.com/joe-biden-2021-video-saying-vaccinations-prevent-covid-resurfaces-1726900.

[6] Available at https://thehill.com/homenews/sunday-talk-shows/553773-fauci-vaccinated-people-become-dead-ends-for-the-coronavirus.

The unavailability of sound scientific research supporting public health policies and messaging may be unavoidable at the outset of sudden and unanticipated circumstances such as the COVID-19 pandemic. But the lack of sound scientific research is all the more reason why the government should embrace, and certainly not suppress, public criticism or questions that illuminate the need for ongoing and additional scientific investigation.

Along the same lines, the government should encourage, not muzzle, public discourse that highlights inconsistencies between its public health messaging and available scientific studies. For example, despite public confusion and uncertainty—and the availability of large-scale, peer-reviewed, scientific research published in the August 2021 edition of *Science* magazine—the Centers for Disease Control and Prevention (CDC) did not acknowledge until recently the natural immunity developed by individuals who have been infected with COVID-19. *See* Jon Miltimore, *The CDC (Finally) Admitted the Science on Natural Immunity. Why Did It Take so Long?*, Foundation for Economic Education (Aug. 22, 2022) (quoting CDC epidemiologist Greta Massetti

regarding release of revised CDC Guidelines) ("'Both prior infection and vaccination provide some protection against severe illness,' Massetti told reporters. 'And so it really makes the most sense to not differentiate with our guidance or our recommendations based on vaccination status at this time.'").[7]

"The public appreciates experts who acknowledge uncertainty where it exists. 'Say what you know; what you don't know; what you are doing to find out; what people can do in the meantime to be on the safe side, and that advice will change.'" Cameron English, *Fact-Checking The Fact-Checkers: What Do Studies Say About Masks And COVID-19?*, American Council on Science and Health (Aug. 24, 2021) (quoting Michael Blastland, et al., *Five rules for evidence communication*, Nature (Nov. 18, 2020)).[8]

Tweets, blogs, podcasts, online and published articles, books, and other communications are not "misinformation" merely because they

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[7] Available at https://fee.org/articles/the-cdc-finally-admitted-the-science-on-natural-immunity-why-did-it-take-so-long.

[8] https://www.acsh.org/news/2021/08/24/fact-checking-fact-checkers-what-do-studies-say-about-masks-and-covid-19-15754.

criticize or question the scientific bases for the federal government's shifting public health policies and messaging at a particular point in time. Instead, such freedom of expression serves the vital purpose of emphasizing the need for public health policies and messaging that are forthright and evolve in real time as scientific knowledge advances.

B. The Surgeon General's Request for Information on sources of COVID-19 "misinformation" chills freedom of expression

In March 2022 the Office of the Surgeon General, a component of the Department of Health and Human Services, issued a Request for Information (RFI) on the "Impact of Health Misinformation in the Digital Information Environment in the United States Throughout the COVID-19 Pandemic." *See* 44 Fed. Reg. 12,712 (March 7, 2022). Waving the banner of battling "misinformation," this carefully worded, seemingly innocuous document enlists the aid of social media and other technology platforms in censoring, penalizing, and discouraging speech that challenges the Executive Branch's repeatedly changing COVID-19 narrative.

- The RFI broadly defines "health misinformation" as "health information that is false, inaccurate, or misleading according to the best available evidence at the time." *Id.* at 12,713.

- It seeks, *inter alia*, "[i]nformation about how widespread COVID-19 misinformation is on technology platforms including: General search engines, content sharing platforms, social media platforms, e-commerce platforms, crowd sourced platforms, and instant messaging systems." *Id.*

- And most troubling, the RFI endeavors to round up "[i]nformation about *sources* of COVID-19 misinformation." *Id.* at 12,714 (emphasis added). "By source," the RFI "mean[s] both *specific, public actors* that are providing misinformation, as well as components of specific platforms that are driving exposure to information." *Id.* (emphasis added).

Appellants' Complaint alleges that the RFI is part of "a coordinated and escalating public campaign to stop the flow of alleged 'health misinformation' related to COVID-19." Compl. at 1. According to the Complaint, "the Surgeon General, HHS, and the Biden Administration,

are not simply colluding with, but instrumentalizing Twitter and other technology companies to effectuate their goal of silencing opinions that diverge from the White House's messaging on COVID-19." *Id.* at 4, *see also id.* ¶¶ 22-54. The Complaint alleges, for example, that in July 2021 the Surgeon General and HHS "ratcheted up the pressure by, *inter alia*, issuing an advisory on the subject" of misinformation, and "directed much of their ire toward social media platforms, which they largely blamed for the problem of ostensible 'misinformation.'" *Id.* at 2; *see* Surgeon General's Advisory, "Confronting Health Misinformation: The U.S. Surgeon General's Advisory on Building a Healthy Information Environment" (July 2021).[9] The Advisory asserts that "technology platforms have contributed to the spread of misinformation . . . [S]ocial media platforms . . . reward engagement rather than accuracy, allowing emotionally charged misinformation to spread more easily than emotionally neutral information." Advisory at 5. A section of the Advisory, "What Technology Platforms Can Do," calls upon social media

[9] Available at https://www.hhs.gov/sites/default/files/surgeon-general-misinformation-advisory.pdf.

and other technology platforms to "[p]rioritize early detection of misinformation '*super-spreaders*' *and repeat offenders*," and to "[i]mpose clear consequences for accounts that repeatedly violate platform policies." *Id.* at 12 (emphasis added).

Regardless of the extent to which the Executive Branch's initiative has succeeded in quelling dissemination of whatever the government views as COVID-19-related misinformation, the Surgeon General's RFI, on its face, chills, if not effectively quashes, individuals' right to express and exchange views on the scientific bases for, and costs/risks and benefits of, the federal government's pandemic mitigation measures. For example—

1. The RFI's freewheeling definition of "health misinformation" is so broad and flexible, it can apply to almost any statement that challenges the scientific bases for the government's public health policies and messaging.

As indicated above, the RFI construes "health misinformation" as "health information that is false, inaccurate, or misleading according to the best available evidence *at the time*." 44 Fed. Reg. at 12,713 (emphasis

added). In adopting this definition, the Surgeon General expressly rejected a more reasonable and measured approach—that "for something to be considered misinformation, it has to go against 'scientific consensus.'" Surgeon General's Advisory, *supra* at 17. This narrower, more concrete definition—unlike the definition chosen by the Surgeon General and utilized in the RFI—does *not* arbitrarily base "misinformation" on a snapshot of the evolving state of scientific knowledge at a particular point in time chosen by the government for its own purposes.

According to the Advisory, *id.* at 4, misinformation, broadly defined, includes, but is not limited to, "disinformation"—misinformation that is "spread intentionally to serve a malicious purpose." ALF, of course, condemns any domestic or foreign dissemination of disinformation.

But viewing tweets and other social media or online posts as "misinformation" merely because—*even if scientifically valid today*—they were incorrect "according to the best available evidence at the time," conflicts with the hypothesis-by-hypothesis manner (discussed above) in which scientific knowledge evolves. For example, under the Surgeon

General's definition, a tweet during the Fall of 2021 disputing President Biden's assertion that COVID-19 vaccines would prevent a person from becoming infected would be "misinformation" if inconsistent with the sparse scientific research that was available *at the time*—even though subsequent scientific research and real-world evidence have demonstrated that such a tweet would have been correct at the time it was posted.

As another example, under the Surgeon General's definition, CDC itself spread misinformation to the American public when it promoted COVID-19 vaccines and boosters to individuals who already had been infected even though the then-available scientific evidence already indicated that the virus produces strong natural immunity. Now, CDC finally has revised its guidance to align with scientific knowledge. *See* Miltimore, *supra.*

The Surgeon General's Advisory, *supra* at 4, recognizes that "[u]pdating assessments and recommendations based on new evidence is an essential part of the scientific process, and further changes are to be expected as we continue learning more about COVID-19." The Advisory

even acknowledges that "what counts as misinformation can change over time with new evidence and scientific consensus." *Id.* at 17. Yet, one of the stated rationales for the Surgeon General's RFI is that "most Americans believe or are unsure of at least one COVID-19 vaccine falsehood." 44 Fed. Reg. at 12,713. What vaccine falsehoods does the Surgeon General have in mind? President Biden's statements that COVID-19 is a "pandemic of the unvaccinated" and that vaccinated individuals are "not going to get COVID"? Dr. Fauci's statement that vaccinated individuals are a "dead end to the virus"?

These widely publicized statements about COVID-19 vaccines, regardless of whether they were consistent or inconsistent with the available evidence at the time they were made, are now known to be false in light of subsequent scientific research and empirical evidence. It would be unreasonable to label such statements as misinformation merely because evolving scientific knowledge has shown them to be untrue. For the same reason, COVID-19-related social media posts should not be treated as misinformation merely if they criticize or

question governmental policies or messaging based on scientific knowledge that continues to evolve.

2. No amount of bureaucratic language can disguise the fact that the RFI encourages a wide range of technology companies to report to the federal government the identifies of "major sources of COVID-19 misinformation." 44 Fed. Reg. at 12,714. The ostensible voluntary nature of the RFI does not change the fact that the government's request for the identities of "specific, public actors that are providing misinformation," *id.*, can be viewed as an effort to silence them.

Even if some supposed sources of misinformation are not intimidated by the government's tactics, the unmistakable censorship signal that the RFI transmits to every social media and other technology platform is loud and clear. The RFI seeks, for example, on a platform-by-platform basis, "any aggregate data and analysis on the prevalence of COVID-19 misinformation on individual platforms including how many users saw or may have been exposed to instances of COVID-19 misinformation." *Id.* In addition to banning or suspending supposed purveyors of misinformation, various forms of high-tech censorship,

expressly recommended by the Surgeon General, will enable an individual platform such as Twitter to lower its aggregate data "on the prevalence of COVID-19 misinformation." *See, e.g.*, Surgeon General's Advisory, *supra* at 12 (advising technology platforms to "take responsibility for addressing the harms [of misinformation] . . . Redesign recommendation algorithms to avoid amplifying misinformation, build in 'frictions'—such as suggestions and warnings—to reduce the sharing of misinformation, and make it easier for users to report misinformation.").

In essence, the RFI helps to foster a symbiotic relationship between the federal government and social media for the common purpose of squelching, under the rubric of "misinformation," any views that undermine the scientific credibility of the Executive Branch's COVID-19 public health policies and messaging. This misguided endeavor starkly conflicts with the White House's stated goal to "develop policy that is science-driven, and based on evidence, exploration, open-mindedness,

rigor, honesty, and scientific integrity." White House Office of Science and Technology Policy Values Statement.[10]

C. The federal government cannot abridge freedom of expression by attempting to accomplish indirectly what the First Amendment prohibits it from doing directly

"[T]he Free Speech Clause prohibits only *governmental* abridgement of speech." *Manhattan Cmty. Access v. Halleck*, 139 S. Ct. 1921, 1928 (2019). "To draw the line between governmental and private, [the Supreme Court] applies what is known as the state-action doctrine." *Id.* at 1926. This doctrine addresses the problem of "how to define the boundary between public and private spheres in a world of overlapping interests and roles." John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. Rev. 569, 572 (2005).

"Under [the Supreme] Court's cases, a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular

[10] https://www.whitehouse.gov/ostp/ostps-teams/values-statement (last visited Oct. 23, 2022).

action; or (iii) when the government acts jointly with the private entity." *Id.* at 1928 (citations omitted).

Here, Twitter and other social media should be viewed as state actors insofar as the federal government, to protect its COVID-19 policies and messaging from widespread criticism, has essentially deputized ostensibly private technology companies to help carry out its ongoing efforts, through the Surgeon General's RFI and other means, to identify and penalize sources of putative "misinformation."

In *Halleck*, a cable television provider, as required by state law, set aside several channels for public access. The plaintiffs were filmmakers who were restricted by the public access channels' private, nonprofit operator from using them because of the objectionable content of a film they had televised. Rejecting the plaintiffs' public-function argument, the Court held that "a private entity who provides a forum for speech is not transformed *by that fact alone* into a state actor." 139 S. Ct. at 1930 (emphasis added).

The situation here is far different. Appellants allege that the federal government is actively compelling or encouraging Twitter's and

other social media's COVID-19 misinformation censorship activities. Indeed, at a July 16, 2021 press briefing, White House Press Secretary Jen Psaki stated that

> it shouldn't come as any surprise that we're in *regular touch with social media platforms*—just like we're in regular touch with all of you and your media outlets—about areas where we have concern, information that might be useful . . . so we are *regularly making sure social media platforms are aware of the latest narratives dangerous to public health* that we and many other Americans . . . are seeing across all of social and traditional media. And *we work to engage with them* to better understand the enforcement of social media platforms.

Press Briefing by Press Secretary Jen Psaki (July 16, 2021, 1:20 PM EDT).[11] Under well-established state-action principles, these concerted governmental efforts to compel or encourage censorship transform social media into state actors for First Amendment purposes.

"[S]tate action may be found if, though only if, there is such a 'close nexus between the [government] and the challenged action' that

[11] Available at https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/16/press-briefing-by-press-secretary-jen-psaki-july-16-2021.

seemingly private behavior 'may be fairly treated as that of the [government] itself.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 354, 351 (1974)).[12] "The nexus test is highly flexible and takes in a variety of criteria." Fee, *supra* at 584. "What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. . . . [N]o one fact can function as a necessary condition across the board for finding state action." *Brentwood Acad.*, 531 U.S. at 295.

The Supreme Court's "cases have identified a host of facts that can bear on the fairness of such an attribution." *Id.* at 296. For example, the Court has held that "a challenged activity may be state action when it results from the [government's] exercise of 'coercive power' [or] when the [government] provides 'significant encouragement, either overt or covert.'" *Id.* at 296 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1974)). Or there is state action "when a private actor operates as a 'willful

[12] Some state-action cases, such as *Brentwood Academy*, involve state government, rather than federal government, activities. "[T]he Fourteenth Amendment makes the First Amendment's Free Speech Clause applicable against the States." *Halleck*, 139 S. Ct. at 1928.

participant in joint activity with the [government] or its agents.'" *Id.* (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982)); *see also* Fee, *supra* at 584-85; Valerie C. Brannon & Whitney K. Novak, Cong. Rsch. Serv., Legal Sidebar, LSB10742, *Online Content Moderation and Government Coercion* 1-2 (2022) (discussing government coercion and encouragement).[13]

Appellants allege that "[b]y instrumentalizing tech companies including Twitter—through pressure, coercion, and threats—to censor viewpoints that the federal executive has deemed 'misinformation,' the Surgeon General has turned Twitter's censorship into State action." Compl. at 30. As discussed in point B above, the Surgeon General's RFI is exactly such a pressure tactic. The RFI's coercive purpose is even more transparent when viewed through the lens of the Surgeon General's Advisory on Confronting Health Misinformation, *supra*¸ and in light of Appellants' additional allegations about the government's heavy-handed social media misinformation initiative.

[13] Available at https://tinyurl.com/8kta9e63.

For example, the Complaint quotes former White House Press Secretary Psaki at a May 5, 2021 press briefing, where, on behalf of President Biden, she expressly coupled social media's "responsibility . . . to stop amplifying untrustworthy content, disinformation, and misinformation" with the threat of "a robust anti-trust program." Compl. ¶ 22. This is an example of "jawboning"—"attempts by government actors to influence private action by threat of future regulation." Brannon & Novak, *supra* at 2. "[J]awboning or other government pressure may convert a private party's conduct into state action subject to the First Amendment if the pressure is so significant that the private party's act is no longer considered an 'independent decision.'" *Id.*; *see also* Derek E. Bambauer, *Against Jawboning*, 100 Minn. L. Rev. 51, 57 (2015) (defining jawboning as "a specific type of informal pressure by a government actor on a private entity: one that operates at the limit of, or outside, that actor's authority").

Since the First Amendment indisputably prohibits the federal government from directly censoring the content of tweets and other social media posts that criticize or question the scientific bases for its

COVID-19-related policies and messaging, Appellees are attempting to engage in what one legal scholar termed "censorship by proxy." Seth F. Kreimer, *Censorship By Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. Pa. L. Rev. 11, 17 (2006). Prof. Kreimer expressed his prescient concern that "[t]his turn to proxy censors carries with it a series of dangers to the system of free expression." *Id.* at 100. Indeed, almost 60 years ago the Supreme Court recognized the affront to the Free Speech Clause where a state-created "Commission to Encourage Morality in Youth" attempted to coerce distributors into acting as censorship proxies by halting sale of books that the Commission deemed "objectionable." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71 (1963). The Court explained that the Commission "was in fact a scheme of state censorship effectuated by extralegal sanctions; they acted as an agency not to advise but to suppress." As in *Bantam Books*, the Executive Branch cannot coerce social media into acting as censorship proxies, such as by threatening them with robust antitrust enforcement if they fail to comply with the government's COVID-19 "misinformation" suppression efforts.

Even if the RFI and the government's additional efforts to induce social media to censor COVID-19 misinformation and identify sources of such misinformation are not tantamount to coercion, they certainly overtly encourage social media to do so. *See, e.g.*, Surgeon General's Advisory, *supra* at 6-7 ("We Can Take Action"), 12 ("What Technology Platforms Can Do"). In view of the RFI and the government's health misinformation dragnet, social media's COVID-19 misinformation censorship activities certainly have been significantly influenced by the government, and indeed, have the government's "imprimatur." *See Blum*, 457 U.S. at 1003, 1004. And if as a result, Twitter or another social media platform is a "willful participant in joint activity," *Lugar*, 457 U.S. at 941 (internal quotation marks omitted), to censor free speech, that too is enough to trigger state action subject to the First Amendment.

CONCLUSION

The Court should reverse the district court's judgment. Alternatively, the Court should vacate the district court's judgment and remand the action to the district court for additional factual development.

Respectfully submitted,

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DATED: October 31, 2022

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I hereby certify that on October 31, 2022 I electronically filed the foregoing Brief of Atlantic Legal Foundation as *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

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