No. 22-1199

In the
Supreme Court of the United States

ROGAN O'HANDLEY,

Petitioner,

v.

SHIRLEY N. WEBER, in her official capacity as California Secretary of State, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae The Buckeye Institute respectfully submits its brief in support of the Petitioners' Writ of Certiorari. The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing them for implementation in Ohio and replication nationwide. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals. The Buckeye Institute frequently litigates to support the First Amendment rights of individuals and a free press. In this case, the allegations of the Petitioners and the substantial evidence adduced to support them, raise significant concerns regarding the blurring of lines between permissible government speech and impermissible censorship schemes, as well as the expansion of the government speech doctrine. The questions presented in this case are important and will continue to recur. This case is an excellent

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[1] Pursuant to Rules 37.2(a) and 37.3(a), The Buckeye Institute states that it has provided timely notice of its intent to file this amicus brief to all parties in the case. Further, pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission.

vehicle for deciding the questions presented. For the foregoing reasons, the Court should grant the Petitioners' Writ of Certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

> And he found a new jawbone of an ass, and put forth his hand, and took it, and slew a thousand men therewith.
>
> And Samson said, With the jawbone of an ass, heaps upon heaps, with the jaw of an ass have I slain a thousand men.

Judges 15:15–16 (King James).

The biblical story of Samson slaying a thousand men with the jawbone of an ass is meant to convey his divinely endowed strength. He could eviscerate an army, singlehandedly, wielding only a happenstance and improbable weapon. In the early 1960s, the term "jawboning" entered the political lexicon to describe a President's ability to accomplish a similar feat of political strength—commanding regulatory policy—through the seemingly innocuous tool of public and private statements. Derek E. Bambauer, *Against Jawboning*, 100 Minn. L. Rev. 51, 57 (2015) (defining jawboning and noting the term's biblical origin). However, it is not just the President who wields this power; state governments, too, can engage in jawboning to exert influence and control over various entities. In the context of the modern regulatory state, this power is not limited to the battlefield of Lehi but extends to the battleground of public discourse and free speech. While Samson's prowess on the battlefield

of Lehi was considerable, his supernatural strength pales in comparison to the modern regulatory state's power to smite the speech, stories, and ideas of political philistines with whom it disagrees.

In the case at hand, jawboning takes on a new dimension. Through public statements, the possibility of monetary sanctions, and informal pressure, the government can exert influence over social media communications. This is akin to wielding the jawbone of an ass in the digital age, where words and statements can have far-reaching consequences. This brief emphasizes the legal and cultural hazards of governance by jawboning, reflects on some dark chapters of American history occasioned by it, and argues that governmental jawboning is inconsistent with the First Amendment's protections, the constitutionally mandated separation of powers, and the rule of law.

ARGUMENT

A. Will No one Rid Me of These Turbulent Tweets?

Had Twitter been available to Thomas à Becket—Archbishop of Canterbury and Lord Chancellor to King Henry II in the 1160s—the separation of church and state that would become a cornerstone of liberal democracies might have emerged centuries earlier. Still, limited to quill and scroll and horseback delivery, Becket and his defense of church independence against royal prerogative achieved the medieval equivalent of going viral. The King was enraged by, among things, Becket's insistence that church authorities, rather than the

Crown, had exclusive jurisdiction to try criminal cases against clergy. And although the King theoretically enjoyed absolute power, because Becket was a papal legate, the King was nevertheless politically constrained in what direct action he could take against Becket. So, like a state official, frustrated by a stream of election-skeptic tweets, Henry reportedly complained to four of his knights—"will no one deliver me this turbulent priest?" *See* Robert Dodsley, *The Chronicle of the Kings of England, from William the Norman to the Death of George III* 27 (1821), https://archive.org/details/chroniclekingse00saddgoog.

The knights, eager to earn favor or avoid reprobation from their King—a man with significant power to influence their lives and fortunes—stepped in to solve Henry's problem by murdering Becket in Canterbury Cathedral. *Id*.

Setting aside for the moment the First Amendment's obvious legal constraints on the government's ability to censor speech, modern state governments face political constraints just as Henry II did in dealing with Becket. Indeed, while the First Amendment allows certain limited types of censorship, such as the prevention of publication of national security secrets, governments that are seen as using their influence to silence political commentary or label it as misinformation tend to activate the public's vigilance against government censorship. In the present case, faced with social media posts that contained political commentary which the State of California deemed as misinformation, the state government employed a strategy reminiscent of King Henry's approach. The

state government, through recommendations and the threat of fines,[2] induced the censorship of O'Handley's Twitter account. In this case, the state sent Twitter a letter demanding that it "do more to rid your platforms of the dangerous disinformation" and threatening that the state would not "hesitate to enforce these laws."[3] Thereafter, Twitter reduced O'Handley's account visibility, removed tweets, and eventually, banned him from the platform—eliminating his ability to speak altogether. The State of California was not the first to employ such tactics and, given the dynamics of government power and human nature, it will not be the last. While it would be plainly unconstitutional for any government entity to directly order social media

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[2] "[A] social media company shall submit to the Attorney General a terms of service report," containing a "detailed description of content moderation practices used by the social media company," such as "[h]ow the social media company would remove individual pieces of content, users, or groups that violate the terms of service, or take broader action against individual users or against groups of users that violate the terms of service." This includes content deemed "disinformation or misinformation." A failure to comply with the code results in "a civil penalty not to exceed fifteen thousand dollars ($15,000)" Cal. Bus. & Prof. Code § 22678(a).

[3] Letter from Cal. Attorney General at 4, 8 (Nov. 3, 2022), perma.cc/GC42-XCX4 (citing Cal. Civ. Code § 52.1(b), Cal. Elec. Code §§ 18302, 18502, 18540, 18543, and Cal. Gov. Code § 84504.6 and attaching "addendum" with a "non-exclusive list of relevant election-related laws" (urging Twitter to "increase your efforts in purging your platforms of the harmful false information, incorrect news, conspiracy speculations, and threats that amplify political violence, disseminate fear and doubt, and in the end, undermine our democratic process," and assuring that "[t]he California Department of Justice won't hold back in implementing these laws").

posts to be removed, their distribution throttled back, or the offending posters be de-platformed, social media platforms might accomplish the goal under the guise of responsible content moderation when influenced by government entities.

Of course, as the Petitioners make clear, the government cannot engage in censorship by proxy by inducing, encouraging, or promoting "private persons to accomplish what it is constitutionally forbidden from accomplishing." *Norwood v. Harrison*, 413 U.S. 455, 465 (1973); *see also Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring) ("The government cannot accomplish through threats of adverse government action what the Constitution prohibits it from doing directly."). The government's influence over a private entity in suppressing speech constitutes a backdoor censorship that raises serious First Amendment concerns. The petition for writ of certiorari should therefore be granted.

B. Academic Views of Jawboning

Three law review articles—all written before the pandemic and the concerns raised in this action—have ably presented the arguments for and against governmental jawboning. The consensus that emerges is that even if the use of threats by the government in certain circumstances might be appropriate—or at least constitutionally tolerable—in pursuit of legitimate regulatory goals, jawboning third parties to engage in extra-constitutional action is not.

First, in 2015, Tim Wu, a senior advisor to the Federal Trade Commission and Columbia Law

Professor—with a political cynicism that would make Machiavelli blush—wrote an article extolling the virtues of governance through jawboning aptly titled *Agency Threats*. Tim Wu, *Agency Threats*, 60 Duke L. J. 1841 (2011). Professor Wu posits that "[t]he use of threats instead of law can be a useful choice—not simply a procedural end run." *Id.* at 1842. "Threat regimes," he suggests, "are important and are best justified when the industry is undergoing rapid change—under conditions of 'high uncertainty.' Highly informal regimes are most useful, that is, when the agency faces a problem in an environment in which facts are highly unclear and evolving." *Id.* "Conditions of high uncertainty" only begin to encompass the challenges that social media platforms have confronted in managing information amid the *annus horribilis* that was 2020 and the two years that have followed it, such as when the facts here took place. This period was further convoluted by the fog of uncertainty of facts surrounding the national election and the prevailing state of the country. Coupled with the inherent dynamism of social media, characterized by swift and often unnoticed modifications in rules, changes in programming algorithms, and fluid company policies, it provides a fertile ground for the Court to examine Professor Wu's theory.

Wu goes on to state the obvious: "[t]he greatest advantage of a threat regime is its speed and flexibility." *Id.* at 1851. Regulation by threat is expedient because "a threat is extant the moment it is made—its final shape, so to speak, is immediately apparent." *Id.* He downplays the obvious due process concerns, ensuring readers that "the argument that

rule by threat is a means of avoiding judicial review may be overstated." *Id*. at 1843. In his view,

> [t]hreats are, by their nature, just that: threats to enforce or enact a rule, not binding actions in the usual sense of that word. Regulated entities that are unhappy with a de facto regime can and do test the threats, forcing the agency to use its more formal powers and therefore invoke judicial review.

Id.

Wu's assurance that if a regulated entity is unhappy it will sue, however, overlooks the fundamental power dynamic that makes jawboning effective: the regulated entity wants to avoid conflict with the regulator. Wu also fails to suggest how to remedy the harm done to customers of the regulated entity, who will end up bearing the cost of the regulation but have little direct legal recourse against the government and are hard-pressed to get information regarding the communications between the government and the regulated entity. Indeed, with California's watchful eye and a fiscal deterrent, social media platforms might grudgingly and blindly follow directives on what is deemed "misinformation," leaving both them and their users burdened with costs and in the dark about the monitoring process.

The equation is even more complicated in the case of social media, where the "customers" who purchase advertising from social media have different interests than the end-users who use the social media product to communicate. Most advertisers would

likely have no qualms with social media companies removing posts with which the majority of social media users might disagree. A "stultifying conformity" of thought may be "destructive to a free society," but it is not necessarily bad for advertisers. *See First Unitarian Church of Los Angeles v. Cnty. of Los Angeles*, 357 U.S. 513, 532 (1958) (Black, J., concurring) (Discussing impact of unconstitutional loyalty oaths on free expression and civil discourse).

Professor Wu closes his defense of agency threats by noting the sound governance practices of Vito Corleone in "The Godfather," who used threats accented by the occasional enforcement actions to achieve his aims. Wu, *supra*, at 1847. While the comparison is made tongue-in-cheek, it is nevertheless apt. In fairness to Professor Wu, his article focuses on encouraging private actors to accept or self-impose regulatory burdens that do not, on their face, offend the Constitution. Professor Wu assumes, perhaps naively, that regulatory threats would be used only to accomplish other legitimate regulatory goals. In other words, the state or a regulatory agency within the state would likely have the authority to enact or establish the type of jawboned policies he suggests, but the processes of enacting laws or working under established frameworks—i.e., providing due process—are deemed inconvenient and inefficient. Professor Wu acknowledges that the Executive branch would abuse its power if an agency used "threats to take actions that Congress has specifically barred, or to accomplish objectives for which it would otherwise lack delegated authority." *Id.* at 1854. The jawboning in the instant case presents a much graver problem because it

involves restrictions on speech that would be entirely impermissible if the government acted directly. The facts pled in the present case call to mind not Vito Corleone—but his son Michael—who begins with noble intentions but nevertheless falls victim to the lure of power.

For those who would prefer the government operate more like a constitutional republic and less like an organized crime family, Jerry Brito, a lawyer and Senior Research Fellow at George Mason University's Mercatus Institute published a response to Professor Wu's article. Jerry Brito, *"Agency Threats" & the Rule of Law: An Offer You Can't Refuse,* 37 Harv. J.L. & Pub. Pol'y 553 (2014). Brito argues—correctly in the view of the amicus—that jawboning regulated entities into submission by threats of greater regulation replaced the rule of law with the rule of men. The fatal flaw of governance by jawboning threats is human nature:

> [H]aving ejected the rule of law in an attempt to secure "speed and flexibility," [Wu] is forced to recreate a stand-in of that very same rule of law through "guidelines" and "lists" made to prevent the predictable consequences of the rule of men. As much as one would like to have omniscient, benevolent angels for regulators, unfortunately only "fallible men" are available.

Id. at 568.

Brito offers a realistic view of how regulatory threats have operated to expand governmental power beyond what it could legally enforce, using as an example a speech by former FCC Chairman Michael Powell to internet service providers:

> Much like a mobster's threat, Chairman Powell's speech was a mere suggestion to the industry. After all, the FCC had no legal way to enforce his edict. Powell was just saying, "Boy, it would sure be nice if the industry started behaving this way." Then the FCC's Enforcement Bureau opened an investigation into a small carrier; a simple letter of inquiry, not a formal enforcement action predicated on any agency rulemaking. In less than a month, however, the carrier had signed a consent decree pledging to adhere to the suggestions in Powell's speech and coughing up a $15,000 contribution to the U.S. Treasury. The rest of the industry got the message loud and clear.

Id. at 565–66. Thus, while the FCC's letter of inquiry carried little legal weight, the potential of a formal investigation and all of the risks, costs, and negative publicity that would accompany it were enough to get the carrier to agree to plainly extra-legal terms and to send a message to the rest of the industry. Even if Powell's motives were pure, even if the industry reforms were salutary, there is more than a whiff of extortion in the air.

In *Against Jawboning*, Professor Derek Bambauer directly addresses the constitutional hazards of jawboning in relation to speech regulation on internet platforms. Derek E. Bambauer, *Against Jawboning*, 100 Minn. L. Rev. 51 (2015). Using the example of a state attorney general subpoena to Google meant to lend aid to the motion picture industry's crackdown on video piracy, Professor Bambauer notes that what Professor Wu saw as the exception—seeking to enforce results that lie beyond an executive's legal capacity—is the norm when it comes to jawboning. The state attorney generals involved "sought to coerce the company based on threatened action at the edges of or wholly outside their legal authority." *Id.* at 55. The constitutional concern "is not simply the motivation; state officials advocate for interest groups constantly," but that the attorney general "threatened Google despite lacking authority over the subject matter of his investigation." *Id.* Why would any company accede to threats and suggestions from the government when it knew that the government lacked any legal authority to enforce them? "Cost and uncertainty," Professor Bambauer answers:

> As to cost, even a subpoena that was ultra vires—beyond the official's power—would cause Google to incur potentially significant expense. Lawyers at WilmerHale—Google's outside counsel—do not come cheap, and if Hood defeated the motion for the temporary restraining order, Google would have had to comply with burdensome discovery. And the

> potential costs were more than pecuniary—the MPAA planned to allocate budget to media outreach efforts designed to harm Google's reputation. Even false accusations can wound.

Id. at 56. According to Professor Bambauer, "The cost-benefit calculus is clear: it makes sense to censor anything questionable." *Id.* at 86.

C. Jawboning's Unhappy Bipartisan History

Although at present, this case alleges a Democratic state government exerting influence on social media platforms to ban or limit speech by individuals perceived to be on the right, instances of power abuse through jawboning are not limited to a specific political affiliation, as history demonstrates, bipartisan tendencies and examples exist at the state, local, and federal levels. Professor Bambauer offers numerous examples, most notably, President George W. Bush authorized the National Security Agency to conduct surveillance on Americans' international telephone calls and e-mail traffic without obtaining either a Title III warrant or an order under the Foreign Intelligence Surveillance Act. Bambauer, *supra*, at 91. The telecom providers agreed to provide the information at the administration's request. Because lack of transparency is one of the bugs—or features—of jawboning, depending on one's point of view, it is impossible to know to what extent the telecom providers' acquiescence was motivated by fear of regulatory retaliation, a sense of patriotism in the wake of the 9/11 attacks, the wish to be "part of the solution," or a mosaic of motives. What is clear is that

these third parties were willing to engage in investigative steps that the administration could not legally take directly.

Earlier governmental jawboning also gave rise, in part, to the practice of industry blacklisting—most notably in Hollywood—of persons suspected of harboring communist sympathies. To be sure, legislative jawboning by members of the House Un-American Activities Committee and Senator Joseph McCarthy played a significant role in feeding anticommunist paranoia. But the movement's roots stem from an executive pronouncement. With the Soviet Union's assertion of dominance over Eastern Europe and communism on the march worldwide, American policy makers became increasingly concerned over Soviet attempts to influence and subvert what they saw as American values through subtle propaganda and the infiltration of American government and private institutions.[4] In December 1947—more than two years before Senator Joseph

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[4] While history didn't exactly repeat itself, it certainly rhymed when fears of Russian influence in the 2016 election came to the fore and served as a topic for politicians to jawbone. *See, e.g.,* Clare Foran, The Atlantic, *Why Hillary Clinton Thinks She Lost the Election* (May 2, 2016), https://www.theatlantic.com/politics/archive/2017/05/hillary-clinton-election-trump-fbi-russia-hacking/525183/. While the actual evidence of Russian "bots" influencing the election was slim, See Patrick Ruffini, *Why Russia's Facebook ad campaign wasn't such a success*, The Wash. Post (Nov. 3, 2017), https://www.washingtonpost.com/outlook/why-russias-facebook-ad-campaign-wasnt-such-success/2017/11/03/b8efacca-bffa-11e7-8444-a0d4f04b89eb_story.html, social media companies anxious to stave off the new Russian subversion and reassure users and regulators that social media undertook a voluntary purge of suspected 'bot' accounts.

McCarthy made his first public allegations of widespread communist infiltration of the federal government—the U.S. Attorney General published the "Attorney General's List of Subversive Organizations" ("AGLOSO"). Robert Justin Goldstein, *Prelude to McCarthyism: The Making of a Blacklist*, 38 Prologue Mag., no. 3 (2006),https://www.archives.gov/publications/prologue/2006/fall/agloso.html.

The list imposed no direct sanctions on any of the organizations named. But "as various scholars wrote contemporaneously and subsequently, AGLOSO, which was massively publicized in the media, became what amounted to "an official blacklist." In the public mind it came to have "authority as *the* definitive report on subversive organizations," understood as a "proscription of the treasonable activity of the listed organizations" and the "litmus test for distinguishing between loyalty and disloyal organizations and individuals." *Id.* Notably, the list was never accompanied by any proof that any of the organizations on it had engaged in any criminal activity or sought to "subvert" the American government.

It was instead a list of the usual suspects. The list served its purpose of dissuading citizens from joining or associating with the groups on it. Many of the organizations folded. That same year, the House Un-American Activities Committee ("HUAC"), which had formed in 1938, began investigating communist subversion in the motion picture industry. Like King Henry's knights, Hollywood took the hint. The studio heads agreed among themselves not to hire actors and screenwriters who exercised their constitutional

rights to decline to cooperate with HUAC as well as anyone with alleged ties to "subversive organizations." Because the studios were acting as private entities, simply trying to act "responsibly" and enforcing their private preference to hire only patriotic Americans, there was no need for actual evidence of any ties to subversive groups like the one named on the AGLSO. Rumor and hearsay were sufficient. By 1956, even McCarthyism began to wane, *Elks Magazine* "carried an article entitled *What the Attorney General's List Means,* which began by accurately noting that "there are few Americans who have not heard of 'the Attorney General's subversive list'" and concluded by declaring, "There is no excuse for any American citizen becoming affiliated with a group on the Attorney General's list today." *Id.*

The Red Scare purge of the 1950s highlights the insidious nature of government censorship by proxy. Blacklisting—like the de-platforming and reducing visibility at issue here—operates in the dark. Individuals may not be fully aware that the reach of their tweets has been limited or that their content is being suppressed. Blacklisted screenwriters did not receive notice that they had been blacklisted or the opportunity to contest that designation in any type of hearing. They simply saw opportunities disappear. Since private entities like the Hollywood studios of the 1950s and social media companies of today owe no explanation, this lack of transparency allows the censors, both government and the regulated parties, to respond by gaslighting—simply denying that there are any restrictions in place or any communication between the government and the regulated entity. *See,*

e.g., the government's response in *Changizi v. Dep't of Health & Hum. Servs.*, 602 F. Supp. 3d 1031, 1048 (S.D. Ohio 2022) (No. 2:22-cv-1776).

D. Jawboning's Allure and Dangers

Jawboning on internet speech issues by "recruiting proxy censors" is particularly effective—and thus particularly dangerous—because it targets the "weakest link in the chain of communication." Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, & the Problem of the Weakest Link*, 155 U. Pa. L. Rev. 11, 27 (2006). Targeting social media platforms works because it "provides a mechanism for the exercise of authority over otherwise ungovernable conduct. Moreover, it does so at a discount: the cost of monitoring and sanctioning disfavored communications is largely externalized onto the intermediaries who are the subjects of direct regulation." *Id.* As Professor Bambauer explains, "[I]t is far easier and more effective to impose controls upon an intermediary than upon a host of dispersed speakers who may be difficult to identify, located outside the regulators' jurisdiction, or judgment-proof." Bambauer, *supra*, at 85–86.

Jawboning targeted at intermediaries is also especially pernicious because "platforms such as Google, Twitter, Facebook, and Instagram are the new gatekeepers for online content." *Id.* at 59–60. Because those entities serve both as gatekeepers and repositories of online activity, they can consign unwanted information or unfavored options to the Orwellian "memory hole." For all practical purposes, "[m]aterial de-listed from Google's search results or

deleted from a Twitter feed simply disappears . . . ." *Id.* at 60.

Jawboning for "moderation" of internet speech, when coupled with human nature and the natural incentives of power, creates a perilously slippery slope. Plainly, the state government is tasked with protecting the welfare of its jurisdiction and by extension its citizens. A government may see an urgent need to take action and engage in some benign jawboning to exert influence over corporations and social media platforms. The government may grow to perceive its policies relating to a specific issue as not only correct but essential. Thus, in addition to promoting the government's arguments, social media platforms may be expected to moderate or suppress arguments made against those policies. Proceeding from the belief that its policies are the only solution for the betterment of the jurisdiction, the government may view its continued governance as equally crucial.

Jawboning is also insidious because the more it is practiced, the easier it becomes. Psychology (as well as common sense and experience) teaches that once a person has crossed an ethical line, it becomes progressively easier to cross that line again. Thus, like a paperclip that is repeatedly bent, gaining the acquiescence of the regulated parties becomes easier and easier until no resistance is offered. In the present case, the open channels of communication between Twitter and the State of California through The Office of Election Cybersecurity, as documented by the Petitioners, suggest a kind of regulatory entwinement. The frequent interactions and familiarity evident in the communications between the state government

and Twitter, as presented in the case, suggest a scenario where Twitter may have developed a disposition towards aligning its actions with the state's preferences. This can be likened to a form of regulatory Stockholm Syndrome, where Twitter, possibly initially cautious, may have progressively become more receptive and even eager to cooperate with the state's requests or recommendations. The social media platforms *want* to cooperate.

From the government's viewpoint, third parties' willingness to assist provides political cover. Even in the 1950s an act of Congress or Executive Order banning potential communist subversives from working in certain private industries where they could implant Marxist or other "un-American" ideas in the national psyche would have faced legal challenges and been seen as politically heavy-handedness. But if the government simply provided information, industry leaders who wished to appear responsible or patriotic might act on their own initiative. Simply put, "When the government can indirectly threaten or compel private actors to fall in line with its preferences, there is a threat to the constitutionally protected liberty to exchange information that is checked poorly, if at all, by standard First Amendment doctrine." Bambauer, *Orwell's Armchair*, 79 U. Chi. L. Rev. 863, 898–99 (2012).

But the danger of jawboning social media companies is not merely that it violates the First Amendment, but that it degrades free speech and expression as a value worth protecting. A Knight Foundation survey on attitudes towards free speech and expression showed Americans are increasingly

willing to value protection from misinformation and freedom from insult above free expression. *Free Expression in America Post-2020*, Knight Foundation (2022), http://knightfoundation.org/wp-content/uploads/2022/01/KF_Free_Expression_2022.pdf. Historian Vincent Blasi suggests a type of national "pathology" regarding freedom of expression, defined by a "shift in basic attitudes, among certain influential actors if not the public at large, concerning the desirability of the central norms of the first amendment." Wasserman, *Symbolic Counter-Speech*, 12 Wm. & Mary Bill Rts. J. 367, 402 (2004) (internal citation omitted). He posits "historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically." *Id.* A government that emphasizes moderation over open debate erodes public confidence in the value of free speech and threatens to usher in such an unwelcome age. At the same time, government intervention in the nation's dialogue—even when done by proxy—also decreases trust in government institutions. The government that cries wolf too often or is perceived as having rigged the argument is less likely to be believed when the wolves inevitably arrive.

Writing in 1958—one year after Joseph McCarthy's death—Justice Black reflected on the anti-communist hysteria, with its blacklists, loyalty oaths, and demands for intellectual conformity with words that resonate today: "The course which we have been following the last decade is not the course of a strong, free, secure people, but that of the frightened,

the insecure, the intolerant." *First Unitarian Church,* 357 U.S. at 532 (Black, J., concurring).

In a pluralistic constitutional republic, societal values exist in constant tension. Freedom is balanced against safety. Democracy and the will of the majority are balanced against individual liberties and minority rights. This often requires citizens, state governments, and even Presidential administrations to hold competing ideas in their heads simultaneously. Thus, in the same year that the Truman administration published its list of subversive organizations, the President's Committee on Civil Rights, convened by President Truman in 1946, published its report. Discussing the primacy of free speech and the right to dissent, the Committee, like Justice Black, saw free expression as the hallmark of a strong nation, confidant in the capacity of free people to reason together:

> This right is an expression of confidence in the ability of freemen to learn the truth through the unhampered interplay of competing ideas. Where the right is generally exercised, the public benefits from the selective process of winnowing truth from falsehood, desirable ideas from evil ones. If the people are to govern themselves their only hope of doing so wisely lies in the collective wisdom derived from the fullest possible information, and in the fair presentation of differing opinions.

To Secure These Rights: The Report of the President's Committee on Civil Rights, No. 47 (1947), https://www.trumanlibrary.gov/library/to-secure-these-rights#47.

The State of California has no more business moderating tweets or Facebook posts than it does deciding who ought to write screenplays. The jawboning of social media companies into censoring posts disfavored by the government causes immediate irreparable harm as a violation of the First Amendment and may lead to longer-lasting irreparable harm through the continued erosion of the nation's commitment to the First Amendment's principles.

CONCLUSION

For all the foregoing reasons, amicus curiae The Buckeye Institute urges the Court to grant the Writ of Certiorari.

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