

No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

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ROGAN O'HANDLEY,

*Petitioner,*

*v.*

SHIRLEY WEBER, in her official capacity as California  
Secretary of State, & TWITTER INC.,

*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI**

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Harmeet Dhillon  
Ronald D. Coleman  
Karin M. Sweigart  
Mark P. Meuser  
DHILLON LAW GROUP, INC.  
177 Post St., Suite 700  
San Francisco, CA 94108

Mark Trammell  
Josh Dixon  
Eric Sell  
CENTER FOR AMERICAN LIBERTY  
1311 S. Main St., Suite 302  
Mount Airy, MD 21771

Thomas R. McCarthy  
Taylor A.R. Meehan  
*Counsel of Record*  
Tiffany H. Bates  
CONSOVOY MCCARTHY PLLC  
1600 Wilson Blvd., Suite 700  
Arlington, VA 22209  
(703) 243-9423  
taylor@consovoymccarthy.com

Adam K. Mortara  
LAWFAIR LLC  
40 Burton Hills Blvd., Suite 200  
Nashville, TN 37215

June 8, 2023

*Counsel for Petitioner*

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## QUESTIONS PRESENTED

In 2018, California created the Office of Election Cybersecurity. State law empowers the Office “[t]o monitor and counteract false or misleading information regarding the electoral process that is published online,” and to “assess” and “mitigate” it alongside other California officials. Cal. Elec. Code §10.5. The Office makes no secret about the fact that it directs social media companies to remove online speech, including California-based Twitter.

Exercising that power, the Office told Twitter that Petitioner’s tweet—political speech—was misinformation. And for the first time, Twitter punished him. Within months, he was suspended altogether. The courts below rejected Petitioner’s First Amendment claims against state officials. They concluded that the First Amendment did not preclude the State from singling out Petitioner’s Twitter account for censorship. Nor could it, according to the Ninth Circuit, because that would thwart the *State’s* right to engage in its own government speech. The questions presented are:

1. Whether the complaint plausibly alleged that state officials acted under color of state law in violation of the First Amendment when a state agency, which exists to police online speech, singled out Petitioner’s disfavored political speech for Twitter to punish and Twitter complied.

2. Whether the government speech doctrine empowers state officials to tell Twitter to remove political speech that the State deems false or misleading.

**PARTIES TO THE PROCEEDING**

Petitioner is Rogan O’Handley. Petitioner was the plaintiff in the U.S. District Court for the Northern District of California and appellant in the U.S. Court of Appeals for the Ninth Circuit.

Respondents are Shirley Weber, in her official capacity as California Secretary of State, and Twitter, Inc. Respondents were defendants-appellees in the courts below. Additional defendants in the district court included former California Secretary of State Alex Padilla, in his personal capacity, SKDKnickerbocker, LLC, Paula Valle Castañon, in her personal capacity, Sam Mahood, in his personal capacity, Aki-lah Jones, in her personal capacity, and the National Association of Secretaries of State.

**STATEMENT OF RELATED PROCEEDINGS**

This case arises from *O’Handley v. Padilla*, No. 22-15071 (9th Cir.) (opinion issued March 10, 2023), and *O’Handley v. Padilla, et al.*, No. 3:21-cv-07063-CRB (N.D. Cal.) (judgment issued Jan. 10, 2022). Petitioner is not aware of any directly related cases in state or federal courts.

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## INTRODUCTION

Today, social media platforms “provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.” *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). Government officials participate in that “modern public square” of social media in different ways. *Id.* But they must do so consistent with the First Amendment. There is no 21st-century exception to the longstanding rule that the government cannot suppress or retaliate against views it doesn’t like. Such “[v]iewpoint discrimination is poison to a free society.” *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring). “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

State officials crossed constitutional lines here, discriminating on the basis of viewpoint and then claiming their own speech warranted more protection than that of private citizens. But the courts below gave the State a free pass. Petitioner Rogan O’Handley’s complaint alleged that California officials had a direct line to Twitter and an entire state agency devoted to policing “false or misleading” elections information online. Cal. Elec. Code §10.5(b)(2). The complaint alleged that Twitter never censored his speech until the California Office of Election Cybersecurity flagged his account to Twitter. Twitter acceded to the State’s call, began labeling O’Handley’s tweets as disputed misinformation, reduced their visibility, put strikes on his account, and ultimately suspended him.

That wasn't good enough to survive a motion to dismiss in the Ninth Circuit.

Despite the motion-to-dismiss posture, the Ninth Circuit found that Twitter acted "independently," deemed the California agency's statements to be "non-threatening," and concluded that the First Amendment did not preclude the State from singling out O'Handley's speech for Twitter to censor it. App.28. As the Ninth Circuit saw it, the *State's* speech to Twitter warranted First Amendment protection, not Petitioner's. App.28-29.

The Ninth Circuit has confused California's unconstitutional suppression of private speech that it disfavors, *see Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), for protected government speech, *see Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). Erroneously broad conceptions of so-called "government speech" are overriding safeguards that would otherwise limit the government's ability to suppress views it disfavors. *See Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1599 (2022) (Alito, J., concurring). Certiorari is warranted to clarify that state officials are not free to effectuate an indirect censorship scheme and then justify that scheme as part of a "First Amendment free" zone of government speech.

### OPINIONS BELOW

The opinion and order of the U.S. District Court for the Northern District of California is published at 579 F. Supp. 3d 1163 and is reproduced at App.32-105. The decision of the U.S. Court of Appeals for the Ninth Circuit is published at 62 F.4th 1145 and is reproduced at App.1-31.

## **JURISDICTION**

The Ninth Circuit issued its opinion on March 10, 2023. This Court has jurisdiction under 28 U.S.C. §1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Constitution's First Amendment states in relevant part:

Congress shall make no law ... abridging the freedom of speech.

Section 1983 of Title 42 of the U.S. Code states in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

California Elections Code §10.5(b) establishes the Office of Election Cybersecurity and defines its duties. It is reproduced at App.108-110.

## STATEMENT OF THE CASE

1. In 2018, California created the Office of Election Cybersecurity within the California Secretary of State’s office. California law empowers the Office “[t]o monitor and counteract false or misleading information regarding the electoral process that is published online or on other platforms and that may suppress voter participation or cause confusion and disruption of the orderly and secure administration of elections.” Cal. Elec. Code §10.5(b)(2). The Office “shall ... [a]ssess the false or misleading information” and “mitigate” it. *Id.* §10.5(c)(8). And the Office “shall ... [c]oordinate with federal, state, and local agencies,” work “[i]n consultation” with “private organizations,” and “make recommendations for changes to state laws, regulations, and policies,” among other mandates. *Id.* §10.5(c)(1), (2), (5).

One such change to state law came in 2022. California enacted AB 587—a law that requires Twitter and other social media companies to submit reports to the California Attorney General about how the companies remove, demonetize, or deprioritize “[d]isinformation or misinformation” from their websites. *See* Cal. Bus. & Prof. Code §22677. Failure to comply is punishable by civil penalties up to \$15,000 per violation per day, or the company “may be enjoined” by a court. *Id.* §22678(a)(1). With AB 587’s passage, the California Attorney General sent a letter to Twitter and other companies instructing them to “do more to rid your platforms of the dangerous disinformation, misinformation, conspiracy theories, and threats that fuel political violence, spread fear and distrust, and ultimately chill our democratic process” and promised

that “[t]he California Department of Justice will not hesitate to enforce these laws,” citing various state statutes in addition to AB 587.<sup>1</sup> AB 587 adds to the panoply of laws that already govern (and stand to punish) a company like California-based Twitter for not censoring speech that the California government does not like.

**2.** Leading up to the 2020 election, California’s Office of Election Cybersecurity seized on its power to police “misleading information.” Cal. Elec. Code §10.5(b)(2). It entered into a \$35-million contract with political consultants, enlisted to help the Office identify misinformation with “Misinformation Daily Briefing[s].” App.123 (¶¶42, 57). The consultants surveyed social media posts for “misinformation,” which the Office then raised with social media companies including Twitter. App.126 (¶¶57-61). The Office, through the California Secretary of State, also had access to Twitter’s so-called “Partner Support Portal,” another direct line to Twitter. App.121 (¶¶32-33).

The Office of Election Cybersecurity makes no secret of its work to police misinformation through its direct channels to Twitter and other companies. *See* App.119-120, 127-28 (¶¶25, 65). After the 2020 election, the California Secretary of State reported on the Office’s successes: “We worked in partnership with social media platforms to develop more efficient

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<sup>1</sup> Letter from Cal. Attorney General at 4, 8 (Nov. 3, 2022), [perma.cc/GC42-XCX4](https://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”).

reporting procedures for potential misinformation. Misinformation identified by our office or voters was promptly reviewed and, in most cases, removed by the social media platforms.” App.127-28 (¶65). He touted that the Office “discovered nearly 300 erroneous or misleading social media posts that were identified and forwarded to Facebook and Twitter to review and 98 percent of those posts were promptly removed for violating the respective social media company’s community standards.” App.127 (¶64).

**3.** The Office targeted Petitioner Rogan O’Handley’s speech. O’Handley is a lawyer and political commentator. App.128-29 (¶¶69-70). He had long posted on Twitter without interference. App.129, 133 (¶¶71, 81). But that all changed when California government officials got involved in November 2020.

O’Handley first drew the ire of the Secretary of State’s Office of Election Cybersecurity when he posted: “Audit every California ballot[.] Election fraud is rampant nationwide and we all know California is one of the culprits[.] Do it to protect the integrity of that state’s elections[.]” App.131 (¶72). Days later, Twitter labeled O’Handley’s speech as “disputed,” reduced its visibility, and put a strike on his account. App.8-9; App.132-33 (¶¶77-78).

A public records request revealed that Twitter did not act alone. California had turned Twitter’s attention to O’Handley’s account. *See* App.131-33 (¶¶74-77). The Office of Election Cybersecurity gave his post a government case number (“Case#0180994675”) and coded it as an “orange” level threat in the Office’s internal documents. App.132 (¶75). The Office’s direct message to Twitter about O’Handley’s speech stated:



“Hi, We wanted to flag this Twitter post ... [f]rom user @DC\_Draino. In this post user claims California of being a culprit of voter fraud, and ignores the fact that we do audit votes. This is a blatant disregard to how our voting process works and creates disinformation and distrust among the general public.”

App.132 (¶76).

Twitter complied, and the State took note. App.8-9; App.132-33 (¶¶77-80). The Office’s internal spreadsheets tracked that Twitter acted favorably upon its request to mark O’Handley’s tweet as disinformation. App.133 (¶80).

Before the Office flagged O’Handley’s account, Twitter had not disciplined O’Handley. App.25; App.133 (¶81). But the Office’s message changed that, targeting his account for further censorship. *Id.* Between November 2020 and January 2021, O’Handley’s tweets were repeatedly labeled as disinformation. After accruing four more strikes, Twitter indefinitely suspended O’Handley in February 2021. App.138 (¶88); *see* App.133 (¶79) (alleging that Twitter bans users after five strikes). After nearly two years, Twitter finally restored O’Handley’s account while his case was on appeal. App.25.

4. O’Handley sued California officials, Twitter, and others. Among other claims, he alleged that California officials acted under color of state law—flexing their newfound power to monitor “false or misleading information regarding the electoral process that is published online,” Cal. Elec. Code §10.5(b)(2)—to censor

O’Handley’s speech in violation of the First Amendment. Relevant here, he sought injunctive relief against state officials. App.25.

The district court dismissed O’Handley’s complaint with prejudice, denying him any opportunity to replead. App.104-05. California officials argued O’Handley did not have standing to sue because his injury was not traceable to the government. App.73-74. The district court agreed that the causal chain between the government and Twitter was too “tenuous.” App.78.

In the alternative, California officials argued there was no state action for the constitutional claims, and the district court agreed. App.78-79. The district court reasoned the Office’s message to Twitter was a “one-off, one-way communication” and waved off other allegations about the State’s direct access to Twitter and the Secretary of State’s public statements about its track record of success with Twitter and other companies. App.55; *see also* App.57. The district court credited *defendants’* explanation for their conduct—that Twitter acted independently based on its own rules. App.58-59. The district court reasoned the complaint’s “allegations might demonstrate a meeting of the minds to promptly address election misinformation, but not a meeting of the minds to ‘violate constitutional rights[.]’” App.61 (emphasis omitted).

5. O’Handley appealed, and the Ninth Circuit affirmed the dismissal with prejudice. App.31. But first, the Ninth Circuit clarified that O’Handley had standing and rejected the district court’s traceability analysis. The court explained, “It is possible to draw a causal line from the OEC’s flagging of the November

12th post to O’Handley’s suspension,” especially given the complaint’s “allegation that Twitter had never imposed any disciplinary action against him until the OEC placed his account on the company’s radar.” App.25.

Nevertheless, the Ninth Circuit agreed with the district court that the complaint did not plausibly state any First Amendment claims because there was no state action. App.26. According to the Ninth Circuit, California officials were “not responsible for any of Twitter’s content moderation decisions with respect to O’Handley.” *Id.* Despite the motion-to-dismiss posture, the Ninth Circuit found “that Twitter acted in accordance with its own content-moderation policy when it limited other users’ access to O’Handley’s posts and ultimately suspended his account,” and inferred from this “simple fact” that California officials bore no responsibility. App.12. The Ninth Circuit emphasized that “Twitter was free to ignore” California’s message flagging Mr. O’Handley’s post. App.16. The court reasoned there was nothing wrong with California and Twitter’s “meeting of the minds” to remove election misinformation. App.19.

The Ninth Circuit went on to reject O’Handley’s reliance on *Bantam Books* as a basis for his First Amendment claim against the State. The Ninth Circuit reasoned that “OEC’s mandate gives it no enforcement power over Twitter.” App.28 (citing Cal. Elec. Code §10.5). The court concluded that state “[a]gencies are permitted to communicate in a non-threatening manner with the entities they oversee without creating a constitutional violation.” App.28. For that proposition, the Ninth Circuit relied solely on

*National Rifle Association of America v. Vullo*, 49 F.4th 700 (2d Cir. 2022), which is now before this Court at the certiorari stage where a member of this Court has called for a response. *Id.*, No. 22-842.

The Ninth Circuit also rejected O’Handley’s argument that the Office unconstitutionally retaliated against him for his disfavored speech. It reasoned that the State’s singling out O’Handley’s account could not be an “adverse action” for purposes of a First Amendment retaliation claim. App.28. That was because the State’s message to Twitter was protected *government speech*, the Ninth Circuit reasoned. App.29. If that government speech could be construed as adverse action, then that “would prevent *government officials* from exercising their own First Amendment rights.” *Id.* (emphasis added). In the Ninth Circuit’s words:

California has a strong interest in expressing its views on the integrity of the electoral process. The fact that the State chose to counteract what it saw as misinformation about the 2020 election by sharing its views directly with Twitter rather than by speaking out in public does not dilute its speech rights or transform permissible government speech into problematic adverse action.

*Id.* Based on the Ninth Circuit’s conclusion that state officials “did not engage in any unconstitutional acts,” the court affirmed the dismissal of the complaint with prejudice. App.31.

## REASONS FOR GRANTING THE PETITION

Social media platforms are today’s public square, and state officials are testing the limits. This petition raises recurring and important questions about the difference between state officials engaged in permissible “government speech” on social media and state officials engaged in a proscribed “system of informal censorship,” *Bantam Books*, 372 U.S. at 71. This Court has already granted certiorari to decide when elected officials’ individual social media activity is state action. See *O’Connor-Ratcliff v. Garnier*, No. 22-324; *Lindke v. Freed*, No. 22-611. This case presents the flip side of that coin: what if, rather than participate publicly on social media, the State works behind the scenes to tell social media companies to suppress private citizens’ speech that the State condemns?

That’s protected government speech, according to the Ninth Circuit. App.28-29. The court affirmed the dismissal of Petitioner’s complaint with prejudice because allowing it to proceed would threaten *government officials’* speech rights. App.29. California—through an agency that exists to police “false or misleading information” online, Cal. Elec. Code §10.5(b)(2)—is now free to tell social media companies to censor political speech. But it shouldn’t be. “[G]overnment speech in the literal sense is not exempt from First Amendment attack” when the State “restricts private expression in a way that ‘abridges’ the freedom of speech,” *Shurtleff*, 142 S. Ct. at 1599 (Alito, J., concurring), just as California’s Office of Election Cybersecurity does here.

These important questions about state officials’ power to indirectly censor private citizens’ speech will

recur. The Court is currently considering a petition that raises related state action issues in *National Rifle Association v. Vullo*, No. 22-842. The Second Circuit dismissed the *Vullo* complaint on the theory that a New York state official was merely advocating for her views, not suppressing constitutionally protected conduct. *See Vullo*, 49 F.4th at 706-07, 717. This petition raises related but distinct state-action issues also in a motion-to-dismiss posture. At the very least, this petition should be held for *Vullo* if the Court grants that case.

This Court’s review is warranted, independent of *Vullo*, to confirm that there is no social media exception to the First Amendment and to clarify how those doctrines apply. *See Biden v. Knight First Amendment Inst.*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring) (“We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.”). As the Court’s decision to grant *Garnier* and *Lindke* shows, confusion persists in the circuit courts about when state officials act “under color of state law” as they become entwined with social media. Other pending petitions highlight disagreement about States’ power to regulate social media companies through legislation. *See Moody v. NetChoice*, No. 22-277, 143 S. Ct. 744 (2023) (calling for the views of the solicitor general); *NetChoice v. Paxton*, No. 22-555, 143 S. Ct. 744 (2023) (same). Petitioner’s case presents a critically important and more basic facet of the First Amendment inquiry—can a State establish an agency whose purpose it is to single out speech it disfavors for private companies to

ensor? And can the State then evade First Amendment scrutiny by proclaiming it was merely engaging in its own government speech? Deciding those questions alongside *Garnier* and *Lindke*, and perhaps also the *NetChoice* cases, would ensure the Court fully considers the constitutional (and unconstitutional) means of regulating private citizens’ speech on social media. And this case is a particularly good vehicle to do so given the motion-to-dismiss posture.

**I. The circuit courts have blurred the line between permissible government speech and impermissible censorship schemes.**

Two categories of this Court’s First Amendment precedents collide in this case. The first is anchored by *Bantam Books* and entails the “adequate bulwarks” necessary to stop state officials’ “barely visible” suppression of private citizens’ speech through informal censorship schemes. 372 U.S. at 66. The second is this Court’s “government speech” doctrine. *Pleasant Grove*, 555 U.S. at 467 (collecting cases).

As for the first category—in *Bantam Books*, this Court explained that state officials cannot effectuate a “system of informal censorship” through private parties, any more than state officials can directly censor speech the State disfavors or deems offensive. 372 U.S. at 69, 71; *see also Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (“[I]t is ... axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.”). The scheme “of informal censorship” in *Bantam Books* arose out of Rhode Island’s creation of a commission charged with “educat[ing] the public concerning” obscene books and other publications and

“investigat[ing] and recommend[ing] the prosecution” of violators of the State’s obscenity laws. 372 U.S. at 59-60 & n.1 (quoting state law). The commission sent obscenity notices to a book distributor on official stationery and listed certain publications as “objectionable.” *Id.* at 61. The notices thanked the distributor for his “cooperation,” and they “usually remind[ed]” him of the commission’s duty to make recommendations about “prosecution of purveyors of obscenity.” *Id.* at 62-63. Local police would visit the distributor regarding the notices. *Id.* at 63. And the distributor ultimately stopped further circulation of the “objectionable” publications. *Id.*

The Court concluded the state commission violated the First Amendment even though it was the distributor who stopped circulating the objectionable publications. *Id.* at 68. It did not matter that the distributor “was ‘free’ to ignore the Commission’s notices” or that “his refusal to ‘cooperate’ would have violated no law.” *Id.* Nor did it matter that the commission had no “power to apply formal legal sanctions.” *Id.* at 66. The commission’s indirect censorship scheme *via* “threat[s] of invoking legal sanctions and other means of coercion, persuasion, and intimidation” was sufficient to warrant injunctive relief against the state actors. *Id.* at 67.

At the same time, a second category of this Court’s precedents establishes that the State can itself engage in “government speech” and “select the views that it wants to express.” *Pleasant Grove*, 555 U.S. at 467-68. State officials are “entitled to promote a program, to espouse a policy, or to take a position.” *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200,



208 (2015). For example, in *Pleasant Grove*, the government could select its preferred monument to install at a public park that would “speak to the public” and “convey some thought or instill some feeling,” as governments, kings, and emperors had done “[s]ince ancient times.” 555 U.S. at 470. To the extent individuals disagree with the government’s speech—be it monuments chosen or positions publicly taken—“the democratic electoral process ... provides a check.” *Walker*, 576 U.S. at 207.

But the government speech doctrine is one “susceptible to dangerous misuse.” *Matal v. Tam*, 582 U.S. 218, 235 (2017). It is the exception to the general rule that “[t]he government may not discriminate against speech based on the ideas or opinions it conveys,” *Iancu*, 139 S. Ct. at 2299, and that “[d]iscrimination against speech because of its message is presumed to be unconstitutional,” *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828 (1995). It is thus no surprise that this Court “exercise[s] great caution before extending [its] government-speech precedents.” *Tam*, 582 U.S. at 235; *see, e.g., Shurtleff*, 142 S. Ct. at 1592-93 (rejecting Boston’s flag flying as government speech). The Court has “neither accepted nor rejected ... that governmental entities have First Amendment rights.” *Shurtleff*, 142 S. Ct. at 1599 (Alito, J., concurring). Nor has this Court declared all “government speech in the literal sense” to be “exempt from First Amendment attack.” *Id.* If that were so, then “virtually every government action that regulates private speech would, paradoxically, qualify as government speech unregulated by the First Amendment.” *Id.*

The decision below blurs the line between these two strands of First Amendment law, with a liberty-destroying effect. By the Ninth Circuit’s reasoning, state officials’ speech behind closed doors to Twitter warrants greater First Amendment protection than private citizens’ political speech posted publicly on Twitter. Worse, the Ninth Circuit held as much in a motion-to-dismiss posture. Petitioner’s complaint was dismissed with prejudice, denying any opportunity to replead and precluding any further factual development. The courts did not gauge whether Petitioner plausibly stated a First Amendment claim by accepting the complaint’s allegations and instead found various facts for defendants, with the effect of ending Petitioner’s case before it could even begin. *But see Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 46 (2011); *Sause v. Bauer*, 138 S. Ct. 2561 (2018) (per curiam) (summarily reversing dismissal). As Petitioner’s case shows, an immediate course-correction is warranted. The government cannot single out disfavored speech for censorship and then claim that all the State has done is engage in protected government speech.

**A. The Ninth Circuit misapplied *Bantam Books*, in conflict with other circuit courts considering similar claims.**

1. Affirming the dismissal of Petitioner’s complaint, the Ninth Circuit concluded that California officials were “not responsible for any of Twitter’s content-moderation decisions with respect to O’Handley” and that the “grievance arises solely out of Twitter’s decision to limit access to his posts and to suspend his account.” App.26. The court construed “*Bantam Books* and its progeny” to “draw a line between coercion and

persuasion: The former is unconstitutional intimidation while the latter is permissible government speech.” App.27. Following that uncertain line, the Ninth Circuit concluded “the complaint’s allegations do not plausibly support an inference that OEC coerced Twitter into taking action against O’Handley.” App.28.

That conclusion depended on defendants’ telling of the facts, contrary to motion-to-dismiss ground rules. *See Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). According to the court (and defendants), Twitter acted “independently, in conformity with the terms of its own content-moderation policy,” “OEC’s mandate gives it no enforcement power over Twitter,” and the state agency was “non-threatening.” App.28. “Twitter was free to ignore” the agency. App.16. That ignored Petitioner’s allegations: that the censorship of his political speech was *not* simply about “Twitter’s terms of service” and that any such justification by state officials was “pretextual.” App.140 (¶99). The complaint alleged the State wanted to silence criticism about the California Secretary of State, including Petitioner’s tweet calling on the Secretary to audit ballots. App.119, 131-32, 140 (¶¶23, 72, 74-75, 99). The complaint alleged the *State*—not Twitter—spurred his suspension from Twitter because his speech targeted the Secretary’s work. Before state officials got involved, “Twitter had never before suspended Mr. O’Handley’s account or given him any strikes.” App.133 (¶81). According to the complaint, the *State*—not Twitter—made his account a target for repeat censorship and ultimately suspension from Twitter. *Id.*

Worst of all, the Ninth Circuit never grappled with this overriding fact: California effectuated its censorship scheme through a state agency, the Office of Election Cybersecurity, that has a state-law mandate to police speech online. *See* App.118-19 (¶¶19-21). It did so with the help of a \$35-million contract and “Daily Misinformation Briefings.” App.123, 126. (¶¶42, 57-60). And it did so with great success. Thanks to the Office’s “dedicated reporting pathways at each major social media company,” the Office successfully directed social media companies to censor 98 percent of reported misinformation. App.119, 127-28 (¶¶25, 64-65). One of those government censorship success stories was for Petitioner’s speech. There is no dispute that the Office successfully used its power to target Petitioner’s speech and kept tabs on Twitter’s willingness to comply. *See* App.132-33 (¶¶76-78, 80-81).

What’s more, had O’Handley’s complaint not been prematurely dismissed, he would have been able to conduct discovery and buttress his allegations with California’s latest enforcement threats targeting Twitter and other social media companies. As described above, social media companies must now submit reports to the attorney general about their suppression of “[d]isinformation or misinformation.” *See* Cal. Bus. & Prof. Code §22677. And in a letter to Twitter, California’s Attorney General has confirmed that California expects Twitter will “do more to rid [its] platforms of ... dangerous disinformation” with the warning that the State’s “Department of Justice will not hesitate to enforce these laws”—not only the recently passed AB 587 but also a string of other elections laws that have long been in place. *See* Letter

from Cal. Attorney Gen., *supra* (attaching addendum of “non-exclusive list” of “relevant election-related laws”). These laws, regulating California-based Twitter and other social media companies, further confirm that the Office of Election Cybersecurity’s misinformation reports to Twitter go beyond mere suggestions.

The complaint’s allegations should have been more than enough to survive a motion to dismiss. That the Ninth Circuit thought it was relevant that Twitter was “free to ignore” the agency (App.16) directly contradicts *Bantam Books*. The Supreme Court of Rhode Island had a similar rationale—that the book distributor was “‘free’ to ignore the Commission’s notices”—and this Court rejected it. 372 U.S. at 66, 68. That rationale is also contrary to the inference drawn from the complaint’s allegations. Under *Bantam Books*, it is sufficient at the motion-to-dismiss stage to allege, as Petitioner has, that a California agency—with a state-law mandate to police false or misleading information online and substantial funding to effectuate that goal—told Twitter to punish Petitioner’s disfavored speech and Twitter fell in line by disciplining O’Handley when it hadn’t done so before. *See* App.133 (¶81). Those allegations plausibly state a claim that the state agency used “means of coercion, persuasion, and intimidation” and “succeeded in its aim” to suppress Petitioner’s speech and many others. *Bantam Books*, 372 U.S. at 67; *see* App.127, 133 (¶¶64, 80).

2. The Ninth Circuit’s rejection of O’Handley’s *Bantam Books* arguments relied on the Second Circuit’s decision in *Vullo*. In *Vullo*, the Second Circuit relied on the same line—that attempts to convince are constitutionally permissible government speech and

only attempts to coerce are constitutionally problematic. 49 F.4th at 715. *Vullo* articulated a multi-factor test to distinguish between convincing and coercing: “(1) word choice and tone, (2) the existence of regulatory authority, (3) whether the speech was perceived as a threat, and ... (4) whether the speech refers to adverse consequences.” *Id.* (citations omitted). Citing *Vullo*, the Ninth Circuit agreed that “[a]gencies are permitted to communicate in a non-threatening manner with the entities they oversee without creating a constitutional violation” and that—at the motion-to-dismiss stage—a court could find a state agency did only that. App.28.

The plaintiff in *Vullo* has petitioned for certiorari, *see Vullo*, No. 22-842 (filed Feb. 7, 2023), arguing that the Second Circuit, like the Ninth Circuit here, found its own facts and drew its own inferences to dismiss an amended complaint based on its flawed multi-factored test. *See Vullo*, 49 F.4th at 717 (finding “as a matter of law” that “statements do not cross the line between an attempt to convince and an attempt to coerce”). A member of the Court called for a response to the petition in April. At the very least, this petition should be held for *Vullo* or heard alongside *Vullo* if the Court grants that petition.

**3.** The Court’s review here is also warranted, independent of *Vullo*, because the Ninth Circuit’s decision relaxes the rules for state officials entwined with social media. The decision is contrary to decisions in other courts of appeals. As other courts considering *Bantam Books* claims have recognized, a court cannot dismiss a complaint by ignoring facts alleged or drawing inferences against the plaintiffs. For example, in

*Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003) (per curiam), the Second Circuit explained that a state official could not send a “threatening” letter, and whether the state official had done so was an issue of fact. *Id.* at 343-44. The Second Circuit concluded that the district court erred by reaching conclusions “about the intent and effect of the letter” in a motion-to-dismiss posture. *Id.* at 344. Even vaguely worded threats by state officials with no regulatory authority were sufficient to plausibly allege a *Bantam Books* claim in *Okwedy*, 333 F.3d at 341-42. Similarly in *Rattner v. Netburn*, 930 F.2d 204, 210 (2d Cir. 1991), the Second Circuit concluded that the district court had impermissibly “weigh[ed] the evidence” about the threatening (or non-threatening) nature of a letter sent from a village trustee to the plaintiff, and impermissibly “assess[ed] credibility as if there had been a trial” when the case was only on summary judgment. *Id.*

Determining whether state actors’ statements were actionable under *Bantam Books* has also led to splintered decisions in both the Third and Tenth Circuits. Those decisions are further indication that the line between permissible government speech and impermissible coercion is blurred in the courts of appeals, and this Court’s clarification is necessary. See *VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151, 1175-77 (10th Cir. 2021) (Hartz, J., dissenting) (faulting majority opinion for failing to construe state official’s statement in favor of plaintiff in support of plaintiff’s First Amendment claim in a motion-to-dismiss posture); *R.C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85, 89 (3d Cir. 1984) (Becker, J., dissenting) (refusing to join majority opinion because

there was “a genuine issue of material fact as to whether the removal of the billboards was the result of any state-coerced action” that should have precluded summary judgment); *see also, e.g., Shurtleff*, 142 S. Ct. at 1587 (acknowledging that “line between a forum for private expression and the government’s own speech is important, but not always clear”).

And the Seventh Circuit’s decision in *Backpage.com v. Dart*, 807 F.3d 229 (7th Cir. 2015), illustrates why it matters that plaintiffs’ suits are not prematurely dismissed. *Backpage* involved a letter sent by the Cook County Sheriff to credit card companies, which “request[ed]” the companies “immediately cease and desist from allowing [their] credit cards to be used to place ads on websites like Backpage.com,” which the sheriff said was promoting sex crimes. *Id.* at 231-32. Contrary to the Ninth Circuit’s decision here, the Seventh Circuit concluded that the Sheriff’s letter violated the First Amendment even though the credit card companies independently decided to disengage with Backpage. *Id.* at 231. And the Seventh Circuit’s conclusion turned on evidence produced in expedited discovery, including internal discussions about how Visa would respond to the letter. *Id.* at 233. But here, O’Handley had no such opportunity.

Similarly, in *Hammerhead Enterprises, Inc. v. Brezenoff*, 707 F.2d 33 (2d Cir. 1983), the Second Circuit rejected a *Bantam Books* claim but only after the district court took evidence and made credibility findings in a bench trial—not on a motion to dismiss. Evidence at the bench trial revealed “not a single store was influenced” by a public official’s letter imploring department stores not to carry a controversial board



game. *Id.* at 39. *Hammerhead* confirms that the dismissal with prejudice here was premature. The plaintiff in *Hammerhead* got all the way to trial without evidence that department stores abided by the public official's request. Here, by contrast, the complaint alleges that the State put O'Handley's account in Twitter's crosshairs, that Twitter did as asked, and that the State kept a record of Twitter's cooperation. *Supra*, pp. 6-7.

As these decisions from other courts illustrate, whether a state official's statement amounts to the "coercion, persuasion, and intimidation" that *Bantam Books* prohibits, 372 U.S. at 67, is a *factual question*. The Ninth Circuit fundamentally erred by drawing inferences against O'Handley to decide that factual question against him at the motion-to-dismiss stage. *See Leatherman*, 507 U.S. at 164. That error is best illustrated by the Ninth Circuit's conclusion that Twitter acted "independently, in conformity with the terms of its own content-moderation policy." App.28. The complaint says the opposite: Twitter responded only because state officials flagged O'Handley's account; state officials had direct channels to Twitter and used them with great success; and state officials tracked Twitter's compliance all as part of their mandate to mitigate false or misleading information, among other allegations. App.114, 119-20, 127-28, 133, 140 (¶¶3, 25, 64-65, 80-81, 99).

The Ninth Circuit's overly strict reading of *Bantam Books* makes no sense. It immunizes a State that singled out disfavored speech for censorship. Having created an agency to police speech online, the State cannot now hide behind Twitter to evade

constitutional scrutiny. Contrary to the decision below, it does not matter whether the private entity “would have acted as [it] did independently.” *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963); see, e.g., *Watts v. Northside Indep. Sch. Dist.*, 37 F.4th 1094, 1098 (5th Cir. 2022) (public official does not “step[] out of his ordinary ‘state actor’ role by enlisting private parties to carry out his orders”); *Paige v. Coyner*, 614 F.3d 273, 280 (6th Cir. 2010) (reversing dismissal for the court to consider whether “state actor ... initiated the entire chain of events” and result was “reasonably foreseeable consequence” of the state action). It does not matter whether a private entity was “‘free’ to ignore” the State. *Bantam Books*, 372 U.S. at 68; accord *Okwedy*, 333 F.3d at 343. Whether the private company would have engaged in its own private censorship is not the question; the question is whether the State induced the scheme. Cf. *Knight First Amendment Inst.*, 141 S. Ct. at 1226 (Thomas, J., concurring). Here, California did, working through third parties “to take action the government itself would not be permitted to do”—that is, “censor expression of a lawful viewpoint.” *Id.*

Where, as here, the complaint alleges a state agency charged with policing false and misleading information online told a social media website to punish O’Handley for his speech, the complaint’s allegations sufficiently allege that state officials acted under color of state law in violation of the First Amendment. See *Bantam Books*, 372 U.S. at 67-68. That is all the more apparent now that California Department of Justice has promised not to hesitate to enforce election laws against social media companies. Letter from Cal.

Attorney Gen., *supra*. Certiorari is warranted, lest California be permitted to direct every social media company to censor disfavored speech and then immunize itself from attack by claiming it was merely exercising its government speech rights in an attempt to persuade.

**B. The Ninth Circuit’s expansion of the government speech doctrine is unbounded and in urgent need of correction.**

The Ninth Circuit also dramatically expanded the government speech doctrine. The court concluded that state officials’ speech behind closed doors to Twitter was protected “government speech” and thus could not be the basis for a First Amendment retaliation claim. In particular, Petitioner claimed that state officials took adverse action against him for his disfavored speech by flagging his account to Twitter, which state officials knew would result in misinformation labels, decreased visibility, strikes, and ultimately suspension. App.28-29; *see Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (government officials cannot take adverse action against someone for engaging in protected speech). But in the Ninth Circuit’s words: “Flagging a post that potentially violates a private company’s content moderation policy does not fit th[e] mold” of such “adverse actions” for First Amendment retaliation claims. App.29. Why? Because “it is a form of *government speech* that [the Ninth Circuit] ha[s] refused to construe as ‘adverse action’ because doing so would prevent government officials from exercising their own First Amendment rights.” *Id.* (emphasis added).

The Ninth Circuit relied on its decision in *Mulligan v. Nichols*, 835 F.3d 983 (9th Cir. 2016), for that

proposition. But *Mulligan* betrays the Ninth Circuit’s expansive rule here. *Mulligan* involved allegations that city officials engaged *publicly* in speech of their own. *Id.* at 988-89. *Mulligan*’s rationale was that public officials must be able to “respond[] to speech of citizens with speech of their own” to contribute to the “uninhibited marketplace of ideas.” *Id.* at 989. But here, state officials are not participating in the marketplace of ideas *publicly* on Twitter. State officials are engaging *privately* with Twitter, with the effect suppressing citizens’ particular viewpoints.

But the Ninth Circuit expressly rejected any distinction between state officials’ public speech contributing to the marketplace ideas and private speech diminishing the marketplace of ideas. In the Ninth Circuit’s words, that “the State chose to counteract what it saw as misinformation” by going “directly” to “Twitter rather than by speaking out in public does not dilute its speech rights or transform permissible government speech into problematic adverse action.” App.29.<sup>2</sup> By ignoring that distinction, the Ninth

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<sup>2</sup> For this statement, the Ninth Circuit cited the Second Circuit’s decision in *Hammerhead*, discussed above. But the Second Circuit expressly did not consider any “competing First Amendment considerations” of the public official’s “own right to speak.” 707 F.3d at 39 n.6. And the Second Circuit acknowledged that a valid First Amendment claim *can* be stated where a government official’s comments “can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official’s request,” or that “the distribution of items containing protected speech has been deterred by official pronouncements.” *Id.* at 39.

Circuit leaves the “government speech” exception unbounded.

The Ninth Circuit’s rule—agnostic to where or how or why the government is speaking—makes the First Amendment a cudgel for the government rather than a right for the governed. But as Justice Alito recently observed in *Shurtleff*, this Court has “neither accepted nor rejected” that “governmental entities have First Amendment rights.” 142 S. Ct. at 1599 (Alito, J., concurring); accord *Hopwood v. Texas*, 78 F.3d 932, 943 n.25 (5th Cir. 1996) (“The First Amendment generally protects citizens from the actions of government, not government from its citizens.”); *Mellen v. Bunting*, 327 F.3d 355, 369 n.8 (4th Cir. 2003) (same); *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) (“The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government.”). Compare that to here, where the Ninth Circuit made “government speech in the literal sense” exempt from First Amendment scrutiny; naked content- or viewpoint-based discrimination to suppress private citizens’ speech is immunized. *Shurtleff*, 142 S. Ct. at 1599 (Alito, J., concurring). The Ninth Circuit’s decision exemplifies how the government speech doctrine is one “susceptible to dangerous misuse,” and the reason why this Court “exercise[s] great caution before extending [its] government-speech precedents.” *Tam*, 582 U.S. at 235. The Ninth Circuit converted the State’s surreptitious censorship scheme into government speech with no First Amendment guardrails.

That unbounded conception of “government speech” is contrary to the doctrine’s origins—meant to

ensure public officials can add their voices to the *public* discourse. In *Pleasant Grove*, for example, the government speech at issue was the display of permanent monuments in a public park. 555 U.S. at 470. In *Walker*, the government speech at issue was license plates—or millions of “little mobile billboards,” as the dissenting opinion put it. 576 U.S. at 223 (Alito, J., dissenting). Still more circuit court decisions involve the public exchange of ideas, distinct from the Ninth Circuit’s decision below. *See, e.g., Mech v. School Bd. of Palm Beach Cnty., Fla.*, 806 F.3d 1070, 1077-78 (11th Cir. 2015) (involving banners on school fences printed in school colors, bearing school initials, and identifying sponsors as school “partners”); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093 (8th Cir. 2000) (involving public radio station’s aired acknowledgements recognizing donors); *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 687 & n.13 (4th Cir. 2000) (involving government officials “speak[ing] out about matters of public concern” through the media); *VDARE*, 11 F.4th at 1173-74 (involving public statement by mayor); *Penthouse Int’l Ltd. v. Meese*, 939 F.2d 1011, 1015 (D.C. Cir. 1991) (involving commission’s report to the public and emphasizing “officials surely must be expected to be free to speak out to criticize”); *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 61, 70 (2d Cir. 1999) (alleging legislators created “a public frenzy” and “state[d] publicly” their criticisms about a contract); *see also, e.g., Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803, 806 (7th Cir. 2011) (“Those who do not agree with a President’s statement may speak in opposition to it; they are not entitled to silence the speech of which they disapprove.”). Even then, as other circuits have explained,

the government’s ability to espouse or criticize ideas publicly is not unlimited. *See, e.g., Amer. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010) (involving public roadside memorials, implicating the Establishment Clause as government speech); *Bloch v. Ribar*, 156 F.3d 673, 676, 680-81 (6th Cir. 1998) (involving emotional distress); *see also Mellen*, 327 F.3d at 369 n.8 (rejecting argument in school prayer case that public university “ha[d] a First Amendment interest that must be weighed in the Establishment Clause analysis”); *Paige*, 614 F.3d at 280 (explaining government bears responsibility for foreseeable consequences of government speech).

California’s conduct here is nothing like that in the above cases. California’s so-called “government speech” is aimed to stop private citizens from speaking, and it cannot evade First Amendment scrutiny. *See Shurtleff*, 142 S. Ct. at 1599 (Alito, J., concurring). There is a critical difference between government speech that contributes to the marketplace of ideas and California’s private missives to third parties to effectuate the “suppression of ideas through the exercise or threat of state power.” *Block v. Meese*, 793 F.2d 1303, 1314 (D.C. Cir. 1986) (Scalia, J.). *Bantam Books* “rigorously proscribed” the latter so that “the former can hold no terror.” *Id.*

Put another way, this would be a different case if the allegations were that state officials publicly engaged with Petitioner on Twitter about his ideas—say, by posting on the Secretary of State’s Twitter page—rather than privately worked to suppress them. When the government contributes to the public exchange of ideas in that way, voters can act as a “check” on the

government's speech at the ballot box. *Walker*, 576 U.S. at 207; *Shurtleff*, 142 S. Ct. at 1589. Any such government speech is “accountable to the electorate and the political process for its advocacy.” *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000). There is no “check” here. The Ninth Circuit used the government speech doctrine not as a shield but as a sword, transforming it into a license to go behind closed doors to discriminate on the basis of viewpoint. The public cannot “influence the choices of a government that, through words and deeds, will reflect its electoral mandate,” *Walker*, 576 U.S. at 207, when the government's audience is Twitter alone and not the public at large.

Here again, contrary to this Court's precedents, the Ninth Circuit prematurely and erroneously dismissed Petitioner's complaint based on a fundamental legal error—expanding the “government speech” doctrine beyond recognition. The “government speech” doctrine has no place here. If “California has a strong interest in expressing its views on the integrity of its electoral process,” App.29, then California can express those views. What it cannot do is go behind closed doors, acting through a state agency, to suppress the views it does not like. “Our constitutional tradition,” after all, “stands against the idea that we need Oceania's Ministry of Truth.” *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (plurality op.). It is the most basic of First Amendment principles that “[d]iscrimination against speech because of its message is presumed to be unconstitutional,” *Rosenberger*, 515 U.S. at 828.



## **II. The questions presented are important and will continue to recur.**

The Ninth Circuit’s decision is a blueprint for state officials who wish to suppress or retaliate against views they disfavor. Going forward, state officials in the country’s largest State—where Twitter and other social media companies are headquartered—may single out disfavored speech on social media platforms without opprobrium. The California Secretary of State’s Office of Election Cybersecurity, with a state-law mandate to police disinformation online, will continue to use its direct pathways to Twitter and other social media companies. It will continue to direct them to downgrade, remove, or otherwise punish speech that the State disfavors. And it will do so with the full power of the California Department of Justice behind it. Letter from Cal. Attorney Gen., *supra*. Now in the Ninth Circuit, such conduct is protected government speech and, consequently, it cannot be the basis for First Amendment claims.

As Justice Thomas observed in his concurring opinion in *Biden v. Knight First Amendment Institute*, the Court “will soon have no choice but to address how [the Court’s] legal doctrines apply to the highly concentrated, privately owned information infrastructure such as digital platforms,” including Twitter. 141 S. Ct. at 1221. That time has come. Social media platforms are today’s public square, *see Packingham*, 582 U.S. at 107, and California is the dominant player. The Ninth Circuit’s decision has far-reaching effects for California, its state agency dedicated to policing false or misleading information online, and the social media companies headquartered there.

Other cases on this Court’s docket are indicative of the confusion that persists in applying this Court’s First Amendment caselaw in the social-media context. The Court has already granted the petitions in *Garnier* and *Lindke*, which will clarify whether a public official engages in state action subject to the First Amendment by blocking an individual from the official’s personal social media account. The Court has also called for the views of the Solicitor General in *NetChoice v. Paxton*, No. 22-555, and *Moody v. NetChoice*, No. 22-277, regarding the State’s power to regulate social media companies to preclude private viewpoint discrimination. *See NetChoice, L.L.C. v. Paxton*, 49 F.4th 439 (5th Cir. 2022); *NetChoice, LLC v. Attorney General, Fla.*, 34 F.4th 1196 (11th Cir. 2022).

This petition presents another facet of the multi-dimensional First Amendment inquiry. Distinct from *Garnier* and *Lindke*, this case presents an alternative state-action problem that has become common: rather than contribute to the marketplace of ideas on Twitter itself, government officials covertly tell Twitter to suppress disfavored speech. Deciding the constitutional limits for such activity is critical. The State’s “viewpoint discrimination,” effectuated through state agencies that exist to single out views the government doesn’t like for suppression, is “poison to a free society.” *Iancu*, 139 S. Ct. at 2302 (Alito, J., concurring). The same question is recurring in other litigation. *Compare, e.g., Missouri v. Biden*, --- F. Supp. 3d ---, 2023 WL 2578260 (W.D. La. Mar. 20, 2023) (denying

motion to dismiss *Bantam Books* arguments),<sup>3</sup> *with Hart v. Facebook*, 2022 WL 1427507, at \*3, \*9 (N.D. Cal. May 5, 2022) (granting motion to dismiss First Amendment claims against federal officials for their involvement with Facebook and Twitter regarding Covid-19-related speech), *and Huber v. Biden*, 2022 WL 827248, at \*6 (N.D. Cal. Mar. 18, 2022) (similar); *see also Vullo*, No. 22-842. This case presents the ideal opportunity for the Court to consider the interplay of this Court’s First Amendment precedents in this recurring context and to clarify what a plaintiff must plead so that he has the opportunity to prove his claims, rather than have them dismissed on the theory that the First Amendment does not apply.

### **III. This case is an excellent vehicle for deciding the questions presented.**

The posture of this case makes it an excellent vehicle for deciding the questions presented. Petitioner’s complaint was dismissed with prejudice. The Court would thus be deciding primarily a legal question, not

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<sup>3</sup> In *Missouri v. Biden*, the district court denied a motion to dismiss First Amendment claims against myriad federal officials and distinguished the decision below. 2023 WL 2578260, at \*30. But by relying only on the Ninth Circuit’s description, the district court had no opportunity to consider Petitioner’s actual allegations that California’s censorship scheme likewise originated with a government agency devoted to policing information online, with “dedicated reporting pathways at each major social media company,” and responsible for recommending changes to state law. *Compare, e.g., id.* at \*33 (“Plaintiffs allege a formal government-created system for federal officials to influence social-media censorship decisions.”), *with App.* 118-20, 126-27, 132-33 (¶¶19-25, 59-61, 64-65, 77-78, 81) (materially the same allegations regarding California’s Office of Election Cybersecurity).

a factual one: assuming Petitioner’s allegations are true and construing all inferences in his favor, is the State’s conduct subject to First Amendment scrutiny? Or, as the Ninth Circuit concluded, must the complaint be dismissed because government officials have a First Amendment right to tell Twitter to censor their citizens’ speech? The petition, moreover, is limited to the State’s role, and thus avoids the often fact-dependent inquiry about when the First Amendment limits the conduct of private actors. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1929 (2019).

Left undisturbed, the Ninth Circuit’s approach to the First Amendment problems presented here will preclude private citizens from ever having an opportunity to move beyond the motion-to-dismiss stage, take discovery, and have a full and fair opportunity to prove claims and defenses. That made all the difference in the Seventh Circuit’s decision in *Backpage* or the Second Circuit’s decision in *Hammerhead*, both of which turned on evidence gathered after the complaint was filed. *See Backpage*, 807 F.3d at 233 (describing evidence from credit card companies); *Hammerhead*, 707 F.2d at 38-39 (concluding after a bench trial that “the evidence indicates that not a single store was influenced”); *see also, e.g., R.C. Maxwell Co.*, 735 F.2d at 89 (relying on deposition testimony that established private company’s decision to remove billboards was “entirely voluntary”). Contrary to the decision below, there is no social-media exception to the longstanding rule that “coercion, persuasion, and intimidation” by state officials that achieves their

desired “suppression” of ideas implicates the First Amendment. *Bantam Books*, 372 U.S. at 67.

**CONCLUSION**

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

Harmeet Dhillon  
Ronald D. Coleman  
Karin M. Sweigart  
Mark P. Meuser

DHILLON LAW GROUP, INC.  
177 Post Street, Ste. 700  
San Francisco, CA 94108

Mark Trammell  
Josh Dixon  
Eric Sell  
CENTER FOR AMERICAN  
LIBERTY  
1311 S. Main Street,  
Ste. 302  
Mount Airy, MD 21771

Thomas R. McCarthy  
Taylor A.R. Meehan  
*Counsel of Record*  
Tiffany H. Bates

CONSOVOY MCCARTHY PLLC  
1600 Wilson Blvd., Ste. 700  
Arlington, VA 22209  
(703) 243-9423  
taylor@consovoymccarthy.com

Adam K. Mortara  
LAWFAIR LLC  
40 Burton Hills Blvd., Ste. 200  
Nashville, TN 37215

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*Counsel for Petitioner*