No. 22-3573

In the United States Court of Appeals for the Sixth Circuit

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

Plaintiffs–Appellants,

v.

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

Defendants–Appellees.

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

**Brief of Amici Curiae for NetChoice,
The Pelican Institute, and The Cato Institute in Support of Neither Party**

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

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

Name of counsel: Nicole Saad Bembridge

Pursuant to 6th Cir. R. 26.1, NetChoice, LLC
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1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

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No

CERTIFICATE OF SERVICE

I certify that on December 5, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Nicole Saad Bembridge

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents.
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INTEREST OF AMICI CURIAE[1]

NetChoice is a national trade association of online businesses that works to protect free expression and promote free enterprise online. To this end, NetChoice is actively engaged in litigation and political advocacy that challenges efforts to undermine these principles on the internet.

The Pelican Institute's Center for Technology and Innovation Policy focuses on policy change that allows entrepreneurs to thrive in Louisiana. Protecting free speech, fostering development of new technologies, and focusing deployment of broadband in a free market way are important pieces of our work. We strive to encourage light touch regulation that allows entrepreneurs to create jobs and consumers to access products and services in a rapidly changing market.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert

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

A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and issues the annual Cato Supreme Court Review.

This case interests amici because it concerns the application of fundamental First Amendment principles to online speech.

INTRODUCTION AND SUMMARY OF ARGUMENT

Between May and December of last year, appellants Mark Changizi, Daniel Kotzin, and Michael Senger were banned from Twitter for violating its terms of service on Covid-19 misinformation. Around the same time, the U.S. Surgeon General and Department of Health and Human Services ("HHS") published two documents. The first was a Request for Information ("RFI"), which asked platforms to submit "information about the major sources of COVID-19 misinformation." The second was a Health Advisory on Building a Healthy Information Environment ("Health Advisory"), which urged social media platforms to "prioritize early detection of misinformation" by "impos[ing] clear consequences for accounts that repeatedly violate platform policies.

Plaintiffs sued the government, arguing the publication of these materials "coerced" Twitter into banning or suspending the plaintiffs' accounts. On appeal, plaintiffs contend that HHS's coercion transformed Twitter's suspensions of appellants' accounts into state action, which violated their First Amendment rights.

The First Amendment prohibits the government from censoring, compelling, or otherwise abridging private speech. Yet government actors seeking to control online speech often try to evade the First Amendment by bullying private social media services into taking action against users' speech on their behalf. But the government cannot achieve indirectly what the First Amendment proscribes it from doing directly. A clear but narrow judicial limit on government "jawboning" is thus necessary to ensure the First Amendment's guarantees endure online.

In evaluating meritorious jawboning complaints brought by social media users against the government, courts should take care not to impose an unreasonably high bar to plaintiffs' success. The district court held plaintiffs' claim was not redressable because there was an indeterminate likelihood of Twitter changing its future content moderation practices on Covid-19 even if the court ruled for the plaintiffs.

But plaintiffs' asserted First Amendment injury was their being censored by the government, not by Twitter. Such an injury would be fully redressed if Twitter's future moderation decisions were no longer products of government coercion.

Government efforts to evade the First Amendment's constraints should be condemned. But not all expressions of disapproval of digital services' moderation policies violate the First Amendment, and extending state action to private content moderation risks undermining free speech online. Amici propose that in the context of social media platforms, this court should make clear that a successful jawboning claim against the government need not require a finding that a social media company has been transformed into a state actor.

ARGUMENT

I. Government jawboning to influence private, online speech should be constrained

Over sixty years ago, the Supreme Court recognized the need to guard free expression both against "heavy handed frontal attack" and against "being stifled by more subtle government interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). This principle is no less relevant today. The First Amendment prohibits the government from

censoring, compelling, or otherwise infringing on private speech. But government actors—increasingly consumed with controlling what speech appears online—frequently try to informally bully social media platforms into taking action against private speech on the government's behalf. *See generally* Will Duffield, *Jawboning against Speech: How Government Bullying Shapes the Rules of Social Media*, Cato Institute, Policy Analysis No. 934, (Sept. 12, 2022) [hereinafter Duffield, *Jawboning against Speech*][2]; Rebecca Kern, *Push to rein in social media sweeps the states*, Politico (July 1, 2022) (noting that over 100 bills have been introduced the last year to control what content gets shared on the internet).[3]

As a result, claims that the government *indirectly* censored users' posts, like plaintiffs', are on the uptick. *See, e.g.*, *State of Mo. v. Biden*, 2022 U.S. Dist. LEXIS 131135 (arguing that the "Government colluded with and/or coerced social media companies to suppress disfavored speakers, viewpoints, and content on social media"); *O'Handley v. Padilla,* 579 F. Supp. 3d 1163 (N.D. Cal. 2022) (arguing that Twitter

[2] Available at https://tinyurl.com/mr2p37he.

[3] Available at https://tinyurl.com/5yud5nv7.

engaged in "joint action" with the California Secretary of State's office when it removed plaintiffs' posts). Government "jawboning" against online speech threatens the users' free speech and violates the social media platforms' First Amendment right to choose the content they host. In evaluating plaintiffs' claims against the government, this Court should take care to ensure the rights of both users and platforms are fully considered.

A. Censorship by proxy is still censorship

Digital services like social media empower billions of people to share and receive an endless stream of content to and from a virtually unlimited global audience. But governments hostile to this proliferation of expression have sought to deputize the social media platforms "as proxy censors to control the flow of information." Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. Pa. L. Rev. 11, 14 (2006) [hereinafter Kreimer, *Censorship by Proxy*][4]; Eric Auchard, *Turkey Blocks Web Site over Insults to Ataturk*, Reuters, March 25, 2018

[4] Available at https://tinyurl.com/bdfz8d6c.

(explaining Turkish speech intermediaries can be ordered to remove content that "offends Turkishness")[5]; "Overview of the NetzDG Network Enforcement Law," Center for Democracy and Technology, July 17, 2017 (explaining Germany's NetzDG law requires platforms to remove content that violates local hate speech laws).[6]

The First Amendment prohibits the government from taking similar action "abridging the freedom of speech, or of the press." U.S. Const. amend. I; *Herbert v. Lando,* 441 U.S. 153, 168 n.16 (1979) (explaining the First Amendment's restrictions on government action apply to local, state, and federal executive agencies and agents). This means the government is barred from controlling what speech appears online—both directly and by proxy. *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (finding First Amendment protection for online media is coextensive with offline media). Unfortunately, the First Amendment's command has not dissuaded many government actors from trying to control social media through the use of soft power. These exercises of soft power, known as "jawboning," "occur when a government official

[5] Available at https://tinyurl.com/3ssu2b72.

[6] Available at https://tinyurl.com/e5e462sk.

threatens to use his or her power—be it the power to prosecute, regulate, or legislate—to compel someone to take actions that the state official," legally, "cannot." Duffield, *Jawboning against Speech*.

Executive and legislative officials at all levels of government have jawboned social media platforms by threatening them with the *possibility* of regulatory changes, legislation, and onerous investigations. Kreimer, *Censorship by Proxy* at 14; *see generally* Genevieve Lakier, *Informal Government Coercion and The Problem of "Jawboning,"* Lawfare (July 26, 2021) [hereinafter Lakier, *The Problem of "Jawboning"*] (explaining the trend of government officials using informal means to pressure social media companies).[7] In May 2020, former President Donald Trump tweeted "Republicans feel that Social Media Platforms totally silence conservative voices. We will strongly regulate, or close them down, before we can ever allow this to happen." Shannon Bond and Avie Schneider, *Trump Threatens to Shut Down Social Media after Twitter Adds Warning to His Tweets*, NPR, May 27, 2020.[8] Likewise, in a hearing on Russian interference in American elections three years earlier, Senator Dianne

[7] Available at https://tinyurl.com/yd34wbtc.
[8] Available at https://tinyurl.com/sfu56zhe.

Feinstein told platform representatives, "You've created these platforms and now they are being misused, and you have to be the ones to do something about it, or we will." Social Media Influence in the 2016 U.S. Election: Hearing Before the Select Committee on Intelligence, 115th Cong. (Nov. 1, 2017) (statement of Sen. Feinstein).[9] By jawboning, rather than duly enacting legislation or regulation, government officials endeavor to infringe upon speech while evading constitutional prohibitions on such infringement.

Yet "system[s] of informal censorship" aimed at speech intermediaries may also violate the First Amendment. *Bantam Books v. Sullivan*, 372 U.S. 58, 61 (1963). If courts did not constrain the government from achieving censorship by proxy, the First Amendment would be a guarantee in name only. Several sitting members of Congress have publicly acknowledged the impropriety of jawboning against speech. In a hearing before the Senate Committee on Commerce, Science, and Transportation, Senator Brian Schatz warned platforms not to "let the United States Senate bully you . . . don't let the specter of removing Section 230 protections, or an amendment to antitrust law, or any other

[9] Available at https://tinyurl.com/yc2pkd72.

kinds of threats cause you to be a party to the subversion of our democracy." Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior: Hearing Before the Committee on Commerce, Science, and Transportation, 116th Cong. (Oct. 28, 2020) (statement of Sen. Schatz at 1:22:00).[10] Senator Richard Blumenthal called the same hearing an attempt to "bully and browbeat the platforms here to try to tilt" their content moderation decisions. *Id.* (statement of Sen. Blumenthal at 1:42:00). *See also* Stifling Free Speech: Technological Censorship and the Public Discourse: Hearing Before the Committee on the Judiciary, Subcommittee on the Constitution, Senate, 115th Cong. (Apr. 10, 2019) (statement of Sen. Mazie Hirono) ("We simply cannot allow the Republican party to harass tech companies into weakening content moderation policies . . .").[11] To be sure, "some of those who complain loudly about the other [party's] jawboning have made their fair share of threats and demands," but these statements show that some in the government understand it is exceeding its legislative and constitutional authority. Duffield, *Jawboning against Speech.*

[10] Available at https://tinyurl.com/yc2pkd72.
[11] Available at https://tinyurl.com/2p8ez6ph.

Instances of jawboning vary in specificity and severity. *See* Daphne Keller (@daphnehk), Twitter (Sept. 10, 2020, 2:31 PM) (explaining jawboning efforts to "launder [government] power to get platforms to do the state's bidding" exist on a continuum of coerciveness).[12] Among the most common, and arguably least pernicious, are general statements of disapproval and "leading requests for information." Duffield, *Jawboning against Speech,* Tracking Jawboning: Jawboning Styles; Sen. Adam Schiff, *Letter to Alphabet and YouTube on Incel Content* (Oct. 24, 2022)[13]; Sen. John Thune, "Letter to Mark Zuckerberg," United States Senate Committee on Commerce, Science, and Transportation, May 10, 2016 ("How many stories have curators excluded that represented conservative viewpoints or topics of interest to conservatives?").[14] Other, more pernicious forms of jawboning contain specific demands or explicit threats of retaliatory action if platforms do not remove or leave up particular content. *See, e.g.*, Ivana Saric, *Senator threatens Musk: Fix your companies or Congress will*, Axios (Nov. 13, 2022) (Senator explicitly

[12] Available at https://tinyurl.com/3ds2p4bx.

[13] Available at https://tinyurl.com/yc8yz99n.

[14] Available at https://tinyurl.com/yc8yz99n.

threatening private business with adverse regulation)[15]; Jessica Guyunn, *Ted Cruz threatens to regulate Facebook, Google and Twitter over charges of anti-conservative bias*, USA Today (April 10, 2019) (same)[16]; Sen. Robert Menendez, *Letter to Jack Dorsey* (March 7, 2019) (Sen. Menendez's letter specifically requesting Twitter user @IvanTheTroll's content be removed).[17]

Appellees' RFI and Health Advisory have aspects that fall on multiple points on this spectrum. The Health Advisory contains eight guidelines for social media to "[p]rioritize early detection of misinformation 'super-spreaders' and repeat offenders," and to "[i]mpose clear consequences for accounts that repeatedly violate platform policies." Surgeon General's Advisory, Confronting Health Misinformation: The U.S. Surgeon General's Advisory on Building a Healthy Information Environment (July 2021). The RFI asked platforms to submit "information about the major sources of COVID-19 misinformation associated with exposure." Impact of Health Misinformation in the Digital Information Environment in the United

[15] Available at https://tinyurl.com/yc3j7exe.
[16] Available at https://tinyurl.com/22xkrzh6.
[17] Available at https://tinyurl.com/rr6kxtc3.

States Throughout the COVID-19 Pandemic Request for Information (RFI), 44 Fed. Reg. 12,712 (March 2022).

Extra-legal efforts to influence social media are not equally pernicious, but the frequency of these tactics, and the lack of a clear judicially created limit on jawboning, is cause for concern. *See* Lakier, *The Problem of "Jawboning."* "Threats of prosecution or regulation to compel private speech suppression simply launders state censorship, compelled speech, and viewpoint discrimination—all proscribed by First Amendment jurisprudence—through private intermediaries." Duffield, *Jawboning against Speech*. Jawboning creates cognizable dangers to free expression "no less than threats of direct prosecution of speakers or listeners." Kreimer, *Censorship by Proxy* at 65. The Supreme Court recognized this in *Smith v. California* when it held that self-censorship, compelled by the State, is no less virulent for being privately administered, rather than directly imposed by the government. 361 U.S. 147, 150–51 (1959); *see also N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 265 (1964) (explaining in the context of libel judgments that the high bar of "actual malice" is necessary to mitigate the chilling potential of newspapers' "self-censorship").

Jawboning also violates the online services' well-established First Amendment right to choose what content they host. In *Miami Herald v. Tornillo,* the Supreme Court explained that "[t]he choice of material . . . the decisions made as to limitations on the size and content . . . and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment" which is protected by the First Amendment. *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974). This editorial freedom extends far beyond traditional newspapers. *See NetChoice, LLC v. AG, Fla.*, 34 F.4th 1196, 1200 (11th Cir. 2022) (finding it is "substantially likely that social-media 'content-moderation' decisions constitute protected exercises of editorial judgment"); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (noting that the First Amendment protects an online bulletin board's decision "to publish, withdraw, postpone or alter content"); *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2013) (First Amendment protects internet search engines). When the government jawbones private speech intermediaries, it may distort those intermediaries' protected editorial decision making. This is especially likely if the jawboning includes

a threat of adverse regulatory action. "Government threats . . . can transform private conduct into government action." Duffield, *Jawboning against Speech*; *see* Liz Wolfe, *How Government Officials Bully Social Media Companies to Censorship*, Reason (Sept. 14 2022) (explaining that Telegram's notorious resistance to the U.S. governments' demands and court orders is likely due to the platform not being based in the U.S.).

B. A judicial limit on jawboning is necessary to preserve the First Amendment's guarantees

Despite the obvious threats jawboning poses to free speech, "relatively little attention has been paid to the constitutional question of whether, or rather when, government jawboning itself violates the First Amendment." Lakier, *The Problem of "Jawboning."* In "proxy censorship" cases like the instant case, it is unsettled when government bullying rises to the level of coercion that violates the First Amendment. *See, e.g.*, *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963) (finding that threatening to punish a private intermediary for not making a certain editorial decision alone violates the First Amendment); *Blum v. Yaretsky*, 457 U.S. 991 (1982) (finding government jawboning converts private action into state action "only when it has exercised coercive power or has

provided such significant encouragement . . . that the choice must in law be deemed to be that of the State"); *Backpcage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015) (finding a public official who tries to censor a speech intermediary through "actual or threatened imposition of government power or sanction" violates the First Amendment). It is also unsettled whether, and how, the specificity of the jawboning directive should affect the analysis. What is settled, however, is that the First Amendment's protections "do not vary when a new and different medium for communication appears," and a fundamental role of the judiciary is to serve as a bulwark against government encroachments on private liberty. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011).

In evaluating jawboning complaints brought by social media users against the government, courts should take care not to impose an unreasonably high bar to plaintiffs' success. The district court held plaintiffs' claim was not redressable because there was an indeterminate likelihood of Twitter changing its *future* content moderation practices on Covid-19 even if the court held in favor of plaintiffs. *Changizi v. HHS*, 2022 U.S. Dist. LEXIS 81488, *33. Because Twitter may still "independently conclude that it is in its interest to take remedial action

against Plaintiffs, as [Plaintiffs' alleged] sequence of events indicates the company has been doing all along," the court found plaintiffs lacked standing. *Id.* But plaintiffs' asserted First Amendment injury was that they were being censored by the *government,* not by Twitter.

Plaintiffs have a right to content moderation decisions made free of government coercion, whatever those decisions may be. *Bantam Books*, 372 U.S. at 72 (Black, J., concurring) (finding that a scheme of state censorship effectuated by extralegal sanctions "retard[s] the full enjoyment of First Amendment freedoms"). Even if Twitter removed appellants' accounts or content again, their First Amendment injury would be redressed by the court so long as Twitter's calculus for any future removals "would be made free of coercion and without prior restraint." *Council for Periodical Distributors Ass'n v. Evans*, 642 F. Supp. 552, 559 (M.D. Ala. 1986), *aff'd in relevant part*, 827 F.2d 1483 (11th Cir. 1987) (finding a prior restraint on the sale of sexually explicit magazines would be redressed by a declaratory judgment stating the government imposed an unlawful prior restraint and an injunction to stop future censorship efforts from the government); *Turaani v. Wray*, 988 F.3d 313, 316 (6th Cir. 2021) (explaining that in the context of

standing, an indirect theory of traceability just requires a showing that the government cajoled, coerced, or commanded). So long as enjoining the government would stop the infringement of digital services' editorial judgment, redressability could be established.

Governance consistent with free speech values is necessary to ensure speech—the users' and the intermediaries'—is the product of free choice, not an arbitrary reflection of government preference. It is critical that there be a defined avenue for holding the government liable for certain censorial collaborations with social media platforms. Without a clearly articulated judicial limit on this type of "informal" speech regulation, the government will continue trying to evade the First Amendment's prohibitions on censorship and compelled speech. However, this court's metric for holding the government accountable for infringing speech must also be narrow enough to preserve services' own First Amendment rights to moderate content.

II. Courts should exercise special caution before finding state action in private editorial decision making

All government efforts to evade the First Amendment's constraints should be condemned. But not all expressions of disapproval of social media platforms' moderation policies violate the First Amendment.

"Government in our republic of elected representatives would be impossible otherwise." *Trump v. Twitter Inc.*, 2022 U.S. Dist. LEXIS 82496 (N.D. Cal. May 6, 2022), *12–13. Critically, extending state action doctrine to private content moderation risks the adverse effect of undermining free speech online. Amici propose that in the context of social media platforms, this court should make clear that a successful jawboning claim against the government need not require a finding that a social media company has been transformed into a state actor. A censored user may hold the government liable for First Amendment violations even in the absence of private "state action."

The First Amendment "safeguard[s] the rights of free speech" by placing "limitations on state action," rather than the acts of private entities. *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 567 (1972). "To draw the line between governmental and private," federal courts apply the state-action doctrine. *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). That doctrine allows private entities to qualify as "state actors" for First Amendment purposes "in a few narrow, limited circumstances—including . . . when the government compels the private entity to take a particular action." *Id.* at 1928. Appellants' First

Amendment claim is based on this theory of government compulsion. *Changizi v. HHS*, 2022 U.S. Dist. LEXIS 81488, *41.

State action analysis is used in two ways. The first is to find whether the government is liable because an act performed by a private entity is functionally "state action" attributable to it. And the second is to find whether a private entity may be liable because it is functionally a "state actor." Appellants' argument falls into the first category, but this Court's holding will also affect active jawboning lawsuits which fall into the second.

Social media "platforms are private enterprises, not governmental (or even quasi-governmental) entities." *NetChoice,* 34 F.4th 1196 at 1204. "Expanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty," namely, private platforms' own speech. *See Halleck*, 139 S. Ct. at 1934. The state action doctrine must not be used to nullify a publisher's First Amendment rights. *Id.* But that is exactly the risk if government coercion were held to transform a private content moderation decision into state action.

First, extending the definition of state action too broadly risks

chilling internal editorial processes without good reason. User-brought jawboning lawsuits like appellants' require discovery of digital services' private editorial source data. Source data includes "the corpus of third-party content submitted for publication, including [user-generated content] items that have been withdrawn from publication by the service or author, as well as items shared with limited audiences (such as notes from private conversations)." Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 Hastings L.J. 1203, 1209 (2022).[18] When internal editorial decisions are exposed, via discovery or mandated transparency laws, public scrutiny cajoles platforms, like traditional print media, into making editorial choices they otherwise wouldn't. *See generally id.*

Federal courts and even Congress already recognize that the Constitution limits the compelled disclosure of editorial source data. *See, e.g.*, *United States v. Cuthbertson*, 630 F.3d 139, 147 (3d Cir. 1980) ("The compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes."); 42 U.S.C. § 2000a (The Privacy Protection Act of 1980 imposes additional

[18] Available at https://tinyurl.com/mrxw8r6s.

restrictions on search warrants directed towards individuals disseminating "public communications."). In *Herbert v. Lando,* the Supreme Court specifically held that discovery requests of editorial source data—unlike discovery requests about non-First Amendment protected activity—must be narrowly tailored, rare, and made under especially strict judicial supervision. 41 U.S. 153, 177–78 (1979); *see also Reno*, 521 U.S. at 849 (explaining that online platforms receive the same First Amendment protection as traditional, offline ones). If this Court's standard for assessing state action claims is too permissive, platforms will be forced into endless discovery that chills their own speech.

Second, extending state action too broadly risks distorting platforms' moderation decisions. Government jawboning of social media platforms is a common practice. If a decision is controversial, the government will almost certainly have made strong statements about it. *See supra,* Section I. If any such statement could lead to a finding that a private social media platform has been transformed into a state actor, claims could be reverse engineered by aggrieved users every time an online service like Twitter makes a controversial moderation decision. To avoid losing First Amendment protection for their own editorial

judgment, online services may make moderation choices that intentionally contravene statements from government officials, for fear of being transformed into a state actor. This is the same kind of editorial distortion appellants argue HHS inflicted on Twitter. To be sure, allowing the government to dictate what speech private platforms can and can't publish—directly or by proxy—violates the most basic First Amendment principles. Yet if no public official could communicate about content moderation without facing liability, debate over issues of great concern to the public would be limited to those in the private sector.

Both political parties often jawbone platforms to take different actions over the same controversial content, with Democrats often telling platforms to remove the content and Republicans often asking them to leave it up. *See generally* DNC Recommendations for Combating Online Misinformation, Democratic National Committee; Nandita Bose, David Shepardson, *'Who the hell elected you?' U.S. Senate tech hearing becomes political showdown*, Reuters (Oct. 28, 2022).[19] "The back-and-forth tussle between removal demands, must-carry demands, and demands to ignore must-carry demands makes platform policy a political football." Duffield,

[19] Available at https://tinyurl.com/4ep3n9we.

Jawboning against Speech. If every controversial content moderation decision made subsequent to one political party's jawboning could be considered state action, any executive or state official belonging to the political party whose view the platforms' moderation action most closely aligned with could be sued for censoring or compelling hosting merely by coincidence.

Critically, the standard this court sets for finding state action may determine or influence currently active user jawboning lawsuits directed at the internet speech intermediaries themselves, rather than those directed at the government. *See, e.g.*, *Doe v. Google LLC*, 2022 U.S. App. LEXIS 31922 (9th Cir. 2022); *Informed Consent Action Network v. YouTube LLC*, 582 F. Supp. 3d 712 (N.D. Cal. Jan. 31, 2022); *Trump v. Twitter, Inc.,* 2021 U.S. Dist. LEXIS 257377 (S.D. Fla. Oct. 6, 2021). Plaintiffs in these cases sued the services directly based on varying theories that government jawboning turned them into state actors liable under the First Amendment. If courts find that jawboning transformed platforms themselves into state actors in these cases, the platforms would be forced to immediately reinstate accounts or content they may have *independently* chosen not to host. There are many reasons why

Twitter would independently decide to try and remove certain content, including a fear of losing revenue from advertisers or other users, or a genuine belief that it should prioritize tackling the spread of certain information. If courts allowed jawboning claims against private entities rather than just the government, social media platforms could effectively lose their First Amendment right to moderate every time a government official complains.

As state officials continue to jawbone social media companies into taking certain editorial action, lawsuits to vindicate users' interests by declaring private moderation "state action" continue to arise. *See, e.g.*, *State of Mo. v. Biden*, 2022 U.S. Dist. LEXIS 131135 (W.D. La. July 12, 2022) (granting expedited discovery of the Biden administration's materials for "colluding with and/or coercing Social Media . . . companies to suppress disfavored speakers, viewpoints, and contents"); *Rogalinski v. Meta Platforms, Inc.*, 2022 U.S. Dist. LEXIS 142721, *3-4 (N.D. Cal. Aug. 9, 2022) (granting social media platform's motion to dismiss user's claim that platform's "efforts to censor information had come in communion with, if not at the behest of efforts by the . . . Government"); *O'Handley v. Padilla*, 579 F. Supp. 3d 1163 (N.D. Cal. 2022) (same). Yet

aggrieved users may hold the government liable for First Amendment violations in the absence of private "state action." In First Amendment cases, there is a low threshold for suits against government agencies and officials that launder censorship through private intermediaries, like social media. In *Bantam Books, Co. v. Sullivan*, a state commission issued notices to book distributors that "certain designated books," published by plaintiffs, were "objectionable for sale," and that it was the commission's "duty to recommend to the Attorney General prosecution of purveyors of obscenity." *Bantam Books*, 372 U.S. at 62–63. As a result of the veiled threat, the distributor stopped selling the effectively banned books. *Id.* at 64. The Supreme Court found that the publishers had standing and a First Amendment remedy against the state commission *without* a finding of state action, even though it was the distributor's action that directly harmed the publishers' sales. "The threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" against book distributors were enough to violate the book publishers' First Amendment rights. *Id.* at 67. For the same reason, aggrieved users should have standing and a First Amendment remedy against the government for coercing editorial judgment, even though it

was Twitter's action that directly harmed appellants.

Likewise, in *Backpage.com v. Dart*, the Seventh Circuit stopped "a [government] campaign intended to crush [the website] Backpage's adult section . . . by demanding that firms such as Visa and MasterCard prohibit the use of their credit cards to purchase any ads on Backpage." 807 F.3d at 230. On official letterhead, the defendant sheriff requested that the credit card companies "cease and desist" allowing payments for Backpage ads. *Id.* at 231–32. The sheriff's letter contained threatening messages, "Visa and MasterCard got the message[,] and cut all their ties to Backpage." *Id.* at 232. Thus, the court found that Backpage had a First Amendment remedy against the sheriff for the ongoing government coercion of credit card and financial services companies—no state action necessary. *Id.* at 239. *See also Novak v. City of Parma*, 932 F.3d 421, 433 (6th Cir. 2019) (citing *Bantam Books*, 372 U.S. at 70) (reversing the dismissal of a claim that a police officer's letter and email to Facebook requesting that comments be removed were "administrative orders that constituted a prior restraint"). This Court should make clear in its decision that a successful jawboning claim against the government need not require a finding that a social media company has been transformed

into a state actor.

Courts should instead cabin jawboning claims to suits against the proper parties: government agencies and officials that have coerced private censorship. Government jawboning against online speech is a problem that threatens both users' free speech and the social media platforms' right to choose the content it hosts. A judicial remedy against the government would strengthen the First Amendment's guarantees online. Even so, not all expressions of disapproval of social media platforms' moderation policies violate the First Amendment and extending state action to private content moderation risks the adverse effect of undermining free speech online.

CONCLUSION

This Court should articulate a clear distinction between jawboning claims against the government and state action claims against private entities, so that legitimate concerns about the government co-opting content moderation do not morph into claims that abridge the First Amendment rights of private speech platforms.

Respectfully submitted,

DATED December 5, 2022

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I hereby certify that on December 5, 2022 I electronically filed the foregoing Brief of NetChoice, LLC, the Pelican Institute for Public Policy, and the Cato Institute as Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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