

23-30445

**United States Court of Appeals
for the Fifth Circuit**

STATE OF MISSOURI; STATE OF LOUISIANA; AARON KHERIATY; MARTIN
KULLDORFF; JIM HOFT; JAYANTA BHATTACHARYA; JILL HINES,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR.; VIVEK H. MURTHY; XAVIER BECERRA;
DEPARTMENT OF HEALTH & HUMAN SERVICES; ANTHONY FAUCI; et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Louisiana

**BRIEF FOR STATES OF NEW YORK, ARIZONA, CALIFORNIA,
COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS,
MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA,
NEW JERSEY, NEW MEXICO, OREGON, PENNSYLVANIA,
RHODE ISLAND, VERMONT, AND WISCONSIN, AND THE
DISTRICT OF COLUMBIA AS AMICI CURIAE
IN SUPPORT OF APPELLANTS AND REVERSAL**

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CERTIFICATE OF INTERESTED PERSONS
Supplemental Statement of Interested Parties
Pursuant to Local Rule 29.2

Missouri v. Biden,
No. 23-30445

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTRODUCTION AND INTERESTS OF AMICI

Since the advent of social media, government and private companies have often shared information and engaged in dialogue about the dangers that the spread of harmful content on social-media platforms may pose to public health and safety. In this lawsuit, plaintiffs—Missouri, Louisiana, and several individuals—seek to enjoin dozens of federal officials and agencies from engaging in such information-sharing and dialogue with social-media platforms. The U.S. District Court for the Western District of Louisiana (Doughty, J.) granted plaintiffs’ motion for preliminary relief and issued a sweeping injunction, which effectively bars *any* communication between many federal officials and agencies and social-media platforms regarding content moderation.

Amici States of New York, Arizona, California, Colorado, Connecticut, Delaware, Hawai‘i, Illinois, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, and Wisconsin, and the District of Columbia submit this brief in support of the federal defendants’ appeal from the preliminary

injunction. Given that seven out of ten Americans are social media users,¹ who spend an average of over two hours on social media every day,² amici States have a substantial interest in protecting their residents from the dangers to safety and health that the spread of harmful content on these platforms can sometimes pose. Critical to this interest is amici States' ability to share information and engage in a dialogue with social-media companies about potential health and safety hazards and other matters within the unique expertise of state governments.

Amici States further have a unique perspective on the nature and importance of such information-sharing and dialogue. Amici States' experiences demonstrate that information-sharing and communication between the government and social-media companies on topics such as child safety, consumer protection, and election integrity is mutually beneficial. And where, as in the federal defendants' case, it is purely recommendatory and non-coercive, the communications further the

¹ Brooke Auxier & Monica Anderson, Pew Rsrch. Ctr., *Social Media Use in 2021* (Apr. 7, 2021), <https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/>.

² Belle Wong, *Top Social Media Statistics and Trends of 2023*, Forbes (May 18, 2023), <https://www.forbes.com/advisor/business/social-media-statistics/>.

public interest and fully comport with the First Amendment. The district court's contrary ruling is erroneous; in purporting to protect First Amendment values, the district court significantly restricted the flow of public discourse on vitally important issues. The federal government, like the amici States, has an essential role to play in contributing to the marketplace of ideas, yet the district court's order effectively imposes a gag order on large swaths of the federal government. This will impoverish, rather than protect, wide open and robust debate on a wide range of matters of public importance.

ARGUMENT

POINT I

THE GOVERNMENT, SOCIAL-MEDIA COMPANIES, AND THE PUBLIC ALL BENEFIT FROM OPEN DISCOURSE ON CONTENT MODERATION

The experience of amici States confirms that maintaining an open line of communication between government and social-media companies on subjects of state expertise is productive, mutually beneficial, and non-coercive. Indeed, prominent social-media companies, such as Meta and Twitter, have lauded the benefits of information-sharing and discourse,³ and have created specific channels for law enforcement and other public and private stakeholders to report potentially harmful content on their platforms.⁴

³ See Mark Zuckerberg, *The Internet Needs New Rules*, Wash. Post (Mar. 30, 2019), <https://tinyurl.com/4vcfkd5h> (calling for a “more active role for governments and regulators” to address “harmful content, election integrity, privacy and data portability”); @TwitterSafety, *Twitter* (Sept. 30, 2020, 8:26 PM), <https://perma.cc/X9XH-VDJZ> (thanking the FBI for providing intelligence about Iran-based Twitter accounts that were attempting “to disrupt the public conversation” during the 2020 presidential debates).

⁴ See, e.g., Facebook Help Ctr., *Information for Law Enforcement*, Facebook, <https://www.facebook.com/help/494561080557017>; Twitter Help Ctr., *Report a Tweet, List, or Direct Message*, Twitter, <https://help.twitter.com/en/safety-and-security/report-a-tweet>.

Over the years, many amici States have engaged in communication and information-sharing with social-media platforms to address the proliferation of harmful content—ranging from extremist videos to election misinformation—and have engaged in an open dialogue regarding best practices in content moderation. For example, New York recently worked with social-media platforms in the wake of the Buffalo mass shooting to identify posts containing live video footage and other graphic images of the attack,⁵ which claimed the lives of ten people.⁶ The shooting was perpetrated by an 18-year-old white male, who selected a local grocery store in Buffalo, New York, as his target because of its “predominantly Black clientele.”⁷ Shortly before the attack, the shooter posted on an online platform Discord both a link to a livestream and the contents of his manifesto purporting to justify the violence he was about

⁵ See N.Y. Off. of Att’y Gen., *Investigative Report on the Role of Online Platforms in the Tragic Mass Shooting in Buffalo on May 14, 2022* 35-36 (Oct. 18, 2022), <https://ag.ny.gov/sites/default/files/buffaloshooting-onlineplatformsreport.pdf>.

⁶ James Doubek & Bill Chappell, *What We Know About the Victims of the Buffalo Shooting*, NPR (May 15, 2022), <https://www.npr.org/2022/05/15/1099031765/buffalo-shooting-victims>.

⁷ See N.Y. Off. of Att’y Gen., *Investigative Report*, *supra*, at 9.

to commit. He then began livestreaming the attack on another online platform, Twitch, which users could access by clicking the link he had posted on Discord.⁸

Although Twitch quickly responded to several user reports by taking down the livestream less than two minutes after the shooter opened fire,⁹ copies of the video and still images continued to circulate online for weeks after the attack, despite social media companies' best efforts to remove the content.¹⁰ In response, the Office of the New York Attorney General performed its own search across various social-media platforms for such posts and reported the content to the respective platforms, where appropriate.¹¹ These efforts—and the State's subsequent report outlining the role online platforms played in the shooting¹²—fostered important public dialogue about the dangers of

⁸ *Id.* at 32-33.

⁹ *Id.* at 33; see also Nathan Grayson, *How Twitch Took Down Buffalo Shooter's Stream in Under Two Minutes*, Wash. Post (May 20, 2022), <https://www.washingtonpost.com/video-games/2022/05/20/twitch-buffalo-shooter-facebook-nypd-interview/>.

¹⁰ N.Y. State Att'y Gen. Off., *Investigative Report*, *supra*, at 35-36.

¹¹ *Id.*

¹² See *id.* at 23-33.

social media in promoting extremist violence and the role social-media companies may play in combatting these harmful effects.¹³

Amici States also have a vital interest in safeguarding the well-being of children on social-media platforms and have long worked with companies to protect the safety and mental health of young users. Since the mid-2000s, States—including both amici States and the plaintiff States here—have engaged in open dialogue with platforms regarding best practices for protecting minors against online predators and inappropriate content. In 2008, these discussions culminated in agreements between MySpace, Facebook, and 49 States and the District of Columbia, to adopt important reforms.¹⁴ MySpace, for example, committed to retaining “a contractor to better identify and expunge inappropriate images,” and to “[i]mplement changes making it harder for

¹³ See, e.g., Aaron Katersky & Bill Hutchinson, *Buffalo Mass Shooting Suspect “Radicalized” by Fringe Social Media: NY Attorney General*, ABC News (Oct. 18, 2022), <https://tinyurl.com/34c2ctfd>.

¹⁴ See Press Release, Ariz. Off. of Att’y Gen., *Terry Goddard Announces Agreement with MySpace to Adopt Multiple Safety Measures* (Jan. 14, 2008), <https://www.azag.gov/press-release/terry-goddard-announces-myspace-adopt-multiple-safety-measures>; Press Release, Ariz. Off. of Att’y Gen., *Terry Goddard Announces Agreement with Facebook to Better Protect Kids* (May 8, 2008), <https://www.azag.gov/press-release/terry-goddard-announces-agreement-facebook-better-protect-kids>.

unknown adults to contact children.”¹⁵ The platform further pledged to “organize, with support of the Attorneys General, an industry-wide Internet Safety Technical Task Force” dedicated to “finding and developing online safety tools.”¹⁶ Facebook likewise agreed to more than 40 new safeguards, including limiting older users’ ability to search online for subscribers under 18,¹⁷ and removing “groups for incest, pedophilia, cyberbullying and other violations of the site’s terms of services.”¹⁸

New York reached a similar agreement in 2014 with Ask.fm, a social-networking site popular among teenagers. The State worked with Ask.fm to combat the rise of “cyberbullying and other harmful content” on the site—a problem fueled, in part, by its anonymous question-and-

¹⁵ Press Release, *Terry Goddard Announces Agreement with MySpace, supra*.

¹⁶ *Joint Statement on Key Principles of Social Networking Social Networking Sites Safety 2* (Jan. 14, 2008), <https://www.azag.gov/sites/default/files/2018-10/SocialNetworkingSitesSafety.pdf>.

¹⁷ *Facebook and U.S. States Agree to Safeguards*, N.Y. Times (May 8, 2008), <https://tinyurl.com/2d3ranp2>.

¹⁸ Press Release, *Terry Goddard Announces Agreement with Facebook, supra*.

answer format.¹⁹ The parties' fruitful discussions ultimately resulted in Ask.fm agreeing to substantially revamp its safety policies, including creating a new online safety center, committing to reviewing user complaints within 24 hours, and removing users who had repeatedly violated the site's terms of service.²⁰ Both the State and the social-media platform lauded the productive and mutually beneficial nature of these discussions: the chief executive officer of Ask.com emphasized that New York was "a like-minded partner with a similar vision," and New York stated that it hoped the discussions would serve as "a useful model for other companies in the digital space."²¹

In recent years, the importance of open dialogue between government and social-media companies on the safety and mental health of young users has grown ever more important, as social-media engagement among children continues to skyrocket. An estimated 95

¹⁹ See Press Release, N.Y. Off. of Att'y Gen., *A.G. Schneiderman and IAC Announce New Safety Agreement to Protect Children and Teens on Newly Acquired Ask.FM Site* (Aug. 14, 2014), <https://ag.ny.gov/press-release/2014/ag-schneiderman-and-iac-announce-new-safety-agreement-protect-children-and-teens>.

²⁰ *Id.*

²¹ *Id.*

percent of youth ages 13 to 17 today report using a social-media platform, with “more than a third” reporting that “they use social media ‘almost constantly.’”²² Critically, studies have repeatedly shown that increased social-media use among adolescents is correlated with worse mental-health outcomes, including depression, poor body image, and even suicide ideation.²³

These findings are of particular concern to amici States and have prompted the States to engage in discussions with social-media companies about the platforms’ role in mitigating the harmful effects of social media on children. For example, upon learning that Facebook (now Meta) intended to launch a version of Instagram for children ages 13 and younger, 44 States and Territories—including many among amici States and the plaintiff States here—explained their concerns about the dangers

²² U.S. Surgeon Gen., Advisory, *Social Media and Youth Mental Health* 4 (2023), <https://www.hhs.gov/sites/default/files/sg-youth-mental-health-social-media-advisory.pdf>.

²³ *Id.* at 6-10 (surveying scientific literature); see also 5Rights Found., *Pathways: How Digital Design Puts Children at Risk* 86 (July 2021), <https://5rightsfoundation.com/uploads/Pathways-how-digital-design-puts-children-at-risk.pdf> (reporting that Instagram targeted children as young as thirteen with content relating to eating disorders, extreme diets, sexualized imagery, body shaming, self-harm, and suicide).

such a platform would create for children.²⁴ This feedback was helpful: upon taking into consideration the views of governmental entities and other important stakeholders, Facebook announced that it would pause the development of its intended Instagram Kids service so that it could “work with parents, experts, policymakers, and regulators” to explore whether the platform would be in the best interests of younger teens online.²⁵

In addition to safeguarding the well-being of children on social-media platforms, amici States also have a substantial interest in protecting other vulnerable populations from scams and other predatory content online. Amici States like Michigan, for example, have issued advisories to caution the public against the proliferation of false information about government benefits on social-media platforms.²⁶ And

²⁴ Letter from Att’y Gen. to Mark Zuckerberg, Chief Exec. Officer, Facebook, Inc. (May 10, 2021), https://ag.ny.gov/sites/default/files/naag_letter_to_facebook_-_final.pdf.

²⁵ See Adam Satariano & Ryan Mac, *Facebook Delays Instagram App for Users 13 and Younger*, N.Y. Times (Oct. 4, 2021), <https://www.nytimes.com/2021/09/27/technology/facebook-instagram-for-kids.html>.

²⁶ Specifically, Michigan has advised residents that “offers to assist claimants” with unemployment benefits “may be scams,” and that “the
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New York has engaged in information-sharing with companies, like Amazon, to specifically address the issue of price gouging. At the beginning of the COVID-19 pandemic, for instance, New York flagged listings by third-party sellers offering products related to the COVID-19 crisis, such as hand-sanitizer, at extremely inflated prices.²⁷ And Amazon, in turn, “proactively shar[ed] information” with state regulators about sellers the platform suspected of engaging in price gouging.²⁸ As a result of this information-sharing, Amazon was able to more effectively identify problematic listings,²⁹ and the New York Attorney General

answers provided to unemployment-related questions on social media may contain misinformation that encourages claimants to commit fraud.” See Mich. Dep’t of Att’y Gen., *Avoid Unemployment Scams on Social Media* (n.d.), <https://tinyurl.com/ye24wdj2>.

²⁷ Cf. Amazon, *Price Gouging Has No Place in Our Stores* (Mar. 23, 2020), <https://www.aboutamazon.com/news/company-news/price-gouging-has-no-place-in-our-stores> (explaining that Amazon “proactively reached out to . . . every state attorney general in the country” and “created a special mechanism” for state attorneys general’s offices to escalate consumer complaints); N.Y. Off. of Att’y Gen., *Consumer Alert: Attorney General James Stops Three Amazon Sellers from Price Gouging Hand Sanitizer and Recoups Funds for New Yorkers* (Nov. 17, 2020), <https://tinyurl.com/mtyn4s29>.

²⁸ Amazon, *Price Gouging Has No Place in Our Stores*, *supra*.

²⁹ See *id.*

successfully recouped nearly \$23,000 in restitution against three Amazon sellers who engaged in price gouging of hand sanitizer.³⁰

Finally, amici States have a strong interest in election integrity and have routinely worked alongside social-media companies to ensure that the elections the States administer are secure and that voters are not misled about the integrity of the voting process. Massachusetts, for instance, has used Twitter's own mechanism to report "Tweets that violate[d] the [platform's] terms and conditions" for posts that contained false or misleading information about the electoral process.³¹ Connecticut, too, has undertaken efforts to monitor and counteract such misleading information by hiring a specialist in advance of the 2020 and 2022 elections to "identify, report and combat election misinformation online and in social media."³²

³⁰ See *Consumer Alert: Attorney General James Stops Three Amazon Sellers from Price Gouging*, *supra*.

³¹ See *Aff. of Debra O'Malley* ¶ 5 (Oct. 29, 2020), *Ayyadurai v. Galvin*, No. 1:20-cv-11889 (D. Mass.), ECF No. 15-1.

³² Andrew Larson, *CT Hires Misinformation Specialist for \$150K*, *Hartford Bus. J.* (May 31, 2022), <https://www.hartfordbusiness.com/article/ct-hires-misinformation-specialist-for-150k>.

The examples above illustrate that dialogue between government and social-media companies contributes to important public discourse and is frequently mutually desired and beneficial. Indeed, in the experience of amici States, information-sharing and dialogue have not been coercive, but rather, helpful in ensuring that social-media companies make fully informed decisions about their own content moderation policies. These communications thus play an important role in safeguarding the public interest in the safety and well-being of all social-media users.

POINT II

THE DISTRICT COURT’S SWEEPING INJUNCTION UNDERMINES THE PUBLIC INTEREST AND CHILLS IMPORTANT DIALOGUE BETWEEN THE GOVERNMENT AND SOCIAL-MEDIA COMPANIES

As defendants have argued (*see* Br. for Defendants-Appellants (Appellants’ Br.) at 47-54, ECF No. 60), the district court’s sweeping and ill-defined injunction is flatly contrary to the public interest. The injunction is not premised on any actual threats by federal actors to compel social-media companies to remove certain content—nor does the injunction prohibit only the making of such threats. Instead the district court’s order broadly prohibits many federal officials and agencies from “taking any action” that can be interpreted as “urging” or “encouraging” social-media companies “to remove, delete, suppress, or reduce posted content protected by . . . the First Amendment.” *See* Judgment at 5 (July 4, 2023), ROA.26614. The order thus bars dozens of federal officials and agencies from engaging in large swaths of communications that are critical to the public interest. *See* Appellants’ Br. at 47-50.

Moreover, the injunction’s negative consequences are not limited to the federal government alone. As explained above (at 4-14), amici States, too, routinely engage with social-media companies on content

moderation, including to exchange recommendations on best practices and to report specific content that violates the platforms' own terms of service without dictating how the platforms should address the content or apply their own content-moderation policies. The district court's injunction sets a harmful precedent, which, if allowed to stand, could chill the ability of state and local governments to productively communicate and share information with social-media companies—a result that would substantially undermine *both* the platforms' and the governments' efforts to ensure that social media is safe and secure for all users.

CONCLUSION

This Court should reverse the district court's order granting plaintiffs' motion for preliminary relief.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 2,621 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and the corresponding local rules.

/s/ Oren L. Zeve

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2023, the foregoing brief for amici curiae was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Dated: New York, NY
July 28, 2023

/s/ Grace X. Zhou