UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

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| THE STATE OF MISSOURI, by and through its Attorney General, ERIC C. SCHMITT; | :NO. 3:22CV01213 |
| THE STATE OF LOUISIANA, by and through its Attorney General, JEFF LANDRY | : |
| PLAINTIFFS, | : |
| VERSUS | : |
| JOSEPH R. BIDEN,JR., in his official capacity as President of the United States; | : |
| JENNIFER RENE PSAKI, in her official capacity as White House Press Secretary; | : |
| VIVEK H. MURTHY, in his official capacity of Surgeon General of the United States | : |
| XAVIER BECERRA, in his official capacity as Secretary of the Department of Health and Human Services; | : |
| DEPARTMENT OF HEALTH AND HUMAN SERVICES; | : |
| DR. ANTHONY FAUCI, in his official capacity as Director of the National Institute of Allergy and Infectious Diseases and as Chief Medical Advisor to the President; | : |
| NATIONAL INSTITUTE OF ALLERGY AND INFECTIOUS DISEASES; | : |
| CENTER FOR DISEASE CONTROL AND PREVENTION; | : |
| ALEJANDRO MAYORKAS, in his official capacity as Secretary of the Department of Homeland Security; | : |

DEPARTMENT OF HOMELAND SECURITY; :

JEN EASTERLY, in her official capacity as Director of the Cybersecurity and Infrastructure Security Agency; :

CYBERSECURITY AND INFRASTRUCTURE SECURITY AGENCY; and :

NINA JANKOWICZ, in her official capacity as director of the so-called "Disinformation Governance Board" within the Department of Homeland Security :

DEFENDANTS. :

REPORTER'S OFFICIAL TRANSCRIPT OF THE MOTION HEARING
BEFORE THE HONORABLE TERRY A. DOUGHTY
UNITED STATES DISTRICT CHIEF JUDGE
MAY 26, 2023

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription

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P-R-O-C-E-E-D-I-N-G-S

(Court Called to Order)

THE COURT: Good morning, everybody. Be seated. Welcome to Monroe if you haven't ever been here before. Thank you for coming.

This is the case of *Missouri versus Biden, 3:22-1213.* First of all, I'd like to ask that -- starting with the plaintiffs, I'd like the attorneys for each side to identify themselves for the record, please.

MR. SAUER: Thank you, Your Honor. John Sauer, Special Assistant Attorney General for the State of Louisiana,

MS. MURRILL: Your Honor, Liz Murrill, Solicitor General for the State of Louisiana.

MR. DIVINE: Your Honor, Joshua Divine, Solicitor General for the State of Missouri.

MS. BROWN: Your Honor, Zhonette Brown. I am representing four of the individual plaintiffs.

MR. SHORT: Good morning, Judge. Tracy Short on behalf of the State of Louisiana Attorney General Jeff Landry.

THE COURT: Okay.

MR. SCOTT: Your Honor, Todd Scott with the Missouri Attorney General's Office.

MR. CAPPS: Kenneth Capps for the State of Missouri.

THE COURT: Is that all of you? Just that few? I'm kidding. Go ahead. All right. How about the defendants?

MR. GARDNER: Good morning, Your Honor, Josh Gardner with the United States Department of Justice Special Counsel. With me today is Amanda Chuzi, Kyla Snow, Indraneel Sur, Kuntal Cholera, our Deputy Assistant Attorney General Brian Netter and then an AUSA Shannon Brown.

THE COURT: I think they've got you outnumbered, though.

MR. GARDNER: Always, Your Honor.

THE COURT: Okay. And our rules prohibit recording or taking a photograph during the session. I told the CSOs, they came in, no problem bringing your phones; even have it on silent. I don't care. Just don't take video or anything during the session or take photographs.

Our court reporter down here is Debbie Lowery. The courtroom deputy here is Amy Crawford. Over here is law clerks Dakota Stephens and Stephanie Stone and we've got Caitlin Huettemann remotely if she can hear. And we've also got Mary Kyle Allen interning with us today.

So just to let you know, the court reporter is going on a vacation after today. And so if you need a transcript of today's proceedings, she won't be able to get that done until about three weeks, something like that, depending on how long y'all talk today, but something like that.

So and kind of the way I was going to proceed, I know I gave everybody -- each side an hour. And I'm going to try to

refrain from asking questions during the time you're doing it, but I may not be able to do that. I may -- you know, something you say I might need to ask you. I'm not going to take any time you take to answer questions against your time.

So and then at the end, and if plaintiff wants to reserve some time, you can do that of your hour for rebuttal. And, after the hour, I'll, you know, ask you some more questions so -- after that. Okay.

Everybody ready to proceed?

MR. SAUER: Yes, Your Honor.

MR. GARDNER: (Affirmative nod.)

THE COURT: Okay. Let's go begin with the plaintiffs. Thank you.

MR. SAUER: Thank you, Your Honor. May it please the Court, Special Assistant Attorney General for Louisiana John Sauer appearing on behalf of the plaintiffs.

On August 2nd, 2021, Secretary Mayorkas of DHS stated that the efforts to combat disinformation on social media are occurring, quote, "across the federal enterprise." And that's exactly what the evidence in this case shows.

It shows efforts by senior federal officials to get control, to get the social media platforms to knuckle under and essentially to kind of take over what the social media platforms are letting Americans say about core topics of great political sensitivity, like, elections, COVID and various other

topics like that.

This is a systemic and systematic campaign. It began seven years ago in 2017, at least, based on testimony of Elvis Chan. It has proceeded relentlessly since then. It has radically expanded over time, including steady expansions over the years, and then two quantum leaps that occur in the beginning of 2020 and then, again, in 2021 as it expands to new federal officials and agencies getting involved in these social media censorship activities, new topics of censorship that are being demanded, new techniques and ways of influencing what the social media platforms are doing and pressuring them. And then just a sort of radical expansion over time and a kind of a cone shape until we get to the current day where we have 67 defendants and federal officials and agencies in this case alone.

This relentless expansion shows no signs of stopping on its own. In fact, every objective indicator, both in their private communications, their public statements, and in their conduct, shows that the federal defendants in this case have every intention of continuing to engage in these unconstitutional activities and continuing to expand them at every opportunity absent court intervention.

And, for that reason, we're here today to ask the Court to enter the preliminary injunction that we propose that will go a long way towards putting a stop to what is really the most

systematic and likely the most egregious violations of the First Amendment in the history of the United States of America.

So, Judge, as I talk today, what I'd like to do is go through a kind of chronological presentation of the evidence starting back in 2017 when this starts ramping up.

Yes, Your Honor.

THE COURT: I don't want to mess you up. Did you want to reserve any time for rebuttal?

MR. SAUER: I'd like to reserve 15 minutes.

THE COURT: Okay.

MR. SAUER: I figured I'd go for about 45 now.

THE COURT: Okay. Thank you. I just wanted to make sure.

MR. SAUER: And, Judge, we've submitted, both to opposing counsel and Court, a binder that the Court may want to consult while I'm talking. There's about 34 tabs in there. 32 of them are excerpts from the evidence. They're the same as what's filed with the Court, but there's some yellow highlighting we added just to sort of call the Court's attention to particular key phrases and so forth.

Tab 1 is a -- actually a statute. It's not evidence. And Tab 17 is a summary of a bunch of evidence about the Election Integrity Partnership that's essentially copied from pages 51 and 52 of our reply brief. So that's what's before the Court there.

And, as I said, I'd like to start -- I said I wanted to start in 2017, but I actually go back further to 1998. 1998, this is where the roots of all this start when Congress enacts the Section 230 of the Communications Decency Act.

Section 230 does at least three relevant things: It immunizes the social media platforms for speech that other people post on their platforms. They can't be held liable if something (sic) posts something -- even something egregious. If they leave it up, they're not liable for that; the speaker is liable.

But it also immunizes them for taking stuff down. It says anything you take down in good faith, for whatever reason, is itself also immunized under Section 230 of the CDA. So the platforms have the best of both worlds. And there's a third provision which is they preempt state law to the contrary.

So the federal government, when it passes this statute essentially creates the conditions that, you know, 19 years later in 2017 make the social media platforms particularly vulnerable to the campaign of threats and coercion, intimidation and pressure that we see in the evidence in this case. And it does it in at least two ways.

Number 1, as Justice Thomas said in his separate opinion for the Court in Knight versus First Amendment -- or *Biden versus Knight First Amendment Center*, it creates a concentration of sort of power in the platforms where this sort

of platform industry is concentrated in a tiny number of key players. And those key players are not really just corporations, it's individuals.

If you want to control what people say on social media, you know right where to go if you're a federal official. You go to the same three people every time: Mark Zuckerberg, Jack Dorsey, Sunder Pichai. That's an exaggeration. There's a few more, but there's this tight concentration. So it's really easy to find who you need to pressure to get control of what Americans can say on social media.

And, also, you've created two huge potential liabilities for the platforms. You've given this -- this immunity that's been aptly described as a hidden subsidy worth billions of dollars. And the federal government has created the conditions for what is something like where they have vulnerability, at least, to antitrust enforcement. And those are the threats that get raised and raised again and again in the evidence in this case.

Then fast forward to 2017, something happens seismic in 2017 politically in --

COURT REPORTER: I'm sorry. Can you slow down.

MR. SAUER: I'm sorry. Fast forward to 2017, something seismic politically happens in 2016, President Trump is elected to the White House using social media very effectively in his own campaign. And there are allegations of

foreign interference where foreign nationals are supposedly supposed to be putting a lot of disinformation on social media during that campaign.

And, as a reaction to that, very senior federal officials immediately commence a pressure campaign to get control of what people can say about election-related speech on social media. This begins, based on the testimony of Elvis Chan, in 2017, and it's a three-pronged pressure campaign.

So one prong is there's a whole series of public statements. And we've put, like, 30 of these in evidence in the Court in our first 30 paragraphs of our proposed findings of fact, where senior federal officials are saying again and again they're making explicit threats. They're linking the threat of we are going to take away things that are very valuable to you: Antitrust enforcement, CDA 230 immunity. We're going to go after those things unless you censor more.

So it isn't just sort of your standard public statement like I think this statute should be repealed. It's, like if, the platforms don't step up to the plate and take down the disfavored viewpoints that we don't like, then there's going to be these adverse legal consequences.

So it's that linking of a demand with a threat, a demand for something that would be unconstitutional if the government did it itself, which is take down speech that we don't like, link to a threat of adverse legal consequences. You get that

in the public statements.

And you also get it in these congressional hearings. That's the second prong. They call in the same CEOs again and again and again in 2017 and 2018. Elvis Chan refers, like, four or five of these in hearings in his master's thesis. And, again, we have more of them that go on in '20 and 2021 and so forth.

So, for a period of years, the CEOs of key tech companies are called in to Congress. They are raked over the coals, and they're put under public pressure. And these same threats are made, "We're going to go after these things that are very valuable to you legally unless you knuckle under to the federal demands for greater censorship."

And then there's a third prong to this which is happening in secret at the time. Senior federal congressional officials, senior staffers from HPSCI and SSCI, the committees that oversee the national security apparatus in the United States, are flying out to Silicon Valley every year bringing adverse proposed legislation in their hands to sit down with senior representatives from the platforms and say, "These are the bills that we're going to try to pass if you guys don't do more to censor the speech that we don't like."

So this three-pronged campaign starts in 2017, and it does nothing but accelerate as the years go by if you look at the evidence in this case.

Well, that's what's going on on kind of the threat side. Now, leveraging these threats, you have executive officials almost immediately working with these threats in the background going to the platforms with specific demands to have content taken down. And in 2018, this includes at least CISA and the FBI. CISA said on its website until March of this year that we started switchboarding in 2018 and we expanded it in 2020.

So in the midterm election cycle of 2018, CISA is going to the platforms and saying, "Take down this speech we don't like." In the background, they've already been under a couple years of pressure from very senior people in Congress to make sure that they're going to be knuckling under.

At the same time, the FBI is starting its campaign of just relentless flagging. The FBI insists they're having meeting after meeting after meeting. They're countless, incessant meetings with the platforms to talk about disinformation.

And at the same time, --

THE COURT REPORTER: I'm sorry. You're going to fast. You need to slow down.

MR. SAUER: Sorry. To talk about disinformation. And then, in addition to that, the FBI starts sending them one to five times per month, list after list after list of specific speakers, accounts and content, URLs, websites, posts on social media saying, "We want you to take this stuff down."

So, in 2018, they take the position, "This was all

foreign. We're not really going after domestic speech at all."

Now, by 2020, that's completely thrown out the window, but even in 2018 that's wrong. How do we know that? CISA -- Brian Scully testified CISA does not do attribution. It makes no effort -- when it reports disinformation to a platform, it doesn't even try to determine whether or not that came from a domestic American speaker, as protected by the First Amendment, or a foreign national who might be outside the First Amendment, makes no effort, just reporting it, please take it down.

And the FBI, in a sense, is even worse. Elvis Chan says, "The FBI is as infallible as the Pope." He says, "We never got it wrong." Hundreds and hundreds and hundreds of speakers that we flagged, he said, "Every single one was a foreign national."

The problem with that is they submitted in their response briefings Exhibit 2 is the congressional testimony from February of this year of Yole Roth, who is the senior content moderation person at Twitter at the time. And he was asked by Congress, "Hey, was the FBI getting it right when they said all these accounts come from foreign nationals?" And he said, "It was a bit of a mixed bag." Right? Actually the question was, "Isn't it true the FBI always got it wrong?" And he said, "No, sometimes they did get it right."

So what you're looking at is the FBI is secretly sending these encrypted lists to the platforms saying, "We've identified with a high degree of" content -- or "confidence

that all this content comes from maligned foreign actors, and we want you to take it down from social media." When, in fact, what's actually going on is they've got a mix.

In that list, there's tons and tons of domestic foreign speech that's completely protected by the First Amendment. If the FBI is giving false information to the platforms saying, "Hey, that's Russia, that's Iran, that's China," when really it's, you know, maybe, you know, a trucker in Nebraska or a housewife in Ohio who just has political opinions.

In addition to that, when the FBI -- even when the FBI got it right, they're going after First Amendment-protected speech. And there's great examples of this. They're actually in, I think, Tab 3 of the binder, sorry, Tab 2 of the binder. Elvis Chan --

THE COURT: 10 or 2?

MR. SAUER: I'm sorry. It's Tab 2 of the binder. I apologize.

THE COURT: 2. Okay.

MR. SAUER: Elvis Chan gives examples in his master's thesis of here's stuff that the FBI flagged and got taken down because it was foreign, Russian originated. One example is, like, an ad that says, "Boo, to Hillary" you know, Hillary Clinton with a black slash over her face. Another one is "Secure the borders," right, just kind of standard, very simple red meat messages. "Defend the Second Amendment."

And the FBI determined these all came from Russians, and we went to the platforms and got them taken down. But if you look at their own exhibits, in the bottom left corner of each one, it says, oh, look, a Hillary one had already been reacted to 763 times by American citizens. The secure the borders one 134,943 Americans had liked that, which means they've taken that -- when you click, "like," it's posted in your own news feed. It kind of becomes your own message. And that's a First Amendment-protected activity.

The FBI says, "Oh, that secure borders message, that came from the Russians. You've got to take that down." And they bragged that 50 percent of the time they do get stuff taken down when, in fact, there's talking about stuff that Americans have interacted with exercising their own First Amendment right to like, to comment, to repost or reply on literally hundreds of thousands of occasions.

The FBI in this case says, "We're in an information war with Russia and with China and with maligned foreign actors." But it's perfectly clear, in the FBI's view, hundreds of thousands of acts of First Amendment protected activity are acceptable collateral damage in that information war. And that's what that, I think, vividly shows.

So that's where we are in 2018. We already have the FBI and CISA actively involved in targeting First Amendment protected speech on a very large scale against the backdrop of

these powerful threats from the congressional staffers that oversee the FBI and CISA saying, "We want you to take down this stuff. Take down the stuff that the federal government doesn't like." And this radically expands when we get to the 2020 election cycle.

So in that particular cycle, there's at least five things going on in 2020.

So CISA switchboarding expands. We've already talked about that. And there's this -- in the 2020 cycle, we've got dozens and dozens of emails and spreadsheet of all their flagging operations and so forth. CISA is very active directly in switchboarding.

In addition to that, the FBI is continuing, and probably accelerating its own flagging activity that it had done in 2018. Again, Elvis Chan is saying "We're sending these things one to five times per month, one to six times per month." And they're just having endless meetings, big group meetings with all the platforms, one on one bilateral meetings out in Silicone Valley where you get a whole crew of FBI agents sitting down with a whole crew of, you know, Twitter and Facebook and Google and YouTube, and so forth, again and again with seven or eight platforms.

But, in addition to that, three new things happen. One, of course, is COVID-19 breaks out in the beginning of 2020. And there's immediately an aggressive move by federal officials

to get control of what Americans and others are allowed to say on social media about COVID-19.

And, now, in 2021, this goes all the way up to the top of the White House. But in 2020, what we see is senior federal officials operating essentially independently and at odds with the White House engaging in deceptive techniques to try and get control of what the platforms are actually censoring.

So the matter obviously circulates the evidence, in this case, around Dr. Fauci and Dr. Collins' multiple campaigns in 2020. I think the crown jewel of them, so to speak, is their deceptive campaign to get the lab leak hypothesis censored, which was so effective, I think, that they just decided to do the same thing again and again.

You know, and you get to October of 2020 when they're going after the Great Barrington Declaration, getting that pulled down from social media.

So you have COVID becoming a new, hot topic in the censorship space. And you have Dr. Fauci and Dr. Collins, in particular NIAD and NIH, very actively involved. And there's a new technique there because what they're doing is they're engaging in deception.

Previously FBI and CISA had been involved in pressure. But what Dr. Fauci and Dr. Collins do is they engage in deliberately sowing, laying out false and misleading information with the intent of inducing the platforms to censor

stuff.

And there's -- there's a series of tabs, you know, that -- Tab 6 to Tab 13, the binder, are all bits of evidence from that particular campaign. There's obviously dozens and dozens of exhibits in the record relating to that.

One really interesting is in Tab 7 where there's an internal email where Dr. Fauci, who said in his deposition, you know, kind of probably a dozen times, "I don't know anything about social medial. I don't follow social media. I don't have an account. I don't pay attention to it," and so forth. But what he's saying in early 2020 in internal emails is, "We have got to stop further distortions on social media about the origins of COVID-19 from a lab." So his internal communications at the time speak much louder.

There's multiple other emails in there with him and Dr. Collins and Jeremy Farrar, who are all kind of collaborating to get the lab leak hypothesis squelched, where they talk about, "What we really want is to control what's being said on," quote, "mainstream and social media."

But, in addition to that -- so there's two other really kind of just watershed events in 2020 in this censorship space. In addition to the COVID stuff, you also have CISA and the GEC collaborating, especially CISA, collaborating to set up the Election Integrity Partnership. And the Election Integrity Partnership is in many ways the most jaw dropping of the

federal censorship activities in this case.

In addition to that, you also have the FBI engaging in its particular campaign of deception, you know, quite similar in many ways to what Dr. Fauci and Dr. Collins do in the lab leak theory to seed, to plant false and misleading information with the platforms to induce them to censor the Hunter Biden laptop story.

So there's tabs about -- in our binder about all of those. I'm going to focus particularly on the Election Integrity Partnership, which is just in many ways, shocking in its scope. It is a mass surveillance operation that involves 120 analysts in 2020 alone, serving 16 hours a day using machine learning and artificial intelligence to surveil the literally hundreds of millions, possibly billions of electronic communications in real time.

Their report talks about how we surveiled 859,000,000 tweets during the four-month period in the 2020 election cycle. And that's just one platform. Right. 859,000,000 tweets were surveiled and reviewed. 21 were classified as involved in their tickets potentially involving misinformation and tracked. And some very large subset of that, probably in the millions, is flagged and removed from social media as a result of their activity.

From the very beginning, the Election Integrity Partnership is a federal project. It is a CISA project. The

very idea from the project is placed in the minds of CISA interns who are simultaneously working for the Stanford Internet Observatory by Brian Scully.

He says, "I told the interns about the gap, the gap that this, you know, EIP is designed to fill." And then they say, "Well, why don't we do this about the gap?" and so forth.

So what is that gap? Well, it's got two elements. One element that Brian Scully emphasizes is we, the federal government, and the state and local government officers, don't have the resources to police all the misinformation that's on the social media and identify it for the platforms. So he said, "We lack the resources." But also they candidly admit, "We don't have the legal authority to do it. We can't do that under the First Amendment, and there is no statute that authorizes us to do that.

So if you look at their internal documents or their public documents, the public EIP report is quite explicit about this. They said, "Well, one of the reasons we set up the EIP is because CISA and the other national security agencies and intelligence agencies lack the legal authority. And if these activities were directed to American citizens, they would likely violate the First Amendment."

So the whole idea of the EIP is to kind of bring in the nonprofits: Stanford, Graphika, Atlanta Counsel and University of Washington, to bring them in and kind of do the dirty work

that the federal government is not willing to do.

And if you look at Tab 14 in your binder is the operational time line from the CISA report where right there at the top they say what's one of the first key dates in their operational time line? Number 2 is meeting with CISA to present the EIP concept. It's almost like they're meeting with their shareholders, right, or their investors. Hey, here's something we'd really like to do. We're going to go and get your approval for it.

And the evidence strongly indicates that CISA is right there at the beginning directly involved in launching this thing. That's reflected in the testimony of Brian Scully and actually they go on to say in the report, once we had that meeting to present the concept, in consultation with CISA, we launched the Election Integrity Partnership.

And the Election Integrity Partnership isn't just -- CISA is not involved just in the launch, but they have ongoing collaboration in its operations. And, in fact, at Tab 15 in your binder, they have like a handy dandy flow chart where they say we formalize the role of government, government there they identify in a later page as CISA, the GEC, the Global Engagement Center, also a defendant in this case, and the EI-ISAC, which is a kind of clearing house of state and local officials also subject to the First Amendment that is funded by CISA. Right?

So you see the government is there, and the platforms are there and everyone has got their role in the flow chart. It's like a nice, you know, encapsulation of ongoing collaboration involved in Election Integrity Partnership.

And, of course, if you flip to the next tab in your binder, Tab 17, we highlighted that statement right at the beginning of the Election Integrity Partnership report about why do we stand this up? That sentence says, "This is especially true for election disinformation that originates from within the United States which would likely be excluded from law enforcement action under the First Amendment and not appropriate for study by intelligence agencies restricted from operating inside the United States.

Renee DiResta, who is one of the key, you know, implementers Election Integrity Partnership at the same time said publicly, you know, if the federal government did this, there would be very real First Amendment questions.

The whole idea of the EIP is to evade the First Amendment and have private parties team up with the government to do what the government cannot do.

And the platforms who, by now, have been subjected to four years of continuous pressure to do what the national security agencies want on election-related speech, they play ball too. So even the EIP is conducted.

One of the really important reasons why Stanford needs

CISA and that's what Scully -- Brian Scully said in his deposition, that Alex Stamos who's organizing this for Stanford realizes he needs CISA's involvement is when they go to the platforms with CISA behind them, behind all that is all those threats that have come out since 2017 and will continue. So -- and, of course, this is just -- I just did a couple, touch base.

The next tab in your binder, Tab 17, is actually based in the evidence 15 points of significant collaboration between federal officials and the Election Integrity Partnership, almost all CISA. CISA's main defense in their briefs is, "Well, we didn't flag any disinformation for them." Well, actually, they're cross-pollinating their disinformation reports because they're both -- they're the same human beings at CISA who are -- who are flagging -- they basically work for -- you know, they've got the CISA hat on during the day. So they're a federal national security agent during the day. And then at night, they put on their Stanford hat.

And during the 2020 election cycle, they are flagging this information for both of them. They are crossing over in their emails. And an email they flag for the EIP turns up in the CISA inbox. You have a spreadsheet where CISA is reporting misinformation to platforms under EIP tracking numbers. And, of course, CISA now says, "Well, we never actually flagged anything directly to the EIP."

CISA is actually funding the EI-ISAC. CISA has put the EIP in connection with NASS and NASED and the various state officials who are making the reports. CISA is coordinating with the platforms on how to have CISA and the EIP report at the same time and again and again and again.

And, of course, their main defense is we never flagged anything directly to the EIP. But in the affidavit from Ms. Bray that they submitted with their response brief, they admit that the GEC did, which we did not elicit from Daniel Kimmage in his deposition because he professed no knowledge of it.

But what she says on 21 occasions that GEC, which is also federal officials, directly was flagging in 2020 misinformation, but not just posts but also narratives she says to the EIP for censorship.

So you're looking at this sort of highly integrated, interconnected, interwoven system of federal officials and social media platforms linked by these -- by the Stanford Internet Observatory and similar entities. And this, the scope of the surveillance and censorship is absolutely staggering.

I mentioned before, and this is Tab 19 in the binder, that they say they had -- looks like they had quite privileged access. They said we had access to Twitter Streaming API. In context, it appears that the Election Integrity Partnership had kind of the same access that internal Twitter people would do

to read people's tweets and to read -- in some cases it looks like they're reading DMs and so forth.

And they said they collected over a four-month period 859,000,000 tweets, almost a billion social media posts on one platform alone. If you multiply that by Facebook, they were looking at Facebook and Instagram and Tik Tok and YouTube. We're looking at surveillance of literally billions of realtime electronic communications by Americans on core political speech.

And they say on Twitter alone, if you go down in there, the other highlighted thing says we tracked in our tickets. The tickets are their organization of narratives that they think are misinformation. They bundle into them these 21 million tweets. And some significant subset of that they're going to the platforms and getting it taken down.

Keep in mind that they also brag that back in the early summer and late summer of 2020 they went to the platforms and pressured them to change their policies to make their policies more stringent and more restrictive so they could get more core political speech censored.

And so that -- in addition to that, Your Honor, because of constraints of time, I'll touch briefly on the fifth major thing that's going on in our evidence in 2020, which is the Hunter Biden laptop story.

We've submitted I think overwhelming evidence that there

was a deliberate campaign of deception similar to the -- as I said before, the campaign by Dr. Fauci and Dr. Collins to plant with the platforms deceptive information.

What did the FBI do? They're having these endless meetings again and again and again in the 2020 election cycle with the platforms. And again and again they say, "You guys watch out for a hack-and-leak operation."

They've admitted in testimony there was no investigative basis for that. They had no actual reason to think that there might be a hack-and-leak operation based on any active investigation. But they kept warning it again and again.

Those warnings come from Brian Scully, Matt Masterson at CISA. They also come from Laura Dehmlow who is the head of FITF, the Foreign Influence Task Force at the FBI; Elvis Chan, other FBI agents. They come in the big group meetings, the USG industry meetings. They also come in the bilateral meetings with the platforms.

And, in fact, Tab 21 is just a couple of the internal emails that reflect that. You've got an email from September where the platforms are saying, "Hey, we talked about, quote, "preparing for a so-called hack-and-leak operation.

And from July of 2020, a deep dive topic for 40 minutes at one of these meetings was hack/leak in U.S.G. attribution speed/process.

So you've got the testimony of Elvis Chan and Brian Scully

admitting to this. And you also have the contemporaneous emails that corroborate it.

What's the result of that? This misleading information it seeded? And, Judge, there's, like, an evidentiary dispute that I've included here as Tab 22 paragraph 11 of your Yoel Roth's contemporaneous declaration which appears to provide the best and clearest accurate account of what happens in those meetings.

So, in that, he says during these weekly meetings, the federal law enforcement agencies communicated that they expected hack-and-leak operations and that he was told that the intelligence community expected they would try hacking attacks and that it would -- it would -- these would likely occur in October when magically it actually happened, right.

The *New York Post* ran the Hunter Biden's story in October. And the kicker at the end, as I also learned in these meetings, that there were rumors that a hack-and-leak operation would involve Hunter Biden.

Now, more recently, a couple months ago, Mr. Roth, who filed this with the FEC in December 2020, tried to retreat from a that in his congressional testimony. And he said, "Well, might have been the platforms, not the federal law enforcement agencies who said that it would come -- involve Hunter Biden.

That facially doesn't make a lot of sense. I mean, obviously it's the federal law enforcement agents who know what

hack-and-leak might be done by foreign agents. But, in any event, when he was pressed in his congressional testimony by Representative Jordan, he said, "Who actually said this?" He admitted, "I truly don't recall." So his attempt to kind of, like, spin that in 2023 fell through.

And if you look back to the contemporaneous documents in 2020, this declaration that's excerpted here at Tab 22 of the binder, actually was filed by lawyers from Covington & Burling, the whitest of white shoe firms in Washington D.C. And they said in their cover letter that included these declarations exhibit at the time, that, quote, "These reports from law enforcement agencies, not from other platforms, suggested that the rumor would involve Hunter Biden."

So I think the only possible inference from that evidence is that when Yole Roth said in December of 2020, it's true; and that it was federal law enforcement agencies who were saying, "Hey, there's going to be a hack and leak, you should expect it likely in October, and, you know what, we are hearing rumors it might involve Hunter Biden."

So, of course, the FBI at this time has been in possession of the Hunter Biden laptop since 2019. They know it wasn't hacked. They got it from the store owner. Right? So they know that they're laying the foundation, deceptively laying the foundation for the future censorship of that story, which was a politically seismic event in the history of censorship in the

United States.

So that gets us to -- that's a summary of the sort of five main pillars we see of federal social media censorship activities in 2020. And that is, like, the first of what I call the two quantum leaps. In the 2020 election cycle, you've got, you know, a huge flurry or expansion of activity.

And then when President Biden enters the White House, you get a second quantum leap. All of a sudden what was being done kind under the nose of the White House, you know, through the FBI -- The FBI, keep in mind, you know, by suppressing the Hunter Biden laptop story is acting directly against the interest of the president at that time.

But then you have in 2021 President Biden enters the White House. President Biden, who, while he was a candidate, said, Mark Zuckerberg should face not just civil liability but possible criminal prosecution for colluding with people to allow them to post stuff on his website that President Biden doesn't like. And that's one of dozens of threats like that that come, not just from him, but from others.

And when he enters the White House, then all of a sudden that notion that the platforms had better fall in line or they're going to endure serious legal pressure, that becomes not just the statement of the candidate, but the official policy of the White House.

And you see in 2021 threat after threat after threat. At

least six occasions in '21 and '22, from Jen Psaki where she's making these public statements where again and again she's closely linking the threat of adverse legal consequences, robust antitrust program.

You know, a great example of this is in the binder. It's the May 5th, 2021, comment where she says, "The president supports a robust antitrust program for social media platforms." That's sandwiched between two statements that are demanding more censorship. "They're not doing enough to take down the censorship. Hey, the President supports a robust antitrust program."

We have statements like that in May of 2021, on July 15th and July 16th of 2022 -- or 2021 from Ms. Psaki, October 6th of 2021, February of 2022, April of 2022. It's this constant theme.

And also there's similar statements from Kate Bedingfield, the White House communications director. And also in private now you're getting threats from senior White House Officials that are communicating in private, like, Rob Flaherty, Andy Slavitt, and so forth. They're now making these ominous communications in their emails to the platform.

There's a very clear message coming out of the administration, play ball with us on censorship or you're going to pay some serious consequences.

And, of course, what we see in the evidence is the social

media platforms falling in line. And what is most vividly displayed I think in the sort of joint pressure campaign from the Surgeon General's Office and the White House, Rob Flaherty and Surgeon General Murthy, Andy Slavitt, Eric Wall, they're all involved in these -- this sort of ongoing private campaign of communications against the backdrop of two big public statements on May 5th of 2021 and July 15th and 16th of 2021 from the White House.

And we see the platforms' kind of resistance to some of the White House demands essentially collapse. By late July of 2021, you have Nick Clegg who is the senior C-suite of Facebook emailing Surgeon General Murthy and saying, "We hear your call for us to do more, and here are all the new censorship actions we're going to take."

In addition to that, we see not just Nick Clegg -- not just that, you see Twitter all of a sudden holding off for several months to White House pressure to deplatform Alex Berenson. And, all of a sudden, they just collapse. They suspend him within hours of July 16th, the President's comments, "They're killing people," on July 16th.

The exact same thing happens with -- to other specific speakers Facebook, for example, the disinformation dozen Facebook was saying in emails in May to Andy Slavitt, "I know you're not going to be happy with our position, but we really can't take him down. They don't violate our policies. Then

after July 16th, boom, they're immediately deplatformed.

And there's a series of three or four different emails where Facebook is going back to the surgeon general's office and the White House saying, "Look at all the stuff we did to take down the disinformation dozen. Look at all the stuff we did."

And this brings us to two additional points I want to emphasize for the Court. One is if -- one of the things they say in their response brief is really the White House is just going after parity accounts and impersonation accounts.

Absolutely not. What you see is the White House going after and trying to procure, and successfully procuring, the censorship of those speakers that the White House believes are the most persuasive and influential in contradicting the viewpoints that the White House wants to push.

So they're going after the disinformation dozen who they think are responsible for 73 percent of the vaccine-related speech that they don't like. They're going after Alex Berenson. And the documents say that the White House said that they think Alex Berenson is the epicenter of disinformation that radiates out to the persuadable public. So they're going after the key strategic speakers.

Tucker Carlson, the journalist who's probably the most prominent critic of the Biden administration, they're secretly emailing Facebook saying, "Take down his content from" -- you

know, "from social media." So they're going after the most persuasive and powerful voices expressing the very viewpoints that most disfavor. So it is a sort of like really core violation of the First Amendment.

In addition to that, in addition to that, another comment I want to point out is one of the tabs in the binder is actually -- I think it's Tab 24, is actually a document received from Twitter in February of this year. It's a supplement.

Last -- last September Twitter, under its prior management, under our subpoena, we said, "Please disclose federal officials who communicate with you about disinformation, misinformation and censorship."

Twitter, under its prior leadership, disclosed 11 names. After the change of ownership of Twitter, we went back to them in December and said, "We think that this is understated because we got 45 names from Facebook and we don't think that your 11 names is plausible in light of the fact that we got 45 names from Facebook.

Under its new leadership, Twitter put together a new list and that has 83 names on it. Now, the names we've highlighted on this list include 15 names who are senior White House officials. Those are the highlighted names. There's an open source review. Those are the ones. There could be more on here because some of these names we don't know who they are.

Right?

There's at least 15 here, and there's more on the Facebook list that are not on the Twitter's list. So we're looking at something that's at least 20 White House officials who are communicating with platforms about misinformation, disinformation and censorship.

And so far in this case, we've actually received written documentary discovery from one of them, just Rob Flaherty. We've never gotten -- now, some of these people are copied on Rob Flaherty's emails, you know, and copied on emails with HHS. But for a lot of these, you know, I just want to emphasize to the Court, we're at the preliminary injunction stage. We're just scratching the surface. We're just looking at the tip of the censorship iceberg here.

So, anyway, moving on, I have a limited amount of time. I do want to emphasize a few other points.

So if you look at this White House campaign, what -- and, again, it's a multipronged campaign, just like back in 2017 you've got the multiprongs of federal pressure coming from -- then coming from congressional hearings, coming from public statements from senior federal officials, and then you've got these private meetings. You see the same dynamic with this White House campaign of pressure.

You've got basically the public statements, the public threats coming from Jennifer Psaki, coming from Kate

Bedingfield and so forth. And then you've got these private threats. And the private threats are really an abusive campaign of demand after demand after demand from Rob Flaherty.

And, again, he's the only White House official that we've got documents from directly so far in this case. But if he's any example of what's going on, we're talking about levels of censorship that should make your eyeballs burn.

So, for example, Tab 25 of your binder is just a selection of the Rob Flaherty emails we received in discovery in lieu of his deposition rather late in the case. And just highlighting in there just gives you a flavor of what he's saying in these communications.

He's making, for example, implied threats like, you know, "Hey, here's a document that's informing our thinking internally and is not necessarily the lower bounds of what we're expecting. Or, again, Andy Slavitt in one of these emails saying internally we don't like how you have not been giving us all the information we're demanding and not censoring what we're asking for internally. Quote, "We're considering our options what to do about it."

So when you juxtapose these, I think the Court really very very aptly summarized these in your motion to dismiss order when you said, "We've alleged threats, some implied and some quite blatant." And you see that here in the Flaherty emails. You also see it in the public statements from senior White

House officials.

And then what you see is essentially a kind of collapse of resistance. The platforms are really brought to heel by mid 2021. And they appear to be essentially, you know, falling over themselves to do whatever the White House demands. As Nick Clegg says, we want to do -- "We hear your call for us to do more. We want to meet with you and understand what the White House expects from us on disinformation going forward.

And then you see these emails, for example. Some of these are tabbed in the binder where the Surgeon General's Office says, "Hey, please report back in 14 days about what new or additional steps you've taken to go after disinformation in your platform." And, sure enough, 14 days later you have an email back from Nick Clegg from Facebook. And he's saying, "Oh, here's all the new and additional steps we've taken." They said, "No, it's all only old stuff," that directly contradicts the text of the email.

That email says, here's a long list. He's got five bullet points with four sub bullet points of here's all the new -- here's the new stuff we've done to go after the disinformation dozen. We've expanded the list of claims we're going after. We expanded penalties for repeat spreaders, etcetera etcetera, etcetera.

And you see this also reflected in the CDC's documents because the CDC at this time, after that July 2021 exchange

where Facebook who had been kind of resisting some of the White House's demands, is now kind of saying, "We'll do whatever you want." What you see is the CDC -- you see the Facebook content moderation officer reaching out to the CDC again and again with long list of claims of supposed misinformation saying -- and first they say, hey, CDC our content moderation policy says we'll take down stuff that's false and could lead to vaccine hesitancy.

And then they email and they say, here's a long list of claims for each one of these. Could you please tell us whether or not it's false and leads to vaccine hesitancy? And the CDC is delighted to oblige. They say, yes, we'll be happy to do it, you know. And we'll go through the list and this is false and this is false, and this is false.

And the response, you know, Carol Crawford discloses stock statement one sentence, no support, "All this could lead to vaccine hesitancy." And then Facebook reports back and says, "As a result of our work together, we're taking down all those claims that you guys have debunked.

So essentially Facebook is outsourcing. And they're doing this for prospective claims as well. So when you get to the vaccines are approved for late childhood, the vaccines are approved for early childhood, you get Facebook going back to the CDC and saying, "We're anticipating that people are going to say a bunch of stuff when this happens. Could you please

prebunk them for us. Tell us whether they're false or misleading, and then we're just going to do whatever you tell us.

So you almost have an outsourcing of content moderation from Facebook to the CDC that goes on in late 2021 and going on into 2022. And some of those are tabbed in the binder.

I want to jump forward a little bit, Judge. There's other tabs in the binder. But in the last few minutes of my time I just want to emphasize that I take the principal defense in this case is we're not doing it anymore. Right? Their argument is they say our evidence is stale. Right? They say, "Well, you're evidence is old. Well, we got documents from you a year ago. And the censorship activities go right up to the time you produced your documents.

And you're saying, you know, you don't have any documents since, you know, August or September of 2020 when we made our major document production. That should be no surprise to anyone.

As I said at the beginning, what you actually see is every objective indicator, both in their private emails, their private text messages between Jen Easterly and Matt Masterson, their public statements, their leaked documents, and in their conduct, shows a firm commitment to this censorship enterprise, a firm commitment to continue engaging in these censorship activities.

And I'm just going to highlight just a few examples of this. For example, you've got a long series of public statements from the White House saying we want to have the social media platform start censoring on new topics we're concerned about.

For example, in the summer of 2020, gender information, disinformation campaigns against female and LGBDQ plus journalists, whatever that means. Right? Abortion-related speech. Climate change is a big one. Actually it's very timely. If you were on Twitter yesterday, you may have seen a republican presidential candidate reporting that Linkedin had booted him off Linkedin for saying climate disinformation.

That's something that the White House and other senior federal officials in the record have been hammering and demanding more censorship of going back at least to Gina McCarthy's public comments in the summer of 2022.

You see this in CISA. And CISA last -- late last fall -- there's a -- or early last fall, there's a leaked document that says that CISA wants to expand its disinformation efforts to address things like the war in Ukraine, racial justice, the U.S. withdrawal from Afghanistan. Why does CISA want to pull down misinformation about that, I wonder, you know, financial services and so forth.

If that was a leaked document report, when Brian Scully was asked about those in his deposition, he confirmed almost

every single one of them. He said, "Yeah, we've got a program with treasury to go after disinformation about the financial services industry. Yes, we have people detached to a task force to talk about mis and disinformation relating to the war in Ukraine, and so forth.

The FBI. Elvis Chan did a wonderful public statement at the end of the 2020 election cycle. He said, "As soon as 2020 was over, we jumped right in 2022." There's no indication the FBI has ever stopped in its flagging activities. In fact, it shows every indication that it's ongoing.

The Election Integrity Partnership. The Election Integrity Partnership posted 14 updates on its website about its activity last year in the 2022 election cycle. So it's humming along strong. They set it up in 2020 and it's going on.

I didn't talk about the Virality Project. There's some tabs about that. So it calls itself the Election Integrity Partnership through 2020; then in early 2021, starts calling itself the Virality Project. It's the same people using the same techniques interfacing with the same partners and federal agencies and platforms, and so forth, doing the same kind of surveillance; and engaging in the same kind of censorship activities.

They gave it a new name. Now we're the Virality Project. Then fast forward a year, you know, we're the Election

Integrity Partnership again are we're still doing it all throughout 2020. And you have public statements from Renee DiResta that say this problem is not going away and we've got to keep doing it. So there's a firm expression of commitment that it's going to keep going on in the next election cycle that's coming at us next year and so forth.

I think two facts here are extremely telling. Eight days before we filed this lawsuit, DHS announced the Disinformation Governance Board, Exhibit 1 to Glenn declaration that's filed way back last summer when we first moved for PI doc 10-1 Exhibit 1 are the leaked documents from DHS that relate to the Disinformation Governance Board.

And what they show, what they show is that the DGB was not a new censoship program. It was created to impose a bureaucratic structure on the censorship that was already going on that was so big and so extensive it needed to create another whole new federal agency within DHS to oversee it essentially.

So the DGB itself that they then retreated from after the public backlash was evidence of this firm commitment and the fact that the censorship activities are expanding relentlessly.

And then, finally, you have from February of 2022, again, two months before the lawsuit, you have the text messages from Jen Easterly -- this is last tab in your binder -- from Jen Easterly to Matt Masterson where she's saying, "You know, on this call we're having the platforms, I'm looking to play a

coordination role, a coord role, a coordination role because it would cause a lot of chaos if every department and agency is independently communicating with the platforms."

So what does that reflect? She knows there is -- this is going on in Mayorkis' words, "across the federal enterprise," and that it's so big that DHS wants to, kind of like, come in and take control of it all because censorship activities are going on throughout the federal government.

So, Your Honor, that's 45 minutes by my watch. So I'll stop there and just invite the Court's questions.

THE COURT: You reserve 15 minutes after that. So I'm going to wait on my questions until everybody finishes and try to do it that way. I'm going to try to lay off the questions, but I'm not going to promise. Okay.

MR. SAUER: Thank you, Your Honor.

THE COURT: Go ahead. Anybody need a break or are you ready to go? Y'all ready to proceed?

MR. GARDNER: We're ready, Your Honor.

THE COURT: Okay. Go ahead and proceed.

MR. GARDNER: Unless -- if anyone else needs a break.

THE COURT: Ma'am? Sir? Oh, you need one? If you need one. Okay. Go ahead and proceed. Thank you. My understanding is you're going to break it up. However you want to do it, that's fine.

MR. GARDNER: Yes, Your Honor. Just so you're aware.

We're going to break it three ways. My colleague Kyla Snow is going to begin. Then my colleague Indraneel Sur will go, and then I will finish up.

THE COURT: Sure that's fine.

MR. GARDNER: Thank you.

THE COURT: Go ahead. Good morning.

MS. SNOW: Good morning, Your Honor. And may it please the Court, I'm Kyla Snow on behalf of the federal defendants.

In today's hearing, as in plaintiffs' briefing, you've been presented with an assortment of out-of-context quotes and select portions of documents that distort the record to build a narrative that the bare facts simply do not support.

What you haven't heard today, but which defendants' briefing lays out in detail, is all of the context and additional evidence contradicting plaintiffs' narrative that plaintiffs either mischaracterize or ignore. For instance, in response to defendants' paragraph by paragraph refutation of plaintiffs' proposed findings of fact which illustrate the vast deficiencies in the evidence, plaintiffs largely say nothing.

And, in response to defendants' proposed findings of fact in our PI opposition brief, plaintiffs refuse to give the paragraph by paragraph answers that parties typically provide. Instead they simply restate their narrative, obfuscating the facts and repeating the word "censor."

But stripped of plaintiffs' labels and hyperbole, the record does not show the First Amendment violations they ask the Court to read into it. Instead what it shows, in the face -- is that in the face of urgent crises, a once-in-a-generation pandemic and bipartisan findings of foreign interference with U.S. elections, the government responsibly exercised its prerogative to speak on matters of public concern.

It promoted accurate information to protect the public and our democracy from these threats. And it used the bully pulpit to call on various sectors of society, including social media companies, to make efforts to reduce the spread of misinformation.

It is that legitimate, government speech that plaintiffs seek to silence in a sweeping preliminary injunction that would effectively preclude the government from taking action in the public interest, including as relates to matters of national security.

The evidence here is far from sufficient to justify that preliminary relief, and plaintiffs do not even -- counsel on the other side does not even mention the preliminary injunction factors, which is why we are here today to determine whether they are entitled to a preliminary injunction. But as my colleagues and I will discuss today, plaintiffs fail to carry their burden on any of the PI factors.

I will begin by discussing irreparable harm. And my

colleague, Mr. Sur, will address the merits of plaintiffs' First Amendment claims, and my colleague Mr. Gardner will address the bounds of harm and scope of relief. And he will also address some issues relating to plaintiffs' motion for class certification.

So turning to irreparable harm, and before jumping into my main points about the evidence on irreparable harm, I want to emphasize that to obtain the extraordinary remedy of a preliminary injunction, plaintiffs bear the burden of pointing to evidence making a clear showing of imminent, irreparable harm. And that is critical to the question of whether they're entitled to a PI because a PI is -- the purpose of a PI is to preserve the status quo and to prevent further harm before the Court can rule on the merits.

As the Fifth Circuit said in *Google versus Hood*, this principle applies in First Amendment cases as well. It said, "Invocation of the First Amendment cannot substitute for the presence of an imminent, nonspeculative, irreparable injury.

And here when you're before the Court in PI proceedings, unlike the motion to dismiss proceedings, plaintiffs cannot simply rely on the allegations in their complaint, and their allegations are not entitled to a presumption of truth. They must substantiate their assertions with evidence. And that evidence must show that the harms purportedly caused by defendants are of such an immediate nature that a PI is

necessary to preserve the status quo. And plaintiffs fail to make that showing.

They attempt to substantiate their claims of irreparable harm in the briefing by submitting several declarations from the plaintiffs. But the declarations set forth only past content moderation decisions by social media companies and fail to link any of those decisions to the conduct of the defendant.

And, in fact, the record shows that much of the conduct of defendants that plaintiffs challenge here is not currently ongoing or likely to occur during the pendency of the lawsuit.

Considering all of that, plaintiffs' asserted harms caused by allegedly caused by defendants' lawful conduct are not actual or imminent. They are speculative and hypothetical and are insufficient to support a preliminary injunction.

So as to the declarations, plaintiffs rely primarily on declarations that were submitted one year ago with their initial motion for -- nearly one year ago with their preliminary injunction motions submitted in June of last year. These declarations are stale.

Despite having the opportunity to supplement them and having access to voluminous discovery, many documents and testimony, plaintiffs have largely not supplemented them. They have submitted two additional declarations. I will discuss those in a moment.

But as to the remainder of the nearly year old

declarations, these are -- point to conduct that occurred far in the past. Social media company content moderation decisions that occurred a long time ago, many of them point to decisions occurring in 2020 and in 2021. The most recent decision, content moderation decision that Dr. Bhattacharyna points to, for instance, is in March of 2021, more than two years ago; and Mr. Kulldorff says -- points to conduct occurring up to January of 2022. The same is true of Mr. Kheriaty who asserts that content moderation became, quote, "more pronounced in 2022."

And the same is true also for the States of Missouri and Louisiana who submitted declarations that included instances of YouTube moderating videos that they've asserted that they've posted to YouTube in the fall of 2021. And they don't point to anything affecting their own speech since then.

And this is important because, in the absence of any social media content moderation decisions affecting the plaintiffs, much less any that can be traced to the conduct of the defendant, occurring in the last year or more, there is insufficient evidence to sustain a finding that a preliminary injunction is necessary now to preserve the status quo while the Court considers the case on the merits. And, again, that is the central purpose of a preliminary injunction.

The plaintiffs implicitly acknowledge the deficiencies in the evidence and try to rectify it by submitting the two new declarations that I referenced earlier. Those come from

Mr. Hoft and Ms. Hines.

And I want to note the fact that the fact that they have only submitted two new declarations is telling about the -- their ability to point to any more recent conduct as to the other declarants. It suggests that the evidence is simply not there.

Even so, these two declarations, like all the others, are insufficient to show irreparable harm for another reason that I mentioned earlier, and that is that they fail to link any of the asserted instances of content moderation affecting their speech to any conduct of a particular defendant. And that makes their assertions of irreparable harm even more speculative.

So take, for instance, Ms. Hines' supplemental declaration. She is one of the only declarants who points to particular conduct of the defendant. And she says in her declaration at paragraph 15 that, according to her, the evidence shows that the Surgeon General's Office cooperated with the Virality Project to target health freedom groups such as hers.

But, in fact, as outlined in defendants' responses to plaintiffs' proposed findings of fact at paragraphs 330 through 337, and 1,266 through 1,323, which plaintiffs ignore, there's no evidence that the surgeon general collaborated with the Virality Project.

The Virality Project does not mention Health Freedom Louisiana or Ms. Hines. And, most importantly, the Virality Project has not been active since 2022, with its final report being issued in February of that year. And the Surgeon General's Office does not currently have any contact with the Virality Project, as is documented in defendants' declaration from Mr. Max Lesko at Exhibit 63 paragraph 14.

Any content moderation decisions of which Ms. Hines complains from Facebook in 2023 in her declaration cannot possibly be liked to any alleged involvement of the Surgeon General's Office with the Virality Project.

And, as to the remainder of the declarations, again, none of them link any of the conduct -- the content moderation decisions at issue to any conduct of defendants. The only other one that points to any conduct of a defendant comes -- well, there's two of them, Doctors Bhattacharya and Dr. Kulldorff. They both discuss the same conduct.

And they say in their declarations that in October of 2020, there was an internal email between Doctors Fauci and Collins that referenced the Barrington Declaration that they coauthored. And they attribute that internal email to content moderation decisions that companies took concerning the Barrington Declaration.

But that internal email is not evidence of a communication with a social media company. And that was -- that internal

email was from October of 2020, more than two and a half years ago. And Dr. Fauci is no longer in government. And there is no assertion that Mr. Auchincloss's successor was in any way involved with that communication.

These assertions of eminent harm based on content moderation decisions occurring long in the past are -- do not show any imminent harm today that can be traced to the conduct of any ongoing conduct by a defendant in this case. And, otherwise, the declarations are purely speculative.

And plaintiffs' fear of imminent, irreparable harm is even more speculative given that the record shows that much of what plaintiffs challenge is past government speech and action that is not ongoing and is unlikely to recur during the pendency of the lawsuit.

And in enjoining past conduct is not necessary to preserve the status quo while the Court considers the case on the merits. Instead enjoining past conduct would amount to an advisory opinion that courts lack power to issue under Article III as the Supreme Court said in *Transunion*.

But plaintiffs spend a substantial portion of their discussion on conduct occurring -- occurring long in the past in the 2022 -- 2020 election cycle and in 2021 and 2022 relating to COVID-19.

And I'll just point out just a couple examples. Plaintiffs again reference conduct of Dr. Fauci in 2020. They

basically acknowledge in their briefing that the only reason that NIAID is in this case relates to conduct by Dr. Fauci. Again, Dr. Fauci is no longer in government. They assert that they are still irreparably harmed because his -- Dr. Fauci's successor received an email, again, an internal email in 2020.

But receiving an email, an internal email, three years ago has nothing to do with content moderation decisions that social media companies are taking today, and is not the basis for any irreparable harm or a preliminary injunction.

And, as to CISA, plaintiffs, again, reference conduct occurring long in the past. They reference switchboarding in the 2020 election cycle. Again, conduct occurring in 2020 cannot be the basis for finding irreparable harm or enjoining the CISA today.

As the evidence shows, and plaintiffs do not really dispute, CISA has not been engaged in switchboarding since 2020. Regardless of whether -- you know, when CISA made a decision about whether to engage in switchboarding in the future, the fact is that that conduct has not occurred since 2020. And that is enough to conclude that there is no irreparable harm here.

But, in any event, the government has submitted a sworn declaration from CISA stating that it does not plan to engage in further switchboarding in the 2020 election cycle.

Again, this conduct was lawful and responsible and helpful

to the public to protect against threats to national security and to election infrastructure. But the fact is when the Court is considering whether to enter a preliminary injunction, regardless of what the Court concludes about the merits of the case, the question is whether it is necessary to enjoin conduct that is -- has any likelihood of causing ongoing or eminent harm to plaintiffs at this time. And it does not show that.

In the absence of that evidence, plaintiffs say that defendants have decided to expand the -- into other realms. And they suggest that if they had more discovery, they could show more. But the record that the Court has now, and the sworn testimony from the defendants shows the contrary. And all of the, you know, additional or, quote, "additional conduct" that plaintiffs refer to does not have any link to the activities of social media companies today.

For instance, plaintiffs point to a memorandum on the establishment of the White House Task Force to address on line harassment and abuse. And they, you know, pull the phrase "gender misinformation" from this. But they do not assert that this memorandum imposes any requirements on social media companies or that social media companies have taken any action against particular content because of this memorandum.

And plaintiffs have not drawn that link with respect to any of the other subjects of which the government has spoken about generally using the bully pulpit or exercising its

executive authority to take, you know, policy actions or make policy decisions, they have not linked it to particular actions of social media companies. And that just underscores the fact that plaintiffs here seek to challenge of government speech in the abstract with which they disagree. But neither Article III, nor the First Amendment, opens the door to this unprecedented challenge to government speech to which they disagree.

Again, they must show irreparable harm that stems from the conduct of social media companies that can be traced directly to the conduct of a defendant, and they cannot do so.

Finally, Your Honor, I will just mention -- I just want to touch on one more thing that was an issue in the briefing that I wanted to make sure that defendants have an opportunity to address today. And that is the evidence submitted by Dr. Gurrea and other evidence that illustrates the myriad factors that social media companies are considering when they make content moderation decisions on their platforms.

Plaintiffs' theory of causation in this case essentially requires assuming that all content moderation decisions made by separate, private social media companies in the past and in the future can necessarily be traced to the conduct of 67 different federal defendants. And, on that basis, they have shown imminent, irreparable harm.

But that fails for several -- for much of the evidence

that defendants have presented, including an expert report by Dr. Gurrea, who is an economist, who shows that companies are -- the social media companies are intrinsically economically incentivised to moderate content on their platforms. They have done so since their existence.

And they have moderated or modified their content moderation policies in response to current events. And that includes, you know, bipartisan findings of interference with the 2016 U.S. elections when social media companies responded by modifying their content moderation policies to focus on election-related misinformation.

That also includes at the start of COVID-19 when social media companies took their existing public health misinformation policies, many of the social media companies already moderated content relating to public health, as defendants' briefing and evidence submitted shows, well before COVID-19. But during COVID-19, social media companies modified their content moderation decisions, their policies to apply those public health misinformation policies to COVID-19.

And plaintiffs have not rebutted this evidence. They attribute instead to Dr. Gurrea an opinion that he did not reach. And the Court should disregard plaintiffs' assertions on that score. Dr. Gurrea, contrary to what plaintiffs have asserted in the briefing, Dr. Gurrea did not conclude that platforms would have moderated all the content the federal

officials flagged or demanded because of economic incentives, as plaintiffs argue.

Dr. Gurrea opined instead, quote, "Social media platforms have strong market-based economic incentives to moderate the content on their platforms," unquote, at paragraph 12.

And that plaintiffs have not rebutted the economic incentives that exist with any particular evidence showing that, despite these other factors, that social media companies consider the economic concerns or, you know, public calls for social media companies to do more, that -- that in spite of all these other factors that they have considered, that they have taken particular content moderation decisions or that they will do so in the future that affects any particular plaintiff here because of defendants.

And in the absence of their ability to do that, they have not shown any irreparable harm that warrants a preliminary injunction here.

Again, plaintiffs bear the burden of submitting evidence making a clear showing that they are suffering or will suffer irreparable harm before the Court can rule on the merits, and they have not done so.

And so I will turn it over to my colleague Mr. Sur to address the merits.

THE COURT: Okay. Thank you, Ms. Snow. Okay. Go ahead.

Good morning.

MR. INDRANEEL: Good morning, Your Honor. I will address the merits of the First Amendment arguments.

THE COURT: Okay.

MR. INDRANEEL: And I'll begin with the Free Speech Clause, of course, which concerns how the government may respond to private speech. But that clause does not limit the government's own speech.

And, under the Government Speech Doctrine, there's a recognition that it is the very business of government to favor and disfavor points of view. As the Supreme Court explained in *Pleasant Grove City, Utah versus Summun*, that was a 2009 case, where the Court was quoting Justice Scalia's opinion from *National Endowment For The Arts versus Finley*, which was a 1998 case.

And what this means is that when the government is the speaker, it is entitled to say what it wishes. That's a phrase from *Rosenberger versus the University of Virginia* from 1995.

So bearing that in mind, and consistent with that doctrine, the free speech clause does not preclude the government from, for example, making information available to platforms on topics such as scientific and medical information about a deadly virus and the vaccines that counter that virus; or about -- again, just as another example -- the government's views about what might be covert, foreign, malign efforts to

influence American elections and other American discussions about major problems.

And that's essentially what the plaintiffs are arguing for here on the merits. They would have this Court reduce the Government Speech Doctrine to what would essentially be a triviality. And, instead, they've seemed to argue that the 67 defendants here embarked on a monolithic, quote, "censorship enterprise," closed quote, across two administrations. But the plaintiffs lack evidence sufficient to support a finding that would give them likelihood of success on the merits of that sprawling claim.

Instead the conduct of each defendant is properly examined on its own. And, under the State Action Doctrine, it's also appropriate to keep in mind the need to maintain the essential dichotomy between private conduct and public conduct, which is subject to the Constitution.

The plaintiffs simply lack evidence as to any agency demonstrating the type of significant encouragement or coercion or joint action or pervasive entwinement that turns private decisions into state action under the established Supreme Court precedent.

Rather, what we have here in the record is evidence that each platform made its own decisions under the terms of its own content moderation policies and using its own independent judgment. And for similar analysis, we've relied on our brief

in the analysis of the Ninth Circuit in the *O'Handley* case from 2023.

Importantly the platforms are very large, independent corporations. And they decided for themselves what content to allow and what not to allow through their terms of service. The major platforms, including Facebook Google and Twitter, have long imposed content moderation measures through those user terms of service because they depend on advertising revenue. This is explained well by Dr. Gurrea. And major companies do not want their brand names to be tarnished by appearing next to objectionable, user-generated content.

I might add, Your Honor, that we did hear this morning about some of the submissions that the plaintiffs made along with their reply brief. And one of those submissions was, as counsel for the plaintiffs mentioned, a letter that the law firm of Covington and Burling put in in addition to the declaration of Mr. Roth before the Federal Election Commission.

In that letter, Twitter explained some of its business imperatives for its policies for content moderation including the content moderation policy from 2018 on hacked materials that Twitter applied to some *New York Post* coverage which Twitter then within 24 hours decided was a mistake.

So that letter from Covington and Burling, considered as a whole, confirms this point that the platforms have their own terms of service on users for content moderation. And there

are business imperatives for the platforms to moderate content in quite that fashion.

And that's exactly what we saw the platforms do, according to the evidence. For example, when the health experts around the world, including the World Health Organization, pointed out that misinformation concerning the COVID-19 pandemic threatened to become a danger on its own terms, the platforms quickly turned to moderating user-generated posts that contained what the platforms viewed as misinformation about the virus and then about the vaccines.

So what we submit the record will show is a lack of sufficient evidence for this assertion that the government communications in the record was what spurred the platforms to somehow meaningfully alter the content moderation policies, be it against misinformation concerning COVID-19, or the U.S. elections or other topics.

The plaintiffs also lack factual support for this notion that they've met the stringent requirements of the State Action Doctrine by somehow pointing to legislative proposals and other discussions about possible amendments to Section 230 of the Communications Decency Act and antitrust enforcement actions which, you know, at various points have been discussed as a potentially appropriate response to the rising economic power of the major platforms.

To begin with, the representatives and senators who made

those proposals are not parties here. And, even apart from that, there's insufficient evidence to support a finding that any defendant warned of any platform that if the platform failed to moderate certain user-generated content or if the platform failed to change a policy that the result would be some concrete change to Section 230, or some actual antitrust proceeding.

Statutes such as Section 230 are always susceptible to amendment. And the mere possibility of reform of a statute couldn't be enough to turn the conduct of private firms affected by a statute into state affection. If that -- if it were the case that mere possibility of statutory change were sufficient, practically every business would become a state actor. And that undermines, if not eliminate, the essential dichotomy between the private and public entities.

So I would turn briefly to the merits, as I said. But I just want to simply reiterate the point that the plaintiffs put in approximately 1,440 proposed findings of fact, counting each paragraph separately. And, in response, the defendants did provide a response to each of those.

The plaintiffs' presentation this morning essentially assumed or proceeded as though the defendants had not put in the opposition paragraph by paragraph. And so many of the assertions that we did hear on the merits this morning, the defendants' response to the proposed findings of fact by the

plaintiffs do explain why the record does not support the kinds of characterizations that the plaintiffs are relying on.

And so, with that observation, I will try to give a -- some of the high points of the defendants' views on the lack of merits on the First Amendment point.

So we heard, for example, about some of Mr. Flaherty's communications. He was the White House digital director. And there's insufficient evidence that his comments coerced platform.

Now, Mr. Flaherty was asking questions about the content moderation policies and how they worked in practice. And those questions did not become demands for adverse action, whether it was removal or demotion or labeling. He was trying to understand how those different kinds of content moderation are actually working in practice.

So he asked such questions as, "Can you share more about your framework here?" At one point, he asks Facebook, as we have long asked for, how big the problem is, what solutions you're implementing and how effective they've been. And that was consistent, as an aside, with the administration's public statements of where, for example, the press secretary had called for companies to measure and publicly share the impact of the misinformation on their platforms.

And one of the reasons that it's helpful to think about the inquiry that was at issue here is that the platforms

themselves were saying that there were content moderations, other than removal, that would apply to certain kinds of content.

So some things were essentially so dangerous, in the platform's view, that that would be appropriate for removal. But other kinds of content, which goes by the umbrella term "borderline content," was subjected by the platforms to other types of content moderation measures, such as reducing the distribution of a post or applying a fact check label to it.

And the plaintiffs seem to assume that anything that isn't removed must therefore be permissible and allowed. And that's simply not the case because the platforms, clearly on the borderline content area, reserved under their own terms of service the right to apply other kinds of moderation measures short of removal to various posts.

But the trouble is that the platforms were never exactly clear about what moderation, short of removal, exactly meant and where it was being applied.

So, for example, the Defense Exhibit 20 is -- has a statement from Facebook in February of 2021, this is February 8th. And Facebook announced that the claims about COVID-19 or vaccines that do not violate these policies, will still be eligible for review by our third-party fact checkers. And if they are rated false, they will be labeled and demoted.

So there was what Facebook calls at another point, a

spectrum of content moderation measures that they would apply. And it was not clear which measure applied, where and for what reason. And that's what Mr. Flaherty, among others, were asking questions about.

I will offer just one more illustration of the open endedness of some of the terms of these policies where Facebook said that it would focus on content that does not violate the misinformation and harm policy, but may contribute to vaccine hesitancy or present a barrier to vaccination. And this includes, for example, content that contains sensational or alarmist vaccine misrepresentation. So that kind of content would be subject to some of their content moderation measures possibly short of removal.

And, as I say, and I think what's clear is, terms like "sensational" or "alarmist" are obviously open ended ones. And it was legitimate and appropriate for government officials to ask exactly what platforms meant by terms of that sort.

The platforms themselves said that they were interested in combating the problem of vaccine hesitancy. The White House shared that broad policy preference. But sharing that broad policy preference is a far cry from the conclusion that the particular content moderation decisions that the platforms were making were at the behest of the White House or did not reflect the independent judgment of the platforms.

As one example that I -- that I will point to there where,

you know, there were questions for Mr. Flaherty. But when the platform gave an answer and there wasn't -- there's no record evidence of retributive action against the platform for not answering the questions, let alone for not applying any particular content moderation decision, is the Mr. Tucker Carlson example that plaintiffs raised this morning that arises in an April 14, 2021 exchange. And after the White House officials, you know, ask questions about a Tucker Carlson post about vaccines, Facebook's response was clear. Facebook said, "Regardless of popularity, the Tucker Carlson video does not qualify for removal under Facebook's policies." And that's docket 174-1 at 34.

THE COURT: Didn't they say, though, that they were going to reduce it?

MR. INDRANEEL: It prompted further questions from Mr. Flaherty. How was this Tucker Carlson video not violative? What exactly is the rule for removal verses demoting, moreover, you say reduced and demoted. What does that mean?

So to Your Honor's point, I think that was part of the discussion, you know, what is -- what is reduction and what is demotion?

But if what the plaintiffs are saying is that anything that was not removed was something that the platforms were somehow required to keep up in the way that the -- you know, the poster wanted, I don't think that this exchange supports

that view because qualify for removal is a judgment that Facebook made, but it could have made other judgments about, you know, the distribution.

And there's no technical means that the government had to influence that. And there's also, you know, nothing in the record that even -- even suggests that, you know -- Again, the government's reasons for asking these questions was that the levers, the spectrum of responses were the platform's spectrum of responses and not the government's.

Related to the White House correspondence, we also heard this morning about the surgeon general's advisory. And I just want to note there that Facebook made what we think is quite a telling response in the public setting in July of 17 -- July 17th of 2021. This was after the rollout of the surgeon general's advisory.

Facebook announced that it was already taking on the eight recommendations from the surgeon general. And Facebook then -- it's a four-page document at Exhibit 71. Facebook is pointing to measures that it had in place since April 2020, more than a year prior to the advisory.

And in that document, Facebook is not listing a single new action that the company said it was taking in response to the advisory. Again, what it was describing was conduct that it was already doing to address the recommendations.

So that shows that the decisions that the platform was

making was not significantly encouraged. It wasn't a change in policy that resulted from the advisory, because it had already been working on the problems that it felt the surgeon general was, you know, issuing these recommendations for; let alone that those eight resulted from the government's coercive power.

I'll turn briefly, then, to some of the other defendants. We did hear about the CDC. The CDC was not a joint participant in platform decisions. Rather the platform is voluntarily elected to treat CDC as one of several authoritative sources of scientific information when the platforms were evaluating the user posts containing potential COVID-19 misinformation.

The plaintiffs have assigned to this the label of CDC dictating platform content moderation decisions. That does not align with the evidence that's in this record. We have Facebook asking questions to the CDC about whether certain claims in the abstract, for example, the claims that the vaccines cause magnetism had been debunked by the scientific sources or were false and could lead to harm or were false and can lead to vaccine hesitancy.

But when CDC gave its responses, CDC was transparent about whether the existing research that CDC had access to answered that question, or whether there was just insufficient information to give a response to Facebook's question. And CDC was not asking the platform in response to take any particular action against any particular content. CDC was providing

factual information. And an example of that is the exchange that's an exhibit to the Crawford deposition at Exhibit 26.

I'll turn also then to the Cyber Security and Infrastructure Security Agency also not a joint participant in the platform's decisions.

The switchboarding operations in 2020 had a particular focus, which was to relay election-related potential misinformation that had been identified by state and local election officials; or other stakeholders, including the National Association of the Secretaries of State, across the 50 states, and the National Association of Election Directors, also at the state level. And it was up to the platforms to decide how to handle that forwarded content based on their own policies.

So CISA made that clear at the outset that its position was to never ask the companies to take any specific actions. And that was in Mr. Scully's deposition made clear.

And then the communications themselves, Your Honor, bear, according to CISA's protocol, a very clear -- I don't know if it's -- if we should call it a statement or a disclaimer, but it's very clear notice provided to anyone who reads CISA's correspondence that CISA is not making any recommendations, "about how the information it is sharing should be handled or used by social media companies."

"Additionally, CISA will not take any action, favorable or

unfavorable, toward social media companies based on decisions about how whether to use this information." One example is Exhibit 106 at 1, also discussed in the Hale declaration at paragraph 72.

And the record, consistent with that representation, contains numerous examples of posts where CISA conveyed it to the platform on behalf of the election officials who raised the concern, and the platforms declined to act. So just one example, Exhibit 108 at 1, is a Twitter email where Twitter is stating that the tweet was not in violation of our civic integrity policy. And there are many more such in the record. So, again, illustrating that the platforms were using their independent judgment.

We did also hear this morning about the EIP at great length. So I do think it is worth mentioning to the Court CISA's involvement with the EIP did not include founding the EIP. CISA did not fund the EIP. And CISA did not have a role in the management or operation of the EIP. That's explained in the Hale declaration in particular at paragraph 52.

The EIP's researchers made clear they were making, quote. "Independent decisions about what to pass on to platforms, just as the platforms made their own decisions about what to do with our tips." That's a statement from the University of Washington, which is one of the academic institutions that's part of the EIP. And that's at Exhibit 122 at 6.

Indeed only 35 percent of the time that EIP shared potential misinformation with the companies was the misinformation, quote, "labeled removed or soft blocked." That's explained at Scully Exhibit 1 at 27 and 40. Apparently no action was taken on the other 65 percent.

So the record is clear that CISA did not send content to the EIP to analyze, and the EIP did not flag content to social media platforms on behalf of CISA. Again, that's Exhibit 122.

We did hear about the GEC's declaration that makes clear that the GEC did put in 21 tickets. But, again, because of the EIP's own process for operating, it was entirely up to the EIP; and then at a next step entirely up to the platform what to do with those tickets.

Taken as a whole, we understand that plaintiffs have various characterizations of the communications that were here at issue. But when applying the State Action Doctrine, the courts have traditionally taken these kinds of characterizations and, to use the DC Circuit's language in the *Penthouse* case, which we relied on for its discussion of coercion, drawn out the rhetoric.

And what the plaintiffs characterize as demands or threats, in our respectful view, when the rhetoric is drawn out, will show questions, you know, sometimes frustrated language on both sides possibly. But that with the rhetoric drawn out, does not amount to coercion. It does not amount to

significant encouragement or to joint action or persuasive entwinement of the kind that the Supreme Court has made clear has a very high bar for a plaintiff to turn private action into action that's constrained by the Constitution.

THE COURT: Okay. Thank you.

MR. INDRANEEL: Thank you, Your Honor.

THE COURT: Thank you.

MR. GARDNER: Good morning, Your Honor.

THE COURT: Good morning.

MR. GARDNER: Let me reintroduce myself, Josh Gardner on behalf of the United States.

One of the overarching defects that pervades this case is the incredible breadth and lack of specificity as to the First Amendment violations by each defendant that is currently causing harm to each plaintiff.

And while these defects are fatal to the first two preliminary injunction factors, as my colleagues explained this morning, it is particularly acute with respect to the bounds of the harms, the scope of the injunction and plaintiffs' motion for class certification.

With that, I want to start with the bounds of the harms. As we explained in detail in our opposition and through the submission of five detailed declarations, from the FBI, from CISA, from the GEC, from the Office of the Surgeon General and from the CDC, the harms to national security, law enforcement,

public health and election integrity that would result if plaintiffs' injunction were to issue.

Plaintiffs' reply brief and their presentation today do not even address the bounds of the harms, let alone dispute any of the evidence presented by the defendants. And because plaintiffs bear the burden to show that the bounds of the harms justifies the extraordinary remedy of a preliminary injunction, their failure to even address the government's arguments should alone justify denial of the preliminary injunction.

Nevertheless, I do want to address a few additional points about the bounds of the harm.

First, as my colleague Ms. Snow explained earlier this morning, much of the defendants' conduct, the plaintiffs' challenge, is no longer ongoing. But there are a few discreet categories of conduct that are still occurring by certain defendants. And those defendants have identified significant harm to the United States's national security, law enforcement, public health and election integrity interests if they were to be enjoined in engaging in that conduct.

The second bucket, Your Honor, and, frankly, the bigger bucket results from the extreme overbreadth of plaintiffs' proposed injunction, which would capture completely legitimate conduct by the defendants that do not appear to relate to any of plaintiffs' claims and, if enjoined, would significantly harm the interest of the United States.

I will address the first bucket in the context of the bounds of the harms. And then I'm going to address the second bucket when we talk about the problems of overbreadth with the scope of the injunction.

But before I get into this first bucket, just a few brief additional points. First, both the Supreme Court in *Winter* and the Fifth Circuit in *Defense Distributed* have held that a preliminary injunction may be denied based exclusively on the bounds of the harms. And the Fifth Circuit decision in *Defense Distributed* explained that even where First Amendment speech rights are at issue, a district court does not err in concluding that the public interest may weigh against the imposition of a preliminary injunction.

The *Defense Distributed* case I think is particularly instructive here. In that case, the plaintiffs sought to enjoin enforcement of certain laws governing the export of unclassified technical data related to prohibited munitions claiming that the state department's regulations constituted an impermissible prior restraint.

The Fifth Circuit in that case said that ordinarily the protection of constitutional rights would be the highest public interest at issue in a case. Nevertheless, the state department had, quote, "asserted a very strong interest in national defense and national security," unquote and, therefore, based on the bounds of the interests, the denial of

the preliminary injunction was affirmed.

The same is true in this case. Like in *Defense Distributed*, the harms identified by the United States would be irreversible if the Court issued a preliminary injunction; whereas, any harm to plaintiffs if a PI did not issue would be temporary at best.

For example, Larissa Napp, the FBI's executive director, explained in paragraph 15 of her declaration, which is Exhibit 157, Your Honor, that plaintiffs' proposed injunction would prohibit the FBI from identifying for social media companies covert foreign malign influence operations.

Now, importantly here, Your Honor, former President Trump issued an executive order, E013848, that was then reissued by President Biden expressing the United States's strong interest in preventing the ability of persons located outside the United States to interfere or undermine confidence in U.S. elections and recognize that this would threaten both national security and foreign affairs.

And, as reflected in EAD Knapp's declaration, covert foreign malign actors operating under a false identity may be a violation of criminal law, including the Foreign Agents Registration Act or FARA, as well as other federal laws. That's her declaration at paragraph 15 note 9.

Despite plaintiffs' acknowledgment that, quote, "content that itself constitutes criminal activity not protected by the

First Amendment," unquote, should be exempted from the scope of the injunction, they nevertheless directly challenged the FBI's efforts to combat covert, foreign, malign influence.

But plaintiffs fail to explain how any potential First Amendment interest that they might have in liking or commenting on posts by foreign malign actors outweighs the United States's substantial national security and foreign affairs interests in combating such influence operations.

Accordingly, Your Honor, the balance of the harms with respect to the FBI's interactions with social media companies to combat foreign maligned influence tip sharply against the imposition of an injunction.

Similarly, Your Honor, as explained in the declaration of Office of Surgeon General's Chief of Staff Mark Lesko, that's Exhibit 63, plaintiffs' proposed injunction could be construed to limit the core public health mission of the office by preventing the surgeon general from issuing public statements encouraging social media companies to take steps to address the adverse effects of, for example, children and the use of social media. Indeed, as Your Honor may be aware, just this week the surgeon general issued a new advisory on this precise topic. And, in that advisory, made recommendations to social media companies about steps they could take to reduce those harms to children.

Plaintiffs cannot show how they have a First Amendment

interest in curtailing what is paradigmatic government speech. And any possible First Amendment interest plaintiffs may have is greatly outweighed by the United States's interest in using the bully pulpit to advance critical public health messages. Plaintiffs' proposed injunction would substantially harm those interests.

The third area, Your Honor, of ongoing agency action, the plaintiffs appear to challenge, relates to the GEC's meetings with social media companies where the topic of foreign malign influence may be raised.

As Leah Bray, the GEC's deputy coordinator, explained in her declaration, which is Exhibit 142, the GEC has a statutory mandate to, quote, "direct, lead, synchronize, integrate and coordinate the efforts of the federal government to recognize and expose foreign states and nonstate propaganda and disinformation."

The GEC effectuates this mission by, among other things, meeting with social media companies where foreign malign influence concerns may be broadly addressed.

Now, plaintiffs appear to challenge the GEC's participation in these meetings despite the fact that they cannot identify any specific action taken by a social company resulting from these meetings, let alone any coercion from the GEC during these meetings to take any particular action, let alone any harm to the plaintiffs themselves as a result of

these meetings.

Yet, any First Amendment interest plaintiffs may have, if any, again, is greatly outweighed by the GEC's substantial interest in performing its critical, statutorily-mandated national security mission.

Accordingly, Your Honor, the Court should conclude that the bounds of the harms tip sharply in favor of the defendants. And, for that reason alone, the motion for preliminary injunction should be denied.

With that, I'd like to turn to the scope of the injunction. And for many of the same reasons that the bounds of the harms tip sharply in favor of the United States, so too is plaintiffs' injunction defective, both because it is overbroad and because it lacks the specificity required by Rule 65(d). And I want to turn to overbreadth first.

Again, as reflected in the five detailed declarations from the various agencies, the proposed injunction would preclude the United States from engaging in plainly lawful conduct that plaintiffs may or may not be challenging. Again, it is somewhat unclear from their allegations.

But just as an example, in the FBI's declaration, again, that's Exhibit 157, EAD Napp explains that the plaintiffs' professed injunction could be rigged to bar, among other things, the following conduct: One, the FBI's ability to notify social media companies of objectively false

election-related time, place and manner disinformation crimes;

Two, the FBI's ability to notify social media companies of classified information posted on their accounts;

Three, the FBI's ability to notify social media companies, including by working with the National Center for Missing and Exploited Children concerning crimes against children;

Four, the FBI's ability to notify social media companies of terrorist organizations using social media platforms to spread propaganda; and,

Five, the FBI's ability to notify social media companies of threats against federal officials such as FBI agents and federal judges.

Now, with respect to the FBI in particular, plaintiffs seem to concede in their reply that the injunction should have a carve-out for, and I'm reading this here, "content that itself constitutes criminal activity not protected by the First Amendment." That's found in their reply brief on pages 116 and 117.

But this does not go nearly far enough to protect the United States's legitimate law enforcement and national security interests.

As EAD Napp explains in here declaration, paragraph 7, "Criminal prosecution is just one of several means the FBI uses to protect national security. It also uses investigative and intelligence capabilities to neutralize terrorist cells and

operatives in the U.S., to help dismantle extremist networks worldwide, and to cut off financing and other forms of support provided by terrorist sympathizers."

For example, in EAD Napp's declaration in paragraph 30, she explains that the use of social media activity by foreign terrorist organizations may or may not constitute a crime.

Nevertheless, the FBI has a strong interest in informing social media companies of the use of their platforms by foreign terrorist organizations. And plaintiffs fail to explain how such notifications by the FBI harm any interests that they may have.

Another example. In paragraph 46 of the Napp declaration, she explains that there are circumstances where the FBI has asked platforms to remove personal information about FBI personnel and federal judges where it appears the purpose is to encourage violence against those individuals. Depending on the circumstances, this may not necessarily amount to a violation of criminal law. Nevertheless, the FBI has an obvious interest in protecting the safety of federal officials. And there may be circumstances where the posting of classified information is not necessarily a criminal offense, for example, when posted by a journalist who received the information unsolicited. Nevertheless, I don't understand plaintiffs to be suggesting that the FBI doesn't have obvious national security interests in preventing the spread of such classified information.

More generally, Your Honor, it may not be apparent at the beginning of a law enforcement investigation whether certain conduct constitutes criminal activity. So, in short, while accepting -- exempting criminal activity from the preliminary injunction is a step in the right direction, it does not go nearly far enough to address the defendants' legitimate overbreadth concerns.

Second, Your Honor, plaintiffs contend that our concerns about the scope of the injunction are misplaced because we have identified activities that are not covered by the injunction. This contention is at war with plaintiffs' legal theory.

For example, as explained in the declaration of Carol Crawford, the CDC's director for the Division of Digital Management, that's Exhibit 80, the proposed injunction could be construed to prevent the CDC from publishing accurate health information on its website to the extent the CDC is aware that social media companies rely upon that information in applying their terms of service.

And, as reflected in the declaration of Brandon Wells from CISA and Leah Bray of the GEC, those agencies also publish accurate information on their websites that may be used by social media companies when they apply their terms of service.

Plaintiffs cannot square why this conduct would be permissible under the injunction while at the same time alleging that the CDC acting as a, quote, "privileged fact

checker," is violative of the First Amendment.

Now, plaintiffs contend that the actions identified in the agency declarations would not violate plaintiffs' proposed injunction despite its plain terms because, and I'm quoting here, "a federal agency that makes a public statement on a policy issue without directing the statement to platforms or crafting the statement to influence the removal of disfavored viewpoints from social media would not violate the proposed injunction." They make this statement on page 115 of their reply brief.

But why not? Why wouldn't that violate the injunction when plaintiffs' entire theory is that otherwise lawful statements or actions made under the alleged backdrop of statements early in this administration concerning Section 230 reform of antitrust liability somehow take on a coercive character?

Given plaintiffs' novel and legally unsupported legal theory, it is entirely unclear what types of conduct would be swept under the proposed injunction.

And let me give you an example that came up this morning. I heard my colleague on the other side argue that CISA's work with the Treasury Department to create publicly available pamphlets for the financial sector somehow shows an expansion of a censorship enterprise. It is absolutely unclear, Your Honor, how CISA's development of public pamphlets that could be

shared with the financial industry could possibly violate the First Amendment. But, yet, as plaintiffs' identify their theory of the case is that is an expansion of censorship and just highlights why their proposed injunction is so unworkable.

Your Honor, I recognize that I am running out of time. So I want to highlight just a very few quick things if I may.

One, I think it's useful analytically to consider plaintiffs' proposed injunction in comparison to the cases they cite to where injunctions have issued to show the complete overbreadth and lack of proportionality.

So, for example, in *Bantam Books*, one of the seminal cases they rely upon, the injunction precluded the commission to encourage morality in youth from issuing notifications to book distributors.

In *Brentwood Academy*, the injunction sought to enjoin enforcement of a rule. In *Backpages.com*, which I think is fair to characterize as the central case plaintiffs rely upon, the conduct enjoined involved a sheriff sending letters to credits card companies.

And then in the Fifth Circuit's *Texans For Free Enterprise* case, the junction was against portions of Texas's -- Texas's, pardon me, election code.

Plaintiffs have not identified a single case imposing such a broad, amorphising injunction in the context of First Amendment speech claims.

Now, Your Honor, may I have just a minute to address the class certification arguments?

THE COURT: Yeah, I'll go ahead and give you that. And I'll give the -- whatever extra time you have, I'm going to also add that to the plaintiffs' rebuttal time. So go ahead.

MR. GARDNER: I appreciate the indulgence, Your Honor.

With plaintiffs' class certification motion, I want to address it here because they contend in their reply brief on page 81 that any defects in their irreparable harm and standing could somehow be cured by a certified class, which they claim will result in their classwide representation of all current and future speakers allegedly targeted by defendants. But plaintiffs cannot establish a viable class.

Plaintiffs' challenge differing actions by 67 separate different defendants spanning multiple administrations over the course of three years. And, as I heard my colleague on the other side say today, or as they admitted today, there are different techniques used, different actors used, different topics addressed and different alleged threats by different congressional executive officials over the course of a three-year period.

There is simply no combination that can be resolved in the stroke of a pen that would materially advance the resolution of this case. In fact, this case reflects a much less cohesive

class than the one rejected by Justice Scalia in *Wal-Mart*. Remember in *Wal-Mart*, the plaintiffs contended that even promotion decisions were made at the local level and were inherently subjective, the discrimination to which they were subjected was common to all female Wal-Mart employees, and that a uniform corporate culture permitted bias to infect all promotion decisions of women, which tied the class together.

The Court rejected that argument and noted it wasn't enough to simply claim that each plaintiff suffered from a Title VII violation or even a Title VII injury. Rather, the plaintiffs had to show a common contention that was capable of classwide resolution such as discriminatory bias by the same supervisor.

And this had to be based on more than contentions. It had to be based on evidence. The only evidence plaintiffs presented in *Wal-Mart* was a policy of discretion by local managers, which was the antithesis of a common, uniform employment practice to satisfy commonality under Rule 23.

These shortcoming are even more apparent here. Plaintiffs contend that there is class cohesiveness because the classes include audience members rather than just speakers. But just as in *Wal-Mart* rejecting the contention that alleging a Title VII injury was sufficient to establish commonality, the Court here would still need to make an individualized determination of whether a particular defendants' conduct violated the First

Amendment under a particular level of constitutional scrutiny, and that the alleged conduct actually harmed a class member either as a speaker or as a receiver.

And just briefly, Your Honor, let me give you a very concrete example of how this would work. Plaintiffs are challenging, among other things, the CDC's holding of several be-on-the-lookout meetings. Those be-on-the-lookout meetings have nothing to do with Dr. Fauci's attempts to address the pandemic, or CISA's switchboarding efforts in service of the 2020 election cycle, switchboarding efforts, which I may add, plaintiffs were direct participants in which they never acknowledge throughout their briefing or their presentation today; or it has anything to do with the FBI's flagging of potential covert malign influence narratives for social media companies.

So, simply put, concluding that the CDC's actions may have violated the First Amendment would tell the Court nothing about whether another agency's separate actions also violated the First Amendment.

And the final here, Your Honor, is, and I think this is worth emphasizing, the sheer size of plaintiffs' proposed class highlights the lack of commonality. For example, the Supreme Court last week in *Twitter versus Taamneh* held, or recognized, I should say, that Facebook, YouTube and Twitter combined have over 3 billion active users each month. And some public

sources report that there are approximately 300 million Americans that use social media. Under plaintiffs' broad class definitions, these would all be class members.

In contrast, in Wal-Mart, the Supreme Court noted, and I'm quoting here, "that this was one of the most expansive class actions ever, which was comprised of 1.5 million current and former female Wal-Mart -- Wal-Mart employees."

It is telling that neither plaintiffs' class certification motion, nor their reply brief, cite to a single case, not one case in which a class was certified for a First Amendment speech challenge. And I think the likely reason for that, Your Honor, is that courts rarely certify class actions in this context because the claims are inherently individualized; and a class action is rarely superior to individualized adjudications.

For that reason, or for those reasons, I should say, the Court should deny plaintiffs' motion for class certification. In addition, the Court should deny the plaintiffs' motion for a preliminary injunction.

And the very last thing I just wanted to say or reemphasize, Your Honor, as we mention in our brief in the conclusion, to the extent the Court is inclined to issue a preliminary injunction, we respectfully request that the Court administratively stay the injunction for seven days to provide the United States time to consider moving for a stay pending

appeal.

Thank you, Your Honor.

THE COURT: Thank you. Madam clerk, how much -- how many minutes was the other one roughly?

COURT CLERK: He's keeping the time. I'm not keeping it.

THE COURT: Okay. I'll give you five more minutes. I'm not sure. It's five extra minutes if you need --

MR. SAUER: Sure. Thank you, Your Honor.

THE COURT: -- for the rebuttal.

MR. SAUER: May it please the Court.

There's a lot of points there that I'd like to address. It might be easier if I just start addressing Mr. Gardner's comments at the end.

Very briefly on the class certification. I think we'd stand on our briefing on that. I think we explained very clearly how there clearly are common questions here. This case is radically different from *Wal-Mart* against *Dukes*, which is essentially a whole bunch of individualized damages, actions, against -- challenging discreet individual acts of discrimination.

Paragraphs 1 to 30 of our proposed findings of fact set forth a campaign of threats that overarches every single one of our claims. That alone is a common question, and so forth. And then when you look at each kind of federal agency, each one

raises a whole host of common questions for everyone who is affected by that federal agency. So you've got one huge overarching common question; then a whole bunch of other common questions that is set for each agency, the White House Surgeon General's office and so forth. And then we briefed that, and I think I'll just stand on that for now.

I do want to address what Mr. Gardner said about the alleged overbreadth and vagueness of the injunction and the notion that it's going to sweep in what they contend is lawful and important conduct.

Mr. Garner didn't actually address the actual language of our injunction in his comments, so I'll read the key part to the Court. We've got a series of verbs that we're asking the Court to enjoin the defendants from doing. And that is to stop them from, quote, "demand, urge, encourage, pressure, coerce, deceive, collude or induce." Those are the verbs. That's the conduct we're asking the Court to enjoin, federal officials who use those verbs to get platforms to take down disfavored content and speakers from social media.

Where did we get those verbs? Well, Mr. Gardner cited the *Backpage* decision. If you read to the bottom of that decision, Judge Posner actually directs the district court to enter an injunction. At the end of that decision, he uses two of our verbs. He doesn't stay, don't send letters, as Mr. Gardner said. He says, they're under -- Sheriff Dart is

under an injunction not to, quote, "coerce or threaten."

Likewise, the *Norwood* decision that this Court quoted in its motion to dismiss order says that it violates the First Amendment to induce, encourage or promote. *Adickes* against *S.H. Kress*, one of the seminal cases on state action, says that it plainly constitutes state action to engage in a conspiracy and reach an understanding. And that's what we're doing with collude.

So if you look at the verbs in our injunction, they're the very verbs that courts like the U.S. Supreme Court, the Seventh Circuit and others have used to describe what conduct actually violates the First Amendment.

So I don't know if they're claiming that the U.S. Supreme Court is unconstitutionally vague when it writes its opinions to give people guidance as to what does violate the First Amendment.

So we tried to hue closely and have verbs, conduct that's described be specific to be clear. These are all verbs that are clearly understandable from the dictionary and tracks the actual guidance we've been given by the U.S. Supreme Court and other decisions.

They claim, however, well, this is -- you know, it's too vague. Again, I think that the dictionary refutes that question. And so their main argument is this is every overbroad. And they say we didn't address this in our brief.

Then he admits that we talk about it in detail in pages 113 to 117 of our reply brief.

They put in five declarations from -- from federal officials from the FBI, CISA, the GEC, CDC and OSG. And all of these declarations say two things. First they say -- or most of them say, we don't actually ask them to take down anything. And they go on to say, but please don't enjoin us from telling them to take anything down because then the world will end. Right? It's a parade of horribles that they say.

If you actually pick apart what they're -- what they're doing is that all their complaints really fall into two buckets.

One bucket is we want to be allowed to make public policy statements, like on our website or in a press release, that aren't directed toward social media platforms, that aren't, you know, calculated to get content taken down. We just want to be able to engage in what we think of as garden variety government speech. And we concede that is not covered by these verbs. Each one of these verbs denotes an intentional action to get speech taken down from social media.

So if the CDC, you know, or the Surgeon General's Office puts a health advisory on their website that says the vaccines work; or, you know, smoking is dangerous or whatever it is, just that act of posting on their website and making a public statement about an important issue does not in itself

constitute demanding, encouraging, pressuring, coercing, deceiving, colluding and inducing, you know, within the meaning of our objections.

We say, they're kind of creating a problem that doesn't exist. They're allowed to do that. And I don't think anyone -- any fair reader of what we're asking the injunction to do would say they can't make public statements.

So they pivot heavily to their second bucket. And their second bucket is there's a lot of stuff we do want them to take down. And there's two subsets. There's stuff that's First Amendment protected; which, you know what, some of it may be bad, but under the First Amendment, they really shouldn't be asking to take it down. Right? So the injunction should cover that. Right?

And then, on the other side of that, you have stuff that's not protected by the First Amendment. And almost all -- they have basically two buckets there. There's true threats, right, or incitement to true threats. And then there is -- there is speech that itself constitutes criminal activity, so malicious cyber activity set forth in the CISA injunction, you know, spear fishing attacks, you know, infiltrating someone's computer and issuing command control directions and stuff like that, live streaming of the abuse of children. That's not protected by the First Amendment, right, you know, and various other arguments like that.

So and we, again, concede in the reply brief that this injunction is defending the First Amendment. And if you want to look at what the exceptions are in the First Amendment, they're really clearly spelled out in Justice Kennedy's opinion in *Alverez*. And conduct that is integral to criminal activity, that's a well-established First Amendment exception. So we agree that the injunction does not stop them from going to the platforms and saying take down stuff that is unprotected by the First Amendment because the speech itself is criminal conduct, like, livestreaming abuse of children, you know, and the various other things, malicious cyber activity, the various other things listed in their brief.

But what you heard Mr. Gardner do is trying to blur the lines a little. Right? So he wants to say, "Well, here's stuff -- here's some things that we're a little worried about because it might be on the borderline. And what he's actually pivoting to is at the very beginning of his presentation, is "We've got to be allowed to go to the platforms and flag malign foreign influence actions."

But that's refuted by Tab 2. What they actually mean by that in practice, based on the evidence in this case, is, you know, a Russian speaker has posted, "Hooray for the Second Amendment." And 96,000 Americans say, "We agree with that. We're reposting that." And they go, "Take it down." That's a First Amendment problem. Right?

So what you have is they're trying to take this concern about actual criminal activity that's not protected by the First Amendment. It raises no First Amendment problem for federal officials to say, "Hey, we're flagging that for you," you know. "Turn off that livestreaming of child abuse." Right? Versus stuff that clearly does raise a First Amendment problem. They're trying to blur those categories. It's very kind of artfully presented.

But the Court's injunction, the language we proposed to the Court clearly delineates those, can clearly delineate them. So essentially you have you saying, "Please don't do this." First of all, they say -- most of their declarants say, "We don't do this. We don't ever ask them to take anything down."

It's actually kind of surprised me they say that the FBI doesn't go and ask them to take down child pornography, which is a First Amendment exception. Right? And they say actually don't ask them to take stuff down. But don't stop us from doing it because then there'll be this parade raid of horribles. There's an inconsistency there.

And all their complaints can be addressed by observing that, number 1, those verbs that we recite in there do not direct them not to make public statements on important issues. And the scope of the injunction does not affect stuff that clearly falls within established First Amendment exceptions which is not First Amendment protected speech. And that

includes, among other things, in *Alverez*, there's a specific list provided by the Supreme Court.

The Supreme Court says, contrary to the arguments you heard today, the Court's lack freewheeling authority to recognize new First Amendment exceptions and they're clearly out of an *Alverez* decision. That includes speech integral to criminal conduct, in other words, where the speaking itself is part of them perpetrating the crime, and true threats.

So that's our response to the questions about both the vagueness and the overbreadth -- supposed overbreadth of the injunction. It's really they're trying to create problems.

There's something really telling here. Right? We have evidence of just astonishing, sweeping violations to the First Amendment. And the government's response to that is essentially too bad. Anything you might do to stop us from doing that is going to cause us some problems at the margin, and, therefore, you can never enjoin us at all. That's an astonishing proposition.

That, like their argument about government speech that Mr. Sur presented, and as the Court has said, flips the First Amendment on its head, they're saying you've got to let us destroy all these First Amendment interests of private American citizens posting about COVID-19 and elections and the whole panoply of other topics.

Destroy their First Amendment rights so that we can keep

doing these tiny, little things that are at the margin that aren't really concerns on the thing. And that is the proper balancing of harms that the Court should engage in here.

The First Amendment interests of private American citizens to speak freely on social media on questions of core political significance with our viewpoint discrimination overwhelms the interest that they're asserting on margins of potential confusion about marginal applications that lie in the shadow of the borderlines between what constitutes criminal activity.

So having addressed that, I want to pivot back to just discuss some things that Ms. Snow and Mr. Sur said.

Ms. Snow argues that our declarations are stale. Actually we've submitted now three rounds of declarations from the private plaintiffs. Every time they've submitted a declaration, their injuries have continued up to the time of the declaration. This includes the declaration we filed last week with our reply brief of Ms. Hines and Ms. Hoft.

Ms. Hines is present in the courtroom today, you know, lives down the street, attests how she was having the continued censorship on social media on the very topics that the Virality Project has called out her type of group for as recently as a few days before the declaration was executed.

So, in other words, the notion that, oh, this is stale. It all ended a year ago. Okay. Here's a declaration in support of our reply brief that shows that our private

plaintiffs continue to experience these same kinds of censorship right up until the date they executed their latest round of declarations.

And they completely ignore their second round of declarations, which is the one we submitted in support of class certification.

And what those say is those private plaintiffs have interests as audience members in listening to and reading the speech of all the other private speakers that federal officials and their partners have targeted in this case.

So you go through and you read those declarations. And they're saying all these people that the White House is targeting, that the Election Integrity Partnership is targeting, you know, the disinformation dozen that the Virality Project is targeting, we listen to and read all those people, not literally all, but, like, dozens of them.

If you read -- again, you read Ms. Hines' second declaration and she talks about following all of the disinformation dozen, all of them.

So the notion that, like, oh, we don't have any current censorship injuries, these censorship injuries are clearly ongoing.

And I would add what -- something that really ties all this notion of imminent harm all together, in my mind, is what the Court said at page 37 of the motion to dismiss order, "They

history of past censorship" -- which, based on the evidence here is enormous -- "The history of past censorship is strong evidence of the threat of future censorship." And so that is exactly what the evidence shows here.

Secondly, Ms. Snow said we failed to link the instances of particular censorship conduct to -- sorry -- instances of acts of censorship to the censorship injuries to the conduct of the defendants.

We addressed this in the reply brief. We identify five ways that that's not correct. First, there's direct censorship injuries where it says experienced by the private plaintiffs, you know, where the Great Barrington Declaration gets deplatformed right after the campaign from Dr. Fauci and so forth. You have Mr. Hoft attesting, who's been flagged again and again and again by CISA's partners in the Election Integrity Partnership, experiencing censorship up to -- you know, as the declaration we filed last week and so forth.

So there's the direct censorship injuries that the private plaintiffs have continued to experience at the hands of federal censors.

Then there's the interests of the private plaintiffs to -- as audience members. I referred to that a minute ago in their second round of declarations in support of class certification. They read and follow -- all these people are -- large numbers of these people are being targeted for federal censorship.

Third, the Court recognized, as upheld multiple times, the state's standing to represent the millions of Missourians and Louisianians who are not hearing speech on social media because there's an active campaign by federal officials to censor it.

Finally, the states have their own direct interests here to uphold their -- you know, their policy, their fundamental policy set forth in their state constitutions that promote freedom of speech, as well as their interest in hearing what their constituents actually have to say, what they actually think, on social media. And that's reinforced by Carrol Crawford's declaration.

And then, fifth, and I think that's why Mr. Gardener brought it up, we pointed out that also the private plaintiffs are seeking class certification to represent a class of all the people who are affected by these censorship activities.

So for all those five reasons, this notion that there's no link between the federal censorship and the injuries to the plaintiffs is -- is indefensible.

Ms. Snow said a few other things. She said there's no evidence that the Surgeon General's Office collaborated with the Virality Project. That's refuted at the highlighted text in Tab 33 of your binder, among other things. She said, "There's no evidence that the Virality Project targeted Ms. Hines' group, Health Freedom Louisiana."

The Virality Project report talks about health freedom

groups which it said it targeted on a, quote, "nationwide basis." And it mentions them 100 times as, you know, the sort of information they're citing. So that inference is compelling that Ms. Hines has been targeted by it.

Ms. Snow made a comment that Dr. Fauci's successor, Dr. Auchincloss or Auchincloss, all he did was receive a email in 2020. That email is in Tab 6 of your binder. That's an email that says at 12:30 in the morning on February 1st, 2020, "important." And then it attaches the article, *The Nature Medicine* article about the gain of function research that NIAD had financed at the Woohan Institute of Virology. And says, "You keep your cell phone on. You will have tasks to do today." That -- that email speaks volumes about the involvement of Dr. Auchincloss and Dr. Fauci's campaign to censor the lab leak theory.

They rely in their papers and Ms. Snow's presentation in their representation that CISA stopped its switchboarding activities after the 2020 election cycle. They neglect to mention that Brian Scully's testimony, which they had the opportunity to contradict or explain, and did not do so, when they submitted the CISA declaration.

Brian Scully said -- I said, "When did you make that decision?" He said, "Late April or May of 2022." "Oh, really. Right after you got sued by us? Right?" And, of course, the standard there is set forth in the Supreme Court's decision in

*Already, Inc. versus NIKE,* which is voluntary cessation of challenged conduct after you got sued is viewed with extreme skepticism.

The person that, here CISA, engaging in voluntary cessation has a formidable burden to establish that it's absolutely clear that there's no reasonable prospect of that conduct to recur.

And, in fact, you see the exact opposite. What you see is Lauren Protentis, as they're terminating their own switchboarding activity, aggressively lobbying the platforms to create an alternative channel for the exact same switchboarding to go, just bypassing CISA. So the notion that, we're getting out of this business, that's old news is just directly contradicted why the evidence.

They refer to Dr. Gurrea's declaration. I think we refute that in great detail in the reply brief. I just want to quote the Northern District, the fact that Dr. Gurrea apparently didn't even read all the emails and other communications the defendants produced in evidence that show social media platforms again and again and again caving to federal demands for greater censorship, as the Northern District of Texas says, his failure to look at -- even look at the relevant evidence, quote, "The gap is an abyss when it comes to his analysis."

Mr. Sur made a series of questions -- or made a series of comments. He started his presentation by invoking the

Government Speech Doctrine. And that's exactly what the government gets dead wrong in this case.

They say, we have to be able to say whatever we want, even when what we're saying is, for example, you know, -- Tab 23, for example, is the first flagging email we have from the White House 1:04 a.m. on January 23rd, 2021, you know, just basically two days and a few minutes after inauguration day, you have Clark Humphrey emailing Twitter linking a tweet by Robert F. Kennedy, Jr., discussing the death of Hank Aaron after taking a vaccine.

And there this White House official is saying, "Hey, can we have this removed ASAP?" Right? That's the Government Speech Doctrine that they want to invoke. We've got to be free to say that, hey, we dislike this viewpoint that's being expressed on social media. Will you please take it down right away? And, by the way, it would be nice if you kept monitoring these and take down other ones as well.

That is totally -- we're right in the heartland of the concern expressed in Metal against Tam, an opinion that you quoted at length in your motion to dismiss saying that it says the Government Speech Doctrine is subject to dangerous misuse. And, in fact, it can be used to suppress disfavored viewpoints. It should not be used that way.

That's exactly -- that's essentially the government's playbook in this case, say no, no, we -- And it expresses

itself again in Mr. Gardner's presentation where he says, "No, no, there's a lot speech that we've got to be able to engage in."

And what the Supreme Court says is you've got that completely upside down. The private First Amendment protected speech, ordinary American citizens, is much more important than the government's assertion of its right to say whatever it wants, even if what it wants to say is a whole bunch of threats and pressure and collusion and deception to go after disfavored speech on social media.

They said each platform -- I think Mr. Sur said the record shows that each platform made its own decisions. Just to refute that, I'd direct the Court's attention to Tabs 28 and 30 of the binder. Those are the emails from Nick Clegg right after the White House's pressure campaign where he says things like, "We hear your call for us to do more." And, "We've got to meet with you to understand what the White House expects of us as censorship going forward." I mean, the internal communications here directly contradict that narrative.

You have the same thing when you talk about Facebook entering a public -- making a public statement saying, "We're already doing the things that the White House calls us to do. And he says, "Aha, they would have done it anyway. If we actually look at the private communications, those emails from Nick Clegg say, "Here's the new and additional things we're

doing, you know, in response to what you've told us to do. We hear your call for us to do more." So and that's the probative evidence here.

Mr. Sur said, "The mere prospect of a statutory change cannot create state action." That just mischaracterizes the evidence here. We don't have here just, hey, we might change a statute. What we have here is take down disfavored viewpoints or else we'll make a statutory change that you don't like.

And, again, that's not the only threat. We've identified that the Court said in again doc 224 that's there's a long theory -- series of threats, you know, thinly veiled and some quite blatant. These are threats of antitrust enforcement, for example, and then other threats as well. For example, the Court -- as the Court noted in that order the RFI from the surgeon general as well as the health advisory previously are both freighted with the threat of regulation. And there's others threats as well, as well as internal and applied threats as well.

Mr. Sur said that the -- Facebook said Tucker Carlson's post didn't qualify removal. You asked him, "Well, didn't they deboost it?" That's at Tab 26 where you have Nick Clegg emailing, or Brian Rice, one of the Facebook officials, emailing back to the White House saying, "This was deboosted for seven days to be fact checked and we will continue to deboost it even though it was not ultimately fact checked.

In other words, they had no reason to remove it all. But since the White House wants it deboosted -- here deboosted means they've reduced its circulation by 50 percent.

Just imagine if that was a senior official in the Trump administration who had sent that email to, you know, Twitter saying, Hey, you know, here Rachel Maddow, the most prominent -- whoever the most prominent journalist then criticizing the Biden administration was, and they were saying to Facebook, "We don't like this video from this person. Take it down." And Facebook responds and says, "Well, we can't really take it down. And, in fact, it doesn't violate any of our polices. But, at your request, we will deboost it and reduce his circulation by 50 percent," what's being viewed by tens of thousands or hundreds of thousands of people. That violates the First Amendment.

And I'm at my allotted time. And so I'll stand down and invite the Court's questions.

THE COURT: Thank you. Debbie, do you need a break?

COURT REPORTER: Yes, sir.

THE COURT: You need a break. Okay. Let's take a little, quick break, about a ten-minute recess on that clock. I think it's a little fast. But it says 11:20. But we'll take about a ten-minute recess, come back. I'll ask some questions. We're not going to go to 12:00 and I'm going to take a lunch break and come back. We're going to finish.

So, you know, I have a fair number of questions, but I don't know how long your answer is going to be. But, you know, I don't anticipate it's going to be, you know, just tremendously long. So let's take a quick break. We'll start back at 11:30. We may go to 12:30 or so to finish. Okay.

(Recess)

THE COURT: I was a state court judge. We didn't do that. So I keep forgetting. So anyway.

All right. Let me start my questions, and some of them I'll address to both; some of them I'll address to one person, I mean, one side.

Let me make sure -- I want to make sure what the -- we're on the same page with regard to what's protected free speech. And I'm primarily going to ask this to the defendants. Whoever wants to answer it, you know, feel free to do that.

The United States Supreme Court has recognized some well-known exceptions to free speech: Incitement, which includes, you know, clear and present danger, fighting words. They've been modified to some extent: Threats, obscenity, child pornography, defamation, criminal conspiracy, criminal solicitation. Those are not protected.

But I'm going to make some statements and you tell me whether you think it's protected free speech or not. The COVID vaccine does not work. Is that -- I'm asking defendant. Is that protected free speech?

MR. GARDNER: I'm happy -- Do you want me to approach the podium, Your Honor or should I do it --

THE COURT: You can stay right there.

COURT CLERK: Speak into the mic.

THE COURT: Yeah. Depends on if you're mad at me or not with these questions.

MR. GARDNER: Yeah.

THE COURT: Is that protected free speech?

MR. GARDNER: Thank you, Your Honor. Josh Gardener for the defendants.

THE COURT: Yeah.

MR. GARDNER: So, again, I'm going to try and answer your question as directly as possible. But the whole question here is whether there was undue coercion or significant encouragement such that the government's relationships with social media companies resulted in a First Amendment violation.

THE COURT: And I do understand that y'all are not -- I'm going to ask some questions about that. I'm not at all saying -- I'm not asking you to admit you did that and are these free speech? I'm asking you just that. Is this protected free speech, that statement?

MR. GARDNER: Well, understood, Your Honor. That statement standing alone, depending on who the speaker is, could be protected by the First Amendment.

THE COURT: Could be?

MR. GARDNER: Yeah. So, for example, --

THE COURT: Could it not be? Is there any -- anything you could see at all that, the COVID vaccine does not work, that that's not protected free speech? Any --

MR. GARDNER: Yeah, absolutely, Your Honor. Let's say it was spoken by a covert Russian operative, that would not be protected by free speech. And plaintiffs acknowledge that. Now, what plaintiffs say is that liking that statement may have First Amendment implications.

THE COURT: Okay. And this was, like, during COVID. I don't know if the Russians were involved in that or not. But I know y'all said in the elections --

All right. Well, how about this: Masks don't work to stop COVID from spreading.

MR. GARDNER: Same response, Your Honor. It could be protected speech depending on who the speaker is.

THE COURT: Okay. And let me just assume they're American citizens making these statements. Okay. The 2020 election was stolen.

MR. GARDNER: So, again, if it came from a American citizen, then that speech itself could be protected, but, again, it doesn't answer the question whether there's a First Amendment violation.

THE COURT: Okay. Tell me how that statement could not be protected. What possibly could go wrong with that

statement that it's not free speech?

MR. GARDNER: If it came from a -- for example, a Russian -- a covert foreign operative like a Russian government.

THE COURT: Okay.

MR. GARDNER: And plaintiffs concede that.

THE COURT: All right. Climate change is a hoax.

MR. GARDNER: Same response.

THE COURT: Okay.

MR. GARDNER: President Biden is responsible for inflation and high gas prices.

MR. GARDNER: Same response.

THE COURT: Okay. All right. Okay. And I just wanted to kind of, you know, go through what free speech was. And I'm not -- like I say, I'm not, you know, assuming that you admit that there's significant encouragement or coercion, but I did want to ask the question to both sides. Do you agree that the test for determining whether a government is responsible for private -- another private company's decisions is whether there's coercion and/or significant encouragement?

MR. GARDNER: Yes, Your Honor, that is the test the Supreme Court has recognized.

THE COURT: Okay.

MR. SAUER: Actually, that's one of multiple tests because there's also joint participation and conspiracy or

collusion. So and I would point out that that test is actually two different things because the case laws makes clear that there's coercion. And then significant encouragement that falls short of coercion still counts.

THE COURT: Okay.

MR. SAUER: So we've presented five tests to the Court. And we think they're all supported in the case law.

THE COURT: Okay. All right. And there's -- you know, we had an issue that we ruled on before, I think in the motion to dismiss, about there's no longer a preliminary injunction against President Biden. I understand that. I think we all are on the same page on that part.

Is there any constitutional or separation of powers issues that would prohibit a preliminary injunction against White House officials other than President Biden? Okay. I'll let both sides respond to that.

MR. GARDNER: Would you like me to go first, Your Honor?

THE COURT: Sure. Well, sure, it's fine. It doesn't matter.

MR. GARDNER: So we have not directly briefed that issue, Your Honor. We would be happy to do so. I do think there is some significant constitutional questions with enjoining senior advisers to the president to provide advice and information to the president so that he can make decisions

under, you know, the Take Care Clause of the Constitution. But we have not directly addressed that.

But what we do address in our opposition is that any injunction in this case should not run against individuals in their official capacity. It should run against the agencies because, again, those claims merge against the agencies.

THE COURT: Okay. All right.

MR. SAUER: My response to that is the only concern -- they've never raised this, so it's waived. And the only concern he just raised is the concern that an injunction that would interfere with the kind of advice that the senior advisors could give the President might raise separations of powers concerns.

But going all the way to doc 34, the Court's order grants a preliminary injunction related to discovery. This injunction is targeted at White House officials' communications with external third parties, the social media platforms. And there's absolutely no reason they can't be enjoined there. If they're violating the First Amendment, they fall within *Armstrong* and the longstanding case law that says they can be enjoined from violating the Constitution.

THE COURT: All right. And the next question is going to be -- and let me just say this first: I do want to complement both sides. I don't want any more briefs, you know. I don't know why they call it -- why it's called a brief or why

this was called a brief, you know. I'm going to call it -- I don't know what I'm going to call it, but I won't call it that. But because, you know, they were all -- everybody's was long, I mean, and I've read it all. I mean, I'm not just, "Law clerks, y'all tell me what it says." You know, I mean, they look at it too. But I've spent a lot of time reading it, so I'm pretty up on it.

But there's a lot that, you know, I have to look at again, and things, because I think -- I know, it's several thousand pages, you know, or something like that. But, anyway, the -- you covered pretty well irreparable harm issue.

But I did want to ask how a -- both sides, if a preliminary injunction is issued -- Now, I'm not saying I'm going to issue one. I'm just asking these questions. If a preliminary injunction is issued of any type, how would you avoid the government speech problem? I see that as the biggest part of what Mr. Gardner talked -- we talked about the government speech issue. Like, can the government get up and say -- you know, get up and make some speech, you know, if he's -- you know, I mean, there was a lot of questions -- President Biden said, "They're killing people."

Surgeon General Murthy said -- you know, he gave his advisory and, you know, social media Jen Psaki said, "The social media companies need to do a whole lot better," and gave a specific, quote, "ask," A-S-K-S, ask about what they were

wanting them to do. So it was a lot of government speech there. But it was other things too more than that.

So how do you avoid the government speech issue, like, if there is something that the government needs to say, how would you avoid that? I'll let the plaintiffs go first on this one.

MR. SAUER: Yeah, and I'd say in the language of the injunction we proposed, we try to do that in two ways. First, in that list of verbs. That's really the operative portion of the injunction. We're asking the Court to enjoin them from taking very specifically defined actions. There's a specific list of verbs there.

Again, it's -- well, I don't have it right -- demand, urge, encourage, pressure, coerce, deceive collude, induce. And craft from that list of verbs, we try to hue to the very verbs that, as I said before, in opinions like *Norwood* and opinions like *Backpage*, those are the very verbs that the courts have said this is what violates the injunction. Verbs like: Coerce, you know, encourage induce are right there in *Norwood*. They're right there in *Backpage*.

So, in other words, we want the scope of the conduct that's enjoined to reflect what courts have already held is what the First Amendment doesn't let you do. And if the First Amendment doesn't let you do it, it doesn't fall within the Government Speech Doctrine. That's *Metal*.

And then, in addition to that, later in the injunction we

say it's whether -- deceive, encourage, induce, so forth, to do what? To take private American speech down from social media.

So the government can say lots and lots of things. But what it can't do is engage in communications with platforms that are deliberately calculated to get disfavored speech, disfavored viewpoints taken down. So those are the two elements. That's how we tried to craft it in the proposed injunction.

THE COURT: Okay. Defendants.

MR. GARDNER: Thank you, Your Honor.

So a few things. First, I do have the language of plaintiffs' injunction in front of me. And some of the verbs they use are inherently not violative of the First Amendment. For example, there's nothing constitutionally inappropriate about urging a private entity to do something or to encourage a private entity to do something. And that is one of the precise concerns the United States has here.

Plaintiffs' entire theory of the case is so at odds with the previous case law. So, for example, in the previous cases or the other cases plaintiffs have cited to, the one who made the alleged threat is the one who actually took the coercive action. Right?

So in *Backpages*, the sheriff is the one who made the threat, and he did it in a letter. That letter was enjoined despite the broader language of the injunction.

What plaintiffs are arguing here is that CISA, in switchboarding in 2020, despite no coercion whatsoever, in fact, it's the opposite, as my colleague said, there are statements in all those emails, that say, "We're not asking you to do anything."

But what plaintiffs argue is those actions somehow take on a coercive effect, almost like the Mosaic Theory of the First Amendment. That is the exact problem we had. And if I'm not answering your question directly, it's because I can't answer a question directly because of the nature of plaintiffs' broad and amorphous claims paired with its even broader injunction.

THE COURT: My question may have been a little overbroad. But go ahead. Go ahead, Mr. Sauer.

MR. SAUER: May I just briefly reply to that. Three points. One is Mr. Gardner said to urge or encourage doesn't violate the Constitution. Here's what the Supreme Court said about that in Norwood. "It is axiomatic that the state may not induce, encourage or promote private parties to engage in contact that would be unconstitutional if the government did it. The adverb "encourage" we've lifted right out of *Norwood*. That does violate the Constitution.

THE COURT: Well, let me ask you this question on that: Is -- All right. So an injunction was issued. And it says you cannot, you know, meet and send emails and meet and go over content and flag these posts; you can't do that. And you

can't meet with the election -- can't work with the Election Integrity Partnership or the Virality, Project if it ever comes up again, or you can't work with these ones who are -- don't have First Amendment concerns.

All right. And then the government wants to -- you know, at a press conference, the press secretary says, you know, something like these social media companies are just -- these social media companies are just -- they just keep on at it. Something needs to change. We need to amend Section 230 of the Communications Decency Act, you know, and that's all they do. They say that.

Would that be a -- would that elicit a motion for contempt by the plaintiffs in that case? They didn't meet with them; they just said that.

MR. SAUER: Yeah. It would depend on the nature and content of the statement. And I think the way we describe it at the very end of the reply brief, we talk about public statements that are not sort of directed to platforms, that are not deliberately intended to induce platforms to take action is not violating the First Amendment.

So if they just made a statement saying, "Hey, Section 230 is really bad. We need to amend it." They can even say, "Hey, COVID misinformation is bad. But if they're taking that additional step of having a statement that's deliberately crafted to pressure or induce the platforms to take down social

media speech, that's where you get into the First Amendment problem.

And, again, we've tried to craft the injunction so it exactly mirrors what courts have said, you know, what really does violate the First Amendment.

THE COURT: Okay.

MR. GARDNER: And, Your Honor, if I may.

THE COURT: Mr. Gardner. Yeah.

MR. GARDNER: If I may just briefly respond.

THE COURT: No, that's fine.

MR. GARDNER: My colleague --

THE COURT: I asked a different question, so go ahead.

MR. GARDNER: I understood. I just want to be totally clear about this.

To the extent that plaintiffs are suggesting that the encouragement of a social media company to take action violates the First Amendment without state action, plaintiffs cannot establish an injury to themselves from that conduct. It may be the social media company can argue that it's violated their First Amendment rights. But plaintiffs have to establish state action here, which is why they spend, I think you acknowledge, many many pages of briefing arguing for state action because they recognize that merely asking a social media company to do something standing alone can't violate the plaintiffs' rights.

So I just wanted to be clear about that.

But their *Norwood* discussion is really no bearing on their theory of the case here.

THE COURT: Okay. All right. I'm going to go to something a little less catchy, standing. I hate to bring up standing again. The only question I have is: There is a discussion in the briefs -- not briefs, sorry. I wish I could think of another word to call them. I don't want to call them briefs. But, anyway, whatever it was that y'all filed, the long, long documents with all these attachments that you filed, that's what they are. No, I'm kidding. It's a detailed case. I really do complement the attorneys on the job done by both sides. Really interesting case to me, really interesting. And y'all did a great job on it.

But my question is this: There's a question about whether there's a different standard for standing in a motion to dismiss, which I've ruled on, versus a preliminary injunction. And I think the -- I'll let the defendants go first because they brought that up. They said there's a different standard. But you didn't really say what it was, that I remember. But so is there a different standard? Does it just have to have evidence backing it up, or what's the standard?

Ms. Snow.

MS. SNOW: Yes, Your Honor. The difference at this stage in evaluating the preliminary injunction motion versus

evaluating the motion to dismiss is that when the Court was evaluating the motion to dismiss, it's taking the allegations as a stand. And the Court gave the allegations a presumption of truth and was determining whether the allegations in the compliant plausibly alleged that the plaintiffs had standing.

And the Supreme Court has said in *Lujan v. Defenders of Wildlife* that the evidence, that the standard of review for the issue of standing, as with all other issues in the case, varies depending on the proceedings and which part of the case you are in.

And so, you know, there the Court was considering on motion for summary judgment whether the evidence then at that point, as distinct from earlier in the case when, you know, plaintiffs only have to plausibly allege standing, whether they had presented sufficient evidence to establish standing according to the standards that would apply in summary judgment.

Here at the preliminary injunction stage, courts also evaluate whether plaintiffs have actually presented evidence that make a, quote, "clear showing." And the Supreme Court said in *Winters* that the plaintiffs bear the burden of providing -- of making a clear showing that they meet all the standards for obtaining preliminary relief, and that would apply to the irreparable portion which does overlap substantially with standing.

And, in the Fifth Circuit, I believe it is *Stringer V Whitley*. We cited the case in our brief which I had written down and now I am not seeing it. But we had -- that case also echoed the clear standing language -- or, sorry, clear showing language. And it reviewed whether the plaintiffs had actually presented evidence that showed whether they were eminently harmed, whether they'd be eminently harmed absent a preliminary injunction. I believe that case is *Barber*.

THE COURT: Well, that's kind of what I was -- my thoughts were kind of that what you're talking about in that was that -- you got evidence backing it up. That's kind of what I thought --

MS. SNOW: Yes.

THE COURT: -- the standard would be. Basically the legal standard is the same except, you know, you're not doing the -- just basing it on the pleadings anymore. You've got to have evidence backing it up.

MS. SNOW: Right --

THE COURT: That's kind of what I thought, but I was just going to ask that and see. Go ahead, Ms. Snow. I'll let you finish and then Mr. Sauer.

MS. SNOW: Yes. Thank you. Sorry. I just wanted to add one more thing that in this case in particular where we have a -- almost a year in between when the plaintiffs had submitted their initial motion for preliminary injunction and

where we are now, where the Court is considering all the evidence that has been presented to it and where plaintiffs have access to thousands of pages of documents, testimony from multiple officials, the requirement that they make a clear showing that they are imminently harmed and that -- and that they will be irreparably harmed without a preliminary injunction, you know, the Court should hold them to -- it shouldn't be hard for them to point to evidence --

THE COURT: Right.

MS. SNOW: -- if they -- if it's true.

THE COURT: And let me ask you this -- and, Mr. Saur, I'm not trying to keep you -- I'll let you answer two -- both questions at the same time. But I went to Del Rio recently, Del Rio, Mexico. I volunteered to kind of go down there and help out some of the judges down there. I had, like, 200 sentencings in four days. And every one of them told me, every one of them told me -- they're mostly border crossing cases. They did something. Every one of them told me, "I apologize to you, to the United States Government. I'm never going to do it again," every one of them. I felt like I'd kind of solved the border crisis after I got back. But, unfortunately, some of them, you know, even now, still getting rearrested.

So the government is saying, "Don't worry. We're not going to ever do any of this again." You've got a 2024 election that's going to be a hotly contested election coming

up. So how can I be sure that this is not going to happen again, that the government is not going to tie up with the Election Integrity Project again and start suppressing or asking this stuff to be suppressed?

Y'all are telling me it's not going to happen.

MS. SNOW: Your Honor, two responses to that. And, first of all, it is not the government's argument that, you know, this, you know, will never happen again. It is the government's position that the conduct here, everything that plaintiffs are challenging, they haven't shown a violation of the First Amendment. They haven't shown state action to even get to the question of whether there's been a First Amendment violation. There's nothing unlawful about the government's use of the bully pulpit or these communications with social media companies.

But the question for the Court is whether plaintiffs have presented evidence that they will be irreparably harmed. And they bear the burden of showing that the conduct is ongoing in such a way that they will be irreparably harmed.

And they haven't shown that. The record shows that much of the conduct that they're challenging isn't currently ongoing, and that's a critical question for the preliminary injunction. That's all the Court needs to determine at this stage.

THE COURT: Okay. All right. Mr. -- You can go

ahead now.

MR. SAUER: Your Honor, I think she just conceded that they are going to do it again. I heard her say --

THE COURT: She didn't say no, did she? She didn't say no, but she might want to say that. Go ahead.

MR. SAUER: I think she just said that, you know what, there's nothing unlawful about this. This is all A-OK. And as soon as it makes sense to us, we will do it again. And that's a really important concession.

THE COURT: And I'm -- if you want -- do you want to say anything else? I'll let Ms. Snow reply. I'm not saying she conceded that, but I'm just -- you know, I don't feel real confident that the government won't do that again, I'll just say that.

MR. GARDNER: Your Honor, sorry. Let me see if I can address this directly.

THE COURT: Okay.

MR. GARDNER: The issue with a preliminary injunction is: Is there harm during the pendency of the lawsuit that we need to stop to protect the status quo? What my colleague was saying is --

THE COURT: Well, or that it's likely to occur.

MR. GARDNER: Correct. So, and again, we've got to go defendant by defendant to think about this conduct. But what do we have in the record? What we have in the record is a

declaration from Geoff Hale from CISA who says, "We won't be switchboarding in 2024." That's an unequivocal statement. Plaintiffs don't challenge that statement.

And I think the more fundamental point to your example about election issues, the election is, what, November of 2024? The question then becomes is: Is there conduct that may occur between now, what is it, May of 2023, and the resolution of this lawsuit that is likely to occur that will harm plaintiffs?

And we have put forth evidence that that challenged action, which, by the way, mostly relates to COVID with a pandemic that is now past us, is unlikely to occur during the pendency of this lawsuit. That's the -- that's the point.

THE COURT: Okay. My next question is going to be, you know, one thing I noticed that, you know, -- y'all feel free to point out something different -- is that, for example, in the election issues, with the Election Integrity Project, CISA, all those involved in that, every bit of postings and things that they had, dealt with conservative speech. I could not -- I didn't see one post that -- you know, in fact, the Election Integrity Project, EIP, said that almost all of the information that they flagged or reported dealt with -- I think they were, like, they worded it conservative, right-wing followers of Donald Trump. That's what they said.

And so I guess my question is: Can y'all point to me some posts that were flagged and/or removed, you know, by EIP

involving liberal left-wing supporters of Biden?

MR. GARDNER: Thank you, Your Honor. I don't have the EIP Report immediately in front of me. But we do note in our response to plaintiffs' proposed findings of fact that the EIP made several conclusions.

One of those conclusions was that the vast majority of mis and disinformation that they were seeing did happen to come from conservative sources. That's just a fact. But they also say, and we note this in our response to proposed findings of fact, that they did identify left-leaning posts as well for targeting or flagging.

And, in fact, I mean, I would note this, you know, you have another lawsuit in front of you right now by RFK, Jr. who is running for the democratic nomination for president, who claims that his materials were flagged by the EIP in connection with the 2020 election.

So I think that's all the evidence you need, Your Honor, to conclude that it wasn't necessarily viewpoint discrimination at all. And, of course, the EIP as a private entity can't engage in --

THE COURT: Well, his was not alleged to be election because he wasn't running 'til I guess just recently. But his was COVID information.

MR. GARDNER: No, that's correct. But I think I took your question to be were there, you know, liberal posters as

well as conservative posters whose information was flagged by the EIP? The EIP reports that, again, while I think there was a significantly more flagging or tagging by conservatives because conservatives were promulgating the most disinformation, that they did also tag liberal information as well.

THE COURT: Do you know of any, any one single one out of the millions or thousands, whatever it was they flagged?

MR. GARDNER: Well, so to be clear, --

THE COURT: Even one?

MR. GARDNER: Yeah. And I'm trying to be very direct with you. Neither party has taken any discovery from the EIP. So we don't have the universe of what the EIP may have flagged for social media companies, let alone what social media companies may have done --

THE COURT: Okay.

MR. GARDNER: -- with that information. But what we do have, Your Honor, is a textual description in the EIP report that explains they did in fact flag materials from liberal viewpoints as well as conservative viewpoints. What that breakdown is, we don't know because we haven't taken that discovery.

THE COURT: And the viewpoints themselves that were flagged, my understanding was from reading the EIC, whatever that was, theirs wasn't brief either, but that their document

that they concluded, you know, what all happened, what all they did and kind of patting themselves on the back and everything about it, that what they were doing, they called it election disinformation, which I understood to be people saying the election was stolen or the democrats stole the election or something happened like that. That's what I understand that they were talking about.

So getting back to is that protected free speech? If I put something on Facebook -- and I'm not even on Facebook or any -- well, hardly anything. I'm not going to put anything on there, I promise. I'm just giving you -- I'll put somebody else.

If my law clerk Dakota Stephens puts something on there on social media and he says the 20 -- and I'm not telling you his political views or anything. I'm just giving him as an example. But if he puts something on there that says, the 2020 election was stolen, is that -- it's coming directly from him. It's not the Russians. It's not Chinese, is that -- is that protected free speech?

MR. GARDNER: Well, if it is being flagged by the EIP, a nongovernmental organization, then there's no First Amendment violation. And I think beyond that, Your Honor, as my colleague Mr. Sur said, there's two steps here. Right? That someone has to flag or the EIP has to identify information, and then they have to make a decision whether to

send it to a social media company. And then the social media company has to make a separate decision what to do with that.

And, again, as the plaintiffs concede, only 35 percent of the time did the social media companies do anything with that information. That's exactly what *O'Handley v. Weber* was talking about when they talked about the fact that social media companies use their own independent judgment.

THE COURT: Well, my question was: Is that protected free speech?

MR. GARDNER: Yeah. And my answer is the content itself standing alone may be. But if it's by a nonstate actor, there's no First Amendment.

THE COURT: Okay. You said, "maybe." Is there any way -- if it comes directly from him. He's an American citizen. I'll just tell you that. Assume he is American. He is an American citizen. He was born in Baskin. So if -- home of what's her name? Lainey Wilson, Lainey Wilson.

But, anyway, if it turns out that he says that, didn't come from the Russians, didn't come from the Chinese, didn't come from Iran, is that protected free speech?

MR. GARDNER: Sure.

THE COURT: How could it not be?

MR. GARDNER: Well, I know --

THE COURT: Well, under what circumstance would that not be protected free speech?

MR. GARDNER: Well, again, not trying to be coy with you. The speech itself may be protected by the First Amendment. But when it comes or is used by a nongovernmental actor, it doesn't violate the First Amendment. And the EIP --

THE COURT: And I do understand that.

MR. GARDNER: Yes.

THE COURT: My next question is going to be: What do you understand the relationship between CISA and the EIP to be?

MR. GARDNER: I'd be happy to --

THE COURT: Okay. Good.

MR. GARDNER: -- address that, Your Honor. So CISA's role, as explained in the documents -- and I wrote this down. Just give me one second here.

THE COURT: And I'm pronouncing it CISA.

MR. GARDNER: That's okay.

THE COURT: So it's pronounced CISA? That's the way y'all pronounce it in D.C.?

MR. GARDNER: Yes, sir. Yeah, I refer you, Your Honor, to Exhibits 74, 122 and 125, as well as the declaration of Mr. Hale from CISA.

And what those are, they're statements from the Stanford Internet Observatory, the University of Washington and the EIP itself. And what those statements say to a person is that CISA did not found, did not fund, did not control and did not manage the EIP.

What did CISA do with respect to the EIP? Well, as the -- I think, I hope undisputed evidence shows there were Stanford interns who spoke to Mr. Scully, a CISA employee. Mr. Scully identified an issue. And that issue is there is a lack of resources by states to identify misinformation for social media companies.

THE COURT: Which turns out to be conservative speech?

MR. GARDNER: I resist that, Your Honor. That's not the case.

THE COURT: Okay.

MR. GARDNER: If it happens to be the case that more conservatives are disclosing disinformation, that may be the case. But there is no, as I understand the EIP report, I think that's what we have right now, there's no intention to target conservatives.

THE COURT: Okay.

MR. GARDNER: But, in any event, so what the evidence shows is that Stanford interns went to Mr. Scully and said, "You know, are there issues that can be addressed?" Mr. Scully identified that there was a lack of resources by states, states like Missouri and Louisiana, who asked CISA to provide disinformation to social media companies.

Mr. Scully identified that. The interns then went back to the Stanford Internet Observatory, shared that with Alex

Stamos. And Alex Stamos said, "Hey, why don't we create an organization that does this because there is a lack of resources?" The EIP then shared what they were going to do with CISA, as they would with any partner. Because, remember, CISA's statutory mission is to partner. I mean, it is in the statute.

So they shared that information with CISA. And then EIP, without any funding from CISA, that's undisputed, created the Election Integrity Project.

Now, did the EIP share what it was doing with CISA? Of course, but that doesn't create joint action.

THE COURT: Well, is that significant encouragement?

MR. GARDNER: No. No. Not -- not constitutionally.

THE COURT: I knew you would say that, but I was going to ask you anyway.

MR. GARDNER: Yeah. Yeah. Yeah. No, not for constitutional purposes. Absolutely. The question is did CISA somehow break the will of a private entity, the EIP? No, certainly not. And, by the way, we know that because we know that not everything flagged by states, the EIP even sent to social media companies.

What do we also know? We also know that CISA never flagged posts for the EIP. They had no involvement in what the EIP was actually doing, which was flagging things for social media companies.

So then what are we left with? We're left with the notion that former employees of CISA at one time then went to work for the Stanford Internet Observatory? Well, that tells the Court nothing about control or dominion of the EIP by CISA. And then so what are we left with? Nothing, Your Honor.

The fact is that EIP, on its own, created a process to flag, you know, misinformation for social media companies that they were then given the complete responsibility, the social media companies, to decide what to do with that information.

THE COURT: Why was CISA even involved in it?

MR. GARDNER: Because CISA has a mission, Your Honor, to protect critical infrastructure.

THE COURT: And I'm going to ask about that, --

MR. GARDNER: I know you are.

THE COURT: -- but not right now.

MR. GARDNER: And one aspect of critical infrastructure is cyber security and, you know, cyber infrastructure. So CISA has been in the space --

THE COURT: And cognitive -- don't forget that, cognitive infrastructure. But we'll talk about that in a minute.

MR. GARDNER: And then, by the way, again, Missouri and Louisiana asked CISA to play this role. They don't dispute that. And what CISA concluded after the 2020 election was, this was a really resource intensive project.

Now, my colleague here says, well, that was then because of the lawsuit. I think we need to be a little clearer about this. What Mr. Scully said was two things, the decision happened in either April or May. Of course, the lawsuit was filed in May, not April. And, two, it was done, at least in part, because of the resource intensive nature of the switchboarding efforts which CIS and EIP were, you know, performing.

So I think that is the most direct answer I have to the question of why CISA's minimal involvement could possibly lead to joint participation under the Constitution such that CISA would be responsible for the actions of the EIP.

THE COURT: Okay. Mr. Sauer, you look like you're ready to say something, so I'm going to let you say something. I've been avoiding you -- I've been asking so many questions, I didn't get -- let you in. But you look like you're just about to say something. If you want to say something, so go ahead.

MR. SAUER: Judge, I cannot leave unaddressed the federal government's insinuation that conservatives are the source of disinformation. I heard Mr. Gardner parroting that point that is made in the EIP report that, well, we end up overwhelmingly targeting conservative speech. But, of course, that's because conservatives are liars, and liberals are not liars. I mean, that reeks of bias and viewpoint discrimination right there.

And on your question about whether or not, you know, the EIP overwhelmingly targeted conservative speech, there's a really telling graphic where they list the top 22 super spreaders of disinformation on Twitter. And that list there, you know, President Trump is number 3, his sons are number 5 and 6. Our plaintiff Jim Hoft is number 2. And then on the right side of that chart, they list the political orientation of everyone and every single one of them is conservative

Then on the question of whether or not CISA's involvement in the EIP is minimal, I just refer you to Tab 17. Tab 17 is basically a cut and paste from pages 51 and 52 of our reply brief where we point to 15 significant points of contact and collaboration between CISA and EIP.

On the notion of funding, they say CISA did not fund the EIP. CISA funded the EI-ISAC, which is the clearing house through which misinformation was reported to the EIP. And other federal agencies did directly fund the EIP.

The EIP report itself says it received funding for this very project from the National Science Foundation. EIP is federally funded. It's working closely with partners, the CIS and the EI-ISAC that CISA directly funds. And, in fact, federal officials are flagging misinformation.

The GEC, you know, and the kind of stunning development in their response brief, they submitted Leah Bray's declaration where she admits there were 21 narratives flagged by -- by the

GEC, information that we somehow didn't manage to elicit from Daniel Kimmage because he denied all knowledge of it in his deposition, 21 narratives flagged by federal officials at the GEC.

THE COURT: Well, one thing that caught my attention with the Election Integrity Project was that the one who was running that, Renee DiResta, I may be pronouncing that wrong, but, you know, that she stated in one of the statements that I read that -- that the purpose of that and the Virality Project was to get around First Amendment concerns that would tie up government agencies. That's the first thing -- first time I ever have seen anybody even mention free speech in all this. And I guess I was kind of, like, does the government have somebody that talks to them about this? Do they ask anybody? I never saw Rob Flaherty, Andy Slavitt, anybody from these agencies ever even mention any possibility that they could be violating the Free Speech Clause.

So I guess -- I guess why in the world would the government, CISA, collaborate? And that's the word used by Mr. -- Is it Stamy?

MR. GARDNER: Scully?

THE COURT: Scully. I'm sorry. In his deposition, he said they collaborated.

Now, I know that can mean a lot of different things. But why would the government collaborate, or whatever they're

doing, with an organization whose goal is to get around First Amendment concerns?

MR. GARDNER: So, well, I'll say this, Mr. Scully said in his deposition -- and we cite to this again in the response to the proposed findings of fact, that collaboration to him just means the partnership that they are, again, statutorily obligated to engage in. They partner with the private sector.

So there's nothing, I think, untoward or problematic about the use of the term "collaborated" in that context. And, again, in one of the 1,442 responses, we explain --

THE COURT: Okay.

MR. GARDNER: -- exactly what he meant there.

THE COURT: Okay. All right. Are the defendants arguing for a pandemic/emergency exception to free speech?

MR. GARDNER: No.

THE COURT: Okay. Okay. Thank you. That's the shortest answer you've given so far. That's good.

MR. GARDNER: It's getting late in the day. The longer we go, the shorter they are.

THE COURT: I'm joking. All right. I'm really interested in knowing why Rob Flaherty of the White House was so interested and so concerned about the Tucker Carlson video. It had Tomi Lahren on it. And it was Tucker Carlson and Tomi Lahren.

And Tucker Carlson basically said the vaccines don't work. Then Tomi Lahren said, "I'm not taking it." That's what it was about. And he was really concerned about that.

If, you know, I don't think you admitted that was protected free speech. But I don't see how it wouldn't be. I think somebody has got -- a United States citizen has got the right to say something like that if they want to say it, you know.

It turned out he was right. When I took the vaccine, I was told it was 80 -- no, 80 to 90 percent chance it was going to prevent it. I've had COVID three times, you know, since. And I know -- you know, I know that's just me. But all over the nation people kept getting it and they're saying, "Well, I don't know why they're getting it." And then all of a sudden -- then later they say, "I don't know why they're getting it, but it does keep you from going in the hospital." I don't know if it did or not. I haven't had to go in the hospital, but I got it three times.

But why was Rob Flaherty so concerned about something that I think is protected free speech spreading on the Internet? I don't understand -- on social media, I mean. Why?

Okay. You going to punt this time? Okay.

MR. INDRANEEL: Your Honor, if I may.

MR. GARDNER: I'm done with the --

THE COURT: I'm joking. I'm joking. I know he does

the merits part.

MR. INDRANEEL: It's Mr. Sur for the United States, Your Honor, if I may. Thank you.

THE COURT: Thank you.

MR. INDRANEEL: So I think because this presupposition all along has been that the contents of what appears on social media platforms are subject to the terms of service that the users of the platforms agree upon with the platforms, the Court noted that absence of discussion about free speech. I think it's explained by the understanding of everyone involved that it was ultimately the platform's decisions about that control about what would be removed, and then what would be subject to these other various measures that the platforms came up with using their technology.

They have so many posts that they have to deal with that many of the posts are handled algorithmically. And some of them are then, from what I understand, reviewed also by humans. But the point is that they have such a high volume, that they have different measures that they apply. So removal might be one measure. But others might be, as the Court suggested in the exchange earlier with me when I was at the podium, noting the reduction of the circulation.

And the -- before this administration began, the platforms announced that they were going to use moderation measures short of removal for claims that did -- their fact checkers did not

find to be true. So that included removal of posts when the posts also had a harm component.

THE COURT: You're talked about Facebook's, that if it caused vaccine hesitancy and was false.

MR. INDRANEEL: Yes, that's right. So they applied a range of measures. And one of the categories that Facebook said that they were going to reduce the distribution of were the posts that encouraged vaccine hesitancy. And so --

THE COURT: Who determines if it's true or false?

MR. INDRANEEL: So, from my understanding, the platforms had these third-party fact checkers. And they also were working with, for example, the World Health Organization, other governmental and nongovernmental health organizations.

In some cases it's true the platforms in the domestic setting did go to federal agencies.

THE COURT: So the government decided, determined if it was true or false?

MR. INDRANEEL: I think if it was a particular claim about a scientific -- if it was a scientific statement, then they might ask CDC, among other entities. But I think the Court's question is pointing to this whole problem of borderline content because a particular individual's experience with the vaccine would -- that individual probably knows best what their own symptoms were; but the platform may, nevertheless, conclude that the particular post would promote

vaccine hesitancy and might be alarmist because it might represent a side effect that only a small percentage of people would have experienced.

THE COURT: I think that one we talked about. All Tucker Carlson said -- he went through, you know, some different scientific things. And he said that the vaccines don't work basically is what he's saying. And Tomi Lahren threw in there, "I'm not going to take it." And that's what it was about. It wasn't about any adverse effects, I don't think. I could be wrong, point it out if I'm wrong.

MR. INDRANEEL: I haven't seen the video myself, Your Honor.

THE COURT: Okay.

MR. INDRANEEL: But I think what I'm just trying to provide as the important context here, is that both, in this case, Facebook and the government, had a shared policy preference that, you know, the vaccine hesitancy be controlled. And the questions that Mr. Flaherty were asking were about sort of the scope and the nature of Facebook's content moderation that was, as we discussed, short of removal when Facebook was addressing posts that Facebook thought might encourage vaccine hesitancy.

THE COURT: Okay. And let me ask you about -- Did you want to say something, Mr. Sauer? You look like you want to.

MR. SAUER: Can't resist.

THE COURT: You're kind of wiggling around over there so I didn't know.

MR. SAUER: I think Mr. Sur's comment raised a really interesting, important point, which is that when you look at the CDC communications, the CDC is saying this is false and it could lead to vaccine hesitancy, therefore, it must be taken down.

What you have from the White House or what you have from the Rob Flaherty emails and other places insistence that truthful content that could lead to vaccine hesitancy must be taken down.

What Rob Flaherty really cares about is not false speech, like, you know, there's magnetism or there's microchips in the vaccine. What he cares about is the truthful, but sensationless, as he calls it -- sensationless is a synonym here for effective in contradicting the proposed narratives. The truthful speech needs to be taken down.

And that's what set the White House really on a hard core, campaign against truthful content that contradicts their narratives.

MR. INDRANEEL: Well, if I may, Your Honor. I think that the whole point of trying to provide the context for this discussion between Facebook and the White House and the platforms generally in the White House is that it was not the

White House that was trying to impose on the platforms any one definition of the truth or the falsity of whatever speech that they were going to have on their platforms. They were -- it was the platforms that consulted these third-party fact checkers.

And, as we pointed out in the brief, there were many instances where, you know, the government asked a question about whether a particular platform -- what approach they were taking to certain kinds of posts.

And once the platform looked at the post and said that's not a violation of our policies, that was essentially the end of the discussion.

THE COURT: Do you remember when Facebook changed that policy to -- because they didn't have it at first. Then they changed it where it said, we're taking down things that are -- that are -- cause vaccine hesitancy and/or not true or something like that? And then they talked -- asked the CDC whether it was true or not.

So do you know when they did that? Do you remember when that was changed or what time?

MR. INDRANEEL: So --

THE COURT: I just can't remember. I mean, I've gone through so many things I can't remember when. But it was during that time sometime, and I was thinking it had not been changed at that time, but I don't know if that's true or not.

MR. INDRANEEL: So in March of 2020.

THE COURT: Okay.

MR. INDRANEEL: This is Exhibit 18. It's Defense Exhibit 18. It's a statement from Facebook where they say that, quote, "We have removed harmful" -- and then, from the context, it's clear they mean health related, so that was our bracketed addition in the brief -- "misinformation since 2018 including false information about the measles and Samoa where it could have furthered an outbreak. And rumors about the polio vaccine in Pakistan where it risked harmed to health and aid workers."

And then they go on in the same document to say, beginning in January 2020, quote, "Applied this policy to misinformation about COVID-19 to remove posts that made false claims about cures, treatments, the availability of essential services or the location and severity of the outbreak."

So there was this category that they said, you know, based on its falsity they would address.

THE COURT: Yeah.

MR. INDRANEEL: And then there were other posts that essentially, even if they had not reached a determination about truth or falsity, they would apply content moderation measures to --

THE COURT: Who did they ask for the truth or falsity of it? Who's the ministry of truth? Have you ever read George

Orwell's *1984*?

MR. INDRANEEL: We did have it as a required text in high school, Your Honor.

THE COURT: Good. Good. That's great. Because, you know, I just think that it applies here because, you know, the whole -- to me, the whole purpose of the First -- not the whole purpose, but a big part of the First Amendment, Free Speech Clause, is that the government can't tell us what's true or false. We've got the right to make our own decisions. And, you know, here they're asking the government is this true or false?

MR. INDRANEEL: Your Honor, to that point, my understanding is that the platforms had -- they refer in the discussions to third-party fact checkers. I'm not certain what the total, you know, list might be of those entities or what resources they have for that.

Among the sources that they do consult are, on occasion, you know, across the world, the recognized local government or, you know, national government health authorities.

THE COURT: Okay. Okay. All right. All right. And I promise I'm going to ask plaintiff some questions too. I'm not just picking on the defendants, but I've got more questions for y'all, for some reason. But I think it's just the nature of it.

But all over the place it was talking about

misinformation, misinformation. How do you define misinformation, or how does the government define misinformation?

MR. GARDNER: So, thank you, Your Honor. I mean, I think there's a couple ways it could be done. But certainly CISA has definitions for misinformation, disinformation and malinformation. Plaintiffs cite to those definitions in their brief. We don't dispute that those are the definitions CISA has identified. But -- or if you're asking me is there a uniform definition across the federal government, I don't think the record supports that.

THE COURT: Okay. All right. Mr. Sauer, you're not wiggling this time so I don't guess you want to say something. So I'll ask you -- I'll go to something else and ask you something else. You can comment on that too.

I guess the disinformation question is, like, you know, because disinformation is, like, what the government says it is basically. And, you know, it could be something that's true or false. And there's a lot of things that the government -- you know, I've never understood why the government was so deadset on everybody taking this vaccine and everybody putting masks on after they first told us not to.

First press conference Dr. Fauci said, "Don't take masks. They don't work" when it was President Trump. And then -- you know, then later he said, "Well, I was just trying to do that

so everybody wouldn't get all the masks that the hospitals need."

After that, it's kind of downhill from there. Nobody is going to believe anything you say when you start off doing that.

Why was the government so keen on just everybody has got to take this vaccine and not listening to alternative views and calling alternative views disinformation? I don't understand. You know, I just -- I think a lot of the Free Speech Clause, I think that's one of the most important rights we have in the United States. And I just don't understand why you say, well, my way or no way.

MR. GARDNER: Your Honor, the government shares your view that the First Amendment is one of the most important constitutional protections. So I don't think there's any dispute between the parties there.

THE COURT: Okay.

MR. GARDNER: I deeply disagree with the notion that we are telling social media companies what to do, that we have somehow broken their will and told them how they need to apply their terms of service. The evidence just does not support that. There is simply nothing, Your Honor, violative of the Constitution with flagging information for social media companies and allowing them to apply their terms of service.

THE COURT: But let me ask you about that since you

pointed that out there's no evidence of it. But, and I'm going to ask you about coercion in a minute, and some things Rob Flaherty did. I mean, it's pretty obvious he was wanting them to take it down. I mean, I don't see how anybody could read all those texts and things and say, "Well, you know, the government, I don't know what they want me to do." They wanted them to take them down. And most of it was protected free speech, if not all of it. And I don't understand -- you know, I noticed a big change.

I was kind of surprised because I thought that when some of the stuff was kind of revealed, that the social media companies were always, you know, liberal and they're kind of in with the -- in with the government's view, or whatever -- not the government, depends on who the government is. But with that view, and they kind of were on the same side. But it looked like they kind of fought back a little bit and said, no, these don't violate our policies.

And then President Biden got on there in July, the middle of July of 2020 or '21 -- '21, I think it's '21, is when it all changed. It was, like, they had this Jen Psaki got up there and said here's the -- you know, "They've got to do better." You know, all these problems, social media companies have got to do, "Here's our ask. We're in constant contact with them telling them what our asks are." And then President Biden said, "They're killing people."

And they thought -- I know he tried to clarify that later to say, "Well, I'm not talking about -- I'm talking about all the disinformation does and not the media companies." But I think they took it as -- I think it's pretty clear they took it as he was talking about them because they were upset about it.

And then the surgeon general did his -- I forget what it's was called, some kind of advisory. But it was the advisory that said, oh, you've got -- you know, "We've got to do something. You've to -- we're going to have to change the laws."

And then Kate, I forgot her last name.

MR. GARDNER: Bedingfield, Your Honor.

THE COURT: Yeah. She said, you know, "We're going to have" -- because every time they start doing this they pound it in, "Oh, yeah, we've got to change this, you know. We're going to change Section 230. We're looking at our options what we can do to change all this."

So it looks like after all that, and that was all right there two days -- within two days the middle of July. And after that, everything changed. These social media companies started falling in line like the Pied Piper. And it just -- they just all started, "What can we do -- what can we do to help? What can we do to get in your good graces? What can we do?" You know, that's the way I saw it from looking at it.

Tell me if you think something different. They started

doing everything the government asked them to do after that.

MR. INDRANEEL: Your Honor, if I may. So on the disinformation dozen, as the Court pointed out, the President did clarify his remarks.

And the Facebook response around that time that, you know, we think it is probative is Exhibit 71 where Facebook publicly announces that it has already been doing everything that the surgeon general's advisory was recommending.

In addition, Exhibit 145 is a statement in August of 2021 where Facebook says that it did address some accounts and some posts or pages that were linked to the disinformation dozen. But it also made clear there that having reviewed the content, as well as its own policies, that there were some -- you know, there were posts and pages that did not violate its policies and so it left those up.

So the -- that Exhibit 145, which it's, again, when I say "exhibit," I just mean to the defense preliminary injunction opposition brief. That Exhibit 145 is a statement by Facebook that confirms their independent judgment about what the disinformation does and was posting and what it was not.

The other thing I will add that may help in the context because of the volume of information that is posted on these platforms, a point that was actually mentioned somewhat as part of the background in the *Twitter* against *Taamneh* case the Supreme Court handed down, the sheer volume is so high that

even a matter of days means that there are a lot of posts that may be at issue.

And, from Exhibit 145, or from the rest of the record, we don't actually know which are the posts that led to Exhibit 145, you know, led to Facebook's statement on that date in August that the disinformation dozen had some of their, yo know, content removed or otherwise subject to moderation, and which ones, you know, they, you know left up and why, but we do know it's a very high volume.

And so to infer just from sort of the timing that there was some kind of relationship, I think would, you know, sort of be contrary to that, that just the reality of the sheer number of posts that these platforms are dealing with.

I think the Court may also have been suggesting or inquiring about the discussions about Twitter and Alex Berenson. The record on that does not support the plaintiffs' theories. We have the interrogatory responses for Mr. Flaherty clarify that, you know, as of the April 2021 meeting, Twitter had concluded that at that time Mr. Berenson's posts hadn't been, you know, something that Twitter was going to take action on because it didn't violate the policies. And that was the end of that discussion.

Mr. Berenson was then later on suspended. And that, I think, came in July or August of 2021. But it wasn't permanent. The documents that plaintiffs themselves have put

into the record show that, as of December, he was then back on.

And, again, we don't know what particular posts led to Twitter's content moderation decisions in either July or August of 2021. But Mr. Berenson was not mentioned by the President. Mr. Berenson was not mentioned by the surgeon general.

So all of that requires leaping into speculation.

THE COURT: They kicked them all off, though, after that July thing. They kicked everybody off, disinformation dozen, Great-- All of that stuff they just got rid of them, is the way I understand. But, anyway, well, I'll look at it closer though and make sure.

Did you want to say anything?

MR. SAUER: I was just going to address the chronology of Alex Berenson. There's an April 21st meeting with the White House where the White House pushes Twitter to deplat for him. They resist. They say, "Well, he's not really violating our policies."

Then there's a pressure campaign from Dr. Fauci in early July of 2021 where he's publicly attacking him and saying he's risking people's lives. Then July 16th, as the Court said, 2021, President Biden says, "They're killing people." And Alex Berenson is suspended by Twitter within a few hours after that comment on the same day.

Later in August he's permanently deplatformed by Twitter. And he gets back on after Elon Musk acquires the platform.

THE COURT: Okay. All right. And I'm going to ask the government some questions now, so I'll quit picking on y'all for a minute and ask the government some questions.

When I reviewed a lot of this, things that NIAID -- I'm just going to go by the initials. I can't remember what it all stands for now, but I know it's infectious diseases. But Dr. Fauci and that NIAID, they made -- there was very little communication with Dr. Fauci's office, you know, saying -- you know, there was a lot of meetings and things like that between these other agencies.

But I didn't see that with the HSS -- HHS or the NAIAD. I didn't see a lot of that. I just saw they were making public statements. You know, Dr. Fauci made videos and he'd be on, you know, different news channels and things, you know, saying, "Wear your mask; stay six feet away from everybody; take your vaccine," that kind of stuff.

So I guess what I'm getting at is: How is there -- you know, is this government speech, first of all? And, like, Dr. Fauci and them were -- it was different than some of the other agencies. You know, you'd have thought it would have been similar, but it didn't appear to be, at least what evidence you've got right now.

But it shows that they were making public statements, which, you know, I kind of tend to think would be government speech. So how do you show significant encouragement and/or

coercion with regard to those defendants?

MR. SAUER: Two responses to that. First on your first question, the factual question about the communications. I agree with that to an extent. You don't see anything like from NIAID the constant meetings between the FBI and CISA. You do in their interrogatory responses, however, see under oath an identification of 13 communications between Dr. Fauci and Mark Zuckerberg in 2020 alone. So there is communication with the platforms, but there isn't communication, like, in the sheer volume.

You also have Dr. Fauci repeatedly appearing with Mark Zuckerberg in at least, I think, three different occasions -- I want to say three different occasions, where they're on joint, you know, Facebook Live chats to talk about COVID and so forth.

THE COURT: That's kind of government speech there, isn't it?

MR. SAUER: I agree. We don't challenge anything in the Facebook Live. He's totally entitled allowed to, do that.

Now, on the question of what's he allowed to say? When does the government speech cross the line? For those 2020 communications involving Dr. Fauci and Dr. Collins, we have argued that those violate -- fall into the deception bucket. Right?

So I mention we have five tests here: Deception. We

relied on the case for *George* against *Edholm* from the 9th Circuit that has two elements where a state official or a federal official knowingly provides false information and does so with the intent of inducing a private party to take an action that the government would not be allowed to take. That violates the First Amendment.

So the *Edholm* case, for example, is a police officer giving a doctor false information about a patient's medical condition. Oh, he's having some kind of, you know, septic seizure to induce the doctor to engage an anal cavity search to locate a baggy of crack cocaine, basically.

The fact the police officer knowingly gives false information to induce the doctor to do something that would violate the Constitution if the government did it itself, that is state action.

And there's another opinion by Judge Posner *Jones* against *City of Chicago* we discussed in our briefs that that really powerfully reinforces this. And they say they can't hide behind the people they've defrauded.

So that -- and I'll focus my comments now on the largest sort of chunk of evidence we have with respect to Dr. Fauci is that campaign to discredit and get censored the lab leak hypothesis that was enormously successful.

We contend Dr. Fauci is entitled to get on TV and give his opinions about the lab leak hypothesis. But we contend that if

you look at all that evidence and look at some highlights we've included in Tab 6 to Tab 13 in your binder, that it was much more than government speech. It was a calculated campaign to deceive the platforms, and in deceiving them, to induce them to censor speech. So we think that there's a compelling inference to be drawn from those.

That is a very unique; it's very detailed. That's why we -- you know, there's hundreds of paragraphs in our proposed finding of fact about it. Because ordinarily those kind of comments absolutely would be government speech. It would be no problem. You know, ordinarily a government official can say, "I don't think it came from the lab. I think it came from nature," or "I think it did."

But if you actually look at that entire course of conduct, the contemporaneous communications, the ginning up of -- you know, the *Nature of Medicine* article, Dr. Fauci's comments at the April 17th press conference where he pretends to not know who the authors are after they send him seven drafts to review and thanked him for his advice and leadership and so forth. We say that all adds up to a campaign of deception. And that campaign of deception was intended to induce the platforms to prevent what Dr. Fauci calls in his emails further distortions on social media, to induce the censorship of that and it succeeded. We think that's state action on that theory.

THE COURT: Okay.

MR. SAUER: To be clear, we do not contend that it's -- you know, that it's principally a coercion and compulsion issue or a joint participation, which doesn't require coercion. But because there isn't that same course of kind of communications about it. It's a form of deception.

THE COURT: Okay. And I've got -- I know in the Third Amended Complaint, in the first ones too, it talks about the Disinformation Governance Board and Nina Jankowicz. And I know -- I understand the defendants' brief indicated that had it had been disbanded, or something to that effect, and attached something that said disbanded.

Is there any contention at all about that at all? Do I need to address any of that at all I guess what I'm trying to figure out?

MR. SAUER: Yeah, I believe that what's principally relevant about the Disinformation Governance Board, keep in mind that was announced, And the enormous public blowback eight days before we filed this lawsuit. The Disinformation Governance Board, the fact that DHS was doing that right up to the moment it got sued is powerful evidence of their intent to continue these censorship activities.

The fact that right up to the moment they got sued they were creating a whole bureaucracy to engage in this flagging and taking down disinformation activities, I think it's the most relevant --

THE COURT: Yeah, I understand the relevance to that.

MR. SAUER: Yeah.

THE COURT: I guess I'm getting at: Is there any request for an injunction against them since they're disbanded, I guess, you know?

MR. SAUER: The government represents that essentially Ms. Jankowicz no longer works there and the entity doesn't exist anymore. So we've sought an injunction against the DHS defendants who are -- you know, who are named. But we don't have evidence to contradict the representation that it's gone.

THE COURT: That's what I'm trying to get at is I do understand what you're saying about the relevance of that part of it.

Okay. In the Third Amended Complaint, I tried to go through all these defendants. And now it's complicated a little more because some of them have left and been replaced and some of them have not been replaced, you know, trying to get them all straight.

But it listed the -- and I apologize this is taking so long, but I'm going to finish the questions before I break for lunch. I'm not going to do break -- I'm not going to do anybody like that, break for lunch and then come back. I know y'all probably have got flights out and things. So we'll finish and be done.

All right. But the U.S. Food and Drug Administration was a defendant; U.S. Department of Treasury; U.S. Election Assistance Commission, and Department of Commerce and several employees that worked for them. I didn't see a lot in anybody's novel -- I'm going to start calling it a novel -- about that, about those entities. So I don't know -- I guess what I'm getting at is: Are you requesting any injunction to those? Do you have evidence of those?

MR. SAUER: We do have evidence, but we haven't sought an injunction as to those. The evidence that we have is set forth in the compliant. But in our preliminary injunction papers, we have not sought an injunction against those particular defendants.

So, yeah, if you want to know the defendants we are seeking, we have in page 66 and 67 of our supplemental brief doc 214. We have specified the exact defendants we're seeking. So it's the White House defendants as defined include these people.

THE COURT: I'll look at that. I missed that. I guess I went to the end of the novel. I read it all, I really did, but sometimes it gets mixed up.

Let's see. All right. Okay. And I'm going to go back to the defendants. You know, basically bottom line, most of these agencies and the White House parties, employees, they were flagging posts for social media platforms, emailing the flagged

posts to social media companies.

They were sending them emails saying, you know, "Why hasn't this been removed?" things like that. You all know what all was said. I'm not trying to go through the details, but that's just -- I'm just generalizing. And they even followed up with them, to follow up with them to say, "What did you do about that post we notified you about?"

I guess what I'm getting at is how can you say that's not significant encouragement? Explain to me how that wouldn't be significant encouragement.

MR. INDRANEEL: Your Honor, if I may, --

THE COURT: You're giving him all the hard questions. Okay. Go ahead.

MR. GARDNER: That's exactly right.

THE COURT: I'm kidding. I'm joking.

MR. INDRANEEL: There are two points. Just on the first point, there were many instances were the platforms didn't even get back to the government about what particular action they took. And I think sometimes there were just follow-up questions to find out what the outcome was, not with an objective of, you know, or an effect really of changing the outcome, but just to learn if the platform had taken any action, and sometimes to learn about the platform's application of its policies.

So one instance that comes to mind of that is that it was

helpful for some of the agencies to understand how the terms of service were being applied so they could -- you know, they could figure out whether something, you know, was something that the platform would, you know, use or consider relevant when it was making its own content moderation decisions. I think that's where you saw some of the follow-up questions.

To a larger part of that significant encouragement, I think what's challenging is that there are not large numbers of cases that have focused on significant encouragement as a distinctive prong of the State Action Doctrine.

And, in fact, when the opinion from the Court in *Bloom* against *Yeretsky* 1982, announces the significant encouragement or coercion formulation, it has a bunch of cases that it cites, you know, previous instances. But it doesn't break them down or classify them as one or the other.

What I do think we know from the precedent is that in the context of the state action requirement, right, which is the threshold inquiry to decide and to preserve the line between private conduct and public conduct that significant really means significant.

So in *American Manufacturer's Insurance Company* against *Sullivan*, which was a 1999 State Action Doctrine case, there the Pennsylvania legislature had amended the workmen's compensation statute to give the medical insurance companies a remedy, right, that they didn't -- that they were foreclosed

necessarily from exercising before.

And the challenger was saying, well, look, the statute was changed to give this new legal option of withholding these disputed payments; therefore, that's encouragement. That's significant.

And the Court says, it may be encouragement in some sense, but it's not significant encouragement consistent with our case law that would be so significant as to turn the private decision, in that case withholding the pending payments pending further review, into the state action.

So I would offer that as one example of a reminder that this -- although ordinarily we might say that something is encouraging in a casual way, when the Court in the state action context is using the phrase "significant encouragement," they're putting a lot of weight on it. And they're saying even enactment of a statute that might incentivize something to happen, is not significant encouragement.

And I think *Sullivan* is a very useful case.

THE COURT: Yeah, I read your cases. You had some good cases, and I read them. One of them was -- one of them was a very, you know, close factual case, the one in California that they flagged, one flagging of a post was not enough for a significant encouragement to send it to them. I think it's one time they flagged it, sent it to them and they deleted it or something. That wasn't enough.

And so it was a very close factual case, but all they said was that wasn't enough. And then the situation about, you know, they said it was enough where they amended a statute to allow -- I think they said it was --

Anyway, it looks like to me there's a whole lot more that went on here than went on in those cases is the difference. So I just don't understand how -- It looks like to me, you know, I didn't -- most of the cases you cited and, you know, I'm sure you cited, did a excellent job on it, I mean, really very good cases, very, you know, close.

But I didn't -- it didn't seem to me that they were -- the cases were anything near what's happening here. It didn't have any -- just had just a couple of things. It was just -- and they said it was not enough for significant encouragement. And I agree with all those cases that you cited that said that. They probably wouldn't have been enough, but there's a whole lot more here.

So, I guess, why is there not, you know, all these meetings, all these emails, all this pressure? It was pressure. I mean, I don't see how anybody could read these emails and come up with anything but the government was putting pressure on them to do something about these emails. I mean, how do you see it?

MR. INDRANEEL: Thank you, Your Honor. So another one of the cases that I think may be helpful here is *Bloom*

against *Yeretsky* itself where there were regulations about the nursing homes that governed whether they were shift -- whether the patients were shifted to higher levels of care or lower levels of care.

And that was what the challenger was saying was the relevant state action. And then Justice Rehnquist in his opinion clarifies that the ultimate judgment about whether the patient would be moved from a higher level of care to a lower level of care or vice versa was a private medical judgment that was being done by private medical standards.

And I think the analogy here that's quite natural is the analogy to the private platforms' content moderation which remained firmly up to them to decide how to compose and how to apply.

I think there may be instances where there were, you know, repeated questions; but that did not turn the questions or, at times, -- you know, at most, the efforts to persuade into, you know, coercion of or significant encouragement that's required for state action. And, again, that's because it's a very high bar to preserve that line between private and public conduct.

THE COURT: And I apologize this is taking so long. I just had a lot questions. I mean, I really tried to read through all this and I had a lot of questions I wanted to ask you.

I don't normally do oral arguments on a lot of things I

decide unless I really need, you know, people to say; and I did here so that's why I did.

But I know there in the response, 723 or whatever page it was, response, you know, to all the 1,440 different, you know, topics or whatever, paragraphs, it -- you know, it contested basically some of the interpretations. But is there any contest of validity in any of these emails, like, Rob Flaherty's emails? I was a little confused about that. I want to make sure.

Is there any dispute that these emails, the contacts were valid? Is it just interpretation of it that you're contesting?

MR. GARDNER: Sorry, I didn't mean to interrupt, Your Honor.

THE COURT: No, that's fine.

MR. GARDNER: Okay. Let me say up front we appreciate your questions. We are not troubled at all to stay longer if it assists you.

THE COURT: Okay.

MR. GARDNER: If your question is do we dispute the authenticity of any email? No, they're genuine emails. Do the emails say what they say? They absolutely do. But to your point, I think the largest dispute in the 1,442 proposed findings of fact the plaintiffs submitted is that it isn't just their quotation of these documents, it is their characterizations, more importantly, their mischaracterizations

of what these emails say.

I hope that was responsive.

THE COURT: Okay. Yeah, basically you're arguing the interpretation of it is what I understood. Basically you're not disputing that these emails are valid or authentic or they say what you they said. But you're saying that they're a different interpretation?

MR. GARDNER: That's right, Your Honor. I mean, and that's for the emails. There are other proposed findings of fact where they just simply have no evidence or they have completely mischaracterized the evidence. But with respect to the emails, generally that's correct.

THE COURT: Okay. I just wanted to make sure. And then -- All right.

I know that the defendants filed -- and I forget what it was called, but it was, like, a motion that kind of listed who had left, was no longer working there anymore. These are all -- all the employees were sued in their official capacities.

So were they -- they were substituted -- you substituted, like, for example, Dr. Fauci retired and Doctor something -- I forgot his -- Hughes something took his place. So you put that in there. And, you know, in different capacity. Some of them left and had been replaced; some of them hadn't been replaced.

So, as far as procedurally, would those be -- I'm going to ask both sides this -- would those be the correct -- the ones

that have been substituted, are they the correct defendants now; or, like, people like Jen Psaki that were alleged to have done things or said things, but they're no longer there anymore. You know, I guess that's what I'm getting at.

Procedurally are they even involved in this suit? I understand you can use what they did. I'm not questioning that.

MR. GARDNER: Thank you for your question, Your Honor. So, yes, we did file a notice of substitution, which of course, we don't even have to do. The Court can automatically substitute, as you know.

The issue here is there are no individual capacity allegations. There are only official capacity claims against individuals. And, therefore, we thought it appropriate to identify for the Court those individuals in their official capacity who are either no longer employed by the federal government at all or no longer employed by the agency for whom they're alleged to be engaged in misconduct, or don't hold, you know, those job responsibilities anymore.

And because plaintiffs are seeking an injunction against individuals in their official capacity, it's even more important that we identify that for the Court. But, of course, as you know, we don't believe it's appropriate to enjoin individuals in their official capacity in the first place.

THE COURT: Okay. Mr. Sauer.

MR. SAUER: Judge, we don't dispute that there should be a substitution of, for example, federal officials who have left and been replaced in their jobs. So Jen Psaki left. She gets replaced by Kerine Jean-Pierre. And that substitution, we think, should occur.

The one quibble we have with the notice of substitution that they filed is they contend that White Officials who have been moved to slightly different roles are no longer proper defendants. They're still in the White House. They're an unspecified different job that may a be more senior job, more influential job. We think those are all absolutely still proper defendants.

MR. GARDNER: And if I could, Your Honor, just for clarification. It's not just that they changed jobs, they changed responsibilities. Let me give you an example. Where this typically comes up is with local sheriffs. Right?

THE COURT: The what?

MR. GARDNER: Local sheriffs.

THE COURT: Okay. Yeah.

MR. GARDNER: You sue a local sheriff in their capacity, sheriff retires, new sheriff comes in, new sheriff in town. There's no dispute that that sheriff has the same responsibilities as the old sheriff. But, as you can imagine in the White House, different people hold different responsibilities and jobs.

And so when someone left the White House or took a different job with different responsibilities, that's why it was appropriate to substitute because that person does not have the same responsibilities that are the subject of the litigation.

THE COURT: They're still in the lawsuit, though. You're talking about the ones that are still in the lawsuit but they were moved to a different capacity or something. Is that what you're --

MR. SAUER: We think they are definitely still proper defendants. And they haven't even given any explanation what the new job is.

THE COURT: Okay.

MR. SAUER: Rob Flaherty has been promoted from deputy assistant to the President to, you know, digital director. That guy is still a threat to the First Amendment. He is still a proper defendant. The mere fact that he's got a slightly different job title or description, which they haven't even disclosed what it is, just an example.

You know, those people who are still in the White House, still there, still capable of communicating with platforms, with the full authority of the White House behind them, they are proper defendants. They should not be substituted.

MR. GARDNER: And, Your Honor, I don't want to take a lot of your time. Mr. Flaherty is a terrible example. We have

not identified Mr. Flaherty as someone who should be substituted. He's still at the White House.

But to say that someone was in the digital communications department when the lawsuit was filed, and they have a completely different job now, and because they're being sued in their official capacity because of that job, it is completely appropriate to substitute them out for someone else.

THE COURT: Well, so, that clears that up. Anyway, I'm just kidding. But that's a little confusing. But I just wanted to make sure what everybody's understanding of that was.

Okay. Now, I was a little confused about -- and I'm confused about a lot of things sometimes. But the claim that the previous administration did it.

First of all, you know, well, that was thrown in there, the previous administration did it; so Trump did it kind of, you know, defense.

First of all, is that -- are you saying that's a defense even if they did? I'm not even saying that it happened. But is that a defense?

MR. GARDNER: No. No. It's not a defense, Your Honor. It's just to point out the plaintiffs' allegation of coercion really makes no sense because this backdrop of concerns about 230 have been going on virtually as long as there's been Section 230.

And it's plaintiffs that say that somehow this

administration has, you know, entered into some censorship enterprise when much of the conduct that they claim is part of that enterprise in this administration were statements made in previous administrations. That's the point.

THE COURT: Okay. Well, but I also was saying that -- Okay. I didn't know if you were just saying that -- I think both parties have said we want to repeal it or do something to it. They've said that. But only one party has tied it to threats to take stuff off social media or suggesting that, I'll put it that way, suggesting. I don't think they threatened. Well, I don't know. I don't know how you interpret it.

Anyway, they said -- they made it clear they wanted them off, you know. That was their -- They wanted them. They're not demanding it but they would like them off is what I --

MR. INDRANEEL: If I may, Your Honor.

THE COURT: Yeah.

MR. INDRANEEL: The problem with the plaintiffs' approach on the Section 230 question is that if it were the case that, you know, repeal of the statute or substantially narrowing it were as easy as the plaintiffs appear to suppose, then logically if you added up their suggestion that, for example, democrats -- some democratic legislators were calling for Section 230 reform during the previous administration, if you added that with the republicans who supported repealing Section 230 with, for example, President Trump's preference for

revocation of Section 230, then you would get to revocation of Section 230.

And the fact that that didn't turn out, I think not only -- you know, it reinforces that statutory amendment, particularly in this area, which has proven, you know, somewhat controversial, is not as quick and easy as the plaintiffs' theory seems to suppose. And the platforms would have drawn the same conclusion that there is no instant, you know, Section 230 repeal or narrowing that is kind of lurking and that would be imposed if the platforms didn't somehow, you know, moderate certain content one way or the other or change a policy.

So it's just an unrealistic depiction of how very dynamic legislative process works.

THE COURT: And how is *Google versus Gonzalez* going to affect anything? Does it affect anything? I know, you know, basically that case just came out with last week I think.

MR. INDRANEEL: So, as I understand it, Your Honor, in *Twitter* against *Taamen* the Court addressed the antiterrorism statute and focused on that question. And so it remanded the Section 230 question *Google* against *Gonzalez* to the Ninth Circuit. So --

THE COURT: Yeah. And I haven't read it. I just kind of read the blurb. And I thought that -- I thought it kind of upheld that the 230 was valid, you know, in other words, kind of what I thought, that it really is -- you know,

that makes it even more valuable, I would think, to the social media companies to have it.

Repealing it may be the only thing Congress can agree on. I don't know. A lot of them call for that, so I don't know the answer to that.

All right. Great Barrington Declaration. That was a couple of the plaintiffs in the case, you know, were involved in that. It's a one-page treatise that says it opposed reliance on lockdowns and advocated for a kind of focused protection. You know, I think the people that are most vulnerable, the older ones that have diseases, kind of focus on them. That's kind of what that was, the way I read it. And it's a one-page document.

What was wrong with that? I guess why would the government want that taken down? Why would they want to -- why would they want to -- I guess all the government is saying is they were kind of helping these social media companies to catch this stuff that violated their policies, I guess.

But why did they want that down? What did that do? What's wrong with somebody saying that?

MR. INDRANEEL: Your Honor, if I may. I don't think -- we didn't address that at great length in the brief, but it is addressed in the response to the proposed findings of fact. I believe it begins at 788.

THE COURT: Okay.

MR. INDRANEEL: And the phrase that I think is most important is that in plaintiffs' selective recitation of the facts in this area, they seem to be -- they seem to accuse Dr. Collins of seeking the prompt publication of a takedown of the Great Barrington Declaration, and the actual language that's in the communications, again, this is from my recollection, is the takedown of the premises.

So what he was calling for, as a scientist would, is that, you know, if someone makes a scientifically questionable assertion that there be a response in the scientific literature that addresses, you know, why that -- why the initial assertion might have incorrect premises. So it's a takedown of a premises and not a takedown of the Great Barrington Declaration that I think plaintiffs seem to be taking it as a demand for --

THE COURT: Any question that these men had the right to say that as protected free speech?

MR. INDRANEEL: I mean, I think that that question was for the -- as we've tried to explain, that question was for the platforms. And, there isn't -- to our knowledge, there isn't a communication, you know, that we have between, like, NIAID and the platforms about that subject.

THE COURT: All right. And Health Freedom Louisiana, that's one of the plaintiffs, Ms. Hines. And it says that -- it didn't really say what she did. Basically it was a grassroot -- my understanding it was a grassroots effort to

reopen Louisiana, is what I understood it to be. Kind of like reopen the schools and reopen, you know, different things what I understood it to be.

I guess what I was getting at is she was kind of -- the government suggested this kind of -- this information be taken down too. I guess what I'm getting at was wrong was the --what was wrong with that? What was wrong with somebody saying that?

MR. GARDNER: Your Honor, I can address that one.

THE COURT: Okay.

MR. GARDNER: There's no evidence whatsoever that the government had any involvement in any of her posts.

Now, what plaintiffs say is her kinds of posts are a type that the Virality Project may have flagged. But they have no evidence at all, out of 1,442 proposed findings of fact, the government had anything to do with any of her speech.

THE COURT: Did the Virality Project flag it? I can't remember.

MR. GARDNER: All the Virality Project says is that it flagged in general that type of information. But it doesn't say that it flagged anything that's in her declaration. And I would urge the Court to look at her declaration closely because her declaration also doesn't say that the government was directly involved, or even indirectly involved, in identifying her information for a social media company.

THE COURT: All right. And EIP flagged Gateway

Pundit. I think it was like, number 2 or 1, or something like that, way up there of things. And, you know, I can't remember exact words that the Gateway Pundit said. But it was more or less aimed at the 2020 election was stolen, or something happened, or something like that. That's what it looked -- appeared to be. So I guess what I'm getting at, again, like, you know, what's protected free speech and what's not? What was wrong with that?

MR. GARDNER: Well, I think you'd have to ask the EIP that question. They're not a government entity.

THE COURT: Well, you've got to admit there's a big question of whether the government was involved in that.

MR. GARDNER: I don't admit that, Your Honor. I actually think there's no question that CISA did not have involvement sufficient to convert EIP's actions in a joint action.

But, having said that, you would have to ask EIP why they flagged the information they flagged. And then you would have to ask the social media companies if they did anything with the information flagged in order to show harm to the plaintiffs.

THE COURT: Okay. Let me see. I'm trying to get through it. Anybody knows, you know, the law viewpoint discrimination is, you know, really looked at hard, strictly, viewpoint discrimination, which is, more or less, a certain point of view.

And I guess what I'm getting at -- and I'm conservative, and I'm not standing up just for conservative speech. I would be the same way -- I mean, this could turn around in one election. You could have a republican president and a republican congress, and they could be doing -- say, well, we got away with it. We're going to do the same thing. They could, you know, trying to do the same thing. It could turn around.

So, to me, all speech, it's important to protect all speech wherever it -- You know, if it's protected free speech, it should be protected whether it's liberal, whether it's conservative, whatever. I am conservative, but I'm, you know, not looking at this so hard because I'm conservative. I'm looking at it because it's free -- you know, the old saying that I don't agree with what you say, but I'll stand for your right to say it, you know. I don't know where that went, but that went out the window a long time ago somewhere.

But viewpoint discrimination, why would it not be viewpoint -- I mean, isn't it evidence of viewpoint discrimination the fact that -- and I know I'll ask the EIP this too, but that the EIP flagged pretty much all conservative election speech posts?

MR. GARDNER: Well, I mean, again, not to repeat myself, Your Honor, but I think if you read the EIP report, it didn't just flag conservative speech. It happened to conclude

there was more conservative speech that identified misinformation than nonconservative speech. But I'll give you an example: You have a bag of marbles. You've got nine black marbles, one red marble. The fact the EIP may have identified nine black marbles doesn't necessarily mean that it's only focused on black marbles. It just happens to be more of them.

THE COURT: All right. Okay. Cognitive infrastructure. Let me ask about that a minute.

Jen Easterly of CISA, now that I know how to pronounce it, she said she -- who's the director of CISA, said she views the word infrastructure, which is I in that acronym, to include "cognitive infrastructure." You know, cognitive means in the mind and the way you -- knowledge and understanding. Any idea what that means by that?

MR. GARDNER: Your Honor, I don't know that the record has anything more than what her statement says. But I would refer the Court to the declarations of both Mr. Wails and Mr. Hale who articulate the statutory basis for CISA's actions.

THE COURT: Okay. Well, I mean, I just wonder does that mean, like, the government is going to try to control mental process of acquiring knowledge, that type thing? It's just --

MR. GARDNER: Your Honor, look, I'm not going to give the answer that that doesn't appear in the record. I feel pretty confident the answer -- no, I feel 100 percent confident

the answer to that question is no.

THE COURT: Okay. Good. I feel good now just like when I went to Del Rio, you know, I felt like --

MR. GARDNER: As you should, Your Honor.

THE COURT: -- I solved it.

MR. GARDNER: I'm with the government. I'm here to help.

But in seriousness, Your Honor, whatever Director Easterly may or may not have said two years ago, the fact is the declarations explain exactly what CISA is doing right now and exactly the statutory authority to support those actions.

THE COURT: Okay. And I realize that. And I'm not looking at the statutory authority, but I'd be very surprised if Congress stated, you know, in their -- when they created CISA that it would cover cognitive infrastructure. I'd be very surprised. But, anyway, that's another day -- that's another fight for another day. Maybe it will be fought somewhere else, but probably not now that I said that. But, anyway, let's see. All right. Redressability. There wasn't much talked about on redressability too much in there. It may not be a big issue, but I think that's kind of what -- the standing part of redressability. If you'd kind of address that, the government -- I mean, I'm sorry, the plaintiffs. Would it be redressable?

MR. SAUER: Yes, sure, Your Honor. Redressability, as the Court knows, tracability tend to be viewed very similar.

So where there is causation, usually an order stopping the misconduct that's causing it will redress that injury.

So if you look at our injuries, we're alleging both ongoing injuries where we have ongoing loss of access to speech on social media and speech that's been taken down, remains taken down and so forth, and imminent future injuries.

On the ongoing piece of that in the redressability context, we only need to show the likelihood or possibility that removing the government pressure will give us a chance -- you know, a fair shake at getting our speech back up on social media.

And then as to the imminent future injuries. As the Court stated in its prior order, the evidence of prior acts of censorship shows a strong -- a strong evidence of the risk of future acts of censorship. If they're stopped from engaging in the future acts of censorship, that will redress the threat of imminent future harms as well.

So the injunction would redress it both as to the -- both as the ongoing harms and as the imminent future harms.

THE COURT: Last set of questions I have. I know it will get somebody's attention when the preacher says the last point is this. This is kind of the last thing. It's kind of the most boring, but I feel like I need to ask it.

On the request for a class certification under Rule 23(b), explain to me the class definitions that are proposed like how

that would work.

MR. SAUER: Yeah. And, Judge, I apologize, I didn't carefully review that in preparation for this hearing.

THE COURT: That's all right.

MR. SAUER: But I'll address it from memory. We've proposed two class definitions that are really kind of subclasses. And each definition includes both, basically class members as audience members, people who listen to other people speaking on social media, and speakers. Right?

And then the other division we've drawn in our class definition is between people whose speech was censored because it was directly flagged where there were some direct communications saying, hey, take that down and take this down.

And then people who suffered censorship as a result of more general, in other words hey, -- one great example of this, for example, is the President says, "They're killing people; you've got to do more." So Facebook comes back. That's different than saying, "Hey, take down Tucker Carlson." It's, "Do more to go after the vaccine misinformation" generally.

And Facebook comes back in, you know, Tab 30, and your email saying, "Here's all the new and additional actions we're taking to go after this. We've amended our policies to add a new list of claims." So that's the second aspect of the class definition.

So we've done that to address the very concerns that they

raised in the *Wal-Mart* against *Dukes* case which talks about making sure you've got commonality. We kind of erred on the side of caution by slicing it up along those two axes.

THE COURT: In the first class, one in flagged. I see how you could find that out if somebody fit in that class or not. But the one about people who are -- didn't get to read something, for example, the people -- the voters who didn't get to read the Hunter Biden laptop story because it was suppressed and didn't see it before the election, they voted, didn't know about that. How are you possibly going to determine who's in that class?

MR. SAUER: You don't have to do that because only a 23(b)(2) class. Right? So we're only seeking injunctive relief. We're not seeking damages. So, in other words, as long as the class definition is sufficiently precise, the Court never has to go down there and figure out every human being in the United States of American who was actually adversely affected --

THE COURT: I mean, pretty much would be everybody in the United States, wouldn't it? Or American citizens in other countries. It would be everybody.

MR. SAUER: We're talking about --

THE COURT: A pretty big class.

MR. SAUER: It would reach --

THE COURT: I have the biggest class action in the

world.

MR. SAUER: Millions upon millions of people, yeah. And, of course, that's -- But, again, we have not sought individualized determinations, which you had in *Wal-Mart* against *Dukes*. We're seeking classwide injunctive relief only. And there's good case law for the Fifth Circuit we cite in our papers that discuss how you don't have to figure out every human being that's a member of the class. You've just got to enjoin the bad misconduct that's injuring those people.

THE COURT: It's kind of like a nationwide injunction, more or less, that covers everybody. But I know it's different.

MR. SAUER: There is a difference, but it's in the same -- it's in the same --

THE COURT: It covers everybody?

MR. SAUER: Yeah, yeah.

THE COURT: Even nonparties?

MR. SAUER: Right. In other words, it would protect -- and this is true of all 23(b) classes, they would protect all the members of the class. The injunction runs not just against, say, listeners and speakers in Missouri or listeners and speakers in Louisiana or just Mr. Hoft or Ms. Hines. It protects everyone else who is similarly situated to them.

THE COURT: Okay. And there's got to be a common behavior or wrongful policy in each class. So, like, what

would be the wrongful behavior? And I realize you're going from your memory. I'm not trying to --

MR. SAUER: Sure.

THE COURT: What's the wrongful behavior in each class?

MR. SAUER: For all of the class members, for all the classes, there's one common question that relates to whether or not, you know, both factual and legal, about we allege that there's this long campaign of threatening statements coming from senior members of Congress, senior members of the White House, senior members of the executive branch. Do those rise to the level of coercion? That's common to everybody. Right?

Then if you look at each of the silos, so to speak, that the government has put forward where there's all this White House communication that's inducing some censorship. And there's all this surgeon general communications that's inducing more censorship. There's all this CISA. There's all this FBI communications. Each one of those is affecting virtually all the members as well, and each one of those is involving a whole host of common questions whose resolution are going to determine whether or not there's a First Amendment violation.

So this is, like, right in the heartland of what *Wal-Mart* and Justice Scalia is talking about in the *Wal-Mart* case which is where we have the ability to achieve common answers at a single stroke. Here it's not one single stroke. The case is

very complex. It's a series of single strokes. We have more common questions.

What they say in their briefing is you can only have one common question. If you have more than that, then you're violating *Wal-Mart* against *Dukes*. That is not right.

THE COURT: Okay.

MR. GARDNER: Your Honor, --

THE COURT: You can go ahead, yeah, sure.

MR. GARDNER: That grossly misrepresents the government's position.

THE COURT: Okay.

MR. GARDNER: And let me just be clear. I have the class action briefing. And what plaintiffs contend is the common question, and I'm just going to read it, "Whether the government is responsible for social media company censorship of content that the government flags." That is not possibly capable of resolution in a single stroke given their theories in this case.

And it isn't just a matter of multiple common questions. It would be an individualized determination defended by defendant and conduct by conduct in order to answer that question.

Justice Scalia's decision in *Wal-Mart* expressly rejects precisely that analysis.

THE COURT: Okay.

MR. SAUER: And, Judge, I refer you to our reply brief where we address that and discuss the common questions in detail.

THE COURT: Okay. I'll look at it more.

Geographic scope. Rule 65 doesn't absolutely require it. It says "scope." It doesn't say geographic scope. I usually put geographic scope in there. But is there any need even to discuss geographic scope?

Now, I understand if I granted the class, that that wouldn't be a need to. But I'm just asking in the event I don't, and assuming I grant the injunction itself, would that be any need to address geographic scope since you're -- would it be limited to these plaintiffs and these states or would it be --

MR. SAUER: I refer the Court to the Fifth Circuit's case law on injunctions in the context of the immigration context.

There the Fifth Circuit has said, look, for this to be fully effective, it is not going to work for just enjoining it in this state or that state or doing it parcelwise.

THE COURT: That's the one that allowed -- that was Judge Tipton's case, I think, that allowed a nationwide injunction.

MR. SAUER: Yeah, exactly right. And that was affirmed by the Fifth Circuit. And the Fifth Circuit has the

power. They say in many cases nationwide injunctions may be deeply problematic. But we have a situation where less than nationwide relief would obviously defeat the purpose of injunctive relief.

THE COURT: All right.

MR. SAUER: That's the heartland we're in now.

THE COURT: So you're saying -- are you saying that if I did grant -- and I'm not telling anybody I'm going to do anything specific; I'm just asking these questions.

If there is a injunction issued, to some extent, and the class action is not -- certification is not done, you're asking for a nationwide injunction?

MR. SAUER: I think so. Now, in the alternative, if the Court is more comfortable with a narrower injunction, but, from our perspective, it's like if you say, "Hey, federal government, you can't interfere with social media speech from people in Missouri and Louisiana," that doesn't work. Social media is completely interconnected, you know.

If they're allowed to censor people in California and Arizona, and Missourians and Louisianians are following them and talking to them and interacting with them, they're just as badly affected. Given the incredibly interconnected nature of social media, we don't see how a geographically limited injunction is workable in this case.

And that's why I analogize to those --

THE COURT: Right.

MR. SAUER: -- Fifth Circuit decisions.

And, again, if class certification is granted, then we're right in the heartland of 23(b)(2).

THE COURT: And if a class certification was granted, you know, -- and I'm not sure how this ties in with the laws on MDLs, you know, multidistrict litigation, but I know that they assign those to -- we were wanting one at one time 'til we got all these hurricane cases. Now we don't want one anymore. But we don't know if -- you know, could be -- I don't know if it would go to a MDL or not.

MR. SAUER: I think this is the only case pending that presents these or maybe one of the very few cases, so I'd be surprised. I know there was a follow-up lawsuit that was filed that was sought to be consolidated with this case. But, other than that, I'm not aware of other cases --

THE COURT: And I know there's no judge -- judge shopping involved here, but it may be sent off to some liberal judge in California, you know. You don't know.

MR. GARDNER: Well, Your Honor, for everyone's awareness, just so everyone is aware, there are multiple cases raising similar concerns. Just this week another lawsuit was filed in the Southern District of Texas raising very similar claims against similar defendants.

There's also a case in the Southern District of New York

brought by Mr. Berenson raising the exact same -- or not the exact same, many of the same claims.

And then, of course, there's the case brought by R.F.K., Jr., who is before you; as well as the case brought by my colleague, Mr. Sauer, against the EIP. So there are a number of cases. And so I just wanted to be clear with the Court about that. This is not the only one. It's not only one of two.

THE COURT: Okay. And last question on certification, and it's the last set of questions, so I'm going to be done after this.

If they -- gosh, I went totally blank on what I was going to ask. Sorry. I've been reading too many novels, these novels. I don't read other novels.

What was I going to ask? Oh, is there any other case like this that First Amendment, Second Amendment, you know, Fifth, anything, Fourth Amendment, anything that's been certified like Bill of Rights like this, like, free speech, gun right, anything that's been certified as a class action that you're aware of in the United States?

MR. SAUER: I'd have to pull our briefs on that, again. I haven't read them recently. But I would point out what I rely on is that comment in the advisory committee notes on Rule 23(b)(2) that says this is exactly what the purpose of the amendments that enacted 23(b)(2) was. Civil rights actions

where there's systematic government conduct that affects -- you know, here millions of people or large numbers of people, all of the diffuse injury and not enough incentive to sue the government on their own. This is exactly what that's all about.

THE COURT: All right. And I think I misjudged how long my questions were going to take because we're about an hour -- well, 50 minutes over what I thought it was going to take.

So that's all the questions I have. Do you have any questions for me? I'm going to refer you to the EIP if you ask me anything, but go ahead -- no, I'm joking.

MR. GARDNER: Just on behalf of the United States, we just thank you for your time and for holding this hearing and for listening to us. Thank you, Your Honor.

THE COURT: Thank you.

MR. SAUER: Thank you, Your Honor.

THE COURT: Thank you. And I know a lot of you have got flights. Most of you probably stayed the weekend, Memorial Day weekend in Monroe. There's nothing like it. But, anyway, I'm sure we'll have some activities going on. But, anyway, have a good trip back. And, by the way, the LSU Lady Tigers are in Washington D.C. right now, so you better get back, I think for winning the National Championship in women's basketball. So they're there now, so y'all better get on back

to see them. All right. Thank you all. Enjoyed it. Everybody did a good job on the briefs -- not briefs, novels. Thank you.

(Court adjourned at 1:25 p.m.)

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CERTIFICATE

I, Debbie Lowery, Certified Court Reporter, do certify that the foregoing is, to the best of my ability and understanding, a true and correct transcript from the proceedings of this matter.

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/s/Debbie Lowery

6/21/2023