No. 23-411

In the
Supreme Court of the United States

VIVEK H. MURTHY, SURGEON GENERAL, ET AL.,
Petitioners,

v.

MISSOURI, ET AL.,
Respondents.

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

BRIEF OF AMICUS POPULI AND FREEDOM X AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amicus Populi is a coalition of former prosecutors who advocate for laws promoting public safety and effective crime prevention. Amicus Populi believes that the people who are most vulnerable to crime and violence deserve a voice in shaping the law, so criminal justice policies should be the product of democratic decisionmaking, as both Justice Scalia observed in his concurrence in *Glossip v. Gross*, 576 U.S. 863, 899 (2015), and Justice Kagan recognized in *Kahler v. Kansas*, 140 S.Ct. 1021, 1037 (2020). Because the quality of that decisionmaking depends on a robust exchange of ideas, and censoring information distorts the debate that is essential for self-government, Amicus Populi advocates for open discourse in the marketplace of ideas.

Freedom X is a public interest law firm devoted to protecting and expanding freedom of thought, speech, and religious conscience. It represents students who challenge constraints on their political and religious activity. Freedom X and the students it represents are vitally interested in this case, as it can help ensure that they enjoy the "wide exposure to that robust exchange of ideas," on which democratic self-government and the discovery of truth depend.

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[1]Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than amicus curiae or its counsel has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case implicates two of Justice Louis Brandeis' most important teachings: that the proper response to "falsehood" is "more speech, not enforced silence"; and that "sunlight" is the "best of disinfectants." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring); Louis Brandeis, Other People's Money 62 (1933). Petitioners and amici seek to claim the mantle of these principles; petitioners contended they worked to "'persuade' the American public" (J.A. 73), and *amici curiae* New York et al. celebrate the "benefit from open discourse." Amici N.Y. Br. 18. But there was no open discourse below; petitioners' efforts were not open but covert, and sought not to engage in discourse but to stifle it. As the District Court found, petitioners

> did not just use public statements . . . but rather used meetings, emails, phone calls, follow-up meetings . . . to pressure social-media platforms . . . to suppress free speech.

J.A. 232

Therefore, petitioners' conduct was not like President Ronald Reagan's publicly urging journalists to provide "tough reporting" about drug abuse. Petr. Br. 24. A closer parallel to petitioners' demands to suppress the Great Barrington Declaration (Declaration), which urged narrower lockdown restrictions, would have occurred if there had been a study contending the costs of widespread confinement for drug offenders outweighed the benefits, and the Government threatened journals with "accountability" for untold harms if they published it.

Though petitioners contend the only question is whether they acted to *coerce* social-media platforms or only to *convince* them, this Court should also weigh the difference between adding and subtracting speech, and between open and covert conduct.

The marketplace of ideas benefits from more vendors rather than fewer: "[T]he best means to [good decisionmaking] is to open the channels of communication rather than to close them." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 578 (2011). There is a fundamental difference between the Government's advertising its wares in the marketplace of ideas (*Block v. Meese*, 793 F.3d 1303, 1313 (D.C. Cir. 1986)), and shutting down a vendor—or the entire market. Accordingly, "The State can express [its] view through its own speech. . . . But a State's failure to persuade does not allow it to hamstring the opposition." *Sorrell*, 564 U.S. at 578.

Petitioner's authorities confirm as much. They cite *Nat'l. Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J. concurring), for the proposition that the Government may favor certain viewpoints and disfavor others. Petr. Br. 23. But Justice Scalia distinguished between governmental conduct that leads to more speech and that which leads to less: "I regard the distinction between 'abridging' speech and funding it as a fundamental divide." *Finley*, 524 U.S. at 598 (Scalia, J. concurring). The *Finley* majority likewise distinguished the valid act of subsidizing speech that furthers the Government's message from the invalid act of driving "certain ideas or viewpoints from the marketplace." *Id.* at 587-88.

There is also a difference between open and covert "persuasion." When government speaks publicly, it is accountable to the electorate, so voters may express their disapproval and decide to change course. *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth,* 529 U.S. 217, 235 (2000). But such accountability is possible only when government speaks through "public statements," not behind closed doors.

Petitioners may have feared that information about vaccination's side effects could lead some people to avoid vaccination, despite its overall benefits for the individual and the public as a whole. But between the Scylla of censorship and the Charybdis of incorrect conclusions, the Constitution is not neutral: The choice, "'between the dangers of suppressing information, and the dangers of its misuse if it is freely available,' is one that 'the First Amendment makes for us.' " *Sorrell*, 564 U.S. 552, 578, internal citation omitted.

Petitioners disregarded this Court's observation that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *Associated Press v. United States*, 326 U.S. 1, 28 (1945). Predictably, excluding other "tongues" from the debate impeded the gathering of right conclusions. The Government organized a "take down" of the Declaration, only to embrace its thesis years later that it was a "mistake" to "attach infinite value to stopping the disease" and "zero value to whether this actually totally disrupts people's lives, ruins the economy, and has many kids kept out of

school in a way that they never quite recovered,"[2] and to concede the Declaration "could have been a great opportunity for a broad scientific discussion about the pros and cons" of narrower lockdowns.[3]

This Court's First Amendment precedents derive from its confidence that the public can rationally assess the truth, quality, and credibility of speech, and that more speech is generally preferable to less. Lyrissa Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. Ill. L. Rev. 799, 810-11 (2010). But petitioners unilaterally rejected this confidence. They replaced the wisdom of John Milton ("Let [Truth] and Falsehood grapple; whoever knew Truth put to the worse in a free and open encounter?")[4] with the cynicism of Jack Nicholson in *A Few Good Men*: "The truth? . . . You can't handle the truth."

The American People can handle the truth.

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[2]The Editorial Board, *Francis Collins Has Regrets, but Too Few: The former NIH chief and promoter of Covid lockdowns now says his view was too 'narrow.'*, (Wall St. J, Dec. 29, 2023) https://www.wsj.com/articles/francis-collins-covid-lockdowns-braver-angels-anthony-fauci-great-barrington-declaration-f08a4fcf?page=1 (*Francis Collins Has Regrets*)

[3]Id.

[4]John Milton, Areopagitica 78, 126 (J. C. Suffolk ed. 1968).

ARGUMENT

The Government must persuade through open discourse, not covert censorship.

Free speech is the engine of self-government; the First Amendment protects an unfettered interchange of ideas to optimize public policy. *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964). That decision recalled Justice Brandeis' description of the Founders' philosophy: "[T]he fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through *public discussion they eschewed silence* coerced by law—the argument of force in its worst form." *Id.* at 270, citing *Whitney*, 274 U.S. 357, 375-76 (Brandeis, J. concurring) (emphasis added). Petitioners reversed the Founders' prescription; they eschewed public discussion and coerced silence. Contrary to their brief, there is no precedent—factual or legal—for their conduct in shutting down even truthful speech about the most pressing policy issue of the century.

A. Petitioners' factual precedents involved open discourse, not covert censorship.

Petitioners attempt to claim factual precedents for their conduct, citing, inter alia, President Reagan's urging "tough reporting" about drug abuse, or President George W. Bush's denouncing pornography's "debilitating effects on communities, marriages, families, and children." Petr. Br. 24. These presidential statements, however, provided the public "benefit" that is produced by "open discourse" (Amici N.Y. Br. 18), whereas petitioners engaged in covert suppression.

Petitioners only partially followed President Bush's example. They openly described the "debilitating effects" of COVID-19, and urged communities and families to take protective measures, such as social distancing, vaccination, and masks. But it was not enough for petitioners to add speech for public consideration. They also sought to "persuade" the public by subtracting the speech of anyone who advanced a different opinion.

> [I]t was not the public statements that were the problem. It was the alleged use of government agencies and employees to *coerce* and/or significantly encourage social-media platforms to *suppress free speech* on those platforms. . . . Defendants *did not just use public statements* to coerce . . . platforms to suppress free speech but rather used meetings, emails, phone calls [and] follow-up meetings.

J.A. 232, italics added.

Petitioners assert the first italicized word is the only one that matters; they contend they should prevail so long as they worked only to convince rather than to coerce the Platforms to suppress the disfavored opinions. Petr. Br. 28, citing *O'Handley v. Weber*, 62 F.4th 1145, 1158 (9th Cir.), petition for cert. pending, No. 22-1199 (filed June 8, 2023). But even petitioners' cited precedents recognize the distinction between expressing ideas and suppressing them, and between using public and covert pressure.

B. Petitioners' First Amendment precedents endorsed open discourse, not covert censorship.

Adding speech warrants more protection than subtracting it. See *Sorrell*, 564 U.S. 552, 578: "[T]he best means to [good decisionmaking] is to open the channels of communication rather than to close them." Open contradiction is therefore the proper remedy for even deliberate lies. See *United States v. Alvarez*, 567 U.S. 709, 726 (2012): "[T]he dynamics of free speech, counterspeech, of refutation, can overcome the lie." The First Amendment thus authorizes the Government to express its favored viewpoint, not to suppress others.

Petitioners cite *Finley*, 524 U.S. 569, 598 (Scalia, J. concurring), for the proposition that the Government may favor certain viewpoints and disfavor others. Petr. Br. 23. But Justice Scalia's concurring opinion recognized the difference between governmental conduct that leads to more speech and that which leads to less: "I regard the distinction between 'abridging' speech and funding it as a fundamental divide." *Finley*, 524 U.S. at 598 (Scalia, J. concurring). The *Finley* majority likewise distinguished between the constitutionally valid practice of promoting a favored message ("Congress may 'selectively fund a program to encourage certain activities it believes to be in the public interest'") and the constitutionally invalid practice of "aim[ing] at the suppression of dangerous ideas." *Finley* at 587-88, internal citations omitted. That the Government may promote its own ideas does not license it to "drive 'certain ideas or viewpoints from the marketplace.'" *Id.* at 587, quoting *Simon &*

Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

Both the *Finley* majority and Justice Scalia thus recognized the fundamental distinction between adding and subtracting speech. When the government intervenes in the marketplace of ideas to promote its favored message, the citizenry remains the ultimate decisionmaker. No matter how much is spent to promote a message, the speech will be effective in persuading the public "only to the extent that it brings to the people's attention ideas which . . . strike them as true." *Austin v. Michigan Chamber of Com.*, 494 U.S. 652, 684 (1990) (Scalia, J., dissenting), overruled in *Citizens United v. FEC*, 558 U.S. 310 (2010).

By contrast, abridging speech and removing it from consideration usurps the public's opportunity to weigh competing positions. Such restraints on information can thus enable a single governmental official to decide important policy questions. William Blackstone recognized the danger:

> Every freeman has an undoubted right to lay what sentiments he pleases before the public . . . . To subject the press to the restrictive power of a licenser, as was formerly done . . . is to subject all freedom of sentiment to the prejudices of one man, and *make him the arbitrary and infallible judge of all controverted points* in learning, religion, and government.

4 William Blackstone, Commentaries on the Laws of England 152 (1769) (italics added).

The pandemic vindicated Blackstone's warning. The decision to ascribe the COVID outbreak to zoonotic causes derived from the conclusion of one individual, Dr. Kristian Anderson, that a "sh**show . . . would happen if anyone serious[ly] accused the Chinese of even accidental release," so "we are content with ascribing it to [a] natural process."[5] Without the "sunlight" of open debate, however, the press ascribed the competing, "lab-leak" theory to politics: a "Trump administration . . . information campaign demonizing China."[6]

Judge Silberman's observation, that "governmental criticism of the speech's content" does not violate the speaker's First Amendment rights, does not support petitioners' suppression. Petr. Br. 34-35, citing *Penthouse International, Ltd. v. Meese*, 939 F.3d 1011, 1016 (D.C. Cir 1991), cert. denied, 503 U.S. 950 (1992). The source of that quotation was *Block v. Meese*, 793 F.3d 1303, 1313, which validated governmental efforts to *add* speech.

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[5]Ari Blaff, *Leading Virologist Who Dismissed Lab-Leak Theory Wanted to Avoid 'Sh*t Show' of Blaming CCP*, Nat'l. Rvw. (July 11, 2023), https://www.nationalreview.com/news/leading-virologist-who-dismissed-lab-leak-theory-wanted-to-avoid-sht-show-of-blaming-ccp-messages-show/

[6]Michael Hiltzik, Column: *New evidence undermines the COVID lab-leak theory – but the press keeps pushing it*, L.A. Times (Sept. 28, 2021) https://www.latimes.com/business/story/2021-09-28/evidence-against-a-lab-leak-as-covid-source

> Nor does any case suggest that "uninhibited, robust, and wide-open debate" consists of debate from which the government is excluded, or an "uninhibited marketplace of ideas" one in which the government's wares cannot be advertised.

Id.

Block has no application here; no one contends the Government must be excluded from the debate, and no one doubts it may advertise its wares in an uninhibited marketplace of ideas. The question presented here, by contrast, is whether a truly uninhibited marketplace of ideas exists where the Government prevents others from advertising *their* wares.

Accordingly, the Government may express its viewpoint but may not "silence or muffle" other views. *Matal v. Tam*, 582 U.S. 218, 235 (2017); see also *Shurtleff v. City of Boston*, 596 U.S. 243, 269 (2022) (Alito, J., concurring) ["government speech" may violate First Amendment "if it uses a means that restricts private expression in a way that 'abridges' the freedom of speech"]. Government must persuade by speaking, not by silencing others. *Sorrell*, 564 U.S. 552, 578.

These precedents indicate the Government may promote speech that advocates for its positions on lockdowns, vaccinations, and masks, but it may not suppress or drive out speech expressing a different viewpoint. The Government must likewise answer respondents' and amici's briefs with counterspeech, not by working to delete them from the Court's website.

There is also a distinction between open and covert "persuasion." *Penthouse* involved the former. It held government officials are "free to speak out" against practices they could not constitutionally restrict. *Penthouse*, 939 F.2d 1011, 1015. For this point, it cited *Reuber v. United States*, 750 F.2d 1039, 1059 (D.C. Cir. 1984) (italics added), which it described as holding "a government actor may *openly criticize* a study produced by an employee so long as no job-threatening sanction is employed." The Government could therefore engage in speech "to embarrass the distributors publicly." *Penthouse*, 939 F.2d at 1016.

This Court's decisions explain the distinctive role of *public* government speech.

> When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, *accountable to the electorate and the political process* for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.

Southworth, 529 U.S. 217, 235 (italics added).

The primary check on government speech is therefore the ballot box. *Shurtleff*, 596 U.S. 243, 252. But such accountability requires public speech; the electorate cannot hold government officials accountable where speech occurs not in "public statements" but behind closed doors, in "private meetings, emails, phone calls [and] follow-up meetings. J.A. 232.

C. Petitioners' criminal law precedents show the need for access to information and for speakers to have "breathing space" from liability.

Petitioners cite several criminal cases. These are generally inapposite, due to the difference between Government's legitimate role in protecting the public from crime and its more dubious role in protecting the public from "misinformation." But insofar as they highlight the need for probative evidence and "'breathing space' for protected speech" from the threat of liability, these cases support respondents' position. *Counterman v. Colorado*, 600 U.S. 66, 82 (2023) (internal citation omitted).

Counterman celebrates free speech despite its risks. The case recognized a threat's harm does not depend on "the mental state of the author" but "what the statement conveys" to the recipient. 600 U.S. 66, 74. Nevertheless, it is hornbook law that a criminal conviction (and ensuing deprivation of liberty) cannot stand absent a guilty mental state. *Id.* at 79. But the instant case does not concern criminal liability; the focus therefore is not on the mental state of governmental officials but on what their statements conveyed to those they would enlist in suppressing information.

A mental state requirement protects lawful speech from the chilling effect of self-censorship; otherwise, the uncertainties and expense of litigation could deter speakers from making even truthful statements. *Counterman*, 600 U.S. at 75-76. Shielding otherwise proscribable speech is a cost worth paying to provide breathing room for more valuable speech. *Id.* at 75.

This Court has long noted the tension between the costs of not enough and too much speech, and holds the First Amendment compels favoring the latter. This is the kind of choice, "between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976), cited in *Sorrell*, 564 U.S. 552, 578. In confirming the need to "protect some falsehood in order to protect speech that matters," *Counterman* supports respondents' position. 600 U.S. at 76 (internal citation omitted).

The other cases also value evidence for its role in discovering truth. In *Colorado v. Connelly*, 479 U.S. 157, 160-61 (1986), this Court declined to exclude an unprompted confession from a suspect whose schizophrenia supposedly interfered with his rational intellect and free will. The Court recalled the function of the exclusionary rule is to deter constitutional violations, not to protect a nonexistent right of criminal suspects to confess "only when rational and properly motivated." *Id.* at 166. As the police had done "nothing wrong" in securing the confession, it would frustrate public safety and serve no countervailing purpose to exclude the confession. *Id.* at 162, 167. To the contrary, the Court recognized what may be described as a criminal law parallel to *Sorrell's* open "channels of communication": the societal interest in obtaining probative evidence regarding a suspect's guilt. *Sorrell*, 564 U.S. 552; *Connelly*, 497 U.S. at 166.

In *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973), the defendant conceded the police did not coerce

him to consent to a search, but they also did not expressly inform him he could decline the request. The Court declined to require such an admonition as a condition for admitting the evidence, and held that determinations as to voluntariness depend on the totality of the circumstances. *Id.* at 227. Investigative searches, including those justified by consent, are a "wholly legitimate aspect of effective police activity," as the enable the discovery of important and reliable evidence, which can clear the innocent, convict the guilty, and thereby protect the public. *Id.* at 227-28, 243.

In contrast to police searches to discover reliable evidence, governmental searches of social-media sites to suppress information are not "wholly legitimate." The public is vulnerable to lawbreakers, and needs the police to protect it from armed criminals. There is no comparable need for protection from controversial speech. To the contrary, the First Amendment rests on the premise that the public can protect itself from unworthy speech; it is not for the Government to police it: "[E]very person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Kleindienst v. Mandel*, 408 U.S. 753, 773 (1972).

D. This case proves the superiority of a "multitude of tongues" over "authoritative selection."

More speech is preferable to less because it enables the discovery of truth. This Court's precedents recognize the wisdom of crowds, that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *Associated Press*, 326 U.S. 1, 28. Rarely if ever has this principle been vindicated as it was during the pandemic.

The Government has belatedly conceded its "mistake" in deciding to "attach infinite value to stopping the disease" and "zero value to whether this actually totally disrupts people's lives, ruins the economy, and has many kids kept out of school in a way that they never quite recovered."[7] They were able to choose these dubious "values" because they excluded alternative perspectives—which were available from the beginning.

> [T]he danger of a new, deadly, and highly contagious virus [must be] balanced with the risk of poverty and despair from shutting down societies in order to battle that virus, and considering the peril inherent in turning the world into a vast prison in order to enforce a shutdown.[8]

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[7] *Francis Collins Has Regrets*.

[8] J.D. Tuccille, *We Need Economists, Civil Libertarians, and Epidemiologists in the COVID-19 Discussion: The tradeoffs among considerations of health, prosperity, and liberty are catching up*

Only now, after "taking down" the Declaration, has the Government conceded it "could have been a great opportunity for a broad scientific discussion about the pros and cons" of narrower lockdowns.[9]

Predictably, vulnerable members of our society suffered the most from this failure to weigh the pros and cons. See also *Virginia State Bd.*, 425 U.S. 748, 763 [observing that the poor, sick, and aged were hurt the most by the suppression of information]. Families with spacious backyards and pools hardly noticed shuttered playgrounds and beaches, but families in cramped apartments suffered physical and psychological harm. Public school closures did not affect families whose private schools remained open. And almost 70 percent of the workforce with a postgraduate degree could work from home, so they avoided a commute, but only 17 percent of those who never went to college could, so they lost their jobs.[10]

This Court must reaffirm the imperative of favoring open discourse, not covert censorship.

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with us even if we don't want to acknowledge them, Reason (May 8, 2020) https://reason.com/2020/05/08/we-need-epidemiologists-economists-and-civil-libertarians-in-the-covid-19-discussion

[9]Id.

[10]Pew Research Center, *How the Coronavirus Outbreak Has – and Hasn't – Changed the Way Americans Work*, 8 (Dec. 9. 2020) (Pew Research), https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/

CONCLUSION

Persuasion must occur through more speech, not enforced silence. *Whitney*, 274 U.S. 357, 377 (Brandeis, J. concurring); see also *Sorrell*, 564 U.S. 552, 578: "The State can express [its] view through its own speech. . . . But a State's failure to persuade does not allow it to hamstring the opposition." Notwithstanding petitioners' reliance on Justice Scalia, he confirmed the fundamental divide between funding speech and abridging it. *Finley*, 524 U.S. at 598 (Scalia, J. concurring). But his most apt concurrence comes from *Riley v. Nat'l. Fed'n. of the Blind of North Carolina*, 487 U.S. 781, 804 (1988) (Scalia, J. concurring), which observed "it is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them."

This Court should affirm the Fifth Circuit's judgment.

Respectfully submitted,

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