No. 24-30252

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF MISSOURI, ET AL.,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., ET AL.,

*Defendant*s.

ROBERT F. KENNEDY, JR.; CHILDREN'S HEALTH DEFENSE; CONNIE SAMPOGNARO,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR.; KARINE JEAN-PIERRE; VIVEK H. MURTHY; XAVIER BECERRA; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Defendants-Appellants.

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

Brief of *Amici Curiae* Lt. General Michael Flynn (USA-ret.), America's Future, Free Speech Coalition, Free Speech Def. and Ed. Fund, Gun Owners of America, Gun Owners Fdn., Gun Owners of California, U.S. Constitutional Rights Legal Def. Fund, and Conservative Legal Def. and Ed. Fund in Support of Plaintiffs-Appellees' Petition for Rehearing En Banc

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ROBERT F. KENNEDY, JR., *et al.*,

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JOSEPH R. BIDEN, JR., *et al.*,

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CERTIFICATE OF INTERESTED PERSONS

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

Robert F. Kennedy, Jr., Children's Health Defense, and Connie Sampognaro, Plaintiffs-Appellees

Joseph R. Biden, Jr., *et al.*, Defendants-Appellants

Lt. General Michael Flynn (USA-ret.), America's Future, Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund, *Amici Curiae*.

William J. Olson, Jeremiah L. Morgan, J. Mark Brewer, James N. Clymer, Patrick M. McSweeney, and Rick Boyer are counsel for *Amici Curiae*.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and 5th Circuit Rule 28.2.1, it is hereby certified that *Amici Curiae* America's Future, Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are non-stock, nonprofit corporations, have no parent companies, and no person or entity owns them or any part of them.

/s/ William J. Olson
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INTEREST OF *AMICI*

The Interest of *Amici* is set out in *amici*'s motion for leave to file *amicus* brief.

STATEMENT

The Panel read *Murthy v. Missouri*, 144 S. Ct. 1972 (2024), to impose a bar to establish standing that is so high it would make it nearly impossible for Americans whose voices have been suppressed by the Government in violation of the First Amendment to obtain injunctive relief. The Supreme Court should not be presumed to have shut the courthouse door to all challengers. Standing is a test designed to ensure there is a genuine "case" or "controversy," not to be used as a way for the judiciary to escape its duty to hold a deeply corrupt Deep State accountable to the Constitution, despite Senator Schumer's warnings of its vast retaliatory powers.[1]

Here, immunity from injunctive relief means total immunity, so under the Panel's approach, the federal government's manifest First Amendment violations will go without remedy. Such court decisions persuade Americans that the Executive Branch has *carte blanche* to abuse their rights, so long as the

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[1] D. Chaitin, "Schumer warns Trump: Intel officials 'have six ways from Sunday at getting back at you,'" *Washington Examiner* (Jan. 4, 2017).

government: (i) conceals the abuses while ongoing; and then (ii) ends (or at least promises to end) its abuses before courts can rule at the end of lengthy and expensive litigation. The panel's decision eviscerates the role of federal courts to protect the people from lawless government actions and is profoundly destructive to the fabric of the nation.

ARGUMENT

I. THE GOVERNMENT MISAPPLIES THE SUPREME COURT'S DECISION IN *MURTHY V. MISSOURI*.

The Panel adopted the Government's theory that it was immune from injunctive relief because the Supreme Court in *Murthy v. Missouri* had found that different plaintiffs did not have standing largely because "the **frequent, intense** communications [pressing they be censored] that took place in 2021 … had **considerably subsided** by 2022." *Id*. at 1980 (emphasis added). The Panel accepted the Government's position here that, since it was able to successfully **conceal** its "**frequent**" and "**intense**" pressuring of social media to censor Americans while it was being done, this Court now is required to deem there is neither "case" nor "controversy" by viewing the likelihood of future censorship "speculative." *Id*. at 1993.

The truth is the opposite — that when the Executive Branch gets away with unconstitutional acts, it makes it more likely they will be repeated. The results of the recent election by which the American People rejected our nation's current political leadership does not cure the problem. No government is immune from the temptation to abuse its powers to enhance its powers, and empowering the Presidency to suppress political opponents is too great and too dangerous a power to allow to remain as an option in the White House toolbox.

However, even if the Panel's cynical reading of *Murthy* were correct, it would not bar Plaintiffs here. The *Murthy* Court made clear that "past injuries are relevant … for their predictive value." *Murthy* at 1987. The Kennedy Plaintiffs have shown a substantial likelihood that the suppression of their speech continues and will continue.

II. PLAINTIFFS HAVE DEMONSTRATED STANDING BASED ON BOTH ONGOING AND FUTURE HARM.

A. Plaintiffs Have Standing Based on Their Public Health Activities.

The Panel ignored the district court's view that the Supreme Court's *Murthy* ruling "focused on the fact that … there were **no specific causation findings** made" by the lower courts with respect to any direct instance of content

censorship. *Kennedy v. Biden*, 2024 U.S. Dist. LEXIS 149217 at *8 (W.D. La. 2024) (emphasis added). Not so as to Petitioner Kennedy, who:

> was identified as a member of the so-called "Disinformation Dozen…." Kennedy formed CHD, a non-profit group that was also targeted for alleged COVID-19 misinformation relating to COVID-19 vaccines. The "Disinformation Dozen" was initially identified by the non-profit Center for Countering Digital Hate in March 2021. [*Kennedy* at *10.]

The district court concluded that "[t]here is not much dispute that both Kennedy and CHD were **specifically targeted** by the White House, the Office of Surgeon General, and CISA, and the content of Kennedy and CHD were suppressed." *Id*. at *16-17 (emphasis added). Then, the Court reviewed the Government's substantial efforts to stop the spread of "disinformation" by Kennedy on specific platforms, and found "a **substantial risk** that in the near future, at least one platform **will restrict** the speech of Kennedy in response to the actions of one Government Defendant." *Id.* at *17 (emphasis added).

Having avoided responsibility for their actions, the CDC and Surgeon General continue to disparage "anti-vax" voices led by Plaintiffs. Even as of the filing of this brief, the CDC publicly demands that only the voices of those favoring COVID vaccinations should be heard:

> **Myths and misinformation** about vaccines put on-time vaccination at risk…. Patients and parents can feel more confident about

> vaccinating when **everyone** in the practice **shares the same message**. ["Strengthen Vaccination Communications," CDC (June 18, 2024) (emphasis added).]

B. Subsequent Developments Undermine the Government's Effort to Use *Murthy* against Kennedy.

1. Unlike the *Murthy* Plaintiffs, the *Kennedy* Plaintiffs Have Demonstrated Present Injury.

The *Murthy* Plaintiffs claimed past injury and the threat of future injury, but not a current, continuing one. By contrast, Plaintiffs demonstrated ongoing, continuing injury which is sufficient for standing by itself. *See Gonzalez v. Blue Cross Blue Shield Ass'n*, 62 F.4th 891, 902 (5th Cir. 2023).[2] As Plaintiffs explained in their brief below:

> In contrast to the *Murthy* plaintiffs, Mr. Kennedy and CHD are still being censored.... Initially deplatformed from Facebook and Instagram in August 2021, CHD remains deplatformed ... today. Holland Dec. ¶¶ 5, 26.... CHD remains deplatformed from YouTube today. Holland Dec. ¶ 6. And while Mr. Kennedy is not deplatformed, the social-media censorship inflicted on him is not only continuing today; it is intensifying.[3]

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[2] *Kennedy v. Biden*, Case 3:23-cv-00381, Dkt. 52 at 14, filed Aug. 1, 2024 (W.D. La. 2024) (hereinafter "Kennedy Supp. Br.").

[3] Kennedy Supp. Br. at 15 (citing Declaration of Mary Holland, CEO of Plaintiff Children's Health Defense ("CHD") (hereinafter "Holland Dec.").

2. Events Since Oral Argument in *Murthy* Demonstrate the High Likelihood of Future Injury.

In August 2024, Meta (Facebook) CEO Mark Zuckerberg wrote to the House Judiciary Committee, conceding that "senior officials from the Biden administration, including the White House, had repeatedly pressured our team for months to censor certain COVID-19 content…."[4] Zuckerberg admitted, "I believe the government pressure was wrong, and I regret that we were not more outspoken about it." *Id.*

Zuckerberg claimed his platform is "ready to push back if something like this happens again." *Id.* But his claim seems unlikely, given Defendants' repeated threats to repeal the liability protection for Big Tech platforms in Section 230 of the Communications Decency Act. Zuckerberg himself testified in 2020 that "without Section 230, platforms could potentially be held liable for everything people say."

As the district court noted, the White House made repeated explicit threats to revoke Section 230 if the platforms refused to censor its political enemies.

> On July 20, 2021, at a White House Press Conference, White House Communications Director Kate Bedingfield … stated the

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[4] Letter from Mark Zuckerberg to Rep. Jim Jordan (R-Ohio) (Aug. 26, 2024).

> administration was reviewing policies that could include amending the Communications Decency Act, and that social-media platforms "should be held accountable." [*Kennedy v. Biden*, 2024 U.S. Dist. LEXIS 149217 at *14 (W.D. La. 2024).]

Zuckerberg's testimony demonstrates that Plaintiffs here have exceeded the showing of *Murthy* plaintiffs, that "the third-party platforms will likely react in predictable ways to the defendants' conduct." *Murthy* at 1986 (internal quotation omitted).

C. The Administration Reopened Its Pressure Communications to the Social Media Platforms Leading Up to the 2024 Election.

The Supreme Court felt that the *Murthy* plaintiffs could not show future injury because government censorship efforts had "slowed" by 2022. *Murthy* at 1994. Further, the Court relied heavily on promises by the wrongdoers: "the Government has represented that it will not resume [censorship] operations for the 2024 election." *Id.* at 1993.

Nevertheless, before the *Murthy* decision was even issued, Senate Intelligence Committee chairman Mark Warner (D-Va.) disclosed that the FBI had again begun "discussions" with social media platforms for 2024:

> Key federal agencies ha[d] **resumed** discussions with social media companies over **removing disinformation on their sites as the November presidential election nears**, a stark reversal after the Biden administration for months froze communications with social

platforms amid a pending First Amendment case [*Murthy*] in the Supreme Court.[5]

Thus, Plaintiffs have demonstrated a high likelihood of future injury as well as ongoing injury.

III. PLAINTIFFS HAVE PROVEN "JOINT ACTION" BETWEEN DEFENDANTS AND THE SOCIAL MEDIA PLATFORMS SUFFICIENT TO CONFER STANDING.

In *Murthy*, the High Court never addressed the "joint action" doctrine. As this Court noted in its *Missouri* ruling, joint action exists "whenever the government has 'so far insinuated itself' into private affairs as to blur the line between public and private action." *Missouri v. Biden*, 680 F. Supp. 3d 630, 706 (5th Cir. 2023) (internal quotation omitted). And, as the Supreme Court has noted, "'[p]ervasive intertwinement' exists even if the private party is exercising independent judgment." *Id.* (quoting *West v. Atkins*, 487 U.S. 42, 52, n.10 (1988)).

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the Supreme Court made clear that the Government can "so far insinuate[] itself into a position of interdependence with [a private entity] that it must be recognized as

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[5] D. DiMolfetta, "CISA, FBI resuming talks with social media firms over disinformation removal, Senate Intel chair says," *Nextgov.com* (May 7, 2024) (emphasis added).

a joint participant in the challenged activity." *Id.* at 725. Such a mutually beneficial relationship exists relative to the deplatforming of Plaintiffs.

A. Under White House Pressure, Facebook Silenced Speech Contradicting the White House Position to Ensure Section 230 Liability Protection.

Although the *Murthy* Court noted "lack of specific causation findings" by plaintiffs there (*Murthy* at 1987), Kennedy has demonstrated multiple direct statements by White House officials to specific social media platforms demanding censorship of his speech. *Murthy* actually found that, beginning in 2021, "White House officials had pushed Facebook to remove the accounts of the 'disinformation dozen,'" including Kennedy, in refusing to toe the government's line on the proper treatments for COVID. *Murthy* at 1991.

As Plaintiffs noted in their Supplemental Brief on Standing, at first, Facebook stood firm against the pressure:

> [O]n May 1, Facebook emailed the White House resisting the deplatforming of the so-called Disinformation Dozen: "[W]e continue to review accounts associated with the 12 individuals identified in the … 'Disinformation Dozen' report, but **many of those either do not violate our policies** or have ceased posting violating content."[6]

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[6] Kennedy Supp. Br. at 8 (citing Holland Dec. at ¶ 14) (emphasis added).

In response, the White House repeatedly threatened Facebook with antitrust action:

> Just a few days later, on May 5, 2021, the White House Press Secretary told media that with respect to "the major platforms," President Biden favors "a robust anti-trust program. So his view is that there's more that needs to be done to ensure that this type of misinformation; disinformation; sometimes life-threatening information is not going out to the American public." [*Id*. (quoting Holland Dec. ¶ 15).]

Then, "[t]he day after this threat, May 6, 2021, White House Deputy Assistant to the President Rob Flaherty emailed Facebook and again chastised the company for failing to censor the so-called Disinformation Dozen: 'Seems like your "dedicated vaccine hesitancy" policy isn't stopping the disinfo dozen.'" *Id.* at 9 (quoting Holland Dec. ¶ 17).

When Facebook continued to refuse to deplatform Kennedy, in July 2021, the White House pressed harder:

> [O]n July 15 … the White House Press Secretary demanded that platforms adopt "a robust enforcement strategy" against disfavored COVID information, again singling out the Disinformation Dozen: "[T]here's about 12 people who are producing 65 percent of anti-vaccine misinformation on social media platforms. All of them remain active on Facebook, despite some even being banned on other platforms." Holland Dec. ¶ 18. [*Id*.]

This was a direct reference to Kennedy, who had been deplatformed on Instagram, which, along with Facebook, is a subsidiary of Meta, while Kennedy's Facebook account remained active. *Id.*

> The next day, July 16, the President publicly stated that Facebook and other platforms were "killing people" due to their refusal to censor speech that challenged the safety and efficacy of the COVID vaccines. Holland Dec. ¶ 21. That same day, the White House Press Secretary reinforced the White House's demand that Kennedy be banned across all platforms: "You shouldn't be banned from one platform and not others … for providing misinformation out there." [*Id*. at 10.]
>
> At this threat, Facebook gave in:
>
> On July 23, 2021, just three days after the White House Communications Director's threat, Facebook emailed Surgeon General Murthy and stated, "I wanted to make sure you saw the steps we took just this past week" — i.e., since President Biden's "killing people" comment on July 16, 2021—"to further address the 'disinfo dozen.'" Holland Dec. ¶ 24. Facebook reported to the Surgeon General that it had censored every member of the Disinformation Dozen, including Kennedy and Children's Health Defense. [*Id*. at 11.]

Both Facebook and the Government mutually benefitted from the suppression of Kennedy's speech. The White House silenced a significant contingent of dissenting speech on COVID issues, and Facebook maintained the Section 230 liability protection essential to its existence. Plaintiffs have shown a

symbiotic, ongoing relationship between Facebook and the White House, sufficient to establish joint action.

B. The Platforms' Creation and Defendants' Use as "Partners" of the "Censorship Portal" also Demonstrate Joint Action.

Communications between the platforms and the Defendants prove that the Government and the Big Tech companies partnered in suppressing dissenting speech. The platforms set up special "'Partner Support Portal[s]' for expedited review of flagging content for censorship" by Defendants. *Missouri* at 645. Twitter gave the White House direct access on one such portal. "On February 7, 2021, Twitter sent [Rob Flaherty] a 'Twitter's Partner Support Portal' for expedited review of flagging content for censorship." *Id*. Facebook likewise provided a Censorship Portal to Defendant CDC, to flag speech from COVID dissidents. Notably, "[t]he portal was only provided to federal officials," not other private sector "partners." *Id*. at 664.

Even if the Government has ceased to apply continuing pressure to the social media platforms, the risk of Section 230 repeal still hangs over the platforms, who continue to have strong motivation to suppress dissent against government policy.

IV. THE 2024 PRESIDENTIAL ELECTION DOES NOT MOOT THIS CASE.

The conclusion of the 2024 presidential election does not moot this case. First, the only possible effect of the election would be on Plaintiff Kennedy's position, and Plaintiff CHD is unaffected. As long as one plaintiff has standing, the case must be permitted to proceed. *See Biden v. Nebraska*, 600 U.S. 477, 489 (2023).

Second, a mere change in administrations from Democrat to Republican does not eliminate the threat posed by government censorship to Kennedy, a former Democrat and third-party candidate.

It is immaterial which party holds the White House. The First Amendment is offended not by Democrats or Republicans suppressing speech, but by Government doing so. Should this Court send the message that government censorship of speech on media outlets is unreviewable, the First Amendment has become a dead letter.

CONCLUSION

Plaintiffs have demonstrated standing based on a clear showing of causation, traceability, and redressability. This Court should grant *en banc* rehearing of a flawed panel decision.

Respectfully submitted,

/s/ William J. Olson

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Lt. General Michael Flynn (USA-ret.), *et al*. in Support of Plaintiffs-Appellees' Petition for Rehearing En Banc, was made, this 25th day of November, 2024, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae*

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Lt. General Michael Flynn (USA-ret.), *et al*. in Support of Plaintiffs-Appellees' Petition for Rehearing En Banc complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 2,584 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as well as Circuit Rule 32.1, because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 21.0.0.194 in 14-point CG Times.

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Dated: November 25, 2024