No. 23-411

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

MISSOURI, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' RESPONSE IN OPPOSITION TO THE MOTION FOR LEAVE TO INTERVENE

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The Solicitor General, on behalf of the petitioners, respectfully submits this response in opposition to the motion for leave to intervene as respondents filed by Robert F. Kennedy, Jr.; Connie Sampognaro; and Children's Health Defense (CHD).

STATEMENT

1. This case arises out of allegations by respondents -- five individual social-media users and two States -- that efforts by private social-media companies to moderate content posted on their platforms must be attributed to the federal government and deemed to violate the First Amendment because federal officials purportedly coerced or significantly encouraged some of the platforms' actions. The district court entered a preliminary injunction prohibiting seven groups of government defendants from en-

gaging in ten types of communications with and about social-media companies, subject to eight carveouts. See D. Ct. Doc. 294, at 1-7 (July 4, 2023); D. Ct. Doc. 302, at 1 (July 10, 2023). The court of appeals reversed the injunction with respect to several groups of defendants, vacated the terms of the injunction in substantial part with respect to the remaining defendants, and modified the terms of what it left in place. See 23-30445 C.A. Doc. 238-1 (Sept. 8, 2023). After granting panel rehearing, the court reinstated the injunction (as modified) with respect to some additional defendants. See 23-30445 C.A. Doc. 268-1 (Oct. 3, 2023).

On October 20, 2023, this Court granted the government's emergency application for a stay of the district court's preliminary injunction, as modified by the court of appeals, pending this Court's review. The Court also treated the application as a petition for a writ of certiorari and granted the petition "on the questions presented in the application." Those questions are "(1) Whether respondents have Article III standing; (2) Whether the government's challenged conduct transformed private social-media companies' content-moderation decisions into state action and violated respondents' First Amendment rights; and (3) Whether the terms and breadth of the preliminary injunction are proper." Stay Appl. 40.

2. Movants are plaintiffs in a separate and later-filed case that raises similar First Amendment claims against the same group of federal defendants. See Kennedy v. Biden, No. 23-cv-381

(W.D. La. filed Mar. 24, 2023); see also Mot. 8 (asserting that movants "have sued these same defendants on the basis of substantially identical facts"). Before filing that suit, two of the three movants (Kennedy and CHD) had sought to intervene in this case for the limited purpose of accessing discovery. See D. Ct. Doc. 118 (Nov. 17, 2022). The district court denied that motion. D. Ct. Doc. 171 (Jan. 10, 2023).

Shortly after filing their suit, movants sought to have their case consolidated with this one. See D. Ct. Doc. 236 (Apr. 1, 2023). The district court deferred consideration of that request pending its resolution of respondents' motion for a preliminary injunction (which had been filed more than nine months earlier) and motion for leave to amend the complaint to add class allegations. See D. Ct. Doc. 240, at 3 (Apr. 5, 2023). Movants then filed a motion for a preliminary injunction in their case, see D. Ct. Doc. 6, Kennedy, supra (No. 23-cv-381) (Apr. 12, 2023), which is now fully briefed.

Meanwhile, in this case, the district court granted movants' motion for consolidation a few weeks after it resolved respondents' outstanding motions. See D. Ct. Doc. 316 (July 24, 2023). In granting consolidation, the court stated that it "will not rule on the preliminary injunction in Kennedy v. Biden until after a ruling by the Fifth Circuit and/or the Supreme Court of the United States on the preliminary injunction in [this case]; that will keep the consolidation from complicating the matter on appeal and will

likely result in a more streamlined resolution of the preliminary injunction in Kennedy v. Biden." Id. at 4-5.

ARGUMENT

This Court should deny the motion to intervene. "No statute or rule provides a general standard to apply in deciding whether intervention on appeal should be allowed," and this Court has accordingly "considered the 'policies underlying intervention' in the district courts." Cameron v. EMW Women's Surgical Ctr., P.S.C., 142 S. Ct. 1002, 1010 (2022) (quoting International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Scofield, 382 U.S. 205, 217 n.10 (1965)). Relevant considerations include "timeliness" and "the legal 'interest' that a party seeks to protect." Id. at 1010, 1012 (citation omitted); see Fed. R. Civ. P. 24. The Court has applied a particularly demanding standard for intervention in this Court, reserving that step for "rare," "unusual" cases where intervention is supported by "extraordinary factors." Stephen M. Shapiro et al., Supreme Court Practice Ch. 6.16(c), at 6-62 (11th ed. 2019). Movants do not satisfy any of the relevant considerations, much less identify anything rare, unusual, or extraordinary that would warrant intervention here.

A. The Motion Is Untimely

Movants have waited far too long to seek intervention. The state respondents filed the complaint in this case in May 2022 and the individual respondents were added as plaintiffs in August of that year. Movants were aware of this case no later than November

2022, when Kennedy and CHD sought to intervene for the limited purpose of gaining access to the discovery. See D. Ct. Doc. 118. After that request was denied in January 2023, movants waited another two and a half months before filing their own suit in the same division of the same district court. Several more months then elapsed as briefing on their own motion for a preliminary injunction proceeded in parallel with briefing on respondents' motion in this case.

Yet at no point did movants seek to intervene in the district court as parties to this case. Nor did they seek intervention in the court of appeals during the three months that the appeal was pending there. Instead, movants chose to pursue their own suit, which they filed more than ten months after this one.

Movants offer no good excuse for their delay in seeking to intervene. Their only argument with respect to timeliness is that they "moved for intervention immediately after this Court granted certiorari." Mot. 7. But that does not explain why they failed to seek intervention in the many months before the grant of certiorari. Movants' delay is particularly unjustified because all of their arguments about their asserted interest in the proceedings in this Court (Mot. 1-4, 8-10) applied equally to the proceedings in the Fifth Circuit, which remained pending for months after movants' case was consolidated with this one in the district court.

Movants also do not explain why, despite knowing about this case since at least November 2022, they did not seek to intervene

as full parties at any point between then and the issuance of the July 2023 preliminary injunction. Nor do movants claim to have only recently discovered any facts or circumstances supporting their bid for intervention. For example, movants contend that intervention is necessary because respondents might lack Article III standing (Mot. 5-6), but -- as the government has consistently and repeatedly observed in a multitude of public filings -- that has been obvious since the day this suit was filed. Equally obvious is that no respondent is a "candidate for President." Mot. 10. And because movants have known respondents' identities since the outset, they long ago should have been able to determine whether respondents adequately represent "social media listeners and viewers." Ibid.

B. Movants Have Not Identified A Significant Protectable Interest That Respondents Do Not Adequately Represent

A litigant asserting an entitlement to intervene must establish a significant "legal 'interest'" in the litigation that the existing parties will not adequately represent. Cameron, 142 S. Ct. at 1010 (quoting Fed. R. Civ. P. 24(a)(2)); see Donaldson v. United States, 400 U.S. 517, 531 (1971) ("significantly protectable interest"); see also Fed. R. Civ. P. 24(a)(2) (no intervention when "existing parties adequately represent th[e] interest"). Movants have not demonstrated any such interest here.

Movants assert that because they are pursuing First Amendment claims that are "substantially identical" to those raised by re-

spondents, Mot. 8, they "have legal rights that will be adjudicated here," ibid., and that their First Amendment rights "will, in a practical as well as a formal sense, be determined here," Mot. 9 (emphasis added). In making that assertion, which is the fundamental premise of the motion to intervene, movants appear to presume that the consolidation in the district court makes them "parties to these proceedings who are not before the Court." Mot. 1 (emphasis omitted); see Mot. 11 (asserting that Kennedy is "already a party to these proceedings below").

Movants' premise is wrong. Consolidation is not like intervention or joinder; "the parties to one case d[o] not become parties to the other by virtue of consolidation." Hall v. Hall, 138 S. Ct. 1118, 1128 (2018). Instead, consolidation should be understood "not as completely merging the constituent cases into one, but instead as enabling more efficient case management while preserving the distinct identities of the cases and the rights of the separate parties in them." Id. at 1125. Even after consolidation, therefore, movants are not parties to the case filed by respondents and will not be bound by any judgment in this case.

Movants are thus simply mistaken in asserting that their rights will be "adjudicated" in this case as a "formal" matter. Mot. 8-9 (emphasis omitted). And to the extent movants claim that they "continue to suffer a violation of their First Amendment rights," Mot. 9, that is simply the result of the fact that the district court has not yet ruled on their motion for a preliminary

injunction. It does not give them a legally protectable interest in this appeal concerning respondents' preliminary injunction.

To be sure, the Court's resolution of the questions presented may affect movants' claims by establishing relevant precedent. But because the Court considers recurring and important questions of federal law, see Sup. Ct. R. 10, virtually all of its decisions establish precedents that affect many other cases involving many other litigants. The possibility of such effects has never been thought to justify intervention. Were it otherwise, this Court would routinely be inundated with motions to intervene.

Instead, nonparties with an interest in the precedent that will be set by this Court's decision in a pending case present their views by participating as amici curiae: "The obvious alternative for one who desires to intervene in a pending Supreme Court proceeding is to seek to file an amicus curiae brief." Supreme Court Practice Ch. 6.16(c), at 6-63. Movants themselves have already done just that during the emergency stay proceedings. See Kennedy Pls.' Amici Br. in Opp. to Stay (filed Sept. 20, 2023). They are free to participate as amici curiae again at the merits stage.

Nor have movants shown that respondents will not adequately protect their asserted interests. Movants observe that Article III standing "is contested" in this case and suggest that they can avoid respondents' standing problems by asserting "the First Amendment rights of social media viewers and listeners." Mot. 5-

6. But respondents have made precisely the same argument in support of their own standing. See Opp. to Stay Appl. 14-15, 22 (invoking a "right to listen" theory). For the same reason, movants' suggestion (Mot. 10) that "social media listeners and viewers do not yet have a devoted advocate before the Court" lacks merit. Finally, that no respondent is "a candidate for President" (ibid.) is immaterial because presidential candidates do not enjoy greater First Amendment rights than private citizens.

Movants also fail to show that intervention is otherwise warranted in "the discretion of the [C]ourt." Cameron, 142 S. Ct. at 1011. That movants' own litigation "remain[s] stranded" in the district court (Mot. 2) is the result of that court's sensible decision to defer consideration of their preliminary injunction motion until after this Court issues its decision in this case -- a decision the district court made specifically to ensure that the consolidation of the two cases would not "complicat[e]" the already-pending appellate proceedings in this case. D. Ct. Doc. 316, at 5. Intervention is not a tool for a litigant to expedite its own lawsuit by piggybacking on a different one. Movants cite no precedent for using intervention in a pending case in this Court to circumvent the procedural rulings of a district court.

C. Permissive Intervention Is Inappropriate

Movants briefly assert (Mot. 11) that "even if the Court finds that [movants] are not entitled to intervene as of right, permissive intervention would still be warranted here" because permis-

sive intervention under Rule 24(b) has "substantially more lenient standards." But Rule 24 does not govern intervention in the courts of appeals or in this Court, and this Court thus has not distinguished between intervention as of right and permissive intervention in this context. Instead, Cameron suggests that the lack of a governing statute or rule means that all motions to intervene on appeal should be treated as motions for "permissive intervention" that are "committed to the discretion of the court before which intervention is sought." 142 S. Ct. at 1011. As explained above, movants have not demonstrated that intervention is warranted as an exercise of discretion. Moreover, even if permissive intervention entailed a more "lenient" standard, movants have not explained how they have satisfied such a standard (or even what that standard would be), and they presumably would rely on the same arguments they have advanced for intervention as of right. Those arguments lack merit for the reasons set forth above.

CONCLUSION

The motion for leave to intervene should be denied.

Respectfully submitted.

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