No. 24-732

IN THE

Supreme Court of the United States

CHILDREN'S HEALTH DEFENSE,
Petitioner,

v.

META PLATFORMS, INC.,
a Delaware Corporation, et al.,
Respondents.

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

REPLY BRIEF

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QUESTIONS PRESENTED

1. Does *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989), mandate that Meta, an interactive computer service provider which receives 47 U.S.C. § 230 immunity, become a state actor when it affirmatively engages with Executive Branch officials to exercise its State-created privilege to suppress particular viewpoints or speakers? If so, is the First Amendment implicated?

2. Does an interactive computer service provider transform private conduct into state action when it willfully conforms its content-moderation process or decisions to Executive Branch preferences to suppress particular protected third-party speech or cedes active, meaningful control of its process or decisions to the State?

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REPLY

Like last Term's *Murthy v. Missouri*, 603 U.S. 43 (2024), this case is about the abuse of Presidential and agency powers to censor opponents and their followers online. But, unlike *Murthy*, Petitioner Children's Health Defense (CHD) and CHD's over half-million subscribers, were specifically targeted, publicly and privately. Respondent Meta Platforms, Inc. ("Meta") *willfully cooperated* with the government in censoring and deplatforming CHD. Yet, despite ample precedent and evidence, the courts below dismissed CHD's claims with prejudice.

The Ninth Circuit decision flaunts precedent and creates an impossible hurdle for plaintiffs challenging covert Executive Branch viewpoint-based suppression of online opposition. After years of outright denials to courts and legislators, Meta now all-but-concedes that the government may have targeted CHD and its former chairman Robert F. Kennedy, Jr. for censorship, and that Meta may have conformed its content moderation to do it. (Opp. 16, 18). Excusing its own conduct, however, Meta contends that it (not CHD) was the "victim" of any such overreach; President Trump's Executive Order 14149 "moots" the case; 47 U.S.C. § 230 immunity is not a factor in state-action analysis; and Meta is an "inappropriate" defendant for resolving the state-action question reserved in *Murthy*. (Opp. 10, 15-16, 18, 23, 31-33.)

That takes a lot of chutzpah, as does respondent Zuckerberg telling Joe Rogan that "the First Amendment doesn't apply to Companies." Rogan, Joe and Zuckerberg, Mark, "*Joe Rogan Experience #2255 - Mark Zuckerberg*" (Jan. 10,

2025), at 18, https://epublications.marquette.edu/zuckerberg_files_transcripts/2064.

The operative questions in this case – has state action in all its forms "shaped" Meta's conduct, and is Meta therefore subject to the First Amendment -- are for this Court to decide, not the issue of remedies, *see, e.g.*, *Bond v. United States*, 564 U.S. 211, 214 (2011), despite Meta's plaint that it can never be ordered to disseminate CHD's content. (Opp. 17). While Executive Order 14149 ("EO") raises novel issues, *e.g.*, whether President Trump himself is bound, it presents no sound reason to deny review. Section 3(b) of that EO directs the Attorney General, "in consultation with the heads of executive departments and agencies," to "investigate the activities of the Federal Government over the last 4 years . . . and prepare a report to be submitted to the President … with recommendations for appropriate remedial actions to be taken based on the findings of the report."

Under these circumstances, if the Court wants the views of the United States on the scope of the EO, its effect on actions against platforms that willfully cooperate with federal censorship, or whether § 230 assists in inducing platform participation in "the activities" the Attorney General is investigating, *see infra*, it should CVSG. In either event, the Court should grant certiorari to resolve the Fifth and Ninth Circuit split and protect the fundamental right at issue.

I. The Ninth Circuit's State-Action Dismissal Warrants Review Because Platform Facilitation of Executive Branch Censorship Isn't Going Away

CHD filed suit against Meta, Zuckerberg, and their fact-checker Poynter in August 2020, seeking declaratory and injunctive relief from Meta's participation in the CDC's "'vaccinate with confidence' partnership." Meta began censoring CHD in May 2019 and became a state actor subject to First Amendment standards. (Pet. 10-14.)

As Covid-related censorship fell on CHD in 2021 and 2022, and as *Missouri v. Biden*, No. 22-cv-01213 (W.D. La. 2022), and the House of Representatives Subcommittee shed light in 2023, CHD supplemented its complaint with allegations that Meta partnered with the Biden Administration specifically to target CHD and Kennedy's speech.

A. The Circuits Are Split in Related Cases

While this Court expressly reserved the Fifth Circuit's state-action standard, *Murthy*, 603 U.S. at 55 & n.3, every lower court to reach the merits in the *Missouri* and *Kennedy* cases found a First Amendment violation and, as pertinent here, that the Biden Administration likely violated CHD and Kennedy's free speech rights as well as CHD subscribers' rights under its significant encouragement, joint action, and coercion tests. *See, e.g.*, *Kennedy v. Biden*, 745 F. Supp. 3d 440 (W.D. La. Feb. 14, 2024), *vacated by Missouri v. Biden*, 2024 U.S. App. LEXIS 27886 (5th Cir. Nov. 4, 2024) (per curiam) (unpubl.), *reinstated for remand to consider mootness by Missouri v. Biden*, 2025 U.S. App.

LEXIS 2144 (5th Cir. Jan. 30, 2025) (per curiam); *Missouri, v. Biden*, No. 22-cv-01213 (W.D. La. Nov. 8, 2024) (Dkt. #404 at 5). Meta argues that *Murthy* nullifies those findings, citing *Teague v. Lane*, 489 U.S. 288 (1989) (Opp. at 19), but *Teague,* a habeas retroactivity case*,* is inapposite. Here, CHD sued multiple co-conspirators, public and private, in two different actions involving overlapping events, occurrences, transactions, and theories. This case was dismissed with prejudice while the others proceeded. The Fifth and Ninth Circuit's state-action standards and applications cannot be squared.

B. The Case is Still Ripe

Meta has not rescinded its "harmful health misinformation" policy that remains largely unchanged since the CDC and Meta co-authored it in 2019. CDC then determined what qualifies as "vaccine-hesitancy"-inducing speech which is why CHD remains deplatformed to this day. *See* Meta Harmful Health Misinformation Policy, avail. at: https://transparency.meta.com/policies/community-standards/misinformation (last accessed May 27, 2025). Nor has the CDC rescinded or repudiated its "Vaccinate with Confidence" program with Meta to "contain the spread" of such speech. CDC "Vaccinate with Confidence," avail. at: https://www.cdc.gov/vaccines/partners/vaccinate-with-confidence.html (last reviewed by CDC Oct. 2019) ("CDC will [. . .] establish partnerships [with social media companies] to contain the spread of misinformation."). Meta ignores its pre- and post-Covid close nexus with CDC (Opp. 4-5), which perpetuates a live controversy. And, even if Meta's ongoing deplatforming of CHD still reverted to private choice after President Biden left office, CHD's right to declaratory judgment

would remain. Respondents continue to defend their practices, albeit in inconsistent ways. *See* Pet.'s Feb. 12, 2025 Suppl. Letter at 1-2. One or more of them is lying, or there's a simple underlying truth: Meta willfully cooperated with the CDC and Biden White House. An election does not moot a case which has not been finally adjudicated. *Davis v. FEC*, 554 U.S. 724, 735 (2008); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007).

Moreover, Zuckerberg's pledge to "push back if something like this [governmental pressure] happens again" and Meta's choice to discontinue "fact-checking" "Covid-misinformation" (Opp. 6, 16-17) are unreliable and unenforceable assurances. If this Court will "not ordinarily decline to decide significant constitutional questions based on the Government's promises of good faith," *Trump v. United States*, 603 U.S. 593, 637 (2024), how much less should it defer to Meta's crocodile tears? *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (voluntary cessation of challenged practice does not deprive a court of power to determine its legality).

C. CVSG is Appropriate for Executive Order 14149

Meta contends that recent developments put CHD's case "years in the past." (Opp. 10, 22.) Meta's reliance on the EO (like § 230) as another "get-out-of-jail-free card," *Doe v. Snap, Inc.*, No. 23-961, 144 S. Ct. 2493, 2494 (2024) (Thomas, J., statement respecting denial of certiorari), defies common sense. For starters, the order contains a preamble that would logically transform Meta into a state actor for its role as a government censorship proxy. Executive

Order No. 14149, § 1, 90 Fed. Reg. 8243 (Jan. 20, 2025).

Moreover, the EO creates no private right of action against the United States "or any other person," *id.* § 4(c), which makes it inappropriate for Meta to assert it as a shield. Most importantly, in terms of the risk of future harm, the order is ambiguous in aspects that the United States could help clarify before the Court accepts Meta's view. For example, as "the only person who alone composes a branch of government," *Trump v. Mazars USA, LLP*, 591 U.S. 848, 868 (2020), it is not self-evident that President Trump is subject to or constrained by his own EO. *See, e.g.*, *Trump v. Anderson*, 601 U.S. 100, (2024) (per curiam); *Trump v. United States*, 603 U.S. 593 (2024). Neither CHD nor Meta can predict whether he might resume White House online censorship with one speed-dial to any Big Tech hegemon.

That's why every institution or entity that has been singled out in recent executive orders, every political or policy opponent, and every citizen should fear the covert power of the Presidency and the institutional incentives for the platforms to team up in secret to accomplish what CHD plausibly alleged took place here. Had Meta itself sued the government as the purported "victim" of ongoing coercion or inducement (Opp. 20, 31), this would be a different case. But, instead, Meta played its part to "go along to get along," as it surely will again if the need or opportunity arises, until judicial standards rein Meta in.

As Nick Clegg wrote in an internal email to Zuckerberg, Meta had "bigger fish to fry" with the White House (the EU data privacy treaty

negotiation) than protecting opposition free speech (Pet. 14-17), a point that Zuckerberg echoed with Joe Rogan after the election turned the tables: "It makes you a little afraid that if you ever actually…mess something up, that they're really going to bring the hammer down on you if you don't have a constructive relationship." ("*Joe Rogan Experience #2255 - Mark Zuckerberg,*" *supra*, at 56.) Amicus Rutherford Institute puts it best when they ask this Court to "clearly establish threshold standards" "[g]iven the risk of further suppression of free speech by social media platforms working hand in glove with government agencies and officials." (Rutherford Inst. 2.)

CHD is among the most censored organizations on social media. It is steadfast in publishing scientific data and health warnings in defiance of corporate/governmental interests as well as criticisms of government health policies, continually putting CHD in the crosshairs of government-induced social media censorship. CHD is amply justified in expecting that it may again be targeted by any Administration that resumes a social media censorship campaign. *See, e.g.*, *Adarand Constructors v. Slater*, 528 U.S. 216, 224 (2000) (case "remains alive" even where the prospect of recurrence is "speculative").

II. The Court Should Apply *Skinner* Here to "Square Up" Private Agency Doctrine under the First and Fourth Amendments

Judge Collins applied a hybrid *Skinner*/§ 230-immunity theory as a well-reasoned analogy between Fourth Amendment private agency and the same three operative factors of official

"encouragement, endorsement, and participation" in censorship here. *Skinner*, 489 U.S. at 615-16. (Pet. 29-31; App. 58a-94a.) Meta argues that § 230's "agnostic," "passive," and "neutral" terms "doom" the theory because "no aspect of Section 230 gives the government a right to 'share the fruits' of Meta's private conduct." (Opp. 23-25.)

Not so. The government and Meta contrived to censor CHD's online speech within the specific context of § 230 immunity for those same acts of speech suppression. The government spoke with one voice in its inducement of and involvement in Meta's suppression of CHD and Kennedy's viewpoint. And it worked. CHD was removed from Meta, its archived content scrubbed, and its subscribers penalized by that silencing. That *is* the government "sharing the fruits" of private agency as much as *Skinner*'s sharing of drug-tests. The "central question" under *Skinner* is whether Meta's *specific interactions* with the Executive Branch, Meta's purposeful "appeasing" actions to comply, and the Executive's specific interest in and benefit from Meta's exercise of immunized censorship against CHD implicate the First Amendment. (App. 77a-83a.)

Meta argues this is merely "permission of a private choice," *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999), where government entwinement is "otherwise insufficient." (Opp. i, 24.) Not so, and nor did Judge Collins so find. (App. 87a.) Rather, it's a part of the "underlying reality," the "range of circumstances," and the "functional" analysis that this Court has always engaged with to meet the exigencies of the day. *West v. Atkins*, 487 U.S. 42 (1988); *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295-96, 301 n.4 (2001);

cf. Illinois v. Gates, 462 U.S. 213, 230-31 (1983) (replacing "rigid legal rules" with "common sense, practical" "totality of the circumstances" approach to probable cause).

Again, CVSG may be appropriate to elicit the views of the government in light of the longevity of §230, despite frequent calls to reform or abolish it from the coordinate branches which use § 230 immunity to threaten, cajole, or induce the platforms to do their bidding. (App. 47a, 49a, 51a, 63a-72a, 80a-83a.) To quote Justice Scalia, "it matters not" when § 230 was enacted, whether it "takes a decidedly passive and neutral position" (Opp. 23), or whether "upon its passage, the Members all linked arms and sang" at how § 230 "passively" permits them or the executive branch to finagle with the immunized platforms to censor disfavored online speech in violation of third party rights. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 595 (1998) (Scalia, J., concurring). What matters for this Court, as the least political branch, is § 230's *effect in practice* in this case and for the future.

Skinner applied common law agency principles to a claim of constitutional right against a private company. *Skinner*, 489 U.S. at 614-16. Common law agency principles provide the way forward here as well. In *United States v. Ackerman*, 831 F.3d 1292, 1301 (10th Cir. 2016), Judge Gorsuch observed, "Neither has the common law traditionally required that the agent be an altruist, acting without any intent of advancing some personal interest along the way (like monetary gain). As clients know well, lawyers can serve as their agents all while zealously charging by the hour. *Instead, the question is usually simply whether the agent acts*

with the principal's consent and (*in some way*) *to further the principal's purpose*. *See generally* [Restatement (Second) of Agency] §§ 387-93." (Emphasis added.)

By this standard and "in light of all the circumstances," *Skinner*, 489 U.S. at 614, CHD states a plausible claim that Meta acted as a government agent or instrument when it censored CHD's free speech. *See, e.g.*, App. 79a ("Meta worked extensively with Executive Branch officials to refine its criteria and practices with respect to limiting or suppressing vaccine-related speech. [. . .] Meta engaged in a dialogue with [. . .] Government officials about what 'levers' to exercise against truthful 'vaccine hesitancy content.'") That approach to Rule 12(b)(6) disposes of counter suppositions that Meta's decisions "reflect[] [its] fully independent judgment," (Opp. 17), or that Meta's views "happen to be shared by the government." (App. 22a.)

Zuckerberg's recent admissions provide further reason to include him and Poynter in the writ. CHD alleged that Poynter was Meta's agent when it took Meta's direction to review and label particular CHD content "false fact," by which Poynter furthered the government and Meta's joint enterprise. *Children's Health Def. v. Meta Platforms, Inc., et al.*, (9th Cir. Case 21-16210), Dkt. #20-4 at ER 426-27, 455-63, 476-78, 502.) Meta's references to "independent, third-party fact-checkers" drawn from its own website (Opp. i, 6-7) do not make them so, especially at the Rule 12(b)(6) stage. Zuckerberg now describes his fact-checker program as "something out of, like, you know, '1984.'" "*Joe Rogan Experience #2255 - Mark Zuckerberg,*" *supra*, at 6. Zuckerberg and Poynter belong in this case for having served as

conductor and caboose of the Meta-White House-CDC wagon train.

III. The Record is Clean and Sufficient to Grant Certiorari Review

Meta paints the record as a "moving target," a "morass," and, thus, an "especially poor vehicle." (Opp. 33-34.) Not so. CHD moved to supplement the record in the district court in 2021, and sought judicial notice on appeal of documents in 2022 through 2024 as they became available through *Missouri* and House subpoenas. Unlike *Murthy*, 603 U.S. at 67 & n.7, the record here is concise but suffices to show CHD's claims are plausible, a lesser-burden than the standard for a showing of standing to obtain a preliminary injunction.

While the opinion below declined to consider that evidence (App. 16a-17a, 23a-27a), dissenting Judge Collins got it right: "We can take judicial notice of the limited fact that these documents exist and have become available to CHD during the course of this appeal. . . . CHD may properly draw on them in sketching the additional factual *allegations* that it could now make if it is given leave to amend." (App. 44a, emphasis in original.) The Ninth Circuit dismissed under a reading of Rule 12(b)(6) that imposed a higher standard than pleading fraud with particularity, and blinkers reality when plaintiffs like CHD are the victim-pursuer of the government's "nonobvious involvement" in private agency action. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961); *see also Missouri v. Biden*, No. 22-cv-01213 (W.D. La. Nov. 8, 2024) (Dkt. #404 at 5) (granting jurisdictional discovery after *Murthy*

because "evidence of such [government-platform] coordination would not be easy to find.")

The public record continues to inculpate respondents. Meta's reading of the Zuckerberg-Rogan interview doesn't pass the laugh test. Just after the sentences quoted by Meta (Opp. 30), Zuckerberg said, "And then at some point, I guess, I dunno, it flipped a bit. . . . for the first time we just faced this massive, massive institutional pressure to basically start censoring content on ideological grounds." ("*Joe Rogan Experience #2255 - Mark Zuckerberg,*" *supra*, at 6.) Though like many a conspirator, he seeks to exculpate himself and his company and cast blame elsewhere.

While those admissions make coercion more plausible in terms of the recipient's reasonable perceptions, *NRA of Am. v. Vullo*, 602 U.S. 175, 193 (2024), other admissions confirm that common law accessory is likely a closer fit. (Pet. 14-17, 35-36.) Coercion is the overcoming of will, and duress is whether, under the totality of the circumstances, a reasonable person would perform or acquiesce to a direct or implied threat. Here, Meta had other options but decided to comply with the government to censor opponents CHD, its chairman and it subscribers.

CONCLUSION

This Court should grant the petition.

Dated: June 6, 2025

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