No. 23A243

In the Supreme Court of the United States

VIVEK H. MURTHY, ET AL.,

Applicants,

v.

MISSOURI, ET AL.,

Respondents.

To the Honorable Samuel Alito, Associate Justice of the United States Supreme Court and Circuit Justice for the Fifth Circuit

On Application for a Stay of the Injunction Issued by the United States District Court for the Western District of Louisiana

BRIEF OF *AMICUS CURIAE* STATE OF OHIO IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO STAY APPLICATION

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STATEMENT OF *AMICUS* INTEREST AND SUMMARY OF ARGUMENT

When Edward Levi accepted his commission to serve as Attorney General in the aftermath of Watergate, he accepted also the difficult task of restoring integrity to the Department of Justice. In remarks Levi delivered at his swearing-in ceremony, he observed that we "have lived in a time of change and corrosive skepticism and cynicism concerning the administration of justice." *From Edward Levi's remarks at his swearing-in ceremony as Attorney General, February 7, 1975*, in *Restoring Justice: The Speeches of Attorney General Edward H. Levi*, p. vii (Jack Fuller, ed., 2013). "Nothing," he observed, "can more weaken the quality of life or more imperil the realization of those goals we all hold dear than our failures to make clear by word and deed that our law is not an instrument of partisan purpose, and it is not an instrument to be used in ways which are careless of the higher values which are within us all." *Id.*

Levi's remarks echo the sentiments of another renowned Attorney General, Robert Jackson. Decades before Levi took office, Jackson warned that, "[w]ith the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone." Robert H. Jackson, *The Federal Prosecutor* at 4–5 (Apr. 1, 1940), https://perma.cc/Z8SC-T9BP. For the vindictive prosecutor, "it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him." *Id.* at 5. "It is in this realm in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects

some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies." *Id.* "It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself." *Id.*

This case demonstrates the importance of leaders like Levi and Jackson. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (Jackson, J., writing for the Court). Yet, as the facts of this case show, the federal government—including members of the Department of Justice—are wielding their influence and power to censor the speech of individuals who are "unpopular with the predominant or governing group" and who are "attached to the wrong political views." Jackson, *The Federal Prosecutor* at 5. Now the Department seeks a stay in hopes of aiding and abetting its program of censorship.

Alas, this case is not a one-off. In recent years, too many in the Department have caused that powerful entity to abandon its role as a neutral enforcer of law. The Department is, on a much-too-frequent basis, using the law as "an instrument of partisan purpose." *Levi remarks* in *Restoring Justice* at vii. As such, we once again "live[] in a time of … corrosive skepticism and cynicism concerning the administration of justice." *Id.*

Fixing the problem begins with acknowledging it. This application provides a good vehicle for doing so. The Department of Justice is petitioning this Court for equitable relief, a stay pending appeal. In "deciding whether to grant" such relief, this Court must consider "the public interest." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of applications for stays). Here, the public-interest factor proves dispositive. *Even if* the government ultimately shows that its conduct stopped short of violating the First Amendment (it will not), or that the respondents lacked standing to sue (it will not), there is no doubt that it suppressed speech by pressuring social-media companies into censoring viewpoints with which it disagreed. Put differently, the government sought to "prescribe what shall be orthodox in politics, … or other matters of opinion." *Barnette*, 319 U.S. at 642. The injunction bars certain government officials from doing so. That advances the public interest. A stay order would not. Indeed, a stay would significantly undermine the public interest, both by facilitating the suppression of speech and by entangling this Court in the government's speech-suppressing scheme—a scheme that is part of a broader pattern of governmental abuse. Whatever the ultimate merits, the public interest militates against this Court's intervening on a discretionary basis when doing so would aid the government in wielding its immense power as "an instrument of partisan purpose." *Levi remarks* in *Restoring Justice* at vii. The State of Ohio is filing this brief to say so.

ARGUMENT

"Before issuing a stay, it is ultimately necessary to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the

public at large." *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 580 (2017) (quotation and alterations omitted). Of most relevance here, in "deciding whether to grant a stay pending appeal or certiorari," this Court must "consider[]… the public interest." *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring in grant of applications for stays). Here, the public-interest factor alone proves dispositive. The record in this case establishes that the executive branch engaged in a concerted, coercive effort to censor disfavored views on major social-media platforms. In so doing, the government—and in particular, the Department of Justice—continued a troubling pattern of targeting those who hold disfavored views for mistreatment. The public interest requires this Court not to exercise its discretionary, equitable powers to facilitate such abuses.

A. The facts underlying this case reflect the federal government's tendency to wield its power to target people and speech specially disfavored by those in power.

1. The record in this case establishes that the federal government—in particular, the White House, the Surgeon General, the CDC, and the FBI (a component of the Justice Department)—suppressed disfavored speech relating to COVID-19. They did so by "coercing and significantly encouraging social-media platforms to censor disfavored speech." *Missouri v. Biden*, Pet.App.206a (5th Cir. Sept. 8, 2023) (quotation and alterations omitted).

Consider first the White House's documented role in this endeavor. The White House identified particular social-media posts and accounts for platforms to remove. Pet.App.182a. For example, emails from a "White House official told a platform to take a post down 'ASAP,'" instructed the platform "to 'keep an eye out for tweets that

fall in this same [] genre' so that they could be removed, too," and "told a platform to 'remove [an] account immediately.'" Pet.App.182a (alterations in original).

"But, the White House officials did not only flag content. Later that year, they started monitoring the platforms' moderation activities, too." *Id.* In the officials' eyes, the monitoring revealed too little censorship of disfavored views. So they demanded more. *Id.* A "White House official demanded more details and data on Facebook's internal policies at least twelve times, including to ask what was being done to curtail 'dubious' or 'sensational' content, what 'interventions' were being taken, what 'measurable impact' the platforms' moderation policies had, 'how much content [was] being demoted," and what 'misinformation' was not being downgraded." *Id.* (alteration in original). "Always, the officials asked for more data and stronger 'intervention[s].'" Pet.App.183a (alteration in original). And the White House pressured the platforms for permanent policy changes to reflect the government's goals. Pet.App.184a. The platforms capitulated to these demands as well. *Id.*

When platforms fell short of the White House's goals, an official would contact them with concerns from "the highest (and I mean highest) levels" of the White House and ask for a "road map to improvement" showing "a deeper dive on [misinformation] reduction." Pet.App.186a (quotation omitted, alterations in original). Once, after a platform responded to criticism by stating that it "clearly still ha[d] work to do," an official "responded that 'removing bad information' is 'one of the easy, low-bar things you guys [can] do to make people like me think you're taking action.'" *Id.* (second alteration in original). President Biden later announced that the platforms were

"'killing people' by not acting on misinformation." Pet.App.187a. His office followed up by announcing that they were "reviewing the legal liability of platforms" because "they should be held accountable." *Id.* (quotation omitted).

Emails from "the Surgeon General asked the platforms to take part in an 'all-of-society' approach to COVID by implementing stronger misinformation 'monitoring' programs, redesigning their algorithms to 'avoid amplifying misinformation,' [and] targeting 'repeat offenders' …." Pet.App.184a. Facebook responded by promising the Surgeon General to "adjust policies on what we are removing with respect to misinformation," according to officials' "specific recommendations for improvement." Pet.App.188a.

Platforms' emails referencing the CDC are similarly revealing. "CDC officials authoritatively told the platforms what was (and was not) misinformation." Pet.App.189a. Those designations "directly controlled the platforms' decision-making process for the removal of content." Pet.App.190a. CDC officials also "asked for, or at least encouraged, harmonious changes to the platforms' moderation policies." Pet.App.189a. "One platform noted that … it would change information on its website to comply with the officials' views. In that same email, the platform said it was expanding its 'misinfo policies' and it was 'able to make this change based on the conversation we had last week with the CDC.'" Pet.App.189a–190a (alterations in original). On some occasions, the CDC "outright directed the platforms to take certain actions." Pet.App.190a. In one email, a platform noted "'several updates to our COVID-19 Misinformation and Harm policy based on your inputs.'" *Id.*

Finally, the FBI. "In the build up to [the 2022 midterm] elections," the FBI "set up 'command' posts that would flag concerning content and … target[] domestically sourced 'disinformation.'" Pet.App.191a. "Apparently, the FBI's flagging operations across-the-board led to posts being taken down 50% of the time." *Id.*

Ultimately, the "platforms responded with total compliance." Pet.App.187a. They "capitulated to the officials' allegations"; they "changed their internal policies" to appease federal officials; they "began taking down content and deplatforming users they had not previously targeted"; and they "continued to amplify or assist the officials' activities.'" Pet.App.187a–188a.

2. All that is bad enough on its own. It is worse still because it reflects a troubling pattern. The government, with increasing openness, is wielding its immense authority as "an instrument of partisan purpose." *Levi's remarks* in *Restoring Justice* at vii. A few high-profile examples drive home the point.

The first example concerns the Department's two-tiered approach to constitutional litigation. In 2021, Texas passed Senate Bill 8, which made anyone who performed an abortion, or who aided and abetted the performance of an abortion, liable in tort. Attorney General Garland concluded that this violated the then-recognized right to abortion. So he had the Department sue Texas in hopes of winning an injunction. Compl., *United States of America v. Texas*, No. 1:21-cv-796 (W.D. Tex. Sept. 9, 2021). Fast forward two years. The Governor of New Mexico issued an Executive Order forbidding anyone in the Albuquerque area from exercising the Second Amendment right to carry firearms. *See* N.M. Exec. Order 2023-130; Public Health Order,

New Mexico Department of Health (September 8, 2023), https://perma.cc/99J3-FQG9. A more blatant constitutional violation is impossible to imagine. Yet as of this filing, the Attorney General has yet to file suit. Indeed, it does not appear that the Department of Justice has even commented on this egregious violation of citizens' Second Amendment rights.

The disparity is not hard to understand: the Department of Justice supports abortion rights but opposes gun rights. *Compare* Attorney General Merrick B. Garland Statement on Supreme Court Ruling on *Dobbs v. Jackson Women's Health Organization*, Department of Justice (June 24, 2022), https://perma.cc/5PLC-UM2R, *with* Justice Department Statement on Supreme Court Ruling on *New York State Rifle & Pistol Association Inc. v. Bruen*, Department of Justice (June 24, 2022), https://perma.cc/4KJM-3LGJ. Accordingly, it will use its powers to vigorously protect abortion access, while at the same time doing nothing to stop ideological counterparts from openly and proudly violating citizens' enumerated rights.

Now turn to the Department's partisan wielding of prosecutorial authority. Not long ago, it conducted an early-morning raid on the home of Mark Houck, a pro-life activist. The FBI raided the home at gunpoint, terrifying Houck's seven young children. *See* 169 Cong. Rec. S1331, 1332 (Apr. 25, 2023) (statement of Sen. Grassley); Letter from Sen. Josh Hawley to Attorney General Merrick Garland (Sept. 26, 2022), https://perma.cc/3JZH-5J9U. This overwhelming display of force stood in stark contrast to the rather-underwhelming charges against Houck: two counts of blocking an entrance to an abortion clinic in violation of the Freedom of Access to

Clinic Entrances Act. *See United States v. Houck*, 2023 U.S. Dist. LEXIS 5377, *1 (W.D. Pa. Jan. 11, 2023). A jury acquitted Houck. But the raid no doubt sent its intended message: those who vigorously exercise their First Amendment right to speak against abortion risk incurring the federal government's wrath.

Critically for present purposes, the same Act under which the Department charged Houck forbids using "force or threat of force" to "injure[], intimidate[] or interfere[] with … any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship." 18 U.S.C. §248(a)(2). Yet the Department of Justice, as far as Ohio can tell, has not prosecuted a single individual in recent years—let alone raided a suspect's home at gunpoint—for violating this provision by disrupting church services in support of abortion access. Not for want of opportunity. In response to (and in anticipation of) this Court's decision in *Dobbs*, protestors disrupted Catholic masses across the country. *See, e.g.*, Gregory Yee, *Protesters in "Handmaid's Tale" outfits disrupt Mass at downtown L.A. cathedral*, Los Angeles Times (May 9, 2022), https://perma.cc/DAC3-5BUP; Danae King, *Respect Life Mass disrupted by protesters*, Columbus Dispatch (Jan 22, 2021), https://perma.cc/25UX-G76S; Joe Bukuras, *Pro-Abortion Protesters Disrupted Mass at Catholic Church in Chicago*, National Catholic Register (July 8, 2022), https://perma.cc/Y5DF-VMBH.

The Department has been equally reluctant to bring charges against those who perpetrate violence against crisis-pregnancy centers, pro-life institutions that help unexpectedly pregnant women find the resources they need during and after

pregnancy. These centers have seen a rash of violence in the aftermath of *Dobbs*—violence rising to the level of firebombing. In March of this year, Attorney General Garland testified that the Department failed to apprehend and prosecute these terrorists because they operated "at night" and "in secret," preventing the FBI from solving and charging these crimes. *See* Oversight of the Department of Justice at 2:04:46–2:05:00 (March 1, 2023), https://www.judiciary.senate.gov/committee-activity/hearings/02/22/2023/oversight-of-the-department-of-justice. But the Department of Justice itself lists over two dozen crimes against abortion clinics that it successfully investigated and prosecuted, some of which were nighttime attacks similar to those against crisis-pregnancy centers. *Recent Cases on Violence Against Reproductive Health Care Providers*, Department of Justice (May 30, 2023), https://perma.cc/2C5H-CRDJ. Accepting Attorney General Garland's explanation requires "'exhibit[ing] a naiveté from which ordinary citizens are free.'" *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)).

Again, the disparate treatment is not hard to understand. Because regular church attendees and those who volunteer at crisis-pregnancy centers are disproportionately likely to hold views the Department abhors, their religious services and property are simply not a priority.

Another example shows the inequitable wielding of prosecutorial power at sentencing. At the beginning of last year, the Department filed a sentencing memorandum requesting a below-guidelines sentence for Montez Lee, who pleaded guilty to

burning down a building. His acts caused the death of an innocent man trapped inside. *Rochester Man Sentenced to 10 Years in Prison for Arson of Minneapolis Pawn Shop that Resulted in the Death of a Man*, U.S. Attorney's Office, District of Minnesota (Jan. 14, 2022), https://perma.cc/XAT5-CQQV. In the eyes of the Department, the "foremost issue" justifying the variance was the fact that Lee committed his arson while rioting in response to the death of George Floyd. The memo quoted Dr. Martin Luther King Jr. for the proposition that "a riot is the language of the unheard," apparently to justify Lee's actions. Sentencing Memorandum, R.67, *United States of America v. Lee*, No. 20-168 at 2, 7–8 (D. Minn. Nov. 4, 2021). With this, the Department again sent a message that no ordinary citizen would misunderstand: violence carried out in service of causes the Department supports will be punished less harshly.

Admittedly, the government's targeting citizens for "mistreatment based on their political views" is not new. *See In re U.S.*, 817 F.3d 953, 955 (6th Cir. 2016) (Kethledge, J., writing for the Court). Beginning in 2010, for example, "the IRS used political criteria to round up applications for tax-exempt status filed by so-called tea-party groups"; it "took four times as long to process tea-party applications as other applications"; and it "served tea-party applicants with crushing demands for what the" Treasury Department's own "Inspector General called 'unnecessary information.'" *Id.* But things appear to have become significantly worse. And the current administration's "'all-of-society' approach" to censoring heterodox thought

about COVID-19, Pet.App.184a, at least *appears* to be unique in its breadth and aggressiveness.

B. The federal government's abusive conduct disqualifies it from obtaining equitable relief.

As the Fifth Circuit's opinion illustrates, the record in this case establishes beyond responsible debate that the applicants wielded their immense power to shut down speakers who dissented from the government's views regarding COVID-19. Regardless of whether the government might find some argument for excusing its conduct as a *legal* matter, its actions contravened the brightest "fixed star in our constitutional constellation": the government attempted to "prescribe what shall be orthodox" on a matter of significant public concern, and to silence dissenting views. *Barnette*, 319 U.S. at 642. Its doing so did not, and will not, serve the public interest. In a society dedicated to free speech, courts must assume that more speech, not less, promotes the public interest. *Cf. Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

Accordingly, a stay would significantly contravene the public interest. For one thing, it would empower the government to resume censoring—or, at minimum, encouraging the censoring—of speech on matters of immense public import. Perhaps more significantly, it would send a damaging message. As the discussion above shows, the federal government now regularly uses its powers, prosecutorial and otherwise, to target unpopular views and groups for disfavored treatment. The injunction below prevents the government—more accurately, it prevents a select number of identified offices—from doing so in one narrow context: certain identified actors must

not pressure social-media companies to censor "*protected* free speech" by individuals whose views the government rejects. Pet.App.248a (emphasis added). An order staying the injunction below, regardless of its justifications, would be understood by the public as affirmation of the government's conduct. It would signal that "our law is … an instrument of partisan purpose," *Levi's remarks* in *Restoring Justice* at vii, which will be wielded by the executive branch to punish citizens who are "unpopular with the predominant or governing group" or "attached to the wrong political views." Jackson, *The Federal Prosecutor* at 5. It would inflame citizens' "skepticism and cynicism concerning the administration of justice." *Levi's remarks* in *Restoring Justice* at vii. And it would "publish forever the discouraging truth," *King v. Burwell*, 576 U.S. 473, 518 (2015) (Scalia, J., dissenting), that the Supreme Court of the United States intervened on a discretionary basis to assist the executive branch's targeting of disfavored speech and speakers. If it is true that "[n]othing … more imperil[s] the realization of those goals we all hold dear than our failures to make clear by word and deed that our law is not an instrument of partisan purpose," *Levi's remarks* in *Restoring Justice* at vii, then the public interest defeats the stay application in this case.

CONCLUSION

The Court should deny the stay application.

Respectfully submitted,

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