No. 23A243

In the Supreme Court of the United States

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

Applicants,

v.

MISSOURI, ET AL.

ON EMERGENCY APPLICATION FOR A STAY OF PRELIMINARY INJUNCTION ISSUED ON JULY 4, 2023 BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, CASE NO. 3:22-CV-01213

KENNEDY PLAINTIFFS' AMICUS BRIEF IN OPPOSITION TO STAY

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INTRODUCTION[1]

Litigants exaggerate. Nonetheless, it may actually be true that the fate of the freedom of speech in America depends on what the Court does with this case.

Social media is "the modern public square."[2] But today's public square has gatekeepers—"platform gatekeepers"[3]—a handful of behemoth private companies with unprecedented control over the content of public discourse.[4] Companies like Facebook and Google decide every day for hundreds of millions of Americans what they are allowed to say, see, and hear. Because these are private companies, the Constitution ordinarily would not apply to their "content moderation" decisions. But as we now know, and as the documentary record in this case demonstrates, the Federal Government has for several years been waging a systematic, clandestine, and

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[1] No counsel for any party authored this brief in whole or in part. No counsel for any party, nor any party, made any monetary contribution intended to fund the preparation or submission of this brief. Nor were any such contributions made by any person other than amici or their counsel.

[2] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (referring to "[s]ocial media" as the "modern public square"). "These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" *Id*. (quoting *Reno v. Am. Civil Liberties Union,* 521 U.S. 844, 870 (1997)).

[3] UNITED STATES HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON ANTITRUST, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 57 (2020).

[4] *See Biden v. Knight First Amendment Institute at Columbia Univ*., 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring) ("Today's digital platforms provide avenues for historically unprecedented amounts of speech. . . Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties."). The Internet's "platform gatekeepers" exercise control over speech content both directly and indirectly. They do so directly though content-based blocking of posts and videos on their social media platforms and by de-platforming (terminating the accounts of) individuals who are said to violate their terms of service. They do so indirectly through content-based "shadow-banning," "de-boosting," "demoting" or otherwise restricting (often without notifying the speaker) the reach of disfavored speech.

highly effective campaign to get these companies to do what the government itself cannot: censor protected speech on the basis of its content and viewpoint.

Thus has arisen an uncharted First Amendment constellation: on the one hand, the "vast democratic forums of the Internet,"[5] the likes of which America has never seen; on the other, a concerted governmental campaign to induce censorship in those forums, threatening to turn them into "the most massive system of censorship in the nation's history."[6] The burden of deciding what to do with this new First Amendment constellation rests on the shoulders of this Court.

This amicus brief is respectfully submitted by the Plaintiffs in *Kennedy v. Biden*, a case consolidated in the district court below with the instant case.[7] This brief is submitted with the hope of assisting the Court by foregrounding a single point that may otherwise be overlooked: the critical importance to this case of *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and, under *Skinner*, of the famous Section 230 of the Communications Decency Act of 1996.

In *Skinner*, as explained more fully below, the Court ruled that certain breath and urine tests conducted by private railways on their own employees constituted

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[5] *Packingham v. North Carolina*, 137 S. Ct. at 1735 (quoting *Reno*, 521 U.S. at 868).
[6] Philip Hamburger, *Is Social-Media Censorship a Crime?*, WALL ST. J., Dec. 13, 2022, https://www.wsj.com/articles/is-social-media-censorship-a-crime-section-241-us-code-government-private-conspiracy-civil-rights-speech-11670934266. Mr. Hamburger is the Maurice & Hilda Friedman Professor of Law at Columbia Law School.
[7] *See Missouri v. Biden*, No. 3:22-CV-01213, 2023 U.S. Dist. LEXIS 127620 (W.D. La. July 24, 2023) (ordering consolidation of *Missouri v. Biden* with *Kennedy v. Biden*). The *Kennedy* Plaintiffs reserve the right to move to intervene in these proceedings should the Court grant *certiorari*.

state action. *Skinner*, 489 U.S. at 615. The reason was twofold. Newly enacted federal regulations, which ***did not require*** those tests, ***immunized*** the railway companies from state law liability if they conducted them. *Id*. At the same time, the government had "made plain" its "***strong preference***" that the tests be conducted. *Id*. (emphasis added). The government could not, held the *Skinner* Court, evade constitutional scrutiny by inducing private companies, through a combination of immunity plus "encouragement," to conduct searches the government could not. *Id*. at 615–16.

The very same one-two punch exists here. First, Section 230 expressly ***immunizes*** social media companies from state law liability if they censor "constitutionally protected" speech the companies deem "objectionable." 47 U.S.C. § 230(c)(2)(A). Second, the Federal Government is making plain to social media companies its ***very strong preference*** that certain government-identified speech and speakers be suppressed.

But this case includes yet a third element that makes a finding of state action even more imperative. Here, as the district court found, as the Fifth Circuit affirmed, and as the documentary record establishes, the Federal Government has applied powerful, relentless ***pressure*** on social media companies to censor government-disfavored speech. Pages and pages of briefing in this case will argue about whether this pressure amounted to "coercion," and surely much of it did. But regardless, under *Skinner*, the combination of ***immunity, strong preference, and pressure*** must dictate a finding of state action—or else every right in the Bill of Rights is in danger. *See* Jed Rubenfeld, *Are Facebook and Google State Actors?*, LAWFARE, Nov. 4. 2019,

https://www.lawfaremedia.org/article/are-facebook-and-google-state-actors ("When governmental pressure is *combined* with a statutory provision like Section 230, the result *must* be state action. *Immunity plus pressure* has to trigger the Constitution's restraints.") (original emphasis).

And *Skinner* in turn rests on a more fundamental constitutional principle, also directly applicable to this case. As this Court held in *Norwood v. Harrison*, 413 U.S. 455 (1973), it is "axiomatic that [the] state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Id.* at 465. For several years now, the federal government's social media censorship campaign has been violating this principle with abandon.

INTERESTS OF AMICI

This amicus brief is respectfully submitted by the named Plaintiffs in *Kennedy et al. v. Biden et al.*, No. 3:23-cv-00381 (W.D. La.), a related case pending in the court below, which has been consolidated for all purposes with the instant case. (ECF No. 316; *Missouri v. Biden*, No. 3:22-CV-01213, 2023 U.S. Dist. LEXIS 127620 (W.D. La. July 24, 2023) (ordering consolidation of *Missouri v. Biden* with *Kennedy v. Biden*). The Plaintiffs in *Kennedy v. Biden* (the "*Kennedy* Plaintiffs") have sued the same Defendants as in *Missouri v. Biden* on the basis of substantially identical facts. The difference is that plaintiffs in *Kennedy* do not sue as *speakers* alleging that their speech has been censored online (although in fact it has); they sue as and on behalf of social media *users* (viewers and listeners) nationwide, whose right to receive information and ideas is being violated by the government's social media censorship

campaign. Because (as consolidated parties below) the *Kennedy* Plaintiffs' legal rights—and those of the social media users they represent—may well in effect be adjudicated in this case, they have a direct interest in the outcome of this application for a stay.

Moreover, one of the *Kennedy* Plaintiffs is Mr. Robert F. Kennedy, Jr., who as much as anyone in the country has been singled out and targeted by the government's censorship campaign. Mr. Kennedy is also a candidate for United States President, and his public speeches are even now being censored by the same social media giants that the Federal Government has been working with, and pressuring, to bring about such censorship. He therefore has a profound, personal interest in halting the government's censorship-by-proxy efforts. Another of the *Kennedy* Plaintiffs is Children's Health Defense (CHD), a nonprofit organization with over 70,000 members across the country; CHD's members are avid consumers of online health news—particularly COVID-related news, which the Government has repeatedly targeted—both to make their own personal health decisions and to inform their political activity. Under *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 757 (1976), CHD, a nationwide organization, has the strongest possible interest in, and standing to seek, a nationwide injunction of the Federal Government's censorship campaign.

SUMMARY OF ARGUMENT

Before the Court is an application to stay a preliminary injunction issued by the United States District Court for the Western District of Louisiana, as modified by

the United States Court of Appeals for the Fifth Circuit. *See Missouri v. Biden*, No. 3:22-CV-01213, 2023 U.S. Dist. LEXIS 114585 (W.D. La. July 4, 2023), *modified*, No. 23-30445, __ 4th __, 2023 U.S. App. LEXIS 23965 (5th Cir. Sept. 8, 2023). Because the test for granting such a stay includes a determination of whether "a fair prospect" exists that the Court will reverse the decision below, *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (citation omitted), the Court will necessarily consider the merits.

Skinner dictates denial of a stay for two distinct reasons. First, under *Skinner*, the government's social media censorship campaign *crosses the state action threshold*—i.e., it turns social media censorship into state action, and as such into a violation of the First Amendment. Second, *Skinner* also supports the conclusion that even if—or to the extent that—the government's social media censorship efforts *do not cross the state action line,* they are *still* unconstitutional.

ARGUMENT

I. *Under* Skinner*, the government's censorship campaign turns social media censorship into state action*.

In *Skinner*, the Court ruled on the constitutionality under the Fourth Amendment of newly enacted regulations dealing with urine and breath testing of railway employees. *See Skinner*, 489 U.S. at 614–15. One section of the regulations ***mandated*** certain tests, and all parties agreed that the mandatory tests were subject to constitutional scrutiny. *See id*. at 614. But Subpart D of the regulations was ***permissive***. *Id*. Subpart D did not require the railway companies to conduct the tests

laid out in that section of the regulations; however, it immunized from state law liability any railway companies that did perform those tests. *Id.*

The government argued in *Skinner* that the Subpart D tests were not subject to Fourth Amendment scrutiny because there was no coercion, with the ultimate decision about whether to perform the tests left to the railway companies, making the tests private action, not state action (*see id.* at 614–15)—essentially the same argument made by the government here, about social media companies' censorship decisions. This Court rejected that argument.

"The fact that the Government has not compelled a private party to perform a search," the Court stated, "does not, by itself, establish that the search is a private one. Here, specific features of the regulations combine to convince us that the Government did more than adopt a passive position toward the underlying private conduct." *Id.* at 615. Specifically, the government: (1) had "removed all legal barriers to the testing;" and (2) had "made plain … its strong preference for [the] testing." *Id.* In addition, there were elements of government "participation" as well, including the fact that the government had laid out the regulations it wanted to see performed and had also expressed a "desire" "to share in the fruits" of such testing. *Id.* "These are clear indices of the Government's encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment." *Id.* at 615–16.

All three features are equally present in the instant case. First, Section 230(c) of the Communications Decency Act "remove[s] all legal barriers" in exactly the same way the regulations in *Skinner* did. Subpart D of the *Skinner* regulations immunized

railroads from state law liability if they conducted the designated tests. *See Skinner*, 489 U.S. at 615. Section 230(c) immunizes social media companies from state law liability if they censor "constitutionally protected" speech they deem objectionable. 47 U.S.C. § 230(c)(2)(A).

Second, the Federal Government has repeatedly "made plain . . . its strong preference" for the censorship it seeks. This *Skinner* factor is not open to serious dispute given the torrent of censorship demands and requests documented below.

Finally, the governmental "participation" here exceeds that in *Skinner*. As detailed comprehensively by the district court, the Government has worked in close and secret coordination with all the major social media companies, communicating frequently, meeting regularly, identifying particular speakers and viewpoints it wanted suppressed. At the same time, the Government made clear its "desire" to use social media censorship to serve its own ends, thus "sharing in the fruits." For example, governmental agents have sought to induce online censorship of constitutionally protected speech: to insulate Administration policies from criticism (for example, by suppressing accurate and legitimate speech questioning the COVID vaccines' safety); to suppress accurate information that could lead to governmentally-disfavored attitudes (such as "vaccine hesitancy"); and apparently to bury potentially damaging information about the President's son. Thus the governmental "participation" here, as well as its expression of "strong preference," is far greater, more direct, and more systematic than anything presented in *Skinner*.

Moreover, as stated above, an additional element present here—governmental ***pressure***—makes the case for finding of state action under *Skinner* even more powerful. The combination of statutory immunity, encouragement, participation, and pressure must dictate a finding of state action, for otherwise the government could violate constitutional rights with impunity. Suppose the Federal Government: (1) passed a statute guaranteeing legal immunity to private companies that hack into U.S. citizens' email accounts (without probable cause or a warrant); (2) made clear its strong preference that such hacking take place; (3) then communicated closely and secretly with those companies, providing them with information about which people the government believed to be most dangerous, whose email the Administration most wanted to intercept; and finally (4) pressured these companies to perform the email seizures in question, hauling their CEOs before congressional committees, threatening adverse regulatory consequences, and suggesting intense White House disfavor if they didn't do more. Surely this combination of facts would trigger a finding of state action and a violation of the Fourth Amendment. The same result should obtain here.

II. **Skinner** *also supports the conclusion that even to the extent the Government's censorship campaign does not satisfy one or more of the familiar state action tests, it is still unconstitutional.*

Much of the argumentation presented to this Court will focus on whether the innumerable communications (detailed by the court below) between federal actors and social media companies satisfy one or more of the familiar state action tests—coercion, joint action, entwinement, nexus, and so on. While many of those

communications undoubtedly satisfy one or more of those tests (and this Court can uphold the injunction on that ground alone), *Skinner* also supports the conclusion that even if—or to the extent that—those communications do not satisfy any of the familiar state action tests, they are still unconstitutional.

The reason is that *Skinner* rests on and exemplifies the "axiomatic" principle set forth in *Norwood*—that government "may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish," 413 U.S. at 465—and *Norwood* was ***not*** a state action case.

In *Norwood*, the Court enjoined Mississippi's policy of providing free textbooks to whites-only private schools. *See Norwood*, 413 U.S. at 466. The phrase "state action" does not appear in the case. No claim was made (or could have been made), for example, that Mississippi was *coercing* private schools to discriminate; there was no requirement that any school discriminate. Similarly, no claim was or could have been made that the textbook-provision program turned the private schools into "*joint actors*" with the government. Providing textbooks to a school is not nearly enough entwinement to meet that test. *See, e.g.*, *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (holding that a private school's receipt of over 90% of its funding from government did not make private school a state actor).

Thus *Norwood* was not tethered to a state action finding. Its axiomatic principle uses language markedly different from the language of state action doctrine ("induce, encourage, or promote" as opposed to "coerce," "conspire," "nexus,"

"entwinement," "public function," and so on), because *Norwood* is addressed to different circumstances and to a different category of cases.

Where plaintiffs *sue a private party* and allege that its conduct violated the Constitution, a court must decide if it is dealing with "one of the exceptional cases" in which the state action doctrine is satisfied. *See, e.g.*, *O'Handley v. Weber*, 62 F.4th 1145, 1156 (9th. Cir. 2023) ("Determining whether this is one of the exceptional cases in which a private entity will be treated as a state actor for constitutional purposes requires us to grapple with the state action doctrine."). Such a determination typically turns on satisfaction of one or more of the familiar state action tests, such as coercion, joint action, nexus, or public function. *See id*. at 1157-58.

By contrast, *Norwood*'s axiomatic principle applies to cases where, as here (and as in *Skinner*), suit is brought *against governmental defendants*, especially where government agents are deliberately evading constitutional rights by asking private parties to do a job that the Constitution prohibits the government from doing directly. In such cases, familiar state action tests like coercion and conspiracy do not set the limits of what the government is barred from doing. Rather, under the express language of *Norwood*, plaintiffs need only show that the government is deliberately seeking to "*induce, encourage or promote*" private parties "to accomplish what it is constitutionally forbidden to accomplish." 413 U.S. at 465 (emphasis added).

Again, without this principle, all constitutional rights would be in jeopardy. If, for example, the police know that a vehicle search they want to conduct would violate the Fourth Amendment, they can't evade the Constitution through the simple

expedient of asking a bystander to do the search for them. As the Ninth Circuit put it in a case involving airport searches, "Constitutional limitations on governmental action would be severely undercut if the government were allowed to actively encourage conduct by 'private' persons or entities that is prohibited to the government itself." *United States v. Davis*, 482 F.2d 893, 904 (9th Cir. 1973).

That is exactly the vice of the Federal Government's social media censorship campaign. That campaign "actively encourage[s] conduct by 'private' persons or entities that is prohibited to the government itself." *Id.* When in a given case the evidence before the Court demonstrates a deliberate governmental effort to circumvent the Constitution by "induc[ing], encourag[ing], or promot[ing] private persons to accomplish what [the state] is constitutionally forbidden to accomplish," *Norwood*, 489 U.S. at 465, no further satisfaction of any state action tests need be proved. Indeed, against a background of government-enacted immunity for private companies if they engage in the conduct the government asks them to perform, nothing more need be shown at all. In such a case, an injunction must issue.

Conclusion

For the foregoing reasons, the *Kennedy* Plaintiffs respectfully ask the Court to deny the stay and uphold the preliminary injunction issued below.

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Respectfully submitted,

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