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September 25, 2023

Scott S. Harris
Clerk of the U.S. Supreme Court
One First Street, N.E.
Washington, D.C. 20543
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Re: *Murthy, et al.* v. *Missouri, et al.*, No. 23A243 – Panel Rehearing Granted by the U.S. Court of Appeals for the Fifth Circuit

Dear Mr. Harris:

We write to advise the Court of a significant procedural development in the lower court in the above-captioned case.

On September 20, 2023, the Plaintiffs-Respondents in this case, Louisiana, Missouri, et al., notified the Court in their Response to the Government's Application for Stay of Injunction that they "plan[ned] to file a petition for panel rehearing in the Fifth Circuit on September 22, 2023." No. 23A243, Stay Opp. 40.

On September 22, 2023, Respondents filed their Petition for Panel Rehearing in the U.S. Court of Appeals for the Fifth Circuit, asking the court to maintain the district court's preliminary injunction against the Cybersecurity and Infrastructure Security Agency and the State Department, and to maintain the prohibition against Defendants collaborating with the so-called "Election Integrity Partnership" and "Virality Project" to censor protected free speech. *See* Petition for Panel Rehearing, No. 23-30445 (5th Cir. filed Sept. 22, 2023) (attached). On September 25, 2023, the Fifth Circuit granted Plaintiffs' Petition for Panel Rehearing in a one-line order. *See* Order Granting Petition for Panel Rehearing, No. 23-30445 (5th Cir. Sept. 25, 2023) (attached).

Respectfully submitted,

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No. 23-30445

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

State of Missouri; State of Louisiana; Aaron Kheriaty; Martin Kulldorff; Jim Hoft; Jayanta Bhattacharya; Jill Hines,

Plaintiffs-Appellees,

v.

Joseph R. Biden, Jr.; Vivek H. Murthy; Xavier Becerra; Department of Health & Human Services; Anthony Fauci; Et al.,

Defendants-Appellants.

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

PLAINTIFFS-APPELLEES' PETITION FOR PANEL REHEARING

CERTIFICATE OF INTERESTED PERSONS

No. 23-30445 – *Missouri, et al., v. Biden, et al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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.

Plaintiffs Dr. Jayanta Bhattacharya, Dr. Martin Kulldorff, Dr. Aaron Kheriaty, Ms. Jill Hines, Mr. Jim Hoft

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PETITION FOR PANEL REHEARING

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellees Louisiana, Missouri, et al. ("Plaintiffs") respectfully request that this Court grant panel rehearing; reinstate the injunction, as modified by this Court, to apply to the CISA Defendants and the State Department Defendants; and reinstate the portion of the injunction that prevents federal officials from collaborating with the Election Integrity Partnership and Virality Project (collectively, "EIP") to censor protected free speech, ROA.26613 (Doc. 294, at 4, ¶ 5). Plaintiffs accept and agree with the vast majority of the Court's opinion and analysis, but they respectfully submit that this Court overlooked or misapprehended material points of fact relevant to the injunction against the Cybersecurity and Infrastructure Security Agency ("CISA"), the State Department's Global Engagement Center ("GEC"), and the Election Integrity Partnership/Virality Project ("EIP"). *See* Fed. R. App. P. 40(a)(2). CISA, in particular, serves as the "nerve center" of federal censorship efforts, and its actions in originating, launching, coordinating, and participating in the EIP constitute particularly egregious violations of the First Amendment.

ARGUMENT

Though it upheld the district court's injunction, as modified, against the White House, Surgeon General, FBI, and CDC Defendants, the Court vacated the injunction as to the CISA and State Department Defendants. As to CISA, the Court

held that "there was not, at this stage, sufficient evidence to find that it was likely that [CISA] coerced or significantly encouraged the platforms." Slip Opinion ("Slip Op.," attached), at 59; *see also id.* at 9, 59-60.

As to the "Election Integrity Partnership" (including the COVID-related moniker for the same group, the "Virality Project"), the Court stated that the EIP is a "private organization[]." *Id.* at 14. It stated that the EIP consists of "private, third-party actors that are not parties to this case and may be entitled to their own First Amendment protections." *Id.* at 69. It held that the provision of the district court's injunction preventing federal officials from coordinating with the EIP "exceeds the scope of the parties' presentation," and that "Plaintiffs have not shown that the inclusion of these third parties is necessary to remedy their injury." *Id.*

As to the State Department Defendants, the Court held that "[t]here is no indication that State Department officials flagged specific content for censorship, suggested policy changes to the platforms, or engaged in any similar actions that would reasonably bring their conduct within the scope of the First Amendment's prohibitions," and that "those officials were not involved to any meaningful extent with the platforms' moderation decisions or standards." *Id.* at 59-60.

I. The Court's Analysis Overlooks Significant Evidence Demonstrating that CISA Violated the First Amendment in Cooperation With the FBI.

First, the Court's analysis overlooks significant evidence that CISA closely cooperated with the FBI in conduct violating the First Amendment.

"Considering their close cooperation," the Court took "the White House and the Surgeon General's office together" in its analysis. Slip Op. 3. Yet the Court overlooked similar evidence of "close cooperation" between CISA and the FBI, both of which are agencies within the federal "law enforcement, investigatory, and domestic security" apparatus. *Id.* at 3, 55. CISA and the FBI participate in the same meetings with platforms and push platforms to censor speech on the same topics. The monthly "USG-Industry" meetings—in which the FBI and other agencies discuss censorship with seven major social-media platforms—are organized and hosted by CISA. *See* ROA.16634-16635 (Doc. 214-1, ¶¶ 861-866). CISA officials, according to the FBI's witness, "usually emcee[] the meeting" as the "primary facilitator[s]." ROA.16635 (Doc. 214-1, ¶ 863 (quoting Chan Dep. 25:15-18, 26:19-22)).

Through the USG-Industry meetings, CISA was directly involved in the FBI's campaign to induce platforms to adopt policies for censoring "hack-and-leak" materials, which was a determinative factor in the Court's conclusion that the FBI violated the First Amendment. Slip Op. 13, 56. The Court held that the FBI "significantly encouraged" censorship because "several platforms 'adjusted' their moderation policies to capture 'hack-and-leak' content after the FBI asked them to do so (and followed up on that request)." *Id.* at 56.

CISA was directly involved in the same meetings with platforms, along with the FBI, and CISA issued the same warnings to platforms about "hack-and-leak" operations. ROA.16,639 (Doc. 214-1, ¶¶ 883 ("hack and leak" was raised at "CISA-hosted USG-Industry meetings") (citing Chan Dep. 178:1-6, 180:24-25, 181:6-11)). As Elvis Chan testified, both Matt Masterson and Brian Scully of CISA raised the threat of hack-and-leak operations to the social-media platforms during the "USG-Industry" meetings that occurred quarterly, then monthly, then weekly leading up to the 2020 election. ROA.16643 (Doc. 214-1, ¶ 894 (quoting Chan Dep. 212:3-22)). CISA evidently coordinated with the FBI about raising such warnings, because the agendas for the CISA-organized "USG-Industry" meetings include plans to discuss "hack and leak" operations. *See* ROA.16690-16691 (Doc. 214-1, ¶¶ 1090-91); *see also, e.g.,* ROA.14476 (Scully Ex. 17, at 16) (agenda for USG-Industry meeting including, as a "Deep Dive Topic," a 40-minute discussion of "Hack/Leak and USG Attribution Speed/Process"); ROA.14460 (Scully Ex. 16, at 1) (email from Facebook to CISA stating that, in the USG-Industry meetings, "we specifically discussed … preparing for so-called 'hack and leak' operations").

These warnings and requests—which came from both CISA and the FBI, working together in the same meetings—provided the "impetus" for platforms to change their policies to censor "hacked materials." ROA.16640-16641 (Doc. 214-1, ¶¶ 884-887 (citing Chan Dep. 205:14-21)). Thus, CISA, just like the FBI,

significantly encouraged social-media censorship on this point, *see* Slip Op. 56—which led directly to the censorship of Plaintiff Jim Hoft, among many others. ROA.1210 (Doc. 10-5, ¶ 10) (describing the censorship of *The Gateway Pundit*'s post about Hunter Biden's laptop under Twitter's hacked-materials policy). These facts warrant the finding that CISA engaged in state action along with the FBI that injured Plaintiffs.

In addition, the Court held that the FBI's communications with platforms are problematic in part because they come from the "the lead law enforcement, investigatory, and *domestic security agency* for the executive branch." Slip Op. 55 (emphasis added). CISA is a major division of the U.S. Department of Homeland Security, which is also the "lead … domestic security agency for the executive branch." *Id.* CISA's status as a federal national-security agency is comparable to the FBI's status as a federal law-enforcement and domestic security agency. Moreover, through CISA's endless meetings with platforms and incessant switchboarding activity, CISA "refuses to take 'no' for an answer and pesters the recipient until it succumbs." Slip Op. 41 (quoting *Kennedy v. Warren*, 66 F.4th 1199, 1209 (9th Cir. 2023).

II. The Court Overlooked Significant Evidence of CISA's and the GEC's Entanglement in Content-Moderation Decisions Through the EIP.

The Court's analysis also overlooks evidence of CISA's and the GEC's extensive entanglement with platforms' decisionmaking through the EIP, which is a

multi-stakeholder censorship consortium including government, academic researchers, and the platforms themselves. This entanglement warrants a finding of state action on this ground as well. *See* Slip Op. 31; *see also id*. at 34.[1]

A. Enjoining federal officials' actions through the EIP does not "exceed the scope of the parties' presentation."

The Court held that the injunction against federal officials' participation in the EIP "exceeds the scope of the parties' presentation." Slip Op. 69. This statement overlooks the nature of Plaintiffs' presentation, of which challenging CISA's role in the EIP was a major focus. The Complaint includes 22 Paragraphs challenging the EIP's activities. ROA.25229–25232 (Doc. 268, at 120-123). CISA's joint activity with the EIP was discussed at length in CISA official Brian Scully's deposition, and Plaintiffs submitted hundreds of pages of the EIP's own public statements as well. *See, e.g.,* ROA.13659–13950, 13951–14182 (Scully Ex. 1; Scully Ex. 2). In support of their request for preliminary injunction, Plaintiffs filed over 300 paragraphs of

[1] Indeed, based on the evidence cited below, CISA readily satisfies all the formulations of the test for entanglement in private decision-making. Through its action with the EIP, CISA "influenced" private content-moderation decisions, Slip Op. 31 (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982)); CISA became "overly involved in" those decisions, *id.* at 30 (citing *Roberts v. Louisiana Downs, Inc.*, 742 F.2d 221 (5th Cir. 1984)); CISA "had some affirmative role, albeit one of encouragement short of compulsion," *id*. at 31 (quoting *Frazier v. Bd. of Trustees of Nw. Miss. Reg'l Med. Ctr.*, 765 F.2d 1278, 1286 (5th Cir. 1985)); and CISA was "heavily involved in one facet of the private actor's operations—its decision-making process regarding the challenged conduct." *Id.* at 32 n.11. All these constitute "significant involvement of the state in the particular challenged action." *Id.*

proposed factual findings about federal involvement in the EIP's activities, quoting from this evidence in detail. *See* ROA.16669–16685, 16703–16753 (Doc. 214-1, ¶¶ 991-1075, 1135-1365)). There is extensive evidence that the EIP specifically targets individual Plaintiffs' speech for censorship. *See, e.g.,* ROA.16709, 16717, 16720–16722 (Doc. 214-1, ¶¶ 1156, 1192-1194, 1207-1216) (EIP targeting Jim Hoft); ROA.16732–16733, 16742 (Doc. 214-1, ¶¶ 1266-1268, 1316-1319) (VP targeting Jill Hines). Plaintiffs specifically sought an injunction preventing federal officials from ongoing participation in the EIP. ROA.16486 (Doc. 214, at 68).

Based on this evidence, the district court made over 14 pages of factual findings and conclusions about Defendants' involvement in the EIP. ROA.26524–26529, 26534–26540, 26564–26567 (Doc. 293, at 70-75, 80-86, 110-113). Among other things, the district court found that "[d]uring the 2020 election cycle, the EIP flagged The Gateway Pundit in twenty-five incidents with over 200,000 retweets." ROA.26536 (Doc. 293, at 82). Plaintiff Jill Hines, too, "was flagged by the Virality Project to be a 'medical freedom influencer' who engages in the 'tactic' of 'organized outrage' because she created events or in-person gatherings to oppose mask and vaccine mandates in Louisiana." ROA.26539 (Doc. 293, at 85).

B. The EIP is not a "private organization" but a joint government-private consortium launched by CISA.

The Court stated that the EIP is a "private organization[]." Slip op. 14. This characterization overlooks extensive evidence showing pervasive federal

involvement in the EIP—including the fact that CISA launched the EIP and works in close cooperation with it. As the district court found, "CISA and the EIP were completely intertwined." ROA.26567 (Doc 293, at 113).

There is extensive evidence of pervasive entwinement between CISA and the EIP. CISA originated the idea of the EIP and was instrumental in launching it. ROA.26564–26565 (Doc. 293, at 110-111). "[T]he EIP was started when CISA interns came up with the idea; CISA connected the EIP with the CIS [Center for Internet Security], which is a CISA-funded non-profit that channeled reports of misinformation from state and local government officials to social-media companies." ROA.26565 (Doc. 293, at 111). "The EIP … held its first meeting with CISA to 'present the EIP concept' on July 9, 2020, and EIP was officially formed on July 26, 2020, 'in consultation with CISA.'" ROA.26566 (Doc. 293, at 112). "CISA had meetings with Stanford Internet Observatory officials (a part of the EIP), and both agreed to 'work together.'" ROA.26565 (Doc. 293, at 111).

CISA is directly involved in the EIP's censorship activities. "CISA directs state and local officials to CIS and connected the CIS with the EIP because they were working on the same mission and wanted to be sure they were all connected." ROA.26566 (Doc. 293, at 112). "CISA served as a mediating role between CIS and EIP to coordinate their efforts in reporting misinformation to social-media platforms, and there were direct email communications about reporting misinformation

between EIP and CISA." *Id.* "EIP identifies CISA as a 'partner in government.'" *Id.* "The Government was listed as one of EIP's Four Major Stakeholder Groups, which included CISA [and] the GEC." *Id.* "CISA connected the CIS with the EIP because the EIP was working on the same mission," *i.e.*, censorship of election-related speech, "and it wanted to make sure they were all connected." ROA.26525 (Doc. 293, at 71). "Therefore, CISA originated and set up collaborations between local government officials and CIS and between the EIP and CIS." *Id.* "There were also direct email communications between the EIP and CISA about reporting misinformation." ROA.26526 (Doc. 293, at 72).

The federal government funds the EIP's operations, ROA.26534 (Doc. 293, at 80); and CISA funds both (1) the Center for Internet Security ("CIS") that coordinates with the EIP in flagging misinformation, and (2) the organization ("EI-ISAC") through which state and local officials report ostensible "misinformation" to the EIP and CISA for flagging to platforms for censorship, ROA.26524, 26533 (Doc. 293, at 70, 79).

CISA's mass-flagging operations were closely integrated with the EIP's. CISA and the EIP "set up a 'switchboarding' operation, primarily consisting of college students, to allow immediate reporting to social-media platforms of alleged election disinformation." ROA.26566 (Doc. 293, at 112). CISA and EIP collaborated on the switchboarding operation: "CISA's tracking spreadsheet

contains at least eleven entries of switchboarding reports of misinformation that CISA received 'directly from EIP' and forwarded to social-media platforms…." ROA.26528 (Doc. 293, at 74). "The 'partners' were so successful with suppressing election disinformation, they later formed the Virality Project, to do the same thing with COVID-19 misinformation that the EIP was doing for election disinformation." ROA.26566–26567 (Doc. 293, at 112-13). CISA and the GEC also submitted disinformation reports to the EIP: "The government agencies that work with and submit alleged disinformation to the EIP are CISA [and] the State Department Global Engagement Center…." ROA.26534 (Doc. 293, at 80).

There is extensive overlap in leadership and personnel between CISA and the EIP. The EIP's key leaders also have formal roles in CISA, and the two organizations share censorship staff. The EIP's three leaders—*i.e.*, Alex Stamos, Renee DiResta, and Kate Starbird, ROA.26535 (Doc. 293, at 80)—"also have roles in CISA." ROA.26526 (Doc. 293, at 72). Further, CISA interns "were simultaneously serving as interns for CISA and working for the Stanford Internet Observatory, which was the[n] operating the EIP," ROA.26528 (Doc. 293, at 74); and those interns "were simultaneously engaged in reporting misinformation to social-media platforms on behalf of both CISA and the EIP," *id.*

The EIP extensively briefed CISA on its activities in both the 2020 and 2022 election cycles. ROA.26525–26526 (Doc. 293, at 71-72). As it was acting in

concert with CISA, the EIP "*successfully pushed social-media platforms to adopt more restrictive policies about election-related speech in 2020*." ROA.26534 (Doc. 293, at 80) (emphasis added).

Through the EIP, CISA and GEC officials targeted domestic speech. The EIP's leader Alex Stamos admits that the speech targeted "is all domestic …. the vast, vast majority … is domestic." ROA.26537 (Doc. 293, at 83). The EIP engages in mass surveillance of posts in real-time, reviewing hundreds of millions and tracking millions as potential "misinformation": "The tickets and URLs encompassed millions of social-media posts, with almost twenty-two million posts on Twitter alone." ROA.26536 (Doc. 293, at 82). This activity is ongoing: "The EIP … indicated it would continue its work in future elections." ROA.26537 (Doc. 293, at 83).

C. Through the EIP, CISA successfully pressured platforms to adopt more restrictive content-moderation policies.

The Court concluded that "[t]here is no plain evidence that content was actually moderated per CISA's requests or that any such moderation was done subject to non-independent standards." Slip Op. 60. This statement overlooks extensive, unrebutted evidence that, through the EIP, CISA successfully pressured platforms to adopt more restrictive content-moderation policies on election-related speech. As the district court found, the EIP "successfully pushed social-media

platforms to adopt more restrictive policies about election-related speech in 2020." ROA.26534 (Doc. 293, at 80).

The EIP's public report states that it "helped strengthen platform standards for combating election-related misinformation," ROA.13667 (Scully Ex. 1, at 9 (v)); and that as a result of its efforts, "[m]any platforms expanded their election-related policies during the 2020 election cycle," and thus "[p]latforms took action against policy violations by suspending users [such as Jim Hoft and Jill Hines, *see supra*] or removing content, downranking or preventing content sharing, and applying informational labels." ROA.13670 (Scully Ex. 1, at 12 (viii)). EIP's leader, Alex Stamos, publicly stated that, "to get platforms to do stuff … you've got to push for written [moderation] policies that are specific," and "this is something we started in the summer, in August [2020]." ROA.16707 (Doc. 214-1, ¶ 1148 (quoting Scully Ex. 4, at 7)). The EIP "led a team from all four institutions to look at the detailed policies of the big platforms," and that the policy changes they produced "create[d] a lot of pressure inside of the companies" because the EIP now had "specific policies that you can hold them accountable for." *Id.* The EIP Report even includes a table showing the changes to the platforms' policies for election-related speech occurring in a three-month period before the 2020 election. ROA.13891 (Scully Ex. 1, at 233 (215)). The EIP then aggressively *reported* violations of the *new* policies (which it had pressured the platforms to adopt); as Stamos stated, it would "report how it's

violating those written policies…. So there's two steps here. Get good policies, and then say [to platforms], this is how it's violated it." ROA.16707 (Doc. 214-1, ¶ 1148 (quoting Scully Ex. 4, at 7)).

Because "CISA and the EIP were completely intertwined" while this push to change the platforms' policies was occurring, ROA.26567 (Doc. 293, at 113)—indeed, it occurred just after CISA launched the EIP along with Stamos—the Court should not have concluded that "[t]here is no plain evidence … that any such moderation was done *subject to non-independent standards.*" Slip Op. 60 (emphasis added); *see also id.* at 56.

Likewise, when CISA's activities are seen to encompass the EIP, there is "plain evidence that content was actually moderated per CISA's requests." Slip Op. 60. The evidence indicates that the EIP induced platforms to moderate content on *millions* of occasions. *See, e.g.,* ROA.13859 (Scully Ex. 1, at 201 (183)) (reporting, in just four months in 2020, that the EIP tracked narratives and posts as potential misinformation on Twitter that encompassed almost 22 million Tweets); ROA.13858–59 (Scully Ex. 1, at 200-01 (182-83)) (in the same period, the EIP surveilled "859 million total tweets"); ROA.13989 (Scully Ex. 2, at 39 (32)) (reporting that, over seven months in 2021, the Virality Project tracked content with 6.7 million engagements per week, for a total of over 200 million engagements); ROA.13713, ROA.13716 (Scully Ex. 1, at 55 (37), 58 (40)) (reporting that the

platforms "had a high response rate to [the EIP's] tickets," and "took action on 35% of the URLs we reported to them").

D. The State Department participated in the EIP along with CISA.

With respect to the State Department Defendants (the Global Engagement Center or "GEC"), the Court held that "[t]here is no indication that State Department officials flagged specific content for censorship, suggested policy changes to the platforms, or engaged in any similar actions that would reasonably bring their conduct within the scope of the First Amendment's prohibitions." Slip Op. 59. This overlooks evidence of the GEC's extensive involvement in the EIP along with CISA.

The EIP's public report lists the GEC along with CISA as one of the "Government" "stakeholders" in its "Four Major Stakeholder Groups." ROA.13688 (Scully Ex. 1, at 30 (12)). Such "Government" stakeholders reported misinformation to the EIP: "Government and civil society partners could create tickets or send notes to EIP analysts, and they used these procedures to flag incidents or emerging narratives to be assessed by EIP analysts." *Id.* The EIP publicly reports that the GEC submits "tickets" or demands for censorship to the EIP: "[G]roups that reported tickets include the State Department's Global Engagement Center…" ROA.13718 (Scully Ex. 1, at 60 (42)). The district court likewise found that "[t]he GEC was engaging with the EIP and submitted "tickets." ROA. 26536 (Doc. 293, at 82).

The Court further overlooks the evidence submitted by the State Department's own witnesses, who admitted both that the GEC worked with the EIP to report misinformation to platforms. Daniel Kimmage of the GEC testified that an official of the GEC was in contact with the EIP. ROA.12570 (Kimmage Dep. 202:10-24). Kimmage admits that the GEC had "a general engagement with the EIP. … the GEC was engaging with the partnership." ROA.12582 (Kimmage Dep. at 214:11-19). And Leah Bray, the GEC's Deputy Coordinator, attested that "[d]uring the 2020 U.S. election cycle, the GEC discovered certain posts and *narratives* on social media and digital media that originated from, were amplified by, or *likely to be amplified by* foreign malign influence actors…. [T]he GEC flagged these posts and narratives for the Election Integrity Partnership (EIP) on approximately 21 occasions." ROA.23609 (Doc. 266-6, at 205 (Bray Decl. ¶ 18)). Thus, the State Department submitted entire "narratives" of *domestic* speech—including speech that was merely "likely" to be amplified by foreign actors, on the GEC's view—to the EIP on 21 occasions. A single "narrative" can encompass hundreds of thousands of posts.

E. Enjoining federal officials from participating in the EIP inflicts no cognizable injury on the rights of third parties.

The Court held that the district court's prohibition on federal officials collaborating with the EIP "may implicate private, third-party actors that are not parties to this case and that may be entitled to their own First Amendment protections." Slip Op. 69. This statement overlooks two points. First, the vacated

prohibition did not prevent those "private, third-party actors" from doing anything; it only prevented *federal officials* from collaborating with them to silence ordinary Americans' speech. Doc. 294, at 4. ROA.26613. Whatever the scope of those third parties' rights, they do not have a First Amendment right to have *federal officials* participate in their censorship projects, or to insist that federal officials violate *Plaintiffs'* First Amendment rights. *See id.* ROA.26613.

Second, those third parties—highly sophisticated entities such as Stanford University, the University of Washington, and others—had ample opportunity to present any such concerns about their own rights to the district court, but never did so. This case was one of the most widely publicized in the country for months, and but they never sought to intervene or even file an amicus brief in the district court to assert their interests. Instead, they raised their concerns for the first time on appeal in an amicus brief that grievously misstates the evidence and their own public statements. *See, e.g.,* Br. of Appellees, at 48-49 n.1. Even if there were any valid concern with those third parties' rights—which there is not—the district court cannot be faulted for failing to address issues that those parties declined to raise before it, despite ample opportunity to do so. *See Allied Bank-W., N.A. v. Stein*, 996 F.2d 111, 115 (5th Cir. 1993).

CONCLUSION

The Court should grant panel rehearing and reinstate the injunction, as modified by the Court, to apply to the CISA Defendants and the State Department Defendants, and further reinstate the portion of the injunction that prevents federal officials from participating or collaborating with the Election Integrity Partnership/Virality Project, ROA.26613 (Doc. 294, at 4, ¶ 5).

Dated: September 22, 2023

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CERTIFICATE OF SERVICE

I hereby certify that, on September 22, 2023, I caused a true and correct copy of the foregoing to be filed by the Court's electronic filing system, to be served by operation of the Court's electronic filing system on counsel for all parties who have entered in the case.

/s/ D. John Sauer

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this motion complies with the type-face, style, and volume requirements of Federal Rules of Appellate Procedure 27(d) and 32(a) because it has been prepared in proportionally-spaced Times New Roman font, 14-point, and because those portions not excluded under Rule 32(f) contain 3,835 words, according to Microsoft Word.

/s/ D. John Sauer

United States Court of Appeals for the Fifth Circuit

No. 23-30445

State of Missouri; State of Louisiana; Aaron Kheriaty; Martin Kulldorff; Jim Hoft; Jayanta Bhattacharya; Jill Hines,

Plaintiffs—Appellees,

versus

Joseph R. Biden, Jr.; Vivek H. Murthy; Xavier Becerra; Department of Health & Human Services; Anthony Fauci; Et al.,

Defendants—Appellants.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 3:22-CV-1213

ON PETITION FOR REHEARING

Before Clement, Elrod, and Willett, *Circuit Judges*.

Per Curiam:

IT IS ORDERED that the petition for rehearing is GRANTED.