No. 23–411

In the Supreme Court of the United States

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

Petitioners,

v.

MISSOURI, ET AL.

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

KENNEDY PLAINTIFFS' MOTION TO INTERVENE AS RESPONDENTS AND TO FILE A BRIEF IN OPPOSITION

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INTRODUCTION

Intervention is infrequent in this Court, but is granted in "unusual circumstances" to protect "vitally affected interests." Stephen M. Shapiro et al., Supreme Court Practice Ch. 6.16(c), at 6-62 (11th ed. 2019). This case is exceptional. Not only is it of the utmost constitutional importance, but ***there are parties to these proceedings who are not before the Court***.[1]

This case involves, in the words of the district court, "arguably . . . the most massive attack against free speech in United States history"—a systematic campaign by the Federal Government to induce censorship of core political speech and opinion in the modern public square. *See Missouri v. Biden*, No. 3:22-CV-01213, 2023 U.S. Dist. LEXIS 114585, at *3 (W.D. La. July 4, 2023); *see also Packingham v. North Carolina*, 582 U.S. 98, 107 (2017) (describing social media as the "modern public square"). One of the individuals specifically targeted for suppression by the Administration is Robert F. Kennedy, Jr.—a ***rival candidate for President and, along with the other movants, a party to these proceedings in the court below***.

The case at bar—captioned *Missouri v. Biden*—is not a standalone suit in the district court. On the contrary, ***consolidated*** with *Missouri v. Biden* is another First Amendment case, *Kennedy v. Biden*, in which Plaintiffs sued identical defendants on the basis of substantially identical facts and also moved for a preliminary injunction. *See Missouri v. Biden*, No. 3:22-CV-01213, 2023 U.S. Dist. LEXIS 127620 (W.D. La. July 24, 2023) (ordering consolidation). The district court granted the *Missouri*

[1] All Petitioners and Respondents have stated that they do not consent to this motion to intervene.

Plaintiffs' preliminary injunction motion, ***but did not rule on the* Kennedy *Plaintiffs' motion***; instead, the court held that motion in abeyance pending the *Missouri* appeal. *Missouri v. Biden*, 2023 U.S. Dist. LEXIS 127620, at *6–7.

Thus the *Kennedy* Plaintiffs were left with no appealable order. They were not before the Fifth Circuit; they could not seek certiorari here. In short, the *Kennedy* Plaintiffs remain stranded in the district court, even though their rights will be as fully adjudicated by this Court as those of the *Missouri v. Biden* Plaintiffs themselves.

Intervention is warranted for that reason alone. *See, e.g.*, *BNSF Ry. Co. v. EEOC*, 140 S. Ct. 109 (2019) (granting employee leave to intervene where his claim of employment discrimination was to be adjudicated in the case at bar). In addition, the *Kennedy* Plaintiffs differ from the *Missouri* Plaintiffs in three critical respects that make intervention especially appropriate.

First, while the *Missouri* Plaintiffs primarily assert their claims as censored speakers, the *Kennedy* Plaintiffs assert the First Amendment claims of social media ***viewers and listeners*** all over the country. *See* ECF No. 1 at 11-12, 121-22, *Kennedy v. Biden*, No. 3:22-cv-01213 (W.D. La. Mar. 24, 2023). One of the *Kennedy* Plaintiffs—Children's Health Defense ("CHD")—is a nonprofit organization with over 70,000 members nationwide, all or virtually all of whom look to the Internet, and particularly to social media platforms, for health-related news (especially COVID-related news, which is central to this case). *See id.* at 23–24. The rights and interests of such individuals—the social media ***audience***—are critical to the just resolution of this case but are not directly represented by the existing parties.

Second, relatedly, the *Kennedy* Plaintiffs have unassailable ***standing***. This Court has permitted new parties to join its proceedings in order to cure potential standing defects. *See, e.g.*, *Mullaney v. Anderson*, 342 U.S. 415, 416–17 (1952) (permitting joinder of new parties to "remove [the issue of standing] from controversy" because "to start over in the District Court would entail needless waste and run[] counter to effective judicial administration"). Here, as will be detailed below, the *Missouri* Plaintiffs' standing is contested, while CHD's standing to assert its members' First Amendment rights to receive information cannot be seriously disputed. *See Virginia Bd. of Pharmacy v. Virginia Citizens Council, Inc.*, 425 U.S. 748 (1976) (upholding standing of similarly situated nonprofit organization to assert First Amendment rights of consumers to uncensored health information). And because CHD is a nationwide organization, there could be no plaintiff with stronger standing to seek a nationwide injunction here.

Finally, the *Kennedy* Plaintiffs include an individual, Mr. Robert F. Kennedy Jr., who is running for President. As the district court found, Mr. Kennedy has been specifically targeted by the Federal Government's efforts to induce social media censorship. *See Missouri v. Biden*, No. 3:22-CV-01213, 2023 U.S. Dist. LEXIS 114585, at *13, 24 (W.D. La. July 4, 2023). Even now, speeches and interviews given by Mr. Kennedy continue to be blocked online.[2] Mr. Kennedy's unique interests as a

[2] *See, e.g.*, NBC NEWS, *YouTube Removes Video of Robert F. Kennedy Jr. and Jordan Peterson for Vaccine Misinformation*, June 19, 2023, https://www.nbcnews.com/tech/misinformation/youtube-removes-video-rfk-jr-jordan-peterson-misinformation-rcna90060; *see also* Congressional Testimony of Robert F. Kennedy, Jr. to the House Subcommittee on the Weaponization of the Federal Government at 5–6 (July 20, 2023), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/

presidential candidate—and the interests of millions of Americans who wish to hear his views—are of vital importance to the constitutionality of the Government's censorship campaign. These interests too are currently unrepresented here.

MOVANTS

The *Kennedy* Plaintiffs are Mr. Kennedy, CHD, and Connie Sampognaro. Mr. Kennedy is an award-winning lawyer and candidate for President. CHD is a nonprofit health organization with over 70,000 members nationwide who are consumers of online health information to make their own health decisions and to inform their political activity. Connie Sampognaro is a Louisiana citizen and an avid consumer of online health information, particularly COVID-related information, which she uses both to make her own health decisions and to inform her political activity. ECF No. 1 at 11–12, *Kennedy v. Biden*, No. 3:22-cv-01213 (W.D. La. Mar. 24, 2023).

ARGUMENT

This Court has permitted intervention or joinder of new parties for two purposes: (1) in important cases, ***to cure potential standing or jurisdictional defects***; and (2) to ***ensure representation of parties whose rights will be adjudicated in the case at bar***. *See, e.g.*, *BNSF Ry. Co. v. EEOC*, 140 S. Ct. 109 (2019) (granting employee leave to intervene in appeal of EEOC's suit against employer concerning discrimination against that very employee); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 565 U.S. 1154 (2012) (permitting new business owners to join where named plaintiff was entering bankruptcy); *Gonzales v. Oregon*, 546 U.S. 807 (2005)

kennedy-testimony.pdf (describing YouTube's removal of videos, including of Mr. Kennedy's campaign announcement speech on May 19, 2023).

(granting terminally ill patients leave to intervene where existing terminally ill plaintiffs might die before proceedings reached their conclusion); *Rogers v. Paul*, 382 U.S. 198, 199 (1965) (permitting joinder of new parties to avoid potential mootness); *Mullaney v. Anderson*, 342 U.S. 415, 416–17 (1952) (permitting joinder of new parties to "remove [the issue of standing] from controversy" because "to start over in the District Court would entail needless waste and run[] counter to effective judicial administration"). In addition, the Court has indicated that Fed. R. Civ. P. 24 provides important guidance when intervention is sought on appeal. *See Int'l Union v. Scofield*, 382 U.S. 205, 217 n.10 (1965). Here, intervention is warranted both under this Court's precedents and the standards set forth in Rule 24.

I. Intervention Will Ensure Standing.

The standing of the *Missouri v. Biden* plaintiffs—both the individuals and the two States—is contested. *Murthy v. Missouri*, No. 23-411 (Oct. 20, 2023) (granting certiorari, inter alia, on the question of standing). The Government argues that the individual *Missouri* Plaintiffs lack standing because they cannot prove that they, specifically, are likely to be censored in future. *See* Appl. Stay at 19, *Murthy v. Missouri*, No. 23A-243 (Sep. 24, 2023). In addition, the Government has challenged the State plaintiffs' *parens patriae* standing, and to the extent that the States allege that their own speech has been censored, the Government contends that the States too cannot prove a likelihood that they, specifically, will be censored in future. *See id.* at 20.

By contrast, the First Amendment rights of ***social media viewers and listeners*** are subject to no such arguments. Unlike the *Missouri* Plaintiffs, the *Kennedy* Plaintiffs need not prove that they, specifically, will be censored in future—because their challenge does not depend on a claim that their specific speech has been (or will be) censored. The right of social media consumers to access an uncensored public square is endangered by the Government's campaign to induce social media censorship ***no matter which particular speakers are targeted or censored in future***. The *Missouri* plaintiffs primarily assert ***speakers'*** rights. The *Kennedy* Plaintiffs assert the rights of the social media ***audience***, and the standing of an organization like CHD to assert such rights on behalf of consumers is established beyond peradventure. *See, e.g.*, *Virginia Bd. of Pharmacy*, 425 U.S. at 756–57 (recognizing standing of nonprofit organization representing consumers to challenge ban on advertising drug prices based on consumers' "right to receive information and ideas"). Moreover, because CHD's membership is ***nationwide***, CHD is better positioned than any existing plaintiff to seek a ***nationwide*** injunction. Accordingly, permitting the *Kennedy* Plaintiffs to intervene in this case will ensure standing and "remove [that] matter from controversy." *Mullaney*, 342 U.S. at 416.

II. Movants Satisfy the Standards for Intervention as of Right.

Rule 24(a)(2) provides for intervention as of right when a party "claims an interest relating to the ... transaction that is the subject of the action, and … the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P.

24(a)(2). Circuit courts generally hold that "[u]nder Rule 24(a)(2), a nonparty is entitled to intervention as of right when it '(i) timely moves to intervene; (ii) has a significantly protectable interest related to the subject of the action; (iii) may have that interest impaired by the disposition of the action; and (iv) will not be adequately represented by existing parties.'" *W. Watersheds Project v. Haaland*, 22 F.4th 828, 835 (9th Cir. 2022); *see also, e.g.*, *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003) (applying similar standard). Courts construe these requirements "broadly in favor of intervention." *W. Watersheds*, 22 F.4th at 835; *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991) ("Rule 24 is broadly construed in favor of potential intervenors."). All four requirements are satisfied here.

A. *This Motion Is Timely.*

"Prejudice is the heart of the timeliness requirement." *Jones v. Caddo Parish Sch. Bd.*, 735 F.2d 923, 946 (5th Cir. 1984) (en banc). Indeed, "courts are in general agreement that an intervention of right under Rule 24(a) must be granted unless the petition to intervene would work a hardship on one of the original parties." *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970) (citation omitted). Here, the *Kennedy* Plaintiffs have moved for intervention immediately after this Court granted certiorari;[3] no party will be prejudiced through delay. Moreover, because *Kennedy v.*

[3] Movants did not seek intervention when the Government appealed to the Fifth Circuit because *Kennedy v. Biden* was not consolidated with *Missouri v. Biden* until three weeks later. Movants did not seek intervention during the emergency stay proceedings because doing so would have caused delay. This Court's grant of certiorari was the *Kennedy* Plaintiffs' first opportunity to move to intervene in the appeal without causing any delay to ongoing proceedings.

Biden is the *only* case consolidated with *Missouri v. Biden*, granting intervention here will not open the proverbial floodgates.

B. *Movants Have a Significant, Protectable Interest.*

The 1966 revisions to Rule 24 expanded the circumstances in which an absent party's interest is sufficient to warrant intervention. *See Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 133–34 (1967). Under the revised Rules, "[i]f an absentee would be substantially affected *in a practical sense* by the determination made in an action, he should, as a general rule, be entitled to intervene." *Id.* at 134 n.3 (emphasis altered) (quoting advisory committee's note to 1966 amendments). Here, the *Kennedy* Plaintiffs not only have interests that will be affected "in a practical sense" by these proceedings; they have legal ***rights*** that will be ***adjudicated*** here.

As stated above, the *Kennedy* Plaintiffs have sued these same defendants on the basis of substantially identical facts and have moved for a similar preliminary injunction. *See Missouri v. Biden*, 2023 U.S. Dist. LEXIS 127620, at *2–3. But instead of ruling on the *Kennedy* Plaintiffs' preliminary injunction motion, the district court has held that motion in abeyance pending this appeal. *Id.* at *6–7. As a result, the *Kennedy* Plaintiffs could neither take an appeal to the Fifth Circuit nor petition for certiorari here—even as the relief they seek is being adjudicated in this Court. *Cf. Lopez-Aguilar v. Marion Cty. Sheriff's Dep't*, 924 F.3d 375, 393 (7th Cir. 2019) (observing that the "strongest case for intervention" exists where intervenors cannot sue directly yet have "a legally protected interest that could be impaired").

The First Amendment rights of listeners and viewers are well established. *See, e.g.*, *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (recognizing as "paramount" the rights of "viewers and listeners"); *Virginia. Bd. of Pharmacy*, 425 U.S. at 756–57 (recognizing rights of consumers to access health information). Thus the *Kennedy* Plaintiffs manifestly have legal rights "relating to" the "transaction[s]" giving rise to this case, and those rights will, in a practical as well as a formal sense, be determined here.

C. *This Action May Impair Movants' Ability To Protect Their Interests*.

The test for demonstrating potential impairment of protected interests under Fed. R. Civ. P. 24 is not demanding. Even "the *stare decisis* effect of an adverse judgment constitutes a sufficient impairment to compel intervention." *Sierra Club v. Glickman*, 82 F.3d 106, 109–10 (5th Cir. 1996). Here, the Court's disposition of the instant case will directly impact the *Kennedy* Plaintiffs and, for all intents and purposes, adjudicate their claims.

Should this Court reverse the preliminary injunction, the *Kennedy* Plaintiffs—and all the social media users whom they represent—will continue to suffer a violation of their First Amendment rights of access to an online public square free from government censorship for the foreseeable future. And the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

D. *Movants' Interests Are Not Adequately Represented*

An intervenor's obligation to show that his interests are not adequately

represented "is satisfied if the applicant shows that representation of his interest 'may be' inadequate," and "the burden of making that showing ***should be treated as minimal***." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (emphasis added). There can be no doubt that this test is satisfied here.

First, social media listeners and viewers do not yet have a devoted advocate before the Court—a party or parties able to champion the First Amendment rights of the social media ***audience*** without having to claim and prove that their own specific speech has been and will in future be suppressed. Second, perhaps even more fundamentally, Mr. Kennedy's unique interests as a candidate for President are not represented at all—let alone adequately represented—by the existing parties.

Never before in America's history has this Court faced a systematic effort by the incumbent Administration to induce private companies with immense control over public discourse to censor the speech of one of the current President's electoral rivals. The threat to a free and fair election is manifest and unprecedented. Only the Alien and Sedition Acts of 1798 (through which the Adams Administration suppressed news publishing that supported Adams's rival, Thomas Jefferson) present an arguable analogue, and those Acts are of course seen today as dark stains on the country's First Amendment history.

As the Court considers the constitutionality of government efforts to work with and pressure social media companies to suppress protected speech, the Court can and must take into account the uniquely vital national interests at stake when one of the individuals targeted for suppression by the current Administration is a rival

candidate for President. To represent those interests adequately—and to defend the right of the entire American citizenry to hear his views—Mr. Kennedy, already a party to these proceedings below, should be a party here.

III. Movants Should Be Granted Permissive Intervention.

Permissive intervention is allowed, in a court's discretion, under substantially more lenient standards. *See* Fed. R. Civ. P. 24(b)(1)(B) ("On timely motion, the court may permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact."). Thus even if the Court finds that the *Kennedy* Plaintiffs are not entitled to intervene as of right, permissive intervention would still be warranted here.

CONCLUSION

For the reasons stated above, the *Kennedy* Plaintiffs respectfully ask this Court to grant them leave to intervene in these proceedings and to file a Brief in Opposition.

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Respectfully submitted,

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