No. 23-411

In the Supreme Court of the United States

VIVEK H. MURTHY, U.S. SURGEON GENERAL, ET AL.,
Applicants,
v.
STATE OF MISSOURI, ET AL., *Respondents*.

On Writ of Certiorari Issued to the
United States Court of Appeals for the Fifth Circuit

PLAINTIFFS-RESPONDENTS' RESPONSE IN OPPOSITION TO THE MOTION TO INTERVENE OF ROBERT F. KENNEDY, JR., ET AL.

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Proposed Intervenors Robert F. Kennedy, Jr. ("Kennedy"), Children's Health Defense, and Connie Sampognaro (collectively, the "Kennedy Plaintiffs") seek leave to intervene in this matter. Intervention after the Court has issued a writ of certiorari is a "rare" and "extraordinary" remedy. STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE ch. 6.16(c), at 6-62 (11th ed. 2019). The Kennedy Plaintiffs fail to meet the factors that this Court consults in considering whether to grant this remedy. *See Cameron* v. *EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 277 (2022).

The *Kennedy* Plaintiffs offer three principal reasons for intervention. Mot. 2-4. First, they contend that their intervention might "cure potential … standing defects," because their own standing is "unassailable." Respondents agree that the Kennedy Plaintiffs' standing is "unassailable," but that fact confirms the standing of the existing Respondents. Respondents include four individuals who are avid followers, listeners, and audience members of the social-media speech of Robert F. Kennedy, Jr., and Children's Health Defense. Any act of censorship of Kennedy or Children's Health Defense inflicts a reciprocal injury on Respondents as their audience members, as the Kennedy Plaintiffs themselves emphasize. On this point, Respondents—as the Kennedy Plaintiffs' audience members—share equally in any censorship injury to the Kennedy Plaintiffs, and have standing on the same basis.

Second, the Kennedy Plaintiffs claim that they assert unique interests as "social media viewers and listeners" and as "the social media audience." Mot. 2. These are valid interests, but they are vigorously asserted by the existing Respondents here. Both individual and State Respondents have emphasized these

very interests as social-media listeners and audiences—including of the Kennedy Plaintiffs' speech, among many others—consistently throughout this case. Respondents will continue to assert these interests in merits briefing as well.

Third, Robert F. Kennedy, Jr., asserts that he has a unique interest in avoiding federal censorship because he is a presidential candidate. Mot. 3-4. Respondents agree that Mr. Kennedy's First Amendment interests are uniquely "urgent" in the context of his campaign for the Presidency. But, like the Kennedy Plaintiffs' other First Amendment interests, these interests are shared equally by Mr. Kennedy's *audiences*—including Respondents here. Indeed, First Amendment rights are uniquely "urgent" during political campaigns chiefly to benefit the candidates' audiences—*i.e.*, the potential voters who are deciding whether to support them.

Further, the Kennedy Plaintiffs' motion to intervene is untimely. Despite being aware of this case for many months, they never sought leave to intervene as parties in the courts below. And they sought consolidation in the district court only after the existing parties had spent over nine months litigating Respondents' motion for preliminary injunction, after the close of six months of preliminary-injunction-related discovery, and when post-discovery preliminary-injunction briefing was well underway. The Kennedy Plaintiffs provide no adequate justification for attempting to intervene at a time that would delay proceedings well underway, such as changes in factual circumstances or legal developments. The district court held the Kennedy Plaintiffs' motion to consolidate in abeyance until after ruling on Respondents' motion for preliminary injunction, and it did so precisely because their eleventh-hour request

threatened to burden and disrupt the long-pending, well-advanced preliminary-injunction proceedings. Because their request to participate in the district court was untimely, it is hard to see how their post-certiorari request for intervention in this Court could be timely now.

I. Respondents Share Equally in the Kennedy Plaintiffs' Censorship Injuries.

The lower Courts unanimously upheld the standing of the individual Respondents and the State Respondents on multiple grounds. *See* Petitioner's Appendix to Stay Application ("Pet. App."), 119a-135a; 5th Cir. Slip Op. (Oct. 3, 2023) ("Slip Op."), at 16-24. One of several grounds for the existing Respondents' standing is that they are audiences, listeners, and followers on social-media of speakers silenced by federal censorship—specifically including Robert F. Kennedy, Jr., and Children's Health Defense. Thus, the Kennedy Plaintiffs' standing does not cure any defect in the existing Respondent's standing—rather, it confirms and reinforces it.

A. The Kennedy Plaintiffs' standing is "unassailable."

Respondents agree that "the Kennedy Plaintiffs have unassailable standing." Mot. 3. The White House directed Twitter to remove posts by Robert F. Kennedy, Jr., and the White House and Surgeon General's Office successfully pressured Facebook and other platforms to de-platform him in a months-long campaign in 2021. And it is clear that federal officials *caused* the censorship of the Kennedy Plaintiffs.

At 1:04 a.m. on January 23, 2021—three days into the Biden Administration—the White House emailed Twitter a link to one of Kennedy's tweets, which referred to the death of baseball legend Hank Aaron, Jr., shortly after taking a COVID vaccine.

Respondents' Emergency Stay Appendix ("Resp. App.") at 131a. The subject line of the email was "Flagging Hank Aaron misinfo." *Id.* The White House stated: "Wanted to flag the below tweet and am wondering if we can get moving on the process for having it removed ASAP. And then if we can keep an eye out for tweets that fall in this same ~genre that would be great." *Id.* As the Fifth Circuit noted, this email was the first in a long series of White House demands for censorship of specific speakers and viewpoints that became increasingly "persistent and angry," many of which were "phrased virtually as orders." Slip Op. 43, 45.

On March 24, 2021, the so-called "Center for Countering Digital Hate" (CCDH) issued a report entitled *The Disinformation Dozen: Why Platforms Must Act on Twelve Leading Online Anti-Vaxxers*.[1] This report coined the phrase "Disinformation Dozen" to describe 12 leading vaccine skeptics, and the report contended that "[t]he Disinformation Dozen are responsible for up to 65% of anti-vaccine content" on social media, including "up to 73% of Facebook's anti-vaxx content." *Id.* at 6, 7. The report listed Kennedy and Children's Health Defense as #2 on the list of the "Disinformation Dozen," *id.* at 14-15, and it noted that "Kennedy's account was banned from Instagram … yet his Facebook Page remains active, as does the CHD's Instagram page." *Id.* at 14. The report demanded that platforms "[d]eplatform the Disinformation Dozen" and "[d]eplatform key anti-vaxxer organizations," including Kennedy and Children's Health Defense. *Id.* at 10.

[1] *Available at* https://counterhate.com/wp-content/uploads/2022/05/210324-The-Disinformation-Dozen.pdf.

Soon after this report, deplatforming the "Disinformation Dozen"—including Kennedy and Children's Health Defense—became a key demand in the White House's secret pressure campaign on Facebook and other platforms to censor disfavored viewpoints. *See* Resp. App. 131a-200a. On May 1, 2021, a senior Facebook executive emailed the White House, stating that the White House had been referring to the CCDH report and demanding action against the "Disinformation Dozen" in oral meetings with Facebook. Resp. App. 171a-172a. In those private meetings, Facebook noted, the White House had insisted that "**12 accounts are responsible for 73% of vaccine misinformation**," parroting the CCDH report, and it had demanded that Facebook censor them. Resp. App. 172a (bold in original). Facebook responded that it was scrutinizing those speakers and censoring them whenever it could, but that much of their content did not violate Facebook's policies: "[W]e continue to review accounts associated with the 12 individuals identified in the CCDH 'Disinformation Dozen' report, but many of those either do not violate our policies or have ceased posting violating content. Our 'Dedicated Vaccine Discouraging Entity' policy is designed to remove groups and pages that are dedicated to sharing vaccine discouraging content and we continue to review and enforce on these where we become aware of them." *Id.*

Facebook acknowledged that the White House would be displeased with Facebook's refusal to deplatform these speakers: "I realise that our position on this continues to be a particular concern for you." *Id.* But, according to Facebook, "[a]mong experts we have consulted, there is a general sense that deleting more

expressions of vaccine hesitancy might be more counterproductive to the goal of vaccine uptake because it could prevent hesitant people from talking through their concerns and potentially reinforce the notion that there's a cover-up." *Id.*

As Facebook anticipated, the White House was not pleased with this response. Just a few days later, at a White House press conference, the White House Press Secretary ominously told media that President Biden favors "a robust anti-trust program" for "the major platforms," and directly linked that threat with the White House's demand for greater censorship by the platforms, stating that the President "supports … a *robust anti-trust program*. So his view is that *there's more that needs to be done to ensure that this type of misinformation; disinformation; sometimes life-threatening information is not going out to the American public*." Resp. App. 1114a (emphases added). The White House's threat struck at a point of known vulnerability, as Mark Zuckerberg has publicly described anti-trust enforcement as "an existential threat" to Facebook. Resp. App. 1073a.

The day after this threat, May 6, 2021, the White House privately emailed Facebook a series of additional demands for censorship, which included attacking Facebook for not taking more aggressive action against the so-called Disinformation Dozen: "Seems like your 'dedicated vaccine hesitancy' policy isn't stopping the disinfo dozen – they're being deemed as not dedicated – so it feels like that problem likely carries over to groups." Resp. App. 171a.

Facebook's refusal to deplatform the Disinformation Dozen remained a sticking point for the White House and the Surgeon General's Office. At the joint

press conference with Surgeon General Murthy on July 15, 2021, the White House Press Secretary demanded that platforms adopt "a robust enforcement strategy" against disfavored viewpoints, again using the Disinformation Dozen as a specific demand: "[T]here's about 12 people who are producing 65 percent of anti-vaccine misinformation on social media platforms. All of them remain active on Facebook, despite some even being banned on other platforms, including … ones that Facebook owns." Resp. App. 1120a. This statement about "being banned on other platforms" was a specific reference to Kennedy and Children's Health Defense, as the CCDH report noted that Kennedy was suspended on Instagram but not on Facebook, and Children's Health Defense was not suspended on Facebook. *See supra*.

The next day, July 16, the President stated that Facebook and other platforms were "killing people" by not censoring disfavored viewpoints. Resp. App. 1120a-1121a. That same day, the White House Press Secretary reinforced the White House's demand that speakers like Kennedy and Children's Health Defense be banned across all platforms: "You shouldn't be banned from one platform and not others … for providing misinformation out there." Resp. App. 1122a. A few days later, on July 20, 2021, the White House Communications Director linked President Biden's comment on "killing people" to an explicit threat of adverse legislative action against the platforms. She "specified the White House is examining how misinformation fits into the liability protections granted by Section 230 of the Communications Decency Act, which shields online platforms from being responsible for what is posted by third parties on their sites." Resp. App. 1123a. The White

House's options "could include amending the Communications Decency Act, or Section 230 of the act. 'We're reviewing that and certainly they should be held accountable,' [the Communications Director] said. 'And I think you heard the president speak very aggressively about this.'" Resp. App. 1123a-1124a.

Immediately after this mid-July pressure campaign, Facebook—which had resisted White House pressure to deplatform the Disinformation Dozen for months—abruptly switched positions and took aggressive action against the "Disinformation Dozen," deplatforming dozens of accounts associated with Kennedy, Children's Health Defense, and the others. On July 23, 2021—three days after the White House Communications Director's public threat—Facebook emailed Surgeon General Murthy and stated, "I wanted to make sure you saw the steps we took just this past week"—*i.e.*, since President Biden's "killing people" comment on July 16, 2021—"to further address the 'disinfo dozen.'…" Resp. App. 1164a. Facebook reported to the Surgeon General that it had censored every member of the Disinformation Dozen, including Kennedy and Children's Health Defense, in compliance with the White House's demands: "We removed 17 additional Pages, Groups, and Instagram accounts tied to the disinfo dozen (so a total of 39 Profiles, Pages, Groups, and IG accounts deleted thus far, resulting in every member of the disinfo dozen having had at least one such entity removed)." *Id.* And Facebook reported that it was secretly censoring other accounts associated with the Disinformation Dozen, without a valid basis in its moderation policies: "We are also continuing to make 4 other Pages and Profiles, which have not yet met their removal thresholds, more difficult to find on our

platform." *Id.* Facebook assured the Surgeon General, "We hear your call for us to do more." Resp. App. 1165a. In a separate email, Facebook told the Surgeon General that "our teams met today to better understand the scope of what the White House expects of us on misinformation going forward." Resp. App. 1163a.

On August 18, 2021, Facebook again reported to the Surgeon General on additional censorship actions it was taking against the Disinformation Dozen. Resp. App. 1167a. Facebook flagged a post that "details how we are approaching content from the disinfo dozen," which detailed a long list of censorship actions against the Disinformation Dozen, including removing over three dozen pages, groups and accounts linked with them; imposing additional penalties on another two dozen pages, groups, and accounts linked with them; applying penalties to some of their website domains so that third parties posting their content would be deamplified; and removing additional content. *Id.* On August 20, 2021, Facebook reported to the Surgeon General still more actions taken against the Disinformation Dozen, listing additional censorship actions taken against them. Resp. App. 1168a.

Based on this evidence, the district court found that White House pressure *caused* the censorship of the Disinformation Dozen—including Kennedy and Children's Health Defense: "The public and private pressure from the White House apparently had its intended effect. All twelve members of the 'Disinformation Dozen' were censored, and pages, groups, and accounts linked to the Disinformation Dozen were removed." Pet. App. 24a; *see also* Pet. App. 36a. These findings are not clearly

erroneous, and so Kennedy and Children's Health Defense are quite correct in contending that their standing to challenge these actions is "unassailable." Mot. 3.

B. Respondents, as the Kennedy Plaintiffs' Audience Members, Share Equally in Their Censorship Injuries.

By the same logic, the existing Respondents' standing is "unassailable." *Id.* In addition to many other injuries, Respondents include multiple individuals who read and follow the Kennedy Plaintiffs' speech on social media, and thus suffer equal and "reciprocal" First Amendment injuries whenever the Kennedy Plaintiffs are censored.

Plaintiff Jill Hines, for example, "frequently read[s] and listen[s] to the speech and writings on social media of other speakers and writers whom federal officials have specifically targeted for censorship … such as … Robert F. Kennedy Jr., Children's Health Defense," and every other member of the Disinformation Dozen. Resp. App. 116a. Dr. Aaron Kheriaty follows the social-media speech of both "Robert F. Kennedy, Jr." and "Children's Health Defense." Resp. App. 109a. So, too, does Jim Hoft. Resp. App. 113a. And Dr. Jayanta Bhattacharya follows and reads the content of "Robert F. Kennedy, Jr." Resp. App. 104a.

The First Amendment's "protection afforded is to the communication, to its source and to its recipients both." *Va. State Bd. of Pharm.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). "[T]he Constitution protects the right to receive information and ideas." *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972) (quoting *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943)). "A fundamental principle of the First Amendment is that all persons have access to places where they can speak *and listen*, and then, after reflection, speak *and listen* once more."

Packingham v. *North Carolina*, 582 U.S. 98, 104 (2017) (emphases added). "There are numerous other expressions to the same effect in the Court's decisions." *Va. State Bd. of Pharm.*, 425 U.S. at 757 (citing many cases). In fact, the rights of audience members to receive speech and information are at least as fundamental as the rights of those who spread the messages. *Red Lion Broad. Co.* v. *F.C.C.*, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.").

The State Respondents, likewise, suffer the same injury. Among other injuries, they assert an interest in following their constituents' speech on social media. Resp. App. 83a-86a, 99a-101a. A communications official for Louisiana or Missouri has a strong interest in knowing whether and how many constituents are re-posting and commenting on anti-vaccine messages, such as those of Kennedy and Children's Health Defense. *See id.* When speakers like the Kennedy Plaintiffs are deplatformed, state officers—who monitor social-media trends "on a daily or even hourly basis," Resp. App. 83a—lose access to their constituents' "true concerns," which prevents those state officials from "craft[ing] messages and policies that are responsive to our citizens." Resp. App. 86a. As the Fifth Circuit held, "[f]ederally coerced censorship harms the State Plaintiffs' ability to listen to their citizens as well. This right to listen is 'reciprocal' to the State Plaintiffs' right to speak and constitutes an independent basis for the State Plaintiffs' standing here." Slip op. 26 (quoting *Va. State Bd. of Pharm.*, 425 U.S. at 757).

The Kennedy Plaintiffs suggest that the existing Respondents assert only "their claims as censored speakers," and do not vigorously assert their rights as "viewers and listeners." Mot. 2 (bold omitted). This is incorrect. Both the individual Plaintiffs and the State Plaintiffs have consistently asserted their right to listen and to receive information on social media throughout the pendency of this case. They have asserted these interests—and the interests of their own audiences as well—in the Complaint, *see, e.g.,* D.Ct. Doc. 268, ¶¶ 21-25, 110-112, 468, 516-517; in their opposition to the government's motion to dismiss based on standing, D.Ct. Doc. 165, at 6-10, 16-20; in their preliminary-injunction brief, D.Ct. Doc. 214, at 56-57, 59; in their preliminary-injunction reply brief, D.Ct. Doc. 274-1, at 81; in their opposition to the government's stay motion in the Fifth Circuit, Ct. App. Stay Opp., Doc. 43-1, at 7-8, 9-10; in their Fifth Circuit merits brief, Ct. App. Br. of App'ees, at 18, 24-26, 29-30; and in their opposition to the government's emergency stay motion in this Court, Stay Opp. 14-15, 22.

Thus, the Kennedy Plaintiffs' injuries are "reciprocal" to the existing Respondents' injuries. *Va. State Bd. of Pharm.*, 425 U.S. at 757. Accordingly, intervention is not necessary to "cure potential standing … defects." Mot. 4 (bold omitted). Instead, the proposed Intervenors' theory of standing duplicates one of several independent bases for the standing of the existing Respondents.

C. Respondents Share Equally in Mr. Kennedy's Asserted Interest in Spreading His Campaign Speech.

Mr. Kennedy asserts a unique interest in avoiding federal censorship during his campaign for President of the United States. Mot. 3-4. Again, this interest is

well-founded. The First Amendment's "constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office," especially campaigns for the highest office in the land. *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 162 (2014) (quoting *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971)). But, once again, Mr. Kennedy's audience members share an equally "full[]" and "urgent" interest in *receiving* his campaign speech, which Respondents directly represent here. *Id.* "The urgency of a campaign … may well require that a candidate, *for the benefit of the electorate* as well as himself, have absolute freedom to discuss his qualifications…." *United States* v. *Brown*, 218 F.3d 415, 430 (5th Cir. 2000) (emphasis added); *see also United States* v. *Ford*, 830 F.2d 596, 601 (6th Cir. 1987) (reversing a gag order on an indicted congressman who was campaigning for reelection because the restriction on his campaign speech would entail that "*his constituents* will have no access to the views of their congressman on this issue of undoubted public importance") (emphasis added). As with other speech, the First Amendment rights of a political candidate's audiences—including the potential voters who are deciding whom to support—are at least as fundamental as the rights of the candidates themselves. *See Red Lion*, 395 U.S. at 390.

II. The Kennedy Plaintiffs Fail to Satisfy the Criteria for Intervention.

Given the foregoing analysis, the proposed Intervenors fail to satisfy the ordinary requirements for intervention in at least two key respects.

First, the proposed Intervenors' attempt to intervene is not timely because they never sought to intervene in the proceedings below, and they sought consolidation

only after the existing parties spent over nine months litigating a motion for preliminary injunction through discovery and briefing. Consolidation at that time would have served only to delay proceedings.

Respondents first filed their motion for preliminary injunction on June 14, 2022, D.Ct. Doc. 10, and they were granted preliminary-injunction-related discovery on July 12, 2022, D.Ct. Doc. 34. Preliminary-injunction discovery lasted through early January 2023. The case was widely publicized in national media, and the Kennedy Plaintiffs were aware of this case since the summer of 2022. Yet they never filed a motion to intervene as parties in the district court. Instead, they waited for many months, until after preliminary-injunction-related discovery had closed and preliminary-injunction briefing was well underway. Then, on April 1, 2023—nine and a half months after Respondents filed their motion for preliminary injunction—the Kennedy Plaintiffs filed a parallel complaint in the same judicial district and requested immediate consolidation of the two cases so that they could participate in the long-pending preliminary-injunction proceedings. D.Ct. Doc. 236-1, 236-4. The district court was rightfully concerned that this last-minute request to participate could disrupt or delay the preliminary-injunction proceedings that the existing parties had already long pursued. D.Ct. Doc. 240, at 2-3. Thus, the district court held the proposed Intervenors' request for consolidation and to participate in the preliminary-injunction proceedings in abeyance. *Id.* The district court reasoned: "[A]llowing the *Kennedy* Plaintiffs to submit a separate motion for preliminary injunction, consolidation of that motion with the *Missouri* Plaintiffs' Motion … prior

to the Court hearing the *Missouri* Plaintiffs' outstanding motions would place a substantial burden on both the Court and Defendants. Judicial economy warrants deferring a ruling on the Motion to consolidate until after the Court's resolution of the above-mentioned outstanding motions," including the *Missouri* Plaintiffs' motion for preliminary injunction. *Id.* Because the *Kennedy* Plaintiffs' request to participate in preliminary-injunction proceedings was untimely in the district court, it remains untimely in this Court.

Second, the proposed Intervenors' interests are adequately represented by the existing Respondents. The proposed Intervenors' argument that "social media listeners and viewers do not yet have a devoted advocate before the Court," Mot. 10, is not correct. As noted above, Respondents have consistently "champion[ed] the First Amendment rights of the social media *audiences*," *id.*, throughout the pendency of this case, from their Complaint through their stay opposition in this Court, and on every occasion in between. They will continue to do so in merits briefing and oral argument in this Court. Though Mr. Kennedy asserts a unique interest in avoiding censorship as a Presidential candidate, Mot. 10, he does not explain how this interest differs in kind, as opposed to degree, from the interests of the existing Respondents to receive his core political speech. *See id.* Instead, they merely assert this interest without supporting citation or explanation. *See id.* The *Kennedy* Plaintiffs, therefore, fail to identify an interest that is not adequately represented by the existing Respondents.

CONCLUSION

The Motion to Intervene of Robert F. Kennedy, Jr., Children's Health Defense, and Connie Sampognaro should be denied.

November 6, 2023

Respectfully submitted,

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