No. 23-411

IN THE

Supreme Court of the United States

VIVEK H. MURTHY, SURGEON GENERAL, *et al.*,
Petitioners,

v.

MISSOURI, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE *KENNEDY* PLAINTIFFS IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI[1]

This brief is respectfully submitted by the named Plaintiffs in *Kennedy v. Biden*, a closely related action consolidated with the instant case in the District Court below. (*See Missouri v. Biden*, No. 3:22-CV-01213, 2023 U.S. Dist. LEXIS 127620 (W.D. La. July 24, 2023) (consolidating *Kennedy v. Biden* with *Missouri v. Biden*).) One of the *Kennedy* Plaintiffs is Robert F. Kennedy, Jr.; there may be no individual in the country more heavily targeted for social media censorship by the Federal Government than Mr. Kennedy. (*See, e.g.*, J.A. 114, 637, 793-94; Plaintiffs-Respondents' Response in Opposition to Motion to Intervene 4-11; *Missouri v. Biden*, No. 3:22-CV-01213, 2023 U.S. Dist. LEXIS 114585, at *13, 24, 30-32, 34, 49, 111 (W.D. La. July 4, 2023).)

INTRODUCTION

Perhaps it will seem like litigation hyperbole, but the fate of the freedom of speech in America may actually depend on this case.

Two recent developments, each extraordinary in itself, have in combination created a peril to free speech unprecedented in our history: (1) the rise of behemoth social media platforms, which this Court has called the "modern public square,"[2] owned by private companies exercising content-based control over all that is said thereon; and (2) a concerted, secret, highly successful campaign by the Federal Government, copiously documented by the courts

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[1] No party, or counsel for any party, authored this brief in whole or in part, and no one other than amici made a monetary contribution to fund its preparation or submission.

[2] *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017).

below, to induce these platforms to censor protected speech, including wholly accurate information and core political opinion critical of Administration policy.

If the Court decides this case unwisely, it runs the risk of approving "the most massive system of censorship in the nation's history"[3]—a brave new world in which the Government can and will censor dissent and dissenters by proxy, controlling what hundreds of millions of Americans can say, see and hear every day.

SUMMARY OF ARGUMENT

Most of the briefing in this case, as well as the opinion under review, assumes that the First Amendment claims here turn on whether the Petitioners have shown state action. Accordingly, the parties extensively discuss this Court's state action precedents, particularly those concerning "coercion" and "joint activity." Against this background, the *Kennedy* Plaintiffs respectfully make three points.

First, that premise is incorrect. As a matter of both precedent and principle, the Government's censorship campaign is unconstitutional ***regardless*** of whether it crosses the state action tripwire. If this were a First Amendment suit against the platforms themselves, then the state action inquiry would properly govern. But this is an injunctive suit against governmental officers, and as the Court held in *Norwood v. Harrison*, 413 U.S. 455, 465 (1973), it is "axiomatic that [the] state may not induce, encourage

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[3] 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.

or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood* was not a state action case; its principle controls regardless of whether any of the familiar state action tests (coercion, joint activity, and so on) are satisfied. And there can be no doubt that the Government has done here exactly what *Norwood* proscribes: it has deliberately sought to "induce, encourage [and] promote" social media platforms to censor core political speech the Government could not constitutionally censor on its own. (*See infra* Point I.)

Second, if the Court does reach the state action issue, "coercion" and "joint activity" need not be the sole focus. The famous Section 230 of the Communications Decency Act—immunizing social media platforms against liability if they censor "constitutionally protected" speech, 47 U.S.C. § 230(c)(2)(A)—should play a decisive role as well. In fact, the closest and most important precedent for the instant case is *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), which turned not on coercion but on a similar federal immunity provision. In *Skinner*, the Court found that private railways' urine testing of their employees was state action where the Federal Government had: (1) "removed all legal barriers to the testing"—i.e., had immunized the railways against liability if they performed the tests; (2) "made plain … its strong preference for [the] testing"; and (3) expressed its "desire" to "participate" in the testing. *Id.* at 615. The same three elements are present here. The Federal Government has: (1) through Section 230, "removed all legal barriers" to social media censorship of constitutionally protected speech; (2) repeatedly made plain its "strong

preference" for such censorship; and (3) endeavored to participate directly and systematically (as established by the facts found below) in deciding what specific speech and speakers the platforms should censor. Indeed, on every front, the case for a state action finding here is ***stronger*** than in *Skinner*. (*See infra* Point II.)

Finally, the *Kennedy* Plaintiffs respectfully suggest that a slightly narrower injunction would obviate certain objections raised by Petitioners. In their preliminary injunction motion below (still pending, undecided, in the District Court), the *Kennedy* Plaintiffs asked for an injunction barring Petitioners from *privately communicating, in their official capacities, with social media companies with the purpose of encouraging censorship of protected speech*. Such an injunction would as a matter of law not impinge one iota on Petitioners' speech rights, would leave Petitioners free to publicly express any opinions they wished, and would be narrowly tailored to the constitutional violation at issue here. (*See infra* Point III.)

ARGUMENT

I. *The Government's censorship campaign is unconstitutional regardless of whether it converts social media censorship into state action.*

Much of the briefing in this case, as well as the opinion under review, focuses on whether the innumerable communications (detailed by the courts below) between federal actors and social media companies satisfy one or more of the familiar state action tests—coercion, joint activity, entwinement,

nexus, and so on. The Court need not reach these arguments. As a matter of precedent and principle, the Government's censorship campaign is unconstitutional ***regardless*** of whether it converts social media censorship into state action.

When a plaintiff sues a ***private*** actor for a constitutional violation, the state action inquiry properly governs because the Constitution (almost invariably) does not restrain private party conduct. In such cases, the plaintiff must prove that the seemingly private defendant was in actuality a state actor, and "[d]etermining whether this is one of the exceptional cases in which a private entity will be treated as a state actor for constitutional purposes requires [courts] to grapple with the state action doctrine." *O'Handley v. Weber*, 62 F.4th 1145, 1156 (9th. Cir. 2023). Such a determination typically turns on satisfaction of one or more of the familiar state action tests, such as coercion, joint activity, conspiracy, nexus, or public function. *See, e.g.*, *id*. at 1157-58.

But where, as here, suit is brought against ***governmental defendants***, the state action doctrine is a misfit, both logically and constitutionally. Governmental defendants are by definition state actors. The question in such cases is not whether the defendants are state actors; of course they are. The sole question is whether they have acted constitutionally or unconstitutionally.

And it is "axiomatic," as this Court held fifty years ago, that governmental defendants violate the Constitution when they knowingly seek to "induce, encourage or promote private persons to accomplish what [the government] is constitutionally forbidden

to accomplish." *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (citation omitted).

The *Norwood* axiom is indispensable to the preservation of every constitutional right. "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." *U.S. v. Davis*, 482 F.2d 893, 904 (9th Cir. 1973). A police officer, knowing that he is constitutionally barred from searching the trunk of a particular car, cannot evade the Fourth Amendment by simply asking a passerby to perform the search instead. This rule, which is not tethered to traditional state action analysis (it does not inquire into "coercion," "conspiracy," "public function," and so on), is routinely enforced by lower courts. *See, e.g.*, *Specht v. Jensen*, 832 F.2d 1516, 1523 (10th Cir. 1987) ("When a government official affirmatively facilitates or encourages an unreasonable search performed by a private person, a constitutional violation occurs."); *Pruitt v. Pernell*, 360 F. Supp. 2d 738, 746 (E.D.N.C. 2005) ("it is also well settled that state actors must not affirmatively facilitate or encourage an unreasonable search by a private person"); *Richard v. City of Harahan*, 6 F. Supp. 2d 565, 573 (E.D. La. 1998) (same).

Norwood itself did not depend or rest on state action doctrine. The prohibitory language used by the Court in *Norwood* ("induce, encourage or promote") is markedly different from and broader than the familiar language of state action doctrine ("coercion," "joint activity," "conspiracy," and so on). Thus *Norwood*'s axiomatic principle can be violated even

when state action (by the private party) has not been shown. This is clear from the facts of *Norwood*, which was ***not*** a state action case.

In *Norwood*, this Court enjoined Mississippi's policy of providing certain free textbooks to whites-only private schools. *See* 413 U.S. at 466. The phrase "state action" does not appear in the case. No claim was made or could have been made that the state's provision of textbooks was somehow coercive. Nor could mere provision of free textbooks convert a private school into a state actor under this Court's joint activity or entwinement precedents. *Cf., e.g.*, *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (private school's receipt of over 90% of funding from government did not make school a state actor).

Norwood did not hold that the private whites-only schools in that case had been turned into state actors. On the contrary, the *Norwood* Court held that the Constitution had been violated, and an injunction had to issue, without reliance on state action doctrine and without applying any state action test. The Court should do the same here.

Blum v. Yaretsky, 457 U.S. 991 (1982), which the Federal Defendants rely on heavily to argue that Respondents must prove coercion, is not to the contrary. In *Blum*, Medicaid-eligible patients brought a procedural Due Process challenge against their transfer to lower levels of medical care in private nursing homes. Although the proper level of care was decided by private physicians at the nursing homes, plaintiffs did not sue the physicians or the homes; instead they sued the state agency that had reduced their Medicaid benefits on the basis of the transfer. This Court dismissed the patients' constitutional

claims, finding that the physicians' decision as to appropriate medical care was not state action because it had not been coerced or otherwise controlled by the state. *See* 457 U.S. at 995-96, 1005-10.

Blum in no way undercuts *Norwood*. There was no claim in *Blum* that state agents had deliberately sought to violate constitutional rights by proxy. There was no allegation that state agents had knowingly sought to induce or encourage any nursing homes or physicians to lower the level of care for any particular patient (and a fortiori no claim that they had done so to evade Due Process constraints). Thus *Blum* does not hold that the coercion test—or some other state action test—must still be satisfied even when governmental defendants commit a *Norwood* violation (i.e., deliberately seek to evade constitutional rights by inducing private parties to do what the government may not). In *Blum* there was no alleged *Norwood* violation.

Sixty years ago, in *Evans v. Newton*, 382 U.S. 296 (1966), this Court held that the city of Macon, Georgia, could not evade the Equal Protection Clause by transferring ownership of a whites-only city park to private parties who would maintain it as a whites-only facility. The *Evans* Court tried to explain its decision in difficult-to-follow "state action" terms, but today *Evans* is seen (correctly) as holding that government cannot be allowed to deliberately evade the Constitution through the use of private party proxies. "[S]hould a public institution be placed in private hands ***with the actual purpose of evading constitutional requirements***, the courts may look beyond the formal structure of the institution" and issue an injunction regardless of whether traditional

state action doctrine is satisfied. *Rendell-Baker v. Kohn*, 641 F.2d 14, 23 (1st Cir. 1981) (emphasis added) (citing *Evans*), *aff'd*, 457 U.S. 830 (1982).

The same anti-evasion principle applies here. In "the vast democratic forums of the Internet," *Reno v. American Civil Liberties Union*, 521 U. S. 844, 868 (1997), Federal agents cannot be permitted to censor protected speech by deliberately seeking to "induce, encourage or promote," *Norwood*, 413 U.S. at 465, such censorship by the private companies that control those forums. If the judiciary does not intervene on this record, a brave new free speech world awaits us, in which the Government can and will censor dissent and dissenters by proxy, controlling what hundreds of millions of Americans can say, see and hear every day. We may be living in that world already.

II. *Under* Skinner*, state action must be found here.*

Should the Court choose to reach the state action issue, coercion and joint activity need not be the sole focus. The famous Section 230 of the Communications Decency Act—immunizing social media platforms against liability if they censor "constitutionally protected" speech, 47 U.S.C. § 230(c)(2)(A)—should play a decisive role as well. In fact, the closest and most important precedent for the instant case is *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), which turned not on coercion but on a similar federal immunity provision.

In *Skinner*, the Court ruled on the constitutionality of newly enacted federal regulations concerning urine and breath testing of private railway employees. *See Skinner*, 489 U.S. at 614–15. One section of the regulations ***required*** 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***. *See id.* Subpart D did not require the railway companies to conduct the tests covered in that section of the regulations; instead, it immunized railway companies against liability if they performed those tests. *See id.*

The government argued in *Skinner* that the Subpart D tests were not state action and hence not subject to Fourth Amendment scrutiny because (1) there was no coercion and (2) the ultimate decision about whether to perform the tests was left to the railway companies. *See id.* at 614–15. That is the very same argument made by the Federal Government here, with respect to social media companies' censorship decisions. But the *Skinner* Court expressly rejected this claim.

"The fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one." *Id.* at 615. "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.* Specifically, the Federal Government had: (1) "removed all legal barriers to the testing"—i.e., had immunized the railways against liability if they performed the tests; (2) "made plain … its strong preference for [the] testing"; and (3) expressed its "desire" to participate in the 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.

The same three features are present here. The Federal Government has: (1) through Section 230, "removed all legal barriers" to social media censorship of constitutionally protected speech, immunizing the platforms against liability if they censor; (2) repeatedly made plain its "strong preference" for such censorship; and (3) endeavored to participate directly and systematically (as established by the facts found below) in deciding what specific speech and which specific speakers the platforms should censor.

Indeed, on every front, the case for a state action finding is ***stronger*** here than in *Skinner*. No allegation was made in *Skinner* that the Government had sought in any way to single out particular employees for testing. Here, by contrast, the Federal Government has repeatedly singled out particular viewpoints, information, and speakers for censorship through its systematic, persistent, and innumerable communications with social media companies. This presents a far stronger case of governmental "encouragement, endorsement, and participation."

Even more fundamentally, there was no allegation in *Skinner* that the Federal Government had ***pressured*** the railway companies in any way to conduct the Subpart D testing. Here, by contrast, there is copious evidence that the Government has pressured social media companies to censor speech the Administration disfavors.

When combined with the other *Skinner* factors, governmental pressure makes a state action finding imperative. *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). Otherwise every constitutional right would be in jeopardy.

Suppose the Federal Government: (1) passed a statute guaranteeing legal immunity to private companies if they hack into U.S. citizens' emails or texts and publish that material online; (2) made clear to these companies the Government's strong preference that such hacking take place; (3) communicated secretly with those companies to tell them which people the government most wanted to target; and finally (4) pressured these companies to perform the hacks by suggesting adverse regulatory consequences and intense White House disfavor if they didn't comply. Even if no coercion took place, these facts must surely trigger a holding of state action. If not, the Government could eviscerate the Fourth Amendment (and every other constitutional right) through the simple expedient of immunizing private parties from liability and having those parties perform the rights-violating conduct at the Government's behest.

III. *An Injunction Barring Federal Agents from Privately Communicating with Social Media Companies Encouraging Censorship of Constitutionally Protected Speech Would Be Narrowly Tailored and Would Not Impinge on Petitioners' Free Speech Rights.*

Petitioners object to the breadth of the injunction issued by the Fifth Circuit and claim it will

interfere with Petitioners' own speech. In the District Court below, the *Kennedy* Plaintiffs sought a slightly narrower preliminary injunction, barring Federal agents from engaging, "pursuant to their official duties, in private communications with any social media company with the purpose of inducing, encouraging, or promoting the censorship of constitutionally protected speech."[4] **S**uch an injunction would not impinge on Petitioners' free speech rights and would be narrowly tailored to redressing the constitutional violation at issue here.

"[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Rather, they are engaging in government speech, and it is well established that "government speech itself is not protected" by the First Amendment. *NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990) ("The First Amendment protects citizens' speech only from government regulation; government speech itself is not protected by the First Amendment."). As this Court has stated, there is a "crucial difference between government speech" and the "private speech [that] the Free Speech and Free Exercise Clauses protect." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000); *see also, e.g.*, *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009) ("[T]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."); *Columbia Broad. Sys., Inc. v. Democratic*

[4] *E.g.*, ECF 20 at p. 9. The *Kennedy* Plaintiffs' preliminary injunction motion remains pending in the District Court, undecided.

Nat'l Comm., 412 U.S. 94, 139 & n.7 (1973) (Stewart, J., concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government.").

Accordingly, an injunction in this case limited to private communications by government agents in exercise of their official duties would not violate Petitioners' First Amendment rights. "[I]f we conclude that the speech in this case is government speech, the analysis ends because there has been no First Amendment violation—in fact, the First Amendment would not even apply." *Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 393 (5th Cir. 2014) (citation omitted), *rev'd on other grounds*, 576 U.S. 200 (2015). *See also, e.g.*, *Vista-Graphics, Inc. v. Va. Dep't of Transportation*, 682 F. App'x 231, 237 (4th Cir. 2017) ("government speech [is] not subject to protection under the Free Speech Clause").

Moreover, an injunction directed solely at federal agents' private communications with social media companies undertaken with the purpose of encouraging censorship of protected speech would be narrowly tailored to redress the constitutional violation at issue here and the means by which that violation has been accomplished. *See Missouri v. Biden*, 2023 U.S. Dist. LEXIS 114585, at *159 ("it was not the public statements that were the problem…. Defendants … rather used meetings, emails, phone calls, follow-up meetings, and the power of the government to pressure social-media platforms to change their policies and to suppress free speech").

Such an injunction would leave Federal officials and Members of Congress entirely free to

publicly state any pro-censorship opinions they choose. If our elected representatives and our administrative officers have lost faith in the First Amendment, and believe that the American people should not be permitted to express or see certain facts or viewpoints, they would be free to publicly say so any time they wished.

In addition, an injunction directed solely at censorship of constitutionally protected speech would defang any claim by Petitioners that Federal agents have a right and duty to ask social media companies to remove genuinely criminal or otherwise illegal content. They would remain entirely free to do so.

CONCLUSION

Oliver Wendell Holmes once said that "general principles do not decide concrete cases." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). But this dictum is itself a "general principle," and like every other titan of American jurisprudence, Holmes violated it and stood unwaveringly on principle when it came to free speech. *See, e.g.*, *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("we should be eternally vigilant against attempts to check the expression of opinions that we loathe").

Fundamental principles do decide this case. The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *Associated Press v. U.S.*, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring) (quoting *U.S. v.*

Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.)).

For the foregoing reasons, the *Kennedy* Plaintiffs respectfully ask the Court to affirm.

Dated: February 9, 2024
Respectfully Submitted,

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