

No. 23A243

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

MISSOURI, ET AL.

SUPPLEMENTAL MEMORANDUM REGARDING
EMERGENCY APPLICATION FOR A STAY

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The government respectfully files this supplemental memorandum to address recent developments in this case in the Fifth Circuit.

1. On July 4, 2023, the district court issued a sweeping preliminary injunction prohibiting seven groups of government defendants from engaging in ten types of communications regarding content-moderation on social media, subject to eight carveouts. See Appl. App. 156a-162a, 176a. On September 8, the Fifth Circuit affirmed the injunction with respect to four of those groups (the White House, the Surgeon General's office, the Federal Bureau of Investigation, and the Centers for Disease Control and Prevention), vacated nine of the prohibitions and modified the tenth, and vacated all of the carveouts. See Appl. 9-13; Appl. App. 248a. On September 11, the Fifth Circuit issued its mandate.

On September 14, 2023, the government sought an emergency stay of the district court's injunction, as modified by the Fifth

Circuit, pending certiorari. Respondents filed their opposition on September 20, and the government filed a reply on September 21. Justice Alito has administratively stayed the district court's injunction until 11:59 p.m. on Wednesday, September 27.

2. On Friday, September 22, 2023, after the stay application in this Court was fully briefed, respondents filed a petition for panel rehearing in the Fifth Circuit. That petition asked the court to "grant panel rehearing and reinstate the injunction, as modified by the Court, to apply to the [Cybersecurity and Infrastructure Agency (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." 23-30445 C.A. Rehearing Pet. 17.

3. On Monday, September 25, 2023, the Fifth Circuit issued a summary order stating in full: "IT IS ORDERED that the petition for rehearing is GRANTED." 23-30445 C.A. Doc. 252-2, at 1. Although Federal Rule of Appellate Procedure 40(a)(3) provides that "no response to a petition for panel rehearing is permitted" "[u]nless the court requests" one and that "[o]rdinarily, rehearing will not be granted in the absence of such a request," the Fifth Circuit never requested a response from the government. And although the Fifth Circuit had already issued its mandate -- thereby divesting itself of authority over the case -- the court also did not purport to recall the mandate or explain why that

step would be justified. Cf. 5th Cir. R. 41.2 ("Once issued a mandate will not be recalled except to prevent injustice.").

4. The intended effect of the Fifth Circuit's order is unclear. Federal Rule of Appellate Procedure 40(a)(4) specifies that "[i]f a petition for panel rehearing is granted, the court may do any of the following: (A) make a final disposition of the case without reargument; (B) restore the case to the calendar for reargument or resubmission; or (C) issue any other appropriate order." Here, the Fifth Circuit did not purport to do any of those things and did not otherwise explain the intended effect of its order. Respondents' September 25 letter notifying this Court of the Fifth Circuit's order describes it as a "significant procedural development," but likewise says nothing about what respondents believe the order actually does.

To the extent the Fifth Circuit contemplated further proceedings culminating in the issuance of a modified opinion and judgment, it did not specify what form those proceedings would take or when a modified judgment would issue -- and it also did not withdraw its original judgment or reinstate its stay of the injunction in the meantime. And to the extent the Fifth Circuit instead intended to summarily grant the relief respondents requested in their rehearing petition, it neither explained why that relief was warranted nor specified precisely what form the modified injunction would take. That would be no small issue: Respondents' rehearing petition sought to extend the injunction to hundreds of

thousands of additional government employees associated with two additional groups of defendants -- those from CISA and the Department of State -- and to reinstate (unspecified portions of) the fifth of the ten prohibitions in the district court's original injunction, which addressed the government's interactions with the Election Integrity Partnership, the Virality Project, and other entities. Appl. App. 159a.*

5. To the extent the Fifth Circuit's order purports to extend injunctive relief beyond the scope set forth in that court's original decision, a stay of that additional relief is warranted for the reasons explained in the government's application: Any additional relief would necessarily rest on the same novel and

* Although neither respondents nor the Fifth Circuit specifically identified the additional parties respondents sought to enjoin in their rehearing petition, the district court's original injunction defined "CISA Defendants" to mean CISA; Jen Easterly, Director of CISA; the Senior Cybersecurity Advisor and Senior Election Security Leader, formerly Kim Wyman; Lauren Protentis, Geoffrey Hale, Allison Snell, and Brian Scully, officials of CISA; the Department of Homeland Security (DHS); Alejandro Mayorkas, Secretary of Homeland Security; Robert Silvers, Under-Secretary of the Office of Strategy, Policy, and Plans; and Samantha Vinograd, Senior Counselor for National Security in the Office of the Secretary, along with their secretary, directors, administrators, and employees. Appl. App. 158a, 168a n.26. The court defined "State Department Defendants" to mean the State Department; Leah Bray, Acting Coordinator of the State Department's Global Engagement Center (GEC); Alexis Frisbie, State Department Senior Technical Advisor and Member of the Technology Engagement Team at the GEC; and Daniel Kimmage, Acting Coordinator of the GEC, along with their secretary, directors, administrators, and employees. Id. at 158a, 168a n.31. To the extent the Fifth Circuit intended its order to extend the injunction to those defendants-appellees, they should be deemed to be applicants here as well.

erroneous understanding of the state-action doctrine, and would also suffer from the same Article III and equitable flaws as the portion of the injunction that the court originally affirmed. Appl. 13-40; Reply 1-18. A stay of any expanded injunction would also be warranted because of the procedural impropriety of substantially expanding the injunction after issuance of the mandate and without giving the government an opportunity to be heard. And such a stay is encompassed within the relief requested in the government's stay application, as well as the administrative stay already issued by Justice Alito -- both of which apply to the July 4, 2023, preliminary injunction issued by the district court and thus reach any portion of that injunction affirmed by the Fifth Circuit. See Appl. 40.

Given the current posture of the case, the unreasoned nature of the Fifth Circuit's order, and the uncertainty about that order's intended effect, the government will not develop at length its additional arguments explaining why any extension of the injunction to cover the CISA and State Department defendants, or to reach activities related to the Election Integrity Project or related entities, would be unwarranted and improper -- as the Fifth Circuit itself previously held, see Appl. App. 238a. The government is of course prepared to submit further briefing on those issues if the Court requests it.

6. The government previously suggested that, if this Court wished to further expedite proceedings in this case, it could

construe the government's stay application as a petition for a writ of certiorari and grant certiorari along with a stay. Appl. 6, 40. That course remains available: The Fifth Circuit's unexplained grant of panel rehearing does not purport to modify its prior judgment; the court lacked authority to modify its judgment without recalling its mandate; and the issues decided in that judgment continue to warrant this Court's review. Whether or not the Court grants certiorari immediately, however, the government respectfully submits that the irregularity of and additional uncertainty caused by this most recent development provide powerful additional reasons to stay the district court's preliminary injunction in its entirety.

Respectfully submitted.

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