No. 24-732

IN THE

# Supreme Court of the United States

CHILDREN'S HEALTH DEFENSE,
*Petitioner*,

*v.*

META PLATFORMS, INC., *et al.*,
*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED

1. Does the existence of 47 U.S.C. § 230, which bars claims based on decisions to remove or not remove third-party content, convert private websites' content-moderation decisions into state action under *Skinner* v. *Railway Labor Executives Association*, 489 U.S. 602 (1989), where government entwinement is otherwise insufficient to allege state action?

2. Did Children's Health Defense plausibly allege that Meta's actions limiting the dissemination of or removing certain of its Facebook posts and unpublishing its Facebook Page (actions primarily resulting from the decisions of independent third-party fact checkers) constituted state action under traditional coercion and joint-action tests based on allegations regarding the Biden administration's general efforts to address the spread of COVID-19 related misinformation?

## PARTIES TO THE PROCEEDING

Meta Platforms, Inc., Mark Zuckerberg, Poynter Institute for Media Studies, Inc. Science Feedback, and Children's Health Defense.

## CORPORATE DISCLOSURE STATEMENT

Meta Platforms, Inc. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

## DIRECTLY RELATED PROCEEDINGS

There are no related proceedings.

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## INTRODUCTION

Children's Health Defense (CHD) alleges that Meta Platforms and its CEO violated the First Amendment by removing or limiting the distribution of certain of its COVID-19 and vaccine-related Facebook posts and ultimately unpublishing its Facebook page. CHD's theory suffers from a host of problems, but chief among them is that CHD fails to allege the requisite state action. The "Free Speech Clause prohibits only *governmental* abridgment of speech," not "*private* abridgment of speech." *Manhattan Cmty. Access Corp.* v. *Halleck*, 587 U.S. 802, 808 (2019). While private parties can sometimes be treated as state actors in "limited circumstances," *id.* at 809, the decision below is just the latest in a long line of decisions across the country that have rebuffed the notion that Meta and companies like it are state actors for First Amendment purposes. CHD does not identify any plausible reason why this case should turn out differently. Instead, it presents the same arguments courts have repeatedly rejected.

Despite that overwhelming consensus in the lower courts, CHD insists Meta's editorial judgments amount to state action because Congress purportedly encouraged those judgments by passing Section 230 in 1996, years before Facebook launched or the COVID-19 pandemic emerged. CHD does not even try to argue that there is a division of authority in the circuits on that question. Section 230 did not coerce Meta to suspend CHD or remove its posts. After all, Section 230's protections apply *regardless* of whether Meta leaves content up or takes it down. It does not tip the scales either way. Because the government has not "put its own weight on the side of the proposed practice," *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974),

Section 230 does not somehow convert Meta's decision to restrict CHD's posts into state action.

Nor is there any reason to grant review of CHD's backup question. CHD insists that the decision below conflicts with the Fifth Circuit's decision in *Missouri* v. *Biden*, 83 F.4th 350 (5th Cir. 2023), which held that various officials in the Biden administration likely violated the First Amendment by coercing websites like Facebook into taking down content. But this Court vacated the Fifth Circuit's decision last Term on standing grounds. *See Murthy* v. *Missouri*, 144 S.Ct. 1972 (2024). And even setting that aside, *Murthy* is plainly distinguishable. Whatever First Amendment claims CHD may have against *government officials* for coercing Facebook to take down their Facebook posts, *see*, *e.g.*, *National Rifle Ass'n* v. *Vullo*, 144 S.Ct. 1316 (2024), CHD has no plausible First Amendment claim against Meta—the *victim* of the alleged coercion. Nothing in the (since vacated) Fifth Circuit decision says anything to the contrary.

Even if the questions presented were worthy of this Court's review (they are not), this is plainly not the case to review them. CHD's petition seeks to revive only its claim for a forward-looking injunction, but that claim is now moot. CHD initially brought this case in response to the Biden Administration's efforts to reduce the spread of COVID-related misinformation as part of its broader effort to fight the pandemic. But much has changed since then. A new presidential administration is in place with very different views regarding the issues relevant to this case. On his first day in office, President Trump issued an executive order repudiating "the previous administration['s]" efforts to address "'misinformation'" online, characterizing those efforts as having "infringed on the constitutionally protected speech

rights of American citizens," and forbidding any federal official from taking similar actions. Executive Order No. 14149, § 1, 90 Fed. Reg. 8243 (Jan. 20, 2025). And CHD's founder, former CEO, and former counsel in this case, Robert F. Kennedy, Jr., is now the U.S. Secretary of Health and Human Services. Against that backdrop, CHD identifies no reason for this Court to weigh in regarding whether Meta's conduct during the Biden administration violated CHD's First Amendment rights. CHD does not plausibly suggest a credible threat of future harm attributable to President Trump, the Kennedy-led health agency, or any other component of the federal government. And even setting that aside, CHD's claim relies heavily on materials outside its complaint—including serial motions for judicial notice—making the record too uncertain and complicated for clean resolution of the questions presented.

## STATEMENT

### A. The State-Action Doctrine

The first bedrock principle of First Amendment jurisprudence is that the Constitution "prohibits only *governmental* abridgment of speech," not "*private* abridgement of speech." *Halleck*, 587 U.S. at 808. Far from being constrained by the First Amendment, private entities have their own "rights to exercise editorial control over speech and speakers on their properties or platforms." *Id.* at 816. Though in rare cases private conduct can be so intertwined with government actors that the private conduct is deemed state action, the state-action doctrine is intentionally narrow to "preserve[] an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). These concerns are heightened in the First Amendment context, where converting

private conduct into governmental action could "eviscerate" private speech rights and chill protected activities. *Halleck*, 587 U.S. at 816.

Accordingly, where a plaintiff alleges a constitutional injury at the hands of private actors, that injury must be "fairly attributable to the State." *Lugar*, 457 U.S. at 937. That requires both that the injury "be caused by the exercise of some right or privilege created by the State or a rule of conduct imposed by the state" and that "the party charged with the deprivation" be "a person who may fairly be said to be a state actor." *Id.* Various tests have been applied to determine when the latter requirement is met, including, for example, when the "challenged activity … results from the State's exercise of coercive power," "when the State provides significant encouragement, … or when a private actor operates as a willful participant in joint activity with the State." *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (quotation marks omitted). Each test attempts ultimately to draw the same line: "state action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Id.* at 295 (quotation marks omitted).

### B. Meta's Past And Present Approaches To Content Moderation

Meta Platforms, Inc. (Meta), offers an array of services, including Facebook, an online service with more than 2.2 billion users worldwide. Appellant's Excerpts of Record Vol. 3 at 421, *Children's Health Defense* v. *Meta Platforms, Inc.*, No. 21-16210 (9th Cir. Oct. 28, 2021), Dkt.20-4 ("ER-3"). Facebook enables users to maintain profiles or create "Pages"; share status

updates, stories, and other content; browse for content through their News Feed; and advocate and fundraise for causes. Appellant's Excerpts of Record Vol. 1 at 7, *Children's Health Defense*, No. 21-16210, Dkt.20-2 ("ER-1"); ER-3 at 425.

Over the years, Meta has developed various policies regarding the content that users may share on Facebook, all part of a continuous effort to balance open expression and community safety. For example, in March 2019 (before the Biden presidency or COVID-19 pandemic), Meta announced it would "reduce the ranking of groups and Pages that spread misinformation about vaccinations in News Feed and Search," as rated by third-party fact-checkers, and "provid[e] people with authoritative information" about vaccines. ER-3 at 445-447. If a Page shared information rated by the third-party fact-checkers as "false" or "partly false," Meta could remove or restrict access to content. ER-3 at 445, 501. If a Page persisted, Meta could reduce the Page's distribution, remove the Page's ability to advertise or solicit donations on Facebook, or disable and delete the Page. *E.g.*, ER-3 at 432, 494, 495-496.

This case centers around Meta's alleged handling of COVID-19-related content during the COVID-19 pandemic—in particular, Meta's posting of third-party fact-check articles regarding certain of petitioner's Facebook posts and its ultimate removal of petitioner's Facebook Page. Neither the COVID-related misinformation policies nor the third-party fact-checking program that lie at the heart of this case remain in effect today.

**1. Meta's Covid-19-era policies**

During the public health emergency posed by the COVID-19 pandemic, Meta instituted measures to "protect people from harmful content … related to COVID-

19 and vaccines." Appellees' Suppl. Excerpts of Record at 131, *Children's Health Defense*, No. 21-16120, Dkt.35 ("SER"). Meta adopted a new policy that, "for the duration of the COVID-19 public health emergency," it would "remove content that repeats other false health information, primarily about vaccines, that are widely debunked by leading health organizations such as the World Health Organization (WHO) and the Centers for Disease Control and Prevention (CDC)." SER 139. By adopting this policy, Meta aimed to "combat misinformation about vaccines and diseases, which if believed could result in reduced vaccinations and harm public health and safety." *Id.*

In May 2023, the WHO announced that it would no longer classify COVID-19 as a global public health emergency, and the federal government ended the COVID-19 public-health emergency declaration in the United States. Shortly thereafter, in June 2023, Meta announced that its "Covid-19 misinformation rules will no longer be in effect globally" and instead would apply only "[i]n countries that have a Covid-19 public health emergency declaration." Lima-Strong, *Meta Rolls Back Covid Misinformation Rules*, Wash. Post (June 16, 2023), https://www.washingtonpost.com/politics/2023/06/16/meta-rolls-back-covid-misinformation-rules. As a result, Meta's COVID-19 misinformation policies are not in effect in the United States today.

**2. Meta's past use of third-party fact-checkers to identify false and misleading content**

Beginning in 2016 and ending in January 2025, Meta relied on independent and non-partisan third-party fact checkers like respondent Poynter Institute (which operates a fact-checking news service, PolitiFact) to identify

potential misinformation posted to Facebook. ER-3 at 501-502. These third-party fact-checkers reviewed content and rated it as "false, altered, partly false, missing context, satire, or true." ER-1 at 11; ER-3 at 501. Posts containing information identified as false or misleading were displayed with an overlay so designating the post and allowing users to click a link to read more about the designation. *E.g.*, ER-3 at 468, 473-474, 479.

On January 7, 2025, Meta announced that it would end its use of third-party fact-checkers and instead implement a "Community Notes" program enabling users of its services to add context to potentially misleading or confusing posts. Issac & Schleifer, *Meta Says It Will End Its Fact-Checking Program on Social Media Posts*, N.Y. Times (Jan. 7, 2025), https://www.nytimes.com/live/2025/01/07/business/meta-fact-checking.

### C. Meta's Labeling and Demoting Of CHD Content Identified By Third Party Fact-Checkers As False Or Misleading

Petitioner CHD used its Facebook Page to share articles and videos that, in its own words, concerned "the risks and harmful effects of chemical exposure upon prenatal and children's health, including from particular vaccines." ER-3 at 424. Between January 2019 and September 2020, third-party fact-checkers rated various CHD posts as containing false or partly false information, causing Meta to impose restrictions on the underlying content. *E.g.*, ER-3 at 465, 466, 468, 470, 473.

As one example, CHD shared a link to an article claiming that "[v]accinated children are more likely to have adverse health outcomes." ER-3 at 471. Third-party factchecker Science Feedback deemed that post to contain "[f]alse [i]nformation" because "[r]igorous and large-scale studies have not found a greater likelihood of

adverse health outcomes in vaccinated children." ER-3 at 470-471. To take another, months into the COVID-19 pandemic, CHD posted a link to an article entitled "Lessons from the Lockdown—Why Are So Many Fewer Children Dying?" that suggested a causal relationship between declining infant deaths during the COVID-19 pandemic and declining "well baby visits" at which vaccines are given. ER-3 at 479. Based on a factcheck from Science Feedback, Meta affixed a warning label to the post. *Id.*

Beyond these examples, CHD's complaint challenged Meta's actions regarding its posts on a range of topics, including vaccines, the pharmaceutical industry, and the impact of 5G networks on human health. *See, e.g.*, ER-3 at 465-493, 517.

In May 2019, Meta deactivated the "donate" button on CHD's Page and prohibited CHD from purchasing advertisements on Facebook after repeated violations of its policies. ER-3 at 493-494. Meta ultimately unpublished CHD's Facebook Page in August 2022. Letter from CHD to Clerk, *Children's Health Defense*, No. 21-16210 (9th Cir. Aug. 18, 2022), Dkt.68.

### D. CHD's Attempts To Allege The Biden Administration's Involvement In Meta's Actions

CHD alleged that Meta's actions regarding its Facebook Page were the result of state action—*i.e.*, the product of either joint action with or coercion by the federal government. However, CHD never asserted claims against any government actor in its complaint. Its allegations, and the focus of its First Amendment claim, have, moreover, shifted over time. In the operative Second Amended Complaint (SAC), CHD alleged that various members of Congress, federal agencies, and nongovernmental entities inquired about or worked with Meta

regarding general issues pertaining to the dissemination of vaccine-related misinformation or promotion of accurate vaccine-related information. The SAC, for example, pointed to the following:

- A letter from Representative Adam Schiff, raising concerns about vaccine misinformation on Meta's online services and asking about Meta's policies and practices regarding such content. ER-3 at 440-442.
- Statements by Mr. Zuckerberg, the CDC, and various nonfederal actors (*e.g.*, the WHO, the British government, and government-affiliated nonprofits like the CDC Foundation) about efforts to "work[] together" to reduce the spread of vaccine misinformation. ER-3 at 435-436, 447-448, 533.
- The fact that Meta directed users to the CDC and WHO websites for reliable information about vaccines. ER-3 at 437.

Throughout this litigation, CHD has repeatedly attempted to supplement its allegations, seeking to refocus the case around the Biden administration's efforts during the height of the COVID-19 pandemic to address the dissemination of COVID-related misinformation. These supplemental allegations concern, for example:

- A January 2021 executive order from President Biden directing federal efforts to "deter the spread of misinformation and disinformation" regarding COVID-19. ER-1 at 44.
- A February 2021 statement by a Meta spokesperson that the company had "reached out to the White House to offer any assistance" in curbing COVID-related misinformation. *Id.* (quotation marks omitted).

- CDC and other Biden administration communications regarding COVID-19 misinformation, produced in response to Freedom of Information Act requests or in the *Missouri* v. *Biden* litigation. *See Children's Health Defense*, No. 21-16210, Dkt.64, 70, 78, 86, 92.
- An August 2024 statement by Mr. Zuckerberg describing interactions with the federal government in 2021 about COVID-19 content. Pet.12; *see* Letter from Mark Zuckerberg, Founder, Chairman & CEO, Meta Platforms, Inc., to Hon. Jim Jordan, Chairman, Comm. on the Judiciary, U.S. House of Reps. (Aug. 26, 2024).

CHD's pivot to focus on the Biden administration's efforts to address COVID-related misinformation is also reflected in its petition, which, like its many requests for judicial notice, focuses on evidence produced in the *Murthy* litigation. *See* Pet.14-19.

### E. Changes Accompanying The Second Trump Administration

In recent months, the federal government's positions regarding the issues pertinent to this case have changed dramatically. President Trump succeeded President Biden on January 20, 2025. That same day, President Trump issued an executive order affirming that it is the policy of the United States to "ensure that no Federal Government officer, employee, or agent engages in or facilitates any conduct that would unconstitutionally abridge the free speech of any American citizen," including through interactions with "online platforms." Executive Order No. 14149, § 2, 90 Fed. Reg. 8243 (Jan. 20, 2025). In the ensuing weeks, he issued executive orders reinstating military members discharged for refusing the COVID-19 vaccine and seeking to end

federally funded COVID-19 vaccine mandates in schools. Executive Order No. 14184, 90 Fed. Reg. 8761 (Jan. 27, 2025); Executive Order No. 14214, 90 Fed. Reg. 9949 (Feb. 14, 2025). And on February 13, 2025, CHD's founder, former chairman, and former counsel in this litigation, Robert F. Kennedy, Jr., assumed office as the U.S. Secretary of Health and Human Services.

**F. Proceedings Below**

CHD initiated this action in August 2020. Its original complaint brought three claims: (1) a *Bivens* claim based on the theory that Representative Schiff, the CDC, and the WHO compelled or acted jointly with Respondents to violate CHD's First Amendment and due process rights; (2) a false-advertising Lanham Act claim; and (3) a civil-fraud RICO claim. SER 89-113. The complaint sought money damages and injunctive and declaratory relief as to all three claims. SER 114-115.

Almost a year later, following serial attempts to supplement its pleadings, *see, e.g.*, ER-1 at 44, 46; Appellant's Excerpts of Record Vol. 2 at 270, *Children's Health Defense*, No. 21-16210, Dkt.20-3 ("ER-2"), the district court dismissed the SAC with prejudice. Pet.App.96a. The court considered CHD's various supplements "as a further proffer of how CHD would amend the complaint if given leave to do so," but concluded that the proffer failed. Pet.App.159a, 162a.

CHD appealed to the Ninth Circuit. Between May 17 and July 26, 2024, CHD moved five times for the court of appeals to take judicial notice of various additional documents, *Children's Health Defense*, No. 21-16210, Dkt.64, 70, 78, 86, 92. On August 9, 2024, the Ninth Circuit affirmed the dismissal of the SAC in an opinion written by Judge Miller and joined in full by Judge Korman and in part by Judge Collins.

As an initial matter, the court determined that, like the district court, it would consider CHD's supplemental allegations as a "proffer of how CHD would amend the complaint if given leave to do so." Pet.App.3a. The court declined to take judicial notice of documents CHD presented for the first time on appeal, but explained that even if it were to consider the documents, they would not have affected the outcome. Pet.App.17a.

Turning to the merits, the court concluded that CHD's constitutional claim failed because CHD did not plausibly allege that Meta was a "state actor for constitutional purposes." Pet.App.10a, 12a. The court reached this conclusion on two independent grounds. First, it held that CHD could not demonstrate state action because it had not alleged that the source of its constitutional harm was a government statute or policy. Pet.App.12. Rather, the "source of the alleged … harm" was Meta's own policies and Terms of Service, not any provision of federal law or actionable federal rule that Meta was required to follow. *Id.* CHD's failure to satisfy this first part of the state action test was itself "fatal to its state action claim." Pet.App.13a (citing *Lindke* v. *Freed*, 144 S.Ct. 756, 767-768 (2024)).

The court then held that CHD's constitutional claim failed for a second, independent reason: Meta's actions were not "fairly attributable to the government" because CHD had not plausibly alleged that Meta had willfully participated in joint action with the government to deprive CHD of constitutional rights or was compelled by the government to do so. Pet.App.13a-14a, 15a (citing *Lugar*, 457 U.S. at 937, 939). CHD had not sufficiently alleged "joint action" because its pleadings failed to show that "Meta has taken any specific action on the government's say-so" and instead "indicate[d] that Meta and the government have regularly disagreed."

Pet.App.17a. This was particularly true, the court reasoned, in light of Meta's "independent incentives to moderate content." Pet.App.16a, 17a (quoting *Murthy*, 144 S.Ct. at 1988).

The court of appeals further concluded that CHD had not sufficiently alleged that the government "coerced or compelled" Meta to take action against CHD. Pet.App.22a. The court noted that "there is reason to doubt that a purely private actor like Meta, which was the *victim* of the alleged coercion, would be the appropriate defendant," but it determined that it "need not resolve that question" because CHD failed to plead coercion. Pet.App.23a. According to the court, "[a]ll CHD has pleaded is that Meta was aware of a generalized federal concern with misinformation on social media platforms and that Meta took steps to address that concern." Pet.App.25a. And although CHD pointed to letters from two members of Congress urging Meta to take action against misinformation generally, "the letters did not require Meta to take any particular action and did not threaten penalties for noncompliance." *Id.*

The court also rejected CHD's "hybrid" theory of state action that focuses on Section 230. Pet.App.27a. Although Section 230 protects Meta from liability related to its moderation of content on its services, the court of appeals explained that "many companies rely, in one way or another, on a favorable regulatory environment or the goodwill of the government," but the law does not thereby consider those companies state actors. Pet.App.27a-28a. It next rejected CHD's analogy of Section 230 to the regulatory scheme in *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). Unlike the regulations at issue there, the court of appeals reasoned, Section 230 is "entirely passive" toward the underlying private conduct: it is "just as protective of a provider's

right to maintain 'objectionable' content on its platform as it is of a provider's right to delete such content." Pet.App.29a. "By giving … Meta that freedom, the government has hardly expressed a 'strong preference' for the removal of speech critical of vaccines." *Id.* Given Section 230's neutral, passive stance toward content moderation, the court of appeals rejected CHD's argument that Section 230 could somehow transform statements that do not by themselves establish joint action and coercion into state action. Pet.App.31a.

Finally, the court affirmed the dismissal of CHD's Lanham Act and civil RICO claims. Pet.App.33a-40a.

Judge Collins concurred in part, concurred in the judgment in part, and dissented in part. Pet.App.42a. His partial dissent focused on CHD's "First Amendment claim for injunctive relief against … Meta," which Judge Collins would have revived. *Id.* With respect to that claim, Judge Collins concluded that CHD had plausibly alleged that the government's interactions with Meta, combined with the immunity Meta receives from Section 230, transformed Meta into a state actor under *Skinner*. Pet.App.72a. But Judge Collins did not dispute the majority's conclusion that CHD had not plausibly alleged state compulsion or joint action under *Lugar*. *See* Pet.App.81a, 86a, 87a.

## REASONS FOR DENYING THE PETITION

### I. PETITIONER'S CLAIM IS MOOT

Circumstances have changed radically such that the courts "can no longer provide [petitioner] with any effectual relief," and its claim therefore "is moot." *Uzuegbunam* v. *Preczewski*, 141 S.Ct. 792, 796 (2021). Federal jurisdiction extends only to live cases or controversies. Thus, to maintain jurisdiction, "parties must continue to

have a personal stake in the outcome of the lawsuit." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 478 (1990) (quotation marks omitted). That requires "an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Id.* at 477. Here, petitioner seeks injunctive relief only. *See* Pet.25 (stating that CHD seeks to enjoin Meta from restricting its posts or account); Pet.35 n.20 (acknowledging that "no relief in damages is available"). But the governmental conduct on which petitioner's claim is based has now stopped and CHD has never asserted a theory that would allow a court to order a purely private actor to carry CHD's content. Doing so would be a First Amendment violation, not a First Amendment remedy. Now that the COVID-19 pandemic is over and there is a new presidential administration, there is no effectual relief petitioner could obtain, and petitioner no longer has "a legally cognizable interest in the outcome" of the case. *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013).

Petitioner's state-action argument turns entirely on the conduct of the Biden administration and, in particular, conduct during a narrow window of time during the height of the COVID-19 pandemic when the Biden administration sought to prevent the widespread dissemination of COVID-related misinformation. *See* Pet.10-19, 30-31, 33-34. As this Court observed in *Murthy*, "the vast majority" of such efforts "occurred in 2021, when the pandemic was still in full swing," and "had slowed to a trickle" by "August 2022." 144 S.Ct. at 1994.

Now, years later, with the pandemic behind us and a new presidential administration with dramatically different policy priorities, no live claim for prospective relief remains. As petitioner acknowledges (Pet.4), its founder and prior counsel in this case, Robert F. Kennedy, Jr., is now the Secretary of Health and Human

Services. President Trump also issued an executive order on the very first day of his term repudiating what it described as the "previous administration['s]" efforts to "pressure … social media companies[] to … suppress speech … [u]nder the guise of combatting 'misinformation.'" Executive Order No. 14149, § 1, 90 Fed. Reg. 8243 (Jan. 20, 2025). That same order declares it the "policy of the United States to … ensure that no Federal Government officer, employee, or agent engages in or facilitates any conduct that would unconstitutionally abridge the free speech of any American citizen"; forbids the federal government from using "any Federal resources in a manner contrary to" that policy; and directs the Attorney General to "investigate the activities of the Federal Government over the last 4 years that are inconsistent with the purposes and policies of th[e] order." *Id.* §§ 2, 3.

As petitioner observed, Meta's CEO, Mark Zuckerberg, has recently criticized the Biden administration's attempts to influence Covid-related content moderation, calling the past administration's efforts "ridiculous." Rogan & Zuckerberg, *Joe Rogan Experience #2255—Mark Zuckerberg* (Jan. 10, 2025), https://epublications.marquette.edu/cgi/viewcontent.cgi?article=3057&context=zuckerberg_files_transcripts; *see also* Pet.'s Suppl. Letter (Feb. 12, 2025). Mr. Zuckerberg has also explained that, while Meta's content-moderation decisions remained its own, he "believe[s] the government pressure was wrong" and that Meta is "ready to push back if something like this happens again." Letter from Mark Zuckerberg to Representative Jim Jordan at 1 (Aug. 26, 2024), https://www.americanrhetoric.com/speeches/PDFFiles/Mark-Zuckerberg-Letter-on-Govt-Censorship.pdf. More generally, Meta has announced that it will discontinue its third-party fact-checking

program in the United States, where it will instead rely on "Community Notes" to identify posts that are "potentially misleading or confusing." Meta, *Our Approach to Misinformation* (Apr. 7, 2025), https://transparency.meta.com/features/approach-to-misinformation.

These widespread changes render petitioner's claim moot several times over regardless of the fact that petitioner "remains de-platformed." *See* Pet.5; *see also* Pet.'s Suppl. Letter at 2 (arguing that CHD's continued suspension "perpetuates a live controversy"). That continued suspension reflects the fully independent judgment and First Amendment protected editorial discretion of Meta. Given the government's change of position and disclaimer of any ongoing interference in Meta's editorial discretion, this case is moot and there is no possibility of any relief that would not simply replicate the status quo by directing the government to stop doing what it has already ceased.

That is for two related reasons. First, petitioner's claim is constitutional, and the Constitution "prohibits only *governmental* abridgment of speech," not "*private* abridgment of speech." *Halleck*, 587 U.S. at 808. When the government oversteps, the proper remedy is to order the government to stop, but the government has already stopped.

Second, because Meta is a private actor, the First Amendment bars any injunction compelling Meta to disseminate CHD's content. Any such order would violate, not vindicate, the First Amendment. As this Court recently articulated, Meta's decisions regarding "which third-party content" to display are "expressive choices" that "receive First Amendment protection." *Moody* v. *NetChoice, LLC*, 144 S.Ct. 2383, 2406 (2024). "The government," courts included, therefore "may not … alter

[Meta's] choices about the mix of speech it wants to convey." *Id.* at 2403. Thus, even where state action has shaped a defendant's expressive conduct, the permissible remedy is not to compel the defendant to reshape its expression but instead to enjoin the government interference and leave the defendant "free" to make its own decisions. *Carlin Commc'ns, Inc.* v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1297 (9th Cir. 1987). Petitioner cannot obtain an injunction precluding Meta from independently deciding not to carry CHD's content.[1]

## II. THERE IS NO PRESENT NEED FOR THIS COURT'S INTERVENTION

### A. There Is No Circuit Split

Even if the petition presented a live controversy, this Court's review would be unwarranted because there is no division in authority to resolve on either of the two questions presented. Pet.i.

The petition's first and primary question presented asks whether Section 230's conferral of immunity transforms private content-moderation decisions into state action under *Skinner* v. *Railway Labor Executives' Association*, 489 U.S. 602 (1989). *See* Pet.26-32. As discussed *infra* pp.22-27, the Ninth Circuit rightly rejected that theory. But merits aside, this Court's intervention is not warranted as petitioner has not even purported to

[1] While CHD's complaint also sought damages, there is no *Bivens* damages remedy for an alleged First Amendment violation, *see Egbert* v. *Boule*, 142 S. Ct. 1793, 1803-1804 (2022), particularly with respect to a private corporation, *see Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 71 (2001); *see also* Pet.App.57a (dissent "agree[ing] that CHD cannot assert a *Bivens* claim against Defendants for monetary damages based on alleged violations of its First Amendment rights"). Presumably for that reason, CHD's petition does not seek to revive its damages claim.

identify a division of authority among the circuits regarding its *Skinner* theory of state action. Indeed, respondents are not aware of any other court of appeals or state supreme court that has ever even addressed that theory.

Regarding the petition's fallback question presented—whether CHD alleged state action under a "nexus" theory—petitioner argues that the decision below conflicts with the Fifth Circuit's decision in *Missouri* v. *Biden*, 83 F.4th 350 (5th Cir. 2023), *rev'd sub nom Murthy* v. *Missouri*, 144 S.Ct. 1972 (2024). *See* Pet.33. That is wrong, for two reasons. First, this Court reversed *Missouri* last Term. *See Murthy*, 144 S.Ct. at 1997. A reversed decision is of no precedential value and does not create an extant division of authority. *See Teague* v. *Lane*, 489 U.S. 288, 309 (1989) (recognizing that reversed decisions are not "conclusive adjudication[s]" (quotation marks omitted)). Moreover, while this Court addressed standing only, its reasoning was consistent with the decision below. Even just to establish standing, this Court required plaintiffs to show "that a particular defendant pressured a particular platform to censor a particular topic *before* that platform suppressed a particular plaintiff's speech on that topic." *Murthy*, 144 S.Ct. at 1988. The majority applied a similar standard below, stating "a plaintiff must show some specificity to the understanding between the private actor and the government." Pet.App.14a-15a. Thus, in light of this Court's reasoning, if not its reversal alone, the Fifth Circuit's decision in *Murthy* does not establish a division in authority.

Second, even if the Fifth Circuit's reversed decision were relevant, it does not present a division of authority. For one thing, the Fifth Circuit's decision is not inconsistent with the decision below because *Murthy*

addressed only claims against *federal officials*, not private companies. Whatever First Amendment claim CHD may have against officials in the Biden Administration for allegedly coercing Meta to take down CHD's Facebook posts, CHD has no viable First Amendment claim against *Meta*—the victim of the alleged coercion. *See infra* pp.31-33. Nor is there any division of authority regarding "the standard for assessing" state action, as petitioner incorrectly suggests. To the contrary, the Fifth Circuit viewed the standard it applied as consistent "with other federal courts," including "the Ninth Circuit." *Missouri*, 83 F.4th at 376. *Compare* Pet.App.11a, 15a, *with Missouri*, 83 F.4th at 377 (articulating similar state-action standards). At most, then, the petition identifies not a split regarding applicable legal standards but only the application of settled law to reach differing conclusions. This Court "rarely grant[s] [a petition for *certiorari*] when the asserted error consists of … the misapplication of a properly stated rule of law." S. Ct. R. 10.

Indeed, the petition does not actually argue that the Ninth Circuit applied an incorrect standard. Instead, it argues that the result reached below conflicts with the Fifth Circuit's reversed decision because the majority failed to "draw all reasonable inferences in CHD's favor" and "refused to consider" the "preliminary injunction evidence" admitted in *Missouri* and of which petitioner sought judicial notice. At bottom, then, the petition does not raise serious questions regarding the state action doctrine but instead quibbles with the Ninth Circuit's application of Federal Rule of Civil Procedure 12(b)(6) and the requirements for judicial notice. Those are not questions worthy of certiorari.

### B. Further Percolation Is Required Following The Court's Recent Decisions In *Murthy*, *Vullo*, And *NetChoice*

Just last Term, this Court decided three consequential cases addressing state action and online content moderation issues pertinent to the questions presented here. *See National Rifle Association of America* v. *Vullo*, 144 S.Ct. 1316 (2024); *Murthy*, 144 S.Ct. 1972; *NetChoice*, 144 S.Ct. 2383. The decision below was the first court of appeals decision to apply those cases. To the extent the Court is inclined to take those issues back up, it should await further percolation among lower courts before doing so. No exigencies require departure from that usual course.

In the decision below, issued about two months after *Vullo* and one month after *Murthy* and *NetChoice*, the majority and partial dissent each grappled with how to apply those three key cases. *See* Pet.App.22a, 94a (*Vullo*); Pet.App.16a-17a, 83a-84a n.11 (*Murthy*); Pet.App.21a, 88a, 90a, 92a (*Moody*). To date, the decision below is the only court of appeals decision to apply all three cases in the context of a First Amendment claim against a private website. It applied those decisions entirely correctly, but regardless, the questions raised here would "benefit from further percolation in the lower courts" before this Court takes up such issues again, *Calvert* v. *Texas*, 141 S.Ct. 1605, 1606 (2021) (Sotomayor, J., concurring); *see also Box* v. *Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S.Ct. 1780, 1784 (2019) (Thomas, J., concurring) (observing that "further percolation may assist our review" of the question presented).

Petitioner has not identified any reason for this Court to cut off lower court percolation by prematurely

revisiting issues decided just last Term. As explained *supra* pp.14-18, CHD's claim lives years in the past. None of the circumstances at the core of petitioner's claim persist today nor are they poised for imminent return. The country is not in the throes of a devastating pandemic. A new presidential administration is in place and has made it a priority to prevent any governmental efforts to influence the dissemination of information on private websites. CHD's founder is now Secretary of Health and Human Services. Pet.4. And Meta has discontinued the third-party fact checking program at the heart of petitioner's claim. *See* Meta, *Our Approach to Misinformation*. Petitioner asserts that the questions presented are "urgent," Pet.3-4, but fails to articulate why in light of the complete reversal of circumstances since this case was filed.

## III. THE DECISION BELOW WAS RIGHTLY DECIDED

### A. Section 230 Does Not Transform Private Action Into State Action

As the panel majority correctly concluded, petitioner's state-action theory fails because Meta's content-moderation decisions do not follow from any "actionable federal 'rule' that Meta was required to follow." Pet.App.12a. Rather, the conduct about which petitioner complains is attributable to Facebook's own Terms of Service. Pet.App.6a, 13a, 98a-99a; *see Murthy*, 144 S.Ct. at 1987-1988, 1992 & n.8 (discussing Facebook's "independent incentives to moderate content"). Where, as here, a company acts under the terms of its own rules—to which users have agreed as a condition of using the platform—and not any provision of law, the company's actions are private, not governmental. Pet.App.13a; *see Lugar*, 457 U.S. at 937 (state action test requires the "exercise of some right or privilege created

by the State or by a rule of conduct imposed by the State"). Nor did the government coerce or engage in joint action with Meta such that Meta may fairly be said to be a state actor. *See infra* Part III.B.

Nothing about Section 230 alters this analysis. *See* 47 U.S.C. § 230. Section 230 takes a decidedly passive and neutral position toward content moderation. Far from placing a thumb on the scale in favor of restricting content, as petitioner suggests, Section 230 protects websites like Meta from legal liability based on their content-moderation decisions, regardless of whether they restrict or disseminate such content. By prohibiting websites from being "treated as the publisher or speaker" of user-generated content, *id.* § 230(c)(1), Section 230 broadly precludes liability based on a website's "publishing activities," including "decision[s] to print or retract." *Bennett* v. *Google, LLC*, 882 F.3d 1163, 1167-1168 (D.C. Cir. 2018) (quotation marks omitted); *Doe* v. *MySpace, Inc.*, 528 F.3d 413, 418-419 (5th Cir. 2008). In addition, Section 230 separately protects websites from liability for removing or restricting the "availability of" "objectionable" content in good faith. 47 U.S.C. § 230(c)(2). The statute's protections are thus wholly agnostic as to whether third-party content is disseminated or removed, universally protecting websites' private rights to exercise discretion regarding the content they carry.

For this reason, the majority below correctly concluded that Section 230 does not alter the state-action analysis here. As the majority observed, Section 230 "is entirely passive—a provider can leave content on its platform without worrying that the speech of the poster will be imputed to it, or it may choose to restrict content it considers 'objectionable' without the threat of lawsuits." Pet.App.29a. That alone dooms petitioners'

Section 230 theory: as this Court has explained, neither the "permission of a private choice" nor even "the kind of subtle encouragement" associated with "the State's creation … of a legal remedy" creates state action. *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 53-54 (1999); *accord Lugar*, 457 U.S. at 937 ("Private parties [do not] face constitutional litigation whenever they seek to rely on some [statute] governing their interactions with the community surrounding them.").

Indeed, Section 230 "can just as easily be seen as state inaction" or "a legislative decision not to intervene" in a provider's editorial judgments about what content to leave up and what to take down. *Sullivan*, 526 U.S. at 53. In enacting Section 230, Congress declared it "the policy of the United States" that the internet be "unfettered by Federal or State regulation." 47 U.S.C. § 230(b). Instead of tasking government regulators with the responsibility of policing content on the internet, Congress chose to allow internet services to self-police the dissemination of offensive material. "Such permission of a private choice cannot support a finding of state action." *Sullivan*, 526 U.S. at 54.

Petitioner's invocation of *Skinner* v. *Railway Labor Executives' Ass'n* is inapt. 489 U.S. 602 (1989). In *Skinner* the Court held that "specific features of [Federal Railway Administration] regulations" that encouraged private railroad companies to drug test their employees in certain circumstances transformed those tests into state action because they were not "primarily the result of private initiative." *Id.* at 615. The regulatory regime at issue in *Skinner* bears little resemblance to Section 230. Unlike Section 230, the regulations in *Skinner* "did more than adopt a passive position toward the underlying private conduct." *Id.* Rather, they "encourage[d]" and expressed a "strong preference" for drug testing.

*Id.* They "prohibit[ed] covered employees from using or possessing alcohol or any controlled substance," and mandated that railroads ensure that employees directly involved in major railroad accidents take drug tests. *Id.* at 608-609. And although the specific provisions at issue merely authorized, rather than required, drug testing in other circumstances, the Court held that the regulatory regime as a whole nevertheless transformed those tests into state action because they imposed on railroads a "duty to promote the public safety," "removed all legal barriers" to testing, punished employees who refused to submit to testing, prevented railroads from "divest[ing] [them]selves of the authority" to test, and provided the government a legal right to obtain test results procured by the railroads and thus "share the fruits" of the railroads' searches. *Id.* at 615.

That analysis simply does not translate to this case. Section 230 does not encourage private actors to take specific actions in the way the Federal Railway Administration regulations encouraged specific drug testing practices. It imposes no legal duty on Meta and does not express a "preference" for content removal; to the contrary, it is "passive" on that question. It does not directly prohibit underlying activity by users, and no aspect of Section 230 gives the government a right to "share the fruits" of Meta's private conduct.

Nor does *Skinner* support the notion that a neutral, passive law like Section 230 is "the additional element" that pushes otherwise permissible governmental attempts to influence private conduct "over the state-action line," Pet.28 (emphasis omitted). To the contrary, that argument gets this Court's precedent exactly backwards. In *Lugar*, this Court explained that "[a]ction by a private party pursuant to [a] statute" does not make that party a state actor absent "something more," *i.e.*,

absent circumstances sufficient to satisfy one of the traditional state-action tests such as "compulsion" or "joint action." 457 U.S. at 939. Those tests are not met here, *see infra* pp.27-30, and Section 230 does not itself provide the requisite "something more." Section 230 does not compel any private action; it is, as discussed, passive and agnostic regarding whether content is removed or not; and it is silent regarding the specific subject matters websites may choose to restrict (or not). Where the requirements for state action are not otherwise met, Section 230's mere existence cannot push private parties across the "state-action line."

In fact, like the Ninth Circuit, other courts of appeals have correctly held that the government's decision to provide private parties with protection from certain suits does not turn those parties into governmental actors. *See, e.g.*, *Rayburn ex rel. Rayburn* v. *Hogue*, 241 F.3d 1341, 1348 (11th Cir. 2001) (explaining that "the act of extending governmental tort liability and immunity rules to foster parents does not transform the [foster parents] into State actors"). Countless rules provide private parties with protection from suits, such as statutes of limitations or federal preemption provisions. Take the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.*, which "declar[es] … a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Much like Section 230, the FAA protects private rights by shielding their exercise from legal challenge, but does not require any particular private action. Perhaps the FAA and other preemption provisions "can in some sense be seen as encouraging" private parties to take certain action. *Sullivan*, 526 U.S. at 53. But if such "subtle encouragement" were enough to turn private

parties into state actors, *id.*, then "private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions." *Lugar*, 457 U.S. at 937. That result "would be contrary to the 'essential dichotomy' between public and private acts" that the Constitution demands. *Sullivan*, 526 U.S. at 53.

### B. CHD's Did Not Plead State Action Under The Existing Tests

As the majority correctly held below, petitioner failed to plead a constitutional claim against Meta under existing state-action tests. Because the Constitution constrains only the government, it may be applied to private acts in only certain limited circumstances where "the conduct allegedly causing the deprivation of federal right [is] fairly attributable to the State." *Lugar*, 457 U.S. at 937. This Court's precedent "reflect[s] a two-part approach to this question of 'fair attribution.'" *Id.*; *accord* Pet.App.10a. First, "the alleged constitutional deprivation must result from 'the exercise of some right or privilege created by the State' or 'a rule of conduct imposed by the State or by a person for whom the State is responsible.'" Pet.App.10a-11a (quoting *Lugar*, 457 U.S. at 937). Second, the defendant must also "'fairly be said to be a state actor'" pursuant to one of this Court's narrow state-action tests. Pet.App.11a (quoting *Lugar*, 457 U.S. at 937). As relevant here, state action can exist "when the government acts jointly with the private entity," such as through a conspiracy to violate a plaintiff's constitutional rights, or "when the government compels the private entity to take a particular action" resulting in the alleged deprivation. *Halleck*, 587 U.S. at 809 (citations omitted); *Dennis* v. *Sparks*, 449 U.S. 24, 28 (1980); *Lugar*, 457 U.S. at 939; *accord* Pet.App.11a. The majority below correctly identified and applied these

tests to hold that petitioner did not plausibly allege state action.

As the majority concluded, petitioner's claim "fails at th[e] threshold" because the specific conduct of which it complains is not attributable to any government-imposed rule. Pet.App.12a. While petitioner pointed to the federal government's identification of vaccine misinformation and hesitancy as significant concerns, those generalized concerns lack any "actionable federal 'rule' that Meta was required to follow." *Id.* Indeed, as the supplementary materials on which petitioner relies show, Meta often disagreed with the government regarding what types of content constitute misinformation. *See* Pet.App.17a. And petitioner is wrong (Pet.32) that Section 230 provides the requisite state-created right; as discussed *supra* pp.22-27, Section 230 passively protects websites from liability for their content-moderation actions, but it is not the source of websites' right to moderate content. Petitioner thus did not plausibly allege that the specific acts of which it complains were attributable to a government-created right or government-imposed rule.

That alone is dispositive, but, as the majority below held, petitioner also failed to plausibly allege that Meta can fairly be said to be a state actor. The petition raises two state-action theories—joint action or conspiracy and coercion—but petitioner did not allege facts supporting either.

The joint-action inquiry begins by identifying "the specific conduct of which the plaintiff complains," and then considers whether that specific conduct constitutes joint action between governmental and private actors or results from a conspiracy to violate the plaintiff's rights. *Sullivan*, 526 U.S. at 51; *see also Adickes* v. *S.H. Kress*

*& Co.*, 398 U.S. 144, 152 (1970). Here, petitioner alleged only that the White House and CDC discussed the importance of fact-checking COVID-19 claims on Facebook. *See* Pet.33-34. Petitioner did not allege that any governmental actor was involved in any decision to fact-check or remove any of its specific Facebook content. Because petitioner alleged that Meta and governmental actors shared at most a "common goal" of generally reducing the impact of vaccine misinformation on Facebook, not the "specific goal to violate the plaintiff's constitutional rights by engaging in a particular course of action," *Gallagher* v. *Neil Young Freedom Concert*, 49 F.3d 1442, 1455 (10th Cir. 1995), the majority below correctly held that petitioner did not plausibly allege joint action, *see* Pet.14a-22a.

Petitioner also did not plausibly allege that Meta can be held constitutionally liable under a coercion theory of state action. To begin, as discussed below, there are compelling reasons to doubt whether a private actor can ever be held liable for what it was coerced to do. *See* Pet.23a. Petitioner has no substantive response, other than to note its disagreement, *see* Pet.35 n.20. In any event, petitioner failed to plausibly allege coercion. As this Court recently explained, coercion requires more than a "forceful[]" request by a government official. *Vullo*, 144 S.Ct. at 1326. Instead, coercion exists only when an official "use[s] the power of the State" to "threat[en] … adverse government action" unless a private actor engages in a particular course of conduct. *Id.* at 1326-1327, 1328. CHD did not allege that any governmental actor ever threatened to take any specific adverse action against Meta in the event that it did not take a particular action with respect to petitioner's Facebook Page. *See* Pet.23a-27a. Rather, CHD alleged, at most, that the Biden administration lobbied Meta, at

times "forcefully," *Vullo*, 144 S.Ct. at 1326, to generally address the spread of COVID-related misinformation. As the majority rightly concluded, petitioner's allegations therefore fell on the permissible side of the line between "persuading others," which government officials, of course, may attempt to do, and "us[ing] the power" of the government to "punish" unwanted conduct. *Id.*; *accord* Pet.App.23a-27a.

Though not part of the record, the recent statements by Meta CEO Mark Zuckerberg identified in petitioner's February 12 supplemental letter do not change the analysis. Petitioner points to certain isolated statements during a recent episode of the Joe Rogan Experience show, Pet.'s Suppl. Letter at 1, but Mr. Zuckerberg in fact explained that Meta *refused* to take down content identified by the Biden administration. *See* Rogan & Zuckerberg, *Joe Rogan Experience #2255—Mark Zuckerberg* ("[W]e just said, no, we're not going to take down humor and satire. We're not going to take down things that are true."). That is consistent with Mr. Zuckerberg's statement last summer to the House Judiciary committee explaining that while "the Biden Administration … pressured [Meta's] teams" to take action regarding COVID-related content, "[u]ltimately it was our decision whether or not to take content down." Letter from Mark Zuckerberg to Representative Jim Jordan (Aug. 26, 2024), https://www.americanrhetoric.com/speeches/PDFFiles/Mark-Zuckerberg-Letter-on-Govt-Censorship.pdf. Where Meta's decisions reflect its "own judgment," they are not fairly attributable to the government and do not support a state-action claim against Meta. *Murthy*, 144 S.Ct. at 1987-1988.

## IV. THIS CASE IS A BAD VEHICLE

### A. The Case Against A Private Defendant Is A Poor Vehicle To Define The Contours Of The State-Action Doctrine

CHD pitches its petition as a vehicle for this Court to resolve the question "not reach[ed]" in *Murthy*—namely, what is the correct "'standard for when the Government transforms private conduct into state action.'" Pet.33 (quoting *Murthy*, 144 S.Ct. at 1985 n.3). But in the context of petitioner's claims against Meta alone, and not the government, the Court cannot directly address that question.

The "time-tested state action tests" that Petitioner seeks to apply (Pet.27) have been developed and applied in claims against governmental parties. *See, e.g.*, Pet.3 (citing *Skinner*); Pet.33 (citing *Vullo* and *Murthy*). Those tests do not directly apply in claims against private defendants. With respect to the coercion test, "there is reason to doubt that a purely private actor like Meta, which was the *victim* of the alleged coercion, would be the appropriate defendant, rather than the government officials responsible for the coercion." Pet.App.23a. After all, "[w]hen the *state* compels a private party" to take certain actions, "it is the *state action*, not the private conduct, which is unconstitutional." *Sutton* v. *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 840 (9th Cir. 1999) (emphases added) (quoting Snyder, *Private Motivation, State Action, and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 Cornell L. Rev. 1053, 1067 (1990)). That is because the state's command "has saved to itself the power to determine" the commanded result and "removed that decision from the sphere of private choice." *Peterson* v. *City of Greenville*, 373 U.S. 244, 248 (1963). A private party

"left with no choice of its own … should not be deemed [constitutionally] liable." *Sutton*, 192 F.3d at 838 (quoting Snyder, 75 Cornell L. Rev. at 1069).

Private parties are likewise inappropriate defendants under the traditional joint action and conspiracy tests in the circumstances presented here. These theories trigger constitutional liability against a private actor when the private actor has "wielded state power." *Ermold* v. *Davis*, 130 F.4th 553, 564 (6th Cir. 2025). That serves "the historic purpose of § 1983," which is to prevent those acting under "the cloak" of state authority from wielding that authority to violate constitutional rights. *Lugar*, 457 U.S. at 948 (1982) (Powell, J., dissenting). A private entity, for example, may be constitutionally liable for "issu[ing]" without probable cause "a citation to appear in court" pursuant to a "delegation of authority by the police department," as a means of clearing an unwanted patron from its premises. *Tsao* v. *Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012). But where the government induces but does not enhance private action, the private actor wields no governmental power that could properly be restricted by the Constitution.

Here, the record reflects not Meta using governmental power to remove unwanted content, but Meta pushing back on the government's inquiries and "disagree[ing] about what policies to implement and how to enforce them." Pet.App.17a; *see also Murthy*, 144 S.Ct. at 1987 (observing that "platforms explained that White House officials had flagged content that did not violate company policy"). Thus, even if the government's communications to Meta regarding its content-moderation practices could make the *government* constitutionally liable, there is no basis for imposing liability on Meta in this case. Accordingly, if the Court is inclined to address

the question "not reach[ed]" in *Murthy*, Pet.33, it should await a case against a governmental defendant.

### B. Addressing The Question Presented Would First Require Resolving The Scope Of The Record

At every step of this case, petitioner's claims have been a moving target, as petitioner has—in its own words—"sought seriatim judicial notice" of matters beyond its complaint, Pet.20. Before the Ninth Circuit alone, petitioner submitted *five* motions for judicial notice. *See Children's Health Defense*, No. 21-16210, Dkt.64, 70, 78, 86, 92. Those motions have fundamentally transformed the nature of this case (or at least attempted to do so), recasting it from a case about the general safety of vaccines and 5G networks into a case all about the Biden administration's efforts to address COVID-19 misinformation. *See supra* pp.8-10.

Petitioner's arguments are premised on the substance of its various requests for judicial notice. The petition's recitation of the factual background of this case, for example, is laden with citations to those requests and to the *Murthy* litigation. *See* Pet.12, 13, 15, 17-18. As the majority below concluded, petitioner's requests for judicial notice were improper because petitioner sought to "rely on the *substance* of the documents" submitted. Pet.App.17a. But, as the majority also concluded, the supplementary materials "d[id] not make" petitioner's state-action claims "any more plausible," because they showed that Meta frequently disagreed with the government's preferred approach to content moderation, Pet.App.17a. Because those supplemental materials are so central to the claims as presented in the petition, the Court would need to wade into the morass of petitioner's requests and determine which, if any, are properly part

of the record before it could reverse and hold that petitioner has alleged state action. The uncertainty regarding the relevant record makes this case an especially poor vehicle to address the questions presented.

## CONCLUSION

The petition should be denied.

Respectfully submitted.

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MAY 2025