No. 24-30252

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT F. KENNEDY, JR.; CHILDREN'S HEALTH DEFENSE; CONNIE SAMPOGNARO,
Plaintiffs-Appellees,
v.
JOSEPH R. BIDEN, JR., KARINE JEAN-PIERRE , VIVEK H. MURTHY, XAVIER BECERRA, UNITED STATES DEPARTMENT O F HEALTH AND HUMAN SERVICES, ET AL.,
Defendants-Appellants

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c/w
STATE OF MISSOURI, EX REL. ERIC S. SCHMITT, Attorney General, et al.,
Plaintiffs-Appellees,
v.
JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, et al.
Defendants-Appellants

AMICI CURIAE BRIEF OF AMERICA'S FRONTLINE DOCTORS AND DR. SIMONE GOLD, M.D., J.D. IN SUPPORT OF THE *EN BANC* REHEARING PETITION OF PLAINTIFFS-APPELLEES

Respectfully Submitted,

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CORPORATE DISCLOSURE STATEMENT,
CERTIFICATE OF INTERESTED PERSONS

Proposed *Amici Curiae* are the Free Speech Foundation, d/b/a America's Frontline Doctors ("AFLDS") and Dr. Simone Gold, M.D., J.D., a non-partisan, not-for-profit organization of hundreds of member physicians, and the founder and physician member, who come from all across the nation, representing a range of medical disciplines and practical experience on the front lines of medicine. AFLDS' programs focus on a number of critical issues discussed below. No publicly held company has a ten percent or greater ownership interest in America's Frontline Doctors.

Pursuant to FRAP 26.1-1, counsel for proposed *Amici Curiae* certifies that, to the best of their knowledge, the Certificate of Interested Persons filed by the parties herein contain a correct complete list of the people and entities that have an interest in the outcome of this appeal, other than the following additions from AFLDS:

Sheriff Richard Mack and Dr. Simone Gold, M.D., J.D.

No counsel for any party authored this brief in whole or in part and no such counsel made any monetary contribution intended to fund this brief.

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C. The trial court properly granted standing to Plaintiffs as proven by Plaintiffs' declarations. The panel opinion's failure to grant standing would leave Plaintiffs, who were some of the worst victims of the violations of their First Amendment rights, with no remedy whatsoever. **To deny these Plaintiffs standing is analogous to denying standing to a gunshot victim, as long as his assailant promises never to do it again.**

D. Robert F. Kennedy is no longer running for President. This changes nothing, as he is now in the running for the Cabinet-level position of Secretary of DHHS, a position held by Defendant Becerra. Therefore, the same considerations apply.

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A MATTER OF THE GREATEST PUBLIC IMPORTANCE AND RULE 29 DISCLOSURES

The Free Speech Foundation, d/b/a America's Frontline Doctors, and Dr. Simone Gold, M.D., J.D., the founder and physician member ("*Amici Curiae*" or "AFLDS") respectfully file this *amici curiae* brief in support of the Plaintiffs-Appellees' ("Plaintiffs") *en banc* rehearing petition in *Robert F. Kennedy, Jr., et al. v. Joseph R. Biden, Jr., etc., et al.*, 23-cv-00381, WDLA, 24-30252, CA5. Many other cases in which AFLDS contributed *amici curiae* briefs to the United States Court of Appeal for the Fifth Circuit and to the United States Supreme Court, including in this consolidated case of *Murthy, et al. v Missouri, et al,* 23-411 (U.S. 2023)*, Missouri, et al v Joseph R. Biden, Jr., etc., et al.*, 22-cv-01213, WDLA, 23-30445, CA5, 23-411 (U.S. 2023), are detailed in the accompanying unopposed Motion For Leave.

This *amici curiae* brief offers an important medical and legal perspective to this Court on a matter of great public importance, by conclusively demonstrating that the Defendants-Appellants ("Defendants") engaged in unconstitutional, dangerous, and possibly criminal activity by suppressing the free speech of dozens of speakers and millions of listeners, including Plaintiffs herein, who should have standing to sue for redress.

Further, the Defendants have not ceased this illegal government overreach, thus supporting Plaintiffs' standing, as well as compromising patient medical care and safety and the free speech rights of millions of Americans.

Censorship of important and accurate medical information to millions of medical patients has dire adverse consequences, including severe injuries and unnecessary deaths. This raises the stakes in any "standing" determination. Medical censorship kills.

INTERESTS OF *AMICI CURIAE*

A. GENERAL INTERESTS OF *AMICI CURIAE*

AFLDS *Amici Curiae* physicians represent a range of medical disciplines and practical experience on the front lines of medicine, with its' founder and physician member, Dr. Simone Gold, M.D., J.D.

AFLDS' programs and interests focus on a number of critical issues including:

• Providing Americans with science-based facts about COVID-19;

• Protecting physician independence from government overreach;

• Publishing evidence-based approaches to various medical situations; and

• Fighting medical cancel culture and media censorship;

Each of AFLDS' member physicians is deeply committed to the guiding

principle of medicine: "FIRST, DO NO HARM." They gravely take their ethical obligations to their patients. It is axiomatic that a physician's duty is to his or her patient, and to assure that the patient has full access to accurate and uncensored medical information. America's Frontline Doctors is committed to preserving the voluntary and fully informed doctor/patient relationship. AFLDS opposes any sort of illegal interference with the doctor/patient relationship and illegal government overreach by the censorship of medical and other information, as is occurring in this case.

B. SPECIFIC INTERESTS OF *AMICI CURIAE*

Along with Plaintiffs herein, Robert F. Kennedy, Jr. and Children's Health Defense, AFLDS and Dr. Gold were also specifically mentioned in the *Murthy* trial court's injunction opinion as being targeted as the so-called "Disinformation Dozen", major American voices including Plaintiffs who were unconstitutionally suppressed by the government Defendants. J.A.713, J.A.716.[1] The names of the other suppressed victims found at ROA.26539-26540 are shocking. Major American voices were silenced.

[1] All record citations are to the consolidated record in *Murthy, et al. v Missouri, et al,* 23-30445 (CA5), 23-411 (U.S. 2023).

These egregious violations of the constitutional rights of Plaintiffs, of Dr. Gold and of AFLDS's truthful and accurate medical free speech by government bureaucrats is **medically very dangerous**. **The censorship of truthful and accurate medical information in the midst of a public health crisis caused much harm, and was the proximate cause of the deaths of thousands of Americans**.

Even false information is protected free speech, excluding only the rare and well-recognized exceptions to free speech. But here, illegal censorship by government bureaucrats of protected free speech, consisting of life saving, truthful and accurate medical information deprived millions of listeners of information which they could have used in formulating personal medical decisions based upon fully informed consent.

These reckless and dangerous censorship efforts cry out for *en banc* intervention for the paramount reason of preventing more unnecessary deaths, among the other reasons cited by Plaintiffs. "**Informed consent**" cannot be formed if it is not fully **informed**. Informed consent can never be coerced, nor obtained by proffering only incomplete information.

SUMMARY OF ARGUMENT

This panel adopted a dangerous and overly restrictive interpretation of legal

standing contrary to the jurisprudence which will foreseeably cause more human harms by allowing the ongoing medical censorship of Plaintiffs to continue. This grievous and life or death legal error necessitates *en banc* intervention. This unconstitutional behavior can easily be redressed by an injunction. Medical censorship kills.[2] Plaintiffs remain barred from various social media platforms. Plaintiff Robert F. Kennedy Jr. is one of the worst victims of this illegal government censorship scheme. The panel held that merely the alleged "voluntary cessation" of unconstitutional and dangerous government medical censorship of accurate medical information deprived Plaintiffs of all legal standing. But "voluntary cessation" does not remove "standing". Otherwise, government actors could destroy anyone's constitutional rights simply by feigned temporary compliance.

To deny these Plaintiffs standing is analogous to denying standing to a gunshot victim, as long as his assailant promises never to do it again.

Plaintiffs established standing by their declarations. They should also be afforded more discovery opportunities than just one more week of discovery. To deprive Plaintiffs of standing, besides endangering human lives, also deprives

[2] See the well-documented *COVID-19 and the Global Predators: We are the Prey*, by Peter R. Breggin MD and Ginger Ross Breggin.

Plaintiffs of any remedy whatsoever for the grave violations of their constitutional rights. The Latin maxim *ubi jus ibi remedium* applies here. "Where there is a right, there is a remedy".

Robert F. Kennedy is no longer running for President, and this changes nothing. He is now in the running for the Cabinet-level position of Secretary of DHHS, a position held by Defendant Becerra. The same considerations apply.

Further, *Amici Curiae* showed in detail in their two previous *amici curiae* briefs submitted in the companion *Murthy* case which are incorporated herein by reference, the many examples of how the Defendants brazenly and repeatedly violated the First Amendment. Plaintiffs have uncovered massive wrongdoing on the part of the Defendants.

The breathtaking scope of the illegal government censorship enterprises uncovered by Plaintiffs are also arguably criminal enterprises designed to violate the free speech rights of Americans under statutes such as 18 U.S.C. §241 and 42 U.S.C. §1985.

This government is funding artificial intelligence viewpoint censorship programs, so that the unconstitutional suppression of disfavored viewpoints can be automated. It is impossible to overstate how alarming this is. Driven by artificial

intelligence and machine learning technologies[3], disfavored opinions are automatically suppressed and deleted. This alarming development defeats the panel's "voluntary cessation" argument and necessitates that this distinguished *en banc* Court grant Plaintiffs' petition and reverse this very harmful and deeply erroneous standing ruling.

ARGUMENT

A. An overly restrictive interpretation of "legal standing" is particularly misguided when such a draconian ruling will foreseeably cause more human lives to be lost due to the ongoing censorship of vital medical information. Medical censorship kills. Any doubt regarding standing should be resolved in Plaintiffs' favor.

This is not your typical standing case. This standing determination has life or death medical consequences. Medically bad and often fatal decisions in the real world, stemming from censorship of accurate medical information are extensively discussed by distinguished doctors in Peter R. Breggin, MD and Ginger Ross

[3] The U.S. Government Is Building A Vast Surveillance And Speech Suppression Web Around Every American: "While the "Twitter Files" offer a glimpse into the government's efforts to censor disfavored viewpoints, what we have seen is nothing compared to what is planned, as the details of hundreds of federal awards lay bare. Research by The Federalist reveals our tax dollars are funding the development of artificial intelligence ("AI") and machine-learning ("ML") technology that will allow the government to easily discover "problematic" speech and track Americans reading or partaking in such conversations.
Then, in partnership with Big Tech, Big Business, and media outlets, the government will ensure the speech is censored, under the guise of combating "misinformation" and "disinformation." https://thefederalist.com/2023/03/21/grants-reveal-federal-governments-horrific-plans-to-censoral-americans-speech/

Breggin's book: *COVID-19 and the Global Predators: We are the Prey.* See fn 2. Given that human lives are at stake here, any doubt should be resolved in favor of Plaintiffs' standing under these circumstances.

Numerous federal courts have found standing in much less compelling cases. In *Daily Wire, LLC v. United States Department of State*, 2024 WL 2022294 (EDTX 2024), media organizations and the state of Texas sued the United States State Department, alleging that government technology to counter propaganda and disinformation infringed upon their free speech rights under First Amendment and violated the Administrative Procedures Act (APA). The Court held that Texas and the two media companies had standing.

In *Pernell v. Fla. Board of Governors of State University System*, 641 F.Supp.3d 1218 (N.D. Fla., 2022), the court held that professors and students who either intended to teach, or would self-censor to refrain from teaching, course content that violated an IFA mandatory content law, had standing to seek a preliminary injunction and were likely to succeed on the merits of their First Amendment challenge.

See *Meese v. Keene*, 481 U.S. 465, 473–75, 107 S.Ct. 1862, 95 L.Ed.2d 415 (1987) (plaintiff senator had standing to challenge the government's labeling as "political propaganda" certain films he wished to show, because this label caused

the plaintiff to "risk of injury to his reputation"); and *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1086, 1107 (10th Cir. 2006). See also *Dunn v. City of Fort Valley*, 464 F.Supp.3d 1347 (MDGA 2020); *Book People, Incorporated v. Wong*, 91 F.4th 318, 330 (CA5 2024); *Davis v. FEC*, 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008); and *Allen v. School Bd. for Santa Rosa Cnty., Fla.*, 782 F.Supp.2d 1304, 1314 (NDFL 2011).

Much more compelling life or death circumstances supporting Plaintiffs' standing to sue are presented by this case.

B. "Voluntary cessation" of unconstitutional, illegal and dangerous government medical censorship of accurate medical information does not remove "standing" under the jurisprudence. Further, this illegal behavior is ongoing, has not ceased, and is also "likely to recur, yet evades review". This "voluntary cessation destroys standing" panel holding is an egregious error which would allow government actors to destroy any and all constitutional rights at will, under the simple pretense of temporary compliance.

Government-developed artificial intelligence "automated censorship", running in the background refutes all claims of "voluntary cessation" by Defendants. See fn 3.

In *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), as Plaintiffs point out, the court held that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the

legality of the practice. At issue in *Mesquite* was the mere issuance of licenses. At issue in this case is the life or death of Americans, and the validity of the Constitution itself. See *West Virginia v. EPA*, 597 U.S. 697, 719 (2022); and *Texas v. Yellen*, 105 F.4th 755, 766 (5th Cir. 2024).

C. The trial court properly granted standing to Plaintiffs as proven by Plaintiffs' declarations. The panel opinion's failure to grant standing would leave Plaintiffs, some of the worst victims of the violations of their First Amendment rights, with no remedy whatsoever. **To deny these Plaintiffs standing is analogous to denying standing to a gunshot victim, as long as his assailant promises never to do it again**.

The ancient Latin maxim "*ubi jus ibi remedium*" applies here. "Where there is a right, there is a remedy". See *Marbury v. Madison*, 5 U.S. 137, 163 (1803); *Byrd v. Lamb*, 990 F.3d 879, 883 (5th Cir. 2021); and *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695, 698 (5th Cir. 1997).

Justice Scalia wrote in The Doctrine of Standing that "The Supreme Court has described standing as a 'sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.' In more pedestrian terms, it is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: "What's it to you?" As Plaintiffs in this case put out public speech, they demonstrably have standing as government censorship has

severely harmed Plaintiffs and will continue to do so.[4]

D. Robert F. Kennedy is no longer running for President. This changes nothing, as he is now in the running for the Cabinet-level position of Secretary of DHHS, a position held by Defendant Becerra. Therefore, the same considerations apply.

That Plaintiff Robert F. Kennedy Jr. is no longer running for President does not deprive Plaintiffs of standing. See *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007).

Amici Curiae inventoried the overwhelming evidence of numerous egregious government censorship violations causing significant harms and proof of the truth of the censored medical information in detail in their two previous *amici curiae* briefs submitted in the companion *Murthy* case which are incorporated herein by reference. While censorship is illegitimate even if the censored speech is false, Plaintiffs have presented abundant evidence that the censored speech was true. And *amici*-petitioners note George Orwell's prescient observation in his book 1984, when he noted that freedom of speech is not necessary to be able to state 2+2=5, but is necessary to state 2+2=4. The reason is

[4] The Doctrine of Standing as an Essential Element of the Separation of Powers, by Antonin Scalia https://bpb-us-e1.wpmucdn.com/sites.suffolk.edu/dist/3/1172/files/2015/11/Scalia_17SuffolkULRev881.pdf

that there is no coordinated government interest in suppressing false speech.

> "If the allegations made by Plaintiffs are true, the present case arguably involves the most massive attack against free speech in United States' history."...

*Murthy*Memorandum Ruling on Request for Preliminary Injunction, ROA.26456.

It is astonishing that the Defendants blatantly disregarded the illegality of their coercive activities.

CONCLUSION

As the *Murthy* District Court eloquently observed:

> "For if men are to be precluded from offering their sentiments on a matter, which may involve the most serious and alarming consequences, that can invite the consideration of mankind, reason is of no use to us; the freedom of speech may be taken away, and dumb and silent we may be led, like sheep, to the slaughter." [*Emphasis added*]
>
> George Washington, March 15, 1783.
>
> *Murthy* Memorandum Ruling on Request for Preliminary Injunction, ROA.26457.

The unconstitutional actions exposed by the Plaintiffs herein are of sufficient gravity and life or death importance so as to amply justify legal standing. Plaintiffs *en banc* petition should be granted.

Respectfully Submitted,

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Certificate of Compliance

I hereby certify that the foregoing *amici curiae* brief contains 2,589 words as measured by Microsoft Word, is in size 14 font, and is fourteen pages long.

s/ David A. Dalia
David A. Dalia

Certificate of Service

I hereby certify that on the 25th day of November, 2024, a copy of the foregoing *Amici Curiae* Brief was filed electronically with the Clerk of Court using the CM/ECF system, and notice of this filing was sent electronically to all counsel of record using the CM/ECF system.

s/ *David A. Dalia*
David A. Dalia