PANEL DECISION ISSUED NOVEMBER 4, 2024

No. 24-30252

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF MISSOURI ET AL.,
Plaintiffs,
v.
JOSEPH R. BIDEN, JR. ET AL.,
Defendants.

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 OF HEALTH AND HUMAN SERVICES, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Louisiana

PETITION FOR REHEARING EN BANC

JED RUBENFELD
N.Y. Bar # 2214104
1031 Forest Rd.
New Haven, CT 06515
Tel.: 203-432-7631
jed.rubenfeld@yale.edu

G. SHELLY MATURIN, II
LA Bar # 26994
Welborn & Hargett, LLC
1031 Camellia Blvd
Lafayette, LA 70508
Tel.: 337-234-5533
shelly@wandhlawfirm.com

Attorneys for Plaintiffs-Appellees-Petitioners

CERTIFICATE OF INTERESTED PERSONS

Kennedy v. Biden, No. 24-30252

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of rule 28.2.1 have an interest in the outcome of this case. This representation is made in order that the judges of this court may evaluate possible disqualification or recusal:

Plaintiffs/Appellees in the instant suit:

1. Children's Health Defense, a non-profit with no parent corporation and no publicly held corporation owning more than 10 percent stock;
2. Robert F. Kennedy, Jr.;
3. Connie Sampognaro

All other parties are governmental entities and individuals operating in their official governmental capacities.

DATED: November 18, 2024

Respectfully submitted,

s/ G. Shelly Maturin, II

G. SHELLY MATURIN, II (#26994)
WELBORN & HARGETT, LLC
1031 Camellia Blvd.
Lafayette, LA 70508
Telephone: (337) 234-5533
Facsimile: (337) 769-3173
shelly@wandhlawfirm.com

PETITION FOR REHEARING EN BANC

INTRODUCTION AND RULE 35(B)(1) STATEMENT

Grave error has occurred here of exceptional importance to the freedom of speech and the nation as a whole.

1. The Panel in this case held[1] that the Government's voluntary cessation of the conduct here challenged—a years-long, highly-successful, coercive Federal campaign to induce social-media censorship of protected speech—deprived Plaintiffs of standing. (Slip op. at 6-7 (holding that Plaintiffs failed to establish redressability because Government "disbanded" team engaging in the challenged activity in May, 2023, and Plaintiffs lack "evidence of continued pressure" by Defendants thereafter).) This holding squarely conflicts with Supreme Court precedent. *See, e.g.*, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.10 (1982) ("defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice"; "[i]f it did, the courts would be compelled to leave '[the] defendant . . . free to return to his old ways.'").

2. In essence, contravening both Supreme Court and Fifth Circuit precedent, the Panel Decision confused standing with mootness. "It is the doctrine of ***mootness***,

[1] *Kennedy v. Biden*, No. 24-30252 (5th Cir. Nov. 4, 2024) (slip opinion attached hereto) (hereafter the "Panel Decision").

not standing, that addresses whether 'an intervening circumstance [has] deprive[d] the plaintiff of a personal stake in the outcome of the lawsuit.'" *West Virginia v. EPA*, 597 U.S. 697, 719 (2022) (original emphasis); *see Texas v. Yellen*, 105 F.4th 755, 766 (5th Cir. 2024) (federal defendants' claim of change in practices does not state "a true standing argument," but rather "sounds in mootness"). The "distinction matters because the Government, not petitioners, bears the burden to establish that a once-live case has become moot." *West Virginia*, 597 U.S. at 719. "'[V]oluntary cessation does not moot a case' unless [defendant establishes that] it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id*. (citations omitted); *Lewis v. United States*, 88 F.4th 1073, 1078 (5th Cir. 2023) (same). Defendants have not met that high burden here.

3. The Panel Decision gravely misconstrues the case it purports to apply, *Murthy v. Missouri*, 144 S. Ct. 1972 (2024). Under the Panel Decision, no court can ever rule on the Government's sweeping censorship-by-proxy campaign because the (alleged) voluntary cessation of the challenged conduct defeats injunctive standing.[2] Indeed, all Federal First Amendment violations would be beyond judicial review so long as the Government ceased the challenged conduct prior to judicial resolution. *Murthy* by no means supports such an unprecedented result, which contravenes

[2] *Egbert v. Boule*, 596 U.S. 482 (2022), held that a damages action was unavailable for a Federal violation of the First Amendment. Thus if injunctive relief is unavailable as well (as the Panel held), no judicial review is possible at all.

bedrock principles of American constitutional law.

The Panel reached this gravely erroneous result because it ignored the crucial differences between *Murthy* and this case. The *Murthy* Court repeatedly emphasized that the plaintiffs there had *not proved causation of their censorship by the Government* and were claiming only *past censorship*, which does not establish standing for injunctive relief. (*See infra* Point III.) By contrast, Plaintiffs here have *proven causation* and are suffering *present, ongoing Government-coerced censorship injury*. Thus *Murthy* supports Plaintiffs' standing. It emphatically does not hold (as the Panel did) that the Defendants' voluntary cessation of challenged conduct is by itself sufficient to defeat standing. It emphatically does not hold that no party can ever challenge the Government's social-media censorship campaign.

4. America has now voted for a new President, and Plaintiffs are well aware that judges may be tempted to view this case as therefore moot. Not so. Intervening elections do not moot a case properly brought before the election. *See, e.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007). The nation's need for judicial review of the Government's censorship partnership with social media platforms remains as paramount as ever.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

PETITION FOR REHEARING EN BANC

STATEMENT OF ISSUES MERITING EN BANC REVIEW

1. Whether the Panel Decision gravely erred by barring all judicial review of the Federal Government's sweeping social-media censorship campaign, which has been ruled unconstitutional by every judge to have reached the merits.

2. Whether the Panel Decision conflicts with Supreme Court and Fifth Circuit precedent by holding that the Defendants' (asserted) voluntary cessation of the challenged conduct deprived Plaintiffs of standing, when in fact a voluntary-cessation claim is a mootness argument and does not deprive a federal court of jurisdiction unless defendants establish that it is "absolutely clear that the allegedly unlawful conduct could not reasonably be expected to recur." *E.g.*, *West Virginia*, 597 U.S. at 719.

3. Whether the Panel Decision gravely misconstrued *Murthy* and violated bedrock constitutional principles by denying any remedy to Plaintiffs, who (unlike the *Murthy* plaintiffs) are suffering present (not past) First Amendment injury found by the District Court to have been directly, specifically caused and coerced by the Defendants.

PROCEDURAL STATEMENT

A. *Murthy v. Missouri*

The case now known as *Murthy v. Missouri* was filed on May 5, 2022, alleging that numerous Federal Defendants "colluded with and/or coerced social media companies to suppress disfavored" speech. *Missouri v. Biden*, No. 3:22-CV-01213, 2022 U.S. Dist. LEXIS 131135, at *2 (W.D. La. July 12, 2022). On July 4, 2023, the District Court granted a preliminary injunction. See *Missouri v. Biden*, No. 3:22-CV-01213, 2023 U.S. Dist. LEXIS 114585 (W.D. La. July 4, 2023). This Court largely affirmed, but on June 26, 2024, the Supreme Court reversed for lack of standing. *See Murthy v. Missouri*, 144 S. Ct. 1972 (2024). It bears emphasis that every judge to have reached the merits in *Murthy*—the District Judge, three Judges of this Circuit, and the three dissenting *Murthy* Justices—found the Government's social-media censorship campaign unconstitutional. Indeed the District Court called that campaign "arguably the most massive attack on the freedom of speech in United States history." *Missouri*, 2023 U.S. Dist. LEXIS 114585, at *158.

B. *Kennedy v. Biden*

This case, *Kennedy v. Biden*, was filed on March 24, 2023, against the same Defendants on similar First Amendment grounds. (23-cv-00381, ECF 1.) (Plaintiffs filed out of concern that the *Murthy* plaintiffs would be found to lack standing.) In July, 2023, the District Court consolidated *Kennedy v. Biden* with *Missouri v. Biden*,

and in February, 2024, on the basis of the *Missouri* discovery record, granted injunctive relief. *See Kennedy v. Biden*, No. 3:23-CV-00381, 2024 U.S. Dist. LEXIS 26751 (W.D. La. Feb. 14, 2024). Defendants' appeal to this Court was placed in abeyance pending Supreme Court review of *Murthy*.

On July 25, 2024, this Court remanded *Kennedy v. Biden* to the District Court to reconsider standing in light of *Murthy*, while permitting Plaintiffs to supplement the record. (23-cv-00381, ECF 50.) Plaintiffs were given a week to comply. (23-cv-00381, ECF 51.) On August 1, 2024, Plaintiffs filed three new Declarations—one concerning each Plaintiff—establishing that Plaintiffs' Government-caused First Amendment injuries were ongoing. On August 20, 2024, the District Court reaffirmed Plaintiffs' standing. (23-cv-00381, ECF 56.) On November 4, 2024, a merits panel of this Court reversed. This Petition followed.

STATEMENT OF FACTS

1. *The Government-Coerced Deplatforming of CHD and Kennedy*

As the District Court specifically found (*id*. at 7-12, 17), various White House officials (the "White House Defendants") in 2021 coerced the nation's behemoth social-media companies to "deplatform"—i.e., to terminate the accounts of, and shut out of the modern public square—Plaintiffs Children's Health Defense ("CHD") and Robert F. Kennedy, Jr., because of their dissent against Administration COVID policy. A short summary of the unrebutted facts follows.

In April 2021, in oral meetings with Facebook, the White House demanded action against the so-called "Disinformation Dozen," twelve individuals and organizations, including Mr. Kennedy and CHD, accused (falsely) of being the leading disseminators of COVID-related "disinformation." (ROA.29731-29734.) On May 1, Facebook emailed the White House resisting such censorship, stating that many of "the 12 individuals identified … do not violate our policies." (*Id*.)

Defendants responded with a threat. On May 5, 2021, the White House Press Secretary linked an "antitrust enforcement" action against "the major platforms" to the Administration's demand for more aggressive censorship of "misinformation." (ROA.29734.) Few threats are more devastating to Meta than an antitrust break-up, which CEO Mark Zuckerberg has referred to as "an existential threat" to his company. (ROA.29734-29735.) Nevertheless, despite continuing pressure over the next two months to censor the "Disinformation Dozen," Facebook continued to resist. (*Id*.)

On July 16, the Press Secretary called publicly for the total deplatforming of the "Disinformation Dozen," and the President stated that Facebook and other platforms were "killing people" by refusing to censor speech challenging the COVID vaccines' safety and efficacy. (ROA.29736.) On July 20, White House Communications Director Kate Bedingfield linked President Biden's comment on "killing people" to an explicit threat of destructive, adverse regulatory action, including removal of "the liability protections granted by Section 230 of the

Communications Decency Act." (ROA.29736-29737; 23-cv-00381, ECF 56 at 10-11.)

Immediately after this ratcheted-up threat, Facebook finally gave in to the Administration's demands. On July 23, 2021, Facebook emailed Surgeon General Vivek Murthy and stated, "I wanted to make sure you saw the steps we took just this past week to further address the 'disinfo dozen.'" (ROA.29737-29738.) Facebook reported that it had censored every member of the Disinformation Dozen: "We removed 17 additional Pages, Groups, and Instagram accounts tied to the disinfo dozen (so a total of 39 Profiles, Pages, Groups, and IG accounts deleted thus far, resulting in every member of the disinfo dozen having had at least one such entity removed)." (*Id*.) The report specifically indicated that Kennedy had been deplatformed from (Facebook-owned) Instagram. (23-cv-00381, ECF 56 at 11.)

But the White House wanted complete de-platforming of the "Disinformation Dozen," not removal of one "page" or "profile." (ROA.29735-29736.) In mid-August, with respect to CHD, the Government finally got what it sought. On August 18, 2021, Facebook again reported to the Surgeon General on additional censorship actions it was taking against the Disinformation Dozen. (ROA.29739.) These actions included the complete deplatforming of CHD, which took place on August 17, 2021.

(ROA.29730, 29739.)[3]

In CHD's case, this Government-coerced deplatforming remains entirely unchanged and ongoing today. Initially deplatformed from Facebook and Instagram in August 2021, and from YouTube in September, 2021, CHD remains shut out of those platforms today. (ROA.29730, 29739.) The chain of causation has never been broken.

2. *The Government's Sweeping Social-Media Censorship Campaign*

CHD and Kennedy were but two victims of the Government's sweeping, multi-agency campaign to induce social-media platforms to censor protected but disfavored speech, including, for example, speculation that COVID might have originated in a Chinese laboratory (long censored on all major social media platforms), criticism of the COVID vaccines (same), and reporting on electoral news of the greatest public import, such as the Hunter Biden laptop story (censored for a critical period prior to the 2020 election). This Court's 2023 opinion in *Missouri* provides a detailed summary. *See Missouri v. Biden*, 83 F.4th 350, 359-66 (5th Cir. 2023) (per curiam).

[3] As the District Court found, unrebutted evidence shows that due to the same Governmental pressure, in September, 2021 YouTube also deplatformed CHD. (ECF 56 at 18; ROA.29739-29741.)

ARGUMENT

I. Standard of Review for Standing and Mootness

The well-known elements of standing are "injury," "traceability," and "redressability." *E.g.*, *Chavez v. Plan Benefit Servs., Inc.*, 108 F.4th 297, 305 (5th Cir. 2024). "At earlier stages of litigation…the manner and degree of evidence required to show standing is less than at later stages. At the preliminary injunction stage, the movant must clearly show only that each element of standing is likely to obtain." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 329-30 (5th Cir. 2020) (citation omitted). Only a single plaintiff need have standing: "[i]f at least one plaintiff has standing, the suit may proceed." *Biden v. Nebraska*, 600 U.S. 477, 489 (2023).

While the plaintiff "bears the burden of establishing standing as of the time he brought th[e] lawsuit and maintaining it thereafter," *Carney v. Adams*, 592 U. S. 53, 59 (2020), "the Government, not petitioners, bears the burden to establish that a once-live case has become moot." *West Virginia v. EPA*, 597 U.S. at 719. "'[V]oluntary cessation [of challenged conduct] does not moot a case' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id*. (emphasis added) (citations omitted).

II. The Panel Decision Must Be Reheard En Banc Because It Effectively Bars Judicial Review of the Government's Censorship-by-Proxy Campaign and of All Federal First Amendment Violations So Long as the Government Ceases the Challenged Conduct Prior to Judicial Resolution.

Seizing hold of one paragraph in *Murthy* while ignoring the rest of the opinion, the Panel Decision rests its holding as to CHD on a single ground: that the Government has stopped engaging in the challenged conduct, thereby depriving CHD of standing. (Slip op. at 6-8.) According to the Panel, CHD failed to show redressability and thus failed to "establish standing" (*id*. at 8) because in May, 2023, "'the White House disbanded its COVID–19 Response Team, which was responsible for many of the challenged communications in this case,'" and Plaintiffs lack "evidence of continued pressure from the defendants" thereafter. (Slip op. at 6-7 (quoting *Murthy*, 144 S. Ct. at 1995).)

Under this holding, there can be no judicial review whatsoever of the Government's sweeping censorship-by-proxy campaign. Critical to recall here is the Supreme Court's 2022 decision rejecting damages actions for First Amendment violations committed by Federal actors.[4] If in addition there is no injunctive standing, then the courthouse doors are entirely closed. This is error of monumental importance to the nation.

[4] *See Egbert v. Boule*, 596 U.S. 482 (2022).

The Panel's reasoning would bar judicial review of any Federal First Amendment violation whenever the Government voluntarily ceased the challenged conduct. That is not the law. 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." *City of Mesquite*, 455 U.S. at 289. "[I]f it did, the courts would be compelled to leave '[the] defendant . . . free to return to his old ways.'" *Id*. at 289 n.10 (citation omitted).

This result is particularly egregious in CHD's case. The panel did not dispute that CHD's constitutional rights were violated. Nor could it have: under settled law, government actors cannot constitutionally coerce private companies to censor third parties' speech.[5] Nor did the Panel dispute that CHD's injury is ongoing. Thus to leave CHD with no remedy is to breach the deepest commitments of American constitutional law. "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. 137, 163 (1803); *Byrd v. Lamb*, 990 F.3d 879, 883 (5th Cir. 2021) (Willett, J., concurring) (quoting *Marbury*); *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695, 698 (5th Cir. 1997) (quoting *Marbury*).

[5] *See, e.g.*, *National Rifle Association of America v. Vullo*, 602 U.S. 175, 187 (2024).

III. The Panel Gravely Misconstrued *Murthy* by Erroneously Turning the Federal Government's Voluntary Cessation of Challenged Conduct into a Categorical Bar on Jurisdiction, Conflicting with Both Supreme Court and Fifth Circuit Precedent.

Murthy by no means supports this unprecedented result. Consistent with well-established standing doctrine, the *Murthy* Court's holding rested on a careful tripartite analysis of injury, traceability, and redressability. The Court did ***not*** hold (as the Panel Decision did) that the Government's voluntary cessation of the challenged conduct by itself defeated standing (a result plainly conflicting with settled precedent). On the contrary, the Court first found that the *Murthy* plaintiffs were extremely weak as to injury and traceability, and only then found that these weaknesses, *combined* with the Government's cessation of the challenged conduct, undermined redressability.

As to injury, the *Murthy* majority emphasized that the plaintiffs primarily rested on allegations of "***past***" censorship, which does not establish redressable injury for injunctive relief: "The plaintiffs rely on allegations of past Government censorship as evidence that future censorship is likely. But ... the events of the past do little to help any of the plaintiffs establish standing to seek an injunction to prevent future harms." *Id*. at 1988-89.

Moreover, as to traceability, the "primary weakness" in the *Murthy* plaintiffs' showing was "the lack of specific causation findings with respect to any discrete

instance of content moderation. The District Court made none. Nor did the Fifth Circuit." *Id*. at 1979. When a plaintiff cannot show that any Government defendant was "behind" any specific act of social-media censorship, it is "much harder" to establish redressability. *Id*. at 1987.

Only after discussing these two failings in detail did the Court go on to hold that the "lack of evidence of continued pressure from the defendants" was fatal to redressability. *Id*. at 1993. The paragraph from *Murthy* emphasized by the Panel is explicit on this point. "'To determine whether an injury is redressable,' we 'consider the relationship between "the judicial relief requested" and the "injury" suffered.'" *Id*. (citation omitted). Because the *Murthy* plaintiffs' injury consisted of claimed "***past social-media restrictions***" and hypothetical "***social-media restrictions in the future***," the lack of "evidence of continued pressure" was fatal. *Id*. (emphasis added).

By contrast, Plaintiff CHD is suffering ***present, ongoing Government-traceable, Government-coerced, Government-caused deplatforming***. The District Court expressly and specifically found such continuing injury and causation (a finding conclusive on appeal absent clear error[6]). But the Panel ignored these crucial, distinguishing facts in its redressability holding as to CHD. As a result, the Panel

[6] "Questions of . . . causation[] are factual issues, and may not be set aside on appeal unless clearly erroneous." *SCF Waxler Marine, L.L.C. v. Aris T M/V*, 24 F.4th 458, 477 (5th Cir. 2022).

ripped from their context the Supreme Court's remarks about the lack of "evidence of continued pressure from defendants" and erroneously held that the Government's voluntary cessation of the challenged conduct—as such, without more, even for a party with proven, ongoing Government-caused injury—was a categorical bar to jurisdiction.

At bottom, the Panel confused standing with mootness. "It is the doctrine of ***mootness***, not standing, that addresses whether 'an intervening circumstance [has] deprive[d] the plaintiff of a personal stake in the outcome of the lawsuit.'" *West Virginia*, 597 U.S. at 719 (original emphasis); *see Texas v. Yellen*, 105 F.4th at 766 (5th Cir. 2024) (claim of change in federal defendants' practices, supposedly "put[ting] to rest" plaintiffs' concerns about future injury, did not state "a true standing argument," but rather "sounds in mootness"). The "distinction matters because the Government, not petitioners, bears the burden to establish that a once-live case has become moot." *West Virginia*, 597 U.S. at 719. "'[V]oluntary cessation does not moot a case' unless [defendant establishes that] it is '***absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur***.'" *Id*. (emphasis added) (citations omitted); *Lewis v. United States*, 88 F.4th 1073, 1078 (5th Cir. 2023) (same).

Defendants have not met—and cannot meet—that high burden here. By no means have Defendants shown that it is "absolutely clear" that governmental efforts

to pressure social media companies to censor speech cannot "reasonably be expected to recur." On the contrary, without a judicial finding of unconstitutionality, there is every reason to believe a subsequent Administration would relaunch the same tactics. (Indeed, there is reason to believe Defendants are engaging in the very same tactics right now.[7]) Plaintiffs had standing when this case originated, and the Government's asserted cessation of the challenged conduct thereafter cannot defeat standing and does not moot this case.[8]

[7] In July, 2024, the Government announced the "Resumption of FBI's Regular Meetings with Social Media Companies," to be conducted in the same "manner" as the "FBI did before pausing the meetings in summer 2023 due to the now-vacated *Missouri* injunction." DOJ, EVALUATION OF THE U.S. DEPARTMENT OF JUSTICE'S EFFORTS TO COORDINATE INFORMATION SHARING ABOUT FOREIGN MALIGN INFLUENCE THREATS TO U.S. ELECTIONS app'x 7 (July 23, 2024), https://oig.justice.gov/reports/evaluation-us-department-justices-efforts-coordinate-information-sharing-about-foreign (hereafter DOJ Memorandum).

[8] The primary distinction between mootness and standing is that "the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome ***when the suit was filed***." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (emphasis added). Here, the Panel made no finding that Plaintiffs lacked standing when suit was filed. On the contrary, the Panel emphasized that in May, 2023 "the White House disbanded its COVID–19 Response Team, which was responsible for many of the challenged communications in this case" (slip op. at 7), ***whereas this case was filed in March, 2023, two months earlier***. At that time, the Response Team was still in place; CHD's Government-caused deplatforming was ongoing; an important public political speech given by Kennedy in New Hampshire" was being "blocked by YouTube" (ROA.138 (Complaint)); the FBI/CISA social-media censorship program was ongoing (*see supra* note 7); and an injunction at that time (prior to voluntary cessation) would have produced "a significant increase in the likelihood" of relief (which is the correct test for redressability, *see Reed v. Goertz*, 598 U.S. 230, 234 (2023)). Plaintiffs will argue injury, traceability, and redressability in greater detail in their *en banc* merits brief; the point here is that the Panel did not call (and could not have called) into question Plaintiffs' standing at the time they filed suit, and thus Supreme Court precedent dictates that the Government's claim of voluntary cessation should have been analyzed (and rejected) under mootness doctrine.

IV. The Presidential Election Has Not Mooted this Case.

Nor has the recent Presidential election mooted this case. First, more than two months remain before Inauguration, and "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14, 19 (2020). Second, assuming the new Administration completely halts the prior Administration's social-media censorship, such voluntary cessation will not moot this case for all the reasons stated above. And finally, numerous cases hold that a subsequent election does not moot cases properly brought beforehand because such cases "fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. at 462; *see Anderson v. Celebrezze*, 460 U.S. 780, 784 n.3 (1983); *Storer v. Brown*, 415 U.S. 724, 737, n.8 (1974).[9]

[9] CHD and Kennedy have a "reasonable expectation" that they "will again be subjected to the alleged illegality." *Wisconsin Right to Life*, 551 U.S. at 462. Kennedy has for years been among the most censored individuals in America. CHD was subjected to government-caused censorship *even prior* to COVID and prior to the Biden Administration (ROA.29742), and has every intention of continuing to publish facts and opinions questioning the safety and efficacy of childhood vaccines, however disfavored that speech may be by government health authorities. Having experienced intense, unrelenting government-induced social-media censorship for years, Kennedy and CHD can reasonably expect that, when the new Administration leaves office, they may well again be subjected to the same illegality.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this Court to grant rehearing en banc.

DATED: November 18, 2024

Respectfully Submitted,

s/ Jed Rubenfeld

JED RUBENFELD
NY Bar # 2214104
1031 Forest Road
New Haven CT 06515
Telephone: 203-432-7631
E-mail: jed.rubenfeld@yale.edu

G. SHELLY MATURIN, II
(LA Bar # 26994)
Welborn & Hargett, LLC
1031 Camellia Blvd
Lafayette, LA 70508
Telephone: (337) 234-5533
E-mail: shelly@wandhlawfirm.com

Attorneys for ROBERT F. KENNEDY, JR.
CHILDREN'S HEALTH DEFENSE
CONNIE SOMPAGNARO

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this Petition for Reharing en Banc complies with Federal Rule of Appellate Procedure 32(a)(5) because it has been prepared in the proportionally-spaced 14-point Times Roman font, and that it complies with the word limits of Federal Rule of Appellate Procedure 35(b)(2) because it contains fewer than 3,900 words, according to Microsoft Word.

s/ G. Shelly Maturin, II

G. SHELLY MATURIN, II (#26994)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 18, 2024, the above Petition for Rehearing en Banc was filed with this Court via the CM/ECF system, which will send notice of said filing to all counsel of record.

Dated: Nov. 18, 2024

s/ G. Shelly Maturin, II

G. SHELLY MATURIN, II (#26994)
WELBORN & HARGETT, LLC
1031 Camellia Blvd.
Lafayette, LA 70508
Telephone: (337) 234-5533
Facsimile: (337) 769-3173
shelly@wandhlawfirm.com

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 4, 2024
Lyle W. Cayce
Clerk

No. 24-30252

STATE OF MISSOURI

Plaintiff,

versus

JOSEPH R. BIDEN, JR.

Defendant,

ROBERT F. KENNEDY, JR.; CHILDRENS HEALTH DEFENSE; CONNIE SAMPOGNARO,

Plaintiffs—Appellees,

versus

JOSEPH R. BIDEN, JR.; KARINE JEAN-PIERRE; VIVEK H. MURTHY; XAVIER BECERRA; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Et al.*,

Defendants—Appellants.

Appeal from the United States District Court
for the Western District of Louisiana
USDC Nos. 3:22-CV-1213, 3:23-CV-381

Before HIGGINBOTHAM, STEWART, and HAYNES, *Circuit Judges*.

PER CURIAM:[*]

In *Murthy v. Missouri*, 144 S. Ct. 1972 (2024), the Supreme Court held that a group of states and social media users lacked standing to seek a preliminary injunction against government defendants for allegedly pressuring social media platforms to suppress the users' content. The present case, which the district court consolidated with *Missouri*, concerns a preliminary injunction granted on the same record. After the Supreme Court's *Missouri* decision, a panel of this court remanded this case to the district court to reconsider standing in light of *Missouri*. Plaintiffs supplemented the record with three declarations, and the district court held that they had satisfied Article III's standing requirements, unlike the plaintiffs in *Missouri*. Because we conclude that Plaintiffs in this case lack standing to seek a preliminary injunction against Defendants, we VACATE the preliminary injunction and REMAND to the district court.[1]

I. Background

Missouri, Louisiana, and five social media users sued several federal government defendants for their alleged involvement in content-moderation activity by social media platforms. *See generally Missouri v. Biden*, 680 F. Supp. 3d 630 (W.D. La. 2023). The district court permitted extensive discovery, held a preliminary injunction hearing, and granted the plaintiffs' request for a preliminary injunction. *Id.* at 721, 729. The preliminary

---

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

[1] On remand, the district court must consider whether Plaintiffs have standing to seek other forms of relief, if any, and if not, dismiss the suit for lack of standing consistent with this opinion.

injunction enjoined the named defendants and unnamed officials from taking action "for the purpose of urging, encouraging, pressuring, or inducing in any manner the removal, deletion, suppression, or reduction of content containing protected free speech posted on social-media platforms." *Missouri v. Biden*, No. 3:22-CV-1213, 2023 WL 5841935, at *2 (W.D. La. July 4, 2023). A panel of this court affirmed the district court's injunction as to some defendants and reversed as to others. *Missouri v. Biden*, 83 F.4th 350, 359 (5th Cir. 2023) (per curiam).

The Supreme Court disagreed, holding that no plaintiff had established standing because they had failed to "demonstrate a substantial risk that, in the near future, they will suffer an injury that is traceable to a Government defendant and redressable by the injunction they seek." *Missouri*, 144 S. Ct. at 1981.

While the *Missouri* plaintiffs' preliminary-injunction motion was pending in the district court, Plaintiffs in this case—Robert F. Kennedy, Jr., Children's Health Defense ("CHD"), and Connie Sampognaro—brought a follow-on complaint against a similar group of federal government Defendants.[2] They also moved for a preliminary injunction, but "s[ought] no new discovery and submit[ted] no new evidence," opting instead to rely exclusively on the factual record developed in *Missouri*. After the district

[2] Defendants include President Biden, White House Press Secretary Karine Jean-Pierre, Surgeon General Vivek H. Murthy, the Centers for Disease Control and Prevention, the Census Bureau, the Department of Health and Human Services, the Department of Commerce, the National Institute of Allergy and Infectious Diseases, the Federal Bureau of Investigation, the Department of Justice, the Cybersecurity and Infrastructure Security Agency, the Department of Homeland Security, the State Department, the Food and Drug Administration, the Department of the Treasury, the Election Assistance Commission, the various heads of those agencies, and numerous other officials.

court granted a preliminary injunction in *Missouri*, it granted Plaintiffs' motion to consolidate the two cases.

The district court later granted Plaintiffs a preliminary injunction "on the same grounds as in *Missouri*," but stayed the injunction pending the Supreme Court's resolution of that case. Defendants in this case timely appealed, but we held proceedings in abeyance pending the Supreme Court's decision. A panel of this court then ordered a limited remand "so that the district court [could] reconsider the plaintiffs' standing in the first instance in the light of" the Supreme Court's *Missouri* decision.[3]

On remand to the district court, Plaintiffs supplemented the record with three declarations. The first was from Mary Holland, the chief executive of CHD. The second was from Brigid Rasmussen, the chief of staff for Kennedy's presidential campaign. The third was from Plaintiff Connie Sampognaro, a healthcare professional who relied on social-media platforms for information about the treatment of COVID-19. The district court concluded that the Supreme Court's *Missouri* decision foreclosed Sampognaro's listener-standing theory, but that Kennedy and CHD established standing. Plaintiffs have not cross-appealed the decision regarding Sampognaro and acknowledge that we need not address it. We therefore focus on the other two declarations in our analysis below.

Defendants moved for a stay of the preliminary injunction pending appeal. We granted a temporary administrative stay and carried with the case the motion for stay pending appeal.[4]

---

[3] Defendants argue that Plaintiffs waived their current theory of standing. Because we conclude that Plaintiffs lack standing under their current theory, we need not address that argument.

[4] We DENY AS MOOT Defendants' motion for a stay pending appeal.

II. Discussion

We review a district court's standing determinations de novo. *Tex All. for Retired Americans v. Scott*, 28 F.4th 669, 671 (5th Cir. 2022). At the preliminary injunction stage, "the plaintiff must make a clear showing that she is likely to establish each element of standing." *Missouri*, 144 S. Ct. at 1986 (internal quotation marks and citation omitted). Because "the parties have taken discovery, the plaintiff cannot rest on mere allegations, but must instead point to factual evidence." *Id.* (internal quotation marks and citation omitted).

In *Missouri*, the Court explained that, to establish standing, "the plaintiffs must show a substantial risk that, in the near future, at least one platform will restrict the speech of at least one plaintiff in response to the actions of at least one Government defendant." *Id.* It also stated that "standing is not dispensed in gross." *Id.* at 1988 (quotation omitted). Rather, "plaintiffs must demonstrate standing for each claim that they press against each defendant, and for each form of relief that they seek." *Id.* (internal quotation marks and citation omitted). "This requires a certain threshold showing: namely, 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." *Id.* The Court ultimately concluded that the plaintiffs had not met that burden. *Id.* at 1981.

Plaintiffs in this case rely on the same factual record as the plaintiffs in *Missouri*, plus the declarations mentioned above. So, to the extent Plaintiffs attempt to establish standing on the same basis as the plaintiffs in *Missouri*, the Court has already rejected those arguments. *Id.* at 1986. But Plaintiffs insist that, in light of the new declarations, this case is "utterly different" from *Missouri* because "the facts show that Defendants specifically targeted Mr. Kennedy and CHD for censorship, that particular

Defendants were indeed 'behind' their censorship, and that their censorship is not merely in the past, but is present and continuing today." We turn now to the Holland and Rasmussen declarations to evaluate those assertions.

A. The Mary Holland Declaration

Holland states that Meta (Facebook's parent company) and YouTube removed CHD from their platforms in August and September 2021, respectively, and have not since restored CHD to their platforms. She also states that Facebook deplatformed Kennedy in July 2021 and that Instagram did the same sometime prior. She does not allege that Kennedy remains deplatformed. Holland describes certain events in 2021 that cause her to believe that Meta and YouTube acted at the behest of the White House, the Surgeon General, and the CDC to target COVID-related content by members of the so-called "disinformation dozen," which includes Kennedy and CHD. She does not, however, discuss any post-2021 government actions.

Holland's declaration is similar to the evidence put forth regarding Jill Hines's standing in *Missouri*. There, the Court stated that "[o]f all the plaintiffs, Hines ma[de] the best showing of a connection between her social-media restrictions and communications between the relevant platform (Facebook) and specific defendants (CDC and the White House)." *Id.* at 1990. But the Court noted that, even assuming "Hines ha[d] eked out a showing of traceability for her past injuries, the past is relevant only insofar as it predicts the future." *Id.* at 1992. "To obtain forward-looking relief, the plaintiffs must establish a substantial risk of future injury that is traceable to the Government defendants and likely to be redressed by an injunction against them." *Id.* at 1993. "But without proof of an ongoing pressure campaign, it is entirely speculative that the platforms' future moderation decisions will be attributable, even in part, to the defendants." *Id.*

The Court in *Missouri* explained that "the vast majority of [the White House's] public and private engagement with the platforms occurred in 2021, when the pandemic was still in full swing" and that "the frequent, intense communications that took place in 2021 had considerably subsided by 2022." *Id.* at 1994. The Court also noted that, "in April 2023, President Biden signed a joint resolution that ended the national COVID-19 emergency" and "[t]he next month, the White House disbanded its COVID-19 Response Team, which was responsible for many of the challenged communications in this case." *Id.* at 1995. Regarding the CDC, the Court concluded that "the risk of future harm traceable to the CDC is minimal" because "[t]he CDC stopped meeting with the platforms in March 2022." *Id.* at 1994. Although "the platforms sporadically asked the CDC to verify or debunk several claims about vaccines," "the agency has not received any such message since the summer of 2022." *Id.* at 1994–95.

Plaintiffs argue that because the CDC and Kennedy continue to be censored, their situation is distinguishable from *Missouri*. *Missouri* demonstrates the flaw in that argument. There, "the plaintiffs and the dissent suggest[ed] that the platforms continue to suppress their speech according to policies initially adopted under Government pressure." *Id.* at 1995. The Court responded as follows:

> [T]he plaintiffs have a redressability problem. . . . The requested judicial relief . . . is an injunction stopping certain Government agencies and employees from coercing or encouraging the platforms to suppress speech. A court *could* prevent these Government defendants from interfering with the platforms' independent application of their policies. But without evidence of continued pressure from the defendants, it appears that the platforms remain free to enforce, or not to enforce, those policies—*even those tainted by initial governmental coercion*.

Id. (second emphasis added). Plaintiffs here have the same redressability problem.

We therefore conclude that the Holland declaration does not establish standing.

B. The Rasmussen Declaration

Rasmussen describes a series of content-moderation actions taken by social-media platforms against the Kennedy campaign and its supporters. But she does not trace any of the platforms' content-moderation actions against Kennedy back to the government.

Plaintiffs argue that "there is evidence that this intolerable electoral interference has been caused by Defendants' resuming their communications with social media platforms." They point to sources outside of the record indicating that the FBI and the Cybersecurity and Infrastructure Security Agency ("CISA") have restarted discussions with social media platforms about removing election-related disinformation.

These allegations fare no better than the election-based allegations in *Missouri*. There, the Court acknowledged that "[t]he FBI's challenged conduct was ongoing at the time of the complaint, as the agency worked with the platforms during the 2022 midterm election season." *Id.* at 1993. Nonetheless, the Court stated that Jim Hoft, the lone plaintiff in *Missouri* who alleged censorship of election-related content, had "not pointed to any past restrictions" of *his* election-related content "likely traceable to the Government defendants." *Id.* The Court explained that "[t]his failure to establish traceability for past harms—which can serve as evidence of expected future harm—'substantially undermines [the plaintiffs]' standing theory.'" *Id.* (second alteration in original) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411 (2013)). That is because Hoft had to "rely on a 'speculative chain of possibilities' to establish a likelihood of future harm

traceable to the FBI." *Id.* (quoting *Clapper*, 568 U.S. at 414). The Court described that speculative chain as follows: (1) "Hoft's future posts (presumably about the 2024 Presidential Election) must contain content that falls within a misinformation trend that the FBI has identified or will identify in the future"; (2) "[t]he FBI must pressure the platforms to remove content within that category"; (3) "[t]he platform must then suppress Hoft's post, and it must do so at least partly in response to the FBI, rather than in keeping with its own content-moderation policy." *Missouri*, 144 S. Ct. at 1993. The Court concluded that, "[e]specially in light of his poor showing of traceability in the past, Hoft has failed to demonstrate likely future injury at the hands of the FBI or CISA—so the injunction against those entities cannot survive." *Id.*

Here, the only new election-related evidence is the Rasmussen declaration. But the declaration does not cure the traceability problem from *Missouri* because it does not allege *any* government action that is responsible for suppression of Kennedy's campaign content. Kennedy must therefore rely on the same "speculative chain of possibilities" as Hoft in *Missouri*. *Id.* (quoting *Clapper*, 568 U.S. at 414). That chain does not become any less speculative if the FBI states that it will continue to communicate with platforms regarding election misinformation. If anything, Kennedy's chain of possibilities might be even *more* speculative now that he has suspended his presidential campaign, a fact of which we may take judicial notice. *See* FED. R. EVID. 201(b).

We therefore conclude that Kennedy lacks standing to seek a preliminary injunction for his claims concerning election-related content.

III. Conclusion

Because Plaintiffs lack standing to seek a preliminary injunction against Defendants, we VACATE the preliminary injunction and REMAND to the district court.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

November 04, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 24-30252 Kennedy v. Biden
USDC No. 3:23-CV-381
USDC No. 3:22-CV-1213

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 35, 39, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and Fed. R. App. P. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

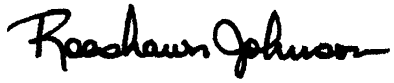
Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST

confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that appellees' pay to appellants' the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk



By: /s/ Roeshawn Johnson
Roeshawn Johnson, Deputy Clerk

Enclosure(s)

Mr. Simon Christopher Brewer
Mr. Glynn Shelly Maturin II
Mr. William Jeffrey Olson
Mr. Jed Rubenfeld
Mr. Michael Shih
Mr. Daniel Bentele Hahs Tenny
Mr. Daniel Winik
Ms. Catherine M. Yang