No. 23–411

In the Supreme Court of the United States

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

Petitioners,

v.

MISSOURI, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KENNEDY PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE

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INTRODUCTION

The facts of this case, as found by the district judge below, establish that the Federal Government, led by the White House itself, has specifically and successfully sought to censor one of the incumbent President's leading electoral rivals—to prevent that rival candidate from giving voice in the modern public square to information and ideas critical of Administration policy. Take a moment to consider that. The constitutional stakes are apparent; the threat to a fair presidential election is apparent. The rival candidate in question—Mr. Robert F. Kennedy, Jr.—is already a party to these proceedings by consolidation below, and his First Amendment rights will be adjudicated by this Court, yet he is not represented here.

No existing party to this case stands on the same footing as Mr. Kennedy, who is not only a leading presidential candidate but one of the leading targets of the Government's censorship campaign. No one else in the whole country stands on the same footing. Accordingly, Mr. Kennedy and his fellow Plaintiffs in *Kennedy v. Biden* (collectively the "*Kennedy* Plaintiffs") have moved to intervene.

This brief is respectfully submitted by the *Kennedy* Plaintiffs in reply to Plaintiffs-Respondents' brief opposing intervention. (For ease of reference, Plaintiffs-Respondents are referred to hereafter as "the *Missouri* Plaintiffs.") It bears emphasis that the Defendants in this case (the Federal Government parties, the parties who sought review in this Court) have ***not*** filed an opposition to the motion to intervene, and that ***no party***—neither the *Missouri* Plaintiffs nor the Government Defendants—***has asserted any prejudice*** that would result from intervention. Because Mr. Kennedy's unique rights and interests demand representation, because

the *Kennedy* Plaintiffs will cement standing, and because no party will be prejudiced, intervention should be granted.

PROCEDURAL STATEMENT

Apparently trying to show dilatoriness of some kind, the *Missouri* Plaintiffs make misleading statements about the proceedings below. They state, for example, that the *Kennedy* Plaintiffs "never filed a motion to intervene as parties in the district court." Pl.-Resp. Br. at 15. But Mr. Kennedy did in fact move to intervene in the district court; indeed he did so ***almost a year ago***.[1] Moreover, as the *Missouri* Plaintiffs acknowledge, right after filing *Kennedy v. Biden* eight months ago in March, 2023, the *Kennedy* Plaintiffs sought "***immediate consolidation***" with *Missouri v. Biden* (Pl.-Resp. Br. at 15), and a motion to consolidate is of course the functional equivalent of a motion to intervene. *See, e.g.*, *Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1049 (5th Cir. 1975) ("The difference between consolidation and intervention in the context of this type proceeding [a civil rights suit] is semantical in nature—with any difference being gossamer.").

In addition, the *Missouri* Plaintiffs repeatedly state that the district court held the *Kennedy* Plaintiffs' motion to consolidate "in abeyance," conveying the impression that the motion to consolidate was never acted upon. Pl.-Resp. Br. at 3, 15. In fact, as the *Missouri* Plaintiffs well know, the district court granted consolidation "for all purposes." *Missouri v. Biden*, No. 3:22-CV-01213, 2023 U.S. Dist. LEXIS 127620, at *8 (W.D. La. July 24, 2023).

[1] *See* ECF No. 118 (motion to intervene for discovery purposes filed Nov. 17, 2022).

Thus the *Kennedy* Plaintiffs have long and vigorously sought to participate in the *Missouri v. Biden* proceedings, they have done so without delay, and they are parties to those proceedings "for all purposes" in the court below.[2] In this Court, the *Kennedy* Plaintiffs moved to intervene immediately after certiorari was granted. No briefing schedule having yet been ordered, intervention will cause no delay here.

ARGUMENT

For three reasons, the *Missouri* Plaintiffs' brief opposing intervention actually supports intervention.

I. The *Missouri* Plaintiffs concede that the *Kennedy* Plaintiffs have "unassailable" standing.

The *Missouri* Plaintiffs expressly acknowledge that the *Kennedy* Plaintiffs have "unassailable" standing. Pl.-Resp. Br. at 4. By contrast, the *Missouri* Plaintiffs' standing is contested. *See* Appl. Stay at 19-20, *Murthy v. Missouri*, No. 23A-243 (Sep. 24, 2023). Intervention by the *Kennedy* Plaintiffs is warranted on this ground alone. *See, e.g.*, *Mullaney v. Anderson*, 342 U.S. 415, 416–17 (1952) (permitting joinder of new parties in this Court's proceedings to "remove [the issue of standing] from controversy" because "start[ing] over in the District Court would entail needless waste and run[] counter to effective judicial administration").

The *Missouri* Plaintiffs argue that because they follow Mr. Kennedy's social media content, they "suffer equal and 'reciprocal' First Amendment injuries

[2] Because they were denied an appealable order on their own motion for a preliminary injunction, and because the district court ordered consolidation only after the Fifth Circuit appeal was under way, the *Kennedy* Plaintiffs were not able to appear before that court and could not have moved for intervention there without causing delay.

whenever" Mr. Kennedy is censored. The contention here seems to be that the online censorship the Government has inflicted on Mr. Kennedy confers derivative standing on the *Missouri* Plaintiffs—from which it is somehow supposed to follow that the parties with ***derivative*** standing (the *Missouri* Plaintiffs) should be permitted ***alone*** to litigate Mr. Kennedy's rights, rather than Mr. Kennedy himself. However convoluted this argument is, it misses the fundamental point.

The *Kennedy* Plaintiffs' unassailable standing rests on a foundation wholly separate from that of the *Missouri* Plaintiffs—indeed wholly separate from the censorship Mr. Kennedy has suffered (and continues to suffer[3]) online. One of the *Kennedy* Plaintiffs is Children's Health Defense ("CHD"), a nonprofit organization whose 70,000+ members are consumers of social media and rely heavily on social media for health information. Under this Court's precedents, CHD's standing cannot seriously be disputed. *See, e.g.*, *Virginia Bd. of Pharmacy v. Virginia Citizens Council, Inc.*, 425 U.S. 748, 756-57 (1976) (recognizing standing of similar nonprofit organization to assert First Amendment challenge to ban on drug price advertising based on consumers' "right to receive information and ideas" important to their health) (citation omitted). Moreover, because CHD's membership is ***nationwide***, CHD is better positioned than any existing plaintiff to seek a ***nationwide*** injunction of the Government's censorship campaign.

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[3] *See* Jed Rubenfeld, *The Big Tech Censorship Machine Is Running in 2024: LinkedIn and Instagram have already suppressed Vivek Ramaswamy and Robert F. Kennedy Jr.*, WALL ST. J., June 5, 2023, https://www.wsj.com/articles/the-censorship-machine-is-running-in-2024-ramaswamy-rfk-jr-election-campaign-linkedin-meta-twitter-462f8aae.

CHD's standing is impervious to the arguments the Government makes against the *Missouri* Plaintiffs' standing. According to the Government, (1) the *Missouri* state Plaintiffs lack *parens patriae* standing, and (2) the *Missouri* individual Plaintiffs lack standing because they have not shown a likelihood that they, specifically, will be censored again in future. *See* Appl. Stay at 19-20, *Murthy v. Missouri*, No. 23A-243 (Sep. 24, 2023). Neither of these arguments applies to CHD. Obviously, CHD does not claim *parens patriae* standing, and the First Amendment rights of social media consumers are violated by the Government's censorship campaign ***regardless of which specific speakers are targeted***. Hence the joinder of CHD as a party in these proceedings will "remove [the issue of standing] from controversy," and intervention should therefore be granted. *Mullaney*, 342 U.S. at 416.

II. The *Missouri* Plaintiffs concede that Mr. Kennedy's rights and interests as a leading presidential candidate are unique; as a result, the *Kennedy* Plaintiffs will raise important arguments not yet made by the existing parties.

The *Missouri* Plaintiffs' brief also concedes that Mr. Kennedy's rights and interests as a presidential candidate are unique. Pl.-Resp. Br. at 3. Because Mr. Kennedy would therefore bring a distinctive "perspective" to this case, intervention as of right is warranted under Fed. R. Civ. P. 24. *See Berger v. N.C. State Conf. of the NAACP,* 142 S. Ct. 2191, 2205 (2022) (reversing denial of intervention as of right under Rule 24 to state legislators despite the presence of other state parties and attorneys in the case, because legislators "give voice to a different perspective"); *Int'l*

Union v. Scofield, 382 U.S. 205, 217 n.10 (1965) (policies behind Rule 24 provide guidance for appellate intervention).

Under Rule 24, it is sufficient "if the applicant shows that representation of his interest 'may be' inadequate," and "the burden of making that showing ***should be treated as minimal***." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (emphasis added). Here, the danger that vital interests will go unrepresented is far more than minimal. Because of Mr. Kennedy's unique status as a presidential candidate, the *Kennedy* Plaintiffs will raise important arguments, perspectives, and considerations that the current parties have not.

For example, political candidates have distinctive legal rights potentially relevant to this case. Federal statutory law bars broadcasters from allowing legally qualified candidates for public office to use their facilities without allowing rival candidates an equivalent use, and expressly states that broadcasters "***shall have no power of censorship***" over the content of a candidate's speech. 47. U.S.C. § 315(a) (emphasis added). The possibility that the values and policies underlying this statute might be worthy of consideration here has not been raised by the *Missouri* Plaintiffs.

Moreover, as a leading candidate challenging the incumbent President, Mr. Kennedy is acutely aware of the dangers posed when the current Administration induces social media platforms to censor political speech ***even when those inducements do not amount to coercion or otherwise satisfy one of the tests for state action.*** The *Missouri* Plaintiffs have assumed as a premise of this case that the Government's censorship campaign violates the First Amendment only if it

satisfies one or more of the state action tests. While the *Kennedy* Plaintiffs firmly agree that the Government's censorship campaign has often crossed the line into coercion, they will argue—if granted leave to intervene—that the Government violates the First Amendment ***whenever it deliberately seeks to induce social media platforms to censor constitutionally protected speech critical of Government policy, regardless of whether it acts coercively***. This important argument has not made by the *Missouri* Plaintiffs and is unlikely to be made by any party unless intervention is granted.

III. **The *Missouri* Plaintiffs nowhere allege prejudice**.

Finally, while the *Missouri* Plaintiffs claim that the motion to intervene is "untimely," their brief does not allege—much less establish—that they will suffer ***prejudice*** of any kind if intervention is granted. But "prejudice to the existing parties" is "the most important consideration in deciding whether a motion for intervention is untimely." *W. Watersheds Project v. Haaland*, 22 F.4th 828, 838 (9th Cir. 2022) (citation omitted); *see also, e.g.*, *Jones v. Caddo Parish Sch. Bd.*, 735 F.2d 923, 946 (5th Cir. 1984) (en banc) ("Prejudice is the heart of the timeliness requirement."). Hence the *Missouri* Plaintiffs' failure to assert prejudice dooms their timeliness argument.

Indeed, "courts are in general agreement that an intervention as of right under Rule 24(a) must be granted unless the petition to intervene would work a hardship on one of the original parties." *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970) (citation omitted).). But the *Missouri* Plaintiffs claim no such hardship,

and because the Federal Defendants have not filed an opposition***, no party to this case has claimed any prejudice whatsoever resulting from intervention***. Accordingly, intervention is warranted here.

CONCLUSION

For the foregoing reasons, the *Kennedy* Plaintiffs respectfully ask this Court to grant them leave to intervene as Respondents in this matter.

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Respectfully submitted,

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