No. 24-732

In The Supreme Court of the United States

CHILDREN'S HEALTH DEFENSE,
Petitioner,

v.

META PLATFORMS, INC., A DELAWARE CORPORATION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its president, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States. One of the purposes of the Institute is to advance the preservation of the freedoms our nation affords its citizens – in this case, the rights under the First Amendment to freedom of speech and freedom from censorship.

SUMMARY OF THE ARGUMENT

The Court should grant *certiorari* for two reasons. First, this case touches on a question left unanswered

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[1] Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae*, its members, or its counsel made a monetary contribution intended to fund this brief's preparation or submission. Pursuant to Rule 37.2, *Amicus Curiae* gave timely notice of its intent to file this brief to counsel of record for each party in this proceeding (because Science Feedback was dismissed from the lawsuit for insufficient service of process, *Children's Health Defense v. Meta Platforms, Inc.*, 112 F.4th 742, 767-68 (9th Cir. 2024), is not a party to this current proceeding, and no counsel for Science Feedback has entered an appearance, no notice was sent to Science Feedback).

in last term's decision in *Murthy v. Missouri*, 603 U.S. 43 (2024), "one of the most important free speech cases to reach this Court in years." *Id.* at 77 (Alito, J., dissenting). Specifically, the Court did not reach the second question: whether the government's challenged conduct transformed private social-media companies' content moderation decisions into state action and violated respondents' First Amendment rights. Instead, the Court held – over a strong dissent – that two States and five social media users lacked standing to enjoin *government* agencies and officials from pressuring or encouraging social media companies to suppress protected speech. The Petition here addresses a closely related issue to that unanswered substantive question from *Murthy* because the platform itself (Meta) is a defendant in this lawsuit.

Second, the Petition raises broader concerns regarding the close relationship between the Government and social media companies and the accompanying implications for the constitutional rights of all citizens. Given the risk of further suppression of free speech by social media platforms working hand in glove with governmental agencies and officials, the Court should clearly establish the threshold standards for when private conduct transforms into state action in the context of governmental interactions with social media platforms.

ARGUMENT

1. The Case Presents an Excellent Vehicle for the Court to Address Substantive Issues Raised in *Murthy* Because Meta Partnered with the Government to Suppress Petitioner's Speech

"[I]t is well established that the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015) (cleaned up). This Court has explained that "Government discrimination among viewpoints—or the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker—is a more blatant and egregious form of content discrimination." *Id.* at 168 (cleaned up). The First Amendment forbids this "egregious form of content discrimination in which the government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). This is because "[a]t the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society." *Nat'l Rifle Ass'n of Am. v. Vullo*, 144 S.Ct. 1316, 1326 (2024).

The fact that the actual suppression of disfavored viewpoints may be carried out by a private actor working in partnership with the Government makes no difference as it is "axiomatic that [the Government] may not induce, encourage or promote private persons

to accomplish what [the Government] is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 413 U.S. 455, 465 (1973). Accordingly, government agencies and officials may not significantly encourage and partner with private entities whereby the Government is "entangle[d] in a party's independent decision-making" to suppress speech which the Government cannot censor directly on its own. *Missouri v. Biden*, 83 F.4th 350, 373-75, 381-82 (5th Cir. 2023) ("The [government] officials do not deny that they worked alongside the [social media] platforms"), *rev'd on other grounds and remanded sub nom. Murthy v. Missouri*, 603 U.S. 43 (2024). That was the case in *Murthy*, and that is the case here because "Meta's relevant First Amendment rights . . . do not give Meta an unbounded freedom to *work with the Government* in suppressing speech on its platforms." *Children's Health Defense v. Meta Platforms, Inc.*, 112 F.4th 742, 789 (9th Cir. 2024) (Collins, J., dissenting).

The Petition raises "novel, difficult, and important legal questions," and "weighty First Amendment interests [are] at stake in this case." *Id.* at 769 (Collins, J., dissenting). That alone should be sufficient for this Court to grant the Petition. In *Murthy*, the "record reflect[ed] that the Government defendants played a role in at least some of the platforms' moderation choices," but the plaintiffs did "not seek to enjoin the platforms from restricting any posts or accounts" and instead sought "to enjoin Government agencies and officials from pressuring or encouraging the platforms to suppress protected speech in the future." *Murthy*, 603 U.S. at 44. Because the *Murthy* plaintiffs failed to demonstrate they had

standing to enjoin the Government's conduct, the Court did not reach the salient questions, including what constitutes state action when the Government works with social media companies to suppress speech. *See id.* at 56 ("We begin—and end—with standing. At this stage, neither the individual nor the state plaintiffs have established standing to seek an injunction against any defendant. We therefore lack jurisdiction to reach the merits of the dispute."). This case raises similar First Amendment issues, but against the platform.

Shortly after the Ninth Circuit issued its decision below on August 9, 2024, Respondent Mark Zuckerberg, on behalf of Meta Platforms, Inc., sent a letter to the U.S. House of Representatives Committee on the Judiciary, stating that

> [i]n 2021, senior officials from the Biden Administration, including the White House, repeatedly pressured our teams for months to censor certain COVID-19 content . . . . *Ultimately, it was our decision* whether or not to take content down, and we own our decisions, including COVID-19-related changes we made to our enforcement in the wake of this pressure. I believe the government pressure was wrong . . . and we're ready to push back if something like this happens again.

Mark Zuckerberg, Letter to the House Judiciary Committee, X (Aug. 26, 2024), *available at* https://x.com/judiciarygop/status/1828201780544504064?mx=2 (emphasis added).

Thus, contrary to the Ninth Circuit's characterization of Meta as "a purely private actor" and "victim" of governmental coercion, *Children's Health Defense*, 112 F.4th at 759, and even though the Government did indeed try to coerce Meta to do its bidding in violation of the First Amendment, *Missouri*, 83 F.4th at 381-82, 397-99, Meta itself admits that it was neither acting completely independently of the Government nor forced to censor speech, as it could have pushed back against the Government. Zuckerberg, Letter to the House Judiciary Committee, X (Aug. 26, 2024). Instead, Meta was significantly encouraged by the Government and decided on its own to join and partner with the Government in advancing the Government's agenda at the Government's direction in a way where the Government was heavily "entangle[d] in [Meta's] independent decision-making" to suppress and censor Petitioner's speech. *See Missouri*, 83 F.4th at 373-75, 381-82; Pet. 10-14, 17-19. "Because this case comes . . . at the motion-to-dismiss stage, the Court assumes the truth of well-pleaded factual allegations and reasonable inferences therefrom." *Vullo*, 144 S.Ct. at 1322 (cleaned up); *Children's Health Defense*, 112 F.4th at 750. Thus, there are sufficient grounds for the Petitioner's claim to proceed against Meta to determine if Meta was a state actor in joining with the Government to suppress Petitioner's speech.

The Court should grant *certiorari* to address the issue head-on and provide the nation's lower courts with much needed guidance as to what constitutes state action by a private entity and therefore implicates the First Amendment in these and

analogous circumstances. Indeed, the Ninth Circuit "acknowledge[d] that there is a degree of uncertainty in determining how specific the details of an agreement must be before a plaintiff can be said to have plausibly alleged joint action." *Children's Health Defense*, 112 F.4th at 758. Now is the time to answer that question.

2. The Court Should Grant *Certiorari* Because the Government's and Meta's Suppression of Speech is Extensive and Likely to Reoccur

As the House Committee on Oversight and Accountability stated, social media companies "are powerful entities that have the potential to influence public opinion and behavior." *The Cover Up: Big Tech, the Swamp, and Mainstream Media Coordinated to Censor Americans' Free Speech*, HOUSE COMMITTEE ON OVERSIGHT & ACCOUNTABILITY (Feb. 8, 2023), *available at* https://oversight.house.gov/release/the-cover-up-big-tech-the-swamp-and-mainstream-media-coordinated-to-censor-americans-free-speech/. That influence is quite tempting to the Government, especially if it can control that influence in secret. "By working through intermediaries, government can suppress speech quickly, without broad support, and potentially without alerting anyone of its involvement." Will Duffield, *Jawboning against Speech: How Government Bullying Shapes the Rules of Social Media*, CATO POLICY ANALYSIS no. 934, p.5 (Sept. 12, 2022), *available at* https://www.cato.org/sites/cato.org/files/2022-09/PA_934.pdf.

Thus, "[t]oo often in recent years, the government has sought to censor disfavored speech online, as if the internet were somehow exempt from the full sweep of the First Amendment." *TikTok Inc. v. Garland*, 604 U.S. ___, ___ (2025) (Gorsuch, J., concurring) (slip op., at 2) (citing *Murthy*, 603 U.S. at 76-78 (Alito, J., dissenting)). Indeed, as the Fifth Circuit found, "[f]or the last few years—at least since the 2020 presidential transition—a group of federal officials has been in regular contact with nearly every American social-media company about the spread of 'misinformation' on their platforms." *Missouri*, 83 F.4th at 359.

Unfortunately, internet platforms are "far more vulnerable to Government pressure than other news sources" because the platforms "are critically dependent on the protection provided by §230 of the Communications Decency Act . . . , which shields them from civil liability for the content they spread." *Murthy*, 603 U.S. at 80 (Alito, J., dissenting). The dissent below hit the nail on the head when it stated that "[h]aving specifically and purposefully created an immunized power for mega-platform operators to freely censor the speech of millions of persons on those platforms, the Government is perhaps unsurprisingly tempted to then try to influence particular uses of such dangerous levers against protected speech expressing viewpoints the Government does not like." *Children's Health Defense*, 112 F.4th at 786 (Collins, J., dissenting). For example, the dissent noted that

> CHD points, in particular, to April 2019 public remarks by House Speaker Nancy Pelosi in which she raised the possibility of removing the immunity for hosting

> third-party content that is granted to social media platforms by § 230 of the Communications Act of 1934. In those remarks, the Speaker noted that, when the subject of § 230 is raised with social media companies, "you really get their attention," and she stated that it was "not out of the question" that § 230's immunity "could be removed" by Congress. As she explained, "for the privilege of 230, there has to be a bigger sense of responsibility" on the part of social media companies.

Id. at 770 (Collins, J., dissenting) (footnote omitted). Similarly, President Trump threatened to repeal § 230 during his first term. *See, e.g.*, Tony Romm, *Trump threatens to veto major defense bill unless Congress repeals Section 230, a legal shield for tech giants*, THE WASHINGTON POST (Dec. 1, 2020), *available at* https://www.washingtonpost.com/technology/2020/12/01/trump-repeal-section-230-ndaa/.

While Meta has recently said it will change its stance on fact-checking and removing speech from its platform, that is likely an effort to align with the new political party wielding governmental power. In response to social media platforms policing speech over the past several years, "Trump and leading Republicans increasingly fought back, decrying the efforts as a form of censorship and launching lawsuits and congressional investigations," and "[n]ow, with Trump returning to office, social networks are racing to roll back those policies as they position themselves

to answer to a Republican administration and Congress." Naomi Nix et al., *Meta ends fact-checking, drawing praise from Trump*, THE WASHINGTON POST (Jan. 7, 2025), *available at* https://www.washingtonpost.com/technology/2025/01/07/meta-factchecking-zuckerberg/. Accordingly, regarding Meta's letter to the House Judiciary Committee, which was discussed above,

> David Kaye, a professor at UC Irvine School of Law and former U.N. special rapporteur on freedom of expression, was more critical of the letter, which he called "cynical" and "obsequious." Zuckerberg's missive, he said, "reinforces the sense of many activists around the world that Zuckerberg does not necessarily stand with his rules but can be swayed by government pressure — even while his letter tries to disclaim that perception." Meta declined to comment beyond confirming the letter's authenticity.

Will Oremus, *Zuckerberg expresses regrets over covid misinformation crackdown*, THE WASHINGTON POST (Aug. 27, 2024), *available at* https://www.washingtonpost.com/technology/2024/08/27/meta-zuckerberg-covid-misinformation-jordan-white-house/.

Because social media companies will apparently align themselves and cooperate with the ruling political party to preserve their § 230 protections, even if it means conspiring or partnering with the Government to help the Government indirectly

violate the Constitution, these issues are not a one-off and they are not going away. A political party in power may change and desire to censor speech again. Unless private entities, like Meta, who willingly conspire or agree to partner with the Government in pursuing an unconstitutional agenda for their own benefit, are held accountable as state actors if they violate the Constitution, then this threat to the First Amendment will continue. The dissent below warned that the consequence of not stopping this threat

> would mean that the Government can create a special immunized power for private entities to suppress speech on a mass scale and then request and receive, from those private entities, an ability to influence the exercise of those levers of censorship. That would thwart the First Amendment's core purpose to prevent the government from tilting public debate in a preferred direction.

Children's Health Defense, 112 F.4th at 790-91 (Collins, J., dissenting) (cleaned up). This is anathema to the First Amendment, which protects the right to "receive information and ideas," *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972), instead of receiving only what the Government considers to be the "correct" information and ideas.

Of additional concern is that the "deplatformed" topics include discussions of medicine and public health, sometimes by professionals in those fields. *See, e.g.*, *Missouri*, 83 F.4th at 359 & n.1. As this Court has recognized, "[p]rofessionals might have a host of good-faith disagreements, both with each

other and with the government, on many topics in their respective fields." *Nat'l Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755, 772 (2018). But "when the government polices the content of professional speech, it can fail to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," and "the people lose when the government is the one deciding which ideas should prevail." *Id.* (internal quotation marks omitted). Indeed, "throughout history, governments have manipulated the content of doctor-patient discourse to increase state power and suppress minorities." *Id.* at 771 (cleaned up) (quoting Paula Berg, *Toward a First Amendment Theory of Doctor–Patient Discourse and the Right To Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 201-02 (1994)).

Social media companies, like Meta, should be held accountable as state actors for allowing the Government to "significantly encourage[] the platforms' decisions by commandeering their decision-making processes," *see Missouri*, 83 F.4th at 382, to censor disfavored viewpoints in violation of the First Amendment. The Petition squarely addresses the constitutionality of Meta's (and other platforms') "*right to team up with the Government* to suppress the speech of particular speakers, or on particular topics, on such immunized mega-platforms"—a right which the dissent below found "no basis for." *Children's Health Defense*, 112 F.4th at 790 (Collins, J., dissenting). Because the issues raised in the Petition are extensive and represent a clear and ongoing threat to constitutional protections for millions of citizens, the Court should grant *certiorari* to address them and ensure that First Amendment protections remain robust in the digital age.

CONCLUSION

For the foregoing reasons, and those described in the Petition, the Court should grant the Petition and reverse the Ninth Circuit's ruling.

Respectfully submitted,

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