No. 23-411

In The
Supreme Court of the United States

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

Petitioners,

v.

MISSOURI, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

LAWRENCE S. EBNER
Counsel of Record
HANNAH S. MARCLEY
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..ii

INTEREST OF THE *AMICUS CURIAE*.................... 1

SUMMARY OF ARGUMENT 3

ARGUMENT... 7

A. Executive Branch officials coerced or significantly encouraged social media to suppress scientific debate about COVID-19 7

B. Suppression of scientific debate undermines sound science.. 10

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

Daubert v. Merrell Dow Pharm., Inc.,
509 U.S. 579 (1993) 1, 4, 10

Nat'l Endowment for the Arts v. Finley,
524 U.S. 569 (1998) 3

Other Authorities

44 Fed. Reg. 12,712 (Mar. 7, 2022) 12, 13

Br. of Rep. Jim Jordan *et al.* as *Amici Curiae* Supporting Plaintiffs-Appellees and Affirmance 6-14, *Missouri v. Biden*, No. 23-30445 (5th Cir. Aug. 7, 2023).. 5

Cameron English, *Fact-Checking The Fact-Checkers: What Do Studies Say About Masks And COVID-19?*, Am. Council on Science and Health (Aug. 24, 2021).. 15

H. Holden Thorp, *Public debate is good for science*, Science, Jan. 15, 2021. .... 11, 12

Jason Lemon, *Video of Biden Saying Vaccinations Prevent COVID Resurfaces After Infection*, Newsweek (July 21, 2022) .... .14

Jay Alexander Gold, *Wiser Than the Law?: The Legal Accountability of The Medical Profession*, 7 Am. J.L. & Med. 145 (1981) 16

Joe G. Hollingsworth & Eric G. Lasker, *The Case Against Differential Diagnosis: Daubert, Medical Causation Testimony, and the Scientific Method*, 37 J. Health L. 85 (2004) 11

Jon Miltimore, *The CDC (Finally) Admitted the Science on Natural Immunity. Why Did It Take so Long?*, Foundation for Economic Education (Aug. 22, 2022).. .15

Joseph Choi, *Fauci: Vaccinated people become 'dead ends' for the coronavirus*, The Hill (May 16, 2021) 14

Nat'l Acad. of Sci., Eng'g, and Med. Comm. on Hum. Rts., Proc. of a Symp. – in Brief, *Attacks on Scientists and Health Professionals During the Pandemic* (Apr. 2023)... 5

Soc'y of Env't Tox. and Chem. (SETAC), Technical Issue Paper, Sound Science (1999)................. .6, 11

The White House, Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021).. 13

INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm. ALF's mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

ALF long has been one of the nation's foremost advocates for fostering sound science in all three branches of the federal government. *See, e.g.*, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993) (quoting ALF amicus brief submitted on behalf of Nobel laureate Nicolaas Bloembergen and other renowned scientists). The question of whether the First Amendment applies to Executive Branch officials' efforts to suppress on social media disfavored

---

[1] No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

viewpoints about the COVID-19 pandemic underscores the importance of ensuring that the government allows sound science to flourish, particularly in connection with urgent matters of public health.

The right to criticize or question the scientific bases for the federal government's public health policies and messaging—*especially* during an unprecedented public health emergency that profoundly affects the social, educational, and economic fabric, and physical and psychological well-being, of the entire nation—not only is constitutionally sacrosanct, but also vital to advancing sound science.

ALF takes no position on the validity of the individual Plaintiffs-Respondents' views concerning topics such as the origin of the COVID-19 virus, or the efficacy and/or detrimental effects of government-imposed or endorsed pandemic mitigation measures, including school closings and business lockdowns, mask mandates, and mass vaccination. Consistent with its sound-science and individual-liberty missions, ALF opposes, however, Executive Branch efforts to coerce or significantly encourage social media to censor scientific debate on vital public health matters under the rubrics of "disinformation" or "misinformation."

ALF leaves it to the individual and state Respondents and other *amici* to address the free speech question in this appeal from a legal perspective. Instead, ALF hopes that this amicus brief will help inform the Court's consideration of that constitutional issue by discussing why suppression of

viewpoints that differ from Executive Branch COVID-19 policies and messaging undermines sound science.

SUMMARY OF ARGUMENT

No reasonable person supports the use of social media to disseminate misinformation, especially concerning urgent matters of public health. The federal government should not be permitted, however, to violate the First Amendment under the banner of fighting misinformation by suppressing free speech that criticizes or questions the scientific bases for its nationwide public health policies and messaging.

"It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects . . . ." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment). The federal government, particularly through the Surgeon General, Centers for Disease Control (CDC), and Food and Drug Administration, indisputably plays a vital role during an unprecedented public health emergency such as the COVID-19 pandemic. To protect the public, the government not only should rely on its own medical and scientific experts, but also encourage and evaluate other credible points of view, even those that criticize or question Executive Branch public health policies and messaging. As Justice Scalia suggested, assessing differing viewpoints "is the very business of government."

But silencing or suppressing, rather than soliciting and evaluating, dissenting or differing scientific points of view is not in the public interest. This is especially true where, as was the case during the COVID-19 pandemic, the Executive Branch hurriedly imposed or endorsed a series of controversial mitigation measures (e.g., nationwide school and business closings; mask mandates; mass inoculation of adults and children with newly developed mRNA vaccines) that necessarily preceded sound and robust scientific research. Labeling criticism of such pandemic mitigation measures as "misinformation," or even intentional "disinformation," simply because it challenges the scientific bases for the federal government's shifting, and often contradictory or inconsistent, public health policies and messaging, fundamentally conflicts with the manner in which scientific knowledge evolves.

As this Court explained in *Daubert*, "arguably, there are no certainties in science." 509 U.S. at 590. "'Indeed, scientists do not assert that they know what is immutably 'true' — they are committed to searching for new, temporary theories to explain, as best they can, phenomena.'" *Id.* (quoting Br. for Nicolaas Bloembergen *et al.* as *Amici Curiae* 9).

This case's extensive and undisputed factual record, as interpreted by the district court, *see* JA 94 n.41, establishes that "[d]iffering views about whether COVID-19 vaccines worked, whether taking the COVID-19 vaccine was safe, whether mask mandates were necessary, whether schools and businesses

should have been closed, whether vaccine mandates were necessary, and a host of other topics were suppressed." JA 213; *see also* Br. of Rep. Jim Jordan *et al.* as *Amici Curiae* Supporting Plaintiffs-Appellees and Affirmance 6-14, *Missouri v. Biden*, No. 23-30445 (5th Cir. Aug. 7, 2023) (discussing corroborating evidence obtained by the House Judiciary Committee from Facebook and Instagram); Nat'l Acad. of Sci., Eng'g, and Med. Comm. on Hum. Rts., Proc. of a Symp. – in Brief, *Attacks on Scientists and Health Professionals During the Pandemic* 6 (Apr. 2023) (summarizing panel discussion on "governmental repression of public health information related to the pandemic [and] the challenge of protecting freedom of expression and access to information during the pandemic, while addressing concerns regarding mis- and disinformation").[2]

Finding no clear error with the district court's factual findings, JA 69, the court of appeals explained that Executive Branch "officials, via both private and public channels, asked the platforms to remove content, pressed them to change their moderation policies, and threatened them—directly and indirectly—with legal consequences if they did not comply. And, it worked—that 'unrelenting pressure' forced the platforms to act and take down users' content." JA 16-17; *see also, e.g.*, JA 580-603, 619-25

[2] Available at http://tinyurl.com/mved2wpf.

(Decl. of Drs. Jayanta Bhattacharya, Martin Kulldorff & Aaron Kheriaty).

Stifling public debate about medical or other scientific matters—which both the district court and court of appeals found that numerous Executive Branch officials aggressively, repeatedly, and successfully accomplished throughout the pandemic—obstructs sound science.

"Sound science can be described as organized investigations and observations conducted by qualified personnel using documented methods and leading to verifiable results and conclusions." Soc'y of Env't Tox. and Chem. (SETAC), Technical Issue Paper, Sound Science 1 (1999).[3] Under the heading "What is Sound Science?" SETAC's paper explains that

> [t]oo often, advocates of a particular issue leap upon news media reports of scientific studies that seem to support their argument. Until others in the field have an opportunity to review the work, it is premature to conclude whether or not a given study is sound. *Caveat emptor* applies—Let the buyer (or, more appropriately, the public) beware!

Id. at 2. Based on the lower courts' findings, numerous Executive Branch officials undertook a concerted effort to squelch, rather than promote,

---

[3] Available at http://tinyurl.com/y7ejy9ty.

development of sound science in connection with the COVID-19 pandemic.

ARGUMENT

A. Executive Branch officials coerced or significantly encouraged social media to suppress scientific debate about COVID-19

The Fifth Circuit's opinion at JA 3-17 recounts the many ways that White House, CDC, and other Executive Branch officials pressured Twitter, Facebook, and other social media companies "to remove disfavored content and accounts from their sites" in connection with the COVID-19 pandemic. JA 2. In response to "escalating threats—both public and private—by government officials," JA 27, the social media platforms "downgraded or removed flagged posts, and deplatformed users." JA 2. "The platforms also changed their internal policies to capture more flagged content and sent steady reports on their moderation activities to the officials." *Id.*

The court of appeals explained that "[t]he Individual Plaintiffs adduced extensive evidence that social-media platforms have engaged in censorship of certain viewpoints on key issues and that the government has engaged in a years-long pressure campaign designed to ensure that the censorship aligned with the government's preferred viewpoints." JA 26. More specifically—

● Beginning in 2021 officials from the White House and the Office of the Surgeon General (a component of

the Department of Health and Human Services) began requesting social media companies to remove accounts and content that the officials had flagged as "misinformation." JA 4. These government officials also began monitoring and complaining about the adequacy of the social media platforms' "content moderation" (i.e., censorship) activities, such as in connection with "vaccine hesitancy." JA 5.

"[A]pparently eager to stay in the officials' good graces," social media representatives "met with the officials, tried to 'partner' with them, and assured them that they were actively trying to 'remove the most harmful COVID-19 misinformation.'" JA 6. But "[t]he officials were often unsatisfied," and "pressed the platforms to change their moderation policies." JA 6-7.

After "[t]he officials' frustrations reached a boiling point," the White House and the Surgeon General publicly criticized and threatened the social media platforms, including by "label[ing] social-media-based misinformation an 'urgent public health threat[]' that was 'literally costing . . . lives.'" JA 10-11. "The platforms responded with total compliance." JA 11. They not only removed "content the officials flagged" and "changed their moderation policies expressly in accordance with the officials' wishes," but also "began taking down content and deplatforming users they had not previously targeted." JA 7, 12.

● "Much like the White House officials, the CDC tried to 'engage on a [] regular basis' with the platforms. . . . like the other officials, the CDC also flagged content for removal that was subsequently

taken down." JA 13. "Unlike the other officials, though, the CDC officials also provided direct guidance to the platforms on the application of the platforms' internal policies and moderation activities." *Id.* For example, in "Be On the Lookout" meetings, "CDC officials authoritatively told the platforms what was (and was not) misinformation." *Id.* The platforms sought CDC's "guidance" as to "whether certain controversial claims were 'true or false' and whether related posts should be taken down as misleading." JA 14. "The CDC officials obliged, directing the platforms as to what was or was not misinformation." *Id.*

As part of its Article III standing analysis, the court of appeals also found that each of the individual Plaintiffs-Respondents has shown injury-in-fact as a result of the Executive Branch officials' unabashed and undisputed censorship activities. *See* JA 19-24. Their constitutional harms included, for example, temporary suspension of social media accounts, removal or suppression of posts critical of vaccine and mask mandates and lockdowns, and "de-boosting" of search results containing such criticism. JA 19-20. Further, the "Individual Plaintiffs have stated in sworn declarations that their prior censorship has caused them to self-censor and carefully word social-media posts moving forward in hopes of avoiding suspensions, bans, and censorship in the future." JA 20; *see* JA 766-76.

B. Suppression of scientific debate undermines sound science

"[O]pen debate is an essential part of . . . scientific analyses." *Daubert*, 509 U.S. at 596. Scientific knowledge is not static, including in connection with a sudden pandemic caused by a novel coronavirus. Instead, "[s]cientific conclusions are subject to perpetual revision. . . . The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance." *Id.* at 597.

The universally accepted process of continually and progressively postulating, testing, and disproving hypotheses is the "scientific method." As the Court explained in *Daubert*, "to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method . . . generating hypotheses and testing them to see if they can be falsified." *Id.* at 590, 593.

> Sound science implies that a set of data, facts, or conclusions of a scientific nature are supported by studies that follow the high standards of the scientific method. These standards describe important investigational attributes and practices such as the formulation of a readily testable hypothesis; the use of systematic and well-documented experimental or analytical methods (e.g., adequate sample sizes, appropriate control experiments); the application of appropriate data

> analysis tools (e.g., statistics and mathematical models) to the data; and the articulation of conclusions that address the hypothesis and are supported by the results.

SETAC, Sound Science, *supra* at 1; *see also* Joe G. Hollingsworth & Eric G. Lasker, *The Case Against Differential Diagnosis: Daubert, Medical Causation Testimony, and the Scientific Method*, 37 J. Health L. 85, 103 (2004) ("[T]he generation of testable hypotheses that are then subjected to the real world crucible of experimentation, falsification/validation, and replication . . . [is] a critical aspect of the application of the scientific method.") (internal quotation marks omitted).[4]

In other words, "science is an honorably self-correcting process," not "a fixed set of facts in a textbook." H. Holden Thorp, *Public debate is good for science*, Science, Jan. 15, 2021, at 213.[5] Dr. Thorp is Editor-in-Chief of the highly respected Science family of journals published by the American Association for the Advancement of Science. In an editorial focused on the COVID-19 pandemic, Dr. Thorp encouraged public debate, including through social media, on scientific issues "where a consensus has not emerged, such as whether and when to close schools or the usefulness of masks." *Id.* He explained as follows:

---

[4] Available at http://tinyurl.com/4ymdffds.

[5] Available at http://tinyurl.com/yw9th8pa.

> When debates in any sector move beyond the halls of universities and government agencies, there is potential for misuse of information and public confusion. But *open debate can also foster communication among scientists and between the scientific community and the public*. During the pandemic, open debate on research, health, and policy—whether on television, in newspapers, or on social media—widened public attention and encouraged more diverse voices. If this trend spurs scientists to agree more quickly about the best solutions to our problems—and at the same time helps the public "see" the process of scientific discourse more clearly—then *this is good for everyone, including scientists*.

Id. (emphasis added).

Censoring dissenting viewpoints and chilling public debate—including on Twitter and other social media—about the validity, accuracy, and/or adequacy of the scientific evidence supporting the federal government's COVID-19 mitigation policies and messaging is fundamentally incompatible with, and detrimental to, the manner in which scientific knowledge develops.

For example, in March 2022 the Surgeon General's office issued a Request for Information (RFI) on the "Impact of Health Misinformation in the Digital Information Environment in the United States Throughout the COVID-19 Pandemic." 44 Fed. Reg.

12,712 (Mar. 7, 2022). The RFI defines "health misinformation" as "health information that is false, inaccurate, or misleading according to the best available evidence *at the time*." *Id.* at 12,713 (emphasis added). This broad and flexible definition fails to take into account the evolving nature of scientific knowledge. Instead, it is a self-serving definition that enables the government to label a viewpoint as misinformation based on a *snapshot* of the state of scientific knowledge at a particular point in time chosen by the government for its own purposes.

Freedom of expression is particularly necessary and potent during a public health emergency where, as in the case of a novel coronavirus such as COVID-19, the federal government promotes mitigation measures based on assumptions that have not yet been fully tested in accordance with scientific methodology—and that subsequently turn out to be false. Indeed, under the Surgeon General's definition of misinformation, the *government itself* can be viewed as a purveyor of scientific misinformation.

For example, with the benefit of subsequent scientific knowledge, President Biden's emphatic, widely publicized assertions that "[t]his is a pandemic of the unvaccinated,"[6] and that "[y]ou're not going to

---

[6] The White House, Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021).

get COVID if you get these vaccinations,"[7] were mistaken, as was Dr. Anthony Fauci's statement that "[w]hen you get vaccinated . . . you become a dead end to the virus."[8] These examples of government statements that ultimately turned out to be untrue illustrate the fallacy of using a freeze-frame approach to labeling scientific viewpoints as misinformation merely because they differ from the government's own preferred viewpoint at a particular point in time during the evolution of scientific knowledge.

The unavailability of sound scientific research supporting public health policies and messaging may be unavoidable at the outset of an unanticipated public health emergency such as the COVID-19 pandemic. But such a lack of adequate scientific research is all the more reason why the government should embrace, and certainly not suppress, public criticism or questions that illuminate the need for ongoing and additional scientific investigation. Regardless of which party occupies the White House, it is not the government's job to cherry-pick a single scientific viewpoint while chilling scientific debate in order to justify critical policy decisions on nationwide public health issues.

---

[7] Jason Lemon, *Video of Biden Saying Vaccinations Prevent COVID Resurfaces After Infection*, Newsweek (July 21, 2022) (recounting President Biden's statement on July 21, 2021 to a CNN Town Hall).

[8] Joseph Choi, *Fauci: Vaccinated people become 'dead ends' for the coronavirus*, The Hill (May 16, 2021) (quoting Dr. Anthony Fauci's statement on Face the Nation).

Along the same lines, the government should encourage, not muzzle, public discourse that highlights inconsistencies between its public health messaging and already available scientific studies. For example, despite public confusion and uncertainty—and the availability of large-scale, peer-reviewed, scientific research published in the August 2021 edition of Science magazine—CDC delayed acknowledging the natural immunity developed by individuals who have been infected with COVID-19. *See* Jon Miltimore, *The CDC (Finally) Admitted the Science on Natural Immunity. Why Did It Take so Long?*, Foundation for Economic Education (Aug. 22, 2022) ("The CDC is late to the party on natural immunity, and many Americans have suffered because of it.").[9]

"The public appreciates experts who acknowledge uncertainty where it exists. 'Say what you know; what you don't know; what you are doing to find out; what people can do in the meantime to be on the safe side, and that advice will change.'" Cameron English, *Fact-Checking The Fact-Checkers: What Do Studies Say About Masks And COVID-19?*, Am. Council on Science and Health (Aug. 24, 2021) (quoting Michael Blastland, et al., *Five rules for evidence communication,* Nature (Nov. 18, 2020)).[10]

Tweets, blogs, podcasts, online and published articles, books, and other communications are not

---

[9] Available at http://tinyurl.com/5hea32av.

[10] Available at http://tinyurl.com/yy843j4c.

"misinformation" merely because they criticize or question the scientific bases for the federal government's public health policies and messaging. Instead, such constitutionally guaranteed freedom of expression serves the vital purpose of emphasizing the need for public health policies and messaging that are forthright and evolve in real time as scientific knowledge advances.

The district court explained that

> [t]he problem with labeling certain discussions about COVID-19 treatment as "health misinformation" was that the Surgeon General Defendants suppressed alternative views to those promoted by the government. One of the purposes of free speech is to allow discussion about various topics so the public may make informed decisions. Health information was suppressed, and the government's view of the proper treatment for COVID-19 became labeled as "the truth." . . . *Without a free debate about these issues, each person is unable to decide for himself or herself the proper decision regarding their health*.

JA 212-13 (emphasis added); *see also* Jay Alexander Gold, *Wiser Than the Law?: The Legal Accountability of The Medical Profession*, 7 Am. J.L. & Med. 145, 149, 174 (1981) (the "democratic principle . . . that people have the right to make the decisions that affect their lives . . . should apply in the case of disagreement among the experts"; "the layman, group, or official

involved should retain the authority to make the decision after considering the experts' disparate recommendations").

By coercing social media to silence, and thereby conceal from the public, scientific viewpoints about COVID-19 mitigation measures that differed from the Administration's policies and messaging, the Executive Branch officials involved in this appeal not only violated the First Amendment's inalienable right to freedom of speech, but also attempted to sabotage the pillars of sound science.

CONCLUSION

The Fifth Circuit's judgment should be affirmed.

Respectfully submitted,

LAWRENCE S. EBNER
Counsel of Record
HANNAH S. MARCLEY
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

February 2024