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 FOR THE STATE OF MONTANA, 15 OTHER STATES, AND THE ARIZONA LEGISLATURE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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INTEREST OF AMICI CURIAE

Social media platforms "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard," and they enable citizens to "petition their elected representatives and otherwise engage with them in a direct manner." *Packingham* v. *North Carolina*, 582 U.S. 98, 104-05, 107 (2017). The rights of speech and petition are vital to the democratic process—for citizens and government officials alike—because they "foster[] the public exchange of ideas that is integral to deliberative democracy." *Borough of Duryea, Pa.* v. *Guarnieri*, 564 U.S. 379, 388 (2011). Without that open and robust exchange of ideas, deliberative democracy and all its attendant benefits withers and dies.

The extensive federal censorship campaign outlined in the district court's and Fifth Circuit's thorough opinions, distorted—and still distorts—the nature of that "public exchange of ideas" and undermines "deliberative democracy." *Id.* Because this censorship regime caused—and still causes—separate and unique injury to our sister states, Missouri and Louisiana ("States"), the States of Montana, Alabama, Alaska, Florida, Georgia, Idaho, Iowa, Kansas, Nebraska, Ohio, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and the Arizona Legislature ("Amici States") submit this amicus brief to safeguard their right to "to vindicate [their] *own* sovereign and quasi-sovereign interests." *Kentucky* v. *Biden*, 23 F.4th 585, 596 (6th Cir. 2022). Amici States urge this Court to affirm the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court and the Fifth Circuit found that federal officials engaged in a years-long campaign to influence the content-moderation decisions of social media platforms by applying "unrelenting pressure" to those platforms to change content-moderation policies to allow easier suppression of disfavored speech. *See* J.A.71; C.A.ROA.26458–540, 26548. That campaign targeted *disfavored* speakers (those critical of the Administration's policies), J.A.48, 82; C.A.ROA.26539-40, and *disfavored* viewpoints on hotly debated issues (COVID vaccines, mask mandates, election-integrity issues), J.A.48, 82; C.A.ROA.26608. This federal censorship distorts the "public exchange of ideas" necessary to our democracy by silencing *only* disfavored speech and disfavored speakers. The result: "Society as a whole [is] the loser." *Sec'y of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984).

This extensive censorship campaign directly injured the States in at least two ways. *First*, their own social-media posts were censored in response to federal pressure on social media platforms. *Second*, the censorship campaign directly interferes with the States' sovereign and quasi-sovereign interest in hearing and engaging with their citizens' views on matters of enormous public importance. In light of these injuries, the States have Article III standing to vindicate their sovereign and quasi-sovereign interests.

In the First Amendment context, "other concerns"—such as hindrances to a party's ability to

defend his or her interests or the danger of chilling protected speech—"justify a lessening of prudential limitations on standing." *Id.* Because the censorship of the States' social-media posts is an Article III injury—an injury shared by "millions" of their citizens, *see* J.A.71; C.A.ROA.26548—the States may "assert those concomitant rights of third parties that would be diluted or adversely affected should [their] constitutional challenge fail." *Craig* v. *Boren*, 429 U.S. 190, 194-95 (1976) (internal quotations omitted). Likewise, as the Fifth Circuit correctly held, the States have standing to defend their interest in hearing and engaging with their citizens' views on issues of public importance. J.A.29-31. The States' seek to defend their Article III *and* sovereign or quasi-sovereign interests, which strengthens the case for relaxing prudential standing limits *in this case*—especially given their status as "[unique] litigants for the purposes of invoking federal jurisdiction." *Texas* v. *United States*, 809 F.3d 134, 151 (5th Cir. 2015) (quotations omitted).

Even if this Court finds that the States lack direct Article III standing, it should hold that the States have standing to defend their sovereign and quasi-sovereign interests vis-à-vis the federal government. Petitioners suggest that such suits are barred by the Supreme Court's decision in *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923). *See* Pet'rs'.Br.22 (quoting *Haaland* v. *Brackeen*, 599 U.S. 255, 295 n.11 (2023)). But *Brackeen* did not define the scope of the "*Mellon* bar," and this broad reading of *Brackeen* ignores the Court's decision in *Massachusetts* v. *EPA*, 549 U.S. 497 (2007),

which permits suits against the federal government asserting quasi-sovereign interests and has not, to date, been overruled. This Court should instead adopt the Sixth Circuit's reasoning in *Kentucky* and hold that states may sue the federal government to defend their quasi-sovereign interests.

ARGUMENT

The States have standing to challenge Petitioners' federal censorship campaign because they suffered Article III injuries and injuries to their quasi-sovereign interests. The Fifth Circuit and the district court found both injuries sufficient to establish standing, and this Court should too.

I. The States have Article III standing.

Article III empowers federal courts to decide only "Cases" and "Controversies," which "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). It does so by ensuring that courts review the legality of federal action only when presented with a dispute when a party suffers concrete harm from that conduct. *Id.* at 409. This is such a case.

1. The States suffered concrete and particularized Article III injuries when their own social-media posts were censored through federal pressure on social media platforms. In one instance, the Louisiana Department of Justice shared video footage on YouTube that criticized mask mandates and COVID-

19 measures, and the video was removed in August 2021 immediately following Defendants' "advocacy for COVID-related 'misinformation' censorship." C.A.ROA.26579; *see also* J.A.28. In another, a Louisiana state legislator's Facebook post addressing the vaccination of children against COVID-19 was censored. C.A.ROA.26579; *see also* J.A.28-29 (noting at oral argument that YouTube "recently removed a video of counsel, speaking in his official capacity, criticizing the government's alleged unconstitutional censorship in this case"). And in another, YouTube removed videos of four public meetings held in St. Louis County, Missouri, regarding county-wide mask mandates because some citizens contended that masks were ineffective. C.A.ROA.26579. These instances of censorship—whether rooted in the First Amendment or, more likely, "derive[d] from a state's sovereign nature"—harm the States' "'right' to speak on [their] own behalf." *See* J.A.29 (quoting *Bd. of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 229 (2000)).

Petitioners suggest that these instances are too diffuse to support standing. Pet'rs'.Br.20-21. Yet, as the district court rightly observed, the fact that such instances were "uncovered through limited discovery suggests that th[is] censorship … could merely be a representative sample of more extensive suppressions … by [Petitioners]." C.A.ROA.25677-78. Even

so, state government officials in Alaska,[1] Florida,[2] and Ohio[3] have alleged various instances of their social-media posts being removed, restricted, shadow-banned, or deplatformed around the time of Petitioners' campaign against COVID-related misinformation. Contrary to Petitioners' attempt to minimize the breadth of their censorship campaign, the record shows that their efforts to silence disfavored viewpoints were both extensive and far-reaching.

2. The States assert that Petitioners interfered with their constituents' First Amendment rights to speak and listen freely, *see* C.A.ROA.26575, as well as the right to petition their governments for redress, *see,*

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[1] *Stop Social Media Censorship Act: Hearing on S.B. 214 Before the S. Judiciary Standing Comm.*, 32nd Leg., 2021-2022 Sess. (Alaska Mar. 28, 2022) (statement of Sen. Reinbold) ("Many of us have known or have actually been restricted, shadow-banned, deplatformed, had lots of misinformation stickers slapped on our user area where we have pages."), https://perma.cc/9FZN-R798.

[2] *See* Arek Sarkissian, *DeSantis Tears into YouTube, Claiming Censorship*, POLITICO (Apr. 12, 2021) (observing that YouTube removed a video of a roundtable discussion with Governor DeSantis because experts said face masks were unnecessary for children), https://perma.cc/J7AY-MDNJ.

[3] *Regards Interactive Computer Services and Social Media Censorship: Hearing on H.B. 441 Before the H. Civil Justice Comm.*, 134th Gen. Assemb. (Ohio Nov. 9, 2021) (statement of Rep. Wiggam) (explaining that social-media "censorship has had a direct impact on Ohioans as one of our committees, State and Local Government[,] had public testimony that was removed from YouTube, despite the individual who provided testimony being questioned from both sides of the aisle").

e.g., C.A.ROA.26549 (describing efforts to censor "Reopen Louisiana," which "encourage[ed] people to contact their legislature to end the Government's mask mandate"). The right to petition is "cut from the same cloth" as other First Amendment guarantees and protects the right of individuals to "communicate their will" to their elected representatives. *McDonald* v. *Smith*, 472 U.S. 479, 482 (1985) (quoting 1 Annals of Cong. 738 (1789)). And that right—similar to the right to speak—"allows citizens to express their ideas, hopes, and concerns to their elected representatives."[4] *Guarnieri*, 564 U.S. at 388. Since "the right to petition is generally concerned with expression *directed to the government* seeking redress of a grievance," governments are a part of, or involved with, the assertion of that right. *Id.* (emphasis added).

And these violations also implicate the States' interest in hearing their constituents' actual views on matters of public importance. As the Fifth Circuit explained, the States' "right to listen is 'reciprocal' to [their] right to speak and constitutes an independent basis for the [States'] standing." J.A.28-29 (citing *Va. State Bd. of Pharm.* v. *Va. Citizens Consumer Council*, 425 U.S. 748, 757 (1976)). State officials in Missouri

[4] Social media platforms provide an easy forum for "users [to] petition their elected representatives and otherwise engage with them in a direct manner." *Packingham*, 582 U.S. at 104-05. Indeed, the governors in every state have set up Twitter accounts for this very purpose, and no doubt many other state government officials have as well. *See id.* Because of this, social media is among "the most important places" where First Amendment activity occurs today. *Id.*

and Louisiana testified that they regularly use social media to monitor their citizens' views on various issues. *See* J.A.30. And when the federal government coerces social-media platforms to censor only certain viewpoints, "it hampers the states' right to hear their constituents and, in turn, reduces their ability to respond to the concerns of their constituents." J.A.31; *see also Mahanoy Area Sch. Dist.* v. *B. L.*, 141 S. Ct. 2038, 2046 (2021) ("[R]epresentative democracy" depends on "free exchange" of ideas that "facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will.").

3. Petitioners also argue that the States lack standing because "they have no First Amendment rights to begin with." Pet'rs'.Br.20. But even if the States don't have First Amendment rights, they have asserted an Article III injury. *See, e.g.*, *Prison Legal News* v. *Livingston*, 683 F.3d 201, 212-13 (5th Cir. 2012) (stating that "it is well recognized" that government "censorship" satisfies "Article III's injury-in-fact requirement"). And the States may, in cases like these, defend their Article III injury and the related First Amendment rights of their citizens, even if they have "no First Amendment rights." Pet'rs'.Br.20.

This Court's decision in *Craig* is instructive. *See* 429 U.S. 190. *Craig* involved a challenge to two provisions in an Oklahoma statute that prohibited the sale of 3.2% beer to males under 21 and females under 18. *Id.* at 191-92. Craig, a male between 18 and 20, challenged the statute, arguing that this gender-based

differential violated the equal protection rights of 18-to-20-year-old males, but he turned 21 before the Court resolved his claim, rendering his claim moot. *Id.* at 192-93. So the Court considered whether a vendor of 3.2% beer could rely on the equal protection interests of 18-to-20-year-old males. *Id.* Finding that the statutes "plainly inflicted 'injury in fact' on the [vendor]" sufficient satisfy Article III standing requirements, *Craig* held that the vendor was "entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should her constitutional challenge fail." *Id.* at 194-95 (quoting *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965)).

A year later, in *Carey* v. *Population Servs. Int'l*, 431 U.S. 678 (1977), this Court relied on *Craig* to find that vendors of contraceptive devices who challenged a New York statute that, among other things, prohibited the sale of nonprescription contraceptives, could rely on the constitutional objections of their potential customers to support standing.[5] *See id.* at 681-84. Because the States have shown an Article III injury—a widespread federal censorship campaign against so-called "disinformation," "misinformation," and "malinformation," that was directed at their social-media posts, in addition to those of private citizens, *see* C.A.ROA.26456-57—this Court's third-party standing

[5] *Craig* and *Carey* are not outliers. *See, e.g.*, *Miller* v. *Albright*, 523 U.S. 420, 433 (1998) (requiring injury-in-fact to assert a constitutional right on behalf of a parent); *cf. Thole* v. *U.S. Bank N.A*, 140 S. Ct. 1615, 1621 (2020) (denying third-party standing because of the absence of Article III injury).

principles support finding that the States have standing to defend their Article III injury and the related First Amendment rights of their citizens. *See, e.g.*, *Joseph H. Munson*, 467 U.S. at 956.

II. The standing inquiry is relaxed in the First Amendment context.

While this Court has generally "not looked favorably upon third-party standing," *see Kowalski* v. *Tesmer*, 543 U.S. 125, 129-30 (2004), it has, in the First Amendment context, identified "other concerns that justify a lessening of prudential limitations on standing," *see Joseph H. Munson*, 467 U.S. at 956. So even though parties must ordinarily assert their own legal rights and interests, that prudential limitation gives way in "circumstances where it is necessary to grant a third party standing to assert the rights of another." *Kowalski*, 543 U.S. at 129-30. When, as here, there is a danger that the challenged conduct will chill protected speech, the Court has relaxed traditional standing requirements because of "society's interest in having the [conduct] challenged." *Joseph H. Munson*, 467 U.S. at 956; *see also Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973) (permitting third parties to sue because of the danger of a chilling effect on "constitutionally protected speech or expression"). Given Petitioners' widespread campaign to target disfavored viewpoints from disfavored speakers on social media platforms, *see* C.A.ROA.26459, 26482, 26504, 26506, and the "special solicitude" afforded to states for Article III standing purposes, *see Massachusetts*, 549 U.S.

at 520, some relaxation of traditional standing requirements is warranted here.[6]

Once a plaintiff establishes an "injury in fact," as the States do here, this Court considers two more prudential criteria to confer standing. *See Powers* v. *Ohio*, 499 U.S. 400, 411 (1991). First, "there must exist some hindrance to the third party's ability to protect his or her own interests." *Id.* Second, the litigant must have a close relationship with the third party. *Id.* Both criteria are present here.

1. When parties face "practical obstacles" to asserting their own rights and a third party can effectively represent their interests, the Court has permitted third-party standing. *Joseph H. Munson*, 467 U.S. at 956. Such "practical obstacles" need not be legal barriers to suit—rather, it's enough of a barrier to suit when there is "a small financial stake involved [compared to] the economic burdens of litigation." *Powers*, 499 U.S. at 414-15; *see also Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 64 n.6 (1963) (book publishers allowed to stand in for their distributors who were unlikely "to sustain sufficient economic injury to induce [them] to seek judicial vindication of [their] rights"). And it is enough that, as a practical matter, the number of lawsuits brought are rare compared to the

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[6] The States' standing in this unique context is even clearer because they "'are not normal litigants for the purposes of invoking federal jurisdiction.'" *Texas*, 809 F.3d at 151 (quoting *Massachusetts*, 549 U.S. at 518, 520). So this Court may appropriately limit consideration of these third-party standing principles to states in the First Amendment context.

frequency of the constitutional abuse. *Powers*, 499 U.S. at 414.

The States meet these criteria in at least two ways. *First*, while the overarching effects of Defendants censorship regime were substantial, most individual users experienced only minimal harm—rarely enough to warrant individual litigation. The district court found that Petitioners engaged in a widespread operation to censor protected speech from a range of users on specific topics, which included targeting specific ideas for censorship and limiting the ability of users to share those posts. *See, e.g.*, C.A.ROA.26459-61, 26464-81. But the average social media user was either unaware of this or experienced minimal disruptions to their social media use. So as the Petitioners sought to squelch politically disfavored viewpoints in the aggregate, each censored user shared in a small part of that constitutional deprivation and had "little incentive to set in motion the arduous process needed to vindicate his own rights." *Powers*, 499 U.S. at 415 (citing *Barrows* v. *Jackson*, 346 U.S. 249, 257 (1953)).

Second, because individual users were often unaware that their speech was being artificially suppressed by Petitioners, lawsuits to vindicate their interests will be rare. The district court found the social media companies, at the behest of the federal government, used "spectrum of levers" to conceal their censorship efforts, including "de-boosting" and preventing content sharing through "friction." C.A.ROA.26471. Petitioners veiled their actions in

two ways. First, government actors directed social media employees to silence protected expression through private channels. *See, e.g.*, C.A.ROA.26463–81, 26554. Second, social media companies artificially limited the reach of protected expression in manners that hid the censorship. C.A.ROA.26459 (reducing account reach); C.A.ROA.26469 (message-forward limits); C.A.ROA.26470 (using "reduction" techniques). Because of the hidden nature of these requests and the enigmatic nature of social media algorithms, "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." *Barrows*, 346 U.S. at 257.

Given the "practical obstacles" that individual social media users face in defending their constitutional interests and the States' ability to represent those interests, allowing the States to defend their citizens' related First Amendment interests is warranted here.

2. The touchstone of third-party standing centers on whether the relationship between the litigant and the third party is one where "the former is … as effective a proponent of the right as the latter." *Powers*, 499 U.S. at 413 (internal quotations omitted). For that to be the case, both the litigant and the third party must have a common interest in safeguarding the asserted right. *See id.* at 413-14.

To assert the constitutional rights of another party, the litigant must be a part of, or intimately involved with, the constitutional right asserted. *See, e.g.*, *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (allowing parochial school to assert fundamental rights of

parents); *Craig*, 429 U.S. at 195 (allowing beer vendor to assert constitutional rights on behalf of customers). In those scenarios, and scenarios like them, the litigant "is uniquely qualified to litigate the constitutionality" of the right asserted. *Singleton* v. *Wulff*, 428 U.S. 106, 117 (1976) (plurality op.).

As discussed above, *see* Sect.I.2, the States allege that Petitioners interfered with their constituents' First Amendment rights to speak and listen, as well as the right to petition their governments for redress. The right to petition is "cut from the same cloth" as other First Amendment guarantees, *see McDonald*, 472 U.S. at 482 (quotation omitted), and it is generally concerned with expression *directed to the government* seeking redress of a grievance," *see Guarnieri*, 564 U.S. at 388 (emphasis added). So governments, like the States here, are necessarily part of, or involved with, the assertion of that right.

And here, the States are in a better position to vindicate their citizens' First Amendment rights—including their right to speak, listen, and petition—than the citizens themselves. *See Powers*, 499 U.S. at 413. Petitioners' conduct has interfered with, and in some cases precluded, the meaningful engagement between the States and their constituents, and the States share a common interest in challenging that conduct. Not only that, but the relationship between the States and their citizens concerning the right to petition is as close as other relationships that have warranted third-party standing. *See, e.g.*, *Pierce*,

268 U.S. at 534-35 (school-parent relationship); *Craig*, 429 U.S. at 195 (vendor-customer relationship).

Even though parties must generally assert their own legal rights and interests, the circumstances present here—the practical obstacles individual social media users face in defending their constitutional interests and the States' superior position to vindicate those rights—"justify a lessening of [this Court's] prudential limitations on standing." *See Joseph H. Munson*, 467 U.S. at 956.

III. The States have standing to defend their sovereign and quasi-sovereign interests.[7]

A. The *Mellon* bar does not apply to quasi-sovereign interest suits against the federal government.

In the standing context, *parens patriae*—or "parent of the country"—captures two distinct concepts. *See Kentucky*, 23 F.4th at 596. The first conception is a form of third-party standing that existed at common law and permitted the King to litigate on behalf of those incapable to represent their own interests, not to redress his own injuries. *See Chapman* v. *Tristar Prods., Inc.*, 940 F.3d 299, 305 (6th Cir. 2019) (citing *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982)). Under the second conception, "states sometimes purport to sue in a

[7] Because the Fifth Circuit found that the States likely had direct standing, it did not consider whether the States had *parens patriae* (or quasi-sovereign-interest) standing. *See* J.A.28 n.6.

'*parens patriae*' capacity, yet what they are really doing is asserting some injury to their *own* interests separate and apart from their citizens' interests." *Kentucky*, 23 F.4th at 596 (citing *Chapman*, 940 F.3d at 305). States in these cases sued to prevent conduct that both injured its citizens *and* invaded their sovereign or quasi-sovereign interests—for example, state suits to prevent pollution that harmed citizens and interfered with the state's prerogative to safeguard public health. *See id.* (citing *Georgia* v. *Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) and *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 592 (1923)).

The distinction between these two conceptions of *parens patriae* standing is most acute when a state sues the United States and its officers. *See id.* at 597. A state cannot sue the federal government when it seeks to represent its citizens in a purely third-party *parens patriae* capacity. This prudential constraint is known as the "*Mellon* bar," *see Gov't of Manitoba* v. *Bernhardt*, 923 F.3d 173, 179 (D.C. Cir. 2019), from the Supreme Court's decision in *Massachusetts* v. *Mellon*. In *Mellon*, which did *not* involve "quasi sovereign rights actually invaded or threatened," this Court explained that states may not sue "as parens patriae … to protect citizens of the United States from the operation of the statutes thereof," nor is it part of a state's "duty or power to enforce [its citizens'] rights in respect of their relations with the federal government." 262 U.S. at 485-86. So, without sovereign or quasi-sovereign interests on the line, states cannot litigate in a third-party capacity as *parens patriae* against the United States because the United States

has the superior claim to *parens patriae* status in that context. *See, e.g.*, *Kentucky*, 23 F.4th at 597 (quoting *Georgia* v. *Pa. R.R. Co.*, 324 U.S. 439, 446 (1945) and *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966)).

But *Mellon* did not bar state suits against the federal government asserting sovereign or quasi-sovereign interests—indeed, it expressly disclaimed that any "quasi sovereign rights" were at issue. This Court later made that point explicitly in *Massachusetts v. EPA*. *See* 549 U.S. at 520 n.17 (observing that in *Mellon* "the Court had been 'called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, [and] *not quasi sovereign rights actually invaded or threatened*" (quoting 262 U.S. at 484-85)). And it further elaborated that "there is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do)." *Id.*

Before the Fifth Circuit, Petitioners argued that *Brackeen* discredited this theory of standing, which they claim traces all the way back to *Alfred L. Snapp*. Br. for Appellants ("App.Br.") at 13–14, *Missouri, et al.* v. *Biden, et al.*, No. 23-30445 (5th Cir. July 25, 2023). Yet that requires either ignoring *Massachusetts v. EPA* or assuming that it has been quietly interred.[8]

[8] To be sure, in *United States* v. *Texas*, 143 S. Ct. 1964 (2023), Justices Gorsuch and Alito both suggested in separate opinions that *Massachusetts* may have been quietly overruled or neutered

See Shalala v. *Ill. Council on Long Term Care*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."). Even so, there's a better way to harmonize these cases. Both *Brackeen* and *Alfred L. Snapp* simply reassert unadorned formulations of the so-called "*Mellon* bar." *See Brackeen*, 599 U.S. at 294-95 (stating that Texas couldn't "assert equal protection claims on behalf of its citizens" because "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government" (quoting *Alfred L. Snapp*, 458 U.S. at 610 n.16)). Neither clarify the scope of the *Mellon* bar, and *Mellon* itself made it clear that it was not addressing "quasi sovereign rights actually invaded or threatened." *See* 262 U.S. at 484-85. But *Massachusetts* and *Kentucky* clarify that *Mellon* bars "third-party *parens patriae*" suits, not "quasi-sovereign interest" suits. *See Massachusetts*, 549 U.S. at 520 n.17; *Kentucky*, 23 F.4th at 598; *see also Texas* v. *Biden*, 20 F.4th 928, 969 (5th Cir. 2021) (finding Texas had standing because its "challenge involved an agency's alleged failure to protect certain formerly

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at the very least. *Id.* at 1977 (Gorsuch, J., concurring in the judgment) (suggesting that *Massachusetts*' standing analysis hasn't "played a meaningful role in this Court's decisions in [recent] years" and hinting that "lower courts should just leave [it] on the shelf in future [cases]"); *id.* at 1997 (Alito, J., dissenting) (asking, of *Massachusetts v. EPA*, "has this monumental decision been quietly interred?"). Because *Massachusetts* "has direct application in [this] case," this Court should either follow it or exercise its "prerogative [to] overrul[e] its own decisions." *See, e.g.*, *Mallory* v. *Norfolk S. Ry. Co.,* 143 S. Ct. 2028, 2038 (2023) (cleaned up).

sovereign prerogatives [that] are now lodged in the Federal Government" (internal quotations omitted)), *reversed and remanded on other grounds*, 142 S. Ct. 2528 (2022). So here, the distinction drawn in *Massachusetts* and *Kentucky* between "third-party parens patriae" and "quasi-sovereign interest" lawsuits should control.

B. The States have a quasi-sovereign interest in hearing and engaging with their citizens' views on matters of public concern.

Alfred L. Snapp sets the boundaries for viable "quasi-sovereign interests." *See* 458 U.S. at 607. Recognizing that "exhaustive formal definition[s]" or "definitive list[s] of qualifying interests" were impossible to present "in the abstract," the Court identified two categories of qualifying interests: (1) "the health and well-being—both physical and economic—of its residents"; and (2) "not being discriminatorily denied its rightful status within the federal system."[9] *Id.* Neither of those interests relies on "impermissible notions of third-party standing in which a state asserts *in a purely vicarious manner* the interests of its citizens." *Kentucky*, 23 F.4th at 599. Rather, they involve

[9] The district court found this interest sufficient to support standing, but the Amici States will focus only on the first *Alfred L. Snapp* interest.

"interest[s] apart from the interests of particular private parties." *Alfred L. Snapp*, 458 U.S. at 607.

Beyond the qualifying interests, *Alfred L. Snapp* makes clear that the injury to the "quasi-sovereign interest" must extend to a "sufficiently substantial segment" of the States' population. *Id.* One indication that the "injury … suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.*

The States have a quasi-sovereign interest in hearing their citizens' views on matters of overwhelming public importance. State officials labor to keep a finger on the pulse of the issues most important to their constituents. *See* C.A.ROA.1317-18; C.A.ROA.1268-69. While they gather this information from traditional means of communication (letters, phone calls), they also "monitor[] activity and mentions on social media platforms, including Facebook, Instagram, Twitter, and YouTube." C.A.ROA.1318; *see also* C.A.ROA.1269. And this information is vital to the States' ability to meaningfully respond to and address their citizens' *actual* views on all manner of public issues, including COVID-19 vaccination policies, mask mandates, and election integrity issues. *See* C.A.ROA.1318; C.A.ROA.1269-70. Even the CDC's witness, Carol Crawford, agreed that state agencies have a strong interest in tracking what their constituents are saying on social media. *See* C.A.ROA.11086 (53:10-12). After all, "if content were censored and removed from social-media platforms, government

communicators would not know what the citizen's 'true concerns' were." C.A.ROA.26503. And that distorting effect on public discourse severely hampers the States' ability to respond to their citizens' concerns. *See* C.A.ROA.1270 (explaining that censorship interferes with the States' "ability to follow, measure, and understand the nature and degree of [citizens]' concerns about mask mandates, and forces me to rely on other, less reliable proxies").

Petitioners argued below that the States' interest "resembles the interest held insufficient in *Brackeen*—a State's interest in safeguarding the constitutional rights of 'non-Indian families.'"[10] App.Br.14 (quoting *Brackeen*, 599 U.S. at 295 n.11). But the injury Texas asserted in *Brackeen*—injury to rights of non-Indian families seeking to foster and adopt Indian children over objections from the relevant tribes—affected only a tiny minority of the Texas population. *See* 143 S. Ct. at 1625-26 (listing the three families in the lawsuit). By contrast, the district court found that Petitioners' social-media censorship regime affects "millions" of Louisianans and Missourians—unquestionably a "substantial segment" of each State's population.

[10] Petitioners characterized the States' interest as an "interest in safeguarding the free-speech rights of a significant portion of their respective populations." App.Br.14. That's only partially correct. The States no doubt have an interest in safeguarding their citizens' free speech rights, but their primary interest is in ensuring a robust forum for public discourse on social media platforms that allows them to hear their citizens' *actual* views on relevant public issues. Petitioners' censorship campaign injures both the citizens' *and* the States' interests.

C.A.ROA.26536 ("millions of social-media posts" flagged as "misinformation," including "twenty-two million posts on Twitter alone"); C.A.ROA.26548 ("unrelenting pressure by [Petitioners]" resulted in "suppressing millions of protected free speech postings"); C.A.ROA.26577 ("extensive federal censorship" restricted "free flow of information on social-media platforms used by millions of Missourians and Louisianans").

Roughly two dozen states have sought to address social-media censorship "through [their] sovereign lawmaking powers."[11] *Alfred L. Snapp*, 458 U.S. at 607; *see* Rebecca Kern, *Push to Rein in Social Media Companies Sweeps the States*, Politico (July 1, 2022) ("More than two dozen [bills]" were introduced

[11] At least 26 states introduced bills seeking to prevent or limit social media censorship. *See* H.B. 213, Reg. Sess. (Ala. 2021); S.B. 214, 32nd Leg., 2021-2022 Sess. (Alaska 2022); S.B. 7072, Reg. Sess. (Fla. 2021); S.B. 393, Reg. Sess. (Ga. 2022); H.B. 323, 66th Leg., First Reg. Sess. (Idaho 2021); S.B. 274, 122nd Gen. Assemb., Second Reg. Sess. (Ind. 2022); S.B. 580, 89th Gen. Assemb., (Iowa 2021); S.B. 187, Leg. Sess. (Kan. 2021); S.B. 111, Reg. Sess. (Ky. 2021); S.B. 196, Reg. Sess. (La. 2021); H.B. 5973, 101st Leg. (Mich. 2022); H.B. 1231, 101st Gen. Assemb., First Reg. Sess. (Mo. 2021); H.B. 770, Reg. Sess. (Mont. 2023); L.B. 621, 108th Leg., First Sess. (Neb. 2021); S.B. 497, Sess. (N.C. 2021); H.B. 1144, 67th Leg. Assemb., Reg. Sess. (N.D. 2021); H.B. 441, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); S.B. 383, 58th Leg., First Sess. (Okla. 2021); H.B. 3102, Gen. Assemb., 125th Sess. (S.C. 2023); H.B. 1223, 96th Leg. Sess. (S.D. 2021); H.B. 682, 113th Gen. Assemb. (Tenn. 2023); H.B. 20, 87th Leg., First Special Sess. (Tex. 2021); S.B. 228, Gen. Sess. (Utah 2021); H.B. 3307, Reg. Sess. (W. Va. 2021); A.B. 530, Leg. Sess. (Wis. 2021); A.B. 589, Leg. Sess. (Wis. 2021); S.F. 100, Leg. Sess. (Wyo. 2021).

"seek[ing] to prevent companies from censoring content or blocking users"), https://perma.cc/2B7L-B5QQ. Only Texas and Florida managed to pass laws banning social-media censorship,[12] but the push to enact similar legislation in so many other states strongly supports finding that the States' interest here extends to a "substantial segment" of their population and thus qualifies as a "quasi-sovereign interest." *See Alfred L. Snapp*, 458 U.S. at 607. Allowing the States to "protect [their] sovereign interests through litigation compensate[s] for [their] inability to protect those interests by the means that would have been available had [they] not entered the Union." *Texas*, 143 S. Ct. at 1997 (Alito, J., dissenting) (observing that even if states receive no "special solicitude" in the standing analysis, they shouldn't be treated with "special hostility").

Because *Mellon* does not bar the States' claims "to the extent they assert … quasi-sovereign interests," and because their asserted interest—hearing their citizens' views on matters of overwhelming public importance—"involves interest[s] apart from the interests of particular private parties," *Kentucky*,

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[12] Both Texas' law (HB 20) and Florida's law (S.B. 7072) are enjoined. *See NetChoice, LLC* v. *Paxton*, 142 S. Ct. 1715 (2022) (vacating the Fifth Circuit's stay of the district court's preliminary injunction), *cert granted*, No. 22-555 (U.S. Sept. 29, 2023); *NetChoice, LLC* v. *AG, Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022) (affirming the district court's grant of a preliminary injunction), *cert. granted* No. 22-277 (U.S. Sept. 29, 2023). Both cases will be argued on February 25, 2024.

23 F.4th at 598, 599 (internal quotations omitted), this Court should find that the States have standing.

CONCLUSION

The Court should affirm the Fifth Circuit's decision.

Respectfully submitted.

February 9, 2024

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