

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 *AMICUS CURIAE* ASSOCIATION OF
AMERICAN PHYSICIANS AND SURGEONS IN
SUPPORT OF RESPONDENTS**

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INTERESTS OF *AMICUS CURIAE*¹

Amicus Association of American Physicians and Surgeons (“AAPS”) is a national association of physicians, founded in 1943. AAPS is dedicated to protecting the patient-physician relationship, and has been a litigant in this Court and in other appellate courts. *See, e.g., Ass’n of Am. Physicians & Surgs. v. Mathews*, 423 U.S. 975 (1975); *Ass’n of Am. Physicians & Surgs. v. Tex. Med. Bd.*, 627 F.3d 547 (5th Cir. 2010); *Ass’n of Am. Physicians & Surgs. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993).

¹ Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

AAPS publishes a medical journal and posts it on the internet, which contains the very type of medical opinions and hypotheses that the Biden Administration and its allies have sought to censor. Accordingly, AAPS has strong interests in the censorship issues presented here.

SUMMARY OF ARGUMENT

Our national motto is not “In Vaccines We Trust,” or even “In Government We Trust.” The right to criticize vaccines and government mandates of vaccines should not be abridged as brazenly sought here by the American Academy of Pediatrics, American Medical Ass’n, et al. (“AMA Amici”) and other allies of the Biden Administration. Freedom to criticize is an essential safeguard against tyranny, and a First Amendment right. U.S. CONST. Amend. I. It is alarming that any professional organization would argue for censorship as the AMA Amici do in this case.

Abuse of government power through misuse of scientific or medical assertions is not new, and a robust First Amendment free of government censorship is necessary to deter such abuse. The slogan “vaccinations save lives” might make for an effective marketing campaign, but it is not medical or legal analysis. There are multiple historical examples of inadequately tested vaccines causing widespread harm, and the benefits of vaccination have been grossly exaggerated. It is essential to allow public criticism, especially when vaccination is administered without a risk-benefit analysis and informed consent. Vaccination is merely one of multiple approaches for combatting a disease, and at times has been harmful. Of course there must remain a full First Amendment

right to say that. Harm caused by the Covid-19 vaccine is suggested by a mountain of government data managed by its own programs, some of which have been made publicly available.

The proper antidote to alleged false information is a stronger right to free speech, not a weaker one. Federal courts have repeatedly so held based on the teachings by this Court, and this fundamental principle should be affirmed again here. “First Amendment jurisprudence is clear that the way to oppose offensive speech is by more speech, not censorship” *Gathright v. City of Portland*, 439 F.3d 573, 578 (9th Cir. 2006) (citing *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)).

“Vaccine hesitancy” is not a psychological condition, as proponents of censorship pretend, but rather is justified self-defense against a government that abuses its power by imposing vaccine mandates. The public is not reluctant to receive treatments that are safe and beneficial, but that showing was never made for the Covid vaccine. Covid vaccine mandates included making them a condition of attending schools, serving in the military, working in hospitals, and pursuing other everyday activities. Yet the AMA Amici ignore the issue of vaccine mandates while insisting on censorship of criticism of vaccines, which is an essential part of opposing the government policy. Censoring such criticism as sought by the AMA Amici would directly infringe on political speech, which is at the core of First Amendment rights.

The argument by the AMA Amici to declare a compelling interest in vaccination such that censorship of it would be allowed should be firmly rejected here. There have not been any new categories

of unprotected speech in more than 50 years, and there is no textual, historical, or logical basis for making vaccine criticism unprotected. *See, e.g., Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 791 (2011) (after recounting the well-established narrow categories of unprotected speech, holding that “new categories of unprotected speech **may not be added to the list** by a legislature that concludes certain speech is too harmful to be tolerated”) (emphasis added).

Criticism of vaccination is warranted in response to the exaggerations of benefits of vaccination and the denial of its proven harms, as illustrated by the AMA Amici brief here. A sharp decline in the prevalence of diseases cited by the AMA Amici began before the relevant vaccine became commonly used, thereby disproving the asserted cause-and-effect. Meanwhile, glaringly absent from the AMA Amici's brief is any reference to the immense harm caused by certain novel or contaminated vaccines, such as the first polio vaccine and many others.

Allowing censorship of vaccine criticism would create an unaccountable license to play God in tinkering with human biology. Indeed, the Covid-19 mRNA injection is not a traditional vaccine, as the terminology in the articles cited by the AMA Amici concede by uniquely referring to it as an “mRNA” vaccine. By seeking censorship of criticism of the Covid-19 mRNA vaccines, the AMA Amici implicitly seek censorship of criticism of anything that may be called a vaccine in the future under yet another redefinition of that term. Surely there is a constitutional right to criticize future horrors that might emerge from genetic modification.

If adopted, the AMA Amici's arguments would green-light government censorship of the presidential candidate Robert F. Kennedy, Jr., whose motion to intervene to protect his First Amendment rights was denied by this Court in this case. His best-selling book, *The Real Anthony Fauci*, could be banned by government under the approach sought by the AMA Amici, because this book criticizes some vaccination. The same arguments made by the AMA Amici could be extended to other types of speech disfavored by the Biden Administration, such as criticism of transgender procedures and late-term abortion.

Entities that have acted in concert with the Biden Administration in censoring vaccine criticism should be considered state actors for the purposes of this First Amendment case. That includes Stanford University, whose arguments to evade scrutiny for its role in censoring vaccine criticism is also rebutted here.

“As to the evil which results from censorship, it is impossible to measure it, because it is impossible to tell where it ends,” observed the legal philosopher Jeremy Bentham.² Allowing government censorship of criticism of vaccination would cause far more harm than good. “Surely, this is to burn the house to roast the pig,” as Justice Frankfurter famously observed in striking down censorship of another type of speech. *Butler v. Michigan*, 352 U.S. 380, 383 (1957). The Constitution prohibits government and those acting in concert with it from censoring this essential type of speech, and the requested censorship by or with government should be fully rejected here.

² Quotefancy.com, <http://tinyurl.com/8tzfafya> (viewed Feb. 4, 2024).

ARGUMENT

I. The Right to Criticize a Vaccine Is Essential Especially When Government Flagrantly Ignores Safety Issues.

To this day the government flagrantly ignores significant safety issues with the Covid vaccine, and briefs in support of the censorship campaign by government suffer from this fatal flaw. It is meaningless to imply, as the AMA Amici brief does, that there is no evidence of significant harm from the Covid vaccine while at the same time the government fails to investigate and disclose pervasive evidence of its actual and potential harm.

A. The Warnings on Safety in VAERS Are Ignored by the Biden Administration and the Proponents of Censorship.

The government manages and publicizes the Vaccine Adverse Event Reporting System (VAERS) database pursuant to a federal statute in order to facilitate public scrutiny and criticisms of vaccination. The very existence of this program stands against allowing any government censorship of vaccine criticism. There would not be any point to posting this data publicly if there were not a right by the public to comment on it. The executive branch cannot properly engage in a censorship campaign after Congress has adopted a policy of transparency and robust public debate, as is implicit in the federal law requiring the posting of the VAERS data. *See* 42 U.S.C. § 300aa-25.

More than six hundred federal court decisions have cited to VAERS, including this summary of its purpose by a federal court:

The Vaccine Adverse Event Reporting System (“VAERS”) is a national warning system designed to detect safety problems in U.S.-licensed vaccines. *See About VAERS, VAERS*, <https://vaers.hhs.gov/about.html> (last visited July 17, 2023). It is managed by both the CDC and the FDA. VAERS monitors and analyzes reports of vaccine related injuries and side effects from both healthcare professionals and individuals.

Guzman v. Sec’y of HHS, No. 21-2030V, 2023 U.S. Claims LEXIS 3264, at *3 n.4 (Fed. Cl. Nov. 29, 2023) (citation to another decision omitted). It is long overdue for this Court to recognize this “national warning system” that is mandated by Congress and “managed by both the CDC and FDA.” *Id.*

The integrity of the VAERS data is fully safeguarded by laws making any fraudulent reporting to it a crime. *See* 18 U.S.C. § 1001. Yet proponents of vaccine mandates and censorship of vaccine criticism repeatedly omit any meaningful reference to VAERS and its overwhelming data about likely harm caused by the Covid vaccine, the very harm that the Biden Administration attempts to censor others from speaking about.

Discussion of this government-run database has been a target of the unlawful censorship. On Jan. 3, 2022, U.S. Sen. Ron Johnson (R-WI) posted on Twitter (now known as X) the following factually correct information based on this government database:

Sadly, we passed two milestones on VAERS. Over 1 million adverse events and over 21,000 deaths. 30% of those deaths occurred on days 0, 1, or 2 following vaccination. When will federal agencies

start being transparent with Americans? Why do they continue to ignore early treatment? [followed by a posting of a summary of VAERS data]

Th[is] post ... got Sen. Ron Johnson slapped with a misleading label on X, the platform formerly known as Twitter, [and a further ban on this post being “replied to, shared, or liked.”]

Ryan King, “Sen. Ron Johnson accuses CDC of ‘censorship’ of own COVID vaccine info,” *New York Post* (Aug. 30, 2023).³ This censorship campaign by Twitter of a U.S. Senator discussing a government-run database is an illustration of what the Biden Administration should be enjoined against causing.

The Biden Administration makes no mention of VAERS in its merits brief here, despite how the record reflects that postings on social media were a prime target of its censorship activities and central to the detailed findings by the district court in the proceeding below. (Gov’t Applic. 5a, 44a, 47a, 48a). As the district court found:

posts about the safety of masking and adverse events from vaccinations, including VAERS data and posts encouraging people to contact their legislature to end the Government’s mask mandate, were censored on Facebook and other social-media platforms.

(*Id.* at 5a, reprinted from the district court decision)
And again the district court emphasized that:

³ <https://nypost.com/2023/08/30/sen-johnson-lambasts-cdc-demands-docs-on-censorship-of-vaccine-data/> (viewed Jan. 24, 2024).

On August 19, 2021, Facebook asked Crawford for a Vaccine Adverse Event Reporting System (“VAERS”) meeting for the CDC to give Facebook guidance on how to address VAERS-related “misinformation.”... The CDC eventually had a meeting with Facebook about VAERS-related misinformation and provided two experts for this issue.

(*Id.* at 44a)

Yet not a word in this Court about VAERS in the arguments by the Biden Administration. Indeed, it appears that this Court itself has never mentioned VAERS in any of its numerous vaccine decisions. This “national warning system designed to detect safety problems” as established by Congress, protected by federal law against fraud, and run by the CDC and FDA is the object of censorship by the federal government when it dislikes the results reported in it, and apparently censored from the Biden Administration’s own briefing lest this Court ever mention VAERS in a decision.

The enormous increase in injuries from the Covid vaccine compared with other vaccines is highly suggestive of harm caused by the Covid vaccine, while no evidence of any misconduct in reporting this data has ever been discovered. The AMA Amici falsely accuse vaccine critics of having conspiracy theories, when the biggest and most implausible conspiracy theory of all is the assertion that hundreds of thousands of diverse people are filing false reports in VAERS in violation of federal law. *See* 18 U.S.C. § 1001. Nothing would be gained by such illegality, and it is absurd for the Biden Administration to ignore

VAERS data as collected and posted by the federal government itself.

In the posture of this appeal, this Court should accept the factual findings by the district court concerning the improper censorship of postings about VAERS, and this Court should address VAERS itself rather than continue ignoring this elephant in the room. For example, a team of researchers reported in a peer-reviewed medical journal that:

The proportional reporting ratio comparing [adverse events] AEs reported after COVID-19 vaccines with those reported after influenza vaccines is significantly increased (≥ 2.0) for COVID-19 vaccine for menstrual abnormality, miscarriage, fetal chromosomal abnormalities, fetal malformation, fetal cystic hygroma, fetal cardiac disorders, fetal cardiac arrest, fetal arrhythmias, fetal vascular malperfusion, fetal growth abnormalities, fetal abnormal surveillance, placental thrombosis, fetal death/stillbirth, low amniotic fluid, preeclampsia, premature delivery, preterm premature rupture of membrane, and premature baby death. When normalized by time-available, doses-given, or number of persons vaccinated, all COVID-19 vaccine AEs far exceed the safety signal on all recognized thresholds.

James A. Thorp, *et al.*, “COVID-19 Vaccines: The Impact on Pregnancy Outcomes and Menstrual Function,” 28 *Journal of American Physicians and Surgeons* 28 (Spring 2023).⁴

⁴ <https://jpands.org/vol28no1/thorp.pdf> (viewed Feb. 1, 2024).

Freedom of speech is guaranteed by the U.S. Constitution, but on the issue of criticizing the Covid vaccine this right appears to be more respected outside of the United States, free of censorship by the Biden Administration. For example, a prestigious peer-reviewed European Heart Journal published the findings by the American Dr. Peter McCullough and other American experts definitively linking the Covid vaccine to heart-related deaths in relatively young men:

The mean age of death was 44.4 years old. The mean and median number of days from last COVID-19 vaccination until death were 6.2 and 3 days, respectively. We established that all 28 deaths were most likely causally linked to COVID-19 vaccination by independent review of the clinical information presented in each paper.

Nicolas Huscher, Roger Hodgkinson, William Makis, Peter A. McCullough, “Autopsy Findings in Cases of Fatal COVID-19 Vaccine-Induced Myocarditis,” *ESC Heart Fail.* (Jan. 14, 2024).⁵ *See also* Ian Kracalik, *et al.*, “Outcomes at least 90 days onset of myocarditis after mRNA COVID-19 vaccination in adolescents and young adults in the USA: a follow-up surveillance study,” *Lancet Child Adolesc Health*, 6 *Lancet Child Adolesc Health* 788-98 (Nov. 6, 2022) (acknowledging and studying the incidence of myocarditis after Covid vaccination).⁶

⁵ <https://pubmed.ncbi.nlm.nih.gov/38221509/> (viewed Feb. 1, 2024).

⁶ <https://pubmed.ncbi.nlm.nih.gov/36152650/> (viewed Feb. 4, 2024).

But instead of addressing these priority issues of harm by the Covid vaccine, the AMA Amici repeat as strawmen the most implausible assertions of harm by the Covid vaccine (AMA Amici Br. 19). The AMA Amici ignore the many hundreds of thousands of reports of likely harm in VAERS, and the detailed analysis by the Harvard-trained Surgeon General of our third largest state, University of Florida Professor Dr. Joseph Ladapo. The AMA Amici mention the VAERS only in passing, and omit any reference to Dr. Ladapo entirely.

As to VAERS, the AMA Amici incredibly assert that “the information in VAERS *in no way* undermines vaccines’ strong safety track record.” (AMA Amici Br. 17, emphasis added) A sharp rise in VAERS reports compared with the baseline reporting of injuries, as occurred from the Covid vaccine, is strongly indicative of a problem. The failure by government then to investigate and disclose details about this uptick is grounds for further alarm, and not a valid basis for denying possible harm.

B. V-Safe Data, Ignored by the Biden Administration and the Censors, Confirm the Vaccine Safety Problems.

Lawsuits became necessary to compel the government to release safety-related data about the Covid vaccine, which the government has mostly concealed from the public throughout the pandemic. In early January a federal judge observed, while ordering government release of long-withheld data about potential harm from the Covid vaccine:

While “Trust the Science” became something of a national slogan, the American public’s trust in

science and scientists are at an all-time low. It is with this background that Plaintiff aims to further the ideals pledged by the Biden-Harris administration: to “Promote trust, transparency, common purpose, and accountability in our government” by making available for public access — and particularly for independent scientific and medical research — all of the relevant health data collected through the V-safe program.

Freedom Coal. of Drs. for Choice v. Ctrs. for Disease Control & Prevention, No. 2:23-CV-102-Z, 2024 U.S. Dist. LEXIS 2581, at *7-8 (N.D. Tex. Jan. 5, 2024) (footnotes omitted).

On Oct. 3, 2022, after two lawsuits forced the release of the check-the-box V-safe data, the concealed data showed alarming adverse effects from the Covid vaccine:

Out of the approximate 10 million v-safe users, 782,913 individuals, or over 7.7% of v-safe users, had a health event requiring medical attention, emergency room intervention, and/or hospitalization. Another 25% of v-safe users had an event that required them to miss school or work and/or prevented normal activities.

There were also 71 million symptoms reported in the pre-populated fields. This is an average of more than 7 symptoms reported per v-safe user. Reported symptoms include, for example, over 4 million reports of joint pain. While around 2 million of these joint pain reports were mild, over 1.8 million were for moderate joint pain and over 400,000 were for severe joint pain.

Siri & Glimstad LLP, “CDC’s Covid-19 Vaccine v-safe Data Released Pursuant to Court Order,” PR Newswire (Oct. 3, 2022).⁷

Amid widely publicized reports of young athletes suddenly collapsing from unexpected cardiac arrests and pointed criticism by the Florida Surgeon General, the CDC did finally admit that the Covid vaccine does cause myocarditis, which is an inflammation of the heart muscle, and pericarditis, which is an inflammation of the lining surrounding the heart. *See* “COVID-19 Vaccine Safety Articles and Studies by Topic.”⁸ These studies relied in part on the same VAERS reports and data which the AMA Amici try to downplay. (AMA Amici Br. 17-18) The CDC used the V-safe data – which the federal government collects in a secure and reliable manner⁹ – to corroborate the alarming adverse effects from the Covid vaccine reported in VAERS. Yet the AMA Amici make no mention of the government V-safe data in their misguided quest to authorize censorship of vaccine criticism.

⁷ <https://www.prnewswire.com/news-releases/cdcs-covid-19-vaccine-v-safe-data-released-pursuant-to-court-order-301639584.html> (viewed Jan. 24, 2024).

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<https://www.cdc.gov/vaccinesafety/research/publications/index.html> (viewed Jan. 24, 2024).

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<https://www.cdc.gov/vaccinesafety/ensuringsafety/monitoring/v-safe/index.html> (viewed Jan. 24, 2024).

II. The “Vaccinations Save Lives” Assertion Is a Marketing Slogan that Is Vastly Exaggerated by Those Who Want Vaccine Mandates.

The phrase “vaccinations save lives” is a marketing slogan, not legal or medical analysis. It is the heading of the first argument by the AMA Amici here, and repeated throughout their brief. One of their cited articles, co-authored by former CDC official Professor Walter Orenstein, who is a longtime advocate of immunization, has an even nearly identical title: “Simply Put: Vaccination Saves Lives.” (AMA Amici Br. 18) Some vaccination has saved lives and some has not; the statement is no more meaningful than a sweeping assertion by a prison official that “incarceration saves lives,” to support longer prison sentences for all. The flaw in these slogans is their failure to recognize that there are significant ignored harms, and that the benefits can be exaggerated.

Prof. Orenstein’s article¹⁰ consists of comparing the mortality rate in 2016 for an assortment of long-combatted diseases with their mortality rates early and throughout the 20th century, when the medical understanding of these diseases was primitive. Of course the mortality rate from diseases has declined, as it has for cancer and most diagnosed health problems. Sanitation and hygiene today are far superior to a generation ago; medical treatments for disease are far better today; and an understanding of how diseases spread is more advanced today. Polio, which is often cited by proponents of vaccination, was

¹⁰ <https://www.pnas.org/doi/full/10.1073/pnas.1704507114> (viewed Jan. 31, 2024).

already sharply declining for several years prior to the use of a vaccine for it,¹¹ and between 1975 and 1992 the vast majority of polio cases in the United States were caused in healthy people victimized by the vaccine itself.¹²

Another often-exaggerated assertion of a vaccine overcoming a disease is the example of measles. The measles vaccine was not approved in the United States until 1963, *after* the mortality from measles had been reduced to nearly zero. “Between 1900 and 1963, the mortality rate of measles dropped from 13.3 per 100,000 to 0.2 per 100,000 in the population, due to advancements in living conditions, nutrition, and health care.” Physicians for Informed Consent, “Measles – Disease Information Statement,” p. 2.¹³ A deficiency in Vitamin A, which is inexpensively available without a prescription, is the primary cause of measles mortality worldwide and hospitalization in the U.S. *See id.* Vitamin A is thus an inexpensive competitor to vaccination; promoters of one approach have motivation to criticize the other. Censorship of

¹¹ <https://ourworldindata.org/grapher/reported-paralytic-polio-cases-and-deaths-in-the-united-states-since-1910> (viewed Feb. 1, 2024).

¹² “Between 1975 and 1992, 189 confirmed cases of paralytic poliomyelitis disease were reported in the United State,” of which 152 were associated with the vaccine and the second-largest category was imported cases. “Options for Poliomyelitis Vaccination in the United States: Workshop Summary,” Institute of Medicine (US) Vaccine Safety Forum; (C.J. Howe and R.B. Johnston, eds. 1996). <https://www.ncbi.nlm.nih.gov/books/NBK231543/> (viewed Feb. 2, 2024). The slogan “vaccinations save lives” was not true for those who contracted polio from the vaccine.

¹³ <https://physiciansforinformedconsent.org/measles-disease-information-statement.pdf> (viewed Jan. 31, 2024).

criticism of the measles vaccine (commonly referred to as “MMR” as it is combination vaccine) can reduce public awareness of the benefits of Vitamin A, as seen during the Covid pandemic when promoters of the vaccine insisted on censoring promotion of the alternative treatments by ivermectin and hydroxychloroquine.

Tetanus is cited by the AMA Amici and others as another supposedly shining example of how vaccinations save lives. The tetanus vaccine has been widely used since the early 1940s, and is credited with reducing mortality from tetanus. But the FDA and the vaccine manufacturer candidly admit, as posted on the FDA’s website, the same uncertainty about possible harm to fertility from this very mature tetanus vaccine – a concern that people also have about the novel Covid vaccine:

13.1 Carcinogenesis, Mutagenesis, Impairment of Fertility DAPTACEL has not been evaluated for carcinogenic or mutagenic potential or impairment of fertility.¹⁴

If applied consistently, the call for censorship by the AMA Amici concerning the Covid vaccine would require taking down the FDA’s above website posting that it is unknown whether the tetanus vaccine harms fertility.

The AMA Amici tout that “diphtheria and rubella have both declined by more than 99.95% from [their] peaks” in the last century, and they again attribute that entirely to vaccination. (AMA Amici Br. 9) Diphtheria is a scary sounding medical term for a

¹⁴ <https://www.fda.gov/media/74035/download> (viewed Jan. 31, 2024).

bacterial “throat distemper,” as it was commonly called, which is typically asymptomatic and “is associated with overcrowding and poor sanitation.” Physicians for Informed Consent, “Diphtheria – Disease Information Statement (DIS)” (Nov. 2023).¹⁵ Diphtheria is easily treated today by antibiotics. As sanitation improved in the United States, “[b]etween 1900 and 1945, *before widespread use of the diphtheria vaccine*, the mortality rate of diphtheria dropped from 40.3 per 100,000 to 1.2 per 100,000 in the population.” *Id.* (emphasis added). The diphtheria vaccine has, in fact, increased mortality, as demonstrated by multiple reported studies. *See, e.g.*, Peter Aaby, *et al.*, “Evidence of Increase in Mortality After the Introduction of Diphtheria–Tetanus–Pertussis Vaccine to Children Aged 6–35 Months in Guinea-Bissau,” 6 *Front Public Health* 79 (2018) (“All studies of the introduction of DTP have found increased overall mortality.”).¹⁶

The AMA Amici’s sweeping claim that vaccinations save lives relies on an article praising the use of the WI-38 cell strain, which was derived from an aborted fetus at a time when such federally funded research was allowed. *See* S.J. Olshanksy & L. Hayflick, *The Role of the WI-38 Cell Strain in Saving Lives and Reducing Morbidity*, 4 *AIMS Pub. Health* 127, 127 (2017) (cited by AMA Amici Br. 9).¹⁷ But that article is critical of a rival polio vaccine for which:

¹⁵ <https://physiciansforinformedconsent.org/diphtheria-dis/> (viewed Feb. 2, 2024).

¹⁶ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5868131/> (viewed Feb. 2, 2024).

¹⁷ <https://bit.ly/3G3Ugjp> (viewed Jan. 31, 2024).

cells isolated from monkey kidneys (and never transferred from the first or primary vessel) were used to grow the viruses. However, it was discovered that these primary cells were often contaminated with dangerous viruses common to monkeys. One contaminant, S.V. 40, was capable of producing tumors in laboratory animals and transforming cultured normal human cells into cancer cells. Other contaminants were either lethal for vaccine workers or could produce pathology.

Id. at 130. That sort of criticism of the first polio vaccine could fall within the scope of the censorship argued for here by the Biden Administration, the AMA Amici, and others opposed to allowing criticism of vaccination.

The slogan “vaccinations save lives” may be rhetorically effective, but the slogan is biased and unscientific. The best phrase for adoption by this Court is the one used by Justice Brandeis in a seminal decision nearly a century ago, presaging a strengthening of First Amendment rights: “the remedy to be applied is more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

III. The Contamination of Vaccines by “Adventitious Agents” Is Prevalent, and Criticism of Vaccination Is Necessary as a Safeguard Against It.

The contamination of vaccines and other biological products is prevalent, which no one can credibly deny. Government researchers have documented, studied, and published articles about the need to address this problem in vaccines, as the National Institutes for

Health (NIH) posts on its National Library of Medicine website, also known as PubMed Central. *See, e.g.*, Bettina Krug, *et al.*, “Adventitious Agents and Live Viral Vectored Vaccines: Considerations for Archiving Samples of Biological Materials for Retrospective Analysis,” 34 *Vaccine* 6617-25 (Dec. 12, 2016).¹⁸

Researchers Krug, *et al.*, explain that “there is a need to safeguard against potential contamination with adventitious agents,” which are:

defined by the World Health Organization (WHO) as microorganisms that may have been unintentionally introduced into the manufacturing process of a biological medicinal product: these include bacteria, fungi, mycoplasma/spiroplasma, mycobacteria, rickettsia, protozoa, parasites, transmissible spongiform encephalopathy (TSE) agents and viruses.

Id. at 1-2 (footnote omitted). These researchers then identify in this government-posted article multiple vaccines that harmed many Americans with adventitious agents, including:

- “At least 10–30 million persons were estimated to have been exposed to SV40-contaminated polio vaccine in the U.S.A.” in the late 1950s and early 1960s.
- “Avian leucosis virus (ALV) is an exogenous retrovirus that causes leukemia in chickens by means of insertional activation of cellular oncogenes” and contaminated the “yellow fever (YF) vaccine” given to the Armed Services and travelers during and after World War II.

¹⁸ <http://tinyurl.com/yb32rkef> (viewed Feb. 2, 2024).

- An epidemic of deadly icteric hepatitis that afflicted 330,000 U.S. Army service members in 1942 was traced in 1985 to contamination of the YF vaccine by the Hepatitis B virus.
- Endogenous avian retroviral particles were found in 1996 in MMR (the measles, mumps, and rubella combination) vaccines, along with reverse transcriptase (RTase) activity.
- The 1976–77 swine influenza vaccine was contaminated “by *Campylobacter*, a now known cause of GBS and endemic in poultry, from which eggs used for influenza vaccine production are sourced,” and that vaccine caused an increased risk of Guillain-Barre syndrome (GBS).
- “Porcine circoviruses (PCVs) are small non-enveloped virus containing a single-strand circular DNA genome virus,” and this contamination was discovered in 2010 in the widely used rotavirus vaccine after “~100,000 children had received the vaccine during clinical trials and ~68 million doses had been distributed worldwide.” The recipients of this vaccine were deprived of the opportunity to provide informed consent about this contamination.

Id. at 4-8. The Krug authors further observed that “[t]he development of some novel viral vaccines ... pose additional safety concerns.” *Id.* at 11.

The Covid vaccine is one of the “novel viral vaccines,” and the risk of its contamination by adventitious agents is very real. The “misinformation” is to disparage the critics of safety and testing

concerning the Covid vaccine as though this vaccine were perfect and not possibly contaminated. The so-called “misinformation” is predominantly from the censors, not from the vaccine critics.

In 2022, two years into the Covid pandemic, federal researchers at the Biomolecular Measurement Division, Applied Genetics Group, National Institute of Standards and Technology, located in Gaithersburg, Maryland, published their concerns about the “many instances where adventitious agents have been detected within pharmaceutical products.” William G. Valiant, *et al.*, “A history of adventitious agent contamination and the current methods to detect and remove them from pharmaceutical products,” 80 *Biologicals* 6-17 (October 2022).¹⁹ This article confirms the many historical examples of contamination of vaccines, and identifies sources from which the contamination occurs.

While imposing Covid vaccine mandates wherever it could possibly assert authority, the Biden Administration apparently did nothing to guarantee that a particular lot of the Covid vaccine is free of contamination. The government typically does not do a comprehensive screening of distributed vaccines, and thus the public depends on a robust criticism of vaccine safety as a check-and-balance against unsafe manufacturing, distribution, and storage of vaccines. Reports of bad batches of Covid vaccines were by chance based on someone noticing a cluster of particularly frequent severe reactions, without any screening to ensure the vaccines were not

¹⁹ https://tsapps.nist.gov/publication/get_pdf.cfm?pub_id=934732 (viewed Jan. 31, 2024).

contaminated. *See, e.g.*, “Moderna vaccines on hold due to allergic reactions found in Tulare, Kings & Kern counties,” FOX26 News (Jan. 18, 2021) (“This particular batch contains about 330,000 doses and was distributed to almost 300 locations,” before being identified as contaminated based on severe allergic reactions).²⁰

The public thus relies on outspokenness by vaccine critics, including those harmed by receiving the injections, to expose and stop the administration of contaminated vaccines. Allowing censorship of such criticism would be harmful to public health, in addition to being unconstitutional.

IV. “Vaccine Hesitancy” Is a Misleading Pejorative, Misused by the Censors against Justified Criticism of Vaccines.

The term “vaccine hesitancy” is a misleading pejorative about people who decline a vaccine due to religious reasons, medical contraindications, safety concerns, or a lack of benefit. No one would properly disparage an opponent of gun control as suffering from “gun control hesitancy,” or someone opposed to mutilating transgender surgery on children as being plagued by “transgender hesitancy.” The Covid vaccine has substantial safety issues amid doubtful benefits. It is hardly surprising and not the result of a so-called psychological “vaccine hesitancy” that the percentage of children who have received the updated 2023-24 Covid vaccine is only 11%, and only 21.5% of adults

²⁰ <https://kmpb.com/news/local/batch-of-moderna-vaccines-on-hold> (viewed Feb. 4, 2024).

have.²¹ Vaccination rates vary widely depending on the potential risk-benefit ratio, and vaccination rates are understandably far higher for mature vaccines than novel ones. The variation in vaccination rates is specific to the vaccine rather than being a general, supposedly irrational and emotional opposition to all vaccines.

As quoted by the Fifth Circuit below and repeated in the brief by the AMA Amici (p. 22), this term “vaccine hesitancy” is a favorite of the censors. A Biden administration official, for example, referred condescendingly to “vaccine hesitant stuff” while demanding that Facebook engage in censorship:

that [the Biden White House officials] had “been asking [] pretty directly, over a series of conversations” for “what actions [the platform has] been taking to mitigate” vaccine hesitancy, to end the platform’s “shell game,” and that they were “gravely concerned” the platform was “one of the top drivers of vaccine hesitancy.” Another time, an official asked why a flagged post was “still up” as it had “gotten pretty far.” The official queried “how does something like that happen,” and maintained that “I don’t think our position is that you should remove vaccine hesitant stuff,” but “slowing it down seems reasonable.” Always, the officials asked for more data and stronger “intervention[s].”

Missouri v. Biden, 83 F.4th 350, 360 (5th Cir. 2023) (emphasis added).

²¹ <https://www.cdc.gov/respiratory-viruses/data-research/dashboard/vaccination-trends-adults.html> (viewed Feb. 1, 2024).

Few appellate courts have ever adopted this misleading, pejorative terminology of “vaccine hesitancy,” and this Court should decline to buy into it. Lower federal courts reportedly never used it prior to 2021, and afterwards used it either in repetition of parties’ arguments or to justify a court’s own vaccine mandate policy. See *United States v. Babichenko*, No. 1:18-cr-00258-BLW, 2021 U.S. Dist. LEXIS 50193, at *4-5 (D. Idaho Mar. 15, 2021) (declaring that “the emerging variants, vaccine hesitancy, and who knows what else could delay or derail a return to pre-pandemic times”).

According to the AMA Amici, “vaccine hesitancy” includes not knowing whether the Covid-19 vaccine causes infertility – it was not tested for that, so an answer of “I don’t know” to a question about that is a correct answer. Yet the AMA Amici complain that “as of October 2021, polling showed that 31% of adults surveyed either believed or were uncertain of the veracity of the claim that COVID-19 vaccinations cause infertility.” (AMA Amici Br. 20) Honest medical experts do not know the answer either, yet the AMA Amici pretend that this reflects some kind of psychological vaccine hesitancy. Rather than demand censorship of criticism concerning the lack of a full understanding about the effect of the Covid-19 vaccine on fertility, the proponents of vaccine mandates should instead call for an adequate investigation with public scrutiny of the data to resolve any doubts. As quoted in Part I.A above from the peer-review, published Thorp study, there is much to suggest that the Covid-19 vaccine may have a harmful effect on menstrual function and pregnancy outcome.

Vaccines are by no means the only approach to addressing a pandemic or disease. One of the most vocal critics of the mRNA Covid vaccine has been the Florida Surgeon General, Dr. Joseph Ladapo, who has enjoyed the full support of the duly elected Florida Governor Ron DeSantis. Throughout the Covid pandemic and to this day this Surgeon General of our third-largest state has sharply criticized the Covid-19 mRNA vaccine, and urged treatment instead. This is not “vaccine hesitancy.”

The FDA and CDC failed to adequately address these concerns raised by Surgeon General Ladapo in his letter to them dated December 6, 2023:

The Surgeon General outlined concerns regarding nucleic acid contaminants in the approved Pfizer and Moderna COVID-19 mRNA vaccines, particularly in the presence of lipid nanoparticle complexes, and Simian Virus 40 (SV40) promoter/enhancer DNA. Lipid nanoparticles are an efficient vehicle for delivery of the mRNA in the COVID-19 vaccines into human cells and may therefore be an equally efficient vehicle for delivering contaminant DNA into human cells. The presence of SV40 promoter/enhancer DNA may also pose a unique and heightened risk of DNA integration into human cells.

“Florida State Surgeon General Calls for Halt in the Use of COVID-19 mRNA Vaccines” (Jan. 03, 2024).²² That is not an emotional or irrational “vaccine hesitancy,” for which the AMA Amici demand censorship to stamp out vaccine criticism.

²² <https://www.floridahealth.gov/newsroom/2024/01/20240103-halt-use-covid19-mrna-vaccines.pr.html> (viewed Feb. 1, 2024).

Rather than rebut Surgeon General Ladapo's criticisms of the Covid-19 vaccine, the AMA Amici resort to censorship to eliminate it. Censorship should never become a substitute for reasoned debate.

V. Stanford University and Others Become State Actors When They Participate with Government in Its Censorship Campaign.

Stanford University ("Stanford"), which reportedly receives more federal funding than most state universities,²³ filed an amicus brief here insisting that its censorship-related work with the Biden administration should not be considered to be state action subject to the First Amendment. But there is no exemption for higher education from respecting the First Amendment, and state action has never been limited to governmental actors alone. Accepting the argument by Stanford would create an impermissibly gaping loophole for the government to achieve its censorship goals through coercion of higher education.

Relevant to the vaccine-criticism censorship at issue here, Stanford "was awarded the sixth-most funding from the National Institutes of Health (NIH) among domestic universities in 2022 Stanford labs were awarded over \$651M in 2022, a \$40 million increase from \$611M in 2021." Allie Skalnik, "Stanford labs received over \$651M in NIH funding last year. Some researchers say that still isn't enough." *The*

²³ Stanford ranks #6 in federal funding among all universities. "30 Colleges With the Most Federal Funding 2024" (Dec. 29, 2023) <https://www.collegevaluesonline.com/colleges-benefiting-from-government-spending/> (viewed Feb. 4, 2024).

Stanford Daily (Feb. 26, 2023).²⁴ That prodigious funding inevitably gave the NIH substantial leverage over Stanford and its Virality Project during the Covid pandemic. A factual analysis by a trial court is needed to determine whether a private entity so intertwined with government is engaging in state action. This funding by the same administration that engages in censorship is suggestive of state action by Stanford on issues relating to NIH, as Covid vaccine criticism was.

Stanford evidently lacks strong safeguards against retaliatory censorship. For example, last year a federal appellate judge, Kyle Duncan, attempted to speak at Stanford University Law School only to be shouted down and silenced by law school students “who said Duncan has taken positions that threatened the rights of LGBTQ people, immigrants, Black voters, women and others.” Karen Sloan and Nate Raymond, “Stanford Law official who admonished judge during speech is on leave, dean says,” Reuters (Mar. 22, 2023).²⁵ The Stanford law school dean subsequently apologized to Judge Duncan, but the episode illustrates the problem of retaliatory censorship.

Stanford admits that its “Virality Project has been a “collaborative project[] that tracked and studied misinformation, disinformation, and rumors concerning ... COVID-19 vaccines” (Stanford Br. 1) Stanford further concedes that it collaborated with the Biden administration on this (and other) political issues, and yet argues that the collaboration should

²⁴ <http://tinyurl.com/4jkg9c4r> (viewed Feb. 4, 2024).

²⁵ <https://www.reuters.com/legal/legalindustry/stanford-law-official-who-admonished-judge-during-speech-is-leave-dean-says-2023-03-22/> (viewed Feb. 4, 2024).

not be restrained by the First Amendment because Stanford is a private university. (*See id.* 18, 27) (arguing against state action doctrine applying to it).

The First Amendment prohibits government from doing indirectly what it cannot do directly. Stanford relies on its strawman argument that “private research universities like Stanford and their researchers are not state actors subject to constitutional constraints just because they speak to the government about their research.” (Stanford Br. 3) No one enjoined Stanford from merely speaking to the government. Censorship pressure and collaboration with government are what trigger the state action.

Stanford and any educational institution are free to remain independent without doing the partisan bidding of an administration in control of government and its purse strings. Hillsdale and Grove City Colleges are two stellar institutions that have long remained independent from government controls. Stanford has not taken that direction of autonomy, but rather has become dependent on government funding.

Regardless, Stanford has no valid basis for objecting to an injunction against government officials collaborating with it. Legitimate academic inquiry does not require political direction from the White House. Stanford admits that it labeled one of Biden’s prominent nemeses on the internet, *The Gateway Pundit*, as “one of the top misinformation websites.” (Stanford Br. 22) Stanford’s conduct, which is what matters in the test for determining whether a private entity was a state actor, was highly partisan indeed.

Enjoining government from engaging in censorship through collaboration with university programs is

appropriate relief under the First Amendment, and the objections raised by Stanford are without merit.

CONCLUSION

The decision below should be fully affirmed, with a holding additionally allowing an injunction against the Biden Administration for its censorship-inducing communications with Stanford University.

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Respectfully submitted,

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