No. 22-3573

In the

United States Court of Appeals for the Sixth Circuit

MARK CHANGIZI; MICHAEL P. SENGER; DANIEL KOTZIN
Plaintiffs – Appellants

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES; SURGEON GENERAL VIVEK MURTHY; SECRETARY XAVIER BECERRA
Defendants – Appellees

On Appeal from the United States District Court for the
Southern District of Ohio, Eastern Division
Case No. 2:22-cv-1776
Honorable Edmund A. Sargus, Jr., United States District Court Judge

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Brief of *Amicus Curiae* Liberty, Life, and Law Foundation in Support of Plaintiffs-Appellants and Reversal

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-3573 Case Name: Changizi et al. v. Dept. of Health & Huma

Name of counsel: Deborah J. Dewart

Pursuant to 6th Cir. R. 26.1, Liberty, Life, and Law Foundation
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on December 2, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Deborah J. Dewart
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF *AMICUS CURIAE*[1]

Liberty, Life and Law Foundation ("LLLF"), as *amicus curiae*, respectfully urges this Court to reverse the Sixth Circuit decision.

LLLF is a North Carolina nonprofit corporation established to defend constitutional liberties. LLLF is gravely concerned about the growing expansion of government power. LLLF has participated in numerous *amicus curiae* briefs in the United States Supreme Court and the federal circuits.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Social media is widely considered "the modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Large tech platforms appear to be the digital equivalent of traditional public fora, reaching even more listeners than time-honored public streets and parks. Perhaps it is not surprising that the government increasingly commandeers this "modern public square" under the pretense of such laudable goals as protecting public health. But America is not a kindergarten classroom that requires protection from "disinformation" or "misinformation." Americans are adult citizens who hold the constitutional right to receive a wide array of information about quintessential matters of public concern

[1] The parties have consent to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

like the coronavirus pandemic. Free access to a variety of viewpoints and medical opinions is critical to achieving informed consent, a standard prerequisite for any medical intervention.

Government agencies, including HHS and DHS, evade their constitutional responsibilities if they use privately owned tech companies to shut down free speech opposed to its preferred narrative about covid-19. That evasion is thinly veiled but not invisible, and it encroaches on our treasured liberty of free expression. In considering this appeal, this Court is obliged to "make an independent examination of the whole record" to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984), quoting *New York Times v. Sullivan*, 376 U.S. 254, 284-286 (1964). In this case, that "forbidden intrusion" not only encroaches on the right to speak but also the right to receive information. That information, spanning a diversity of perspectives and medical opinions, is critical to the "informed" component of informed consent, a prerequisite for medical treatment.

ARGUMENT

I. STATE ACTION IS PRESENT WHEN THE GOVERNMENT SURREPTITIOUSLY HIJACKS SOCIAL MEDIA PLATFORMS TO BE THE COURIERS OF ITS PREFERRED VIEWPOINT.

State action is the launching pad for any constitutional violation. A burglar does not violate the Fourth Amendment, nor does a mugger violate the Fourteenth.

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 278 (1993). Although state action is obvious when the challenge concerns a statute, "[c]onstitutional violations may arise from the chilling effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Penny Saver Publications, Inc. v. Vill of Hazel Crest*, 905 F.2d 150, 154 (7th Cir. 1990). Indirect action may be even more concealed and difficult to detect and may involve the government's use of a private entity to accomplish its desired censorship (or other unconstitutional objective).

Where the government's action is indirect, there are three possible avenues to finding state action. One route is a private actor's assumption of powers that are "traditionally the exclusive prerogative of the State." *Blum v. Yaretsky,* 457 U.S. 991, 993, 1005 (1982), quoting *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 353 (1974); *see Board of Educ. of Kiryas Joel Village School Dist. v. Grumet,* 512 U.S. 687, 698 (1994) (authority over local public school district); *Larkin v. Grendel's Den, Inc.,* 459 U.S. 116, 125 (1982) (zoning power). A second possibility occurs where the state and private actors are in a position of such interdependence that they become joint participants in the challenged activity. *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961) (lessee restaurant's racial discrimination attributed to government lessor). In *Burton*, "the State had so far insinuated itself into a position of interdependence with the restaurant that it was a joint participant in the

enterprise." *Jackson*, 419 U.S. at 357-358 (finding no "symbiotic relationship" between government and a private utility company).

The third pathway is the one most applicable here. State action is present, and the government may be responsible for private conduct, "when it has exercised *coercive power* or has provided such *significant encouragement, either overt or covert*, that the choice must in law be deemed to be that of the State." *Blum,* 457 U.S. at 993, 1004-1005 (1982) (emphasis added). A "close nexus" must exist, not merely between the state and the private actor, but between the government and the alleged constitutional violation, such that "seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n,* 531 U.S. 288, 295 (2001); *Jackson*, 419 U.S. at 351.

A private entity is ordinarily not constrained by the Free Speech Clause; even one that "opens its property for speech by others is not transformed by that fact alone into a state actor." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). But when a private entity "acts in concert with a public agency to deprive people of their federal constitutional rights," it may incur liability along with the agency. *Hudson v. Chi. Teachers Union Local No.* 1, 743 F.2d 1187, 1191 (7th Cir. 1984), *aff'd* 475 U.S. 292 (1986) (emphasis added). A private entity may be subject to First Amendment constraints and liability "if the government coerces or induces it to take action the government itself would not be permitted to do," such as—in

this case—"to *censor expression of a lawful viewpoint*." *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 (2021) (emphasis added).

Appellants have properly alleged the sort of "significant encouragement" or "coercive power" sufficient to trigger state action for the conduct of Twitter and other social media platforms in censoring viewpoints about covid-19 that the government deems "misinformation" or "disinformation."

A. The government may adopt a viewpoint but may not use its regulatory authority to shut down opposing viewpoints or coerce a private speaker to become the government's mouthpiece.

The government speech doctrine allows the State to adopt and promote its own favored viewpoint. *Rust v. Sullivan*, 500 U.S. 173, 192-193 (1991); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc*., 135 S. Ct. 2239, 2245 (2015). But where government compels a private speaker to be a conduit for its own message, that compromises "the core principle of speaker's autonomy" (*Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 575 (1995)) and "assum[es] a guardianship of the public mind" (*Riley v. Nat'l Fed'n of Blind,* 487 U.S. 781, 791 (1988), quoting *Thomas v. Collins,* 323 U.S. at 545 (Jackson, J., concurring)).

Here, government agencies assert a need to protect the public from "disinformation" or "misinformation," particularly with respect to information about covid-19—*medical* information that Americans need to access and evaluate to make

informed decisions about their own individual health care. This paternalistic government interference is unconstitutional and even potentially dangerous if the government's professed "truth" is ultimately false and unreliable. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley,* 515 U.S. at 579. The government's unconstitutional viewpoint discrimination is transparent here.

Compelled speech. Government-coerced "partnerships" with social media not only censor other viewpoints but also compel the government's preferred narrative about covid-19. "[T]he First Amendment does not look fondly on attempts by the government to affirmatively require speech." *Alliance for Open Soc'y Int'l, Inc. v. United States Agency for Int'l Development*, 651 F.3d 218, 235 n. 3 (2d Cir. 2011) (rejecting a funding condition requiring agencies to adopt a policy explicitly opposing prostitution). Compelled speech is anathema to the First Amendment, particularly where the government mandates conformity to its preferred viewpoint. In *NationaI Institute of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361 (2018), California commandeered pregnancy centers to disseminate a state-sponsored message. *NIFLA, Barnette, Wooley,* and other "eloquent and powerful opinions" stand as "landmarks of liberty and strong shields against an authoritarian

government's tyrannical attempts to coerce ideological orthodoxy." Richard F. Duncan, *Article: Defense Against the Dark Arts: Justice Jackson, Justice Kennedy, and the No-Compelled Speech Doctrine*, 32 Regent U. L. Rev. 265, 266 (2019-2020); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977). *NIFLA* involved a statutory scheme, unlike the subtle pressure alleged in this case, but coerced orthodoxy is perhaps even more pernicious when it is cloaked with the mantle of protecting public health. Indeed, "such compulsion so plainly violates the Constitution" that courts rarely need to step in. *Janus v. Am. Fed'n of State, Cnty*., 138 S.Ct. 2448, 2464 (2018).

This case is "a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression." *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring). "[T]he history of authoritarian government . . . shows how relentless authoritarian regimes are in their attempts to stifle free speech." *Id.* There is "no such thing as good orthodoxy" under a Constitution that safeguards thought, speech, conscience, and religion, even when the government pursues seemingly benign purposes like public health. If the government surreptitiously hijacks social media platforms to be the couriers of its preferred viewpoint, there is undeniably state action. HHS, DHS, and the CDC could establish their own social media platforms to promote their preferred viewpoints. On such a platform, officials could decide what to include or

exclude. But the government may neither squelch private speech nor compel dissemination of its own narrative, either directly or indirectly.

B. The government evades its constitutional responsibilities by violating the right to receive information about a quintessential matter of public concern.

It is widely known that the Biden Administration has engaged in pressuring tech companies to censor what they classify as misinformation about covid-19, even announcing the creation of a Disinformation Governing Board (DGB), an advisory board of the United States Department of Homeland Security (DHS), to accomplish that task using private social media companies. The DGB has been dissolved, but there is no guaranty the government will not disguise a similar maneuver using more duplicitous means. This rank censorship is anathema to the First Amendment, regardless of how indirect it may be, and it is an obvious ploy for the federal government to evade its constitutional responsibility to *protect* free speech—even speech the state perceives to be "misinformation." The government misunderstands the nature of its duty to the public. "It cannot be the duty, *because it is not the right*, of the state to protect the public against false doctrine." *Thomas v. Collins,* 323 U.S. at 545 (Jackson, J., concurring) (emphasis added). Terms like "disinformation" or "misinformation" do not strip speech of its First Amendment protection. On the contrary, even *false* statements are not beyond constitutional protection. *United States v. Alvarez*, 567 U.S. 709, 718 (2012).

The government may not, "under the guise of [protecting public health], ignore constitutional rights." *NAACP v. Button*, 371 U.S. 415, 439 (1963). "[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be . . . ." *Burton*, 365 U.S. at 725. In *Burton*, the government tried to evade its constitutional responsibilities by leasing a restaurant to a private entity rather than operating it directly.

No government agency may "induce, encourage, or promote private persons to accomplish what it is *constitutionally forbidden* to accomplish" by exercising its own powers. *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (emphasis added). *See also Biden v. Knight First Amendment Inst.*, 141 S. Ct. at 1226 (Thomas, J., concurring) ("The government cannot accomplish through threats of adverse government action what the Constitution prohibits it from doing directly."). Government threats are more than gentle suggestions. They are heavy-handed, ominous, and intimidating. "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 68 (1963) (First Amendment violation where private bookseller stopped selling works officials deemed "objectionable" after sending him a veiled threat of prosecution). Under this

rationale, Appellants may have colorable claims against digital platforms that take adverse action against them in response to government threats.

Twitter, Facebook, Instagram, YouTube, and other major tech companies enjoy huge public followings. When the government uses pressure, coercion, and threats to co-opt these platforms to censor viewpoints the government deems "misinformation," this transforms otherwise private censorship into state action. The government's censorship efforts implicate Section 230 of the Communications Decency Act (47 U.S.C. 230), which purportedly protects free speech by providing immunity for third party content to public platforms like Twitter and Facebook. But if these private companies censor speech—and particularly if the government participates through threats or incentives—then either their immunity should be revoked or they should be liable for violating the First Amendment. These companies cannot rightfully maintain their immunity under Section 230 *plus* the right to censor free speech. Either they must be treated like the government, subject to constitutional restraints, or like private parties, free to engage in their own speech, promote a viewpoint, and censor other perspectives.

II. COLLUSION BETWEEN GOVERNMENT AGENCIES AND SOCIAL MEDIA PLATFORMS VIOLATES THE PUBLIC'S RIGHT TO RECEIVE INFORMATION.

The government evades its constitutional responsibilities by stealthily encroaching on the right to receive information about a quintessential matter of

public concern. The right to speak and the corollary right to listen are "flip sides of the same coin." *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002) (Kozinski, J., concurring) (medical marijuana). "[T]he right to receive ideas follows ineluctably from the sender's First Amendment right to send them." *Board of Educ., Island Trees Union Free Sch. Dist. Number 26 v. Pico*, 457 U.S. 853, 867 (1982). The marketplace of ideas would be "barren" with only speakers and no listeners. *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

Court may not exercise "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Stevens,* 130 S. Ct. 1577, 1586 (2010). Diverse opinions about covid-19, however controversial, are not beyond the First Amendment. Government suppression of information smothers expression and impedes access to information about alternative perspectives. The government cannot wield its regulatory authority as a weapon to suppress opposing messages. The public has a right to hear alternative views about treatments, vaccines, masks, lockdowns, social distancing, and other protocols—including viewpoints that conflict with the government's narrative. Appellants-plaintiffs have all used their social media accounts to question the wisdom, efficacy, and morality of government responses to covid-19, and to consider and engage with other views. It is their First Amendment right to disseminate those concerns, and it is equally the First

Amendment right of others to access and hear the information—particularly when the subject matter is such an urgent matter of public concern.

A. Information about public health, particularly a crisis like the coronavirus pandemic, is indisputably a matter of public concern.

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). If there were ever a matter of public concern demanding robust public debate, freely accessible information about diverse viewpoints, and an "unfettered interchange of ideas," the covid-19 crisis fits like a Cinderella slipper. The last couple of years have engendered unprecedented chaos, confusion, political division, disagreement, economic disaster, and novel legal challenges—on top of the illness and deaths.

The U.S. Supreme Court has defined a "matter of public concern" as "any matter of political, social, or other concern to the community." *Connick v. Meyers*, 461 U.S. 138, 146 (1983). It is "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004). The First Amendment guards our nation's "profound commitment" to "uninhibited, robust, and wide-open" debate on such matters. *New York Times*, 376 U.S. at 270; *see Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790 (2011) (Free Speech Clause principally protects speech on public matters). Speech about public concerns is not merely self-expression but

rather "the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, it "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. at 145 (internal quotation marks omitted). Additional citations are peppered throughout decades of jurisprudence: *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940) ("liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment"); *Time, Inc. v. Hill*, 385 U.S. 374, 387-388 (1967) (setting high standard to redress false reports about matters of public interest); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776-777 (1978) ("free discussion of governmental affairs"); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-759 (1985) (speech about "matters of public concern" is "at the heart of the First Amendment's protection"); *Virginia v. Black*, 538 U.S. 343, 365 (2003) (provision prohibiting flag-burning "chills constitutionally protected political speech"); *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 329 (2010) (political speech "is central to the meaning and purpose of the First Amendment"). Even "offensive or disagreeable" speech may not be prohibited. *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Speech that is "misguided or even hurtful" may not be banned. *Hurley* 515 U.S. at 574; *see also Snyder v. Phelps*, 562 U.S. 443, 457 (2011). The arguably "inappropriate or

controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin* v. *McPherson*, 483 U.S. 378, 387 (1987).

The public nature of the venue "heightens concerns when what is at issue is an effort to communicate to the public . . . views on matters of public concern." *Snyder*, 562 U.S. at 456 n. 4. Speech in a public place on a matter of public concern deserves the utmost First Amendment protection. Any government censorship, direct or indirect, is especially pernicious under these circumstances. Social media platforms are not literal public streets or parks, but they are rapidly emerging as the digital equivalent. "[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown*, 564 U.S. at 790, quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

B. The government's collusion with social media chokes the free flow of information needed for informed consent to medical treatment.

It is a "fundamental principle of the First Amendment" that "all persons have access to places where they can speak *and listen*, and then, after reflection, speak *and listen* once more." *Packingham*, 137 S. Ct. at 1735 (emphasis added). This principle is nowhere more critical than in health care decisions. *Informed* consent to medical treatment demands access to complete and accurate information. "Consent" that is *uninformed* cannot be truly voluntary. Informed consent requirements

facilitate the free flow of information, enabling patients to make informed decisions about their health.

"If the First Amendment means anything, it means that regulating speech must be a *last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try*." *Thompson v. Western States Medical Ctr.*, 535 U.S. 357, 373 (2002) (emphasis added); *see also Conant*, 309 F.3d at 637. The Ninth Circuit enjoined a federal law that allowed revocation of a physician's license for recommending medical marijuana. *Id*. at 636, noting that "[a]n integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients." In *Conant*, the law impermissibly "condemn[ed] expression of a particular viewpoint." *Id*. The same is true here. The federal government may not ban all viewpoints regarding covid-19 that depart from their narrative.

In the coronavirus context, the "science" is not set in stone but constantly evolving. This is a *novel* virus, requiring rapid development of treatments and protocols. Medical opinions vary widely, and the public is entitled to hear them all, so that individuals can make informed decisions with their own doctors. But the government—particularly the executive branch and its officials—has issued sweeping one-size-fits-all medical mandates with scant attention to informed consent or individual health conditions.

Informed consent is legally mandatory for medical interventions subject to "emergency use authorization." The FDA has issued "emergency use authorizations" for various vaccines as well as face masks. The relevant federal law underscores the importance of informed consent. For example, the FDA issued an "emergency use authorization" (EUA) for face masks on April 24, 2020. *Under federal law, an EUA medical device cannot be mandated*. Informed consent is required and the user must have the option to refuse the product, i.e., to refuse to wear the mask or take the vaccine:

> (ii) Appropriate conditions designed to ensure that individuals to whom the product is administered are *informed*—
>
> > (I) that the Secretary has authorized the emergency use of the product;
> > (II) of the significant known and potential benefits *and risks* of such use, and of the extent to which such benefits and risks are unknown; and
> > (III) of the *option to accept or refuse administration of the product*, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

21 U.S.C. § 369bbb-3(3)(1)(A)(ii) (emphasis added). Mask proponents have been quick to presume benefits (without evidence) but risks are rarely ever acknowledged, let alone disclosed. The same is true for the vaccines, developed at "warp speed," that governments attempt to mandate.

Informed consent rests on the right to bodily autonomy. No right is "more sacred" or "more carefully guarded" than "the right of every individual to the possession and control of his own person, free from all restraint or interference of

others, unless by clear and unquestionable authority of law." *Union P. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). This right to bodily integrity "has been embodied in the requirement that informed consent is generally required for medical treatment." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1989). *Cruzan* "effectively enshrined personal autonomy in a medical setting as a constitutionally protected liberty interest," with the majority assuming it while dissenting Justices "explicitly found that the right existed." Kathy L. Cerminara, *Cruzan's Legacy in Autonomy*, 73 SMU L. Rev. 27, 27 (Winter 2020). As then-Judge Cardozo expressed it, every competent adult has "a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Schloendorff v. Society of New York Hospital*, 105 N.E. 92, 93 (N.Y. 1914). This tracks common law, where "even the touching of one person by another without consent and without legal justification was a battery." *Id.*, citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 9, pp. 39-42 (5th ed. 1984).

The logical corollary of informed consent is "the right of a competent individual to refuse medical treatment." *Cruzan*, 497 U.S. at 277; *see also In re Quinlan*, 355 A.2d 647, cert. denied *sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976); *In re Storar*, 420 N.E.2d 64, 70 (N.Y. 1982), cert. denied, 454 U.S. 858 (1981) (basing the right to refuse treatment on doctrine of informed consent). "The

right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician." *Mills v. Rogers*, 457 U.S. 291, 294 n.4 (1982). *Cruzan* cited other key cases affirming the right to refuse, including one decided during the same term. 497 U.S. at 278, citing *Washington v. Harper*, 494 U.S. 210, 229 (1990) ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty"); *Vitek* v. *Jones*, 445 U.S. 480, 494 (1980) (mandatory behavior modification treatment); *Parham v. J. R.*, 442 U.S. 584, 600 (1979) (even a child has "a substantial liberty interest in not being confined unnecessarily for medical treatment"). The conclusion is inescapable—"the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment." *Cruzan*, 497 U.S. at 289 (O'Connor, J., concurring). The Supreme Court confirmed that right as "fundamental" in *Washington v. Glucksberg*, combining now-familiar key phrases from *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental") and *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937) ("implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed"). 521 U.S. 702, 721 (1997).

But the lofty language of "fundamental rights" evaporates if the First Amendment right to free speech is not honored, and governmental officials

commandeer social media platforms to shut down the free flow of information. The right to *informed* consent and the corollary right to refuse medical treatment are rendered meaningless and cannot possibly be exercised without *information*.

CONCLUSION

The government is correct about one thing—the public needs accurate information about covid-19. But it is woefully wrong to presume that it is the sole source of that information and the final judge or what is or is not correct.

The district court ruling should be reversed and remanded to allow Plaintiffs-Appellants to proceed with the litigation of their claims.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,418 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on December 2, 2022. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: December 2, 2022

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