"JAWBONING" IN THE AGE OF RAMPANT ONLINE DISINFORMATION: SUPREME COURT TO RULE ON WHETHER GOVERNMENT INTERACTIONS WITH SOCIAL MEDIA PLATFORMS REGARDING CONTENT MODERATION VIOLATE RIGHTS OF FREE SPEECH

Last Friday, in an unsigned order, the Supreme Court granted an application for a stay of injunction (in legal parlance, "granted cert.") to temporarily block a lower court order that enjoined named federal government agencies from communicating with social media platforms regarding their content moderation policies, and agreeing to hear the merits on the underlying cases (*Missouri v. Biden, and Murthy v. Missouri)* during their next term. These related cases raise the question of how far the government can go in influencing content moderation decisions of the social media platforms without violating the First Amendment rights of those whose content is deplatformed. The stay of injunction (meaning the government can resume communications with the social media platforms about their content moderation) is a victory for the Biden administration, and with luck will be more than a temporary one. We will likely only find out next June.

As I previously reported (*see* my July 7, 2023 briefing note), in July, in a case brought by the Attorneys General of Louisiana and Missouri together with five individual plaintiffs, a US District Court judge granted a sweeping order enjoining various agencies of the federal government from engaging with named social media platforms in respect of their content moderation activities. The case in effect sought to transform content moderation decisions of the social media platforms into state action, thereby triggering First Amendment protections for those whose content, albeit by private parties, was moderated. The US District Court order was largely upheld on appeal to the Fifth Circuit.

Separately, the Supreme Court has agreed to hear two cases representing a split in circuit courts (*Net Choice v. Moody* and *Net Choice v. Paxton*) involving the constitutionality of Florida and Texas state laws (S.B. 7072 and HB 20, respectively) that purport to regulate how large online platforms control content on their websites. The Court also will hear oral arguments later this month on two other "state action cases" representing another split in circuit courts (*O'Connor-Ratcliff v. Garnier* from the Ninth Circuit and *Lindke v. Freed* from the Sixth Circuit) addressing the question of whether First Amendment rights were violated by public officials who blocked members of the public on their personal social media accounts.

Missouri v. Biden

As I noted in my July 7th briefing note, the plaintiffs in the *Missouri v. Biden* case allege that the federal government colluded with social media platforms to suppress free speech, a vast effort they characterize as a "massive, sprawling Censorship Enterprise" involving dozens of federal officials across at least 11 federal agencies and components. A finding against the government could have far-reaching First Amendment implications and, in my view, could severely impair the ability of the government to address the scourge of online disinformation amplified on social media platforms. While there are few single comprehensive analyses of the extent and reach of disinformation, I commend the publications available on the website of the Institute for Strategic Dialogue, which tracks online extremism, disinformation and weaponization of hate worldwide.

The lawsuit must be seen in the context of a multi-pronged effort by conservatives to undercut content moderation aimed at curbing disinformation. Rather than sue the platforms, whose terms of reference and activities are not subject to the First Amendment and, in fact, enjoy First Amendment protection,[1] the plaintiffs sued the government. In essence, the plaintiffs are recharacterizing interactions between the government and the platforms (meetings, conversations and emails) as coercion, and by extension a violation of First Amendment rights of free speech. In effect, the plaintiffs are saying that the federal government is using private companies (the platforms) to do what it cannot do directly, "censor conservative speech."

In granting an injunction on July 4 pending review on the merits of the underlying case, US District Court Judge Terry Doughty wrote that, "If the allegations made by Plaintiffs are true, the present case arguably involves the most massive attack against free speech in United States' history. In their attempts to suppress alleged disinformation, the Federal Government, and particularly the Defendants named here, are alleged to have blatantly ignored the First Amendment's right to free speech." The judge continued, "What is really telling is that virtually all of the free speech suppressed was "conservative" free speech. Using the 2016 election and the COVID-19 pandemic, the Government apparently engaged in a massive effort to suppress disfavored conservative speech."

The Fifth Circuit on September 8, on appeal by the Biden administration, largely affirmed the District Court judgment and upheld one of ten prohibitions subject to injunction (with a modification).[2]

The appellate court described the conduct of the government at issue as a "coordinated campaign … orchestrated by federal officials that jeopardized a fundamental aspect of American life." It found that the District Court "was correct in its assessment – 'unrelenting pressure' from certain government officials likely 'had the intended result of suppressing millions of protected free speech postings by American citizens'" and saw "no error or abuse of discretion in that finding." It, however, narrowed the scope of the injunction to the White House, the Surgeon General, the Centers for Disease Control and Prevention, and the FBI. The plaintiffs appealed the narrowed scope, resulting in the inclusion of the Cybersecurity

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[1] As Daphne Keller noted in her Hoover Institute essay ("Who Do You Sue? State and Platform Power over Online Speech"), in the United States speakers have few or no legal rights when platforms take down their posts. Lawsuits, which she and others refer to as "must-carry" claims, against platforms for removal of content have consistently failed. At the time of the article (2019), more than two dozen must-carry cases had been brought against platforms, and none succeeded (based on a range of defenses proffered by the platforms, including their own First Amendment rights, as well as terms of service and Section 230 of the Communications Decency Act). Plaintiffs have failed to win on First Amendment grounds, or in other cases on due process or equal protection grounds, breach of contract or unfair competition.

[2] The modified injunction provides: "Defendants, and their employees and agents, shall take no actions, formal or informal, directly or indirectly, to coerce or significantly encourage social-media companies to remove, delete, suppress, or reduce, including through altering their algorithms, posted social-media content containing protected free speech. That includes, but is not limited to, compelling the platforms to act, such as by intimating that some form of punishment will follow a failure to comply with any request, or supervising, directing, or otherwise meaningfully controlling the social-media companies' decision-making processes."

and Infrastructure Agency (CISA) and the State Department within the ambit of the, now narrowed, injunction.

The Biden administration appealed the Fifth Circuit decision to the Supreme Court.

State Court Efforts to Restrict Content Moderation

Texas and Florida each have enacted legislation aimed at platform moderation, and one circuit court (the Fifth Circuit) has found in favor of the prohibitions on social media platforms, and another (the Eleventh Circuit) found against the same types of prohibitions. The split must now be resolved by the Supreme Court.

Texas law (HB 20)

HB 20 prohibits social media platforms (with over 50 million active users in the United States in any calendar month) from censoring users, which it defines as blocking, banning, removing, deplatforming, demonitizing, denying equal access or visibility to or otherwise discriminating against expression. Texas governor Abbott described social media companies as part of a movement to silence conservatives and religious beliefs. HB 20 was to become effective December 1, 2021, but was challenged by two trade associations (NetChoice and the Computer and Communications Industry Association ("CCIA")) whose members operate social media platforms, and shortly before its effectiveness, Texas was enjoined from enforcing the law by a US District Court. In May 2022, the Fifth Circuit lifted the stay in a one-sentence order. Plaintiffs then went to the Supreme Court requesting an order reinstating the injunction. The request was granted, and the injunction was reinstated. In September, the Fifth Circuit issued its opinion and judgment reversing the District Court's preliminary injunction, but agreed to stay the appeal pending review by the Supreme Court.

NetChoice and CCIA appealed the underlying appellate decision to the Supreme Court. On September 29, the Supreme Court agreed to hear the case.

Florida law (S.B. 7072)

Florida has a law similar to Texas' HB 20 – S.B. 7072, which addresses deplatforming political candidates as well as "censorship" in an effort to regulate social media content moderation. A lower court enjoined enforcement of the legislation and, in May 2022, following an appeal by Florida, the Eleventh Circuit affirmed the portion of the injunction that covered constitutional questions (First Amendment issues).

Florida appealed the Eleventh Circuit decision to the Supreme Court. On September 29, the Supreme Court agreed to hear the case.

Position of the Biden administration

In August, Solicitor General Elizabeth Prelogar, at the request of the Supreme Court, submitted an *amicus* brief in both the Texas and the Florida cases. She urged that the Supreme Court address whether the laws' content-moderation restrictions comply with the First Amendment and whether the laws' individualized-explanation requirements comply with the First Amendment, and urged the Court to strike down both laws as the answer to both cases is in the affirmative. The Supreme Court confirmed that it will address both questions presented by the Solicitor General.

Legal Landscape – Government Request Versus Government Threat

In her comprehensive analysis in Lawfare (July 2021) of the caselaw regarding informal government pressure on private companies, or what legal experts tend to call First Amendment "jawboning," Genevieve Lakier notes that there are two strands of jurisprudence – one that represents a narrow test of constitutionality that would give the government more leeway (the Third Circuit view), and one that represents a more expansive test that would more readily constrain government action (the Second and Seventh Circuit view). Ultimately, the question is, in the context of efforts to encourage social media platforms (private intermediaries, from a legal perspective) to moderate harmful though legal speech, where is the line between permissible government pressure and impermissible government coercion?

Precedent caselaw …

The question does not lend itself to an easy answer as there are equally good reasons to support a broad First Amendment right against jawboning as there are to oppose a broad reading of the First Amendment against jawboning. In the 1963 seminal case (*Bantam Books Inc. v. Sullivan*), the Supreme Court found that government efforts to intimidate booksellers to remove certain books from their store shelves by threatening them with adverse consequences for failing to comply (by a state commission to "encourage morality in youth") amounted to impermissible suppression of the affected authors' free speech in violation of the First Amendment. The Court conceded, however, that the government need "not renounce all informal contacts" with book distributors, though in this case those contacts amounted to "state censorship effectuated by extralegal sanctions."

In 1982, in *Blum v. Yaretsky* the Supreme Court (with a different composition) found that the government was not ultimately responsible for nursing home decisions to transfer to lower levels of care or discharge Medicaid patients and, therefore, there were no violations of the First Amendment. The Court noted that "[t]he mere fact that a private business is subject to state regulation does not, by itself, convert its action into that of the State for purposes of the Fourteenth Amendment." "A State normally can be held responsible for a private decision only 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" (emphasis added). To establish the requisite nexus, it must be shown "that the State is responsible for the specific conduct of which the plaintiff complains."

The US Court of Appeals for the DC Circuit followed the Third Circuit view in 1996 when it found that National Public Radio did not violate the First Amendment rights of a political activist and death row inmate when it cancelled an interview with him (*Abu-Jamal v. National Public Radio*). The alleged government nexus was funding of NPR via the Corporation for Public Broadcasting and alleged pressure and threats to restrict funding from members of Congress. The Third Circuit, in *R.C. Maxwell Co. v. Borough of New Hope*, similarly found no coercion in a case brought by a billboard owner against a city that had "politely but firmly suggested" that the bank on which the billboard stood should remove it.

The Second Circuit, in *Okwedy v. Molinari*, found that a reasonable jury could conclude that letters from the Staten Island borough president to a private company to remove anti-gay billboards sponsored by a minister violated the First Amendment rights of the minister (by

reason of conveying implicit threats of retaliation), even though there was no explicit threat and that the borough president had no authority over the billboard company. The court found that "a public official who threatens to employ coercive state power to stifle protected free speech violates … First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of … direct regulator or decisionmaking authority or, or in some less direct form."

In *Backpage.com, LLC v. Dart*, the Seventh Circuit (relying on *Bantam Books* and *Okwedy*) concluded that letters written by the Cook County Sheriff to credit card companies "requesting" that the companies "cease and desist" from allowing their "credit cards to be used to place ads on websites like Backpage.com" (which hosted, among 11 types of classified ads, ads for prostitution) violated the First Amendment rights of the platform and its users. A press release following decisions by the credit card companies to shut down use of their cards on the platform characterized the sheriff's efforts as "demands." The court emphasize that what mattered was not whether the targets of government pressure in fact faced imminent harm for noncompliance, but rather whether government action represented an attempt to coerce private parties to comply, rather than convince or persuade.

In contrast, in *National Rifle Ass'n v. Vullo,* the Second Circuit found that the actions of a by then former New York state official (the Superintendent of the NY Department of Financial Services) who allegedly "urged" insurers and banks to drop the NRA as a client and in closed-door meetings allegedly indicated she was less interested in pursuing regulator infractions so long as the institutions ceased doing business with the NRA, were not tantamount to coercion, but rather constituted "permissible government speech." Seemingly threatening language was deemed permissible government advocacy. For the court, citing precedents, government communications are coercive, and not merely persuasive, if they "can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request." The court also noted that "communications were not coercive because, in part, they were not phrased in an intimidating manner and only referenced reputational harms – an otherwise acceptable consequence for a governmental actor to threaten." The court referred to a four-part test in distinguishing between attempts to convince and attempts to coerce: the speaker's "word choice and tone"; "the existence of regulatory authority"; "whether the speech was perceived as a threat"; and, "perhaps most importantly, … whether the speech refers to adverse consequences." No single factor is dipositive.

In 2022, the Ninth Circuit found (in *John Doe, et al v. Google*) none of a series of actions, including, among others, statements by then House Speaker Nancy Pelosi on possibly removing Section 230 immunity, a letter by Rep. Adam Schiff to Google/YouTube encouraging the curbing of pandemic-related misinformation, a statement by Speaker Pelosi calling for greater accountability for "the division and the disinformation proliferating online," and a House resolution acknowledging platform efforts to remove QAnon content, to be sufficient to establish the requisite state-action nexus to find violations of the First Amendment.

The Ninth Circuit, in May of this year, in *O'Handley v. Weber*, affirmed a lower court decision in a case that alleged that the California Secretary of State acted in concert with Twitter to censor speech when it flagged tweets as false or misleading. The lower court

found no violation of First Amendment rights, based on precedent holding "that government officials do not violate the First Amendment when they request that a private intermediary not carry a third party's speech so long as the officials do not threaten adverse consequences if the intermediary refuses to comply." The decision went on to note that "[a] private party can find the government's stated reasons for making a request persuasive, just as it can be moved by any other speaker's message. The First Amendment does not interfere with this communication so long as the intermediary is free to disagree with the government and to make its own independent judgment about whether to comply with the government's request." A cert. petition is pending.

… Applied in Missouri v. Biden

The Fifth Circuit, in *Missouri v. Biden*, analyzed the caselaw and, in particular, the tests of "coercion" and "significant encouragement," the latter being more than "uninvolved governmental oversight," but rather involving "a 'close nexus' that renders the government practically 'responsible' for the decision." It characterized the test for significant encouragement as requiring "some exercise of *active* (not passive), *meaningful* (impactful enough to render them responsible) *control* on the part of the government over the private party's challenged decisions." Whether the foregoing "is entanglement in independent decision-making" or "direct involvement in carrying out the decision itself, the government must encourage the decision to such a degree that we can fairly say it was the state's choice, not the private actor's." The court also noted that in federal jurisprudence, the Ninth Circuit, interpreting *Blum,* looked to whether "encouragement" can be said to have "overwhelmed" a private party's choice, "forcing it to 'act in a certain way,'" or "overrode" independent judgment.

The court concluded that White House officials, together with the Surgeon General, had both "coerced" and "significantly encouraged" the platforms to moderate conduct and therefore "must in law be deemed to be that of the State." Similarly, the court concluded that the FBI had coerced and significantly encouraged, while the CDC had significantly encouraged, platform moderation decisions. All then supported a conclusion of likely violation of the First Amendment.

In her application for a stay in the *Missouri v. Biden* case, the Solicitor General noted that the Ninth Circuit's O'Handley dismissal (the court having found that "coercion" requires "threat[s] to prosecute," threat[s] [of] adverse or "equivalent threat[s]" and, as to significant encouragement, there must be "positive incentives [to] overwhelm the private party and essentially compel the party to act in a certain way") is "irreconcilable" with the Fifth Circuit's appellate decision (that relied on "tone" and authority, and as to significant encouragement, held that mere "entanglement" is sufficient). The Fifth Circuit approach is also inconsistent with other appellate decisions, including the *NRA case* in the Second Circuit as well as cases in the Tenth Circuit.

Experts weigh in …

Lakier, in an October 13th blog post ("Jawboning as a Problem of Constitutional Evasion") supports the "significant encouragement" test, but concludes that the Fifth Circuit in *Missouri v. Biden* in applying the "significant encouragement" test swept "too broadly both as a matter of principle and precedent." She notes:

> "The Fifth Circuit interpreted *Blum* to mean that government officials could be held responsible for acts of speech suppression carried out by private parties – in this case, the social media platforms – not only when there was no evidence that the platform's will was "overwhelmed" but no evidence that the platform felt pressured or incentivized by the government officials to act at all. Instead, the Fifth Circuit found that the mere fact that government officials (White House officials, representatives from the CDC and the FBI) communicated frequently with platform employees about their content moderation decisions, and that these communications influenced the decisions the platforms made, was sufficient to deem those decisions "that of the State," and therefore unconstitutional. In other words, in a remarkable act of judicial chutzpah, the Fifth Circuit turned what had been an extremely narrow test of state action into a very broad test of unconstitutional jawboning and one that appeared to prohibit government officials from communicating with private speech intermediaries in any way that ends up having an impact on their decision making about speech."

In his October 4 blog post, Enrique Armijo ("The Unambiguous First Amendment Law of Government Jawboning") takes issue with the Fifth Circuit's application of the coercion test as well as with the validity of the significant encouragement test. Citing *Backpage,* he notes, "what matters is the distinction between attempts to convince and attempts to coerce." Or said another way, the distinction should be between a permissible request and an impermissible demand. "And a demand, even one from the government, means nothing under the First Amendment when there is no power behind it to follow through." Applying the coercion test to *Missouri v. Biden,* he notes that:

> "It should have been difficult to find that the White House coerced platforms to take down speech when, as TechDirt has shown, the majority of its takedown requests were ignored. Any real or imagined threat of distributor liability would be, by definition, ineffective, given the platforms' Section 230 immunity for distributing user speech. And as Professor Bhagwat also points out, the White House statements that the plaintiffs claim were veiled threats to revoke Section 230 itself – a threat that the Fifth Circuit said would be inherently coercive, even if it was 'unspoken' (to repeat, the governing theory here is that any government request is an implied threat) – were even more hollow, since no one congressperson, let alone one bureaucrat in the executive branch, can change the law alone."

As for "significant encouragement," Ashutosh Bhagwat in his blog post ("Persuasion or Coercion? The Fifth Circuit's Muddled View of Missouri v. Biden") notes that the government itself has the right to speak on any topic, provided the communication does not rise to the level of coercion or threats (as was the case, for example, in *Bantam Books).* Urging a platform to take down the account of a designated terrorist organization, for example, should not constitute a violation of the First Amendment, and similarly the FBI tip-offs about potential "hack and dump" activities from state actors found in *Missouri v. Biden* to have violated the First Amendment should not have been impermissible. CDC encouragement to combat pandemic-related disinformation should also not have been impermissible.

Bhagwat also points out that there was no evidence that the platform saw themselves as victims of government coercion. In acting to suppress pandemic-related disinformation, the platforms were largely enforcing their own content moderation platforms, albeit with guidance and pressure from the government.

Yoel Roth, the former head of site integrity for Twitter, in his blog post ("Getting the Facts Straight: Some Observations on the Fifth Circuit Ruling in Missouri v. Biden") and based on his own interactions with the FBI, found the Fifth Circuit's narrative on coercion in respect of election-related disinformation unsupported by the facts or the known timeline. Among other conclusions, he notes that claims that "meetings with the government [to proactively shape platform policy] coerced the platforms to change their rules don't withstand scrutiny," "the relationship between the platforms and the government, at least in Twitter's case, remained arm's length and mutually wary," and "in spite of the fact that [misleading content about elections] was potentially illegal under federal election law, the FBI never demanded – or even requested – that Twitter remove it; all reports were phrased as requests for platforms to assess the content against our own, independently determined policies."

It is noteworthy that Roth shares the overall concerns raised in *Missouri v. Biden,* namely that tech platforms are ill-equipped to manage the influence of government actors on content moderation policies, but despite these concerns, he believes that "platforms and government must, in some fashion, work together to address clear and present threats to the security of elections in the United States. Outright prohibitions on executive branch interactions with platforms are heavy-handed solutions that, in my view, do more harm than good." More broadly, he concludes that notwithstanding that jawboning can present a "clear and present problem," "[e]ffectively combating malign foreign interference in elections, as well as other collective security challenges, requires some degree of collaboration and information-sharing between elements of the government and private sector."

Concluding Thoughts

It is unfortunate that judge in the *Missouri v. Biden* case made no effort to balance competing interests in an area that calls for precision and clarity. It is unfortunate that the court looked to *Blum*, which establishes a narrow test, and then tried to weave a "significant encouragement" argument, in effect pushing *Blum* beyond its recognized parameters and ignoring the inconvenient facts that the platforms did not consider themselves to have been pressured or lacked discretion to act differently.

It is noteworthy that the contours of jawboning should be a cross-partisan issue: while the *Missouri v. Biden* case represents one more arrow in the quiver of the right to shut down content moderation, which conservatives view as "censoring conservative free speech," imagine what could happen under a Trump 2.0 administration. Similarly, as Daphne Keller, in her post ("Six Things About Jawboning"), notes, the First Amendment protects speech we agree with, as well as speech we find to be anathema. That said, there are tests that recognize that not all government interactions with the private sector, particularly if consistent, in the case of combatting disinformation, with voluntary platform content moderation policies, transform moderation under those policies into state action, and we should hope that those

tests are applied to permit the Biden administration (in the words of Keller to "yell at the platforms without violating the First Amendment") to continue to flag disinformation.

All to say that Supreme Court guidance is imperative. We have an existential election looming that could severely be undermined by disinformation, while at the same time major platforms are reining in their content moderation activities, the levels of online weaponization of hate and disinformation are surging, Congress is in no position to provide legislative clarity and instead further muddies the waters with subpoenas aimed at uncovering "collusion" on the part of the platforms and disinformation researchers in desperation to demonstrate the "weaponization of government," and there is a split in circuit courts.

It is noteworthy that much of the expert commentary on *Missouri v. Biden* comes from First Amendment legal scholars and little from the disinformation research space. From the perspective of the latter, while third-party research access to platform algorithms along the lines provided by the EU Digital Services Act (*see* my June 10, 2023 briefing note) would be hugely beneficial, that access is unlikely to be mandated anytime soon by Congress and, in the view of disinformation researchers and a growing part of the mainstream media, while platforms are left to their own devices, the firehouse of online disinformation seems only to be getting worse. For this reason, the efforts of the Biden administration to inform and persuade content moderators should be welcome. And the fact that those efforts at persuasion (the use of the bully pulpit if you will) are successful should, from a First Amendment perspective, be irrelevant.

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