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Legal Sidebar

# Louisiana Court Rules on Government Communications with Social Media Companies

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On July 4, 2023, a Louisiana federal district court entered a preliminary injunction in *Missouri v. Biden*, preventing a number of executive branch agencies and employees from communicating with social media companies in certain ways. The court cited free speech concerns with prior government communications that allegedly led to the censorship of third parties on private social media platforms. The injunction is broad: it prevents the agencies—including the Centers for Disease Control and Prevention (CDC), the Census Bureau, the Federal Bureau of Investigation (FBI), and the Department of Justice—from encouraging social media companies to remove or restrict "content containing protected free speech." The injunction contains exceptions for certain communications relating to criminal activity, national security, election misinformation, and "permissible public government speech," among other things. The order bars prohibited government communications with all "social media companies," an undefined term. It may thus implicate the same types of concerns commentators have previously raised about nationwide injunctions that bar government enforcement actions against non-parties.

The U.S. Court of Appeals for the Fifth Circuit has now entered a temporary administrative stay preventing enforcement of the order during the government's appeal of the ruling. The case is set for oral argument at the Fifth Circuit on August 10. This Sidebar discusses the legal basis for the preliminary injunction in *Missouri v. Biden*, focusing on the First Amendment concerns raised by the plaintiffs.

## Legal Background: First Amendment and Government Coercion or Encouragement

The First Amendment to the U.S. Constitution prevents the government from "abridging the freedom of speech." The First Amendment generally does not restrict private parties absent special circumstances. Accordingly, as a prior Legal Sidebar discussed, a number of courts have dismissed lawsuits attempting to challenge the actions of private social media companies under the First Amendment. Users whose content has been removed or restricted have challenged these restrictions on their speech, but without government action, courts have said these private content moderation actions do not implicate the First Amendment. Some plaintiffs, though, have alleged the government coerced or encouraged the private company into restricting their content, asserting a type of informal pressure sometimes known as "jawboning."

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These lawsuits have relied on Supreme Court jurisprudence recognizing that private conduct can be attributed to the government "when the government compels [a] private entity to take a particular action." The Supreme Court has outlined a variety of different "state action" tests to determine when the government (the "state") is sufficiently involved in private action to trigger constitutional protections. Among other tests, the Court has said "state action" may be present if a private action results from the government's "exercise of coercive power," if the government "provides significant encouragement," or "when a private actor operates as a willful participant in joint activity with" the government. Under these circumstances, a person harmed by private action might attempt to sue either the private actor or the government for violating the Constitution.

Two primary Supreme Court cases have discussed when informal government action—that is, action short of a regulatory requirement—may create compulsion allowing a person to sue the government for compelled private action. First, in *Skinner v. Railway Labor Executives' Association*, the Court held that one federal scheme governing (but not requiring) drug tests of private railway employees contained "clear indices of the Government's encouragement, endorsement, and participation." Among other provisions, the law required employees to submit to drug tests if railroads decided to institute them. Second, *Bantam Books, Inc. v. Sullivan* provides an example of informal government coercion. That case challenged a state commission formed "to educate the public" about "obscene, indecent, or impure" materials. The state argued there could be no constitutional issue where the commission "simply exhorts booksellers and advises them of their legal rights" with respect to material deemed objectionable by the commission. The Court disagreed with this characterization of the commission's actions. Although the commission had not "seized or banned books," it had exercised "informal sanctions": it sent letters that notified distributors they were carrying objectionable materials, reminded them of the commission's duty to make prosecution recommendations to the state Attorney General, and informed them that copies of the lists of objectionable publications were circulated to local police departments. In addition, according to one distributor, police officers would show up to ask what actions the distributor had taken in response to the notice. Under these circumstances, the Court said distributors' compliance with the commission's directives "was not voluntary." Instead, the commission's operations created a "form of effective state regulation" that did not comply with the First Amendment.

Informal government influence might not always convert private action into government action, however. The Supreme Court has said "[m]ere approval of or acquiescence in" private action will not trigger constitutional protections. The Court has also suggested the need for a somewhat specific connection between government involvement and the "specific" private action challenged by the plaintiff. Further, the Supreme Court has recognized that the First Amendment is not implicated if the government is speaking for itself. This "government speech doctrine" holds that when the government is speaking on its own behalf, it can engage in content and viewpoint discrimination, which would ordinarily be impermissible in regulations of private speech.

In addition to these few Supreme Court cases, a number of lower court cases have distinguished between governments' "attempts to convince and attempts to coerce." As in *Bantam*, these lower court cases consider when the government violates the First Amendment by pressuring a private party to restrict the speech of other private parties. One trial court recognized that government "jawboning" can violate the First Amendment if a private action restricting others' speech is "caused substantially by government pressure," so that the private party is no longer making an "independent decision." Lower courts have said coercion is present if a government statement "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." For instance, a federal appeals court found impermissible coercion where a local elected official sent a letter that implicitly threatened to "use his official power to retaliate" against a billboard company that hosted advertisements containing "offensive" messages. Another federal appeals court concluded that a sheriff violated the First Amendment when he sent a "cease and desist" letter implicitly threatening to officially encourage government investigation and prosecution of credit card companies unless they cut off their

relationship with Backpage.com. In contrast, federal appeals courts have found no violation where government actors did not suggest any "adverse consequences" that might follow from noncompliance. Whether a government actor has "regulatory authority" is another relevant factor, and one court rejected a constitutional claim where the government actor had no "authority to censor publications."

## *Missouri v. Biden*: Background

The plaintiffs in *Missouri v. Biden* are the States of Missouri and Louisiana as well as a number of individuals who allege social media platforms restricted or removed their speech on the platforms. (Among other allegations, the states raised *parens patriae* claims—a special type of action available to states who sue on behalf of their citizens.) Although the asserted injuries stem from *private* platforms allegedly removing or restricting online content, the plaintiffs sued the *federal government* under the First Amendment alleging, generally, that the government coerced or significantly encouraged the social media companies to remove content. There are more than 50 defendants, including a number of agencies as well as individual defendants such as President Biden, Alejandro Mayorkas, and FBI agents.

More than 80 pages of the trial court's opinion justifying the preliminary injunction relay the plaintiff's factual allegations. The allegations relating to government conduct are wide-ranging. For instance, the court cited emails in which White House officials specifically asked Twitter to remove "an anti-COVID-19 vaccine tweet" from a non-plaintiff as well as a "parody account" of President Biden's granddaughter. Outside of White House officials, the court highlighted multiple instances in which Facebook and Google employees informed the Surgeon General's office about the spread of disinformation on their platforms, for example, and a CDC official who had weekly meetings with Facebook, apparently about COVID-19 misinformation. In addition to these direct contacts, the court also cited general public statements made by executive officials, such as a press conference where the White House Communications Director raised broader concerns about misinformation on social media platforms without mentioning specific content and public media statements in which officials from the National Institutes of Health spoke out against a "declaration" authored by two of the plaintiffs.

Although the individual plaintiffs primarily alleged that private social media platforms censored their speech about COVID-19, at least one plaintiff raised claims that the platforms had removed his speech about election integrity, among other things. The court discussed factual allegations that, for example, the FBI met with social media companies to raise concerns about potential foreign interference in elections and the possibility of so-called "hack and leak" operations. The court also mentioned that the FBI flagged specific posts containing "alleged election disinformation" for social media platforms.

Other trial courts previously ruled that potentially similar allegations did not suffice to create state action that implicated the First Amendment. Further, in March 2023 in *O'Handley v. Weber*, the U.S. Court of Appeals for the Ninth Circuit rejected allegations that the Secretary of State worked with Twitter to unconstitutionally censor a user's tweets. The lawsuit claimed the Secretary of State "entered into a collaborative relationship with Twitter in which state officials regularly flagged tweets with false or misleading information for Twitter's review and that Twitter responded by almost invariably removing the posts in question." The Ninth Circuit concluded the plaintiff had failed to show the presence of state action. Rejecting the claims of coercion, the court held there was no "threat" from any government official. According to the court, the government did not even encourage the private action, since it "offered Twitter no incentive for taking down the post that it flagged." The court said the First Amendment does not inhibit government 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." In the court's view, that standard was satisfied since "Twitter complied with the request under the terms of its own content-moderation policy and using its own independent judgment."

## *Missouri v. Biden*: Opinion on Preliminary Injunction

In its opinion justifying the preliminary injunction in *Missouri v. Biden*, the Louisiana district court concluded that, if the plaintiffs' allegations were true, the federal government "blatantly ignored the First Amendment's right to free speech."

One of the critical issues for the court to consider was whether the government had "compel[led] the private entity to take a particular action." Among other claims, the federal defendants in *Missouri v. Biden* argued that there was no reason to conclude "the social-media platforms made the disputed content-moderation decisions because of government pressure." The trial court disagreed, saying that government officials had "extensive contact . . . via emails, phone calls, and in-person meetings," and this contact "seemingly resulted in an efficient report-and-censor relationship." The plaintiffs' proposed findings of fact did allege that government officials directly communicated with social media companies about all of the specific content moderation decisions affecting the plaintiffs, but the court concluded the general allegations were nonetheless sufficient to suggest the plaintiffs might be able to prove "a causal connection" between the government's actions and the plaintiffs' injuries. Further, in contrast to the holding in *O'Handley v. Weber*, the court in *Missouri v. Biden* said it "makes no difference what decision the social-media companies would have made independently of government involvement." In this court's view, the dispositive issue was the *government's* actions: since the social media companies were "not defendants in this proceeding," the court's "only focus" was on the actions of the government.

Focusing on those government actions, the court acknowledged that the government "cited many cases in support of their argument that plaintiffs have not shown significant coercion or encouragement," including *O'Handley v. Weber*—but the court "disagree[d]" with the government's view of the case. Instead, the court concluded the plaintiffs had alleged the government provided "significant encouragement" for social media companies to suppress "protected free speech postings by American citizens," implicating the First Amendment. As discussed above, prior cases in this area generally required plaintiffs to show some threat of regulatory action or other punishment accompanied by regulatory authority. The Louisiana trial court did not identify specific threats of regulation or punishment from most of the government defendants but said generally that (for example), the defendants "met with social-media companies to both inform and pressure them to censor content protected by the First Amendment."

One exception to these generalized allegations of "pressure" was with respect to the White House defendants. There, the court detailed specific actions that it believed demonstrated coercion, including, for instance, statements where staffers said the White House had been "considering [its] options on what to do about it." The court concluded the executive branch defendants "likely . . . had the power to amend" federal statutes governing the social media companies' liability, as the defendants "combined their threats to amend [the law] with the power to do so by holding" the presidency and a majority in Congress.

## *Missouri v. Biden*: Subsequent Proceedings

The government has appealed the ruling to the Fifth Circuit. It also filed motions with both the trial court and the Fifth Circuit seeking to stay the preliminary injunction pending the appeal. *Preliminary* injunctions are designed to be temporary relief that will stand only until a court can enter final relief. Here, the federal government sought to pause the order even before the trial court can consider whether to grant a permanent injunction. The trial court denied the motion to stay the appeal, repeating its original reasons for entering the injunction. However, the Fifth Circuit summarily granted a stay pending appeal. The Fifth Circuit's order does not necessarily signal the appellate court's view on the merits of the case.

The Fifth Circuit has set oral argument on the preliminary injunction for August 10, 2023, and the federal government's brief is currently due on July 25. The government will likely expand on some of the objections it raised in its motion for a stay, including arguments that the trial court's preliminary injunction is unclear and overbroad, potentially sweeping in lawful government speech.

On July 24, the trial court granted a motion to consolidate the case with a similar suit filed by Robert F. Kennedy Jr., among other plaintiffs.

### Considerations for Congress

Some Members of Congress have expressed concern about possible government involvement with social media content moderation decisions. A number of bills have been introduced that would prevent government officials from acting "to censor any private entity," or require the disclosure of communications between the federal government and social media companies related to content moderation. The bills that prevent "influencing" or "direct[ing]" private entities to take certain actions may be less demanding than First Amendment standards of "coercion" or "significant encouragement," prohibiting certain government actions regardless of whether a private party can meet current constitutional standards for proving state action. The preliminary injunction in *Missouri v. Biden*, however, reflects the willingness of at least one court to find the presence of "significant [government] encouragement" in violation of the First Amendment in circumstances beyond those previously recognized by courts as amounting to state action. The ruling thus might represent a lower First Amendment standard more similar to these enhanced statutory protections.

If other trial courts agreed with the reasoning of the opinion in *Missouri v. Biden*, the implications of the ruling could resonate not only in other First Amendment lawsuits, but also in other constitutional contexts involving the state action doctrine—for instance, the Fourth Amendment, which was at issue in the *Skinner* case discussed above.

Additionally, although the injunction in *Missouri v. Biden* is currently stayed, the opinion and order could nonetheless set a precedent for similar restrictions on other government officials, possibly including legislators, who seek to communicate with social media companies about their content moderation policies. A number of courts have previously rejected lawsuits alleging that legislators violated the First Amendment by sending letters to private companies about content related to COVID-19. In contrast to those prior rulings, which found insufficient evidence of regulatory threats, the ruling in *Missouri v. Biden* could suggest that similar types of activities could create government "pressure" that violates the First Amendment. However, as discussed briefly in this prior Legal Sidebar, Members' own free speech rights or the Constitution's Speech or Debate Clause might still prevent liability in some circumstances.

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