

# Missouri v. Biden

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83 F.4TH 350 (5TH CIR. 2023)

*Missouri v. Biden* involved plaintiffs who alleged injuries by Defendants in the censorship and moderation of their expressions on social media platforms regarding, *inter alia*, the COVID-19 pandemic and the 2020 United States Presidential Election. The District Court for the Western District of Louisiana issued an injunction broadly prohibiting government officers from communicating with social media companies regarding concerns about content on their platforms, which the Fifth Circuit significantly narrowed.<sup>1</sup> The Supreme Court granted certiorari to hear the case on three questions regarding: (1) Article III standing, (2) the state action doctrine, and (3) the breadth of the preliminary injunction.<sup>2</sup>

## I. BACKGROUND

Plaintiffs Dr. Jayanta Bhattacharya and Dr. Martin Kulldorff, both medical research professionals, co-authored the “Great Barrington Declaration” on October 4, 2020, which professed criticism of government authorities for imposing restrictions on personal conduct during the COVID-19 pandemic.<sup>3</sup> They alleged that the declaration itself was “deboosted” on social media platforms such as Google, Reddit, Facebook, and others, whereby users searching for the document were directed to content in opposition and that URLs to the document were removed.<sup>4</sup> Plaintiffs also alleged that videos of them discussing the declaration were removed and that they were denied access to personal accounts.<sup>5</sup>

Plaintiff Jill Hines, an advocate for consumer and human rights in Louisiana, engaged in advocacy during the COVID-19 pandemic, demanding that government-issued mandates requiring children to wear face masks be rescinded.<sup>6</sup> Hines alleged that such advocacy expressed on social media platforms was removed by Facebook.<sup>7</sup> Similarly, plaintiff Dr. Aaron Kheriaty, a psychiatrist, who engaged in advocacy against government-issued

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1. *Missouri v. Biden*, 83 F.4th 350, 362 (5th Cir. 2023) [hereinafter *Biden II*], *cert. granted sub nom.*, *Murthy v. Missouri*, 144 S. Ct. 7 (2023).

2. *Murthy v. Missouri*, 144 S. Ct. 7 (2023).

3. *See Missouri v. Biden*, No. 3:22-CV-01213, 2023 WL 4335270, at \*4 (W.D. La. July 4, 2023) [hereinafter *Biden I*].

4. Declaration of Dr. Jayanta Bhattacharya at 5, *Biden I*, No. 3:22-CV-01213 (W.D. La. June 14, 2022), ECF No. 10-3; *Biden II*, 83 F.4th at 367.

5. *See Biden II*, 83 F.4th at 366-67.

6. *See Biden I*, 2023 WL 4335270, at \*3.

7. *See id.*

restrictions on personal movement (termed “lockdowns”) and vaccination mandates during the pandemic, alleged that such advocacy was limited in its reach on social media platforms X (formerly Twitter) and YouTube.<sup>8</sup>

Plaintiff Jim Hoft, who operates a news website known as “The Gateway Pundit” located in St. Louis, Missouri, published several content items on social media that were critical of defendant Dr. Anthony Fauci, election laws in Virginia regarding the 2020 presidential election, as well as a video alleging irregularities in said election.<sup>9</sup> Hoft alleged that such content on social media platforms was restricted, as was his access to the accounts used to publish them.<sup>10</sup>

State plaintiffs, Missouri and Louisiana, asserted an interest in ensuring the free transmission of information within their jurisdiction and that their citizens are informed of public policy decisions and may exercise their constitutional rights.<sup>11</sup> They alleged that the actions of social media companies harmed their citizens by precluding them from exercising such rights, which grants them the right to sue *parens patriae*.<sup>12</sup>

The defendants include Dr. Anthony Fauci, President Joe Biden, U.S. Surgeon General Vivek Murthy, multiple White House officials, and various executive departments and agencies.<sup>13</sup> Defendants are alleged to have “coerced” social media companies to “censor disfavored speech and speakers,” and coordinated with them to remove such content posted by the plaintiffs and third parties.<sup>14</sup> This coercion took the form of communications between officials and company executives and public statements compelling obedience with efforts to reduce “misinformation” and “disinformation,” particularly regarding the efficacy of vaccinations against COVID-19.<sup>15</sup> One such measure, plaintiffs contend, was the vow to revisit social media companies’ immunity from suit under Section 230 of the Communications Decency Act (CDA).<sup>16</sup>

The state plaintiffs initially filed their complaint in the U.S. District Court for the Western District of Louisiana on May 5, 2022.<sup>17</sup> The plaintiffs later sought a preliminary injunction on the defendants’ contacting social media companies regarding objections to content.<sup>18</sup> Defendants then filed a motion to dismiss.<sup>19</sup> The complaint was amended three times, enabling

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8. *See id.*

9. *See id.* at \*3-4.

10. *See id.*

11. *See id.*

12. *See* Third Amended Complaint at 137, *Biden I*, No. 3:22-CV-01213 (W.D. La. May 5, 2023), ECF No. 268.

13. *See Biden I*, 2023 WL 4335270, at \*5-37.

14. *Id.* at \*2, \*4, \*5.

15. *Id.* at \*6-14.

16. *See id.* at \*4.

17. *See* Complaint, *Biden I*, No. 3:22-CV-01213, 2022 WL 1431257 (W.D. La. May 5, 2022), ECF No. 1.

18. *See* Motion for Preliminary Injunction, *Biden I*, No. 3:22-CV-01213 (W.D. La. June 14, 2022), ECF No. 10.

19. *See* Memorandum in Support of Defendants’ Motion to Dismiss, *Biden I*, No. 3:22-CV-01213 (W.D. La. July 12, 2022), ECF No. 35-1.

individual plaintiffs to join the suit.<sup>20</sup> The district court denied the defendants' motion to dismiss in part, dismissing claims for relief against President Biden and replacing him with U.S. Surgeon General Vivek Murthy as lead defendant.<sup>21</sup> On July 4, 2023, the district court granted the plaintiffs' proposed injunction.<sup>22</sup>

Defendants appealed the injunction to the U.S. Court of Appeals for the Fifth Circuit.<sup>23</sup> The Fifth Circuit significantly narrowed the injunction covering only certain plaintiffs and reversed all provisions except a bar on coercing companies to remove content by intimating possible punishment.<sup>24</sup> The injunction was affirmed on rehearing and Defendants moved the Supreme Court to stay the injunction. On October 20, 2023, the Court granted the stay and issued a writ of certiorari.<sup>25</sup>

## II. ANALYSIS

### A. Do respondents have Article III standing to sue?

The government challenged the standing under Article III of the U.S. Constitution of both the individual plaintiffs and state plaintiffs in the case.<sup>26</sup> Both Defendant-Petitioners and Plaintiff-Respondents based their claims of standing upon the Article III standing requirements first set out in *Lujan v. Defenders of Wildlife*, which establishes factors to assess standing. The first factor requires "a concrete and particularized injury in fact" that is "traceable to the actions of the defendant[s]," which is the second factor. The injury must be "likely to be redressed" by relief granted by a "favorable judicial decision," the third factor.<sup>27</sup> The states, additionally, asserted *parens patriae* standing.<sup>28</sup>

The Fifth Circuit ruled on the standing claims in favor of the plaintiffs. On the first factor, it ruled that the "chilling" effect on future speech by the content moderation decisions established a continuous injury-in-fact.<sup>29</sup> On the second factor, the Fifth Circuit relied on a theory of traceability articulated by the Court in *Department of Commerce v. New York* in 2019, that a likely predictable reaction by a third party to a defendant's conduct is sufficient to establish a causal link between plaintiffs' injuries and the defendant.<sup>30</sup> In this

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20. See Third Amended Complaint at 137, *Biden I*, No. 3:22-CV-01213 (W.D. La. May 5, 2023), ECF No. 268.

21. See *Biden I*, No. 3:22-CV-01213, 2022 WL 2825846 (W.D. La. July 12, 2022).

22. See *Biden I*, 2023 WL 4335270, at \*73.

23. See *Biden II*, 83 F.4th at 362.

24. See *id.* at 399.

25. See *Murthy*, 144 S. Ct. 7.

26. See Brief for the Petitioners at 16-22, *Murthy*, 144 S. Ct. 7 (2023) (No. 23-411).

27. *Id.* at 16 (citing *Carney v. Adams*, 141 S. Ct. 493, 498 (2020) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992))); Brief of Respondents at 18, *Murthy*, 144 S. Ct. 7 (2023) (No. 23-411).

28. Third Amended Complaint, *Biden I*, No. 3:22-CV-01213 (W.D. La. May 5, 2023), ECF No. 268.

29. *Biden II*, 83 F.4th at 368.

30. See *id.* at 370-71 (citing *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2561 (2019)).

case, it ruled that the government's continued advocacy for social media companies to restrict certain speech would likely constitute such a predictable reaction, with only "likelihood" being required to be established as opposed to certainty.<sup>31</sup> On the third factor, the Fifth Circuit concluded that an injunction precluding contact between the government and companies on the issue of content moderation decisions would likely redress the injuries identified.<sup>32</sup>

*B. Did the government's conduct transform content restrictions into state action?*

The plaintiff-respondents in the case have contended that the federal government's alleged coercion of social media companies to restrict content transformed such restrictions into state action that violated their First Amendment rights.<sup>33</sup> Plaintiffs relied on several precedents to suggest that state action had occurred following an exercise of the state's "coercive power," where the state provides significant encouragement, and where the state and the private actor are "joint participants" in said conduct.<sup>34</sup> Plaintiffs also claimed that companies' legal immunity under Section 230 of the CDA merged with these factors to create a "compelling case for state action" and, thus, a likelihood of success on the merits.<sup>35</sup>

The Fifth Circuit addressed the question of state action using the "close nexus test" specified in *Blum v. Yaretsky*, whereby a private party is "significantly encouraged" or coerced "to such a degree that its 'choice'—which if made by the government would be unconstitutional—'must in law be deemed to be that of the State.'"<sup>36</sup> To determine what constitutes "significant encouragement," the Fifth Circuit relied on *Blum* and its own precedent to infer that the state must exercise active and meaningful control over the challenged private action, which may involve "entanglement in a party's independent decision-making," a direct involvement in the decision's execution, extensive oversight.<sup>37</sup> Applying these principles to the defendants in this case, the Fifth Circuit found that the White House, Surgeon General's Office, Federal Bureau of Investigation, Centers for Disease Control and Prevention, and the Cybersecurity and Infrastructure Security Agency significantly encouraged the companies' conduct by virtue of their "consistent and consequential interaction with the platforms" and their "[compliance] with the officials' requests."<sup>38</sup> The court ruled that, over time, the tenor of such requests changed to a point of the platforms capitulating to "state-sponsored pressure."<sup>39</sup>

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31. *Id.* at 371 ("[P]redictability does not require certainty, only likelihood.").

32. *See id.* at 372, 375.

33. *See* Plaintiffs' Memorandum in Support of Preliminary Injunction at 43, *Biden I*, No. 3:22-CV-01213, 2022 WL 3444621 (W.D. La. June 14, 2022), ECF No. 15.

34. *Id.* 43-44.

35. *Id.* at 42, 50.

36. *Biden II*, 83 F.4th at 373-74 (quoting 457 U.S. 991, 1004 (1982)).

37. *Id.* at 375 (citing *Blum*, 457 U.S. at 1004.).

38. *Id.* at 387.

39. *Id.*

Regarding coercion, the Fifth Circuit employed a four-factor test used by the Second Circuit in a recent case, *National Rifle Association v. Vullo*, to establish whether the government's conduct could be "reasonably construed as intimating a threat."<sup>40</sup> Regarding the first factor, which looks at "word choice and tone," the Fifth Circuit examined the record to determine that the officials' communiques were "on-the-whole intimidating" and involved "inflammatory, and hyper-critical phraseology," that amounted to them being "phrased virtually as orders."<sup>41</sup> On the second factor, regarding how the companies perceived government communications, the Fifth Circuit reviewed the record to conclude that the platforms were influenced to remove content specifically identified by government officials.<sup>42</sup> The Fifth Circuit noted that "when they asked for the platforms to be more aggressive, 'interven[e]' more often, take quicker actions, and modify their 'internal policies,' the platforms did."<sup>43</sup> Regarding the third factor of a state entity's coercive authority over the companies, the Fifth Circuit, in considering whether a "reasonable person would be threatened" by the government's statements, concluded that they would.<sup>44</sup> The final factor, concerning a reference to adverse consequences, was established by references to the record where officials threatened that the platforms would be "held accountable" with "fundamental reforms," such as a rescinding of immunity.<sup>45</sup> The court concluded that the communications were state action and violated the First Amendment.<sup>46</sup>

*C. Are the terms and breadth of the injunction improper?*

The defendant-appellants in the case asked the Supreme Court to consider whether the injunction's terms, as well as its breadth, were proper. The district court's injunction, as modified by the Fifth Circuit, enjoined several defendants from demanding the removal of content involving First Amendment-protected speech.<sup>47</sup> The defendants argued that the injunction was "impermissibly overbroad" in its directives to government agencies and did not "state its terms specifically," thus arguing that the injunction was violative of Federal Rule of Civil Procedure 65.<sup>48</sup>

In this respect, the Fifth Circuit agreed with the defendants, noting that the injunction was overbroad in that it prohibited the government from engaging in legal conduct.<sup>49</sup> The Fifth Circuit found that the injunction's provisions that barred "urging, encouraging, pressuring, or inducing" social media companies to restrict conduct was not unconstitutional, unless it

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40. *Id.* at 379-80 (citing *Kennedy v. Warren*, 66 F.4th 1199, 1211-12 (9th Cir. 2023)); see also *Nat'l Rifle Ass'n of Am. v. Vullo*, 49 F.4th 700 (2d Cir. 2022).

41. *Id.* at 383.

42. See *Biden II*, 83 F.4th at 384.

43. *Id.* at 383-85.

44. *Id.*

45. *Id.* at 385.

46. See *id.* at 392.

47. See *id.*

48. *Biden I*, 2023 WL 4335270, at \*69.

49. See *Biden II*, 83 F.4th at 394.

satisfied the “close nexus test” described, here, in Section II-B.<sup>50</sup> Regarding vagueness, it observed that, for an official, “[t]here would be no way for a federal official to know exactly when his or her actions cross the line” into impermissible conduct.<sup>51</sup> The court also noted that the injunction’s provisions barring government contact with several private non-parties might have impermissibly implicated these group’s First Amendment rights.<sup>52</sup> Hence, the Fifth Circuit vacated all but one prohibition of the injunction.

The remaining prohibition, identified as “provision six,” is modified *suo motu* by the Fifth Circuit to avoid encompassing any First Amendment protected speech by the defendants.<sup>53</sup> Relying, once again, on the provisions of the “close nexus test,” the Fifth Circuit’s new language for the injunction barred the state defendants from actions that “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.”<sup>54</sup> It specified “guiding inquiries” for the defendants to determine whether their conduct runs afoul of the modified injunction, which are the standards of reasonableness in the interpretation of a threat as well as active and meaningful control by the state over platforms’ content decisions.<sup>55</sup>

### III. CONCLUSION

For these reasons, *inter alia*, the Fifth Circuit modified the preliminary injunction. The Court’s grant of certiorari attracted a dissent from Justice Alito, joined by Justices Thomas and Gorsuch. They argued that the defendants did not make a “clear showing of irreparable harm” as required for a stay.<sup>56</sup> Oral arguments in the case took place on March 18, 2024.<sup>57</sup>

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50. *Id.* at 374, 395.

51. *See id.* at 395.

52. *See id.* at 396-97.

53. *Id.*

54. *Id.*

55. *Biden II*, 83 F.4th at 397.

56. *Murthy*, 144 S. Ct. at 8 (Alito, J., dissenting).

57. *See* Docket for No. 23-411, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/docket/docketfiles/html/public/23-411.html> [<https://perma.cc/U8MG-STXQ>] (last visited Mar. 18, 2024)