

UC Davis

UC Davis Previously Published Works

Title

The Bully Pulpit or Just Plain Bully: The Uses and Perils of Jawboning

Permalink

<https://escholarship.org/uc/item/14d163rq>

Author

Bhagwat, Ashutosh Avinash

Publication Date

2024-02-16

The Bully Pulpit or Just Plain Bully: The Uses and Perils of Jawboning

Ashutosh Bhagwat¹

Introduction

On July 4, 2023, Chief Judge Terry A. Doughty of the Western District of Louisiana, a Trump appointee, issued an opinion in *Missouri v. Biden*.² This lawsuit was brought by a number of individuals as well as the States of Missouri and Louisiana against various senior officials of the Biden Administration. The plaintiffs claim that these officials violated the First Amendment by working with and pressuring social media firms to remove or deemphasize specific forms of content on their social media platforms. Judge Doughty ruled in favor of the plaintiffs on essentially all issues, including standing, finding that efforts by the Biden Administration officials to successfully convince/cajole/coerce (the proper characterization is disputed) the major social media platforms to suppress certain content did indeed violate the First Amendment.³ As a result, he issued a sweeping preliminary injunction forbidding an extraordinarily broad range of officials and government entities from having any contact with social media platforms for the purpose of inducing the platforms to suppress content.⁴ The enjoined individuals include a number of senior White House officials including Press Secretary Karine Jean-Pierre, four entire cabinet Departments (HHS, Justice, Homeland Security, and State), Surgeon General Vivek Murthy, the Centers for Disease Control & Prevention (“CDC”) and named officials within it, the National Institute of Allergy & Infectious Diseases (“NIAID”) and named officials within it, the Census Bureau, and the FBI (redundantly, since the FBI is located within the Justice Department).⁵

On September 8, 2023, a unanimous panel of the Fifth Circuit in a *per curiam* opinion partially affirmed and partially reversed Judge Doughty’s decision.⁶ In particular, the panel originally removed some of the defendants, including NIAID, the State Department, and the Cybersecurity and Infrastructure Security Agency (“CISA”), an entity within the Department of Homeland Security, from the reach of the injunction.⁷ But then on October 3, 2023, the same Fifth Circuit panel, after rehearing, withdrew its original opinion and issued a slightly modified opinion which added CISA to the list of agencies and officials subject to the injunction (though continuing to exclude the other previously-removed defendants).⁸ In all other respects, including in its legal analysis, the new opinion on rehearing was essentially identical to the original panel opinion (all references to the Fifth Circuit opinion henceforth are to the opinion on rehearing). The panel also substantially

¹ Distinguished Professor and Boochever and Bird Endowed Chair for the Study and Teaching of Freedom and Equality, UC Davis School of Law (contact: aabhagwat@ucdavis.edu). Thanks to

² 2023 WL 4335270 (W.D. La. July 4, 2023).

³ *Id.* at *41.

⁴ *Id.* at *73.

⁵ *Id.* at *73 n.2.

⁶ *State v. Biden*, 80 F.4th 641 (5th Cir. 2023).

⁷ *Id.* at 656–657.

⁸ *Missouri v. Biden*, 83 F.4th 350, 391 (5th Cir. 2023).

reduced the breadth of Judge Doughty’s sweeping injunction, rejecting nine of the ten prohibitions adopted by Judge Doughty and narrowing the language of the remaining prohibition.⁹ But importantly, the panel did affirm an injunction against the White House, the Office of the Surgeon General, the CDC, the FBI, and CISA, as well as numerous named officials in those organizations,¹⁰ prohibiting those defendants from taking any action, “formal or informal, directly or indirectly, to coerce or significantly encourage social media companies to remove, delete, suppress, or reduce, including through their algorithms, posted social media content containing protected free speech.”¹¹

Finally, in the most recent event in this legal saga as of this writing, the United States Supreme Court stepped in. On October 20, 2023, the Court acted upon an application for a stay of the Fifth Circuit decision filed by the government defendants.¹² The Court, by a 6-3 vote (with Justices Alito, joined by Thomas and Gorsuch, dissenting) granted the stay. It also treated the application for stay as a petition for a writ of certiorari, and granted review, thereby ensuring that the Court will hear the case on the merits during the October 2023 Term.

In this essay, I will consider the legal justifications, or lack thereof, for the Fifth Circuit’s injunction. More broadly, I will consider when the law should attribute the actions of private persons (here the social media platforms) to government officials who convince/cajole/coerce those persons into taking actions which, if done by the government, would violate the Constitution. I will also consider the broader propriety of such governmental conduct in light of free speech principles, regardless of technical constitutionality.

Part I will briefly summarize Judge Doughty’s and the Fifth Circuit’s factual findings. Part II will summarize and analyze the legal doctrine governing the state-action issue in the *Missouri v. Biden* litigation, and evaluate Judge Doughty’s and the Fifth Circuit’s application of it (the two courts’ legal analyses are quite similar). Part III will consider more broadly when “jawboning” or other forms of government speech and pressure *should* be held to cross the constitutional line. Finally, Part IV will apply that analysis to the facts of *Missouri v. Biden*.

I. The Factfinding in *Missouri v. Biden*

Judge Doughty’s opinion in *Missouri v. Biden* is notably long (the slip opinion is 162 pages in length). I will begin with it because the Fifth Circuit panel’s recitation of facts largely summarizes Judge Doughty’s, which is unsurprising given the trial court’s role as factfinder. The opinion starts off with some standard First Amendment platitudes and rather unconvincing claims of political neutrality (unconvincing because most of the opinion is a masterwork of conservative grievances). The bulk of the opinion then recites facts from the record documenting contacts between officials across the Biden Administration and various social media company executives regarding content that the

⁹ *Id.* at 395–97.

¹⁰ *Id.* at 398–99.

¹¹ *Id.* at 397.

¹² *Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023), *cert. granted sub nom. Murthy v. Missouri*, 2023 WL 6935337 (U.S. Oct. 20, 2023) (No. 23-411).

government officials wanted social media platforms to either entirely remove, or deprioritize so that the content, even though available by searching the platform, would not automatically be offered up to users. While it is impossible to do justice to the plethora of evidence presented in this space, I will briefly summarize it.

First, let us consider the nature of the contacts described. The evidence Judge Doughty recites (which is largely undisputed) shows that a number of entities in the executive branch, including the White House, the Surgeon General's Office, the CDC, NIAID, and the FBI, had specific officials dedicated to working with social media platforms to suppress or control harmful content.¹³ Those officials often privately urged social media executives to suppress specific content they deemed harmful, including especially disinformation about COVID treatments and vaccines—though the FBI was focused on foreign-based election disinformation rather than COVID. Most of this back-and-forth appears to have been cooperative and friendly, with the important exception of certain White House officials (notably Rob Flaherty, then the Deputy Assistant to the President and Director of Digital Strategy) whose communications were often hectoring to the point of bullying.¹⁴ Some of these officials, especially in the White House and the Surgeon General's office, also regularly requested (or in the case of the White House, more accurately demanded) reports from social media firms documenting their efforts to suppress COVID disinformation.¹⁵

In addition to these private contacts, Judge Doughty also recites evidence that senior Biden Administration officials, including the president, regularly publicly berated social media companies for their failure to make sufficient efforts to suppress harmful content. Judge Doughty's opinion gives the impression that disclosing these statements is some sort of revelation, which is rather odd given that all of these statements were very much in the public record. In particular, Judge Doughty regularly cites President Biden's famous public statement on July 16, 2021, that social media firms were "killing people" by failing to suppress vaccine disinformation.¹⁶ He also emphasizes a vague statement by White House Press Secretary Jen Psaki at a press conference suggesting that social media firms might face "legal consequences" for contributing to the spread of COVID misinformation.¹⁷

In addition to public statements from the White House, Judge Doughty also recites public statements criticizing social media from other government officials, notably Surgeon General Vivek Murthy and then-Director of NIAID Anthony Fauci. For example, Judge Doughty extensively discusses a press conference Murthy held on July 15, 2021, during which Murthy blamed social media platforms for the spread of health disinformation, described by Murthy as "poison," which he said was costing lives.¹⁸ On the same day, Murthy's office also issued a health advisory that called on platforms to take steps to reduce the availability of misinformation, including notably urging platforms to tweak their algorithms to reduce the spread of such content.¹⁹ And on numerous later occasions,

¹³ *Missouri v. Biden*, 2023 WL 4335270 (W.D. La. July 4, 2023).

¹⁴ *Id.* at *5–11.

¹⁵ *Id.* at *15–18.

¹⁶ *Id.* at *11, *14, *16, *45, *46.

¹⁷ *Id.* at *11; *see also id.* at *13.

¹⁸ *Id.* at *15–16.

¹⁹ *Id.*

Murthy continued to publicly criticize (or in Judge Doughty’s words, “chastise”) platforms for permitting the spread of health misinformation.²⁰

In discussing these events, the opinion quotes a senior advisor to Murthy, Eric Waldo, as having “admitted” that “Murthy used his ‘bully pulpit’ to talk about health misinformation and to put public pressure on social media platforms,”²¹ somewhat bizarrely implying that this public campaign was some sort of a secret. Judge Doughty also quotes Waldo as agreeing that Murthy’s public calls for social media to have “greater transparency and accountability” regarding the spread of harmful content was in fact a “threat of consequences”²²—though Judge Doughty fails to explain what conceivable authority or power the Office of the Surgeon General could have over behemoth social media firms. Finally, in discussing the Surgeon General’s actions, the opinion also places great weight on a public Request for Information (“RFI”) issued by Murthy’s Office on March 3, 2022, asking social media platforms to provide data and information about the spread of misinformation.²³ Indeed, in the (rather cursory) legal analysis portion of Judge Doughty’s opinion, he explicitly relies on the issuance of the RFI as well as Murthy’s public statements to support his conclusion that the Surgeon General’s Office “exercised coercion and significant encouragement” against social media platforms.²⁴

Judge Doughty’s opinion also extensively discusses Dr. Anthony Fauci’s public statements regarding COVID. He begins by reciting, seemingly approvingly, the plaintiffs’ conspiratorial claim that Dr. Fauci was seeking to suppress the lab-leak theory of COVID’s origins (the theory that COVID-19 came from a lab in Wuhan, China) because NIAID “had funded ‘gain-of-function’ research at Dr. Fauci’s direction” at the relevant Wuhan lab. The opinion then extensively recounts Fauci’s public statements attacking the lab-leak theory, and concludes by noting that “Twitter and Facebook censored the lab-leak theory of COVID-19.” Regarding Fauci’s involvement in the platforms’ actions, the opinion states, with a clear tone of skepticism, that “Dr. Fauci claims he is not aware of any suppression of speech about the lab-leak theory on social media, and he claims he does not have a Twitter or Facebook account.”²⁵ Finally, this section of the opinion closes by discussing a video Dr. Fauci made for use on Facebook’s “Coronavirus Information Hub,” as well as several live-streams on Facebook about the virus.²⁶

Other than the lab-leak theory, the rest of Judge Doughty’s discussion of the facts surrounding Dr. Fauci and NIAID discusses a number of public statements. In one series of statements, Dr. Fauci publicly opposed the use of hydroxychloroquine to treat COVID-19. Judge Doughty also recounts Fauci’s public statements attacking something called “The Great Barrington Declaration,” a public declaration by three epidemiologists opposing COVID-related lockdowns. And in a particularly pointed part of the opinion, Judge Doughty recounts that Dr. Fauci had, early in the COVID-19 pandemic, expressed public skepticism

²⁰ *Id.* at *17–*18.

²¹ *Id.* at *13.

²² *Id.* at *15.

²³ *Id.* at *18.

²⁴ *Id.* at *48.

²⁵ *Id.* at *24.

²⁶ *Id.*

about masking, but later supported universal masking because of new studies. This section closes with the bland statement that “Dr. Fauci could not identify those studies.”²⁷

The above somewhat-detailed summary should give some sense of the tone of the factual part of Judge Doughty’s opinion. Given limited space, only brief summaries of other elements of his fact-findings are possible. In one important section of the opinion, Judge Doughty strongly emphasizes the concededly critical role that CDC officials played in identifying for Facebook what content the CDC considered to be misinformation, and Facebook’s reliance on CDC guidance (the opinion describes the guidance CDC provided as “scientific information” in quotes).²⁸ He also flags the fact that Facebook granted CDC and Census Bureau officials special access to a misinformation reporting channel,²⁹ and in the analytic section of the opinion relies heavily on the CDC’s role in this regard to find that plaintiffs’ claims against the CDC were likely to succeed.

The Fifth Circuit’s opinion reviewing Judge Doughty is notably less incendiary in tone than the lower court, though the facts it recites are the same. The panel did conclude, however (contrary to Judge Doughty) that the actions of NIAID (including Dr. Fauci) and the State Department were not sufficient to establish a constitutional violation. The panel therefore lifted the injunction against them.³⁰ And, as noted in the Introduction, the Fifth Circuit also sharply reduced the scope of the injunction, rejecting most of Judge Doughty’s language as being both vague, and far broader than necessary to remedy the alleged injuries.³¹ But on the core legal question of whether, on the facts as found by Judge Doughty, social media platforms’ decisions to suppress or reduce the spread of constitutionally protected content was attributable to the government, the court’s analysis largely duplicates Judge Doughty’s. And as such, the court agreed with Judge Doughty’s conclusion that the actions of the remaining defendants violated the First Amendment. So it is to that legal analysis that we will now turn.

II. State Action and Government Speech

The legal issues posed in the *Missouri v. Biden* litigation are complex and controversial. There is no serious doubt, based on the factual record in the case, that extensive amounts of speech on social media platforms had been suppressed or disfavored based on the content or viewpoint expressed in that speech. It is also quite clear that most of the suppressed speech was, even though often factually false, fully protected by the First Amendment, as interpreted by the Supreme Court.³² The difficulty arises because, as all concede and Judge Doughty acknowledges at the start of his analysis, the First Amendment does not prohibit private actors such as social media companies from suppressing speech.³³ Nor did the case raise a typical “state action doctrine” issue, where the question is whether a private party should be deemed a state actor, because the social media platforms

²⁷ *Id.* at *27.

²⁸ *Id.* at *20.

²⁹ *Id.*

³⁰ *Missouri v. Biden*, 83 F.4th 350, 391–92 (5th Cir. 2023).

³¹ *Id.* at 395-97.

³² *United States v. Alvarez*, 567 U.S. 709 (2012).

³³ *Missouri v. Biden*, 2023 WL 4335270 at *41 (W.D. La. July 4, 2023) (citing *Manhattan Community Access Corporation v. Halleck*, 139 S. Ct. 1921, 1928 (2019)).

were not defendants (or, for that matter, litigants) in the case.³⁴ Instead, the question was whether, on these facts, the actions the social media platforms took to suppress speech could be attributed to the defendant government officials, thereby triggering First Amendment scrutiny.

In determining whether such an attribution was appropriate, both Judge Doughty and the Fifth Circuit relied primarily (in the Fifth Circuit's case, exclusively) on a test derived from the Supreme Court's decision in *Blum v. Yaretsky*: the government "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 be deemed that of the State."³⁵ *Blum*, however, is a peculiar case from which to draw a rule of decision for this litigation. Understanding why, however, requires some knowledge of the *Blum* litigation.

Blum arose when a group of nursing home residents in New York State challenged the way in which nursing homes made decisions to transfer patients to a lower level of care. While the nursing homes themselves were private entities, the government was involved because the costs of the care provided to the plaintiffs were reimbursed by New York's Medicaid program. In addition, federal Medicaid regulations required nursing homes receiving Medicaid funds to establish utilization review committees ("URCs"), made up of independent physicians, who would periodically assess whether nursing home patients were receiving the appropriate level of care.³⁶ If a URC determined the level of care was incorrect, it would notify Medicaid officials who would then reduce benefits paid to nursing homes if a lower level of care was recommended. Plaintiffs sued New York state officials who administered Medicaid, claiming that the Due Process Clause entitled them to notice and a hearing before URC determinations were made.³⁷ Crucially, however, by the time the case reached the Supreme Court, the state defendants had already agreed to a consent decree that banned URC-initiated transfers unless patients received more procedural protections. As a result, the only transfers at issue before the Court were transfers initiated by private nursing homes or physicians who were influenced but not bound by URC determinations.³⁸

The *Blum* Court found against the plaintiffs, concluding that state officials had not coerced or significantly encouraged the private transfer decisions.³⁹ Crucially, it did so despite the fact that New York State Medicaid regulations heavily impacted private transfer decisions. Those regulations required nursing homes "to make all efforts possible to transfer patients to the appropriate level of care," and required a physician to complete a state-specified form used to determine the level of care appropriate to patients.⁴⁰ Furthermore, New York law also imposed potentially severe sanctions on nursing homes

³⁴ *Id.* at *41 n.599.

³⁵ 457 U.S. 991, 1004 (1982).

³⁶ *Id.* at 994–95.

³⁷ *Id.* at 996.

³⁸ *Id.* at 999–1000.

³⁹ *Id.* at 1005.

⁴⁰ *Id.* at 1006 (first citing N.Y. COMP. CODES R. & REG. tit. 10, §§ 416.9(d)(1), 421.13(d)(1) (1980); and then citing N.Y. COMP. CODES R. & REG. tit. 10, §§ 416.9(d)(4), 421.13(d)(4) (1980)).

who did not transfer patients who were not at the appropriate level of care.⁴¹ In other words, even though federal and New York state law legally *required* nursing homes and physicians to evaluate appropriate levels of care periodically, using a state-mandated template, and punished nursing homes who failed to provide proper levels of care, the Court *still* found that the ultimate decision to transfer patients to a lower level of care was a private one, not attributable to government officials.

That *Blum* does not support the legal conclusion reached by Judge Doughty and the Fifth Circuit should now be obvious. First, *Blum*'s analysis was conducted in a context in which the operations of the private entities whose actions the plaintiffs wanted to attribute to the government were heavily regulated in almost every respect. It was in this context that the Court put forward the "coercion or significant encouragement" standard. Given the famous lack of regulation of social media platforms by the federal or, in most respects, any government, there are serious reasons to doubt that the same legal standard should apply. And in any event, *Blum* failed to find a constitutional violation in a setting in which state and federal law—which was completely absent in the *Missouri v. Biden* context—heavily impacted the private decisions sought to be attributed to the government.

To be clear, there is no question that the "coercion" aspect of the *Blum* standard, if satisfied, would surely trigger constitutional constraints. Obviously, the government cannot force a private actor to do to another what the government itself is forbidden to do. It cannot legally require or coerce a private detective to conduct a search that, if done by the police would violate the Fourth Amendment.⁴² And just so, it cannot force social media platforms to suppress or otherwise limit the spread of constitutionally protected content. If this was not so, constitutional protections would be little more than Swiss cheese. The interesting issue, however, and the one I will argue is central to the *Missouri v. Biden* case, is whether the government can try and convince or cajole—*i.e.*, give "significant encouragement" to—a private decision it could not command. In the Fourth Amendment context the answer is obvious—it absolutely can. The government regularly requests private entities to share information or evidence that it could not constitutionally subpoena or require release of. The question is whether the same rule should apply in the First Amendment context.

Aside from the standard announced in *Blum*, Judge Doughty's (but not the Fifth Circuit's) analysis also relied heavily upon the Supreme Court's decision in *Burton v. Wilmington Parking Authority*.⁴³ After a conclusory analysis, Judge Doughty found that in addition to satisfying the *Blum* tests, the government officials subject to the injunction were also "joint participants," as defined in *Burton*, with social media platforms in suppressing disfavored content, thereby triggering the First Amendment.⁴⁴ *Burton* was a leading case from the civil rights era, in which plaintiffs challenged racial segregation by a privately owned restaurant located within, and renting from, a publicly owned parking building. On those facts, the Court (over a sharp dissent by Justice Harlan) found that the restaurant's racial segregation constituted state action, in violation of the Equal Protection Clause of the

⁴¹ *Id.* at 1009–10 (first citing 42 CFR § 420.101(a)(2) (1981); and then citing N.Y. COMP. CODES R. & REG. tit. 10, § 414.18 (1978)).

⁴² *Carpenter v. U.S.*, 138 S. Ct. 2206, 2221 (2018).

⁴³ 365 U.S. 715, 728 (1961).

⁴⁴ *Missouri v. Biden*, 2023 WL 4335270 at *54 (W.D. La. July 4, 2023).

Fourteenth Amendment.⁴⁵ In doing so, the Court relied heavily on the fact that the public parking authority that owned the building could have required, in its leases, that businesses do not discriminate based on race, but failed to do so.⁴⁶

Burton does not support the result Judge Doughty reached for two separate reasons. The first is that the cases are factually distinguishable. As noted, the *Burton* Court relied heavily on the state agency's failure to ban racial discrimination by its "partner"/tenant, thereby profiting from the tenant's discrimination (the record showed that a racially integrated restaurant would have been less profitable). But in *Missouri v. Biden*, while it is true that the government did not require platforms to permit harmful falsehoods to remain on their platforms, its failure to do so was obviously not morally problematic in the same way as the state's behavior in *Burton*. To the contrary, any such requirement would, as I have argued elsewhere, almost certainly have itself violated the First Amendment.⁴⁷ As such, the government's failure to act clearly does not create the kind of complicity the Court found in *Burton*.

But finally, *Burton* is also not on point for a more basic reason: it involved racial discrimination, and in particular racial discrimination in the Jim Crow South. Even semi-serious students of the Supreme Court's state-action doctrine know full well that in *Burton*, and its cousin *Shelley v. Kramer*,⁴⁸ the Court stretched the state-action doctrine up to, and in truth probably beyond, its limits in order to permit the law to reach private racial discrimination prior to the enactment of the Civil Rights Act of 1964. In subsequent cases not involving private racial discrimination (which after 1964 was statutorily barred, making constitutional analysis irrelevant),⁴⁹ the Court steadfastly refused to extend the reach of *Burton*. Indeed, the *Burton* Court itself conceded this point, essentially limiting the holding of the case to its specific facts at the very end of its opinion.⁵⁰

Another case Judge Doughty (but again not the Fifth Circuit panel) relied on heavily was *Peterson v. City of Greenville*,⁵¹ which he cited (twice) for the proposition that "when the government has so involved itself in the private party's conduct, it cannot claim the conduct occurred as a result of private choice, *even if the private party would have acted independently*."⁵² But *Peterson* is even more obviously distinguishable from the situation before Judge Doughty (and also, it should be noted, involved private racial segregation during Jim Crow). The case involved civil rights activists who were challenging their trespass convictions after being arrested during a sit-in at a segregated lunch counter.⁵³ Crucially, however, the racial segregation at issue was *mandated by city ordinance*, and so

⁴⁵ *Burton*, 365 U.S. at 724–26.

⁴⁶ *Id.* at 725.

⁴⁷ Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. Free Speech L. 97 (2021).

⁴⁸ 334 U.S. 1 (1948).

⁴⁹ *E.g.*, *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987).

⁵⁰ *Burton*, 365 U.S. at 725–26 ("Owing to the very 'largeness' of government, a multitude of relationships might appear to some to fall within the Amendment's embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present.").

⁵¹ 373 U.S. 244 (1963).

⁵² *Missouri v. Biden*, 2023 WL 4335270 at *42 (W.D. La. July 4, 2023) (emphasis added) (citing *Peterson*, 373 U.S. at 247–48); *id.* at *44.

⁵³ *Peterson*, 373 U.S. at 245.

the trespass convictions were in effect enforcing a clearly unconstitutional local law.⁵⁴ Obviously, there is no law requiring platforms to suppress disinformation (nor could there be consistent with the First Amendment), so the situations are completely different.

Indeed, what is striking about both Judge Doughty's and the Fifth Circuit opinions is that although they cite a litany of cases, in almost all of them the court rejected claims of constitutional violations.⁵⁵ And in the few cases where violations were found, there existed either explicit state law governing the challenged conduct (as in *Peterson*), or clear coercion. Persuasion alone, without an accompanying threat, was never found sufficient. It is telling in this regard that the only Supreme Court case finding a constitutional violation on facts analogous to these (*i.e.*, not involving Jim Crow) is *Bantam Books v. Sullivan*,⁵⁶ a case that the Fifth Circuit cited extensively.⁵⁷ In that case, the Court found that a Rhode Island state commission placed books on an "objectionable" list, and then induced in-state book distributors to suppress the offending books. But that case involved explicit threats of prosecution by the commission,⁵⁸ which a distributor testified was the reason for its compliance with the commission's orders.⁵⁹ Indeed, the Fifth Circuit conceded that in *Bantam Books*, the "coercion [was] obvious."⁶⁰ The case thus provides no support for a finding of a constitutional violation based on government persuasion alone.

The Fifth Circuit opinion, to be fair, concedes that government "coaxing" or "persuasion" alone cannot be enough to attribute private conduct to the government.⁶¹ The court (correctly) noted that coercion is different from persuasion and so actionable, albeit drawing that line "is a more nuanced task."⁶² But the court also insisted that "significant encouragement" was distinct from persuasion, a rather challenging assertion. The difference, it said, was that "significant encouragement" requires "such a 'close nexus' between the parties that the government is practically 'responsible' for the challenged decision."⁶³ And that close nexus in turn requires that "the government must exercise some active, meaningful control over the private party's decisions."⁶⁴

But at this point, it would seem that the "coercion" and "significant encouragement" tests have merged, since "control" surely implies coercion, not just persuasion. And that in turn makes it clear that the meaning of the doctrinal phrase "significant encouragement" is very, very different from its common usage (a point Judge Doughty appears to have missed altogether). After all, in common usage, "encouragement" and "persuasion" mean almost the same thing; if anything, "persuasion" is the stronger term because it implies success. So it would seem that, whatever the Court intended with its dictum in *Blum*, under modern law (as described by the Fifth Circuit itself), some level of government control or coercion is required to attribute private action to the government.

⁵⁴ *Id.* at 247–48.

⁵⁵ See *Missouri v. Biden*, 2023 WL 4335270 at *43–44; *Missouri v. Biden*, 83 F.4th 350, 373–80 (2023).

⁵⁶ 372 U.S. 58 (1963).

⁵⁷ *Biden*, 83 F.4th at 377–86, 397.

⁵⁸ *Bantam Books*, 372 U.S. at 62–65; *Missouri v. Biden*, 2023 WL 4335270 (W.D. La. July 4, 2023).

⁵⁹ *Bantam Books*, 372 U.S. at 63, 67; *Biden*, 83 F.4th at 350, 391.

⁶⁰ *Biden*, 83 F.4th at 377.

⁶¹ *Id.* at 374.

⁶² *Id.* at 377.

⁶³ *Id.* at 374 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

⁶⁴ *Id.*

Another way of thinking about this point is that the issue in the *Missouri v. Biden* litigation is not the state action doctrine at all. Given that the defendants are government officials acting in their official capacity, *of course* state action existed. Rather, the question is whether the specific governmental actions identified violate the First Amendment, which is a question of substantive law.⁶⁵ So the question we are asking is whether, when government officials encourage and successfully persuade private parties to suppress speech on their platforms, that violates the First Amendment. The answer has to be “no,” so long as the government’s conduct falls short of actually controlling or coercing the private actor.

One reason for this is common sense, and real-world implications. Under the “significant encouragement” test as employed by Judge Doughty, if the FBI identifies a social media account as an ISIS front, informs the hosting platform of this, and successfully urges them to shut down the account, the FBI has violated the First Amendment. That simply cannot be the law. And it is not.

In addition to common sense, the reason this must be true is, of course, the government speech doctrine. This is a body of law that Judge Doughty barely touches upon, although the Fifth Circuit does mention it. The government speech doctrine provides that “[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”⁶⁶ Difficult questions regarding the government speech doctrine arise in situations in which private expression is intertwined with the government, when the question becomes whether the government may suppress or control the speech because it is its own,⁶⁷ or whether the speech at issue is in fact private speech entitled to First Amendment protections.⁶⁸ Here, however, there is no dispute that *all* of the speech that Judge Doughty and the Fifth Circuit cite as unconstitutional was speech by government officials, uttered in the course of their duties. As such, it sits at the core of the government speech doctrine—which is why the government defendants’ primary defense in the *Missouri* litigation was, unsurprisingly, the government speech doctrine.⁶⁹

Furthermore, nowhere in the cases setting forth the government speech doctrine is there even a hint that the doctrine does not apply to speech that seeks to persuade (or “encourage”) private entities to take specific actions. Nor is there any requirement that government speech be polite or mild mannered. The Fifth Circuit’s analysis explicitly equates “urgent, uncompromising demands” with coercion,⁷⁰ but that cannot be right, as it would reduce permissible government speech to milquetoast requests. And in another part of the opinion, the court made much of the fact that platforms often (but by no means universally) carried out White House requests as proof that they were coerced.⁷¹ But again, private compliance alone cannot create a constitutional problem if the compliance is voluntary, or there would be little point to much governmental speech (consider the

⁶⁵ Thanks to Professor Jim Weinstein of Arizona State University for extensive conversations that helped us jointly get to this insight.

⁶⁶ *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009)).

⁶⁷ *Id.* at 219–20.

⁶⁸ *Matal v. Tam*, 582 U.S. 218, 234–39 (2017).

⁶⁹ *Missouri v. Biden*, 83 F.4th 350, 360 (5th Cir. 2023).

⁷⁰ *Id.* at 382.

⁷¹ *Id.* at 383–84.

FBI/ISIS example above). In short, the government speech doctrine strongly confirms that control or coercion are necessary to attribute private actions to the state, and so trigger constitutional constraints.

III. Jawboning and the First Amendment

Assuming now that coercion or control are a necessary element of finding that government speech has crossed the line into raising constitutional concerns, how should that line be drawn? In particular, what forms of jawboning raise especially serious concerns? And given this analytic framework, do the facts of *Missouri v. Biden* establish the existence of the requisite coercion or control (*i.e.*, did the Fifth Circuit get the case right)?

Public Versus Private Jawboning

To begin, a sharp distinction needs to be drawn between public jawboning by government officials, and private jawboning. By public jawboning, I mean public statements by officials, either to the press or distributed to the broader public (typically on the internet), that strongly urge private actors to take actions that, if done by government officials, would violate the Constitution (the latter limitation is necessary because public officials urging private persons to take actions the government is permitted to do itself would not seem to raise any serious legal issues).

Public jawboning, I would argue, should almost never be considered coercive. The reason, quite simply, is that public hectoring of corporations by political actors is extremely common, and indeed central to the jobs and personas of many elected officials. A good example can be found in the facts of *Kennedy v. Warren*.⁷² In September of 2021, Senator Elizabeth Warren, Democrat of Massachusetts, sent a sharp letter to Amazon criticizing Amazon's promotion and sale of books containing what she (correctly) considered COVID mis- and disinformation and describing Amazon's behavior as an "unethical, unacceptable, and potentially unlawful course of action."⁷³ Warren later issued a press release along with her letter. Some of the authors of the criticized books then sued Warren claiming that her attempts to intimidate Amazon violated their First Amendment rights. The lead plaintiff was Robert F. Kennedy, Jr., an independent candidate for President in 2024 and son of former Attorney General and Senator Robert F. (Bobby) Kennedy (and so nephew of President John F. Kennedy). The Ninth Circuit concluded that Warren's actions constituted an attempt at persuasion, not coercion despite Warren's harsh language—as the Fifth Circuit in the *Missouri v. Biden* litigation acknowledged⁷⁵.

Another good example is Senator Josh Hawley, Republican of Missouri. His official website contains the following quote from him: "Children suffer every day from the effects of social media. At best, Big Tech companies are neglecting our children's health and monetizing their personal information. At worst, they are complicit in their exploitation

⁷² 66 F.4th 1199 (9th Cir. 2023).

⁷³ *Id.* at 1204.

⁷⁵ *Biden*, 83 F.4th at 378–80.

and manipulation.”⁷⁶ The quote accompanies an announcement that Hawley was introducing legislation that would “enforce a minimum age of 16 years old for all users on social media platforms.”⁷⁷ On its face, these statements would seem to sharply criticize current social media practices, accompanied by a threat of legal action if they do not change them.

Finally, another (non-federal) example of such hectoring is a statement made by then-New Jersey Attorney General Gurbir S. Grewal to the New York Times in August of 2020. Grewal complained about the failure of Facebook and other social media platforms to block harmful content, including hate speech (it should be noted that this statement came in the context of nationwide protests over the murder of George Floyd). Grewal went on to state that if Facebook did not do a better job of blocking hate speech, “we always have a variety of legal tools at our disposal.”⁷⁸

All of these public statements by powerful government officials were made in a hectoring, somewhat ominous, and arguably vaguely threatening tone. But they also constitute important contributions to public discourse by leading political figures. As noted earlier, the government speech doctrine explicitly protects the right of these figures to engage in such discourse. And more fundamentally, it is absolutely essential to the health of a democratic government that public officials engage with and in (but not control or dominate) the public discourse that shapes public opinion. But to treat such public jawboning as potentially unconstitutional if its tone is too strong, or if it is accompanied by implicit threats of action, would sharply limit or deter participation in public discourse by powerful government officials. And that is a problem. To quote the Supreme Court, public discourse is *supposed* to be “uninhibited, robust, and wide-open,” and even at times “vehement [and] caustic,”⁷⁹; and that is true for speech *by* public officials no less than speech *about* such officials, or public discourse will become skewed.

To be clear, this discussion began with the argument that public jawboning should *almost* never be considered coercive. The caveat is necessary because it is, of course, possible that a government official would include with a public call to action an accompanying, serious threat of reprisal if the desired action is not taken. If a serious such threat was made, of course coercion and control can be found even in a public statement. And so, in that situation, it would be fair to find that the responsible official has crossed a constitutional line. But, it should be emphasized, the seriousness requirement is important. Politicians threaten unspecified “consequences” including “legal” consequences, or exude other forms of hot air, all the time.

Consider in this regard Senator Warren’s suggestion that Amazon’s sale of a book containing COVID misinformation was a “potentially unlawful course of action.”⁸⁰ The Supreme Court has unambiguously held that intentional falsehoods, including especially

⁷⁶ *New: Hawley Introduces Two Bills to Protect Kids Online, Fight Back Against Big Tech*, JOSH HAWLEY, U.S. SENATOR FOR MISSOURI (Feb. 14, 2023), <https://www.hawley.senate.gov/new-hawley-introduces-two-bills-protect-kids-online-fight-back-against-big-tech>.

⁷⁷ *Id.*

⁷⁸ Davey Alba, *Facebook Must Better Police Online Hate, State Attorneys General Say*, N.Y. TIMES (Aug. 5, 2020), <https://www.nytimes.com/2020/08/05/technology/facebook-online-hate.html>.

⁷⁹ N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964).

⁸⁰ Missouri v. Biden, 83 F.4th 350, 378 (5th Cir. 2023)(quoting Kennedy v. Warren, 66 F.4th 1199 (9th Cir. 2023)).

politically charged falsehoods (which COVID misinformation surely is) receive First Amendment protection.⁸¹ Given this, the idea that *selling* a book containing COVID misinformation could be criminal is utterly ridiculous—something that Senator Warren, a former law professor at Harvard after all, should surely have known (and perhaps did, making her comments hot air indeed).

Or consider then-Attorney General Grewal’s threat of using “legal tools” against Facebook if they failed to suppress hate speech. Hate speech, as a well-trained lawyer such as Grewal should surely know, is also fully protected speech under the Court’s First Amendment doctrine; indeed, the Court has treated regulations of hate speech as viewpoint-based, and so almost *per se* unconstitutional.⁸² As such, Facebook obviously has no *legal* obligation to block hate speech (though they may, and do, choose to do so voluntarily). As such, what “legal tools” Grewal was referring to remains a mystery. And, to state the perhaps-obvious, to treat such silly and amorphous “threats” as coercion would significantly impede the participation of government officials in public discourse, for no particular reason.

Even Senator Hawley’s legislative threat is, frankly, of dubious seriousness. Children, as the Senator (a former Supreme Court law clerk) surely knows, have strong First Amendment rights.⁸³ In addition, the Supreme Court has recognized the role of social media as the essential modern venue for “the exchange of views,” going so far as to strike down a law that barred sex offenders from social media.⁸⁴ Given all of this, the odds that the courts would uphold a flat ban on children under the age of sixteen—including many teenagers—accessing social media are obviously extremely low.

In short, courts should be extremely reluctant to treat public jawboning by government officials, even jawboning with a sharply critical, hectoring, or even vaguely threatening tone, as coercive. To do so would severely threaten public officials’ participation in public discourse, with little to be gained. After all, when officials *publicly* press action upon private persons or entities, they are fully politically accountable for their speech, which is an important deterrent to misconduct.

The Nature of the “Threats”

Unlike public statements by government officials, there is no question that private jawboning can sometimes rise to the level of unconstitutional coercion or control. At the same time, as the example from Part II of the FBI identifying an ISIS account to a platform shows, not all private communications urging action not permitted by the government can possibly be unconstitutional. Determining when private jawboning crosses the constitutional line, however, raises extremely difficult questions. There are many factors which might influence how a court should assess the nature of private communications,

⁸¹ *United States v. Alvarez*, 567 U.S. 709 (2012). The one caveat the Court noted was that falsehoods such as perjury or fraud, which are linked to specific, material harms, do not receive constitutional protection. But given the enormous volume of COVID misinformation existing in our public discourse, the idea that a single book could be link to material harm is far-fetched indeed.

⁸² *Matal v. Tam*, 582 U.S. 218 (2017); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

⁸³ *Brown v. Ent. Merch. Ass’n*, 564 U.S. 786, 794–95 (2011).

⁸⁴ *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017).

and the ultimate judgment is likely to be highly contextual. Nonetheless, some considerations come to mind which would clearly be relevant to any such decision.

The first, and most obvious, of those is the nature, seriousness, and explicitness of the threats made by the jawboning public official to the private party whose conduct they seek to influence. As with public jawboning, far-fetched suggestions of retaliation which no reasonable person would take seriously, cannot be sufficient to justify a finding of coercion (though such behavior by an official, especially when done in private, is certainly morally troubling). At the same time, it must be acknowledged that some veiled threats might well influence private behavior, especially if coming from officials with significant authority over the private actor. As such, some subtle judgments will inevitably be necessary.

Nonetheless, it seems self-evident that a finding of coercion should be more likely the more plausible, serious, and explicit the threat. For all of the reasons recited in Part II, it is crucially important that the law and decisions in this area clearly distinguish between unconstitutional coercion or control, and fully protected government speech. And while that distinction is always important, it is especially important in the context of speech directed at the major social media platforms because, given their enormous importance and ability to project speech, government cooperation and collaboration with the platforms is both inevitable and often socially necessary. It is important to remember in this regard that Twitter (now “X”), probably the most important platform for public discourse, in its early days disclaimed content moderation and as a result developed a serious “ISIS problem.” As a pathbreaking 2015 Brookings Institute report demonstrated, Twitter had become the primary tool for ISIS recruitment because of its wide open nature and broad reach—the report found that as of late 2014 at least 46,000 Twitter accounts were associated with ISIS supporters.⁸⁵ It was in response to this report and, crucially, pressure from government agencies that Twitter began to actively block extremist content, suspending 125,000 extremist accounts from 2015 to 2016.⁸⁶ Any rule of law that prevented or deterred such joint action would be highly problematic. As such, strong words or a hostile tone in government speech, even in private jawboning, should not be deemed coercive, absent other actions which *in toto* cross the line between strong persuasion and coercion.

It also should be clear that in determining how serious and coercive a threat is, the identity of the threat’s recipient matters. Certainly one would expect run-of-the-mill individuals and small businesses to be far more susceptible to coercion than large and powerful corporations or wealthy and powerful individuals. Having a law enforcement officer or powerful and distant public official direct vague, but threatening comments towards an average person or small business owner can be expected to intimidate (and yes, coerce) the recipient; but not General Motors or Warren Buffet—or, more relevantly, Alphabet/Google, Meta/Facebook, or Elon Musk.

A good example of threats which, though ultimately not credible, were probably coercive can be found in the facts of *Bantam Books, Inc. v. Sullivan*, which as noted earlier is

⁸⁵ J.M. Berger & Jonathon Morgan, *The ISIS Twitter Census: Defining and Describing the Population of ISIS Supporters on Twitter*, CENTER FOR MIDDLE EAST POLICY AT BROOKINGS (Mar. 2015), https://www.brookings.edu/wp-content/uploads/2016/06/isis_twitter_census_berger_morgan.pdf.

⁸⁶ Mike Isaac, *Twitter Steps Up Efforts to Thwart Terrorists’ Tweets*, N.Y. TIMES (Feb. 5, 2016), <https://www.nytimes.com/2016/02/06/technology/twitter-account-suspensions-terrorism.html>.

the primary case in which the Court found jawboning to cross the line into coercion.⁸⁷ The State of Rhode Island created a “Commission to Encourage Morality in Youth,” and tasked it with identifying books containing “obscene, indecent or impure language, or manifestly tending to the corruption of the youth.”⁸⁸ The Commission’s practice was to send notices to local book distributors identifying “objectionable” books, instructing the distributor to halt circulation of the named books, and “reminding” the distributor that the Commission was obliged to recommend criminal prosecution in case of noncompliance.⁸⁹ And a police officer was typically dispatched to the distributor soon after the notice, “to learn what action he had taken.”⁹⁰ The distributors inevitably complied with Commission orders. And, importantly, Rhode Island conceded at oral argument that many of the identified books were legally non-obscene, and so protected by the First Amendment.⁹¹

On these facts, the Court concluded that the distributors’ compliance “was not voluntary,” and so found that the Commission had violated the First Amendment.⁹² The Commission’s communications were private, expressly threatened serious legal action, were backed by law enforcement, and were directed at a small business with few resources to fall back on. Of course the victims complied—the distributor at issue in the case (who was the exclusive Rhode Island distributor of the plaintiffs’ books) testified that he complied “rather than face the possibility of some sort of a court action.”⁹³ And under those circumstances, the fact that criminal prosecution was likely to be unsuccessful given constitutional constraints hardly mattered, since the very burden of being prosecuted was itself enough to coerce. But, it should be noted, this system did *not* deter the plaintiffs, who were major New York publishing houses books, from suing to challenge this system of informal censorship because they possessed the resources, and the sophistication, to litigate their rights.

Private Motives to Comply

Finally, another important factor in identifying coercion (or lack thereof) is whether the alleged “victim” of government jawboning had private motivations to act as the government jawboning sought, or whether the actions requested/demanded were against the private actors’ interests. *Bantam Books* provides a good example of the latter situation. Complying with the Morality Commission’s notices cost the distributor business, and indeed required him to incur additional costs because he typically sent employees to retrieve unsold copies of “objectionable” books from bookstores and return them to the publisher.⁹⁴ When, however, the private actor is simply acting as they would have even absent the jawboning, a finding of coercion is far more dubious. At a minimum, if the private actors’ conduct was not the result of the jawboning, it is hard to see how the

⁸⁷ See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

⁸⁸ *Bantam Books*, 372 U.S. at 59.

⁸⁹ *Id.* at 62–63.

⁹⁰ *Id.* at 63.

⁹¹ *Id.* at 64.

⁹² *Id.* at 68.

⁹³ *Id.* at 63.

⁹⁴ *Id.*

causation requirement of constitutional standing is satisfied,⁹⁵ since in that situation the defendant government officials' speech definitionally did not *cause* the plaintiffs' alleged injury. That is why Judge Doughty's assertion that a constitutional violation exists "even if the private party would have acted independently"⁹⁶ is clearly incorrect—and probably why the Fifth Circuit did not repeat it.

Finally, it is important to note that the Fifth Circuit itself conceded that if a private actor yields to jawboning because of concerns about reputational harms, that in itself does not constitute unconstitutional coercion.⁹⁷ Furthermore, this concession is firmly supported by the caselaw. In the Ninth Circuit decision arising from Senator Elizabeth Warren's letter to Amazon discussed earlier, the court specifically found no constitutional violation because Amazon's (very limited) compliance with Warren's demands were triggered by "reputational concerns," not legal ones.⁹⁸ Indeed, the Fifth Circuit also discusses a Second Circuit case, involving a New York state official who urged insurers and banks to drop the NRA as a client, in which the court also failed to find coercion because the only thing "threatened" by the official was "reputational risks."⁹⁹

IV. *Missouri v. Biden* Redux

Under the general principles laid out above, was the Fifth Circuit (and was Judge Doughty) justified in finding that the Biden Administration's jawboning of social media platforms violated the First Amendment? The answer, in short, is almost certainly not.

To start off, consider the identity of the defendants against whom Fifth Circuit granted injunctive relief: the White House and the Surgeon General, the FBI, the CDC, and CISA¹⁰⁰ (Judge Doughty, recall, issued an injunction against a vastly broader range of officials, but the Fifth Circuit refused to extend the injunction to many of those for lack of evidence¹⁰¹). As for the Surgeon General the CDC, and CISA, they obviously possess no regulatory authority, or any other power, over social media platforms. To the contrary, they are primarily providers of information to the public (and sometimes, at the platforms' request, to the platforms). As such, once one accepts that the relevant legal standard should be coercion or control, not "significant encouragement," an injunction against them becomes insupportable since they had absolutely no power to coerce the platforms.

And as for the FBI, obviously the FBI, as a law enforcement agency, could in principle coerce private companies. However, the record as well as the Fifth Circuit's and Judge Doughty's opinions are completely devoid of a single example of the FBI threatening or coercing platforms. Instead, all of the cited contacts and communications are best characterized as cooperating and providing information (the same is also true of CISA, as it happens). As such, again no coercion could possibly exist.

That leaves the White House, which admittedly poses a more complex problem. In considering the role of the White House, we should note a basic point. It is true, as noted

⁹⁵ *Allen v. Wright*, 468 U.S. 737, 756–59 (1984).

⁹⁶ *See Missouri v. Biden*, 2023 WL 4335270 (W.D. La. July 4, 2023).

⁹⁷ *Missouri v. Biden*, 83 F.4th 350, 397 (5th Cir. 2023).

⁹⁸ *Id.* at 380 (citing *Kennedy v. Warren*, 66 F.4th at 1211).

⁹⁹ *Id.* at 377 (citing *National Rifle Ass'n v. Vullo*, 49 F.4th 700, 717 (2d. Cir. 2022)).

¹⁰⁰ *Id.* at 392.

¹⁰¹ *Id.* at 391–92.

earlier, that misinformation and disinformation are protected speech under the First Amendment,¹⁰² and that the government almost certainly does not have the power to regulate most forms of COVID and election mis- and disinformation, the types of speech at issue in *Missouri v. Biden*. (I say most because it may be that the government can suppress some specific forms of election lies, such as lies about the location or opening times of polling places.¹⁰³) But the fact that speech is protected by the First Amendment, and not subject to serious regulation, does *not* mean that the speech is beneficial, or that it is not associated with serious social harm—think of hate speech in this regard. Misinformation and disinformation about COVID and (especially) COVID vaccines almost certainly caused thousands of deaths in the United States, as a consequence of individuals refusing to get vaccinated. Lies about the 2020 presidential election being stolen caused massive violence on January 6, 2021, and continue to poison American politics. And more broadly, flagrant lying by political candidates and public officials fundamentally undermine democratic processes. Lies, and even reckless mistakes, cause serious harm.

With that in mind, let us turn to the facts laid out by Judge Doughty and the Fifth Circuit regarding Biden Administration officials' communications with platforms. To start with, many of the communications most emphasized by both courts were public, indeed vociferously so. For example, the Fifth Circuit quotes President Biden's statement that by failing to confront misinformation, platforms were "killing people" three separate times.¹⁰⁴ And Judge Doughty repeats that statement an astonishing six times.¹⁰⁵ Judge Doughty (but not the Fifth Circuit) also cited then-White House Press Secretary Jen Psaki's public statement that if platforms failed to act, they would face "legal consequences" including a "robust anti-trust program" and amending Section 230 of the Communications Decency Act.¹⁰⁶ The opinion suggests, correctly, that repeal or major changes to Section 230 would be a death blow to social media platforms, because Section 230 is the key legal provision granting internet platforms legal immunity from liability for harm caused by third-party content posted on their platforms, and also grants immunity for good faith content moderation by platforms.¹⁰⁷ Eliminating the former immunity would make it essentially impossible for platforms to operate, since they cannot possibly hope to identify and suppress all harmful content. And, for reasons to be discussed, eliminating the latter immunity, and so effectively eliminating content moderation for legal content, would utterly undermine platforms' business models.

Despite both courts' heavy reliance on President Biden's statements, it is far from clear how it qualifies as threatening. Certainly Biden intended to put public pressure on platforms to act (that is often the point of public statements), but what exactly did he threaten? And as for Psaki's alleged threats, I will discuss below why neither is serious. But the key point is that both Biden's and Psaki's statements were classic example of public jawboning. They were highly charged, public statements, in highly public settings. As such, for all of the reasons discussed earlier, the Fifth Circuit and Judge Doughty simply erred in

¹⁰² See *United States v. Alvarez*, 567 U.S. 709 (2012).

¹⁰³ See James Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibition of Lies in Political Campaigns*, 71 OKLA. L. REV. 167, 222 (2018).

¹⁰⁴ *Missouri v. Biden*, 83 F.4th 350, 363, 383, 385 (5th Cir. 2023).

¹⁰⁵ *Missouri v. Biden*, 2023 WL 4335270 at *11, *14, *16, *45, *46, *62 n.660 (W.D. La. July 4, 2023).

¹⁰⁶ *Id.* at *11, *12.

¹⁰⁷ 47 U.S.C. § 230.

relying on them as significant indicators of coercion (as opposed to “significant encouragement,” which demonstrates why that standard is vastly overbroad).

Aside from the public nature of much of the speech the Fifth Circuit objected to, another obvious, big question that arises is, what consequences exactly were the relevant public officials threatening that were sufficiently serious to coerce the platforms into removing content they did not want to. In truth, both opinions are extremely vague in this regard, but a close reading reveals only two serious candidates: threats of enhanced antitrust enforcement,¹⁰⁸ and threats to repeal or reform Section 230.¹⁰⁹ On closer examination, however, neither is very convincing as a serious threat given the identity of the alleged victims.

Let us take antitrust scrutiny first. There is no doubt that threat of legal action can constitute coercion sufficient to raise constitutional issues, as demonstrated by the facts of *Bantam Books* demonstrates.¹¹⁰ But does anyone really believe that the Biden Administration’s interest in antitrust scrutiny of Big Tech was triggered by their failure to suppress misinformation? Or, more to the point, could the major platforms really have believed that antitrust scrutiny of their actions would end, or even be reduced, if they cooperated with the Administration on controlling mis- and disinformation? The idea beggars belief. From the earliest days of his Administration, President Biden signaled his interest in aggressive antitrust scrutiny of internet giants. Most notably, early in his term, President Biden, appointed well known foes of Big Tech to key antitrust positions: Lina Khan as Chair of the Federal Trade Commission (FTC),¹¹¹ and Jonathan Kanter as head of the Justice Department’s Antitrust Division¹¹² (he also appointed another prominent critic of Big Tech, Columbia Professor Tim Wu, to be Special Assistant to the President for Technology and Competition Policy¹¹³). And the appointments paid off, as demonstrated by the Justice Department’s antitrust case against Google (which was in trial in late 2023), and the major antitrust action that the FTC (joined by 17 state Attorneys General) filed Amazon in September of 2023.¹¹⁴ Did the Fifth Circuit truly believe all of this could have been avoided if the major tech firms had just done a better job of controlling COVID disinformation? Surely not—but that establishes that “antitrust scrutiny” was not a threat related to suppression of COVID misinformation, it was a background condition.

As for Section 230 reform, whatever hot air emitted from the White House on the topic, no tech executive could possibly have taken the (extremely vague) statements about

¹⁰⁸ *Biden*, 83 F.4th at 364, 373, 381; *Biden*, 2023 WL 4335270 at *4.

¹⁰⁹ *Biden*, 83 F.4th at 364, 381; *Biden*, 2023 WL 4335270 at *4, *12, *47, *56.

¹¹⁰ See *supra* notes 84–90 and accompanying text.

¹¹¹ Cat Zakrzewski and Tyler Pager, *Biden Taps Big Tech Critic Lina Khan to Chair the Federal Trade Commission* WASH. POST (June 15, 2021), <https://www.washingtonpost.com/technology/2021/06/15/khan-ftc-confirmation-vote/>.

¹¹² Cat Zakrzewski & Tyler Pager, *Biden to Nominate Big Tech Adversary Jonathan Kanter to Helm the Justice Dept.’s Antitrust Division* WASH. POST (July 20, 2021), <https://www.washingtonpost.com/technology/2021/07/20/doj-kanter-antitrust/>.

¹¹³ *White House Announces Additional Policy Staff*, WHITE HOUSE (Mar. 5, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/05/white-house-announces-additional-policy-staff/>.

¹¹⁴ *FTC Sues Amazon for Illegally Maintaining Monopoly Power* FEDERAL TRADE COMMISSION (Sept. 26, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power>.

repealing or amending Section 230 seriously. To begin with, the White House of course has no unilateral power to change Section 230, that is in Congress's hands. Judge Doughty suggests that the Biden Administration had the power to amend Section 230 after the 2020 election because Democrats held majorities in both houses of Congress.¹¹⁵ Given the realities of the Senate filibuster, and the fundamental disagreements between Democrats and Republicans on *how* Section 230 should be amended, this is obviously grasping at straws. The Fifth Circuit, notably, never suggested that platform executives should take references to Section 230 reform seriously.

Consider in this regard the fact that during the 2020 presidential campaign, *both* Presidents Trump and Biden explicitly called for repeal of Section 230.¹¹⁶ Yet, despite countless bills being introduced by members of Congress on both sides of the aisle proposing to amend Section 230, absolutely no progress has been made, and there is no indication that any movement or bipartisan consensus is imminent on the subject (the major reason being that Democratic and Republican Section 230 reform proposals are diametrically opposites of each other). In light of these widely known facts, it seems highly implausible that decisionmakers at the major platforms would take vague references to Section 230 reform by White House officials as a *serious* threat.

And in considering how seriously these “threats” would be taken, it is very important to keep in mind who the White House’s jawboning was directed to. The *Murthy* case focused on jawboning directed at four platforms: YouTube, Facebook, Instagram, and Twitter. YouTube is owned by Alphabet (formerly Google), which as of September of 2023 was the fourth largest company *in the world* by market capitalization, with a value of \$1.65 trillion.¹¹⁷ Facebook and Instagram are both owned by Meta (formerly Facebook), which is merely the tenth largest company in the world, with a value of \$765 billion. And Twitter, now “X,” is owned and fully controlled by Elon Musk,¹¹⁸ the wealthiest human being on the planet.¹¹⁹ It is certainly easy to believe that even vague mutterings by powerful White House officials about “legal consequences” would be enough to coerce less powerful individuals and small (and perhaps even mid-sized) businesses. But the alleged victims of the coercion campaign posited by the Fifth Circuit are literally some of the wealthiest and most powerful people and companies in the world. To seriously threaten *them*, the threats need to be, well, serious. And those identified by the Fifth Circuit and Judge Doughty simply were not.

Finally, we should consider *why* the platforms did accede to some (but by no means all) official urgings to remove content—because as noted earlier, if private motives to comply exist, that cuts strongly against a finding of coercion. In seeking to deduce these

¹¹⁵ *Biden*, 2023 WL 4335270 at *47.

¹¹⁶ Bobby Allyn, *As Trump Targets Twitter’s Legal Shield, Experts Have a Warning*, NPR (May 30, 2020, 11:36 AM), <https://www.npr.org/2020/05/30/865813960/as-trump-targets-twitters-legal-shield-experts-have-a-warning>; Editorial Board, *Joe Biden*, N.Y. TIMES (Jan. 17, 2020), <https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html>.

¹¹⁷ *Top 10 Biggest Companies in the World by Market Cap in 2023*, FORBES INDIA (Sept. 25, 2023), <https://www.forbesindia.com/article/explainers/top-10-largest-companies-world-market-cap/86341/1>.

¹¹⁸ Kate Conger & Lauren Hirsch, *Elon Musk Completes \$44 Billion Deal to Own Twitter*, N.Y. TIMES (Oct. 27, 2022), <https://www.nytimes.com/2022/10/27/technology/elon-musk-twitter-deal-complete.html>.

¹¹⁹ *The World’s Real-Time Billionaires*, FORBES, <https://www.forbes.com/real-time-billionaires/#3a712e683d78> (last visited Sept. 27, 2023).

motives, it is important to remember that disinformation, especially medical and political disinformation, may be constitutionally protected, but it also causes serious social harm.¹²⁰ The reason the First Amendment protects disinformation is not because of its intrinsic value, but because we do not trust *the government* to choose what disinformation to suppress—and such choosing is inevitable given the ubiquity of lying.¹²¹ But that does not mean that private entities, who are not constrained by the First Amendment, might not voluntarily choose to suppress such content. Just as I may not wish to be associated with intemperate liars, so too platforms may not either.

With that preliminary thought in mind, it seems entirely plausible that social media platforms' campaigns against mis- and disinformation may have been motivated by some combination of business interests, concerns about reputational harms, and even some ethical considerations, rather than coercion. Let us begin with business interests. Social media platforms famously maximize revenues by maximizing eyeballs. The more time more people spend on a platform, the greater the opportunities for platform owners to monetize those users by selling targeted advertising directed at them (the primary source of revenue for most social media platforms). And while it might seem as if this incentivizes platforms to maximize the variety of content they carry in order to attract all possible niche group of users, there is a problem: some content is so toxic that it will chase off more users than it will attract. This is why the most financially successful platforms, Facebook and Instagram, have always had strong content moderation policies without any pressure from the government.

Now consider medical disinformation about COVID and COVID vaccines (the primary driver of the *Missouri v. Biden* litigation). Such content is undoubtedly harmful, and indeed may well have caused substantial numbers of deaths during the pandemic. It is also content that some section of the population obviously wished to access. But it seems equally obvious that such disinformation was also likely to turn off a substantial number of social platform users who embrace the scientific method. It then becomes a business judgment for platforms whether specific content is more like hate speech, which the platforms generally consider too toxic to carry, or celebrity gossip (even mistaken gossip) which on-net attracts users. By adopting content moderation policies against medical misinformation the platforms appear to have made just such a business judgment—because, it is important to remember, most of the content whose suppression the Fifth Circuit found objectionable was removed pursuant to the platforms' own content moderation policies.

The argument for reputational concerns as a motivator is similar. Essentially all companies care about their public reputations, if for no other reason than concerns over driving away customers/users. Social media platforms are of course no different (Elon Musk notwithstanding). And there is no doubt that during the height of the COVID pandemic, widely followed national and international news sources carried stories hammering at the platforms for their failure to control medical disinformation.¹²² That

¹²⁰ See *supra* notes 99-100 and accompanying text.

¹²¹ *United States v. Alvarez*, 567 U.S. 709, 723 (2012).

¹²² See, e.g., Fergal Gallagher, *Facebook 'Failing' to Tackle COVID-19 Misinformation Posted by Prominent Anti-Vaccine Group, Study Claims*, ABC NEWS (Dec. 3, 2021), <https://abcnews.go.com/Technology/facebook-failing-tackle-covid-19-misinformation-posted-prominent/story?id=81451479>; Dan Milmo, *Facebook Failing to Protect Users From Covid Misinformation, Says Monitor*, THE GUARDIAN (Nov. 1, 2021),

platforms responded to this pressure by acknowledging and accommodating concerns (just as Facebook did after the Cambridge Analytica scandal) is hardly surprising. It is no doubt true that powerful government officials, including President Biden, Surgeon General Murthy, and Press Secretary Psaki, piled on this issue with the express (and obvious) goal of adding to the reputational pressure on platforms. But, as noted earlier, even the Fifth Circuit (following the lead of the Ninth Circuit in the *Kennedy v. Warren* litigation) acknowledged that actions triggered by such reputational concerns, even when public statements from government officials contribute to such concerns, do not violate the First Amendment.¹²³

Finally, it is important to consider the real possibility that at least part of the motive for the actions the platforms took was ethical—platform executives did not want to be responsible for large numbers of preventable deaths. This is not to say that platform executives are saints. Of course they are not, and of course they normally place profit over ethics. But the COVID-19 pandemic was not a “normal” situation. It was an unprecedented global disaster resulting in millions of deaths. Especially given the generally progressive orientation of most platform employees and executives (at least until Elon Musk’s purchase of Twitter, which did not finalize until October of 2022), a desire not to worsen the situation is an entirely plausible explanation for the platforms’ actions—and it was certainly the one that leaders of social media firms themselves advanced in explaining their actions.

In short, there are many utterly plausible explanations aside from government coercion for the actions social media platforms took to reduce mis- and disinformation. And on balance it seems far more likely than not that it was a combination of those motives, rather than fear induced by the vague statements of public officials, that motivated these actions. Indeed, given the rather obvious nature of this possibility, it is striking that the Fifth Circuit and Judge Doughty failed to engage in any serious way with the non-coercive explanations for the platforms’ content moderation decisions.

Conclusion

For all of the reasons discussed above, it seems extremely unlikely that the Biden Administration’s jawboning of the major social media platforms with regard to COVID and election disinformation violated the blackletter law of the First Amendment. Judicial precedent and first principles both strongly suggest that at least in the First Amendment context (racial discrimination raises distinct issues), private action suppressing speech should be attributed to the government only when the government has coerced that action. Short of coercion, jawboning is a legitimate form of government speech.

<https://www.theguardian.com/technology/2021/nov/02/facebook-failing-to-protect-users-from-covid-misinformation-says-monitor>; Donie O’Sullivan, Clare Duffy, Tara Subramaniam, & Sarah Boxer, *Facebook Is Having a Tougher Time Managing Vaccine Misinformation Than It Is Letting On, Leaks Suggest*, CNN BUSINESS (Oct. 27, 2021), <https://www.cnn.com/2021/10/26/tech/facebook-covid-vaccine-misinformation/index.html>; Terry Collins, *‘This Deception Must End Now’: Facebook Gets Letter From 500 Health Professionals Demanding Data on COVID Misinformation*, USA TODAY (Nov. 5, 2021), <https://www.usatoday.com/story/tech/2021/11/05/facebook-covid-misinformation-doctors-letter/6275730001/>.

¹²³ See *supra* notes 94–96 and accompanying text.

None of this is to say, however, that government officials *should* engage in such jawboning. Given the nature of the COVID crisis, perhaps some actions were justified (though at least some White House actors appear to have blurred the line between legitimate uses of the bully pulpit and simple bullying). But in general, of course public officials should not target speech they do not like. And whatever the doctrine, in most circumstances when government officials seek to enlist private actors to suppress the speech of their political opponents, this violates the spirit, if not the letter, of the First Amendment. Bluntly, in most circumstances government officials have no legitimate interest in controlling (as opposed to participating in) public discourse, and it is incumbent on voters to punish elected officials who cross those lines. But that is a job for We the People, not an unelected judiciary.