SILENCING THE ADMINISTRATIVE STATE: A CRITIQUE OF MISSOURI V. BIDEN

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Over the last decade, the administrative state has been under attack. The federal courts have limited agencies' authority to act on environmental, educational, and public health concerns. The assaults on these institutions have eroded our democracy by restricting our ability to self-govern. In *Missouri v. Biden*, the U.S. Court of Appeals for the Fifth Circuit continued to undermine the federal government's power to protect the public by limiting its ability to speak.[1] The Fifth Circuit[2] did so by upholding a Louisiana federal judge's order blocking federal officials and federal agencies from communicating with social media companies to combat disinformation about COVID-19 and vaccines. Leading up to this order, federal officials feared that false claims about COVID-19 would put public health at risk and communicated these concerns to social media companies. In response, four individual social media users, one news website, and two states filed suit, claiming the federal government's communication with social media companies violated their First Amendment rights. The U.S. District Court for the Western District of Louisiana agreed, issuing a sweeping injunction against the White House, FBI, Surgeon General's Office, Centers for Disease Control and Prevention, as well as dozens of federal agency officials.[3] The Fifth Circuit affirmed, holding that federal officials violated the First Amendment by "coerc[ing] social-media platforms" into censoring certain content.[4]

This critique focuses on a significant flaw in the Fifth Circuit's opinion: specifically, the court's expansive and unprecedented definition

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

[2] The Fifth Circuit has been called "the most conservative federal court of appeals in the US." Adam Feldman, *Supreme Court Eyeing Fifth Circuit, But Too Early to Decipher Why*, BLOOMBERG L. (Dec. 11, 2023), https://perma.cc/4VAL-GCV3.

[3] *Biden*, 83 F.4th at 398-99.

[4] *Id.* at 359-61.

of the First Amendment's "state action" doctrine that equates nearly all government communication with coercion.[5]

This critique of *Missouri v. Biden* proceeds in three parts: First, it considers the state of the First Amendment's state action doctrine before *Missouri v. Biden*; next, it describes the *Biden* court's novel analysis of the doctrine that private platforms' content-moderation decisions are state actions subject to First Amendment constraints; and finally, it highlights *Missouri v. Biden*'s direct and harmful consequences for the administrative state. It argues that this decision represents a radical extension of the state action doctrine and the federal courts' troubling assault, with its potentially far-reaching implications, on the administrative state. The decision significantly affects the executive branch and federal agencies' ability to speak and act, undermining our democratic institutions' ability to address threats, provide information, and maintain civil society.

THE STATE ACTION DOCTRINE BEFORE MISSOURI V. BIDEN

Missouri v. Biden involved private entities—namely social media platforms like Google, Twitter (now known as "X"), YouTube, and Facebook—making decisions based on their content-moderation policies. Ordinarily, private companies' conduct is not subject to the Constitution's constraints; the First Amendment may only be violated by state action.[6] Thus, to prove their First Amendment claims, the plaintiffs had to demonstrate that the social media platforms' content-moderation decisions amounted to state action.

Courts analyze state action under the two-step framework developed in *Lugar v. Edmondson Oil Company.* Courts first ask whether the State or a rule of conduct imposed by the State caused the constitutional violation.[7] If the answer is yes, courts then ask whether "the party charged with the deprivation [is] a person who may fairly be said to be a state actor."[8] The *Lugar* court outlined four tests to answer this second question: (1) the public function test; (2) the state compulsion test; (3) the nexus test; and (4) the joint action test.[9] *Missouri v. Biden* relies only on the nexus test.[10]

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[5] *Id.* at 380-98.

[6] Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802, 808 (2019).

[7] Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982).

[8] *Id.*

[9] *Id.* at 939.

[10] *See* Missouri v. Biden, 83 F.4th 350, 373-81(5th Cir. 2023) (per curiam), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023) (mem.).

Courts have articulated two different versions of the nexus test. The Supreme Court described the first formulation as asking whether there is "pervasive entwinement of public institutions and public officials in [the private actor's] composition and workings."[11] Here, the Fifth Circuit did not assess the defendants' conduct under the first nexus test and instead applied the second version, asking whether government officials have "exercised coercive power or [have] provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[12]

In *Bantam Books, Inc. v. Sullivan*, the Supreme Court explained that unconstitutional coercion concerning speech requires, at a minimum, an actual "threat of invoking legal sanctions [or] other means of coercion, persuasion, and intimidation."[13] Parsing permissible efforts to convince from impermissible efforts to compel, the Supreme Court recognized general pressure to act or acquiesce is insufficient to establish coercion.[14] Instead, coercion requires a showing that the government has compelled "the specific conduct of which the plaintiff complains" based on the articulation of actual adverse consequences for the refusal to comply.[15]

Following *Bantam Books*, lower courts have drawn a line between permissible government officials' speech to convince and unlawful attempts to censor by coercing intermediaries not to distribute a third party's speech.[16] To assist in distinguishing between persuasion and coercion, the Second Circuit articulated a non-exclusive four-factor framework that examines: (1) the government official's word choice and tone; (2) whether the official has regulatory authority over the conduct at issue; (3) whether the statement was perceived as a threat; and (4) whether the communication refers to any adverse consequences if the

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[11] Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 298 (2001) (explaining how government entanglement in a private entity's organization, composition, or funding is one way to satisfy the nexus standard).

[12] Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

[13] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963).

[14] *Blum*, 457 U.S. at 1004-05.

[15] *Id.* at 1004.

[16] *Compare* Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1296 (9th Cir. 1987) (holding that a deputy county attorney violated the First Amendment by threatening to prosecute a telephone company if it continued to carry a dial-a-message service), *with* Am. Family Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1119-20, 1125 (9th Cir. 2002) (holding that San Francisco officials did not violate the First Amendment when they criticized religious groups' advertisements and urged television stations not to broadcast the ads).

recipient refuses to comply.[17] The Second Circuit also recognized that none of these factors are dispositive on their own.[18]

Although the Supreme Court has not endorsed a definition of "significant encouragement," federal circuits have their own articulations. The Ninth Circuit's significant encouragement test focuses on the government's use of incentives, asking "whether the government's encouragement is so significant that we should attribute the private party's choice to the State, out of recognition that there are instances in which the State's use of positive incentives can overwhelm the private party and essentially compel the party to act in a certain way."[19] In contrast, in *Missouri v. Biden,* the Court held that significant encouragement is shown by the government's exercise of "*some* exercise of active (not passive), *meaningful* (impactful enough to render them responsible) control on the part of the government over the private party's challenged decision[, w]hether [by] . . . entanglement in the party's decision-making process or . . . direct involvement in carrying out the decision itself."[20]

THE FIFTH CIRCUIT'S BROADENED APPLICATION OF THE STATE ACTION DOCTRINE

In *Biden*, the plaintiffs argued—and the Fifth Circuit agreed—that officials from the White House, Office of the Surgeon General, Center for Disease Control & Prevention ("CDC"), Cybersecurity and Infrastructure Security Agency ("CISA"), and Federal Bureau of Investigation ("FBI") used coercion or significant encouragement to cause social media companies to censor speech on social media platforms.[21] In concluding there was coercion, the Court found that each of the four factors from the Second Circuit test were supported.[22]

Concerning the first factor, the Fifth Circuit determined the government's word choice was inflammatory, citing, for example, President Biden's comments that platforms were "killing people" by not acting on misinformation.[23] The Court found that the second factor—that the platforms must have perceived the communication as coercive—was met because the platforms complied with the government's alerts and re-

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[17] Nat'l Rifle Ass'n of Am. v. Vullo, 49 F.4th 700, 715 (2d Cir. 2022).

[18] *Id.*

[19] O'Handley v. Weber, 62 F.4th 1145, 1158 (9th Cir. 2023).

[20] Missouri v. Biden, 83 F.4th 350, 375 (5th Cir. 2023) (per curiam), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023) (mem.).

[21] *Id.* at 388-93.

[22] *See id.*

[23] *See id.* at 363, 383.

quests.[24] And, the Court found that, though the White House did not have direct power over the platforms, it had an "inherent authority" sufficient to establish the third factor.[25] With respect to the fourth factor, the *Biden* Court found the threat of adverse consequences by citing remarks from the White House Press Secretary expressing the President's concerns about the lack of transparency regarding social media companies' practices and his support for reform to achieve accountability, including by amending Section 230 and antitrust laws.[26] The Fifth Circuit also found that the FBI coerced the platforms not based on any direct threat[27] but rather because the FBI "regularly met with the platforms," "frequently alerted the social media companies to misinformation spreading on their platforms," and "urged the platforms to take down content."[28]

Although the Fifth Circuit did not find that the CDC or CISA coerced the social media platforms, the court did conclude—in applying its unique test for significant encouragement—that nearly all defendants were entangled with the social media platforms' decision-making.[29] For example, the Fifth Circuit held that the CDC's entanglement resulted from its officials directing social media companies on how to moderate their content by avoiding or adding context to potentially misleading information.[30]

The Fifth Circuit's expansion of state action doctrine is dangerous and out of step with prior First Amendment jurisprudence. The Supreme Court has consistently warned against expanding the state action doctrine,[31] cautioning against prohibiting private entities from having any relationship with the government without being treated as state actors.[32] The Court has further warned that broad state action theories disempower private entities and deny their freedom to conduct their affairs.[33]

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[24] *Id.* at 383-84.

[25] *Id.* at 384-85.

[26] *Id.* at 364, 385-86.

[27] *Id.* at 388.

[28] *Id*.

[29] *Id.* at 387-89, 390-92 (describing how the White House, the Surgeon General, the CDC, the FBI, and CISA "likely coerced or significantly encouraged social-media platforms to moderate content, rendering those decisions state actions"). However, the Fifth Circuit concluded that State Department and National Institute of Allergy and Infectious Diseases officials did not engage in such coercion or significant encouragement. *Id.* at 391.

[30] *Id.* at 389-90.

[31] *See, e.g.*, *id.* at 392 (citing Matal v. Tam, 582 U.S. 218, 235 (2017)) (urging courts to take "great caution" before expanding the state action doctrine's scope).

[32] *See* Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 814–16 (2019).

[33] *See id.*

However, in *Biden*, the Fifth Circuit ignored Supreme Court precedent. In failing to engage the two-step *Lugar* framework to analyze state action, the *Biden* court does not acknowledge that most of the conduct it cites as impermissible government coercion and significant encouragement fails at the first step of the *Lugar* test. The social media platforms did not exercise any state-created right when they responded to requests about enforcement of their content-moderation policies, limited access to posts, or removed content based on alerts from the government. Their right to take these actions when enforcing their content-moderation policy was derived from their respective user agreements with the plaintiffs, not from rights that the government conferred. Nor does social media platforms' removal of content that the government flagged as misinformation show that the companies ceded control over their content-moderation decisions to the government. Rather, content-moderation decisions show social media companies were generally aligned with the government's mission to stop the spread of misinformation. This alignment does not transform private conduct into state action. Therefore, plaintiff's failure to establish the deprivation of a right rooted in state authority should have proved fatal to their attempt to establish state action under the *Lugar* framework.

The Fifth Circuit's coercion analysis is equally flawed. For a private entity's decision to be deemed state action, the government must have compelled that "specific conduct," not simply sought to generally influence the entity's activities.[34] And even when government officials specifically "request that a private intermediary not carry a third party's speech," they do not violate the First Amendment "so long as [they] do not threaten adverse consequences if the intermediary refuses to comply."[35] By looking past the lack of evidence that the government compelled specific conduct or threatened actual adverse consequences, the Fifth Circuit side-stepped well-established principles in favor of the Second Circuit's four-factor test. Yet even those factors, loosely applied, are not met. Concerning the "tone" or "words" factor, even strong language used to criticize the platforms and request action does not make those statements coercive. Using the bully pulpit has never been regarded as violating the First Amendment or transforming private action into state action. The government is entitled to "advocate and defend" its policies, including that particular speech is false or harmful to public health.[36]

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[34] Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

[35] *O'Handley*, 62 F.4th at 1158.

[36] Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000).

The Fifth Circuit's analysis of the platforms' perception of the relevant government statements factor is also flawed. The perception inquiry is objective, depending on "whether a message can 'reasonably be construed as coercive.'"[37] Even considering the platforms' perceptions, the *Biden* court erred in finding coercion merely because "the platforms were influenced by" and complied with some of the officials' requests.[38] Influence is also implicitly the result of successful persuasion, so the platforms' compliance with the removal requests is arguably immaterial. The First Amendment does not interfere with this communication so long as the intermediary is free to disagree with the government and decide whether to comply with its request. And the fact that social media platforms frequently rebuff the government further undermines any claims the government engaged in coercion.[39]

The Fifth Circuit determined that the third factor, the presence of authority, was satisfied because of the government's so-called "inherent authority" over the platforms.[40] But, such authority is only relevant when there is a threat; if the speaker lacks the authority to impose any adverse consequences, the threat cannot be coercive.[41] The Fifth Circuit failed to identify any actual threat. Although the fourth factor asks whether the speaker threatened adverse consequences, none of the statements cited by the Fifth Circuit could plausibly be characterized as a threat of adverse action because they did not contain a sanction that might follow from the failure to act.[42]

Finally, the Fifth Circuit's "significant encouragement" test—requiring the government to exercise "some active, meaningful control

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[37] Missouri v. Biden, 83 F.4th 350, 379-80 (5th Cir. 2023) (per curiam), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023) (mem.).

[38] *Id.* at 383-84.

[39] *See, e.g.*, Missouri v. Biden, 680 F. Supp. 3d 630, 677 (W.D. La.) (describing the limited success rate of government officials' efforts to get platforms to comply with requests to remove content from their platforms), *aff'd in part, rev'd in part,* 83 F.4th 350 (5th Cir. 2023) (per curiam), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023) (mem.).

[40] *See Biden*, 83 F.4th at 384-85.

[41] O'Handley v. Weber, 62 F.4th 1145, 1163 (9th Cir. 2023) (describing how the existence or absence of direct regulatory authority is 'not necessarily dispositive'").

[42] *See Biden*, 83 F.4th at 382 (describing federal officials' requests asking the platforms to remove posts "ASAP" and accounts "immediately," and to "slow[ ] down" or "demote[ ]" content). Although the Fifth Circuit stated that when the platforms did not comply, government officials "threw out the prospect of legal reforms and enforcement actions," it did not point to any evidence in the record supporting this assertion other than a statement of Biden's Press Secretary that the President favored fundamental reforms to hold tech platforms for accountable for the harms they cause—including reforms to Section 230, enacting antitrust reforms, and generally imposing more regulations. *See id.* at 381-83.) Such broad and off-the-cuff statements cannot reasonably be characterized as a threat of adverse action tied to specific acts of content-moderation.

over the private party's decision"[43]—is a flawed formulation pulled from the ether. None of the cases the *Biden* court relies on, including from the Fifth Circuit, articulate or anticipate that significant encouragement includes government control or entwinement in the private actor's conduct.[44] Though the Fifth Circuit notes that encouragement can become control when it "is so significant that we should attribute the private party's choice to the State, out of recognition that there are instances in which the State's use of positive incentives can overwhelm the private party and essentially compel the party to act in a certain way," it has held that government officials may issue requests of private entities so long as these officials "do not threaten adverse consequences if the intermediary refuses to comply."[45] By embedding a nebulous element of control into significant encouragement, the Fifth Circuit dilutes the test. It conflates the "significant encouragement" test with other distinct and more demanding state action tests, including the joint-action and pervasive entwinement nexus tests, rendering both unnecessary and redundant. Thus, this unprecedented articulation of the significant encouragement test lacks any basis in the law.

IMPACT ON DEMOCRACY AND THE ADMINISTRATIVE STATE

Ultimately, *Missouri v. Biden* is not only wrongly decided; it also threatens our democracy by assaulting the executive branch and undermining the administrative state in three important ways.

First, the decision curtails the government's ability to speak. Courts have recognized that "the government can speak for itself," including to "advocate and defend its own policies."[46] However, the Fifth Circuit's

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[43] *Biden,* 83 F.4th at 374.

[44] In support of its entanglement analysis, the *Biden* court cites two Fifth Circuit cases: *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544 (5th Cir. 1988) and *Roberts v. Louisiana Downs, Inc.*, 742 F.2d 221 (5th Cir. 1984). *See Biden*, 83 F.4th at 375-376. However, in both *Howard Gault* and *Roberts*, the government officials did not simply encourage or incentivize the private actor; rather, they directly controlled the decision, which justified finding state action in each of those cases. *See Howard Gault*, 848 F.2d at 548-549, 555 (quoting Blum v. Yaretsky, 457 U.S. 991, 992 (1982)) (determining that, because the local authorities assisted private farmers to shut down a worker strike, the activity of axing the strike "while not compelled by the state, was so 'significant[ly] encouraged, both overt[ly] and covert[ly], that the choice must in law be deemed to be that of the state"); *Roberts*, 742 F.2d at 224, 228 (finding that a private horseracing club's denial of a horse racing stall was a state action because the stalling decision was made partly by the "racing secretary," a legislatively created position accompanied by extensive supervision from on-site state officials who had the "power to override decisions" made by the club's management).

[45] *See O'Handley*, 62 F.4th at 1158 (citing Am. Family Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1125 (9th Cir. 2002); *accord.* Okwedy v. Molinari, 333 F.3d 339, 344 (2d Cir. 2003).

[46] Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000).

decision would prohibit communication regarding private entities' conduct, even in public forums like press briefings. If government spokespersons cannot publicly express their views, it is hard to imagine where the government can freely speak. Government officials' and agencies' public critiques of private entities' practices and policies are a part of the government's role in serving the public. Government officials' public discourse on policy promotes democratic values.[47]

Second, *Missouri v. Biden* threatens democracy by inhibiting administrative agencies' work. Agencies and private entities often collaborate. For example, agencies like the CDC offered guidance to the public, state and local governments, and private entities throughout the pandemic about the risks of COVID and the efficacy of vaccines.[48] However, under the Fifth Circuit's reasoning, such collaboration transformed the private entities seeking the CDC's advice into state actors. The Fifth Circuit cited no precedent for this startling conclusion, which contradicts the Supreme Court holding that private action with the approval or acquiescence of the government is not state action.[49] Moreover, the Fifth Circuit's attack on the government's ability to collaborate has significant implications for federal agencies[50]. If the Supreme Court adopts *Missouri v. Biden's* nebulous construction of coercion and encouragement, government officials and employees will be forced to choose between two options: either curtail interactions with private entities or violate the law.

Finally, *Missouri v. Biden* presents an existential threat by implying that administrative agencies' mere existence is inherently coercive. For example, even though the *Biden* court acknowledged that the FBI's communications were not "plainly threatening in tone or manner" and did not "plainly reference adverse consequences," it held that the FBI

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[47] *See generally Transparency, Communication and Trust: The Role of Public Communication in Responding to the Wave of Disinformation About the New Coronavirus*, ORG. FOR ECON. COOP. & DEV. (July 3, 2020), https://perma.cc/7UTB-ZXEZ (describing the role of the government in responding and communicating about COVID as a part of good governance).

[48] *See, e.g.*, Pien Huang, *Inside the CDC's Battle to Defeat the Virus*, NPR (Apr. 1, 2021), https://perma.cc/V7D8-Z7QJ (describing the CDC's efforts to provide guidance about the threat posed by COVID).

[49] Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999).

[50] *See, e.g.*, Ann E. Marimow & Cat Zakrzewski, *Supreme Court Likely to Reject Limits on White House Social Media Contacts*, WASH. POST (Mar. 18, 2024), https://www.washingtonpost.com/politics/2024/03/18/supreme-court-social-media-free-speech-biden/ (on file with CUNY Law Review) (reporting on the implications of the Fifth Circuit decision in *Missouri v. Biden*, including preventing government employees and officials from communicating with tech companies and online platforms about posts the government deems dangerous that are related to public health, national security and foreign interference, and election integrity).

engaged in impermissible coercion simply because the FBI is a law enforcement agency with "*some* authority over the platforms."[51] Because many government actors exercise general and unspecified authority over private actors, this aspect of *Missouri v. Biden* poses a grave danger to the functioning of our democracy. It may incapacitate the administrative state's ability to work on public health, our general welfare, and the protection of our democracy. Given that public discourse is often clouded in controversy and polarization, the Supreme Court should take heed of the Fifth Circuit's holdings. For the sake of our democracy, communication and collaboration between the administrative state and the people should be fostered, not suppressed.

[51] Missouri v. Biden, 83 F.4th 350, 388 (5th Cir. 2023) (per curiam), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023) (mem.).