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NCLA Sixth Circuit Appeal Asks Court to Halt Government-Directed Social Media Censorship

Mark Changizi, Michael P. Singer, and Daniel Kotzin v. Department of Health and Human Services, et al.

Washington, DC (November 29, 2022) – Biden Administration officials, including some within the Department of Health and Human Services (HHS), have violated the First Amendment by directing social media companies to censor viewpoints that conflict with the government's Covid-19 messaging. The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, appealed *Changizi, et al. v. HHS, et al.*, which urges the U.S. Court of Appeals for the Sixth Circuit to reverse the lower court's dismissal and allow the case to move forward.

Mark Changizi, Michael P. Senger, and Daniel Kotzin were active Twitter users who built large followings due to their reasoned criticism of Covid-19 restrictions. Statements by President Biden, Press Secretary Jen Psaki, and other federal officials unequivocally prove they told social media companies what and whom to censor. This fact makes the government responsible for suspensions and de-platforming of Plaintiffs' accounts. Subsequent discovery in similar cases—including NCLA's *State of Missouri ex rel. Schmitt, et al. v. Joseph R. Biden, Jr., et al*. suit—has shown that the government used state power to browbeat social media companies into censoring non-government-approved Covid-19 views. Emails and text exchanges revealed through discovery in that case show a previously unimaginable level of governmental entanglement in this viewpoint-based censorship scheme.

In granting HHS's motion to dismiss, the court below erred. The court disregarded statements made by the President, who is in charge of all Defendants, and by Jen Psaki, threatening tech companies with adverse action if they did not carry out specific Covid-19-related censorship aims. The court did so because the President was not named as a defendant, which ignores the clear import of his role under Article II of the Constitution. Furthermore, the timing of Plaintiffs' suspensions corresponded to the government's escalating demands, creating the inference that Twitter was responding to government pressure by censoring the Plaintiffs' accounts.

The district court premised its determination that Plaintiffs lacked standing to bring their claims on erroneous interpretations of the governing legal standards, holding them to an unreasonably high burden at the pleadings stage. The court essentially required Plaintiffs to prove their allegations that they had been censored *because of* the government. But that high bar is not the right standard by which to judge a motion to dismiss.

Nor is that what Plaintiffs ultimately have to prove on the merits. First Amendment precedent holds that Plaintiffs only need to show that the government, through coercive means or entanglement with private companies' decision-making, turned Twitter's censorship into state action and that such state action chilled Plaintiffs' speech. By declining to accept these statements as evidence of the government's involvement in social media censorship, the court did not draw factual inferences in Plaintiffs' favor, as it must do when assessing a motion to dismiss.

The Sixth Circuit must reverse the district court's erroneous judgment. By instrumentalizing tech companies including Twitter—through pressure, coercion, and threats—to censor viewpoints that federal officials have deemed "misinformation," those officials have turned Twitter's censorship into state action. The government's policy of pressuring Twitter to censor the Plaintiffs and their viewpoints should be halted immediately.

NCLA released the following statements:

"The government may not direct social media platforms to censor expression of certain viewpoints about Covid-19 or anything else. The law is clear that the First Amendment prohibits government from using private companies to accomplish what it cannot do directly. The reasoning underlying the district court's dismissal order in this case would prevent any individual from bringing a case alleging such censorship, since it will almost always be impossible—without discovery—to prove the government targeted a specific person. We're confident that the Sixth Circuit will recognize that the lower court handled this case wrong, as discovery produced subsequently in *Missouri v. Biden* reveals the existence of a vast censorship network at the highest levels of government."
— Jenin Younes, Litigation Counsel, NCLA

"Whether the government was responsible for the censoring of our clients is a factual issue. The district court's decision on the pleadings alone would give the government *carte blanche* to intimidate and cajole private actors in reducing the public square to only government-approved views, so it must be reversed."
— John J. Vecchione, Senior Litigation Counsel, NCLA

For more information visit the case page here.

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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