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PERSPECTIVE

Why government regulation of social media threatens 1st Amendment rights

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Does the government violate citizens' First Amendment rights when it pressures social media platforms to remove posts it doesn't approve of? It's a question at the heart of speech doctrine in the modern age but was avoided by the Supreme Court in the recent case of *Murthy v. Missouri*.

In *Murthy*, a group of plaintiffs alleged that the White House, the Surgeon General, and other federal agencies used their positions of power vis a vis social media firms to do indirectly what the government may not do directly – remove speech that the government doesn't want published. The plaintiffs' evidence included private emails in which government officials heavily leaned on the platforms – sometimes with thinly-veiled threats of consequences – to suppress certain viewpoints about COVID-19, vaccines, and other issues.

The Fifth Circuit granted plaintiffs a preliminary injunction that prohibited the government defendants from "coerc[ing] or significantly encourag[ing] social-media companies to remove, delete, suppress, or reduce, including through altering their algorithms, posted social-media content containing protected free speech."

In reversing the injunction, the Supreme Court did not take up the merits of the First Amendment claim and instead decided the case on Article III standing grounds. Writing for the majority, Justice Barrett held that the speech restrictions did not create an injury traceable to government action and redressable by judicial action, as required for standing. Calling the plaintiffs' claims "no more than conjecture," the Court found insufficient proof that the social media firms' decisions were a result of government pressure as opposed to the firms' own independent judgment. The Court also ruled that plaintiffs lacked evidence of "an ongoing pressure campaign" as opposed to one that had largely ended in 2022 when the government "wound down" its pandemic response measures.

In dissent, Justice Alito accused the majority of applying a "new and heightened standard" for standing that improperly required "a series of ironclad links" showing conduct and injury. The dissent noted that the effects of the changes the officials had coerced persisted beyond 2022 and argued that it would be "silly" to assume that past threats "lost their force merely because White House officials opted not to renew them on a regular basis." The record showed that some platform decisions were attributed in part to the defendants, which was sufficient for standing, according to Justice Alito.

Since the *Murthy* decision came down on June 26, legal analysts have generally fallen into one of two camps. One side lauds the majority's insistence on a factual record that draws strong lines between conduct, injury, and redressability by Court action, and sees the ruling as a victory for the rule of law. The other side criticizes the majority for creating a new and impossibly high bar for standing that may deprive victims of indirect government censorship of their day in court.

I join the concerns raised by the

dissent. Presume, for example, that the government decides today to launch a campaign to censor Viewpoint X by privately emailing or placing phone calls to employees at Twitter. A citizen expressing Viewpoint X might have her speech censored tomorrow – yet it might be months or years until she learns sufficient facts about the coercion to support a lawsuit, at which point the government's censorship efforts may have ended. Does that citizen have no recourse because, in Justice Barrett's words, the campaign had already "wound down" or "slowed to a trickle," thus foreclosing the "redressability" element of Article III standing? Is the outcome of these events the successful silencing of Viewpoint X by the government?

In *Murthy*, the State plaintiffs argued that their citizens were deprived of the right to listen to viewpoints that had been removed at the government's behest. The majority dismissed this concern on an evidentiary basis, holding "[t]he States have not identified any specific speakers or topics that they have been unable to hear or follow." But this begs the question: how would an average citizen *know* which specific speakers they are being deprived of the opportunity of listening to if the government's pressure is being applied privately and behind the scenes?

While the majority did not rule that what the government did in *Murthy* was legal (indeed, it likely was not), the fact that it allowed the issue to evade judicial review could encourage government actors to repeat this conduct going forward. History is notorious for repeating itself. Accordingly, I join the call made by others for increased transparency. If the government wishes to communicate with social media platforms regarding content moderation decisions, let it do so in a public-facing manner, so that citizens may know what topics the government seeks to declare off limits – and if a government actor's "suggestions" cross the line into "coercion," timely lawsuits may be brought to remedy the problem, before it's too late.

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