

PREMIUM REPORTS

Why the Courts Are Failing to Stop Government Censorship

'More speech is being censored and suppressed by government actions than has ever been the case in the past,' constitutional attorney Andrew Grossman says.





(Illustration by The Epoch Times, Getty Images, Freepik, Wikimedia Commons)

By Kevin Stocklin | Nov 09, 2023 Updated: Nov 10, 2023

A growing government–corporate partnership in the United States to control what Americans say has established an unprecedented system of censorship that circumvents and undermines the constitutional right to free speech, legal analysts say.

While free speech advocates fight this new form of “censorship by proxy” in the courts, many have expressed concern that even prevailing in the lawsuits may not be enough to preserve First Amendment rights.

“More Americans are being censored, more speech is being censored and suppressed by government actions, than has ever been the case in the past,” Andrew Grossman, constitutional attorney at BakerHostetler, told attendees at a Cato Institute free-speech conference on Nov. 2.

“But this isn’t primarily the old kind of censorship. We’re not talking about book bans; we’re not talking about other types of traditional restraints on speech or publications. What we’re talking about is a phenomenon that I call ‘government censorship by proxy.’”

Adding to extensive prior evidence of “censorship by proxy” by the Biden administration, Rep. Jim Jordan (R-Ohio) on Nov. 6 released a [report](#) titled “The Weaponization of ‘Disinformation,’

Pseudo-experts and Bureaucrats: How the Federal Government Partnered with Universities to Censor Americans' Political Speech.”

The report states, “What the federal government could not do directly, it effectively outsourced to the newly emerging censorship–industrial complex.”



(Left) Facebook co-founder, chairman, and CEO Mark Zuckerberg testifies before a combined Senate Judiciary and Commerce committee hearing in the Hart Senate Office Building on Capitol Hill in Washington on April 10, 2018. (Chip Somodevilla/Getty Images) SpaceX founder, Twitter owner, and Tesla CEO Elon Musk speaks during the Vivatech technology startups and innovation fair in Paris, on June 16, 2023. (JOEL SAGET/AFP via Getty Images)

Mr. Jordan wrote on X, formerly Twitter, that “hundreds of secret reports show how the DHS [Department of Homeland Security], CISA [the Cybersecurity and Infrastructure Security Agency], the State Department, Stanford [University], and others worked together to censor Americans before the 2020 election, including true information, jokes, and opinions.”

“The federal government, disinformation ‘experts’ at universities, Big Tech, and others worked together through the Election Integrity Partnership to monitor and censor Americans’ speech,” he wrote.

More Articles



Government Censorship, Election Manipulation Exposed in Congressional Report

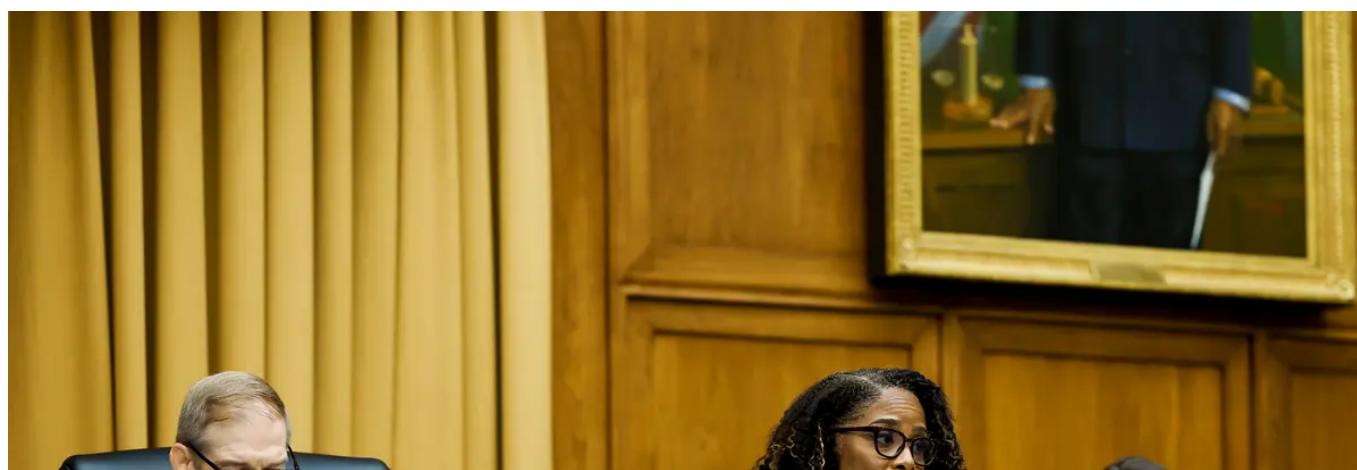


Climategate: Released Emails Show Blatant Censorship in Climate Journals | Facts Matter

Currently, the United States awaits what is expected to be a landmark First Amendment decision by the Supreme Court in the case of *Missouri v. Biden*. This case, which was originally brought by then-state Attorneys General Eric Schmitt in Missouri and Jeff Landry in Louisiana, accuses the Biden administration of arm-twisting social media companies into blocking speech that contradicted the state narrative regarding the COVID-19 pandemic.

The AGs argued that, in compelling private companies to censor, the government has made them “state actors,” thus violating Americans’ First Amendment rights.

“If the allegations made by Plaintiffs are true, the present case arguably involves the most massive attack against free speech in United States’ history,” the plaintiffs [stated](#). “In their attempts to suppress alleged disinformation, the Federal Government, and particularly the Defendants named here, are alleged to have blatantly ignored the First Amendment’s right to free speech.”





Ranking member Del. Stacey Plaskett (D-VI) speaks alongside House Judiciary Chairman Jim Jordan (R-Ohio) during a hearing on the Weaponization of the Federal Government on Capitol Hill in Washington on July 20, 2023. (Anna Moneymaker/Getty Images)

Those accused include, among others, President Joe Biden, White House press secretary Karine Jean-Pierre, Surgeon General Vivek Murthy, Health Secretary Xavier Becerra, DHS Secretary Alejandro Mayorkas, as well as the Health and Human Services Department, the Centers for Disease Control and Prevention (CDC), the Department of Homeland Security, the Justice Department, the FBI, the State Department, and the Treasury Department.

The state AGs say that Biden administration officials, “through public pressure campaigns, private meetings, and other forms of direct communication, regarding what Defendants described as ‘disinformation,’ ‘misinformation,’ and ‘malinformation,’ have colluded with and/or coerced social-media platforms to suppress disfavored speakers, viewpoints, and content on social media platforms.”

Circumventing the 1st Amendment

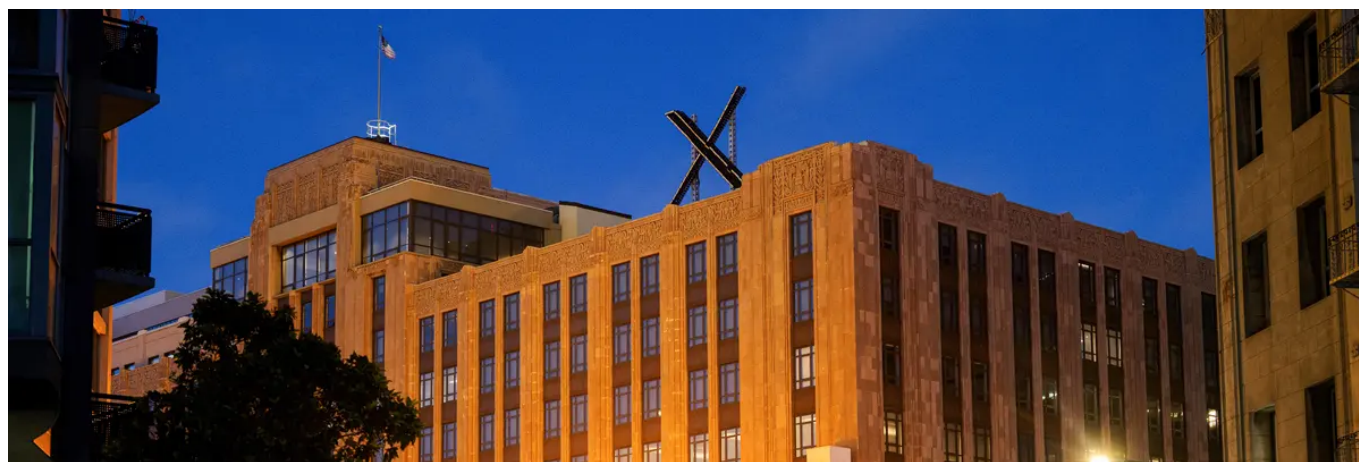
Legal analysts argue that if the government is prohibited by the First Amendment from restricting protected speech, it can't attempt to force private companies to do the same.

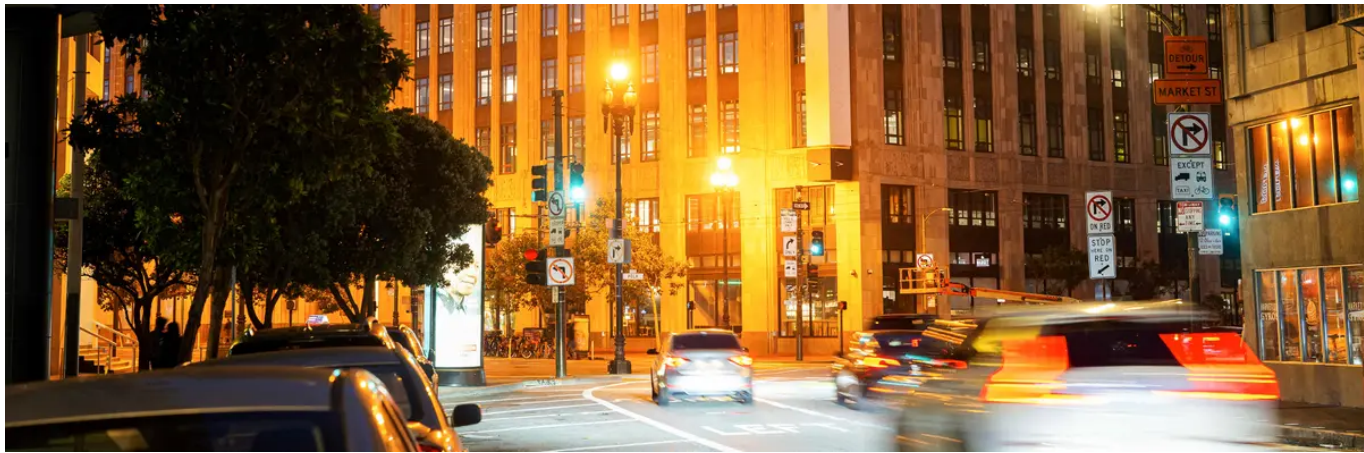
“The government cannot bypass the First Amendment’s protections by going and asking private companies to censor in ways the government cannot,” Jeremy Tedesco, senior counsel for the Alliance Defending Freedom (ADF), told The Epoch Times. “But that’s what’s going on.

“It’s a very dangerous problem that’s unique to the age we live in, because these massive social media companies own the digital public square. Through the ‘Twitter Files,’ we know the government is monitoring peoples’ posts and recommending, encouraging, and even coercing these companies to take down content that the government disagrees with.”

The Twitter Files are documents that show extensive correspondence between the Biden administration and Twitter, now known as X. These documents were revealed to several independent journalists by Elon Musk after he purchased Twitter in October 2022.

The internal communications revealed that federal authorities, including the CDC, the FBI, and the White House, put intense pressure on Twitter to censor its users—to restrict views of posts not only on topics such as the origins of COVID-19 and the efficacy of masks and vaccines, but also about the incriminating contents of Hunter Biden’s laptop computer, which many believe had a material effect on the 2020 presidential election.





A newly constructed sign is seen on the roof of the X headquarters, previously known as Twitter, in San Francisco, on July 29, 2023. (JOSH EDELSON/AFP via Getty Images)

There's evidence that the FBI actively engaged with Twitter executives in flagging posts it didn't like and that the CDC actively collaborated with Facebook on which posts it considered acceptable. President Biden added to that pressure, even [accusing](#) social media companies of “killing people” with misinformation in July 2021.

More cases of speech suppression by the Biden administration have been revealed as part of the discovery process in the *Missouri v. Biden* case. In a ruling on the case, District Judge Terry Doughty [decided in favor](#) of the state attorneys general, ordering defendants in the Biden administration to refrain from further attempts to “coerce or significantly encourage social-media companies to remove, delete, suppress, or reduce ... posted social-media content containing protected free speech.”

James Burling, vice president of legal affairs at the Pacific Legal Foundation, said the Biden administration put a "great deal of pressure" on social media companies.

“If you read some of the decisions that came out of the trial court and then the 5th Circuit Court of Appeals, I found it rather appalling,” he told The Epoch Times.

In rendering his opinion against the Biden administration, Judge Doughty cited President Harry Truman: “Once a government is committed to the principle of silencing the voice of opposition, it has only one place to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear.”

The Supreme Court has since lifted the district court’s injunction, pending its decision on the case.



President Joe Biden prepares to speak about COVID-19 vaccines at the White House complex in Washington on Aug. 23, 2021. (Drew Angerer/Getty Images)

States Join Feds in Regulating Speech

In addition to federal efforts, some states are also working to control speech.

New York enacted its “[Hateful Conduct Law](#)” on Dec. 3, 2022. This law forces social media platforms to establish internal policies against “hate speech,” to set up reporting mechanisms for the public to report offenses, and to respond to each report of an offense. Failure to comply will result in an investigation by the New York attorney general and daily fines of \$1,000 per violation.

New York’s “hate speech” law compels private companies to establish speech codes as an alternative method to state laws doing the same thing. Forcing private companies to set speech codes is a way to circumvent the First Amendment because, as Mr. Burling states, “a social media company, being a private entity, is generally going to be exempt from the First Amendment.”

Daniel Ortner, an attorney at the Foundation for Individual Rights and Expression who is litigating against the New York law, told The Epoch Times that New York claims the law is merely a matter of consumer protection. In fact, he said, it goes well beyond that.

“If you don't want to have a policy for dealing with what the state defines as hate speech, tough luck, you have to define it, you have to have your definition match their definition, so as to cover the speech they're referring to, which is very vague,” Mr. Ortner said. “And the other side of it is that the state is then putting pressure on websites to take down content.”

The New York state attorney general’s office “just sent a letter to Rumble, one of our clients, along with other social media platforms over the Israeli–Palestinian conflict, demanding that they reveal their policies and show how they’re taking down speech,” he said.

One of the likely targets of this type of legislation is a satirical site that frequently mocks progressive ideology. In March 2022, the Babylon Bee was [suspended](#) from Twitter for naming Assistant Health Secretary Rachel Levine, a man who identifies as a woman, as its “Man of the Year.”



The Babylon Bee website shows transgender Assistant Secretary for Health Rachel Levine, as “Man of the Year” in one of its headlines. (screenshot)

“Our concern with these laws is similar to our concern for pre-existing hate speech prohibitions on social media platforms, like Facebook and Twitter,” Babylon Bee founder and CEO Seth Dillon told The Epoch Times. “It’s an overly broad category that can easily be misapplied to disfavored viewpoints—and that’s not a mistake.”



Seth Dillon, CEO of The Babylon Bee, in Washington on June 22, 2022. (Matthew Pearson/CPI Studios)

“These rules are put in place not to protect users from jokes, but to protect preferred narratives from criticism. If it becomes unlawful to mock or criticize the left's bad ideas, then those ideas don't have to be defended—they just win by default.

“And if the past couple of years have taught us anything, it's that bad ideas taken seriously have catastrophic consequences.”

Free speech advocates are looking to the Supreme Court to rule that government actions to compel private companies to censor speech make those private companies, in effect, a “state actor” or an extension of the government and thus subject to the First Amendment.

Meanwhile, challenges to New York’s “hate speech” law are moving through the courts. On Feb. 14, District Court Judge Andrew Carter issued an [injunction](#), blocking enforcement of the law, writing in his decision that “the First Amendment protects from state regulation speech that may be deemed ‘hateful.’”

New York has appealed the decision.



Temporary security fences align a path to the plaza of the Supreme Court building in Washington on April 19, 2023. (Anna Moneymaker/Getty Images)

'Radical Transparency'

However, court actions, while essential to protect freedom of speech, may not go far enough, legal analysts say.

Mr. Grossman says it will be difficult for most people who are censored on social media to know or prove that government has pressured a social media company to censor them.

“So much of this activity occurs in the dark, and the people targeted simply have no way of knowing that the government was involved in the decision,” Mr. Grossman said. “Litigation is not and cannot be a silver bullet.”

In addition, he said, it will be difficult to enact laws that bar the government from engaging in censorship by proxy.

“It’s very easy to describe censorship by proxy in the abstract, but it’s very difficult to describe what exactly would be covered by a prohibition,” he said. “As we saw in the evidence for the Twitter Files, the government very rarely makes explicit threats with respect to content removal; sometimes, it simply says, ‘You should be aware of this.’”

Instead, Mr. Grossman advocates what he calls “radical transparency.”



Facebook employee Mohamed Almari works from his laptop decorated in various Facebook stickers at the company's corporate headquarters campus in Menlo Park, Calif., on Oct. 23, 2019. (JOSH EDELSON/AFP via Getty Images)

That would include laws, modeled on the Freedom of Information Act and the Privacy Act, that require immediate public disclosure

of any action by government officials to encourage or force private companies to censor protected speech.

“That provides a window to the public as well as to targeted individuals about how the government is exercising this power, what speech it is targeting, and the frequency with which it is doing it,” he said. Government officials would be required to make these reports to the Office of Management and Budget, which would make them available to the public.

“We’ve seen in the past that when these types of abuses come to light, they tend to stop.”

Corporate Speech Codes

Beyond the issue of government pressure to censor, however, the instinct to suppress speech has become so embedded in the culture of social media companies that government intervention is unnecessary in many cases, legal experts say.

“I think it’s essential that the Supreme Court find that it’s illegal for the government to coerce these companies to censor,” Mr. Tedesco said. “But that’s only part of the battle.

“Most of the censorship that’s occurring on these platforms is done because the private companies are enforcing their own policies. They have policies that are ‘hate speech,’ that are ‘intolerance,’ that are ‘hateful conduct,’ and other things that, if the government were to impose those standards as a speech regulation, it would be dead on arrival in front of any federal court under the U.S. Constitution.”

But here, too, efforts to protect free speech may run into roadblocks. Given that private companies aren’t subject to the First Amendment, it may prove difficult to prevent them from

setting speech codes on their own, unless they are deemed to be a “public square,” meaning that they are effectively a sole platform for public speech.

That case may be hard to make.

“I am disturbed by the behavior of some of these social media companies,” Mr. Burling said. “But I don’t think they rise to the level of a public square.”



Rep. Marjorie Taylor Greene (R-Ga.) at a press conference outside the U.S. Capitol in Washington on April 28, 2022. (Win McNamee/Getty Images)

Many people who have been banned from Twitter, Facebook, or YouTube were able to find other platforms such as Rumble or Truth Social, undermining the argument that social media companies have monopolized online speech platforms, he said.

Given the actions by the federal government, some have turned to state laws to protect speech.

“In some cases, the state courts have also chosen to grant more protection under their constitutions than under the First Amendment,” a [report](#) by the Free Speech Center at Middle Tennessee University states.

“New Jersey [and] Connecticut offer more free expression guarantees than [the] federal constitution.” Additionally, California has state laws that bar discrimination from political views. The extent to which attorneys general in these states choose to enforce such laws is a separate matter, the report states.

While the practice of censorship by proxy is new and specific to current technology, attempts to censor Americans aren't new.

“Throughout the history of the Republic, there have always been threats to free speech—things like the Alien and Sedition Acts—and these threats continued through the Cold War, they continued through the Vietnam era, and they’re front and center today with ‘hate speech,’” Mr. Burling said. “But I think our Constitution is robust, and I think our courts are robust enough to continue giving us some protections.

“If they stopped being protective of free speech, then we have some serious problems ahead of us.”



Friends Read Free

Copy



More Special Reports



Trump or Biden: Who Has Most to Lose From RFK Jr.'s Independent Run?



Backers See a 2025 Trump–Johnson Team as a Panacea for America



A Young Palestinian Who Found Refuge in Israel



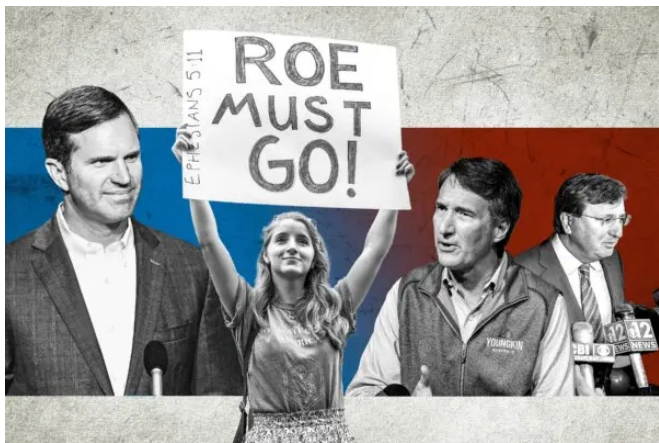
Eyewitness Recounts Death of Jewish Protester in California



A Weaker China to Meet With a More Wary US



Key Moments From the 3rd Presidential Primary Debate



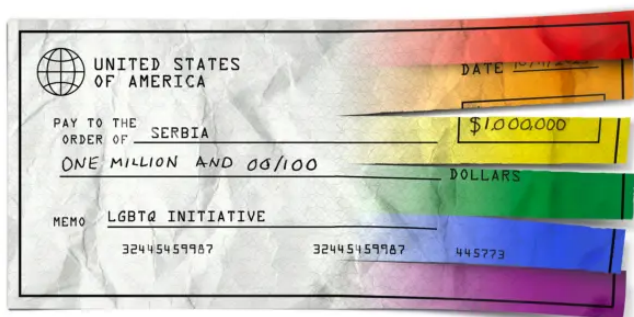
Top 10 Takeaways From Tuesday's Election— And What It Means for 2024



So, You Want to Buy a Home In This Market? Think Again.



To Understand Mike Johnson, Look to Small-Town Louisiana



How the US Spent \$4.1 Billion on Global LGBTQ Initiatives

THE EPOCH TIMES

Copyright © 2000 - 2023 The Epoch Times Association Inc. All Rights Reserved.