Supreme Court Divided Over Ability of Government to Censor Speech

The Solicitor General of Louisiana, who argued the case for our side, opened by pointing out that the government has many levers for coercion of social media companies, and they have been aggressively deployed since at least 2020. The platforms initially tried to push back but eventually caved under relentless government pressure to censor.

He also argued that while governments have the right to attempt to persuade by making *public* arguments, governments have no right to "persuade" by censoring the views of others and using their power to suborn social media companies behind-the-scenes. As I explained in my previous post, any so-called "persuasion" in this context has powerful carrots and severe sticks attached—even when threats are not explicitly stated.

Returning to a theme he explored with the government's attorney, Justice Thomas asked whether *coordination* could be deployed in addition to coercion in ways that might be

unconstitutional. Our lawyer clarified that the government cannot induce private platforms—or third-party censorship enterprises (like the Election Integrity Partnership or the Virality Project)—to do what would be illegal for the government itself to do.

I will add that the analogy of the hit man is illustrative: if I hire an assassin to kill someone, that assassin is obviously responsible for the murder, but I am not thereby absolved of criminal responsibility simply because I did not pull the trigger.

Returning to the question of whether the government could try to persuade social media companies to censor, Justice Kagan argued that the government does this all the time when they reach out to platforms to give them information. But in fact, as the record shows, when they reached out it is not to give information but to make imperious demands backed up by explicit or implicit threats. Kagan then pressed the question of standing again, asking whether the plaintiffs were among the "disinformation dozen" that were clearly censored at the bequest of the government (the answer is no). She then asked whether we were directly harmed by the government (the answer is yes).

Consuming much of the oxygen in the room, the verbose and aggressive Kagan later returned to her traceability hobby horse, claiming it would be hard to tell whether the censorship in any given case was government action vs. platform action against the plaintiffs, even advancing the outrageous claim—contradicted time and again in the evidentiary record—that "it seems hard to overbear Facebook's will." Tell that to Mark Zuckerberg, who publicly admitted that they censored things which otherwise would not have been removed except for government pressure.

(See my discussion yesterday for more on this issue of traceability of harms from government to plaintiffs. To

reiterate, I strongly believe the Supreme Court will find, as did both lower courts, that plaintiffs have standing.)

I don't foresee Kagan getting sufficient traction on this question to overrule the two lower courts. All it would do is kick the can down the road: our attorneys round up the so-called "disinformation dozen," add them as plaintiffs, and refile the case. We'd be back at the Supreme Court in six months. The government only needs to find one plaintiff that has standing for the case to move forward, and two of my co-plaintiffs—Jill Hines and Jim Hoft—were *specifically named* in government communications to social media companies regarding censorship.

I believe Kagan is pressing this point to avoid having to rule on the merits: it will take some creative word-salad from Kagan, Sotomayor, and Jackson to explain how the government's behavior was not—at the very least—coercive in many instances. Being smarter than the other two, Kagan probably wants to avoid having to twist her legal logic into a pretzel to accomplish this.

Alito and Kavanaugh, bringing the questions back to the merits and central issues at stake, raised the question again of the breadth of the injunction and its criteria for permissible vs. impermissible forms of persuasion/coercion. Gorsuch—who generally does not favor injunctions but who seems sympathetic to our arguments—cited a universal injunction in an analogous case, which, like the lower court injunction, would apply not just to the seven plaintiffs but to all those similarly situated.

He asked whether the plaintiffs would accept a more narrowly tailored injunction applying only to the plaintiffs. This is obviously not our preference, but to keep Gorsuch on board our lawyer indicated that any injunction would be better than no injunction at all. We need a win—a first big dent in the censorship leviathan and a Supreme Court precedent. So we will

strategically take what we can get if it means maintaining a majority of supportive justices.

Regarding coercion, Barrett asked what constitutes a threat—simply someone with authority to impose a sanction, the criteria in the *Bantam Books v. Sullivan* case? Our lawyer clarified that it is not only the authority to impose a threat, but even just the recipient's *belief* that the authority has this power, which counts as coercion. One knows that the boxer's hands are deadly weapons even if he does not raise his fists in a threatening pose.

Finally, I cannot fail to mention Justice Ketanji Brown Jackson's attempt to create out of thin air a novel free speech doctrine which would permit broad latitude for government censorship and eviscerate the plain meaning of the First Amendment.

In doing so, she went far beyond even what the government's attorney was arguing when she indicated the government could even use coercion in some circumstances to censor. Interjecting at several points, piece-by-piece, she built up this argument, which eventually took her so far off the reservation that I doubt Kagan or even Sotomayor is prepared to follow her that far.

She first indicated that government could censor in some circumstances if it has a compelling state interest. She later suggested that an emergency situation might necessitate government censorship, illustrating this with a wacky hypothetical in which we were to suppose that children were responding to a TikTok challenge to jump out of ever higher windows. Addressing our attorney, she concluded her case with this whopper: "My biggest concern is that your view has the First Amendment hamstringing the government in significant ways in the most important time periods." She apparently fell asleep in her high school civics class and missed the part about the First Amendment being a constraint upon the

government: its entire purpose is to “hamstring the government in significant ways.”

Regarding her hypothetical: presumably the government simply telling citizens not to jump out of windows, or working with parents to help children avoid this behavior, would be insufficient for her purposes without censorship to back it up. Furthermore, every time a government official tries to preemptively censor he or she will naturally believe there is a compelling state interest—otherwise why would the government be doing it?

There is a strict scrutiny test (compelling state interest, narrowly tailored to achieve purpose, no alternative means, etc.) used by the court to define the very narrow categories of illegal speech—which can be counted on one hand—such as child pornography or direct incitement to physical violence. But as our lawyer clarified, those are established by the courts on the back end, when the government brings a challenge to something that has *already* been published. This does not permit individuals in government to expand these categories willy-nilly according to their own subjective criteria by *preemptively* censoring speech.

There is no emergency exception, no pandemic exception, no vaccine exception, not even a national security exception, to free speech in the US Constitution—and the Court has carved out no such exceptions in previous cases. But to carry Ketanji Brown Jackson’s wacky hypothetical a bit further, as my co-plaintiff Jay Bhattacharya explained in our interview after the oral arguments: it was *the government*, not the plaintiffs, that was telling people to jump out of windows, i.e., the government was recklessly harming our health and safety by its own misinformation during Covid. If censorship had not happened, we would not have had an illusion of consensus in favor of harmful policies ranging from school closures to lockdowns to vaccine mandates. I wish this point had been driven home more forcefully during the oral arguments.

For purposes of our legal case, we don't have to establish that our speech was true, but merely that it was constitutionally protected. But it's worth noting that Dr. Bhattacharya was initially right about the infection fatality rate and the WHO was initially wrong. Dr. Kulldorff was right about the low risk of Covid to children and the government's policies were wrong. Bhattacharya and Kulldorff were right about the harms of lockdowns and school closures and the government was wrong, as most scientists today acknowledge.

And I was right about natural immunity as compared to vaccine immunity, about the fact that vaccines did not stop infection and transmission, and about the consequent injustice of discriminating against the unvaccinated with mandates, and the government was wrong (though the CDC eventually admitted after the damage was done that my view was correct). Had this information not been censored, these harmful policies would have been abandoned much sooner or perhaps avoided entirely.

If you have persevered this far, you may be wondering how I think the court will rule. Those who watch the Supreme Court arguments closely will all tell you that the tone and tenor of oral arguments, and the behavior of the justices, are frequently not at all predictive of their final ruling. It may appear that the justices are friendly to one side's lawyer and hostile to the other side's, only to rule with the latter against the former. Some of their questions are not so much directed at the lawyers but function as subtle and coded forms of communicating to the other justices—the implications of which are not always apparent to outsiders. A research group at the University of Michigan Law School developed a predicted algorithm that achieved an accuracy merely 7% better than random chance; yet they were all given tenure and hailed as SCOTUS predictive geniuses.

So with that in mind, and the additional caveat that this is

my first time observing oral arguments at the Supreme Court, I will attempt some (soft) conjectures regarding what we might expect in our *Murthy v. Missouri* ruling, likely to be released in June. We'll find out in a few months how good or bad a prognosticator I am.

I think the court is divided on this case into thirds. It seems clear that Alito, Gorsuch, and Thomas grasp what is at stake, and while Gorsuch generally does not like injunctions, these three will try to uphold the 5th Circuit ruling. In fact, they wrote a dissenting opinion on the temporary stay of the injunction, indicating they thought it should go into effect immediately without waiting for the Supreme Court decision. I saw nothing in the Court on last Monday suggesting they have changed their view on this.

We have three judges that appear hostile to our case: Jackson, who would torch the First Amendment entirely whenever the government deems it appropriate; Sotomayor, who is not the sharpest tool in the shed; and Kagan, who is very sharp, which is why she wants to punt by questioning our standing rather than ruling on the merits. These three will have to invent some creative word salad to justify the government's behavior as presented in the record, but I anticipate they will find a way to do so and rule against us. "But it was a national emergency, a once-in-a-lifetime pandemic, and so the rules had to be suspended…" etc.

So it comes down to Barrett, Kavanaugh, and Roberts. It's hard to know where exactly they will land, but Barrett's hypothetical (described here) suggested a keen awareness of the problem of deep entanglements between government and social media resulting in unconstitutional joint action. Kavanaugh is philosophically a free-market fan who likely wants government to stay away from private platforms; but he seems also to want to leave open the door to government efforts at reasoned persuasion, so long as they are not

coercive or excessively heavy-handed. Roberts likes to build consensus on the court: if Kavanaugh and Barrett side with us, he will probably do so as well. If only one of them sides with us, and Roberts becomes the deciding vote, I think it's up in the air which way he'll land.

To build a consensus, these three may narrow the Circuit Court's injunction by defining government censorship more strictly. This will still be a win for free speech, which desperately needs a win right now. The most likely scenario, I believe, would involve defining the lower court's "significant encouragement" standard with narrowed criteria, perhaps opting for another term to describe this threshold and providing some examples of what does and does not cross the line. How this would square with the plain text of the First Amendment, which forbids any *abridgment* of speech, remains to be seen.

If I'm a betting man (and I'm not), I'll place my money (though not much money) that we'll get a 5-4 or 6-3 decision upholding some kind of injunction. And while I hate to admit it, things could also go the other way. I think it will be close. Supreme Court decisions are notoriously difficult to predict, and it appears there are enemies of free speech on the bench even in the highest Court in the land.

This is a republished article from Brownstone Institute. The author analyzes and comments on the government's oral arguments and the Justice's interrogations of the government here.