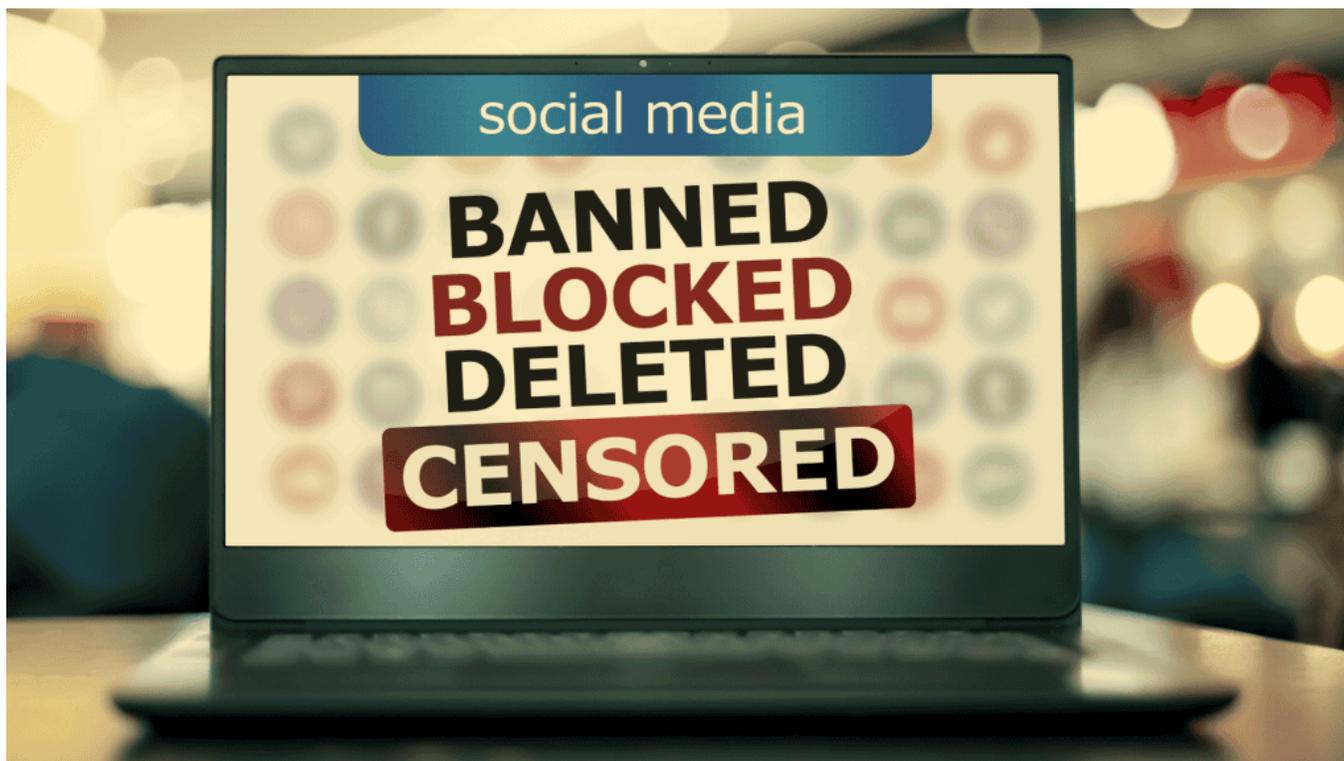NCLA: New Civil Liberties Alliance

# Massive Government Censorship During and About Covid



During the Covid pandemic, numerous federal officials and agencies implemented an expansive censorship apparatus, which was used to compel—and, in some instances, collaborate with—social media companies and other private intermediaries to suppress a range of Covid-related viewpoints that ran counter to or questioned the government's policies or preferred narrative. The censored viewpoints included those which questioned or criticized: (a) the efficacy and/or safety of the Covid vaccines; (b) the origin of Covid; (c) the efficacy of societal lockdowns and social distancing; (d) the efficacy of mask mandates; (e) the necessity of vaccinating children and infants; and (f) the necessity of school shutdowns and virtual learning from home. The government's actions have raised serious First Amendment concerns and prompted multiple legal challenges, several of which

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ranging from public statements to behind-the-scenes communications with social media companies in an effort to compel the major platforms (*e.g.*, Facebook, Instagram, YouTube, Twitter, TikTok) to remove or suppress content that the government deemed to be mis-, dis-, or malinformation.[2]

In numerous statements, the Biden Administration publicly signaled that it expected the social media companies to remove so-called misinformation from their platforms. For instance, in May 2021, White House Press Secretary Jen Psaki stated that the platforms "have a responsibility" to censor Covid-related misinformation and warned that, if they failed to do so, they might face punitive measures, including increased regulation and antitrust enforcement. In a statement in July 2021, President Biden accused Facebook and other social media platforms of "killing people" by failing to censor enough misinformation.

That same month, the U.S. Surgeon General issued an advisory, which called on the platforms to take more action to suppress "misinformation" and "[i]mpose clear consequences" for users who repeatedly spread such misinformation. In March 2022, the Surgeon-General went further, issuing a formal "Request for Information" (RFI) demanding that tech companies turn over data on individuals who spread disfavored Covid viewpoints.

Additionally, an array of government officials participated in a "whole-of-government" efforts to suppress speech through frequent private calls, meetings, and other communications with the social media platforms. Agency officials, including those within the White House, CDC, DHS, and FBI, frequently and systematically communicated with social media executives and employees to ensure that the platforms would alter their content moderation policies and algorithms so that more disfavored viewpoints would be censored. As detailed in one of NCLA's ongoing cases (*Dressen v. Flaherty*), the Covid-related content targeted for censorship included true speech, factual testimonials, humorous posts (*e.g.*, memes, gifs), and personal anecdotes.  Even private speech posted in online

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federal courts have often stymied them by deciding plaintiffs did not have standing to pursue the cases. Plaintiffs have argued that the government has violated their First Amendment right to free speech, as federal officials may not coerce, induce, or significantly encourage private parties, such as the social media companies, to perform actions at the government's behest, which would otherwise qualify as First Amendment violations if the government were to directly perform the actions itself.

Although private companies are not typically subject to the First Amendment's restrictions, if the government's influence or involvement in a private party's actions is so significant that the party's actions are no longer independent, the private party's conduct becomes "state action," for which the government may be held accountable. Plaintiffs have argued that the federal government's "censorship by proxy" vis-à-vis Covid-related "misinformation" qualifies as a violation of the First Amendment—and that the courts should hold that such conduct is unconstitutional to discourage future misconduct.

Much of the litigation, including several of NCLA's cases, remains ongoing.[3]

[1] *Changizi v. HHS*, 602 F. Supp. 3d 1031 (S.D. Ohio 2022); *Missouri v. Biden*, No. 3:22-cv-1213 (W.D. La. 2023); *Dressen v. Flaherty*, No. 3:23-cv-155 (S.D. Tex. 2023); *Daily Wire, LLC v. United States Dep't of State*, No. 6:23-cv-609 (E.D. Tex. 2023).

[2] "Misinformation" refers to false information that is not intended to deceive or cause harm, whereas "disinformation" refers to false information that is meant to mislead, harm, or manipulate. "Malinformation" refers to true information that could mislead or harm.

[3] *E.g.*, *Missouri v. Biden*, No. 3:22-cv-1213 (W.D. La. 2023); *Dressen v. Flaherty*, No. 3:23-cv-155 (S.D. Tex. 2023); *Daily Wire, LLC v. United States Dep't of State*, No. 6:23-cv-609 (E.D. Tex. 2023).

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