

Missouri v. Biden moves forward

 cnav.news/2023/03/21/editorial/talk/missouri-v-biden-moves-forward/

By Terry A. Hurlbut

March 21, 2023



The case of *Missouri v. Biden*, arguably the most important civil liberties case in modern memory, will move forward. Judge Terry Doughty yesterday handed down a ruling mostly *denying* a motion to dismiss. The judge cut out only *one* named defendant (President Biden) but left the rest of the case *intact*. Now pre-trial discovery can continue.

Background of *Missouri v. Biden*

The plaintiffs in the case include the States of Missouri and Louisiana, plus five individuals:

- Dr. Jayanta Bhattacharya,
- Jill Hines,
- Jim Hoft,
- Dr. Aaron Kheriaty, and
- Dr. Martin Kulldorff.

The defendants read like a Who's Who in Government. They start with the President (or they did; more on that below). The suit also charges Press Secretary Karine Jean-Pierre, the Surgeon General, *and* the infamous Dr. Anthony S. Fauci. After that come a dizzying variety of agencies and their heads – for a total of 67 defendants. This [link](#) has the Second Amended Complaint, all 164 pages of it.

The plaintiffs filed their first Complaint on August 2, 2022, and their Second Amended Complaint on October 6, 2022. On November 1, 2022 (a week before Midterms), *The Intercept* published its “Thought Cops” [piece](#). That piece [confirmed for the first time](#) that social media, including Twitter before Elon Musk bought it, were State actors.

From the beginning, the government has tried to argue that private actors are not and never can be State actors. Therefore no court could hold the government liable for anything they did.

But Judge Terry Doughty, in whose court the case rests, is having none of that. Yesterday, in seventy-seven pages, he said so.

The New Civil Liberties Alliance maintains this landing page for *Missouri v. Biden* with links to all available documents.

Several threads

Tracy Beanz, Editor-in-chief at *Uncover DC*, dropped a lengthy thread on *Missouri v. Biden* on December 16, 2022. It has links to articles at *Uncover DC*, and some deposition transcripts in the case.

THREAD: Missouri v. Biden

To get back up to speed on the case as we have covered it at [@UncoverDC](#), I will provide 3 links for you. I will begin this thread with the latest in the case and if you want more details you can read:

1. <https://t.co/kMB04wh9UY>

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

3. <https://t.co/VTVt3hR5D0>

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

..with social media companies to limit free speech. Recently, the judge entered a ruling on motions before him. The Biden Administration had appealed to a 3 judge panel at the 5th circuit to either bar the lower court from forcing the depositions of high level officials he had..

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

The transcripts of Elvis Chan (FBI Agent who visited Meta about the laptop) and Anthony Fauci were produced from depositions in this case. You can read those here in case you haven't.

Chan: <https://t.co/sip1IXFnQ3>

Fauci: <https://t.co/n2IHBzUV3E>

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

It is linked above. The defendants told the judge that he should pause all of this while their motion to dismiss the case was on the table. The defendants want all of this discovery and deposition to stop and don't want to have to answer to anyone.

The judge isn't having it.

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

As usual, in any filing or order, you get a brief summary of "what is this about and why are we here?" It makes it easy to understand what the parties are arguing at that particular time, and why. <pic.twitter.com/tiwGVjmvxP>

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

..for a ruling on the motion to dismiss in the case. The last brief by the Plaintiffs offered up some alternatives for the people they initially sought. Keep in mind, Psaki is no longer the head of anything. <pic.twitter.com/1klmWoSnto>

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

Rob Flaherty:

One of the criteria you need to meet to be able to depose high-level government officials is "exceptional circumstances." Flaherty was recently added to the case after expedited discovery revealed his involvement.

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

The judge orders that no suitable replacement is available for Flaherty, but that they will start with written interrogatory and discovery in the form of document requests. The judge lays out a timeline for this. Understand, this is a very big deal.

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

This is the warning. “If you don’t respond correctly, Flaherty will be sitting down for a verbal deposition, under oath” pic.twitter.com/peoWYF8R9g

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

Also, please note that the judge reaffirms “Cognitive Infrastructure.” We learned earlier in the suit that CISA has designated YOUR THOUGHTS as part of it’s critical infrastructure, and therefore they can regulate that the same way they would regulate other things.

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

Murthy had responded in written form, and defendants argue no deposition is needed from anyone there because his responses were good enough. The judge doesn’t agree with that either, but I am considering this one a loss for now. They really needed Murthy. pic.twitter.com/MwqrMsMF6k

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

Even with a gazillion other courts breathing down his back, he is doing the right thing. In analyzing the judges decision, I suppose he is thinking that by allowing the depo of a lower official, with options for more later, he is circumventing the 5th circuit stepping in (cont)

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

Psaki didn’t like that, so she started fighting it, with the government helping her. However, the government maintained that there is no replacement for Psaki. They are saying no one knows what she was saying and why. That’s their argument. pic.twitter.com/jXcplMkve

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

One of the biggest worries for people on the side of actual justice, is that the courts seem to grant motions to dismiss on cases that really need to be adjudicated, especially when it comes to big-tech and censorship. I think this judge is going to see this case through.

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

He also reminds everyone that this discovery is ONLY so he can rile on the temporary injunction and that since the plaintiffs do have standing, (a central argument of the motion to dismiss,) they may move to trial where MORE deposition and discovery will be necessary. pic.twitter.com/4q6oj2iaEk

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

The argument folks always put forth (and the government does as well) is, “Well sure, as the government we were making SUGGESTIONS about censorship, but we weren’t FORCING them to do it”

Hogwash. Psaki made statements from the podium threatening anti-trust and also 230 (cont)

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

The highlighting of the Hobbs email was part of this, and came from discovery here. People would send in “tickets” and CISA, in partnership with NGO’s and other Non Profits, used YOUR TAX dollars to run a censorship “help desk.” However, they needed more organization and funding

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

I have really missed being able to bring this information to you. Please bookmark our website, and if you are on alternative platforms you can find us there as well.

I hope my account stays active and I can continue to bring you ACTUAL journalism. <https://t.co/ji1ateKsqZ>

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

One more – I neglected the link to the docket. Thank you [@bocamarla](#) for reminding me: <https://t.co/UmLIKYGsX>

— Tracy Beanz (@tracybeanz) [December 16, 2022](#)

Then beginning in January 2023 Ms. Beanz released several more threads and embeds of filings:

THREAD: A refresh on Missouri v. Biden and where we are. <https://t.co/pu00yecnvH>


— Tracy Beanz (@tracybeanz) [January 8, 2023](#)

THREAD: There has been some recent discovery released in the case; namely from Rob Flaherty, Deputy Assistant to the President and Director of Digital Strategy.

You can read it here, but I will provide it below with commentary as well:

<https://t.co/EgPJTAIsRs> <https://t.co/pu00yecnvH>


— Tracy Beanz (@tracybeanz) [January 10, 2023](#)

 THREAD: There have been a few new important filings in the Missouri v. Biden case. If this is your first time hearing about this case, I recommend you take a look through this thread to bring yourself up to speed. I will be detailing the fight for deposition and more, below. <https://t.co/pu00yecnvH>

— Tracy Beanz (@tracybeanz) [January 12, 2023](#)

Missouri v. Biden: Judge orders amended response from gov in re: to Psaki depositions, sets briefing schedule. <pic.twitter.com/FyOgGv3uDT>


— Tracy Beanz (@tracybeanz) [January 13, 2023](#)

 THREAD – New in Missouri v. Biden: CISA didn't disclose information from 5 people who were working the “switchboard” to transfer censorship requests to social media platforms. They had originally said those people DID NOT have responsive info – more –

— Tracy Beanz (@tracybeanz) [January 19, 2023](#)


HUGE in Missouri v. Biden. Judge orders CISA to provide more information stating there is enough evidence now to allow Plaintiffs to explore whether CISA actually STOPPED censorship desk after the election. A massive win here. READ and SHARE <https://t.co/OYmDWxkX0l>

— Tracy Beanz (@tracybeanz) [January 25, 2023](#)

 NEW: Missouri v. Biden: Pending is the Plaintiff supplemental briefing to argue why the judge should issue a temporary injunction halting the government from working with social media companies to silence speech. It was originally due Monday. See next <pic.twitter.com/dqXW2g7MkX>

— Tracy Beanz (@tracybeanz) [February 23, 2023](#)

Then last week (March 15) came this ruling, denying a motion to strike the Statement of Fact from the Second Amended Complaint.

 BREAKING: Missouri v. Biden. As I mention below, the gov. wanted the judge to strike the entire “Statement of Facts” laying out their blatant 1st amendment abuses. As I expected, because this judge isn’t playing around, that motion has been DENIED. Justice is winning in this... <https://t.co/PrDHOGpGLp> pic.twitter.com/288zOJ3Siw

— Tracy Beanz (@tracybeanz) [March 15, 2023](#)

That memorandum also gave the defense twenty days to respond, and set a hearing date for May 12, 2023.

All parties were still waiting on a ruling on a motion to dismiss the case outright. That ruling came down yesterday. Jenin Younes, Attorney for Jill Hines and for the three doctors, dropped this thread linking to and explaining the ruling:

Judge Doughty just DENIED gov't defendants' motion to dismiss in Missouri v. Biden (with an exception for claims against President, which are generally disfavored). I'm working my way through the 77-page decision, which I'll link to soon and post choice quotes from

— Jenin Younes (former handle @leftylockdowns1) (@JeninYounesEsq) [March 20, 2023](#)

"Accordingly, the Court finds that Plaintiffs have plausibly alleged state action under the theories of joint participation, entwinement, and the combining of factors such as subsidization, authorization, and encouragement."

— Jenin Younes (former handle @leftylockdowns1) (@JeninYounesEsq) [March 20, 2023](#)

Rejecting Defendants' claim to be merely exercising their own free speech rights: "The Complaint...alleges extensive and highly effective efforts by government officials to 'silence or muffle the expression of disfavored viewpoints.'" (quoting *Matal v. Tam*)

— Jenin Younes (former handle @leftylockdowns1) (@JeninYounesEsq) [March 20, 2023](#)

<https://t.co/NpsFBhwIC8> Here's the decision and order

— Jenin Younes (former handle @leftylockdowns1) (@JeninYounesEsq) [March 20, 2023](#)

She initially had a tweet directly after the anchor tweet, saying this:

The Court finds that the Complaint alleges significant encouragement and coercion that converts the otherwise private conduct of censorship on social media platforms into state action, and is unpersuaded by Defendants' arguments to the contrary.

But subsequently she deleted it, for reasons best known to herself.

Reaction to Attorney Younes' thread was almost entirely congratulatory. A few users wanted some explanations of concepts they didn't understand. Why a court cannot enjoin a sitting President, for example.

Analysis: the ruling...

Here *CNAV* offers its own analysis of the ruling, in addition to that of Attorney Younes. The defense tried to throw the case out on three main grounds. First they denied that the Plaintiffs had Article III standing. The judge said yes, they had. The States and individuals had alleged injuries-in-fact, traced the injury to the defendants, and suggested a remedy within the court's power to grant. Furthermore, the court found that the States had a type of standing called *parens patriae* ("parents of their country"). That means any injury to the "sovereign interests" of a State is an injury to the State itself.

Next the defendants tried to claim federal sovereign immunity. No go, said the judge. Sovereign immunity cannot excuse violations of the First Amendment, exceeding one's lawful authority (i.e., acting *ultra vires*, or "beyond one's power"), nor violations of the Administrative Procedures Act.

Finally, the defendants argued that all the actions taken against plaintiffs were by the private social media companies, acting privately. No, said the judge; the plaintiffs alleged that, while the companies are private, their acts are not. Not when the government orders them so to act.

The only success the defense had was to dismiss all claims and prayers for injunctive relief against the President. Courts do not enjoin Presidents with regard to their official acts. But *declaratory* judgments might still be valid.

... and the Missouri v. Biden case itself

The case of *Missouri v. Biden*, now that it can move forward, will set boundaries where this administration has clearly crossed them. But that doesn't apply only to this President. Several of the censorship orders came earlier, in time to skew public opinion about then-President Trump and then-candidate Biden. The flip side of a court not directly enjoining a President is that the injunctions do not "go away" after that President leaves office. *Nor do they have any limit on their force or effect by reason of whether a given agency, agent, or supervisor acted before, or after, any particular President entered office.* Which makes Dr. Fauci, for example, liable for all his acts, under Biden, Trump, and perhaps even Obama.

More to the point, *Missouri v. Biden* will put paid to the notion “this is a private company, so you have no standing.” Thus far a court has now said those of us who had our voices stilled, *do* have standing to complain. That same court has also set a standard for determining when private acts become State acts. As Clarence Thomas has already said, private acts become State acts when the State threatens, cajoles, pleads, orders, or otherwise induces those acts.

All eyes will turn to the court again, when the case comes to a hearing for a preliminary injunction.