AAPS Triumphs over Censorship in the U.S. Court of Appeals

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The landmark legal precedent of this year—and perhaps this decade—is the recent victory by the Association of American Physicians and Surgeons Educational Foundation (AAPS) against censorship in the U.S. Court of Appeals for the Fifth Circuit.[1] There we established a robust "right to hear" under the First Amendment of the U.S. Constitution. This unanimous decision was rendered on Jun 3, 2024, in favor of AAPS and against censorship by board certification groups and by the federal government. There should be an unfettered right for physicians to speak out on matters of public concern, such as COVID and other controversial issues, and our victory in the Fifth Circuit against censorship sets the standard for protecting this freedom of speech.

The rising tide of censorship by powerful entities, including both the federal government and private monopolies, has become so devastating that it washes away our freedom and prosperity. Freedom of speech is the lifeblood of our constitutional republic, and censorship of physicians who speak out on matters of public policy is extremely harmful to public debate.

The defendants in this case are the Biden Administration, in the name of Alejandro Mayorkas as the Secretary of the Department of Homeland Security (DHS), and three of the most powerful board certification groups: the American Board of Internal Medicine (ABIM), the American Board of Obstetrics and Gynecology (ABOG), and the American Board of Family Medicine (ABFM). These entities have threatened, or in some situations actually taken, disciplinary action against the board certifications of physicians based on their outspokenness on matters of grave public concern.

I argued this case on appeal in New Orleans on Apr 4, and the oral argument is posted on the Fifth Circuit's website for public access.[2] The decision in favor of AAPS was then rendered less than two months later.

The Fifth Circuit presides over Louisiana, Texas, and Mississippi, and has become the most important court in our country. With nearly a half million Americans moving to Texas annually, it will surpass California in population within 25 years. The Fifth Circuit has also become the national leader on many issues that the U.S. Supreme Court dodges. The Supreme Court accepts review on only about 1 percent of the cases brought to it, and the Court prefers to decline review of controversial matters.

In one closely following appeal this spring, for example, after extensive briefing and oral argument the Supreme Court ultimately dismissed that controversial case with this terse ruling: "The writs of certiorari before judgment are dismissed as improvidently granted,"[3] and restored a lower court order allowing emergency abortions in Idaho under the Emergency Medical Treatment and Labor Act (EMTALA). This returned the case to the lower courts without a ruling on the merits.

On the rare occasions in which the Supreme Court does render a full decision, it prefers to use procedural grounds, such as legal standing, to avoid the substantive merits. In two of the biggest cases this summer concerning state laws attempting to end censorship by social media platforms, the Supreme Court ducked the substance and merely sent these entire cases back down to lower courts for reconsideration and further delay. This is called "kicking the can down the road," rather than picking it up and disposing of it.

There is no such reluctance by the Fifth Circuit to address and resolve controversial cases. Located 1,000 miles away from Washington, D.C., the Fifth Circuit maintains its independence and healthy skepticism about what emanates from our Nation's capital.

Our lawsuit objected to the Disinformation Governance Board, which was created by the Biden Administration, existed for about three months in 2022, and was terminated only after we sued in challenging it. When the Biden Administration announced its cancellation of this Ministry of Truth, which would have been a more honest name for it, DHS also indicated that the work planned by this censorship Board would continue in a dispersed rather than centralized manner. This unconstitutional censorship includes the federal government's monitoring and taking action against so-called "misinformation" and "disinformation," which means any speech disfavored by the ruling regime. The First Amendment stands against infringement on speech deemed by our federal government to be misinformation or disinformation. AAPS sued to protect this basic First Amendment right.

The Fifth Circuit recognizes the dire threats to freedom of speech posed by censorship today, including when the censorship is done under the guise of combatting so-called misinformation or disinformation. The Fifth Circuit did in our case what the Supreme Court failed to do in the *Murthy v. Missouri* case, in which the High Court dissolved a good injunction against the Biden Administration's censorship of social media. The Supreme Court based its decision on a perceived lack of legal standing in that case by two states and five plaintiffs. Thus, our case moves forward while the *Murthy* case has run aground.

One of the three Fifth Circuit panelists in our AAPS case, Judge James Ho, wrote a brilliant and powerful separate opinion in our favor, which could be printed and kept on our bookshelves next to the Declaration of Independence and U.S. Constitution. Judge Ho included his following statement about our liberty:

> In America, we don't fear disagreement—we embrace it. We persuade—we don't punish. We engage in conversation—not cancellation. We know how to disagree with one another without destroying one another.
>
> Or at least that's how it's supposed to work. As the Supreme Court recently reminded us, our Constitution is premised on our firm conviction that "viewpoint discrimination is uniquely harmful to a free and democratic society." Intolerance of differing views contradicts our Founding principles.[1,4]

Our successful lawsuit leads the way to protect freedom of speech for physicians on issues of immense importance to the public and to the future of our country. By protecting physicians' right to speak out, we protect patients' right to hear what candid physicians want to say.

Background to *AAPS v. ABIM, et al.*

As previously recounted,[5] AAPS filed this lawsuit on Jul 12, 2022. AAPS objected to retaliation by specialty board entities against the board certifications of physicians because of disagreement with the physicians' public statements. As Judge Ho stated:

> At various times throughout history, medical care

> has suffered—and patients have been harmed, even killed—because doctors succumbed to social pressure and desire for approval and advancement. We may "look back in disbelief at [doctors] who ridiculed and ostracized proponents of handwashing and sterilizing surgical instruments to prevent disease and infection." But we would do well to learn from our past. Yes, we should absolutely follow the science. But that doesn't mean we should always follow scientists. Because scientists don't always follow the science.[1]

Judge Ho then cited an impressive collection of work that would be a fine addition to any of our libraries or reading lists:

> Sherwin B. Nuland, The Doctors' Plague: Germs, Childbed Fever, and the Strange Story of Ignác Semmelweis (2003); Lindsey Fitzharris, The Butchering Art: Joseph Lister's Quest To Transform The Grisly World of Victorian Medicine (2017); *see also* Samir Okasha, Philosophy Of Science: A Very Short Introduction 77 (2nd ed. 2016) (scientists are subject to "peer pressure"); Katalin Karikó, Breaking Through: My Life in Science 184 (2023) ("I had become a very good scientist. But I was learning that succeeding at a research institution like Penn required skills that had little to do with science.").[1]

Despite these authorities, the phony war by the federal government and other powerful entities, such as monopolies, against "misinformation" and "disinformation" rages on. The DHS could not even agree on how the terms should be defined. Another federal agency, the Cybersecurity and Infrastructure Security Agency (CISA), concerned with foreign influence operations and disinformation, adds a new term of "malinformation" to its posting of its malleable definitions:

- **Misinformation** is false, but not created or shared with the intention of causing harm.
- **Disinformation** is deliberately created to mislead, harm, or manipulate a person, social group, organization, or country.
- **Malinformation** is based on fact, but used out of context to mislead, harm, or manipulate. An example of malinformation is editing a video to remove important context to harm or mislead.[6]

Any governmental censorship of any of the above types of speech by American citizens is flatly contrary to the right of free speech as guaranteed by the First Amendment. The government does not censor the liberal media, of course, but instead censors critics of government policy, as many physicians have been about COVID-related mandates. If the government is allowed to infringe on First Amendment rights by censoring so-called misinformation, disinformation, or malinformation (which is not even a term recognized yet by the Merriam-Webster dictionary), then freedom of speech would cease to exist in America.

The Initial Dismissal of Our Lawsuit by the District Court in Galveston

In response to AAPS's lawsuit in federal court in Galveston, Texas, on Sept 26-27, 2022, the Biden Administration and the specialty board defendants (ABIM, ABOG, and ABFM) filed their motions to dismiss. On May 16, 2023, the district court in Galveston issued an Opinion and Order granting the board defendants' motions to dismiss, and on May 23 the district court rendered a separate Opinion and Order granting the Biden Administration's motion to dismiss.

The ruling rendered against AAPS in Galveston is what we were able to reverse on appeal. The district court in Galveston held that, "[a]s AAPS has failed to show Article III standing, all of its claims against the board defendants are dismissed," and that there was a lack of legal standing for both AAPS's claim under the First Amendment and its antitrust claim based on the monopolies held by ABIM, ABOG, and ABFM over board certification.[7] As to the First Amendment claim, the district court wondered aloud whether the Fifth Circuit would recognize a right to listen: "The Fifth Circuit has not addressed the 'right to listen,'" the court held. The district court then ruled that even if such a right is recognized by this Court, "there would still be no injury in fact [because a] precondition of asserting the right to listen is the existence of a willing speaker."[7] In its pleading, AAPS had not expressly identified Dr. Peter McCullough or anyone else as a willing speaker who had been censored by the Board Defendants, and the district court held as follows:

> AAPS does not identify any willing speakers. Although AAPS mentions Dr. Peter McCullough in its response, it alleges only that Dr. McCullough spoke at an AAPS conference and has been targeted—not that Dr. McCullough would speak differently at AAPS events if it were not for the threats he has received.[7]

Ultimately, the district court did not reach and resolve whether the Board Defendants are subject to the First Amendment for allegedly "impos[ing] their censorship as alleged herein either at the request of officials in the Biden Administration and Democrats in Congress, or in the expectation of obtaining favoritism from them as a result."[7] This necessitated the appeal by AAPS to the Fifth Circuit.

The district court in Galveston also dismissed the antitrust claim by AAPS against the specialty boards' misuse of their monopolies over board certification, whereby these board defendants retaliate or threaten to retaliate against physicians' board certifications if they speak out. The district court held that there was a lack of standing based on antitrust injury. The district court found that "the board defendants, whether monopolies or not, do not compete with AAPS and are not purchasers or consumers of AAPS services."[7] The court held further that:

> If the board defendants were to violate the antitrust laws, the resulting antitrust injury, if any, would befall either their consumers (the physicians) or their competitors (other board-certification organizations). AAPS—which fits in neither group—would not suffer an antitrust injury.[7]

The district court continued, "To the extent AAPS has been injured, however, it was independent third-party physicians, rather than the board defendants, who committed the injurious acts."[7] The court elaborated that:

> [I]t is pure speculation that the board defendants' actions, rather than any other factors, caused the alleged harm. It is equally speculative that court action would redress AAPS's injury and increase or restore robust speech, conference attendance, internet traffic, and monetary income. It is just as plausible that the nonparty physicians would continue to make the same decisions that cause the alleged harm even if the court granted the requested relief.[7]

As to the Biden Administration, which AAPS sued in the name of Homeland Security Secretary Alejandro Mayorkas, the district court granted his motion to dismiss for lack of subject matter jurisdiction because Mayorkas had purportedly disbanded the Disinformation Governance Board (DGB). "Mootness is dispositive here and fatal for the claims AAPS properly brings before the court."[8] The termination of the DGB supposedly "gave AAPS the precise relief that it requested—to 'disband,' 'permanently discontinue,' and 'abolish' the board," the district court held.[8] "Mayorkas's disbandment of the board and revocation of its charter eliminated any live case or controversy against him, making AAPS's claims moot," the district court added.[8] In fact, as AAPS argued on appeal, the federal government has not ceased its censorship activities, but instead merely dispersed this among multiple groups rather

than in one centralized committee.

The district court reasoned that "[t]he voluntary-cessation exception does not apply here," in part because government is presumed to be acting in good faith when it, in contrast with a private defendant, voluntarily terminates an objectionable activity.[8] The fact that government has indicated its determination to continue to combat what it considers to be misinformation and disinformation was unpersuasive to the court, which held that it:

> does not show that Mayorkas and the Department *will* re-establish the board; it merely demonstrates their *ability* to do so. That, by itself, is insufficient to prove the voluntary-cessation exception.[8]

Finally, the district court denied AAPS leave to amend its Complaint, based on its unusual Local Rule of Practice 6. The Galveston Division Rules of Practice are available online,[9] and on appeal the Fifth Circuit struck down and invalidated this rule at the request of AAPS.

Finally, one of AAPS's claims is that the Biden Administration had failed to make its internal documents available to the public as required by the Federal Advisory Committee Act (FACA). The district court dismissed that claim without providing a reason.

The John Minor Wisdom Courthouse in New Orleans

The Fifth Circuit presides in the vibrant cultural center of the South, New Orleans, which is the birthplace of jazz. Free concerts are performed weekly in Lafayette Park, located across the street from the John Minor Wisdom federal courthouse of the Fifth Circuit. Early in the evening before our oral argument in our case, the park came alive with musical performances, which illustrated one of the many benefits of freedom of speech.

Digressing for a moment, jazz is a combination of ragtime, blues, Caribbean, slave songs, and spiritual hymns. Louis Armstrong, the renowned trumpet and cornet player, was born and raised in New Orleans and was a leader in popularizing jazz nationwide in the 20th century. Miles Davis, Duke Ellington, Dave Brubek, and others expanded the reach of jazz, and their performances continue to be enjoyed by millions today. This is uniquely American music, thanks originally to New Orleans and to American creativity. Today jazz has an enormous following worldwide, particularly in Europe and Japan.

As to the John Minor Wisdom Courthouse in N'awlins, as locals refer to their city, until 1981 the Fifth Circuit included within its jurisdiction Alabama, Georgia, Florida, and (prior to the transfer arranged by Jimmy Carter) the Panama Canal Zone. Judge John Minor Wisdom presided on the Fifth Circuit for nearly a record-setting 42 years. For comedic effect, his name is rivaled by only the name of Judge Learned Hand, who was an esteemed federal judge in New York presiding for 52 years.

The growth of Texas has made the Fifth Circuit more important than any other Circuit in our country. While the federal government runs an annual deficit of $2 trillion now, Texas had a budget surplus of $32.7 billion in the biennial that ended last fall.[10] It was the Fifth Circuit that issued a splendid decision enjoining the Biden Administration from pressuring social media platforms to censor postings in *Murthy v. Missouri*, but the U.S. Supreme Court subsequently reversed on procedural grounds of legal standing, which leaves the Biden Administration free to continue to censor again. Fortunately, the AAPS lawsuit can move forward after the *Murthy* case has stalled.

The Decision in the Fifth Circuit

Our threshold issue on our appeal to the Fifth Circuit was whether there is a constitutional "right to hear," such that AAPS as a sponsor of conferences has legal standing to object to the censorship of its speakers. The Fifth Circuit quickly addressed and dispelled the doubt cast by the district court, and the appellate court gave a ringing endorsement of a robust First Amendment right to hear as we requested.

The Fifth Circuit clarified that "'[t]he First Amendment protects the right to hear as well as to speak,' so that which 'silences a willing speaker...also works a constitutional injury against the hearer.'"[1,11] This decision strongly upholds a constitutional right to hear, such that censorship infringing on that right is accountable in court. The Fifth Circuit fully reversed the district court on this and other points of law:

> The District Court mistakenly believed that this Circuit had not yet spoken on a "right to hear," so it instead looked to a Third Circuit case for guidance when it decided that no injury-in-fact existed. But this Circuit has addressed the issue in the above-cited and other cases. *See, e.g., Brooks v. Auburn Univ.*, 412 F.2d 1171, 1172 (5th Cir. 1969) ("The First Amendment, applicable to a state university through the Fourteenth Amendment, embraces the right to hear.").[1]

"Freedom of speech presupposes a willing speaker. But where a speaker exists…the protection afforded is to the communication, to its source and recipients both," the Fifth Circuit held while quoting the U.S. Supreme Court in *Va. State Board of Pharmacy v. Va. Citizens Consumer Couns., Inc.*, 425 U.S. 748, 756 (1976), abrogated on other grounds by *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).[1]

A sticking point on appeal was whether AAPS had to identify a specific willing speaker, by name, whose speech at an AAPS conference was being infringed by defendants, in order to proceed to discovery in this case. Decisions that have required naming names like that, including the *Murthy v. Missouri* Supreme Court case discussed further below, were based on a lack of evidence *after* discovery, not before it. As was pointed out at oral argument in the AAPS case, it subjects good physicians to retaliation if they had to be named in the initial pleading, and no precedent has required such identification. Federal rules are based on a relaxed standard of notice pleading, such that detail of naming names in a pleading as sought by the district court is only required in narrow circumstances not including this case. There is no justification for subjecting physicians unnecessarily to retaliation for exercising their First Amendment right of freedom of speech.

As the lead-up to ruling in favor of AAPS on this issue, the Fifth Circuit explained this as follows:

> "Recipients of protected communications have standing only if there is a speaker who wishes to express himself or herself." Id. (citing *Va. State Board of Pharmacy*, 425 U.S. at 754). The parties debate whether AAPS must, at the pleading stage, identify a specific "willing speaker" whose speech has been chilled for AAPS to hear to establish an injury-in-fact: AAPS says no, while the Board Defendants say yes. At this stage, AAPS is right.[1]

The Fifth Circuit then fully rejected the argument by defendants that AAPS is required to identify in its initial pleading a "willing speaker" who feels censored or chilled by wrongful interference with his First Amendment rights. The Fifth Circuit emphasized that:

> AAPS's claims were dismissed before AAPS could engage in meaningful (if any) discovery, and it was not afforded even a *single* opportunity to amend its complaint. AAPS's complaint alleges that numerous physicians have been affected by the Board Defendants' threats, any one of whom could serve as a witness and "willing speaker." That one is not identified by name directly and expressly in the complaint is unsurprising and begs the question—the entire point of AAPS's suit is that the Board Defendants

chilled physicians' speech by threatening significant, career-damaging retaliation. And the parties do not identify any cases that would require a specifically named "willing speaker" at the pleading stage.[1]

Judge Ho's Splendid Separate Opinion

Judge Ho's remarkable separate opinion can be cited nationwide for many years to come. Judge Ho stated that the majority decision did not go far enough. The Court styled his opinion as a "dissent" when it is really a stronger concurrence. Judge Ho disagreed with the majority in letting the federal government off the hook merely because it said it discontinued its Disinformation Governance Board:

> I agree with the majority that the district court erred. I would simply go further, and accordingly dissent in part. I would remand this case for further proceedings on all of the association's claims—including those against the government officials sued here, which the majority dismisses as moot. That said, I'm grateful that the majority has made clear that the association should have full opportunity to amend its complaint on remand. So whatever disagreement there may be on this panel, it may ultimately make no practical difference to the future course of this litigation.[1]

Judge Ho explained why:

> During oral argument, counsel for the government refused to assure us that the Department would neither reconstitute the Board nor replicate its functions through other means. Oral Argument at 17:43-18:37. In *Navy Seals* [where the Biden Administration unfairly imposed a Covid vaccine mandate against Navy Seals], there was at least a belated, post-oral argument stratagem by federal officials to abandon their prior course of conduct. *See* 72 F.4th at 674-75. The panel majority there regarded that belated effort as sufficient assurance of mootness. I dissented, noting that our circuit precedent requires greater skepticism than that. ***But we don't even have that much here [from the government concerning its wrongful conduct]*** (emphasis added).[1]

The Mootness Issue

Ordinarily, when a litigant discontinues objectionable conduct during a lawsuit, that voluntary discontinuation or cessation does not moot the claim against the conduct, because a defendant could again restart the conduct as soon as the lawsuit is dismissed. Known as "voluntary cessation doctrine," this ordinarily prevents a defendant from obtaining dismissal based on mootness of a lawsuit by ceasing to engage in the challenged conduct.

But, as one of many examples of how government has inherent advantages in litigation, there is an exception known as the "voluntary cessation exception." As the two-judge majority on the Fifth Circuit explained, over the dissent by Judge Ho:

> The voluntary cessation exception requires courts to examine defendant-induced mootness cautiously. *See Yarls v. Bunton*, 905 F.3d 905, 910 (5th Cir. 2018). Normally, voluntary conduct doesn't moot a case unless a defendant demonstrates that "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Freedom from Religion Found., Inc. v. Abbott*, 58 F.4th 824, 833 (5th Cir. 2023) (quoting *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009), *aff'd on other grounds sub nom. Sossamon v. Texas*, 563 U.S. 277, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011).[1]

So far, so good. But, as on too many other issues, the government enjoys an exception for itself from this doctrine. The government as a defendant is too often able to obtain dismissal of a valid lawsuit against it by telling the court that the government has terminated its objectionable activities. This is described as a presumption of "good faith" given to the government, but not to private defendants. As explained by the panel majority on the Fifth Circuit (with which Judge Ho disagreed):

> But the government enjoys a "good faith" carveout here. When governmental officials voluntarily cease potentially wrongful conduct, we "presume that [they], as public representatives, act in good faith." *Freedom from Religion Found., Inc.*, 58 F.4th at 833. And "[w]ithout evidence to the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing." *Sossamon*, 560 F.3d at 325. "Among other things, the government's ability to reimplement the statute or regulation at issue is insufficient to prove the voluntary-cessation exception." *Freedom from Religion Found., Inc.*, 58 F.4th at 833.[1]

With this, the panel majority let the Biden Administration escape at this time in this case, but then established a right for AAPS to amend its complaint in Galveston in order to bring the Biden Administration back in.

Judge Ho strongly disagreed, and rightly so, with giving the federal government a presumption of good faith such that it could be dismissed on the grounds of mootness:

> The district court held, and the majority agrees, that the Board's dissolution moots the association's claims against the Secretary. I disagree.
>
> "[A] defendant cannot automatically moot a case"—and thereby avoid accountability—"simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 133 S. Ct. 721, 184 L. Ed. 2d 553 (2013). "[S]ubsequent events [must] make it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Trinity Lutheran Church of Columbia, Inc., v. Comer*, 582 U.S. 449, 457 n.1, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017) (cleaned up) (emphasis added).
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> So when government officials voluntarily cease some action in response to litigation, courts are supposed to be skeptical. That's because an official "could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already*, 568 U.S. at 91. "We should be suspicious ... of officials who try to avoid judicial review by voluntarily mooting a case—especially in the absence of...credible assurance of future compliance." *U.S. Navy SEALs 1-26 v. Biden*, 72 F.4th 666, 677-78 (5th Cir. 2023) (Ho, J., dissenting) (quotations omitted).Those suspicions are fully warranted here. During oral argument, counsel for the government refused to assure us that the Department would neither reconstitute the Board nor replicate its functions through other means. Oral Argument at 17:43-18:37. In *Navy Seals*, there was at least a belated, post-oral argument stratagem by federal officials to abandon their prior course of conduct. See 72 F.4th at 674-75. The panel majority there regarded that belated effort as sufficient assurance of mootness. I dissented, noting that our circuit precedent requires greater skepticism than that. But we don't even have that much here.[1]

Judge Ho was right to be skeptical of indications by the Biden Administration that it had ceased its censorship campaign. The DHS gave as a reason for disbanding its Disinformation Governance Board the fact that it is engaging in similar efforts in a

non-centralized manner without the need for a centralized Board. Moreover, now that the Biden Administration has prevailed in *Murthy v. Missouri*, it seems likely that censorship attempts by the government will extend as far and wide as officials in Washington, D.C., would like in this election year.

Murthy v. Missouri and the Constitutional Right to Hear

Our victory in the Fifth Circuit became even more important when the other prominent lawsuit against censorship, captioned *Murthy v. Missouri* in the Supreme Court, ran aground on the legal technicality of standing. On Jun 26, 2024, the Supreme Court dismissed plaintiffs' challenge to censorship by government in that case, leaving our AAPS lawsuit the one to carry this issue forward to vanquish the interference with speech by both government and specialty boards that hold monopolies on board certification.

In the recent disappointing decision by the U.S. Supreme Court in *Murthy v. Missouri*, in which two states (Missouri and Louisiana) joined with five social-media users to challenge government censorship of postings, the Court slightly narrowed the constitutional right to listen:

> We conclude briefly with the plaintiffs' "right to listen" theory. The individual plaintiffs claim an interest in reading and engaging with the content of other speakers on social media. The First Amendment, they argue, protects that interest. Thus, the plaintiffs assert injuries based on the restrictions that countless other social-media users have experienced.[12]

Indeed, we all do suffer when we are prevented from "reading and engaging with the content of other speakers on social media," as the Supreme Court stated above. But the Supreme Court in *Murthy v. Missouri* then went further and held that:

> This theory is startlingly broad, as it would grant all social-media users the right to sue over *someone else's* censorship—at least so long as they claim an interest in that person's speech. This Court has "never accepted such a boundless theory of standing." *Already, LLC v. Nike, Inc.*, 568 U. S. 85, 99, 133 S. Ct. 721, 184 L. Ed. 2d 553 (2013). While we have recognized a "First Amendment right to 'receive information and ideas,'" we have identified a cognizable injury only where the listener has a concrete, specific connection to the speaker. *Kleindienst v. Mandel*, 408 U. S. 753, 762, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972). For instance, in *Mandel*, we agreed that a group of professors had a First Amendment interest in challenging the visa denial of a person they had invited to speak at a conference. *Id*., at 762-765, 92 S. Ct. 2576, 33 L. Ed. 2d 683. And in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, we concluded that prescription-drug consumers had an interest in challenging the prohibition on advertising the price of those drugs. 425 U. S. 748, 756-757, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).[12]

The holding in *Kleindienst v. Mandel*, as affirmed above by *Murthy v. Missouri,* is conceptually very similar to AAPS's lawsuit against the censorship by the Biden Administration and the specialty boards. Overall, this decision by the U.S. Supreme Court in *Murthy* is helpful to our case, although disappointing to the plaintiffs in *Murthy*, because that case was dismissed on procedural grounds.

The Supreme Court held in the *Murthy* decision that the two states and five plaintiffs there, after having the benefit of full discovery, "do not point to any specific instance of content moderation that caused them identifiable harm. They have therefore failed to establish an injury that is sufficiently 'concrete and particularized.'"[12,13] Similarly, the Court found defective in *Murthy* that "[t]he States have not identified any specific speakers or topics that they have been unable to hear or follow."[12]

AAPS, in contrast, will identify at an appropriate time the specific speakers and topics that have been censored by defendants such that AAPS cannot listen and benefit from what they would otherwise say. AAPS did not add any States as plaintiffs to our lawsuit, so fortunately there will not be any dismissal on the grounds of insufficient standing by states to bring this type of lawsuit against the federal government.

Invalidation of the Galveston Local Rule

As part of its decision and as requested by AAPS, the Fifth Circuit also invalidated a longstanding local federal rule in Galveston that was used by the district court to dismiss this case prematurely. The invalidation of this rule enables us to expand our lawsuit upon remand to the federal district court in Galveston.

This procedural aspect of our victory is a landmark ruling that helps protect full access to court for all citizens to challenge unconstitutional government policies. Lawsuits against infringement on constitutional rights in federal court in Galveston can no longer be prematurely dismissed without providing the right under the Federal Rules of Civil Procedure for plaintiffs, such as AAPS, to amend their pleading to correct any perceived deficiency.

Conclusion

Our Fifth Circuit decision is an historic victory for physicians and patients. This precedential decision establishes a tremendous new authority for the First Amendment in the U.S. Court of Appeals for the Fifth Circuit, which is cited as an authoritative court nationwide. Moreover, Judge Ho's separate 7-page opinion at the end is one of the finest statements in favor of the First Amendment written anywhere, and it ranks with esteemed documents such as the *Federalist Papers* and our Constitution itself.

Much work by all of us still lies ahead on this fundamental issue of protecting First Amendment rights of physicians, patients, and all Americans. We must vigorously defend our right to speak out, and the rights of others to do likewise, in order to preserve our constitutional republic.

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