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## How to Take the Twitter Files to Court

File a class action against federal agents seeking an injunction against social-media censorship efforts.

By Jed Rubenfeld

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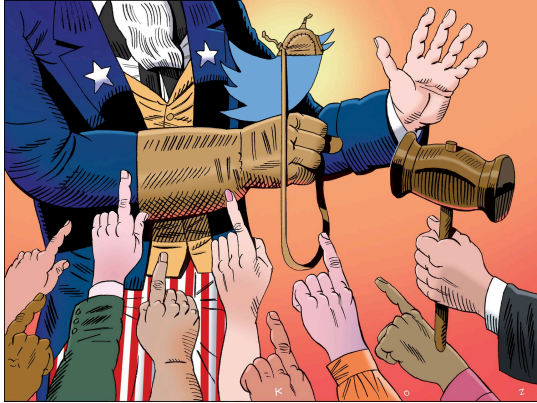


ILLUSTRATION: MARTIN KOZLOWSKI

Elon Musk says the Twitter Files prove a profound and systematic violation of the First Amendment. Commentators on the left insist they're a "nothingburger." This dispute ought to be resolved in court. But how?

The wrong way would be more First Amendment lawsuits against Twitter by targets of censorship such as journalist Alex Berenson. Mr. Berenson was suspended in 2021 for disputing public-health orthodoxy about Covid vaccines. Although Twitter reinstated Mr. Berenson's account before Mr. Musk took over the company, a judge dismissed the First Amendment claim without even allowing discovery, declaring it "implausible" that the federal government was heavily involved in the company's censorship decisions. That assumption was wrong. We now know that federal agencies were deeply enmeshed in Twitter's censorship, from high-level policy making to targeting specific posts.

But because of two recent developments, there are no real remedies available to a plaintiff in such a case. First, a Supreme Court decision, *Egbert v. Boule* (2022), virtually guarantees that a plaintiff in these circumstances couldn't recover monetary damages. Second, Mr. Musk's takeover of Twitter precludes injunctive relief. If the company no longer works with federal agents to censor speech and is welcoming back the past targets of such censorship, there's nothing to enjoin.

Instead, Twitter users—including but not limited to those targeted for censorship—should bring a class action against the government agents involved in the censorship.

The First Amendment protects not only speakers but also consumers, listeners and viewers. As the high court held in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council* (1976), when speakers are muzzled, their intended audience suffers a First Amendment

violation too. Twitter users, even those who weren't censored themselves, would therefore have standing to bring suit.

Suing federal agents would pre-empt the claim that there was no "state action." The nub of the "nothingburger" argument is that the Twitter Files fail to show government "coercion" and Twitter therefore never became a state actor. That argument is wrong: A private party can become a state actor through voluntary joint action with the government, which the Twitter Files richly detail. But a class action against federal defendants would avoid the entire question. They're obviously state actors.

And as the Supreme Court held in *Norwood v. Harrison* (1973), it is an "axiomatic" principle of constitutional law that the government "may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." That's exactly what the Twitter Files show officials from the Federal Bureau of Investigation, the Centers for Disease Control and Prevention, the Central Intelligence Agency, the Department of Homeland Security and other federal agencies doing—inducing and encouraging Twitter to censor constitutionally protected speech.

The plaintiffs wouldn't have to prove Twitter was a state actor. It wouldn't even matter if Twitter had rebuffed all the government's censorship requests (which it didn't). Judge Richard Posner of the Seventh U.S. Circuit Court of Appeals made this point in *Backpage.com v. Dart* (2015): When a government official unconstitutionally attempts to induce a private company not to carry someone else's speech, the official's conduct "is actionable and can be enjoined" even if the company "ignores it."

A class action would eliminate another roadblock. Some free-speech cases against social-media companies have been dismissed on the ground that the individual plaintiffs couldn't show that the government had targeted them or their posts in particular. A class action escapes this difficulty. It might target the CDC's successful effort to get Twitter to adopt policies banning posts arguing that children didn't need Covid-19 vaccines or observing that the government's own data show the shots don't prevent infection or transmission. These policies denied all users important information and opinions and thereby violated the First Amendment rights of listeners as well as speakers regardless of whether the government was involved in a particular individual's being censored.

If Twitter is no longer acting as a federal censorship field office, why wouldn't such a class action by social-media users be moot like an individual lawsuit against the company? Because of Facebook, Google and other internet companies. As Matt Taibbi reported, "the government was in constant contact not just with Twitter, but with every major tech firm." There's no reason to think that has stopped. A class action against federal defendants would seek to halt all government efforts to use social-media companies to achieve the censorship the Constitution forbids.

The attorneys general of Missouri and Louisiana have already jointly brought a similar lawsuit, and preliminary discovery has added more evidence of federal involvement in

censorship at all major social-media companies. But a motion to dismiss is pending in that case, and it remains to be seen whether courts will find that state attorneys general have standing to press these claims. A user class action would overcome this difficulty too.

That no monetary damages lie waiting explains why plaintiff class-action firms aren't lining up to bring this litigation. But that shouldn't deter intrepid public-interest lawyers who still believe in the First Amendment, few though they may be. (And if the plaintiffs prevail in a civil-rights case, their lawyers are entitled to attorney fees at market rates.)

Let's hope that proves incentive enough. The internet, as the Supreme Court has said, is the modern public square. The freedom of speech can't survive in this country if the government is free to work with tech companies to control what can be said or seen in that square.

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