

Northern District of California Dismisses Case Against Facebook and Twitter

White House Press Conference Not Sufficient to Show State Action

By Allyson Veile and Maggie Strouse

The Northern District of California's decision in [Hart v. Facebook, et. al.](#), 22-cv-00737-CRB (N.D. Cal. May 5, 2022), joins the growing collection of case law rejecting First Amendment claims against social media companies for exercising control over the content that appears on their platforms.

The Plaintiff in the case, social media user Justin Hart, sued Facebook, Twitter, President Joe Biden, and Surgeon General Vivek Murthy, for violating his First Amendment freedom of speech, among other claims. Giving rise to the suit, Facebook and Twitter removed Plaintiff's posts and restricted his accounts for violating their respective Community Standards to prevent the spread of COVID-19 misinformation. Hart also brought a FOIA enforcement action against the Department of Health and Human Services (HHS) and the Office of Management and Budget (OMB) for failure to respond to his FOIA requests, which sought evidence that his social media posts were specifically targeted by the White House campaign against COVID-19 misinformation on social media.

Hart argued that the social media companies were acting jointly with the federal government because of a series of pronouncements and statements from the Administration about social media misinformation regarding COVID-19. The Court, however, disagreed, dismissing Hart's First Amendment claims for lack of state action. In so doing, the Court also declined to exercise jurisdiction over Hart's related state-law claims, including Facebook and Twitter's Anti-SLAPP claim under California law.

Hart's FOIA claims against HHS and OMB will continue on, and the Court left the door open for Hart to amend his Complaint if Hart's FOIA claims provide facts that could plausibly support a claim of state action by the social media defendants.

Background

Hart's state action claims against Facebook and Twitter arose from several of Hart's posts that were flagged as containing misinformation about COVID-19. According to Hart's complaint,

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Facebook restricted Hart’s account on several occasions and had flagged his posts for violations of its Community Standards. First, he alleged that in September 2020, Facebook banned him from advertising or using the Facebook Live feature for 30 days in response to one of his posts. Second, he alleged that in April 2021, Facebook restricted his ability to post or comment for 24 hours in response to another three of his posts. Third, he alleged that in July 2021, Facebook flagged one of his posts (an infographic opposing mask use for children) for violating its Community Standards, specifically citing “misinformation that could cause physical harm.” In response to the July 2021 post, Facebook also restricted Hart’s ability to post or comment for 3 days.

Hart’s complaint also alleged that Twitter had restricted his account once—after he tweeted about masks on July 18, 2021. In response, Twitter locked his account, stating that he had violated “the policy on spreading misleading and potentially harmful information related to COVID-19.”

On July 15, 2021, the White House held a press conference with Surgeon General Vivek Murthy. The press conference focused on Surgeon General Murthy’s 22-page advisory entitled “Confronting Health Misinformation.” At the press conference, White House Press Secretary Jen Psaki said the Administration was in “regular touch” with social media platforms and that it was “flagging problematic posts for Facebook.” In a statement to the press on July 16, 2021, President Biden stated that social media companies were “killing people” due to the spread of COVID-19 misinformation on their platforms. A week after the press conference, Hart submitted FOIA requests to the HHS and the OMB seeking communications with social media companies about him or his social media posts.

In August 2021, Hart filed suit against President Biden, Surgeon General Murthy, Facebook, Twitter, HHS, and OMB. Hart claimed that Facebook and Twitter had violated the First Amendment by flagging his posts and suspending his accounts, arguing that they had acted jointly with the President and the Surgeon General. Hart also brought various state law claims against Facebook and Twitter, including claims under the California Constitution’s Free Speech Clause, and promissory estoppel claims. Hart also brought claims against HHS and OMB were for failing to timely respond to his FOIA request. President Biden, Surgeon General Murthy, Facebook, and Twitter all moved to dismiss the claims against them, which the Court granted. HHS and OMB did not move to dismiss, so Hart’s FOIA suit is ongoing.

Court Ruling

The Court first addressed whether Hart adequately alleged state action to support a First Amendment claim against Facebook and Twitter. The Court concluded he had not, rejecting the two state action theories that Hart had proposed—the “joint action” theory and the “government compulsion or coercion” theory.

Hart relied on the Administration’s statements at the press conference about the dangers of COVID-19 misinformation and Surgeon General Murthy’s opinion to establish joint action

between the government and Facebook/Twitter. The Court rejected Hart's argument, emphasizing that Facebook and Twitter claim that they flagged Hart's posts based on their own policies and Community Standards. Because this explanation plausibly explains Hart's injury, the Court refused to find that Hart plausibly pled that the social media companies and the Administration engaged in secret illegal joint action to violate Hart's First Amendment rights. The Court also noted that most of Facebook's actions occurred before the Biden Administration issued any public guidance on the topic at all. Indeed, Hart's complaints regarding his social media posts in September 2020 occurred before the President Biden was even in office.

Even for the social media companies' July 2021 actions, which were closer in time to the press conference, the Court explained that the plausibility of joint action was lacking because the statements by Press Secretary Psaki and Surgeon General Murthy were too vague to constitute a directive to social media companies. And, importantly, the Administration's statements did not specifically relate to Hart himself. Accordingly, there was no "meeting of the minds" sufficient to suggest joint action to violate Hart's rights. The Court noted that, even if there had been communications specific to Hart, such communications would likely fall short of the kind of "substantial cooperation" required to show joint action.

As for government coercion, Hart argued that President Biden's public remark that social media companies were "killing people" was a threat to social media companies when considered in the context of the public controversy over Section 230 of the Communications Decency Act, as well as executive agency investigations of social media companies. The Court rejected these arguments, explaining that private companies do not commit state action by doing things that are "vaguely in line" with a President's stated preferences. The Court noted that it was "difficult to understand" how generalized legislative debate would give the President coercive power over private companies. Moreover, the Court again emphasized that the coercion would have to be specific as to Hart himself to constitute state action by government coercion.

The Court did not address the companies' arguments that Hart's claims were barred by Section 230. And because the Court dismissed the First Amendment claim, which was the only federal claim against Facebook and Twitter, the Court declined to exercise supplemental jurisdiction over the state law claims. In so doing, the Court avoided addressing the social media companies' arguments that Hart's state law claims were barred by California's Anti-SLAPP statute. Both companies argued that Hart's claims were barred because they arose from a protected activity: the constitutional right to exercise editorial control over their content.

The Court dismissed the First Amendment claims against President Biden and Surgeon General Murthy on standing grounds.

The Court then concluded that granting leave to amend would be futile, thus dismissing all the claims against Facebook, Twitter, President Biden, and Surgeon General Murthy. However, the FOIA claims against HHS and OMB were not the subject of any motion to dismiss, and thus, a part of the case will continue. The Court also noted that if Hart learns additional facts from his FOIA request that more plausibly suggest joint action, it would permit amendment. And

because the Court dismissed Hart's state law claims without prejudice, Hart could theoretically bring those claims separately in state court, although the social media companies could reassert their Anti-SLAPP defense.

We probably have not seen the last of these claims, as Hart's attorneys created a [webpage for this case](#) .

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