

Andrew Lustigman Quoted in Corporate Counsel on What the Fifth Circuit's Content-Moderation Ruling Means for Social Media

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Andrew Lustigman, Chair of Olshan's Advertising, Marketing & Promotion's Group and Co-Chair of the firm's Brand Management & Protection Group, was quoted in a Corporate Counsel article (subscription required) on the ruling by the U.S. Court of Appeals for the Fifth Circuit that the Biden administration had likely violated the First Amendment for "coercing" social media platforms to take down "disfavored" content from their sites that it deemed to be misinformation about topics such as COVID-19 or the 2020 elections. The court issued an injunction against several members of the Biden White House, including the Centers for Disease Control and Prevention (CDC) and the FBI, but the Supreme Court subsequently put a pause on the injunction. Andy opined that the ruling is overbroad and could leave a lot of room for uncertainty for legal teams at social media companies: "I think it's going to be much harder." He notes that, while social media companies often list the type of content they allow or forbid in their terms of use—such as hate speech or defamatory language—removing the government from this dialogue could make enforcing these policies more difficult. "How are you able to police your rules as it relates to things impacting the federal government or the people who are covered by the injunction? ... What crosses the line?" Andy said. If anything, he said that this could allow "for less informed judgment calls" from social media companies. Andy explained that this would not create more liability for these organizations because the injunction narrowly targets government officials. The Fifth Circuit's injunction comes just months after the momentous Supreme Court rulings in the *Gonzalez v. Google* and *Twitter v. Taamneh* cases where the court ruled in favor of Big Tech and declined to address the scope of Section 230, and while Section 230 of the 1996 Communications Decency Act is not directly at play in this case, it's possible that it could become part of this conversation going forward. Andy concludes, "I do think it fits into 230. I wouldn't be surprised if a few years down the road somehow this plays into [Section 230]."

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