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SHUT YOUR APP: HOW UNCLE SAM JAWBONED BIG TECH INTO SILENCING AMERICANS

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED NINETEENTH CONGRESS

FIRST SESSION

OCTOBER 8, 2025

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED NINETEENTH CONGRESS

FIRST SESSION

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SHUT YOUR APP:
HOW UNCLE SAM JAWBONED BIG TECH INTO SILENCING AMERICANS

WEDNESDAY, OCTOBER 8, 2025

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 10:31 a.m., in room SR–253, Russell Senate Office Building, Hon. Eric Schmitt, presiding.

Present: Senators Schmitt [presiding], Fischer, Blackburn, Sullivan, Moreno, Sheehy, Cantwell, Klobuchar, Markey, Peters, Rosen, Luján, Hickenlooper, Fetterman, and Blunt Rochester.

OPENING STATEMENT OF HON. ERIC SCHMITT, U.S. SENATOR FROM MISSOURI

Senator SCHMITT [presiding]. We will call this Commerce, Science, and Transportation Committee meeting to order.

The author of the great book "Dune", Frank Herbert, set the table for what techno-totalitarianism looked like. Once men turned their thinking over to machines in the hope that this would set them free, but that only permitted other men with machines to enslave them.

In the West, we are headed down this path toward thought crime enslavement. In the United Kingdom, 30 Brits are arrested per day for speech-related offenses. In the EU, the Digital Services Act is creating a censorship regime that would make Communist China blush. In the United States, before President Trump's return to power, the American vast censorship enterprise sought to control speech, to control how we think, and to influence national discourse and elections.

In 2022, as the Attorney General of Missouri, I filed a landmark lawsuit, *Missouri v. Biden,* which Justice Alito called one of the most important First Amendment cases in American history. Through the lawsuit uncovered a vast censorship regime perpetrated by the Biden administration, I saw all the e-mails, I saw all the text messages. I deposed senior government officials including Anthony Fauci.

Missouri v. Biden uncovered for the American people how the Biden administration built one of the largest censorship operations in American history by working in secret through third parties, pressuring, bullying, threatening, jawboning big tech into suppressing viewpoints that they disagreed with.

Jen Saki boasted about flagging disinformation with Facebook. The Biden White House was revealed to have been backchanneling with YouTube about suppressing disfavored speech, suppressing things like the lab-leak theory. White House Digital Director Rob Flaherty pressured platforms like Facebook and YouTube to censor all kinds of COVID-related speech. Joe Biden said Facebook was killing people.

Last week, Chairman Cruz and the Senate Commerce Committee released a report that revealed more details about how the Biden administration, as part of this larger censorship operation, weaponized the Cybersecurity and Infrastructure Security Agency, or CISA, into an agent of censorship, pressuring big tech to police speech.

The Biden administration's collusion with big tech and non-governmental organizations to censor speech, infringed on the individual freedoms of millions of Americans to limit what they could say, what they could hear, and what they could read.

Fortunately, President Trump won a historic victory and on January 20, 2025, the first day of his second Presidential term, President Trump signed an executive order titled "Restoring Freedom of Speech and Ending Federal Censorship". But the story of censorship does not begin and end with the Federal Government. Big tech was censored—was censoring long before Presidential job owning and I imagine will continue to censor long after.

Here are some instances of pre-Biden censorship. All of big tech censored the Hunter Biden laptop story. Google banned COVID skepticism. Twitter shadow banned and suspended conservatives. Facebook throttled posts from pages like *The Federalist* in the *New York Post.* Facebook flagged and removed posts questioning voter ID laws and ballot harvesting.

Two of today's witnesses, Alex Berenson and Sean Davis were direct targets of this censorship operation and were deplatformed, shadow banned and silenced for their viewpoints. Congress should address this problem with decisive legislative action like my Collude Act or my Censorship Accountability Act, both of which hold big tech and government sensors accountable.

I look forward to hearing from our witnesses about what Congress and this Committee can do to make sure that no American, regardless of their political leanings, ever learns that the Federal Government, entrusted with protecting their First Amendment Rights, is actually working to undermine them behind closed doors.

Our Founding Fathers recognized that freedom of speech is vital. Protecting it is first and foremost in the Bill of Rights. While some argued that free speech was already protected because the Constitution did not give the government power to censor, the framers went further, affirmatively restricting government intrusion.

The First Amendment is the beating heart of our Constitution. Free speech is not just instrumental but an end to itself in the digital age with all the peril and possibility that accompanies it, the struggle for free speech is the struggle for civilization itself.

I want to thank the witnesses for being here today and look forward to their testimony.

And I will, before I turn it over the Ranking Member for her opening remarks, request that Chairman Cruz's opening statement be entered into the record.

Without objection.

[The prepared statement of Chairman Cruz follows:]

PREPARED STATEMENT OF HON. TED CRUZ, U.S. SENATOR FROM TEXAS

In a free society, the people govern—not by mob or might—but by reasoned argument and the rule of law. Essential to keeping a society free is the ability of a citizenry to speak freely and debate openly without fear of government reprisal. That ability—to think and speak one's mind—enables a society to hold its government to account. It's so critical that our Founders made this *natural* right a constitutionally protected one.

The First Amendment is a powerful weapon against the government's ability to publicly censor its own citizens. But in recent years, we have seen the government censor in secret through third parties, "jawboning" Big Tech into suppressing user content, often under the guise of "safety" or "national security."

It starts subtly. Officials say they are combatting foreign disinformation campaigns from the Russians or the Chinese. Next, they clamp down on anyone re-posting such content. Then, government officials curtail speech that undermines their own positions.

Tweeting about COVID–19 vaccine mandates or the efficacy of wearing a mask? Sorry, that's a "safety" issue. Questioning mail-in voting? That's a threat to critical election infrastructure.

And so, our government becomes the speech police—the arbiter of truth—silencing those that disagree.

Last week, I released a report detailing how the Biden administration weaponized the Cybersecurity and Infrastructure Security Agency to pressure Big Tech into policing speech. Two of today's witnesses—Alex Berenson and Sean Davis—were personally targeted by our government. At the behest of government officials, Mr. Berenson was completely deplatformed for having the temerity to challenge the Biden COVID narrative. Mr. Davis was shadow-banned for questioning the integrity of mail-in voting.

But the silencing didn't stop there. The Biden administration sought to bring its censorship playbook into the Age of AI. It "volun-told" AI developers to allow the National Institute of Standards and Technology to test AI products for misinformation and "harmful" speech. The National Science Foundation funded propaganda tools.

By controlling AI inputs and outputs, the Biden administration was deciding what information Americans could see and consume—an effort that continues with laws in California, Colorado, and New York.

Now censorship is growing around the world. In the United Kingdom, more than 12,000 Britons are arrested every year for speech-related offenses, according to the Times of London. My CISA (*siss-uh*) report shows why, in this context, the United States must remain a free speech beacon, zealously guarding against censorship regardless of who is in office.

A few weeks ago, I received a letter from nearly every Democrat on this Committee calling for a hearing to stop an "unprecedented attack on the First Amendment." The letter rightly stated that "government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors."

But my colleagues weren't referring to the silencing of Messrs. Berenson and Davis or any of the other countless Americans censored during the previous administration. They were coming to the defense of Jimmy Kimmel, whose unpopular show was suspended by ABC following critical comments from the FCC Chairman.

I've been clear on my views about Chairman Carr's comments.

But I must ask my colleagues: Where were you when the Biden administration was silencing the American people?

Maybe it's too much to ask Democrats to defend the First Amendment regardless of who is in power, not just when it is politically convenient.

No government official—regardless of party—should be engaged in jawboning. The First Amendment is not about opinions you agree with. It's not about opinions that are right and reasonable. The First Amendment is about opinions that you passionately disagree with and the right of others to express them. I am one who agrees with John Stuart Mill: the best solution for bad ideas, for bad speech, is more

speech and better ideas. We don't need to use brute force to silence them because truth is far more powerful than force.

In the coming weeks, I will be introducing legislation to prohibit government jawboning and empower Americans to hold government officials accountable.

As we'll hear today, Alex Berenson and Sean Davis face major hurdles in seeking remedies after the government launched secret censorship campaigns against them. My bill will fix that problem.

I'll give my Democrat colleagues a chance to redeem themselves: Join me in standing up for free speech by working to advance this legislation and stop censorship by government officials.

I thank the witnesses who are here with us today, and I look forward to this critical discussion about how we can protect freedom of thought in our country.

Senator SCHMITT. Ranking Member Cantwell.

STATEMENT OF HON. MARIA CANTWELL,
U.S. SENATOR FROM WASHINGTON

Senator CANTWELL. Thank you. Thank you, Mr. Chairman. And welcome to our witnesses. Thank you for joining us this morning. These issues of the media, and consumers, and free speech, very important issues for us to discuss in an era where consumers are paying more, where not enough competition exists, where deals are getting done that lead to fewer choices, less local news. I do have an important question. Where is Chairman Carr?

Americans are paying and spending more money on content that used to be free more than ever before. And just a few weeks ago, we witnessed a deeply troubling episode. The FCC Chairman demanding ABC take immediate action against Jimmy Kimmel for tasteless remarks and saying, quote, "We can do this the easy way or the hard way", end quote. A line that Senator Cruz rightly criticized as something quote, "Right out of Goodfellows", end quote.

Within hours, the Nation's largest ABC affiliate, NextStar and Sinclair, announced they would preempt the show indefinitely, and shortly thereafter, ABC suspended *Jimmy Kimmel Live* altogether. While ABC, NextStar, and Sinclair have since returned Mr. Kimmel to the air, that chain of events should alarm every American, because the power of the FCC was never meant to weaponize against a President or political targets.

Let me be clear. Chairman Carr does not have the authority to police speech, nor does he or the White—that he or the White House finds offensive. He does not have the authority to threaten licenses based on content decisions. And this is especially true when those same companies have mergers and licensings pending before the FCC.

That is exactly the kind of political interference, chilling effect on free speech that the First Amendment was designed to prevent. We need to hold Chairman Carr accountable for these threats. And that is why I have called on us to have a hearing and hopefully that will happen sometime in the near future.

There is a need to have oversight on this, and I hope that this hearing does happen without further delay. Professor Volokh, am I saying that right, Volokh?

Mr. VOLOKH. Yes.

Senator CANTWELL. Thank you—said in his testimony, quote, "FCC Chairman Brendan Carr's statement about Jimmy Kimmel may likewise have threatened retaliation in a way that would violate the First Amendment", end quote.

So the point on this there is broad agreement. Free expression is not a partisan issue. It is the bedrock of our democracy. So this is in a long list of issues about the First Amendment, I think, the President is making pretty much a standard issue.

Just last week, the Federal Court found that the administration violated the First Amendment by arresting, detaining, and deporting non-citizen students and faculty members for their pro-Palestinian advocacy. This follows the White House revocation of the Associated Press' credentials for refusal to use the term, "Gulf of Mexico", clearly an attempt to police the language and intimidate free speech.

Meanwhile, the administration continues to wield the full power of the Federal Government to retaliate against law firms the President does not like and threaten funding for universities he disfavors.

It is alarming to see the administration use its regulatory and informal authority to unlawfully and infringe on free speech, the free press, and the First Amendment. And it is important that we also understand the broader context here. That is why Mr. Kimmelman, I am so glad to see you here today.

Local journalism in America is already under extraordinary strain. The Commerce Committee has documented how online platforms monopolize advertising, siphon revenue away from local newspapers and broadcasters, and the result has been newsroom closures, layoffs across the country, and even as the public trust in local journalism remains at an all-time high.

At the same time, media consolidation has been concentrated into fewer hands. Since 2005, the U.S. has lost almost one-third of its newspapers. This year alone, 127 newspapers closed. Nearly 55 million Americans have limited or no access to local news, disproportionately affecting rural areas. That leaves new outlets more vulnerable to political and corporate pressures and leaves the public without further resources of getting to true competition, which I believe gets us to the truth.

If Chairman Carr can threaten one network over a single late-night host and his message, what kind of message does that send to local broadcasters in Seattle or Houston? Do they lose their licenses if they are reporting or they are crossing the White House? This kind of intimidation undermines the very foundation of the free press.

I want to be clear, protecting a free press does not mean ignoring the dangers of harmful hate speech. I have expressed concerns about companies like Facebook, Google, and X on issues that really did threaten the lives of individuals. And I know that we will hear a lot about what the Biden administration did in these areas. But let us not forget the Supreme Court rejected allegations of the Biden administration censorship because the record showed that social media companies, "Continued to exercise their independent judgment", and had, quote, "Independent incentives to moderate content" end quote. I am sure we will talk a lot about this.

Persuading companies to enforce their own content moderation policies is not the same, is not the same as threatening them with retaliation. And that is precisely what Chairman Carr did when he publicly threatened ABC, an entity over which the FCC holds di-

rect regulatory power, to take action over the speech the administration did not like.

Holding companies accountable for amplifying harm is not the same as expressing Constitutional protected speech the President finds politically inconvenient. That is what we should be focusing on today. making sure the FCC, as a Federal agency, cannot use its authority to threaten or intimidate the media to ensure the licensed decisions are based on the law and not on political coercion. I hope today we can speak clearly about this and do what we can to make sure that we show that free speech is something we all agree on.

Thank you, Mr. Chairman. And look forward to hearing from the witnesses.

Senator SCHMITT. Thank you, Ranking Member.

One point of clarification for the record, *Murthy v. Missouri* was not decided that way. It was sent back to lower court for additional arguments on standing, not on the merits.

I would like to introduce our witnesses for today. Our first witness is Mr. Eugene Volokh, a Senior Fellow with the Hoover Institution at Stanford University and a Professor of Law Emeritus at UCLA School of Law. He is an expert in First Amendment Law, and his writings have been cited in over 300 court opinions including ten Supreme Court cases. Welcome.

Our second witness is Mr. Alex Berenson, an author, independent journalist, and victim of the Biden administration's embargo on free speech. I look forward to hearing from Mr. Berenson and his story, and what we can do to preserve speech online.

Our third witness is Mr. Sean Davis, Chief Executive Officer and Co-founder of *The Federalist,* a conservative news outlet that was subject to censorship and demonetization efforts for speaking out against the COVID-19 shutdowns.

And our final witness is Mr. Gene Kimmelman, a Senior Policy Fellow at Yale's Tobin Economic Policy Center and a Senior Research Fellow at the Harvard Kennedy School's Center for Business and Government.

And at this point would recognize Mr. Volokh for your own opening statement. Thank you for being here.

STATEMENT OF EUGENE VOLOKH, THOMAS M. SIEBEL SENIOR FELLOW, HOOVER INSTITUTION, STANFORD UNIVERSITY

Mr. VOLOKH. Thank you. Thank you very much for having me. This is a topic that is I think very important, and something that I have been very interested in myself. I should also say by sheer accident turns out that today is 50 years to the day since my parents brought me to the United States from the then Soviet Union. So thank you to the United States of America for letting me in.

Very, very glad to be here. So I wanted to speak briefly about the First Amendment Law on the subject both that which is settled and that which is not entirely certain. So one thing that I think is worth noting is that the word "jawboning" is sometimes used in two different senses. One sense is coercion, when the government is essentially threatening someone with retaliation as a means of suppressing either that person's speech or getting that person to suppress somebody else's speech.

A second one is what might call persuasion and maybe pressure, short of coercion. When the government is kind of urging people, some people might say again pressuring people to restrict, again, either their own speech or other people's speech.

So the government coercion is generally unconstitutional. I think, indeed, in the remarks of Chairman Carr seemed to be an attempt at coercion. Whether or not they actually caused the suspension of Jimmy Kimmel, I think they were an attempt to do something that the Constitution does not allow.

Just last year the Supreme Court found in *NRA v. Vullo,* that the National Rifle Association had adequately alleged coercion on the part of New York government authorities aimed at trying to get insurance companies to limit ties to the NRA as a means of trying to interfere with the NRA's political advocacy. So that is pretty well settled for that constitutional problem.

Now, what about persuasion? Well, in some situations, the government is entitled to urge entities to not speak. You can imagine a situation where a police chief calls up a newspaper and says: Look, I am not trying to coerce you. I know I cannot coerce you. You can publish this article you are about to publish, but it is going to interfere with us catching the criminals, and you would not want that, right? So could I just ask you please to do this?

You know, some amount of that has got to be permissible. Or to take another example as to misinformation. Somebody calls up a reporter and says: You are about to publish this article or this oped and it is just false. It is just wrong. Don't you want to be corrected on this?

Again, some amount of that, it seems to me, has to be constitutionally permissible. At the same time, there is a complication because the line between coercion and persuasion is often very hard to draw. And that is particularly true when the speaker has power over the listener.

The Supreme Court has most clearly recognized this in the employment context. Employers are entitled to talk to their employees, including about unionization. They are entitled to explain why they think unionizing would be a mistake. But the court has recognized that in looking at what the employer says and seeing if the employer is speaking coercively, one has to appreciate that the employee is dependent on the employer, and may pick up coercive messages even in situations where it is not expressed on the face of this statement.

And I think the same thing is true when the government, which is a very powerful regulator, is talking to people in a regulated industry. There are times when what might sound on its face, or let us say just on the bare paper might look like it is not coercive may in fact, in context, be quite coercive.

Another concern is the merger of government and private power when it is not just kind of occasional conversations but a systemic mechanism for trying to restrict speech. An analogy might be a few amendments down in the Fourth Amendment. If you have a roommate and you notice some evidence of crime and you call up the police, the police can use that evidence, because that is not a government search. The police did not search for it. You did.

On the other hand, if the police called you up and say: Hey, you know, not trying to coerce you, but could you please rummage through your roommate's papers? That does become a Fourth Amendment's—a search subject to the Fourth Amendment, precisely because it is encouraged, substantially encouraged by the police. The police become enmeshed with the private search. So that suggests that there is something similar may apply to the First Amendment.

So let me just close with suggesting that this is, in fact, the right body to be dealing with a lot of these concerns. That some of these problems can only be solved through statutory action, through laws that maybe limit attempts at systemic persuasion and systemic suppression of speech even if it is not technically coercive.

At laws that facilitate finding information about that, and at laws that actually provide a cause of action which the Congress has for over a century provided against state governments, but provided against the Federal Government, as well.

[The prepared statement of Mr. Volokh follows:]

PREPARED STATEMENT EUGENE VOLOKH, THOMAS M. SIEBEL SENIOR FELLOW, HOOVER INSTITUTION, STANFORD UNIVERSITY

Dear Chairman and Members of the Committee:

Thank you for asking me to testify on the important First Amendment issues raised by government jawboning, a subject that I have been studying for several years. I will try to offer a big picture view of the matter, rather than focusing on the particular factual details related to, for instance, the various interactions between CISA (the Cybersecurity and Infrastructure Security Agency) and social media platforms.

"To jawbone" has been defined as "to attempt to persuade or pressure by the force of one's position of authority,"[1] especially when done by the government. That in turn reflects two possible meanings:

(1) government officials trying to *persuade* through the force of their reasoning, though strengthened by their authoritativeness and resulting credibility and influence;

(2) government officials trying to *coerce* through the explicit or implicit threat of retaliation stemming from their position of authority, *e.g.,* through the threat of enforcement or regulation.

As a practical matter, the two meanings are closely intertwined, especially since it may be hard to tell whether there is an implicit "or else" behind a request. As a legal matter, though, there may be a substantial distinction, at least when it comes to the government trying to pressure entities into shutting down third parties' speech.

I. GOVERNMENT COERCION: GENERALLY UNCONSTITUTIONAL

Say the government doesn't like some speech, though the speech is constitutionally protected against direct punishment (*i.e.,* the speech doesn't fit into one of the narrow First Amendment exceptions, for example the exception for true threats of criminal conduct). The government therefore demands that a private entity that has the private power to control such speech—say, a social media platform, a bookstore, a financial intermediary—suppress the speech, or else face some coercive government action. That generally violates the First Amendment. "[A] government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf."[2]

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[1] *See, e.g.,* COLLINS DICTIONARY, *https://www.collinsdictionary.com/us/dictionary/english/jawboning* (quoting Irwin Stelzer, *GM Has Riled the Jawboner-in-Chief,* Times (London), Dec. 2, 2018).

[2] NRA v. Vullo, 602 U.S. 175, 190 (2024).

The long-standing Supreme Court precedent addressing that issue is *Bantam Books, Inc. v. Sullivan* (1963), in which a state commission threatened to prosecute stores that sold books it deemed pornographic, including books that were protected by the First Amendment.[3] Likewise, in *NRA v. Vullo* (2024), the Court held that the NRA could sue New York financial regulators under the First Amendment for allegedly coercing banks and insurance companies "to cut their ties with the NRA in order to stifle the NRA's gun-promotion advocacy."[4] Under these precedents, FCC Chairman Brendan Carr's statements about Jimmy Kimmel may likewise have threatened retaliation in a way that would violate the First Amendment.[5]

Lower court cases have found that there could be impermissible coercion even absent express threat of prosecution or regulatory action, so long as the threat is sufficiently implicit. Consider two cases that were favorably cited by the Supreme Court in *NRA v. Vullo:*

1. The president of the Borough of Staten Island sent a letter to a billboard company urging it to take down an antihomosexuality billboard. The letter closed with:

> Both you and the sponsor of this message should be aware that many members of the Staten Island community, myself included, find this message unnecessarily confrontational and offensive. As Borough President of Staten Island, I want to inform you that this message conveys an atmosphere of intolerance which is not welcome in our Borough.
>
> P.N.E. Media owns a number of billboards on Staten Island and derives substantial economic benefits from them. I call on you as a responsible member of the business community to please contact Daniel L. Master, my legal counsel and Chair of my Anti-Bias Task Force . . . to discuss further the issues I have raised in this letter.

Potentially unconstitutional, the Second Circuit held in *Okwedy v. Molinari* (2003):

> [A] jury could find that Molinari's letter contained an implicit threat of retaliation if PNE failed to accede to Molinari's requests. In his letter, Molinari invoked his official authority as "Borough President of Staten Island" and pointed out that he was aware that "P.N.E. Media owns a number of billboards on Staten Island and derives substantial economic benefits from them." He then "call[ed] on" PNE to contact Daniel L. Master, whom he identified as his "legal counsel and Chair of my Anti-Bias Task Force."
>
> Based on this letter, PNE could reasonably have believed that Molinari intended to use his official power to retaliate against it if it did not respond positively to his entreaties. Even though Molinari lacked direct regulatory control over billboards, PNE could reasonably have feared that Molinari would use whatever authority he does have, as Borough President, to interfere with the "substantial economic benefits" PNE derived from its billboards in Staten Island.[6]

2. The Sheriff of Cook County in Illinois sent letters to Mastercard and Visa saying, "As the Sheriff of Cook County, a father and a caring citizen, I write to request that your institution immediately cease and desist from allowing your credit cards to be used to place ads on websites like Backpage.com [which hosted ads for sex-related services]." Potentially unconstitutional, the Seventh Circuit held in *Back-*

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[3] 372 U.S. 58 (1963).

[4] 602 U.S. at 197. Note that I was one of the NRA's lawyers in this case.

[5] The statements on the Benny Johnson podcast, *https://x.com/bennyjohnson/status/1968359685045838041,* were:

> Broadcasters . . . have a license granted by us at the FCC, and that comes with it an obligation to operate in the public interest. . . .
>
> We can do this the easy way or the hard way. These companies can find ways to change conduct, to take action, frankly, on Kimmel or there is going to be additional work for the FCC ahead. . . .
>
> There's calls for Kimmel to be fired. I think you could certainly see a path forward for suspension over this.
>
> The FCC has a rule that prohibits "broadcast news distortion," *https://www.fcc.gov/broadcast-news-distortion,* and it's possible that—given the lower First Amendment protection given to broadcasting than to, say, newspapers or the Internet—the FCC might be able to impose a modest fine for Kimmel's statement or even just issue an admonition. But there appears to be no justification for the government's demanding outright suspension of the Kimmel show based on one false statement, nor does there appear to be any precedent in the past four decades for anything more than a token punishment in such a situation.

[6] 333 F.3d 339, 341, 342, 344 (2d Cir. 2003).

page.com, LLC v. Dart (2015). The court went through the Sheriff's letter in detail and concluded:

> And here's the kicker: "Within the next week, please provide me with contact information for an individual within your organization that I can work with [harass, pester] on this issue." The "I" is Sheriff Dart, not private citizen Dart—the letter was signed by "Thomas Dart, Cook County Sheriff."
>
> And the letter was not merely an expression of Sheriff Dart's opinion. It was designed to compel the credit card companies to act by inserting Dart into the discussion; he'll be chatting them up.
>
> Further insight into the purpose and likely effect of such a letter is provided by a strategy memo written by a member of the sheriff's staff in advance of the letter. The memo suggested approaching the credit card companies (whether by phone, mail, e-mail, or a visit in person) with threats in the form of "reminders" of "their own potential liability for allowing suspected illegal transactions to continue to take place" and their potential susceptibility to "money laundering prosecutions . . . and/or hefty fines." Allusion to that "susceptibility" was the culminating and most ominous threat in the letter.[7]

3. Finally, consider a third example: The Biden administration's attempting to persuade social media platforms to block or remove posts on various topics, including "the COVID–19 lab-leak theory, pandemic lockdowns, vaccine side-effects, election fraud, and the Hunter Biden laptop story." The Fifth Circuit concluded in *Missouri v. Biden* (2023) that some of the government's actions were likely unconstitutionally coercive:

> On multiple occasions, the officials coerced the platforms into direct action via urgent, uncompromising demands to moderate content And, more importantly, the officials threatened—both expressly and implicitly—to retaliate against inaction. Officials threw out the prospect of legal reforms and enforcement actions while subtly insinuating it would be in the platforms' best interests to comply. As one official put it, "removing bad information" is "one of the easy, low-bar things you guys [can] do to make people like me"—that is, White House officials—"think you're taking action." When the officials' demands were not met, the platforms received promises of legal regime changes, enforcement actions, and other unspoken threats. That was likely coercive. . . .
>
> [M]any of the officials' asks were "phrased virtually as orders," like requests to remove content "ASAP" or "immediately." The threatening "tone" of the officials' commands, as well as of their "overall interaction" with the platforms, is made all the more evident when we consider the persistent nature of their messages. . . . [T]here is [also] plenty of evidence—both direct and circumstantial, considering the platforms' contemporaneous actions—that the platforms were influenced by the officials' demands. . . .
>
> [And] the speaker [had] "authority over the recipient." [The White House] enforces the laws of our country, and—as the head of the executive branch—directs an army of Federal agencies that create, modify, and enforce Federal regulations At the very least, as agents of the executive branch, the officials' powers track somewhere closer to those of the commission in *Bantam Books*—they were legislatively given the power to "investigate violations and recommend prosecutions."
>
> [T]he officials made express threats and, at the very least, leaned into the inherent authority of the President's office. . . . But, beyond express threats, there was *always* an "unspoken 'or else.'" [W]hen the platforms faltered, the officials warned them that they were "[i]nternally considering our options on what to do," their "concern[s] [were] shared at the highest (and I mean highest) levels of the [White House]," and the "President has long been concerned about the power of large social media platforms."[8]

The Supreme Court reversed the Fifth Circuit's decision on procedural grounds, so that decision is no longer binding precedent.[9] The Court's opinion also cast doubt on the factual findings that the Fifth Circuit relied on.[10] Nonetheless, the Fifth Cir-

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[7] 807 F.3d 229, 231–32 (7th Cir. 2015). The bracketed words, "harass, pester," were added by the court, presumably as an indication of how the court interpreted "work with." See Complaint Exh. B at 7, Backpage.com, LLC v. Dart, No. 1:15-cv-06340 (N.D. Ill. July 21, 2015).

[8] 83 F.4th 350, 382 (5th Cir. 2023).

[9] 603 U.S. 43 (2024).

[10] *Id.* at 60 n.4.

cuit's analysis is a good illustration of how courts sometimes evaluate such allegations of coercion.

II. Government Persuasion

A. Often Constitutional

Now say the government simply tries to persuade various intermediaries—whether today's social media platforms or, as was the case in the recent past, bookstores, billboards, or payment processors—to stop carrying certain speech, *without* an express or implied threat of retaliation. Generally speaking, courts of appeals have said that this does not violate the First Amendment. To offer a few examples:

1. In 1980, a New York City official sent a letter urging department stores not to carry "a board game titled 'Public Assistance—Why Bother Working for a Living.'" The letter said the game "does a grave injustice to taxpayers and welfare clients alike," and closes with, "Your cooperation in keeping this game off the shelves of your stores would be a genuine public service." Not unconstitutional, said the Second Circuit in *Hammerhead Enterprises, Inc. v. Brezenoff* (1983):

> [T]he record indicates that Brezenoff's request to New York department stores to refrain from carrying Public Assistance was nothing more than a well-reasoned and sincere entreaty in support of his own political perspective Where comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request, a valid claim can be stated. . . . [But] appellants cannot establish that this case involves either of these troubling situations.[11]

Note, though, that Brezenoff was the administrator of New York City's Human Resources Administration, with no enforcement authority against the department stores. How might the matter have looked had he been the sheriff or the head of some civil enforcement agency?

2. Not long after, the U.S. Attorney General's Commission on Pornography sent letters to various corporations (such as 7-Eleven) urging them not to sell pornographic magazines:

> The Attorney General's Commission on Pornography has held six hearings across the United States during the past seven months on issues related to pornography. During the hearing in Los Angeles, in October 1985, the Commission received testimony alleging that your company is involved in the sale or distribution of pornography. The Commission has determined that it would be appropriate to allow your company an opportunity to respond to the allegations prior to drafting its final report section on identified distributors.
>
> You will find a copy of the relevant testimony enclosed herewith. Please review the allegations and advise the Commission on or before March 3, 1986, if you disagree with the statements enclosed. Failure to respond will necessarily be accepted as an indication of no objection.
>
> Please call Ms. Genny McSweeney, Attorney, at (202) 724–7837 if you have any questions. Thank you for your assistance.

Not unconstitutional, said the D.C. Circuit in *Penthouse International, Ltd. v. Meese* (1991):

> [T]he Advisory Commission had no tie to prosecutorial power nor authority to censor publications. The letter it sent contained no threat to prosecute, nor intimation of intent to proscribe the distribution of the publications. . . .
>
> We do not see why government officials may not vigorously criticize a publication for any reason they wish. As part of the duties of their office, these officials surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not have the statutory or even constitutional authority to regulate. If the First Amendment were thought to be violated any time a private citizen's speech or writings were criticized by a government official, those officials might be virtually immobilized.[12]

3. In the late 1990s, a New York state legislator and a New York congressman accused X-Men Security—a security organization connected to the Nation of Islam—of various conspiracies, "asked government agencies to conduct investigations into

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[11] 707 F.2d 33, 34, 37, 38–39 (2d Cir. 1983).
[12] 939 F.2d 1011, 1013, 1015–1016 (D.C. Cir. 1991).

its operations, questioned X-Men's eligibility for an award of a contract supported by public funds, and advocated that X-Men not be retained." X-Men lost certain security contracts as a result. Also not unconstitutional, ruled the Second Circuit in *X-Men Security, Inc. v. Pataki* (1999):

> [J]ust as the First Amendment protects a legislator's right to communicate with administrative officials to provide assistance in securing a publicly funded contract, so too does it protect the legislator's right to state publicly his criticism of the granting of such a contract to a given entity and to urge to the administrators that such an award would contravene public policy. We see no basis on which X-Men could properly be found to have a constitutional right to prevent the legislators from exercising their own rights to speak.[13]

And it does appear that at least some such persuasion ought to be constitutionally acceptable. After all, government officials have a strong interest in conveying their views, including their views about what speech is harmful and should not be published. It's not clear whether they have a personal First Amendment *right* to do so in their official capacities.[14] But there may still be real value to public discourse, and to their listeners, in their being able to do so—and thus it might not be a First Amendment *violation* in their asking intermediaries to sometimes choose to block certain speech.

For instance, national security officials might sometimes tell a news outlet, "Look, we can't force you to do anything, but if you run this story it will lead to deaths of intelligence sources/damage to national security. Could you not run the story, or fuzz over some details, or delay it?" The news outlet might find that to be valuable information. Reporters and editors might want to avoid causing deaths or harming national security, especially if the bulk of the story can still be reported with a bit of delay or slight modification.

Likewise, law enforcement officials might reasonably and permissibly tell a newspaper or broadcaster, "If you run this story right now, you'll tip off the criminals we're investigating/jeopardize witnesses. Don't you want us to fight crime effectively?" The newspaper might say yes or no, assuming there's no context to make the statement coercive. I doubt such a request would violate the First Amendment.

Or say that a newspaper is about to run an op-ed that alleges governmental misconduct. A government official learns of this—perhaps the editors call him to get his side of the story—and says, "That's nonsense, and here's the evidence to prove that." Or he says, "The allegations are so slanted as to be deceptive or unfair; here's the context that shows it." And then adds, "Please don't run such an unfair story; it would be bad for us if you did, but it would also be bad for your reputation, when the truth comes out, and it would be bad for your readers, who would be misled."

That is a call for an intermediary (the newspaper) to block the publication of a third-party item (the op-ed). However, it is unlikely to be unconstitutional. Indeed, the newspaper may be quite pleased to learn the full story and thereby avoid publishing an op-ed that would make the newspaper look bad.

B. Potential Limits: Subtle Coercion

At the same time, there may be limits on such persuasion. The first comes from the reality that the coercion/persuasion line is often hazy. One concern about government persuasion of intermediaries is that when the government *asks,* people who are subject to regulation by the government may hear this as *demanding.* As it happens, this concern has arisen in at least one other First Amendment context, and the reasoning in that context might be applicable here as well.

That context is labor law. Since the 1940s—early in the Court's modern First Amendment jurisprudence—the Court has recognized that "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guarantee" but not when "to this persuasion other things are added which bring about coercion, or give it that character."[15] In *NLRB v. Gissel Packing*

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[13] 196 F.3d 56, 68, 70 (2d Cir. 1999).

[14] *Compare* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (concluding that government officials generally don't have First Amendment rights when exercising their official duties); and David Fagundes, *State Actors as First Amendment Speakers,* 100 NW. U. L. REV. 1637 (2006) (discussing uncertainty about when state officials may have First Amendment rights vis-à-vis the Federal government).

[15] Thomas v. Collins, 323 U.S. 516, 537 (1945) (treating the matter as having been settled by *NLRB v. Virginia Electric & Power Co.,* 314 U.S. 469 (1941)); *Virginia Electric & Power,* 314 U.S. at 477 ("The employer in this case is as free now as ever to take any side it may choose on this controversial issue. But, certainly, conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act").

Co. (1969), the Court made clear that the employer's power over employees should be considered in deciding whether the speech is likely to coerce:

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting [A]ny balancing of [the employer's and employee's] rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.[16]

Similar logic, I think, may apply when high-level executive officials, or those who speak for them, address intermediaries who are regulated by those officials or the officials' appointees:

> [A]ny balancing of [government speakers' and intermediaries'] rights must take into account the economic dependence of the [intermediaries] on their [regulators], and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

This analogy would still leave government officials able to make requests in certain ways, just as employers remain able to speak in certain ways to employees about the possible consequences of unionization. But the officials would have to be more careful to make clear that the request carries no threat of retaliation.

What sort of statement by the government would make clear that there is no such threat? That would doubtless turn on many factors. Thus, for instance, with regard to the requests sent to the social media platforms by CISA, the Fifth Circuit in *Missouri v. Biden* found sufficient evidence only that CISA "significantly encouraged the platforms' content-moderation decisions"—the court didn't state that there was sufficient evidence that CISA was coercing the platforms, though the court did find sufficient evidence of coercion by some other government agencies.[17]

I think, though, that if there were some serious concern about coercion, dispelling such concern would require considerably more than the disclaimer that CISA included in its e-mails:

> CISA affirms that it neither has nor seeks the ability to remove or edit what information is made available on social media platforms. CISA makes no recommendations about how the information it is sharing should be handled or used by social media companies. Additionally, CISA will not take any action, favorable or unfavorable, toward social media companies based on decisions about how or whether to use this information.[18]

Of course the social media companies' likely worry wouldn't have been that "*CISA*"—an agency that itself lacks regulatory power over the companies—"will take . . . action . . . toward" them. Rather, the worry would have been that *some other,* much more powerful, Federal government actors would take "adverse government action," such as "antitrust enforcement and legal reforms" [19] or possibly law enforcement action of the sort that the FBI can engage in.[20] In light of this, a disclaimer pointedly limited to retaliation by CISA was unlikely to do much good.

C. Potential Limits: Merger of Government and Private Power

There is also reason to think that at least sometimes the Constitution does constrain the merging of government and private power, at least when the government tries to use that merger to bypass the usual constraints on its powers—even in the absence of coercion. And even if the Constitution itself doesn't render such merging of power unconstitutional, there may be good reason to try to constrain such merging by statute.

To begin, let's consider an analogy, three Amendments down: the Fourth Amendment. Say you rummage through a roommate's papers, find evidence that he's committing a crime, and send it to the police. Because you're a private actor, you haven't violated the Fourth Amendment. (Whether you committed some tort or

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[16] 395 U.S. 575, 617 (1969).

[17] *See* 83 F.4th at 391; *cf. id.* at 389 (stating, as to the FBI, that "the platforms' decisions were significantly encouraged *and coerced* by the FBI" (emphasis added)).

[18] *See The Mechanics of Government Censorship* 14 (2025).

[19] 83 F.4th at 373.

[20] *Id.* at 388–89.

crime is a separate question.)[21] Because they didn't perform the search, the police haven't violated the Fourth Amendment either, and the evidence from this "private search" can be used against the roommate.

But if the police *ask* you to rummage through the roommate's papers, that rummaging may constitute a search governed by the Fourth Amendment. "[I]f a state officer requests a private person to search a particular place or thing, and if that private person acts because of and within the scope of the state officer's request," then the search would be subject to the constitutional constraints applicable to government searches.[22] "Police officers may not avoid the requirements of the Fourth Amendment by inducing, coercing, promoting, or encouraging private parties to perform searches they would not otherwise perform."[23] Coercion is only one way a private search may become subject to the Fourth Amendment; inducement, promotion, or encouragement can also suffice.

Indeed, in *Skinner v. Railway Labor Executives' Association* (1989), the Supreme Court held that drug tests of railway employees that were authorized but not required by Federal regulations were subject to Fourth Amendment scrutiny:

> The Government has removed all legal barriers to the testing authorized by Subpart D, and indeed has made plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions. In addition, it has mandated that the railroads not bargain away the authority to perform tests granted by Subpart D. These are clear indices of the Government's encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment.[24]

Considering the extensive regulation of railroads by the government, the railway companies might have felt special pressure to view the government's "encouragement" and "endorsement" as a command. Yet the Court did not rely on the theory that the government had indeed coerced the railroads to perform the tests. It appeared to be enough that it "encourage[d], endorse[d], and participat[ed]" in the tests. The same may apply to social media platforms, especially (but perhaps not only) in a political environment where there is talk of possible regulation, such as through antitrust law or by modifying Section 230 immunity.[25]

Likewise, "In the Fifth Amendment context, courts have held that the government might violate a defendant's rights by coercing *or encouraging* a private party to extract a confession from a criminal defendant."[26] More broadly, the Supreme Court held in *Blum v. Yaretsky* (1982), a Due Process Clause case, that "a State normally can be held responsible for a private decision only when it has exercised coercive power *or has provided such significant encouragement,* either overt or covert, that the choice must in law be deemed to be that of the State."[27] And in *Norwood v. Harrison* (1973), an Equal Protection Clause case, the Court viewed it as "axiomatic that a state may not *induce, encourage or promote* private persons to accomplish what it is constitutionally forbidden to accomplish."[28]

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[21] *See United States v. Phillips,* 32 F.4th 865, 867 (9th Cir. 2022); *Burdeau v. McDowell,* 256 U.S. 465, 475–476 (1921).

[22] State v. Tucker, 330 Or. 85, 90 (2000) (applying the Oregon Constitution's Fourth Amendment analog; police request to tow truck driver to search items in car being towed), followed by State v. Lien, 364 Or. 750, 778 (2019) (police request to trash company to pick up a person's trash in a particular way that would facilitate its being searched). *See also* United States v. Gregory, 497 F. Supp. 3d 243 (E.D. Ky. 2020) (similar fact pattern to *Lien*).

[23] George v. Edholm, 752 F.3d 1206, 1215 (9th Cir. 2014) (police request to doctor to do a rectal search). *See also* United States v. Ziegler, 474 F.3d 1184, 1190 (9th Cir. 2007) (police request to employer to search employee's work computer); United States v. Rosenow, 50 F.4th 715, 733 (9th Cir. 2022) (recognizing that, even when a private party's search would normally be entirely legal, the government's "encouragement" of such a search may constitute "state action").

[24] Skinner v. Railway Labor Executives Assn', 489 U.S. 602, 615–16 (1989).

[25] *See Murthy,* 603 U.S. at 80–81 (Alito, J., dissenting) (reasoning that "internet platforms, although rich and powerful, are at the same time far more vulnerable to Government pressure than other news sources" because "[t]hey are critically dependent on the protection provided by § 230 of the Communications Decency Act of 1996," which Congress might threaten to withdraw; "[t]hey are vulnerable to antitrust actions"; and, "because their substantial overseas operations may be subjected to tough regulation in the European Union and other foreign jurisdictions, they rely on the Federal Government's diplomatic efforts to protect their interests").

[26] United States v. Folad, 877 F.3d 250, 253 (6th Cir. 2017) (emphasis added). *See also* United States v. Garlock, 19 F.3d 441, 443–444 (8th Cir. 1994).

[27] 457 U.S. 991, 1004 (1982). *See also* Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco, 792 F.2d 1432, 1435 (9th Cir. 1986) (emphasis added).

[28] 413 U.S. 455, 465 (1973) (emphasis added).

D. Potential Limits: Systemic Cooperation

Might there be a difference between occasional one-off conversations and systematic programs? To be sure, when it comes to coercive threats aimed at suppressing speech, both the ad hoc and systematic demands are unconstitutional.[29] Likewise, the cases involving government encouragement of searches by private parties find even ad hoc demands unconstitutional.[30]

But if courts do conclude that ad hoc requests to remove or block speech are constitutional, perhaps some line should still be drawn between those requests and systematic encouragement of such removing or blocking. This appears to be what the Fifth Circuit concluded in *Missouri v. Biden,* when it found that the government's speech was impermissible "significant encouragement" of speech restriction by platforms, even apart from the coercion argument:

> The officials had consistent and consequential interaction with the platforms and constantly monitored their moderation activities. In doing so, they repeatedly communicated their concerns, thoughts, and desires to the platforms. The platforms responded with cooperation—they invited the officials to meetings, roundups, and policy discussions. And, more importantly, they complied with the officials' requests, including making changes to their policies. . . .
>
> When the platforms' policies were not performing to the officials' liking, they pressed for more, persistently asking what "interventions" were being taken, "how much content [was] being demoted," and why certain posts were not being removed. Eventually, the officials pressed for outright change to the platforms' moderation policies Beyond that, they relentlessly asked the platforms to remove content, even giving reasons as to why such content should be taken down. They also followed up to ensure compliance and, when met with a response, asked how the internal decision was made. . . .
>
> Consequently, it is apparent that the officials exercised meaningful control—via changes to the platforms' independent processes—over the platforms' moderation decisions. By pushing changes to the platforms' policies through their expansive relationship with and informal oversight over the platforms, the officials imparted a lasting influence on the platforms' moderation decisions without the need for any further input. In doing so, the officials ensured that any moderation decisions were not made in accordance with independent judgments guided by independent standards. Instead, they were encouraged by the officials' imposed standards.
>
> In sum, we find that the White House officials, in conjunction with the Surgeon General's office, coerced and significantly encouraged the platforms to moderate content. As a result, the platforms' actions "must in law be deemed to be that of the State."[31]

Indeed, when it came to requests for removal made by the Centers for Disease Control and Prevention, the Fifth Circuit concluded that the requests were not coercive, but still constituted unconstitutional significant encouragement:

> [T]he CDC was entangled in the platforms' decision-making processes. The CDC's relationship with the platforms began by defining—in "Be On the Lookout" meetings—what was (and was not) "misinformation" for the platforms. Specifically, CDC officials issued "advisories" to the platforms warning them about misinformation "hot topics" to be wary of. From there, CDC officials instructed the platforms to label disfavored posts with "contextual information," and asked for "amplification" of approved content. That led to CDC officials becoming intimately involved in the various platforms' day-to-day moderation decisions. For example, they communicated about how a platform's "moderation team" reached a certain decision, how it was "approach[ing] adding labels" to particular content, and how it was deploying manpower. Consequently, the CDC garnered an extensive relationship with the platforms.
>
> From that relationship, the CDC, through authoritative guidance, directed changes to the platforms' moderation policies. . . . [The platforms] adopted rule changes meant to implement the CDC's guidance. . . . Thus, the resulting content moderation, "while not compelled by the state, was so significantly encour-

[29] See Fagundes, *supra* note 14, at Part II.B.
[30] *See id.* at Part IV.A.
[31] 83 F.4th 350, 387 (5th Cir. 2023).

> aged, both overtly and covertly" by CDC officials that those decisions "must in law be deemed to be that of the state."[32]

And the court held the same as to CISA requests.[33]

As noted above, the Supreme Court reversed this Fifth Circuit decision on procedural grounds and cast some doubt on the factual findings on which the Fifth Circuit relied.[34] But the Fifth Circuit's legal analysis as to substantial encouragement and systematic entanglement may still offer a persuasive precedent.

Of course, distinguishing "consistent and consequential interaction" from mere occasional interaction—such as the examples of constitutionally permissible requests given above—can be difficult. Still, constitutional law does sometimes draw such distinctions between occasional action and systemic action. One analogy, though distant, might be how the law sometimes treats administrative searches.

Courts have upheld various kinds of searches—even ones that lack a warrant, probable cause, or both—on the grounds that they are targeted at specific public safety concerns rather than at broad law enforcement. Airport searches of luggage, aimed at detecting weapons, are one example, as the Ninth Circuit discussed in detail in *United States v. $124,570 U.S. Currency* (1989).[35]

Now say that Transportation Security Administration agents, U.S. government employees following their normal duty to search for weapons, spot a suspicious amount of cash or drugs. They then alert the police who use this information as part of the probable cause needed to justify a search. That is constitutional.[36] TSA agents are free to "report information pertaining to criminal activity, as would any citizen."[37]

So far, so good. But say that the Drug Enforcement Administration comes up with a systematic program to encourage TSA agents to search not just for weapons, the rationale that led airport searches to be upheld in the first place, but also for drugs or cash. The Ninth Circuit held that this would be going too far:

> We see the matter as materially different where the communication [about the drugs or money that the TSA agent found] is undertaken pursuant to an established relationship, fostered by official policy, even more so where the communication is nurtured by payment of monetary rewards.[38]

Even if ad hoc reporting by TSA agents to the police of things other than weapons is permissible under the Fourth Amendment, a system set up to encourage such reporting is not. "The line we draw is a fine one but, we believe, one that has constitutional significance."[39]

Or consider sobriety checkpoints. The Court has upheld them as permissible administrative seizures because they are aimed at protecting safety on the very roads that are being temporarily blocked.[40] Yet the Court has held that the government may not set up drug trafficking checkpoints aimed at finding drug dealers.[41] The difference in these cases, the Court held, stems from the "difference in the Fourth Amendment significance of highway safety interests and the general interest in crime control."[42]

Now, if officers conducting sobriety checkpoints happen to see evidence of crime in plain sight—blood on the seat, an illegally carried gun, or, for that matter, drugs—they are free to keep detaining the driver and search further, based on this newly discovered probable cause.[43] But say that the checkpoint is deliberately set up as a systematic way of searching for drugs or for other contraband. That would trigger additional Fourth Amendment scrutiny: ad hoc observation of evidence of crime, in the course of a valid administrative seizure (valid because the seizure is part of a drunk driving checkpoint, rather than a drug checkpoint or a general law enforcement checkpoint), may become unconstitutional if it happens in the course of a systematic program of search for evidence of crime.[44]

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[32] *Id.* at 390.
[33] *Id.* at 391.
[34] *See* 603 U.S. at 60 n.4.
[35] 873 F.2d 1240, 1244–45 (9th Cir. 1989).
[36] *See id.* at 1247 n.7 (approvingly describing United States v. Canada, 527 F.2d 1374, 1376, 1378–79 (9th Cir. 1975)).
[37] Id.
[38] *Id.*
[39] *Id.*
[40] *Michigan v. Sitz,* 496 U.S. 444 (1990).
[41] *City of Indianapolis v. Edmond,* 531 U.S. 32 (2000).
[42] *Id.* at 40.
[43] *See* Texas v. Brown, 460 U.S. 730, 744 (1983) (plurality opinion); *id.* at 746 (Powell, J., concurring in the judgment); People v. Edwards, 101 A.D.3d 1643, 1644 (2012).
[44] I borrow this from *United States v. Soyland,* 3 F.3d 1312, 1317 (9th Cir. 1993).

I should stress again that these analogies are imperfect. Among other differences, they involve the Fourth Amendment and not the First, and concern attempts to systematically encourage certain action by government employees and not by private parties.

But my point here is that they offer some support for the view that even if some actions are not subject to constitutional scrutiny when done on a one-off basis, they may become unconstitutional when done systematically. In the Fourth Amendment context, systematizing permissible ad hoc searches into "an established relationship, fostered by official policy" increases the threat of undue government intrusion on privacy, enough to change the Fourth Amendment analysis. Perhaps systematizing permissible ad hoc requests not to publish something (or to block or remove users' publications) into a similar official established relationship may likewise increase the threat of undue government interference with public debate to the point that First Amendment scrutiny would be required.

III. Reason for Congressional Action

To be sure, courts may be reluctant to try to draw lines between permissible persuasion and excessively systematized persuasion. They might conclude that government attempts to persuade entities to restrict speech just aren't First Amendment violations, so long as they fall short of coercion.

At the same time, even if the merger of government and social media platform power aimed at setting up a system for blocking, deleting, or otherwise deplatforming user posts isn't *unconstitutional,* it may be bad for democracy. At least, it may be the sort of thing that ought to be done with public scrutiny, rather than behind closed doors.

And Congress may be able to draw lines that courts might be reluctant to draw. Indeed, the Committee's proposals seem to be promising ideas:

- Create transparency around Federal agency communication with private entities on issues that may affect American speech.
- Produce guidelines that clearly restrict government officials from influencing social media platforms' content moderation decisions of constitutionally protected speech.
- Establish a reporting mechanism to allow platforms to report if they think they may be experiencing government jawboning efforts of censorship or content moderation.
- Before contemplating new Federal regulation, enact guardrails that preclude existing Federal AI pro-grams, such as the NAIRR and the Center for AI Standards and Innovation (CAISI) (formerly known as the AI Safety Institute) from curtailing speech in the name of addressing harms.[45]

Any such proposals would of course have to be carefully crafted, and would need to be attentive to how, for instance, we may want to expect different things from AI platforms than from social media platforms. But it's good that the Committee is considering what Congress can do here, rather than just relying entirely on courts.

Indeed, such new statutes would be like other Federal statutes in which Congress has provided more protection for constitutional values than the courts have expressly held is required. For instance, Congress has chosen to provide extra protection for religious freedom through the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act. It has chosen to provide extra protection for free press through the Privacy Protection Act of 1980, which limits searches and seizures of journalists' notes and work product. It has chosen to provide extra protection for Fourth Amendment values through statutes such as the Stored Communications Act and the Electronic Communications Privacy Act. Likewise, Congress may wisely choose to provide extra protection against government jawboning for ordinary citizens' free speech and free press interests as well.

The Internet has democratized speech, restricted the power of one set of intermediaries (traditional media), and empowered a new set (social media platforms). In the process, it has made the latter tempting targets both for government coercion and government persuasion. Congress should turn its attention to whether govern-

[45] *See The Mechanics of Government Censorship* 35 (2025).

ment jawboning, even when constitutionally permissible, unduly risks increasing government power and undermining public debate.

Sincerely,

EUGENE VOLOKH,
Thomas M. Siebel Senior Fellow,
Hoover Institution, Stanford University.
Gary T. Schwartz Distinguished Professor of Law Emeritus,
UCLA School of Law.

Senator SCHMITT. Thank you very much.

We will now recognize Mr. Alex Berenson to deliver his opening statement.

STATEMENT OF ALEX BERENSON, INDEPENDENT JOURNALIST AND AUTHOR

Mr. BERENSON. Senator Schmitt, Committee Members, thank you for giving me the chance to speak on this crucial topic.

On October 28—on August 28, 2021, Twitter, as it was then called, permanently suspended my account, supposedly for violating its COVID–19 Misinformation Rules. The ban deprived me of my largest and most vital platform for my journalism at a time when many Americans were eager to hear what I had to say about COVID and the mRNA vaccines and viewed what I wrote millions of times a day.

Twitter's decision was no accident. It came after a deliberate and relentless campaign by the Biden administration as well as at least one senior Pfizer board member to violate my First Amendment Rights.

Led by Andrew M. Slavitt, an official in the Biden White House, the administration began pressuring Twitter to silence me almost as soon as President Biden took office with both public and private attacks on my reporting. Frontline and senior Twitter employees viewed what was happening to me with dismay.

Going back to 2020, the company had previously defended my right to speak as third parties demanded I be censored because Twitter believed that it should be a place where free speech and debate were encouraged.

Ultimately, at the time of my suspension, Twitter's top executives, including then Chief Executive Jack Dorsey, secretly believed the company should not have suspended me. But the Twitter lobbyist who faced the Biden administration's pressure most directly went around them to orchestrate my ban.

In the words he wrote to another Twitter official just days before he silenced me, this lobbyist hoped, "To keep the target off our back", none of this is speculation.

Thanks to internal e-mails and other documents that Twitter turned over to me before Elon Musk took over, and more documents that Musk voluntarily and graciously turned over after he bought the company, I have hard proof of everything I have just told you.

In fact, after I sued Twitter in 2021, in December 2021, over the ban, the company admitted I had not broken its rules and that my tweets, quote, "Should not have led to his suspension"—"my suspension". The company even reinstated me in July 2022. Again, that is before Elon bought Twitter.

By then, though, I had already suffered and so had a lot of people who were depending on my reporting to help them think about COVID vaccines and COVID lockdowns. In losing my access to Twitter, I lost my best chance to offer Americans my dissenting views on the Biden administration's COVID vaccine mandates, mandates that the Supreme Court would later strike down.

Federal District Judge Jessica G.L. Clarke laid out all these facts in two rulings she made this year on a 2023 lawsuit I brought against the Biden administration and senior officials at Pfizer for its censorship—for their censorship.

In fact, in a ruling just last week, Clarke noted that, "On the merits, the Federal Government has now conceded my claim that the Biden administration unconstitutionally violated my First Amendment Rights in 2021". Yet, in the same ruling, Clarke still dismissed my lawsuit. That may sound impossible. A Federal judge agreed my constitutional rights had apparently been violated, yet said my lawsuit over the violation could not move forward.

But it is true. The Supreme Court has made it essentially impossible for me or anyone to win monetary damages for violations of their First Amendment Rights by the Federal Government. As the law now stands, Federal officials can run censorship campaigns, like the Biden administration carried out—like the one the Biden administration carried out against me, with impunity. At worst, they may face an injunction, but they will never have to pay for doing so for violating our most basic right, the right to speak freely.

So it is open season for government censorship. This loophole is even more expansive and dangerous when it comes to Federal efforts to jawbone, pressure, or outright threaten third parties like Twitter into silencing the speech of their users, employees, or business partners. That is true whether these third parties are legacy media companies, news social media giants, or other types of businesses.

As a practical matter, users are generally not privy to the communications between Federal officials and the companies, so they have no way of proving the pressure existed, or that it led to their censorship. My case is exceptional because of the documents I have proving my rights were violated. Yet even so I have been unable to obtain a remedy so far. And expecting companies to resist censorship on behalf of their users or business partners is unrealistic.

My case, as well as documents the House has unearthed in its own censorship investigation shows social media companies dislike the Biden administration's efforts to force them to censor users, yet, they had many other interests before the Federal Government. They viewed sacrificing speech as the price they had to pay to stay in the administration's good graces.

Every company will face this calculus, whether it is a Democrat or Republican, in the White House. And social media companies are really the most important way that independent Americans, that citizens can get their speech out into the marketplace of debate. That is why there is so much pressure on them.

The truth is that as the law now stands, Federal officials have every reason to believe they can coerce private third parties to suppress speech. This is a powerful loophole that is no doubt enticing to politicians and officials of both parties. But it is wrong. Whether

it affects Republicans or Democrats, journalists or comedians, conservatives, or liberals, or independents, and whether it goes by jawboning, coercion, pressure, or threats, this kind of censorship is wrong.

And this committee has the chance to begin the process of fixing that wrong. I urge you to take it.

[The prepared statement of Mr. Berneson follows:]

PREPARED STATEMENT OF ALEX BERENSON, INDEPENDENT JOURNALIST AND AUTHOR

Chairman Cruz, committee members, thank you for giving me the chance to speak on this crucial topic.

On Aug. 28, 2021, Twitter (as it was then called) permanently suspended my account, supposedly for violating its "COVID–19 misinformation rules." The ban deprived me of the largest and most vital platform for my journalism—at a time when many Americans were eager to hear what I had to say about COVID and the mRNA vaccines and viewed what I wrote millions of times a day.

But Twitter's decision was no accident. It came after a deliberate and relentless campaign by the Biden Administration (as well as at least one senior Pfizer board member) to violate my First Amendment rights. Led by Andrew M. Slavitt, an official in the Biden White House, the administration began pressuring Twitter to silence me almost as soon as President Biden took office, with both public and private attacks on my reporting.

Both frontline and senior Twitter employees viewed what was happening to me with dismay. Going back to 2020, the company previously defended my right to speak as third parties demanded I be censored. Ultimately, Twitter's top executives, including then-chief executive Jack Dorsey, secretly believed the company should not have suspended me. But the Twitter lobbyist who faced the Biden Administration's pressure most directly went around them to orchestrate my ban. In the words he wrote to another Twitter official just days before he silenced me, the lobbyist hoped "to keep the [White House] target off our back."

None of this is speculation. Thanks to internal e-mails and other documents that Twitter provided to me before Elon Musk took over—and more documents that Musk graciously and voluntarily turned over after he bought the company—I have hard proof of everything I've just told you. In fact, after I sued Twitter in December 2021 over the ban, the company admitted I had not broken its rules and "Mr. Berenson's Tweets should not have led to his suspension."

The company even reinstated me in July 2022—again, *before* Musk bought Twitter. By then, though, the damage had already been done. In losing my access to Twitter, I lost my best chance to offer Americans my dissenting views on the Biden Administration's COVID vaccine mandates, mandates the Supreme Court would strike down.

Federal District Judge Jessica G.L. Clarke laid out all these facts in two rulings she made this year on a 2023 lawsuit I brought against the Biden Administration and senior officials at Pfizer for its censorship. In fact, in a ruling just last week, Clarke noted that "on the merits," the federal government has now conceded my claim the Biden Administration unconstitutionally violated my First Amendment rights in 2021.

Yet, in the same ruling, Clarke *still* dismissed my lawsuit.

This may sound impossible—a Federal judge agreed my Constitutional rights had apparently been violated, yet said my lawsuit over the violation could not move forward. Yet it's true.

Why?

Because the Supreme Court has made it impossible for me, or anyone, to win monetary damages for violations of their First Amendment rights by the Federal government. In fact, as the law now stands, Federal officials can run censorship campaigns like the one the Biden Administration carried out against me with near-impunity. At worst, they may face a judicial injunction telling them to stop violating the First Amendment. But neither the officials individually nor the government as a whole face any risk that they may have to pay for doing so—for violating Americans' most basic Constitutional right, the right to speak freely.

It's open season for government censorship.

This loophole is even more expansive, and thus dangerous, when it comes to Federal efforts to "jawbone," pressure, or outright threaten third parties like Twitter into silencing the speech of their users, employees, or business partners. That's true

whether those third-parties are legacy media companies, new social media giants, or other kinds of businesses.

Why? First, as a practical matter, users are generally not privy to the communications between Federal officials and the companies, so they have no way of proving the pressure existed or that it led to their censorship. My case is exceptional because of the documents I have found proving that my rights were violated—yet even so, I have been unable to obtain a remedy so far.

Second, expecting the companies to resist censorship on behalf of their users or business partners is unrealistic. My case, as well as documents from Facebook/Meta and other social media companies that the Select Subcommittee on the Weaponization of the Federal Government has unearthed in its own censorship investigation, shows that social media companies disliked the Biden Administration's efforts to force them to censor users.

Yet they had many other interests before the Federal government. They viewed having to sacrifice speech from some users as the price they had to pay to stay in the administration's good graces. Every company faces this calculus, whether a Democrat or Republican is in the White House.

Yet jawboning of social media companies, in particular, is a more successful censorship strategy than ever before. These outlets are now the most important way for individuals to push their ideas into the marketplace of debate. I saw this firsthand in 2020 and 2021 (and still do). Twitter gave me a megaphone I would not otherwise have had, which is why the Biden Administration was so desperate to take it from me.

In 2024, the Supreme Court found that "a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf." But that case, NRA v Vullo, applied to *state* government officials—New York state's insurance commissioner, to be precise.

The truth is that as the law now stands, Federal officials have every reason to believe they can coerce private third parties to suppress speech without facing any sanction. And following the success of the Biden Administration's efforts against me and other users, they have every reason to believe those efforts will succeed.

This is a powerful loophole that is no doubt enticing to politicians and officials of both parties. But it is wrong. Whether it affects Republicans or Democrats, journalists or comedians, conservatives or liberals or independents—and whether it goes by "jawboning," "coercion," "pressure," or "threats," this kind of censorship is wrong. Only two institutions have the power to fix it—Congress and the Supreme Court.

But the Supreme Court has until now declined to act, by extending the right to money damages to First Amendment claims.

This committee has a chance to begin the process of doing so—to take the first step helping Congress protect our vital Constitutional rights from censorious Federal officials. I urge you to take it.

Again, thank you for giving me the chance to tell you about my case and my censorship. I view the protection of free speech as a bipartisan issue, and this issue as one that will hopefully have a bipartisan solution. I am happy to take any questions.

Senator SCHMITT. Thank you.

We will now recognize Sean Davis to deliver his opening statement.

STATEMENT OF SEAN DAVIS, CHIEF EXECUTIVE OFFICER, THE FEDERALIST

Mr. DAVIS. It begins with censorship, it moves to the destruction of statues and monuments, and it ends with the murder of people. It begins with censorship, it moves to the destruction of statues and monuments, and it ends with the murder of people.

The drive to silent speech does not end at a podium's edge or at the four corners of a page, it always advances toward the violent elimination of speakers. And that is because the authoritarian impulse to silent speech is driven by a totalitarian desire to seize total power by any means necessary, up to and including the murder of one's political opponents.

This dynamic was made clear on a Tuesday afternoon in Utah last month when my friend, Charlie Kirk, was assassinated in broad daylight by a left-wing transgender ideologue who is enraged by Charlie's clear understanding and teaching that God created us male and female. That boys cannot become girls and girls cannot become boys. Charlie was murdered by this left-wing assassin who had been radicalized by demonic transgender ideology because he was one of the most bold and effective speakers in the country opposed to this evil ideology.

Rather than see a nation unite against terroristic violence designed to permanently silence speech, we actually saw the opposite. We witnessed people praising the murder of Charlie. We witnessed people thanking his assassin. We even witnessed members of the U.S. Congress all but say that Charlie deserved it.

That is not the only recent example. The Democratic candidate for Attorney General in Virginia was revealed last week to have called for the murder of one of his political opponents. Even worse, he also said he wanted his opponent to witness the murder of his own children, to watch them die in their mother's arms. Why? To make him feel pain for having different political opinions.

How many here today condemned that insanity or publicly recognized that someone with such a broken moral compass is simply unqualified to be a state's top law enforcement officer? We have heard the tired cliche that riots are the language of the unheard. But the reality is that violence is the language of the unhinged and far too many people in this room are fluent in it.

My name is Sean Davis and I am the CEO and Co-Founder of *The Federalist,* a conservative digital media company that focuses on politics, culture, and religion. I am also a victim of illegal and unconstitutional censorship. My company, my colleagues, and I have been the targets of a coordinated and global multiyear censorship campaign.

In 2020, a foreign government connected outfit in the UK colluded with Google to demonetize *The Federalist,* our crime, we published an article in the summer of 2020 entitled, "The Media Are Lying to You About Everything, Including the Riots".

Later that year, in the midst of a close and heated Presidential election campaign, government-funded efforts in the U.S. repeatedly censored Mollie Hemingway, *The Federalist* Editor-in-Chief and a *New York Times* bestselling author who is here behind me today, and me because of our election reporting and commentary. I was censored for posting a screenshot of and a link to a Pennsylvania Supreme Court decision requiring mail-in ballots received after election day and lacking a postmark to be counted and presumed as valid votes.

Mollie was censored for posting a link to an article *The Federalist* published. The headline of that article, "America Won't Trust Elections Until the Voter Fraud Is Investigated."

But the censorship did not stop there. We were also targeted for bankruptcy and destruction by the U.S. State Department and its Global Engagement Center, or GEC. Despite the fact that GEC was explicitly prohibited by both the U.S. Constitution via the First Amendment and its authorizing statute from targeting domestic speech, it nonetheless sought to drive us out of business by fund-

ing, developing, and distributing technologies and tools to reduce our reach, by bullying advertisers into blacklisting us, and many other conservative outlets, and by coercing big tech companies like Facebook, Google, and Twitter to throttle access to our content.

In essence, our own government secretly and without any due process, charged us with thought crimes, convicted us, and sentenced *The Federalist* to death. The censorship efforts our government funded with our money are still being wielded against us today.

I am here today to testify about the unconstitutional and illegal censorship of my company and my colleagues. But I am also here to help you understand the real-world consequences in flesh and in blood of the drive to silence your political opposition.

It does not stop at the page's end. The effort to censor and silence political opposition is not the final step in the effort to usher in tyranny and authoritarianism. It begins with censorship. It moves to the destruction of statues and monuments, and it ends with the murder of people. And it has to stop. Thank you.

[The prepared statement of Mr. Davis follows:]

PREPARED STATEMENT OF SEAN DAVIS, CEO AND CO-FOUNDER, THE FEDERALIST

Chairman Cruz, Ranking Member Cantwell, and members of the committee, thank you for inviting me to testify on behalf of First Amendment speech and press rights and against authoritarian censorship designed to shut down the free speech rights of American citizens.

My name is Sean Davis, and I am the CEO and co-founder of The Federalist, a conservative digital media company focused on politics, culture, and religion. I am a Christian, a conservative, and a political commentator and reporter. I am also the victim of illegal and unconstitutional censorship by my government which was targeted at my publication, my publication, and me personally.

The First Amendment affirms and protects five God-given rights: free speech, religion, press, assembly, and petition. In my capacity as the publisher of a major national media outlet which produces news and opinion, an infringement on or abridgement of any one of those five rights can be cataclysmic.

Unfortunately, my publication, our writers, and I were all directly targeted for destruction by my own government, using my tax dollars. Even worse, much of the targeting was done in secret, by individuals and institutions who were desperate to hide their illegal and unconstitutional actions against us. This long-running conspiracy to deprive us of our God-given First Amendment rights is illegal, unconstitutional, and unconscionable. Sadly, many senators who sit on this committee either refused to condemn and fight these censorship efforts, or outright supported them.

In the summer of 2020, at the behest of foreign government-connected organizations, Google attempted to demonetize The Federalist for the apparent crime of criticizing American government response to and media coverage of COVID–19 and the violent Black Lives Matter (BLM) riots that raged throughout the country. The apparent article that triggered this outrageous attack on us and our First Amendment rights was entitled, "The Media Are Lying To You About Everything, Including The Riots."

This was all orchestrated secretly behind closed doors between a foreign NBC News cell and corrupt Google executives, despite the fact that we had broken zero rules. But that was only the beginning.

Unbeknownst to us at the time, a government department called the Cybersecurity and Infrastructure Security Agency (CISA) was also directing and funding censorship efforts against my colleagues and me because of our reporting on unprecedented new election laws rammed through ahead of the 2020 election. This agency is supposed to prevent attacks on American infrastructure, but at some point its leaders apparently decided that its real objective was to censor American citizens and journalists for criticizing their own government.

My colleagues and I were deliberately singled out for censorship because our own government decided our rights as citizens and members of the news media needed to be crushed. The agency and its partners used a ticketing system to flag and report social media posts that it wanted to be eliminated and funded efforts to badger

and threaten tech companies, many of which had effective monopolies over online content, to delete social posts that the government and its partners found inconvenient.

For those who know me or follow me on social media, I can be opinionated and provocative. But in this particular case, it wasn't even one of my spicier tweets that attracted the ire of Orwellian government censors. In a tweet targeted for censorship, I posted a screenshot of and a link to a Pennsylvania Supreme Court decision which stated that mail-in ballots received after the election and containing no postmark still had to be presumed as cast on-time, and counted. Anyone who understands basic logic can see the problems with such a declaration: ballots cast and mailed long after the election, potentially even after preliminary results were known, would still have to be counted, creating huge incentives to flood the system with late, invalid ballots.

My tweet with the link to and screenshot of that Pennsylvania Supreme Court decision was censored by Twitter, and it was done so at the direct demand of a U.S. Federal government-sponsored censorship consortium. Another one of my tweets, in which I alleged that the best evidence that the 2020 election was being rigged was the fact that tweets stating the election was being rigged were being censored, was censored. Another ticket demanding censorship of me stated, "[S]ame guy (sean davis) continues to post about this. has spread to thousands on [Facebook] because of Federalist article[.]"

According to JIRA ticket data obtained and release by the House Judiciary Committee, at least 21 separate tickets were submitted to censor Twitter posts from me. Several of those tickets also demanded censorship by Facebook.

Kafka-esque doesn't even begin to describe this madness.

My colleague Mollie Hemingway, who wrote a national best-selling and rigorously researched and fact-checked book about 2020 election shenanigans, was also censored by Twitter at the demand of the Federal government and its partners. Multiple censorship tickets were submitted to shut down her social media presence. The most ridiculous example was a demand to censor a tweet from Mollie which contained a link to an article published by The Federalist. The headline of that article? "America won't trust elections until the voter fraud is investigated."

Imagine how deranged and authoritarian you must be to want to censor a post about how addressing voter fraud is key to ensuring election integrity.

Though we noticed and wrote about that censorship at the time, we had no idea that it was our own government which funded and targeted our speech for censorship, nor did we understand how often we had been targeted, both personally and institutionally. It was only through dogged investigation and oversight from people like Rep. Jim Jordan and then-Missouri Attorney General and now-Sen. Eric Schmitt that the depths of the government scheming against us even began to be plumbed.

Again, the censorship didn't stop there, and it didn't remain contained within CISA. We were also targeted for outright bankruptcy and destruction by the U.S. State Department and its Global Engagement Center (GEC). Despite the fact that GEC was explicitly prohibited by both the U.S. Constitution via the First Amendment and by the very statute which created and authorized the agency from targeting domestic speech, it nonetheless sought to drive us out of business by funding, developing, and distributing technologies and tools to reduce our reach, by bullying advertisers into blacklisting us and many other conservative outlets, and by coercing Big Tech companies like Facebook, Twitter, and Google to throttle access to our content. In essence, our own government secretly and without any due process charged us with thoughtcrimes, convicted us, and sentenced The Federalist to death.

We survived, but just barely.

Once the censorship-industrial complex injected its lies into the bloodstream of the body politic, the effects became endemic and permanent. To this day, we are still dealing with the effects of their blatantly illegal and unconstitutional censorship efforts. Although we sued in Federal court nearly two years ago, we are still awaiting relief. Although the President and Vice President of the United States admitted that these illegal censorships efforts were undertaken, we are still awaiting relief. And although the U.S. Secretary of State himself, whose agency targeted The Federalist, plainly admitted in our very pages that the State Department did exactly what we alleged, we are still awaiting relief. Some members of this committee have supported our efforts to vindicate our rights. Many, however, haven't said a word in our defense, a fact which suggests that defenses of media millionaires like Jimmy Kimmel are based more on partisanship than any sort of actual belief in free speech.

And it is worth noting that unlike Mr. Kimmel, who is employed and distributed by a broadcaster who is required to abide by well-known rules as a condition of operating a monopoly on publicly owned airwaves—rules that were drafted and en-

acted by this very legislative body—my colleagues and I are independent journalists who operate online, far outside the regulatory purview of the Federal Communications Commission (FCC). FCC rules and regulations, which radio and television broadcasters like Mr. Kimmel are required to obey, do not apply to us. It also takes real chutzpah, in the aftermath of the assassination of Charlie Kirk—who was brutally murdered while peacefully debating a college student about transgender ideology—to try and make Jimmy Kimmel a free speech martyr just to cynically change the subject from yet another example of left-wing violence designed to permanently silence not just speech, but its speakers.

As we noted in our complaint against the State Department, we are the victims of one of the most audacious, manipulative, secretive, and gravest abuses of First Amendment rights by the Federal government in American history.

I have no doubt today that we will hear words like "disinformation," "misinformation," and "malinformation" thrown around by politicians desperate to create a pretext for censoring speech and speakers they don't like. Make no mistake: these types of labels exist entirely to justify illegal and unconstitutional violations of the First Amendment rights of every American.

Americans are allowed to say ridiculous things on the Internet. They are allowed to post things you don't think are true. They are allowed to publish things that are mean. They are allowed to be hateful. Politicians and government officials do not have the authority to bootstrap their way to censorship by baselessly throwing a "Russian disinformation" label on every post or news article they don't like. In fact, the more a particular politician dislikes a particular political statement, the more it is protected by the First Amendment. We don't really need laws to protect popular speech. It is the unpopular speech, the speech that criticizes government, that is most desperately in need of protection.

It also is imperative that everyone lives under the exact same speech regime. A legal regime in which one party or one side of the political spectrum has free speech, while another is subjected to speech controls, is an abomination, and one that should not be tolerated. It is absurd to watch the government crack down on accurate reporting, like that of the New York Post, which was censored for reporting on Hunter Biden's laptop, and then watch publications that repeatedly published falsehood after falsehood not just escape scrutiny, but receive lucrative journalism prizes and rewards for their nonsense.

I would prefer that everyone live under a legal regime that treasures and protects free speech and freedom of the press. In fact, I have fought for that for years. But I will not abide a system that illegally cracks down on conservative media while doing nothing to stem left-wing lies. Everyone should live under the same set of rules.

The best antidote to speech you don't like is more speech. That is why the Founding Fathers drafted the Constitution and the Bill of Rights. They understood that a government could not purport to represent its people if it prohibited their rights to speech, assembly, religion, press, and petition. It is time to return to a world where we can say what we wish without fear of being censored, or deplatformed, or shot dead.

If you woke up two weeks ago and suddenly decided you care about free speech, I invite you to prove it. I invite you to demonstrate to the world that your commitment to free speech is principled, rather than an attempt to change the subject because one of your famous millionaire friends on television received 1/1,000,000,000th of the treatment that conservatives have been subjected to for years. I invite you to condemn the nakedly illegal and unconstitutional censorship efforts of the last 5 years. I invite you to apologize for any past support of censorship. I invite you to finally stand up for speech you don't like from people you don't like. And I invite you to condemn any and all violence meant to permanently silence speech, and speakers, even if you hate them.

Prove your commitment to the First Amendment is real by finally admitting to the censorship schemes many of you cheered, and working to make sure nothing like that ever happens again.

Senator SCHMITT. Thank you. We will now recognize Mr. Gene Kimmelman for his opening remarks.

STATEMENT OF GENE KIMMELMAN, SENIOR FELLOW, TOBIN ECONOMIC POLICY CENTER, YALE UNIVERSITY

Mr. KIMMELMAN. Thank you, Mr. Chairman, Senator Cantwell, Members of the Committee. It is an honor to appear before you today.

So as we have experienced this explosion in digital technology which fundamentally is transforming our media landscape and information ecosystem, I think the fundamental principles that our democracy has always relied upon remain the same. First, we must prevent government from censoring protected speech as Mr. Volokh said. Second, we must also prevent media and information distribution platforms from concentrating enough power to block the competition and diversity that fuels open debate in our society.

I am worried that the current FCC is heading down a dangerous path on both of these principles. Recent statements from Chairman Carr echoing the President threatening to revoke broadcast licenses for presenting content unfavorable to the administration has chilled protected speech, and the FCC's push to eliminate or relax broadcast ownership rules and to welcome consolidation in media threatened the independence and diversity of local media that are critical to an informed citizenry.

Just consider we have pending before us the NextStar merger with TEGNA, combining broadcast—national broadcast companies with more than 250 broadcast stations. combining multiple broadcast licenses in the top markets that are the most popular broadcast television stations, and having ownership in two-thirds of all markets, covering almost 80 percent of all households in the country, even though this appears to violate the limit Congress set at half that level Chairman Carr seems to be moving forward.

And this is on the heels of Skye Dance backed by Oracle's owner, Mr. Larry Ellison, buying Paramount Global, CBS, now seeking to buy Warner Brothers, Discovery, more studios, more networks, cable channels, and Mr. Ellison appearing to pick up about a 20 percent stake in TikTok. And the FCC is also considering allowing companies to own multiple national networks.

These deals, and certainly more to follow, likely threaten to build a form of private censorship through outsized media power. It is time to update the law and establish new guardrails to promote local, diverse, and independent media. The threat to democracy also comes from the dominant information distribution systems controlled by Google, Meta with Facebook, Instagram, WhatsApp, and Apple with its App Store.

Here, the Trump administration has done an excellent job challenging these companies monopolistic behavior, continuing the antitrust enforcement from the Biden administration. However, antitrust is not enough to eliminate the enormous power of these text platforms. More needs to be done.

Congress must give antitrust enforcers more tools to truly open up the tech information distribution platforms and modern media markets to robust competition. We need to reduce concentration of control in these markets. Private control that can censor just as the government can censor.

In conclusion, I want to say it is really time for Congress to update the Communications Act, to jump in and put an end to the

threat of the bullying that we are seeing from the FCC, which chills speech and eliminates open debate and information flow in our media. And it is time to stop media consolidation and monopolization that puts too much control over the marketplace of ideas into few hands.

Thank you, Mr. Chair.

[The prepared statement of Mr. Kimmelman follows:]

PREPARED STATEMENT OF GENE KIMMELMAN, SENIOR FELLOW, TOBIN ECONOMIC POLICY CENTER, YALE UNIVERSITY; SENIOR FELLOW, MOSSAVAR-RAHMANI CENTER FOR BUSINESS AND GOVERNMENT, HARVARD KENNEDY SCHOOL

Democracy in the United States is built upon a foundation of constitutional speech protections plus a process of open debate and elections, fueled by independent and diverse media. I believe our democracy cannot survive unless we prevent government from coercing or suppressing protected speech. Nor can it survive without strong competition along independent and diversely owned information and media distribution platforms.

A robust marketplace of ideas requires strong protection against both public interference in open debate and the exercise of private market power that distorts or blocks public discourse. I am concerned that recent statements and actions from government officials, like the Chairman of the Federal Communications Commission (FCC), appear designed to unduly pressure tech platforms and media distribution companies to favor certain speech and suppress the views of others. I am equally concerned that a wave of media consolidation driven by the current FCC's efforts to relax or eliminate ownership rules will concentrate local media power in the hands of a few national companies, reduce the diversity of national media players, and thereby empower a few media tycoons to distort the most popular sources of information in our society.

While strong antitrust enforcement can play a critical role to prevent media monopolization or excessive concentration of ownership, it is not enough to ensure open debate through local and diverse players in the media ecosystem. The Trump Administration's antitrust enforcement cases (which build upon the work of the Biden Administration) against Google's, Meta's, and Apple's monopolization practices are precisely what is needed to break up or restrain tech platform practices that harm competition and impede the free flow of information.

Although many of these cases are still pending, the recent Google search remedy decision illustrates how cautious courts are when confronted with a legitimate request to require asset divestitures or ban on payments that have been found by the courts to be illegal in nature. Courts seem reticent to upend business models, even in the face of blatantly illegal behavior. Furthermore, antitrust was never designed to directly promote democracy by maximizing diverse marketplace voices. Antitrust is a necessary but often insufficient tool to sustain local, diverse media.

That is why Congress's decision to promote local and diverse media through communications policy has always been so important to our democracy. Obviously, the explosion of digital technology has dramatically changed the media landscape. However, a substantial portion of the public still relies upon local broadcast content, regardless of how the content is distributed, for their daily news and information. More importantly, these local media play a critical role in promoting open public debate at the key moments when we select our public representatives.

I am therefore concerned that the FCC is heading down a very dangerous path by suggesting that diverse and locally controlled broadcast media may not matter anymore. It is also disconcerting to see a data gathering giant (Oracle) become financially intertwined with a national television network (Paramount/CBS) which is seeking to purchase a major studio and cable channels through Warner Bros Discovery while picking up a substantial ownership stake in TikTok. Such conglomeration involving major media companies threatens media diversity and will likely lead to further consolidation among other tech and media players.

Now is the time for Congress to step in and update the Communications Act and expand antitrust tools that can pry open tech platforms and the emerging Artificial Intelligence (AI) market to increase competition. I believe technological changes have blurred the lines between broadcast, cable, streaming, website content, and user generated media like YouTube. Therefore, Congress needs to delineate and update public duties across all media. Congress should treat all forms of media power equally, and establish new standards for independent ownership and control that promote a robust marketplace of ideas. In addition dominant tech platforms must

be prevented from discriminating against those dependent on information and services distributed over those platforms.

Given that Google was not constrained by the Federal District Court from making unlimited payments to Apple, Samsung, Motorola, or the wireless phone carriers to promote their search and AI services, it is now imperative that Congress also established guardrails to ensure that neither Google nor anyone else can dominate the exploding AI marketplace.

It is critical that we prevent both government and private players from impeding the free flow of ideas in our society. Our democracy cannot survive without robust media competition and open debate, especially involving public discourse about how we govern ourselves.

Senator SCHMITT. Thank you. Thank you for testimony.

And I guess I will just start there with just a quick question. So Mr. Kimmelman, you are the CEO of a group called Public Knowledge; is that correct?

Mr. KIMMELMAN. I was at one point, sir.

Senator SCHMITT. OK. When what years were you the CEO of Public Knowledge?

Mr. KIMMELMAN. 2014 to 2019.

Senator SCHMITT. OK. Let us just take a DeLorean back in time to COVID era. Do you think it is appropriate for these, sort of, NGOs or non-profits to work hand-in-hand with government agencies to flag misinformation, or disinformation, or malinformation?

Mr. KIMMELMAN. Mr. Chairman, I have worked with NGOs for many, many years, and I think it is appropriate on the left and the right for them to present ideas to the government, to the major players in the marketplace about their views, that certainly, that is what I was involved with.

Senator SCHMITT. Well, let me get more specific then. Do you think it is appropriate that the White House was working directly through a number of different agencies to work with the University of Washington and Stanford information to sort of outsource their censorship enterprise to find out what the posts that they did not like, and then work with—and then collude with at least, or coerce social media companies to punish those folks?

Mr. KIMMELMAN. Well, Senator, I think it is—I have seen the government in many instances work with private contractors——

Senator SCHMITT. But I am asking—I am asking about this instance because it was not like a you know a galaxy far, far away, it was like a few years ago. Do you think that is appropriate?

Mr. KIMMELMAN. Yes, I am not familiar with the details of what might or might not happen there.

Senator SCHMITT. But what about the scenario I just gave you though?

Mr. KIMMELMAN. Working with a university to——

Senator SCHMITT. To flag misinformation so that the government then can coerce social media companies to throttle or to——

Mr. KIMMELMAN. I never think government should coerce social media companies, so I cannot imagine——

Senator SCHMITT. OK.

Mr. KIMMELMAN [continuing]. That that part of it as——

Senator SCHMITT. OK. Thank you.

Mr. Davis, your testimony described how in the summer of 2020 Google attempted to demonetize *The Federalist* following your critiques of violent Black Lives Matter riots. it is documented that the

Center for Countering Digital Hate, the CCDH, specifically worked to demonetize *The Federalists* for these critiques. Could you just describe what tactics, specifically, were employed to do that?

Mr. DAVIS. Yes, sir. Thank you for bringing that up. So I believe it was in July 2020, we started receiving e-mails from a NBC News reporter based out of the UK, I do not remember her name exactly, and they were almost taunting asking for comment: Hey, Federalist, how does it feel knowing Google is going to—is about to demonetize you for hate speech, or something like that. I am paraphrasing.

And this was news to us. We had not broken any rules. We had gotten no notifications of breaking rules that we had violated Google's terms and conditions, or AdSense's, or whatever. And so we started calling around to contacts at Google and learned that: Oh, yes, you are about to be demonetized because of hate speech was what we were told. We had, you know, racist, violent hate speech which was not true at all.

And it was the CCDH who was working with this NBC News, I think it was called the Verification Unit at the time, they were working together and colluding with executives at Google, to this day I do not know who, to come in and secretly demonetize us. And what I found most offensive about it was they were all in on it. They had news articles ready to be written kind of crowing about how we got demonetized.

We were able to fight back. We had a pretty robust response to that, and they ended up relenting. Largely, what was interesting was in that initial news article targeting us they had cited that news article, how the media are lying to you about literally everything including the riots. The NBC News ended up stealth editing that out, and they worked with Google to come up with a new rationale for demonetizing us, which was our comments were mean.

We had an unmoderated comment section. So we ended up having to delete our comment section to avoid being demonetized by Google because a bunch of foreign-connected government outfits decided that they did not like what we were publishing.

Senator SCHMITT. OK. In limited time, I want to—Mr. Berenson, it is clear now that during the Biden administration, CISA, which is mentioned a lot in this report obviously, operated kind of a switch-boarding mechanism during this period flagging disfavored content from domestic sources for social media platforms. Based on what you have seen, how was CISA specifically doing this? What was the abuse really all about?

Mr. BERENSON. Well, again, I think you laid it out. You know, they redefined infrastructure so it was not actual physical infrastructure or software infrastructure it was things people were saying. And you know, there was a period very early in 2022 when they actually tried to redefine terrorism as quote/unquote "misinformation", there is a bulletin from February 2022 which I think DHS put out and then retracted under pressure.

So you know, once you start saying that people's speech is terrorism, you are going down a bad path and I think—I do not think that is something that either party should do, honestly.

Senator SCHMITT. Thanks. Ranking Member Cantwell.

Senator CANTWELL. Thank you, Mr. Chairman. I am going to yield to my colleague for a second to make a statement, then I will finish with my questions.

STATEMENT OF HON. AMY KLOBUCHAR,
U.S. SENATOR FROM MINNESOTA

Senator KLOBUCHAR. Thank you. I will do my questions on the record because I have to leave, but I was not going to speak and I appreciate Senator Cantwell's willingness to let me say a few words here, given what happened in my state this summer.

First of all, I think Mr. Kimmelman knows that I have been out front on monopoly issues, and antitrust, and making sure that we have true competition in the marketplace, working with Senator Cruz, and Senator Lee, and Senator Kennedy, and many others on that issue, and I continue to believe that it is a legitimate solution.

Second, I think what happened with the Chair of the FCC was wrong in the last month. I appreciated Senator Cruz being out front on it. I truly do. And calling it out. And I am looking forward to that hearing to try to get some sense into what is going on there, with not just the Jimmy Kimmel moment, but many others.

Third, I think that the AI piece of this, and I will ask some questions about this, but to me, it should not be that radical that we say number one that if speech is violent or it incites violence, that that is different than other kinds of speech, but that with these AI videos where you cannot even tell it is yourself or not, I had this experience at a hearing, that they could at least be labeled.

It is always going to be litigation over whether something is the violent side, and the heat side, or whether it is the legally, constitutionally allowed speech like parody. But at the very least these videos should say something about prepared for by AI, or digitally created.

I just happened to be late on CNN last night and Robin Williams' family was on one of the shows talking about how he is dead, and they have created AI videos that do not say digitally altered, that people think are real. So people should have the right over their own identity.

And the last thing, when it comes to these horrific mass shootings and acts of violence, I have come to see them as all-purpose haters, which is something that the FBI actually said, after the enunciation, church shooting in Minnesota, because that shooter actually hated President Trump in the manifesto, hated wokeness, hated Jews, hated Muslims, hated Hispanics, hated Blacks, and shot these two little kids, Fletcher and Harper, through stained-glass windows in a Catholic church.

Then you go to the shooting of my dear friend, and I had a good discussion with FBI Director Patel about this in judiciary. He lost his friend Charlie Kirk and we mourn that. And we lost our friend Melissa Hortman.

Now, that shooter literally had a manifesto or ramblings that targeted mostly, and in fact all Democratic office holders and he went to the houses of the people that he knew—that he knew the addresses, and the ones that he did not he was not able to go to.

He went after law firms, businesses, went after planned parenthood, and then left a actual letter saying that he did it because he

was supposed to assassinate me, which is on X about every 5 minutes with my name with "assassination", which I think is completely not a good idea for public safety, but I cannot get it off.

So the point of all this is that to say it is one side or the another when you look at the Cato Institute Report that came out this year of this extremism and what is triggering these, basically, mad murderers to commit these acts, whether it is in the Michigan temple, or whether it is Charlie Kirk in Utah. I just do not think it is the right approach to be like it is one side or the other.

These people have been targeted, in their heads, and they go out and create these mass crimes and it is on us to figure out what is triggering them and actually do something about it instead of playing the blame game.

One of my answers is an assault weapon ban or at least 21 years and under that would have helped in Uvalde, Buffalo, Parkland, doing something about this instead of just blaming each other. Thank you.

Senator SCHMITT. Thank you. Senator Fischer.

STATEMENT OF HON. DEB FISCHER,
U.S. SENATOR FROM NEBRASKA

Senator FISCHER. Thank you, Senator Schmitt.

Mr. Davis, government censorship in the name of fact-checking is an unacceptable trampling on our democratic values. Knowing what we know now, how should social media companies respond if the government comes to them to deplatform users based on their political opinions? What is your suggestion?

Mr. DAVIS. That is a great question. Thank you for raising it. If I could wave a magic wand and create a solution or a response there, what I would say is anytime a government goes to a social media platform, Google, YouTube, Twitter, whatever, and they tell someone, you need to take this down because it is hate speech, or misinformation, or whatever fancy label they want to throw on speech they do not like, first off, those tech companies should tell them to take a hike. We do not censor anyone. We are a platform. we are not a content company.

And then number two, I think they should have to disclose it to the public and the people who were targeted. I would love to have known in 2020 who was actually behind the censorship of me and my colleagues. We knew we were being censored because we watched it happen. We saw our posts disappear. We saw ourselves being shadow-banned. We did not actually know why.

I would say to this day, we do not actually understand the full extent of the government effort to censor us. So I think there should be full disclosure following an absolute denial of any sort of censorship demands from government. it is totally inappropriate.

Senator FISCHER. Thank you. Mr. Berenson, I thank you for sharing your experience of being deplatformed by Twitter. it is a valuable story for us to hear. You spoke of a huge influence that you witnessed between Twitter and the White House at the time back in 2020. And you described your understanding that the company's lobbyist hoped to keep the White House target off their back. Can you explain, specifically, what your understanding of

that target was? And are you aware of any specific threats that were made?

Mr. BERENSON. Sure. So in July 2021, as the Biden administration was preparing vaccine mandates, and that is sort of what you have to understand about the backdrop here, and they knew that those might be politically unpopular, they started pressuring the companies to deplatform people like me—I mean, they have been doing this, but they upped the pressure. And that is when President Biden said that Facebook was quote/unquote, "Killing people" by allowing people like me or RFK Jr. to speak.

And you know, the biggest legal protection that social media companies have is what is called the Section 230, as I am sure you know, where they are essentially immune from lawsuits, from users over the decisions they make for content. So they have all the immunity of a traditional publisher to make decisions over what speech they want to carry, and so——

Senator FISCHER. Yes. But did the White House—do you have any of any kind of information or records? Did the White House specifically say what they would do to Twitter?

Mr. BERENSON. Well, so they specifically—well, they publicly said that they were going to reconsider Section 230. That was again in July. And they had privately said to Twitter in April, they had, based on Twitter's own records said a really—quote/unquote, "A really hard question about why I was still being allowed to speak", which in my—from my point of view, and my lawyer's point of view, that all by itself was a First Amendment violation, because it forced Twitter to start looking at me in a way that Twitter had not previously done. And that was in secret. And you know and I will say this I——

Senator FISCHER. And again, there was no transparency that——

Mr. BERENSON. No transparency——

Senator FISCHER.—as Mr. Davis spoke on.

Mr. BERENSON. Yes. So I mean, look, what I do not like what Brendan Carr did but he did it publicly and we can have a debate about it. What is really problematic is when the government goes in secret to these companies and targets individual users or individual categories of speech. And I think that that should not be allowed. I think that both parties should agree that that targeting an individual user, or an individual post, as you know, if it is legal, it is wrong.

And nobody has ever said that I had said anything illegal, and actually I think most people now would agree that a lot of what I said was—has been confirmed. So I think that that is a pretty basic place to start.

Senator FISCHER. Thank you. Mr. Volokh, you mentioned a reporting mechanism that might be a promising idea for companies that think the government is coercing them. Can you describe to the Committee how such a mechanism might have prevented a situation that Mr. Berenson just described, and how would you structure that mechanism?

Mr. VOLOKH. Sure. So this is a familiar line [no mic]—is the best disinfectant. There may in fact be certain kinds of requests to remove something that might be justifiable in certain situations, if

they are not coercive, but they are just, kind of appealed to somebody's better instinct. Maybe, maybe not.

But presumably it is something that members of this committee, that other Members of Congress might be interested in, that reporters for newspapers might say: Well, here is a list of all of these things that the government has been asking that people remove. Is it justifiable or not? Is it excessive? Does it show political bias? That is impossible to do if it is all essentially corporate secrets and government secrets.

Senator FISCHER. Is there, I am picking up on Senator Klobuchar's—I am over time. Can I finish? Thank you.

Senator Klobuchar was saying, is you know, she is worried, as I think many of us are with AI and things that are happening there, and at least to get a label, at least to get a label. Do any of you know, are these social media companies, any of these companies capable of doing that to be able to identify when something has been tampered with, with AI, or if it is to totally false, to be able to do that?

Mr. VOLOKH. So I think that that is a separate question but a very important question, there is a—what you are asking I think is the technical question, which is even if they were just to do it on their own, can they do it?

Senator FISCHER. And in that case——

Mr. VOLOKH. So my understanding is that there are ways of determining that, they are hard to do at scale. So perhaps a forensic examiner might look at a video, but it does not mean that you can have an algorithm that will reliably do it, and there is going to be false positives and false negatives. There is also always going to be an arms race, right.

If there is a better fake technology, better detector technology, better fake technology that evades the detector technology. I am not up on all the details, but my understanding is right now there is no guaranteed reliable mechanism of determining it all.

Senator FISCHER. Then maybe you get into the whole question also on, what is comedy, what is satire.

Mr. VOLOKH. Yes.

Senator FISCHER. It opens up a whole, another avenue then.

Mr. VOLOKH. That is absolutely right. There certainly is no software you can write that says, oh, this is obvious parody and therefore it should not be taken down or labeled.

Senator FISCHER. Thank you, sir. Thank you, Mr. Chairman.

Senator SCHMITT. Thank you, Senator Cantwell.

Senator CANTWELL. Thank you, Mr. Chairman.

And thank you Professor Volokh for both the, you know, statement you made about Brendan Carr's coercive tactics and that that would not be appropriate, and for your recommendations on transparency, and rules that I think would be a concept of just making sure that things were clear.

And to my colleague's comment, Senator Klobuchar. Definitely, one of the reasons I appreciate many things she said, but one of the reasons I support the Blackburn Legislation and joined her as a co-sponsor on the COPIED Act is because it gives the content holders some rights, and it shows who the content holders are, and

even in the case of compensation, which is an important issue to keeping competition and perfect information.

I will just note that during this debate, this Committee and this Body passed a public health emergency language—related to deceptive practice language. It was unlawful to engage in deceptive practices related to the treatment, cure, prevention, mitigation, or diagnosis related to COVID.

Why did we do that? Why did we give that extra power? Because there were a lot of crazy things online, like take bleach, or what have you, and we wanted to make sure that we were being—protecting consumers against deceptive practices, as it related to that. That was passed with a very, very big bipartisan support by this this—by the Senate, and became law.

OK. So now to this, Mr. Kimmelman, this larger issue. Even my colleague from the House who was Chairman of the China Committee, I see does not like the TikTok decision because he does not think it goes far enough, and banning you know the actual algorithm. We have this attempt by Carr to kind of realign the deck chairs at this moment that we have competition shrinking. And so that is why it is so concerning to me.

And the unevenness. We had a hearing here, a Facebook whistleblower who literally said the company knew that it was putting—elevating hate speech as a way to increase the revenue for advertisers. And you know, I feel like that is—you know, if a newspaper or a broadcaster puts false information in the paper, the community will respond and that person will no longer be able to continue their business. But online, you do not even know that that is happening.

And so making sure that we do not have, you know, these challenges, what do we need to do to really get people to understand that right now you could in a very—I mean, in a very vertical way have such an alignment that that influence that we are talking about now, of not being coercive, is actually done in major ways? Even as my Republican colleague in the House is saying he is concerned about this as it relates to what TikTok might be doing.

Mr. KIMMELMAN. Well, um, Senator Cantwell, I think it is a critical issue because as the technology has changed, the entire media landscape has changed. So I think we have to update our understanding of: Where is the excess power being used, how is it being used? These examples you have heard today all relate to a gatekeeper in the media landscape that is a tech company. We have not always thought of them as being part of the same ecosystem, and I think we need to do that.

Because if you have such enormous power over the major ways in which the public gets news, information, can keep up about whether it is their community, or matters of public health, or national affairs, we have got to make sure that they are playing by some reasonable rules, or that there is full competition in the marketplace to give people the checks and balances in the media. And that is all——

Senator CANTWELL. You do not think Professor Volokh's statement about transparency is a bad idea? It is a good idea.

Mr. KIMMELMAN. No, it is a great idea. I think transparency is one element of this, but it is not enough to prevent the kinds of

concerns about coercion and suppression if too few people have the megaphone, have the ability to turn on the microphone for the voices that need to be part of our public debate.

Senator CANTWELL. And are you worried about too much content being behind paywalls? Because I am. I am worried that the more of this vertical integration, and that is why, again, I was so concerned about Chairman Carr's comments, in addition to the free speech, that if you start using this power as the FCC Chairman, and you just allow for all of this vertical integration, and the next thing you know, it is kind of like on the sports issue you put so much of it behind a paywall, you know, how is the consumer just kind of constantly being short-changed by this whole change in the landscape?

Mr. KIMMELMAN. It is a huge problem, and that is why we need to make sure there is adequate ways for the companies that really invest in news and information, and gathering the information that the public wants, engaging people in public debate, can finance that and present it, so it is not all dumbed down, and kind of diluted in an Internet where there is just such massive information flow that you cannot tell fact from fiction.

Senator CANTWELL. And you are talking about localism now, and that we make sure that we——

Mr. KIMMELMAN. Absolutely. It is localism, and it is preventing the few companies that seem to have amassed quite a bit of power already from getting any larger and acting as gatekeepers to our public debate.

Senator CANTWELL. Thank you. Thank you, Mr. Chairman.

STATEMENT OF HON. BERNIE MORENO, U.S. SENATOR FROM OHIO

Senator MORENO. Thank you to all the witnesses for being here. If there is no objection, I would like to put into the record a letter sent from this committee back in 2018 to the Chairman of the FCC requesting that Sinclair Broadcasting licenses be reviewed because in the minds of the 12 Democrats, including two on this committee, felt that Sinclair was perpetuating misinformation.

We will put that into the record.

[The information referred to follows:]

United States Senate
WASHINGTON, DC 20510

April 11, 2018

The Honorable Ajit V. Pai
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Dear Chairman Pai:

We write to express our grave concerns regarding Sinclair Broadcasting Group's (Sinclair) conduct. This conduct affects its fitness to hold its existing broadcast licenses and its fitness to acquire even more broadcast licenses through the proposed merger with Tribune Media Company (Tribune).

In particular, we have strong concerns that Sinclair has violated the public interest obligation inherent in holding broadcast licenses. Sinclair may have violated the FCC's longstanding policy against broadcast licensees deliberately distorting news by staging, slanting, or falsifying information (traditionally known as the news distortion standard).[1] Multiple news outlets report that Sinclair has been forcing local news anchors to read Sinclair-mandated scripts warning of the dangers of "one-sided news stories plaguing our country," over the protests from local news teams.[2]

As strong defenders of the First Amendment, guarantees of free speech and freedom of the press, we are alarmed by such practices. In the United States, the airwaves belong to the American people. The Federal Communications Commission (FCC) is responsible for ensuring that broadcast licensees use the public airwaves to serve the public interest. We call on the FCC to investigate whether Sinclair's production of distorted news reports fails the public interest test.

These Sinclair actions also undermine the legitimacy of non-Sinclair news outlets. In fact, following the recent wave of stories about scripted broadcasts, a Sinclair commentator asserting the neutrality of Sinclair's news content said (in another must-run segment), "[t]he same [objectivity] cannot be said for cable and broadcast news hosts who inject their opinions and bias into news coverage all the time without drawing any lines between them."[3]

Furthermore, must-run dictates from Sinclair harm the freedom of the press guaranteed in the First Amendment by turning local journalists into mouthpieces for a corporate and political

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[1] https://www.fcc.gov/consumers/guides/broadcasting-false-information.
[2] https://www.npr.org/sections/thetwo-way/2018/04/02/598794433/video-reveals-power-of-sinclair-as-local-news-anchors-recite-script-in-unison; https://www.nytimes.com/2018/04/02/business/media/sinclair-news-anchors-script.html.
[3] http://www.foxnews.com/entertainment/2018/04/04/sinclair-political-analyst-boris-epshteyn-defends-experience-in-white-house-trump-campaign.html.

agenda. In the context of our strong commitment to the First Amendment, guarantees of free speech, and freedom of the press, we are troubled by such practices. These Sinclair must-run segments must be reviewed in the context of recent steps taken at the FCC to further enable Sinclair to expand the scope and scale of its news distortion operations. Specifically, in the last past 18 months:

- The FCC has implemented a series of media ownership rule changes that directly benefit Sinclair;
- The FCC inspector general commenced an investigation of whether a disturbing pattern of meetings and communications between Sinclair, the Trump Administration, and you, suggests a quid pro quo that violates the public interest mission of the FCC;[4]
- President Trump has publically praised Sinclair while attacking every other media outlet that publishes stories he views as critical;[5] and
- Sinclair has proposed merging with Tribune and that transaction is currently pending at the FCC.

Because of these concerns, we are requesting that the FCC review both Sinclair's fitness to retain its existing broadcast licenses and whether it is in the public interest to permit it to acquire more broadcast licenses thorough the proposed merger with Tribune.

As you know, the FCC is required to base its broadcast licensing decisions on "the determination of whether those actions will serve the public interest, convenience, and necessity."[6]

Moreover, the FCC recognizes that:

> [A]s public trustees, broadcast licensees may not intentionally distort the news: the FCC has stated that "rigging or slanting the news is a most heinous act against the public interest." The Commission will investigate a station for news distortion if it receives documented evidence of such rigging or slanting, such as testimony or other documentation, from individuals with direct personal knowledge that a licensee or its management engaged in the intentional falsification of the news. Of particular concern would be evidence of the direction to employees from station management to falsify the news.[7]

We are concerned that Sinclair is engaged in a systematic news distortion operation that seeks to undermine freedom of the press and the robust localism and diversity of viewpoint that is the foundation of our national broadcasting laws.

Because of the new facts that have come to light with regard to Sinclair's misconduct and abuse of the public trust pertaining to its existing broadcast licenses, we believe it is appropriate to

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[4] http://thehill.com/policy/technology/374001-fcc-inspector-general-investigating-chairman-over-sinclair-report.
[5] https://twitter.com/realDonaldTrump/status/981117684489379840.
[6] https://www.fcc.gov/media/radio/public-and-broadcasting#REGULATION.
[7] https://www.fcc.gov/media/radio/public-and-broadcasting#LAWPOLICY.

pause the pending Sinclair-Tribune merger review and reopen the agency record on the transaction[8] so that the FCC can receive another full round of robust public comments.

We are concerned that if the Sinclair-Tribune merger continues without a thorough review of these new facts, Sinclair's practices of news distortion will proliferate to even more local stations, which Americans rely upon every day for fair and impartial news.[9] Currently, Sinclair owns 193 stations in 89 markets.[10] A Sinclair-Tribune merger, if approved, would create a broadcasting giant with 223 TV stations serving 108 markets (including 39 of the top 50), covering 72% of United States households. Given the recent and partisan changes to the media ownership rules, such as elimination of the main studio rule,[11] Sinclair would have new tools to use in its quest to centralize its news operation and alter local broadcasting in ways that contravene the public interest.

For these reasons, it is imperative that the FCC investigate Sinclair's news activities to determine if it conforms to the public interest. This investigation should, at a minimum, examine whether the scripting of local news programs is tantamount to news distortion.

More generally, these new facts about how Sinclair operates its stations suggest that it may not be complying with the public interest obligations inherent in holding broadcast licenses.[12] An affirmative finding could disqualify Sinclair from holding its existing licenses and should disqualify it from acquiring additional broadcast licenses.

Consistent with FCC precedent, extra weight should be given to evidence of the direction to employees, from Sinclair, to skew or falsify the news. FCC investigators should speak with current and former personnel at stations that have openly challenged Sinclair's directions to broadcast scripted segments or segments produced by Sinclair's national news operations.[13]

We further request that the results of this investigation be made public and included in the record of the FCC consideration of the Sinclair-Tribune merger transaction.

Sincerely,

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[8] Application to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc., (Sinclair and Tribune), MB Docket 17-179, https://www.fcc.gov/transaction/sinclair-tribune.

[9] http://www.journalism.org/fact-sheet/local-tv-news/.

[10] https://www.vox.com/2018/4/4/17190240/sinclair-local-tv-map-data.

[11] https://www.fcc.gov/document/media-bureau-announces-effective-date-main-studio-rule-elimination.

[12] https://www.nytimes.com/2018/04/04/business/media/sinclairs-boss-responds-to-criticism-you-cant-be-serious.html?smid=tw-share.

[13] There are at least three examples of local stations challenging Sinclair's direction to air content on the basis that the content did not comport with the public interest.

1. Madison, Wisconsin's WMSN/FOX47 refused to air a Sinclair segment, stating that it wanted to stay true to its commitment to provide viewers local news, weather, and sports of interest to them. https://www.rawstory.com/2018/04/local-affiliate-station-rebelled-sinclair-broadcasting-viewers-loved/.
2. KHGI TV in Nebraska's TV producer resigned in protest of what he calls the company's bias. http://money.cnn.com/2018/04/04/media/sinclair-producer-resigns-protest/index.html.
3. Seattle local station KOMO made it obvious that it was reading Sinclair's produced news content by standing apart from the usual speaking desk, looking at the camera, and reading from a teleprompter.

Maria Cantwell
United States Senator

Tom Udall
United States Senator

Patty Murray
United States Senator

Elizabeth Warren
United States Senator

Ron Wyden
United States Senator

Edward J. Markey
United States Senator

Richard Blumenthal
United States Senator

Tina Smith
United States Senator

Bernard Sanders
United States Senator

Jeffrey A. Merkley
United States Senator

Tammy Baldwin
United States Senator

Cory A. Booker
United States Senator

Before the
Federal Communications Commission
Washington, DC 20554

FCC 19M-01

In the Matter of	)	MB Docket No. 17-179
	)	
Applications of Tribune Media Company (Transferor)	)	
	)	
and	)	
	)	
Sinclair Broadcast Group, Inc. (Transferee)	)	File No. BTCCDT-20170626AGW, *et al.*
	)	
For Transfer of Control of Tribune Media Company and Certain Subsidiaries, WDCW (TV), *et al.*	)	
	)	
and	)	
	)	
For Assignment of Certain Licenses from Tribune Media Company and Certain Subsidiaries	)	

ORDER

Issued: March 5, 2019 **Released: March 5, 2019**

On June 28, 2017, Sinclair Broadcast Group, Inc. (Sinclair) and Tribune Media Company (Tribune) filed the above-captioned applications seeking to transfer control of Tribune subsidiaries to Sinclair.[1] The record, however, contained substantial and material questions of fact that rendered the

[1] The applications filed to effectuate the transfer of control of Tribune to Sinclair are as follows: BTCCDT-20170626AGW; BTCCDT-20170626AGH; BTCCDT-20170626AGL; BTCCDT-20170626AGO; BTCCDT-20170626AFZ; BTCCDT-20170626AGA; BTCCDT-20170626AGB; BTCCDT-20170626AGC; BTCCDT-20170626AFH; BTCCDT-20170626AFI; BTCCDT-20170626AFP; BTCCDT-20170626AFO; BTCCDT-20170626AFN; BTCCDT-20170626AFM; BTCCDT-20170626AFL; BTCCDT-20170626AFK; BTCCDT-20170626AFJ; BTCCDT-20170626AFT; BTCCDT-20170626AFY; BTCCDT-20170626AGF; BTCCDT-20170626AGP; BTCCDT-20170626AGI; BTCCDT-20170626AGN; BTCCDT-20170626AGM; BTCCDT-20170626ADY; BTCCDT-20170626ADZ; BTCCDT-20170626AFR; BTCCDT-20170626AFS; BTCCDT-20170626AFU; BTCCDT-20170626AFV; BTCCDT-20170626AFW; BTCCDT-20170626AEM; BTCCDT-20170626AFF; BTCCDT-20170626AFE; BTCCDT-20170626AFD; BTCCDT-20170626AFC; BTCCDT-20170626AFB; BTCCDT-20170626AFA; BTCCDT-20170626AEZ; BTCCDT-20170626AEY; BTCCDT-20170626AEX; BTCCDT-20170626AEW; BTCCDT-20170626AEV; BTCCDT-20170626AEU; BTCCDT-20170626AET; BTCCDT-20170626AES; BTCCDT-20170626AER; BTCCDT-20170626AEQ; BTCCDT-20170626AEP; BTCCDT-20170626AEO; BTCCDT-20170626AEN; BTCCDT-20170626AEL; BTCCDT-20170626AGQ; BTCCDT-20170626AGR; BTCCDT-20170626AGS; BTCCDT-20170626AGT; BTCCDT-20170626AGU; BTCCDT-20170626AGV; BTCCDT-20170626AGX; BTCCDT-20170626AEF; BTCCDT-20170626AEE; BTCCDT-20170626AFQ; BTCCDT-20170626AGJ; BTCCDT-20170626AEG; BTCCDT-20170626AGD; BTCCDT-20170626AGE; BTCCDT-20170626AEA; BTCCDT-20170626AEB; BTCCDT-

Commission unable to make the finding required by the Communications Act that grant of the applications would be consistent with the public interest, convenience, and necessity.[2] Accordingly, on July 19, 2018, the Commission designated the applications for hearing "to determine whether the above-captioned applications should be granted or denied."[3]

On August 9, 2018, Sinclair notified the Commission of the dissolution of its underlying agreement with Tribune and the withdrawal of the subject applications, to be dismissed with prejudice, and requested termination of this hearing proceeding.[4] On August 10, 2018, the Enforcement Bureau filed a response indicating that it does not oppose dismissal of the designated applications and termination of the hearing proceeding.[5] The *Hearing Designation Order* afforded a number of additional entities party status; none filed a responsive pleading.[6]

Discussion

In the *Hearing Designation Order,* the Commission delineated four issues to be considered by the Presiding Judge:

> (a) Whether, in light of the issues presented [in the *Hearing Designation Order*], Sinclair was the real party-in-interest to the WGN-TV, KDAF, and KIAH applications, and, if so, whether Sinclair engaged in misrepresentation and/or lack of candor in its applications with the Commission;
>
> (b) Whether consummation of the overall transaction would violate Section 73.3555 of the Commission's rules, the broadcast ownership rules;

20170626AFG; BTCCDT-20170626AGK; BTCCDT-20170626AGG; BTCCDT-20170626AFX; BTCCDT-20170626AEK; BTCCDT-20170626ADX; BTCCDT-20170626AED; BTCCDT-20170626AGY; BTCCDT-20170626AEC; BTCCDT-20170626AEH; BTCCDT-20170626AEJ; and BTCCDT-20170626AEI.

[2] *See* 47 U.S.C. § 310(d) ("No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby"); 47 U.S.C. § 309(d)(2) ("If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with [the public interest, convenience, and necessity]," it must formally designate the application for a hearing pursuant to 47 U.S.C. § 309(e)).

[3] *Applications of Tribune Media Company (Transferor) and Sinclair Broadcast Group, Inc. (Transferee)*, MB Docket No. 17-179, Hearing Designation Order, 33 FCC Rcd 6830, 6831, para. 3 (2018) (*Hearing Designation Order*).

[4] Sinclair Broadcast Group, Inc., Notice of Withdrawal of Applications and Motion to Terminate Hearing, MB Docket No. 17-179 (filed Aug. 9, 2018), https://ecfsapi.fcc.gov/file/10809224250794/Sinclair%20Notice%20of%20Withdrawal%20and%20Motion%20to%20Terminate.pdf. In a concurrently-filed letter to the Secretary of the Commission that is appended to that pleading, Sinclair appears to erroneously intend to request that the Media Bureau dismiss the applications rather than the Presiding Judge. That request is instead resolved in this Order.

[5] Enforcement Bureau's Response to Notice of Withdrawal of Applications and Motion to Terminate Hearing, MB Docket No. 17-179 (filed Aug. 10, 2018), https://ecfsapi.fcc.gov/file/1081074748667/8.10.18.EB%20Response%20to%20Motion%20to%20Terminate.pdf.

[6] *Hearing Designation Order*, 33 FCC Rcd at 6841, para. 32. Oppositions were due to be filed by August 20, 2018, per 47 CFR. § 1.45(b).

(c) Whether, in light of the evidence adduced on the issues presented, grant of the above-captioned applications would serve the public interest, convenience, and/or necessity, as required by Section 309(a) and 310(d) of the Act; and

(d) Whether, in light of the evidence adduced on the issues presented, the above-captioned applications should be granted or denied.[7]

Issues (b), (c), and (d) relate to the proposed underlying transaction and the propriety of granting the pending applications. Because those issues involve a transaction that has been dissolved and applications that are no longer being pursued, issues (b), (c), and (d) are effectively moot. The licenses at issue are now the subject of a set of applications that would ultimately transfer them from Tribune subsidiaries to a third party,[8] and the Media Bureau has granted waiver of the Commission's inconsistent application rule, 47 CFR § 73.3518, to allow for filing of those applications.[9]

Issue (a), however, does not rely on the continued pendency of the proposed transaction and the related applications. Rather, that issue concerns whether Sinclair's conduct before the Commission in furtherance of that transaction involved misrepresentation and/or lack of candor. Inherent in that line of inquiry is whether Sinclair, the licensee of multiple broadcast stations, possesses the requisite character qualifications to be a Commission licensee.

Honesty with the Commission is a foundational requirement for a Commission licensee.[10] Section 1.17 of the Commission's rules mandates that FCC licensees deal truthfully with the agency, not only by refraining from misrepresenting information but also by not omitting "material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading."[11] The Commission has repeatedly emphasized to licensees that "[f]ull and clear disclosure of all material facts in every application is essential to the efficient administration of the Commission's licensing process, and proper analysis of an application is critically dependent on the accuracy and completeness of information and data that only the applicant can provide."[12] The courts have recognized that "[t]he FCC

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[7] *Hearing Designation Order*, 33 FCC Rcd at 6840, para. 29.

[8] *Media Bureau Establishes Pleading Cycle for Applications to Transfer Control of Tribune Media Company to Nexstar Media Group, Inc.*, MB Docket No. 19-30, Public Notice, DA 19-82, 2019 WL 655115 (MB Feb. 14, 2019). While Sinclair is the focus of the allegations raised in the *Hearing Designation Order*, the underlying licenses are held by Tribune.

[9] *Tribune Media Company (Transferor) and Nexstar Media Group, Inc. (Transferee), Consolidated Applications for Consent to Transfer Control*, MB Docket No. 19-30, Order, DA 19-81, 2019 WL 655114 (MB Feb. 14, 2019).

[10] *Policy Regarding Character Qualifications in Broadcast Licensing*, Gen. Docket No. 81-500, Report, Order and Policy Statement, 102 F.C.C.2d 1179, 1211, para. 61 (1986) (*1986 Character Policy Statement*) ("The integrity of the Commission's processes cannot be maintained without honest dealing with the Commission by licensees"); *Policy Regarding Character Qualifications in Broadcast Licensing*, Gen. Docket No. 81-500, Notice of Inquiry, 87 F.C.C.2d 836, 846, para. 23 (1981) ("The Commission's scheme of regulations rests upon the assumption that applicants will supply it with accurate information").

[11] 47 CFR § 1.17.

[12] *Fox Television Stations, Inc.*, MB Docket No. 07-260, Memorandum Opinion and Order, 33 FCC Rcd 7221, 7239, para. 42 (2018); *Ministerios El Jordan*, EB Docket No. 18-239, Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing, DA 18-834, para. 13, 2018 WL 5004795 (EB Oct. 11, 2018); *Metro Two-Way LLC*, WTB Docket No. 18-133, Order to Show Cause, Hearing Designation Order and Notice of Opportunity

relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing."[13] Indeed, providing false statements to the Commission has been a basis for license revocation since the inception of the Communications Act in 1934.[14]

The *Hearing Designation Order* alleges that Sinclair may have misled the Commission in the course of its attempted acquisition of Tribune by misrepresenting and/or omitting material facts relevant to whether Sinclair was the real party in interest to which some of Tribune's licenses would be transferred. This alleged deception was ostensibly aimed at allowing Sinclair to bypass the Commission's multiple ownership limitations.[15] Allegations that Sinclair engaged in misrepresentation and/or lacked candor before the Commission are extremely serious charges that reasonably warrant a thorough examination, notwithstanding the decision to discontinue the transaction and withdraw the pending applications. As the Commission pointed out in the *Hearing Designation Order*, "a real party in interest issue, by its very nature, is a basic qualifying issue in which the element of deception is necessarily subsumed."[16] So, too, are issues involving misrepresentation and lack of candor.[17]

Nonetheless, the dissolution of the Sinclair/Tribune consolidation is a circumstance that would render a hearing at this time in the context of this proceeding an academic exercise. The basic character-related allegations specified against Sinclair in the *Hearing Designation Order* are untethered to any active application to which Sinclair is a party. The licenses at issue are now part of an unrelated proposed transaction not involving Sinclair. That is not to say that Sinclair's alleged misconduct is nullified or excused by the cancellation of its proposed deal with Tribune. Certainly, the behavior of a multiple-station owner before the Commission "may be so fundamental to a licensee's operation that it is relevant to its qualifications to hold any station license."[18] That broad inquiry, however, would be more appropriately considered in the context of a future proceeding in which Sinclair is seeking Commission approval, for example, involving an application for a license assignment, transfer, or renewal. At that time, it may be determined that an examination of the misrepresentation and/or lack of candor allegations raised in this proceeding is warranted as part of a more general assessment of Sinclair's basic character qualifications to be a Commission licensee. Absent a specific transaction or other proceeding to provide context for this unresolved character issue, however, conducting a hearing at this time would not be a

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for Hearing, 33 FCC Rcd 4526, 4529-30, para. 9 (WTB-MD 2018); *Cumulus Licensing LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 13711, 13716, para. 13 (MB-AD 2007); *Rancho Palos Verdes Broadcasters, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 18 FCC Rcd 5043, 5055, para. 35 (MB 2003); *WRKL Rockland Radio, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability, 14 FCC Rcd 1042, 1044, para. 7 (MMB 1999).

[13] *Contemporary Media Inc. v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000) (citing *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454 (D.C. Cir. 1980)).

[14] 47 U.S.C. § 312(a)(1). *See also* Federal Radio Act of 1927, 44 Stat. 1162, Section 14.

[15] 47 CFR § 73.3555, note 2.

[16] *Hearing Designation Order*, 33 FCC Rcd at 6831 n.5, 6834, para. 15, 6835 n.42 (quoting *Maritime Communications/Land Mobile, LLC*, EB Docket No. 11-71, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, 26 FCC Rcd 6520, 6534-35, para. 36 (2011)).

[17] *See Fox River Broadcasting, Inc.*, BC Docket No. 80-310, Order, 93 F.C.C.2d 127, 129, para. 6 (1983) ("[B]oth misrepresentation and lack of candor represent deceit").

[18] *1986 Character Policy Statement*, 102 F.C.C.2d at 1223, para. 92.

prudent use of Commission time and resources. Accordingly, Sinclair's request to dismiss the above-captioned applications and terminate this hearing proceeding is granted.

Ordering Clauses

IT IS ORDERED that Administrative Law Judge Jane Halprin shall serve as Presiding Judge in the above-entitled proceeding.

IT IS FURTHER ORDERED that the above-captioned applications are dismissed with prejudice.

IT IS FURTHER ORDERED that Sinclair's unopposed motion is granted and this hearing proceeding is terminated.

SO ORDERED.[19]

FEDERAL COMMUNICATIONS COMMISSION

Jane Halprin
Administrative Law Judge

[19] A copy of this Order will be sent via U.S. mail to Sinclair, Tribune, the Enforcement Bureau, and the parties listed in the *Hearing Designation Order* at paragraph 38.

Senator MORENO. Which I find given the conversations around Commissioner Carr, I find that decently ironic.

Mr. Volokh, I am just——

Senator CANTWELL. Can I just make a——

Senator MORENO. We can do it then. You had your time. So Mr. Volokh, you mentioned that you came to the U.S. 50 years ago. We, to this day, congratulations. I came to America a little bit more than 50 years ago, which I hate to actually say in public testimony, because it makes me feel old. How many TV stations you—you are probably like me, had to learn English watching TV—how many TV stations and news information sources were there by then?

Mr. VOLOKH. I do think that——

Senator MORENO. The button.

Mr. VOLOKH. I am sorry.

Senator MORENO. You have to hit the button so we can hear you.

Mr. VOLOKH. The button. Sorry. When we came to LA, I think there were maybe six or seven VHF. And then if I twiddled the antenna around, you get like four or five UHF.

Senator MORENO. Did you listen to a lot of podcasts?

Mr. VOLOKH. I believe that I was not allowed to listen to podcasts in 1975, if that——

Senator MORENO. Well, there was not—it did not exist. It did not exist.

Mr. VOLOKH. Exactly.

Senator MORENO. Did you go online and get sources from online sources?

Mr. VOLOKH. No.

Senator MORENO. Did you go on X, or Facebook, or Twitter? Did you open TikTok?

Mr. VOLOKH. I did not.

Senator MORENO. Did you go on Facebook, Instagram? None of that existed? Because I just find it——

Mr. VOLOKH. None of that, no.

Senator MORENO.—I just find it interesting that my colleagues are talking about how broadcast TV and monopolism, and Mr. Kimmelman, you talked about that which I thought was just fascinating that there is all of a sudden, this lack of resources to find information when there has never been more ways to get information than there is today.

But Mr. Kimmelman, I have a question for you. You are over at the Harvard School; is that correct?

Mr. KIMMELMAN. At the Kennedy School, yes, sir.

Senator MORENO. The Kennedy School? So you would agree with all of us, I think, that free speech is important. You would agree with George Washington's comment that if freedom of speech is taken away, then dumb and silent, we may be led like sheep to the slaughter. You would agree with that, right?

Mr. KIMMELMAN. Certainly.

Senator MORENO. What are you doing about Harvard's F rating for free speech?

Mr. KIMMELMAN. I am a fellow at the Kennedy School, I have a very——

Senator MORENO. No. I mean, have you spoken to your colleagues? Have you made a protest? Have you rallied the students

to say: How do we get rid of this F rating? I mean, I cannot imagine Harvard students would find it objectionable to have an F in anything. What are you doing about fixing Harvard?

Mr. KIMMELMAN. There is a lot of discussion I know around me about trying to make sure there is an open environment for learning and——

Senator MORENO. But they have an F rating, just to be clear. They have an F rating. Harvard University has an F rating in free speech. And you are here giving us lectures on free speech. Does not exactly—ring very hollow.

Mr. Berenson, a quick question for you. We need to put on the record. What was the outrageous things that you said in 2021 that got you thrown off Twitter? I mean, were you planning to overthrow the United States government? Were you creating a militia? Like, give me an example. Give me a flavor of the outrageous things that you must have said?

Mr. BERENSON. The tweet that got me banned from Twitter on August 28, 2021, begin, "It does not stop infection or transmission".

Senator MORENO. What?

Mr. BERENSON. Yes.

Senator MORENO. Are you saying that a mask—a cloth mask does not stop the spread of COVID, how dare you say those kinds of outrageous comments?

Mr. BERENSON. I said that the mRNA vaccine did not stop infection or transmission.

Senator MORENO. And did it?

Mr. BERENSON. I mean, I think I might be the only person in this room who was not vaccinated with the mRNA vaccine. And we all got COVID.

Senator MORENO. Did the vaccine stop the spread?

Mr. BERENSON. No. No, of course not.

Senator MORENO. So you were allowed to be wrong, but you were right. Does that make it—now, what accountability has been in place for that? Like who has been held accountable for this?

Mr. BERENSON. Well, Twitter actually admitted that they should not have done that.

Senator MORENO. Yes, you know they admitted it, but what accountability? Because that cost you money, that cost you direct——

Mr. BERENSON. Oh, yes.

Senator MORENO.—money in your pocketbook. What accountability has been put in place?

Mr. BERENSON. There has been no—I mean, more important than accountability, I did not get to tell people what I thought and there were—I mean, I was getting hundreds of millions of views a month. People wanted to hear what I thought, and the Biden administration did not like it and they forced Twitter to ban me. And I will also say it is a way——

Senator MORENO. So you are saying—you are saying the U.S. Government, elected officials, who swore an oath to the Constitution told private media companies to terminate your account which cost you your money? I assume you are not naturally wealthy from five generations of wealth, and that you actually have to work for a living, and that ability to earn an income was taken away from you because you dared to have an opinion on a vaccine?

Mr. BERENSON. I regard it as more important that I was not able to say what I thought. The money matters less to me. And I also have to say this, Pfizer made $100 billion selling that vaccine, and Pfizer officials cooperated or collaborated with the Biden administration. It is a scandal.

Senator MORENO. Yes.

Mr. BERENSON. Let me just say one thing. If I had been reporting on plane crashes and Boeing had colluded with the Biden administration or the Trump administration, it would be a national scandal that a Boeing official had leaned on a social media company.

Senator MORENO. Yes.

Mr. BERENSON. But Pfizer somehow got away with this.

Senator MORENO. Yes. And in the—her opening statement, the Ranking Member talked extensively about protecting free speech, but then stated she was not referring to hate speech. I think what maybe my colleagues mean to say is speech that they hate.

Mr. BERENSON. That is right.

Senator MORENO. Because it is—hate speech is in the eye of the beholder. Would you agree, Mr. Davis?

Mr. DAVIS. I completely agree. Hate speech, misinformation, disinformation, they are just fancy words that people use to shut down speech they do not like.

Senator MORENO. Right. So if I say that there is only—such thing as a man and woman, that maybe when I got to the U.S. 50-plus years ago, somebody would have said, why did you say that, like obviously there is only men and women. I come from a culture where our entire language is male or female, but that could be considered hate speech, right, if I say that?

Mr. DAVIS. It was for a long time, if you said that on Twitter for several years you ran the risk of being censored, shadow-banned, or permanently suspended.

Senator MORENO. Well, obviously we will talk more about this topic. I do find it interesting that my colleagues who were totally and completely complicit during the Biden era, that were absolutely applauding people being thrown off social media, that were saying that any commentary about a Hunter Biden laptop story being misinformation was considered an insurrectionist.

That now all of a sudden clutch their pearls because a moronic, second-rate comedian who makes $16 million a year got fired from his job for having atrocious ratings, is somehow now an attack on free speech. I do not know that they have the moral high ground here, but thank you for your testimony.

And I recognize the Senator from Nevada.

STATEMENT OF HON. JACKY ROSEN, U.S. SENATOR FROM NEVADA

Senator ROSEN. Thank you. Thank you for being here today and speaking your mind. It is about the First Amendment. Appreciate that because the freedom to express yourself and speak your mind is the cornerstone of America. It is one of the main ways we distinguish ourselves from other nations. In the United States, you are free to criticize whomever you want, including government leaders, without government censorship.

And so it is wholly appropriate and indeed necessary for this committee to hold oversight hearings that focus on protecting this critical right from being eroded by anyone. But that is not the focus of today's hearing. Rather than providing us with a forum that will evaluate truly harmful government censorship.

This has become increasingly commonplace under the Trump administration, are undertaking an effort to settle old political scores against an administration that is no longer in power. There are issues that we have to deal with, and we do want to support and we must support free speech, but this hearing is not the place.

Two weeks ago, I sent a letter to Chairman Cruz calling for the FCC Chairman to testify before this Committee after he threatened to revoke broadcast licenses over Jimmy Kimmel's comments criticizing President Trump. I was particularly concerned as I know the Chair was from his statements calling the threat mafia-like. Chairman Cruz called the threats mafia-like, with his clear attempt to suppress speech, a comedian.

However, I am disappointed that that is not what is the focus of today's hearing. Chairman Carr's later backtracking, claiming there is some sort of local community exception to the First Amendment. There is no exception. You have free speech or you do not. We know those limits. There is precedent for that. His comments, Chairman Carr's, were reprehensible and this demands a full accountability, and we demand full accountability.

Indeed, his weak excuses have been repeatedly contradicted by the President's own statements. President Trump has said outright that the reason the FCC should revoke broadcast licenses is because of negative coverage of his administration. I want there to be journalist that looks at things. This is the clearest possible violation of the First Amendment.

The President of the United States directing an agency to revoke a license of networks that run a critical story of him. There never would have been press, or print, or TV, or radio. You could go back 250 years if all presidents did this.

This is a government—this is government censorship by our President. Plain and simple. It is what they do in Russia. It is what they do in North Korea. It is what they do in China. It is not what we do in a democracy that has a First Amendment.

Those attacks on free speech. They harm not only our democracy but our economy. Last month it was Brendan Carr's interference in the private business decisions of large media companies. But tomorrow could be tech, energy, tourism, any other industry could be impacted.

In Las Vegas, we are seeing fewer international tourists because people are afraid to come to the U.S. under this administration. People planning to travel to the U.S. see this administration detaining people for posting something online that is critical of the President in another country where they live, and they cancel their trips to America out of fear of U.S. Government retaliation. And the consequences for our economy are substantial.

So Mr. Kimmelman, can you discuss the direct impacts of infringement on speech rights, and can you tell us what you see as the biggest threat to the First Amendment, writ large, please?

Mr. KIMMELMAN. Sure. Well, the threats, coercion, chill speech. Either they suppress directly or create an environment in which everyone is afraid to speak his or her mind, to engage in debate, to have the kind of open discussion that our democracy requires. So it is extremely dangerous. Obviously, as you point out, when the government does it directly, it is horrible. It is a First Amendment violation. It needs to be stopped.

But it also can happen when tech platforms become too powerful, when they do not face competition, when they play a gatekeeper role. This could be the same if there is too much roll up of media, and it is the most popular media. Senator Moreno made a good point. There is a lot of—there is so much more out there than before. But it is not just availability. It is what do people rely upon? What is most popular? What do they need to get news and information?

And so anywhere there is a chokehold, I think there is an appropriate question of: Is it too much concentration? Is it too much power? Does it work for our democracy? And that is where Congress has a role to set guardrails.

Senator ROSEN. Thank you. I see my time is up. Appreciate this hearing and wish that we would be having Chairman Carr here to discuss some of free speech and the open platforms. And I look forward to Chairman Cruz working with us to get that on the docket. Thank you.

Senator SCHMITT. Thank you, Senator. I am told that we will do that. We need to open the Government up first, right? That is the first priority.

I will also note that I asked the Chairwoman to have Lina Khan come before this Committee. Never came in my two years. I asked for Pete Buttigieg to appear, the Secretary of Transportation, never appeared in my two years, but I know the Chairman is committed to having the FCC and the FTC here.

Senator Blackburn.

STATEMENT OF HON. MARSHA BLACKBURN,
U.S. SENATOR FROM TENNESSEE

Senator BLACKBURN. Thank you, Mr. Chairman. That is exactly right. we are looking forward to being able to return to regular order and to do oversight.

Just one item I want to mention. There was a comment: Tourists are not coming because they are fearful of words. Tourists are not coming because they are fearful of crime. And there are so many stories that bear this out. When you look at New York City, when you look at Chicago, when you look at the effect that violent crime is having in some of these cities, I am very grateful that President Trump has made it a priority to address this.

We are seeing fantastic results in Memphis from the increased presence that is there from the Memphis Safe Task Force, which is 13 Federal agencies. The Tennessee Bureau of Investigation, the Tennessee Highway Patrol, the National Guard will be going in there this week to assist the Memphis PD. They have arrested nearly a thousand gang members, and they have already started the process with indictments, and moving these criminals into court.

And indeed, we are very grateful for that, and we know the crime level needs to come down in these big cities so people do want to go to these cities.

Mr. Davis, always good to see you. Grateful that you are here, and for the good work that you all do. I am pleased that Ms. Hemingway is here today also.

I want to talk with you a little bit because I know *The Federalist* and your team at *The Federalist* was constantly on the receiving end of some of these attacks and actions from the Biden administration. And I would like to hear you talk about why you all were on the receiving end, why you felt like you were on that, and why you were accused of misinformation, and why their goal was to always shut you up?

And we know that the left made great sport out of shutting up conservatives, and attacking conservatives. And as we learned this week, surveilling conservatives. And of course, seven of my Senate colleagues and I found out that the FBI was surveilling us, and pulling our phone records. And I think it would be helpful if our colleagues across the dais wanted to join us in calling the FBI—the Biden-led FBI out about those actions.

But lay out for me what you all experienced and why you felt like it was such a repeated attack on you and *The Federalist*?

Mr. DAVIS. Well, thank you, Senator. It is an honor to be here in front of you. And wonderful to see you as always. You pose a great question. Why were we targeted? I am reminded of the quote, I think it was the baseball player Reggie Jackson: They do not boo nobodies. Well, they do not censor nobodies either. In fact, that it is the most effective voices which tend to be targeted for censorship.

And at *The Federalist* we are extremely effective at tearing down false narratives and reporting the facts. We have a team of absolutely fearless, courageous journalists who get up every day to tell the truth and report the facts, especially when they might be facts the government does not want people to hear. And so they targeted us because we were effective, because we were exposing the lies about the Russia collusion hoax, about the Kavanaugh hoax, about COVID–19 lies that it came out of a wet market in China.

We were exposing ridiculous new election laws that ignored existing laws in the Constitution in 2020. We exposed the whole Hunter Biden laptop thing, which was 100 percent real. It was not a hoax. Somebody remarked earlier that: Oh well, you have the market to take care of if a newspaper or a network says something that is not true, why people will not follow them. Well, we know that is not true because MSNBC and CNN, they are all still around. They lied repeatedly. They were not targeted for censorship.

And I have to say, it is nice to be here to hear a bipartisan support for free speech. Man, I wish a lot of you all were helping us as the Biden administration was censoring us. We have been in Federal court for two years trying to vindicate our free speech rights. And I have got to tell you, it is pretty aggravating being an American citizen whose family has been here for hundreds and hundreds of years, to see illegal immigrants get faster action in Federal district courts than we have gotten.

We are still awaiting vindication and relief. And we were not targeted because what we were saying was false. We were targeted because what we were saying was true.

Senator BLACKBURN. And how much, talk to me about the expense of having to be tied up with trying to get your day in court for that period of time?

Mr. DAVIS. You know, it is extensive. Thankfully we have lawyers who are representing us out of the goodness of their own hearts. But if you look at the effect of censorship over years, Alex made the great point that you cannot compensate someone for the crime of having shut them up, by unjustified means for years. That speech that he should have been able to give for years, he can never give. That that opportunity is gone.

But there is also a real cost in terms of money. I cannot even begin to think about how many millions or tens of millions of dollars we lost out on because our advertisers were targeted, because our readers were targeted, because Facebook, and Google, and Twitter, and YouTube were told to throttle us. It has to be in the millions or tens of millions of dollars. Quite frankly, we are owed restitution.

Senator BLACKBURN. Thank you. Thank you, Mr. Chairman.

Senator SCHMITT. Thank you. Well, I am sure you will support my legislation which would give a private right of action to a citizen to sue an individual government bureaucrat for suppression of speech. I think that turns the tables on the incentive structure that currently exists.

Senator Markey.

STATEMENT OF HON. EDWARD MARKEY,
U.S. SENATOR FROM MASSACHUSETTS

Senator MARKEY. Thank you, Mr. Chairman.

We have heard a lot today about the Biden administration supposedly censoring of conservatives by talking to social media companies about misinformation. Republicans have wasted an enormous amount of time and resources over the past few years attempting to prove this theory correct, only for it to be repeatedly proven false.

The Supreme Court shot down their big lawsuit against the Biden administration in a 6 to 3 vote. Their big House Judiciary Committee investigation came up empty. And in the Chairman's Report last week, the supposedly incriminating e-mails from Biden administration officials pressuring the big tech platforms to censor conservatives, including—included explicit disclaimers that the officials were not threatening any action against any platform. Strike one, strike two, strike three, you are out, Republican theory of censorship.

Since my Republican colleagues seem confused about what actual government censorship looks like, I thought I could show a few of them to you. It is not just the mafia boss threats from Brendan Carr at the FCC to Disney and ABC, on six different occasions Donald Trump took office and he now has posted on Truth Social explicitly calling for the Federal Communications Commission to revoke broadcast station licenses owned by major networks over their editorial decisions.

On February 6, Trump said CBS should, quote, "Lose its licenses" over its interview of Vice President Kamala Harris in the fall of 2024. Just over TWO months later, on April 13, Trump again said "CBS should lose its license for its Harris interview". On July 26, Trump wrote: "Networks are not allowed to be political pawns for the Democratic Party".

It has become so outrageous that in my opinion, their licenses could and should be revoked. On August 24, that was a big day for unconstitutional threats. Twice in under an hour, Trump said that "ABC and NBC should lose their licenses". And then just last Sunday, Trump said the FCC should quote, "Look into the license of NBC".

Mr. Kimmelman, do you agree that the explicit threats from the President of the United States against broadcasters are far more dangerous than e-mails from the Biden administration officials identifying online misinformation?

Mr. KIMMELMAN. Yes.

Senator MARKEY. Mr. Kimmelman, how many times did President Biden threaten to revoke a broadcast license in our country?

Mr. KIMMELMAN. None to my knowledge.

Senator MARKEY. Mr. Kimmelman, how many times did President Biden publicly direct his FCC Chairman to look into a broadcaster's license?

Mr. KIMMELMAN. None to my knowledge.

Senator MARKEY. Again, zero. This hearing is a farce. We are not focusing upon the imminent threat to the First Amendment. The beating heart of democracy, freedom of speech, freedom of press. That is what this hearing should be about. What is going on at the FCC right now.

We are relitigating an issue that the Supreme Court has already decided, that in fact independent analysts have debunked even as President Trump and Federal Communications Chairman Brendan Carr and other Trump officials wage a war on free speech that this country has not seen since the McCarthy Era in the 1950s. Like during that Red Scare, if you are a voice of dissent in this country, you have a target on your back. And they let you know you have a target on your back if you speak up.

Law firms, universities, protesters, news media, all have faced this administration's wrath for their political speech. These threats are real. They are scary and they undermine our democracy. The President is threatening the free speech of the broadcasters in our country every time they dare to run some news story that questions their judgment as an administration.

Yet, we are wasting time here trying to distract the American people with old e-mails from the Biden administration, while Chairman Carr turns the FCC into the Federal Censorship Commission, threatening free speech, censoring free speech in our country, allowing Donald Trump to continue with his direct attacks on the First Amendment in our country.

This is an urgent crisis for our country. Our democracy is at risk when the First Amendment is being challenged so fundamentally by the President out of the White House and instructing his Chairman of the Federal Communications Commission to revoke the licenses of anyone who dares run any program that runs contrary

to his views. That is what we should be focusing upon right now. That is the threat to our democracy.

Thank you, Mr. Chairman.

Senator SCHMITT. Thank you, Senator. And a mixed sportsman——

Senator MORENO. Mr. Chairman? Mr. Chairman, just a quick question to my colleague, just 5 seconds. Did you sign on to that letter asking the FCC to revoke the license of Sinclair Broadcasting in 2018?

Senator MARKEY. I will have to go in to review that, but from my perspective, what Trump is doing right now at a Presidential level, ordering the FCC to act is absolutely an imminent threat to our democracy.

Senator SCHMITT. OK. And I also mixing sports metaphors on your strikes. I am going to throw the red flag because the Federal District Court, I know something about this, said that the Biden administration had engaged in the worst example of violation of the First Amendment in American history. That decision was upheld by the Fifth Circuit. The Supreme Court did not rule against it. It sent it down. It did not rule on the merits. It sent it down for a standing issue.

So Senator Peters.

STATEMENT OF HON. GARY PETERS,
U.S. SENATOR FROM MICHIGAN

Senator PETERS. Thank you, Mr. Chairman. I had first just like to start by making a very clear statement. Government censorship is wrong. Full stop. Never should be should be tolerated. That should be no matter what side of the aisle that you are on. I think we can agree that the government takes when it—when government takes adverse action against speech that it dislikes, that is bad for all Americans, and it is counter to the fundamental values that this country stands for.

As Ranking Member of Homeland Security and Governmental Affairs Committee, I have reviewed thousands of pages of documents, including testimony from the cybersecurity and infrastructure agency employees. And I will say that I simply do not agree that CISA, the agency, has worked in a coordinated effort to censor American speech. And the Supreme Court has basically agreed with that finding.

However, if there is evidence, if there is evidence of wrongdoing on the part of anyone in previous administrations, I want to address it and I will work with folks on this panel to do that. Protecting free speech should not be—should not be a partisan issue. And that is why I am disappointed that instead of having the FCC here today to discuss what are urgent and I believe a flagrant violation of America's First Amendment rights, as my colleague just mentioned before me, instead we are rehashing debunked claims regarding activities at CISA from 2018 to 2022.

Since it was created in 2018, CISA has protected our Nation against cyber criminals and foreign adversaries who are constantly, constantly seeking to breach critical networks and steal America's most sensitive personal information. And unfortunately, today we

are hearing claims that have been debunked about the Agency's mission and its vital work.

The Supreme Court decision in Murthy v. Missouri found with regard to CISA, quote, "The evidence does not support the conclusions that the relevant plaintiff made that CISA had violated the First Amendment Rights." So it is a Supreme Court decision.

None of the documents I reviewed included instructions for the social media platforms to respond to CISA's questions on flagged content, nor did they attempt to cover up their interaction in some way with these companies.

So it is concerning to me that the Committee would choose to focus on a backward-looking claim at a time when today, currently, we are seeing unprecedented efforts to wield government power as a tool to suppress free speech and stifle legitimate criticism, and legitimate political discourse.

In recent months, the Trump administration has revoked media access, revoked media access, got to say it again, over news coverage that did not flatter the President. Oh, my gosh, horrible. You did not flatter the President. You cannot have media access. That is a high crime and misdemeanor, apparently. He also sued media outlets who publish content that the President does not agree with. And he has launched baseless investigations into the President's perceived political enemies.

In one instance, the President's FCC Chair, Brendan Carr, threatened to revoke the broadcast licenses of ABA [sic] affiliates over comments made by a comedian. Oh, my, gosh, horrible, comedian comments. Revoke that license. President did not like the comedy.

Let us be clear, these acts are unprecedented. Unprecedented in American history, and they rightfully raise alarms, I think, for every American. Thousands of Michiganders have reached out to my office saying that we must hold the Trump administration accountable to ensure that these abuses of power are not left unchecked.

And I certainly hope that the Chairman of this Committee, and members of the Committee will devote their efforts to examining these abuses that I mentioned, regardless of who commits them because we must all stand up for First Amendment rights in the face of unprecedented overreach. And it is right to call out wherever we see it, no matter who is saying it, no matter what administration, but let us not ignore what we are seeing in front of us right now, constantly, in the media.

So Mr. Kimmelman, a quick question. After threatening regulatory action against ABC affiliates if it did not suspend Jimmy Kimmel, FCC Chair Brendan Carr said, quote, "If you are going to have a license from the FCC, we expect you to broadly serve the public interest"; end of quote.

So my question for you, sir, is there precedent for the FCC using the public interest convenience and necessity standard in the Communications Act to stifle First Amendment protected speech? And how has the FCC historically interpreted the public interest? How is this different?

Mr. KIMMELMAN. Not to my knowledge, Senator. The FCC has used—it is a public interest standard—the FCC has used it very

carefully. There is specific direction in the Communications Act beyond the Constitution itself of Congress reminding the FCC not to stifle speech, not to impede First Amendment rights. And the FCC has been very careful in that regard.

Senator PETERS. So the comments made by the current FCC Chair is simply unprecedented, in all of your knowledge of past actions?

Mr. KIMMELMAN. In my experience, Senator, I have been doing this for more than 45 years. I have never seen anything like that.

Senator PETERS. That is perhaps why it was so shocking to Americans all over this country, but apparently not to some individuals serving in the U.S. Senate.

Thank you. Thank you, Mr. Chairman.

Senator SCHMITT. Thank you, Senator. Senator Luján.

STATEMENT OF HON. BEN RAY LUJÁN,
U.S. SENATOR FROM NEW MEXICO

Senator LUJÁN. Thank you, Mr. Chairman. Mr. Chairman, before I begin, one of my colleagues raised a letter that was sent to the FCC back in 2018, that was signed by Democrats. I do not know how many of you know who the Chair of the FCC was in 2018. Do any of you know? Does the name Ajit Pai sound familiar?

You know who was president in 2018? Donald Trump. I am sorry if I stumped you all. It was Chairman Pai that denied this thing. And Chairman Pai in his order, he said something along the lines of: What was submitted to the FCC lacked candor.

It is funny to me how there are so many legal ways to call a lie a lie. When the FCC says a submission lacks candor, it means that it intentionally provided false or misleading information omitting crucial facts. Just so that the record is straight.

Mr. Volokh, just a few weeks ago, the Federal Communications Commission Chairman, Brendan Carr, made several statements. You heard a lot of them today with regulatory action over remarks made by Jimmy Kimmel if they, quote, "Did not take action". In his own words, Chairman Carr said, quote, "We can do this the easy way or the hard way."

Now, to be clear, ABC can suspend Jimmy Kimmel's show for whatever reason they want. However, the fact pattern that led ABC to suspend Jimmy Kimmel's show involved a government official, in this case FCC Chair Carr, making direct threats.

As you have written, quote, "But if the Government coerced ABC into suspending the show through threats or of retaliation, that would have likely violated the First Amendment."

Yes, or no, if ABC acted to remove Jimmy Kimmel because of FCC Chairman Carr's threats, would Carr's actions violate the First Amendment?

Mr. VOLOKH. Yes, I think so.

Senator LUJÁN. Unfortunately, the events from a few weeks ago related to Kimmel's show was not the first time that Chairman Carr has weaponized the FCC against broadcasters since he took office.

Mr. Kimmelman, I would like for you to help get some facts on the record. I think you answered these to Chairman Markey, but questions sometimes need to be heard twice, and as the responses.

Did President Biden ever direct Chair Rosenworcel to investigate a media company, pull their license, and: Impose the maximum fines and punishment, by the way that is a quote for from Donald Trump, for their unlawful and illegal behavior immediately after threatening to sue that company?

Mr. KIMMELMAN. No, Senator.

Senator LUJÁN. Did President Biden suggest Chair Rosenworcel should revoke broadcaster licenses for giving him, quote, "Bad publicity"?

Mr. KIMMELMAN. No, sir.

Senator LUJÁN. Did Chairman Carr reinstate complaints against NBC, ABC, and CBS for election coverage that were dismissed by the prior FCC?

Mr. KIMMELMAN. Yes, Senator.

Senator LUJÁN. Did Chairman Carr launch investigations into local NPR, PBS stations alleging that they could be violating Federal Law by airing commercials?

Mr. KIMMELMAN. Yes, Senator.

Senator LUJÁN. Has Chairman Carr openly threatened to remove Comcast broadcast license over a news coverage?

Mr. KIMMELMAN. Yes, Senator.

Senator LUJÁN. Now look, what is disappointing is that is just a sample of what is recently happened. And I appreciate this hearing. I think this was a good hearing. There are a few of us that actually authored legislation to say FCC, keep your hands off of these media companies. Protect the First Amendment. Follow the law. I hope that is something that you all will take a look at and see if maybe there is bipartisanship. And if anyone is worried about doing it under this president, let us say the next president, let us just say let us take this off the table. So I certainly hope that is something that we can all do together.

Now, Mr. Kimmelman, President Trump has developed a habit of suing media companies if they report or publish content he does not like. He sued CNN, ABC, CBS, *Washington Post, Wall Street Journal.* I mean, it goes on and on. Trump even sued the Pulitzer Prize winner to the *New York Times* and *Washington Post* for their reporting about Russian interference in the 2016 election.

Now, some of the media companies such as ABC and CBS chose to settle, others are still fighting. Even if a lawsuit is baseless, what effect does it have on the opposing part party, Mr. Kimmelman?

Mr. KIMMELMAN. Senator, it has an enormous chilling effect. Even as you have heard from these, my colleagues on this panel here in a different context, it is overwhelming to take on the government even if you think you can vindicate your rights. It is a daunting task, and it tends to pull people away from presenting the views, or actually trying to vindicate their rights because it is such an overwhelmingly costly endeavor.

Senator LUJÁN. Look, I think it is fact that Meta paid $22 million to President Trump to settle a lawsuit. Did Paramount pay, yes, $16 million to President Trump as well? after Skydance settled, there was a merger approved within days as well.

As a matter of fact, my team looked into the last time that a president sued one of these media companies. They had to go back

to Teddy Roosevelt to find it. And do you know how much the settlement was for? Six cents.

Anyhow, there is a little trivia for you all as well. Look, as my time concludes. Mr. Davis, I do not know if you have ever been asked this. I cannot find anywhere on the record where you have answered it. Who won the 2024 election in the United States of America?

Mr. DAVIS. Who won the 2024 election?

Senator LUJÁN. Yes, for President?

Mr. DAVIS. Joe Biden was elected President.

Senator LUJÁN. In 2024?

Mr. DAVIS. Oh. Excuse me. sorry, had 2020——

Senator LUJÁN. Now, misinformation right there. So let us set the record straight. Who won the 2024 election?

Mr. DAVIS. I was in government censorship mode. Donald Trump won the 2024 election.

Senator LUJÁN. Who won the 2020 election?

Mr. DAVIS. Joe Biden was elected President in 2020.

Senator LUJÁN. I appreciate that very much.

Mr. Chairman, I yield back.

Senator SCHMITT. Thank you. Well, since we are doing some Presidential history, Mr. Davis, could you name the last president that was a prosecutor attempted to throw in jail for the rest of his life and impoverish his family, has that ever happened?

Mr. DAVIS. Yes, I recall Donald Trump being threatened, right——

Senator SCHMITT. The only one, not even Teddy Roosevelt. Since we are going back in time. I do want to ask you, you Mr. Kimmelman, because just as a follow up for, and I am going to get to you just very quickly. The question was a president suing a news organization and you said that the government taking that on would have a chilling effect. You are not arguing that an individual citizen as President Trump suing a media company for lies is a threat to the First Amendment, right?

Mr. KIMMELMAN. No. No, I am not.

Senator SCHMITT. OK. Thank you.

Senator Blunt Rochester.

STATEMENT OF HON. LISA BLUNT ROCHESTER,
U.S. SENATOR FROM DELAWARE

Senator *Blunt Rochester.* Thank you Mr. Chairman. To my colleagues, yesterday there was a split screen on the news. Coverage of committee hearings and a shutdown clock. It was a tale of two realities. Republicans continue to call for hearings like it is business as usual, while Americans are literally living in the midst of a shutdown that jeopardizes their health, that jeopardizes their jobs, and the services that Americans rely on.

So the issues before us are vitally important, but our number one priority in this moment should be reopening the government and restoring people's healthcare.

So today, I want to use my time to remind all of us what is at stake. We are in a pivotal moment. Energy costs are up. Food prices are up. The rent has gone up for many. And millions of Americans in red states and blue states alike are on the brink of

their health care costs doubling or losing it altogether. From small businesses, to farmers, to ranchers, to moms and dads, at this very moment, Americans across our Nation are making some very difficult decisions about how to make ends meet.

We can fix this. But it requires negotiations. It requires us all to do our jobs, and to find a path forward together. We can reopen the Government. We can restore health care for the millions of Americans who are counting on us. But it requires urgency, and it requires trust, and it requires willingness to come to the table now.

My Republican colleagues control the White House, the House, and the Senate. The ball is in your court. Let us make a deal.

Thank you. And I yield back, Mr. Chairman.

Senator SCHMITT. Thank you, Senator. I want to ask just a couple of questions before we close out here, because this is a topic of great interest to me.

Mr. Davis, obviously this agenda that was at work cost you a lot, critical resources, for your publication, your family. Given organizations like, I mean, there are so many of these that I just do not have time to go into them. I mean, the truth of the matter is what was uncovered was that, you know, we took their deposition.

The CDC had approved words and phrases that social media companies could use in this secret portal that was established between the government and these social media companies conveyed this, and if people utter this phrase, I mean, this is sort of like—this is prior restraint, sort of like this is what you will take down ahead of time.

CISA was very much involved in this. You have an alphabet soup of agencies most people have never heard of that were weaponized against millions of voices in this country. We talk about President Trump a lot but there is just a lot of just people who were online who had questions about forced masking of kids, or the vaccine mandate all those sorts of things and they were throttled or taken down.

So given what you knew about organizations like—the Election Integrity Project, that is another one, in collaboration with CISA and received taxpayer funding, how are these NGOs still working currently to harm individuals from speaking their mind, particularly conservatives?

Mr. DAVIS. Yes, it is a great question. The thing about these censorship tools, and technologies, and efforts is they are a little bit like injecting something into the body's bloodstream. They inject it in, it is in there, it is working its thing. And just because you pull the needle out does not mean the effects are gone. A lot of these organizations are still out there using technologies, and tools, that were deliberately funded and distributed by the Federal Government for the purpose of censoring people like me, people like Alex Berenson, people like my colleague Mollie Hemingway.

I do not know if we will ever actually be free of the effects of this censorship industrial complex that the previous administration created. I do not know if we will ever be free of the horrible effect that it created. The horrible dampening and abridgement of our speech that we were forced to endure, secretly, for years and the extent of which we still do not fully know.

Senator SCHMITT. Mr. Berenson, I want to ask you. What is the most—in your kind of review of all this stuff after the fact, what is the single—it is hard to probably pick one—what is the most shocking thing that sort of you uncovered or found out about this whole thing, your experience?

Mr. BERENSON. That the White House would directly target me as an individual, you know, and again RFK. I think the White House, the Federal Government has tremendous power it is more than it should go out there and say what it thinks, and if it wants to promote mask, or whatever it wants to promote, obviously it has every right to do that, but to target individuals or target entire classes of speech I just do not understand how anybody thought that was OK.

And clearly, I will tell you actually what the most stunning thing was. The companies did not like it. OK. You had private companies saying: Hey, we are worried about the First Amendment. You had you had a British politician, the former deputy prime minister of Britain saying to the White House: I think there is a problem here. And the White House said: Oh. No, do not worry about it.

Senator SCHMITT. And then last, then I will get to Senator Hickenlooper.

Mr. Volokh, I want to ask you. The NIST, AI Risk Management Framework Guidance advises developers, this is a government agency, advises developers to mitigate risks related to quote, "Harmful bias" and content that may not, quote, "distinguish fact from opinion or fiction". From a First Amendment perspective, what is the danger of the government suggesting that these AI companies or other platforms should filter out quote/unquote "harm", or quote/unquote, "bias"?

Mr. VOLOKH. Well, if the government—I am sorry—if the government were to mandate that AI companies restrict their outputs in particular ways, I think that would violate the First Amendment partly because of the rights of the companies, but partly because of the rights of users, users as listeners, users as people who would want to use the AI to create their own speech.

At the same time, when it comes to government procurement decisions, government needs to get AI for its own purposes, it has to insist that the AIs provide accurate information. I am still——

Senator SCHMITT. You understand the danger of that though, right?

Mr. VOLOKH. There is definitely a danger, but at the same time, again, the government as buyer, the purpose of AI is to provide accurate information. Social media, I think the main purpose is to provide information that users supply. It is to provide, I think, should be a largely unfiltered channel——

Senator SCHMITT. A passthrough platform——

Mr. VOLOKH. Right.

Senator SCHMITT.—which is why they are given the Section 230 protections in the first place, correct?

Mr. VOLOKH. Well, I do think that that is the—that that is a good model as a passthrough platform. But AI cannot be to be effective a passthrough platform. It has to make decisions that we hope are decisions in favor of more accurate information. Other-

wise, the government, as a user of AI, will be constantly deceived by it.

So I think as in its procurement capacity the government needs to be able to insist that the AI companies do what it takes to provide more accurate information, and to fight indeed misinformation in their own output. That is something that is required. And indeed, AI companies do not have Section 230 immunity in that context, that we——

Senator SCHMITT. Correct. And I suppose—I think this is going to be a big issue, whether you call it Woke AI, whatever.

Mr. VOLOKH. Um-hum.

Senator SCHMITT. The previous administration, one of the untold stories to lock in, and I actually agree with Mr. Kimmelman on this point, to lock in the incumbents and the monopolies in exchange for that was to have algorithms that locked in this bias. And that is a very, very dangerous road to go down. So I do not think this is the last we are going to—is not really the purpose of this hearing, but since we are having the discussion, I think it is really kind of an interesting and important thing.

So, Senator Hickenlooper.

STATEMENT OF HON. JOHN HICKENLOOPER, U.S. SENATOR FROM COLORADO

Senator HICKENLOOPER. Thank you, Mr. Chair, and I agree completely that what we should be looking at is the algorithms as much as the speech because those algorithms are going to control what we get. And in a funny way that is an abrasive and intrusive form of speech that has almost nothing to do with your freedoms.

Let me just start just by saying that the First Amendment to most of us is a bedrock of our country, it is a bedrock of a healthy democracy. It protects people from government censorship at every level. It provides free speech, but it is not unlimited. And we know that speech encourages violence, spreads lies from foreign enemies, or defrauds people, a fire in a crowded theatre, that that is not protected.

But this freedom should be nonpartisan. It is, you know, whether you are Republicans or Democrats are in power, we should all remain united in stopping these genuine threats to the fundamental civil rights of our society. People in this country should be free to speak their minds without pressure, without censorship. Not from government, not from government agencies or policies, not from companies acting under political influence.

What worries me is that some claim to defend free speech only when it helps their political party and ignore it when it silences others. And I think it is worth reiterating that we are not here to pick sides, it is to make sure that we protect everyone's right to speak freely no matter who they are, what they believe, or what they are saying.

Let me start just by talking a little bit about campus. You know, I went to a small liberal arts college in Middletown, Connecticut, the famous Wesleyan University, and they, like every school had to navigate a lot of this in the last couple years. We have seen an increase in people calling for imposing bans on peaceful organizing related to issues such as the war in Gaza, or Black Lives Matter.

I think we also need to recognize our duty to protect the rights of conservative views that are expressed on college campuses. I know that Wesleyans worked very hard to make sure that they get both sides. But not everyone has. And whether we agree or disagree with each other, our right to that freedom of speech should be defended loudly and consistently. I think as long as we all feel that our safety is protected from threats of violence, of unconscionable violence.

So let me start, Mr. Berenson, regardless of ideology, as long as individuals or groups are not inciting violence with the intent to harm others, should they not have the same rights to free speech?

Mr. BERENSON. Yes.

Senator HICKENLOOPER. Not a very complicated question, but it is one of those ones that I feel like the more times you can ask it on the record, each time you do that, it builds a little bit of a better foundation.

Mr. Davis, you have defended conservative speech online. Would you extend that same defense to college students expressing their views about the U.S. foreign policy, or calling for racial justice, if their speech was censored by a state government?

Mr. DAVIS. Yes, I do not think American citizens should be subjected to censorship by their government anywhere for any reason.

Senator HICKENLOOPER. I just want to make sure that is on the record. I was pretty sure what that answer would be. You know, we have seen some disinformation campaigns from foreign governments. U.S. Government under both Republicans and Democrats have worked hard to limit, counter foreign propaganda—and counter foreign propaganda, they are especially important. These efforts are especially important when it comes to stopping these disinformation campaigns that, oftentimes, are trying to interfere in our elections.

Under the first Trump administration, the FCC even proposed to require the mandatory disclosure of all foreign sponsored content broadcast over TV or radio. Again, there are some that argue that that disclosure would in fact be a form of limitation. I am not saying that myself.

Now, Mr. Berenson, again, would you support the government having zero communication with companies about foreign disinformation campaigns that could affect U.S. elections or public safety?

Mr. BERENSON. I mean, I have not really thought about that. Zero? I do not know. There might be a time when it would be reasonable. But I mean, you said foreign, right?

Senator HICKENLOOPER. Yes.

Mr. BERENSON. So the First Amendment does not—is not implicated. The problem as we have seen in the last 10 years, it is very easy to go down a slippery slope and you start interfering in American speech. So I think you have to be very careful.

Senator HICKENLOOPER. That is where that question comes from, especially when sometimes that disinformation is our foreign rivals or adversaries of Iran, Russia, China.

Last question, Mr. Volokh, is there not a difference between coercive threats and agencies actually sharing factual information about foreign disinformation campaigns? And I think one example

of this would be Russia's 2016 interference efforts. And would you recommend the U.S. Government simply stop investigating foreign interference on our elections altogether, or you know, if we were to do that, what would that do? Would that help or harm our democracy?

Mr. VOLOKH. So there is a difference between coercion and kind of other non-coercive communication. The coercion would be a First Amendment violation. The others may or may not be, depending I think on how systemic they are. I do think that indeed we have seen lots of situations throughout American history where attempts to try to suppress foreign influence have turned into attempts to suppress domestic dissent.

Including in the examples you gave of some people who are trying to suppress, I think wrongly trying to suppress anti-Israel speech on campuses are arguing: Oh, these people are the cats' paws of Hamas and such.

So I do think that, even to the extent it is permissible for the government to communicate with the platforms, I think it is important that there be as much transparency as is possible consistently with national security, and that it is especially dangerous when they are trying to—where the government is trying to do that and then nobody finds out about it for years or until somebody manages to break the log jam in a lawsuit using discovery.

Senator HICKENLOOPER. Thank you. Mr. Chair, if I can ask one more question?

Senator SCHMITT. Sure.

Senator HICKENLOOPER. It will just be a yes/no, because this is one that I was—never really followed I had—until I was partners with a woman, remarkable woman named Joyce Meskis, had a bookstore in Denver called the Tattered Cover, and she was a great defender of free speech, and she looked at it in the—in that sense of: Your speech is part of what you read, and you should be able to read whatever you want without government interference or knowing about it.

And there was a domestic terrorist who had blown up—had a bomb. They were pretty sure that he had purchased the book on how to make this bomb at her bookstore. And she refused to give the information over what her customers had purchased. And I just wanted to see with each of you whether you think that is—in that situation whether that is appropriate or not? And that is it is pretty much what it was. They wanted to get—find out whether this guy had bought that book from the bookstore as part of the case. And she said: You do not need that case. You got them on a million other things. This is a freedom of information issue.

Yes, so I will start with you, Mr. Volokh.

Mr. VOLOKH. Yes, so as I recall, I think she prevailed in that particular case. I am not sure that the court got it right there. As a general matter if—especially if there is probable cause and a warrant, all sorts of information may need to be turned over, and I am not sure there should be a categorical prohibition on disclosure of that information, especially when there is probable cause in a warrant.

Mr. BERENSON. I think that is a very smart answer, and I will just go with it.

[Laughter.]

Mr. DAVIS. Yes, I am not familiar with the facts of that case obviously as you are. I think that is a pretty complicated one. So I am going to have to decline on that one because I just do not have enough information. But that that is a, that is a tricky one.

Senator HICKENLOOPER. You guys would not make very good senators. You know, all of our cases are pretty tricky.

Mr. KIMMELMAN. Senator, I can understand the sentiment that she expressed and why she did it. I think I agree with Mr. Volokh, if there is a real legal cause for that information be handed over, the government has a right to it.

Senator HICKENLOOPER. Well, I guess——

Senator SCHMITT. I think they dodged pretty well, Senator. They would make good senators.

Senator HICKENLOOPER. Yes. I am pretty sure. You are exactly right—that means they would be excellent material for senators.

Senator SCHMITT. Yes. They pivoted.

Senator HICKENLOOPER. I think that the Supreme Court obviously did support her and that this was part of the free speech that should be protected. And I guess you can, those most of you disagreed with that. So you can feel some comfort that precedence does not seem to be that all powerful in the present court. So there is a—certainly a chance in a similar situation we might get a different ruling.

Senator SCHMITT. Thank you. Thank you, Senator.

Senator HICKENLOOPER. I yield back

Senator SCHMITT. Thank you, all. I want to thank all the witnesses for their testimony here today.

Senators will have until the close of business on October 15 to submit questions for the record. The witnesses will have until the close of business on October 29 to respond to those questions.

And with that, that concludes today's hearing. The Committee stands adjourned.

[Whereupon, at 12:33 p.m., the hearing was adjourned.]

A P P E N D I X

THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS
October 8, 2025

Hon. TED CRUZ,
Chair,
Committee on Commerce, Science, and Transportation,
U.S. Senate,
Washington, DC.

Hon. MARIA CANTWELL,
Ranking Member,
Committee on Commerce, Science, and Transportation,
U.S. Senate,
Washington, DC.

Dear Chair Cruz and Ranking Member Cantwell,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 240 national organizations to promote and protect the rights of all persons in the United States, and the undersigned co-chairs of our Media/Telecommunications Task Force, we appreciate the committee's attention to the critical issue of government overreach and threats to free expression guaranteed by the Constitution. The First Amendment serves as the bedrock of American democracy, and vigilance against government overreach is essential to preserving our constitutional freedoms. For these reasons, we respectfully request that you follow this hearing with one conducting oversight of the current Federal Communications Commission (FCC) and its commissioners. We also ask for this letter to be entered into the record of the Senate Committee on Commerce, Science, and Transportation hearing titled "*Shut Your App: How Uncle Sam Jawboned Big Tech Into Silencing Americans.*"

The Supreme Court Recently Rejected Claims of Unconstitutional "Jawboning" by the Prior Administration, Including Allegations Against CISA.

This hearing claims to examine a "censorship campaign conducted in secret by the Biden administration's Cybersecurity and Infrastructure Security Agency (CISA)." Just last year, the Supreme Court examined similar allegations in *Murthy v. Missouri* (2024) and rejected them.

In *Murthy,* plaintiffs—including two states and five social media users—alleged that Biden administration officials, including CISA, the White House, the Surgeon General, and the Center for Disease Control (CDC), pressured social media platforms to censor speech about COVID–19 and election-related topics in violation of the First Amendment. The District Court issued a preliminary injunction against multiple agencies including CISA, and the Fifth Circuit affirmed.

The Supreme Court reversed 6–3, holding that plaintiffs lacked standing because they failed to establish that their injuries were fairly traceable to government conduct or that an injunction would redress their harms. Writing for the majority, Justice Coney Barrett emphasized that the extensive factual record—spanning over 26,000 pages—did not support the conclusion that government communications actually coerced platforms into content moderation decisions.

The Court made several critical factual findings that undermined plaintiffs" claims of coercion. First, "the platforms had independent incentives to moderate content and often exercised their own judgment." Second, and most significantly, "the platforms began to suppress the plaintiffs' COVID–19 content before the defendants' challenged communications started." The Court found that this is timeline undermined any inference that government pressure, rather than platforms' independent editorial policies, drove moderation decisions. As Justice Coney Barrett explained, this "complicates the plaintiffs' effort to demonstrate that each platform acted due

to 'government-coerced enforcement' of its policies, rather than in its own judgment."

The Court further found that by the time plaintiffs filed suit in August 2022, "the frequent, intense communications that took place in 2021 between the Government defendants and the platforms had considerably subsided." Without evidence of ongoing pressure, the Court concluded that there was no basis to conclude that future content moderation would be traceable to government action rather than platforms' independent editorial choices. The Court noted that "the available evidence indicates that the platforms have continued to enforce their policies against COVID–19 misinformation even as the Federal Government has wound down its own pandemic response measures."

Critically, the *Murthy* decision distinguished between government communications—even strong or critical ones—and unconstitutional coercion. The Court recognized that government officials may express views about misinformation and even "speak with the platforms about COVID–19 and election-related misinformation," without violating the First Amendment. The core of this analysis is whether such communications cross the line into coercion that transforms private editorial decisions into state action. The Court held that the extensive factual record before it did not meet this standard.

In *Murthy,* the Supreme Court examined claims similar to those at the heart of this hearing. After exhaustive fact-finding, the Court concluded that the evidence did not establish the causal link required to show unconstitutional coercion, finding instead that platforms acted on independent incentives, began content moderation before most government communications occurred, and continued their policies after government engagement ceased.

The Court's framework makes clear that strong government criticism of platform policies, or even requests for policy changes, do not constitute "jawboning" absent concrete evidence that government pressure, rather than platforms' own editorial judgment, drove specific moderation decisions.

The First Amendment Protects Content Moderation Decisions by Platforms and Prevents Government Intrusions that Suppress Individual Freedom of Expression.

This hearing's framing inverts the actual threat of jawboning and the continued undermining of First Amendment rights that people in the U.S. face today. While the committee examines the actions of a previous administration no longer able to jawbone, the current administration is waging an unprecedented campaign of government coercion against private actors' constitutionally protected rights to engage in content moderation and editorial judgement.

Since inauguration day, the President has used private lawsuits to extract nearly $60 million in settlements from social media platforms and over $30 million from major broadcast media outlets; the administration has simultaneously been attempting to criminalize otherwise protected speech by threatening prosecutions and political retaliation.[1] These actions fall squarely within this Committee's jurisdiction and demand immediate oversight, investigation, and accountability for these ongoing abuses.

Private companies—including social media platforms, broadcasters, and publishers—possess their own First Amendment rights to establish and enforce community standards, moderate content, and make editorial decisions about what speech to host or amplify on their platforms. The Supreme Court has repeatedly and recently affirmed these principles.

In *Moody v. NetChoice* (2024), the Court held that platforms engage in constitutionally protected speech activity when they exercise editorial discretion, and that the government cannot require platforms to "carry and promote [] speech they would rather discard or downplay." The Court explicitly rejected arguments that government can dictate platforms' content moderation to achieve ideological balance, noting that "it is no job for government to decide what counts as the right balance of private expression."

Similarly, in *National Rifle Association v. Vullo* (2024), the Court unanimously held that government officials cannot use regulatory authority to coerce private entities into suppressing speech, warning that officials cross into impermissible coercion

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[1] Charlie Warzel, "YouTube Bends the Knee," The Atlantic (Oct. 1, 2025), *https://www.theatlantic.com/technology/2025/10/youtube-trump-settlement/684431/?gift=YyWH8VklYl_6f2ICNsEnCaezGBz2MZZ0fzSx_iY8nfE;* Meg James, "After CBS and ABC's Trump Settlements, Democrats Want to Curb Presidential Library Gifts," Los Angeles Times (July 16, 2025), *https://www.latimes.com/entertainment-arts/business/story/2025-07-16/cbs-abc-trump-pay-outs-qatar-jet-proposed-curbs-library-gifts.*

when their conduct "could be reasonably understood to convey a threat of adverse government action in order to punish or suppress speech."

Recent Activity and Statements by the Trump Administration Constitute a Campaign of Coercive Intrusion and Control that Violate the First Amendment.

The Trump administration's ongoing campaign against companies' content moderation and editorial decisionmaking runs afoul of the standard for impermissible government coercion set out in *NRA v. Vullo.* In September 2025, YouTube settled with President Trump for $24.5 million over its decision to suspend his account following January 6, 2021—joining Meta ($25 million) and X ($10 million) in paying nearly $60 million collectively for enforcing their own community standards during a national crisis.[2]

These settlements represent precisely the chilling effect the First Amendment forbids: private companies' forced acquiescence in response to a "threat of" (or actual) "adverse government action" that interferes with and punishes private actors for exercising their editorial judgment as permitted by the First Amendment. This chilling effect extends across the entire media ecosystem, from social media platforms to broadcast networks to publishers, creating an environment of threat or undue government pressure in which companies make editorial decisions based on government pressures rather than their own standards, business model, users' safety, or the public interest.

Recent statements by top U.S. Department of Justice (DOJ) officials further showcase how this administration is perpetuating unlawful overreach, violating principles of freedom of expression. After the murder of Charlie Kirk, Attorney General Pam Bondi has threatened to prosecute individuals and even businesses for "hate speech"—speech that is constitutionally protected from government sanction—while simultaneously pressuring companies to abandon their own voluntary efforts to moderate such content.[3] This incoherent approach punishes the exercise of free speech by individuals and companies alike, undermining constitutional protections and boundaries while expanding government control and suppressing free expression.

Social media platforms have substantial legitimate interests—indeed, even responsibilities—in moderating hate speech, preventing the organization of violent extremist groups, and limiting the amplification of content that harms users and degrades the quality of discourse. Unlike government actors that are constrained by the First Amendment's prohibition on censoring hate speech, private platforms may permissibly decide not to host or amplify hate speech, inauthentic or misleading content, or extremist organizing. These editorial decisions serve multiple critical purposes: they maintain a platform's information ecosystem, protect users from harm, and prevent platforms from becoming vectors for radicalization and real-world violence.

Coerced Demoderation Extracts Measurable Real-World Costs from Communities, the Marketplace of Ideas, and American Democracy.

The consequences of abandoning content moderation fall disproportionately on communities of color and other marginalized groups. When platforms have reduced appropriate content moderation, unmoderated spaces have become vehicles for real-world voter suppression, orchestrated harassment campaigns, and targeted disinformation that functionally silences already marginalized voices.

As civil rights enforcement offices across Federal agencies are eliminated, and nondiscrimination standards are corroded, the absence of platform moderation exacerbates these threats. To be clear, harassment and disinformation do not function as mere expressions of viewpoints: they systematically silence communities that have historically faced discrimination and continue to face barriers to full participation in democratic discourse.

Moreover, content moderation protects consumers from fraud and scams that disproportionately target communities of color. The Federal Trade Commission's data shows that between January 2021 and June 2023, losses from social media-related fraud reached $2.7 billion, with Black and Latino consumers more than twice as

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[2] Charlie Warzel, "YouTube Bends the Knee," The Atlantic (Oct. 1, 2025), *https://www.theatlantic.com/technology/2025/10/youtube-trump-settlement/684431/?gift=YyWH8VklYl_6f2ICNsEnCaezGBz2MZZ0fzSx_iY8nfE.*

[3] Giselle Ruhiyyih Ewing, "'That is Not the Law': Bondi Promised to Target 'Hate Speech.' She's Facing Backlash From All Corners.," Politico (Sept. 16, 2025), *https://www.politico.com/news/2025/09/16/pam-bondi-first-amendment-hate-speech-prosecution-00566424.*

likely as white consumers to lose money to digital scams.[4] Platform policies that reduce fraud and disinformation serve essential consumer protection functions that align with—rather than contradict—regulatory objectives and First Amendment protections.

The consequences of demoderation have become evident. Users of X (formerly Twitter), following the platform's adoption of minimal content moderation policies and elimination of fact-checking, have experienced widely reported increases in hate speech, harassment, and extremist content. The platform has seen significant advertiser departures and user migration to alternative platforms.[5] This degradation demonstrates why platforms historically invested in content moderation—not because the government forced them to, but because maintaining quality standards is essential to user safety and to product quality and viability.

Government jawboning in its most pernicious form is the current distortion and unlawful weaponization of legal precedent and established constitutional norms to pressure private actors to abandon editorial standards altogether while also attempting to criminalize otherwise protected speech. If this Committee is concerned about government threats to free speech and editorial independence, this administration's ongoing campaign of corporate and individual intimidation and capitulation-seeking behavior demands immediate oversight and investigation.

FCC Chair Brendan Carr's Actions Warrant Scrutiny by the Full Commerce Committee.

Much has already been said about FCC Chair Brendan Carr's comments to American Broadcasting Company (ABC) affiliates urging them to inform ABC that they would not carry Jimmy Kimmel Live and highlighting the power the FCC has over the broadcasting licenses of the affiliates.[6] First amendment experts pointed to Carr's rhetoric and the subsequent (temporary) removal of Kimmel's show as a textbook example of an undue and violative form of pressure,[7] and highlighted the many ways in which the FCC has attempted to police speech in the name of the public interest (both in the issuance of broadcast licenses and the approval of mergers).[8]

Underlying all of this is also Nexstar's pending merger before the FCC and the upcoming changes to its existing media ownership rules, necessary for the merger to be permitted under current law.[9] This recent behavior by the Chair was so egregious that many members of Congress on both sides expressed deep concern,[10] and some even called for Carr's removal as Chair.[11]

We also have serious concerns about the way in which telecommunications companies have been pressured by FCC leadership into dropping their diversity, equity, and inclusion programs to ensure their mergers are approved.[12] Both T-Mobile and Verizon had pending mergers before the FCC that were approved within days of sending letters to Chair Carr announcing the end of the programs. Despite plain

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[4] Emma Fletcher, "Social Media: A Golden Goose for Scammers," Federal Trade Commission (Oct. 6, 2023), *https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2023/10/social-media-golden-goose-scammers.*

[5] Michael Jensen, "Hate Speech on X Surged for at Least 8 Months After Elon Musk Takeover—New Research," The Conversation (Feb. 12, 2025), *https://theconversation.com/hate-speech-on-x-surged-for-at-least-8-months-after-elon-musk-takeover-new-research-249603*

[6] Press Release, ACLU, ACLU Responds to Trump Administration Move Censoring Jimmy Kimmel (Sept. 17, 2025), *https://www.aclu.org/press-releases/aclu-responds-to-trump-administration-move-censoring-jimmy-kimmel.*

[7] Anna Branigin, "How Cancel Culture Came for Everyone," Washington Post (Oct. 1, 2025), *https://www.washingtonpost.com/style/power/2025/10/01/cancel-culture-kimmel/.*

[8] Ted Johnson, "Brendan Carr's Threats On Networks May Be "Jawboning," And Courts Don't Like It, Legal Experts Say" Deadline (Sept. 19, 2025), *https://deadline.com/2025/09/fcc-brendan-carr-jawboning-jimmy-kimmel-1236549243/;* Tom Wheeler, "Trump's CBS Lawsuit Ties Media Freedom to FCC's Regulatory Power," Brookings (Feb. 19, 2025), *https://www.brookings.edu/articles/trumps-cbs-lawsuit-ties-media-freedom-to-fccs-regulatory-power/.*

[9] Keith Collins and Raj Saha, "How a TV Merger Raised the Pressure on ABC to Suspend Kimmel," New York Times (Sept. 19, 2025), *https://www.nytimes.com/interactive/2025/09/19/business/media/abc-nexstar-kimmel.html.*

[10] Anthony Adragna, John Hendel, and Gabby Miller, "'Be Very Careful:' Some in the GOP Balk at Kicking Kimmel Off TV," Politico (Sept. 18, 2025), *https://www.politico.com/news/2025/09/18/gop-lawmakers-come-out-against-the-fccs-role-in-kimmel-axing-00572140.*

[11] Press Release, Democratic Leader Hakeem Jeffries, Whip Katherine Clark, Caucus Chair Pete Aguilar, Caucus Vice Chair Ted Lieu, Assistant Leader Joe Neguse and DCCC Chair Suzan DelBene, Joint Leadership Statement on the Suspension of Jimmy Kimmel (Sept. 18, 2025), *https://democraticleader.house.gov/media/press-releases/joint-leadership-statement-suspension-jimmy-kimmel.*

[12] Brit Morse, "The FCC Takes on a New Role: DEI Regulator," Fortune (July 17, 2025), *https://fortune.com/2025/07/17/federal-communications-commission-new-role-dei-regulator/.*

civil rights mandates and an abject failure to meet them, the FCC required many companies to eliminate their programs that aimed to ensure fair treatment of and equal opportunity for women, people of color, people with disabilities, and the LGBTQ community in order for their mergers to be approved.

Chair Carr has shown a pattern of complete disregard for the First Amendment and a willingness to abuse the FCC's authority to further this administration's authoritarian agenda. All of the above actions are part of a larger pattern of behavior at the FCC: disregard for the law and the will of Congress. This warrants further investigation by the Commerce Committee, and we strongly urge you to follow-up this hearing with one conducting oversight of the current FCC and its three commissioners.

We stand ready to work with Congress on policies that will protect civil rights, prevent unlawful discrimination, and advance equal opportunity. Should you require further information or have any questions regarding this issue, please feel free to contact Jonathan Walter, senior policy counsel, at walter@civilrights.org.

Sincerely,

The Leadership Conference on Civil and Human Rights
UnidosUS
United Church of Christ Media Justice Ministry

Prepared Statement of Writers Guild of America West and Writers Guild of America East

Media Consolidation Enables Censorship and is a Threat to Workers, Consumers, and American Culture

The Writers Guild of America West (WGAW) and Writers Guild of America East (WGAE) appreciate the opportunity to submit this statement for the record concerning the hearing entitled "Shut Your App: How Uncle Sam Jawboned Big Tech into Silencing Americans" on behalf of our membership. WGAW is a labor organization representing more than 11,000 professional writers of films, television and streaming series, and news programming. WGAE is a labor union of more than 7,500 members working in film, television, news, podcasts and online media.

For decades, the Guilds have called attention to the threat that concentrated market power in media poses to diversity of content and variety of viewpoints, in the context of mergers, antitrust policy, and broadcast and Internet regulations. Our members are directly affected by the lack of competition in media—a consolidated handful of employers have tremendous power to pressure writer compensation and working conditions and to gatekeep what stories can be seen in theaters, on television and on streaming services.

Recent events have illustrated how easily this concentration of power transforms into direct censorship. ABC's decision to stop airing *Jimmy Kimmel Live!* after pressure from the Trump Administration and Nexstar Media Group followed Paramount's cancellation of *The Late Show with Stephen Colbert* during the Federal government's review of the Paramount-Skydance merger.[1] Still more consolidation looms on the horizon. Powerful and consolidated gatekeepers already exercise considerable control over free speech by deciding what programming reaches Americans and unless consolidation in this industry is addressed, censorship of Americans by large conglomerates and the Federal government will remain unchecked.

Mergers have Consolidated Control over Media

Deregulation and antitrust underenforcement over the last few decades have allowed for waves of consolidation in the media industry, leaving just a handful of major studios with control over the marketplace. Over the last two decades, more than $435 billion worth of mergers and acquisitions have been completed in media production or distribution.[2] These mergers have increased the power of corporations to the detriment of writers, viewers, and competition.

After the Disney-Fox merger, for example, Disney closed the competing Fox animation studio, pulled back content it had licensed to Netflix, banned Netflix from advertising on its television entertainment networks, and pressed creators and other

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[1] Press Release, WGA Statement on ABC's Decision to Pull *Jimmy Kimmel Live!* WGAW (Sept. 17, 2025), *https://www.wga.org/news-events/news/press/2025/wga-statement-on-abc-decision-to-pull-jimmy-kimmel-live.*

[2] WGAW, Broker Promises: Media Mega-Mergers and the Case for Antitrust Reform (2021), *https://www.wga.org/uploadedfiles/news_and_events/public_policy/broken-promises-merger-report.pdf.*

workers to forego sharing in future licensing revenue on Disney shows. Disney's serial acquisitions of Pixar, Marvel, Lucasfilm, and Fox have reduced innovative development in favor of focusing on franchise films, reducing variety and choice at the theater. The company now owns two of the four largest streaming services in the U.S., Disney+ and Hulu, and has announced plans to combine them. After the Warner-Discovery merger, the company canceled, pulled, or wrote off $2 billion in content, including numerous projects created by or about people of color, and laid off hundreds of workers. WarnerMedia and Discovery are now essentially up for sale as the pre-merger companies; yet another in a series of mergers that purported to create better competitors, but instead result in merged entities burdened by debt and focused on rationalizing their disastrous business decisions by cutting costs.

Streaming is Accelerating the Problems of a Consolidated Media Landscape

In recent years, streaming video has become the dominant distribution platform for content while also becoming increasingly vertically integrated. In the 2024–2025 television season, 78 percent of original scripted streaming series were distributed by four companies, Netflix, Disney, Amazon and Apple.[3] The entertainment industry's major employers also combine content production and distribution arms in order to self-supply their own content globally on their affiliated streaming services. In the 2024–2025 television season, nearly three-quarters of online scripted content on the major streaming platforms was self-supplied.[4] This market structure forecloses competition from independent producers and distributors, enables monopsony power over writers and other industry workers, and gives conglomerates outsized control over what content reaches audiences.

In the current streaming landscape, independent producers must compete with affiliated studios to sell content to the studios' streaming services, leaving them with few opportunities for accessing consumers. Meanwhile, a new competitor in streaming distribution would have difficulty licensing the third-party premium content it needs to offer a competitive service. The Disney-Fox and AT&T-Time Warner mergers, for instance, were both immediately followed by those companies withdrawing their content from competing services like Netflix and Amazon in favor of launching Disney+ and HBO Max.[5] And in order to reach the end consumer, new streaming distribution entrants must strike deals with platform gatekeepers Amazon Fire TV, Roku, or Apple TV—which together control two-thirds of the U.S. connected TV market[6]—to have their apps available on the services, a barrier that reportedly inhibited the launches of HBO Max and Peacock.[7] This market structure and the mergers that created it raise substantial barriers to entry, reduce innovation in content production, and increase the ability of gatekeepers to impose their own restrictions on what content gets made—while making further consolidation more likely.

Streaming's dominant employers have also used their leverage to push down writers' pay. In 2023, writers went on strike for nearly five months to improve compensation and employment terms as practices such as short-term, more precarious employment and caps on experienced writer compensation had spread between employers to become "standard." The lack of competition and vertical integration has also led to disputes among the bargaining parties in the period between contract ne-

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[3] Writers Guild of America West Internal Data, 2025 (on file with WGAW) (based on WGA-covered scripted series).

[4] The major streaming platforms are Amazon Prime Video, Apple TV+, Disney+, HBO Max, Hulu (folding into Disney+), Netflix, Paramount+ and Peacock. Writers Guild of America West Internal Data, 2025 (on file with WGAW) (based on WGA-covered scripted series).

[5] *See, e.g.,* Michelle Castillo, *Disney Will Pull Its Movies From Netflix and Start Its Own Streaming Services,* CNBC (Aug. 8, 2017), *https://www.cnbc.com/2017/08/08/disney-will-pull-its-movies-from-netflix-and-start-its-own-streaming-services.html;* Sarah Perez, *Disney+ Gains the Marvel Series From Netflix and New Parental Controls,* TECHCRUNCH (Mar. 1, 2022), *https://techcrunch.com/2022/03/01/disney-gains-the-marvel-series-from-netflix-and-new-parental-controls/;* Ben Munson, *HBO Max Expects Subscriber Impact From Amazon Channels Exit,* FIERCE VIDEO (Aug. 11, 2021), *https://www.fiercevideo.com/video/hbo-max-expects-subscriber-impact-from-amazon-channels-exit.*

[6] Press Release, Pixalate's Q2 2025 Global Connected TV Device Market Share Reports: Roku Leads in North America (37 percent) and LATAM (45 percent), Samsung No. 1 in EMEA (33 percent), Xiaomi Leads in APAC (24 percent) (2025), *https://finance.yahoo.com/news/pixalate-q2–2025-global-connected-143100935.html.*

[7] HBO Max and Peacock customers were unable to access the new streaming services through Amazon devices when they launched in 2020 because the companies had not reached agreement. Peacock and HBO's disputes reportedly stemmed from executives' desires to keep their streaming services outside of Amazon Channels to retain control of the user experience and viewership data. News commentary suggested that the lack of Amazon Fire carriage notably slowed subscriber growth at these services, and when HBO Max finally reached a deal with Amazon months later, the terms included an extension of WarnerMedia's contract with Amazon Web Services, its cloud computing platform.

gotiations. For example, the WGAW has collected millions in underpayment from Paramount[8] and Netflix[9] for undervaluing "imputed" license fees to vertically-integrated streaming services, and has filed related claims against Disney and NBCUniversal. Each of these disputes stems directly from the increasing consolidation of the media companies.

In the streaming market, instead of dynamic competition, we also see all the major firms raising prices and reducing content spending in parallel, leaving consumers to pay more for less, hallmarks of a concentrated market. And despite these already anticompetitive conditions, Wall Street continues to call for further consolidation. More mergers will leave even fewer firms in control of what content can reach audiences, and diminished variety in media's marketplace of ideas. And as the suspension of *Jimmy Kimmel Live!* and cancellation of *The Late Show of Stephen Colbert* illustrate, the lack of competition can easily facilitate explicit censorship.

Congress Must Act

Over the past few months, both Comcast-NBCUniversal and Warner Bros. Discovery have announced plans to spin off their linear networks to better position themselves for future M&A transactions. The newly combined Paramount-Skydance, immediately after that merger's conclusion, is exploring a bid for all of the assets of Warner Bros. Discovery, which would combine two major streaming services, movie and television studios, and a suite of television networks under a single owner. Absent government intervention, more harmful mergers are on the horizon as each merger spurs reactive consolidation among the remaining firms. But even the existing level of consolidation and vertical integration in the media industry is unacceptable and demands scrutiny, as we have recently seen it put free speech at risk. Congress must explore creative solutions that address the current level of consolidation, including limits on the ability of streaming services to own the content on their platforms, which was a condition of the Financial Interest and Syndication rules imposed on the broadcast networks when they held similar levels of control over content distribution. Failing to act will allow streaming services to dictate what stories are told, and permit media conglomerates to exercise their economic power as political power.

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[8] Cynthia Littleton, *WGA Sets $3.4 Million Settlement With CBS for All Access Streaming Residuals,* VARIETY (Apr. 15, 2021), *https://variety.com/2021/tv/news/wga-cbs-streaming-settlement-all-access-1234952956/*.

[9] Katie Kilkenny, *Writers Guild Arbitration With Netflix Yields $42M in New Residuals for Members,* THE HOLLYWOOD REPORTER (Aug. 4, 2022), *https://www.hollywoodreporter.com/business/business-news/wga-netflix-residuals-42-million-writers-1235192877/*.

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ENERGY AND NATURAL RESOURCES
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The Honorable Jessica Rosenworcel
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The Honorable Anna Gomez
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The Honorable Geoffrey Starks
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October 3, 2024

Chairwoman Rosenworcel and Commissioners Stark and Gomez,

I am greatly concerned with the FCC's recent party-line decision to approve the sale of Audacy Inc., the second largest radio network in the United States, to a foreign entity. Despite reaching 200 stations across 40 markets—to the cars and homes of 165 million Americans—the FCC waived the required national security review to allow for an expedited takeover only two months before the election.

Per Section 301(b) of the Communications Act of 1934, the FCC is prohibited from approving the sale of broadcast licenses to any corporation that has more than 25% foreign investment, if the public interest requires refusal.[1] As your colleague Commissioner Brendan Carr noted in his dissent, there is only one mechanism the FCC uses to determine the public interest when reviewing purchases that exceed the foreign ownership threshold: the applicant must file a petition for declaratory ruling to obtain FCC approval.[2] This allows relevant agencies ("Team Telecom") to review the transaction for any national security threats or foreign policy concerns.

Despite the enormity of the Audacy takeover, its conspicuous timing, and the repeated attempts at Congressional oversight, none of this occurred. The applicants—George Soros-funded entities notorious for their Leftist influence in American politics—filed no such petition, and the FCC

[1] 47 U.S.C. § 310(b)
[2] 47 C.F.R. § 1.5000(a)(1)

made no attempts to determine the public interest or review the transaction for national or election security purposes.[3]

The implications for this unprecedented decision are immense. In a disturbingly blasé statement by Chairwoman Rosenworcel, the only justification on record for this complete circumvention of statutory law and federal regulation, concerns held by the American people are described as "cynical and wrong."[4] In this 131-word *magnus opus*, it was also asserted this process was similar to bankruptcy proceedings in several previous cases. Further, the Chairwoman also fails to consider the convergence of key factors in this transaction, including the lack of petition, the lack of a national security review, the political nature of the acquiring foreign entity, the timing of the upcoming election, and the repeated attempts at Congressional oversight in this opaque process. Even if one were to believe that expedited approval of this transaction was in the public interest, the FCC had six months in which a national security review could have taken place. Given the absence of a review during this open window, one can only assume that the review was indefinitely delayed for political purposes.

The FCC has neither the authority nor any viable excuse for its special dispensation to George and Alex Soros, the financiers of this transaction. The FCC is responsible for ensuring that American broadcasters and radio stations are not subject to undue foreign influence, protecting the sacred right of the American people to govern themselves. Many of the impacted radio stations include popular conservative talk shows such as Sean Hannity, Mark Levin, Glenn Beck, and Dan Bongino. By delaying the national security review indefinitely, the FCC is blatantly creating the opportunity for the greatest possible threat that this transaction could pose: influence in consequential American elections by highly political and resourced foreign actors.

Given the time-sensitive nature of this matter and the upcoming election, please provide answers to the following inquiries by October 22nd, 2024:

1. Please provide explanation for the FCC's decision to not pursue a national security review during the past six months that the transaction has been known.
    a. When did the FCC learn about this deal?
    b. How long are national security reviews?
    c. Were the relevant agencies responsible for a national security review consulted or made aware of this transaction and waiver?

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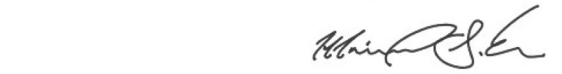
[3] Federal Communications Commission. *DISSENTING STATEMENT OF COMMISSIONER BRENDAN CARR.* (FCC 24-94).
[4] Federal Communications Commission. *STATEMENT OF CHAIRWOMAN JESSICA ROSENWORCEL.* (FCC 24-94).

2. Please provide explanation on how the FCC determines public interest pursuant to 47 U.S.C. § 310(b) and compare it to how the FCC determined public interest in the case of Audacy, Inc.
3. Please reference and provide analysis on the statute(s) and federal regulation(s) that grant FCC the authority to waive the filing requirement for a declaratory ruling pursuant to 47 C.F.R. § 1.5000(a)(1).
4. Please provide analysis on the cases that Chairwoman Rosenworcel references in her statement and how they supposedly compare to the Audacy, Inc. case (Cumulus Media in 2018, iHeart Media in 2019, Liberman Television in 2019, Fusion Connect in 2019, Windstream Holdings in 2020, America-CV Station Group in 2021, and Alpha Media in 2021).
    a. Include the size and scope of the transactions.
    b. Include the approval processes, filing requirements pursuant to 47 C.F.R. § 1.5000(a)(1), and any Congressional efforts to monitor, inquire, oversee, or in any be involved in the transaction and review process.
5. Does FCC and the relevant "Team Telecom" agencies consider foreign influence in upcoming elections as part of the national security review?
    a. If not, why not?
    b. If so, why was the review for the Audacy, Inc. transaction delayed prior to the upcoming presidential election?

Thank you for your immediate attention to this matter. I urge you to prioritize this matter of immense significance and uphold your statutory duty to protect Americans against undue foreign influence in broadcast media.

Sincerely,



Senator Mike Lee

CC:

The Honorable Nathan Simington
Commissioner
Federal Communications Commission
45 L Street NE
Washington, D.C. 20554

The Honorable Brendan Carr
Commissioner
Federal Communications Commission
45 L Street NE
Washington, D.C. 20554

Congress of the United States
Washington, DC 20515

June 8, 2022

The Honorable Jessica Rosenworcel
Chairwoman
Federal Communications Commission
45 L Street NE
Washington, D.C. 20554

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Dear Chairwoman Rosenworcel:

We write to urge the Federal Communications Commission (FCC), within all applicable rules and regulations, and pursuant to the FCC's public interest mandate pursuant to the Radio Act of 1927 (P.L. 69-632), to thoroughly scrutinize the proposed sale of 18 Spanish-language radio stations to the so-called Latino Media Network (LMN), including Radio Mambí 710 AM in Miami, Florida. We are concerned that LMN, as a newly formed front group led by partisan operatives with zero experience in broadcasting, may work to silence political viewpoints with which its funders disagree. If successful, LMN could exercise virtually uncontested influence over nearly one third of all Hispanics across the country.[1] Given the importance of the FCC's stewardship over the limited AM and FM bandwidth available across the United States, we ask that the commission carry out its due diligence and thoughtfully scrutinize the takeover of these stations by a partisan organization only announced last week.

Many of the stations implicated in this sale are pillars of their local community. For example, Radio Mambí serves a vital role in South Florida, offering listeners critical coverage of the dictatorship in Cuba and local news reporting. In some cases, these are among the last media outlets dedicated to, and staffed by, the local community. The hostile takeover by LMN would destroy those long-standing community connections.

LMN's founders, Obama Administration and campaign alumnae, have emphasized the unprecedented scope of the proposed sale, touting it as "one of the largest single acquisitions of stations by a Latino owned and operated company in history."[2] While grave questions remain about the nature of LMN – its precise ownership structure, the potential involvement of foreign funding, how it intends to program a massive network of radio stations given its total lack of experience – there should be no ambiguity about the intent of this transaction. Funding for the LMN comes mostly from Democrat partisans, including Lakestar Finance LLC, an investment firm tied to leftwing billionaire George Soros.

Far from benign, the proposed sale is the latest in a series of moves by elite progressives desperate to claw back support from Hispanic voters, who have rightly turned their backs on

[1] https://www.nbcnews.com/news/latino/group-high-profile-latinos-makes-60m-cash-deal-buy-18-radio-stations-rcna31895
[2] https://radioinsight.com/headlines/227505/latino-media-network-to-acquire-univision-radio-properties-in-ten-markets/

Democrats and their socialist priorities. But instead of overhauling their own unpopular policies, we are concerned that far-left ideologues are attempting to consolidate and expand their control over the media, so they can flood the airwaves with propaganda with the hopes of fooling listeners so that they can silence effective conservative voices who challenge their progressive propaganda.

In fact, leftists have been explicit about these aims; last year, faced with the prospect of losing political influence via the proposed sale of a single AM radio station located in Miami, members of the all-Democrat Congressional Hispanic Caucus jumped to action to halt the transaction. Past and present members of the caucus were clear about their real purpose in getting involved, with one proclaiming in April 2021: **"To win in 2022 this must stop!"**[3]

With the collapse of that sale, Democrats are back on the offensive, now pushing to take over 18 different Spanish-language radio stations around the United States. We believe that this blatant, partisan effort to destroy community-based radio and silence opposing voices provides ample reason for the FCC to act with the due diligence with which it has been tasked. We also believe that any takeover of this scale and speed, especially when critical questions remain about LMN and its lack of operational experience, must be analyzed with extraordinary scrutiny.

Thank you for your attention to this vitally important subject. We look forward to your response.

Sincerely,

Marco Rubio
U.S. Senator

Rick Scott
U.S. Senator

Tom Cotton
U.S. Senator

Carlos Giménez
Member of Congress

María Elvira Salazar
Member of Congress

Mario Díaz-Balart
Member of Congress

[3] https://twitter.com/DebbieforFL/status/1382757157481889792

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TED CRUZ TO EUGENE VOLOKH

Question 1. Does the First Amendment apply to the information Americans are permitted to receive and not just the content they can express?

Answer. Yes. *See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 756 (1976) (concluding that commercial speech is protected because "protection afforded is to the communication, to its source and to its recipients both"); *id.* at 757 ("[I]n *Procunier v. Martinez,* 416 U.S. 396, 408–409 (1974), where censorship of prison inmates' mail was under examination, we thought it unnecessary to assess the First Amendment rights of the inmates themselves, for it was reasoned that such censorship equally infringed the rights of noninmates to whom the correspondence was addressed."); *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 775–76, 783 (1978) (concluding that corporate speech is protected "based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas"); *Lamont v. Postmaster Gen.,* 381 U.S. 301, 305, 307 (1965) (relying on "the addressee's First Amendment rights" rather than the sender's, where the sender was a foreign government); *see also id.* at 307–08 (Brennan, J., concurring) (stressing that it's not clear whether the First Amendment protects "political propaganda prepared and printed abroad by or on behalf of a foreign government," but concluding that the law was unconstitutional because it violated the recipients' "right to receive" information, regardless of the senders' rights to speak).

Question 2. Does the First Amendment apply to artificial intelligence?

Answer. I think the First Amendment precludes the government from restricting the output of AI programs, because that would unduly interfere with Americans' right to receive information (and Americans' right to use the AI to help craft their own messages). *See* Eugene Volokh, Mark A. Lemley & Peter Henderson, *Freedom of Speech and AI Output,* 3 J. Free Speech L. 651 (2023).

Question 3. What are the First Amendment and free speech implications of government attempts to alter content generated by artificial intelligence to address alleged "bias" or to pressure artificial intelligence companies to set up processes to moderate or eliminate alleged "disinformation," as well as "offensive" or "objectionable" content?

Answer. I think this would violate the First Amendment, just as it would be unconstitutional for the government to restrict "bias," "disinformation," or "offensive" or "objectionable" content in newspapers. *See, e.g.,* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (bias); *New York Times Co. v. Sullivan,* 376 U.S. 254, 288 (1964) (disinformation about the government); *United States v. Alvarez,* 567 U.S. 709 (2012) (plurality opin.) (disinformation generally); *id.* at 731–32 (Breyer, J., concurring in the judgment) (disinformation about "philosophy, religion, history, the social sciences, the arts, and the like"); *id.* at 751 (Alito, J., dissenting) (disinformation "about philosophy, religion, history, the social sciences, the arts, and other matters of public concern"); *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46 (1988) (offensive or objectionable content).

Question 4. What should I keep in mind as I craft legislation to ensure that Americans are fully protected against government efforts to decide or limit what they can read?

Answer. That substantive rules require procedural enforcement mechanisms, such as allowing people to sue the Federal government and officials for violating the First Amendment, just as Congress has let people sue state and local governments and officials.

Question 5. What are some of the key challenges Americans face in court to hold the Federal government accountable for improper and unlawful jawboning?

Answer. The lack of a private right of action against Federal officials for violating First Amendment rights under color of Federal law, parallel to the private right of action provided as to violations by state and local officials under 42 U.S.C. § 1983.

Question 6. Can Congress help solve any of the challenges identified in the preceding question with new legislation?

Answer. Yes, by providing a private right of action against Federal officials for violating First Amendment rights under color of Federal law, parallel to the private right of action provided as to violations by state and local officials under 42 U.S.C. § 1983.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO EUGENE VOLOKH

First Amendment. Brendan Carr, the Chairman of the FCC, recently went on a podcast to criticize Jimmy Kimmel's comments on his late-night talk show on ABC. He told Disney, the parent of ABC, that "we can do this the easy way or the hard way."

And he told the licensed broadcasters that carry ABC programming that "it's time for them to step up" and stop this "garbage." Just hours later, the biggest affiliate groups said they would preempt Kimmel's show, including one with a major pending merger that requires FCC approval. Minutes later, ABC said it would suspend Kimmel. Kimmel is back on the air, but the chilling effect of Brendan Carr's words lingers.

As I wrote to Chairman Cruz weeks ago, we need Brendan Carr to answer for this attack on the free press.

Question 1. Professor Volokh, you are a noted First Amendment scholar. Do you think that Carr's threats to ABC and its affiliates violated the First Amendment?

Answer. Yes.

AP and Gulf of America. President Trump tried to rename the Gulf of Mexico to the Gulf of America. Polls show that more than 70 percent of Americans oppose the idea.

What's actually dangerous, though, is how the White House used this juvenile stunt to intimidate the free press. The Associated Press refused to go along with Trump's Orwellian attempt to make Americans change the name of the Gulf of Mexico.

In retaliation, the AP was kicked out of the White House press pool and not allowed into the Oval Office.

Question 1. Professor Volokh, setting aside whether the White House's actions technically violated the First Amendment, do you think that in a free society, it is appropriate for the White House to punish news organizations that refuse to go along with its attempts to police language?

Answer. I don't believe it is appropriate, especially when the AP's decision went along with a long-established and broadly accepted name.

At some point, the actions of a news outlet may become so bizarre or ideologically skewed that they may lead the outlet to lose credibility, and reasonably lead the Administration to no longer want to give the outlet special access to the press pool: Say, for instance, that the AP decided to rename the Gulf of Mexico "the Stolen Indigenous People's Sea," or to start calling Washington, D.C. "the Capital of the Great Satan." But of course, the AP's retaining the longstanding name "Gulf of Mexico" is very far removed from such hypotheticals.

Universities. In addition to the media and law firms, President Trump has also targeted universities and nonprofit organizations that express views that he disagrees with. The administration has threatened to revoke non-profit status; restricted universities' ability to enroll international students; and canceled or paused billions of dollars in grant funding.

Courts have consistently held that government officials cannot retaliate against individuals or entities because they disagree with their speech.

Question 1. Prof. Volokh, you are a scholar of the First Amendment. Is it consistent with the First Amendment for the administration to strip the tax-exempt status or otherwise punish universities or other entities that have political disagreements with the administration?

Answer. No, if the stripping or punishment were to happen *because* the universities or other entities express viewpoints that the administration disagrees with.

Law Firms. Since he took office earlier this year, President Trump has attacked institutions that he perceives to be opposed to him. President Trump signed a series of executive orders targeting law firms that hired perceived political opponents or represented clients who opposed him.

These executive orders suspend the security clearances for firm lawyers; deny them entrance to Federal buildings; and seek to force Federal contractors to end a relationship with them.

Question 1. You are an expert on the First Amendment. Do these executive orders violate the First Amendment?

Answer. Yes, considerable portions of the orders do. I signed a brief so arguing, Brief of Amici Curiae 353 Law Professors in Support of Plaintiff's Motion for Summary Judgment and for Declaratory and Permanent Injunctive Relief, *Perkins Coie LLP v. U.S. Department of Justice,* No. 1:25-cv-00716 (D.D.C. Apr. 2, 2025), *https://*

storage.courtlistener.com/recap/gov.uscourts.dcd.278290/gov.uscourts.dcd.278290.45.1.pdf.

Question 2. Does the First Amendment prevent government officials from retaliating against political opponents for their views?

Answer. That is complicated, because it depends on the nature of the retaliation. Government officials can't deny people or organizations generally available benefits (such as tax exemptions or broadly available grants aimed at promoting a diversity of private views) based on their viewpoints. Nor can they generally cut off contracts or other grants to people or organizations because of those people's or organizations' other speech (speech that isn't funded by those contracts or grants).

But they can, for instance, refuse to appoint a political opponent to high office based on the opponent's views. Likewise, they can choose to give discretionary grants for speech that endorses certain views but not other views. To offer one famous example, "When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." *Rust v. Sullivan,* 500 U.S. 173, 194 (1991).

There are of course other possible scenarios; in some, government officials' viewpoint-based judgments may be unconstitutional while in others they may be constitutionally permissible.

App Stores. Recently, after Attorney General Pam Bondi demanded that Apple remove a lawful app crowdsourcing location information from the App Store, Apple agreed to do so.

Question 1. Do you think citizens sharing location information with each other, such as the locations of police speed checks, through an app, is protected speech under the First Amendment?

Answer. It depends. At some point, it may become essentially aiding and abetting crime or a civil violation—basically, acting as a lookout for someone else—or obstruction of justice, and thus constitute constitutionally unprotected "speech integral to criminal conduct." The exact boundaries of that First Amendment exception are not clearly settled. I wrote about this in detail at Eugene Volokh, *Crime-Facilitating Speech,* 57 Stan. L. Rev. 1095 (2005), but the law has become still more complex since then, see Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception,* 101 Cornell L. Rev. 981 (2016); *United States v. Hansen,* 143 S. Ct. 1932 (2023).

Question 2. Did the Attorney General violate the First Amendment when she demanded that Apple remove a legal app with crowdsourced location data from its app store?

Answer. If the AG threatened Apple with prosecution for removing such an app, then she might have violated the First Amendment, depending on the precise facts about just what information the app conveyed and under what circumstances (I'm not certain). But if the AG argued to Apple that the app violated Apple's own guidelines, and asked it to enforce those guidelines, without threatening Apple with prosecution or other government retaliation, then that likely didn't violate the First Amendment.

Question 3. Are you aware of any instances during the Biden administration when the Federal government demanded that Apple or Google remove a legal app?

Answer. Yes; the Protecting Americans from Foreign Adversary Controlled Applications Act, the statute targeting TikTok enacted during the Biden Administration, essentially required Apple and Google to remove from their app stores the TikTok app, which had hitherto been legal.

Question 4. Are you aware of any instances where foreign governments have demanded that Apple and Google remove legal apps?

Answer. No, but I haven't closely studied the actions of foreign governments.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO GENE KIMMELMAN

First Amendment. Brendan Carr, the Chairman of the FCC, recently went on a podcast to criticize Jimmy Kimmel's comments on his late-night talk show on ABC. He told Disney, the parent of ABC, that "we can do this the easy way or the hard way."

And he told the licensed broadcasters that carry ABC programming that "it's time for them to step up" and stop this "garbage." Just hours later, the biggest affiliate groups said they would preempt Kimmel's show, including one with a major pending

merger that requires FCC approval. Minutes later, ABC said it would suspend Kimmel. Kimmel is back on the air, but the chilling effect of Brendan Carr's words lingers.

As I wrote to Chairman Cruz weeks ago, we need Brendan Carr to answer for this attack on the free press.

Question 1. Mr. Kimmelman, you have observed the media for decades. Have you ever seen quite so blatant an attempt at censorship by the Chair of the FCC?

Answer. I have never seen such blatant interference in the content of media companies from any previous FCC Chair.

Question 2. At the hearing, some claimed that legislators expressing their views about a licensed media company to the FCC, as I did in 2018, Senators Rubio, Scott, and Cotton did in 2022, and Senator Lee did in 2024, raises the same First Amendment concerns as the FCC Chair threatening action against a regulatee. Do you think that legislators expressing their views to the FCC about a licensee raises the same concerns as the regulator itself threatening a licensee?

Answer. No, I believe that legislators have a right to express their views and propose legislation as they see fit. It is a very different, direct threat to the First Amendment, for the FCC to threaten to take action against a licensee based on the content they distribute.

During the same podcast where Carr criticized Jimmy Kimmel, Carr also stated: "It's the licensed TV stations that have the public interest standard, including those TV stations that Comcast and Disney own. So FCC regulatory action focuses on those individual stations." He also claimed: "The public interest means you can't be running a narrow partisan circus and still meet your public interest obligations. It means you can't be engaging in a pattern of news distortion."

Question 3. Is Carr's statement that the FCC's public interest obligation means broadcast stations "can't be running a narrow partisan circus" correct? Why or why not?

Answer. I don't really know what Chairman Carr was referring to, but the public interest test has previously been viewed as a way to evaluate whether a broadcaster is meeting community needs. It is hard to imagine that presentation of a set of views of interest in a community is somehow outside the scope of the public interest. The FCC has previously refrained from cataloging ideas as "partisan" just for presenting a particular point of view, to protect the First Amendment rights of their licensees.

Question 4. Other than Carr, has an FCC chair ever threatened a network or local affiliate with regulatory action based on the content of a late-night comedian's monologue?

Answer. Not to my knowledge.

Question 5. Have the FCC's actions since the Nixon administration to revoke broadcast licenses been limited to concerns over the licensee's character, such as being a convicted criminal, and not based on the content of the licensee's speech?

Answer. Yes

The Communications Act of 1934 requires broadcast licensees to serve the "public interest, convenience, and necessity," and grants the FCC authority to consider those interests when granting or renewing licenses. The FCC has long held that "the public interest is best served by permitting free expression of views," and Section 326 of the Communications Act specifically prohibits the Commission from "censorship."

Question 6. Does the "public interest" standard legally permit the FCC Chair to suppress speech by revoking the licenses of broadcasters for airing content the Administration does not like?

Please explain.

Answer. No

Question 7. Should an FCC Chair repeatedly mislead the American public that the FCC's longstanding public interest standard should be used to suppress speech? Please explain.

Answer. I fear that repeated statements from the FCC Chair describing a power to suppress speech, which clearly exceeds his authority, has a chilling effect on public discourse and harms open, democratic debate in our society.

Media Consolidation. Americans rely on local news to understand what's going on in their communities. According to the Pew Research Center, nearly three-quarters of Americans trust their local newspapers and broadcasters. But local news faces serious headwinds. The advertising-supported model of local newspapers and local broadcast has declined, with an increasing share of revenue going to tech platforms rather than news organizations.

There has been a wave of consolidation in the media, ranging from broadcast affiliates to newspapers. And for many Americans, most of their news comes through social media algorithms, giving the owners of these platforms inescapable influence over what we see and read.

Question 1. What are the effects of media consolidation on the diverse voices and viewpoints that we need for a vibrant democracy?

Answer. Excessive media consolidation is likely to reduce open, diverse debate in our society, undermining the marketplace of ideas that is essential for a vibrant democracy.

Question 2. Does the increasing consolidation of media make it more vulnerable to pressure from politicians?

Answer. Politicians can always try to pressure the media, however the fewer the owners the easier it is to make that pressure succeed. The more media is diversely owned by independent companies, the more difficult it is for politicians to steer public debate to serve their self interest.

Social Media and Antitrust. Social media platforms are increasingly the most important town square in our democracy. The algorithms decide the topics that are debated and the views that are represented. Because of the power of these platforms in our society, there has been a bipartisan recognition of the need to hold them to account. To date, the most prominent efforts have been through antitrust law.

Major antitrust cases were brought against several platforms by the first Trump administration and the Biden administration and have been continued through transitions.

Question 1. Is antitrust the right tool to bring platforms to heel?

Answer. Antitrust is an essential tool to address market abuses by tech platforms, however it is not sufficient to address all the impediments to robust competition in digital markets.

Question 2. What other policies should we consider to ensure these platforms serve individuals and support a democratic society, rather than undermine it?

Answer. Congress should consider making it easier to bring antitrust cases against dominant digital platforms, and it should also create some regulatory guardrails to prevent discriminatory practices.

Public Media and Local Journalism. Grants from CPB support nearly 400 public radio stations across the country, which employ nearly 9,800 people, including 3,000 local journalists, editors, and producers. With their signal reach, particularly in rural areas, public radio stations can help to slow the spread of "news deserts," or areas that have no source of local news.

Of the 204 "news desert" counties identified by the State of Local News Project, 67 are served by local public radio signals. Newsrooms have lost over 60 percent of their newsroom employees over the last two decades. Meanwhile, public radio has added 900 local newsroom employees since 2012.

Despite this, Republicans zeroed out Federal funding for public broadcasting earlier this year, costing more than 400 jobs in public media, putting dozens of stations at risk of closure, and causing the Corporation for Public Broadcasting to close down.

Question 1. How does public media enhance local journalism?

Answer. Public media has served a critical role in local markets, filling in information gaps left by the disappearance of private media players. Without public media, and with the shuttering of numerous local newspapers, many communities will be deprived of the information flow we rely upon to fuel a robust democracy.

Question 2. What will be the effect of Republicans defunding public broadcasting?

Answer. Given the enormous loss of local information flowing through local newspapers, any reduction in public media threatens to harm the marketplace of ideas that is critical to an informed citizenry.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. AMY KLOBUCHAR TO GENE KIMMELMAN

Question Topic: Antitrust and the First Amendment

Competitive markets can help ensure that no one entity controls what we see or hear. But when markets become consolidated, access to diverse viewpoints is put at risk. In your testimony, you said that antitrust is a necessary but often insufficient tool to sustain diverse local media.

- How have Big Tech platforms used their position as content gatekeepers to siphon away resources from local media, including by misappropriating content?

Answer. As more and more people rely upon the Internet as a gateway for their information needs, the dominant tech platforms (*e.g.,* Google, Apple, Meta) have enormous power over how news and media content are disseminated. Control of these gateways to the public is synonymous with control over the advertising and related revenue necessary to produce content and report on local, societal and even global events. It is critical to prevent tech platforms from expropriating revenue necessary to fund high quality content.

Question Topic: AI and Local Media

A free press is a crucial part of our democracy, but local news is facing an existential crisis. Since 2005, the U.S. has lost about 3,300 local newspapers, roughly one-third of newspapers nationally. The pace of these newspaper closures is accelerating at a time when tech companies are using local news content to train AI models without compensating journalists and papers for their critical contributions.

- What role should companies that profit from AI models that use news content play in ensuring journalists and newspapers are fairly compensated?

Answer. Companies that build AI models with content created by others should pay license fees or royalties to content creators. We have done this for music and broadcasting in the past, and now is the time to do something similar for AI models.

Question Topic: Political Violence

Our country has endured a troubling wave of political violence that threatens public safety and our democracy. Elected officials from both parties must bring down the temperature of our political discourse, especially online, where a lot of this hate is spread.

- How would transparency from platforms regarding their ranking algorithms help address the algorithmic amplification of violent political rhetoric?

Answer. Transparency should put pressure on the tech platforms to address the dangers they create or contribute to by amplifying violent content. Transparency should enable the public to reject engaging with platforms that promote violence, creating financial benefits for platforms that seek to limit algorithmic amplification of violence.

○