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Introduction

I thank the Committee for the opportunity to testify today. I am a fellow at the Constitutional Law Center at Stanford Law School. I have previously held academic appointments at Harvard Law School, the Yale Law School, and the Benjamin N. Cardozo School of Law. My scholarship focuses on constitutional law, with a particular emphasis on election law.

The focus of today’s hearing is allegations of censorship by social media platforms, purportedly at the behest of the federal government. As every member of the Committee undoubtedly knows, the First Amendment applies to governmental restrictions of speech, not private conduct.¹ The plaintiffs in *Missouri v. Biden*² cannot, of course, claim that social media platforms themselves are governmental actors. Instead, they argue that the federal government coerced those platforms or, alternatively, that the government and the platforms colluded in a wide-ranging conspiracy to suppress disfavored speech through the application of the platforms’ own content moderation policies. That contention lacks a reasonable legal and factual basis, and it threatens to undermine efforts by social media platforms to combat the grave and growing threat posed by misinformation on issues ranging from public health to election integrity.

Claims that the federal government censored social media content by coercing platforms fail for two fundamental reasons. First, governmental officials in the White House, the CDC, the Cybersecurity Infrastructure and Security Agency, and elsewhere consistently and repeatedly reaffirmed—in public pronouncements and in private communications—that content moderation decisions ultimately rest with social media platforms and the officials’ communications were simply suggestions that the platforms were free to adopt or disregard in the application of the platforms’ own moderation policies. Second, there was no threatened adverse governmental action attached to those suggestions. No governmental official ever even hinted that social media platforms would be subject to any enforcement action of any kind if they declined to adopt the officials’ recommendations. And when platforms disagreed with governmental officials, no punitive action was ever taken.

¹ The First Amendment “safeguard[s] the rights of free speech” by imposing “limitations on state action, not on action by” private parties. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972). See also *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 128-30 (2019) (“protect[ing] a robust sphere of individual liberty” so private parties can “exercise editorial discretion over the speech” appearing on their platforms requires “enforc[ing] th[e] constitutional boundary between the governmental and the private”).

² *Missouri v. Biden*, 3:22-cv-01213 (W.D. La.).

Social media platforms' content moderation decisions have always rested and remain with the platforms themselves. Those decisions constitute the platforms' own speech. By attacking platforms' attempts to combat misinformation, and the government's assistance to those platforms' implementation of their own content moderation policies, the plaintiffs in cases like *Missouri v. Biden* do disservice to the principles of free speech that they claim to support and invite the grave consequences of misinformation that they seek to spread unchecked.

Background

From their founding, social media companies recognized the need to moderate the content on their platforms.³ Beginning nearly two decades before the Biden Administration took office, the platforms understood that their appeal to users and thus their economic viability depended on ensuring that users' experience was not degraded by hate speech, harassment, spam, and misinformation.⁴ The platforms also began to appreciate their social responsibility as stewards of a privatized public square that would host an increasing, and increasingly dominant, role in public discourse.⁵

To meet that challenge, social media platforms adopted robust, formalized moderation policies and sophisticated mechanisms for implementing those policies. From the beginning, and to this day, both the platforms and outside commentators have grappled with striking the right balance between preserving a robust exchange of opposing points of view and combatting the spread of misinformation. In the early years of social media, platforms tended to apply relatively vague standards to take down content that was, for one reason or another, objectionable. Over time, they realized that a more formalized system of rules was more effective at demarcating the line between the speech their policies aimed to regulate and speech that, while potentially unpopular, nonetheless did not warrant moderation. These more formalized rules also enhanced uniformity in the application of content moderation policies, helping to ensure that those policies were applied consistently across users. The platforms also recognized that they needed to rely on outside experts in order to design and apply effective content moderation policies, especially when moderation decisions depended on technical expert judgments.

Three events in recent years marked the growing risks of misinformation on social media platforms. First, in the months surrounding the 2016 presidential election, unsubstantiated rumors and networks of accounts linked to foreign adversaries flooded the platforms. Second, the COVID-19 pandemic prompted an extraordinary surge in misinformation about public health, particularly about vaccines and their potential side effects. Third, the 2020 presidential election saw an unprecedented onslaught of election misinformation, including demonstrably incorrect conspiracy theories about the manipulation of electronic voting machines and unfounded allegations of hundreds of thousands of ballots being cast on behalf of dead or unqualified voters.

³ See, e.g., *Making the Internet Safe for Kids: The Role of ISP's and Social Networking Sites: Hearing Before the Subcomm. on Oversight & Investigations, of the H. Comm. on Energy & Com.*, 109th Cong. 214-16 (2006) (statement of Chris Kelly, Chief Privacy Officer, Facebook.com, Inc.).

⁴ See Kate Klonick, *The New Governors*, 131 HARV. L. REV. 1598, 1602 (2018) (“[P]latforms moderate content because of a foundation in American free speech norms, corporate responsibility, and the economic necessity of creating an environment that reflects the expectations of their users.”).

⁵ *Id.*

In response to these challenges, social media platforms strengthened their content moderation policies and enforcement mechanisms, both with respect to election misinformation⁶ and with respect to public health misinformation.⁷ The flood of public health misinformation alone led platforms to take down or flag millions of posts in 2020. For example, Facebook reported that it “displayed warnings on about 40 million posts related to COVID -19” and had “removed hundreds of thousands of pieces of misinformation that could lead to imminent physical harm” in the month of March 2020 alone.⁸ Notably, the platforms took these actions during the Trump Administration, prior to the Biden Administration taking office in January of 2021.

Given the technical character of the scientific information at issue, platforms relied on outside experts—including officials at expert governmental agencies like the CDC and NIH—to provide assistance in the crafting and implementation of their policies. For example, in January 2020, Twitter announced that it was “direct[ly] engag[ing] . . . with organizations [working to] contain the threat” of COVID-19, including “[e]xperts, NGOs, and governments.”⁹ Similarly, Facebook’s COVID-19 policy explains that the company “want[s] to make sure that [its] policies help to protect people from harmful content” and accordingly Facebook “engage[s] with experts like the World Health Organization (WHO), government health authorities, and stakeholders from across the spectrum of people who use our service” to guide its policies.¹⁰ Moreover, as the discovery record in *Missouri v. Biden* demonstrates, the platforms regularly reached out to outside experts for guidance on the application of the platforms’ misinformation policies to specific pieces of content.¹¹

⁶ See, e.g., Mark Zuckerberg, Facebook (Nov. 18, 2016) (providing “update” on platform’s ongoing efforts to “do[] [something] about misinformation,” noting that the company has “been working on this problem for a long time”), <https://www.facebook.com/zuck/posts/10103269806149061>; Guy Rosen, et al., *Helping to Protect the 2020 US Elections*, Meta (Oct. 21, 2019) (announcing “several new measures to help protect the democratic process” in advance of the 2020 elections, including attempts to “[p]revent[] the spread of misinformation” through “clearer fact-checking labels.”), <https://perma.cc/CL5W-7MDQ>.

⁷ See, e.g., Vijaya Gadde & Matt Derella, *An update on our continuity strategy during COVID-19* (Mar. 16, 2020; updated Apr. 1, 2020) (announcing policies to “address content that goes directly against guidance from authoritative sources of global and local public health information.”), <https://perma.cc/2UAL-YXSH>; Guy Rosen, *An Update on Our Work to Keep People Informed and Limit Misinformation About COVID-19*, Meta (Apr. 16, 2020) (explaining that “[e]ver since COVID-19 was declared a global public health emergency in January [2020],” Meta adopted policies to “keep harmful misinformation about COVID-19 from spreading on” its platforms, including Facebook and Instagram), <https://perma.cc/XVM4-L6YG>; *How has YouTube responded to the global COVID-19 crisis?*, YouTube (detailing YouTube’s policies that “prohibit, for example, content that denies the existence of the coronavirus” and “content that explicitly disputes the efficacy of global or local health authority advice regarding social distancing,” and noting that “[i]n October 2020, [YouTube] expanded our COVID-19 medical misinformation policy to remove content about vaccines that contradicts consensus from health authorities, such as the Centers for Disease Control or the World Health Organization”), <https://perma.cc/3DC2-G8YN>.

⁸ Guy Rosen, *An Update on Our Work to Keep People Informed and Limit Misinformation About COVID-19*, Meta (Apr. 16, 2020), <https://perma.cc/XVM4-L6YG>.

⁹ Jun Chu & Jennifer McDonald, *Helping the world find credible information about novel #coronavirus*, Twitter (Jan. 29, 2020), <https://perma.cc/63SP-CNLQ>.

¹⁰ *COVID-19 and Vaccine Policy Updates & Protections*, Facebook Help Center, <https://perma.cc/JVB5-G45G>.

¹¹ See, e.g., *Missouri v. Biden*, 3:22-cv-01213, Doc. 71-7 at 51 (W.D. La.) (email from Facebook employee to CDC on July 26, 2021, asking “we were hoping your team could help us understand if [three claims about “possible side effect[s]”] are false and can lead to harm?”); *id.* Doc 71-7 at 4 (email from Facebook employee on June 3, 2022, thanking CDC for “your help debunking claims about COVID vaccines and children” and asking “could you please

As the threat posed by social media misinformation intensified, particularly in the context of the pandemic, governmental officials highlighted those risks and emphasized the critical importance of social media platforms taking action to minimize the spread of misinformation. Those officials' statements expressed the governments' own views on matters of pressing public concern. Critically, those officials' statements also consistently reaffirmed that social media platforms' content moderation decisions ultimately rested with the platforms themselves. For example, in May 2021, the White House Press Secretary expressed the President's view regarding social media platforms' "responsibility" to "stop amplifying untrustworthy content, disinformation, and misinformation, especially related to COVID-19, vaccinations, and elections."¹² In expressing that view, the Press Secretary emphasized that the President "believe[s] in First Amendment rights" and that "social media platforms need to make" "the decisions" for "how they address the disinformation" and "misinformation" that "continue to proliferate on their platforms."¹³ Similarly, in July 2021 a Surgeon General Advisory offered "recommendations" for social media platforms to address public health misinformation while recognizing the civic imperative for social media platforms to "safeguard[] . . . free expression" and emphasized that "it is important to be careful and avoid conflating controversial or unorthodox claims with misinformation," because "[t]ransparency, humility, and a commitment to open scientific inquiry are critical."¹⁴

As the Press Secretary explained that month, the government's actions were limited to "regularly making sure social media platforms are aware of the latest narratives dangerous to public health" and "engag[ing] with them to better understand the enforcement of social media platform policies." The Press Secretary further explained that "social media platforms themselves" are "private-sector compan[ies]" that ultimately "make[] decisions about what information should be on their platform[s]."¹⁵ The Press Secretary then left no doubt about the limits of the federal government's involvement in social media platforms' content moderation decisions:

[T]o be crystal clear: Any decision about platform usage and who should be on the platform is orchestrated and determined by private-sector companies. Facebook is one of them . . . [a]nd there are a range of media who . . . have their own criteria and rules in place, and they implement them. And that's their decision[.]. That is not the federal government doing that.¹⁶

No governmental official ever threatened any social media platform with adverse action if a platform declined to moderate content flagged by the official or if a platform decided not to take an official's suggestions.

let us know whether the CDC is able to debunk the following [claims about vaccines] as false and harmful for young children?").

¹² Press Briefing by Press Secretary Jen Psaki and Secretary of Agriculture Tom Vilsack (May 5, 2021), <https://perma.cc/4ZGE-N9QL>.

¹³ *Id.*

¹⁴ Confronting Health Information: The U.S. Surgeon General's Advisory on Building a Healthy Information Environment, at 12, 17, <https://perma.cc/KMU4-Q3RB>.

¹⁵ Press Briefing by Press Secretary Jen Psaki (July 16, 2021), <https://perma.cc/HE54-LB2R>.

¹⁶ *Id.*

Analysis

Social media platforms' content moderation decisions are those platforms' responsibility. Neither governmental officials' general expressions of the importance of content moderation policy nor those officials' assistance in platforms' development and application of the platforms' own content moderation policies changes that fundamental fact.

A First Amendment claim based on private conduct may proceed only if that conduct “can fairly be seen as state action.”¹⁷ The Supreme Court has explained that courts must “avoid[] the imposition of responsibility on [governmental officials] for” private “conduct it could not control.”¹⁸ Accordingly, officials “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 those officials.¹⁹ “Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding” governmental officials “responsible for those initiatives.”²⁰ “The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.”²¹

As the Ninth Circuit explained just two weeks ago:

In deciding whether the government may urge a private party to remove (or refrain from engaging in) protected speech, we have drawn a sharp distinction between attempts to convince and attempts to coerce. Particularly relevant here, we have held that government officials do not violate the First Amendment when they request that a private intermediary not carry a third party's speech so long as the officials do not threaten adverse consequences if the intermediary refuses to comply.

This distinction tracks core First Amendment principles. A private party can find the government's stated reasons for making a request persuasive, just as it can be moved by any other speaker's message. The First Amendment does not interfere with this communication so long as the intermediary is free to disagree with the government and to make its own independent judgment about whether to comply with the government's request.²²

Courts around the country applying these principles have found that social media platforms' content moderation decisions are not coerced, and therefore do not constitute state action subject to the First Amendment, in precisely the circumstances present in *Missouri v.*

¹⁷ *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982).

¹⁸ *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988). *See also Halleck*, 139 S. Ct. at 1928-30.

¹⁹ *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

²⁰ *Id.* at 1004-05.

²¹ *Blum*, 457 U.S. at 1004. Legal scholars sometimes use the term “jawboning” to refer to governmental influence on private decisions regarding speech. *See, e.g.*, Derek E. Bambauer, *Against Jawboning* 100 MINN. L. REV. 51 (2015); Genevieve Lakier, *Informal Government Coercion and The Problem of “Jawboning”*, LAWFARE (July 26, 2021), <https://www.lawfareblog.com/informal-government-coercion-and-problem-jawboning>.

²² *O'Handley v. Weber*, No. 22-15071, slip op. at 15-16 (9th Cir. Mar. 10, 2023) (citations omitted).

Biden.²³ The district court’s contrary decision in *Missouri v. Biden* is incorrect and is very likely to be reversed on appeal. The district’s holdings on a range of procedural and jurisdictional issues, including standing and sovereign immunity, independently warrant reversal. In view of the focus of the Committee’s hearing, I will instead focus on the district court’s erroneous rulings on the merits of the plaintiffs’ claims under the First Amendment.

The first fundamental flaw in the district court’s merits analysis is that it failed to recognize that the challenged actions by governmental officials constitute governmental speech, not governmental coercion. As Justice Scalia explained, it is “the very business of government to favor and disfavor points of view on . . . innumerable subjects.”²⁴ That is precisely what happened here. Public health officials like experts at the CDC and Surgeon General Vivek Murthy expressed to social media platforms their views regarding the scientific inaccuracy of claims about the pandemic, including false claims about the purported side effects of vaccines. Similarly, officials at agencies like CISA flagged misinformation about voter fraud and other election improprieties. Those officials often offered their views, and their opinions about the potential harms that such inaccurate claims could cause, at the request of the social media platforms who sought assistance in applying their own content moderation policies against misinformation.

Those suggestions, even emphatic ones, never approached an order or direction that social media companies comply nor a threat of legal or economic sanctions if they declined to do so. The governmental officials’ communications were almost always explicitly phrased as “suggestions” or “recommendations.” And as the plaintiffs’ own evidence establishes, social media platforms could and did disagree with the governmental officials’ suggestions without consequence. For example, in October of 2020 an official at the Cybersecurity and Infrastructure Security Agency forwarded to a Twitter employee an email from the Office of the Secretary of State of Washington “flag[ging]” several “tweets that include misinformation and/or false allegations of election fraud.”²⁵ Twitter responded that “[a]ll Tweets have been labeled, with the exception of two from” a particular user which “were not found to violate our policies.”²⁶ This dialogue, typical of the communications between governmental officials and platforms, illustrates a dynamic in which the officials offered information and suggestions to platforms, which were free to take that information into account or not as they saw fit. And as Twitter and other social media platforms often emphasized, they received that information as helpful in the implementation of content moderation decisions “under *our* civic integrity policy.”²⁷

²³ See, e.g., *Changizi v. Dep’t of Health & Hum. Servs.*, 2022 WL 1423176 (S.D. Ohio May 5, 2022), *appeal filed*, No. 22-3573 (6th Cir. June 30, 2022); *Hart v. Facebook Inc.*, No. 22-cv- 00737, 2022 WL 1427507 (N.D. Cal. May 5, 2022); *Ass’n of Am. Physicians & Surgeons v. Schiff*, 518 F. Supp. 3d 505 (D.D.C. 2021), *aff’d*, 23 F.4th 1028 (D.C. Cir. 2022); *Doe v. Google*, No. 21-16934, 2022 WL 17077497 (Nov. 18, 2022). See also Nick Nugent, *Social Media Isn’t a Public Function, but Maybe the Internet Is*, Lawfare (Mar. 15, 2023) (“[W]hen it comes to private online services, attempts to find state action have generally failed. Clever arguments centered on the public function doctrine, joint action, and even jawboning have seen their day in court, so to speak, and been found wanting. The public-private dichotomy is alive and well when it comes to online spaces, and that seems unlikely to change anytime soon.”), available at <https://www.lawfareblog.com/social-media-isnt-public-function-maybe-internet>.

²⁴ *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J. concurring).

²⁵ *Missouri v. Biden*, 3:22-cv-01213, Doc. 71-8 at 51-53 (W.D. La.).

²⁶ *Id.*

²⁷ *Id.*, Doc. 71-8 at 14-15 (email from Twitter to CISA on October 23, 2020).

The second fundamental flaw in the district court’s merits analysis is that the government never attached, explicitly or implicitly, any consequences to social media platforms’ content moderation decisions. No governmental official ever threatened to punish social media platforms in any way if they disagreed with suggestions regarding the application of the platforms’ content moderation policies. Quite the opposite, governmental officials expressly stated both in public and in private communications with platforms that their suggestions carried no consequences. For example, correspondence from CISA and other agencies to social media platforms specifically disclaimed any adverse consequences if the platforms disagreed with the governmental officials’ suggestions. In the very correspondence that plaintiffs seek to characterize as threats and coercion, CISA repeatedly explained “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 [that] it is sharing should be handled or used by social media companies.”²⁸ To remove any doubt whatsoever, it further explained that “CISA will not take any action, favorable or unfavorable, toward social media companies based on decisions about how or whether to use this information.”²⁹ And, as noted above, these reaffirmations of the social media platforms’ independence and ultimate responsibility for content moderation decisions echoed that same consistent message from the White House through the Press Secretary’s daily briefings.

In the absence of any evidence suggesting that governmental officials threatened social media platforms with adverse actions specifically connected to their content moderation decisions, the plaintiffs in *Missouri v. Biden* instead point to general policy proposals regarding technology companies that were discussed in entirely separate contexts. In particular, the district court concluded that the federal government issued “threats of official government action in the form of threats of antitrust legislation and/or enforcement and calls to amend or repeal Section 230 of the CDA with calls for more aggressive censorship and suppression of speakers and viewpoints that government officials disfavor.”³⁰

Neither bipartisan calls for greater antitrust enforcement against large tech companies nor bipartisan proposals for amending Section 230 of the Communications Decency Act of 1996 could constitute partisan threats of governmental retaliation for social media platforms’ content moderation decisions. Members of both parties have expressed deepening concern about tech companies’ concentrated market power. For example, on May 19, 2022, Representatives Pramila Jayapal, Ken Buck, David Cicilline, Burgess Owens, and Matt Gaetz introduced a bipartisan bill that served as a companion to Senator Mike Lee’s legislation, the Competition and Transparency in Digital Advertising Act.³¹ As the bill’s co-sponsors explained, “[t]his bill takes direct aim at Google and Facebook’s ad market duopoly.”³² Congressman Gaetz further elaborated that the bill would “provide[] for an integral mechanism to prevent Big Tech from continuing to exploit

²⁸ *Id.*, Doc. 71-8, at 7, 11, 14, 17, 37, 51, 81, 101.

²⁹ *Id.*

³⁰ *Missouri v. Biden*, 3:22-cv-01213, slip op. at 61-62 (W.D. La. Mar. 20, 2023).

³¹ See *Jayapal, Buck, Cicilline, Owens, Gaetz Introduce Bipartisan Bill to End Big Tech’s Grasp on the Digital Ad Industry*, available at <https://jayapal.house.gov/2022/05/19/jayapal-buck-cicilline-owens-gaetz-introduce-bipartisan-bill-to-end-big-techs-grasp-on-the-digital-ad-industry/>.

³² *Id.*

the digital advertising marketplace” by “prohibiting” “giant Big Tech companies, such as Google” “from owning more than one side of the digital advertising system.”³³

Antitrust enforcement actions similarly reflect a growing bipartisan consensus that began well before the Biden Administration took office. Under the Trump Administration, the Department of Justice joined with eleven Republican state attorneys general in an antitrust lawsuit against Google, accusing it of “unlawfully maintaining monopolies in the markets for general search services, search advertising, and general search text advertising in the United States through anticompetitive and exclusionary practices.”³⁴ Also in 2020, the Federal Trade Commission filed a civil antitrust suit against Facebook, alleging that the platform’s conduct, including its acquisitions of Instagram and WhatsApp, were harmful to competition.³⁵ According to the FTC, the suit “alleg[es] that the company is illegally maintaining its personal social networking monopoly through a years-long course of anticompetitive conduct.”³⁶ It defies reason to speculate that this longstanding, bipartisan concern with anticompetitive conduct by large tech companies suddenly converted into retaliatory threats targeting disfavored content moderation decisions when the Biden Administration took office in January of 2021.

Similarly, members of both parties have proposed limiting or eliminating social media platforms’ immunity from civil liability under Section 230 of the Communications Decency Act of 1996. Earlier this month, the Senate Judiciary Committee held hearings in which members of both parties expressed support for reforming Section 230. As Republican Senator Josh Hawley explained: “More and more, leaders on both sides of the aisle are acknowledging that the current law isn’t working. Big Tech should be held accountable for their decisions, like their hands-off approaches to the proliferation of exploitation material on their sites. This hearing is a critical first step.”³⁷ On June 11, 2021, Chairman Jim Jordan introduced H.R. 3827, the Protect Speech Act. Its purpose, according to its preamble, was “to amend section 230 of the Communications Act of 1934 to ensure that the immunity under such section incentivizes online platforms to responsibly address illegal content while not immunizing the disparate treatment of ideological viewpoints and continuing to encourage a vibrant, open, and competitive internet, and for other purposes.”³⁸ Its legal effect would have been to expose social media platforms to greater liability for “restrict[ing] access to or availability of material on deceptive grounds or apply[ing] terms of service or use to restrict access to or availability of material that is similarly situated to material that the service intentionally declines to restrict.”³⁹ Neither Senator Hawley’s hearings nor

³³ *Id.*

³⁴ *United States v. Google*, No. 1:20-cv-03010, Complaint at 1 (D.D.C. Oct. 20, 2020). *See Doe*, 2022 WL 17077497 at *2 (DOJ “antitrust lawsuit against Google for maintaining monopolies in general search services and search advertising” among events found insufficient to plausibly allege state action by YouTube).

³⁵ *FTC v. Facebook, Inc.*, No. 20-cv-3590, Complaint (D.D.C. Dec. 9, 2020).

³⁶ *Facebook v. FTC*, FEDERAL TRADE COMM’N, available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/191-0134-facebook-inc-ftc-v>.

³⁷ *Blumenthal & Hawley to Hold Hearing on the Future of Tech’s Legal Immunities Following Argument in Gonzalez v. Google* (Mar. 1, 2023), available at <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-and-hawley-to-hold-hearing-on-the-future-of-techs-legal-immunities-following-argument-in-gonzalez-v-google>.

³⁸ Protect Speech Act, H.R. 3827 (2021), available at <https://www.congress.gov/bill/117th-congress/house-bill/3827/text?r=45&s=1>. *See also* Protect Speech Act, H.R. 8517 (2020) (identical bill introduced by Jordan in previous Congress), available at <https://www.congress.gov/bill/116th-congress/house-bill/8517>

³⁹ *Id.* § 2 (amending Section 230(c)).

Chairman Jordan’s introduction of legislation to limit platforms’ immunity constituted retaliatory threats that converted social media platforms’ moderation content decisions into governmental action. So too with similar statements by Democratic members of Congress or Biden administration officials.

Moreover, the only concrete administrative actions against large tech companies with respect to Section 230 were taken by the Trump administration, not the Biden administration. In May of 2020, President Trump issued an executive order directing “all executive departments and agencies” to “ensure that their application of section 230(c)” was “narrow.”⁴⁰ Far from threatening to punish social media platforms, in May of 2021 President Biden *rescinded* President Trump’s executive order.⁴¹ President Trump also vetoed the National Defense Authorization Act for Fiscal Year 2021 on the express basis that it “fail[ed] even to make any meaningful changes to Section 230” which he claimed “must be repealed.”⁴² These administrative actions by the Trump administration, including a veto of a critical military appropriations bill on grounds wholly unrelated to military policy, might raise suspicions that the former administration used the levers of government to retaliate against social media platforms for President Trump’s frequently voiced concerns that the platforms were suppressing conservative speech. By contrast, the Biden administration has taken no such administrative action against any social media platform.

On the basis of these two considerations, it is highly likely that the Fifth Circuit Court of Appeals will reverse the district court’s decision in *Missouri v. Holland*. The Fifth Circuit recognizes that a third-party platform for speech “[r]esponding agreeably to a request” is a “different category[y] of response” from “being all but forced by the coercive power of a governmental official.”⁴³ The plaintiff in that case, the Sons of Confederate Veterans, sought to march in a city parade coordinated by a private business association.⁴⁴ The Mayor of Natchitoches asked the association to “prohibit the display of the Confederate battle flag in that year’s parade.”⁴⁵ Two days later, the association denied the plaintiff’s request to march in the parade. The court rejected the plaintiff’s First Amendment claim, explaining that the “Mayor’s letter” contained only “a request,” and that “the decision to deny the [plaintiff’s] parade application rested with the [association], not the City.”⁴⁶ That holding, consistent with longstanding Supreme Court precedent and the fundamental principles of First Amendment law, precludes the plaintiffs’ constitutional claims in *Missouri v. Biden*.

⁴⁰ Exec. Order No. 13,925, Preventing Online Censorship, § 1, 85 Fed. Reg. 34,079, 34,079 (May 28, 2020).

⁴¹ Exec. Order No. 14,029, Revocation of Certain Presidential Actions and Technical Amendment, § 1, 86 Fed. Reg. 27,025 (May 14, 2021).

⁴² Presidential Veto Message to the House of Representatives for H.R. 6395 (Dec. 23, 2020), <https://perma.cc/KFS7-CK2G>.

⁴³ *Louisiana Division Sons of Confederate Veterans v. City of Natchitoches*, 821 F. App’x 317, 320 (5th Cir. 2020).

⁴⁴ *Id.* at 318-19.

⁴⁵ *Id.*

⁴⁶ *Id.* at 320.

Conclusion

At the heart of this formal legal analysis is a deeper truth. The plaintiffs in *Missouri v. Biden* allege that the federal government, led by the Biden administration, seeks to censor and control private speech by coercively influencing social media platforms' content moderation decision. The opposite is far closer to the truth. The States of Missouri and Louisiana, among others, are plaintiffs in the case. Those state governments have brought a lawsuit in their sovereign capacities, seeking a federal court judgment ordering private social media platforms to change their content moderation policies to be more accommodating to speech of which those States approve. This Committee is holding hearings about those social media platforms' content moderation policies, bringing the full weight of the House of Representatives to bear on those private companies' decisions about what content they wish to host on their platforms.

This is not idle political theatre. The stakes are high. The consequences of unchecked misinformation spreading like wildfire across social media are grave. It is often said that Americans inherit a birthright of liberty that endows them with the inviolable right to make personal medical decisions. But Americans' liberty and their lives are endangered when they make those decisions based on lies about the safety and effectiveness of vaccines. It is often said that free and fair elections are the foundation of the democratic legitimacy of American government. But the integrity of American democracy and the rule of law itself are violently assaulted when baseless conspiracy theories about voter fraud lead hundreds of members of Congress, including members of this Committee, to attempt to overturn the legitimate results of a presidential election by objecting to lawful electoral votes.

Social media platforms face an immense challenge in attempting to maintain their platforms as robust forums of Americans' discourse on matters of public concern, uncorrupted by the misinformation that transforms the free exchange of ideas into an unfettered free-for-all of falsehoods and lies. There is no question that social media platforms can and must do better at that critical task. And there is no question that attempts to handicap those efforts, often by precisely those politicians who are themselves purveyors of misinformation, does grievous harm to American democracy.

I thank the Committee for the opportunity to testify, and I look forward to answering your questions.