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"Protecting Free Speech in American Elections"

Good morning, Chairman Steil, Ranking Member Morelle, and members of the committee.

Thank you for inviting me to testify before you today on a topic that I believe to be both an existential threat to our democracy and corrosive to our core values as a nation.

I'm referring of course to the pervasive coordinated efforts between government and private actors to influence the outcome of our elections.

I'd like to address two separate but related examples of the ever-expanding public-private alliances directly impacting public trust in American elections: the expanding government efforts to censor core political speech online, and the increasing use of private funds to run public election operations.

It's important at the outset to recognize an obvious yet fundamental prerequisite to the successful functioning of our form of government: it only works if the governed believe in it.

This necessarily requires a significant degree of trust in the process—a level of trust that is receding in communities across the country.

Growing consternation over the integrity of U.S. elections is due in large part to the actions of the government itself—both its failure to perform its proper election-administration functions and its misguided attempts to perform functions it shouldn't.

In my law practice, non-profit work as founder of the Center for American Liberty, as Chairman of the Republican National Lawyers Association, and as a representative of millions of California voters at the Republican National Committee, there are few issues that I have to discuss and analyze more than the unfortunate and precarious situation we face with respect to trust in our elections. This includes the indefensible state of political censorship permeating everyday life.

While many Americans are either oblivious or deliberately ignorant to the varying state-sponsored efforts to censor constitutionally protected speech, those of us who are paying attention are quickly losing trust in our government. And the longer this infection festers, the more disillusioned the American public will become.

Reporting over the past year reveals an alarming degree of collusion between government, big tech, media, non-profit organizations and academics to identify and stifle what they collectively decide is "misinformation."

For example, in an illuminating piece by the Intercept, journalists Ken Klippenstein and Lee Fang reported in detail the federal government's efforts to work with social media companies to censor disfavored opinions. The piece describes the formalized processes that social media platforms including Facebook, Instagram, and Twitter created that allow the government to quickly "flag" content for removal, and the vast network of non-profit organizations working in concert with the federal government and social media companies to police online speech. Many of these organizations are affiliated with prestigious universities, and have extensive resources to police online platforms.

Ultimately, this is a story of top-down command and control. As one FBI official noted during a meeting with the Bureau's censorship partners,

the end goal is to create "a media infrastructure that is held accountable."

But accountable to whom?

Much of what we've learned in recent months about the extent to which these censorship efforts were coordinated is the byproduct of litigation discovery. Last year, then-attorney general Eric Schmitt of Missouri and attorney general Jeff Landry of Louisiana sued the federal government for its role in policing online speech. What these states have uncovered should concern anyone who cares about protecting civil liberties.

The allegations in the complaint rely on extensive documentation that describes at a granular level how private social media platforms and high-ranking government officials worked together to define "misinformation." These efforts were especially targeted toward topics such as the origins of COVID-19, the efficacy of mask mandates and COVID-19 lockdowns, and most relevant to our current conversation, speech about election integrity and the security of voting by mail.

I commend Missouri's and Louisiana's efforts to uncover the full extent of the federal government's censorship efforts, and I am hopeful the courts will recognize the grave constitutional concerns at issue here.

While this coordination was apparent to those of us who have been scrutinizing growing censorship concerns over the past several years, many of our fears were confirmed with the release of "the Twitter Files" last fall.

As the committee is likely aware, shortly after Elon Musk purchased the social-media platform Twitter last October, he ordered the release of a trove of documents and records of communication between our government and Twitter, one of the largest and most influential social media companies in the world.

Thanks to excellent reporting by a handful of independent journalists, the public learned that the efforts by the federal government to

coordinate, and even pressure, private social-media companies to silence certain information, and even speakers, were a top priority.

The government's censorship campaign spanned multiple federal agencies and involved hundreds, if not thousands, of government employees leveraging the full weight of federal bureaucracy, with its implied coercion, to systematically direct the suppression of political opponents' viewpoints.

Here are just a few examples of what the Twitter Files reporting uncovered:

- Twitter's ominously named "trust and safety team" coordinated extensively with the FBI to limit the spread of so-called "election misinformation." The FBI even paid Twitter millions of dollars for its staff time spent on the FBI's censorship priorities.

- Twitter aided the United States Intelligence Community in running online "influence campaigns" in other countries such as Yemen, Syria, and Kuwait, preventing certain accounts that were covertly run by the U.S. government from being flagged and banned.

- Twitter also engaged in extensive "visibility filtering," also known as "shadow banning" to limit the reach of certain opinions on its platform. The reach limitations applied almost exclusively to accounts that shared opinions different than the government-approved narrative on issues such as election security and the COVID-19 pandemic.

- Twitter relied on both government agencies and non-profit organizations to identify content that supposedly violated the platform's terms of service. These censorship soldiers almost universally agreed with the government's position on what constituted "misinformation" and was thus subject to censorship.

Each of these examples is emblematic of a larger problem permeating the federal government: Agencies have been granted license to engage in

unregulated censorship operations that target American citizens with little or no oversight from Congress. Any opinion that is deemed "wrong" subjects a speaker to sanctions including curtailment of their ability to be heard, and those silenced have little, if any, recourse to appeal their banishment from the platform—today's most popular form of communication on matters of politics, policy, and culture.

The silencing of American speakers by our government's hand is antithetical to the values of free expression that are central to our national identity.

Sadly, the censorship industrial complex is not just limited to the federal government—states are following suit.

One of my clients has been a victim of state-led efforts to censor political speech online. Mr. Rogan O'Handley, known to his hundreds of thousands of followers online as @DC_Draino, was targeted by the California Secretary of State in the days and weeks following the 2020 election.

In 2018, the California Legislature created the obscurely named Office of Election Cybersecurity, which was given a mandate to partner with social media platforms to target and remove online "misinformation." Any comment deemed a threat to the government's narrative about our elections being secure was subject to removal.

What's more, OEC outsource some of its speech-police work to private entities with known political bias. The OEC contracted with the SDKnickerbocker, a "communications" consulting firm—which lists multiple Democratic candidates for office as clients—to identify wrongspeak online and report it to the OEC. The OEC also worked with the National Association of Secretaries of State to coordinate its censorship efforts with social-media companies.

Though Mr. O'Handley did not have a record of violating Twitter's terms of service, that quickly changed once the OEC noticed him. Just days after the 2020 election, the state of California flagged one of Mr. O'Handley's tweets as "misinformation," notified Twitter of the supposed

violation of its terms of service, and then sat back and waited for Twitter to ban Mr. O'Handley. It wasn't long before my client was kicked off the platform, harming his livelihood and reputation in the process.

The entire ordeal unfolded pursuant to a well-understood process: the state tells Twitter which speech to censor, and Twitter dutifully complies. Had the state not told Twitter to censor my client, there is no reason to think the company would have given his tweets a second thought.

Let me be clear: this was a direct request by a government agency to silence the political speech by an American expressing a disfavored viewpoint about an election. In any other context, this would be an obvious constitutional violation. But because the speech occurred on a private social-media platform, courts to date have been hesitant to apply the constitution, despite excessive and coercive government action.

The Ninth Circuit, for example, rejected Mr. O'Handley's free speech and discrimination claims against both Twitter and the state of California. The court reasoned that because Twitter is a private platform that was merely enforcing its terms of service, neither it, nor the state of California violated the constitution by censoring a specific speaker for his political speech.

This unwillingness by courts to recognize established constitutional principles in the context of social media platforms is unsettling, especially given how important these particular constitutional protections are to free expression in our country.

Indeed, the question of whether government may silence core political speech has long been settled. More recently, the Supreme Court recognized in *Packingham v. North Carolina* that social media platforms are the "modern public square," an important recognition by our Nation's highest court of the practical role social media play in every-day life.

The bedrock constitutional principle prohibiting censorship—coupled with the recent recognition that citizens increasingly engage in protected speech on private platforms—creates an important foundation for the future of free speech in this country. But until the Supreme Court takes

the opportunity to clarify this important contour of constitutional jurisprudence, the political branches of government must act.

Later this summer our team at the Center for American Liberty will be filing a Petition for a Writ of Certiorari with the Supreme Court to hear Mr. O'Handley's case and reaffirm the constitutional protections for political speech online. We are hopeful that the Court will recognize that these coordinated efforts to silence opinions disfavored by the government fall squarely within the bounds of constitutional protections.

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Even if the Supreme Court does extend First Amendment protections to prohibit government coordination with private social media platforms, federal statutory law could still bar claims against the social media companies themselves for their role in discriminatory and manipulative censorship practices.

This is primarily the result of two separate shortcomings in the law that Congress should address:

- First, courts have interpreted Section 230 of the federal Communications Decency Act of 1996 to create expansive statutory immunity for social-media companies' content-moderation decisions.

- Second, there is a surprising lack of regulatory controls prohibiting social-media companies from engaging in viewpoint discrimination or engaging in post-hoc rulemaking, thus leaving consumers with fewer rights and protections than in just about any other sphere in the economy.

Taken together, these two missteps compound a growing problem—social-media companies have all the benefits of government-provided immunity from legal liability for what are known as "traditional publisher functions" while also retaining the ability to discriminate against users at will.

Congress enacted Section 230 in the early days of the internet to encourage growth of the burgeoning industries that relied on the world

wide web. The statute accomplished this by providing immunity to platforms that published content created by others—allowing these companies to host large amounts of user content without fear of being held liable for any harm that content might cause (such as defamation of third parties). Importantly, however, content created by the platform itself, in whole or in part, is not protected by Section 230.

In addition to immunizing against harm caused by publishing others' content, Section 230 also immunizes the act of restricting access to content, so long as the restriction was done in "good faith."

Though the two distinct functions of Section 230 immunity are clear from the text and structure of the statute alone, lower courts have created an extensive body of confused and imprecise interpretations of this provision. Chief among these missteps is the unfortunate trend of collapsing the immunity for *restricting access* into *publisher immunity*, thus creating one giant liability shield for anything considered to be a "traditional editorial function."

This immunity mutation covers any decision by a platform to publish (or not publish), edit, or withdraw content. Consequently, social-media companies need only argue that their content-moderation decisions meet the broad concept of a "traditional editorial function" to escape legal liability for censorship, *regardless of whether they acted in good faith*.

Predictably, the shadows of lower courts' overbroad interpretation of Section 230 are a haven for the discriminatory content-moderation practices that fuel the censorship culture endemic among social-media companies. For example, in Mr. O'Handley's case, Twitter argued that it was immune for censoring his tweets about the election because doing so was a "traditional editorial function." For this reason, according to Twitter, it was not required to act in good faith. But this argument reads the good faith requirement—which was supposed to apply when a website's restricts access to content—right out of Section 230.

Under this interpretation, platforms can freely censor content that does not fall within their version of "the Truth," and yet escape liability for their viewpoint discrimination by hiding behind Section 230's liability

shield. The plain text of the statute should prohibit this result, yet lower courts' misreading of Section 230 has effectively given social-media companies blanket immunity for their content-moderation decisions.

Congress would do well to clarify this aspect of Section 230 to ensure that it does not protect intentionally discriminatory content-moderation practices conducted in concert with government actors.

The second barrier to the free exchange of ideas on social-media platforms is the lack of state or federal regulatory controls that prevent social-media companies from engaging in discriminatory or even arbitrary censorship practices in the first place. Even if Section 230 didn't shield a platform's censorship practices from liability, there is no guarantee a user would have any legal recourse for holding the platform accountable when it engages in viewpoint discrimination.

Some states have passed laws designed to fix this problem. I want to focus on Texas.

To bring neutrality back to content moderation practices, Texas enacted a law that prohibits social-media platforms from discriminating against user content based on viewpoint. The law allows social-media companies to continue removing unlawful content from their platforms but prevents them from blocking users and removing content simply because they disagree with what the user has to say. If a social-media company violates these prohibitions, it can be required to restore blocked users and content and pay the user's attorney's fees.

In *NetChoice v. Paxton*, the Fifth Circuit upheld the Texas law as constitutional, rejecting social-media companies' argument that *they* have a First Amendment right to be free from government regulation in deciding what user content to leave up and what to take down on their websites. According to the Fifth Circuit, the First Amendment protects speech, not censorship, and the Texas law neither restricts what social-media companies may say nor compels them to speak. Instead, it merely requires that they not discriminate against their users based on viewpoint.

Under the Fifth Circuit's reasoning in *Paxton*, Congress and the states have tools available to rein in social-media companies' discriminatory censorship practices.

Congress and state legislatures are best positioned to enact reasonable and sensible regulatory controls that both recognize the outsized role social-media companies play in modern discourse and take appropriate actions to ensure these companies act fairly and responsibly in their content-moderation practices.

While Texas has demonstrated the good sense to take such steps, other states have been slow to follow suit, and Congress has yet to advance any meaningful reforms that adequately address this rampant trend of discrimination. A legislative fix can't come soon enough.

In the meantime, the Supreme Court has an opportunity to begin reining in social-media companies' license to censor by limiting the scope of Section 230.

The Court recently heard arguments in *Gonzalez et al. v. Google*, a case that presents the question of whether a website is immune under Section 230 for its recommendations of others' content. This will be the first time the Court has considered Section 230 since it was passed in 1996. Depending on how broad the decision is, it could address the problem with lower courts' expansive reading of publisher liability. At this time, it is impossible to know how the Court will rule, but we will know in the next couple of months.

This need for judicial intervention can be avoided if Congress itself clarifies the scope of Section 230 protections. It is within the power of this body to modify the statute to bring it current with modern times and methods of communicating, and limit the ambiguity currently used to protect mass censorship by online platforms, often hand in hand with the government.

And even if *Gonzalez* corrects lower courts' expansive reading of publisher liability under Section 230, that case will not create regulatory restraints. Only Congress or the states can do that. The plaintiffs in

Gonzalez sued under the federal Anti-Terrorism Act, which applies in only a narrow set of situations, and one that would not be generally available to people who were discriminated against based on their election-related speech.

I'm hopeful that members from both parties in both chambers would support legislation that protects free expression, and not censorship, online.

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The extensive reporting on the issue of social media censorship and discovery obtained through the Missouri-Louisiana lawsuit both paint a frightening picture: A powerful conglomerate of putatively altruistic protectors of "Truth" has the full weight of the U.S. government behind it, the full weight of many state governments behind it, and the near-universal blessing of every legacy media outlet in the country, which millions of Americans rely on to stay informed.

Collectively, the most influential institutions in our society have created a well-oiled machine that can identify, rout out, and then suffocate any opinion that dares challenge the accepted narrative. From scientific debate to questions of election integrity, no topic of discussion is immune from censorship.

The end result of this campaign to combat "misinformation" is that any speech conflicting with the government-created definition of "the Truth" is held as intolerable heresy that must be roundly rejected, condemned, and ultimately smothered to prevent further consumption and contemplation.

Indeed, the U.S. Department of Homeland Security even attempted to formalize the command structure for this censorship army through the creation of the Orwellian-named "disinformation governance board." Fortunately, this effort appears to be on hold for now. But until Congress expressly forbids such an agency, the prospect of a Ministry of Truth in our country will continue to chill protected speech.

I urge each of you to exercise your authority as members of Congress to put an end to the vast, and ever-growing, censorship efforts led by the federal government.

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I'd like to touch briefly on another growing concern related to election integrity. That is, private funding of public election functions.

States are grappling with the phenomenon of "Zuckerbucks." This is a short-hand reference to private entities injecting hundreds of millions of dollars into the local-election administration in battleground precincts, determined on a partisan basis, that often decide the outcome of important elections.

Election officials in battleground states, as a condition of these partisan grants, are often required to work with "partner organizations" to massively expand mail-in voting and staff their election operations with partisan activists. This targeting has effectively obliterated state budget control and oversight of how resources are allocated for election administration.

During the 2020 presidential election, for instance, nearly 2,500 election offices across the country received grants of varying amounts from the Center for Technology and Civic Life (CTCL), a liberal nonprofit founded in 2015.One of CTCL's largest donors was the Chan Zuckerberg Initiative. Google and Facebook contributed $350 million to the initiative so that CTCL could regrant the funds to local election jurisdictions.

CTCL's election grants were advertised as additional resources to help election jurisdictions "safely serve every voter" amid the COVID-19 public health emergency. But the available data shows that the funds were largely requested for get-out-the-vote efforts. Further, the data shows that less than one percent of the funds were actually spent on PPE nationwide.

Zuckerberg and his wife also funded Center for Election Innovation and Research (CEIR), another nonprofit whose stated purpose is to work with states to help them maintain accurate and current voter lists and secure

their election technology to prevent interference. In reality, many voters in battleground states and those who study election administration have observed that funds from CEIR were used disproportionately to boost turnout in the 2020 election in heavily Democratic, urban areas, while little of the funds went to "partnerships" with local elections offices get out the vote in more conservative jurisdictions.

This unprecedented merger of public election authority with private resources and personnel is an acute threat to our republic and should be a focus of electoral reform efforts moving forward. While a handful of state legislatures have taken the necessary first step of passing laws banning Zuckerbucks from influencing our elections, Democrat governors (including the governors of Pennsylvania, Michigan, Wisconsin and North Carolina) have *vetoed* those measures. It is critically important, then, to continue to push these reforms forward, as they will likely continue to be met with fierce resistance from Democrats and their lawyers seeking to embed nonprofit-funded partisans in election offices.

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Collective trust in the democratic process, is essential. I urge the committee to consider action, both investigatory and legislative, to reign in these growing threats not only to our elections, but also to public confidence in the outcomes of our elections. If we continue to allow coordination between the government and private entities to stifle free expression and promote turn-out in certain favored jurisdictions, the American public will quickly lose confidence in the integrity of our electoral process.

Thank you for your time and attention to this matter. I'm happy to answer any questions you may have.

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