Censorship Laundering Part II:

Preventing the Department of Homeland Security's Silencing of Dissent

Testimony by Mark Chenoweth
President and General Counsel of the New Civil Liberties Alliance to the
Oversight, Investigations, and Accountability Subcommittee of the
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Chairman Bishop, Ranking Member Ivey, and members of the Subcommittee, thank you for inviting my testimony.

Introduction

The New Civil Liberties Alliance is a nonpartisan, nonprofit civil rights organization founded by prominent legal scholar Philip Hamburger, the Maurice and Hilda Friedman Professor of Law at Columbia Law School in New York City, to protect constitutional freedoms from violations by the Administrative State. Professor Hamburger is among the nation's foremost First Amendment scholars, and his brilliant scholarship informs the cases that NCLA pursues and the arguments that NCLA makes in those cases on behalf of our clients. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights. NCLA views the administrative state as an especially serious threat to constitutional freedoms. No other development in contemporary American law denies more rights to more Americans.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as freedom of speech, jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal administrative agencies, and even sometimes the courts have neglected them for so long. NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern. NCLA urges Americans to recognize the administrative threat and join our civil liberties movement against it.

From the outset of the Covid-19 pandemic, the New Civil Liberties Alliance has been dismayed at the widespread and brazen violation of Americans' civil liberties by all levels of government in the United States. It's as though officials

think the U.S. Constitution does not apply in times of emergency when, in fact, it is during such times of crisis that the Constitution's protections for individual rights are of paramount importance. NCLA's litigators have been at the forefront of the battles against illegal lockdowns, the unlawful nationwide eviction moratorium, and unconscionable vaccine mandates for university employees and students, federal employees, federal contractors, and others. Particularly with reference to vaccine mandates, NCLA adopted the position that natural immunity to Covid-19 is a real phenomenon and that vaccines are not necessarily appropriate—and certainly should not be mandated—for individuals who have recovered from Covid-19 and have antibodies against the virus, which can be measured through antibody testing. NCLA has also argued that federal law prohibits forcing anyone outside the military (and then only when ordered by the Commander-in-Chief) to take a vaccine that has only been approved under Emergency Use Authorization. We have also argued that it is a fundamental violation of personal liberty to be forced to accept an experimental vaccine as a condition of maintaining employment, especially public employment by a state or federal agency or state university.

In contrast, the federal government peddled the falsehoods that natural immunity does not exist to Covid-19, that vaccine immunity is superior to natural immunity, that lockdowns were an effective mitigation strategy, that everyone needs the vaccine, that the Covid-19 vaccines would stop transmission of the virus, that masks are effective in preventing transmission of the virus, that people hospitalized with Covid-19 need to be intubated, that EUA vaccines can be mandated for federal employees, that the Wuhan lab was not the origin of the Covid-19 virus, and so forth. Eventually, the federal government came to its collective senses and backed away from propagating most of these falsehoods. It was forced to abandon some of them after courts ruled against the government. Some of them persist today. However, thanks in part to NCLA's efforts, at least the government now admits that natural immunity to Covid-19 exists for some period of time among those who have recovered from the virus.

To make matters worse, not only did the federal government peddle falsehoods during the pandemic, but it also suppressed dissenting voices in the public square on Twitter, Facebook, and elsewhere, who dared to express rational and scientifically accurate views about the Covid-19 virus and the vaccines

authorized for emergency use in response to it. And it did so in blatant violation of the First Amendment. That is how NCLA first became aware of the vast and shocking censorship problem infecting the federal government today: our clients were censored for their views about Covid-19 and related issues.

We can come back to that, but first let's explore the legal principles at stake here and the scope of the problem as it pertains to the Department of Homeland Security.

Legal Principles

NCLA's most prominent role to date in fighting against unlawful federal censorship has been through our participation representing the individual plaintiffs in the Missouri v. Biden case, now pending at the U.S. Supreme Court under the name Murthy v. Missouri. The U.S. District Court for the Western District of Louisiana, which had the opportunity to look at all of the (admittedly still limited) discovery in this case before ruling, pronounced on the Fourth of July this year that "the present case arguably involves the most massive attack against free speech in United States' history." "Although this case is still relatively young, and at this stage the Court is only examining it in terms of Plaintiffs' likelihood of success on the merits, the evidence produced thus far depicts an almost dystopian scenario. During the COVID-19 pandemic, a period perhaps best characterized by widespread doubt and uncertainty, the United States Government seems to have assumed a role similar to an Orwellian 'Ministry of Truth.'"

On expedited appeal of that decision, the U.S. Court of Appeals for the Fifth Circuit, after noting that the U.S. Supreme Court has been reluctant to expand state-action doctrine, said: "[W]e do not take our decision today lightly. But, the Supreme Court has rarely been faced with a coordinated campaign of this magnitude orchestrated by federal officials that jeopardized a fundamental aspect of American life. Therefore, the district court was correct in its assessment – 'unrelenting pressure' from certain government officials likely "had the intended result of suppressing millions of protected free speech postings by American citizens."

As a reminder to this body, the First Amendment says, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Under the First Amendment, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU,* 535 U.S. 564, 573 (2002). This "profound" commitment to free speech is *even more necessary* when the debate may include critical or sharp attacks on government or its policies. *See NY Times v. Sullivan*, 376 U.S. 254, 270 (1964). And, of course, it is "axiomatic" that the Government may not "induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 431 U.S. 455, 465 (1973). So, just as the Fourth Amendment does not permit a police officer to ask a landlord to conduct an unconstitutional search on behalf of that officer, so too the First Amendment does not permit government officials to use third-party companies or platforms to censor lawful free speech indirectly that the government itself would be prohibited from regulating directly. If anything, given the 'abridging' language, the First Amendment protects against such machinations even more than the Fourth Amendment.

Again, the government cannot do indirectly through third parties what it cannot do directly. Congress must hold to that line. Otherwise, free speech is a dead letter, because the Executive Branch has countless ways of influencing private parties to suppress their speech—as we have seen in Missouri v. Biden. Indeed, this kind of soft power exercised through third parties may be worse in the sense that it is harder to fight, harder to prove, and easier for the government to get away with. Indeed, I daresay there are some in this room—on both sides of the aisle—who brush away the monumental efforts of the Biden Administration to squelch speech on Twitter, Facebook, LinkedIn and other social media sites as merely the actions of private companies. Not so. When the government coerces or pressures a company with inducements or threats and the company responds by crushing private individuals, that is state action, and the First Amendment forbids it. Or when the government has entangled its practices with a private company to where the company is relying on the government to identify individuals and accounts to be censored, the First Amendment forbids that too. Or, if the government writes and tests software to effectively monitor and shut

down speech that the government does not like and then turns that over to private operators to run the software program and execute the censorship it identifies, that is still state action.

Is every person who was ever canceled on social media a victim of state action? Maybe not, but without discovery into the government's unprecedented practices, NCLA and our co-counsel would never have uncovered how widespread this practice has been and how far up the chain of command it goes. We know the background level of censorship these companies engaged in before January 2021, especially Twitter given the disclosures of the Twitter files. And we know what they did in response to government pressure in terms of ramping up the amount of censorship they were doing. So, there is plenty of evidence here to ascertain that this censorship was not conducted as independent, private action.

But even the Fifth Circuit's test for government action here is flawed. We don't need and should not invent a judicial standard for adjudging infringements on free speech. The Constitution already provides the standard. The only question for the courts is whether the government's conduct has led to the "abridging" of speech. That is what the First Amendment's text proscribes. Not coercion. Not pressure. Not entanglement. Abridgment. And that is a very low bar. The First Amendment prohibits government from "abridging" freedom of speech (contrasted with prohibited in the context of religion)

The Bill of Rights' evolution demonstrates that the Framers purposefully decided to use the term "abridging" which is a different term than "prohibiting" which is used in the Free Exercise Clause. This was not a mere attempt to create linguistic variety. *See* Hamburger, *Courting Censorship*, __ COLUMBIA L. J at 39. An earlier draft of what would become the First Amendment separated the guarantees to free exercise of religion and free speech into two adjacent paragraphs, using the term "infringe" to designate unlawful government conduct in both contexts. *Id.* (citing House Committee Report (July 28, 1789), CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, 30 ed., Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford (Baltimore: Johns Hopkins Univ. Press 1991)). The two paragraphs were combined in a subsequent iteration, which used "prohibit" in the context of proscribed government conduct with respect to free exercise of religion, and "abridge" for speech. *Id.*

As Professor Hamburger writes: "This contrast is revealing. An action prohibiting is one that involves coercion—in the sense of government force or at least the threat of it. So, when the First Amendment distinguishes *abridging* and *prohibiting*, it tells us something important. A law can abridge the freedom of speech, or the press, without prohibiting or otherwise coercively assaulting it." *See* Hamburger, *Courting Censorship*, __ COLUMBIA L. J at 39. In other words, the Framers' conscious choice to use the terms "abridging" in the speech context and "prohibiting" in the religion context establishes that they sought to prevent Government from *diminishing* free speech to any extent. That means any action that the Government takes to impede free speech violates the First Amendment. By contrast, when it comes to religion, the Government's conduct must effectively "forbid" the free exercise, a much more severe action and a higher bar to clear.

Finally, in terms of legal principles, recognize that the Supreme Court has held that even "false statements, as a general rule" are not "beyond constitutional protection." United States v. Alvarez, 567 U.S. 709, 718 (2012). Thus, merely labeling disfavored speech as "disinformation," "misinformation," or "mal-information" does not strip it of First Amendment protection. Of course even under the government's own definitions, misinformation, disinformation, and malinformation are not necessarily false speech—often just inconvenient or unpleasant truthful speech.

But the court has explained that "… some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." Id. (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)). "Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech … it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." Id. at 723.

"The theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" Id. at 728 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). "The First Amendment itself ensures the right to respond to speech

we do not like, and for good reason. Freedom of Speech and thought flows [sic] not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates." Id. at 728.

Background on CISA and DHS

Founded in 2018, CISA, a component of DHS, was initially created to protect "critical infrastructure" (information technology, telecommunications, chemical, transportation systems, emergency services, postal and shipping) from cybersecurity threats.[1] It rapidly expanded its mission to combat foreign "disinformation." *See, e.g.*, CYBERSECURITY AND INFRASTRUCTURE SEC. AGENCY, #PROTECT2020 STRATEGIC PLAN, at 20 (2020), https://www.cisa.gov/sites/default/files/publications/ESI_Strategic_Plan_FINAL_2-7-20_508.pdf. That soon morphed into an attempt to control "cognitive infrastructure" in the context of elections, a term coined by Jen Easterly, former

[1] *See* https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/cisa-staff-report6-26-23.pdf at 5 (citing 6 U.S. Code § 652).

42 U.S.C. 5195c(e): Defines "critical infrastructure" to mean "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters." CISA https://www.cisa.gov/topics/critical-infrastructure-security-and-resilience

6 U.S.C. § 650 Defines: "cybersecurity risk" to mean threats to and vulnerabilities of information or information systems and any related consequences caused by or resulting from unauthorized access, use, disclosure, degradation, disruption, modification, or destruction of such information or information systems, including such related consequences caused by an act of terrorism;

And defines "cybersecurity threat" as "an action, *not protected by the First Amendment to the Constitution of the United States*, on or through an information system that may result in an unauthorized effort to adversely impact the security, availability, confidentiality, or integrity of an information system or information that is stored on, processed by, or transiting an information system" (emphasis added).

CISA director. *See* Maggie Miller, *Cyber agency beefing up disinformation, misinformation team*, THE HILL (Nov. 10, 2021).

Easterly's "cognitive infrastructure" spin conflicts with the definition of "election infrastructure" the then-DHS Secretary Jeh Johnson adopted in January of 2017 when he designated election infrastructure as "a critical infrastructure subsector:" "By 'election infrastructure,' we mean storage facilities, polling places, and centralized vote tabulations locations used to support the election process, and information and communications technology to include voter registration databases, voting machines, and other systems to manage the election process and report and display results on behalf of state and local governments. https://toresays.com/wp-content/uploads/2022/08/JohnsonStatement-ElectionInfrastructure.pdf

So, originally the term meant policing "misinformation" on social media, first about elections, but that soon crept into other areas too, including Covid (Easterly said, quoted in *Hill* article above: "One could argue we're in the business of critical infrastructure, and the most critical infrastructure is our cognitive infrastructure, so building that resilience to misinformation and disinformation, I think, is incredibly important[.]").

In June of 2021, DHS created the CISA Cybersecurity Advisory Committee, which in turn established the "MDM [misinformation/disinformation/malinformation] subcommittee]."[2] *See, e.g.*, CISA Cybersecurity Advisory Committee, Dec. 6, 2022 Meeting Summary Closed Session at 3. This Committee (since disbanded) brought together government, big tech, and academic "misinformation" experts, including Kate Starbird from the University of Washington and Renee DiResta from Stanford. One of the Committee's recommendations was that "CISA should approach the [misinformation and disinformation] problem with the entire information ecosystem in view. This includes social media platforms of all sizes, mainstream media, cable news, hyperpartisan media, talk radio, and other online resources."

[2] Definitions: "misinformation" means false information that the disseminator thinks is true; "disinformation" is false information that the disseminator knows is false; and "malinformation" is true information that "lacks context."

CISA's mission expanded even further outside its original purview: internal documents providing updates say, for example, that CISA is "bringing on staff to address MDM related to the pandemic."[3] By 2022, the CISA apparently believed its mission was "to strengthen the security and resilience of the nation's critical functions," or at least CISA's CSAC (Cybersecurity Advisory Committee) claimed that was CISA's mission.[4]

And believing CISA had a mandate to "strengthen the security and resilience of the nation's critical functions," CISA CSAC proposed CISA focus on "MD that risks undermining critical functions of American society including: (i) MD that suppresses election participation or falsely undermines confidence in election procedures and outcomes; (ii) MD that undermines critical functions carried out by other key democratic institutions, such as the courts, or by other sectors such as the financial system, or public health measures; (iii) MD that promotes or provokes violence against key infrastructure or the public; and (iv) MD that undermines effective responses to mass emergencies or disaster events."[5] Any attempt to limit CISA's purview to foreign actors by now had evaporated—the agency was explicit that it was involved in identifying domestic actors.[6]

CISA's Work with Third Parties[7]

CISA worked with third parties on a frequent basis, laundering the censorship through those third parties such as the Election Integrity Partnership (EIP) and the Virality Project (VP). Federal officials at CISA and GEC, and state officials through CISA funded EI-ISAC, work in close collaboration with the Stanford Internet Observatory (DiResta's organization) and other nonprofits.[8]

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[3] *See* https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/cisa-staff-report6-26-23.pdf at 16.

[4] https://www.cisa.gov/sites/default/files/publications/June%202022%20CSAC%20Recommendations%20%E2%80%93%20MDM_0.pdf

[5] https://www.cisa.gov/sites/default/files/publications/June%202022%20CSAC%20Recommendations%20%E2%80%93%20MDM_0.pdf

[6] *See* https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/cisa-staff-report6-26-23.pdf at 13.

[7] Note: the Fifth Circuit reversed the district court's injunction that covered these third parties. NCLA is asking the Supreme Court to reverse the Fifth Circuit on this point.

[8] *See* Proposed Findings of Fact at 285, Dkt. 212-3, *Missouri v. Biden*, (No. 3:22-cv-1213) (W.D. La 2023).

Moreover, it has recently come to light that DHS/CISA set up the EIP.[9]

CISA engaged in "switchboarding": CISA officials forwarded content flagged by third parties, especially local election officials, to the social media companies, either explicitly asking that such material be removed, or implying that it should be.[10] The Surgeon General's Office and other federal officials likewise collaborated closely with the Stanford Internet Observatory's Virality Project. *Id.*

The Stanford Internet Observatory and others had portal systems, through which they would report to social media companies posts that they thought contained "misinformation." The companies didn't *always* remove posts that SIO and other third-party groups flagged, but there was a high compliance rate. As an example, Virality Project flagged one of NCLA client Martin Kulldorff's tweets (which stated: "Thinking that everyone must be vaccinated is as scientifically flawed as thinking that nobody should. COVID vaccines are important for older high-risk people, and their care-takers. Those with prior natural infection do not need it. Nor children."). This tweet was censored, and Kulldorff's account was flagged as one that should be watched.

The Virality Project also wrote a report in which another NCLA client, Brianne Dressen, was identified as a purveyor of "misinformation" for discussing the adverse effects she suffered from the Astra Zeneca vaccine (following her participation in a vaccine trial) even though the NIH itself had diagnosed her as vaccine injured.

The U.S. Court of Appeals for the Fifth Circuit's Findings in *Missouri v. Biden* with Respect to CISA's Involvement in Social Media Censorship[11]

The Fifth Circuit held that the evidence showed "CISA's role went beyond mere information sharing. Like the CDC for Covid-related claims, CISA told the platforms whether certain election-related claims were true or false. CISA's

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[9] *See* Alex Gutentag and Michael Shellenberger, *New Documents Reveal US Department of Homeland Security Conspiracy to Violate First Amendment and Interfere in Elections* (Nov. 7, 2023), https://public.substack.com/p/new-documents-reveal-us-department

[10] *See* https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/cisa-staff-report6-26-23.pdf at 12.

[11] Whether or not CISA appeared to have violated the First Amendment was the main issue upon which we requested reconsideration in the Fifth Circuit, and upon which the Fifth Circuit granted and extended the injunction to CISA.

actions apparently led to moderation policies being altered and content being removed or demoted by the recipient platforms." *Missouri v. Biden*, 83 F.4th 350, 365 (5th Cir. 2023) (decision after reconsideration). "CISA also likely violated the First Amendment." *Id.* at 391. CISA was a "primary facilitator" of the FBI's interactions with the social media platforms and worked in close coordination with the FBI to push the platforms to change their moderation policies to cover "hack and leak" content.

CISA's switchboarding operations were more than merely relaying information—it used frequent interactions with social media platforms to push them to adopt more restrictive policies on censoring election-related speech. CISA told the platforms whether the content they had switchboarded was true or false—the platforms' censorship decisions "were made under policies that CISA has pressured them into adopting and based on CISA's determination of the veracity of the flagged information."

NCLA's Clients

The Questions Presented in the Murthy v. Missouri case are:
(1) Whether respondents have Article III standing;
(2) Whether the government's challenged conduct transformed private social-media companies' content-moderation decisions into state action and violated respondents' First Am. rights; and
(3) Whether the terms and breadth of the preliminary injunction are proper.

NCLA's clients in the Missouri v. Biden litigation are Dr. Jay Bhattacharya, Dr. Martin Kulldorff, Dr. Aaron Kheriaty, and Ms. Jill Hines. Their speech has revolved around the extent to which the government's public health and public policy advice about Covid 19 is sound. Drs. Bhattacharya and Kulldorff were co-authors and signatories to the Great Barrington Declaration. They opposed lockdowns. Other speech included efforts to say that natural immunity is real, efforts to say that not every category of the populace needs the vaccine, efforts to oppose forced vaccination, efforts to say that natural immunity provides equal or greater protection than the vaccine.

Note that several examples of suppressed speech were neither misinformation, disinformation, nor even malinformation. Indeed, the government now admits that natural immunity exists and is effective against

reinfection with Covid-19 for at least as long as the vaccine, though the government still wants those folks vaccinated, saying that there is some marginal benefit to them. Note as well that several of the government's false narratives were allowed to propagate widely on social media unrefuted. For example, the narrative against natural immunity and the narrative refuting that the Wuhan Institute of Virology was the source of the virus (via a leak from the lab) persisted.

We have only been able to obtain limited discovery in the Murthy v. Missouri case because we are still at the preliminary injunction phase of litigation. The Supreme Court may or may not decide that we have enough discovery to establish connections to the extent its precedents will demand. That is in part because the Court might demand a coercion or significant encouragement standard that is higher than the "abridging" standard set by the First Amendment itself. Such a standard would not be consistent with either the text of the First Amendment or jurisprudence in the area, and it would have disastrous, broad implications for Americans' First Amendment speech rights.

If these plaintiffs are unable to succeed, it is hard to envision how future litigants will do so. Consider first that in this case there was a district court judge who was willing to order a modicum of pre-injunction discovery. Second, we were able to turn up a fair bit of good discovery and identify at least some of the correct government officials to seek information from—though the government lied to us about the scope and identity of relevant officials. Third, we discovered this dishonesty because we also obtained third-party discovery from Facebook, which turned over dozens more emails and similar communications with government officials that the government's initial response to discovery had omitted. Fourth, we also were able to rely on the Twitter Files to some extent to find examples of censorship. That material only became available because Elon Musk bought Twitter and for no other reason. Fifth, we were able to rely on the investigative journalism work of Michael Shellenberger, Matt Taibbi, and others, who combed through the Twitter files and made some relevant information public. Finally, Congress used its oversight capacity to issue subpoenas that turned up some additional information. This came rather late in the game, so it has not been as beneficial as it would have been if it had come earlier, but it is still useful to have.

To see how difficult these cases are to bring and win, consider that NCLA already lost a very similar case at the circuit court level, which we are still appealing. In the Sixth Circuit, we filed suit on behalf of three clients—Mark Changizi, Michael Senger, and Daniel Kotzin—whose messages were taken down from Twitter and in one instance our client was kicked off Twitter entirely. But the panel ruled against our clients on standing, saying that they could not trace their harm to government conduct. In other words, the complaint supposedly did not state enough facts to meet the bare minimum necessary to allege government wrongdoing.

The district court in that case had denied us any discovery. The Court of Appeals then limited itself to the facts in the complaint, even though many more facts had come out by the time of the briefing on appeal and the oral argument. The Sixth Circuit, without reaching the merits of the First Amendment issues in the case, held that we had not met the minimum pleading standards to even survive a motion to dismiss.

The court also said that our allegations against the government were—and I quote—"not phantasmagoric" which is a funny thing to say since all of our allegations were facts provable and proved from discovery obtained (albeit later) in the Missouri v. Biden litigation. Yet that was not enough for a panel in the Sixth circuit to even allow our clients to survive a motion to dismiss. Under such circumstances, where courts are willing to put blinders on to well-established facts, it is hard to see how other plaintiffs will be able to make any headway against government censorship. Under this standard, most people being censored would never be able to plead their allegations with the degree of specificity apparently required to survive a motion to dismiss.

Several of the modes of censorship used against our clients are surreptitious; that is, our clients did not even know they were being censored in some cases or on some platforms for a long time. They certainly were unaware of the government's insidious involvement in their censorship, which for the most part was conducted via backdoor channels, behind closed doors. Thus, the government has been able to evade democratic accountability for federal conduct that violates core First Amendment-protected activity. You may wonder how extensive this censorship has really been. If so, recognize that information taken

down has included: (1) known and open parody accounts; (2) information posted by experts from the nation's top medical schools and universities; (3) In our Dressen v. Flaherty case, the government stooped so low as to shut down support groups for vaccine-injured individuals. These are the equivalent of cancer support groups, private online groups where people can go for emotional support. Some people kicked off of these platforms have committed suicide and/or failed to get assistance (or failed to learn of better medical protocols) that could have led to better outcomes for them sooner. The government wants people's personal reports of their own symptoms and experience, the most personal of truths, taken down. This is essentially private speech among people who want to engage in consensual speech with each other (i.e., conversation), and it is speech occurring among already vaccinated people who in reality had no chance of promoting vaccine hesitancy to the general public because the speech occurred in private forums. And yet even that was taken down. This is censorship to the nth degree.

Recommendations

In considering solutions to the federal censorship conduct problems at DHS, CISA, and across the federal government, Congress needs to realize that there is very little recognition among the offending officials that they are blatantly violating the First Amendment. About the only recognition comes in those places where officials (mistakenly) seem to think that orchestrating censorship through third parties somehow insulates it from violating the First Amendment. Keeping that in mind, Congress should demand better education of front-line executive branch officials about their constitutional obligations and responsibilities. These officials who requested the takedown of lawful speech had an independent duty to uphold the First Amendment, which they ignored.

(1) If this censorship were being done by state officials, censorship victims could sue under Sec. 1983 for deprivation of their civil rights. Congress could create a federal cause of action akin to Sec. 1983 for victims of censorship to sue federal officials who violate their First Amendment rights.
(2) Congress should outright forbid anyone in the Executive Branch or Legislative Branch from ever requesting lawful speech to be taken down.
(3) Where the federal government decides to request speech to be taken down, because it is unlawful speech—and NOT just because it violates a

platform's internal policies—those requests should only be made where they are transparent, immediately public, and made by a named individual in the federal government who can be held responsible for that decision by Congress and the censored individual(s).

Conclusion

The censorship discussed here involved many topics, including election-related speech like the Hunter Biden laptop and climate change-related speech. The last of these was not part of the preliminary injunction as discovery was not taken at the preliminary injunction stage to support the complaint's claims on that topic. Still, the debate over nearly all things related to Covid-19 provides a perfect case study for Americans to realize the danger that exists when the government pushes for the censorship of dissenting views. Without the government's participation, it is doubtful that the media would have uniformly censored those stories, and the censorship gravely injured Americans' ability to make important decisions regarding their health and the health of their families. We have evidence, in the form of email exchanges, that the social media companies were caving to pressure from government when they censored certain topics. For instance, as the Facebook Files demonstrated, the lab leak theory was censored on social media due to pressure from the White House. Meta Head of Global Affairs, Nick Clegg, asked a colleague in charge of content policy why the story had been censored, and the colleague responded, "Because we were under pressure from the [Biden] Administration and others to do more" and that "we shouldn't have done it." Meta acknowledged changing its policies regarding content discussing adverse events of the vaccine to avoid retaliation from the White House.

This is conduct that violates the First Amendment rights of censored Americans—as well as the rights of every other American to listen to and learn from those censored perspectives to draw their own conclusions about the truth. As Justice Robert Jackson famously said in the West Virginia v. Barnette case: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

Less famously, as Justice Jackson noted two years later in Thomas v. Collins, "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech and religion. In this field, every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." Today's federal government has strayed far from this wise and constitutionally required path. I hope that this Committee will ensure that the Executive Branch corrects course.