

U.S. House of Representatives Small Business Committee Hearing

“Under the Microscope: Examining the Censorship-Industrial Complex and its Impact on  
American Small Businesses”

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The concepts of free speech and censorship are complex and highly contested. The distinction between government actors and private actors, between speech protection and speech promotion, and between popular and legal definitions of free speech can make it difficult to engage in clear discussions of First Amendment issues. As both a law professor and the head of a nonprofit organization, I hope to provide some guiding principles drawn from my scholarly expertise in First Amendment doctrine on the one hand and my advocacy experience with the real-world consequences of harmful speech on the other.

I want to begin first with a thought experiment. Imagine that a nongovernmental organization concerned with child welfare develops a system for identifying how often wholly AI-generated child sexual abuse material (CSAM) appears on certain websites. Even though fully virtual CSAM is protected by the First Amendment,<sup>1</sup> the organization believes that that such content is harmful and that advertisers and the public should know which sites are hosting it. Funded in part by a federal grant, the organization conducts extensive research and publishes a report of its findings and recommendations. The report assigns a high synthetic CSAM score—H-SCAM for short—to those sites that host large amounts of such content and a low synthetic CSAM score—L-SCAM—to those that host little or none of this content. In the wake of this report, many advertisers choose to pull their ads from the H-SCAM sites and many social media platforms decide to limit posts and accounts associated with those sites. The H-SCAM sites lose considerable revenue and visibility, leading to changes in their business operations and downsizing.

There are many ways to describe what has happened to the H-SCAM sites: they have been called out; they have been criticized; they have suffered consequences for their conduct. What they have *not* been is censored. The organization that published the report did not engage in censorship, but in speech—speech that advertisers, social media companies, and the public were free to ignore if they wished. The advertisers who pulled their ads from the H-SCAM sites and

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<sup>1</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

the companies that limited content associated with them also did not engage in censorship, but exercised their First Amendment right not to associate with speech they find objectionable. The organization and the H-SCAM sites both participated in the marketplace of ideas, and the H-SCAM sites lost.

The fact that the government provided funding to the organization does not alter the analysis. The government has both First Amendment obligations and freedoms. So long as it does not *prohibit* protected speech on the basis of viewpoint, the government is allowed to speak on its own behalf. It is allowed to take sides in controversial matters, including by funding certain messages and not others.

The analysis above applies with equal force to the situation described in the June 18, 2024, Memorandum from the U.S. House of Representatives Committee on Small Business Majority Staff providing the background for this hearing (hereafter Memorandum). While the Memorandum claims to target censorship, what it actually complains of is speech. Specifically, the memorandum objects to organizations and individuals engaging in “fact-checking,” “labeling businesses as purveyors of mis-, dis-, or malinformation,” “using select studies to support ... determinations of fact,” “push[ing] partisan narratives,” and “inaccurately painting a narrative as disinformation for partisan gain.”<sup>2</sup>

Even if one assumes that these highly subjective characterizations of the efforts of universities, research organizations, and experts to combat misinformation and election interference are accurate, what they describe is quintessentially protected speech. The First Amendment protects opinions, including aggressive, critical, and partisan ones, especially about matters of public concern.<sup>3</sup> It even protects false statements to some degree in some contexts. The fact that critical speech may lead to negative consequences for those being criticized—including by losing popularity in the marketplace of ideas or experiencing a decline in revenue—does not transform that speech into censorship. The same First Amendment that protects the right to speak also protects the right to reject, discredit, or ignore speech. The First Amendment does not provide protection against criticism. It does not guarantee any speaker a platform or a profit.

And while “[g]overnment officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors,”<sup>4</sup> the government is allowed to take sides in controversial matters—indeed, the government often *must* take sides in order to function. “When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others.”<sup>5</sup> To take one example, the federal government did not violate the First

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<sup>2</sup> U.S. House of Representatives Committee on Small Business Majority Staff, [Memorandum](#) RE: Full Committee Hearing Titled: “Under the Microscope: Examining the Censorship-Industrial Complex and its Impact on American Small Businesses,” 2-3 (June 18, 2024).

<sup>3</sup> The Supreme Court has stated that “debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>4</sup> *Nat’l Rifle Ass’n v. Vullo*, 603 U.S. \_\_\_, slip op. at 1 (2024).

<sup>5</sup> *Matal v. Tam*, 582 U.S. 218, 234 (2017).

Amendment when it created and distributed posters promoting enlistment and war bonds during World War I without balancing that message with posters discouraging those efforts.<sup>6</sup> The First Amendment “prohibits Congress and other government entities and actors from ‘abridging the freedom of speech,’” but the government retains the right to speak on its own behalf: “the First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely.”<sup>7</sup>

The Supreme Court has repeatedly affirmed that the federal government can make funding choices favoring particular messages without violating the First Amendment. In contrast to the Memorandum’s characterization of such choices as “censorship by proxy,” the Supreme Court has sharply distinguished between the government acting as a “sovereign” and acting as a “patron”<sup>8</sup> with regard to speech. “There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy,” the Court held in 1977. “Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State’s power to encourage actions deemed to be in the public interest is necessarily far broader.”<sup>9</sup> Applying this principle to the government’s decision to fund speech promoting childbirth but not speech promoting abortion, the Court held that “the Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.”<sup>10</sup>

To reiterate: Counterspeech is not censorship. Criticism is not censorship. Research, even when government-funded, is not censorship. Providing information to advertisers or businesses about what content their ads appear next to is not censorship. Efforts to convince consumers, business, and the public that certain kinds of content are false, fraudulent, harmful, extremist, harassing, or exploitative—regardless of whether that content is protected by the First Amendment—is not censorship.

The individuals, organizations, and research institutions fighting to maintain the integrity of our elections, our public health systems, and our information ecosystem are not censors. Their work may not be free of error or bias—no human work is—but it is speech that seeks to protect the public interest.<sup>11</sup> For engaging in this speech, they are being vilified, defunded, harassed, and threatened, including by members of Congress.<sup>12</sup>

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<sup>6</sup> *Id.* at 234-35.

<sup>7</sup> *Id.* at 234.

<sup>8</sup> *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998).

<sup>9</sup> *Maher v. Roe*, 432 U.S. 464, 475-76 (1977).

<sup>10</sup> *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

<sup>11</sup> Stanford Internet Observatory, [Stanford files amicus brief in Murthy v. Missouri pending before U.S. Supreme Court](#) (March 5, 2024).

<sup>12</sup> Steven Lee Myers and Sheera Frenkel, [G.O.P. Targets Researchers Who Study Disinformation Ahead of 2024 Election](#), N.Y. Times (June 19, 2023).

The Memorandum criticizes “the federal government” for using “taxpayer dollars” to encourage “consolidations of power around specific ideological viewpoints.”<sup>13</sup> But members of Congress are also part of the federal government, and the hearings, subpoenas, lawsuits, document requests, and investigations they have instigated against speech they do not like are also paid for by taxpayer dollars. And unlike the federal funding programs attacked in the Memorandum, these actions by government officials are not encouraging protected speech through subsidies, but interfering with protected speech through threats of punishment.<sup>14</sup>

These efforts have been extremely effective. According to a June 2023 article in the Washington Post, “As the field of disinformation research has grown more politically contentious, researchers say that records requests, subpoenas and lawsuits have become tools of harassment. The fear of being targeted is profound enough that several researchers spoke on the condition that they not be named, and one prominent professor asked to be removed from the story entirely, citing concerns about his family’s safety.”<sup>15</sup>

A little over a year later, the Post reported that the Stanford Internet Observatory, a cross-disciplinary program that provided in-depth analyses of social media’s role in child exploitation and the spread of false information about elections and vaccines “has shed most of its staff and may shut down amid political and legal attacks that have cast a pall on efforts to study online misinformation.”<sup>16</sup> Those attacks included “lawsuits, document requests and threats of physical harm,” including the targeting of student volunteers.

This is what censorship looks like: government-led efforts to directly suppress disfavored speech as well as to leverage third parties to assist those efforts. The harassment and silencing of misinformation researchers, especially in a year when a record-breaking number of elections will take place around the world, threatens free speech and democracy on an unprecedented scale. If Congress truly cares about censorship, it must acknowledge that the call is coming from inside the House.

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<sup>13</sup> Memorandum at 3.

<sup>14</sup> *Maher*, 432 U.S. at 475–76.

<sup>15</sup> Naomi Nix & Joseph Menn, [These academics studied falsehoods spread by Trump. Now the GOP wants answers](#), Wash. Post (June 6, 2023).

<sup>16</sup> Joseph Menn, [Stanford’s top disinformation research group collapses under pressure](#), Wash. Post, June 14, 2024.