

U.S. Senate Judiciary Committee Subcommittee on the Constitution

Hearing on Censorship

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Submitted March 24, 2025

I am a constitutional law scholar who has researched, taught, and written on First Amendment law for nearly two decades. I also study the intersection between technology and civil rights. For many years I have advocated for legal and policy reform to deter online abuses, especially those that disproportionately affect women, girls, and other vulnerable communities, such as the nonconsensual distribution of intimate imagery (sometimes called “revenge porn”), sexually explicit digital forgeries (sometimes called “deepfake porn”), and other forms of image-based sexual exploitation. A core theme of my advocacy on these issues has been to hold the tech industry accountable for its role in facilitating and amplifying these kinds of harms. I have had the privilege of testifying before both the Senate and the House on prior occasions about these issues, and of working with the offices of multiple members of Congress, both Democratic and Republican—including some of the members of this committee—on legislation to prohibit image-based sexual abuse and addressing Section 230 reform.

In this work, I have endeavored to honor the principles of free speech, due process, and equality that are essential to democracy, and greatly respect the members of Congress I have had the opportunity to work with who are committed to the same. First Amendment doctrine is complex, and my scholarship and my advocacy have often focused on aspects of free speech law that are ambiguous or contested. But my testimony for this hearing will focus on the aspects of the First Amendment that are absolutely clear.

These include, most importantly, the core principle of the First Amendment eloquently expressed in the 1943 case *West Virginia State Board of Education v. Barnette*. In the words of Justice Robert H. Jackson, “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.”¹

¹ 319 U.S. 624, 642 (1943).

To repeat: “no *official*” can dictate what Americans can say, think, or believe. The First Amendment constrains *the government* from interfering with freedom of speech. That includes the President, his administration, members of Congress, “special government employees,” state legislators, and other government actors. The First Amendment does *not* constrain *non-government* actors from making their own choices about what to say, what to hear, and what to promote. Indeed, it does the opposite.

This leads to a second fundamental and long-settled principle: the First Amendment protects the right of private actors—which includes individuals, private universities, nonprofit organizations, non-governmental organizations, and for-profit businesses—to ignore, criticize, or refuse to associate with speech they don’t like. The First Amendment protects what Justice Brett Kavanaugh has called “the robust sphere of individual liberty”²: the right of the people not only to speak, but also the right not to speak, the right not to associate with speech, and the right to criticize speech, also known as counter-speech.

A third longstanding principle of First Amendment law is that the government has its own rights of free speech: “The First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely.”³ The government has the right to *prefer* certain viewpoints, and it is allowed to communicate those preferences through persuasion, encouragement, and funding. The government is allowed to take sides in controversial matters—indeed, the government often must take sides in order to function.⁴ “When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others.”⁵ For example, during World War I, the federal government created and distributed posters promoting enlistment and war bonds even though it did not balance that message with posters discouraging those efforts. This was not a violation of the First Amendment even though it meant the government used its power to promote one view and not another.

This freedom to promote a particular viewpoint extends to government funding choices as well. The federal government is allowed, for example, to fund speech promoting childbirth without also funding speech promoting abortion: as the Supreme Court has stated, “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.”⁶

What the government may not do is *compel* private actors to think or speak a certain way through coercion or threats. There is a difference, the Supreme Court has emphasized, between

² *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 808 (2019).

³ *Matal v. Tam*, 582 U.S. 218, 234 (2017).

⁴ In *NRA v. Vullo*, 602 U.S. 175 (2024), the Court reaffirmed the right of the government to “say what it wishes’ and ‘select the views that it wants to express’” because “the government could barely function otherwise.” *Id.* at 187.

⁵ *Id.* (quoting *Matal*, 582 U.S. at 234).

⁶ *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

government *encouragement* and government *interference*.⁷ Government officials may “share [their] views freely and criticize particular beliefs, and ... do so forcefully in the hopes of persuading others to follow [their] lead,” but they “cannot attempt to *coerce* private parties in order to punish or suppress views that the government disfavors.”⁸

In summary: when government actors speak on their own behalf, this is not censorship. When government actors promote their own viewpoints, including through persuasion and funding, this is also not censorship. When non-government actors ignore, delete, reject, mock, or criticize certain kinds of speech, or encourage others to do the same, this is also not censorship.

But when the government purges books, words, and concepts that it does not like, that is censorship. When the government threatens people with the loss of employment, lawsuits, violence, jail, or deportation for their speech, that is censorship. When it seeks to force universities, law firms, or businesses to adopt the government’s viewpoint, or when it seeks to punish judges, lawmakers, journalists, religious leaders, teachers, or students for dissent or criticism of the government—that is censorship.

For Republicans to call yet another Congressional hearing to investigate the so-called “censorship industrial complex” of Biden administration officials, nonprofit organizations, and Big Tech companies allegedly collaborating to censor conservative speech—a conspiracy theory so ludicrous that even the current Supreme Court, stacked with a supermajority of far-right conservative judges, dismissed it out of hand last year in *Murthy v. Missouri*⁹—while ignoring the current wholesale assault on the First Amendment by the Trump administration is a betrayal of the American people.

As I stated in my testimony last year in a House Small Business Committee hearing on this same pernicious trope,

Counter-speech 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, businesses, 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.

What is more, the central premise at the heart of the myth of the “censorship industrial complex,” namely, that conservative speech is disproportionately suppressed or attacked online, is simply not true. As multiple researchers have observed, “Top conservative influencers have bigger

⁷ See *Maher v. Roe*, 432 U.S. 464, 475–76 (1977) (“There is a basic difference between direct state *interference* with a protected activity and state *encouragement* of an alternative activity consonant with legislative policy. 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.”) (emphasis added and footnote omitted).

⁸ *Vullo*, 602 U.S. 180, 188 (emphasis added).

⁹ 603 U.S. 43 (2024).

followings than top liberal influencers, and far-right accounts get more engagement on Facebook than accounts of other political persuasion. While conservatives are more likely to spread information that fact-checkers deem inaccurate, there's no available data to substantiate the allegation that conservatives are unfairly targeted by fact-checkers.”¹⁰

Even before Elon Musk bought Twitter and supercharged it for rightwing content, internal research demonstrated that its algorithms amplified rightwing content more than left-wing content. Research by the Tech Transparency Project found that YouTube algorithms create a much more robust filter bubble for right-wing content than leftwing content and that Fox News is by far the most recommended information channel on YouTube.¹¹ Researchers have suggested that the Fox News channel dominates YouTube because it traffics in conspiracy theories and employs more polarizing and inflammatory language than left-leaning channels like MSNBC. The influence of Fox News illustrates that the ecosystem of extremism and disinformation is not limited to social media. Indeed, in many ways, Fox News pioneered the strategies of outrage, engagement, and virality that now characterize social media.

Even before Mark Zuckerberg explicitly vowed to allow more false information and dehumanizing rhetoric, Meta deliberately promoted conservative sites on its platforms, even changing Facebook’s algorithm to reduce the visibility of left-leaning news sites and allowing right-wing sites to evade fact-checking and quality controls, despite the efforts of its own employees to convince the company to consistently apply its own policies.¹² Internal Facebook research, titled “Carol’s Journey to QAnon,” demonstrated how quickly Facebook’s algorithm recommended extremist conspiracy theories to an account set up for an imaginary woman with interests in Fox News and Sinclair Broadcasting. The day after the 2020 election, 10 percent of all political content posts viewed on Facebook in the United States falsely claimed that the vote was fraudulent.¹³

A 2025 Media Matters for America study found that “the right dominates the online media ecosystem, seeping into sports, comedy, and other supposedly nonpolitical spaces.”¹⁴ Among the key findings were that right-leaning online shows had nearly five times as many followers and subscribers as left-leaning shows and that nine out of 10 online shows with the largest followings were right-leaning.

¹⁰ Huo Jingnan & Lisa Hagen, *A White House order claims to end 'censorship.' What does that mean?*, NPR (Jan. 25, 2025), <https://www.npr.org/2025/01/24/nx-s1-5270071/eo-weaponization>.

¹¹ Tech Transparency Project, *YouTube’s Filter Bubble Problem is Worse for Fox News Viewers* (Oct. 24, 2021), <https://www.techtransparencyproject.org/articles/youtubes-filter-bubble-problem-worse-fox-news-viewers>.

¹² *Keach Hagey & Jeff Horwitz*, Facebook’s Internal Chat Boards Show Politics Often at Center of Decision Making, WALL ST. J. (Oct. 24, 2021), <https://www.wsj.com/articles/facebook-politics-decision-making-documents-11635100195>.

¹³ Ryan Mac & Sheera Frenkel, *Internal Alarm, Public Shrugs: Facebook’s Employees Dissect Its Election Role*, N.Y. TIMES (Oct. 25, 2021), <https://www.nytimes.com/2021/10/22/technology/facebook-election-misinformation.html>.

¹⁴ Kayla Gogarty, *The right dominates the online media ecosystem, seeping into sports, comedy, and other supposedly nonpolitical spaces*, MEDIA MATTERS (Mar. 14, 2025), <https://www.mediamatters.org/google/right-dominates-online-media-ecosystem-seeping-sports-comedy-and-other-supposedly>

Despite the domination of conservative content in the online ecosystem and despite the fact that private platforms and nongovernmental entities are fully entitled under the First Amendment to prioritize other content (even if government actors are encouraging them to do so), Republicans have used the myth of the “censorship industrial complex” to vilify and harass experts, students, government employees, and nonprofits working on online misinformation with the express goal of discrediting, defunding, and dismantling their work. These efforts have been extremely successful. 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, ended its Election Integrity Partnership rapid-response election observation work in the summer of 2024 after it was sued repeatedly by conservative groups, subjected to multiple subpoenas from Congressional Republicans, and its members (including students) were harassed and threatened. The Global Alliance for Responsible Media (GARM), a small, nonprofit, voluntary cross-industry initiative created by the World Federation of Advertisers to help advertisers avoid having their ads appear alongside content promoting child sexual abuse material (CSAM), terrorism, and anti-Semitism, was forced to fold in August 2024 after being targeted by Musk’s X. Republicans shuttered the Global Engagement Center, a unit of the State Department dedicated to countering foreign disinformation, in December 2024.

The myth of the “censorship industrial complex” and the disabling of safeguards against foreign and domestic misinformation and media manipulation has been essential to the far right’s political success. Abandoning fact-checking and allowing lies about immigrants, the economy, inflation, crime, and the 2020 election to flourish online greatly contributed to Trump’s presidential victory. Now the far right does not just dominate the online ecosystem, but also every political branch in the U.S. So far from being “liberal” in any meaningful sense, Big Tech has eagerly assisted in conservative demands for greater and greater deference to conservative content. The relationship between Big Tech and the Trump administration is so close that the two can hardly be distinguished from each other. Trump himself is the owner of a social media platform, Truth Social, which provides Trump with both a personal propaganda outlet and a lucrative source of income. At Trump’s second inauguration, five of the most powerful men in tech – including the three richest men in the world—stood on the dais with him: X owner Elon Musk, Amazon founder and owner of the Washington Post Jeff Bezos, Meta CEO Mark Zuckerberg, Apple CEO Tim Cook, and Google CEO Sundar Pichai. All of these men have signaled their eagerness to obey Trump’s directives in exchange for preferential treatment of their businesses. Most notable of these is of course Musk, who contributed a quarter of a billion dollars to elect Trump and turned X into a pro-Trump propaganda channel. For this, he was rewarded by being named Trump’s “special government employee” and granted seemingly unlimited powers over the federal government and over the American people.

Musk, Trump, and their collaborators have, within the span of a few weeks, unleashed the greatest assault on the First Amendment since the Red Scare—all the while insisting that they are “restoring freedom of speech.” This kind of gaslighting technique is familiar to those who study the dynamics of domestic abuse. Psychologist Jennifer Freyd created the acronym DARVO, for “deny, attack,

reverse victim and offender,” to describe how abusers avoid being held accountable for their actions, and her description of these tactics is illuminating here:

[A]busers threaten, bully and make a nightmare for anyone who holds them accountable or asks them to change their abusive behavior. This attack, intended to chill and terrify, typically includes threats of law suits, overt and covert attacks on the whistle-blower's credibility, and so on. The attack will often take the form of focusing on ridiculing the person who attempts to hold the offender accountable. [...] [T]he offender rapidly creates the impression that the abuser is the wronged one, while the victim or concerned observer is the offender. [...] The offender is on the offense and the person attempting to hold the offender accountable is put on the defense.¹⁵

The “censorship industrial complex” operates like other thought-terminating cliches such as “the woke mind virus” or “cancel culture”: as a way for powerful people to invert reality as well as First Amendment doctrine. This victim-claiming tactic seeks not only to distract the American people from the efforts of the government to engage in actual censorship, but to disguise these censorship efforts as free speech.

But the American people can see what is happening. The current President of the United States is ordering lawful residents to be kidnapped and expelled from the country because of their speech. He is dictating what words people are allowed to use, what educational institutions are allowed to teach, what values businesses are allowed to promote. He is declaring any person he disagrees with to be a criminal. He is calling for critics and dissenters to be imprisoned and assaulted. He is threatening journalists, students, judges, lawyers, religious leaders, governors—anyone he deems insufficiently loyal and insufficiently obedient. Trump’s message could not be clearer: you either bow down to him, or you will be punished. This is what censorship looks like.

You are members of the United States Senate, government officials tasked with the sacred duty of serving the American public—not a self-professed king and not his wealthy jester—and honoring their constitutional rights. This is a president who has declared himself above the law, including the First Amendment. Those who truly wish to fight censorship should start with him.

¹⁵ Jennifer Freyd, *Violations of power, adaptive blindness, and betrayal trauma theory*, 7 FEMINISM & PSYCHOLOGY 22, 30 (1997).