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Subcommittee on Oversight, Investigations, and Accountability

Hearing on "Censorship Laundering Part II:
Preventing the Department of Homeland Security's Silencing of Dissent"

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Chairman Bishop, Ranking Member Ivey, and Members of the Subcommittee, thank you for inviting me to testify today. My name is Alex Abdo, and I am the litigation director of the Knight First Amendment Institute at Columbia University.

The topic that this Subcommittee has been exploring on the relationship between the government and social media platforms is an important one—in large part because it implicates many competing First Amendment interests. I'd like to offer several observations to clarify the constitutional principles that should guide this Subcommittee's work.

First, as the Supreme Court held sixty years ago in *Bantam Books v. Sullivan*, the First Amendment forbids the government from coercing private actors into silencing disfavored speech.[1]

That decision was correct because coercion, by definition, overrides the ability of people to decide for themselves what to say, what to listen to, and what communities to join. This rule is important not only in protecting individuals, but also in protecting the social media platforms, which now play a vital role in hosting and curating the speech of millions of people. The communities they create reflect their own expressive decisions as well as the expressive and associational preferences of their users. Outside of very narrow exceptions, it would be inconsistent with the principle of self-government to allow officials to dictate the speech individuals may create and consume in these online communities, whether directly through official sanction or indirectly through official coercion.

[1] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71 (1963).

Second, while the First Amendment forbids the government from coercing private actors into suppressing speech, it does not preclude the government from trying to *persuade* private actors to embrace its views.

A democratically elected government must have the power to govern, and an indispensable tool in governing is attempting to galvanize public opinion. As the Supreme Court reaffirmed just a few years ago, governing "necessarily [involves] tak[ing] a particular viewpoint and reject[ing] others."[2] "[I]t is not easy to imagine," the Court wrote, "how government could function"[3] if it could not express its views.

The public also has a strong interest in hearing what its government has to say. Hearing the government's views helps ordinary citizens evaluate the government's decisions and hold government officials accountable for them. In addition, private actors often rely on the government's expertise in making decisions about their own speech. In the years after 9/11, for example, news organizations welcomed the input of the government in deciding whether to publish classified information that had been leaked to them.[4]

That's not to say, of course, that anyone should defer to the government's views, knowledge, or expertise. The government often gets things wrong.[5] But a rule requiring the government to stand silent on matters of public policy "would be paralyzing," as the Supreme Court has said.[6]

Third—and this is a point I really want to emphasize today—the First Amendment protects the right of researchers to study social media platforms, and to share their findings with the public, the platforms, and the government.

It should not need to be said that when researchers study the social media platforms, they are exercising rights protected by the First Amendment. When they criticize the platforms' content-moderation policies and practices, the First

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[2] *Matal v. Tam*, 582 U.S. 218, 234 (2017); *see also Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015) ("But, as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf.").

[3] *Matal*, 582 U.S. at 234 (internal quotation marks omitted) (quoting *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009)).

[4] *See, e.g.*, James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html ("After meeting with senior administration officials to hear their concerns, the newspaper delayed publication for a year to conduct additional reporting. Some information that administration officials argued could be useful to terrorists has been omitted.").

[5] *See, e.g.*, *'Group Think' Led to Iraq WMD Assessment*, Fox News (July 11, 2004), https://www.foxnews.com/story/group-think-led-to-iraq-wmd-assessment; Zeynep Tufekci, *Why Telling People They Don't Need Masks Backfired*, N.Y. Times (Mar. 17, 2020), https://www.nytimes.com/2020/03/17/opinion/coronavirus-face-masks.html.

[6] *Matal*, 582 U.S. at 234; *see also Bantam Books*, 372 U.S. at 72.

Amendment protects them. When they press the platforms to take down speech, the First Amendment protects them. And yes, even when you and I disagree with their research findings and proposals, the First Amendment protects them.

For these reasons, I think it's crucial for the Subcommittee to tread carefully in this area. It's legitimate to investigate the executive branch, to see whether it has coerced or conspired with researchers to suppress protected speech. But investigations of and lawsuits against private researchers who acted independently of the government are not a defense of the First Amendment; they are a grave threat to it.

Finally, let me conclude by acknowledging what I hope is a common concern—the concentration of private power over public discourse is a threat to free speech.

The First Amendment does not forbid the social media companies from assuming gatekeeper control over public discourse. Nor does it insulate them from careful regulation that would loosen that control.

Congress can, and should, pass legislation that would do just that. It should require the platforms to design their systems to be "interoperable," so that users can switch to competing services without losing their social networks. It should enact a privacy law that gives users greater control over their personal data, making it easier for users to switch between competing services and harder for platforms to obtain and monopolize access to the data that drives their profitability. And Congress should enact transparency laws that make it easier to study the platforms and the effects they're having on public discourse.

Carefully drafted laws of this kind would address some of the legitimate concerns with the platforms, consistently with the First Amendment.

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Thank you, again, for the opportunity to testify today.