

No. 23-30445

United States Court of Appeals for the Fifth Circuit

STATE OF MISSOURI; STATE OF LOUISIANA; AARON KHERIATY; MARTIN KULLDORFF; JAYANTA BHATTACHARYA; JILL HINES,
PLAINTIFFS-APPELLEES,

v.

JOSEPH R. BIDEN, JR.; VIVEK H. MURTHY; XAVIER BECERRA; DEPARTMENT OF HEALTH & HUMAN SERVICES; ANTHONY FAUCI, ET AL.,
DEFENDANTS-APPELLANTS.

*APPEAL FROM THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA,
NO. 22-CV-1213, HON. TERRY A. DOUGHTY, PRESIDING*

**BRIEF OF REPRESENTATIVES JIM JORDAN, KELLY ARMSTRONG,
ANDY BIGGS, DAN BISHOP, KAT CAMMACK, RUSSELL FRY, LANCE
GOODEN, HARRIET HAGEMAN, MIKE JOHNSON, THOMAS MASSIE,
BARRY MOORE, AND ELISE STEFANIK AS *AMICI CURIAE*
SUPPORTING PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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CERTIFICATE OF INTERESTED PARTIES

State of Missouri, et al. v. Joseph R. Biden, Jr., et al., No. 23-30445:

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1, in addition to those listed in the briefs of the parties, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amicus: Jim Jordan is a Member of Congress who represents the Fourth District of Ohio in the United States House of Representatives.

Amicus: Kelly Armstrong is a Member of Congress who represents North Dakota in the United States House of Representatives.

Amicus: Andy Biggs is a Member of Congress who represents the Fifth District of Arizona in the United States House of Representatives.

Amicus: Dan Bishop is a Member of Congress who represents the Eighth District of North Carolina in the United States House of Representatives.

Amicus: Kat Cammack is a Member of Congress who represents the Third District of Florida in the United States House of Representatives.

Amicus: Russell Fry is a Member of Congress who represents the Seventh District of South Carolina in the United States House of Representatives.

Amicus: Lance Gooden is a Member of Congress who represents the Fifth District of Texas in the United States House of Representatives.

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August 7, 2023

TABLE OF CONTENTS

	Page
Certificate of Interested Parties.....	i
Table of Authorities	iv
Interest of <i>Amici Curiae</i>	1
Introduction	3
Argument.....	6
I. The United States has coerced speech about COVID.....	6
II. The United States has coerced speech about Biden Family influence peddling.	14
III. The United States has coerced speech about elections.	22
A. Cybersecurity and Infrastructure Security Agency (CISA).....	23
B. The Election Integrity Partnership (EIP)	26
Conclusion	31

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Anderson v. Bessemer City</i> , 470 U.S. 564 (1985).....	4
<i>Arizona Free Enter. Club’s Freedom Club PAC v. Bennett</i> , 564 U.S. 721 (2011).....	4, 5
<i>Barr v. Am. Ass’n of Pol. Consultants, Inc.</i> , 140 S. Ct. 2335 (2020).....	5
<i>Dennis v. United States</i> , 341 U.S. 494 (1951).....	4
<i>Direct Biologics, LLC v. McQueen</i> , 63 F.4th 1015 (5th Cir. 2023).....	4
<i>Kennedy v. Warren</i> , 66 F.4th 1199 (9th Cir. 2023).....	4
<i>McIntyre v. Ohio Elections Comm’n</i> , 514 U.S. 334 (1995).....	22
<i>Missouri v. Biden</i> , 2023 WL 4335270 (W.D. La. July 4, 2023).....	4, 6, 13, 13, 14
<i>Norwood v. Harrison</i> , 413 U.S. 455 (1973).....	31
<i>Snyder v. Phelps</i> , 562 U.S. 443 (2011).....	3, 5
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989).....	3

STATUTES

6 U.S.C. § 652.....23

OTHER AUTHORITIES

Betsy Klein, *White House Reviewing Section 230 Amid Efforts to Push Social Media Giants to Crack Down on Misinformation*, CNN (Jul. 20, 2021)
.....13

Bruce Golding, *Zuckerberg Says Facebook Censored the Post’s Hunter Biden Stories Because FBI Warned of Russian Misinfo ‘Dump,’* NEW YORK POST (Aug. 26, 2022)
.....16

CENTER FOR INTERNET SEC., *EI-ISAC*
..... 25, 25

CYBERSECURITY AND INFRASTRUCTURE SEC. AGENCY, MIS-, DIS-, AND MALINFORMATION
.....23

Declaration of Yoel Roth
.....17

Deposition of Brian Scully
.....24

Deposition of Elvis Chan
..... 17, 19, 20, 21

DEP’T OF HOMELAND SEC., DEPARTMENT OF HOMELAND SECURITY CYBERSECURITY AND INFRASTRUCTURE SECURITY AGENCY OPERATIONS AND SUPPORT FISCAL YEAR 2024 CONGRESSIONAL JUSTIFICATION (2023)
.....25

ELECTION INTEGRITY P’SHIP, *The Long Fuse: Misinformation and the 2020 Election* (2021)
..... 26, 27, 30

Emma-Jo Morris & Gabrielle Fonrouge, *Smoking-gun Email Reveals how Hunter Biden Introduced Ukrainian Businessman to VP Dad*, NEW YORK POST (Oct. 14, 2020)15

Letter from John B. Bellinger III to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary (July 27, 2023) 28, 29, 30

Letter from Rep. Jordan, Chairman, House Comm on the Jud., to the Hon. Christopher Wray, Director, FBI (July 20, 2023) 14, 15, 16, 17, 18, 20, 21

Matt Taibbi (@mtaibbi), TWITTER (Mar. 2, 2023, 12:00 PM)29

Miranda Devine, *Media Helped Hide the Real Joe Biden by Censoring Hunter Stories*, NEW YORK POST (Nov. 28, 2021)22

Nandita Bose and Elizabeth Culliford, *Biden Says Facebook, Others ‘Killing People’ by Carrying COVID Misinformation*, REUTERS (Jul. 16, 2021)10

OFFICE OF INSPECTOR GEN., DEP’T OF HOMELAND SEC., OIG-22-58, DHS NEEDS A UNIFIED STRATEGY TO COUNTER DISINFORMATION CAMPAIGNS, (Aug. 10, 2022)23

Press Release, Dep’t of Homeland Sec., Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector (Jan. 6, 2017)23

Rep. Jim Jordan (@Jim_Jordan), TWITTER (July 27, 2023, 12:03 PM)7

Rep. Jim Jordan (@Jim_Jordan), TWITTER (July 28, 2023, 12:03 PM)7

Rep. Jim Jordan (@Jim_Jordan), TWITTER (Aug. 3, 2023, 11:00 AM)7

Rep. Jim Jordan (@Jim_Jordan), TWITTER (Aug. 7, 2023, 10:11 AM)7

Ryan Tracy, *Facebook Bowed to White House Pressure, Removed Covid Posts*,
THE WALL STREET JOURNAL (July 28, 2023)14

Sen. Ted Cruz (@tedcruz), TWITTER (Oct. 27, 2022, 12:34 PM)26

STAFF OF THE H. COMM. ON THE JUD., 118TH CONG., INTERIM STAFF REPORT: THE
WEAPONIZATION OF CISA22

STAFF OF H. COMM. ON THE JUD., SELECT SUBCOMM. ON THE WEAPONIZATION OF
THE FED. GOV’T, & PERMANENT SELECT COMM. ON INTEL., 118TH CONG., THE
HUNTER BIDEN STATEMENT: HOW SENIOR INTELLIGENCE COMMUNITY OFFICIALS
AND THE BIDEN CAMPAIGN WORKED TO MISLEAD AMERICAN VOTERS (2023)15

STANFORD INTERNET OBSERVATORY, *Background on the SIO’s Projects on So-
cial Media* (Mar. 17, 2023)30

Steven Nelson, *The Post’s FB Traffic Tanked After WH Aide’s False Claim of
‘Churning Out Articles Every Day About People Dying’ From COVID Vax*,
NEW YORK POST (Aug. 4, 2023)9

U.S. DEP’T OF STATE, *About Us—Global Engagement Center*29

INTEREST OF *AMICI CURIAE*

Representatives Jim Jordan, Kelly Armstrong, Andy Biggs, Dan Bishop, Kat Cammack, Russell Fry, Lance Gooden, Harriet Hageman, Mike Johnson, Thomas Massie, Barry Moore, and Elise Stefanik are Members of the United States House of Representatives and Members of the House Judiciary Committee and/or the Select Subcommittee on the Weaponization of the Federal Government. The Judiciary Committee is authorized by the House to conduct oversight and legislate on matters concerning civil liberties, the separation of powers, and the judiciary. Each Member of Congress has taken an oath to uphold the Constitution and laws of the United States. As Members of the House Judiciary Committee and/or the Weaponization Subcommittee, each Member has an institutional interest in protecting First Amendment rights from encroachment by the executive branch, protecting the rule of law, and holding the executive branch accountable when it overreaches. This interest also includes ensuring that the courts police those constitutional boundaries.

Each Member signatory is concerned that the Biden Administration has violated the Constitution and abridged Americans' civil liberties. The House Judiciary Committee and the Weaponization Subcommittee have been conducting an ongoing investigation into how and to what extent the executive branch has coerced or colluded with social media companies to censor speech. Very recent evidence, obtained in said investigation in the weeks after the district court's preliminary injunction

ruling, further corroborates the district court’s findings. Thus, each Member signatory has a substantial interest in this case and offers a unique perspective by virtue of his or her role in Congress.¹

¹ All parties consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and, no person—other than the *amici curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

Wielding threats of intervention, the executive branch of the federal government has engaged in a sustained effort to coerce private parties into censoring speech on matters of public concern. On issue after issue, the Biden Administration has distorted the free marketplace of ideas promised by the First Amendment, bringing the weight of federal authority to bear on any speech it dislikes—including memes and jokes. Of course, Big Tech companies often required little coercion to do the Administration’s bidding on some issues. Generally eager to please their ideological allies and overseers in the federal government, these companies and other private entities have repeatedly censored accurate speech on important public issues. When the censors were too slow to suppress speech that the partisans in the Administration disliked, the federal government prodded them back into action with continual and increasing pressure.

Official pressure to suppress speech violates the First Amendment. “[A] principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989) (cleaned up). No doubt, the government may find some individuals’ speech “misguided, or even hurtful,” but “the point of all speech protection is to shield just those choices of content.” *Snyder v. Phelps*, 562

U.S. 443, 458 (2011) (cleaned up). “The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the unfettered interchange of ideas—not whatever the State may view as fair.” *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011) (cleaned up). The First Amendment is founded on “the hypothesis that speech can rebut speech, propaganda will answer propaganda, [and] free debate of ideas will result in the wisest governmental policies.” *Dennis v. United States*, 341 U.S. 494, 503 (1951). Thus, the First Amendment stands against any governmental effort to coerce or otherwise burden the free speech of private entities—even if that action falls short of outright suppression. *Cf. Kennedy v. Warren*, 66 F.4th 1199, 1213 (9th Cir. 2023) (Bennett, J., concurring) (“[W]e do not require a government official to list specific consequences in order to find a constitutional violation.”).

The district court found, as a matter of fact, that “the United States Government, through the White House and numerous federal agencies, pressured and encouraged social-media companies to suppress free speech.” *Missouri v. Biden*, 2023 WL 4335270, at *44 (W.D. La. July 4, 2023). These factual findings “must be left undisturbed unless clearly erroneous.” *Direct Biologics, LLC v. McQueen*, 63 F.4th 1015, 1020 (5th Cir. 2023) (cleaned up). “Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

The district court’s findings are easily “permissible”; they are clearly correct. Beyond the ample evidence cited by the district court and the Plaintiffs, even more recent evidence obtained by the House Judiciary Committee and the Weaponization Subcommittee confirms the district court’s conclusions.

That evidence shows that the Biden Administration has relentlessly pressured private entities—sometimes in cooperation with other private entities—to censor speech that the Administration disliked. As detailed below, this official coercion has undermined the marketplace of ideas on issues of public importance ranging from COVID to federal elections to Biden family misdeeds. And the suppression “does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers”: conservative voices opposed to the current Administration. *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2347 (2020). “This sort of ‘beggar thy neighbor’ approach to free speech—restricting the speech of some elements of our society in order to enhance the relative voice of others—is wholly foreign to the First Amendment.” *Bennett*, 564 U.S. at 741 (cleaned up). Likewise foreign to the First Amendment are governmental efforts to coerce the speech of private Americans. “As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.” *Snyder*, 562 U.S. at 461.

Because the Biden Administration has repeatedly used government coercion to stifle public debate—and the district court’s injunction rightfully halts the Administration’s unlawful conduct—the Court should affirm.

ARGUMENT

I. The United States has coerced speech about COVID.

As the district court found, the federal government “suppressed alternative views” about COVID-related matters, including the origination of the virus, the efficacy of vaccines and masks, and the adverse effects of lockdowns, effectively forcing social media companies to enforce the government’s view as “the truth.” *Biden*, 2023 WL 4335270, at *49–50. The district court listed over twenty examples of the government engaging in coercive acts directed toward social media companies to bring about censorship. *Id.* at *45–47. And the government’s pressure campaign worked. Facebook agreed to moderate certain COVID-related speech in response to pressure from the Biden Administration, telling the government that Facebook would rely on their “authorities” to determine what content to censor. *Id.* at *5, *6, *50. The district court described the government’s direction of Facebook’s content choices as a “partner[ship].” *Id.* at *47.

Very recent evidence corroborates the district court’s findings. The House Judiciary Committee subpoenaed internal documents from Meta, the parent entity of Facebook and Instagram. The documents obtained thus far confirm that the

companies censored information and altered their content moderation policies because of pressure from the Biden Administration to rid their platforms of purported “misinformation.”²

This pressure was direct and coercive. For example, the Administration tried to suppress discussion of COVID’s origins: when a Facebook executive asked in July 2021 why the company censored the COVID lab leak theory, an executive in charge of content policy development said, “[b]ecause we were under pressure from the [A]dministration” to do so.³ The same Facebook executive confessed that the company “shouldn’t have done it.”⁴

Yet Facebook continued to do the Administration’s bidding, repeatedly removing and reducing content the federal government disfavored. The Biden White House’s successful months-long campaign to censor views expressing or supporting vaccine hesitancy is the clearest example of how the government coerced social

² Rep. Jim Jordan (@Jim_Jordan), TWITTER (July 27, 2023, 12:03 PM), <https://tinyurl.com/5nz8sn3b> (“THE FACEBOOK FILES PART 1”); Rep. Jim Jordan (@Jim_Jordan), TWITTER (July 28, 2023, 12:03 PM), <https://tinyurl.com/3z5npf92> (“THE FACEBOOK FILES PART 2”); Rep. Jim Jordan (@Jim_Jordan), TWITTER (Aug. 3, 2023, 11:00 AM), <https://tinyurl.com/4kjvehbb> (“THE FACEBOOK FILES PART 3”); Rep. Jim Jordan (@Jim_Jordan), TWITTER (Aug. 7, 2023, 10:11 AM), <https://tinyurl.com/yebawzjr> (“THE FACEBOOK FILES PART 4”).

³ Ex. 1 (E-mail from Nick Clegg to Facebook employees (July 14, 2021, 11:46 AM)). All Exhibit cites are to this brief’s Appendix.

⁴ *Id.*

media companies to change the scope and enforcement of their content moderation policies.

In an internal email, a Facebook employee explained to CEO Mark Zuckerberg and COO Sheryl Sandberg: “We are facing continued pressure from external stakeholders, including the [Biden] White House and the press, to *remove* more COVID-19 vaccine discouraging content.”⁵

Mark, Sheryl:

We are seeking your guidance on whether to take more aggressive action against certain vaccine discouraging content.

We are facing continued pressure from external stakeholders, including the White House and the press, to *remove* more COVID-19 vaccine discouraging content. For example, we recently shared with the White House a list of the top 100 vaccine-related posts on FB in the U.S. for the week of 4/5-4/11. While authoritative information dominated the list, the White House was concerned that the #3 post was a vaccine discouraging humorous meme, and they called on us to delete the meme.

Another Facebook executive notified his team that a senior advisor to President Biden was “outraged” “that [Facebook] did not remove” a meme that bothered the Administration.⁶ Likewise, to appease the Administration, Facebook demoted a Tucker Carlson video critical of the COVID vaccine, even though Facebook admitted that the video did not violate company policy.⁷

⁵ Ex. 2 (E-mail from Facebook employee to Facebook employees (Apr. 27, 2021, 11:58 AM)) (emphasis in original).

⁶ Ex. 3 (E-mail from Nick Clegg to Facebook employees (Apr. 19, 2021, 9:40 AM)).

⁷ *Id.*

Tucker Carlson was not the only prominent critic of President Biden to be targeted by the Administration’s censorship efforts. According to Facebook’s internal notes of meetings with White House senior advisors, White House officials questioned whether Facebook’s enforcement of its content moderation policies against the *New York Post* was aggressive enough.⁸ Similarly, in April 2021, a White House official questioned whether Facebook could “change [its] algorithm so that people were more likely to see [the *New York Times*], [the *Wall Street Journal*], any authoritative news source over [the] Daily Wire, Tomi Lahren, polarizing people.”⁹ The White House’s requests were rooted in the paternalistic notion that Americans cannot decide for themselves what information should or should not be believed. As a White House staffer condescendingly remarked in a meeting with Facebook in April 2021, “[i]f someone in rural Arkansas sees something on [Facebook], it’s the

⁸ Ex. 4 (Facebook employee’s notes of a call between White House personnel and Facebook employees on March 26, 2021). The *New York Post*’s traffic on Facebook subsequently plummeted by over 50 percent before rebounding to “normal levels” by fall 2021. Steven Nelson, *The Post’s FB Traffic Tanked After WH Aide’s False Claim of ‘Churning Out Articles Every Day About People Dying’ From COVID Vax*, NEW YORK POST (Aug. 4, 2023), <https://tinyurl.com/rrmtzkk>.

⁹ Ex. 5 (Facebook employee’s notes of a call between White House personnel and Facebook employees on April 14, 2021).

truth.”¹⁰ In a June 2021 meeting, the White House pushed Facebook to “reduce the spread of bad information,” *i.e.*, “bad” information according to the White House.¹¹

Not only did the Biden Administration privately coerce Facebook and other companies into censoring information, it also engaged in a public relations campaign against the companies to pressure them into submission. In July 2021, President Biden publicly denounced these companies, particularly Facebook, claiming they were “killing people” by not censoring alleged “misinformation” to the government’s satisfaction.¹² Facebook employees internally lamented that the Biden White House’s “definition of ‘misinfo’ is completely unclear.”¹³ Following the White House’s pressure, Facebook leadership—internally admitting that the move was “stemming from the continued criticism of our approach from the [Biden] administration”—directed employees to “brainstorm some additional policy levers we can

¹⁰ Ex. 6 (Facebook employee’s notes of a call between White House personnel and Facebook employees on April 5, 2021).

¹¹ Ex. 7 (Facebook employee’s notes of a call between White House personnel and Facebook employees on June 15, 2021).

¹² Nandita Bose and Elizabeth Culliford, *Biden Says Facebook, Others ‘Killing People’ by Carrying COVID Misinformation*, REUTERS (Jul. 16, 2021), <https://ti.nyurl.com/zpt53rna>.

¹³ Ex. 8 (E-mail from Facebook employee to Facebook employees (July 16, 2021, 8:14 PM)).

pull to be more aggressive against . . . misinformation.”¹⁴ Ultimately, the company decided to adopt four new, more aggressive policy options one month later.¹⁵

Likewise, before meeting with the Biden Administration’s Office of the Surgeon General (OSG), a Facebook employee said that Sheryl Sandberg “is keen that we continue to explore some moves that we can make to show that we are trying to be responsive to the [White House].”¹⁶ The email continued: “My sense is that our current course—in effect explaining ourselves more fully, but not shifting on where we draw the lines . . . is a recipe for protracted and increasing acrimony with the [White House].”¹⁷ Internal documents obtained by the House Judiciary Committee and the Weaponization Subcommittee show that the Biden Administration pressured Facebook to censor information about the COVID vaccine’s side effects, even if the information was true.¹⁸ In a July 2021 meeting with OSG, a Facebook employee confirmed that Facebook was demoting content that questioned whether vaccine

¹⁴ Ex. 9 (E-mail from Facebook employee to Facebook employees (Aug. 6, 2021, 7:13 PM)).

¹⁵ Ex. 10 (E-mail from Nick Clegg to Facebook employees (Aug. 19, 2021, 5:25 PM)).

¹⁶ Ex. 11 (E-mail from Facebook employee to Facebook employees (July 22, 2021, 12:17 PM)).

¹⁷ *Id.*

¹⁸ Ex. 12 (E-mail from Sheryl Sandberg to Nick Clegg (Jul. 21, 2021, 4:49 PM)) (“The Surgeon General wants us to remove true information about side effects.”).

mandates constituted “government overreach,” despite acknowledging “[t]hat’s not false information.”¹⁹

Worse still, when Facebook questioned censoring information, the Biden Administration showed disdain and contempt for the First Amendment. For example, when the Administration flagged satirical content about the COVID vaccine, a Facebook executive first warned that removing satirical content would “represent a significant incursion into traditional boundaries of free expression in the US.”²⁰ But the Biden Administration was unpersuaded, insisting that the content “inhibits confidence” in the COVID vaccine.²¹

A Facebook vice president warned internally that the company was at “a crossroads” with the Administration over its censorship efforts.²² Facebook executives grasped the connection between the company’s business prospects and staying in the Administration’s good graces. One executive, recommending that the company consider bending to the Administration’s censorship requests, cautioned COO Sheryl Sandberg that Facebook had “bigger fish we have to fry with the Administration — data flows etc.”²³

¹⁹ Ex. 13 (Facebook employee’s notes of a call between OSG personnel and Facebook employees on July 16, 2021).

²⁰ Ex. 3 (E-mail from Nick Clegg to Facebook employees).

²¹ *Id.*

²² *Id.*

²³ Ex. 11 (E-mail from Facebook employee to Facebook employees).

Another looming issue was—and still is—reform of Section 230. As the district court explained, Section 230 of the Communications Decency Act is “valuable” to Big Tech because of its legal protections. *Biden*, 2023 WL 4335270, at *47. And the district court found that the federal government “threat[ened]” Big Tech with the repeal of Section 230 to induce compliance with its censorship campaign. *Id.* Mark Zuckerberg has referred to the possibility of antitrust enforcement as an “existential threat” to his empire. *Id.* at *4. Four days after President Biden publicly accused Facebook of “killing people,” the White House Communications Director publicly said the Administration was “reviewing” Section 230 reform as an option because the social media companies “should be held accountable.”²⁴ Internal documents show that Facebook executives feared that the Biden Administration would retaliate against the company for not censoring enough: one executive commented that the dispute over content was not “a great place for us to be,” and he would be “grateful for any further creative thinking on how we can be responsive to their [content] concerns.”²⁵ In response to mounting pressure, Facebook capitulated: “By August 2021,

²⁴ Betsy Klein, *White House Reviewing Section 230 Amid Efforts to Push Social Media Giants to Crack Down on Misinformation*, CNN (Jul. 20, 2021), <https://ti-nyurl.com/73hnfk3h>.

²⁵ Ex. 11 (E-mail from Facebook employee to Facebook employees).

Facebook executives were emailing each other about new planned changes to their Covid content policies,” including increased punishments for violators.²⁶

In short, the Biden Administration used its power to commandeer the apparatuses of social media companies to affect their COVID-related content policies. And out of self-interest, the companies complied and censored content beyond what it otherwise would have. This government coercion violates the First Amendment.

II. The United States has coerced speech about Biden Family influence peddling.

The federal government, specifically the FBI’s Foreign Influence Task Force (FITF), also used its power and influence to deceive and coerce social media companies into suppressing factual information during the 2020 election about the Biden family that the FBI knew to be true.²⁷ The district court rightly labeled “[t]he FBI’s failure to alert social-media companies that the Hunter Biden laptop story was real, and not mere Russian disinformation,” as “particularly troubling.” *Biden*, 2023 WL 4335270 *50. The laptop contained documents and emails with incriminating details

²⁶ Ryan Tracy, *Facebook Bowed to White House Pressure, Removed Covid Posts*, THE WALL STREET JOURNAL (July 28, 2023), <https://tinyurl.com/2bepvs5t>; *see also* Ex. 10 (E-mail from Nick Clegg to Facebook employees).

²⁷ Letter from Rep. Jordan, Chairman, House Comm on the Jud., to the Hon. Christopher Wray, Director, FBI, at 1 (July 20, 2023), <https://tinyurl.com/3m7a6wsa>.

about foreign business dealings that also implicated Hunter Biden’s father—then-presidential candidate, Joe Biden.²⁸

In a recent transcribed interview before the House Judiciary Committee and Weaponization Subcommittee, current Section Chief of FITF, Laura Dehmlow, testified that (1) FBI agents who knew the laptop was real were some of the same FBI agents who repeatedly warned social media companies about a potential “hack-and-leak” likely to occur in October 2020; and (2) despite direct requests from Twitter and Facebook for information on the day the *New York Post* story was published, the FBI decided to deliberately withhold critical information from the social media companies.²⁹

Although the FBI had the authenticated laptop in its possession since December 2019, it did not publicly acknowledge that it was real until after the November 3, 2020, election.³⁰ Rather than acknowledge the truth, the FBI actively influenced and deceived the social media companies to censor the story when it inevitably came

²⁸ Emma-Jo Morris & Gabrielle Fonrouge, *Smoking-gun Email Reveals how Hunter Biden Introduced Ukrainian Businessman to VP Dad*, NEW YORK POST (Oct. 14, 2020), <https://tinyurl.com/v7maymv8>; STAFF OF H. COMM. ON THE JUD., SELECT SUBCOMM. ON THE WEAPONIZATION OF THE FED. GOV’T, & PERMANENT SELECT COMM. ON INTEL., 118TH CONG., THE HUNTER BIDEN STATEMENT: HOW SENIOR INTELLIGENCE COMMUNITY OFFICIALS AND THE BIDEN CAMPAIGN WORKED TO MISLEAD AMERICAN VOTERS 1, 6 (2023), <https://tinyurl.com/47v4fxb8>.

²⁹ Ex. 14 (Excerpts of Transcribed Interview of Laura Dehmlow before the House Committee on the Judiciary and the Select Subcommittee on the Weaponization of the Federal Government (July 17, 2023)), at 29–37, 173–174.

³⁰ Jordan, *supra* note 27, at 5.

out.³¹ In a well-executed, months-long plan, the FBI primed the narrative, telling social media companies to “look for a ‘hack and dump’ operation by the Russians prior to the 2020 election.”³² Then, as soon as the laptop’s contents were exposed, the FBI refused to answer questions and let the narrative it had constructed do its work of distracting from and minimizing the truth. Mark Zuckerberg’s justification for censoring the story illustrates the effectiveness of this plan: “the FBI basically came to us” and said, “you should be on high alert.” Facebook censored the story because when “[the FBI] come[s] to us and tell[s] us that we need to be on guard about something, then I want to take that seriously,” and the story “basically fit the pattern” the FBI warned about.³³ This federal coercion led to the censorship of accurate information.

In “the nine months leading up to the 2020 election, the FBI met over 30 times with social media platforms—all while in possession of Hunter Biden’s laptop.”³⁴ The FBI had “at least five meetings with Facebook, Google, Microsoft, [and] Yahoo!, in addition to multiple meetings with Twitter and Reddit.”³⁵ Yoel Roth, former Head of Site Integrity at Twitter, confirmed in a sworn declaration that he had regular

³¹ *Id.* at 1.

³² *Id.* at 4.

³³ Bruce Golding, *Zuckerberg Says Facebook Censored the Post’s Hunter Biden Stories Because FBI Warned of Russian Misinfo ‘Dump,’* NEW YORK POST (Aug. 26, 2022), <https://tinyurl.com/5n8xz6xd>.

³⁴ Jordan, *supra* note 27, at 1.

³⁵ *Id.*

meetings in 2020 with different federal agencies, including the FBI, where they “communicated that they expected ‘hack-and-leak operations’” against those associated with political campaigns “shortly before the 2020 presidential election, likely in October.”³⁶ “These expectations of hack-and-leak operations were discussed throughout 2020.”³⁷ He was also told “that material obtained through those hacking attacks would likely be disseminated over social media platforms, including Twitter” and even that there were rumors the materials could involve Hunter Biden.³⁸

The companies also participated together in regular “USG-Industry” meetings, including four in October 2020, with representatives from federal agencies, including the FBI.³⁹ During these meetings, the FBI asked social media companies what their “hack and leak” policies were, how the companies would handle a potential “hack and leak,” and whether the companies would remove hacked materials from their platforms.⁴⁰ In response, some companies without a specific “hack and

³⁶ Declaration of Yoel Roth, ¶¶ 10–11, Federal Elections Commission MUR 7821, (Dec. 17, 2020), <https://tinyurl.com/3mmzx2bk> [hereinafter Roth Decl.].

³⁷ *Id.*

³⁸ *Id.*

³⁹ Jordan, *supra* note 27, at 1.

⁴⁰ Deposition of Elvis Chan at 248:5–250:21 (filed below as ECF No. 204-1) [hereinafter Chan Dep.]; *see also* Roth Decl., *supra* note 36, ¶ 11.

leak” policy, such as Facebook, developed and adopted a new policy during summer 2020.⁴¹

Dehmlow confirmed that “the FBI could—and did—share information with companies regarding foreign malign influence operations, like hack-and-leak operations, including those conducted by Russia-aligned actors.”⁴² For example, the agenda for the October 7, 2020 “USG-Industry” meeting—one week before the October 14 *New York Post* story—lists “Hack/Leak Concerns” as a topic.⁴³

On the day the article was published, FBI met with Twitter, and a company representative asked if the laptop was real.⁴⁴ In testimony to the House Judiciary Committee and Weaponization Subcommittee, Dehmlow stated that, in response, “one of the FBI folks who was on the call” confirmed that the laptop was real before “another participant jumped in and said, ‘no further comment.’”⁴⁵ After the meeting, FBI personnel “deliberated internally” and determined that—even though they knew

⁴¹ Ex. 15 (Excerpts of Transcribed Interview of David Agranovich before the House Committee on the Judiciary and the Select Subcommittee on the Weaponization of the Federal Government (May 16, 2023)); Ex. 16 (Excerpts of Transcribed Interview of Nathaniel Gleicher before the House Committee on the Judiciary and the Select Subcommittee on the Weaponization of the Federal Government (June 21, 2023)).

⁴² Jordan, *supra* note 27, at 2; Ex. 14 (Laura Dehmlow Transcribed Interview), at 173–174.

⁴³ Ex. 17 (E-mail from Facebook employee to Matthew Masterson and Brian Scully (Sept. 29, 2020, 11:41 AM)).

⁴⁴ Ex. 14 (Laura Dehmlow Transcribed Interview), at 29.

⁴⁵ *Id.*

the laptop was not Russian disinformation—in all further communications with social media companies the FBI would reply with “no comment.”⁴⁶

Later that same day, the FBI met with Facebook. This time the FBI had its story straight. When Facebook asked whether the laptop was real, Dehmlow, on behalf of the FBI, said, “no comment.”⁴⁷ Despite requests made during Dehmlow’s interview and subsequently to Director Wray by letter, the FBI has thus far refused to reveal to the House Judiciary Committee and Weaponization Subcommittee the identities of the FBI official who told Twitter that the laptop was real, the FBI lawyer who instructed “no further comment” during the call with Twitter, or the FBI official who determined that the agency would respond only “no comment” when asked about Hunter Biden laptop’s authenticity going forward.⁴⁸

Facebook followed up again the next day, October 15.⁴⁹ According to an internal Facebook document recently obtained by the House Judiciary Committee and the Weaponization Subcommittee, a Facebook employee (and former FBI official) “spoke with SSA Elvis Chan (FBI San Francisco) on 15 October 2020, as a follow up to the call with the Foreign Influence Task Force on 14 October.”⁵⁰ Facebook

⁴⁶ *Id.* at 33.

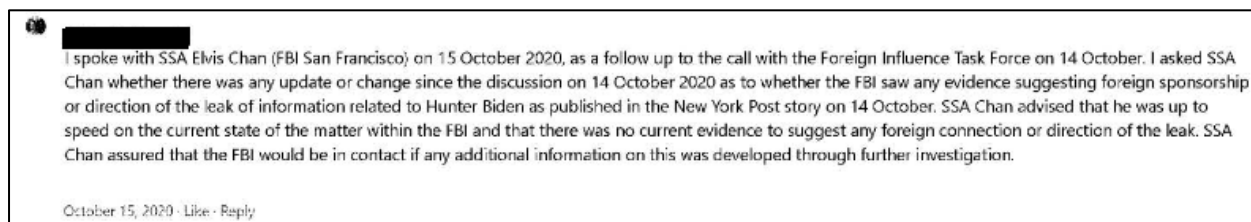
⁴⁷ *Id.* at 33; *see also* Chan Dep., *supra* note 400, at 215.

⁴⁸ *See* Ex. 14 (Laura Dehmlow Transcribed Interview), at 29–31; Jordan, *supra* note 27, at 5–6 (requesting a response by August 3, 2023).

⁴⁹ Ex. 18 (Entry on internal Facebook case file by Facebook employee (Oct. 15, 2020)).

⁵⁰ *Id.*

again asked if the FBI had any new information, to which “Chan advised that he was up to speed on the current state of the matter within the FBI and that there was no current evidence to suggest any foreign connection or direction of the leak.”⁵¹ But of course, the FBI knew not just of the *absence* of evidence suggesting any foreign connection; the FBI knew the laptop was real.⁵²



This internal Facebook document directly conflicts with the deposition testimony FBI Special Agent Elvis Chan provided in this case. Chan testified that he was “confident” that he “was not a party to any meeting with social media companies where Hunter Biden was discussed outside of the [October 14 FITF-Facebook meeting where Laura Dehmlow responded ‘no comment’].”⁵³ Later, when asked if, other than the October 14 FITF-Facebook meeting, he was “aware of any communications

⁵¹ *Id.* Chan testified in his deposition that, unlike Dehmlow, FITF Section Chief Bradley Benavides, the Russia Unit Chief of FITF, and other FITF personnel, he did not know prior to October 14 that the FBI had the laptop. *Cf.* Chan Deposition, *supra* note 40, at 230:7–19; Ex. 14 (Laura Dehmlow Transcribed Interview), at 37.

⁵² Jordan, *supra* note 27; Ex. 14 (Laura Dehmlow Transcribed Interview), at 37.

⁵³ *Cf.* Chan Dep., *supra* note 40, at 215:22–216:16; Ex. 18 (Entry on internal Facebook case file by Facebook employee (Oct. 15, 2020)).

between anyone at Facebook and anyone at the FBI related to the Hunter Biden laptop story,” Chan responded, “No.”⁵⁴

As a result of the FBI’s withholding critical information the day of (and the days after) the *New York Post*’s article was published, the social media companies began to do precisely what the FBI intended: suppress truthful First Amendment-protected speech less than three weeks before the presidential election.⁵⁵ The story implicating one of the two major party candidates was blocked by Twitter and de-amplified by Facebook, “significantly reducing its circulation and prevalence in users’ newsfeeds.”⁵⁶ All because the FBI—an organization that the companies felt compelled to follow—had led them to believe the laptop story was Russian disinformation.⁵⁷ The story was not Russian disinformation, and FBI personnel meeting with Twitter and Facebook knew *at the time* that it was not Russian disinformation.⁵⁸ This government coercion of the marketplace of ideas undoubtedly affected the 2020

⁵⁴ Chan Dep., *supra* note 400, at 233:22–234:3.

⁵⁵ Jordan, *supra* note 27.

⁵⁶ *Id.*

⁵⁷ FBI Director Wray testified that “the FBI is not in the business of moderating content or causing any social media company to suppress or censor” speech. Oversight of the Federal Bureau of Investigation: Hearing Before the H. Comm. on the Judiciary, 118th Cong. (July 12, 2023). On July 18, Chairman Jordan and Representative Mike Johnson, Chairman of the Subcommittee on the Constitution and Limited Government, wrote a letter to Director Wray providing him the opportunity to amend his testimony. Director Wray has not responded.

⁵⁸ Jordan, *supra* note 27.

election.⁵⁹ The district court’s findings that the federal government unlawfully coerced private speech are amply supported by the evidence.

III. The United States has coerced speech about elections.

The United States also flouted the First Amendment by coercing election-related speech. This coercion is especially troubling because speech pertaining to elections “occupies the core of the protection afforded by the First Amendment.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995). Yet the federal government has repeatedly coerced social media companies to censor election-related speech. It has done so directly, through DHS’s Cybersecurity and Infrastructure Security Agency (CISA), and indirectly, through the private-sector Election Integrity Partnership (EIP). Following revelations from this lawsuit and the ongoing investigation by the House Judiciary Committee and Weaponization Subcommittee, CISA has taken steps to cover-up and hide its efforts to surveil and censor domestic speech.⁶⁰

⁵⁹ See Miranda Devine, *Media Helped Hide the Real Joe Biden by Censoring Hunter Stories*, NEW YORK POST (Nov. 28, 2021), <https://tinyurl.com/mvp474ba>.

⁶⁰ STAFF OF THE H. COMM. ON THE JUD., 118TH CONG., INTERIM STAFF REPORT: THE WEAPONIZATION OF CISA, (available at <https://bit.ly/45jYPke>) [hereinafter Interim Staff Report] (filed below as ECF 291-2).

A. Cybersecurity and Infrastructure Security Agency (CISA)

Congress established CISA in 2018 to “lead cybersecurity and critical infrastructure security programs, operations, and associated policy.”⁶¹ Shortly after the 2016 election, DHS Secretary Jeh Johnson designated “election infrastructure” as a “critical infrastructure subsector.”⁶² CISA’s “Countering Foreign Influence Task Force” (CFITF) focuses “on election infrastructure disinformation.”⁶³ But in an effort to expand its focus on foreign misinformation to domestic misinformation, “CISA transitioned its [CFITF] to promote more flexibility to focus on general MDM,” or so-called “Mis-, Dis-, and Malinformation.”⁶⁴

CISA’s focus on so-called “malinformation” is particularly alarming. According to CISA, “[m]alinformation is based on fact, but used out of context to mislead, harm, or manipulate.”⁶⁵ Put more plainly, “malinformation is *factual* information

⁶¹ 6 U.S.C. § 652.

⁶² Press Release, Dep’t of Homeland Sec., Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector (Jan. 6, 2017), <https://tinyurl.com/2xt3twjd>.

⁶³ OFFICE OF INSPECTOR GEN., DEP’T OF HOMELAND SEC., OIG-22-58, DHS NEEDS A UNIFIED STRATEGY TO COUNTER DISINFORMATION CAMPAIGNS 5 (Aug. 10, 2022), <https://tinyurl.com/2p9h2p75>.

⁶⁴ *Id.* at 7.

⁶⁵ CYBERSECURITY AND INFRASTRUCTURE SEC. AGENCY, MIS-, DIS-, AND MALINFORMATION PLANNING AND INCIDENT RESPONSE GUIDE FOR ELECTION OFFICIALS 1 (2022), <https://tinyurl.com/52pvpn5d>.

that is objectionable not because it is false or untruthful, but because it is provided without adequate ‘context’—context as determined by the government.”⁶⁶

In his deposition, Brian Scully, the first head of the CFITF and later the head of the MDM team at CISA,⁶⁷ said that CISA engaged in “switchboarding,” where CISA would flag alleged disinformation to social media platforms.⁶⁸ According to Scully, “switchboarding” involves CISA officials first receiving alleged “misinformation” reports from election officials and then forwarding those reports to social media companies so that they could take enforcement measures against the reported content.⁶⁹ Scully admitted that CISA was aware that its outreach to social media companies about alleged misinformation would trigger content moderation.⁷⁰

CISA also funded and utilized third parties, such as the Center for Internet Security (CIS), to achieve these aims. CIS is the nonprofit entity responsible for operating the Multi-State Information Sharing and Analysis Center (MS-ISAC) and

⁶⁶ INTERIM STAFF REPORT, *supra* note 600, at 10.

⁶⁷ Deposition of Brian Scully, 11:19–12:6, (available at <https://tinyurl.com/2epb2mw9>) (filed below as ECF No. 209-1).

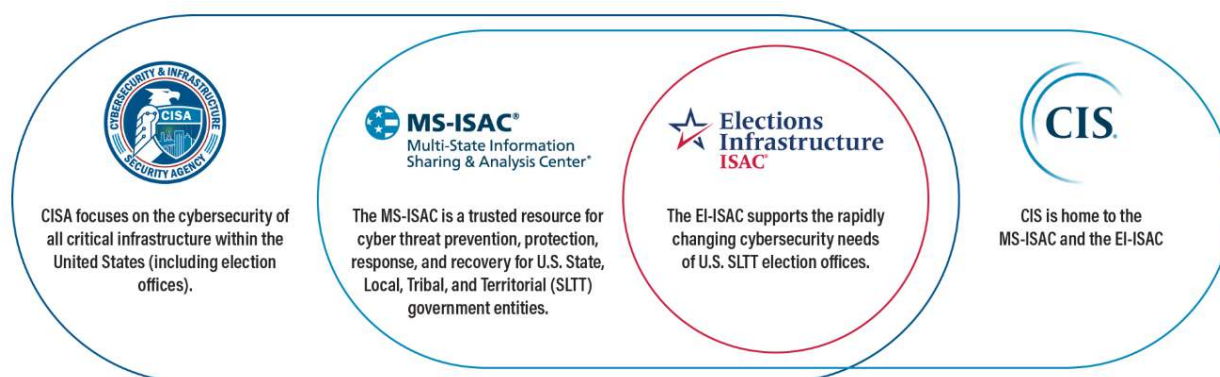
⁶⁸ *Id.* at 23:16–24:2.

⁶⁹ *Id.* at 17:1–18:1.

⁷⁰ *Id.* at 17:15–18:1. In response to a question from Representative Dan Bishop, DHS Secretary Mayorkas testified that he believed that “it is true” that “CISA does not flag anything to social media organizations at all,” but that he would “verify that.” Oversight of the Department of Homeland Security: Hearing Before the H. Comm. on the Judiciary, 118th Cong. (July 26, 2023). Secretary Mayorkas has failed to provide the Judiciary Committee with any information to verify his testimony.

Elections Infrastructure Information Sharing and Analysis Center (EI-ISAC).⁷¹ The EI-ISAC allows election officials around the country to send alleged “misinformation” to CIS, which CIS then forwards to the relevant social media platforms.⁷²

As illustrated by the diagram below from CIS’s website, the “EI-ISAC is federally funded by CISA and a division of the Center for Internet Security.”⁷³ CISA requested \$27 million in FY 2024 funding CIS to operate the EI-ISAC and the MS-ISAC.⁷⁴



Illustrating that claims of “misinformation” are inherently political, the CISA-funded EI-ISAC facilitated attempts to censor core political speech. For example, a state government official working for Pennsylvania’s Secretary of State, a Democrat, reported to the EI-ISAC posts on Twitter and Facebook from Senator Ted Cruz’s

⁷¹ CENTER FOR INTERNET SEC., *EI-ISAC*, <https://tinyurl.com/36cny5pu> (last visited Aug. 7, 2023).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ DEP’T OF HOMELAND SEC., DEPARTMENT OF HOMELAND SECURITY CYBERSECURITY AND INFRASTRUCTURE SECURITY AGENCY OPERATIONS AND SUPPORT FISCAL YEAR 2024 CONGRESSIONAL JUSTIFICATION 73 (2023) (available at <https://tinyurl.com/5n72k25h>); *see also* INTERIM STAFF REPORT, *supra* note 60, at 7–8.

accounts.⁷⁵ In the offending post, Senator Cruz, a Republican, asked: “Why is it only Democrat blue cities that take ‘days’ to count their votes? The rest of the country manages to get it done on election night.”⁷⁶ Emblematic of this “switchboarding,” the federally funded EI-ISAC forwarded the report to Facebook.⁷⁷

B. The Election Integrity Partnership (EIP)

The United States, primarily CISA, also coerced social media companies into censoring speech about the 2020 election through the private-sector Election Integrity Partnership (EIP), led by Stanford University. Formed in the summer of 2020, EIP was a coalition of research entities created “in consultation with CISA and other stakeholders”⁷⁸ and “united government, academia, civil society, and industry, analyzing across platforms, to address misinformation in real time.”⁷⁹ Emails obtained by the House Judiciary Committee and Weaponization Subcommittee confirm that CISA officials were involved with EIP from the very beginning.⁸⁰

⁷⁵ Ex. 19 (E-mail from misinformation@cisecurity.org to Facebook employees (Oct. 27, 2022, 5:06 PM)).

⁷⁶ Sen. Ted Cruz (@tedcruz), TWITTER (Oct. 27, 2022, 12:34 PM), <https://tinyurl.com/2s9dce95>.

⁷⁷ Ex. 19 (E-mail from misinformation@cisecurity.org to Facebook employees).

⁷⁸ ELECTION INTEGRITY P’SHIP, *The Long Fuse: Misinformation and the 2020 Election 2* (2021), <https://tinyurl.com/4frucxab> [hereinafter EIP].

⁷⁹ *Id.* at 241.

⁸⁰ Ex. 20 (E-mail from Kate Starbird to Alex Stamos (July 8, 2020, 10:26 AM)).

Because the four entities comprising EIP were not government entities,⁸¹ the United States sought to use EIP to do things that the government could never do without violating the First Amendment—namely, directly monitoring and censoring speech. By its own account, EIP filled the “gap” in the government’s ability to police so-called “misinformation” and “disinformation” about elections on social media because “no government agency in the United States has the explicit mandate to monitor and correct election mis- and disinformation.”⁸²

EIP used the Jira Service Desk, a ticketing software to allow approved entities (government agencies, EI-ISAC, and others) to submit “misinformation” reports, creating a “Jira ticket.”⁸³ From there, EIP personnel analyzed the submission and could comment on the ticket, before a manager would assess whether to forward the ticket to the relevant social media platform(s).⁸⁴ EIP’s final report illustrates this workflow⁸⁵:

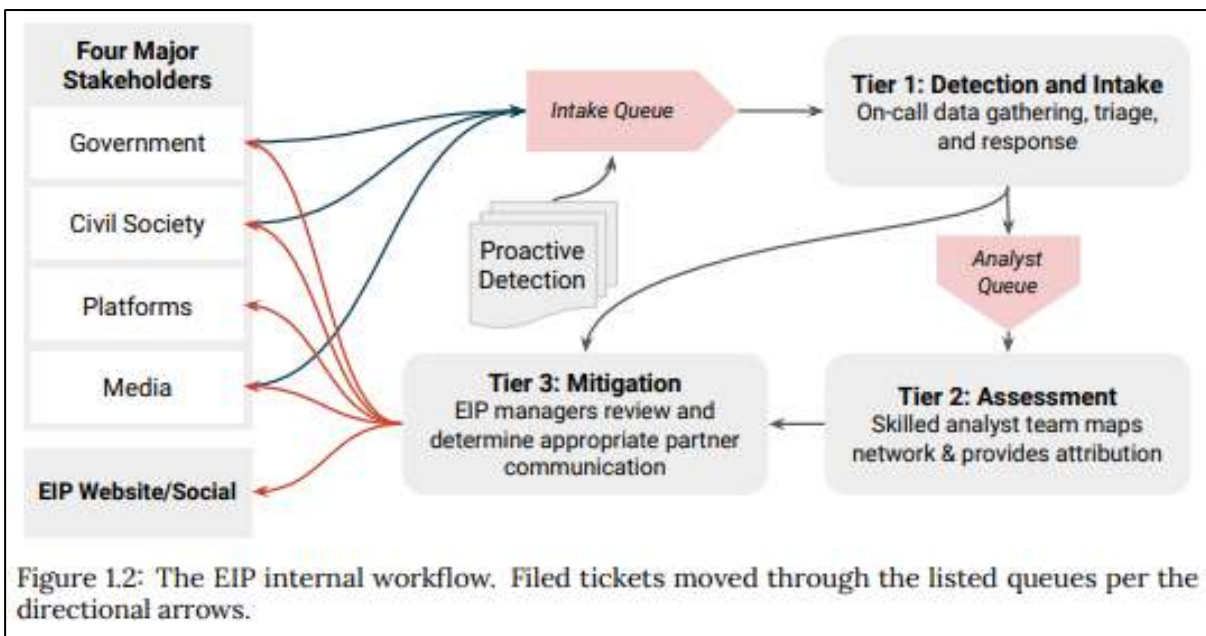
⁸¹ Stanford Internet Observatory, the University of Washington’s Center for an Informed Public, the Atlantic Council’s Digital Forensics Research Lab, and Graphika.

⁸² EIP, *supra* note 78, at v, 2.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*



EIP was thoroughly intertwined with CISA, which aided EIP in the process of reporting undesirable election-related speech to social media platforms.⁸⁶ Stanford confirmed in a recent letter to Chairman Jordan that CISA was directly “tagged” in a number of Jira tickets “rather than or in addition to” the CISA-funded EI-ISAC.⁸⁷ Other documents obtained by the House Judiciary Committee and Weaponization Subcommittee confirm CISA’s involvement.⁸⁸

The FBI, the National Security Agency (NSA), and the Global Engagement Center (GEC) were also involved. The GEC is a federal government interagency organization housed at the State Department with the stated mission of countering

⁸⁶ *Id.* at 13.

⁸⁷ Letter from John B. Bellinger III to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary (July 27, 2023) (on file with the H. Comm. on the Judiciary).

⁸⁸ Ex. 21 (E-mail from Elena Cryst to TikTok employee (Nov. 4, 2020, 7:41 PM)); Ex. 22 (E-mail from Reddit employee to Alex Stamos (Nov. 3, 2020, 12:36 PM)).

foreign “propaganda and disinformation efforts.”⁸⁹ Most notably, the GEC submitted tickets to EIP through Jira.⁹⁰ Stanford recently confirmed to the Committee that social media platforms could see which entity submitted a ticket, including federal government entities.⁹¹ In addition, before the 2020 election, EIP briefed the NSA, and sent one Jira ticket to the FBI.⁹²

The EI-ISAC, federally funded and operated by CIS and CISA, also submitted tickets.⁹³ CISA even coordinated “an agreement” between CIS and EIP to avoid double reporting.⁹⁴ The two admittedly became “partners,”⁹⁵ sharing personnel.⁹⁶ Information obtained to date during the House Judiciary Committee and

⁸⁹ U.S. DEP’T OF STATE, *About Us—Global Engagement Center*, <https://tinyurl.com/43dmawd9> (last visited Aug. 4, 2023); *see also* Matt Taibbi (@mtaibbi), TWITTER (Mar. 2, 2023, 12:00 PM), <https://tinyurl.com/3pmhu8j6> (“GEC’s ‘Chinese’ list included multiple Western government accounts and at least three CNN employees based abroad.”).

⁹⁰ *See, e.g.*, Ex. 23 (E-mail from Elena Cryst to Google employee (Nov. 2, 2020, 7:03 PM)).

⁹¹ Letter from John B. Bellinger III to the Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary (July 7, 2023) (on file with the H. Comm. on the Judiciary).

⁹² Ex. 24 (Excerpts of Transcribed Interview of Alex Stamos before the House Committee on the Judiciary and the Select Subcommittee on the Weaponization of the Federal Government (June 23, 2023)).

⁹³ *Id.* at 114–115.

⁹⁴ *Id.* at 212:07–12.

⁹⁵ *Id.* at 369:01–11.

⁹⁶ *Id.* at 168:22–171:16, 183:20–22.

Weaponization Subcommittee’s investigation confirms that the government-funded EI-ISAC submitted over 100 Jira tickets in the lead-up to the 2020 election.⁹⁷

This close affiliation with the federal government heightened the coerciveness of EIP’s interactions with social media platforms. EIP onboarded major social media platforms, gaining privileged access to some of these platforms’ data and the ability to collect such data in real-time.⁹⁸ EIP’s direct recommendations for censorship resulted in the suppression of disfavored speech about the 2020 election.⁹⁹ Thirty-five percent of the URLs EIP “shared with Facebook, Instagram, Twitter, TikTok, and YouTube were either labeled, removed, or soft-blocked.”¹⁰⁰ Every Twitter account holder EIP identified as a “Repeat Spreader” of election-related “disinformation” expressed “conservative or right-wing political views.”¹⁰¹

EIP’s election-speech monitoring did not end with the 2020 election. EIP recreated itself for the 2022 election and may again for the 2024 election.¹⁰²

⁹⁷ Letter from John B. Bellinger III to the Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary (June 14, 2023) (on file with the H. Comm. on the Judiciary).

⁹⁸ EIP, *supra* note 78, at 17, 181–82; *see* Ex. 22 (E-mail from Reddit employee to Alex Stamos).

⁹⁹ *Cf.* Ex. 22 (E-mail from Reddit employee to Alex Stamos); STANFORD INTERNET OBSERVATORY, *Background on the SIO’s Projects on Social Media* (Mar. 17, 2023), <https://tinyurl.com/3x4ys8me> (“EIP did not make recommendations to the platforms about what actions they should take.”).

¹⁰⁰ EIP, *supra* note 78, at 27.

¹⁰¹ *Id.* at 187–88.

¹⁰² Ex. 24 (Alex Stamos Transcribed Interview).

The United States’ coercive tactics with social media platforms to quell election-related messages it finds undesirable are unconstitutional—even when funneled through a private-sector entity. *See Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (“[A] state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.” (cleaned up)).

CONCLUSION

For these reasons, and to vindicate the First Amendment’s promise of a marketplace of ideas free from government meddling, the Court should affirm the preliminary injunction.

Respectfully submitted,

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AUGUST 7, 2023

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/s Christopher Mills
Christopher Mills