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FOR FREEDOM OF THE PRESS

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for purposes of identification.*

Hon. John Thune, Chairman
Committee on Commerce, Science, and Transportation
United States Senate
512 Dirksen Senate Building
Washington, DC 20510

Dear Chairman Thune:

We write regarding this Committee's request from Facebook for information regarding its Trending Topics feature, which the company describes as "a recent innovation designed to connect people to topics that people are talking about on Facebook."¹ According to Facebook, it uses a combination of algorithms and company personnel to identify trending news and deliver it to individual users.²

This component of Facebook's services is thus similar to algorithmic-driven functions on many news sites, and the Reporters Committee, which has been defending the rights of the news media since 1970, submits this letter to emphasize that the First Amendment protection the nation's courts have long recognized for such core editorial activities are just as applicable in the social-media age.

Facebook, although not a traditional news organization, plays an important role in today's media landscape. While Facebook does not employ journalists who gather and report on news, through Trending Topics and other features, Facebook has become a vital method for Americans to learn about governmental affairs and other events affecting the country and the world. The publishing activities that take place on Facebook's platform – and Facebook's editorial management of that space, whether through algorithms or human judgment – are fully protected by the Constitution.

We understand you to agree with the well-established First Amendment markers that constrain government action in this area when you write that companies such as Facebook are "entitled to espouse their own views."³ We are thus troubled by the Committee's inquiry of Facebook. Its questions go to the heart of any company's decision-making about how to provide news and information to the public.

¹ Facebook Letter of May 23, 2016 to Chairman John Thune regarding Trending Topics at 1, <http://1.usa.gov/1qFQVNS>.

² *Id.* at 2-3.

³ Statement of Chairman John Thune of May 23, 2016 regarding Facebook response,

Your letter states that the Committee sent the questions pursuant to its oversight authority.⁴ But we can recall no precedent for a Congressional committee making demands that interfere with editorial freedoms in this way since lawmakers subpoenaed CBS in the 1970s over the *Selling of the Pentagon* documentary and sought testimony from two reporters in the 1990s during the Clarence Thomas confirmation hearings. Both efforts cratered. As Thomas Rubin, a Harvard Law School lecturer and fellow at Stanford Law School's Center for Internet and Society (and a member of the Reporters Committee's Steering Committee), noted in Slate:

Congress doesn't have to explain itself, but three possible explanations might justify its demands: Facebook doesn't qualify for First Amendment protection; the inquiry doesn't involve First Amendment-protected activity; or Facebook's editorial process is an appropriate subject for Congress to probe. None of these remotely holds water.⁵

Facebook would have been entitled to contest the Committee's questions and the propriety of any effort seeking to compel answers to them. That it chose to respond in no way legitimizes the inquiry.

The Committee's expressed concerns about potential bias in the delivery of news and the influence of large communications companies on public life are hardly new. Every generation has confronted these issues. It would be surprising if the latest dominant technology in the Internet era did *not* give rise to conversations about the new digital communicators and the means they utilize to keep Americans informed in an increasingly complex world. That these discussions are situated around online platforms as opposed to metropolitan newsrooms does not change the constitutional calculation. Time and time again, the courts have protected news providers from intrusions into their editorial autonomy. "[O]ur traditions are clear," writes First Amendment scholar Lucas A. Powe, Jr. "A fair press, as determined by a government mechanism, is not a free press."⁶

<https://www.commerce.senate.gov/public/index.cfm/2016/5/thune-statement-on-facebook-response-to-questions-about-trending-topics-bias-allegations>.

⁴ Letter of Chairman John Thune of May 10, 2016 to Facebook regarding Trending Topics at 2, <http://1.usa.gov/1ZBBLoC>.

⁵ Thomas C. Rubin, *Facebook's Trending Topics Are None of the Senate's Business: What is Sen. John Thune doing trying to conduct oversight over the First Amendment?*, May 23, 2016, <http://slate.me/1WL1HjG>.

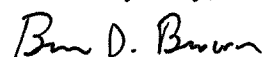
⁶ Lucas A. Powe Jr., *The Fourth Estate and the Constitution: Freedom of the Press in America* 278-79 (1991).

As for the issue of editorial transparency, the policies and practices Facebook or any platform employs for the dissemination of news are entirely valid subjects for public discussion. It may be that the company, over time, creates a public-facing ombudsperson position to address any concerns between the company and its users over Trending Topics or other Facebook services. But these developments cannot be mandated by the government. When a demand for information comes on Congressional letterhead with a deadline to comply, the conversation becomes coercive.

The modern First Amendment that protects conservative and liberal media alike would not be possible without treating the publishers of news as independent, autonomous institutions, not as public utilities.⁷ The rules that shield America's newspapers, broadcasters, and wire services from the meddling of their would-be editors in government equally protect today's entrants into the news ecosystem. Interrogation of news providers on whether they had "manipulated" a website's "content" by "targeting news stories related to conservative views" and on "what steps" they will take to "hold the responsible individuals accountable" thus crosses a line regardless of whether the companies are old or new media.⁸

Once Congress intrudes into the protected zone of free speech and free press at the world's largest social media company, it encourages the use of similar pressure by governments around the globe to investigate "bias" and promote "transparency." As U.S. news organizations have reporters on the ground in many jurisdictions hostile to legal protections for journalism, and as U.S. technology companies are increasingly exposed overseas on issues ranging from digital security to the right to be forgotten, this is no time to disregard the First Amendment at home.

Yours very truly,



Bruce D. Brown

cc: Hon. Bill Nelson, Ranking Minority Member

⁷ See Bruce D. Brown & Alan B. Davidson, *Is Google Like Gas or Like Steel?*, N.Y. Times (Jan. 5, 2013), at A17.

⁸ Thune Letter, *supra* note 4, at 2.