



March 13, 2023

VIA CERTIFIED MAIL

Hon. Christopher A. Coons, Chair
Hon. James Lankford, Vice Chair
U.S. Senate Select Committee on Ethics
220 Hart Building
United States Senate
Washington, DC 20510

Investigation of Senators Blumenthal, Luján, Markey, Menendez, Feinstein, Warren, and Booker for violating Senate Rule 43 by engaging in *ex parte* communications concerning an ongoing federal enforcement proceeding

Dear Chairman Coons and Vice Chairman Lankford,

America First Legal Foundation (“AFL”) is a national, nonprofit legal foundation working to promote the rule of law, prevent executive overreach, protect due process and equal protection, and educate Americans about the individual rights guaranteed under the Constitution and laws of the United States. Our mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and media, including social media platforms, all to educate the public and to keep government officials accountable for their duty to faithfully execute, protect, and defend the Constitution and laws of the United States.

On March 7, 2023, the U.S. House of Representatives, Committee on the Judiciary and Select Subcommittee on the Weaponization of the Federal Government, released a staff report on the FTC’s harassing behavior toward Twitter once Elon Musk took control.¹

On May 26, 2022, the Northern District of California entered an Order against Twitter which required the “reopening of the proceeding in FTC Docket No. C-4316.”² Given this Order, the FTC’s investigations of Twitter constitute an agency proceeding

¹ COMMITTEE ON THE JUDICIARY AND THE SELECT SUBCOMMITTEE ON THE WEAPONIZATION OF THE FEDERAL GOVERNMENT U.S. HOUSE OF REPRESENTATIVES, THE WEAPONIZATION OF THE FEDERAL TRADE COMMISSION: AN AGENCY’S OVERREACH TO HARASS ELON MUSK’S TWITTER, (Mar. 7, 2023) (available at <https://bit.ly/3yvb8vD>) (hereinafter “Committee Report”).

² Stipulated Order for Civil Penalty, Monetary Judgment, and Injunctive Relief at 3, *U.S. v. Twitter*, No. 3:22-cv-03070 (N.D. Cal. May 26, 2022).

under 5 U.S.C. § 557(a). Under the Administrative Procedure Act (“APA”), “no interested person outside the agency shall make or knowingly cause to be made to any . . . employee who is or may reasonably be expected to be involved in the decision process of the proceeding, an ex parte communication relevant to the merits of the proceeding.”³

Yet the Committee Report reveals that the above-named Senators urged the FTC to use its open consent decree as a pretext to investigate Twitter and Mr. Musk. On or about October 27, 2022, Elon Musk closed his deal to purchase Twitter. From the start, Mr. Musk made it clear that he was intent on protecting free speech, ending censorship, and making public Twitter’s role in suppressing information disfavored by the Biden Administration and its allies.⁴ On November 17, 2022, subsequent to the reopening of the FTC Docket on Twitter, Senators Richard Blumenthal (D-CT), Ben Luján (D-NM), Edward Markey (D-MA), Robert Menendez (D-NJ), Dianne Feinstein (D-CA), Elizabeth Warren (D-MA), and Cory Booker (D-NJ) wrote to Chair Lina Khan “urg[ing] the Commission to vigorously oversee its consent decree with Twitter and to bring enforcement actions against any breaches or business practices that are unfair or deceptive, including bringing civil penalties and imposing liability on individual Twitter executives where appropriate.”⁵ On December 2, 2022, reporter Matt Taibbi published the first installment of the “Twitter Files,” using internal Twitter emails to expose the federal government’s interference in the 2020 Presidential election through its collusion with the Biden campaign and allied nongovernmental actors (including a wide range of social media companies, foundations, and nonprofit organizations) to suppress the derogatory information of corruption contained on Hunter Biden’s laptop.⁶

Senate Rule 43 governs Senators’ right to intervene in agency matters on behalf of petitioners. The Select Committee on Ethics, in interpreting Senate Rule 43, has warned that Senators must avoid interfering in “quasi-judicial, adjudicative, or enforcement” matters since executive agency decisions must be “based only upon a record developed during a trial-like hearing.”⁷ The Select Committee has specifically opined that “a Senate office that seeks to communicate with a federal agency may find it useful to contact the agency congressional liaison or similar functionary to determine with respect to the matter in question whether the agency is operating

³ 5 U.S.C. § 557(d)(1)(A).

⁴ See e.g. Elon Musk (@elonmusk), TWITTER, (Jan. 11, 2021, 12:50 PM), <https://bit.ly/4047DIk>, (“A lot of people are going to be super unhappy with West Coast high tech as the de facto arbiter of free speech”).

⁵ Letter from Senator Blumenthal *et al.* to Federal Trade Commission Chair Lina Khan at 3, (Nov. 17, 2022) (available at <https://bit.ly/3JesGkm>).

⁶ Matt Taibbi (@mtaibbi), TWITTER, (Dec. 2, 2022, 6:34 PM), bit.ly/405WmHw, (“1. Thread: THE TWITTER FILES”).

⁷ U.S. SEN. SELECT COMM. ON ETHICS, SENATE ETHICS MANUAL, S. PUB. 108-1 at 178 (2003), *available at* bit.ly/3TgxV7N.

under any internal restrictions on outside communications.”⁸ It has further opined that “Senate offices should refrain from intervening in such legal actions” and communications are only permitted “where the agency is not engaged in an on-going enforcement, investigative, or other quasi-judicial proceeding with respect to the matter[.]”⁹

Here, the Senators did not address the FTC’s congressional liaison but wrote directly to the agency decisionmaker, Chair Lina Khan, while the FTC was actively engaged in investigations of Twitter based upon a judicial reopening of its adjudicative docket. Consequently, the Senate Ethics Committee should investigate them. Federal enforcement actions must be free from political taint, bias, and untoward influence.

Thank you in advance for your cooperation. If you have any questions, please do not hesitate to contact us at info@aflegal.org.

Sincerely yours,

/s/ Reed D. Rubinstein

Reed D. Rubinstein

America First Legal Foundation

⁸ *Id.* at 178.

⁹ *Id.* at 178-179.