Attachment—Additional Questions for the Record

Subcommittee on Communications and Technology
Hearing on
"Legislating to Safeguard the Free and Open Internet"
March 12, 2019

Mr. Matthew F. Wood, Vice President of Policy and General Counsel, Free Press Action

The Honorable Anna G. Eshoo (D-CA)

1. **In your comprehensive written testimony, you don't mention Section 230 of the Communications Decency Act (CDA). Some of my colleagues on the other side of the aisle have suggested that net neutrality and updating Section 230 of CDA should be linked. Can you describe why these are separate and distinct issues?**

Response: Thank you for the question, Representative Eshoo. You are correct that the issues of Net Neutrality and Section 230 are separate and distinct, and should not be linked. And while my written testimony in March did not mention Section 230 because it is not germane to the scope and effect of the Save the Internet Act, my testimony for the April 2018 subcommittee hearing on "Internet Prioritization" did address the topic briefly.[1] I am happy to elaborate on that answer on the record for this hearing as well.

It is for good reason that lawmakers and the public are asking questions about the power and conduct of internet companies, including the largest social media, advertising, and sales platforms. That is understandable, and frankly overdue, in light of the controversies caused by the harmful and predatory behaviors of Facebook alone – to say nothing of other companies like Google and more that likewise collect private data to monetize user-created content and conversations.

Yet while you rightly note the stray suggestions from some of your colleagues regarding "updates" to Section 230, I am not aware of actual legislative proposals to amend Section 230 in any specific way. Calls to "address" or "consider" Section 230 generally stop there. That's likely because some lawmakers pointing at Section 230 either do not understand how that statute operates and what it protects, or do not care to know. Nor do they seem to understand that weakening Section 230 would not address the problems they imagine – and could in fact exacerbate them. But it would harm every entity that allows for user comments and engagement online, not just giant platforms.

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[1] *See* Written Testimony of Matthew F. Wood, Policy Director, Free Press and Free Press Action Fund, "From Core to Edge: Perspective on Internet Prioritization," before Committee on Energy & Commerce, Subcommittee on Communications & Technology, at 27-31 (Apr. 17, 2018), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony-Wood-CAT-Hrg-on-From-Core-to-Edge-Perspective-on-Internet-Prioritization-2018-04-17.pdf.

As I noted in my April 2018 testimony before addressing the question of so-called "edge provider" conduct, there is perhaps a misperception that Free Press Action and other Net Neutrality supporters are unwilling to regulate those platforms or edge providers generally.

Nothing could be further from the truth. When it comes to their troubling data collection practices and privacy abuses; their pattern of profiting from hate, from racism, and from their own or other parties' violations of election law and civil rights law; and their impact on journalism revenues and competition, Free Press Action is deeply concerned and proposing real solutions.

That is why, within the last six months alone, we have (1) helped launch the Change the Terms Coalition to combat the spread of hate speech online, including on the largest platforms; (2) proposed taxes on targeted advertising to generate funds for civic-minded journalism; and (3) co-authored model legislation to not only require affirmative consent for internet and telecommunications companies' collection and use of individuals' data, but also to prohibit discrimination and misuse of such data in ways that violate longstanding civil rights protections.

Changing Section 230 – in some as-yet-unspecified way – would do nothing to remedy the real problems that these and other sincere policy proposals identify and address.

To assess what changing Section 230 would do, we must first understand what the statute does today. Contrary to misconceptions possibly held by some who talk of reforming that law, it does <u>not</u> apply solely to Silicon Valley giants, nor is it predicated on any requirement of neutrality.

Section 230 provides two different but complementary liability exemptions to any "interactive computer service." That defined term includes social media platforms and broadband internet access providers alike, as well as any other website or application that "enables computer access by multiple users to a computer server," then allows third-party "information content providers" to put information on the internet by using that service. *See* 47 U.S.C. § 230(f)(2), (3).

The liability exemptions in the law apply not only to Facebook posts, Google search results, Twitter timelines, and Amazon reviews; but to a broadband provider, for any content accessed through its internet connections; to a website owned by Comcast, AT&T, or Verizon (like MSNBC.com, CNN.com, or Yahoo.com), for any user comments or user-generated material on them; and to a website or app belonging to Fox News, the New York Times, any other news organization, or any other online entity, for user comments or user-generated material on them.

The first liability exemption, appearing in Section 230(c)(1), precludes liability for third-party speech that covered entities actually host or allow to be accessed using their services. It says, in full: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

But the second liability exemption, in Section 230(c)(2)(A), preludes civil liability if such entities choose <u>not</u> to host or allow access to particular third-party speech, and instead take down, remove, or block it. Thus, no interactive computer service may be held liable for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."

Put even more succinctly, all covered entities enjoy these liability exemptions – both if they allow access to third-party content, and if they choose not to allow it. There is no discrepancy between the application of Section 230 to social media platforms and its application to other sites that host user-generated content, comments, or conversations. And while this is indeed a broad pair of exemptions, removing one or both of them could have dire consequences.

To the extent that concerns about online platforms' content moderation choices are motivated by supposed political bias in that curation process, removing or weakening the first liability exemption in Section 230(c)(1) would actually encourage more blocking and takedowns of speech. The reason for that is quite simple: if a website suddenly could be liable for content generated by third parties, that website's risk-tolerance for such third-party content would drop precipitously. "Block first, ask questions later" would necessarily become the mantra of any site or service used to access third-party content, so that removing this liability exemption would have the opposite effect from what some lawmakers proposing vague changes might intend.

In a misguided attempt to apply Net Neutrality-like provisions to edge providers and prevent alleged (but unproven) political bias, lawmakers who talk of "fixing" Section 230 might choose to tinker instead with the second liability exemption, in Section 230(c)(2)(A). But removing the exemption for such curation (whether removals of allegedly objectionable material are done automatically by algorithms or by humans reviewing third-party content) would not necessarily create any obligation for platforms and websites to carry all user-generated content. Nor should it.

Removing or weakening the exemption in subsection (c)(2)(A) could prevent or discourage any website, application, or other interactive computer service from taking down material that violates its terms of service. And while that might change business models and bottom lines in Silicon Valley, it also would fundamentally alter the rights of all sites that host user-generated content.

Publishers could in theory face civil liability for taking down terroristic, hateful, harassing, or pornographic content that some platforms today may indeed choose to allow, but that many do not. News sites (or any other sites) targeted to specific topics, interests, or demographics could in theory face civil liability for moderating comment sections and removing improper and irrelevant posts, and would likely choose as a result not to allow user-generated content and comments at all. So amending subsection (c)(2)(A) could lead to the same result as amending subsection (c)(1): more blocking, not less.

Yet even in that case, with greater threat of liability for takedowns, we are not aware of any existing legal obligation or proven theory that would affirmatively require websites, applications, and other information services to host any and all content "neutrally." To perhaps give more thought to their proposals than they themselves have, the lawmakers who call for "fixing" Section 230 in this way might also need to contemplate the creation of some additional carriage requirements applicable to some or all online platforms.

In other words, having long opposed Net Neutrality as unnecessary "regulation of the internet," they now propose regulating websites. And having even longer opposed the Fairness Doctrine for broadcasters, they now demand a Fairness Doctrine for Facebook.

Yet the spectrum scarcity rationale put forward by the *Red Lion* case to support the FCC's broadcast "Fairness Doctrine" – so long disfavored by the Republican party – was never applied to newspapers or other media outlets, even though these outlets wield tremendous power to decide what news stories are covered and which aren't. Websites, applications, and social media platforms also can have tremendous power to shape what their users see – both on the platform itself and off, thanks to referral of traffic to other sites. But even if the largest platforms today have billions of users, there still remain billions of other websites, applications, media outlets, and other sources of information online and off.

Economic, political, and editorial power alone have historically been insufficient in this country to support content restrictions on speakers, editors, or content aggregators such as newspapers. This remains one of the key differences between what the Communications Act defines as a true "information service," on the one hand, and a broadband telecommunications service on the other. An online publisher, aggregator, or forum may have great sway over news, opinion, and public dialogue, but it does not and cannot have the same type of power that broadband providers do to exclude information from any and all sources online. A news story or comment blocked or removed by Facebook likely already is or can be made available to internet users' on one or many other sites that are literally just a click away; but a news story, comment, or entire website blocked by Comcast becomes unavailable to all users accessing the internet through Comcast.

Verizon dangerously argued once in Net Neutrality appellate litigation that "broadband providers possess 'editorial discretion,'" and said that "[j]ust as a newspaper is entitled to decide which content to publish and where, broadband providers may feature some content over others." This is simply not true. Edge providers and other speakers are not the same thing as telecommunications networks. This is why common carriers such as broadband providers (at least when they are properly classified as such by the FCC), have always been subject to reasonable nondiscrimination rules. They typically are not liable for the speech they carry, and they benefit from Section 230 in this regard too. But they are forbidden from blocking speech they disfavor, unlike edge providers and other services that actually do act as speakers or curators. Note that this includes any websites owned and operated by broadband providers' themselves, such as NBC.com or HBO.com. Websites and applications – no matter how large or widely used – simply are not the same thing as telecommunications pathways that transmit all speech rather than choosing what to transmit.

In sum, changing the first relevant liability exemption in Section 230 would encourage more blocking and removal of content by online platforms rather than less, and thus would likely make all entities that currently benefit from that exemption less "neutral" than they presently are. Changing the second liability exemption in Section 230 could potentially make speakers, editors, and curators of third-party speech and information liable for removing content that violates their terms of service and community standards, yet that bad idea alone would not make interactive computer services more neutral either. That questionable result seemingly would require additional, speculative, and heretofore unarticulated changes to the law, imposing on all information services an unprecedented duty of carriage unsupportable under the First Amendment.

Attachment—Additional Questions for the Record

Mr. Matthew F. Wood, Vice President of Policy and General Counsel, Free Press Action

The Honorable Billy Long (R-MO)

1. **How many fundraising emails has Free Press and the Free Press Action Fund sent regarding Open Internet legislation and the FCC's various proposals and Orders on Open Internet Rules from February 2014 until the date of the hearing (February 13, 2019)?**

Response: Thank you for the questions, Representative Long. We welcome the chance to provide these answers on the scope and scale of our fundraising activities to support our charitable mission and our advocacy work.

As you may know, Free Press is a 501(c)(3) entity and Free Press Action is a 501(c)(4) entity. These entities exist as two separate and autonomous but interrelated organizations. Both organizations are completely independent: We don't take money from business, government or political parties, and we rely on the generosity of public charities, private foundations, and individual donors to fuel our work. That is why, despite the skeptical tenor of the questions posed to me in the hearing and in these questions for the record, we are proud of the fact that so many people choose to support our work with donations in response to our requests.

While some of the precise details and totals responsive to your questions are not available on our website and in the other public filings the organizations make, many of the facts and figures provided here are a matter of public record and freely available on the Free Press website at https://www.freepress.net/about and https://www.freepress.net/about/financials. We summarize that information here, and – for the sake of brevity – link to rather than attach our full IRS Form 990s and annual reports. Should you find it useful to receive these filings or other publicly available information from us directly, we can provide same.

Having set forth that background information and those general parameters, the answer to your first question is that while we do not precisely track information in the format and manner your inquiries request, we still can provide detailed responses along the lines you suggest.

Beginning in January 2014, through the date of the March 12th hearing, Free Press and Free Press Action combined sent approximately 200 fundraising emails regarding Open Internet legislation, the FCC's various proposals and orders on Open Internet rules, and the appellate litigation stemming from both the 2015 FCC order and its 2017 repeal. As Free Press was a party to both of those appellate cases (as an intervenor defending the 2015 rules, then a petitioner challenging the 2017 repeal), our efforts to promote and defend these longstanding communications rights has been a more or less constant priority in our work (at the FCC, in Congress, and in the courts) during the entire five-year period on which you seek information.

The vast majority of these emails were sent on behalf of the 501(c)(4) entity, Free Press Action, which typically relies more heavily on individual donations rather than public charity or foundation grants. The vast majority of these initial emails were also followed by what we call "topper" messages, reminding recipients who have not yet donated about the fundraising request.

2. How much money has both Free Press and the Free Press Action Fund raised from such emails? If this information is available in public reports, such as tax documents, please provide those reports for the same period of time as listed above.

Response: The organizations do not track or report totals raised from specific email solicitations over such a lengthy period of time, and we cannot provide that information now without incurring additional burdens. What we can provide readily is the total raised from all email fundraising efforts over the course of the five-year period from 2014 through 2018, including but not limited to the Open Internet fundraising emails referenced in answer to your first question above.

From 2014 to 2018, Free Press raised $167,630 from fundraising emails. Free Press Action, during that same time period, raised $1,413,479 from fundraising emails. As our organizations' IRS Form 990 filings and our annual reports (each linked to below) will indicate, the organizations together raised a total of $19,729,701 for those same five years. That means our online fundraising efforts accounted for approximately 8 percent of our total support over that five-year period.

Free Press IRS Form 990 for 2018:
https://www.freepress.net/sites/default/files/2019-05/fp_990_public_disclosure_2018.pdf

Free Press IRS Form 990 for 2017:
https://www.freepress.net/sites/default/files/2018-07/free_press_2017_irs_form_990_public_disclosure.pdf

Free Press IRS Form 990 for 2016:
https://freepress.net/sites/default/files/2018-02/2016_free_press_990_public_disclosure.pdf

Free Press Action IRS Form 990 for 2018:
https://www.freepress.net/sites/default/files/2019-05/fpaf_990_public_disclosure_2018.pdf

Free Press Action IRS Form 990 for 2017:
https://www.freepress.net/sites/default/files/2018-07/free_press_action_fund_2017_irs_form_990_public_disclosure.pdf

Free Press Action IRS Form 990 for 2016:
https://freepress.net/sites/default/files/2018-02/2016_free_press_action_fund_990_public_disclosure.pdf

Free Press/Free Press Action Annual Report for 2018:
https://www.freepress.net/2018_annual_report

Free Press/Free Press Action Annual Report for 2017:
https://www.freepress.net/2017_annual_report

Free Press/Free Press Action Annual Report for 2016:
http://www.freepress.net/2016_annual_report

Free Press/Free Press Action Annual Report for 2015:
http://www.freepress.net/2015_annual_report

3. Is your organization encouraging its supporters to badger Representatives Butterfield, Schrader, and Soto online because these members advocated for bi-partisan Open Internet legislation and implied that H.R. 1644 may need to be amended in order to make the legislation bi-partisan?

Response: It is not possible to answer this compound question without separating it into its component parts. Free Press Action does not "encourage[e] its supporters to badger" any Members of the House, or any other officials or government decision-makers. We do encourage our members to contact their elected representatives, however, in order to make their views known on proposed legislation and other matters, as is their right under the First Amendment.

Neither did we encourage our supporters to contact Representatives Butterfield, Schrader, Soto, or any others because of any suggestion that Open Internet legislation should be "bi-partisan." Indeed, as I took pains to point out in my written testimony and in my appearance before the subcommittee, there is overwhelming bi-partisan support – among 90% of Democratic voters and 82% of Republican voters, according to one poll – for the 2015 Open Internet rules and legal framework that H.R. 1644 restores.

We did encourage our email list members and other constituents of subcommittee members to contact their representatives in order to oppose what Free Press Action viewed as unnecessary or harmful amendments to H.R. 1644. While we consistently and vocally supported the approach taken by Chairman Doyle in that legislative process, our support for this legislation – and for the overwhelmingly popular and bi-partisan legal framework it reinstates – has nothing to do with the identity of the party controlling the House or introducing the measure.

4. Is your organization opposed to considering amendments that would make H.R. 1644 bi-partisan?

Response: No. As explained above, H.R. 1644 as introduced and then as passed did garner tremendous support from voters across the political spectrum. It truly is bi-partisan at the outset and at the last. But to the extent your question is meant to probe whether we would have supported amendments offered by Republican or Democratic House Members, our views on any amendments are determined solely by the substance of and need for such legislative proposals, not the political party of the person proposing them.

For instance, Free Press Action did not oppose the amendment offered on the House Floor by Rep. Latta, adopted by voice vote, and then made part of the bill on passage, which calls for the FCC to produce a list of statutory and regulatory provisions forborne from in the 2015 order. Yet we opposed an amendment offered at the Rules Committee stage by Rep. Horn (though not made in order on the floor) that called for study of imposing access fees on "edge providers" merely for delivering content to broadband customers who already pay their phone and cable companies for broadband service and for the ability to obtain such content.

5. Does your organization want Congress to enact a permanent legislative Open Internet solution, or would your organization prefer to continue raising funds by creating further divisiveness on this issue?

Response: Free Press Action wants to make permanent people's longstanding rights, under the Communications Act, to just, reasonable, and nondiscriminatory telecommunications service. We do not believe that these rights could or should wash away simply because today's telecommunications network provides broadband access to the internet rather than narrowband access to the telephone network alone.

Whether the permanent preservation of those rights comes with a new bill like H.R. 1644 or through the proper interpretation of existing law, we have supported measures to achieve that permanent end – and thought we had achieved just that before FCC Chairman Pai rejected his predecessors' efforts and upended the successful, innovation-spurring 2015 rules upheld by the DC Circuit Court of Appeals.

As all of our advocacy attests, those rules are not the least bit "divisive." In fact, perhaps the only place in the country where one can find much of a partisan split on this issue is in the Halls of Congress and certain corridors at the Federal Communications Commission.

While Free Press Action's independence from political parties and corporate funding means we will quite likely always need to "continue raising funds" in furtherance of our work, we are proud to seek public support for that work by building bridges and recognizing common ground – not by pretending the positions staked out by representatives inside the Beltway alone are what makes a law "bi-partisan" or unifying.