Attachment—Additional Questions for the Record

Subcommittee on Communications and Technology
Hearing on
"Holding Big Tech Accountable: Targeted Reforms to Tech's Legal Immunity"
December 1, 2021

Mr. Eugene Volokh, Gary T. Schwartz Distinguished Professor of Law, UCLA School of Law

The Honorable Anna G. Eshoo (D-CA)

1. Your testimony states that the provision of the *Preserving Constitutionally Protected Speech Act (PCPSA)* requiring platforms to report on actions against conservative and liberal accounts is "likely unconstitutionally vague." You also state that provisions in *PCPSA* and the *SAFE TECH Act* about political discrimination raise difficult First Amendment questions. I believe these are the only times you raise constitutional issues with Section 230 bills in your written and oral testimony.

   Given your deep expertise as a First Amendment scholar and expert, is it reasonable for us to read your silence on First Amendment considerations for the other three bills debated at the hearing – the *Justice Against Malicious Algorithms Act*, the *Protecting Americans Against Dangerous Algorithms Act*, and the *Civil Rights Modernization Act* – as a view that you do not see First Amendment issues with those bills as currently drafted?

   RESPONSE:

   These bills would only withdraw aspects of the Congressionally granted § 230 immunity, rather than affirmatively imposing any new liability for constitutionally protected speech. They would also do so in a viewpoint-neutral way, and wouldn't violate the other First Amendment rules that apply to limits on government-provided benefits and privileges (such as the unconstitutional conditions doctrine or the void-for-vagueness doctrine). I'm therefore inclined to think that these particular bills are unlikely to violate the First Amendment.

2. The case of *Zeran v. America Online* was raised at several points during the hearing and I would like to give any witness who did not have the opportunity to opine about it to do so.

    a. Do you believe the case was correctly decided and the court correctly interpreted the statutory text of Section 230?

    RESPONSE:

    I think it is a close question, but I think that on balance *Zeran* correctly interpreted the text. Because publication—in the sense of communicating libelous information to a third party—is an element of libel, any libel lawsuit against a service provider treats the service provider as a publisher. And allowing service providers to be sued on the theory that they are mere "distributors" would create a strong incentive for them to remove any user-generated material based on a mere unproven allegation that it is libelous, especially when the allegation is submitted by a rich and litigious organization. That would appear to be inconsistent with the Congressional policy of promoting "user control over what information is received" rather than control by the targets of criticism.

    b. Do you believe the Supreme Court should revisit the lower courts' current expansive interpretation of Section 230, as Justice Thomas suggests in his concurrence on the Supreme Court's denial of a petition for writ of certiorari in *Malwarebytes v. Enigma Software Group USA*?

    RESPONSE:

    For the reasons given above, I don't think so.

    c. Do you support Congress passing statutory clarification that Section 230 does not apply to distributor liability as proposed in H.R. 2000, the *Stop Shielding Culpable Platforms Act*?

    RESPONSE:

    No, because it would put ordinary Americans' speech at the mercy of the wealthy and litigious.

    Say, for instance, a consumer criticizes a business. The business could then simply claim to Google or Facebook or Twitter that the criticism is libelous, which would put the platform on notice and open the door to distributor liability.

    The platform would then likely realize that fighting the lawsuit would cost a lot of money, but taking down the criticism (even if it may well be perfectly accurate) would cost it virtually nothing. And platforms of course aren't set up to be able to adjudicate libel disputes, so they'll err on the side of what's cheapest to them—

deleting the user post. Indeed, the business wouldn't even need to spend a lot of money to get what it wants through litigation; it would just need to credibly threaten that it will litigate.

This effect might be less strong in states that have "anti-SLAPP" statutes that allow meritless libel cases to be dismissed quickly, with the plaintiff having to pay fees. That might change the platforms' cost calculations, and make them more willing to fight such lawsuits. But most states don't have such statutes, or have only narrow ones; and even when a state has such a statute, some federal circuits have concluded that those statutes don't apply to lawsuits in federal court.