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

The Honorable Anna G. Eshoo (D-CA)

1. Your testimony recommends the Subcommittee take a close look at H.R. 2000, the *Stop Shielding Culpable Platforms Act*, which effectively overturns *Zeran vs. America Online*. If this bill was enacted into law, how do you think platforms would change their behavior in response?

RESPONSE:

Thank you for the questions, Representative Eshoo. As you note, my written testimony did indeed commend to the subcommittee H.R. 2000, the "Stop Shielding Culpable Platforms Act." Yet I also noted that Free Press Action had not fully endorsed that bill.

In answer to your thorough questions numbered 2(a), (b), and (c) below, I will explain more fully our posture towards this particular bill. I will also provide analysis as you requested about the *Zeran* decision itself, and Justice Thomas's views on it. Finally, I will comment briefly on other legislative proposals that likewise aim to re-establish potential liability for distributors with knowledge of harms but preserve Section 230's essential core protections.

In answer to this first question specifically, I would suggest that effectively overturning *Zeran v. America Online* via legislation as H.R. 2000 proposes might incentivize platforms to change their behavior for the better, but Congress overruling that case and stopping there still might not provide enough certainty to achieve the bill sponsors' espoused goals. Congress's aim in revisiting *Zeran* should not be to turn the clock back to 1997 when that case was decided. We are not better served by a return to the uncertainty generated by the even earlier and warring *Prodigy* and *CompuServe* cases that prompted Section 230's enactment in

the first place. Congress should instead look forward to the ways in which it can provide further guidance on what distributor liability could mean in the modern internet era, because there is no perfect analogue available in the body of case law developed prior to Section 230's passage.

Overturning *Zeran* alone, while doing nothing more to structure this concept of distributor liability for online platforms, would not necessarily give "online platforms . . . responsibility to act as a 'good Samaritan', even when moderating illicit material" (in the language of H.R. 2000's legislative findings). It would indeed put platforms on notice that they might be held liable if they "knowingly distribute unlawful materials." Yet it would not give them much sense of when and how that determination of their knowledge and potential liability might be made by courts.

There are considerations that could make leaving this job to the courts attractive nonetheless, letting judges build that framework for distributor liability on their own with successive precedents. After all, Section 230 is a crucial shield against much tort liability and criminal liability for third-party content – crucial because it maintains low barriers to interactive computer services hosting quite literally billions of benign and even beneficial pieces of content and transactions per day. Since the application of tort law and criminal law to harmful content is a judicial exercise, properly cabined but not entirely constrained by the First Amendment in many cases, letting judges make common law on this point could result in good outcomes – or at least better outcomes than any improperly constructed statutes or static congressional pronouncements possibly precluding continued refinement of a revived distributor liability doctrine.

In the end, however, Free Press Action still believes the more promising course would be legislation not only re-visiting *Zeran* but providing some guideposts for the road beyond a simple repeal. The drafters of H.R. 2000 understandably want platforms to take more responsibility for their own conduct and business models, and make better decisions. Overturning *Zeran* undoubtedly could change platforms' behavior dramatically at the outset, but we wouldn't know precisely how it might change their incentives in the long run because we'd need to wait and see how courts developed and applied the doctrine over time.

In sum, a straight reversal of *Zeran* with no further guidance from Congress could clear the way for some courts to get beyond the motion to dismiss stage, and to reach the merits on more claims of liability for platforms' own conduct and content. That might prevent the kind of overbroad application of Section 230

described so well by other witnesses at the hearing. But rather than more finely tuning platforms' incentives to remove harmful material once they have actual knowledge of adjudicated or otherwise proven harms, overturning *Zeran* and stopping there could look more like repealing Section 230 altogether – albeit with less drastic consequences than that kind of full statutory repeal. That's because it could lead to the same bad results: some sites resorting to excessive preemptive takedowns in order to minimize their risk; others deciding not to moderate third-party content at all, and thereby leaving up harmful material on the theory that avoiding any knowledge of its content is the only way to defend against claims of "knowing" distribution.

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 would be hesitant to argue that *Zeran* was wholly or obviously incorrect when handed down, because that decision offered at least a plausible reading of Section 230's text and relevant decisions to date. It represented the ruling court's understanding of distributor liability in the context of more nascent internet publishing. But I would indeed argue that *Zeran*'s interpretation of the statute is by means the only plausible one, nor with the benefit of hindsight the best.

    My written testimony cited the analysis of pre-eminent Section 230 scholar Professor Jeff Kosseff on this point. As Kosseff authoritatively argues, without opining on how broadly it ought to be read from a policy perspective, "[t]here are at least two ways to read" the operative language in Section 230(c)(1): "A limited reading would conclude that by prohibiting interactive computer service providers from being 'treated' as publishers or speakers of third-party content," Congress in fact meant "that all such providers are instead treated as distributors."[1]

    The *Zeran* case took what Kosseff describes as the other path, with the appeals court deciding that the potential class of all "distributors" is nothing more than a subset of the class of all "publishers "under the statutory framework established in Section 230. To quote from *Zeran* itself, with apologies for the double negative in the opinion: prior court decisions utilizing different terms and recognizing different standards of liability for publishers and distributors "do not, however,

[1] Jeff Kosseff, "A User's Guide to Section 230, and a Legislator's Guide to Amending It (or Not)," 37 Berkeley Tech. Law J. ___ (2022), abstract published Aug. 14, 2021, *available at* https://ssrn.com/abstract=3905347, at 16.

suggest that distributors are not also a type of publisher for purposes of defamation law."[2] The conclusion *Zeran* reached as a result was that even if a distributor cannot be treated as a publisher without notice, the sole impact of receiving such notice is to place the distributor back in the shoes of a publisher, rather than to create some separate theory of liability that applies to distributors but not publishers. Thus, to finish on *Zeran*'s reasoning, the language of Section 230(c)(1) that prohibits a platform from being treated "as the publisher or speaker of any information provided by another information content provider" precludes distributor liability too.

Based on the testimony provided at the hearing by other witnesses and based on our own research, Free Press Action now believes that Section 230(c)(1) has been applied too broadly and too early on in many cases actually challenging the content that platforms generate on their own or the conduct in which they engage, not merely their decisions on what third-party content to publish or distribute. That deleterious impact of the *Zeran* decision and its progeny is something that Congress and the courts could revisit.

The abstract exercise of rendering historical judgment on the *Zeran* court's opinion is less important than the way forward. From a logical and textual standpoint, Congress could treat platforms as distributors, and thus distinct from publishers, after they have obtained the kind of knowledge discussed in the *Zeran* case itself. However well-reasoned *Zeran*'s interpretation of Section 230 may or may not have been against the backdrop of publisher liability and defamation law prior to that decision's issuance 25 years ago, Congress is not compelled to freeze in place and can instead write new law on this point so long as it is good and strikes the right balance.

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:

Free Press Action does believe that courts could revisit *Zeran*'s expansive interpretation of Section 230's application to distributors, as Justice Thomas writes in his *Malwarebytes* concurring statement. Yet we do not agree with all of his suggestions in that statement, such as the notion that courts should read Section 230(c)(2)(A) more narrowly, then sit in judgment on whether platforms exercised "good faith" in determining that third-party content was truly "objectionable" before the platform in question decided to remove it or restrict

[2] *Zeran v. America Online*, 129 F.3d 327, 332 (4th Cir. 1997).

access to it.

Courts could indeed revisit *Zeran*'s initial decision on distributor liability, discussed at some length in my answer to question 2(a) immediately above. And Justice Thomas marshals an array of statutory construction and textual interpretation arguments in support of the proposition that *Zeran* erred. For instance, his statement notes that had Congress intended to create such a broad liability protection in Section 230(c)(1), it could have used the same broad language it used in subsection (c)(2)(A) immediately following – where the statute simply says "[n]o provider or user of an interactive computer service shall be held liable" for certain actions, instead of saying as subsection (c)(1) does that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker" of content that another party provides. 47 U.S.C. § 230(c) (emphases added).

He also argues that Congress expressly imposed distributor liability in other parts of the Communications Decency Act, and thus suggests that it would be odd for Congress to implicitly preclude distributor liability in one instance having expressly imposed it another. I agree that could be read as an inconsistency, but it could cut both ways. Congress's express creation of distributor liability in one instance could signal, contrary to Justice Thomas's own implication, that its failure to do likewise by explicitly allowing for distributor liability under Section 230(c)(1) means that no distributor liability lies here.

For these reasons, as well as those suggested in my answers above, Free Press Action believes congressional guidance and positive statutory changes hold more promise for targeted reform to Section 230 than judicial corrections alone do – even from the highest court in the land. Justice Thomas's review of defamation law and tort treatises highlights the same truths as Professor Kosseff's analysis cited above: that *Zeran*'s interpretation of "distributor liability" as a mere subset of publisher liability is not the only plausible reading of the text. Yet merely re-establishing that courts might hold platforms liable as distributors while staying consistent with Section 230's current text would do little to suggest when platforms could or should be held liable for their actions, based on what knowledge standards, legal theories, or causes of action.

New judicial constructions simply removing the obstacle to distributor liability findings that *Zeran* created does not mean there is any there there in judge-made defamation law. To say that platforms might be held liable as distributors upon some future hypothetical revisitation of *Zeran* by the Supreme Court would not

guarantee that such platforms would indeed face liability for their own harmful conduct, unless there is more definitive indication from Congress both of platforms' duties and the knowledge standards to which they may be held.

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:

As reflected in all of my answers to Representative Eshoo's various and vital questions, Free Press Action would (upon opportunity for full review of any proposed bill, of course) support attempts at statutory clarification of the distributor liability problems posed by *Zeran*. Yet passing H.R. 2000 alone would not provide the most certainty for platforms, plaintiffs, and internet users in general. A simple reversal of *Zeran* and reinstatement of potential distributor liability, without more, would not establish any new standards for such liability. Nor would it readily establish comprehensive theories of such liability and causes of action in all cases, at least if those are to be based solely on the body of defamation law forming *Zeran*'s backdrop.

Coupled with the fact that H.R. 2000 was not formally before the subcommittee at this hearing, the concerns above are why we did not fully endorse that bill in our initial testimony or since. We likewise commended to the subcommittee's attention, but likewise offered no full endorsement for, S. 797, the Senate's "PACT Act." But we believe the PACT Act or vehicles like it have more promise than H.R. 2000. Instead of stopping at a simple proclamation that distributor liability is not precluded by Section 230(c)(1), the PACT Act expressly sets forth tests for a platform's potential liability for distribution when it "has actual knowledge of [ ] illegal content or illegal activity" as defined in the bill, and takes no steps to remove such harmful material within a set time after it acquires this knowledge. Congress should in this way frame and clarify not just the knowledge requirements for finding distributor liability, but also the duty that platforms owe people to prevent injuries that platform action (or inaction) may cause.

The Honorable Tony Cárdenas (D-CA)

1. In the United States, social media platforms have systematically failed to effectively remove antisemitic content. According to AJC's 2021 State of Antisemitism in America report, 42 percent of American Jewish respondents who had been the target of an antisemitic remark online reported it and, of those reporting, only 36 percent noted that the content had been removed by the platform. While the flagging and removal of content by large tech platforms is merely symptomatic of the larger national problem of combating hatred, understanding what content is being removed/not removed can help

policy makers and platforms alike develop new tools, policies, and guidelines for effective content removal. Are social media companies open to sharing this content with the public? An independent research group? What steps can Congress take to move towards better understanding how social media companies address harmful content to craft effective policy?

RESPONSE:

Thank you for the questions, Representative Cárdenas. The simple answer to your first question, about whether or not social media companies have been willing to share this information with the public or with independent researchers, is no: they certainly have not been willing enough or forthright enough in sharing comprehensive and truthful information about their content moderation decisions. As Free Press Action co-CEO Jessica J. González subsequently testified before the Senate Commerce Committee's Subcommittee on Communications, Media, and Broadband, these types of companies "have failed outright at fulfilling even the most basic requests for transparency about how their systems work and what they know about" their hundreds of millions of users.[3]

As her testimony went on to explain, Facebook is not the only big tech company guilty of such obfuscations, but "Facebook's top decision makers have brazenly and routinely lied to or withheld the full truth from me and other civil rights leaders, in meetings between company executives and leaders from the Stop Hate for Profit campaign, Change the Terms coalition, and Spanish-Language Disinformation coalition. Facebook has done the same to researchers, the U.S. Congress, and the American public."[4]

You asked about steps Congress can take to move towards a better understanding of how social media companies address harmful content, in order for Congress to craft effective policy on these issues. On this score, Free Press Action has endorsed bills that require more transparency from platforms for the inputs and outcomes of their algorithmic decisions and other policies. One such bill is Representative Matsui's "Algorithmic Justice and Online Platform Transparency Act," H.R. 3611, and we urge Congress to pass it; but other bills contain similarly valid concepts and propositions.

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[3] Jessica J. González, Co-CEO, Free Press Action, "Disrupting Dangerous Algorithms: Addressing the Harms of Persuasive Technology," before the Senate Committee on Science, Commerce, & Transportation, Subcommittee on Communications, Media, & Broadband, at 1 (Dec. 9, 2021), *available at* https://www.commerce.senate.gov/services/files/FCB71657-4A1C-4796-BCED-55BBF418246A.

[4] *Id.* at 6

Were Congress to go beyond requiring transparency, by attempting to dictate how, when, or why platforms should make these editorial decisions, that would raise serious – and in some but not all cases, likely insurmountable – First Amendment concerns. Even mandating transparency about how platforms make editorial decisions could raise some (but in our view, more readily answered) concerns about Congress putting a thumb on the scale.

Yet while we do support legislative efforts to improve and even require social media companies' candor about their adherence to their own stated content moderation policies and community guidelines, we do not support proposals to remove Section 230 protections for companies that fail to meet such transparency requirements. Agencies like the Federal Trade Commission, which enforces rules against deceptive practices by companies including online platforms, need better information about those practices as well as better tools to investigate them and hold companies accountable. But removing Section 230 protections for platforms' failure to follow any existing or new transparency requirements would be a punitive and scattershot approach, less effective at promoting transparency than valid and direct legislative requirements for disclosures and appropriate enforcement for failing to meet those requirements.

2. Mr. Wood, data and privacy protections are essential to safeguard users. We know that the selling of private data is used to amplify advertisements on social media platforms. Can you please elaborate on how the lack of privacy protections or enforcement of existing protections are currently being used to target vulnerable consumers/users?

RESPONSE:

In Free Press Action's view, privacy law is not merely about protecting people's rights to be left alone by the companies and brokers, large and small, that are so ready to snap up, sell, and monetize data. In fact, any notion of privacy turning on notice and consent alone is outdated, considering how often people today are not only asked for consent or even manipulated into granting it; but how often they do in fact choose to consent, even if they do so without full knowledge of all they are surrendering, to use platforms and applications in which they find great utility.

The problem then is not merely that all manner of entities online are tracking and collecting thousands of data points on all of us, though that type of collection forms the foundation for any abusive practices built on top of it. The problem is that participating in our modern society and economy, with so many of our daily routines

and vital tasks moving online, should not require consent to data abuse in violation of longstanding civil rights laws and hard-won consumer protections applicable in offline contexts.

Yet measures intended to prevent any and all data collection, targeting, or monetization by online platforms and other entities risks overbroad prohibition of beneficial and above-board uses of data to make welcome connections. That kind of overbreadth could form the basis of not only suboptimal policy choices, but of constitutional challenges to such a sweeping ban.

That is why Free Press Action has instead supported (as discussed in more detail in question 3 below) measures designed to:

(a) increase platforms' transparency in their collection and processing of data;
(b) minimize the data platforms use and store – and too often fail to protect against breach – by discouraging collection of data that is not necessary for the service provided; and
(c) most importantly, clearly prohibit any abusive or discriminatory use of collected data that contravenes existing civil rights laws.

In the absence of comprehensive online privacy laws, updated for the modern era but also attuned to preventing abuse rather than merely ensuring consent to collection, agencies like the Federal Trade Commission have begun considering rules (and little-used, until recently, rulemaking processes) to establish parameters for what counts as an unfair data practice. But without new laws from Congress or at least these kinds of new guidelines from agencies based on their existing authorities, online entities will continue to have too much leeway to collect and use data however they see fit. They can do so as long as they have a colorable argument that the practice was disclosed – and thus, not deceptive, in the parlance of the FTC Act – or even if these entities fail to disclose a practice but that failure goes undetected and the practice persists.

3. Free Press advocates that Section 230 is necessary to preserve free expression online, yet as we now know all too well, online platforms have not done enough to protect consumer welfare, they have commercialized our personal data, and have failed to consistently enforce their own community guidelines and moderation standards. If amending Section 230 isn't the best remedy, what in your opinion is the appropriate legislative pathway forward to modernize our policy framework so that equity, opportunity, and choice become the defining feature of American innovation?

RESPONSE:

Thank you again for the question, Representative Cárdenas. Yet rather than characterizing our view as a belief that changing Section 230 isn't the best remedy, I would say our testimony explains that smart amendments to this statute could be a possible remedy for some but by no means all of the issues posed by platforms' conduct.

As my written testimony and answers at the hearing show, Free Press Action would consider endorsing good statutory reforms that recalibrate Section 230's judicial interpretation. We agreed with the need to clarify, in some fashion, that the statute does not immunize platforms for their own conduct or for content they themselves create. Instead, it does and should protect the choices platforms make initially to publish or not publish other content providers' information.

Free Press Action opposes bills that tip the scales too much against these current Section 230 protections for platforms' moderation and curation of third-party content. That is not only because (as your question rightly suggests) these protections are vital for platform users sharing their own ideas, content, and goods. Section 230 preserves low barriers to such expression, but it does so by also protecting platforms' decisions to take down hateful and harmful material without fear of being held liable as publishers merely for exercising that choice.[5]

In other words, as you indicate in this question, platforms too often have failed to enforce their own community guidelines and moderation standards consistently. But Section 230 facilitates them having any such guidelines and standards in the first place, even if it does not guarantee their consistent enforcement. Interactive computer services' ability to moderate goes hand-in-hand with opening up their platforms to third-party content, meaning that the statute's liability protections are key both to encouraging the free flow of ideas and to allowing the removal of harmful content as well.

No changes to Section 230 – no matter how sweeping or how surgical – could solve for every problem identified in your question or raised in last month's hearing. For instance, a great deal of harmful and hate-filled material posted on platforms is neither unlawful nor readily actionable under any tort theory of which Free Press Action is aware. Stripping away protections from lawsuits and immunity from criminal sanctions for the content that platforms publish would make little sense as an attempt to change platforms' behavior in cases when there

[5] *See* Gaurav Laroia & Carmen Scurato, "Fighting Hate Speech Online Means Keeping Section 230, Not Burying It," *Techdirt* (Aug. 31, 2020), https://www.techdirt.com/articles/20200821/08494445157/fighting-hate-speech-online-means-keeping-section-230-not-burying-it-gaurav-laroia-carmen-scurato.shtml ("Before Section 230 became law, . . . websites were incentivized to go in one of two directions: either don't moderate at all, tolerating not just off-topic comments but all kinds of hate speech, defamation, and harassment on their sites; or vet every single post, leading inexorably to massive takedowns and removal of anything that might plausibly subject them to liability for statements made by their users.").

could be no such suits or sanctions at all.

In the same vein, somehow making platforms potentially liable as publishers or speakers of content actually provided by another information content provider would be a poor fit (at best) for making platforms adopt better privacy policies. A punitive and overbroad Section 230 amendment threatening to take away the liability shield for any and all platform misconduct likewise makes little sense – and also may run afoul of the First Amendment. If lawmakers' true aim instead is to incentivize better privacy protections for people's data, or to change the financial incentives of platforms with a tool more fine-tuned than just the threat of lawsuits, Congress should proceed directly to do so. It should neither avoid Section 230 debates altogether, nor believe that any changes to this set of liability protections is a panacea for every platform concern.

That is why Free Press Action has recommended that Congress legislate to rein in tech company abuses in a number of ways, starting with digital privacy and civil rights legislation that:

- Limits tech companies' collection and use of people's personal data.
- Establishes people's rights to control their own data.
- Enhances data transparency.
- Prevents discrimination by algorithms.
- Increases platforms' transparency about known impacts of their business models.
- Protects whistleblowers and external researchers.
- Expands FTC oversight.
- Encourages collaboration across agencies that hold specialized expertise.
- Sets a federal floor for consumer protection, not a ceiling.

This approach has been endorsed by over three dozen grassroots organizations in the Disinfo Defense League,[6] a distributed national network of organizers, researchers and disinformation experts disrupting online racialized disinformation infrastructure and campaigns that deliberately target Black, Latinx, Asian American/Pacific Islander and other communities of color.

We see many of the necessary elements for such legislation included in Representative Matsui's "Algorithmic Justice and Online Platform Transparency Act," H.R. 3611. That bill prohibits platforms from discriminating based on protected characteristics when processing data, and also establishes safety and effectiveness standards against which such data processing decisions may be measured. Free Press Action has endorsed H.R. 3611, and also supported similar concepts seen in various degrees in other privacy legislation formally introduced or circulated on a discussion draft basis by members of this Committee.

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[6] *See* Disinfo Defense League, https://www.disinfodefenseleague.org/.

In addition to adopting privacy and civil rights safeguards, Free Press Action believes that the country also must invest in a thriving media system to support a 21st-century democracy. Along with those same partners in the Disinfo Defense League, we have urged Congress to pass legislation to tax digital advertising. Congress then could direct those monies to support high-quality noncommercial and local journalism, including journalism by and serving people of color, non-English speakers, and other such groups under-represented in the media today.