Additional Questions for the Record
Submitted April 28, 2023

Subcommittee on Communications and Technology
U.S. House Committee on Energy and Commerce

Hearing on
"Preserving Free Speech and Reining in Big Tech Censorship"
March 28, 2023

Spencer Overton
President, Joint Center for Political and Economic Studies
Patricia Roberts Harris Research Professor, George Washington Law School

Majority Questions for the Record

1. **Has Section 230 created an environment where Big Tech feels that they are able to censor whomever or whatever they want without regard to the principle of free speech?**

The First Amendment has created a legal environment in which tech platforms have the freedom to engage in content moderation.

The First Amendment of the U.S. Constitution restricts Congress and other government actors—not private actors—from restricting speech.[1] For example, a state law to prohibit private sector employers or public university professors from discussing diversity, racial equity, systemic racism, or related topics is a viewpoint restriction subject to strict scrutiny and violative of First Amendment free speech rights.[2]

[1] See., e.g., Lloyd Corp. Ltd., v. Tanner, 407 U.S. 551, 567 (1971) (holding that individuals had no free speech right to distribute pamphlets in a privately-owned mall, and finding that "the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property."); Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019) (holding that "[t]he Free Speech Clause of the First Amendment constrains governmental actors and protects private actors.").

[2] Honeyfund.com, Inc., v. DeSantis, 2022 WL 3486962, at *11 (N.D. Fla. Aug. 18, 2022) ("the [Individual Freedom Act as applied to employers] violates the First Amendment. . .Florida's Legislators may well find Plaintiffs' speech "repugnant." But under our constitutional scheme, the "remedy" for repugnant speech "is more speech, not enforced silence." . . . If Florida truly believes we live in a post-racial society, then let it make its case. But it cannot win the argument by muzzling its opponents."); Pernell v. Florida Board of Governors of State University System, 2022 WL 16985720, at *41 (N.D. Fla. Nov. 17, 2022) ("the IFA unreasonably burdens the Professor Plaintiffs' speech. Defendants cannot, through the IFA, prophylactically muzzle professors from expressing certain viewpoints about topics that the State of Florida has deemed fair game for classroom discussion. Doing so in the name of reducing racism does not insulate the State from the First Amendment's reach.").

In contrast, as non-state actors, social media companies have the freedom and crucially the power to engage in content moderation. Attempts by politicians to use the power of government to restrict content moderation by private technology platforms violate First Amendment free speech principles.

Politicians may disagree with tech platform content guidelines that prohibit harassment, threatening messages, hate speech, slurs, dehumanizing speech, harmful stereotypes, and statements of inferiority directed at people. A politician may feel as though a January 6, 2021 post instructing protesters to "fight to take their country back" is valuable political speech. The politician may feel as though a post comparing comedian Leslie Jones to an ape is legitimate satire.[3] The politician may agree with a post that uses masculine pronouns to refer to a transgender woman.

Regardless of a politician's views, however, the First Amendment prohibits the politician from using government to prevent or deter a private tech platform from flagging, de-amplifying, or removing this content. An attempt by government to restrict content moderation by platforms is a content-based restriction that is subject to heightened First Amendment scrutiny.[4]

The U.S. Supreme Court has routinely held that such government actions—such requiring a newspaper to provide space for political candidates to reply to criticism,[5] requiring that cable operators carry broadcast TV channels,[6] or requiring that a privately-run parade allow a gay-pride organization to march in the parade[7]—violate the First Amendment.[8] Further, tech platforms are not "common carriers" that receive less First Amendment protection,[9] and even common carriers (e.g., airlines, railroads) can remove users who do not comply with their guidelines.

Aside from the First Amendment, the internet would be much worse if tech platforms were treated as "state entities" prohibited from "censoring" speech. Without content moderation, a great deal of speech that the First Amendment protects from government regulation would thrive on Facebook, Twitter, YouTube, and other platforms. For example, legal adult pornography, spam, hate speech, swastikas, holocaust denial, white supremacy radicalization, violent and graphic

---

[3] Katie Rogers, *Leslie Jones, Star of 'Ghostbusters,' Becomes a Target of Online Trolls*, N.Y. TIMES (July 19, 2016) ("Leslie Jones, one of the most visible and accessible stars in the all-female remake of the "Ghostbusters" movie, said that she would leave Twitter after becoming the target of online trolls who sent her a stream of pornography, racist speech and hateful memes. . . . "Ok I have been called Apes," she wrote on Twitter, "even got a pic with semen on my face. I'm tryin to figure out what human means. I'm out."").

[4] NetChoice, LLC v. Attorney General, Florida 34 F.4th 1196, 1227-1228 (11th Cir., 2022) (granting a preliminary injunction because it was substantially likely that a Florida statute's regulation of social media content moderation was unconstitutional). *But see* NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022) (single-sentence unreasoned order staying a federal district court's preliminary injunction preventing implementation of a Texas law to restrict content moderation by social media platforms).

[5] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 250–51, 256 (1974).

[6] Turner Broadcasting Systems, Inc. v. FCC, 512 U.S. 622, 637 (1994).

[7] Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 570 (1995).

[8] See also Pacific Gas & Electric Co. v. Public Utilities Commission of California, 475 U.S. 1, 17-21 (1986) (invalidating a state agency's order requiring a utility company to include in its billing envelopes third-party speech).

[9] *See* NetChoice, LLC v. Attorney General, Florida 34 F.4th 1196, 1220-21 (11th Cir., 2022) (explaining that social media platforms are not common carriers because users agree to comply with community standards and platforms do not have the unique physical limitations of broadcast media (e.g., scarcity of broadcast frequencies), and holding that state restrictions on social media platform content moderation violate the First Amendment).

content, disinformation campaigns, and deep fakes would be much more pervasive. More young people would be exposed to content promoting eating disorders and instructions on how to engage in self-mutilation and suicide.[10] TripAdvisor would be prohibited from removing comments that are not relevant to travel, and Amazon would be unable to remove spam and other comments that are unrelated to product reviews.[11]

Currently, because platforms are not state actors and do not have First Amendment obligations, they can freely remove or downrank this material. Indeed, while Congress itself could not remove this material, an original purpose of Section 230 was to allow tech platforms to freely remove pornography and other objectionable content without fear of legal liability.[12]

2. **What does the future look like without Section 230 reform?**

Even though the First Amendment protects private tech platforms in their content moderation, it does not demand that they bear no responsibility for what they choose to promote or amplify. This kind of supercharged, unqualified immunity has no basis in the First Amendment, but is rather the product of courts' overly broad interpretation of Section 230 of the Communications Decency Act.

Absent Section 230 reform, in the future Americans will be increasingly vulnerable as more transactions move online. For example, the *New York Times* could be sued for including in a hard-copy version of the newspaper a discriminatory classified housing ad indicating "no minorities."[13] Section 230, however, immunizes online platform Craigslist from legal liability for the same content.[14] Similarly, Facebook has argued that Section 230 shields it from liability for steering housing ads away from Latino and Black users.[15] Guests who are denied a hotel room based on their race by Marriott can clearly sue. Airbnb, however, argues that Section 230 prevents it from

[10] Brief of Amici Curiae of Chamber of Progress, et. al. in Support of Cross-Petitioners, NetChoice, LLC v. Moody, No. 22-292 (U.S. Nov. 22, 2022) ("Platforms also may restrict content promoting self-harm, especially that directed to minors. Indeed, federal lawmakers on both sides of the aisle have urged platforms to take steps to help support teen users' mental health.").

[11] See Brief of Amici Curiae of Chamber of Progress, et. al. in Support of Cross-Petitioners, NetChoice, LLC v. Moody, No. 22-292 (U.S. Nov. 22, 2022) citing LinkedIn, *Professional Community Policies* (last visited November 4, 2022), perma.cc/V4NX-TUDZ; TripAdvisor, *Content & Community Guidelines* (May 4, 2022), perma.cc/Y529LEPL.

[12] In Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), a state trial court held that Prodigy Services Co. was liable for defamatory content on its platform because it had made prior attempts to screen content for offensiveness. Congressional sponsors of Section 230 criticized *Prodigy* because it opened a platform up to liability simply because it had engaged in good faith content moderation efforts. The sponsors intended Section 230 to incentivize platforms to engage in good faith content moderation by removing the threat of liability. See Brief of Amici Curiae The Cyber Civil Rights Initiative and Legal Scholars, in Support of Respondent, at 6–7, *Gonzalez v. Google LLC*, No. 21-1333 (U.S. Feb. 21, 2023) (summarizing CompuServe, Prodigy, and legislative history and intent in passing Section 230).

[13] United States v. Hunter, 459 F.2d 205, 211–12 (4th Cir.1972); Mayers v. Ridley, 465 F.2d 630, 633 (D.C.Cir.1972); cf. Ragin v. New York Times Co., 923 F.2d 995 (2d Cir.1991).

[14] *See* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668 (7th Cir. 2008); See Adam Liptak, *The Ads Discriminate, but Does the Web?,* N.Y. TIMES (March 5, 2006).

[15] Notice of Motion & Motion to Dismiss First Amended Complaint for Defendant at 2, Onuoha v. Facebook, Inc., No. 16-cv-06440-EJD (N.D. Cal. Apr. 3, 2017).

being sued when its guests are denied lodging due to racial discrimination.[16] Online background check companies that have included inaccurate information on credit reports have argued that Section 230 makes them immune from liability under consumer protection laws like the Fair Credit Reporting Act.[17] White nationalist organizations can be sued to deter and hinder their future attacks on communities of color,[18] but a tech company that creates a platform that it knows white nationalists will use to organize, plan, and promote attacks on communities of color generally will be deemed immune from civil liability due to Section 230.[19]

Absent reform, Section 230(c)(1) immunity will continue to narrow legal protections because online platforms will play an increasingly large role in our economic and social life. Digital ad spending ($129 billion) surpassed traditional print and television ad spending ($109 billion) for the first time in 2019,[20] and by 2025 digital ad spending is predicted increase to $315 billion and account for 77.5% of total media spending.[21] Over 80% of employers use social media tools to find employees.[22] An estimated 80% of U.S. consumers use social media before choosing their next rental property, and as of 2018, 93% of those seeking to buy a home use the internet.[23] Two companies—Airbnb and Vrbo—accounted for 18% of U.S. lodging revenues in 2019,[24] and Airbnb alone has a higher total market value ($120 billion) than Marriott, Hilton, Wyndham, and

---

[16] Airbnb, *Communications Decency Act Section 230 and How the PLAN Act Could Change it,* AIRBNB: NEWS (Oct. 23, 2019) (explaining Airbnb's opposition to removing (c)(1) immunity from short-term rental platforms and making the company liable for its users' listings);); Jamila Jefferson-Jones, *Shut Out of Airbnb: A Proposal for Remedying Housing Discrimination in the Modern Sharing Economy*, FORDHAM URB. L. J. (May 26, 2016);); Sam Levin, *Airbnb gives in to regulator's demand to test for racial discrimination by hosts*, THE GUARDIAN (Apr. 27, 2017); Brittany McNamara, Note, *Airbnb: A Not-So-Safe Resting Place*, 13 COLO. TECH. L.J. 149, 159-167 (2015) (exploring the legal uncertainty surrounding Airbnb legal compliance due to Section 230; Smith v. Airbnb, Inc., 316 Or. App. 378, 381 (Or. Ct. App. 2021)) ("Airbnb moved for summary judgment, arguing, among other points, that under CDA 230, 'Airbnb cannot be held liable for the content, or lack of content, on defendant Dennis's listing, as a matter of established law.'"); Airbnb, Inc. v. City and Cnty of S.F., 217 F.Supp.3d 1066 (N.D. Cal. 2016) (arguing that Section 230 preempted the ordinance which made it a misdemeanor to provide and collect a fee for booking services related to short-term rentals); La Park La Brea A LLC v. Airbnb, Inc., 285 F. Supp. 3d 1097, 1104-5 (C.D. Cal. 2017) (holding that Airbnb was immune under section 230 although it provided ancillary services and edited content from third parties on its site).

[17] *See* Henderson v. Source for Pub. Data, 540 F. Supp. 3d 539, 549 (E.D. Va. 2021) (concluding that online background check service that included inaccurate criminal information on background check was entitled to 230 immunity) overruled by Henderson v. Source for Pub. Data, 53 F.4th 110 (4th Cir. 2022). L.P., No. 21-1678, 2022 U.S. App. LEXIS 30534 (4th Cir. Nov. 3, 2022) (overruling district court because online background check service made a material contribution to content and finding that 230 immunity did not bar claim).

[18] *See* Denice Lavoie, *Jury awards $26M in damages for Unite the Right violence*, AP (Nov. 23, 2021) (reporting that a " jury ordered 17 white nationalist leaders and organizations to pay more than $26 million in damages Tuesday over the violence that erupted during the deadly 2017 Unite the Right rally in Charlottesville in 2017.").

[19] While federal crimes are exempt from (c)(1) immunity, the exemption does not extend to federal and state civil claims and state criminal claims. *See* 47 U.S.C. § 230(e)(1). Thus, federal and state civil claims and state criminal claims are unavailable to deter platforms from facilitating white supremacist violence. Further, the carve out for federal crimes may inadequately deter a tech platform that reasonably foresees criminal activity by white supremacists it hosts when the tech platform itself has not manifested the intent required for prosecution under the federal criminal statute.

[20] Kurt Wagner, *Digital advertising in the US is finally bigger than print and television*, VOX, Feb. 20, 2019.

[21] *Digital Advertising in 2022: Market trends & predictions,* INSIDER INTELLIGENCE (Apr. 20, 2022).

[22] *See* SHRM, *Using Social Media for Talent Acquisition*, SHRM (Sept. 20, 2017)

[23] *See* Apartment Data, *Multifamily Data on Social Media for Apartments*, APARTMENT DATA (Jan. 5, 2021)); Statista, *Use of online website for home searching in the United States in 2018*, STATISTA (2018).

[24] *See* Max Starkov, *How can hoteliers win the booking war with Airbnb,* HOSPITALITYNET (Apr. 8, 2021).

Hyatt combined.[25] Most white supremacists no longer belong to formal groups that can be sued like the Ku Klux Klan, but are connected to each other by tech platforms. [26]

The future is bright, however, if Republicans and Democrats come together to enact 230 reforms that protect average Americans. Republicans and Democrats should be able to agree on several issues – like the fact that the internet is vastly different today than it was in 1996 when Section 230 was enacted. Today, many tech companies design and implement algorithms and other platform features to engage users to maximize profits, and because of broad interpretations of Section 230 many tech companies lack the same incentives as other companies to act responsibly. There should be bipartisan consensus that federal law should not incentivize companies to design platforms that impose real harms on many of the most vulnerable Americans – such as child exploitation and abuse, teen eating disorders and other mental health harms, hate-motivated violence, and employment and housing discrimination.

[25] *See* Max Starkov*, How can hoteliers win the booking war with Airbnb,* HOSPITALITYNET (Apr. 8, 2021).

[26] Daniel L. Byman, *When Hate Goes Viral*, FOREIGN POLICY (March 23, 2022) ("White supremacists are also less group-oriented than other extremists, complicating the challenge: You remove al Qaeda content by focusing on the group, but white supremacists are often an amorphous set of individuals connected by complicated networks."). See also ADL, *With Hate in their Hearts: The State of White Supremacy in the United States*, ADL (March 3, 2017) ("Most white supremacists do not belong to organized hate groups, but rather participate in the white supremacist movement as unaffiliated individuals.").