

Additional Questions for the Record

Subcommittee on Communications and Technology
Subcommittee on Consumer Protection and Commerce
Hearing on
“A Country in Crisis: How Disinformation Online Is Dividing the Nation”
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The Honorable Jan Schakowsky (D-IL)

1. I continue to see critics of reform say that without Section 230, the internet as we know it would end. But you aren't suggesting we eliminate Section 230, are you?

Chair Schakowsky, I am not suggesting that we eliminate Section 230. I am simply suggesting that Congress explicitly state what is already the law—that Section 230 does not provide a defense to federal and state civil rights claims when social media companies make a “material contribution” to the underlying discrimination through their ad targeting and delivery.

Social media companies make a material contribution to discrimination when they target (and/or deliver) employment or housing ads away from communities of color and other protected groups, and when they target (and/or deliver) voter suppression ads toward Black users and other protected groups. In these situations—when social media companies are accepting money and deploying their algorithms to target and/or deliver ads away from or toward protected classes—Congress should make clear that courts should not accept overly expansive legal claims that civil rights laws do not apply to social media companies—as Facebook attempted to do in 2017. *See* 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) (“Advertisers, not Facebook, are responsible for both the content of their ads and what targeting criteria to use, if any. Facebook’s provision of these neutral tools to advertisers falls squarely within the scope of CDA immunity.”). In 2019, Facebook settled several legal actions and agreed to make significant changes to prevent advertisers for housing, employment, or credit, from discriminating based on race, national origin, ethnicity, age, sex, sexual orientation, disability, or family status. *Summary of Settlements Between Civil Rights Advocates and Facebook, Housing, Employment and Credit Advertising Reforms*, ACLU (Mar. 19, 2019), <https://www.aclu.org/other/summary-settlements-between-civil-rights-advocates-and-facebook>.

The Honorable Bobby Rush (D-IL)

1. How will the Department of Justice proposal to focus on unlawful material impact the fight against disinformation?

Chairman Rush, the Justice Department's replacement of "objectionable" with "unlawful" in Section 230 would discourage social media companies from content moderation, which would undermine democracy by effectively promoting disinformation, polarization, and suppression. Section 230 clearly gives social media provider the power to in good faith "restrict access to or availability of material that the provider or users considers" to be "objectionable, whether or not such material is constitutionally protected." This revision to Section 230 would chill social media companies from moderating content during an election season—content that should be moderated for the good of democracy even if such content is not manifestly "unlawful" on its face.

It would undermine democracy, damage lives, and undermine engagement if social media companies could not freely remove threats, altered video, or misinformation, unless it was undisputedly "unlawful" or clearly fell within one of the other categories ("obscene, lewd, lascivious, filthy, excessively violent, harassing"). They could not prevent much of the harmful targeting of people from marginalized groups and the abuse and torment of marginalized groups engaging online—or block many invasions of intimate privacy—unless a legal violation was clear. As non-state actors, social media companies currently have the freedom and crucially the power to prevent these harms under an "otherwise objectionable" standard—but an "unlawful" requirement would hinder such content moderation. Even content that could result in "unlawful activity" would be more difficult to moderate because it could require an extensive legal analysis as to whether the content is "unlawful."

The restrictive nature of this language increases the likelihood that social media companies will disengage from pro-social content moderation. It would result in the failure to take down disinformation by fake accounts that provide erroneous information about voting and discourage voting by communities of color. It would increase the likelihood that social media companies would ignore posts that promote hate speech and facilitate racial polarization. The Justice Department's proposal only promotes the likelihood of disinformation and suppression—particularly during an election season—and effectively undermines free and fair elections and democracy.

2. If the Department of Justice's changes were to be enacted, what impact would it have on Russian interference in the upcoming election?

Chairman Rush, the Justice Department's changes would facilitate Russian interference in the upcoming lesson.

3. We have heard much about what the platforms have been doing wrong. In your opinion, is there anything the platforms are doing that is working? What can be done to promote those actions?

Chairman Rush, we want platforms to invest in tools and technologies that minimize disinformation and suppressive content. Many platforms currently invest in these tools to moderate pornography to maintain advertisers and enhance their bottom line, and we want them to do the same for voter suppression, civil rights violations, White supremacy, and other content that marginalizes underserved communities. We want the companies to invest in additional civil rights expertise so they have a much better understanding of threats to marginalized communities—particularly as these threats evolve.

Continued oversight of the industry through hearings—along with revisions to Section 230 that explicitly state that the law does not provide immunity to platforms that materially participate in violations of federal and state civil rights laws through the targeting and delivery of ads for housing, employment, and financial services away from protected classes—or the targeting and delivery of voter suppression ads toward these protected classes—is also important.

The Honorable Anna Eshoo (D-CA)

1. What are the long-term impacts of census disinformation on underserved, undercounted, or otherwise neglected communities?

Chair Eshoo, census disinformation threatens to result in an undercount of underserved communities, which would fall short of the constitutional mandate that apportionment of Representatives be based on “persons” counted by a census conducted in such a manner that Congress directs by law. For example, the Department of Commerce “estimated a net undercount (relative to the total number of Americans undercounted) of about four percent for African Americans” in the 1990 Census and two percent in the 2000 Census and the 2010 Census.¹ In 2016, the Russian Internet Research Agency coordinated a campaign to impersonate African Americans and encourage African Americans to “boycott the election” (African Americans made up 12.7 percent of the U.S. population but accounted for 38 percent of the U.S.-focused ads purchased by the Russian Internet Research Agency). A similar disinformation campaign targeted at marginalized groups attempting to sow distrust of the census or boycott the census could result in a serious undercount of marginalized communities, which could result in diminishing the votes and resources of these populations and their fellow residents, and unfairly inflating the political influence and government benefits enjoyed by those communities where there was not an undercount.

2. You each discuss the harms of political ad microtargeting in your testimonies. I’ve proposed banning political ad microtargeting in H.R. 7014, the *Banning Microtargeted Political Ads Act*, because lesser regulatory interventions, such as requiring disclosures, just won’t solve the problem.

- a. How are marginalized communities impacted by political ad microtargeting?

Chair Eshoo, political ad microtargeting can be used to spread disinformation to marginalized communities that sows confusion and discourages the communities from participating in the process. It can also be used to mobilize marginalized communities to participate in the political process.

- b. What is your view on prohibiting the microtargeting of political ads, as I’ve proposed in H.R. 7014?

Chair Eshoo, I wholeheartedly support the apparent goals of [H.R. 7014](#), which I interpret as: 1) preventing the targeting and suppression of particular groups of voters (e.g., African Americans in 2016); and 2) preventing racial and political polarization fueled by targeting ads with conflicting

¹ Charmaine Runes, [Following a Long History, the 2020 Census Risks Undercounting the Black Population](#), Urban Institute (February 26, 2019).

messages at different communities without disclosure that allows recipients to realize that the conflicting messages stem from the same source.

To strengthen the *Banning Microtargeted Political Ads Act*, one could obtain a constitutional analysis of the bill and guidance on whether simple revisions could retain the bill's purpose while minimizing the potential for First Amendment challenges (on speech and associational grounds).

Additionally, as a policy matter, I would want to ensure that the language of the bill does not prevent less wealthy candidates that lack resources for television ads from targeting their supporters online and mobilizing them to the polls. For example, if I'm the only African American candidate in a congressional district where African Americans make up 25 percent of my district's population and 40 percent of the Democratic primary electorate, I might want to spend my limited budget in the Democratic primary contest to target social media ads so that each African American Democratic voter sees my social media ads 20 times, rather than being forced to have all voters (including Republicans) see my social media ads 5 times (as I can do with U.S. postal mail). A U.S. Senate general election candidate in a contested state like Florida, Ohio, Arizona, or Nevada might also want to mobilize base voters in his or her party in a similar manner.

Also, I would want to ensure language that allows for a consistent application of the "recognized place" exception by courts. As written, it seems as though the ban on platforms targeting political ads "does not apply to the targeting of the dissemination of a political advertisement to an individual residing in, or to a device located in, a recognized place." Some courts could interpret that exception as allowing for targeting based only on geography (e.g., social media ads can be targeted so that they are only delivered to all voters in Menlo Park, California).² Other courts could possibly interpret the exception as allowing for targeting based on other factors (e.g., race) as long as the individuals or their devices are in a recognized place (e.g., social media ads can be targeted to all Latina/os in Menlo Park, California).

The Honorable Tom O'Halleran (D-AZ)

1. In light of social distancing requirements from COVID-19, many online platforms have adapted their workplace structures from employing human content moderators to relying heavily on artificial intelligence algorithms to moderate online content instead.³
 - a. Do you believe online platforms have shown an ability thus far to properly balance effective content moderation between employing human moderators versus algorithms?

² This interpretation seems consistent with the rule proposed by F.E.C. Chair Ellen Weintraub. Ellen L. Weintraub, "[Don't Abolish Political Ads on Social Media. Stop Microtargeting.](#)" *Washington Post*, November 1, 2019.

³ Brookings, *COVID-19 is triggering a massive experiment in algorithmic content moderation* (April 28, 2020) (<https://www.brookings.edu/techstream/covid-19-is-triggering-a-massive-experiment-in-algorithmic-content-moderation/>).

The platforms need to do a much better job of deploying both humans and AI.

First, the platforms need much more internal civil rights expertise with regard to establishing norms and developing those norms over time in response to evolving attempts to suppress votes, promote White supremacy, and violate civil rights. This human expansion is less focused on manual moderation, and more focused on a better understanding of evolving challenges and developing norms to respond.

Second, the platforms need additional incentives to invest more to develop tools to identify and remove disinformation and other content that work to disadvantage communities of color. Again, my understanding is that the companies have invested in developing these tools to address pornography – they need to also develop tools to prevent their platforms from replicating and magnifying systemic racism.

2. Reports show that thousands of human content moderators, including many enforcing the spirit of Section 230 of the Communications Decency Act in Arizona⁴, suffered from mental health trauma such as PTSD. This trend was underscored when Facebook reached a landmark \$52 settlement with impacted human content moderators on May 12, 2020 for mental health trauma suffered on the job.⁵ The lawyer representing the moderators described the threat from human content moderation as “real and severe”.
 - a. How can new or existing labor or content moderation statutes be evaluated and updated by Congress to better protect the mental health and workplace safety of human content moderators?

Many of these workers are low-wage, hourly, highly stressed-out contract workers. Social media companies could start by making them full-time employees given how crucial their work is to the safety of platforms.

Second, occupational safety and health should (and likely does) include mental health. The Occupational Safety and Health Administration (OSHA) could be involved in setting standards for exposure to emotionally disturbing content in consultation with the National Institute for Occupational Safety and Health, as well as the National Institute of Mental Health. Second, workers should be entitled to medical leave under the Family and Medical Leave Act if they are experiencing the consequences of mental trauma sufficient to make it a "serious health condition." In a fairer world, workers would get sick leave—or just mental health leave—so they can take frequent breaks from exposure to emotionally damaging content.

⁴ The Verge, *The Trauma Floor: The Secret Lives of Facebook moderators in America* (Feb. 25, 2019) (<https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona>).

⁵ NPR, *In Settlement, Facebook to Pay \$52 Million to Content Moderators with PTSD* (May 12, 2020) (<https://www.npr.org/2020/05/12/854998616/in-settlement-facebook-to-pay-52-million-to-content-moderators-with-ptsd>).

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This is a failure of job design. It is similar to exposing workers to toxic chemicals for too long. The answer is to limit their exposure and give them the protections they need—not equipment, but training and means to recover from the trauma.