April 10, 2019

Senator Ted Cruz
Chairman, Subcommittee on the Constitution
Senate Judiciary Committee
404 Russell Senate Office Building
Washington, DC 20515

Senator Mazie Hirono
Ranking Member, Subcommittee on the Constitution
Senate Judiciary Committee
730 Hart Senate Office Building
Washington, DC 20515

RE: Stifling Free Speech: Technological Censorship and the Public Discourse

Chairman Cruz, Ranking Member Hirono, Members of Senate Judiciary Subcommittee on Constitution:

We write to clarify confusion about the issues to be discussed at this hearing.

In a 2018 joint hearing of the Senate Judiciary and Commerce, Science and Transportation Committees, Sen. Ted Cruz (R-TX) argued that Congress intended Section 230 of the Communications Decency Act of 1996 to apply only to "neutral public platforms." He asked Facebook CEO Mark Zuckerberg: "It's just a simple question. The predicate for Section 230 immunity under the CDA is that you're a neutral public forum. Do you consider yourself a neutral public forum, or are you engaged in political speech, which is your right under the First Amendment?"[1] Cruz also asked, "Are you a First Amendment speaker expressing your views, or are you a neutral public forum allowing everyone to speak?"[2] Sen. Lindsay Graham (R-SC) took up the same message after the hearing: "[Website operators] enjoy liability protections because they're neutral platforms. At the end of the day, we've got to prove to the American people that these platforms are neutral."[3]

[1] *Facebook, Social Media Privacy, and the Use and Abuse of Data: J. Hearing of S. Comm. on the Judiciary and S. Comm. on Commerce, Science, and Transp.*, 115th Cong. (2018) (statement of Sen. Ted Cruz, member, S. Comm. on Commerce, Science, and Transp.), available at http://www.cruz.senate.gov/?p=video&id=3715.
[2] *Id.*
[3] Elena Schor, Graham seeks 9/11-style commission on social media vulnerabilities, POLITICO (Nov. 2, 2017), https://www.politico.com/story/2017/11/02/social-media-commission-lindsey-graham-244466.

This binary has no basis in constitutional law. There is no requirement for content on a platform to be neutral to trigger the First Amendment protections. Just the opposite: choosing not to exercise editorial discretion protected by the First Amendment does not waive that protection. Website operators are clearly entitled to the full protection of the First Amendment — unlike, say, broadcasters, who receive only limited First Amendment protection. Nor can website operators be said to have violated the expectations of their users: unlike Internet Service Providers, all major "platform" operators make clear in their terms of service that they reserve the right to police content on their sites — because their sites would be unusable if they did not.

Similarly, these Senators completely misstate the purpose of Section 230, which is plain on the text of the statute. Congress recognized that traditional tort liability would, by holding companies liable for user-generated content, create a perverse incentive for companies *not* to take measures to remove objectionable or harmful content (or not to host such content at all). It was Republicans, particularly concerned with protecting children online, who drafted and pushed for Section 230 as part of the Communications Decency Act. Far from requiring Section 230 to be "neutral," the law encouraged websites *not* to be neutral.

Whatever Section 230's original intention, rewriting the law to require "neutrality" would effectively resurrect the Fairness Doctrine — an idea that conservatives fought vigorously from its imposition upon broadcasters in 1949 through the abolition of the doctrine by President Reagan's FCC in 1987. President Reagan vetoed a Democratic bill to revive the rules, and opposition to the Fairness Doctrine remained a rallying point for conservatives through the 2016 election.

Yet now some Republicans want to impose the same basic requirement upon website operators as a condition of Section 230 immunity. This will have three practical effects:

1. As with the original Fairness Doctrine, subjecting content moderation and curation decisions to second-guessing, either by a regulator or in court, will inevitably politicize how companies operate their websites — just as it politicized how broadcasters ran their newsrooms. Both are offensive to the First Amendment.

2. Discourage website operators from moderating content that they believe disrupts their online communities or harms their business model. When did Republicans suddenly decide that anything less than a "Mad Max," anything-goes digital war of all-(trolls)-against-all amounts to censorship?

3. Harm small companies far more than large ones, because large companies will be better able to handle the legal uncertainty surrounding what constitutes "neutrality."

> This would be supremely ironic, given that those who want to amend Section 230 also claim that the largest tech companies already exercise too much market power.

We addressed these issues in greater depth in the attached documents: (1) testimony delivered before the House Judiciary Committee on this same subject nearly a year ago today, and (2) a letter we sent to then-Attorney General Jeff Sessions explaining why the antitrust laws could not be used to punish the exercise of editorial discretion protected by the First Amendment.

Finally, we must note that the most commonly repeated examples of anti-conservative bias among tech companies simply do not hold up under scrutiny. In particular, it has become a conservative commonplace that Twitter, Facebook and Google had "censored" Sen. Marsha Blackburn (R-TN)'s campaign launch video. In fact, the companies did not take down her video, or her account; instead, they simply declined to allow her to pay to advertise that ad on their platforms because the ad claimed that Blackburn had stopped Planned Parenthood from selling body parts of babies — a false claim that would likely be considered defamatory. Social media sites have more restrictive policies regarding content that is shown to users by advertisers for reasons that should be obvious: that content does not come from their friends, and is thus much more likely to offend users, thereby undermining the effectiveness of advertising on these platforms overall — and their business models.

More generally, the fact that some conservative-leaning speakers or media outlets may appear to be disadvantaged more than left-leaning sites by the way website operators moderate or curate content does not, by itself, prove bias. It may simply show *variance*: that speakers and media outlets vary greatly in how they behave, how much they rely on "click-baity headlines," outright misinformation, fake accounts to promote their content, etc.

We would be happy to assist your Committee in understanding these issues and in crafting policy approaches in this area consistent with conservative and First Amendment principles. But in the end, we must recognize, as President Reagan did, that problems of media bias are ultimately not problems that the First Amendment permits the government to solve.

Respectfully,

Berin Szóka

President, TechFreedom