



October 28, 2020

The Honorable Roger Wicker
Chairman, Senate Commerce Committee
United States Senate
Dirksen Senate Office Building 512
Washington, D.C. 20510

The Honorable Maria Cantwell
Ranking Member, Senate Commerce Committee
United States Senate
Hart Senate Office Building 420 A
Washington D.C. 20510

The Honorable Lindsey Graham
Chairman, Senate Judiciary Committee
United States Senate
Russell Senate Office Building 290
Washington, D.C. 20510

The Honorable Diane Feinstein
Ranking Member, Senate Judiciary Committee
United States Senate
Hart Senate Office Building 331
Washington D.C. 20510

Re: Senate Commerce Committee Hearing: “Does Section 230’s Sweeping Immunity Enable Big Tech Bad Behavior?” (Oct. 28, 2020)

Dear Chairman Graham, Ranking Member Feinstein, Chairman Wicker, Ranking Member Cantwell and members of the Senate Judiciary and Commerce Committees:

The Senate Commerce Committee recently published a “fact sheet” entitled “Understanding Section 230 Reform Ahead of 10/28 Big Tech Hearing.”¹ This document makes a series of dubious claims about the First Amendment, Section 230, and the Online Freedom and Viewpoint Diversity Act (“the bill”). We write to respond to those claims with which we take issue most strongly (highlighted in bold italics).

¹ Understanding Section 230 Reform Ahead of 10/28 Big Tech Hearing (Oct. 20, 2020), <https://bit.ly/37LyPn3>.

Big Tech companies have stretched their liability shield past its limits, and civil discourse and First Amendment protections now suffer because of it.

This obtuse wording allows Senators Wicker, Graham and Blackburn to pose as defenders of the First Amendment even as they attempt to use the power of law, and the bully pulpit of their committee, to force private media companies to host speech those companies find repugnant. This is, in effect, what the Fairness Doctrine did to broadcasters — until President Ronald Reagan ended it in 1987. The Republican Party steadfastly opposed the Fairness Doctrine for decades. The 2016 Republican platform (re-adopted verbatim for 2020) states: “We likewise call for an end to the so-called Fairness Doctrine, and support free-market approaches to free speech unregulated by government.”² Yet now Republicans have embraced a new, more vague and more arbitrary Fairness Doctrine for the Internet.

To say that “First Amendment protections now suffer” because of decisions made by private media companies not to carry the speech of others is to fundamentally misunderstand how the First Amendment works. What the First Amendment protects is *not* a right of access to private media platforms, but a right *against* government meddling in the editorial discretion of private entities, regardless of the technology they use.

Sens. Wicker, Graham and Blackburn appear to have imbibed the constitutional claim at the heart of President Trump’s May “Executive Order on Preventing Online Censorship”: that “Big Tech” companies aren’t protected by the First Amendment because, as operators of “public fora,” they are required to justify their editorial decisions just as any government agency would.³ That claim turns clear Supreme Court precedent on its head. When Justice Kennedy described social media as “the modern public square” in *Packingham v. North Carolina*, he was merely conveying the gravity of the deprivation of free speech rights effected by a state law barring sex offenders from using the Internet.⁴ *Packingham* says nothing whatsoever to suggest that private media companies become *de facto* state actors by virtue of providing that “public square.” On the contrary, in his concurrence, Justice Alito expressed dissatisfaction with the “undisciplined dicta” in the majority’s opinion and asked the majority to “be more attentive to the implications of its rhetoric” likening the Internet to public parks and streets.⁵ More recently, in *Manhattan Community Access Corp. v. Halleck*, Justice Kavanaugh, concluded the majority opinion of the conservative bloc as follows:

² Republican Platform 2016, at 12 (2016), <https://bit.ly/2HF1MZP>.

³ Preventing Online Censorship, Exec. Order No. 13925, 85 Fed. Reg. 34079, 34080 (June 2, 2020) (Executive Order).

⁴ 137 S. Ct. 1730, 1732 (2017).

⁵ *Id.* at 1743.

“merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.”⁶

The real threat to “civil discourse” is what Republicans are proposing: a whole-sale assault on the content moderation that makes it possible for civil discourse to survive online. Their proposed legislation would turn every website into something more like Gab, the “free speech” social network dominated by hate speech, conspiracy theories, and other forms of “lawful but awful” content.⁷

Q: Will this make it harder for platforms to remove objectionable content?

A: No. We’re asking companies to be more transparent about their content moderation practices and more specific about what kind of content is impermissible.

In fact, the bill proposes no transparency measures. Instead, it focuses entirely on “mak[ing] it harder for platforms to remove objectionable content.” Today, websites can’t be sued for decisions they make regarding content provided by others that they are in no way responsible for creating: hundreds of courts have interpreted 230(c)(1) to protect decisions made as “publishers,” including both hosting third-party content and also giving it less visibility, preventing it from being shared, removing it completely, *etc.* — all forms of content moderation.

The bill says 230(c)(1) would no longer apply to anything but liability for hosting content. Instead, content moderation would be protected only by 230(c)(2)(A), which means, under current law, that websites would have to prove that they had acted in “good faith.” That, in turn, would make litigation *much* more expensive, since any competent plaintiffs’ lawyer will be able to defeat a website’s motion to dismiss with inventive allegations of “bad faith.”

But that’s just the first step. The bill also sharply limits what content moderation decisions are protected by 230(c)(2)(A): instead of protecting the full range of a website’s editorial discretion, the bill replaces the current catch-all “otherwise objectionable” with “promoting self-harm, promoting terrorism, or unlawful.” Thus, a website could be sued for its content moderation decisions if they did not fit into one of those new categories or those already in the statute (“obscene, lewd, lascivious, filthy, excessively violent, harassing”). That may sound like a long list but it actually leaves quite a lot out — especially, racism and other forms of hate speech, misinformation, and the kind of “coordinated inauthentic activity” by which

⁶ 139 S. Ct. 1921, 1930 (June 17, 2019).

⁷ Berin Szóka, TechDirt, “Why Do Republican Senators Seem To Want To Turn Every Website Into A Trash Heap Of Racism & Abuse?” (Sept. 30, 2020), <https://bit.ly/3kAKhFM>.

bots can manipulate algorithms to make content seem more popular than it is — a tactic employed particularly by foreign actors intent on further destabilizing American politics.

Q: Why not create a new cause of action?

A: Creating a new tort will only help enrich trial lawyers.

The bill doesn't need to create a new cause of action to enrich trial lawyers. It opens the door to liability under a broad range of existing state and federal laws — precisely so that trial lawyers can sue websites for decisions they make about online content moderation. Such litigation would become a political weapon, a tool for harassment that allows partisans to “work the refs” to reshape content moderation practices in their favor. While most such lawsuits would likely fail on First Amendment grounds anyway, having to litigate them will be expensive and time-consuming — especially for smaller platforms who want to compete with the incumbents. It would be another version of the “death by ten thousand duck-bites” that the Ninth Circuit warned about in *Fair v. Roommates*. Lest websites simply cave in to legal threats, the court concluded, “section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.”⁸

The claim that the bill will *not* “enrich trial lawyers” is, at bottom, nothing more than rhetorical cover. In reality, the bill is a gift to the plaintiff's bar. Indeed, that is *the* key fact about the bill that any Republican seeking to learn more about it should know.

Q: Will this allow hate speech/racism/misogyny to “flourish” online, as some congressional Democrats claim?

A: No, but we invite opponents of the bill to discuss their views in the Senate Commerce and Judiciary Committees all the same.

All mainstream websites ban such content, including leading conservative websites. FoxNews.com bans “hateful; or discriminatory” comments; *The Daily Caller* bans “racially, ethnically, or otherwise offensive language.” Even *Infowars* bans comments that are “hateful, racially or ethnically objectionable.” *Gateway Pundit* bars users from posting content that is “hateful, racist, or otherwise objectionable.” Evidently, “otherwise objectionable” is an appropriate reservation of editorial discretion for *Gateway Pundit* — so why would it be inappropriate for any other website? *Breitbart* claims equivalently vast discretion to remove content, or block users who post it, merely because that content is “inappropriate.” Yet if the bill passes, each of these websites could be sued for attempting to enforce these terms of service in moderating user comments.

⁸ 521 F.3d 1157, 1175 (9th Cir. 2008).

Republicans have claimed that moderation of hate speech would remain protected under the “harassing” prong of 230(c)(2)(A). Yet the Administration’s recent request for an FCC rule proposes to construe that term narrowly to require “the subjective intent to abuse, threaten, or harass any specific person and is lacking in any serious literary, artistic, political, or scientific value.”⁹ So, yes, sending racial, sexist, or homophobic epithets to a “specific person” might qualify as “harassing” but generalized rants about groups would not. If Republicans want Section 230 to clearly protect content moderation of hate speech regardless of whether it is targeted at a specific person, their proposed amendments to the law must say so.

Q: Why didn’t you cover medical misinformation?

A: We believe that platforms will be able to remove this content under the “self-harm” language in the bill.

Yes, telling people to, for example, cure themselves with unproven medical remedies *should* qualify as encouraging them self-harm. But, of course, self-harm is a relatively small part of the harm caused by medical misinformation. The greater harm posed by misinformation about masks, social distancing, vaccination, and other aspects of managing communicable diseases is that posed to the health of the public at large, and, in particular, that those in elevated risk categories may suffer serious consequences from behaviors that may pose minimal risk of “self-harm” to those who practice them. The less clear it is whether Section 230 will protect decisions to moderate medical misinformation, the more website operators will be discouraged from engaging in such content moderation.

There is simply no excuse for leaving this question to courts to decide. If the bill intends to protect moderation of medical misinformation, it must say so clearly. That clarity is essential to ensure that the fear of litigation does not deter moderation of content that jeopardizes the health of the public and, especially, the most vulnerable among us.

Blackburn: “the contentious nature of current conversations provides perverse incentive for these companies to manipulate the online experience in favor of the loudest voices in the room.”

To the contrary, by limiting online content moderation, Republicans would allow the most obnoxious voices to dominate online conversations. Just look at any website that engages in no, or little, moderation of its comments section, or at “free speech” social networks such as 8kun, Gab and Parler.

⁹ Petition for Rulemaking of the National Telecommunications and Information Administration, in re Section 230 of the Communications Act of 1934, RM-11862, at 54 (July 27, 2020) (Petition), <https://bit.ly/2TslNT8>.

Q: Will this bill protect against election interference campaigns?

A: Foreign interference in elections is unlawful. This bill won't prevent Big Tech companies from removing content posted by these bad actors.

Websites would still be protected from suit in enforcing rules against “election interference” — but only if they can show that their belief that the content was illegal was “objectively reasonable.” Unfortunately, this will protect against only a narrow subset of ongoing election interference. Title 52 U.S.C. § 30121(a) bars foreign nationals from making even “independent expenditures” on U.S. elections that are not coordinated with campaigns, political parties, *etc.* But as a three-judge panel of the District Court for the District of Columbia ruled in *Bluman v. FEC*, in an opinion written by Brett Kavanaugh, then a D.C. Circuit Judge, this statute “does not restrain foreign nationals from speaking out about issues or spending money to advocate their views about issues. It restrains them only from a certain form of expressive activity closely tied to the voting process—providing money for a candidate or political party or spending money in order to expressly advocate for or against the election of a candidate.”¹⁰

Only part of the documented foreign (mostly Russian) meddling in the 2016 election constituted “express advocacy.” Much of it simply involved disinformation about a variety of conspiracy theories, and posts aimed at inflaming Americans’ pre-existing grievances and bigotries. Nothing in existing election law bars such speech by foreign nationals. So, while the bill would not “prevent” moderation of such content, the bill *would* penalize it: Section 230 would no longer protect such content moderation. Companies would have to start defending their efforts to combat Russian and other foreign propaganda in court.

Democrats have proposed a flurry of bills that would extend the existing ban on foreign “election interference” to cover “issue advocacy” (speech that does not expressly advocate for a particular candidate). It is far from clear that such speech restrictions would be constitutional, and the *Bluman* court specifically declined to address the question of expanding the existing ban on express advocacy.¹¹ Thus, today, the *only* effective limit on this form of interference is content moderation. Anyone truly concerned about foreign interference in America’s elections must defend the ability of websites sued for their content moderation decisions to quickly dismiss that litigation under Section 230(c)(1). Removing this procedural safeguard will cause websites to hesitate to exercise the editorial discretion guaranteed to them by the First Amendment over content they find objectionable — and invite foreign interference on a far larger scale than we have seen to date.

¹⁰ 800 F. Supp. 2d 281, 289 (D.D.C. 2011).

¹¹ *Id.* at 292.

Q: Will this require companies to create more warning labels?

A: Putting a warning label on a tweet could constitute “editorializing,” which would in turn open platforms up to potential legal liability. The idea is to make companies think twice before engaging in view correction.

Section 230(c)(1) has never protected websites for content they create themselves.¹² Thus, under current law, there is no question that Twitter can be sued for the contents of any “warning label” it might attach to a Tweet. But the bill goes much further: it says “being responsible in whole or in part for the creation or development of information ... includes any instance in which a person or entity editorializes....” This could easily be interpreted to mean that a website is not only responsible for the contents of its label, but also potentially liable merely for placing the label on the content, or, say, hiding the content behind the label (so the user has to click through the label to access the tweet) or restricting the visibility of the underlying content. It could also make platforms liable for user experience decisions — *e.g.*, what’s “trending.”

Q: What is your position on fact checking?

A1: We will always find better solutions from the free market concerning fact checking.

A2: This bill provides a starting point for discussion on objectivity by updating the statutory language to include a new “objectively reasonable” standard.

Recent decisions by Facebook and Twitter to fact-check claims they consider likely to be false are, in fact, the product of “the free market.” These are private companies exercising their First Amendment rights to decide how to handle content others want them to carry.

Although they use conservative rhetoric about “free markets,” Sens. Wicker, Graham and Blackburn are openly attempting to interfere with the exercise of editorial discretion by private companies: “The idea is to make companies think twice before engaging in view correction.” That is what, in First Amendment jurisprudence, is called “chilling effects”: deterring the exercise of free speech rights even without directly abridging them.

Today, websites can resolve most lawsuits based on their content moderation decisions with a motion to dismiss: Section 230(c)(1) requires only that they show that they provide an interactive computer service, are in no way responsible for the third-party content for which they are being sued, and that the lawsuit treats them “as a publisher” of that content. Requiring an “objectively reasonable belief” that content falls into a category for which content moderation is permitted will make it difficult, if not impossible, for such lawsuits to

¹² 47 U.S.C. § 230(c)(1) & (f)(2).

be resolved with a motion to dismiss, thus forcing websites to litigate such suits through discovery and a motion for summary judgment, if not all the way to trial. Discovery costs alone have been estimated to account as much as 90% of litigation costs.¹³ By making litigation hugely more expensive, and also by inviting significantly more litigation, the bill will clearly deter content moderation, including fact-checking.

Q: Does the bill raise First Amendment concerns?

A: No. This bill was created with free speech in mind. By narrowing the scope of removable content, we ensure that Big Tech has no room to arbitrarily remove content just because they disagree with it while enjoying the privilege of Section 230's liability shield.

The bill is unconstitutional on multiple levels. The First Amendment protects media entities' right to remove content "just because they disagree with it," however "arbitrary" those decisions might be. Again, forcing private media companies to host content they do not want to host is what the Fairness Doctrine did for decades. The Supreme Court upheld the Fairness Doctrine only because it found that broadcasters do not enjoy the full protection of the First Amendment. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). The Supreme Court has explicitly rejected applying the same arguments to the Internet. In *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997), the Court made clear that, unlike broadcasters, digital media operators enjoy the same protections in exercising their editorial discretion as newspapers. The Court had previously struck down a state law imposing a version of the Fairness Doctrine on newspapers in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Thus, websites enjoy the same First Amendment right as newspapers: "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment." *Id.* at 258.

The current structure of Section 230 is content-neutral: websites enjoy the same immunity regardless of the nature of their content moderation decisions.¹⁴ By contrast, Sens. Wicker, Graham and Blackburn could hardly be more clear that their goal is to change how websites exercise their editorial discretion in specific ways. Despite their talk of "fairness," their amendments to Section 230 would privilege some forms of content moderation with legal

¹³ Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000).

¹⁴ Except, that is, for decisions that amount to anti-competitive conduct, which would constitute "bad faith" under (c)(2)(A) and would fall outside the scope of "publisher" decisions protected by (c)(1), just as the First Amendment does not protect newspapers refusing to carry ads from advertisers that will not join in a boycott of a competing advertising platform. See *Lorain Journal Co. v. United States*, 342 U.S. 143, 152, 155 (1951).

immunity while punishing others: moderating pornography, dirty words and pro-terrorist content would remain protected by Section 230's legal shield, while moderating generalized bigotry, conspiracy theories, most medical misinformation, and foreign disinformation would not. Drawing such distinctions in law is among the most clearly unconstitutional forms of censorship.

Republicans attach great importance to the notion that Section 230 is a "privilege," as if selectively denying private media a "privilege" were any less constitutionally problematic than relying on direct censorship to achieve the same ends. The courts have held otherwise under the "unconstitutional conditions" doctrine. As we explained in detail in our comments to the FCC about NTIA's petition,¹⁵ the First Amendment would no more permit the government to make a legal immunity contingent on the surrender of editorial discretion than it would permit, say, the government to make eligibility for Paycheck Protection Program contingent on businesses being politically neutral in any political signage they display, or allow to be displayed by customers, on their premises. NTIA's reply comments offer only one example of where a legal immunity has been made contingent upon the surrender of editorial discretion and been upheld — but that 1958 case involved broadcasters, which simply do not enjoy the full protection of the First Amendment.¹⁶

Q: Is this legislative push motivated by the President's social media presence or the 2020 election?

A: No. The Commerce Committee has spent the past several years working on Section 230 reform. Repeated instances of censorship targeting conservative voices have only made it more apparent that change is needed.

The President's Executive Order directed the NTIA to petition the FCC to amend Section 230. It is clear that petition provided the basis for the specific amendments proposed in the Wicker-Graham-Blackburn bill. Even NTIA's Petition could not identify a single empirical study that would substantiate claims of anti-conservative bias. Instead, this debate has been dominated by the President's ongoing grievances over isolated instances of Twitter finally deciding to apply its generally applicable policies to the President. His Executive Order was issued just days after Twitter's decision to attach a label to his tweet claiming that mail-in ballots would be "substantially fraudulent," and the very day Twitter attached another label

¹⁵ NTIA, Reply Comments, In the Matter of Section 230 of the Communications Act of 1934, File No. RM-11862, at 37 (Sept. 17, 2020) (citing *Farmer's Union v. WDAY*, 360 U.S. 525, 526-28 (1958)), <https://bit.ly/31MnL5k>.

¹⁶ TechFreedom, Comments, In the Matter of Section 230 of the Communications Act of 1934, File No. RM-11862 (July 27, 2020), <https://bit.ly/3kAKsRs>; TechFreedom, Reply Comments, In the Matter of Section 230 of the Communications Act of 1934, File No. RM-11862 (Sept. 17, 2020), <https://bit.ly/3dZtfPa>.

to his tweet, in reference to Black Lives Matter protests, that “when the looting starts, the shooting starts.” The Order clearly invokes these examples.

The President has since been quick to squelch dissent from Republicans uneasy with rewriting Section 230 to retaliate against such content moderation. In late July, FCC Commissioner Mike O’Rielly, a stalwart conservative, warned that it would be a mistake to try to extend to the Internet anything like the Fairness Doctrine regulations originally developed for broadcasters. Trump retaliated quickly by announcing that O’Rielly would not be renominated after a distinguished career on the Commission. More recently, his replacement was announced: Nathan Simington, the junior staffer who drafted the Administration’s petition to the FCC. In short, the push to rewrite Section 230 to limit its protections for content moderation is very much being driven by the White House and is very much about the “President’s social media presence.”

It seems telling that Senate Commerce Republicans have insisted that this hearing occur the week before the election — and that they were so insistent that this hearing be organized on such short notice. Such hearings involving corporate CEOs usually take months to organize. That the Committee took the extraordinary step of compelling the CEOs to participate by issuing subpoenas further underscores the partisan agenda behind this hearing.

Q: Why not repeal and start over?

A: The tech industry relies on Section 230’s liability shield to protect against frivolous litigation. If we repeal the law, we risk increasing censorship online, and encouraging the creation of a government body ill-equipped to act as judge and jury over speech and moderation. Repealing Section 230 in its entirety could also be detrimental to small businesses and competition.

Acknowledging the essential role Section 230 has played in allowing today’s Internet to develop is encouraging, but it is not reflected by the rest of this document or the bill. Yes, a government body charged with acting “as judge and jury over speech and moderation” would be antithetical to free speech, but this is only superficially different from what Senate Commerce Republicans are proposing. Far more important than whether this task has been assigned to a specific regulator is whether courts themselves must decide whether a website has engaged in disfavored content moderation — and has therefore lost its legal immunity for those moderation decisions. *This* is the First Amendment violation, not some hypothetical “creation of a government body.” Notably, however, Republicans’ legislative proposals would do nothing to prevent a very real, existing government body — the FCC — from proceeding with rulemakings to further define what kind of editorial decisions are and are not protected

by Section 230. The current Republican FCC Chairman recently announced his intention to do just that.

A further clarification is warranted: Section 230 protects not only the “tech industry” but also every website that hosts content created by others. Each of the law’s three immunities protects equally both providers and users of interactive communications services. Thus, it protects equally how social media platforms handle posts, videos and ads created by others, how websites moderate user comments, and users who retweet, reshare, or forward (in emails) content created by others.

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We are not opposed to discussing amendments to Section 230. Legitimate questions have been raised about the current state of the law, and we have attempted to engage with them. Among other things, we led a large group of academics and policy organizations across the ideological spectrum in developing principles to inform lawmakers considering this issue.¹⁷ But a serious conversation about Section 230 will be impossible so long as one side of the aisle continues trying to use the law as a tool to “work the refs” for their own partisan advantage, and to coerce private companies to surrender their First Amendment rights not to be associated with content they find repugnant.

Republicans would do well to remember what President Reagan said when he vetoed legislation to restore the Fairness Doctrine back in 1987:

We must not ignore the obvious intent of the First Amendment, which is to promote vigorous public debate and a diversity of viewpoints in the public forum as a whole, not in any particular medium, let alone in any particular journalistic outlet. History has shown that the dangers of an overly timid or biased press cannot be averted through bureaucratic regulation, but only through the freedom and competition that the First Amendment sought to guarantee.

President Reagan firmly rejected the notion that broadcasters could be forced to carry speech they did not wish to carry in exchange for the “privilege” of holding a broadcast license. The constitutional case against limiting the editorial discretion of private media operators is even more clear when it comes to Internet media providers, which, unlike broadcasters, enjoy the full protection of the First Amendment. President Reagan would be deeply disappointed to see those who claim his mantle today embrace, with such gusto, the basic underpinnings of the Fairness Doctrine. Commissioner O’Rielly was channeling Reagan

¹⁷ Liability for User-Generated Content Online: Principles for Lawmakers (July 11, 2019), <https://bit.ly/3mq1m8k>.

when he said: “I shudder to think of a day in which the Fairness Doctrine could be reincarnated for the Internet, especially at the ironic behest of so-called free speech ‘defenders.’”¹⁸ Sadly, it seems that day may be coming soon.

We remain available to discuss these issues with you and your staff at your convenience, as we have on so many issues for the last decade.

Sincerely,

TechFreedom

¹⁸ FCC Commissioner Michael O’Rielly, Remarks of before The Media Institute’s Luncheon Series at 5 (July 29, 2020), <https://docs.fcc.gov/public/attachments/DOC-365814A1.pdf>.