



March 18, 2021

Hon. Cathy McMorris Rodgers
Ranking Member,
Energy and Commerce Committee
U.S. House of Representatives
2185 Rayburn House Office Building
Washington, DC 20515

Re: Request for Comment re March 25 Hearing on "Disinformation Nation: Social Media's Role in Promoting Extremism and Misinformation"

Dear Ranking Member McMorris Rodgers:

You have put a “call to action” to the public, asking: “Do you trust Big Tech to consistently enforce their policies? ... Do you trust Big Tech as fair and responsible stewards of their platforms?”¹

It is jarring to hear these questions from Republicans — after many decades of Republicans insisting that the government had no business attempting to police the “fairness” of private media operators. Even when those media operators were broadcasters licensed by the government to use scarce airwaves, even after the Supreme Court ruled that the Fairness Doctrine could be applied to broadcasters because their licensure represented state action,² conservatives opposed the Fairness Doctrine on principle. The 2016 Republican Platform, recycled for 2020, declares: “[w]e likewise call for an end to the so-called Fairness Doctrine, and support free-market approaches to free speech unregulated by government.”³

Yet now, convinced that “Big Tech” is out to get them, all too many Republicans have abandoned these long-held principles and have embraced something like — indeed, far more intrusive than — the original Fairness Doctrine for the Internet. They want government to ensure that social media sites handle the moderation of objectionable content “consistently” or “fairly” — both inherently subjective decisions. They want to force private companies to bear

¹ *Energy and Commerce Republicans Seek Public Comment Before Big Tech Hearing*, (March 8, 2021), <https://republicans-energycommerce.house.gov/news/public-comment-big-tech/>.

² *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969).

³ Republican Platform 2016, at 12, (2016), available at https://prod-cdnstatic.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf.

the burden of explaining their decisions. It would be difficult to find a better refutation from a conservative of this about-face than these remarks, made in October 2019:

To be clear, I fully support free speech and believe society strongly benefits from open dialogue and free expression online. I know that there's been some calls for big government to mandate or dictate “free speech” or ensure “fairness” [with heavy sarcasm] online. And it’s coming from both sides of the aisle. Though do I share similar concerns that others have expressed that are driving some of these policy proposals, I do not believe these proposals are consistent with the First Amendment. Republicans successfully fought to repeal the FCC’s Fairness Doctrine for broadcast regulation during the 1980s and I strongly cautioned against advocating for a similar doctrine online. It should not be the FCC, FTC or any government agency’s job to moderate free speech online.⁴

Of course, these remarks came from you. You even tweeted about these remarks to make your point clear:⁵



Yet now, you are using your position as a senior government official to interrogate private companies about the “fairness” and “consistency” of their editorial practices. Here, you have

⁴ Remarks of Cathy McMorris Rodgers, House Energy & Commerce Committee, Hearing on "Fostering a Healthier Internet to Protect Consumers," (Oct. 16, 2019), <https://youtu.be/DaACbUEenZo?t=1430>.

⁵ Cathy McMorris Rodgers (@cathymcmorris), Twitter (Oct. 16, 2019, 12:15 PM), <https://twitter.com/cathymcmorris/status/1184503142412627968>.

“put[] out a call to action from the public” — a veritable “Airing of Grievances” with the trappings of an official government proceeding. Such a government-hosted “Festivus” celebration about how social media companies exercise their editorial discretion is as offensive to the First Amendment as committee hearings about the “unfairness” or “bias” of Fox News would be. Private citizens have every right to boycott media they dislike or whose policies they disagree with, but elected officials may not use their office to retaliate against the editorial choices of private media companies. Put simply, this committee has no business holding hearings on protected First Amendment activity. Where “Congress shall make no law,” neither may Members of Congress use their bully pulpit to browbeat private companies into hosting speech they find objectionable.

In taking your 2019 stand against regulating “fairness” online, you did more than clearly articulating the long-standing conservative understanding of the First Amendment as a shield against government meddling in media, rather than a sword. You also debunked the false claims being made then by your Republican colleagues, which have since been repeatedly endlessly: “Section 230 is ... largely misunderstood. Congress never intended to provide immunity only to websites who are ‘neutral.’ Congress never wanted platforms to simply be neutral conduits, but in fact wanted platforms to moderate content.”⁶ Indeed, Congress aimed to remove any potential legal disincentive against content moderation. Section 230 ensures that, when a website is sued for “unfairly” declining to host someone else’s speech, the court will quickly dismiss the suit — just as the First Amendment would ultimately require, but without the hassle and expense of litigation.

The tragic events of January 6 made clear how much damage misinformation and ongoing incitement to violence could do — most notably, the deaths of five Americans, including one police Capital Police officer, and two subsequent suicides by traumatized Capital Police officers. Only following this real-world reaping of a months-long campaign of online sowing did tech companies *finally* refuse to carry Trump’s speech. At that 2019 hearing, you said: “harmful speech... should be removed, regardless of the political leanings of the speaker or the moderator.” Yet now, you attack the decision of social media companies not to carry Trump’s lethal speech as “censorship.”⁷ It is difficult to imagine in what circumstances you would find content moderation acceptable or “fair,” if not these.

“If Big Tech can silence a sitting United States President,” you claimed in your newly released “Accountability Platform” memo, “they can silence anyone else for having unpopular

⁶ *Supra* note 4.

⁷ Memo from Republican Leader McMorris Rodgers to Energy and Commerce Committee Republican Members re : Big Tech Accountability Platform (Jan. 2021), <https://republicans-energycommerce.house.gov/wp-content/uploads/2021/01/Big-Tech-Accountability-Platform-Memo.pdf>.

opinions.”⁸ This is pure deflection. Trump isn’t just “anyone” and he didn’t just express “unpopular opinions”: he spent months using the largest bully pulpit in the world to delude huge majorities of Republicans into believing that the election had been stolen,⁹ and inciting an insurrection and preventing a peaceful transition of power for the first time since George Washington peacefully left office in 1797.

Indeed, you actively participated in this gaslighting of America. On January 5, citing “questions about the integrity of the 2020 presidential election,” you announced that you would vote to reject “Electoral College vote counts in states where there have been allegations of voter fraud and questions raised about the legality of changes to state election law.”¹⁰ The next day, only *after* five Americans died, including one Capitol Police officer, you became the sole House Republican to publicly change her vote, citing the day’s violence.¹¹ But during Trump’s Senate trial, even as you bemoaned the “lack of civility” online, you refused to assign any responsibility whatsoever for the insurrection to President Trump’s blatant, relentless lies about election fraud or his open incitement to violence.¹²

As with the election, you frame your concerns about content moderation in terms of process, insisting that websites must prove they’ve been “consistent” and “fair.”¹³ The First Amendment—which protects content moderation—forbids such a requirement just as it would forbid requiring the same of *The Wall Street Journal* or *Fox News*. When it comes to speech, what is “fair” is ultimately in the eye of the beholder — and, unlike election procedures, “fairness” cannot be decided by the courts or regulators. Again, the First Amendment prevents the government from second-guessing the “fairness” of websites’ editorial decisions just as it bars the government from scrutinizing, say, whether Fox News is really “Fair and Balanced.” The Federal Trade Commission was asked to do precisely that back in 2004. You would do well

⁸ *Id.*

⁹ Chris Cillizza, CNN, *Three-quarters of Republicans believe a lie about the 2020 election* (Feb. 2, 2021), <https://www.cnn.com/2021/02/04/politics/2020-election-donald-trump-voter-fraud/index.html>.

¹⁰ Melissa Luck, KXLY, *Rep. Cathy McMorris Rodgers will object to certification of presidential election* (Jan. 5, 2021), <https://www.kxly.com/rep-cathy-mcmorris-rodgers-will-object-to-certification-of-presidential-election/>.

¹¹ McMorris Rodgers Statement on Protests In Nation’s Capital (Jan. 6. 2021), <https://mcmorris.house.gov/mcmorris-rodgers-statement-on-protests-in-nations-capital/>.

¹² Whitney Ward, Kaitlin Riordan, KREM, *Rep. McMorris Rodgers says Trump didn't give rioters 'direction' to storm U.S. Capitol* (Feb. 10 2021), <https://www.krem.com/article/news/investigations/mcmorris-rodgers-says-trump-didnt-give-rioters-direction-to-storm-the-capitol/293-6052edac-09fc-433f-8694-c4390a265e15>.

¹³ *Supra* note 8.

to remember what the Republican FTC chairman said: “That is a task the First Amendment leaves to the American people, not a government agency.”¹⁴

Sincerely,

Berin Szóka

President, TechFreedom

P.S. For your Committee’s consideration, I attach for the record several recent TechFreedom pieces explaining why the First Amendment bars the government from interfering with content moderation decisions made by private websites:

- Berin Szóka & Ari Cohn, *The Wall Street Journal Misreads Section 230 and the First Amendment*, LAWFARE (Feb. 3, 2021), <https://www.lawfareblog.com/wall-street-journal-misreads-section-230-and-first-amendment>
- Corbin Barthold & Berin Szóka, *No, Florida Can’t Regulate Online Speech*, LAWFARE (March 12, 2021), <https://www.lawfareblog.com/no-florida-cant-regulate-online-speech>
- Berin Szóka, *We Need Section 230 Now More than Ever*, PROTOCOL (Jan. 11, 2021), <https://www.protocol.com/we-need-section-230-now>
- Berin Szóka & Ashkhen Kazaryan, *Section 230: An Introduction for Antitrust & Consumer Protection Practitioners*, Report on the Digital Economy (Oct. 10, 2020), <https://gaidigitalreport.com/2020/10/04/section-230-an-introduction-for-anti-trust-and-consumer-protection-practitioners/>

¹⁴ Statement of Federal Trade Commission Chairman Timothy J. Muris on the Complaint Filed Today by MoveOn.org (July 19, 2004), <https://www.ftc.gov/news-events/press-releases/2004/07/statement-federal-trade-commission-chairman-timothy-j-muris>.