TESTIMONY ON OHIO HOUSE BILL 441

By: James Sherk

Chair Hudson and members of the Civil Justice Committee of the Ohio House of Representatives, thank you for inviting my testimony. My name is James Sherk. I am the director of the Center for American Freedom at the America First Policy Institute (AFPI). My work at AFPI focuses on protecting Americans from traditional and emerging threats to their freedom. Prior to joining AFPI I served as a Special Assistant to President Trump on the White House Domestic Policy Council. In that role I led the White House inter-agency working group on combatting Big Tech censorship, including the development of what became Executive Order 13925 on Preventing Online Censorship.

Big Tech censorship has become a major threat to American freedom. Half of all Americans know someone who has been censored by Big Tech. Since the Biden Administration has shown no interest in combatting Big Tech censorship, the focus on combatting online censorship has shifted to the state. Big Tech argues that Section 230 of the Communications Decency Act of 1996 (Section 230) and the First Amendment prevent states from taking any actions to limit their censorship. They overstate their case. States can take effective action against Big Tech censorship while staying within the parameters of federal law and the constitution. The Ohio legislature can prevent Big Tech from censoring Ohioans.

TECH CENSORSHIP WIDESPREAD

The internet has become the 21st-century public square. Today most Americans keep in contact with friends and relatives, follow the news, and discuss current events online. Indeed, the internet has largely supplanted traditional mediums of communication: most Americans say they prefer to get their news online. Most Americans also regularly get news from social media websites such as Facebook, Twitter, and YouTube (Shearer, 2021). Major online platforms allow Americans to communicate as never before.

This development has also given major technology companies unprecedented private power to control Americans' speech. When the major online platforms ban a user or their content, users have few alternative ways to make their voice heard. As Supreme Court Justice Clarence Thomas recently observed:

> When a user does not already know exactly where to find something on the Internet—and users rarely do—Google is the gatekeeper between that user and the speech of others 90% of the time. It can suppress content by deindexing or downlisting a search result or by steering users away from certain content by manually altering autocomplete results. Facebook and Twitter can greatly narrow a person's information flow through similar means (*Biden v. Knight First Amendment Institute*, 2021).

By deplatforming users or restricting their content – especially when acting in concert – major technology companies can effectively shut Americans out of the public square. Technology companies are increasingly using this power to control America's public discourse, censoring users and viewpoints they dislike. This censorship typically takes the form of establishing broad and superficially neutral terms of service, then selectively

applying and enforcing them against disfavored – often conservative – views. Several recent high-profile content takedowns illustrate this phenomenon:

- During the 2020 Presidential elections Twitter froze the New York Post's account for several weeks for reporting since-verified materials recovered from Hunter Biden's abandoned laptop. Twitter claimed the coverage violated their policy against publishing hacked materials. However, Twitter did not previously restrict tweets covering materials published by Wikileaks or reported by Edward Snowden (Flood, 2020).

- YouTube's "Elections Misinformation Policy" prohibits posting "Content that advances false claims that widespread fraud, errors, or glitches changed the outcome of any past U.S. presidential election" (YouTube, n.d.). However, YouTube has not taken down numerous videos in which Hillary Clinton claims the 2016 election was stolen from her. For example, a YouTube video in which Hillary Clinton says "Trump knows he's an illegitimate president" remains active (CBS Sunday Morning, 2019).

- In August 11, 2020 OutKick.com – a prominent sports and opinion website – ran articles covering the site founder's interview with President Trump, where they discussed the importance of not canceling the fall 2020 college football season. The articles proved highly popular and OutKick web traffic increased substantially. But the next day, and for the next week, their Facebook traffic dropped more than two-thirds below normal levels. OutKick's tech team determined that Facebook had restricted OutKick's audience following the Trump interview. Over the next several months OutKick tested positive articles about President Trump and then-candidate Biden. Biden articles had no effect on OutKick's Facebook traffic, but positive Trump coverage induced traffic collapses, despite high levels of interest in these articles by readers who did come to the site. OutKick concluded that Facebook was restricting their audience when they posted materials friendly towards President Trump (*Reviving Competition*, 2021).

- Newt Gingrich's Twitter account was suspended for "hateful conduct" after he Tweeted: "If there is a covid surge in Texas the fault will not be Governor Abbott's comon [*sic*] sense reforms. The greatest threat of a covid surge comes from Biden's untested illegal immigrants pouring across the border. We have no way of knowing how many of them are bringing covid with them" (McFall, 2021). However, Twitter did not suspend the account of the digital magazine the Root when it tweeted an article titled "Whiteness is a Pandemic" (The Root, 2021).

Big Tech censorship widely affects Americans of all stations in life. Over 100,000 Americans reported cases of online censorship to the America First Policy Institute in 2021. Nearly half of Americans—46 percent—say they personally know someone who has been temporarily or permanently banned from a social media platform (Rasmussen, 2021).

The American people widely recognize that technology companies engage in censorship. A Pew poll found that almost three-quarters of Americans (73 percent) believe social media sites intentionally censor viewpoints they find objectionable. This majority included 90 percent of Republicans and 59 percent of Democrats (Vogels, Perrin, and Anderson, 2020).

FOCUS ON THE STATES

However, the federal government appears unlikely to protect Americans from Big Tech censorship in the immediate future. The Biden Administration openly wants to increase Big Tech censorship, not combat it. President Biden revoked EO 13925 on protecting Americans from online censorship. The Biden Administration is working with major social media platforms to take down content (Nelson, 2021). The Biden Administration is also considering modifying Section 230 to penalize online platforms that do not aggressively censor "misinformation" (Klein, 2021).

The Biden Administration's stance has turned the policy focus to the states. If a substantial number of states passed legislation protecting online discourse, then the major tech companies would likely need to modify their policies nationwide. Florida and Texas have already enacted legislation prohibiting online censorship.

IMPEDIMENTS TO STATE-BASED LEGISLATION

Critics counter that two obstacles prevent states from enforcing such laws: Section 230 and the First Amendment (Soave, 2021). Section 230 immunizes online platforms from liability for moderating content. Since Federal law supersedes state legislation, opponents argue states cannot independently regulate platform content moderation.

Even if Section 230 did not exist, critics argue the First amendment prohibits such laws. The Supreme Court has expressly held that the First Amendment's guarantee of free speech protects the right not to communicate ideological views one disagrees with (*Wooley v. Maynard*, 1977).[1] The Supreme Court has similarly held that the government cannot force newspapers to provide space to political candidates when they endorse their opponents (*Miami Herald Publishing Co. v. Tornillo*, 1974). Critics argue the First Amendment gives platforms a constitutional right not to run content they disagree with. These arguments persuaded conservative policymakers in both Utah and North Dakota to reject legislation combatting tech censorship (Turley, 2021). A federal district judge recently enjoined enforcement of Florida's social media law on both Section 230 and First Amendment grounds (*NetChoice vs. Moody*, 2021).

These legal obstacles are not insurmountable. Section 230 itself may be unconstitutional. To the extent it is constitutional, states have leeway to combat bad faith content moderation and viewpoint discrimination. And the Supreme Court has also held that, while the government generally cannot force entities to express a particular message themselves, it can require them to host third-party speech. So while the Supreme Court has not ruled directly on point, existing precedents suggest states can pass laws protecting free speech on social media.

SECTION 230

Section 230 provides in relevant part:

(c) Protection for "Good Samaritan" blocking and screening of offensive material

[1] In *Wooley v. Maynard* the Supreme Court struck down New Hampshire law requiring residents to display the state motto "Live Free or Die" on their vehicle license plates. The Court held that the First Amendment prohibited the government from requiring an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.

> (1) *Treatment of publisher or speaker*. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> (2) *Civil liability*. No provider or user of an interactive computer service shall be held liable on account of … any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected[.]

This language has preempted most legal challenges when online platforms restrict content (Brannon, 2019, pp. 15, 22). Nonetheless, Section 230 may be unconstitutional. If so, it cannot prevent states from protecting their residents. Congress enacted Section 230(c)(2) immunity to encourage internet platforms to voluntarily remove "objectionable" material, even if that material is constitutionally protected. The Supreme Court has held that it is "axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish" (*Norwood v. Harrison*, 1973). Congress cannot, by encouraging third party restrictions, indirectly suppress content that it cannot directly censor. The courts have not yet ruled on this issue with respect to Section 230, but there are strong arguments that Congress has no authority to incentivize and immunize third-party censorship.[2]

Similarly, to the extent Section 230 preempts state laws preventing online censorship, it prevents states from protecting free speech. Legal commentators have pointed out that this may also be unconstitutional under existing precedents (Volokh, 2021a). The Supreme Court has held that federal laws that prevent states from protecting individual rights must withstand constitutional scrutiny, even if they only enable private parties to act:

> If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. … The enactment of the federal statute … is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction (*Railway Employees v. Hanson*, 1956).

Section 230 may not preempt state laws protecting online discourse at all. Existing precedents suggest Congress cannot empower and incentivize third parties to suppress speech.

FREE SPEECH PROTECTIONS CONSISTENT WITH SECTION 230

Even if Section 230(c) is held constitutional, there are good arguments that states can draft speech-protecting legislation within its confines.

Lower courts have interpreted Section 230's immunity for content moderation inconsistently. Some lower courts have interpreted subsection (c)(1) to sweepingly

[2] President Trump recently filed a class-action lawsuit against Facebook, Twitter, and YouTube for censoring users. President Trump's complaint argues that Section 230's broad immunity for content moderation is itself unconstitutional on these grounds. The America First Policy Institute's Constitutional Litigation Partnership is supporting this litigation effort.

immunize all content restriction.[3] Other lower courts have instead held that immunity depends on platforms acting in "good faith" under subsection (c)(2) (National Telecommunications and Information Administration, 2020, pp. 28-30). The Supreme Court has not resolved this question, although Justice Thomas has described the "sweeping immunity" as "questionable precedent" that "reads extra immunity into [Section 230] where it does not belong" (*Malwarebytes v. Enigma Software*, 2020). Justice Thomas, and many lower courts, conclude that construing subsection (c)(1) to generally immunize content restriction would render subsection (c)(2)'s specific immunity for good faith behavior superfluous. This violates canons of statutory construction that call for giving effect to all parts of a statute.

If Section 230's immunity for content restrictions depends on "good faith" under (c)(2) then states have room to act. Section 230 does not clarify what "good faith" means. Commentators have observed that states could adapt their consumer protection laws to flesh out subsection (c)(2)'s "good faith" obligations (Coleman, 2019). Similarly, section 230(c)(2) enumerates types of content that platforms may prohibit (e.g. obscene, excessively violent, etc.). It says nothing about immunizing viewpoint-based discrimination. So if Section 230 immunity derives from subsection (c)(2), states may be able to prohibit viewpoint-based discrimination while still allowing platforms to take down specific types of content in a viewpoint-neutral fashion. Ohio HB 441 prohibits exactly such viewpoint-based discrimination.

Such state laws would be consistent with the interpretation of Section 230 that Justice Thomas and many lower courts have favored. They would not treat platforms as publishers or speakers. They would simply ensure that platforms do not moderate content deceptively or otherwise in bad faith, or engage in viewpoint based discrimination.

COMMON CARRIER LAWS CONSTITUTIONALLY PERMISSIBLE

Similarly, the First Amendment does not prevent all government actions to prevent online censorship. The First Amendment generally prevents the government from forcing people (or companies) to express a particular message. However, as Justice Breyer has noted, "requiring someone to host another person's speech is often a perfectly legitimate thing for the Government to do" (*Agency for Int'l Development v. Alliance for Open Society International*, 2020). In particular, the government likely can regulate social media companies as common carriers under existing First Amendment precedents. Justice Thomas discussed this possibility in a recent concurrence (*Biden v. Knight First Amendment Institute*, 2021).

Common carrier laws require regulated businesses to serve all customers without discrimination. They originally applied to industries like transportation and courier services. Congress subsequently applied them to telecommunications services. Under common carrier laws, for example, telephone companies cannot deny customers service based on their political views or what they say on the telephone. They must transmit all paying customers' speech. Justice Thomas noted that such common carrier regulations existed at the time of the founding and were not – and are still not – seen as infringing on free speech. Common carrier precedents explain why Net Neutrality policies do not raise First Amendment concerns. Net Neutrality generally requires internet service providers (ISPs) to

[3] The theory is that under (c)(1) platforms cannot be treated as editors or publishers, and a core function of an editor is to decide what to publish or not publish. Therefore these courts have held that Section 230 bars any suit that would hold platforms liable for restricting access to particular content.

allow users equal access to all websites and internet content. As the D.C. Circuit Court of Appeals has explained, the "absence of any First Amendment concern in the context of common carriers rests on the understanding that such entities, insofar as they are subject to equal access mandates, merely facilitate the transmission of the speech of others rather than engage in speech in their own right" (*U.S. Telecom Association v. FCC*, 2016).

SOCIAL MEDIA COMPANIES LIKELY CAN BE REGULATED AS COMMON CARRIERS

The Supreme Court has not directly considered whether the government can impose common carrier duties on social media companies. However, Eugene Volokh – a prominent First Amendment legal scholar – observes that several of the Court's precedents suggest it can (Volokh, 2021b). Richard Epstein has also reached a similar conclusion (Varadarajan, 2021).

Three main precedents support this argument. In *Pruneyard Shopping Center v. Robins* (1980) the Court considered a challenge to a California law requiring shopping malls to allow petition signature gathering on their premises. PruneYard Shopping Center argued "that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others." The Supreme Court unanimously rejected that argument and upheld the California law.

In *Rumsfeld v. Forum for Academic and Institutional Rights* (2006) the Supreme Court considered a challenge to a law that required universities to provide military recruiters equal access to on campus recruiting or lose federal funds. Several law schools objected to the military's then-extant "Don't Ask, Don't Tell" policy. They argued that it was unconstitutional for the government to force them to host speech they disagreed with. The Supreme Court unanimously disagreed, holding that "students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy."

In *Turner Broadcasting System v. FCC* (1994) the Justices considered a law requiring cable providers carry local broadcast stations. Cable providers sued, arguing these requirements unconstitutionally forced them to transmit messages they did not want to convey. The Supreme Court held Congress could constitutionally require them to do so.

Under these precedents the government can require organizations to host third-party speakers under a few conditions. First, compelled hosting must not prevent the organizations expressing their own speech (Volokh, 2021b, pp. 42-47). Second, compelled hosting must not prevent the organizations from dissociating with or disavowing the speakers' message (Volokh, 2021b, pp. 47-52). Finally, the government generally may not require organizations to convey a specific message. The government can only require organizations to provide a forum for others to speak, not to communicate a particular viewpoint (Volokh, 2021b, pp. 65-67).

These conditions apply to social media companies. Common carrier duties would not prevent social media platforms from communicating their own views, and the platforms could easily disassociate themselves from third-party content. Indeed, under Section 230 third-party content cannot be legally attributed to platforms. And common carrier duties would only oblige platforms to provide a forum for others, not to communicate a specific message.

Moreover, in *Turner* the Supreme Court expressly held that private control over a communications "bottleneck" can constitutionally justify requiring them to host third-party speech:

> When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.
>
> The potential for abuse of this private power over a central avenue of communication cannot be overlooked. Each medium of expression must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems. The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas … assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment. (*Turner Broadcasting*, 512 U.S. at 656-57, 663)(cleaned up).

This reasoning applies with equal force to major social media platforms.

Federal law does not preempt state common carrier regulations either. Current FCC common carrier regulations do not limit states' ability to regulate internet service providers (ISPs).[4] President Biden plans to change these ISP regulations to resurrect Net Neutrality (Exec. Order 14036). However, the Biden administration has shown no interest in extending these regulations to cover online platforms. Unless the Federal government affirmatively regulates online platforms under Title II of the Communications Act, states can set their own policies.[5] States can in principle prohibit online censorship in a manner consistent with constitutional requirements and federal law.

CONCLUSION

Big Tech censorship has become a serious threat to free speech in the United States. Major corporations should not be the judge of who can speak online, and what they can say. While federal action against Big Tech censorship appears unlikely in the immediate future, states have leeway to act. Big Tech argues that both Section 230 and the First Amendment render such efforts futile. They overstate their case. While states cannot

[4] The FCC order rolling back the Obama administration's net neutrality rule held that internet service providers (ISPs) were "information services" not subject to common carrier regulations as "telecommunications services" under Title II of the Communications Act. That FCC order also categorically preempted state net neutrality regulations. In subsequent litigation the D.C. Circuit Court of Appeals invalidated the preemption provision, holding that if ISPs were not covered by Title II then the FCC had no statutory authority to categorically preempt state laws imposing common carrier duties. See *Mozilla Corp. v. Federal Communications Commission* (2019). That holding implies that states can generally regulate ISPs under state law.

[5] Under the *Mozilla v. FCC* holding, the FCC would have to affirmatively classify online platforms as "telecommunications services" and not "information services" for the Communications Act to preempt state legislation. The Biden administration has shown no interest in making this policy shift..

contravene either federal law or the constitution, states can pass effective anti-censorship legislation that operates consistently with both Section 230 and the First Amendment.

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