TESTIMONY BEFORE THE COMMUNICATIONS AND TECHNOLOGY COMMITTEE OF THE MICHIGAN HOUSE OF REPRESENTATIVES

By: James Sherk

Chair Hoitenga, Vice Chairs Damoose and Coleman, and members of the Communications and Technology Committee of the Michigan House of Representatives thank you for inviting me to testify. My name is James Sherk. I am the director of the Center for American Freedom at the America First Policy Institute. My work focuses on protecting Americans from traditional and emerging threats to their freedom. I previously 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 combating Big Tech censorship, including the development of what became Executive Order 13925 on Preventing Online Censorship.

There are three points I would like to make this morning. First, Big Tech censorship is a widespread and serious problem. Second, government intervention to protect free speech is an appropriate and conservative policy response. Third, modifications to HB 5973 could reduce the risk of Section 230 preventing these protections from taking effect.

The first point the Committee should understand is that Big Tech censorship is a widespread and serious problem. The United States Supreme Court has rightly described social media platforms as the 21st-century public square,[1] but they are operated by a handful of large corporations. These tech firms are now using their control of these platforms to censor and suppress views with which they disagree. There are numerous high-profile examples of such censorship. For example:

- Twitter de-platformed President Trump on the grounds that he violated their "glorification of violence" policy. But Twitter has not restricted the accounts of Vladimir Putin, the Taliban spokesman in Afghanistan, Bashar al-Assad of Syria, Venezuelan dictator Nicolas Maduro, or Ayatollah Khamenei of Iran, all of whom have engaged in or advocated for acts of horrific violence.

- Facebook banned posts arguing that COVID-19 was a man-made virus that escaped from a Chinese lab—a ban Facebook subsequently reversed after leaked intelligence suggested this theory was highly plausible.[2]

[1] *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).
[2] Hern, A. (May 27, 2021). Facebook lifts ban on posts claiming Covid-19 was man-made. *The Guardian*. https://www.theguardian.com/technology/2021/may/27/facebook-lifts-ban-on-posts-claiming-covid-19-was-man-made

- YouTube's elections misinformation policies prohibit posting content that claims that fraud or errors changed the outcome of a past U.S. presidential election.[3] YouTube selectively enforces this policy, leaving up numerous videos in which Hillary Clinton claims the 2016 election was stolen from her.

Unfortunately, these high-profile incidents illustrate a broader trend. Social media censorship is widespread and affects Americans from all walks of life. More than 100,000 Americans have reported cases of online censorship to the America First Policy Institute. And nearly half of Americans—46 percent—say they personally know someone who has been temporarily or permanently banned from a social media platform.[4]

Pew polling shows that almost three-quarters of Americans believe social media sites intentionally engage in viewpoint discrimination. Big Tech is using its control of communications channels to suppress viewpoints and control the public debate.

My second point is that free speech protections are an appropriate and conservative policy response. America's government was founded on the principle that everyone is endowed with inalienable rights, including life, liberty, and the pursuit of happiness, and that government exists to protect these rights. The Founders took great care to create checks and balances to prevent the government from threatening liberty. But the government has never been understood as the only threat to liberty. Concentrated corporate power can also threaten Americans' freedom. When that happens, government protection can be an appropriate policy response. Conservatives have long supported such interventions, and these protections are deeply rooted in American history, tradition, and law.

Common carrier laws require telecommunications companies to serve all comers without unfair discrimination or arbitrary exclusion. This prevents, for example, telephone companies from stopping Americans with unpopular views from making phone calls. Common carrier laws give the public a right to equal treatment. These longstanding protections are uncontroversial.

Right-to-work laws are another government intervention that protects freedom. Organized labor argues that corporations and unions should be free to negotiate contracts that make union dues compulsory. Michigan and 26 other states have passed right-to-work laws that prohibit these provisions. Conservatives have consistently supported right-to-work because it protects workers' freedoms from corporate and union coercion.

Similarly, federal anti-trust law has long protected Americans from abusive monopolies. Large corporations generally cannot prevent their suppliers from doing business with their competitors.[5] The government prohibits such restraint of trade to protect a free and competitive marketplace.

Conservatives have historically supported anti-trust laws. The economist Friedrich Hayek was a leading opponent of central planning. But Hayek also saw monopolies as possessing

[3] YouTube (n.d.). *Elections misinformation policies*. https://support.google.com/youtube/answer/10835034?hl=en
[4] Rasmussen, S. (2021, Aug. 1). 29% believe social media companies provide neutral platform. SR Poll Results. https://scottrasmussen.com/29-believe-social-media-companies-provide-neutral-platform
[5] See U.S. Federal Trade Commission (n.d.), *Exclusive supply or purchase agreements*. Guide to Antitrust Laws: Single Firm Conduct. https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/exclusive-supply-or-purchase-agreements; and U.S. Federal Trade Commission (n.d.), *Refusal to deal*. Guide to Antitrust Laws: Single Firm Conduct. https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/refusal-deal

coercive power. Consequently, he supported anti-trust laws and opposed what he described as a "dogmatic laissez-faire" approach. He believed the government should prevent large corporations from restraining trade.

So did Barry Goldwater, one of the founders of modern conservatism. In his book "The Conscience of a Conservative," he called for "war on all monopolies" because "[t]he enemy of freedom is unrestrained power, and the champions of freedom will fight against the concentration of power wherever they find it."[6]

Those sentiments apply equally to Big Tech today. Social media platforms like Facebook and Twitter enjoy network effects that make them natural monopolies. The main value of a social media platform is that everyone else is also on the platform. This makes it very hard for competitors to provide an effective alternative.

Social media platforms are abusing the power these network effects give them to control America's political discourse. Extending common carrier obligations to modern communications technology would protect free speech from Big Tech's concentrated power. Doing so would be an appropriate and conservative policy. Conservatives believe in ordered liberty, not dogmatic laissez-faire.

My third point is that modifications to HB 5973 could improve its prospects of avoiding Section 230 preemption. Subsection (c)(1) of Section 230 of the Communications Decency Act states that internet platforms cannot "be treated as the publisher or speaker of any information provided by another."[7] Subsection (c)(2) says they cannot be held liable for "any action voluntarily taken in good faith to restrict access to or availability of" certain categories of offensive content.[8]

Courts have viewed how this language applies to content moderation differently. Some courts have adopted a textual interpretation, holding that subsection (c)(1) deals with liability for content that a platform puts up and subsection (c)(2) governs liability for content that platforms take down.[9] Under this interpretation, Section 230 only protects the "good faith" removal of certain types of content. It does not protect viewpoint discrimination. Under the textual interpretation, Section 230 likely does not prohibit HB 5973's requirement that platforms consistently apply viewpoint-neutral standards.

Other courts interpret subsection (c)(1) to immunize virtually any decision platforms make to publish or curate content, irrespective of good faith under subsection (c)(2).[10] Under this expansive interpretation, Section 230 likely preempts HB 5973.

The 6th Circuit Court of Appeals has not adopted either interpretation. The Michigan legislature can pass HB 5973 and defend it on the grounds that it is consistent with the textual reading of the statute. There are strong arguments that this is the best reading of the

[6] Goldwater, B. (1960). The conscience of a conservative. Victor Publishing Co.
[7] 47 U.S.C. § 230(c)(1)
[8] 47 U.S.C. § 230(c)(2)
[9] See for example *Barrett v. Rosenthal*, 40 Cal. 4th 33 (2006) or *e-ventures Worldwide, LLC v. Google, Inc.*, (M.D. Fla. Feb. 8, 2017) 2017 U.S. Dist. LEXIS 88650.
[10] See for example *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592 (S.D.N.Y. 2020) or *Lancaster v. Alphabet, Inc.*, 2016 WL 3648608 (N.D. Cal. July 28, 2016).

statute.[11] However, the legislature can strengthen HB 5973 by adding free speech protections that are enforceable even under an expansive reading of Section 230.
A number of courts that have adopted the expansive reading have also held that platform content moderation commitments are legally enforceable.[12] As the Ninth Circuit reasoned in *Barnes vs. Yahoo*, such suits do not "seek to hold [platforms] liable as a publisher or speaker of third-party content, but rather as the counter-party to a contract, as a promisor who has breached."[13]

The legislature can strengthen HB 5973 by strongly incentivizing the platforms to modify their terms of service to include free speech protections. The America First Policy Institute has developed model legislation that does this.[14]

The model legislation operates in two parts. It imposes large—but not coercive—fees on major online platforms and uses those fees to fund state universal service funds.[15] The model legislation then exempts platforms that incorporate free speech protections into their terms of service. This framework strongly incentivizes platforms to make free speech commitments. If they put those commitments into their terms of service, the 6th Circuit would likely enforce them.

Moreover, Big Tech is unlikely to sue over this approach. With a properly drafted severability clause, any lawsuit that struck down the fee exemptions would not affect the underlying fees, which are clearly within the legislature's authority. So, the most Big Tech could get by suing would be forcing itself to pay steep fees, not getting out of them altogether. The legislature can use this approach to safeguard against the 6th Circuit taking an expansive reading of Section 230.

Thank you. I appreciate the opportunity to explain that Big Tech censorship is a widespread and serious problem, legislation protecting online free speech is an appropriate and conservative policy response, and that the legislature can take additional steps to reduce the risk of Section 230 preemption.

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[11] 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. Additionally, 230(c) is entitled "Protection for 'Good Samaritan' Blocking and Screening of Offensive Material." Construing 230(c) to immunize all content moderation – regardless of good faith or whether pertaining to offensive material – gives no effect to the words "Good Samaritan" or "Offensive Material" in the subject heading. Justice Thomas has described the expansive interpretation as "questionable precedent" that "reads extra immunity into [Section 230] where it does not belong." See *Malwarebytes, Inc. v. Enigma Software Group*, 592 U.S. _____ (2020). Statement of Justice Thomas respecting the denial of certiorari.

[12] *Teatotaller, LLC vs. Facebook, Inc.* 242 A.3d 814 (N.H. 2020) or *Hiam v. HomeAway. com, Inc*., 267 F.Supp.3d 338 (D. Mass. 2017).

[13] *Barnes vs. Yahoo!, Inc*., 570 F. 3d 1096 (9th Circuit, 2009).

[14] James Sherk, "Preventing Big Tech Censorship: How States Can Defend Free Speech Online," *The America First Policy Institute*, November 15, 2021. https://americafirstpolicy.com/assets/uploads/files/preventing-big-tech-censorship-how-states-can-defend-free-speech-online.pdf

[15] The Internet Tax Freedom Act prohibition on taxing internet platforms specifically exempts fees that fund state universal service funds. See 47 U.S.C. § 151, note, § 1107: "Nothing in this Act shall prevent the imposition or collection of any fees or charges used to preserve and advance Federal universal service or similar State programs … authorized by section 254 of the Communications Act of 1934 (47 U.S.C. 254)."

AUTHOR BIOGRAPHY:

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