Statement before the House Committee on Energy and Commerce
Subcommittee on Communications and Technology
On "Holding Big Tech Accountable: Targeted Reforms to Big Tech's Legal Immunity"

Assessing Proposed Reforms to the Twenty-Six Words that Created the Internet

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Chairman Doyle, Ranking Member Latta, Chairman Pallone, Ranking Member McMorris Rodgers, and members of the Committee, thank you for the opportunity to appear before you at today's hearing on holding Big Tech accountable. I am a nonresident senior fellow at the American Enterprise Institute and a professor at Boston College Law School, where I teach and write about telecommunications and internet policy.

My testimony today proceeds in two parts. First, I want to highlight the continuing importance of Section 230 to the current internet ecosystem. Second, I want to discuss in particular the difficulties with targeting algorithms, which may cause more harm than good to internet-based companies and their users while unleashing a torrent of litigation unrelated to the issues the subcommittee wishes to address.

The Continuing Importance of Section 230

It is difficult to understate the importance of Section 230 to the modern internet landscape. Professor Jeff Kosseff memorably but accurately dubbed the statute "The Twenty-Six Words that Created the Internet."[1] Section 230 was an important driver of the internet's evolution from Web 1.0 to Web 2.0 and beyond. During the early stages of the World Wide Web, the internet was largely an advanced form of broadcasting: A small number of content creators served content to a large number of passive consumers. It was the legal framework created by Section 230, coupled with technological advances in storage and broadband speeds, that paved the way to the rich social media landscape that we see today, where individual Americans are simultaneously producers and consumers of content. Section 230 helped make the internet revolutionary rather than simply evolutionary.

Today, a wide range of internet-based services rely heavily on Section 230 to connect users and share curated content to millions of Americans.[2] Because of Section 230, companies like Facebook and Twitter could establish themselves as platforms where users could easily share content with one another — because the platform need not worry about whether its users' speech would get it into trouble. If a Facebook user defamed someone, the victim could sue the user for saying it, but not Facebook just for carrying it.[3] At the same time, Facebook could take steps on its own to moderate content and take down objectionable material (such as excessively violent or pornographic imagery) so that it didn't devolve into a cesspool, without anyone suing it for doing so.[4] Section 230 created the modern internet by making room for these companies to operate — not just social media platforms, but any company that connects users and facilitates the exchange of ideas online.

In addition to facilitating user speech at a mass scale, Section 230 also promotes competition and innovation among such platforms. As Professor Eric Goldman has noted, the statute immunizes re-publishers from liability for third-party content, which means relieving them of the costs

[1] Jeff Kosseff, The Twenty-Six Words that Created the Internet (Ithaca; Cornell University Press, 2019).
[2] Eric Goldman, Want to Kill Facebook and Google? Preserving Section 230 is Your Best Hope, Balkinization, June 2019, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3398631.
[3] 47 U.S.C § 230(c)(1).
[4] Id. § 230(c)(2).

associated with protecting against that liability.[5] This significantly reduces the barriers to competition in the online marketplace, alleviating new entrants from the burdens of content moderation when testing new and different business models. This is one reason why the history of the internet is a history of Schumpeterian creative destruction, as America OnLine, Yahoo, MySpace, and countless other dominant players were disrupted by upstarts, often from unexpected directions with new and better ways to connect consumers and curate content.[6]

We tinker with this regime at our peril. Section 230 is woven into the fabric of online society, making it difficult to predict how a change to the statute would ripple throughout the internet ecosystem. Professor Goldman hypothesizes that without Section 230's protection, it would be more difficult for disruptive entrants to challenge the existing Big Tech titans.[7] While increased content moderation costs affect all players, incumbents are better positioned to absorb those costs and keep going. This committee has focused significant attention on Facebook's activity; it would be ironic if its actions inadvertently insulated Facebook from competition.

Congress's earlier forays into Section 230 reform highlight the risk of such unintended consequences. By passing the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), Congress amended Section 230 to eliminate immunity from certain claims related to prostitution and sex trafficking, to protect victims from exploitation via online platforms.[8] But the first comprehensive study of the amendment, published earlier this year in the *Columbia Human Rights Law Review*, concludes that "though the exact legal applicability of FOSTA is speculative, it has already had a wide-reaching practical impact; it is clear that even the threat of an expansive reading of these amendments has had a chilling effect on free speech, has created dangerous working conditions for sex-workers, and has made it more difficult for police to find trafficked individuals."[9] The Government Accountability Office similarly concluded that the post-FOSTA landscape has heightened the challenges for law enforcement.[10]

The Challenge of Regulating Algorithms

The bills currently under consideration present similar risks. This is particularly true of the attempts to regulate the use of algorithms by platforms. Critics have highlighted the role that certain algorithmic functions have played in promoting socially undesirable content online. Presumably, this criticism underlies the efforts in HR 2154 and HR 5596 to strip interactive computer services of Section 230 protection for using these tools. But it is important to recognize that algorithms have, at best, ambiguous effects. Speakers and listeners alike benefit significantly from companies' use of personalized algorithms to organize and curate user-generated content. It would be a mistake to eliminate those benefits because of the risk of abuse.

For most of human history, information costs were a significant barrier to education and

[5] Goldman, supra note 2.
[6] Id.
[7] Id.
[8] Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (2018).
[9] Kendra Albert et al., FOSTA in Legal Context, 52 *Columbia Human Rights Law Review* 1085 (2021).
[10] Government Accountability Office, *Sex Trafficking: Online Platforms and Federal Prosecutions* (June 2021) (GAO-21-385).

enlightenment. Knowledge existed primarily in particular locations, and it cost significant time and money to find, acquire, and consume that information. The genius of the internet is the reduction of those information costs to nearly zero: at the click of a mouse, one can access a vast treasure trove of information which can be transported anywhere on the planet at the speed of light for very little cost.

The challenge of the Internet Age is therefore not information costs, but filtering costs. Users face a limitless amount of information, and must sort through this deluge to identify the content they desire. Platforms compete by trying to find newer and better ways to sort that information for users, so users maximize the ease with which they can identify and consume relevant material and minimize the amount of irrelevant material.

Algorithms are the tools by which platforms provide this service to their users. And in an increasingly diverse society, the personalization of those services is increasingly important, as different users have different preferences about the type of content they wish to find. As platforms learn more about their users, they can serve individual users more of the content that they desire, and less of the content that they do not.

Admittedly, personalized algorithms are also helpful to platforms that rely on advertising as a significant revenue stream. But this, too, can benefit users. Assuming a user will be exposed to ads, the user would presumably prefer to view ads that are relevant to his or her needs. Advertisers, too, pay a premium for personalized ads, as it increases the likelihood that the ad will lead to a sale. Reduced yields would lead to reduced advertising revenue, which over time could lead platforms reliant on advertising to degrade the quality of their service or find revenue elsewhere (such as charging users directly for service).

One of the challenges of regulating algorithms is defining the term in a way that captures negative effects while preserving these positive effects. These bills fall short, as the term is defined vaguely. HR 5596 defines "personalized algorithm" as any algorithm that uses "information specific to an individual." This could include demographic or location information, an individual's past activity on the platform or elsewhere, or the user's own expressed preferences. "Algorithm," in turn, is defined broadly, to include "any computational process, model, or automated means of processing to rank, order, promote, recommend, amplify, or similarly alter the delivery or display of information."

The vagueness and potential breadth of this provision is troubling because of the statute's consequences. If a recommendation via a personalized algorithm materially contributes to physical or severe emotional injury to any person (also vague terms), the platform is stripped of Section 230 protection. To avoid this fate, platforms are likely to reduce — quite significantly — their filtering and sorting services, even when those services provide significant benefits to users. Whatever social gains we achieve by reducing algorithmic promotion of undesirable content would be dwarfed by the loss of the ability to personalize one's feed and easily find only the content one desires.

The minimization of personalized algorithms could take the "social" out of "social media." In the pre-internet era, traditional media lacked detailed information about their audience. As a result,

the "Big Three" networks broadcast primarily milquetoast content (such as Gilligan's Island) designed to appeal mildly to a large number of viewers without alienating significant segments, to maximize advertising revenue given the inability to personalize ads. It was this bland, vacuous programming-to-the-middle that then-Federal Communications Commission Chairman Newton Minow criticized as "a vast wasteland," and which significantly limited programming to niche audiences, including minorities.

Perhaps more importantly, this vagueness would likely create a flood of litigation unrelated to the purposes of the statute. As a law professor, I teach my students to identify the ambiguous terms in any statute, because they are the terms most likely to prompt litigation. Vague standards like "information specific to an individual," "any computational process," "materially contributes," and "physical or severe emotional injury" are catnip to trial lawyers, particularly when used to sue the deep pockets of Big Tech intermediaries. Creative attorneys excel in finding unusual ways to exploit ambiguous language such as this in ways Congress never intended, particularly in dynamic environments where technological innovation creates new opportunities for litigation.

This is the lesson of the Telephone Consumer Protection Act (TCPA), a 1991 statute written to limit autodialers. Among other issues, the statute prohibited using autodialers to call cell phones, which were rare at the time. The technology Congress sought to target largely went out of vogue by the late 1990s. But as technology advanced, creative lawyers stretched the vague definition to encompass a wide range of digital-era calls and texts (such as phone calls made pursuant to two-factor authentication to improve security). As cell phones proliferated, the TCPA took on new life, growing from 351 cases in 2010 to 4,638 in 2016. With an average payout of $6.6 million each, these cases targeted conduct that Congress neither intended nor contemplated in 1991 — before the Supreme Court finally limited the statute earlier this year. Even if plaintiffs are ultimately less successful at stretching HR 5596 as they did the TCPA, the costs of discovery and litigation over vague terms can be a considerable expense and, again, disproportionately affect smaller disruptive startups that can ill afford the cost.

Mr. Chairman and Members of the Committee, this completes my testimony. I look forward to answering any questions you may have.