Written Questions Submitted by Honorable John Thune to Chris Cox

Question 1. Rep. Cox, in your written testimony, you state that "When an internet platform promises its customers—through its advertising, published community standards, and terms of service—that its content moderation policy is politically neutral, then that promise can be enforced both by the government and civil litigants under existing federal and state laws."

To your knowledge, has there ever been a civil litigant or government litigant who has sued an internet platform to enforce the platform's promise to customers through its advertising, published community standards, and terms of service that its content moderation policy is politically neutral?

There is a long litany of FTC cases that have been brought under Section 5 of the FTC Act (15 USC §45) for deceptive trade practices, in which the business did not comply with its terms of service. As with the notorious example of the federal government's long-standing failure to use its authority to pursue criminal remedies against Backpage.com, however, the federal government has not used its authority to pursue civil remedies against platforms that mislead their users and the public through false advertising and fraudulent practices related to content moderation. Section 230 expressly states that it has no effect on federal criminal law enforcement, so there is no reason that authority cannot be exploited. Likewise, the FTC Act clearly gives the federal government authority to pursue "unfair or deceptive acts or practices in or affecting commerce." This prohibition, in Section 5(a) of the FTC Act, applies to all persons engaged in commerce. Similarly, state "little FTC Acts" give state law enforcement the same authority to use their consumer protection laws against false advertising and deceptive conduct.

Question 2. If the Federal Trade Commission or a state attorney general were to bring a case against a platform that has not kept its promise that its content moderation policy is politically neutral, how could the agency possibly avoid criticism and suspicion of motives on First Amendment free speech protection grounds? Don't you agree that there's no conceivable way in the real world that any FTC chairman would ever allow such a case to be brought against a platform?

No, I don't agree. To the contrary, evenhanded law enforcement should not spare any business that is violating the law.

The basis for FTC enforcement is that a business is engaged in unfair or deceptive acts or practices; assuming the facts bear this out in a specific case, there would be no reasonable ground for criticism or suspicion of the decision to enforce the law. If a platform, as the hypothetical in this question posits, has explicitly promised its users (through its terms of service and content moderation policy) and the public (through its advertising) that its content moderation policy is politically neutral, then that is the platform's choice. The federal government would not be imposing the neutrality requirement, only enforcing the promise the platform itself chose to make. There is no reason to think this exercise of law enforcement authority would not be upheld. An analogous situation is the case of *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009), in which the court ruled that Yahoo! could be held liable for breach of promise when it said it would take down specific offensive content, but then failed to do so.

It is equally difficult to see what First Amendment issue could arise in such a case. The platform's First Amendment rights would not be affected by the FTC enforcement action, because that action would be based on the platform's own self-imposed rules for content moderation. Users' First Amendment rights would not be constrained for a number of reasons – including the fact that private platforms would not be deemed state actors. The most obvious reason there would be no First Amendment issue is that any restraint on user postings would be due either to the content moderation policy itself or the illegal, deceptive and unfair violation of that policy by the platform. The FTC suing to redress any such violation of the content moderation policy would actually be a vindication of the users' opportunity to express themselves.

To repeat the essential premise, what is necessary to avoid both criticism and suspicion of the agency's motives is that in any enforcement action, the business being sued actually *is* engaged in unfair or deceptive acts or practices. This requires that in the exercise of its prosecutorial discretion, the FTC chooses to bring strong cases — and to resist political pressure to bring weak cases in ambiguous circumstances.

When, in 2004, the FTC declined to sue Fox News for deceptive advertising based on its use of the "Fair and Balanced" slogan, it wisely recognized that the only way to carry its burden of proof would have been to evaluate the entirety of Fox news reporting, and then subjectively to evaluate each story on the basis of the impossibly vague standard embodied in the slogan. Not only would such a sweeping investigation of all of the reporting of a news organization in search of government-defined bias have raised First Amendment concerns, but also it would have justifiably exposed the agency to charges of political partisanship (with the most severe criticism coming from whichever political quarter was dissatisfied by an eventual finding of bias or lack of it).

Contrast this with a decision to enforce detailed terms of service and content moderation policies, particularly in cases where the platform's own rules are clear and can be applied to a decision about specific content. In these circumstances, the FTC could satisfy its burden of proof without need of examining all of the content moderation decisions made by the platform, and it could rely upon objective metrics rather than a vague standard such as "fairness" or "balance."

The concern you raise in your question is a valid one, but it is addressed by the FTC exercising independent good judgment in choosing which cases to bring. The agency has shown in the past that it will proceed with proper caution.

Question 3. How would a civil litigant sidestep a Section 230 defense in the course of litigating a claim that a platform has not kept its promise that its content moderation policy is politically neutral?

Section 230(c)(1) would not apply to a suit for breach of promise, false advertising, breach of contract (terms of service), and the like. All of these causes of action would be based on the acts of the platform acting alone — none would require holding the platform liable for internet content created by others. The Good Samaritan protection in Section 230(c)(2)(a) extends to

good faith efforts to implement a content moderation policy, but not at all to unfair or deceptive acts to subvert such a policy.

Written Questions Submitted by Honorable Shelley Moore Capito to Chris Cox

Question 1. Are you aware of any instance where an interactive computer service has profited from illegal activity online? If so, which services? What have they done to remedy these instances?

Yes. The most notorious instance is Backpage.com. The company's entire business model was designed to profit from illegal prostitution and sex trafficking. The CEO of Backpage confessed that he "knowingly facilitate[d] the state-law prostitution crimes being committed by Backpage's customers." His confession described a content "moderation" process that he said was "intended to create a veneer of deniability for Backpage." Its real purpose was "concealing and refusing to officially acknowledge the true nature of the services being offered in Backpage's 'escort' and 'adult' ads." His confession added: "I have long been aware that the great majority of these advertisements are, in fact, advertisements for prostitution services (which are not protected by the First Amendment and which are illegal in 49 states and in much of Nevada)."

Without any new legislation from Congress, and under the original text of Section 230, Backpage was shut down and the company's executives were jailed. The federal government moved to seize 10 of their residences in California, Arizona, Texas and Illinois and 25 bank accounts, as well as 35 website domains.

Question 2. On July 1st, 2020, the USMCA took effect, and for the first time the United States required trading partners to adopt provisions modeled on Section 230. As a former Member of Congress and the co-author of the law, what impacts do you foresee this having on future legislation passed by Congress to reform or amend 230?

Article 19.17 of the USMCA, which endorses the basic concept of Section 230 and thereby the principle of free expression on the internet, will not affect Congress's ability to reform or amend Section 230. Congress's power to exceed the text of the USMCA and other trade agreements is enshrined in the Trade Promotion Authority reenacted in 2015. TPA expressly includes a section on "Sovereignty" confirming that U.S. law has primacy over trade agreements. Section 108(a) of TPA ensures that U.S. law will prevail in the event there is a conflict between the law and a trade agreement entered into under TPA. Section 108(b) ensures that no provision of a trade agreement entered into under TPA will prevent Congress from amending or modifying a U.S. law. Section 108(c) provides that dispute settlement reports issued under a trade agreement entered into under TPA shall have no binding effect on U.S. law. Finally, USMCA is subject to longstanding exceptions that allow countries to enact measures "necessary for the protection of public morals." USMCA negotiators made clear that this exception applies to Article 19.17, and highlighted the recent FOSTA-SESTA law as a recognized example under this exception.

As you know, the United States routinely incorporates statements of important American principles in our trade agreements. For example, American copyright law is regularly debated in Congress and is analyzed, amended, and updated by Congressional fiat — notwithstanding that

U.S. copyright principles are set forth explicitly in many of our trade agreements including USMCA, as an expression of American values.

The American core value of free speech from diverse voices deserves promotion in our trade agreements, now more than ever. Because of Section 230, individual users of the internet have generated more free speech than at any time in the history of the world. For over 20 years, U.S. policy has successfully encouraged user-created content on the internet, even as elsewhere on the planet, from Europe to Asia to the Middle East and Africa, governments have been cracking down on internet free speech and monitoring social media, email, and other internet activity by citizens as a means of exerting social control.

If you Google the Wikipedia article "Websites blocked in mainland China," you will see that the PRC government prevents the Chinese people from having access to, or contributing to, the major part of the internet that we in the U.S. take for granted. China's people are screened from almost all of the user-generated content that makes the internet what Section 230 calls "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." Of course Wikipedia itself, constructed entirely from user-generated content under the protection of Section 230, is banned completely in the PRC. When we enter into trade agreements with China and other countries that suppress internet speech, we should use our leverage to push back against this violation of fundamental human rights — not least because free expression is essential for trade and free markets to function properly.

If you peruse the Wikipedia article "List of websites blocked in Russia," you will see that the Russian government has blocked over 15.8 million IP addresses, many related to Amazon and Google, because these service providers refuse to grant the Russian FSB access to users' private communications.

The Chinese Communist Party invades its citizen's rights to freedom of thought and of speech by monitoring what they say on the internet. This information is used in a secretive social credit system that assigns every person a score, good or bad, based on whether they behave as model citizens according to the state's directives. A citizen whose online voice is out of harmony may find, without explanation, that her child can't be admitted to school, she is unable to board an airplane, or she cannot obtain a loan or find a job.

In both Russia and China, government supervision of user-generated content on the internet is the norm. Internet platforms are compelled to enforce the government's rules about what can and cannot be expressed . In this way, the platforms themselves become tools of the surveillance state, and unwilling accomplices to the authoritarian censors of online expression.

China and Russia are hardly the only countries that suppress online speech. Many other government abusers of free speech rights are members of the World Trade Organization, and do business with the United States on a regular basis. In most cases, the U.S. in particular is one of their principal markets, if not the largest of their trading partners. Congress and the Administration should use America's trading clout to push back against their national policies

that punish websites for posting user-created content, including a significant amount of commercial speech.

This does not mean the United States needs to threaten punitive tariffs. Rather, we should take every opportunity as we negotiate new trade agreements to incorporate into them the principles on which America's free and open internet is based. The USMCA is exemplary in this respect. It makes clear that websites including those, such as Wikipedia, that are banned in China and Russia are free to rely on third-party content without being punished as content creators themselves. China and Russia under their current leadership will not agree to similar provisions, but many among the WTO's 164 members will.

In this time when so many governments are threatening speech on the internet, it is more important than ever to stand up for the American principle that individual citizens should have access to social media, news sites, email, and other internet platforms that welcome user-created content.

Question 3. The internet and internet companies have provided the world with access to an unprecedented amount of diverse ideas, admirable and unpleasant alike. Considering the number of tech companies forbidding the use of "hate speech," including Facebook, Twitter, and Google, to name a few, what possible "unintended consequences," if any, could arise from opening Sec. 230 up to amendment?

Section 230's stated objective was to establish a legal framework conducive to the internet functioning as "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." Unquestionably it has been successful in achieving that objective, as today internet users have access to millions of websites providing news, information, educational resources, opinions, and services we could not have imagined 20 years ago.

The legal certainty that Section 230 has provided is central to this. The statute is very clear that content creators will be held liable for any illegal content they create, while the sites that host the content will be protected so long as they are not complicit in the illegality. Were Congress to change this rule, for example by making the test for liability more vague through the introduction of negligence concepts such as "knowledge" or "should have known," the legal certainty would be lost.

Faced with significant new liability if they continue to host user-created content, websites that previously incorporated user-created content into their service models would need to recalibrate. Some would scale back their use of it. Others could decide to eliminate it altogether.

Consumers who rely on sites like Yelp and TripAdvisor and Open Table for customer reviews, who tap into web platforms such as Wikipedia and Khan Academy for access to knowledge, and who participate in citizen journalism on thousands of blogs, social media sites, and wikis would all feel the loss immediately.

While legislative efforts to use Section 230 as a lever to encourage specific content moderation policies would undoubtedly be well-intentioned, legislating finely-tuned definitions of hate

speech (the example you specifically mentioned) or unacceptable political speech, another example, would very likely be an imperfect exercise. This is especially so considering that Congress does not find itself in general agreement about the problem to be solved. M any Senators and Representatives believe platforms should exercise greater control over user-created speech; many other Senators and Representatives believe platforms are already censoring too much user-created speech.

Unlike 1995-96, when then-Rep. Wyden and I wrote the bill that became Section 230, today internet activity affects every commercial interest in the nation, and every citizen. Reconciling those competing interests will be enormously difficult and predictably will require compromises that could threaten the careful balance between liability and free expression that the original legislation established. When inevitably a bill to amend Section 230 goes through multiple markups in multiple committees on both sides of the Capitol; when Senate floor action allows further amendments without committee consideration; when a potential House-Senate conference potentially rewrites critical sections of the bill — all the while, with interested parties seeking to influence the last-minute changes — the risk is that we might no longer recognize the well-intended Section 230 amendment we started out with.

The result of opening up Section 230 to further amendment, therefore, could well be that we find ourselves disappointed with the unintended consequences of diminished opportunities for citizen expression, and lost availability of valuable web services and content.

Written Questions Submitted by Honorable Rick Scott to Chris Cox

Question 1. Honorable Cox, does the current law's permission to remove or restrict access to "otherwise objectionable" material open it up to abuse, like silencing certain political viewpoints based on potential bias by the platform operator?

No.

A private platform (as opposed to, for example, a government website, which would be subject to First Amendment constraints) can adopt whatever content policies it wishes. The GOP Facebook page, for example, curates user-created content so that it is focused on promoting Republican Party principles, ideas, and candidates. It would make little sense to force the RNC to maintain a website that also promoted their opponents. Section 230 is not the source of authority for the RNC to control content on its site in this way. Rather, it is simply the case that nothing in Section 230 requires a website or platform to be politically neutral.

Section 230(c)(1) provides that a platform won't be liable for content provided by someone else, unless it was itself involved in creating or developing that content. This protection from liability for the acts of third parties is independent of whether the platform is involved in content moderation. Indeed it does not matter whether or not the platform even has a content moderation policy at all.

Section 230(c)(2) covers the situation in which the platform, by virtue of its moderation efforts, is involved with content created by one of its users. Subsection (c)(2) immunity applies if the purpose of the involvement is 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." In that case, Section 230 protects the platform even if it *did* create or develop the content, at least in part — which would deprive it of subsection (c)(1) immunity.

The "otherwise objectionable" coda extends the half-dozen specifically listed categories in subsection (c)(2) to include other categories, pursuant to the well-established rule of statutory interpretation that when general words follow specific words in a law, the general words embrace things similar in nature. Harassment, a specifically included category, is thus naturally extended to similar things that aren't included on the list such as cyberstalking and revenge porn; online terrorist communications are covered because congeneric with "excessive violence"; and so on. While "otherwise objectionable" is not an open-ended grant of immunity for editing content for any unrelated reason a website can think of, our purpose in including that phrase when we wrote the statute was to ensure that the Good Samaritan protection is not limited to the handful of categories specifically listed. (We were well aware that there would be objectionable material that we ourselves could not imagine, and indeed we understood that the future could well see the creation of whole new genres of objectionable material that had not even been invented yet.)

To complete the analysis, we must return to the initial point that a non-governmental platform can choose not to host political content with which it disagrees. Section 230 (neither the "otherwise objectionable" coda nor any other part of the statute) is not the source of this authority. Nor is Section 230 immunity automatically provided on account of moderation or curation policies that restrict access to or availability of content on the basis of political viewpoint. Only if the moderated content falls within the ambit of Section 230(c)(2), including the specific categories or categories similar in nature, does immunity attach. In all other cases, while it would always be a platform's prerogative to curate and moderate based on political point of view, such content moderation does not of itself give rise to Section 230 immunity.