The Future of Online Expression In The Trump Era: Freedom vs Regulation

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AUDIO

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Gracie Gilligan

Good afternoon, Anna, and welcome to today's Congressional Internet Caucus Academy briefing. My name is Gracie Gilligan, and I'm with the internet Education Foundation, and it is my pleasure to welcome you to today's luncheon event the future of online expression in the Trump era, Freedom versus regulation. The Congressional Internet Caucus was founded in 1996 and has been operating for nearly 30 years. The caucus is currently co chaired by Congressman Michael McCaul and Congresswoman Haley Stevens in the House of Representatives and by Senator John Thune in the Senate. The briefing today is hosted by the Congressional Internet Caucus Academy. The Caucus Academy is also announcing upcoming briefings for June, July and September, discussing video, streaming energy for AI innovation and cybersecurity. We hope to see you there for today's event. We have a panel of experts who will be instrumental in shaping policy surrounding online expression in the

coming years. Our moderator today is ash Kazarian, senior legal fellow at the future of free speech out of Vanderbilt University, Ash, I'll hand it over to you to introduce the panel and get us started.

Ashkhen Kazaryan
Hello, everyone. We have a great panel for you today, and I know many of you have asked me for it to be as entertaining as possible, and Tim might have a heart attack, but we're going to deliver that. We have an incredible lineup. I prefer to not read people's bios, because you can look them up. So we have Jenna Leventhal from ACLU, we have Luca from the American Foundation for American innovation, Chris Marchese for NetChoice, and then Daniel Cochrane, Cochrane, Cochrane from the Heritage Foundation. You might have heard of them. So last October of 2024 the future of free speech survey asked. We surveyed about 52,000 people in 30 free countries on their support for free speech policies. And what we have seen was definitely confirmation for global free speech recession and United States was the third country after Israel and Japan, where support for free speech policies has dropped significantly. Put that within the context of having online speech be the new medium through which speech is disseminated and government is focusing on to try and address the concerns they have, and you have a pretty long list of issues that we're going to try and cover. So the first one is going to be a very non controversial one. It will be a Federal Communications Commission, and it's now chair who has since, I would say, about November of last year, Brendan Carr, has expressed that the FCC has authority over regulating section 230 which is as old as the internet caucus Association, actually, in 1996 so I'm going to first go to Jen and Luke and ask them, What do you think about well, you can address it from few different angles. What do you think about FCC having authority over regulating section 230 in online speech. And what do you think about that as an idea? Jen, you want to start?

Jenna Leventoff
Yeah, I mean, I'll start with the idea of it, because I think that's really central to the ACLU viewpoint here. I think most of you know the ACLU, if you don't, we are an organization that promotes free speech and civil liberties, and we tend to take a pretty hard line on a lot of things that have to do with speech. We're known for literally defending Nazis as well as Pro Palestinian protesters, so we've kind of fallen on both sides of the aisle there. But for us, 230 is central to the internet. 230 says that platforms aren't liable for what their users post. We think that if platforms are liable for what their users post, they're not going to let users post. And the internet is pretty much the forum for free speech today. More so, I think, than the town square. People are going online to organize. They're going online to read news. They're going online to talk to friends and family. I mean, you're probably half of you are on your phones, online, randomly, right now, right? It's the forum for free speech, and so if we interrupt section 230 if the FCC steps in to interpret it in a way that is obviously intended to significantly narrow, if not repeal section 230 we're really concerned about what that would do to the internet and what control that would give the FCC to really like push on platforms and dictate what they want these platforms to look like, because there's also two sides of the coin right for as much as we want users to be able to have the speech to post online without getting stopped because of the platform's liability, we also want platforms to have their own free speech rights to Make their platform what they want them to be. And so some platforms can decide, you know, we want all this type of content and none of this type and that's their own right. And so I think we just think keeping section 230 as it is is a good idea. And for that reason, on policy alone, we don't want the FCC to step in and take action there. Yeah. I don't

Luke Hogg
know if this is working. Oh, it is working. Cool. So I would, I would generally agree with most of what Jenna said. I think the area of disagreement is actually not about the principle of Section 230 and the principle of intermediary liability, but the actual implementation and the way that section 230 has been interpreted by the courts and the way that it's been used by platforms and by tech companies, right? So I think the area of disagreement that we would have is, first, I mean, I mean, it literally sits in the Communications Act. So, like, if, no, if the FCC doesn't have authority to interpret section 230 then, like, I don't know who does, but I think the the deeper question is really about whether, whether we can change section 230 so I think the there's this idea that gets floated out there that we can't touch, we can't do anything, or else the internet will explode, like the Internet as we know it, will just completely collapse if we like do anything to section 230 like it's this, and it is this cornerstone of the internet. But we have, we have precedent of touching section 230 So Congress in 1998 injected into the intellectual property exemption for Section 230 and then fosta sesta creates runarounds for Section 230 for child sexual abuse material and sexual trafficking. So there's, there's ways in which that you can touch section 230 that you can change these principles. And I think that fundamentally, what what Chairman car has said, and I think what they what the FCC wants to do, is essentially say, Listen, there is a good faith aspect to section 230 in the statute. And we're just going to interpret what that good faith actually looks like. If you want section 230 immunity, then you have to, like, basically, be acting in good faith. You have to provide arbitration agreements. You have to actually lay out and follow what your terms of service say. And you can't just pick and choose when you're going to apply these terms. Because, I mean, I agree that this is it's an essential component, and most speech is going online, but that makes it all the more important that the platforms that are being the central conduit of speech in this world are also not putting their hands on the scale in terms of going one way or the other. And I think that that's essentially what Chairman car and I think this administration have said on 230 it's not that we're going to blow up intermediary liability, or we're necessarily going to say that a platform is suddenly a publisher, and they're going to have to be liable for everything that happens. They're saying is you have to play by certain rules. And, you know, I don't know what the exact rules that Chairman car will eventually put up with, but you have to be, you know, neutral. And I think that that's, you know, we've seen that where I think we were going to eventually get to talking about broadcasters. And the FCC has a long history of having these, these rules where, if you're going to be a central platform and you're going to use public spectrum, you're going to use public access and rights of way, you're going to use public resources in order to be a speech platform, you also have to serve the public interest to a certain degree. So I'm going

Ashkhen Kazaryan
to go down the line and get to both of you on this question, because I can tell you are both excited to cover too. So I'm going to go Chris and then sure Daniel. So

Chris Marchese
I think that the most important thing to keep in mind about Section 230 is that it is the most successful tort reform in US history. The United States Congress did something that was very effective. It said, We want to make sure that the Internet remains a place for innovation and free expression, right and Congress looked around and said, What is the biggest threat to that? It's lawsuits. When you have, you know, 10s of millions of people potentially able to sue over the decisions you make about content. Well,

those lawsuits, even if they end up getting tossed out of court, are going to be expensive and they're going to act as a penalty on how you exercise your first amendment rights as a website. And so Congress said, We don't like that. We want websites to exercise their First Amendment rights, including their First Amendment right to moderate content, right? There's a whole backstory about how we got section 230 that has to do with the Wolf of Wall Street. You know, believe it or not, in the early 2000 early 1990s there were web forums, and some, you know, average Americans were posting in forums about how they had concerns that Stratton Oakmont, you know, the big brokerage firm in the movie Wolf of Wall Street, was a fraud, and Stratton Oakmont sued for defamation, and they won. They won because the court said, if you do any type of content moderation, then you are responsible for every person's speech on your website. And so, of course, you know it turned out not to be defamation. It was true, but at the time, the court was stupid and said it was defamation. But regardless, the point is, there was a penalty. There was a penalty for hosting third party speech and for moderating, for trying to have a family friendly website, there was a penalty. And so Congress stepped in with Section 230 and said, That's unacceptable. We want there to be a lot of speech on the internet, but we also want websites. To moderate that speech so that kids and families can go to it and not just see pornography. And so section 230 is the most successful tort liability in US history, right? That's why we have as much speech and innovation online as we do now in terms of the FCC look, section 230 is self executing. There is nothing in that statute that tells any agency what to do precisely because Congress did not want an agency enforcing it. It is true that it's in the Communications Decency Act of 1996 but it's also true that in 1996 Congress started to deregulate our telecommunication systems. Right now the internet was brand new, and so Congress said, we are going to keep the agencies away from this, because they ruin everything, right? Like, look at the lack of innovation in broadcast. And they said we're not going to have that for the internet. And so they specifically did not give the FCC or any agency any authority to interpret, reinterpret, enforce or do anything. In fact, it's only for the courts. Section 230 is a procedural shortcut for the courts to look at a lawsuit and say, Is this about third party speech? Is this about a user speech? If so, lawsuit gets tossed because you're suing the wrong person, you can sue the person who defamed you, but not the website that hosted the content, right? And there is no role for the FCC. And I think something you know that is an interesting intersection here is that chair car has been very forward about concerns about jawboning and the things that the Biden administration did around COVID and misinformation, and yet, here's an agency that has no statutory authority claiming that it can reinterpret section 230 and use that as a cudgel to sort of coerce some of the content moderation decisions that it would prefer to see. So to me, that's a huge problem. And you know Commissioner Gomez, she's a Democrat appointee, but I find myself strongly agreeing with her in the sense of, you know, she tweeted out like, Look, if we're going to be putting out guidance on Section 230 Make no mistake, it is jawboning. This is a way for the FCC to bully private companies into changing how they exercise their First Amendment rights. So all of which is to say section 230 is what allows the Internet to flourish, allows free speech online to flourish, and the FCC has no role. And the FCC claiming that it does is just meant to bully private companies into exercising their First Amendment rights differently. Daniel, I

Daniel Cochrane
think it's notable that the FCC under the first Trump administration, disagreed with Chris' statement. In fact, under Chairman Pye, at the end of the last trump administration, I believe in November of 2020, the General Counsel of the FCC issued a very long memorandum arguing for why he thought that the FCC had the authority to implement the statute that Congress had passed. And I want to make two key

points. First is that the context matters. We often think of 230 as sort of this free standing law, but it was part of a much larger statute called, I mean, obviously, the Telecommunications Act, but the part of the Telecommunications Act in which section 230 is placed is the Communications Decency Act. Now Congress, when it enacted this law, key concern was was both Yes, ensuring that consumers exercise choice. It is right that they wanted to ensure free speech online, but another concern they had was the proliferation of obscene content, pornography and other really dangerous materials, stuff that I think we in this room, I'll just speak generationally as a millennial, that we have experienced as these platforms have become larger and larger and proliferate in all of our all of our lives. So I think it's critical to note that a conservative Republican, I think pro innovation chairman of the FCC disagrees with the position that there is no authority to implement the statute. And the second point is, there's really sort of two kind of underlying questions. The first is, can the agency or can the commission, implement the statute through rulemaking? And I think the answer has to be yes. I think that's what commissions and agencies are charged, what they are charged with the enforcement of the law. So the real question is not, can the FCC do? Can the FCC do rule making on 230 The real question is, what did Congress actually mean? What was the original text? What did the original text of 230 and the larger context of the law actually require, and I want to sort of punt on this, because at least in our conversation, we might want to get deeper into the legal weeds. So I don't want to go down that path quite yet, but I want to suggest to you that the answer is not obvious, and I think the Third Circuit points the way. But I'll stop there as sort of a teaser,

Chris Marchese
just a. Quick point, though, just I think, you know, I hear you that agencies love rule making, and they do believe it is their duty to promulgate regulations. But you know, we have very recent Supreme Court cases, including Roper bright from last term, that says an agency doesn't get to point to ambiguities in a statute or the lack of statutory authority as a means to then regulate. Congress did not grant any agency to enforce or interpret section 230 because there is nothing in it to interpret or to enforce. It is simply a tool for the courts to apply in cases. So the courts have a role, but no agency does. And after Loper bright there is absolutely no there's nothing to hang your hat on as an agency that claims like, oh, section 230 that's for us to enforce. No. I mean, the Supreme Court is clear when Congress wants an agency to do something that is, you know, significant on social or economic policy, Congress must speak clearly. And so even if we, you know, were to agree that there was some something in the Communications Decency Act of 1996 supporting the notion that Congress wanted, you know, a heavier hand in censorship. Well, the fact of the matter is, it's not in the law. So I'm just

Daniel Cochrane
going to respond to that really quickly, because I know I want to let I want to respect ash in leading the discussion. So number one, okay, so agencies don't get special deference, so when there's this, goes back to a case called Chevron right? So the question there is, if there's a benefit of the doubt, if there's an ambiguity in the statute and a court doesn't know. It's not clear. There's not a clear grant from Congress of like, what the intent of the law is. There's no special deference that's afforded to an administrative agency. That is true, but it doesn't. It doesn't, it doesn't do away with the fact that 230 is part of the Telecommunications Act and that the FCC has always had as long as well as other commissions and agencies have always had the authority to implement the clear will of Congress. And so, as I say to Chris, the question here is, what did what does the statute actually say? Because what

the statute actually says would determines whether or not the FCC can intervene or not intervene, but rather implement the statute. And that's, I think, what this whole conversation comes down to, is, what is, what is the context in which Congress enacted 230 and how should we read 230 that's, that's the real I think key point here.

Ashkhen Kazaryan
I think the exciting thing is that if FCC does go down this road, we will find out if little bird bright has changed the admin law rules here. And I know admin law usually sounds boring, but this one is going to be exciting. So stay tuned. Daniel, you said something that made me think of ACLU, the Rita versus ACLU case and obscenity that steam from Communications Decency Act. I feel like you're the best person to speak on it. Jenna, yeah, so

Jenna Leventoff
I want to actually start with a little First Amendment lesson. I think that's a helpful framing for this panel, right? What does the First Amendment protect? Almost all speech with a handful of exceptions, defamation, obscenity, with a very specific legal definition, porn, for the most part, protected speech. Like that's why porn exists and people who watch it, it's considered protected speech. And so I think what's important to know about the First Amendment is that speech is protected in limited categories. It's not, and that's how we need to be looking at all these things. What Daniel is essentially saying is, oh my god, some of this stuff is bad and some of this stuff is offensive. And so we need to stop everyone from seeing it. But the reason the First Amendment exists is because people don't agree on what's good and what's bad, and I think that's very clear in the world today, right? People don't agree on what's good and what's bad. And if you give the government the power to say, This is good, this is bad, you can only see this. You can only see that. Then do we have a democracy? Not really, right? We don't. So I think what's the reminder here is, while the intentions are good and people think, Oh, my God, this is bad, we need to protect people from this. Ultimately, the government, the First Amendment exists because the government can't get involved in that, because we don't want the government telling people what is okay for them and what's not okay for them to see and what's not okay for them to say. And so 230 really just enables that exercise of free speech, and doesn't let someone who is offended by something come in and say that because they are offended by it, no one else is able to see it. And so I think that that needs to underpin this entire conversation. Luke,

Ashkhen Kazaryan
I think you wanted to do like a class exercise, if I

Luke Hogg
can get this turned on. So I agree with Jenna, and I think that you know where I would come down on some of this is really that. I mean, obviously you, you have a right to to express your speech as much as possible. But when, when I'm talking about Section 230 and what platforms are doing, it's actually. More about how a private party has the right to curtail or change or modify or amplify or degrade the Free Speech of another private individual. You know, I think that that's an interesting, interesting question. But I, you know, going back to 230 specifically, I'm, I'm actually a little curious how many people in this room actually ever used CompuServe or prodigy or a bulletin board system at all, 345, okay, yeah, this, this was passed in 1996 and my question to Chris and Jenna, which, I mean, I'm when

or if Chairman car decides to move forward this, I will assume that probably one of your two organizations, or perhaps both, will supme for doing so. I mean, do you think that if we passed section 230 today, that it would be the exact same as Cox and Wyden did in what they admit was kind of a half fast way, like they injected this at the last minute into section 230 I mean, like, it's not technically 27 words, but it's really short, right? Do you think that if we had this debate in Congress today, that the result would be the exact same? Or do you think that there would be some more nuance to the way section 230 is interpreted and developed as a statute? As

Ashkhen Kazaryan
the moderator, I'm going to take the privilege of asking the questions, but so I'm going to monitor, I'm going to modify, I'm going to modify what you said with the caveat. But you know, like, the Constitution was passed a while ago, and I don't think you want to change that. So, like, the argument of 30, it's been 30 years. I don't know if that works. So the question you're asking, although I also do want to say, I don't think Ron Wyatt and Chris Cox have said that they have asked anything the office

is.

Ashkhen Kazaryan
So the question you're asking is, do you think we would have section 230 if Congress was grappling with a question of, should platforms be liable for third party user speech? And I'm gonna ask Jen and Chris, Chris, you wanna go first?

Chris Marchese
So I think just Google or use DuckDuckGo, because there's robust competition in the marketplace. But just search for Chris Cox, Ron White in section 230 history, and you will see that this was over a year in the making. It was incredibly deliberate. They worked really hard to bring their colleagues on board. They had briefings, hearings, negotiations. It was a very deliberate law. So do I think that we would have section 230 written the exact same way today? No, I would hope that today Congress would say there is no neutrality requirement, even though that should be clear on the face of the statute. But to the extent that people misunderstand that we're going to put it in there that you know explicitly does not require you to violate your first amendment rights in order to achieve, you know, immunity. So I think that's true. But I just want to bring it back to the fact that Congress can always legislate, as was pointed out earlier. You know, section 230 has been amended most recently with the foster amendments of 2018 so if Congress would like to change section 230 it can. But I think ultimately, what's significant to note is that whether you're on the left or the right, you know, people are complaining about how section 230 applies, and that, to me, signals that it's working exactly as intended, right? It should not be something that makes our politicians happy, because it is, again, sort of enabling private publishers, private publishers of billions of pieces of content to exercise their First Amendment rights without government coercion or influence. That is, of course, going to piss people off.

Ashkhen Kazaryan

So how many of you folks in the room with a show of hands know about sesta. Fosta. Know what it's about? Okay, great. This is such an educated audience. This is great. Jenna, just quickly. Do you want to talk about Sister Foster and what ACLU has seen as a result of it?

Jenna Leventoff
Yeah, so cesta, Fauci child sex trafficking. What we've actually seen is platforms proactively censor a lot of other speech, not just speech about or not just content about child sex trafficking and things that enable that. We've seen sex workers have their forums where they discuss safety measures completely shut down. We've seen content about sexual and reproductive care shut down, taken down. We see that also under platform, sort of existing Terms of Service. I think one thing that's really interesting is as we don't have a platform here today, but most of the platforms, the way they moderate is through AI, essentially, right? And so these AI systems aren't that good at being able to tell us, tell the difference between different things, right? Like they are not going to know if I am sharing my story about how I was sex trafficked versus someone trying to do sex trafficking. And those speech wise, are very different things, right? One is a crime and one is someone sharing their experience and their story, but they have the same keywords, they might have the same images and. And so a lot of these systems aren't capable of that. And so what we see, what we've seen with sesta Fauci, and continue to see, is the takedown of a lot of protected speech that gets mixed up in this thing that has been removed from Section 230 protections.

Ashkhen Kazaryan
I do want to we have so much to cover, as I said at the beginning, so I'm going to move on to the FTC portion of the evening, and I'm going to go to Daniel, maybe first Trump. FTC has been very active on a lot of fronts, and they are currently have an inquiry with, I believe, due date of May 21 where they've asked anyone you know, the general public, to submit their experience with maybe being censored by platforms, or how they see the platform's community policies, content policies, versus their experience on them. Now, they haven't said explicitly what they are going to do post this inquiry, but I have a feeling they're not just going to read it and move on. What do you think of this action and what it possibly could mean? Sure, and

Daniel Cochrane
I'm going to actually respond really quick. So I think to your point about obscenity, there is a compelling interest in preventing minors from accessing porn, and to the extent that we treat obscenity the same as we do political and religious speech. Think we need to go back and look at that. I think we need to take an originalist approach to the First Amendment to ash. Ash. Ash is very good question about the FTC. I think it's really important to note that we talk about, we assume, I think that when platforms have these, these content moderation and recommender algorithms that they are engaged in, first party expression, right? That's sort of the underlying premise of and I assume we'll get into the Paxton moody case. And it's so often, so often. It's not at all the case that these companies do so often. What's happening is these companies are creating, say, AI, so using large language models, right that are trained on a plethora of data. And a lot of times, the companies don't even understand how the models are operating. So the way that they enforce their rules, especially now that we're moving into the AI space, has become even more vague. And OPEC, it was already vague and opaque before. And I think one thing to note is, during the COVID pandemic in 2020 thanks to investigations by the House

Judiciary Committee, by litigation like Murphy V Missouri, we now sort of have an extensive record not just of the collusion between government and private actors, but we also have a pretty good idea of what was going on on the platform side. And I think, I mean, it's probably not news to people in this room that platforms were using their considerable power to action millions of pieces of content, right? And this is not just we think about, like the high profile cases right now. Obviously, I think those are problematic. But you know, the real problem with censorship is how it affects ordinary, normal Americans, who don't get a say. They get no due process. They don't even know what's going on. And like, you know, Shadow banning, which we now know has been, has been happening on these platforms all the time, basically just means that your content gets demoted. You may not get, you know, explicitly taken down or off the platform, or it may not be that your account is, is, is, is banned, but your content essentially is invisible. And often that happens without any due process whatsoever. And that gets to Ash's point about, or Ash's question about the FTC. So Chairman Ferguson, you know, has long said that censorship the way that these companies, because they are service providers, they have commercial contracts with their users and and as as a provider, as a platform that enables these individuals, millions and millions of Americans, to generate share and create and engage with each other's speech, these platforms also have consumer protection requirements, both under federal and state law. And so I think one of the one of the keys about the FTC notice of or not noticeable making but request for information, is the FTC is giving normal Americans the opportunity to tell their stories. Because, as I said, we got a rare glimpse into what these platforms were doing during 2020 and we only got a glimpse because we had the course intervene after multiple states, including Louisiana and Missouri, sued the Biden administration and the House Judiciary Committee opened a extensive investigation. And look, I think this is the commission sending a clear message to normal Americans, we care about you. We care about how your services are affected, and we want to hear your stories. I'll just share one, because I think it's really important. There was a YouTuber, and I've got to know him personally. There's a YouTuber. He had a decently large following. He posted for years about political content on YouTube. He created an entire business. This around his YouTube content on all kinds of political matters. He hired staff, right? So it was his family, the family of his staff, that was supported by this business. One day, YouTube, without explanation, demonetized his channel. He asked repeatedly, what can I do? What was the policy violation here? After months of going back and forth with Google, they refused to even explain to him what he had done to violate their policy. Let's just cabin the question of, can the platforms do this stuff? Let's just put that to the side for a second. Shouldn't the YouTuber who's built his entire livelihood and the livelihood of his employees and all the followers the two is 2 million followers. Shouldn't he have at least the right to due process? Shouldn't he have at least the right to know if the platform is preventing the 2 million people who chose to follow him from seeing his content? That I think is what's at stake here, and what the FTC request for information is getting as the normal Americans affected by the censorship, what was his name? I'm not going to share that here in this in this

Ashkhen Kazaryan
context, but I'll the 2 million followers. That's that's a lot. Chris, do you want to talk about the FTC? Sure. So

Chris Marchese

my views on the FTC don't differ that much from the FCC, except to add that the FTC is even scarier because it holds even more regulatory power, right? You know, obviously tech companies are under the antitrust gun at the moment, and so you know, additional investigations into their content moderation policies which violate the First Amendment are not are not great, but it's especially not great when it's coming from an agency that is also responsible for potentially breaking up your company, right? So that that that, in of itself, should be recognized as a point of leverage, and the government knows very well that it holds that leverage. In fact, it's very different. It's not very different at all, from the Biden White House, you know, emailing meta or other companies saying, Hey, we really don't like the way that you're moderating some of your content. In fact, when meta pointed out to the White House that the First Amendment exists, the White House sort of laughed. Quite frankly, that seems quite consistent with how the FTC is also approaching this, right? The FTC has a mandate to protect consumers and to enforce the antitrust laws. That is true, but fraud has victims hurt feelings from content moderation has pundits, and I think the FTC is forgetting that it is that it has a duty to enforce the law, not to use the law as leverage in unrelated context. So I hear Daniel's Point about, you know, maybe there are genuine harms in the marketplace that the FTC should look at, but the fact of the matter is, the FTC is going way beyond its mandate, and it's trying to make disagreements over content moderation into actionable fraud or actionable harm that allows the agency to step in, and that's just false. And I think you know to the extent that people have concerns about how content moderation works, well, listen our members, right? You know, NetChoice is a trade association. Our members include all the usual guys and a ton more, that if you have disagreements with how they exercise their First Amendment rights. You really do have a choice in the marketplace, and our members do respond to market pressure. I mean, you saw this with meta announcing that it was going to walk back its fact checking program, that it was going to change the way that it moderated content or used algorithms to moderate certain content. That is meta responding to pressure from the marketplace, and so when Americans say that they want a less moderated internet experience, platforms will respond, and there is nothing for the FTC to do. And I think that's the way we want to keep it. Because again, if we're concerned about jawboning, it shouldn't matter whether it's the White House, the FCC or the FTC. The fact of the matter is it's the government using its power in inappropriate and unconstitutional ways.

Ashkhen Kazaryan
So we are going to try and have some time for Q and A. So I'm going to move on to the next part of what's going on with online speech, which is Congress. I'm going to go to Luke and Jennifer. Luke, is there anything with online speech related that's not just section 230 you know, there's been some conversations about job, owning, bills, some other things, feel free to highlight whatever you just anything. I could just talk about anything, anything online speech related? Yes,

Luke Hogg
no. I mean, I think that when Congress is looking at these issues, whether it's kids Online Safety Act, whether it's we're talking about jawboning, whether we're talking about the FTC inquiry. I mean, I think that the fundamental issue that we're seeing here is that people feel like they don't have choice. And you know, I would respectfully push back against Chris that he says, Listen, there's so much competition in the market, you can just do it. Every woman, federal courts have all recently disagreed with him, at least on Google, and I think are likely to disagree with him on the amount of competition and the amount of choice that users have across the ecosystem. So while I don't think that the solution

to that is, you know, some people have proposed very radical remedies for some of these problems. You know, breaking up, breaking up Google, who is now lost to federal antitrust lawsuits, and, you know, going after some of these big companies in very dramatic ways. I think the fundamental issue is that we're looking at ways that that you can give users more choice in this ecosystem, and you can give them empowerment, because these people don't, parents don't feel empowered, and that's why we're having these conversations about cosa and COPPA 2.0 and age verification online. I mean, users don't feel empowered to have choice and to know what's going on. I mean, you sign, you agree with these terms of service. And to the FTC point. I mean, it's like the fundamental issue that the FTC is looking at is whether the company is abiding by the contract that you're signing with it. When you sign Terms of Service, that's a service, that's a contract. Is the company abiding by it? I have no idea, but I would I respect the fact that legislators and regulators are looking at some of those issues. So I think, you know, I'll respectfully dodge the question a little bit on specific legislation, but I think that the the more that we can talk about this in context of giving users more choice, giving consumers more choice, giving consumers more power in the market, that's where this conversation needs to be happening, not about whether there needs to be, like, more competition among regular players. We gotta, we gotta recenter this conversation about, like, what the average person is actually dealing with online Jo

Jenna Leventoff
Anna, to dodge the question, less, not that you didn't fully dodged the question. I mean, I think most of the debates that we're seeing right now in Congress are focused on kids online safety. Right there is a rumored driven section 230 sunset bill that we haven't seen yet. So I think most of the debates that we're actively seeing are kids Online Safety Act, kids off social media act. All of these bills that are seeking to protect kids online. But ultimately, what almost all of these bills do is they, for cosa for example, give the FTC the ability to make the choice what is and isn't safe for kids to see. I think there have been efforts to reform cosa efforts to say, Oh, this isn't about the speech. This is about, you know, the platform design feature. And then you drill down further, and I asked some of you in the audience, who are staffers, like, what is your boss concerned about? And oh, my boss is concerned about their kids seeing content about eating disorders. And I'm like, Yes, there you go. Like, this is about speech, right? So I think we are concerned that in these efforts to protect kids, what the government is actually doing is giving the FTC the ability to decide what is and isn't okay for kids across the country to see, and what is and isn't okay for kids across the country to say. And also, you know, threatening the availability of content online for adults as well some of the other pieces of legislation kids off social media Act are full throated bands of kids creating social media accounts, period. And I always kind of like to remind people, kids also have first amendment rights, like, just like adults, kids have first amendment rights. And it's ultimately, you know, when a parent gets involved in, you know, protecting their kid from the internet. Cool, have fun. Like that's what a parent should be doing. When platforms decide what they can and can't have on their platform. That's the platform's own First Amendment, right. But the issue comes when the government steps in and tries to say, we think this content is harmful, please take it down. And that's ultimately, I think, the goal of most of these kids online safety bills, and so we don't think they actually do that much to make kids safer. What they do is threaten everyone's free speech rights. So

Ashkhen Kazaryan

over a past few years, we've seen some states pass legislation that's been challenged in court, often by a little choice association called that choice, and I want to talk about the courts and the Supreme Court. I'll start with you, Daniel, because you said something that was fascinating to me as a First Amendment lawyer. You said the originalist interpretation of the First Amendment. Do you want to talk a little bit about that, or overall, how you're seeing the cases unfold? Whatever you want to highlight in the court section?

Daniel Cochrane
Sure, I'm going to cabin the comment about obscenity, because I think that would take us down a different path that we're not going to go down right now. But I want to, I do want to turn to, I think, the important case, Anderson V tick tock. And this gets to the 230 point in that case as just, I mean, people in this room are probably generally aware of what that case was, a 10 year old girl, Nyla Anderson saw a blackout challenge video. It was a video that was suggested and recommended to her in the for you page on on Tiktok. And it's a challenge that that encourages young people to try to self affix it basically, hang themselves, strangle themselves. She. Tempted to do so. She died as a result. Her family is now suing in litigation against Tiktok, claiming that they are strictly they're liable. They're, I believe, strictly liable. And so the question is, in this case, well, does 230 immunize the platform against the I believe it's a state, state claim, I can correct me if I'm wrong about that. So the district court, Eastern District of Pennsylvania concluded that, in fact, 230 does provide immunity. The third circuit took up that case and reversed it. And I think the key, and I'll you know, we can, we can talk about the nuances here, but the key there is that the Court drew on the NetChoice moody and Paxton decisions, and this is where it's critical the court said moody and Paxton understand or recognize that certain kinds of algorithms, not every algorithm, but certain kinds of algorithms appear to be expression on the part of the platform. Now it's critical, and because of that, they conclude so 230 only applies to third party speech, not to first party speech. So they concluded on that basis, that the platform is engaged in first party speech, and therefore not immunized by 230 but critically, and this is this is important, Judge Mady, who joined in the judgment, so he concurred in the judgment, but dissented in the reasoning, points out that the court need not reach the question of whether these algorithms are first party speech to conclude that they're they're not, in fact, immunized by 230 and that Is because he goes back, recites the history of the difference between publisher and distributor liability. And it's sort of, I don't want to risk sort of getting that's really nuanced, and I don't want to take us down that path too far. But in very like short, brief terms, the difference is that in product liability, it's strict liability. So you're talking about the sort of the either first person speech or first person action. But distributor liability is a looser kind of liability that you had reason to believe that a particular design feature or a particular particular conduct that you facilitated resulted in a harm. So again, we could get we could get into that down that road. But the what's critical, I think, to note, is that essentially, this, this, this, I think, clarifies the original we talked about the original intent. Ash was asking about the originalist view of the First Amendment. This is really good statutory interpretation, because it's looking at the text, history and tradition of 230 and it's distinguishing the line of cases out of which 230 arose. Chris talked about one of those earlier in which the courts were trying to figure out what the early bulletin boards how to essentially determine whether strict or whether, excuse me, publisher or distributor liability applied. And judge made a notes in his in his dissent, slash concurrence, that in fact, that this was premised on 230 was premised on protecting the hosting of content, not all of the other decisions, and not all the other conduct that the platform is engaged with. So this has two really key implications. Number one, it means that 230 ought not apply to

a lot of these design decisions that put kids in harm's way, and it caused other harms. Number two, it means that it doesn't The platforms are not necessarily engaged in speech when they have algorithms that are involved in how content is presented. Now Chris is probably about to say, well, we have Paxton and moody, and we get into Paxton moody, but Paxton and Moody was a very narrow decision on in a procedural posture, on a very limited factual record. So I think we ought to be very careful not to overstate that case, but also to recognize what the court was doing in the Anderson case as well.

Ashkhen Kazaryan
But you just cited Paxton and moody yourself, so I'm well,

Daniel Cochrane
I'm saying, I'm saying that the that the court in Anderson the majority. So it's a three judge panel, and two of those judges said the reason why you have, you're immunized from liability under 230 is because we think you're engaged in first party expression. I'm saying judge made his point is you need not conclude that you're engaged in expression, that the platform is engaged in expression to conclude that the platform is still liable, meaning that they're not immunized by 230 I'm saying that's a really important distinguished distinction. And I'm saying that there is a tendency, perhaps, to over read Paxton and moody, to say that any algorithm that in any way affects the way that content is displayed or organized is the is the platform's first party expression, when the court was very clear and Justice Kagan in writing the opinion was very clear that it's only true insofar as algorithms are doing the same thing as a newspaper editor or close to that.

Ashkhen Kazaryan
I don't think I'm understanding you, but we don't have a lot of time. So Chris,

Chris Marchese
so. I'm actually going to start with some First Amendment originalism. You know, go back to the founding and think about our founding fathers and the fact that they used very partisan newspapers to get their messages out right, like the Federalist Papers, the anti federalist papers, and then, you know, the New York Daily News, right? That was Alexander Hamilton's hit piece against his political opponents. And so since the very beginning of this country, we have recognized the power of publishers to not just promote their own views, but also to sort of influence the general public. And from the very beginning, when the First Amendment was passed, we have had a very strong protection for letting publishers make their own decisions about what to publish, how to publish, and when to publish. And something that is, you know, kind of interesting about the American context is like, while we did take a lot of liability rules from, you know, the British common law and all that, we did break new ground in the colonies, you know, defamation was a strict liability tort in the UK, whereas in the US, the Peter Zenger trial actually introduced truth as an absolute defense to defamation claims. So even if you are, you know, technically debating somebody under common law, if it's truthful, then there is no defamation. That was an American innovation, and that was a jury system that came up with that, and that is now enshrined and good law in the United States. So we have always had a more protective view of speech than the Anglo Saxon tradition. Now, moving on from that, you kind of fast forward to section 230 the moody Paxton litigation and all that. And all we are doing is sort of making clear that the First Amendment protects contemporary publishers too, right? Whatever you feel about social media.

The fact is, they are engaged in publishing speech, their own speech and third party speech, and they are also exercising their editorial rights when they decide how to serve you, the user, the speech that it thinks you want to see. And of course, algorithms are used right it's you know, no different from a newspaper started using spell check. I don't think anybody would claim that the New York Times switching over to, you know, Microsoft Word and using spell check to fix some of its mistakes, you know, renders it unprotected speech, right? That's just crazy. And I would also say that, you know, when it comes to algorithms and so forth, if, if they don't do anything in terms of, like, expressive content or expressive conduct, or, you know, sort of symbolizing the platform's views on what makes a good online forum, then we wouldn't be sitting here complaining about how they exercise that right like either algorithms do nothing or they do specifically what we're complaining about, which is moderate content in a way that we would do differently. I know for myself that I would never have removed the New York Post story about, you know, Hunter Biden's laptop. But it's in recognizing that, right? It's precisely by recognizing that that we have to understand that the First Amendment is so important here. It's precisely because we would make different judgment calls that we have to protect everybody else's right to do that, right? And so, you know. And if we want to get into some like original intent, which I don't really love, but let's go with originalism and textualism. And look at section 230 it uses the term publisher, and we know from the Supreme Court that we have to define that term as it was commonly understood in 1996 if you look at any of the authoritative dictionaries that the Supreme Court has cited, you will see that publisher as understood in 1996 meant everything from the decisions about what content to include to what content to exclude, how to display that content, disseminate that content, and how to distribute it. So distributor liability is actually just a form of Publisher liability. So when Congress decided to grant immunity for publisher liability, it did so with the understanding that it was protecting far more than just hosting third party speech. And of course, you know, section 230 has other provisions, including c2 which says when you moderate content, you are not then a first party speaker who is liable for it, you are simply exercising your first amendment rights concurrent with a user, and that is still granted immunity. And of course, there is, I think it's subsection seven, but don't quote me on that, but there is a subsection that talks about sort of like device filtering technology and other forms of technology that can be used to sort of display content. And so Congress, very clearly, even in 1996 understood that it was going to be granting immunity beyond just the hosting of third party speech, it was also granting immunity for how that. Beach is moderated, curated and disseminated. So

Ashkhen Kazaryan
we only have 10 minutes left, and I did promise, as a community guideline that I was going to do a Q and A, and I don't want FTC to come after me. So if you have a question that all of our panelists can answer, please raise your hand. All right. We have one.

Speaker 1
Isn't this going to be a moot point? Is this going to be a move? Point of language and circuits ruling in FCC, the ATT, V and T, last week, Enforcement Bureau can't do anything. What's the point of making these regulations? If everyone I'm curious have no idea, Canton, there

Luke Hogg
are telecom attorneys in this room. I'm not one of them.

Ashkhen Kazaryan
Talk to them afterwards. I'm a moderator. So I was told I can't have opinions. So Chris,

Chris Marchese
I think it should already be mute because of Loper bright and all the other administrative law decisions from the Roberts Court that indicates you got to point to something specific in the text that authorizes you to do what what it is you're claiming you want to do. And there is nothing in section 230 granting any agency. In fact, just a fun aside. And yes, this is legislative history, so forgive me. Like when Congress passed section 230 they literally joked, thank God we are not forming a federal an FCC, Federal computer commission, right? So it was designed specifically to rely on the free market and not government enforcers. I get that times have changed since 1996 but the fact is that is still the law. And so there is nothing. It should already be moved. It should be a non starter.

Daniel or Jenna, do you want to answer that? Or should we get enough?

Daniel Cochrane
I mean, I could respond, but I don't have Sure. Okay, quickly. So I'm going to punch on on your point, but in terms of the history of 230 so, I mean, I'm hearing two things earlier the panel, I brought up how 230 was part of the larger Communications Decency Act that one of the goals of Congress there was to create more choice for how individuals, for individuals to choose how their information environments are mediated and curated. And also that was underlied by a concern so the good faith blocking provision, which is c2 of Section 230 right when we talk about good faith, and it has that list, lascivious, libelous, filthy, Congress was concerned about the proliferation of pornography on the early internet. So when we talk about intent, I mean, Jenna earlier said, Oh, well, obscenity is protected speech, and that's a different question than asking what was the intent of Congress when they created the statute? The the intent of 230 was user empowerment. It was to give users more choice, and it was also to enable the small startups, the small companies which were in their their infancy at that time. I mean, Google, I think what it was they they started in the basement in like the late 90s or something, or the garage, the Palo Alto garage in late 90s, right? So Google wasn't even on the scenes yet, and and the reality is that the purpose of 230 was empowering the user and empowering the small players to challenge the Giants. That was the promise of the early internet, a decentralized ecosystem that made perfect sense at the time. But the reality is that the little guys, the little startups, have become the giants, and 230 has created an incentive that only allows those companies to continue to dominate the information space. So

Luke Hogg
since I punted earlier, I'll give I'll unpun now and go with like crazy moonshot idea. I think that part of the problem is we're talking about a lot of this in the last time we touched the Telecommunications Act was 1996 when, like, prodigy and CompuServe, which aren't even companies anymore, we're we're doing this, like, when we're talking about broadcast regulations, which we didn't really get to, when we're talking about 230 when we're talking about, you know, these questions, all of these questions, I think, deserve much, much more robust discussion. And like, maybe it's time to retouch the Telecommunications Act. Like we only have three titles. Maybe we need four or five, I don't know. But

like, if Congress is going to do something, I think, and address a lot of these questions, I think that that's the obvious place to start.

Ashkhen Kazaryan
We have who else has questions? Raise your hand. I'm going to actually take all of them at the same time and then use moderator privilege to adjust. Do you want to go first? Yes, I'd like to ask about

Speaker 2
your role of self regulation and different regulation from third parties. Is there a role in which organizations can come together and build their own guiding principles that would not then force the government to come in and develop free speech for speech for laws that

would it be

just curious how the FCC action will change this

Speaker 3
rule, make these courts pages, it's like, or guidance, yeah. Well, let's get to the third

Speaker 4
it's. So, number one, love to hear any reflections on rather than the coaching of the CDA. And second, 230, in that environment, the broader environment, was about litigation. Was about trial lawyers and quarterback trial lawyers. Number two, I heard that the half assed, which all, what is the concern? Are we having concern about the government? You mentioned how bad big tech was put on the government in the cases, because I think it's, I think they responded to the government. In fact, I government. So

Ashkhen Kazaryan
I'm going to take those three questions. One was about self regulation. Was about FCC, telecom, wonky, admin, law, things. And one was was about basically job auditing and government having power over speech, and turn them into what do you think are the inflection points for the rest of the year that might address any of those or maybe those are the solutions. And I'm going to give each of you 40 seconds. We're going to go Jenna, Luke, Chris, Daniel.

Jenna Leventoff
I'll start with the self regulation. I think that that's a very constitutional way of doing things, because, like I said, the First Amendment only talks about government regulation. It does not talk about these third party actors, and so if they come together and decide what they do or want to do, the ACLU doesn't have a First Amendment problem with it. I can't talk to the wonky admin law stuff, because that's very admin. We

Luke Hogg

generally agree on the suffering. I like self regulation. I like standards when they work. I like non mining standards. Like NIST has a role, and Commerce has a role that I don't think we've talked about here to the question about job owning. I think one of the inflection points for the remainder of the year and for the remainder of the Trump administration is going to be the executive order on job voting. It's interesting to see how that'll be implemented. I think it's a very positive thing that we've seen come out of you know, people complain when Biden was in office, the right was complaining about job learning. Now that Trump's in office, the left is complaining about job learning. So maybe it's just a power problem, and hopefully we can take some of the lessons from this executive order and pass them into statute. Because it's just an executive order, it's just a piece of

paper, fully agree that

Chris Marchese
Congress should pass a law that prohibits jaw burning, right? I mean, it has to be carefully tailored, because there are legitimate conversations that the government should be having with private businesses to, you know, for national security reasons or whatever. But the fact is, Congress should definitely act in this space, because whether it's a Republican president or a Democrat president, the point has already been proved that the White House can exercise considerable coercion over private parties, and that extends to every government agency that has any type of regulatory power over a private business. So that is definitely right for Congress. I think another point that we're seeing is NetChoice is now involved in 17 lawsuits, and so we are actively interpreting and enforcing a moody decision, and we're doing so against various state laws that attempt to regulate how people access constitutionally protected speech online. And so we're seeing that play out. But what is really sort of interesting is that the courts are all coalescing around a similar bundle of First Amendment rights. And so, you know, I think as these decisions come out, that is also going to weigh on Congress's consideration of things like cosa which, you know, for what it's worth, is, in my opinion, very unconstitutional, and you can look to our lawsuits for why that is. And then the last thing, of course, is, you know, what are we going to do about generative AI, you know, we see a ton of lawsuits popping up that have copyright claims and so forth. But there is also a question of like, you know, when AI generates an output that somebody doesn't like or that does, you know, have some type of negative impact on someone, you know, what do we do? Then, how should the courts interpret it? And so section 230 might offer some answers. It might not, but that is going to be the next big thing, I think, for lawmakers to look at. Yeah,

Daniel Cochrane
I think do basic due process and transparency for platforms, especially with AI. I think, I mean candidly, I think a lot of the challenge here is we see so little of what happens on the platform side of the ledger, especially with the really complicated generative ai llms, it's really, really, really hard to know, like, well, how are the companies enforcing if they're, you know, if Paxton said it's expressive, if they are enforcing their What did they say? Guidelines and standards? What are those guidelines and standards with a, you know, language model with billions of parameters, right? That's general purpose, I think, also more randomly, for social media platforms, just the ability for users to know how their content is being treated. You know, if I'm, you know, I'm a, I'm a YouTuber. I gave the example with 2 million

followers. And, you know. YouTube is preventing those followers from seeing my content, it seems like a basic notice requirement would be quite reasonable. And it would seem to me that if we're talking about making allowing the free market to work, reducing the information asymmetries between the users and the platforms, that's what's necessary to ensure good consumer choice, but it's also an it's, I think it's also necessary to realign the platform's incentives with the normal Americans that rely on them.

Chris Marchese
Can I just add one quick thing? So, sorry. Okay, there's another case, everybody. We haven't talked about it, but it's x versus Bonta. You know, Twitter sued the state of California because California tried to do exactly what Daniel was talking about and won. That's not what they required. It required

Luke Hogg
next week. Can we continue this conversation? I just googled the case x versus Bonta. If

Ashkhen Kazaryan
you folks want to hear more about x versus Bonta, the Tick Tock divest chair, that's not happening, I don't know, or generative AI and liability, you can tell that man right there at Tim, but he should invite all of us back and have another discussion on that. I want to thank my wonderful panelists for an incredibly important discussion, and all of you for being here with us. Thank you. Applause.