Big Tech Is Not Immune From State Anti-Censorship Laws

When, as and if states wake up to their own sovereignty, they will realize that they could destroy Big Tech censorship in a very short period of time. Unfortunately, too many state legislators are complicit with or compromised by the same censors. TN Editor

As state legislatures look to protect their citizens' free-speech rights with social media anti-censorship laws, we often hear that Section 230 of the federal Communications Decency Act of 1996 preempts any such state laws. That line of thought is certainly what Big Tech wants people to believe, but that is also a misapplication of Section 230, which only shields Big Tech from civil liability suits regarding the censorship of sexually obscene or excessively violent material. In the vast majority of cases, political speech and cultural commentary are not sexually obscene or excessively violent.

Whenever investigating the reach and application of a law, the first thing a person should do is examine the language of the law itself. There are several plain-language reasons why Section 230 of the Communications Decency Act does not apply to political free speech.

First, the title of the law is the Communications *Decency* Act. It is not

the Communications Ban Anything You Want Act, the Communications Political Correctness Act, the Communications Politeness Act, or the Communications Arbiter of Truth Act. The explicit purpose of the legislation is listed in its title: to allow Internet platforms to block *indecency* if they so choose.

Second, the section of the Act—section (c)(2)(A)—that provides internet providers civil protection is titled, "Protection for 'Good Samaritan' Blocking and Screening of Offensive Material." The title of this section, like the title of the Act itself, shows the purpose is to grant protections for censorship of a finite, explicitly defined category of material—"offensive" and "indecent" material.

Third, the Act provides explicit examples of offensive and indecent material that internet platforms may censor. Every explicit example involves sexual obscenity or excessive violence, which fit clearly and comfortably within the title of the Act. Content that is explicitly subject to censorship is that which is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." None of these explicit examples are even remotely connected or similar to political speech or cultural commentary.

So how do Big Tech apologists argue that Section 230 gives them carte blanche power to censor and ban any speech they wish? They claim that the final three words in section (c)(2)(A)—"or otherwise objectionable"—mean that Congress intended to allow internet platforms to censor and ban anything they please, well beyond material that is indecent and offensive. Of course, that begs the common-sense question: Why would Congress explicitly title the Act the Communications Decency Act if Congress intended to grant censorship protections regarding decent and indecent material alike? Why would Congress place civil protections for censorship under Good Samaritan and offensive material if Congress intended to grant censorship protections to everything else as well?

Fortunately, we don't need to rely solely on common sense. Congress provided additional clear instruction.

The language of the Communications Decency Act explicitly states that it is Congress' policy to "encourage the development of technologies which maximize *user* control over what information is received by individuals, families, and schools" (emphasis mine). Congress is instructing us that these narrowly defined censorship protections are not to be applied broadly and that, other than these narrow exceptions, Congress is emphasizing that users themselves (rather than internet platforms) should determine what they share and receive from one another.

Also, the explicit language of section (c)(2)(A) states that internet platforms must make a "good faith" determination that material runs afoul of the statute in order to have immunity from civil suits. However, interpreting the final three words of section (c)(2)(A) to allow internet providers to censor and ban anything they wish makes the statute's requirement of "good faith" determinations unnecessary and silly. One can reasonably assume that Congress would not include a requirement for a "good faith" determination that certain material qualifies for censorship protection if literally everything in the world qualifies for censorship protection.

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