JULIAN BRADLEY
WISCONSIN STATE SENATOR

Senate Committee on
Government Operations, Legal Review and Consumer Protection
Thursday, October 26, 2021

Senate Bill 525

Chairman Stroebel and committee members,

The First Amendment is under attack. Recently, social media has been monitoring, fact-checking and censoring posts by people across the political spectrum that's advantageous to elites' political agendas. Social media, which state and federal courts are now saying are constitutionally protected forums, should be a place where free speech flourishes and thrives. But that's not the case.

It's time that we ensure that Mark Zuckerberg, Jack Dorsey, and their Silicon Valley liberal allies cannot restrict Wisconsinites' political speech in these essential public spaces. That's why Representative Horlacher and I have authored Senate Bill 525 that's before you today. Free expression is one of the most vital components of our democratic republic. We must ensure our citizens can engage in political speech unfiltered and uncensored by Big Tech.

The bill prohibits social media companies from censoring content by or about candidates in Wisconsin or elected officials. Doing so would allow a citizen to sue a social media platform that violates these provisions, with monetary penalties for de-platforming, as well as punitive damages and attorney fees.

Furthermore, a recent story uncovered by the Wall Street Journal shows that Facebook isn't equitable in monitoring its own terms of use. Today, millions of VIP Facebook users don't have to follow the typical enforcement process. An internal review by Facebook found, "We are not actually doing what we say we do publicly." This unequal treatment must end. Facebook and Twitter must consistently and fairly enforce their own rules, which need to allow for free political speech.

Under this bill, we also require Big Tech companies to do the following:

- Publish their moderation standards,
- Apply moderation consistently across all of its users,
- Give notification and an explanation for specific censoring actions, and provide annual notice of the types of algorithms used in content moderation, among other things, and
- Allow users to opt-out of an algorithm's post prioritization.

There is nothing more critical for the future of our country than the survival of our First Amendment right to free speech and petition the government. Social media can be a valuable tool in making that happen, but business as usual proves that Big Tech will continue to censor Wisconsinites' unless we act and do something about it today.

Thank you for your time. I appreciate your consideration of this bill.

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2021 Senate Bill 525

Testimony of Representative Cody Horlacher

October 26, 2021

Chairman Stroebel and members of the Senate Committee on Government Operations, Legal Review and Consumer Protection, thank you for having me here today to testify on Senate Bill 525.

Social media has become a part of almost every Wisconsinite's daily life. People use social media to keep up with family, stay up-to-date on the news and share their thoughts and ideas with others.

As people use social media platforms like Facebook and Twitter to share those thoughts and ideas with each other, First Amendment free speech concerns are at the forefront of users concerns. That's because as political speech proliferates these sites, the Big Tech companies that own them have unfortunately seen fit to censor speech they do not agree with. Not only do these companies suppress the free exchange of ideas, they even ban users from their sites just for expressing personal views.

The result has been that people on both sides of the political aisle have seen social media punish their exercise of constitutionally protected free speech.

That's wrong. People should be able to engage in the free expression and exchange of ideas. Therefore, Senate Bill 525 seeks to make the social media giants more accountable and transparent. This bill requires Big Tech companies do to the following:

1. Publish their moderation standards
2. Apply moderation *consistently* among *all* of its users
3. Notify and explain certain censoring actions they take and provide an annual notice of the types algorithms they use when they moderate content
4. Allow users to opt out of their algorithms' post prioritization

SB 525 would also prohibit social media platforms from censoring content by or about political candidates or elected officials in Wisconsin. If the Big Tech companies *did* take such prohibited actions, the bill allows a user of a social media platform to bring a private cause of action against that social media platform. The bill provides that in such a private cause of action, a court may award statutory damages of not more than $250,000 for each proven claim involving statewide candidates and elected officials, $200,000 for each proven claim involving other candidates and elected officials, or $100,000 for each proven claim involving other users. It would further allow actual damages, punitive damages if certain aggravating factors are present; costs and attorneys' fees, and any other form of relief a court would deem just and equitable.

(more – over)

Big Tech has developed a monopolistic grip on social media platforms, and has used that grip to suppress the free speech of Wisconsinites. Senate Bill 525 would ensure the people of our State maintain the ability to engage in the free expression of ideas and opinions.

Thank you for your time.

Testimony Before the Wisconsin Senate Committee on Government Operations, Legal Review and Consumer Protection on Senate Bill 525 in Reference to Censorship of Users' Expression by Social Media Platforms

The Heartland Institute

October 26, 2021

Chairman Stroebel and Members of the Committee:

Thank you for holding a hearing on Senate Bill 525, legislation intended to challenge Big Tech when it comes to Wisconsinites' rights to political and religious free speech.

My name is Samantha Fillmore, and I am a State Government Relations Manager at The Heartland Institute. The Heartland Institute is a 37-year-old independent, national, nonprofit organization and our mission is to discover, develop, and promote free-market solutions to social and economic problems. Heartland is headquartered in Illinois and focuses on providing elected officials on all levels reliable and timely research on important policy issues such as Big Tech censorship.

This year we have had 77 pieces of legislation in 33 states all attempting to challenge Big Tech censorship. The volume of bills on this topic throughout the nation is indicative of the fact that many Americans recognize we are entering into a dangerous period of censorship at the hands of Big Tech oligarchs.

In the blink of an eye, the emergence of social media platforms has elevated the national conversation and political discourse to a size and scope nearly unimaginable a decade ago. The associated emerging technologies and mediums promised democratization of free speech in a way never dreamed of. Free speech and political activism, once the realm of partisans and professional pundits, was accessible such that people who were once spectators were now engaged.

However, this mass communication network is managed by a handful of powerful tech titans, who are shielded from liability and operate as monopolies. The consolidation of this power to these titans has now effectively erased the empowerment of millions of Americans and their newfound voices.

Where it has empowered voices and people across the political spectrum, it has also empowered the voices that seek to divide, misinform, and manipulate us. I would like to tell you that the very platforms on which those messages are spread have been fair and impartial, yet the truth is that they haven't been.

The number of social network users worldwide reached 3.6 billion in 2020 and is projected to increase to 4.4 billion by 2025. This phenomenon was further exacerbated by the coronavirus pandemic. A Harris Poll conducted in the spring of 2020 found that 46 to 51 percent of American adults were using social media at higher rates than they were pre-

pandemic. In addition, U.S. social network ad spending is projected to rise 21.3 percent from the already staggering $40 billion spent in 2020.

All of these statistics provide ample evidence that social networks have become so much more than a host for expression, memes, and life updates among friends and family. In today's world, social media companies have become a major sector of the U.S. economy, influencing corporate successes and failures.

Opponents of this legislation would argue that such censorship is appropriate because "market forces" have allowed these titans to rise to power. To that, I submit to you that these instances are not the product of a healthy free market but rather the result of a corrupted market.

Moreover, private corporations have no more of a right to suppress Americans' free speech than does the government. Americans would never stand for a neighbor breaking into their house to forcibly take their possessions, just as the same would not stand for a rogue policeman. In this case, one is a private entity while one is a government entity. Similarly, Big Tech corporations have no more right to suppress your free speech rights than does the government. Government exists to defend our unalienable rights – and especially our unalienable free speech rights – from being suppressed by third parties.

Our right to free speech rights exist independent of the First Amendment. Our free speech rights do not exist because the government benevolently gave them to us in the First Amendment; our free speech rights exist because they are innate human rights that are unalienable, either by the government or any other actor. Wisconsin has every right to independently safeguard our unalienable free speech rights from suppression by private corporations and that is what is SB 525 aims to accomplish.

This legislation would inject autonomy back to the state level for Wisconsin lawmakers and constituents alike.

So here we are today, challenging the behavior of Big Tech for Wisconsinites. To challenge the argument Big Tech perpetuates. The argument that they have a free-speech right to suppress other people's free speech. This rationale would appear in a George Orwell novel. It is evident that Big Tech lacks transparency and respect for the moral obligation it has as a primary outlet for political discourse in our nation and the dissemination of information of public import.

A dominant "user platform" for speech simply does not have any right to silence Americans' free speech rights. That is especially the case, given that social media and the internet are the primary means by which Americans today share information and ideas with each other. Respecting free speech rights on the primary means by which Americans communicate with each other is not "forced speech in violation of the First Amendment."

Senate Bill 525 is good legislation, promoting overall free speech for residents of the Badger State. This bill sends the message to Wisconsinites that clear and robust public

debate is sacrosanct and any action or failure to act to ensure a robust debate will be met with hard questions, and if necessary, enabling policies.

Finally, I would like to submit to you that on the issue of freedom of speech, more speech is always the answer, never less.

Thank you for your time today.

For more information about The Heartland Institute's work, please visit our websites at www.heartland.org or http:/news.heartland.org, or call Samantha Fillmore at 312/377-4000. You can reach Samantha Fillmore by email at SFillmore@heartland.org.

Frequently Asked Questions

What Critics of a State Solution to Big Tech Censorship Are Saying

1. **States, under what is known as the dormant Commerce Clause, cannot enact laws that are more onerous than federal law, in this case, Section 230 of the 1996 Communications Decency Act (CDA).**

   This simply isn't true and here's why: Section 230 of the CDA *explicitly says* states may enact legislation that does not contradict that section of the federal code. Under 47 U.S. Code § 230 (e)(3), it says: "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."

   Furthermore, Section 230 governs liability for third-party content. It does not speak at all to platforms' own decisions to discriminate against certain political and religious groups and speech. Because Section 230 does not speak to, let alone preempt, state efforts to prevent discrimination within their borders, states are free to legislate in this area.

   Lastly, the dormant commerce clause only prohibits state action that discriminates against out-of-state actors or burdens interstate commerce. Guaranteeing fair treatment of your constituents does neither. Not surprisingly, state laws that protect groups that federal discrimination law does not, *i.e.,* appearance discrimination, have never been successfully challenged on dormant commerce clause grounds.

2. **Don't interactive websites like Facebook and Twitter, for example, have a First Amendment right to remove content they deem objectionable?**

   Sure, they do. But, if they want to hold viewpoints and editorialize by choosing the type of viewpoint and content that users can view and interact with, then they become "publisher or speaker" under Section 230. As publishers and speakers, the interactive websites share with *The New York Times* and *The Washington Post*, broad First Amendment protections, yet are held to legal standards for fraud, libel, slander, and defamation.

   But, because Section 230 gives immunity for liability resulting from *third-party* content, *i.e., if a user posts something libelous on Facebook, the user has liability not Facebook,* Section 230 does not give immunity when Facebook chooses to edit, remove, or promote content.

   Remember, *The Washington Post* just settled a nine-figure defamation claim with a student from Covington High School for its treatment of him after trying to hide behind the First Amendment. Big Tech wants to have its cake and eat it too—it wants to be able to edit, remove, and promote content just like a newspaper, but then claims Section 230 frustrates any efforts to hold Twitter or Facebook accountable for editorial decisions.

3. **The definitions for things like lewd, lascivious, objectionable, etc. are ill-defined and could expose the state to litigation.**

Again, not true. Those are long-defined terms and the bills being contemplated use language and standards that are well established by the courts. The first four adjectives in subsection (c)(2), "obscene, lewd, lascivious, filthy," are found in the Comstock Act as amended in 1909.[1] They have long been accepted as terms defining obscene speech that the First Amendment does not protect.

The next two terms in the list "excessively violent" and "harassing" also refer to typical concerns of communications regulation which were, in fact, stated concerns of CDA itself. Congress and the FCC have long been concerned about the effect of violent television shows, particularly upon children; indeed, concern about violence in media was an impetus of the passage of the Telecommunications Act of 1996, of which CDA is a subpart. Section 551 of the Telecommunications Act, titled Parental Choice in Television Programming, requires televisions over a certain size to contain a device, later known at the V-chip, which allowed content blocking based on ratings for broadcast television that consisted of violent programming.[2]

Lastly, Section 223, Title 47, the provision CDA amended and into which the CDA was in part codified, is a statute that prohibits the making of "obscene or harassing" telecommunications. These harassing calls include "mak[ing] or caus[ing] the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number" or "mak[ing] repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication."[3]

4. **AI and algorithms these websites use to flag content that may not catch (or catch) content could expose them to liability under the legislation being contemplated.**

First, many Section 230 reform proposals aim to reform the *Zeran* decision, which gives platforms immunity for *knowingly* distributing unlawful content, such as child pornography and solicitations for human trafficking. Thus, most reforms would not create a liability for failure to "catch" content if reasonable efforts were exerted.

More importantly, if Section 230 did not exist, platforms would not face unreasonable liability for every bit of unlawful content they failed to catch. Rather, liability standards would emerge—*as they exist now for data breaches under countless federal and state laws and regulation*—relying on best practices and industry standards that differ according to the size of the firm. Thus, internet firms regularly shield themselves from liability for data breaches and demonstrate "reasonable care"

[1] Section 3893 of the Revised Statutes in section 211 of the Criminal Code, Act of March 4, 1909, c. 321, 35 Stat. 1088, 1129; United States v. Limehouse, 285 U.S. 424, 425 (1932) (stating that "Section 211 of the Criminal Code (18 USCA § 334) declares unmailable 'every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character"). The phrase is repeated in numerous state statutes.

[2] 47 U.S.C. § 303(x). See Technology Requirements to Enable Blocking of Video Programming Based on Program Ratings, 63 Fed. Reg. 20, 131 (Apr. 23, 1998) ("[T]he Commission is amending the rules to require . . . technological features to allow parents to block the display of violent , sexual, or other programming they believe is harmful to their children. These features are commonly referred to as 'v-chip' technology."). Finding that "[t]here is a compelling governmental interest in empowering parents to limit the negative influences of video programming that is harmful to children," Congress sought to "provid[e] parents with timely information about the nature of upcoming video programming and with the technological tools" to block undesirable programming by passing the Telecommunications Act of 1996.

[3] 47 U.S.C. § 223(a)(1)(D); see also 47 U.S.C. § 223(a)(1)(C), (E).

by adherence to industry best practices. The same result would emerge for liability for unlawful content in a post-Section 230 world.

5. **States shouldn't interfere with market solutions. If conservative speech is being censored and conservatives are being de-platformed, then there are alternatives to use.**

   First, the major platforms enjoy a liability gift in Section 230, not shared by their competitors. They are already not working on a level playing field or in a fair and free market.

   Second, requiring dominant communications platforms to refrain from discrimination and censorship is as American as apple pie. From the eighteenth century onwards, governments have required ferries, telegraphs, telephones, and cable systems to serve all, regardless of race, religion, or political creed. As the Framers understood, when in the first Congress they passed laws expanding the postal service and granting preferential rates to newspapers, an open public discourse is essential to democracy. Free speech is an institutional requirement for democracy and the rule of law, which are, in turn, the only true defenders of free markets.

   Third, telling conservatives to make their own networks is like saying build your own telephone company. It fails to recognize the demonstrable hostility conservatives face from corporations, particularly in Silicon Valley, the media, and other elite institutions. The Parler story is a great example. Because it provided a free speech outlet for all, including conservatives, Amazon Web Services, whose servers were hosting the platform, removed it from service, and Apple and Google both removed it from their respective app stores. Similarly, in recent weeks, mainstream media outlets have targeted Substack for hosting center-right authors and other media critics. In the wake of the January 6 attacks on the U.S. Capitol, Rep. Alexandria Ocasio-Cortez (D-NY) urged her supporters to report as harassment to Twitter any individuals who challenged her account of events.

   Effectively, this all amounts to conservatives being on borrowed time. As time passes, the status quo becomes increasingly lucrative and the momentum for a response lessens.

   Fourth, Section 230 also declares that it is the policy of the United States, "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;". "*Presently.*" The rise, popularity, and ubiquity of social media websites is *because* of Section 230. Congress' declaring it so does not a free market make. That Section 230 exists is self-evident of a corrupted market, where traditional economics doesn't apply.

6. **A state-based solution to Big Tech Censorship means dangerous and criminal activity wouldn't be "censorable" and social media platforms wouldn't be empowered to remove the content of ISIS recruiters or child pornographers.**

   This is patently false, meant only to obfuscate and freeze lawmakers into inaction. Under both federal and state law, solicitation to a criminal act, e.g., ISIS recruitment, is already illegal, governed elsewhere in federal law. Again, 47 U.S. Code § 230 (e)(1) already contemplates this: "NO EFFECT ON CRIMINAL LAW: Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute."

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October 25, 2021

The Honorable Duey Stroebel, Chair
Committee on Government Operations, Legal Review and Consumer Protection
Wisconsin State Capitol
Room 18 South
PO Box 7882
Madison, WI 53707

RE: Opposition to SB 525

Dear Chairman Stroebel:

I write on behalf of TechNet respectfully **in opposition to SB 525,** which will subject Wisconsin residents to more abhorrent and illegal content on the internet by creating frivolous liability risks for social media companies that remove objectionable content from their platforms.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents more than three and a half million employees and countless customers in the fields of information technology, e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance.

Our members are committed to keeping their users safe online, which is why social media companies review millions of pieces of content every day in order to remove harmful content that conflicts with their policies. Wisconsin should encourage these companies to have content policies, as they govern the removal of content showing the exploitation of children, child sexual abuse materials, bullying, harassment, gore, pornography, and spam. Instead, SB 525 perversely creates an incentive for companies to not prohibit and remove any objectionable content in order to avoid the frivolous lawsuits that this bill would create. The result would be the rapid spread of abhorrent and illegal content that will cause real-world harm in Wisconsin communities and beyond.

Social media companies understand that they have an obligation to remove objectionable content, otherwise their users will be subjected to dangers like images of child endangerment, financial scams, spam, and other nefarious links.

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Companies take this responsibility seriously, removing harmful content in an unbiased manner while keeping their services open to a broad range of ideas. In the overwhelming number of cases, removal of offensive content is accomplished as intended. However, the sheer volume of content – hundreds of millions of posts per day – ensures that both artificial intelligence and human reviewers at companies cannot get it right 100 percent of the time. Billions of transactions, after all, will inevitably lead to errors. It would be fundamentally unfair to implement such a draconian penalty for instances where code misfired or a simple mistake was made. As written, the scope of this bill would affect many other businesses as well such as news sites, platforms for hosting reviews and comments, business to business services, and education and learning platforms.

Additionally, the bill runs counter to the American free speech law governing content liability on the internet, Section 230 of the federal Communications Decency Act. Since its enactment in 1996, Section 230's two key provisions have empowered online intermediaries to remove harmful content while providing them with the same "conduit immunity" that commonly exists in other real world offline contexts – for example, not holding a bookseller liable for libelous books, but rather the individual who committed the libel.

Due to Section 230, American companies have the right to curate information on their service to meet the needs and expectations of their customers. Section 230 has supported innovation across the internet while also encouraging companies to be "Good Samaritans" by allowing them to "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, whether or not such material is constitutionally protected."

For these reasons, TechNet opposes SB 525. We thank you in advance for your consideration, and please do not hesitate to reach out with any questions.

Sincerely,

Tyler Diers
Executive Director, Midwest
TechNet