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Tech Platforms and the 1st Amendment: Supreme Court Rulings

CONGRESSIONAL INTERNET CAUCUS ACADEMY

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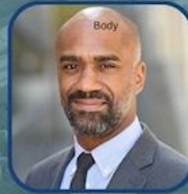
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Tech Platforms and the 1st Amendment: Impacts of Landmark Supreme Court Rulings

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SPEAKERS
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Rhett Styles
Welcome to today's event. My name is Rhett Styles. I'm a legislative assistant in Congressman McCaul's office, the co chair of the Congressional Internet Caucus. I want to welcome you to today's luncheon event called Tech Platforms and the First Amendment: Impacts of Landmark Supreme Court Rulings. I want to note that this event is hosted by the Congressional Internet Caucus Academy in conjunction with the Congressional Internet caucus and its fco chairs. On the House side. The co chairs of the Caucus are Congressman McCaul and Congresswoman Anna Eshoo. On the Senate side, it is

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Senator John Thune. We have been doing these luncheon briefings regularly with a brief pause during the pandemic since 1996, when the Internet Caucus was founded. Our next briefing after this will be on Friday, September 20, in this room, so keep your eye out for an announcement. Today we have a panel of experts who are on the frontlines of freedom of expression issues with deep knowledge of these cases, and what they mean for Congress. Our moderator today is Nadine Farid Johnson, who is the inaugural Policy Director of the Knight First First Amendment Institute at Columbia University. Nadine, let me hand it over to you. Thanks.

Nadine Farid Johnson
Thank you so much. Thank you all for being here and making it through the rain to join us really appreciate it and happy to see everyone on livestream as well. So I'm going to do a quick introduction of our panelists. There's so much to discuss here. So I really wanted to dive in as quickly as possible, but I will start all the way down at the end with Steve DelBianco, who is the president and CEO of NetChoice. Steven is an expert on Internet Governance online consumer protection the Internet taxation who has testified several times before Congress and state legislatures. As President and CEO Steve works with NetChoice members to set and execute the net choice agenda. Next to Steve is Yael Eisenstat who is a senior fellow at Cybersecurity for Democracy. Yael is a tech and democracy activist and the former vice president of the Anti Defamation League Center for Technology and Society. At Cybersecurity for Democracy, she is working on policy solutions for how social media, AI powered algorithms and generative AI affect political discourse, polarization and democracy. Olivier Sylvain is the professor of law professor of Law at Fordham University School of Law and a Senior Policy Research Fellow at the Knight Institute. He is a senior adviser to the Chair of the Federal Trade Commission from 2021 to 2023. A wide ranging expert on these issues, his research is in information and communications law and policy. And next to me, I have we have Vera Eidelman, who was a staff attorney with the ACLU, speech Privacy and Technology Project, where she works on the rights to free speech and privacy in the digital age. A First Amendment expert she focuses on the free speech rights of protesters and young people online speech and genetic privacy. So as I mentioned, we have just under an hour here, so I'd like to just really dive in because I think you all know why we are here and Vera, I'll ask you to kick us off. If you can lay the foundation for us. You're the First Amendment foundation and tell us what the cases is say, and don't say, with respect to First Amendment protections, please.

Vera Eidelman
Thank you, Nadine. Nope. It is on. Okay. Thank you very much. I'm an expert on tech. Right. Thank you. So thank you all for joining. And thank you, Nadine, for the introduction. I thought I would just sort of table set for us. By starting with what is the First Amendment? What does it protect? And who does it protect against? And then I promise I'll discuss the NetChoice cases. So if any of you have heard my colleague Emerson Sykes speak on this, this will sound very familiar, because I'm basically stealing from him but with attribution, because I think he does a really good job on this. So just to start with the First Amendment, what does the text say roughly, it starts with Congress, the government shall make no law respecting first freedom of religion. So essentially, freedom of thought, what's happening inside your head, second, freedom of speech, your ability to say that out loud, express it, third freedom of the press, to publish it, to publicize it, to put it in writing and make it available to others for the right to assemble, so to join with others in public who share your views gather with other people, and fifth, to

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petition the government for a redress of grievances. So we've moved from the ability to think to the ability to act and really make change. All of those things are protected under the First Amendment, and they're protected against government, congressional, but other government actor intervention. So starting with that, let's look over at the net choice cases. I think it's actually a helpful rubric because what the case basically does when talking about content moderation specifically is asked what is protected by the First Amendment here, and it gives us a pretty clear answer. It says that ration and editorial discretion, including when exercised by social media platforms is protected by the First Amendment. Some of the verbs that the majority opinion include uses includes deciding what to include and exclude online, deciding how to organize it, how to prioritize it, how to filter it, how to label it, how to display it, selecting content, ordering content, presenting content. So publication choice of what you're publishing, in what order how you're prioritizing what you say about it, etc. The majority makes clear that the First Amendment applies to all of these activities, whether they're happening offline, as it's held for everything from newspaper publishers, to utility bill providers to parade organizers or online as it holds very clearly, in this case, with respect to social media platforms, whether it's using old or new technology, whether the editorial discretion is being exercised to curate a lot or just a little, and whether that editorial discretion is giving a clear articulable message, we're a place where you can say x but not y or not. So the protection is quite expansive. And the court goes on to say, whatever we think of how social media platforms are exercising those protected rights, however, they're exercising their discretion, and we're not saying they're doing it in a good way, the government standing in for them and imposing its views of what the editorial preferences ought to be, would be even worse. The court says the First Amendment exists to ensure that the public has exposure to a wide variety of views. And the way it does that is by limiting the government, not private actors. It also makes clear that any regulation that is related to the suppression of free expression, and there I'm quoting from the opinion, quote, related to the suppression of free expression is very likely to fail, because that goal is never valid under the First Amendment. Those for me are the main takeaways.

Nadine Farid Johnson
That's a great tablesetting. Thank you so much. And now I'd actually like to turn to Steve because as the plaintiffs in this case, I know we are particularly interested in your take about what ended up happening.

Steve DelBianco
Thanks to Nadine, if you're, again, I'm Steve del bianco, President net choice who's one of the two plaintiffs in the NetChoice cases. The other was CCIA, we're so grateful that they were a co plaintiff. It has been a wild strange journey from Tallahassee to Austin, to the Supreme Court over the last three and a half years. And the journey isn't over. Right. We're back in the courts again in about 30 days. But that journey starts from the concept of why do NetChoice members even bother to moderate content, you probably understand they try to cultivate and create a community. They want to reduce spam and fraud that scares off users. They want to reduce the sharing of awful but lawful content, namely pornography, hate speech and violence. That's all legal in the United States. But it turns off the user community. Let's not forget who pays for everything, the advertisers, the advertisers are particularly sensitive of having their ads appear next to objectionable content, and they're paying the piper they get to call the tune. So the trick is on content moderation is how do you get it right, and the balance, half of Americans think that social media moderates too much content from users. The other half of Americans

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think we don't moderate enough, it is an impossible squeezed play. And it was already working itself into a louder became to an boil on January the sixth, after President Trump was kicked off of Twitter, Facebook and YouTube. Both the governors of Texas and Florida raced to pass a quick law, prohibiting Facebook, Twitter and YouTube for moderating the content based on viewpoints expressed in the content. So I testified in Texas and Florida against the legislation and asked two questions of the committee's, that I think will help you all understand this. I said, Mr. Chairman, could you force a newspaper to carry your op eds and letter to the editor? If they didn't want to? Your answer was, well, obviously not the First Amendment prohibits that. I said, Could you force every newspaper to to explain why they didn't take your letters to the editor or give you an appeal process? The answer was, well, of course not the First Amendment. So what's the follow up? Well, then what makes you think you can do it to social media was no difference in his various explained that's what the court upheld. So Florida and Texas had to go big on different theories by saying that it's not speech really, or saying that you're a common carrier, or that it's a public square, even though it's privately owned. But the federal courts in Florida in Texas didn't buy any of that and very quickly gave us an injunction back in 2021. Block in the law. Florida played to the 11th circuit, who upheld the lower court and agreed with my choice. Texas appeared to the Fifth Circuit, which canceled the injunction saying that content moderation wasn't really speed. Should all and even if it were Texas said, we can regulate anyway because we want to see a diversity of ideas. Well, that brings us up to last week last Monday when the Supreme Court rejected the Florida and Texas efforts to fend off the First Amendment. And they, the quotations Bureau gave you a couple. Another one was on the spectrum of dangerous to free expression, there are a few greater than allowing the government to change the speech of a private actor in order to achieve its own conception of speech nirvana. And this principle does not change, because the curated compilation has gone from the physical to the virtual world. Fortunately, all of that has been clarified. The courts sent our cases back to the lower courts for factual development on the scope of the laws, how broadly do they apply, they apply to things like Venmo and Uber, Airbnb. And they want more analysis that follows with the opinion laid out where the opinion laid out is beer explained, these are the rules about First Amendment, it's protected speech. So the discussion here today is about one of the other avenues of things that can happen, particularly for Hill audience. But we are naturally so focused heavily on the idea that the avenue of telling social media how to moderate that avenue, is a dead end right now. And I believe that a major Avenue though that is open is that social media sites can actually compete about how they moderate, they can compete for users and compete for advertisers. And that innovation is allowed to go on that experimentation goes on without interference from government. Now, we've watched the experiment over Twitter, Twitter went to x changed its content, moderation policies, those changes have consequences. They've played out in front of all of us, and the advertisers are not so happy about it. We have new social media sites like truth, social, that does its own heavily, heavily moderated website, where it does very little content moderation. So each of these are different models, there's very few barriers to entry to new social media sites. And I think that'll be there. So I believe the natural use cases are a real win for those who value free expression, offline and online, and oppose government control. That would be opposing government control, whichever party is controlling the levers of power.

Nadine Farid Johnson

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Great, Steve, thank you so much. Olivier, i'd like to turn to you because one of the things the court seemed to do was actually leave open other avenues. And those include the avenue of consumer protection. Can you speak a little bit to that?

Olivier Sylvain
Um, thanks, Nadine. And thanks, Tim, and everybody for for having me. And joining this fantastic panel. I want to talk about consumer protection and the First Amendment in but I want to weigh in on a couple of things that have come up if that's okay. one clear thing is I agree that this line, there's language in this opinion, that is very good for people who believe in Independence, of political independence, private actors. The focus of this opinion, however, is on to the extent there's language on this is on two prominent features of our of our information economy, and that is newsfeed on Facebook, and YouTube's homepage, everything else is not really clear. And that's what you've heard, Steve say there are a lot of things that need to be flushed out. And so the court is actually pretty direct about the failure of all the parties, including the courts, the Fifth Circuit, in particular, for failing to think about all the nuance and detail. That is a rebuke of all the parties, right, the states, NetChoice, CCIA and the courts below. And that's to say, the courts have to go back and look more carefully at all the different applications that might be at stake all the different functions like Yelp, like email, right, all these other functions, because that's when we determine whether or not the statute is on valid valid as a facial matter, right, as to the application in the context of YouTube and the newsfeed is probably unlawful. So that I just wanted to make sure I said that. Also, another quick point, and this gets to the commercial, the consumer protection point. I don't think anyone on this panel would say that the First Amendment protects all expressive activity. You've heard, you've heard that, essentially. And the court recognizes this because that's what it reminds back, there are certain things that are just unlawful, even if you express them. So advertising is an example. You can't just advertise in any way you want. You have to abide by, say, discrimination laws, you also have to abide by consumer protection laws. And this gets to me the and finally, to your question. One of the issues that's important to this case is whether or not governments can require companies to disclose information. This is the sort of thing we take for granted in the context of pharmaceuticals and health products. Right and and food, certain things have to be disclosed. And what the state's tried to do here. Probably a little clumsily is to require companies to explain the decisions they make. What's really interesting here is to me is that we don't have any resolution from this court on what the level of scrutiny is for this. Most of us have thought that this is the sort of thing subject to a lower level of scrutiny. It's an expressive activity and is subject to commercial speech regulation, doctrine, or intermediate scrutiny doctrine, which is not the strictest level of scrutiny. And the reason this is important, the the majority in Kagan's opinion says, It doesn't matter whether we do the most strict analysis or intermediate analysis. But this is such an important problem. And and the reason you know, that is because Clarence Thomas, who likes to invite all kinds of issues to the court says, I don't think I believe that commercial speech is entitled to the same kinds of protection, even the requirements to disclose information is required to the same kind of protection from government as expressive activity. That can't be right, because that would really go after basically all these consumer protection laws. So one of the things I want to underscore is that there is there's there's an opportunity here for Congress, and for regulators to think creatively about not intruding on expressive activity, but attending to commercial conduct that is already understood under the doctrine to be unlawful.

Nadine Farid Johnson

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Great, thank you so much for bringing up those points in claim clarifying that. So Yael, I'm going to turn to you. You've described yourself as a tech, tech and democracy activist, right. And I think we really, I'm interested in your perspective on these cases, given your background and the work that you've done over the past couple of decades in this space. So

can you all hear me? Is this on? Mute? Close?

Yaël Eisenstat
That was the problem. All right. Good for technology. Um, so the one thing I think we all agree on on this stage, although correct me if I'm Miss speaking on behalf of anyone is that these actual laws were gone beyond the pale. The idea I mean, I think that is probably one of the few areas that we all agree with, that we understand why Texas and Florida laws went too far. And we understand why that choice challenged them. And I think we all agree that protecting company's rights to moderate content without government interference based on ideological viewpoint is right. But that does not in any way, in my opinion, override the fact that we do actually still need to figure out what the guardrails are, where the lines are, how these systems work, and what Congress can do about it. So my overarching analysis and reaction to this case, is that including this case, over the past year and a half, we've had a number of Supreme Court cases that touch on social media issues. And they all prove one clear thing to me. And that's that Congress has yet to actually modernize and update legislation to meet the realities of how the Internet works today. And in that vacuum SCOTUS has been asked to weigh in on really complicated issues about social media about online platforms. And keep trying to squeeze these complicated current online realities into outdated laws, and limited judicial precedent. Thanks to what I'm sure we'll talk about later, section 230. It's a whole nother thing. But it's part of the reason we don't have enough precedent to really base some of these decisions on. So I think this actually sounds like a great opportunity for Congress to step up and figure out what are the rules of the road for the future. But on this particular case, I am going to echo a little bit with Olivier said, in a way everybody actually lost. Because what I find really interesting is, you know, our colleague here will will hand out these flyers that make it sound like this was an overwhelming victory. And again, on the point of content, moderation and government interference. I think it was that said, what I find. Just note, the eternal genuine Attorney General of Florida also said this was an overwhelming victory, which I find very interesting. And as I view it, everybody lost in part, because what I heard was a Supreme Court that said, they are getting frustrated with these just sweeping First Amendment arguments. And, you know, the facial First Amendment argument and has said, this is not enough for us to actually base any real judgment on. And so I think there's still a lot of work to be done. I think I'm going to point out a few things that a few Supreme Court justices said that I think is actually hopeful, because I believe there's a tipping point coming out of this case. And I believe the tipping point is that the Supreme Court is fed up with what I would call somewhat lazy legal arguments at this point of just saying everything that ever happens online on the Internet is 100% protected by the First Amendment. And I think the Supreme Court has made it clear in a number of cases that that is not going to be the argument that wins forever. On everything to do with social media. You had justice Barrett hinting at the idea that algorithms and AI might not all be considered in the same way. I mean, that's an invitation to help figure out how they should be considered. Your Justice Jackson say not every potential action taken by a social media company will qualify as expression protected by the First Amendment. That's a really critical point, you

even have Justice Alito made clear that we need more information on how these algorithms actually worked, as opposed to taking the industry's explanations at face value. And so I actually think, again, I'm gonna repeat this again, the Supreme Court justices going back to Gonzalez even, are getting frustrated with an industry that is operated with impunity for so long, that they're offering these legal legal arguments. And the Supreme Court has said enough, the idea that facial First Amendment arguments for everything that ever happens online, has got to change. And in that, I'm just going to finish this first part with saying that even in Justice Kagan's oral arguments, going back to Gonzalez, she pretty much made it clear. Congress needs to update the laws around where the lines should be drawn. What is just content moderation versus I would hate for us to think content moderation is the only thing we should be talking about when we talk about the guardrails of how social media companies operate. And I think this case, and other cases have made it clear that we have to update these laws so that we can give the Supreme Court and other courts more guidance on how to view these different cases coming forward.

Olivier Sylvain
Nadine Can I weighed in just a little bit, just on this point, this excellent point from from the aisle to give some specific detail about the information economy and the effort to regulate commercial activity on the information in the information economy and the stakes with regards to First Amendment doctrine, that there are two cases I want to draw attention to one is a net Choice versus Bonta out of the Northern District of California, where an Obama judge referring to the First Amendment arguments and net choice makes about an age appropriate design code law in California, is unlawful on First Amendment grounds. Now, there are elements of that state law that look unlawful in some ways I agree. But this is an example of a First Amendment argument that is going after a whole set of practices that we might have historically thought as a, as a political matter, at least, our fair game, right protecting children from targeted advertisements and content on websites that know that they're directing their children. The other one is even more extraordinary to me. And that is a case out of Maryland, in which no choice is invoked the First Amendment to challenge a tax law. The tax law is a pass through provision that says you cannot you have to increase your price. That you're there's there's a tax imposed on you for advertisements online. And and that choice, it says this is a violation of First Amendment because we cannot tell customers that we're increasing the price as a result of this law. Now, this is a tax law. This is a First Amendment gone crazy, in my opinion. And this is the worry that I think we should we should be thinking about saying

Nadine Farid Johnson
that's your excellent segue. I knew I knew was coming. I'll get I'll get you right there. I want to I want to frame this for for our audience, because I think it's important to to use that very, very well. Now, we we know from this case, from these cases, that some kind of regulation in this sphere is not completely barred. Right. We know there's there's room but the question is, what kind of room and how do we get there? And so I'd like us to talk about this in terms of what these cases mean for you all for policymaking going forward. What kind of decisions in terms of regulatory approaches to content moderation? Might these cases influence? Where is Congress now left after these cases? So, Steve, I will start with you. So you can both respond, Olivier and give your thoughts here, then I'm going to turn back to you yell to to bridge that for us.

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Steve DelBianco
Thanks, Nadine. And Olivia is right. The Maryland law started as the tax law they want to tax any online advertising. And then when the company's many choice members said that we're going to show that tax to the consumer, the person buying the ads will see that the extra money was a tax from the state of Maryland. Well, then they rush back into special session and passed an amendment prohibiting us from telling anybody that the tax increase came from the state of Maryland. So they turned the tax law into a speech suppression censorship law. So lydiate There's no wonder that First Amendment came in. But maybe I also mentioned our case, no choice case against Bonta, which is the eighth, eg of California. And in that case, it's not just California, we have injunctions in California, and Utah, Arkansas, Ohio. And on Monday, we got one in Mississippi against very similar laws that require age verification. And the whole point of the law is that age verification requires that a company, verify your age, no matter how old you are. So an old guy like me, and a lot of youngsters, like you are all over 18 are going to have to produce forms of government ID to use YouTube, use Google Search to use social media sites. So I know it's aimed at the children, but it applies to everyone. So forcing people to provide ID to be able to use YouTube was deemed by federal courts and all six states where we sued to be an undue burden on their rights to both Express and see free expression. So the First Amendment implicated not because of what is happening to the kids. The First Amendment is implicated because it applies to everyone. And they deemed Did you want it for me to dive into the notions for application to Congress? Sure. That's great. So I think that I mean, Yale's talked about the idea of Congress to update laws. That's always a good idea. But it's even a better idea to pay attention to what the Supreme Court has said before you update the laws. Because if Congress were to jump in and try to do some content, moderation laws, not unlike what happened in Texas and Florida, you now have some pretty pretty clear guidelines, because the Supreme Court didn't write the net choice rulings just for the states that applies to any form of government and age verification. I've just discussed earlier what what would happen there, but those haven't made their way to the Supreme Court. We have only one injunctions. Federal Court and the First Circuit Court is next week, California Ninth Circuit. When it comes to Section 230, there's always talk about trying to update section 230. But the First Amendment was written 230 years ago. Section 230, was in the mid 90s, and had to do with tort reform. How many of you saw the Wolf of Wall Street? Well, Leonardo DiCaprio played Jordan Belfort, who sued prodigy because a bunch of a bunch of investors who've been ripped off by Leonardo DiCaprio were telling each other on the bulletin board stay away from Stratton Oakmont. So Leonardo DiCaprio sues prodigy and a judge in New York said, you know, Prodigy, because you moderate some content, I'm going to hold you liable for everything that all these investors have said these nasty things they said about Leonardo DiCaprio? Well, that was bizarre. That was insane. And Chris Cox, who's on the board of NetChoice, wrote the outline of section 230. On the airplane back from California the next morning, section 230 is tort reform. It says that if a content moderation occurs, that that content is the property of the person that wrote it, that the person that wrote it is liable if they break a law, or they're going to be sued, you sue them, you don't see the platform if the platform had nothing to do with the content itself, other than displaying it. So section 230 itself, I believe, might well go through some update. But remember that section 230 doesn't apply at all to any federal criminal law whatsoever. Read section 230. It doesn't apply to intellectual property law doesn't apply to child protection and Child Sexual Abuse Material. And it applies to nothing to do with federal criminal law. This is why the back page executives went to prison. You might look at transparency and appeal process. That's an interesting angle. Olivier said that we were chastised a bit for failing to think about the broad scope of the law. And,

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again, Olivier's right, I've agreed with him on everything. But think about it. When we went in to the legislature and the courts. In Texas and Florida. We were up against the fact that the governors and the sponsors of the bill all claimed every day that the bill was designed to punish Facebook, Twitter and YouTube. The fact that it had broader scope was because they wrote the law in a way that was incredibly vague. So that wasn't their intended target. But Justice Barrett is right, we're going to go back down to the lower court focus on whether there's a substantial implication there. And then finally, the Twitter files in jawboning maybe a few of you were around late 22 When the Twitter files came out. And the first batch of Twitter files NetChoice was in 10% of them. Because we were warning our contacts on the hill. We were warning our members. The contacts on the Hill were really upset about the suppression of the Hunter Biden laptop story in the week and a half before the election said we don't understand how content moderation rules are being invoked to suppress the sharing of that story. Within a day or two. Our members got it and made the switch that Elon Musk released these things to try to show know that his company was being pressured by the government and the First Amendment prohibits government officials using their official capacity to try to indirectly pressure any notion not just social media, about content to carry this house, just last March, passed on a partisan vote, passed a bill from Cathy McMorris Rogers, Representative Cole, or Representative Jordan, that prohibits any federal employee from using their official capacity to Jawbone social media could cost them their job and their pension. If they do so, well, it's sitting in the Senate probably isn't gonna go anywhere. But then the state of Florida enacted an identical law applying to Florida employees. So there are things in fact that you can do legislatively, but it's a comfort to do. So knowing what the guardrails already are coming from the Supreme Court.

Nadine Farid Johnson
I think that's a great entree for you. Yael, I'll say we'll turn right to you. Sure.

Yaël Eisenstat
Um, so I'm not going to go into the jaw boning case, I think most people can agree that there should be lines around jow boning, unfortunately, the rest of that case, though, a lot of it was predicated on some pretty wild conspiracy theories. So I'm not going to go all the way down that case. One of my key concerns is that, in this situation, industry wants it both ways. On the one hand, companies are getting privileges as speakers under the First Amendment, that is what we just saw in the NetChoice case, right. But they don't have any of the responsibilities or liabilities that speakers usually have. And that's because of the pre emptive immunity that section 230 affords them for so much of what is happening. Now, I want to be very clear, I agree that a company should not be held responsible for third party speech, if you say something terrible on Facebook, I agree that you as the speaker should be held accountable. What I don't agree with is this overly broad interpretation that, therefore, anything a tech company does with that speech, with their own tools, how they recommend content, how they micro target content, how they monetize that, that also all counts as speech. And therefore, again, section 230 is not about whether a company is guilty or innocent of a crime, it is about not even letting us explore whether they have any responsibility in that crime. So I do want to just emphasize that even though to your point, section 230 is a criminal liability. It is not about, you know the same case, the same situations in this neck choice case, it is still an industry that wants it both ways. They want First Amendment protection as speakers, but then they don't want any of the responsibility that comes with being a speaker. So in my opinion, if we keep going down this path of categorizing every single facet of

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tech platform behavior as protected expression, where do we draw that line, and even Supreme Court justices have been asking Congress to help determine where to draw that line. And I know that we don't have so much time. But I do want to go to a few examples. In one point of my background that I think is important to know, even though it was short lived, I did actually work at Facebook. I joined in 2018 to head the elections integrity work right after Cambridge Analytica. And part of my role there was to help determine how to make sure that the money that they that the political advertising for which they not only money, but also cell targeting tools to advertisers to help figure out how to make sure that political advertising could not be manipulated by bad actors. And so I do informants, I knowledge as well of how these systems work and what the companies do and don't know. And for me, I guess the question is Where Where does this line stop? Does it where does this idea of free expression stop? Does it stop at algorithmic amplification of hate and harassment? Does it stop at recommendations to users to join extremist groups? Does it stop it revenue sharing with users or groups who advocate for extremism or incite violence? What about companies, our auto generation of content, because they always talk about it being third party speech, I can point to ample evidence of where companies themselves auto generate content, but then say it's third party speech. So when company auto generates pages for ISIS, which we have proof has happened on meta or YouTube videos for white supremacist bands, which we have evidence has happened is that the point where they no longer get to hide behind the idea of just being intermediaries of just having this free extra expression protection. And I am gonna go to extreme examples here because I those of you in the room who are involved with thinking through To how Congress might update these laws, I have never been one to advocate for getting rid of section 230. I think some of the protections there are absolutely critical. But here's an example, what if a registered sex offender doesn't just use a social media platform to go find children? But what if the platform itself recommends that that no sex offender, connect with an underage child and what remains the connections themselves? And then that person does harm to that child? Should that child's family, at least be able to have their day in court to figure out if the company played any role in facilitating that. And even though you say that federal crimes are different, would still possibly be over interpreted as section 230. This case can't even go forward. And so for me, the question is, at what point do we stop saying this industry gets a 100%? Free Pass. And while we agree on some of the results and arguments, net choice has made some very sweeping arguments about how anything that we want to do to try to rein in some of this company behavior falls into some form of free expression issues. Now, the transparency one is another interesting one, right? Because this case, now the net choice case, the Supreme Court justices made it pretty clear that mandating transparency around what they didn't say, specifically, but they left the door open for what might transparency legislation look like. And what's critical to understand is you don't have to have transparency legislation that actually says, content based this is the content you should or should not allow. But how about disclosures around how your systems work around how you are recommending content around even possibly disclosures around takedowns, all of these things should still be on the table. So my two, my two biggest recommendations would be to figure out what transpired, you cannot make smart policy or legislation in a vacuum. And transparency, what that provides is the data and evidence needed in order to craft smart policy. Just imagine if any other industry got to operate in as much of a black box is the tech industry does just bear with me for one minute. And imagine that the pharmaceutical industry not only got to study itself. But imagine if it turned out that they didn't have to do any safety testing before putting medicine down on the market. And when people got sick, they were the ones who got to study what happened. They were the ones who got to self select what data to make public, and whether or not they caused any harm.

And then they were the ones who got to figure out how to fix it with no outside independent audit expertise. That is where we are with the tech world right now. And so I'm not saying that we should be holding them accountable for particular acts, I'm saying we have the right to at least start understanding the systems, how they work, the recommendation engines, their own tools and their own business decisions. And it will not be easy, there is no easy, clear cut answer. I am sure that you will be told that will invite a wave of lawsuits. Guess what lawsuits in and of themselves are one way that we as an American system have decided we will hold corporate power to account. So I don't see that as valid argument. And we will also say it won't pass First Amendment scrutiny. Again, I'm not talking about content. I'm talking about platform behavior and tools. And we have to start considering that.

Nadine Farid Johnson
All right, great. So I know both. They have a lot to comment on. So I will start over here with beer and we will move on. And let's think about this in terms of again, not only responding to this, but also thinking about for for this audience, where do you think some key opportunities are for them?

Vera Eidelman
Thank you. So I just listening to my thoughtful and esteemed co panelist. I'm learning a lot. It's really helpful. And it sounds to me like we agree that social media platforms shouldn't be aren't First Amendment free zones, meaning some First Amendment protection applies. We also think that they shouldn't be regulation free zones. That seems true across the board. And I think maybe we slightly disagree on whether they are regulation free zones. Because what I would say is that I think some of the questions Yael has raised are real section 230 questions and are interesting, what is protected and what isn't. But I certainly don't think that every single thing that a platform does is immunized by 230. For example, the ACLU has successfully challenged the discriminatory targeting of housing, employment and credit ads on Facebook. We've also argued that the use and misuse of users probably about data when given two platforms not for publication, but for actual use of the platforms is not immunized by 230. So I think there's plenty already that is on the table, and perhaps illegal notwithstanding 230. I also think 230 is incredibly important for users for all of us for the ability of information to be available online to be available in different forms of curation to be available for different communities. But I will not focus solely on to 30 year, I also think that it is worth saying that, as Olivier actually pointed out, a lot of the problem here also rests with the regulations, a lot of what we're looking at when it comes to the Internet are super messy, unclear regulations from who is governed to what is actually being required. And I completely agree that's that was, in some ways, the central holding of the natural use case and part of what the court was chastising everyone for. And I would say that to you all, as you're thinking about regulation that might be useful, it's really important to be precise, both because I think if you have one thing in your mind, that is the thing that you're trying to accomplish, the court has made clear correctly, that that's not all that matters. What matters is the text of what you actually write, and the effect of what you actually require of your regulated entities. That's been true across the board. So even when legislation is passed with good intentions, which I think it typically is, that's not all that the court looks to the court looks at what the legislation actually does, and requires of the regulated entities. So when it comes to regulating online speakers, online actors, online businesses, those are all arguably slightly different things, it's important to be clear what you're regulating. And I think that that matters, both for the ability of anyone being regulated to understand what they have to do. And also to ensure that you don't have to face lawsuits where you don't need to, I

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think to some of the cases that people have identified, I imagine all four of us would actually slightly differently define and describe the laws at issue. And that's partially because they're really broad and messy, and they do a lot of different things. Sometimes they do good things mixed in with the bad things. There are a lot of these laws that I would say, if they had the consumer privacy regulations, the geolocation disclosure, just requirements separate from the content base burdens I purchased, I'll just speak for myself, I would probably personally support them. I can't say what the hell you would do. But I think that it's just important to focus in on the problem and regulate that thing, rather than regulating so very broadly. And I do think that both the First Amendment and 230 gives space for that. I'll also just identify the two things that I saw in the opinion that the majority, specifically identified as spaces for potential regulation, they numerous times referred to competition policy, perhaps that's because there's a Supreme Court case that deals with the application of competition policy and kind of a similar situation. But they did identify that as a viable option. And the majority also writes about decreasing inequities and the social in the speech marketplace in general. So I read that to say you basically give more and more people the opportunity to speak, perhaps enable certain speakers who don't feel comfortable speaking to speak more, don't restrict the ability of anyone to speak.

Olivier Sylvain
So we have an hour left, right. There's so much on the table. This is such a rich area. And I feel grateful to be able to talk on this stuff, as I think everyone on this panel does. I'm sorry, we don't have enough time. I'm going to try to hit as many issues as I can in the time that we have. And I think we want q&a also. All right, so So I want to I'll talk about the First Amendment stuff and then turn to 230. And then potential other reforms, which I think is what you want us to talk about Nadine. And so with regards to the Maryland case, the Fourth Circuit heard this argument about whether the pastor provision is a speech is a violation of First Amendment, given the facts that you that Steve recounted correctly. The question that it remanded back to the district court is, is this conduct that where you can regulate or is this speech? That's the legal question. That's the legal question. And that's the question that I want to make sure we're laser. We're just clear on are these activities commercial conduct that we can regulate in the way that I described? Or are they protected speech? That's the question. The other thing I want to touch on is, you know, there's a viewer made recommendations about, you know, make great recommendations about being attentive to the details, when you all are talking to your bosses about language and drafting language. And the two things that I would have completely agree on given where the court is after the Supreme Court's Sorrell opinion in 2011 is to worry about laws that are addressed that target certain kinds of people and certain kinds of speech. And that's largely what I think might be difficulties in the California and Maryland laws. But just to be clear, those are problems that I think drafters should be worried about. And that's where I would raise caution. Now, with regards to 230. How many of you are using prodigy right now? That's the case. That's the Stratton Oakmont case. Nobody uses prodigy. I think 230 was mindfully written given where things were in 1996. It's interesting that represented then representative Cox wrote, drafted this language on a plane ride back, there wasn't a lot of information about what would come next. Most of us know that automated systems and the ways in which services delivered today look nothing like they did in 1996. They enable the sorts of things that you heard the I'll talk about. So with regards to Section 230, the fact pattern the hypothetical that I think y'all offer, the horrible one is actually a case the courts have been where courts are close to cases, the courts have relied on 230 to kick the case out match.com And the experience project cases, I recommend that you take a look, citing 230, as a justification for picking claims out even when the

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companies know that they're making recommendations that will be harmful. Now with regards to the Facebook settlement, a case I actually participated in as a consultant with plaintiffs, that was actually settlement. There was no decision on the case. I think the companies were worried about what a court might do. But it was a case that had to be settled, given where the courts had gone with section 230. So discriminatory ads on Facebook, there's yet an opinion on it, largely because 230 could afford closed discovery of how employees implicated Facebook is. So the big picture lesson, I think from the Supreme Court's in that choice cases, and from the things I think you're hearing all of us talk about, is that we should now be far more alert to the nuances of applications and functions. And that means being open to the possibility that sometimes these companies, I don't use the term platforms, because they're commercial enterprises, that these companies sometimes might be doing something that resembles unlawful conduct. That's something that's important. And we should be alert to. That's the key question. So other possibilities, so sure reforms to Section 230. I've written a bunch about it yet spoken about it. And they're there. I think there's there's even you know, Steve recognized that there have been amended, there's been changed in section two there over time. I want to pivot a little bit and say that there are other things that we might want to think about. And that is what you've heard about, right. One of the driving considerations for companies is advertising. And the reason advertisers are interested because these companies, many of them have access to a lot of consumer information, they know how to target information in ways that have never been possible before. These are not newspapers, these are not newspapers, they know a lot about people. And so targeting and processing of information is an area that is arguably commercial conduct that might instill a degree of responsibility to the extent companies now have to be alert to the ways in which they collect information and use it to target. I think this is part of the content moderation conversation, there's less incentive to attend to certain kinds of advertising, if you are careful about all the information you collect. So I would put data protection regulation, the API era, the thing that Congress is considering as part of content moderation, why this is about commercial incentives, attending to commercial incentives.

Nadine Farid Johnson
Great. Yes. So what I'd love to open up to questions now, because I'm sure that many of you have these questions, and as you've been thinking about these issues, and where to go from here, so please

know, one of the things for today, I hear this a lot.

Olivier Sylvain
Who are you by the way, for whom?

To protect freedom right now, it's been six years, especially for that. So the comparison of industries, strikes me as a little bit of an apples to oranges situation, false equivalence, pharmaceuticals or non speech, there are different rules and comparing the two industries as one operates on a different plant the different rules is true. That is because the first one and not the other. And I find that kind of kind of a rhetorical sleight of hand that definitely intended effect but really kind of misleads people. Actually. I don't, I'm not gonna sit here and say there's no possible intersection. Perfect. Nor do I think anybody actually series in Section 230 applies to literally every single thing I know of anybody who says Okay,

we do have, we do have some imports that this is not covered. But when it comes to some of the things, recommended, recommended content, there's no doubt about the kids expressing that kind of the phrase, I don't feel like this is expressing. So even without sexual [inaudible], you don't necessarily get the [inaudible] that you want. Because the courts for decades now have held there is no duty to not to prevent speech from causing harm. We've seen this in places broadcasters broadcast to True Crime documentary [inaudible], do copycat crimes, almost do the same that Dungeons and Dragons where kids have committed suicide, the court said, the makers of this [inaudible] can't be held liable because of that vision to put this video in the hands of individuals. So how do you get from no 230, to getting around the First Amendment what restrictions to liability to make this possible? Instead of actually focusing perhaps on advertising, which, which may be the one thing that actually can take attention to content based things? When those are so foreclosed by so much good precedent?

Olivier Sylvain
Can I say one thing? I would like you to answer this just one thing, the one thing the reason is there, we need a mechanism to instill a sense of civic responsibility

Yaël Eisenstat
100%. And I'll just say two quick things, the apples to oranges, you're right, of course, the pharmaceutical industry in the tech industry are not exactly equal. However, this industry does remain the only industry that gets to research itself, that gets to hold all of the data and the research findings and gets to determine whether or not anybody else gets to either see behind the veil, including not having a safety requirements before I mean, for certain part. Now, here's the problem, we're using the word tech industry, let's be very clear, the tech industry is a broad term. And we know that I don't mean every single element of the tech industry. But at the end of the day, it's apples to oranges. And yet, when it comes to, for example, social media, the idea that they get to study themselves, they get to bar access to data, when they want and how they want, and that we have to continue to take industry at their word is a problem. I will just really quickly talk about recommendations. This is why I said I will never say there is an easy solution. And there will always be trade offs. And when recommendation to your example of hey, you might like this, whatever is one thing, the recommendation of telling this man and this young woman that they should meet is also a recommendation engine. So it's about to your point being precise and starting to figure out what are the guardrails and what actually can lead to potential company responsibility. I don't like using recommendation engines to talk about everything. Some of it is expressive, and some of it is not.

Nadine Farid Johnson
Steve 15 seconds, I have two more questions. fiftteen seconds is easy, the

Steve DelBianco
Section 230 protects against lawsuit abuse, America's unique, we don't have 230 of the rest of the world because the rest of the world goes by the English rule on lawsuits, meaning the loser pays the cost of the other side. That isn't happening United States and we'll never get there because the plaintiffs bar loves the current situation. So the lawsuits would make it so that without 230, who in their right mind would allow you to say whatever you want, that was lawful on a platform, because if the platform gets sued for defamation, because you insulted my restaurant on Yelp, or you made fun of the

way I drove the car on Uber, if those platforms can be sued for things that you said, you're not gonna say it on platforms anymore. Without 230, we don't have user generated content, period.

Yaël Eisenstat
I'm sorry, I'm just want to say that's why I'm not advocating for getting rid of 230. To your point, that is not the reform that many of us are advocating.

Nadine Farid Johnson
All right, I see a number of hands. So I'll ask that you state your and and then give your question, please, we can get to you more representative.

But justices is touched a tiny bit on artificial intelligence. And I'm really wondering where you all see the court going on that topic and the interaction between that and speech, there was some discussion about how far away from policy and how do we get there. Just want to see what your thoughts are on.

Steve DelBianco
Justice Barrett, in her concurrence was the one who mentioned it in the notion that when humans design the algorithm, or feed it the data that allows it to perfect itself, that's clearly expressive content, but she and she alone raised the question that if it's completely computer controlled without any human design or interaction that maybe that might not enjoy as much First Amendment protection. So that door got opened a little bit, but only by one justice and not the rest of

Yaël Eisenstat
Alito as well actually questioned how far algorithms and secrecy would be okay. So it wasn't just, Barrett.

Olivier Sylvain
It's a great question. I agree. And I will say one thing, because I actually really want to hear Vera says about this. And that is that even when an automated system makes a recommendation, it is not autonomous, where it's not the Terminator, right. This is designed by people. So I'm not it's for me. I like that her parade of possibilities. But I think that there's still openings for thinking about First Amendment issues that are limited.

Vera Eidelman
I largely agree with that. I think the hypo she raised maybe doesn't exist and maybe won't exist. And I do think there's a little bit of a difference between AI and algorithms, which your question got to. The majority opinion spoke about algorithms made very clear and algorithms are a set of instructions that one follows. So the court I think, made clear that the fact that computers and algorithms are used to enforce content moderation policies that humans write and intend, clearly protected. And then yes, I think there's this question of like, human out of the loop entirely, but I'm just not sure that's real. It's also a question that's in one concurrence, and I am very loath ever to read Supreme Court tea leaves, and especially when it's in a single concurrence, that's basically saying, adding to the list of 100 questions

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here. Here's another one that I imagine at some point, we'll have to decide, but also, I hope, will be briefed, explained, technologists will say what AI is, etcetera, etcetera.

Individuals trying to go in the Wayback Machine when I used to see some of these as a staff or anything going on afterwards. So trying to go back to your question, what our path forward era and Steve, as opposed to he's griping about industry, the way laws are, and they wish there was lesser protection. I heard for both Vera and Steve crystal idea is about how to go forward. One of those fell right into the wheelhouse of Congress that supports. Steve, I think you would talk about maybe changing some of the transparency and appeals. I'd love to hear more. I am a former Judiciary staffer so

Steve DelBianco
Just a quick answer, then. Transparency could be many things in Texas and Florida, they talk about make sure that you show your content moderation policies, transparently, they all do. So it's really not transparency, as much as it is explain why you didn't take my post, explain why you didn't rate it first on my friends, feeds. And then if the user is not happy with that answer, they get to appeal. So you have to stand up an ability to explain why content wasn't featured or listed and then go through an appeals process. And the court looked at the Florida and Texas and the 11th. And fifth circuit tried to figure out what the standard is because if at some point it becomes a tremendous burden, that burden then chills First Amendment. But one other question for all of you to think about if you can force Facebook, to tell you why it didn't carry your post and given appeal? Well, then I guess you could force the New York Times to explain to you why they didn't carry your letter to the editor, or why they didn't print your op ed. But in the oral arguments, our attorney said, could the New York Times be forced to explain why it didn't take your wedding announcement, there was tremendous competition to get into Sunday, New York Times wedding announcements, and they don't take them all. But they weren't now because wedding announcements are subject to explanations. We didn't like your dress or appeals process. At some point, they stopped taking wedding announcements in the New York Times. That's what we mean by chilling speech. So a transparency sounds like a good word. By God, we should be as transparent as possible on what our rules are. But if you ask us to stand up an appeals process, you have to think about whether it's discriminatory against the online space versus the offline, I

Yaël Eisenstat
know at a time, but just know there are some content neutral transparency proposals out there. So it does not always have to be based on this part of what this case was looking at.

Olivier Sylvain
I also want to observe that the I think no serious person who thinks about this will do an immediate equalization of identification, identity between newspapers and the kinds of things we're talking about, that this is what the this is the nuance we need. And I'm glad for the question. You focused on Vera. And, Steve, I don't think you heard what I was saying or what you heard Yael say. So I think we agree that there's some transparency mechanisms and disclosure is probably really important. I don't know maybe you didn't hear me talk about data protection. But data protection law is actually a pretty important thing. I think we have our friend from Tech Freedom who agrees, attending to commercial

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practices addressed to advertising is important. And finally, the idea that maybe you didn't hear me say this, but I've made a recommendation. Oh, you only heard the griping about industry. Okay. So the what the other thing I want to observe is that I made a recommendation when you write laws, make sure they're not addressed to speakers and specific content. I was saying more than the thing that I think you heard you say you weren't listening,

Nadine Farid Johnson
I'm glad you you were able to reinforce those points. And I saw one more question that I know you all have been very patient and hopefully because it's so scintillating in here. I agree. So let's have one more question. We'll go for it. Thank you,

Michael. I'm a student at Georgetown University. I was wondering on section 230, in the First Amendment, like promoting CSAM material, for example, I was wondering how you could update Section 230. Without legislation as a whole. Its ability to protect like good moderation. And

Steve DelBianco
one quick answer is Congress can enact, so can states. But if you enact a criminal law, if you made it a criminal law to share CSAM, and Oh, I guess it already is. So that's why CSAM has nothing to do with 232. 230 will never affect a CSAM case, it'll never affect treason will never affect violations of harassment policies in any crime, any federal crime, 230 is not even on the table. So Congress can put together federal crimes, and 230 won't fly at all. And then

Yaël Eisenstat
unfortunately, no, no, I there's no way to get into all of this right now. It's we're over time, I would be I would be happy to, we've have written a lot about this. But just to be very clear. While what you say is true, unfortunately, section 230 has been overly broadly interpreted by the courts. And so some of those cases have been thrown out. And that's where I think Congress can actually clarify the rules in the road, because it has just been so overly broadly interpreted to throw out cases that actually could have possibly touched on some of the things that he's mentioning. But I do think it is time to actually differentiate between what we mean by expression in third party speech and what we mean by company behavior. And that is something that really warrants updating. Yeah,

Nadine Farid Johnson
and I think I think the point here is that means now we have an opening from from the court and it's important to seize that opportunity. Thank you all so much for being here for your time to our incredible panelists. Really appreciate everyone being here. Thanks again.