Subcommittee on Communications and Technology of the Committee on Energy and Commerce
Hearing on "Holding Big Tech Accountable: Targeted Reforms to Tech's Legal Immunity"

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I. Introduction

The operative provision of Section 230 is titled "Protection for 'Good Samaritan' blocking and screening of offensive material." Legislative headings supply important guidance about a provision's intended meaning, providing "a short-hand reference to the general subject matter" to which Congress meant to apply the provision.[1] In the offline context, Good Samaritan laws provide legal immunity to people who do not have a duty to aid but nonetheless attempt in good faith to provide aid in emergencies. For example, a bystander who renders medical assistance to a gunshot victim cannot be sued for inadvertently causing injury to that person while doing so. For obvious reasons, however, Good Samaritan immunity in the physical world does not extend to people who do nothing to aid in emergency situations; those who helped create the emergency situation; those who owe a duty of care to those affected by the emergency; or those who exploit emergencies for profit or entertainment. A person who stands by and watches a gunshot victim bleed to death, or steals the victim's wallet, or charges an admission fee to view the victim's corpse is not a good Samaritan. Granting such persons legal immunity would not only do nothing to incentivize good faith voluntary acts of assistance, but would perversely encourage harmful acts and absolve otherwise legally responsible actors of their obligations.

And yet this is exactly how Section 230, the "Good Samaritan" law of the Internet, has been invoked by the tech industry and interpreted by many courts. Specifically, the prohibition in Section 230 (c)(1) against treating intermediaries as the "publisher or speaker" of information provided by another entity has been broadly interpreted to "immunize platforms dedicated to abuse and others that deliberately host users' illegal activities." Long before the most recent deluge of whistleblower documents detailing how Facebook[2] knowingly allowed violent extremism, dangerous misinformation, and sexual exploitation to flourish on its platforms, scholars, victim advocates, and other experts have been sounding the alarm that the deferential and preferential treatment of the tech industry threatens equality, security, and democracy itself. The anonymity, amplification, and immediacy of Internet communication make it possible to aggregate harm and disaggregate responsibility to an unprecedented degree; Section 230 makes it incredibly profitable.

In an affidavit submitted to the Securities and Exchange Commission in October 2021, a former member of Facebook's Integrity team revealed that in the wake of controversy over the company's role in Russian interference in the 2016 election, a Facebook communications official stated, "It

[1] Trainmen v. Balt. & Ohio R.R. Co., 331 U.S. 519, 528 (1947).
[2] Now rebranded as "Meta."

will be a flash in the pan. Some legislators will get pissy. And then in a few weeks they will move onto something else. Meanwhile we are printing money in the basement, and we are fine." This unvarnished remark by a representative of one of the most powerful companies in the world provides a snapshot of the tech industry at large: Dominant tech companies are fully aware that their products amplify extremism, misinformation, discrimination, harassment, and sexual exploitation, because that's what a profit model based on the euphemism of "engagement" does. And they are perfectly confident that Congress will keep letting them do it.

II. Section 230 Reform: Objections and Challenges

Between the strident (and often deep-pocketed) objections to Section 230 reform, the weaponization of the 230 debate for crass political ends, and the magnitude and variety of online harms, the project of tech industry reform can feel like an insurmountable task. But it is both possible and necessary to reform the tech industry to promote free expression and democracy over engagement and profit. This section addresses some common objections and challenges to Section 230 reform that obscure the path to this goal.

A. Liability, Risk, and Incentives

Some Section 230 defenders equate limiting the Section 230 immunity of intermediaries with imposing liability on them for the actions of third parties (often imprecisely referred to as "user-generated content"). But removing immunity is not at all the same thing as imposing liability. Most people and most industries, most of the time, do not enjoy preemptive legal immunity for actions they take that might harm other people. That does not make them automatically liable for those actions. A complex set of facts and relationships not only have to exist, but also have to be established, before any entity can be held legally accountable to another entity.

A slightly more sophisticated version of this objection maintains that the risk of liability – the *possibility* of being sued – will incentivize tech companies to take down any third-party content that could be controversial, resulting in the loss of valuable, First Amendment-protected expression. But every industry (with the possible exception of the firearms industry) has to contend with the risk of liability. Auto manufacturers can be sued when engines catch on fire; cigarette companies can be sued when smokers get lung cancer; hospitals can be sued for botched surgeries. But cars still get made, cigarettes keep being sold, and doctors still operate. There is no reason to think that allowing people to sue when they are harmed by a product means that the product will cease to exist in any meaningful sense. Indeed, the potential for litigation is often a powerful motivator for industries to become safer, more efficient, and more innovative.

Not only does Section 230 as currently interpreted fail to incentivize safer tech products and practices, but it also denies members of the public access to the courts to seek redress for injuries. Private individuals are left to deal with the fallout of a reckless tech industry moving fast and breaking things – including life-destroying harassment, publicized sexual exploitation, and ubiquitous surveillance – on their own. Section 230 preempts plaintiffs from ever bringing suit in many cases and makes it difficult for any suit that is brought to survive a motion to dismiss. Some

Section 230 defenders argue that this is as it should be, because many suits against online intermediaries will ultimately fail on the merits. But whether a plaintiff's claim will ultimately succeed in any given case is always indeterminate. The value of the right to bring the claim does not turn on whether the claim is vindicated in the end. Moreover, in many cases, the discovery process will provide significant value not just to the plaintiff in the case at hand, but to legislators, regulators, future plaintiffs, and the public.

B. Free Speech

But, some argue, the Internet is fundamentally different from cars and cigarettes and hospitals because the product in question is speech, and speech deserves special protection under the First Amendment. There are two important points to note here. First, the way that Section 230 is drafted and currently interpreted protects far more than speech protected by the First Amendment – everything from defamation to credit card transactions to sales of illegal firearms. Second, other speech- focused industries do not enjoy the sweeping immunity of Section 230. Newspapers can be sued. So can television companies and radio stations, book publishers and book distributors. Employers, school districts, and housing authorities can all be sued for discriminatory or otherwise actionable speech. Such industries survive without the blanket immunity granted to the tech industry, though they are no doubt put at a competitive disadvantage because of it.

That is not to say that Section 230 reform poses no danger to free speech. Some of the most pernicious attacks on free speech and the First Amendment in recent years have come in the guise of Section 230 reform. Social media platforms have become such important sites of democratic discourse and debate that it is easy to forget that they are private entities with their own First Amendment rights of speech and association. But it is vitally important to respect those rights and to reject any attempt by government actors to force social media platforms to carry certain speech or demand that they provide access to certain speakers.

Respecting free speech and the First Amendment means respecting tech companies' right to fact-check, label, remove, ban, and make other interventions as they see fit about the content on their sites. Providing additional or alternative information to false or misleading posts is classic "counterspeech," a treasured First Amendment value famously identified by Justice Brandeis in *Whitney v. California*, a landmark free-speech case: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[3]

The First Amendment also protects the right to refuse to host content altogether, as the right to free speech includes both the right to speak and the right *not* to speak. As the Supreme Court held in *West Virginia State Board of Education v. Barnette*, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their

3. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

faith therein."[4] The First Amendment also protects the right of association, including the right of private actors to choose with whom they wish to associate.[5] And the Supreme Court has long recognized that private-property owners generally have the right to exclude individuals from their property as they see fit.[6]

Other Section 230 defenders claim that any reform of Section 230 jeopardizes free speech in a larger sense, even if not strictly in the sense of violating the First Amendment. It is true enough that free speech is a cultural as well as a constitutional matter. It is shaped by non-legal as well as legal norms, and tech companies do play an outsized role in establishing those norms. There is good reason to be concerned about the influence of tech companies and other powerful private actors over the ability of individuals to express themselves. This is an observation scholars and advocates who work on online abuse issues have been making for years—that some of the most serious threats to free speech come not from the government, but from non-state actors.

But the unregulated tech industry—or rather, the selectively regulated tech industry—makes this problem worse, not better. As the Internet multiplies the possibilities of expression, it also multiplies the possibilities of repression. The new forms of communication offered by the Internet have been used to unleash a regressive and censorious backlash against vulnerable groups, in particular women and minorities. The Internet lowers the costs of engaging in abuse by providing abusers with anonymity and social validation, while providing new ways to increase the range and impact of that abuse. Unchecked online abuse does not just inflict economic, physical, and psychological harms on victims—it also silences them. Targeted individuals shut down social media profiles and withdraw from public discourse. Those with political ambitions are deterred from running for office. Journalists refrain from reporting on controversial topics. While the current model shielding the tech industry from liability may ensure free speech for the privileged few, protecting free speech for all requires legal reform.

III. Recommended Changes to Section 230

It is tempting to carve out exceptions to Section 230 immunity for issues of particular gravity, such as deprivations of civil rights, or to single out particularly pernicious design features of dominant tech platforms, such as algorithmic amplification. Indeed, reforms that focus on these issues would likely go some way to improving the status quo. But Section 230 is structurally flawed, and piecemeal reforms will not fix its most serious flaws. The exceptions approach is also inevitably underinclusive, and the hierarchy of harms it establishes raises normative and fairness questions. Such an approach also requires Section 230's exceptions to be regularly updated, an impractical option given the glacial pace of congressional efforts and partisan deadlock. Precisely targeted, forward-looking, structural changes to Section 230 are the best hope for meaningful tech industry reform.

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4. 319 U.S. 624, 642 (1943).
5. *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958).
6. *PruneYard Shopping Ctr. v. Robins,* 447 U.S. 74, 82 (1980).

Section 230 has three key provisions, and it is important to be clear about which of these provisions should be changed. Section 230(e)(3) sets out the principle of broad immunity for tech companies, and other two sections detail the two situations in which this principle is applied: when a company leaves harmful content up—(c)(1), or the "leave up" provision—and when it takes it down or restricts it—(c)(2), or the "take down" provision. The primary problem with Section 230 lies not in (c)(2), which comports with Good Samaritan laws in the offline context, but in (c)(1)'s broad dictate that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

Subsection (c)(2), the "take down" provision, assures providers and users of interactive computer services that they will not be held liable with regard to any action "voluntarily taken in good faith 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" or "taken to enable or make available to information content providers or others the technical means to restrict access" to such material. As noted above, most interactive computer service providers are private entities, and so their right to choose whether to carry, promote, or associate themselves with speech derives not from Section 230, but from the First Amendment. Section 230 (c)(2) merely reinforces this right by making it procedurally easier to avoid specious lawsuits.

By contrast, (c)(1), the "leave-up" provision, has been interpreted in ways directly at odds with Good Samaritan laws, as well as with a host of other legal principles and settled law. Where (c)(2) offers immunity to interactive computer service providers in exchange for intervening in situations where they have no duty of care, (c)(1) has been read to provide the same immunity to providers who do nothing at all to stop harmful conduct and even to those who actively profit from or solicit harmful conduct. For example, Section 230(c)(1) has been invoked to protect message boards like 8chan (now 8kun), which provide a platform for mass shooters to spread terrorist propaganda, online firearms marketplaces such as Armslist, which facilitate the illegal sale of weapons used to murder domestic violence victims, and to classifieds services like the now-defunct site Backpage, which was routinely used by sex traffickers to advertise underage girls for sex.

While it could fairly be said that (c)(2) provides incentives for the tech industry to engage in responsible, "Good Samaritan" regulation, that effect is undone by (c)(1), which has been interpreted to grant them the same protection if they do nothing. Rather than encouraging the innovation and development of measures to fight online abuse and harassment, (c)(1) removes incentives for online intermediaries to deter or address harmful practices no matter how easily they could do so. It effectively grants powerful corporations a super-immunity, encouraging them to pursue profit without internalizing any costs of that this pursuit. It eliminates real incentives for tech corporations to design safer platforms or more secure products. Section 230(c)(1)'s preemptive immunity ensures that no duty of care ever emerges in a vast range of online scenarios and eliminates the incentives for the best positioned party to develop responses to avoid foreseeable risks of harm.

Accordingly, there are two primary changes that should be made to Section 230 in order to promote justice and accountability: (1) Plaintiffs should not be barred from suing online

intermediaries unless the harmful content or conduct in question is clearly speech protected by the First Amendment; and (2) Online intermediaries that demonstrate deliberate indifference to harmful content unprotected by the First Amendment should not be able to take advantage of Section 230's protections. Both changes are explained in more detail below.

1. Limit Section 230's protections to speech protected by the First Amendment.

Both critics and defenders of Section 230 agree that the statute provides online intermediaries broad immunity from liability for a wide range of Internet activity. While critics of Section 230 point to the extensive range of harmful activity that the law's deregulatory stance effectively allows to flourish, Section 230 defenders argue that an unfettered Internet is vital to a robust online marketplace of ideas. The marketplace of ideas is a familiar and powerful concept in First Amendment doctrine, serving as a justification for a laissez-faire approach to speech. Its central claim is that the best approach to bad or harmful speech is to let it circulate freely, because letting ideas compete in the market is the best way to sort truth from falsity and good speech from bad speech, and because government cannot be trusted to make such decisions wisely or fairly.

The Internet-as-marketplace-of-ideas presumes that the Internet is primarily, if not exclusively, a medium of speech. The text of Section 230 reinforces this characterization with the terms "publish," "publishers," "speech," and "speakers" in 230(c), as well as the finding that the "Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."

When Section 230 was passed, it may have made sense to think of the Internet primarily as a speech machine. In 1996, the Internet was text-based and predominantly noncommercial. Only 20 million American adults had Internet access, and these users spent less than half an hour a month online. But by 2019, 293 million Americans were using the Internet, and they were using it not only to communicate, but also to buy and sell merchandise, find dates, make restaurant reservations, watch television, read books, stream music, and look for jobs. Many of these activities have very little to do with speech, and many of their offline cognates would not be considered speech for First Amendment purposes. If the broad immunity afforded online intermediaries is justified on First Amendment principles, then it should apply only to online activity that can plausibly be characterized as speech protected by the First Amendment. What is more, it should only apply to third-party protected speech for which platforms serve as true intermediaries, not speech that the platform itself creates, controls, or profits from.

To accomplish this, the word "information" in Section 230 (c)(1) should be replaced with the word "speech protected by the First Amendment." This revision would put all parties in litigation on notice that the classification of content as protected speech is not a given, but a fact to be demonstrated. If a platform cannot make a showing that the content or information at issue is speech, then it should not be able to take advantage of Section 230 immunity.

2. Recognize the longstanding principle of collective responsibility.

Many harmful acts are only possible with the participation of multiple actors with various motivations. The doctrines of aiding and abetting, complicity, and conspiracy all reflect the insight that third parties who assist, encourage, ignore, or contribute to the illegal actions of another person can and should be held responsible for their contributions to the harms that result, particularly if those third parties benefited in some material way from that contribution. Third parties can be held both criminally and civilly liable for the actions of other people for harmful acts they did not cause but did not do enough to prevent.

Among the justifications for third-party liability in criminal and civil law is that this liability incentivizes responsible behavior. Bartenders who serve alcohol to obviously inebriated patrons can be sued if those patrons go on to cause car accidents; grocery stores can be held accountable for failing to clean up spills that lead to slip and falls; employers can be liable for failing to respond to reports of sexual harassment. Such entities are often said to have breached a "duty of care," and imposing liability is intended to give them incentive to be more careful in the future. It is a central tenet of tort law that the possibility of such liability incentivizes individuals and industries to act responsibly and reasonably.

Conversely, grants of immunity from such liability risk encouraging negligent and reckless behavior. In subsidizing platforms that directly benefit from illegal and harmful conduct, Section 230(c)(1) creates a classic "moral hazard," ensuring that the multibillion-dollar corporations that exert near-monopoly control of the Internet are protected from the costs of their risky ventures even as they reap the benefits. Given that the dominant business model of websites and social media services is based on advertising revenue, they have no natural incentive to discourage abusive or harmful conduct: "abusive posts still bring in considerable ad revenue… the more content that is posted, good or bad, the more ad money goes into their coffers."

Online intermediaries who do not voluntarily intervene to prevent or alleviate harm inflicted by another person are in no sense "Good Samaritans." They are at best passive bystanders who do nothing to intervene against harm, and at worst, they are accomplices who encourage and profit from harm. Providing them with immunity flies in the face of the longstanding legal principle of collective responsibility that governs conduct in the physical world. In physical spaces, individuals or businesses that fail to "take care" that their products, services or premises are not used to commit wrongdoing can be held accountable for that failure. There is no justification for abandoning this principle simply because the conduct occurs online. If anything, there are more compelling reasons for recognizing collective responsibility online, because online interaction provides so many opportunities for direct tortfeasors to escape detection or identification.

Creating a two-track system of liability for offline and online conduct not only encourages illegality to move online, but also erodes the rule of law offline. Offline entities can plausibly complain that the differential treatment afforded by broad interpretations of Section 230 violates principles of fairness and equal protection, or to put it more bluntly: if they can do it, why can't we? There is a real risk that Section 230's abandonment of the concept of collective responsibility will become the law offline as well as on.

To address this, Section 230 (c)1 should be further amended to clarify that providers or users of interactive computer services cannot be treated as the publisher or speaker of protected speech *wholly provided by* another information content provider, *unless such provider or user intentionally encourages, solicits, or generates revenue from this speech.* In addition, a new subsection should be added to Section 230 to explicitly exclude from immunity intermediaries who exhibit deliberate indifference to unlawful content or conduct.

The revised version of Section 230(c) would read:

> **(1) Treatment of publisher or speaker**
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any ~~information~~ speech protected by the First Amendment wholly provided by another information content provider, unless such provider or user intentionally encourages, solicits, or generates revenue from this speech.
>
> **(2) Civil liability**
> No provider or user of an interactive computer service shall be held liable on account of-
> **(A)** any action voluntarily taken in good faith 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; or
> **(B)** any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1);
>
> (3) **Limitations.** The protections of this section shall not be available to a provider or user who manifests deliberate indifference to unlawful material or conduct.

While changes to Section 230 are necessary to ending tech industry impunity for harm, they will likely not be sufficient. Among other steps, Congress should enact federal criminal legislation addressing new and highly destructive forms of technology-facilitated abuse, especially those disproportionately targeted at vulnerable groups. These abuses include nonconsensual pornography, sexual extortion, doxing, and digital forgeries ("deep fakes"). As Section 230 immunity does not apply to violations of federal criminal law, such laws will ensure that victims of these abuses will have a path to justice with or without Section 230 reform, and help protect the free expression, equality, and safety of all Americans.