Attachment—Additional Questions for the Record

Subcommittee on Communications and Technology
Hearing on
"Holding Big Tech Accountable: Targeted Reforms to Tech's Legal Immunity"
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The Honorable Anna G. Eshoo (D-CA)

1. You recommend replacing the word "information" in Section 230 with the phrase "speech protected by the First Amendment wholly." Others have proposed something similar. If your recommendation was enacted into law, how do you think platforms would change their behavior in response?

RESPONSE:

I first want to note that before I presented my oral testimony but after the submission deadline for the written testimony had passed, I removed the words "protected by the First Amendment" from my suggested revision of Section 230, reverting back to the phrasing I originally proposed in *Reforming Section 230 and Platform Liability*, my January 2021 contribution to the Stanford Cyber Policy Center Recommendations for the New Administration. That is, my current recommended revision to this section of the statute is as follows: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any ~~information~~ speech wholly provided by another information content provider."

My reason for reverting back to "speech," rather than "speech protected by the First Amendment" was that the latter struck me upon reflection as overly restrictive. For example, while a defamatory statement about a public figure made with actual malice would not be protected by the First Amendment and thus provide a legitimate basis for civil liability, the same would not and should not necessarily be true of a repetition or reference to that defamatory statement without such malice. To limit Section 230 immunity to third party speech protected by the First Amendment would also create confusion and uncertainty in situations where it is difficult or impossible to know, prior to litigation, whether the speech is protected or not. This would likely lead platforms to be overzealous in their removal of controversial content.

I am therefore glad that it is the original version of my suggested amendment that made its way into the SAFE TECH Act. I believe that limiting Section 230 to "speech wholly provided by another information content provider" rather than to an unqualified and open-ended category of "information" would force tech companies to be far more cautious and responsible about any practices that do not clearly involve speech. They would be compelled to think and act more like businesses in the physical world, which face the risk of liability for harms flowing from faulty products, false advertising, unsafe premises, illegal sales, etc. and must allocate their resources accordingly. It is my hope that this would mean increased investment in safety testing, quality control, product recalls, customer service, and transparency standards, and less reckless behavior with regard to new, untested, or dangerous products.

2. The case of *Zeran v. America Online* was raised at several points during the hearing and I would like to give any witness who did not have the opportunity to opine about it to do so.

    a. Do you believe the case was correctly decided and the court correctly interpreted the statutory text of Section 230?

    RESPONSE:

    It is my view that *Zeran* was not correctly decided and that the court did not correctly interpret the text of Section 230. Given that distributor liability differs from publisher liability in significant ways, I believe that if Congress had intended to preclude distributor liability as well as publisher liability in enacting Section 230, it would have done so explicitly.

    Social media platforms, which allow near-instantaneous posting and sharing of information by users in real time, could likely not exist at all if intermediaries had an affirmative obligation to screen the content of their users. However, it is not necessary or beneficial to immunize social media platforms from distributor liability for the posts, likes, shares, and so on of third-party content, at least as the term is understood in defamation law. A distributor makes content available to the public without exerting editorial control over this content. Libraries and bookstores are offline examples. Accordingly, distributor liability for unlawful content is limited to situations in which the distributor knows or should have known of the unlawfulness of that content. Treating online intermediaries as distributors arguably strikes a good balance between making online intermediaries bear too much of the costs of harmful speech and not making them bear any at all. This is especially true considering that so many intermediaries directly profit from the speech that they make available to the public, regardless of its harmful content.

    b. Do you believe the Supreme Court should revisit the lower courts' current expansive interpretation of Section 230, as Justice Thomas suggests in his

concurrence on the Supreme Court's denial of a petition for writ of certiorari in *Malwarebytes v. Enigma Software Group USA*?

RESPONSE:

Should the appropriate case arise, I do believe that the Supreme Court should evaluate the sweeping interpretation of Section 230(c)(1) adopted by the majority of lower courts, for many of the reasons that Justice Thomas articulates in his concurrence in *Malwarebytes*. But Justice Thomas appears to be very much in a minority in this position, and it seems unlikely that the Court will take up the issue in the near future.

I would also sound a note of caution about Justice Thomas's suggestion that Section 230(c)(2), not just Section (c)(1), has also been widely misinterpreted and needs review. This claim is unconvincing and potentially alarming. Unlike Section 230(c)(1), Section(c)(2) is grounded in the First Amendment; namely, in the right of private entities, including social media platforms, to decide for themselves what kind of speech they wish to associate with or promote. There are those who seek to hijack Section 230 reform for political purposes, trying to find a way to allow government actors to force social media platforms to carry certain speech or demand that they provide access to certain speakers against their will. These bad-faith, partisan attacks on Section 230(c)(2) are at bottom attacks on the First Amendment.

c. Do you support Congress passing statutory clarification that Section 230 does not apply to distributor liability as proposed in H.R. 2000, the *Stop Shielding Culpable Platforms Act*?

RESPONSE:

I would support the specific clarification that Section 230 does not preclude distributor liability, though I would emphasize that the amendment of "information" to "speech" as discussed above would still be necessary to rein in the current expansive overreach of Section 230. That is, the clarification that Section 230 does not preclude distributor liability will not address, and may in some ways entrench, the current conflation of speech and conduct.

The Honorable Tony Cárdenas (D-CA)

1. You've written previously about the need for targeted, intentional reforms to Section 230 and rejecting both a piecemeal approach to reform and total elimination of the provision. Can you describe, in your opinion, a few guiding principles for reform that would better secure user safety and wellbeing? Please also explain why the alternative two approaches would be insufficient?

RESPONSE:

The most important guiding principle for reform is that no entity—no individual and no industry—should be rewarded for recklessness. Responsibility for harm does not just fall to those who cause harm directly and intentionally, but also to those who look the other way, who aid and abet, and who knowingly profit from harm. Store owners can be sued for not mopping up a spill if someone slips and falls. Car manufacturers can face liability for engines that catch fire. Hospitals can be sued for botched surgeries. Virtually every person and every industry faces the risk of liability if they engage in risky conduct that causes harm. This is not only essential for justice, but also for the future prevention of harm. The possibility of liability forces people and industries to take care, to internalize risk, to prevent foreseeable harm.

A second important principle for reform is to acknowledge that despite the industry's insistence that sweeping immunity is necessary to protect free speech, Section 230 currently immunizes a vast range of speech and conduct not only unprotected by the First Amendment but in many cases directly antagonistic to it. Threats, harassment, the exposure of private information, civil rights violations, surveillance, and similar abuses chill the free speech and association rights of American rather than advancing them.

While 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, Section 230 is structurally flawed and requires structural reform. Meaningful reform must be targeted at changing the perverse incentives it provides to the tech industry to be reckless with regard to harm. The piecemeal 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.

Given its flaws, wholesale repeal of Section 230 would probably produce better outcomes than the status quo. But it would be preferable that the aspects of Section 230 that are defensible and comport with the advancement of civil rights and liberties for all Americans be preserved. In particular, Section (c)(2), the "take down" provision, could plausibly be viewed as a "Good Samaritan" law for

the Internet, reinforcing the First Amendment rights of private companies to exercise their own discretion and liberty to choose what speech they wish to facilitate and promote. And a more limited version of (c)(1) immunity along the lines of what I have urged would provide the industry with incentives to facilitate controversial and dissenting speech.