Attachment—Additional Questions for the Record

Subcommittee on Communications and Technology
Hearing on
"Holding Big Tech Accountable: Targeted Reforms to Tech's Legal Immunity"
December 1, 2021

Ms. Carrie Goldberg, Owner, C.A. Goldberg, PLLC

The Honorable Anna G. Eshoo (D-CA)

1. The stories you provided in your testimony are harrowing. I appreciate that you centered our discussion around real-world harms and the perspectives of victims. On *Herrick v. Grindr*, I want to first say that I believe Grindr's actions in this case are abhorrent and I believe the court blocking the case from proceeding is a terrible outcome. Critics of Section 230 reform say victims can sue the individuals causing harm to those victims. Did Mr. Herrick also sue his ex who was causing the harassment? What are the drawbacks of such a suit compared to suing an intermediary like Grindr?

RESPONSE:

At the time we commenced the case seeking an injunction against Grindr, Mr. Herrick had already taken extensive legal action directly against his ex. Mr. Herrick had obtained an Order of Protection, reported the stalking and violations ten times to the precincts and was cooperating with prosecutors at the Manhattan District Attorney's office.

In my experience as a civil lawyer who represents people targeted by dangerous individuals, it is unwise to commence civil litigation against individuals who are active threats. I've never seen a case where the civil justice system will deter a mentally ill person's out-of-control and illegal conduct. By that point – in late 2016 – we'd already seen that this man was not deterred by orders of protection, arrests, future costly imprisonment. Certainly he was not going to be deterred by an injunction (which would have been duplicative of the order of protection we already had). Rather, suing in civil courts would have just created a new theater for the offender to get access and continue his combat against Mr. Herrick. On top of that, Mr. Herrick's offender was judgment proof. So even if we were successful in a lawsuit against him, it would take hundreds or thousands of hours of legal work, with no possibility of recovering a dollar of it.

Bringing a suit against Mr. Herrick's ex would have rewarded him with getting to see my client at court dates. My client, on the other hand was terrified of his ex who'd stalked him not only through the Grindr app, but by coming in person to his home and job. Mr. Herrick was

actively hiding from this individual. Somebody with this offender's psychology – obsessiveness and the sadistic need for Mr. Herrick to suffer – would have created an unruly civil litigant with needless pro se motion practice that would have involved hundreds if not thousands of hours of fruitless litigation with no recovery at the end.

We sued Grindr out of necessity. The attack on Mr. Herrick was still active with as many as 23 unwanted visitors coming to his home a day. Most litigations are for harms that occurred in the past, whereas the case against Grindr was for an active, ongoing, dangerous emergency. Grindr was in the exclusive position to stop the offender from using its product. Mr. Herrick and I also recognized that suing Grindr would help not only Mr. Herrick, but other people like him. And that it might, if successful, be a lesson to other dating apps too about the obligation to design a product that foresees the likelihood that sometimes it will be weaponized by rapists, predators, and stalkers; thereby making it a necessity to design into the product a way to exclude such foreseeable users.

We really didn't see Grindr as an intermediary in this matter. We were careful to sue Grindr for Grindr's own product failures and not for any of the content in the offender's posts. The court saw it differently. However, in the *Lemmon v Snap* case, we're pleased our pioneering legal theory applying product liability to tech products was ratified in the Ninth Circuit.

2. In your critique of my *Protecting Americans from Dangerous Algorithms Act (PADAA)*, you say it disappointingly includes a small business exception because "some of the most deliberately malicious platforms are small." Can you provide examples from your experience where your clients have sued platforms with fewer than 10 million users (the threshold in *PADAA*)?

RESPONSE:

Because of Section 230 and the expanding immunity courts have bequeathed onto platforms, we've been deterred from bringing suit in 99.5 percent of cases that come to our firm where somebody has been significantly injured from tech-facilitated harms. It's because of Section 230 that I do not have examples of suing small platforms.

I can think of several horrific platforms that I predict have 10 million users or less where my clients' lives were upended. I'm not going to name them into the Congressional record because of the extreme retaliation my own firm, clients, and employees have faced from taking mild action to protect our clients.

In one case, a paralegal of ours sent a standard take-down request to remove a copyrighted picture of our client being gang-raped from a notorious anti-trans Reddit-style website. Two years later, my firm continues to be haunted by the users of this site who organized what they called a "cyber-jihad" against my firm. They created expansive threads

about the one client involved, doxed her, harassed her brutally when her father died of Covid-19. They published images of the members of my law firm and called them horrific racist and homophobic slurs and created pictures of them having sex with each other. They figured out my home address, published a Google map of my walking route, and a floor plan of my apartment. They found my grandma's memorial web page and defaced it with anonymous anti-semitic posts. When my mom died in the summer of 2020, they commented on her online memorial page, creating dozens of posts from Adolf Hitler and calling her an oven-dodger. They accessed Lumen's database of takedown requests (Lumen is a Harvard Law School Project which was created to combat abuse of DMCA takedown requests and various big tech platforms forward the takedown requests they receive so that Lumen can catalogue them), found the ones my firm had submitted on behalf of our revenge porn victim clients, published them and then discovered their names and URLs to their revenge porn. They attacked my website and webpage. All of this because we sent exactly one nonthreatening correspondence to remove a picture of our 18 year old being gangraped by two men three times her age.

Other similar Reddit-style sites exist where the users have a few common enemies and where they organize to brainstorm new ways to harass those clients. Some of the most pernicious sites are small sites where anti-abortion harassers organize to incite one another to harass and stalk abortion providers and their families.

One of the most deadly sites on the Internet is Sanctioned Suicide which is a thriving online platform, complete with wikis, direct messaging, message board, and emoji reward system. I've spoken directly to six families who lost loved ones to suicide after becoming a member of this community. Sanctioned Suicide attracts vulnerable adolescents and people with acute or longterm mental health problems. They create an addictive user experience that keeps members coming back and bonding with other people in the community long enough for them to order (via Amazon Prime one-day shipping) the implement they will use to complete their suicide. The site then has "Good bye threads" where individuals live-post their suicide and the voyeurs in the community encourage them to go through with it. The website auto-deletes the user profile for anybody who does a good bye thread to both punish those who aren't serious about suicide and to destroy evidence (unlawfully) that professionals forensically investigating the death would have needed. I have no idea the membership of that community, though I was surprised to see in a recent *New York Times* article that the site receives 6 million page views a month.

Although I understand the instinct to want to go after the big fish, many of the bad actors are smaller platforms. In the rest of the world, liability does not attach differently to small businesses versus big businesses. My small law firm with 11 employees is just as liable for malpractice as a multi-billion global firm with 2000 lawyers. The competitive market will favor companies, whatever the size, that don't cause harm. We don't need the extra layer of immunity from liability protecting grievously injurious companies.

3. You testified that "SESTA-FOSTA has come to be a bit problematic in my practice area because it conflates child sex trafficking with consensual sex work."

    a. Do you have recommendations on how that law may be amended to avoid such conflations?

RESPONSE:

Initially, SESTA-FOSTA seemed like a boon for sex workers and victims of child sex trafficking. Both groups became empowered to hold liable platforms for injuries they suffered. One imagined a sex worker who was raped by a serial predator would have the ability to sue the platform and the platform would be incentivized to innovate on how to keep predators off the site. Instead, not wanting to face the risk of being responsible to sex workers, platforms that had been involved in sex work just shut down. With no platforms replacing places like Backpage, sex workers have been thrusted back into the streets which has endangered them, especially sex workers of color and trans sex workers.

Civil libertarian organizations that are funded by big tech money and never showed any prior interest in protecting sex workers have opportunistically advanced the idea that any change to section 230 is anti-sex work.

There are three parts of 47 USC(e)(5) aka SESTA/FOSTA. SESTA/FOSTA says that Section 230 immunity from liability does not apply if (paraphrasing):

(A) A plaintiff is suing a platform for its role in sex trafficking him/her as a child or by force fraud or coercion;
(B) A defendant platform is charged under state law for conduct that violates our federal trafficking laws; or
(C) A defendant platform is charged under state law for conduct that violates our federal law against promoting or facilitating prostitution.

Section 230 is about platform's immunity from *civil* liability, but two parts of SESTA/FOSTA address criminal laws. Any changes to Section 230 ought to focus on empowering individuals to sue for harms they experienced. SESTA/FOSTA though is focused on empowering law enforcement. We should certainly remove 47 USC(e)(5)(C) and not have this carve-out for state criminal cases of prostitution. Many states are in the process of decriminalizing prostitution. So (C) re-criminalizes it even in states that have decriminalized it.

There's a massive difference between child sex trafficking and consensual sex work. SESTA/FOSTA has created a huge philosophical divide between child sex trafficking victims and advocates on the one hand and sex workers on the other.

b. Do you have recommendations on how Congress should avoid repeating this problem as we consider other Section 230 reforms that are specific to a given issue, e.g., how SESTA-FOSTA was specifically focused on child sex trafficking?

RESPONSE:

The focus on 230 reforms should be based on restoring civil liability so people who are harmed can bring their own litigations to hold platforms accountable. It should not focus on carve-outs and exceptions that give more power to law enforcement.

4. You testified that "[t]here's a case pending right now against Facebook for discrimination where Facebook has claimed that Sheryl Sandberg and Mark Zuckerberg are immune from liability for lies they said to Congress." This is highly troubling. So that we track this case closely, please point us to which case you referred.

RESPONSE:

The case is *Muslim Advocates v Mark Zuckerberg, et al.*, 2021 CA 001114B (D.C. Super.), which is pending in the District of Columbia Superior Court. In this case, Muslim Advocates, a civil rights organization, is suing Facebook and a number of its executives (Mary Zuckerberg, Sheryl Sandberg, Kevin Martin, and Joel Kaplan) for making false and misleading statements to Congress and Facebook's consumers in violation of the D.C. Consumer Protection Procedures Act (CPPA). Muslim Advocates alleges that when Facebook's executives testify before Congress, speak to civil rights leaders, and consumers, they falsely state that whenever Facebook learns about content that violates its community standards—like hate groups and dangerous organizations—Facebook removes that content. But, as a Muslim Advocates shows in its complaint, Facebook routinely fails to remove harmful content that violates its standards, especially anti-Muslim hate and anti-Muslim organizations—and even when civil rights leaders and professors specifically alert Facebook of such violations.

The suit alleges that Facebook's executives made these false statements in order to discourage Congress and government agencies from regulating it and bringing enforcement actions, to curry favor with civil rights groups, and to make consumers believe that Facebook is a safe place or a safer place than otherwise believed.

Muslim Advocates is represented by Peter Romer-Friedman and Robert Friedman of Gupta Wessler PLLC, Naomi Tsu, Muslim Advocates' legal director, and Aziz Huq, a University of Chicago constitutional law professor.

On September 17, 2021, Facebook and its executives moved to dismiss the action by filing a Rule 12 motion and an anti-SLAPP motion. Both motions argue that Facebook and its executives

have Section 230 immunity to make false oral statements to Congress and consumers, even when under oath—because they are speaking about Facebook's content moderation decisions. *See* Defendants' Motion to Dismiss at 13. Thus, Facebook is arguing that Section 230 immunizes Facebook and its executives from liability under the D.C. consumer protection law, dozens of similar state laws, and the Federal Trade Commission Act. Under the same theory, Facebook and its executives to make false statements to investors about their business would have immunity from liability under federal securities laws. Facebook also argues in its motions that Facebook does not have to follow consumer protection laws like the DC CPPA because it does not charge its users money.

In November 2021, Muslim Advocates filed its opposition briefs that explained why Facebook lacks immunity in this situation, because: (1) oral statements have no protection under Section 230; (2) the statements that give rise to liability were created by Facebook's executives, not third-party users; and (3) the duty that gives rise to liability does not require Facebook to monitor or edit content, since the consumer protection law simply requires Facebook's executives to not make false statements about Facebook's actual practices. Muslim Advocates also explained how consumer protection laws like the DC CPPA apply to online services that don't charge their users money, because Facebook's users still provide consideration (their own data and attention) to Facebook to create a sale and because Facebook transfers its services to users.

In December 2021, the D.C. Attorney General Karl Racine filed an amicus curiae brief in the case, joining Muslim Advocates in attacking Facebook's Section 230 arguments and Facebook's claim that consumer protection laws don't apply to non-cash services. In addition, Consumer Reports, Public Knowledge, and Upturn filed an amici curiae brief arguing why non-cash services must follow consumer protection laws.

5. 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?

Yes and no. Ultimately I agree that *Zeran* is a case where a platform was sued for user content and therefore probably was correctly found not liable. However, for 2 ½ decades, despite the internet evolving into platforms that do far more than publish or distribute content, *Zeran* has stood for the idea that <u>all</u> claims against a platform should be dismissed. The language of 230 says that claims should be dismissed when the platform is sued as a publisher, but Zeran with the plaintiff pleading the tort of negligence caused the case law to veer off-course from legislators' original meaning. The truth is that even Mr. Zeran's negligence claim. Thus it was

correctly decided. The problem is not that *Zeran* was wrongfully decided, it's that it gave judges a license to just dismiss all cases against platforms on 230 grounds without having to deeply engage with the substance of the claim and whether a platform was being sued for content it published or its own conduct and product design.

Zeran is very different than, say, Herrick v Grindr. *America Online,* a two diminsional bulletin board was responsive to Mr. Zeran's request for content removal. They actually had a customer service department he spoke to in real time as the malicious content was posted. Mr. Zeran's injury derived not so much from AOL, but from a third party radio personality who spread misinformation and incited listeners to call Mr. Zeran's phone number. The harm was centered around people calling him at all hours of the day and night. Nine months later, well after the harm had subsided, Zeran sued AOL. Zeran sued America Online for the malicious content and negligence. The court dismissed it all under Section 230 because it found that AOL was immune from liability both for its role as a publisher and a distributor. The court also said even though negligence was not specifically a publication tort, it too was dismissed under 230 grounds.

Contrast that with Matthew Herrick. When Mr. Herrick sued Grindr, the attack was currently underway. He was receiving as many as 23 visitors in-person to his home and job. His offender was creating profiles using Mr. Herrick's images and was using Grindr's product features like direct messaging and geolocating to direct visitors to Matthew, believing they were going to play out his rape fantasy. For nine months these unwelcome visitors came. Sometimes the offender would publish nude images or say Matthew was "on all fours with his ass lubed." Sometimes he'd impersonate Matthew to incite his visitors by saying racist or homophobic slurs so that they came to his home to assault him.

Matthew's suit, which advanced a novel product liability theory did not sue for any publication torts or based on content posted by the offender. Rather, it sued because Grindr was unable to ban malicious users and had developed a defective product in its failure to design a product that addressed foreseeable abuses. First and foremost, the lawsuit sought injunctive relief to require that Grindr remove this user.

At the time our case was being decided in SDNY, there were only two cases in the 2nd Circuit that had interpreted Section 230. The most recent one (*Federal Trade Commission v LeadClick Media, LLC,* 838 F.3d 158 (2d Cir. Sept. 23, 2016) had found that an affiliate marketing network could be held responsible for false and misleading advertisements it profited off of. That case held that a platform could become a first party publisher for malicious content.

The judge in the Grindr case had no precedent standing in her way from ruling that Grindr should face liability for its product design. *Zeran* in the 4th Circuit was not precedental. The SDNY judge and the 2nd Circuit, however used *Zeran* to say that even lawsuits that focus on the product design should be immune. They said if not for the content of a third party, Mr. Herrick would not have been harmed and Grindr's product would not have failed him and therefore the lawsuit was based on Grindr's role as a publisher. It's like in a product liability

case against a car company that designed car against breaks that if not for the driver getting behind the wheel, the breaks never would have gone out.

In other words, the problem is not Zeran. It's judges being afraid to rule against big tech even when there is no precedent standing in their way.

RESPONSE:

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:

We do need a Section 230 case to come before the Supreme Court. In the *Malwarebytes* denial, Justice Thomas sagely cited the misdirected canon of Section 230 case law and how off-course it's gotten, specifically citing my case of *Herrick v Grindr* where the defendant was immune from product liability.

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:

Yes. I also support Congress passing the statutory changes I set forth in my December 1, 2021 written testimony which I've named the Herrick Act Against Violence Online ("HAAVO"). HAAVO is a combination of the SAFETECH Act and many of the recommendations I advanced and the Department of Justice embraced in its Key Takeaways and Recommendations following DOJ's February 2020 symposium, "Section 230-Nurturing Innovation or Fostering Accountability."

A summary of HAAVO is below and a redline is on pages 17-20 of my written testimony:

- Conduct carve-outs
  - Bad Samaritan carve-outs – no immunity from civil liability for platforms that
    - purposefully facilitate or solicit third party content or activity that violates criminal law;
    - Are willfully blind to illicit conduct, (e.g. failure to detect or respond to illegal conduct, preventing or seriously inhibiting swift detection and banning of offenders, impeding law enforcement's ability to investigate

and prosecute serious crimes, and depriving victims of the evidence they need to bring civil claims against their perpetrator)
    - Egregious conduct carve-outs – no immunity for the worst type of conduct -- claims involving child exploitation, sexual abuse, terrorism, and stalking. Section 230 was never intended to shield platforms from liability so far outside the original purpose of the statute
    - Actual knowledge and court judgments – no immunity where a platform has actual knowledge or notice that the third party content violates criminal law or ignores a court order indicating that content is unlawful or that published content or conduct on a platform underlies a criminal case or civil restraining order.
- Injunctive relief to help in emergency cases where the plaintiff is suffering imminent harm because of harms on a platform or a court has ruled content unlawful or when the basis of a criminal case or civil restraining order is content or conduct occurring on a platform
- The ICS is the ICP and therefore not entitled to immunity for claims pertaining to
    - Breaches of its own terms of services;
    - Breached promises made to users or the public;
    - Testimony of its executives under oath;
    - Constructive notice of the specific harm and damages; or
    - Paid content, including in-kind payment. This includes payment to or from the ICS;
    - Content recommended to users via algorithm;
    - Defectively designed or manufactured products or failure to warn;
- Define "information content" to include only speech-based content
- Limit immunity to only publication-related torts like obscenity and defamation.

The Honorable Angie Craig (D-MN)

1. Ms. Goldberg, during the first panel discussion on December 1, 2021, I discussed the role that Snapchat (Snap) played in the accidental fentanyl overdose of a young man in my district—Devin Norring—who purchased what he thought was a painkiller over the Snapchat platform. Devin was suffering from migraines and dental pain and sought out the painkiller to deal with the pain.

   Instead, he passed away when the pill he bought via Snapchat turned out to be laced with fentanyl. Devin would have been celebrating his 21st birthday on December 19, 2021. As your written testimony indicated, this is a situation that has become all too familiar. In fact, you noted that you are representing the families of other children who were each sold fentanyl-laced pills on Snap. And you testified that Snap has refused to crack down on the Fentanyl murders its facilitating despite the United States hitting its all-time record for drug overdoses in 2020.

Can you help the committee better understand what legislation might create accountability and prevent this kind of avoidable tragedy? And what do you see as the primary reasons that platforms like Snapchat have continued to shirk responsibility for facilitating interactions that lead to tragically avoidable deaths of young people, whether it be from accidental overdose or suicide?

RESPONSE:

We cannot give platforms immunity for wrongful death actions. When harms are as serious as death, we need families to have their day in court and for the pressure/threat of litigation to incentivize platforms to design safety features into their product. And by safety features, we aren't talking about little educational warnings about elicit and dangerous drug use. Instead, companies like Snapchat need to be figuring out the usage patterns of the dealers and stopping them. They need to cooperate with law enforcers and parents in turning over evidence of deathly drug-related crimes, and they must make sure that dealers are permanently banned from the platform.

When Uber was the target of fraudulent drivers and losing money from it, its coders created code to recognize the usage patterns and then worked with law enforcement to crack down on the fraud and organized crime. When it comes to Silicon Valley, it seems that only a hit to a platform's bottom line incentivizes ingenuity and product design.

The SAFE TECH Act and my proposed HAAVO bill contain carve-outs for wrongful death cases. This carve-out is crucial for any proposed change to Section 230. It addresses two current matters presently impacting my clients – deaths from fentanyl-laced pills and deaths from the pro-suicide social media platform, Sanctioned-Suicide. It also addresses the *Armslist* case which involved a woman murdered after her ex illegally purchased a gun from a rogue online gun marketplace.

As we brace ourselves for the outcry from big tech lobbyists, it's important to remind folks that a carve-out for wrongful death does not impose liability onto platforms. But rather it removes immunity from liability. Litigants suing platforms for wrongful death will still face the standard challenges of all lawsuits – particularly establishing the platform's duty to the decedent and the causation between the platform and the harm.

Section 230 was meant to shield platforms from frivolous defamation lawsuits where at worse somebody's reputation is under fire. I believe the immunity bestowed from Section 230 and its two and a half decades case law has *caused* the deaths we are now seeing. Snapchat is not solely responsible for the fentanyl-laced pills sold on its site. So, too, is the culture where we've somehow accepted that occasional fatalities is the price we must pay for a libertarian internet. For too long tech companies and their lobbyists have advanced a false story that removing immunity will destroy the internet and all the companies. If such were the case, we'd have no industries in our country. After all, no other individual, industry or business gets to escape lawsuits for harms they caused.

Section 230 immunity has licensed tech companies to run amuck, putting profits over humanity, knowing they will never face judgment from the courts.