Additional Questions for the Record
June 24, 2020, Virtual Joint Hearing on:
"A Country in Crisis: How Disinformation Online Is Dividing the Nation"

U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Communications and Technology
Subcommittee on Consumer Protection and Commerce

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The Honorable Jan Schakowsky (D-IL)

1. I continue to see critics of reform say that without Section 230, the internet as we know it would end. But you aren't suggesting we eliminate Section 230, are you?

Chair Schakowsky, you are correct that critics of section 230 want policymakers and the public to believe that every section 230 reform effort would repeal the provision and, with it, free speech on the internet. That isn't the case. The proposals under serious consideration do not strike section 230, but instead make narrow changes to fix its flaws. And, as always, the First Amendment has the final word on free expression in the United States—even on the internet.

When Congress added section 230 to the Communications Act through the Communications Decency Act, which was itself contained in the 1996 Telecommunications Act, it had two goals: 1) helping then-nascent online platforms grow as outlets for free expression, and 2) encouraging platforms to curb the growing spate of harmful behavior on the internet.

Congress' decision to create section 230 was precipitated by the 1995 case of *Stratton Oakmont v. Prodigy*. Applying a traditional libel analysis, the N.Y. Supreme Court had ruled that Prodigy's effort to moderate inappropriate language on its electronic bulletin boards meant Prodigy had exercised editorial discretion, making it a "publisher." Consequently, Prodigy was potentially liable for defamatory statements on the bulletin boards, even if it wasn't aware of the statements. Platforms that chose not to moderate content, by contrast, could not be held culpable unless they knew or should have known about such statements.

Concerned that platforms would stop moderating content to avoid liability, Congress overturned *Stratton* legislatively. In particular, section 230(c)(2) states that "[n]o provider or user of an interactive computer service shall be held liable on account of … 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."

By creating a safe harbor for content moderation, section 230(c)(2) gives platforms confidence to serve as outlets for user-generated content and free expression. That's a good thing. The problem is that another provision, section 230(c)(1), states 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." Courts have held that this language shields platforms from liability even if they inadequately moderate illicit activity or refuse to moderate at all, including in cases involving sexual disparagement, revenge porn, harassment, and terrorism.

That interpretation eliminates for internet platforms the ordinary legal duty of businesses to take reasonable steps to curb illicit use of their services or facilities. Many platforms say they take such steps, anyway, and that may be true in some cases. But their decisions are beyond judicial scrutiny, which means they cannot be held accountable even when they don't in fact take such steps.

Internet platforms oppose section 230 reform because they wish to continue avoiding liability when they negligently, recklessly, or willfully disregard illicit activity. But they know that's not a winning argument. So they claim that reforming section 230 would imperil free speech and the internet.

This simply isn't true, at least under proposals by a number of commentators—myself included—to require that platforms take reasonable steps to curb illicit conduct as a condition of receiving liability protection under section 230.

The reasonableness standard is inherently flexible. It would account for the resources available to a platform and the benefits and risks posed by use of its services. The effort needed to meet the reasonableness standard will be proportional to platform size, ensuring smaller platforms are not unreasonably burdened as they try to grow and that firms are asked only to expend resources that make sense in light of the severity of a potential harm and the costs to combat it. Furthermore, smaller platforms and platforms that focus less on user-generated content will have fewer users and uses to moderate.

Because this approach does not require regulation, it avoids censorship concerns. Significantly, it would also leave in place the section 230(c)(2) safe harbor for content moderation. So long as platforms meet the modest responsibility of taking reasonable steps to curb use of their services and facilities for illicit activity—as other companies must—the platforms could continue to moderate content without fear of liability. Moreover, even if an internet platform failed to take such steps, it would not automatically be subject to liability. It simply could no longer hide behind section 230. Any lawsuit would still need to prove some cause of action. And a court would still be bound to consider the free speech implications, because loss of section 230's special protections does not eliminate the First Amendment's protections. Revising section 230 this way would better accomplish Congress' original goal of encouraging internet platforms to moderate content, while fostering them as a means of free expression.

Internet platforms' desire to prevent any change to a provision that gives them liability protection not enjoyed by non-internet services—many of which they compete with—is not surprising. But it does not represent good public policy when it is contributing to an increase in harmful behavior online that victimizes real people.

The Honorable Bobby Rush (D-IL)

1. In your opinion, would changes to Section 230 interfere with innovation. If so, how?

Congressman Rush, proposals by Prof. Danielle Citron and myself to condition section 230's protection on reasonable steps to curb illicit activity would not hinder innovation. They would simply apply to internet platforms the same legal obligation of most other, non-internet businesses to engage in reasonable measures to prevent use of their services and facilities for illicit activity. The reasonableness standard is inherently flexible. It would account for the resources available to a platform and the benefits and risks posed by use of its services. The effort needed to meet the reasonableness standard will be proportional to platform size, ensuring smaller platforms are not unreasonably burdened as they try to grow and that firms are asked only to expend resources that make sense in light of the severity of a potential harm and the costs to combat it. Furthermore, smaller platforms and platforms that focus less on user-generated content will have fewer users and uses to moderate. The potential liability on the back end will also encourage "responsibility by design" at the front end. This will itself promote innovation in the way companies create their services to avoid facilitating harm. Addressing potential problems in the earlier stages of a service's creation will also be a lot easier than trying to fix problems later, when those problems are already entrenched in a platform's business model and architecture.

2. We have heard much about what the platforms have been doing wrong. In your opinion, is there anything the platforms are doing that is working? What can be done to promote those actions?

Preventing users from engaging in illicit activity over the platform, and terminating their service if they do, certainly helps protect consumers. Section 230, however, hinders the ability of courts to examine whether platforms are adequately taking such steps—or any steps, for that matter—to combat illicit activity. Amending section 230 to require platforms to take reasonable steps to curb use of their services for illicit activity, as a condition of receiving the section's protections, would better encourage all platforms to take reasonable steps, better protect consumers, and help maximize the benefits of the internet while reducing its harms.

The Honorable Anna Eshoo (D-CA)

1. What are the long-term impacts of census disinformation on underserved, undercounted, or otherwise neglected communities?

Congresswoman Eshoo, based on the testimony and the hearing, I believe other witnesses from the panel have more expertise related to this question than I do. I will thus leave this question to them.

2. You each discuss the harms of political ad microtargeting in your testimonies. I've proposed banning political ad microtargeting in H.R. 7014, the *Banning Microtargeted Political Ads Act*, because lesser regulatory interventions, such as requiring disclosures, just won't solve the problem.

    a. How are marginalized communities impacted by political ad microtargeting?

b. What is your view on prohibiting the microtargeting of political ads, as I've proposed in H.R. 7014?

As with question one, I believe other witnesses from the panel have more expertise related to this question than I do.

The Honorable Tom O'Halleran (D-AZ)

1. In light of social distancing requirements from COVID-19, many online platforms have adapted their workplace structures from employing human content moderators to relying heavily on artificial intelligence algorithms to moderate online content instead.[1]

    a. Do you believe online platforms have shown an ability thus far to properly balance effective content moderation between employing human moderators versus algorithms?

Congressman O'Halleran, based on the testimony and the hearing, I believe other witnesses from the panel have more expertise related to this question than I do. I will thus leave this question to them.

2. Reports show that thousands of human content moderators, including many enforcing the spirit of Section 230 of the Communications Decency Act in Arizona[2], suffered from mental health trauma such as PTSD. This trend was underscored when Facebook reached a landmark $52 settlement with impacted human content moderators on May 12, 2020 for mental health trauma suffered on the job.[3] The lawyer representing the moderators described the threat from human content moderation as "real and severe".

    a. How can new or existing labor or content moderation statutes be evaluated and updated by Congress to better protect the mental health and workplace safety of human content moderators?

Addressing this issue may require amending section 230, since section 230 prevents holding internet platforms liable for actions taken in good faith to moderate content. Beyond that, other witnesses from the panel with particular expertise on this issue may have additional suggestions.

The Honorable Gus M. Bilirakis (R-FL)

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[1] Brookings, *COVID-19 is triggering a massive experiment in algorithmic content moderation* (April 28, 2020) (https://www.brookings.edu/techstream/covid-19-is-triggering-a-massive-experiment-in-algorithmic-content-moderation/).
[2] The Verge, *The Trauma Floor: The Secret Lives of Facebook moderators in America* (Feb. 25, 2019) (https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona).
[3] NPR, *In Settlement, Facebook to Pay $52 Million to Content Moderators with PTSD (*May 12, 2020) (https://www.npr.org/2020/05/12/854998616/in-settlement-facebook-to-pay-52-million-to-content-moderators-with-ptsd).

1. Mr. Fried – bipartisan members of Congress have raised concerns about including Section 230 immunity into our trade agreements, including the Chairman and Ranking Member of this Committee. Do you think it makes sense to continue including Section 230 in U.S. trade agreements?

Congressman Bilirakis, I agree that the United States should refrain from including section 230 in trade agreements. Until we have resolved concerns here, it seems irresponsible to export the problems abroad. Doing so could wreak the same harms on citizens of foreign nations—as well as U.S. companies doing businesses overseas—that we are experiencing at home. Moreover, because the internet is inherently global, lax standards for platforms in other countries can also harm citizens and businesses in the United States.

The Honorable Michael C. Burgess, M.D. (R-TX)

1. Mr. Fried, in your testimony you argue that Congress should restore a duty of care by requiring technology companies that host content to only receive Section 230 immunity if they make a good faith effort to remove illicit content.

    a. In your view, what would constitute a good faith effort? If a platform failed to remove all illicit content, would the immunity still apply?

Congressman Burgess, section 230 contains two focal provisions.

The first provision, Section 230(c)(1), provides 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." Congress created this provision to legislatively overturn the *Stratton Oakmont v. Prodigy* decision, which it believed would discourage online platforms from engaging in content moderation efforts to keep harmful material off their services. Unfortunately, Congress created this liability protection without requiring online platforms to actually take any steps to curb harmful activity, and courts have interpreted the provision as preventing liability even when platforms negligently, recklessly, or willfully ignore illicit conduct. I recommend that Congress amend section 230 to require that platforms take reasonable steps to curb illicit activity as a condition of receiving the section's protection. This change would not require platforms to successfully prevent all illicit activity. No one expects them to be perfect. Just like most other businesses today, they would merely need to take reasonable steps to guard against their facilities and services being used for unlawful conduct, but could be held liable if they act negligently, recklessly, or in willful disregard of illicit activity. To be clear, though, even a failure to take reasonable steps would not automatically subject platforms to liability. They would just lose the section 230 shield. Someone would still need to have a legitimate cause of action, and a court would need to conclude that all the elements of that cause of action had been proven. Amending section 230 this way would better accomplish the intended goals of Congress to promote the growth of online platforms as modes of free expression, while also encouraging them to moderate the content on their services.

The second provision, section 230(c)(2), is where the "good faith" requirement comes into play. Section 230(c)(2) states that "[n]o provider or user of an interactive computer service shall

be held liable on account of … 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." This provision ensures that online platforms cannot be sued when they do what Congress intended: take down harmful content. Some critics of online platforms are concerned, however, that the platforms may take down content for inappropriate reasons. The "good faith" language of section 230(c)(2) can help address such concerns. In particular, in evaluating whether a platform has acted in good faith in a specific case, I would suggest examining whether there is some indication of pretext, inconsistent application, or lack of due diligence.

- Evidence that a platform was motivated by something other than protecting users or the public, for example, might suggest that the platform was invoking section 230 as mere pretext, and thus that the platform was not acting in good faith.
- Failure of a platform to act consistently or in compliance with its own policies and procedures regarding the flagging and removal of content or termination of a user might similarly constitute a lack of good faith.
- A platform's lack of due diligence regarding claims that someone has posted inappropriate content might also indicate the absence of good faith.

A court could look for any of these factors today when applying the current language of section 230, or Congress could amend the statute to explicitly make them statutory considerations. Platforms could help avoid claims of pretext, inconsistent application, or a lack of due diligence by clearly delineating their policies and procedures, such as in their terms of service. The platforms are in control of their terms of service, however, and may fail to state their policies with specificity or at all. Some in Congress are working on legislation to address that issue. Transparency would certainly help. Amending the statute to require platforms to take reasonable steps to curb use of their services for illicit activity will also be necessary, however, if we are to protect consumers from growing instances of harm online and realize the internet we all aspire to.

2. While many of us agree on what content should be considered illicit, to enforce such a measure, illicit content would need to be defined.

    a. Should Congress define illicit content?

    b. Should platforms be responsible for defining illicit content in their Terms and Conditions?

Neither Congress nor the platforms would need to define illicit conduct. Those bringing a claim would have the burden of proving that someone engaged in unlawful activity using the facilities or services of the platform, and that the platform's failure to take reasonable steps to prevent that activity caused them harm. There is an abundance of precedent regarding such claims in the brick-and-mortar world, and courts have ample experience with this area of law.

3. Mr. Fried, many arguments for changing the liability protections granted by Section 230 point to the fact that the startups the law was meant to protect are now behemoth technology companies hosting millions, if not billions, of content posts per day. We did not envision such an interconnected world before the creation of Facebook, Twitter, Google, and others.

    a. If we change the applicability of Section 230 based on the size of a few technology companies, will we be creating barriers to entry for others for which we have yet to conceive?

Fixing section 230's flaws in the manner I propose would not create barriers to entry for others.

Despite Congress' goal of promoting content moderation, it did not require platforms to actually do any content moderating in order to receive the liability protections of section 230. As a result, platforms escape liability even when they negligently, recklessly, or willfully disregard illegal activity occurring over their services. By contrast, virtually any other business—many of whom compete with the platforms—appropriately can be held culpable in such circumstances.

The solution is to better fulfill Congress' original intent by requiring platforms to take reasonable steps to curb illicit activity occurring over their services. The reasonableness standard is inherently flexible. It would account for the resources available to a platform and the benefits and risks posed by use of its services. The effort needed to meet the reasonableness standard will be proportional to platform size, ensuring smaller platforms are not unreasonably burdened as they try to grow and that firms are asked only to expend resources that make sense in light of the severity of a potential harm and the costs to combat it. Moreover, smaller platforms and platforms that focus less on user-generated content will have fewer users and uses to moderate. The potential liability on the back end will also encourage "responsibility by design" at the front end. This will itself promote innovation in the way companies create their services to avoid facilitating harm. Addressing potential problems in the earlier stages of a service's creation will also be a lot easier than trying to fix problems later, when those problems are already entrenched in a platform's business model and architecture.

4. Mr. Fried, the author of this provision, Rep. Chris Cox, suggested to me that the authority by state attorneys general to enforce unfair or deceptive acts or practices, the "mini FTCs" as they're referred to, could be used to enforce content moderation policies as outlined in a platforms Terms and Conditions.

    a. Given the nature of the Internet and cross-border application of technology company platforms, where would the jurisdiction reside?

    b. Is this a viable option to force companies to comply with their own content moderation policies?

I am not a consumer protection or state enforcement expert, but I presume the state attorneys general would say that they have jurisdiction if someone who resides in their state was harmed by the misapplication of the terms of service of a platform doing business in the state. Even if the attorneys general do have jurisdiction, however, section 230 might prevent such claims. Although the attorney generals would argue that the cases were based on the failure of the platforms to abide by their terms of service, not because of any third-party content, section 230 might come up in a couple of ways.

A state attorney general might argue that a platform had failed to take down content, despite applicable language in its terms of service saying it would. In such circumstances, a platform would likely argue that the case, at its core, was seeking to hold the platform culpable for something posted by a third party, and that violates section 230(c)(1)'s prohibition on treating the platform as the publisher or speaker of third-party content.

Alternatively, a state attorney general might argue that a platform did take down content, but in a way that did not comply with the policies and procedures in the platform's terms of service. In that circumstance, a platform would likely argue that the claim violates section 230(c)(2)'s prohibition on holding the platform "liable on account of [an] action voluntarily taken in good faith to restrict access to or availability of material." Absent evidence of bad faith, such a claim might succeed.

An added complication is that platforms control their terms of service. If those terms are silent or vague on particular issues, state that the platforms reserve the right to take unilateral action, or state that the platforms reserve the right to follow certain procedures and take certain actions but do not commit to always do so, it may be difficult for a state attorney general to make a case.

Thus, to enable the FTC or the state attorneys general to bring these types of cases, it may be necessary to pass transparency requirements in legislation, and also to explicitly carve out application of section 230.

Increasing transparency would be helpful. In addition, I recommend Congress amend section 230 to require platforms to take reasonable steps to curb use of their services for illicit activity as a condition of receiving the section's protection. Doing so would ensure that platforms are taking proactive steps to protect the public from unlawful conduct.

5. Mr. Fried, how are platforms properly using Section 230 immunity protections? How can Congress further promote such activity?

Preventing users from engaging in illicit activity over the platform, and terminating their service if they do, is consistent with section 230(c)(2) and certainly helps protect consumers. Section 230(c)(1), however, hinders the ability of courts to examine whether platforms are adequately taking such steps—or any steps, for that matter—to combat illicit activity. Amending section 230 to require platforms to take reasonable steps to curb use of their services for illicit activity, as a condition of receiving the section's protections, would better encourage all platforms to take reasonable steps, better accomplish Congress' goals in passing section 230, better protect consumers, and help maximize the benefits of the internet while reducing its harms.