



Written Testimony of

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Before the

**Congress of the United States**  
**House of Representatives**  
**Committee on Energy and Commerce**  
**Subcommittee on Communications and Technology**

Regarding

**“Holding Big Tech Accountable: Targeted Reforms to Tech’s Legal Immunity”**

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Chairman Doyle and Ranking Member Latta, Chairman Pallone and Ranking Member McMorris Rodgers, and members of the Subcommittee: thank you for having me testify again, and for seeking Free Press Action's views on the important values Section 230 upholds as well as the questions that law now faces.

And Chairman Doyle, I must also take a moment to thank my hometown Congressman for your leadership -- and for your kind attention to our organization's input over the years if this is the last time I have the honor to appear before you as chair of this esteemed subcommittee.

Today's hearing proposes holding "big tech" accountable through what are characterized as targeted reforms to the liability limitations afforded to an "interactive computer service" (or "ICS," for short) by Sections 230(c)(1) and 230(c)(2)(A).

That framing is understandable. In light of the testimony other witnesses today will share, it's clear why Congress would ask how to hold technology companies accountable for the impacts their business models impose on people online and off. There's obvious reason for concern about widespread assaults conducted and facilitated online against individuals' health and wellbeing, from all manner of amplified harassment, targeted disinformation and defective product designs. Just as at a national and global scale, there's obvious reason for concern about violent assaults on democratic institutions and social wellbeing from all manner of disinformation about elections, civil and human rights, and public health too.

That does not mean, however, that repealing or drastically weakening Section 230 would remedy the full litany of harms ascribed to big tech. When advocates, academics, and activists say that people ought to be able to sue giant platforms, that always requires answering the question "sue for what?"

For instance, while there might be tort remedies or criminal sanctions for some types of disinformation, there would be no such relief available when such speech is protected by the First Amendment and not the legal cause of any tortious harm to people receiving or acting on it.

That's why there are other, and in our view better, ways to address many of these accountability concerns. Those include better enforcement and application of existing civil rights law and other existing bodies of law to original posters of harmful and actionable information. They also include new privacy laws or FTC rules based on the agency's existing authority, prohibiting unfair and discriminatory targeting, use, and abuse of people's personal data. And last but not least, they include greater transparency about platforms' content moderation policies and other terms of service, as well as more consistent and equitable enforcement of those policies across all languages in which the platform operates, not just in English.

The changes proposed to Section 230's text in the bills subject to this legislative hearing - as well as in many other bills and even more numerous scholarly proposals -- could not solve all of these problems attributed to social media nor other societal harms more generally. Yet there may still be room for and need for careful Section 230 changes, to clarify its meaning and better align court results with its original text. Free Press Actions suggests that the subcommittee and other lawmakers account for these six precepts in any legislative discussions:

1. Any Section 230 reforms should strike a balance by preserving low barriers to the distribution of benign and beneficial content, yet allowing platforms to be held accountable for their own bad acts, such as knowing distribution of content adjudicated to be unlawful or otherwise actionable, as well as other conduct, content, or defective design and distribution choices of the platform's own making.
2. Congress should reject any suggestion of a full repeal or effective evisceration of Section 230. A repeal would raise barriers to speech and chill expression by promoting excessive takedowns, possibly shuttering entire sites and services, and disproportionately shutting out people of color and other already marginalized speakers.

3. Section 230 reforms should apply across the board, not just to “big tech” companies, because much harmful and abusive activity happens on smaller platforms.
4. The best path for Section 230 reform, in our view, would be to clarify that the plain text of Section 230 does not immunize “interactive computer services” for their own actions beyond liability for “publishing” information others provide, or removing or restricting access to such information that the platform considers objectionable. Platforms’ use of algorithms to distribute content when they have knowledge of its harms, or their monetization of engagement with that content, would be factors in determining ultimate knowledge and liability but would not automatically turn off 230’s protections.
5. Even if Congress significantly altered Section 230, much of the speech the members are (legitimately) concerned about would still be protected by the First Amendment and otherwise unactionable on the basis of existing tort law.
6. That means Section 230 reform is not the only or even the most effective way to stem the tide of harm that online platforms are facilitating, and the types of positive privacy law enhancements and enforcement of existing laws described above are essential components for holding big tech accountable, as the hearing proposes.

In the testimony that follows I’ll explore several of these precepts in more detail, as well as the precedents and policy considerations underpinning them, but with a focus on the text of Section 230 and how it’s already been interpreted in different ways by different courts considering it.

**We should retain the balance Section 230 strikes between competing and compelling policy concerns.** The law lowers barriers to people posting their own content, ideas, and expression on platforms, without needing permission or pre-clearance from those platforms for everything their users say and share. But its text and plain meaning also allow (or at least should allow) holding platforms liable for their own conduct.

The balance the statutory text currently strikes – prohibiting platform liability for third-party speech, and also permitting platforms to make content moderation decisions while retaining that protection from “publisher” liability – is what facilitates not just the open exchange of ideas, but also swift and wide-ranging takedowns of hateful and harmful material.

There's also real potential not just for losing that good moderation, but for chilling expression with Section 230 amendments done wrong – including expression from Black and brown folks, LGBTQ+ individuals, immigrant populations, religious or language minorities, political dissidents, and others whose ideas would be targeted for suppression. Yet we must listen to the individuals representing and studying impacts on people from these same communities – some of whom you'll also hear from in today's hearing<sup>1</sup> -- about the effects from unaccountable distribution of harmful and hateful content that platforms know to be actionable or unlawful, yet often fail to remove even when their own terms of service dictate it.

None of these considerations about the potential impact of 230 bills on platforms large and small make Section 230 sacrosanct, but the questions are complex. We can acknowledge, assess, and strive to preserve a platform's typical immunity for decisions on hosting or removing third-party speech. Yet we can also distinguish that immunity from that same platform's potential liability for actions of its own, even when related to or arising from hosting third-party content. That could mean amplifying user-generated information, adding the platform's own content to it, facilitating connections and engagement between users that results in harm, and otherwise profiting from dangerous product design – whether from defective products sold on an e-commerce platform or the possibly dangerous and negligent design of the platform itself.

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<sup>1</sup> See, e.g., Color Of Change, Statement of Rashad Robinson (Oct. 29, 2020), available at [https://colorofchange.org/press\\_release/color-of-change-responds-to-section-230-hearing/](https://colorofchange.org/press_release/color-of-change-responds-to-section-230-hearing/) (“Section 230 plays a critical role in ensuring a free and open Internet where advocacy groups like Color Of Change can organize, but it was never intended to provide billion dollar corporations a loophole to trample over hard-fought civil rights laws.”); see also Dr. Mary Anne Franks, “Reforming Section 230 and Platform Liability,” *Stanford Cyber Policy Center Cyber Policy Recommendations for the New Administration* (Jan. 2021), available at [https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/cpc-reforming\\_230\\_mf\\_v2.pdf](https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/cpc-reforming_230_mf_v2.pdf) (“The anonymity, amplification, and aggregation possibilities offered by the internet have allowed private actors to discriminate, harass, and threaten vulnerable groups on a massive, unprecedented scale. Abundant empirical evidence demonstrates that online abuse further chills the intimate, artistic, and professional expression of individuals whose rights were already under assault offline.”).

**Section 230 does not apply solely to “big tech.”** It protects all manner of large and small “interactive computer services,” including commercial ventures, but noncommercial sites and applications too. Even more importantly, it preserves the ability that users of all these interactive websites, applications, and platforms have to connect and communicate with each other without needing permission from such sites for every idea and exchange that users post.

Changes to Section 230 that might account for these size and reach disparities by applying new rules only to platforms above a certain revenue or monthly user threshold are suboptimal in our view. That’s because the largest platforms can enable all manner of benign and even beneficial interactions, even as advocates and other witnesses at today’s hearing testify to the often catastrophic outcomes of those same mechanisms and business models. Plus, smaller platforms below any line that Congress might draw could still cause grievous harm with their own content, conduct, and dangerous design choices.

Taking away Section 230 protections altogether would alter the business models of not just big platforms but every site with user-generated material. And, as discussed again more fully below, modifying or even getting rid of these protections would not solve the problems often cited by members of Congress who are rightly focused on racial justice, voting rights, and protecting against the spread of damaging, dangerous and malicious material.

**The plain text of Section 230 does not immunize “interactive computer services” for their own actions.** The text of the statute prohibits liability for “publishing” information that others provide (in subsection 230(c)(1)), or removing or restricting access to such information that the platform considers objectionable (in subsection (c)(2)(A)). Court cases over the past quarter-century have explored the scope of this liability limitation.

Decisions like *Roommates.com*, *Barnes*, *Oberdorf*, *Malwarebytes*, and *Lemmon* found platforms were indeed potentially liable for their own conduct -- or to be more precise, that Section 230 does not bar all such claims, even though plaintiffs clearing the 230 hurdle still must prove harm caused by the platform in breach of a duty owed to that plaintiff.

These decisions found interactive computer services that enjoyed Section 230 protections in many instances, and even from some of the separately pleaded claims in these very same cases, still could be liable for posing their own discriminatory questions to housing advertisers; failing to follow through on takedown promises made directly to aggrieved parties; providing content layered on top of user submissions that encouraged those users to drive at reckless speeds; or taking part in and profiting from sales transactions beyond just letting third-party sellers post their wares. In other words, Section 230's text does not set forth an absolute immunity for any suit or action arising from publication of third-party content. Nor should it.

That is how some other courts have read the statute though, ruling that subsequent distribution of material a platform knows to be harmful, actionable, or unlawful, is essentially nothing more than re-publication of that material, and thus protected by Section 230(c)(1). But that broad reading in *Zeran v. AOL*,<sup>2</sup> as both Justice Thomas<sup>3</sup> and preeminent Section 230 scholar Jeff Koseff<sup>4</sup> suggest, is not the only plausible or obvious reading of 230's text.

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<sup>2</sup> 129 F.3d 327 (4th Cir. 1997).

<sup>3</sup> *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15-16 (2020) (statement of Thomas, J., respecting denial of certiorari).

<sup>4</sup> Jeff Koseff, "A User's Guide to Section 230, and a Legislator's Guide to Amending It (or Not)," 37 *Berkeley Tech. Law J.* \_\_\_\_ (2022), abstract published Aug. 14, 2021, available at <https://ssrn.com/abstract=3905347>, at 16. ("There are at least two ways to read the 26 words of Section (c)(1). A limited reading would conclude that by prohibiting interactive computer service providers from being 'treated' as publishers or speakers of third-party content means that all such providers are instead treated as distributors.").

As a question presented even more recently to the Supreme Court asks, in a case about Facebook’s potential liability for connecting a trafficking victim to those who perpetrated these crimes, “Does Section 230 . . . provide immunity from suit to internet platforms in any case arising from the publication of third-party content, regardless of the platform’s own misconduct?”<sup>5</sup> In our view, and more importantly the view of many courts that have already considered it, that answer is no.

The uncertainty then -- for litigators, legislators, and the justices on the highest court in the land, as well as all internet users and people impacted by internet companies’ actions -- is not whether Section 230’s scope along these lines will continue to be subject to interpretation. It certainly will be. The question is whether smart and straightforward changes to the legislative text would aid in clarifying its meaning prior to the Supreme Court or other appellate courts taking up this question again.

Free Press Action believes that Section 230 amendments, if done right, could establish a different interpretation of the law -- one that accounts for these competing policy priorities but does not, in Justice Thomas’s words, rely solely on current “purpose and policy” considerations and other “nontextual arguments” to discern the meaning of the statute.

While we have not endorsed any of the four bills subject to this legislative hearing, nor endorsed any other Section 230 bill, we have praised the concepts in and discussions suggested by some of them, including Representative Clarke’s H.R. 3184, the “Civil Rights Modernization Act of 2021.” Yet while it is not before the subcommittee today, Free Press Action would also commend to your attention Representative Banks’ bill, H.R. 2000, the “Stop Shielding Culpable

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<sup>5</sup> *Jane Doe v. Facebook*, \_\_\_ U.S. \_\_\_, Petition for Writ of Certiorari (filed Sept. 23, 2021), [https://www.supremecourt.gov/DocketPDF/21/21-459/193572/20210923155657043\\_Petition%20for%20Writ%20of%20Cert%20-%20Doe%20v%20Facebook.pdf](https://www.supremecourt.gov/DocketPDF/21/21-459/193572/20210923155657043_Petition%20for%20Writ%20of%20Cert%20-%20Doe%20v%20Facebook.pdf).



Platforms Act,” which overrules *Zeran* and opens up the possibility of -- though by no means any certainty for -- distributor liability for interactive computer services’ conduct.

There’s still another approach to distributor liability suggested by S. 797, the bipartisan “PACT Act” introduced in the Senate, led by Senators Schatz and Thune. That bill proposes that interactive computer services could lose the protections afforded by Section 230(c)(1)’s prohibition on publisher treatment if the ICS has “actual knowledge” of illegal content or activity and still fails to remove it within a specified number of days. Such content or activity must first be adjudicated “illegal” by a federal or state court, and the ICS must receive actual notice of that adjudication before it might face liability.

We have endorsed neither H.R. 2000 nor S. 797. In fact, we have questions about how the PACT Act would work, both in terms of the notice procedures and timeframes it sets out and its proposed expansion of current Section 230 exceptions for federal criminal law to include federal civil law and state defamation law too. Yet we see promise in revisiting *Zeran* in these ways, and in accounting for the constitutional concerns and practical considerations highlighted by *Smith v. California*,<sup>6</sup> which ruled that it would violate the First Amendment to hold a bookseller strictly liable for distributing obscene (and thus constitutionally unprotected) material if that distributor had no knowledge of the material’s illegality.

At internet scale, it would be difficult, undesirable, and dangerous to expect every ICS to develop that knowledge on its own.<sup>7</sup> We don’t want the high barriers to user-generated content that would come if platforms had to pre-clear every piece of it -- assessing it in advance for potential liability. It would be just as difficult, however, to suggest with a straight face that

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<sup>6</sup> 361 U.S. 147, 153 (1959).

<sup>7</sup> See, e.g., Daphne Keller, “Six Constitutional Hurdles for Platform Speech Regulation,” The Center for Internet and Society at Stanford Law School Blog (Jan. 22, 2021), available at <http://cyberlaw.stanford.edu/blog/2021/01/six-constitutional-hurdles-platform-speech-regulation-0>.

platforms can't possibly take account of notices about the adjudicated illegality or tortious nature of content even once a court has ruled on it. That's like suggesting that platforms simply cannot and need not follow the law, even when such decisions stem from constitutionally tested existing causes of action rather than novel civil actions or newly imagined criminal sanctions.

This approach will still dissatisfy parties on both sides of the Section 230 debate. Those who desire speedier takedowns may see the need for prior court action as too slow and laborious. Those who see benefits in *Zeran*'s more sweeping interpretation of 230 will decry the notice and takedown regime, and suggest that such processes could be abused to chill speech that is not in fact "illegal" even under the PACT Act's conception of illegality that encompasses criminal law and (at least) some torts. They'll argue that such chilling impacts the individual speakers whose information may be targeted, and burdens the interactive computer services responding to these kinds of notices too.

None of these potential objections from either side can simply be waved away. But they can be dealt with by explaining the distinctions from more automatic takedown regimes, where the additional process is a benefit not a detriment in getting these tough determinations right. They can also be justified by acknowledging, as we must, that there can be severe negative consequences from immunizing platforms for their own knowing decisions to distribute content even after it's been adjudicated by the courts as harmful.

**Repealing Section 230 in its entirety would not create tort remedies or constitutionally sound prohibitions on much of the content people rightly see as harmful.** Even if full repeal were on the table -- which it is not in this hearing, and which it ought not to be in any future proposal the subcommittee might consider -- we have to remember two things about such a drastic step. Repealing and greatly reducing Section 230's scope would lead to far more preemptive

takedowns and refusals to host any user-generated content at all, if U.S. social media platforms and online exchanges would even tolerate such a drastic change.

Indeed, that was the state of affairs that prompted Section 230's enactment in the first place, when two different court decisions worked together to suggest that engaging in **any** content moderation could subject an interactive computer service to publisher liability for **all** such decisions and all user-generated content it hosts.<sup>8</sup> That's why, as Free Press Action has written previously, fighting hate speech online -- and more generally preserving platforms' ability to curate and moderate their services -- means keeping Section 230, not abandoning it.<sup>9</sup> Section 230(c)(2)(A) may be less well known than the more famous "twenty-six" words in subsection (c)(1), but both provisions work together to preserve this discretion for platforms generally to host what they see fit and refuse to host what they do not.

Yet even if interactive computer services were suddenly (in theory) liable for everything their users posted, many of those posts containing clearly awful racism, bigotry, homophobia, sexism and other ills like COVID disinformation and election conspiracy theories couldn't be addressed by changes to Section 230. The First Amendment generally protects that speech, and tort law doesn't readily provide for civil suits against it either. Repealing or otherwise gutting the statute wouldn't suddenly make speech unlawful or tortious for a platform to host if it weren't already unlawful or tortious for the original speaker to post in the first place.

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<sup>8</sup> See *Cubby v. CompuServe*, 776 F. Supp. 135 (S.D.N.Y. 1991); *Stratton Oakmont v. Prodigy Servs Co.*, Trial IAS Part 34, 1995 WL 323710 (N.Y. Supr. Ct. May 24, 1995).

<sup>9</sup> See Gaurav Laroia & Carmen Scurato, "Fighting Hate Speech Online Means Keeping Section 230, Not Burying It," *Techdirt* (Aug. 31, 2020), available at <https://www.techdirt.com/articles/20200821/08494445157/fighting-hate-speech-online-means-keeping-section-230-not-burying-it-gaurav-laroia-carmen-scurato.shtml>.

**The bills in today’s hearing offer promising starts on this conversation, but there is more work to be done.** Bills like H.R. 5596, the “Justice Against Malicious Algorithms Act of 2021” (or “JAMA”) and H.R. 2154, the “Protecting Americans from Dangerous Algorithms Act” (or “PADAA”) propose far narrower and more promising steps than any such dramatic abandonment of Section 230’s core. Free Press Action appreciates their intent to home in on platforms’ own conduct, specifically on platforms’ algorithmic amplification of harmful material that is arguably distinct from merely hosting that third-party content in the first place. But as explained earlier, we are at present more drawn to exploration of the distributor liability path described above, clarifying and restating Section 230’s plain text in ways that might hold platforms accountable for harms they cause whether using an algorithm or not.

That’s because defining what qualifies as a personalized algorithm and recommendation under JAMA, or as non-obvious and non-understandable algorithmic ranking under PADAA, is an exacting though not impossible drafting exercise. And even if Congress could legislate these technological terms correctly, the series of exemptions to 230’s liability limitations (and then exemptions to those exemptions) read as something of a triple-negative: platforms are **not** liable for publishing information provided by another party; then **not** protected for amplifying or targeting that information in some circumstances; yet switching back once more, **not** subject to liability in the end if a recommendation is user-specified or otherwise “obvious.”

We also appreciate the intent in JAMA and PADAA to narrow the scope of the changes to Section 230. PADAA limits any new potential ICS liability to amplification of material violating Civil Rights Act provisions or triggering private rights of action for acts of international terrorism. JAMA limits any new potential ICS liability to personalized recommendations of content that “materially contribute[s] to a physical or severe emotional injury.” H.R. 3184, in somewhat similar

fashion, creates potential liability for civil rights violations arising only from showing ads to a “particular subset of users who are part of or have a protected class or status.”

These bills introduce many new concepts and terms into the test for potential ICS liability instead of sticking more closely to existing (if not unnuanced) common law concepts and court cases interpreting them. No matter how rational the new concepts are, they could lead both to more false positives and false negatives in our view. That is, the attempt to make platforms liable for harmful material based on the particular technological or economic method used to distribute it could deter the use of algorithms and targeted ads even when there is no suggestion that they are operating in a “malicious,” “dangerous,” or discriminatory fashion.

On the other hand, these approaches could continue to immunize platforms for harms they may cause even when they’re not employing “personalized” or non-“obvious” algorithms or “targeting” advertising at particular users. The fact that an ICS employs an algorithm, or that it accepts payment for promoting, amplifying, or advertising certain content, all seem highly relevant to testing its knowledge about and culpability for the potentially harmful content it distributes. But under a distributor liability test as opposed to an algorithmic or targeted ad test, monetizing content or using algorithms would not automatically switch Section 230 off.

**Free Press Action does not share the view that such revisions to Section 230, or any other congressional regulation of algorithmic amplification, is constitutionally infirm.** The First Amendment is indeed a constraint on speech torts like various forms of defamation, and even more so on any claim that one party’s speech incited another’s violent and wrongful acts. Yet while speech torts are constrained by the First Amendment, especially in the context of commentary on public figures, those torts clearly are not *per se* unconstitutional.

So we need not conceive of algorithms as unexpressive or **outside** the scope of the First Amendment to imagine constitutionally sound tort liability based on the recommendations they make. Put another way, arguing that algorithmic recommendations and other curation decisions fall **within** the scope of the First Amendment does not immunize them from any and all potential tort liability, even if it does shield algorithms from many criminal laws or other state actions purporting to prohibit them or guide their operation. If a defamatory statement can be actionable in court, yet constitutionally protected at least insofar as tort liability does not subject the defendant to criminal sanction, we're not aware of any reason that further distribution and amplification of that same statement by algorithm or otherwise couldn't be actionable as well.

JAMA and PADAA thus remain viable starting points for the subcommittee's work going forward, notwithstanding Free Press Action's present view that a straightforward revisitation of the publisher/distributor distinction holds as much or more promise. Treating platforms as distributors along one of these routes, and thus as **potentially** liable despite Section 230 once they have knowledge of the harms their distribution causes, also could prevent the same kinds of malicious and dangerous outcomes that understandably concern these bills' co-sponsors.

Unfortunately, we do not believe that the fourth and final bill in today's hearing -- H.R. 3421, the "SAFE TECH Act" -- provides a workable start. Despite the fact that it lists out many of the same kinds of unassailably important topics as the civil and human rights concerns highlighted by PADAA and Rep. Clarke's bill, this fourth bill tips even further towards the potentially chilling effects risked by any broad change to Section 230.

It suggests not only that targeted ads or advertisements of any kind might fall outside of Section 230's protections, but so too could any information the ICS hosts when it "has accepted payment to make the speech available." Without further clarification, this could subject a platform

to liability for all content on an advertising-supported or subscription-supported site or interactive service, not just the specific content in a particular ad or post with paid promotion.

While this may not be the intent of the drafters of the original Senate bill, Free Press Action has opposed several bills and suggestions that an ICS generating any of its own content or amplifying any others' content (whether in exchange for money or not) should lose all 230 protections. In fact, we even joined a lawsuit against the former president's punitive and chilling attempt to remove Section 230 from platforms in retaliation for their own free speech and fact-checking. SAFE TECH and other bills not on today's hearing slate raise the same concerns.

Moreover, the SAFE TECH Act also proposes removing Section 230 protection for "any request for injunctive relief arising from the failure of an interactive computer service provider to remove, restrict access to or availability of, or prevent dissemination of material that is likely to cause irreparable harm." This is very unlike the type of approach outlined in the PACT Act, or even the one suggested by a more comprehensive but open-ended reversal of *Zeran*. This provision would incentivize platforms to take down any content challenged in an initial filing before the case even goes to court, rather than only after receiving notice of a fully adjudicated court decision. SAFE TECH thus would raise barriers to any and all user-generated speech. Big platforms operated by Facebook, Google, Twitter, to say nothing of sites with far fewer posts but also far fewer lawyers at their disposal, would need to concern themselves in advance with the likelihood of success on the merits for potential claims against almost any content they host.

Lastly, the bill also contains carve-outs not only for civil rights law, but for international human rights law and antitrust law too, as well as stalking, harassment, intimidation and wrongful death claims. We need not weigh these different kinds of gravely concerning crimes and conduct against the ones already subject to exemptions in Section 230, nor accept the suggestion that if

some important topics deserve such exemptions from 230 then surely others must too. An approach so dependent on carve-outs begs the question of how consistent any statutory revamp could be if platforms were incentivized to block first and ask questions later about such a long but necessarily non-comprehensive list of claims. Clarifying instead that platforms might be liable for distributing if not initially “publishing” harmful content, but only after they have knowledge of that harm whether from prior adjudication or otherwise, would be a simpler and shorter route to holding them accountable without requiring them to make these difficult legal calculations in advance.