

June 27, 2022

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United States Senate  
722 Hart Senate Office Building  
Washington, D.C. 20510

Hon. Ben Ray Luján  
United States Senate  
498 Russell Senate Office Building  
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Hon. Ron Wyden  
United States Senate  
221 Dirksen Senate Office Building  
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Hon. Tammy Baldwin  
United States Senate  
709 Hart Senate Office Building  
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Dear Senators Schatz, Wyden, Luján, and Baldwin,

We write to address Rep. Cicilline’s June 15, 2022, response to your letter of June 14, in which you expressed well-founded concerns that the American Innovation and Choice Online Act (AICOA)—specifically Section 3(a)(3)—would be used to subvert or attack content moderation. While none of Rep. Cicilline’s arguments adequately address these concerns, we would like to specifically highlight the inadequacy of his assertion that Section 230 would protect against such abuses.

Rep. Cicilline argues that Section 230’s protections will remain intact because AICOA § 5 provides that “[n]othing in this act may be construed to limit . . . the application of any law.” But the danger AICOA poses to content moderation is not that it abrogates Section 230 or explicitly limits its applicability. Rather, the danger lies in how AICOA will inform courts’ application of existing Section 230 precedent.

As you know, Section 230 provides two primary protections. Section 230(c)(1) immunizes online services from publisher liability for content provided by third parties. Courts have broadly construed this provision, holding it to immunize against “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.”<sup>1</sup> The vast majority of content moderation cases are decided under Section 230(c)(1).<sup>2</sup> Yet there are reasons to doubt that Section 230(c)(1) will provide the protection that Rep. Cicilline presumes.

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<sup>1</sup> *Zeran v. Am. Online*, 129 F.3d 327, 330 (4th Cir. 1997).

<sup>2</sup> Elizabeth Banker, *Internet Association: A Review of Section 230’s Meaning & Application Based On More Than 500 Cases*, INTERNET ASSOCIATION, at 10 (July 27, 2020), [https://internetassociation.org/wpcontent/uploads/2020/07/IA\\_Review-Of-Section-230.pdf](https://internetassociation.org/wpcontent/uploads/2020/07/IA_Review-Of-Section-230.pdf) (concluding, based on a study of more than 500 Section 230 cases, that Section 230 “typically” protects content moderation “through application of

**Why 230(c)(1) May Not Apply.** Courts may hold that claims brought under AICOA seek to impose liability not for “publisher” conduct, but rather for anticompetitive *business conduct*. In general, the First Amendment does not protect media companies against “laws regulating [their] business practices.”<sup>3</sup> Thus, a newspaper could be sued for refusing to carry ads from local advertisers who would not join a boycott of a new radio station.<sup>4</sup> Similarly, a business may be liable even when it engaged in “speech related to its anticompetitive scheme” because the speech is incidental to the antitrust violation.<sup>5</sup> Likewise, courts may conclude that the gravamen of an AICOA claim is not the content moderation itself (a form of “speech”), but rather the alleged competitive conduct, and therefore that the claim does not impose publisher liability and thus 230(c)(1) does not apply. This result is made more likely because courts will seek to find a way to give effect to both statutes, as discussed below.

**Why 230(c)(2)(A) May Not Apply.** There has been significant backlash against the broad interpretation of Section 230(c)(1). Many, including Justice Thomas, argue that only 230(c)(2)(A) protects content moderation.<sup>6</sup> This provision offers weaker protection against liability for “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.” Critics of content moderation want to force platforms to rely solely on 230(c)(2)(A) precisely because that provision requires them to show that removed or restricted content falls into one of the enumerated categories, and that moderation actions were taken in “good faith.” Both requirements may undermine content moderation as enforcers invoke AICOA.

First, critics of content moderation have sought—and continue to seek—to narrow the interpretation of the categories whose moderation is protected under 230(c)(2)(A). Under a Trump administration proposal, the word “harassing” would mean, in part, material “that has the *subjective intent* to abuse, threaten, or harass any *specific* person and is lacking in any serious literary, artistic, political, or scientific value.”<sup>7</sup> Intent is difficult to prove, and is

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subsection (c)(1) rather than (c)(2).”).

<sup>3</sup> *Associated Press v. United States*, 326 U.S. 1, 7 (1945).

<sup>4</sup> *Lorain Journal Co. v. United States*, 342 U.S. 143, 152, 155 (1951).

<sup>5</sup> See *Jefferson Cty. Sch. Dist. No. R-1 v. Moody’s Inv’r Servs.*, 175 F.3d 848, 859 (10th Cir. 1999) (collecting cases).

<sup>6</sup> See *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S.Ct. 13 at 16–17 (2020) (Thomas, J., statement respecting denial of certiorari); see also NAT. TELECOMM. & INFO. ADMIN, PETITION FOR RULEMAKING: IN THE MATTER OF SECTION 230 OF THE COMMUNICATIONS ACT OF 1934 at 37 (July 27, 2020), available at [https://www.ntia.gov/files/ntia/publications/ntia\\_petition\\_for\\_rulemaking\\_7.27.20.pdf](https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf) (“First, the FCC should make clear that section 230(c)(1) applies to liability directly stemming from the information provided by third party users. Section 230(c)(1) does not immunize a platforms’ . . . decisions to restrict access to content or its bar user from a platform. Second, section 230(c)(2) covers decisions to restrict content or remove users.”)

<sup>7</sup> NAT. TELECOMM. & INFO. ADMIN, PETITION FOR RULEMAKING: IN THE MATTER OF SECTION 230 OF THE COMMUNICATIONS ACT OF 1934 at 37 (July 27, 2020).

negated in any case by a showing of some plausible redeeming value. When Alex Jones or his InfoWars channels post conspiracy theories about mass school shootings being “false flag” operations, he (and likeminded enforcers) will undoubtedly claim that questioning government narratives holds political value—and platforms might then not be immunized for discriminating against his business. This narrower reading of (c)(2)(A) would render moderation of much toxic content, including hateful speech and disinformation, unprotected—and AICOA would provide a road-ready vehicle for attacking it in the courts.

The term “otherwise objectionable” has likewise been used as a tool to force platforms to moderate less content. Because most content moderation cases have been decided under 230(c)(1), few courts have considered the scope of “otherwise objectionable.” But plaintiffs, commentators, and some scholars have invoked the *ejusdem generis* canon of construction: when general words follow specific words in a statutory enumeration, the *general words* are construed to embrace only objects similar to those enumerated by the specific words.”<sup>8</sup>

Under this narrower construction, courts would have to decide whether the content at issue is sufficiently similar to the list of enumerated categories (“obscene, lewd, lascivious, filthy, excessively violent, harassing”) for the statutory immunity to apply to its moderation. For example, self-harm content might seem “excessively violent” if it involves cutting or suicide instructions, but what about normalization of anorexia?<sup>9</sup> It is difficult to see how misinformation about COVID or vaccines—let alone election misinformation or foreign propaganda—is “similar” to any of these enumerated categories. If courts were to adopt this position, 230(c)(2)(A) would not bar AICOA liability for such moderation decisions.

Second, plaintiffs have long alleged that moderating content in a discriminatory way constitutes bad faith and is therefore unprotected by 230(c)(2)(A), which requires “good faith.”<sup>10</sup> Such arguments have been unsuccessful thus far, but by creating a *competition* claim,

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<sup>8</sup> Washington State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 372 (2003); see also Eugene Volokh, *Interpreting 47 U.S.C. § 230 (c)(2)*, REASON (June 28, 2021, 12:45 PM), <https://reason.com/volokh/2021/06/28/interpreting-47-u-s-c-%C2%A7-230c2/> (arguing that the canon of *ejusdem generis* should limit 230(c)(2)’s seemingly catch-all language to similar materials that is specifically covered by the CDA and would likely not preempt state law that prohibits platforms from discriminating against content based on viewpoint).

<sup>9</sup> See Kate Conger, Kellen Browning and Erin Woo, *Eating Disorders and Social Media Prove Difficult to Untangle*, N.Y. TIMES (Oct. 22, 2021), <https://www.nytimes.com/2021/10/22/technology/social-media-eating-disorders.html> (discussing the complex nature of moderating content that may encourage eating disorders to young people while acknowledging experts’ statements that social media in general “does not cause an eating disorder” but “can contribute”).

<sup>10</sup> See Pls.’ Opp’n to Def.’s Mot. To Dismiss, *Domen v. Vimeo, Inc.*, No. 1:19-cv-08418-SDA (S.D.N.Y. Nov. 1, 2019), ECF No. 45, available at <http://tinyurl.com/46rh5d5x> (“The FAC alleges that Plaintiffs’ compliant videos were restricted and deleted whereas videos on similar subjects, were not. . . . In an effort to side-step the “good faith” requirement, Vimeo asserts immunity provision under §230(c)(1). However, as set forth in more detail below, (c)(1) does not apply where, as here, Vimeo, a receptacle and conduit for third party speakers, is the sole perpetrator of the illegal and unlawful discrimination; see Complaint ¶ 109, *Missouri v.*

AICOA renders them plausible. In *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, the U.S. Court of Appeals for the Ninth Circuit—which decides more Section 230 cases than any other appellate court—held that Section 230(c)(2)(A) does *not* protect content removal or restriction decisions that are motivated by “anticompetitive animus.”<sup>11</sup>

Enigma and Malwarebytes offered competing threat detection and removal software. Enigma claimed that Malwarebytes configured its software to block Enigma’s own software in order to divert customers to itself.<sup>12</sup> Malwarebytes claimed Enigma’s software was “deceptive” and “scare[d] users into believing that they have to download Enigma’s programs to prevent their computers from being infected.”<sup>13</sup> Enigma alleged that those objections were pretexts for anticompetitive blocking of its software. Malwarebytes insisted otherwise, but the court denied Malwarebytes’ motion to dismiss anyway: “if a provider’s basis for objecting to and seeking to block materials is because those materials benefit a competitor, the objection would not fall within any category listed in [Section 230(c)(2)(A)] and the immunity would not apply.”<sup>14</sup> Ultimately, the trial court dismissed Enigma’s claims for failing to satisfy the requirements of existing laws—requirements that AICOA would obviate—and only after expensive, extended litigation.<sup>15</sup> By threatening to impose such costs, government enforcers may succeed in deterring content moderation they dislike.

There is a substantial risk that courts will extend the *Malwarebytes* reasoning to exclude AICOA claims from Section 230 protection—including politically motivated claims aimed at content moderation. Specifically, courts may try to harmonize the two statutes—*i.e.*, “strive to give effect to both”<sup>16</sup>—by accepting some showing of anticompetitive results as sufficient to circumvent Section 230(c)(2)(A) in non-discrimination claims.

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Biden, No. 3:22-cv-01213 (W.D. La. May 5, 2022), ECF No. 1, available at <http://tinyurl.com/36f726r9> (“Viewpoint and content-based discrimination—now widely practiced by social-media platforms—are the antithesis of ‘good faith.’”).

<sup>11</sup> 946 F.3d 1040, 1047 (9th Cir. 2019), *cert. denied*, 141 S.Ct. 13 (2020).

<sup>12</sup> *Id.* at 1044.

<sup>13</sup> *Id.* at 1052.

<sup>14</sup> *Id.* The court rejected the Malwarebytes’ argument that, if it “has sole discretion to select what programs are ‘objectionable,’ the court need not evaluate *the reasons for the designation.*” It thus appears that what the court was really talking about was whether Malwarebytes acted in good faith. Regardless, the risks we identify are present no matter how the courts label their analysis.

<sup>15</sup> *Enigma Software Grp. U.S. v. Malwarebytes Inc.*, 5:17-cv-02915-EJD (N.D. Cal. Aug. 9, 2021).

<sup>16</sup> *EPIC Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). The Court’s decision in *EPIC Systems* shows what a dicey process this “harmonizing” can be. The dissent argued, and the majority did not dispute, that the more “pinpointed” or “subject-matter specific” of two statutes should tend to prevail. But the two sides disagreed about whether these factors applied, or how they cut in the case at hand. The dissent noted, too, that often the later-enacted statute should have an edge. We, for our part, think it clear that, in a case alleging that an exercise of editorial discretion (protected by Section 230) harmed competition (banned under AICOA), Section 230 would be the more “pinpointed” and “subject-matter specific” statute. As *EPIC Systems* shows,

Anticompetitive animus is not required by the plain text of AICOA § 3(a)(3). Allowing only AICOA claims that allege (and, ultimately, prove) anticompetitive *motivation* to bypass Section 230’s protection would infer an intent requirement where Congress chose not to include one.<sup>17</sup> While courts do sometimes infer intent requirements,<sup>18</sup> they may reasonably conclude that doing so here would effectively read Section 3(a)(3) out of the statute. How could a platform with no direct stake in the market where competitive harm is alleged ever have an anticompetitive intent? Thus, how could any plaintiff ever bring a Section 3(a)(3) claim regarding “harm to competition” *between* downstream business users that would survive Section 230(c)(2)(A)? For Rep. Cicilline’s presumptions about Section 230 to be correct, courts would have to effectively render Section 3(a)(3) a nullity by holding that only claims of self-preferencing—but not discrimination between other business users—are actionable. This is an implausible reading that *clearly* contradicts what the present draft of AICOA says.<sup>19</sup>

The *Malwarebytes* court relied heavily on Section 230’s “history and purpose” as evincing Congressional intent to “protect competition.”<sup>20</sup> Here, there is explicit statutory language and legislative history from which a court could conclude that AICOA’s purpose is to prohibit anticompetitive results, regardless of motive—and thus to carve those claims out from Section 230. This result would apparently be statutorily *required* if another bill co-sponsored by Sen. Klobuchar becomes law: The SAFE TECH Act (S. 299) would amend Section 230 to exempt “any action brought under Federal or State antitrust law.”<sup>21</sup>

It is easy to imagine how this will play out even for regular, everyday content moderation decisions. A state attorney general, or a future Republican DOJ, will point to allegedly disparate enforcement of terms of service. Again, plaintiffs routinely point to such disparities. For example, Laura Loomer (who would qualify as a “business user” under AICOA), complained that she was banned from Twitter in part based on a tweet alleging that

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however, even judges tend to bring their priors to a discussion of how two statutes should “harmonize.” And it must be conceded that AICOA gets points for being the later-enacted statute.

<sup>17</sup> Section 230 appears potentially applicable to at least half of the 10 causes of action created by AICOA, i.e., those dealing with whether, or how, a business user appears on a covered platform. AICOA §§ 3(a)(1)-(5), (9).

<sup>18</sup> *Zenith Electronics Corp. v. Exzec, Inc*, 182 F.3d 1340 (Fed. Cir 1999).

<sup>19</sup> In self-preferencing claims, courts may simply infer intent from the nature of the offense: favoring one’s own offerings over those of rivals.

<sup>20</sup> *Malwarebytes*, 946 F.3d at 1050–51 (“Congress expressly provided that the CDA aims “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services” and to “remove disincentives for the development and utilization of blocking and filtering technologies.” Congress said it gave providers discretion to identify objectionable content in large part to protect competition, not suppress it.”) (internal citations omitted).

<sup>21</sup> S. 299, 117th Cong. § 2 (2021); AICOA has been promoted by its sponsors as an antitrust bill, and appears to fall into the definition of “antitrust law” provided in 15 U.S.C. § 1311(a)(2) (“Any statute enacted on and after September 19, 1962, by the Congress which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to any restraint upon or monopolization of interstate or foreign trade or commerce.”).

Rep. Ilhan Omar “is an adherent of a belief system in which ‘homosexuals are oppressed,’” while CNN and *The Economist* were not penalized for tweets noting that Islamic regimes criminalize and/or execute homosexuals.<sup>22</sup> A politically motivated enforcer will surely find many other complaints of such “selective enforcement”<sup>23</sup> alleging a discriminatory application of the terms of service to harm the competition in news/editorial publication, or perhaps the more general market for “alternative” ideas. Parler, Gettr, Gab, Rumble and Donald Trump’s Truth Social could all allege that competition in the market for social networking services is harmed if they are excluded from app stores or denied the same treatment afforded to “mainstream” apps, especially those affiliated with a covered platform, such as Google’s YouTube. To a court, such claims will seem precisely the type that Congress sought to provide a remedy for—and thus something that should be excluded from Section 230 protection.

Even if—against the clear intent of Congress—the courts require that AICOA plaintiffs prove anticompetitive motivation to bypass Section 230, every AICOA plaintiff aggrieved by content moderation will always allege “anticompetitive animus.” In antitrust cases, courts allow facially plausible allegations to shift the burden to the defendant if it has “easier access to relevant information,”<sup>24</sup> which would clearly be the case for assessing the platform’s intent. If courts allow government plaintiffs to wield their broad subpoena powers to conduct fishing expeditions, government plaintiffs will probably find some “hot” document that can be portrayed as evincing “anticompetitive animus.” A *Malwarebytes*-style divination of AICOA’s intent would make courts not only more deferential to government agencies’ investigative demands, but also more willing to accept a “hot doc” as establishing anticompetitive intent than they are under existing antitrust law, where intent is a required element of only the most extreme claims.<sup>25</sup> Given that *Malwarebytes* made no reference to any existing antitrust principles in its discussion of anticompetitive animus, why would courts look to those principles in determining what qualifies as anticompetitive animus?

Many supporters of this bill have been explicit that their support is predicated on their perception that the bill will provide a remedy for content moderation that they disagree with. “The time for conservatives to hope for fair treatment from the woke corporations is long over,” declared Sen. Hawley in response to criticism of these bills.<sup>26</sup> AICOA would,

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<sup>22</sup> Amended Complaint at 7–9, *Illoominate Media, Inc. v. CAIR Florida, Inc.*, No. 9:19-cv-81179 (S.D. Fla. Aug. 22, 2019), ECF No. 1 Exhibit B, *available at* <http://tinyurl.com/5ehvfmry>.

<sup>23</sup> State attorneys general have already issued calls to report “Big Tech censorship” to their offices for the purpose of identifying alleged unlawful behavior. *See Louisiana, Alabama Launch Initiative To Gather Info On Social Media Censorship*, Attorney General Jeff Landry, <http://ladoj.ag.state.la.us/Article/10943>.

<sup>24</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 131 (D.C. Cir. 2001).

<sup>25</sup> *See, e.g., Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993) (attempts to monopolize is “something more than an intent to compete vigorously”).

<sup>26</sup> Josh Hawley (@HawleyMO), TWITTER (June 13, 2022, 11:03 AM), <https://twitter.com/HawleyMO/status/1536363638029799426>.

observed Sen. Ted Cruz (R-TX) at last year’s markup of the bill,<sup>27</sup> “make some positive improvement on the problem of censorship” because “it would provide protections to content providers, to businesses that are discriminated against because of the content of what they produce.”<sup>28</sup> And Sen. Grassley pointedly rejected your proposed amendment: “That type of addition is a non-starter and can’t be included,” Grassley said.<sup>29</sup> His spokesman warned that your amendment would cause the bill to lose Republican support. Presuming that AICOA is drafted precisely enough to preclude attacks on content moderation ignores multiple, loud warnings that future politically motivated enforcers (and judges) will seize on. This is a risky gamble indeed.

We appreciate your attention to these important issues, and stand ready to discuss them and assist you in resolving them at your convenience.

Sincerely,

**Organizations**

TechFreedom

Free Press Action

Copia Institute

**Individuals** (affiliations listed for identification purposes only)

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<sup>27</sup> Issie Lapowsky, *Congress’ antitrust push has a hate speech problem*, PROTOCOL (Jan. 22, 2022), <https://www.protocol.com/policy/antitrust-hate-speech>.

<sup>28</sup> *Sen. Ted Cruz: Big Tech Censorship is the Greatest Threat to Free Speech in America*, TED CRUZ (Jan. 21, 2022), <https://www.cruz.senate.gov/newsroom/videos/watch/sen-ted-cruz-big-tech-censorship-is-the-greatest-threat-to-free-speech-in-america>.

<sup>29</sup> Brendan Bordelon, *Tech CEOs descend on Congress to block antitrust bill*, POLITICO (June 17, 2022), <https://subscriber.politicopro.com/newsletter/2022/06/tech-ceos-descend-on-congress-to-block-antitrust-bill-00040430>.