

May 21, 2024

Chairwoman Cathy McMorris Rodgers
Committee on Energy and Commerce
U.S. House of Representatives
2188 Rayburn House Office Building
Washington, DC 20515

Ranking Member Frank Pallone
Committee on Energy and Commerce
U.S. House of Representatives
2107 Rayburn House Office Building
Washington, DC 20515

Re: Communications and Technology Subcommittee Hearing: “Legislative Proposal to Sunset Section 230 of the Communications Decency Act”

Dear Chair Rodgers, Ranking Member Pallone, and Members of the Committee:

For nearly three decades, Section 230 has allowed the Internet to flourish and enabled a revolution in mass communications that has led to an unprecedented democratization of speech worldwide. This proposal would sacrifice those remarkable societal benefits in service of a directionless and myopic attempt to punish the largest tech companies. In fact, the entire interactive, user-driven Internet simply could not have survived America’s uniquely expensive legal system without Section 230—and still could not.

In recent years, the idea of “reforming” or repealing Section 230 has been discussed in countless congressional committee meetings. Still more bills have been discussed, introduced, and marked up. Congress has failed to enact legislation not, as some assert, because “Big Tech” has refused to engage, but because various factions have fundamentally antithetical goals. Simply stated: some would modify Section 230 to penalize platforms for hosting “harmful” yet constitutionally protected content, while others would coerce platforms into abandoning their First Amendment rights to decide *not* to host such “lawful yet awful” content. These goals are as mutually exclusive as they are unconstitutional.

This bill’s sponsors claim that sunseting Section 230 would “force Congress and stakeholders to work together in good faith to develop a long-term solution.”¹ The opposite is true: the need to avoid breaking the interactive Internet would create the same kind of

¹ <https://energycommerce.house.gov/posts/bipartisan-energy-and-commerce-leaders-announce-legislative-hearing-on-sunsetting-section-230>

chaos associated with the National Defense Authorization Act and other must-pass bills: a dizzying variety of unrelated amendments resolved less by substantive policymaking than by political horse-trading. Any new liability regime would coerce platforms into hosting either more speech or less speech—depending on which party holds the upper hand at the time. What starts as a one-time sunset could all too easily become a biennial legislative Christmas tree certain to be weaponized for partisan political gamesmanship.

This is a dangerous gamble indeed.

Even worse, Congress may be unable to reach consensus at all, to the undeniable detriment of online expression. Indeed, the implications for free speech are far more profound than proponents of sunseting Section 230 acknowledge. While it is ultimately the First Amendment that protects free speech, Section 230 has extensive speech-enabling effects beyond what the First Amendment provides,² and they are what makes it feasible for online services to host any user-generated content in the first place. Absent Section 230's protections, online speech platforms would face an impossible choice: cease moderating any content—including the types of content that Congress has expressed concern over, and which users and advertisers would not stand for—or face liability for every piece of user-generated content they host. That the First Amendment still protects online speech will be of little solace to those users who find far fewer places in which to speak.

Despite the myopic focus on “Big Tech,” Section 230 is actually vital to competition: without it, startups and other challengers—without extensive legal budgets—could not compete with dominant platforms by promising to better address the concerns of users (and Congress) without the fear of crippling liability. Large companies with massive budgets may be better able to adjust to a (still harmful) post-Section 230 existence than their competitors. Sunseting Section 230 in this manner thus poses another threat to the Internet: dominant platforms can gain a comparative leg up by using their considerable influence to shape the new regime in a way that imposes greater relative costs on competitors—or they may just run out the clock.

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The First Amendment does not render Section 230 unnecessary for a free and open Internet. But it *does* constrain Congress's ability to shape content moderation to its liking—whether by penalizing platforms for leaving up protected expression that Congress deems harmful, or by punishing them for moderating objectionable content. Threatening to pull the rug out

² See Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 34 (2019) (explaining the additional benefits provided by Section 230, such as enabling early dismissals and reducing litigation expense, mooting state-level conflicts of laws, and facilitating constitutional avoidance).

from under the Internet if a new liability regime with massive implications for online speech is not decided upon in 18 months only encourages bad-faith actors to hold the Internet hostage. If lawmakers want to amend Section 230, they should propose those amendments, subject them to public scrutiny in hearings, and pass them *before* upending the legal framework on which the Internet has relied for decades. Hanging the Sword of Damocles over the Internet is no way to legislate.

Sincerely,

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