

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Friday, May 29, 2020 3:56 PM
To: Barnett, Gary (OAG)
Subject: RE: Section 230

Thanks!!

-----Original Message-----

From: Barnett, Gary (OAG) (b) (6) >
Sent: Friday, May 29, 2020 3:38 PM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Levi, William (OAG) (b) (6) >
Subject: Re: Section 230

Thanks Lauren. Looking forward to helping where I can.

Gary

> On May 29, 2020, at 3:30 PM, Willard, Lauren (OAG) (b) (6) > wrote:
>

Duplicative Information - See Document ID 0.7.2270.5111

Whitaker, Henry C. (OLC)

From: Whitaker, Henry C. (OLC)
Sent: Friday, May 29, 2020 4:01 PM
To: Willard, Lauren (OAG); Feith, Daniel (ODAG)
Cc: Wallace, Benjamin (OLC)
Subject: RE: Section 230 call today

I can do it now, but have another call at 4:30.

From: Willard, Lauren (OAG) (b) (6) >
Sent: Friday, May 29, 2020 4:00 PM
To: Feith, Daniel (ODAG) (b) (6) >
Cc: Wallace, Benjamin (OLC) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >
Subject: RE: Section 230 call today

Ben/Henry – are you all free now or at 4:30 for a quick call?

From: Feith, Daniel (ODAG) (b) (6) >
Sent: Friday, May 29, 2020 4:00 PM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Wallace, Benjamin (OLC) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >
Subject: RE: Section 230 call today

I'm free until 5.

From: Willard, Lauren (OAG) (b) (6) >
Sent: Friday, May 29, 2020 3:59 PM
To: Feith, Daniel (ODAG) (b) (6) >
Cc: Wallace, Benjamin (OLC) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >
Subject: RE: Section 230 call today

Yup, have further guidance from call today too. If folks are free before end of day we can hop on to discuss.

Thanks!
Laun

From: Feith, Daniel (ODAG) (b) (6) >
Sent: Friday, May 29, 2020 3:57 PM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Wallace, Benjamin (OLC) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >
Subject: RE: Section 230 call today

Lauren,
When do you need the proposals from us? Would sometime Monday work?
Dan

From: Willard, Lauren (OAG) (b) (6) >

Sent: Friday, May 29, 2020 1:09 PM

To: Shores, Ryan (ODAG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) (b) (6) (OLA) (b) (6) >; Herlihy, Brianna (PAO) (b) (6) >

Subject: RE: Section 230 call today

Duplicative Information - See Document ID 0.7.2270.7830

Wallace, Benjamin (OLC)

From: Wallace, Benjamin (OLC)
Sent: Friday, May 29, 2020 4:02 PM
To: Whitaker, Henry C. (OLC); Willard, Lauren (OAG); Feith, Daniel (ODAG)
Subject: RE: Section 230 call today

I can do now too.

From: Whitaker, Henry C. (OLC) (b) (6) >
Sent: Friday, May 29, 2020 4:01 PM
To: Willard, Lauren (OAG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >
Cc: Wallace, Benjamin (OLC) (b) (6) >
Subject: RE: Section 230 call today

Duplicative Information - See Document ID 0.7.2270.6121



Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Friday, May 29, 2020 4:02 PM
To: Whitaker, Henry C. (OLC); Feith, Daniel (ODAG)
Cc: Wallace, Benjamin (OLC)
Subject: RE: Section 230 call today

Ok let's do it now and quickly.

(b) (6) (b) (6) #

From: Whitaker, Henry C. (OL) (b) (6) >
Sent: Friday, May 29, 2020 4:01 PM
To: Willard, Lauren (OAG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >
Cc: Wallace, Benjamin (OL) (b) (6) >
Subject: RE: Section 230 call today

Duplicative Information - See Document ID 0.7.2270.6121

Toensing, Brady (OLP)

From: Toensing, Brady (OLP)
Sent: Friday, May 29, 2020 5:05 PM
To: Grieco, Christopher (ODAG); Willard, Lauren (OAG); Shores, Ryan (ODAG); Feith, Daniel (ODAG); Raman, Sujit (ODAG); Pandya, Brian (OASG); Whitaker, Henry C. (OLC); Wallace, Benjamin (OLC); Hankey, Mary Blanche (OLA (b) (6)); Herlihy, Brianna (PAO)
Subject: RE: Section 230 call today

ARTICLE BY

Jeffrey D. Neuburger

Proskauer Rose LLP

New Media and Technology Law Blog



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<https://www.natlawreview.com/article/repeal-cda-section-230>

Repeal of CDA Section 230?

Friday, January 17, 2020

In an [interview](#) with the editorial board of the *New York Times*, published today, **former Vice President Joe Biden advocated for repeal of Section 230 of the Communications Decency Act (CDA)**. As readers of this blog may know, the CDA offers service providers protections that underpin the hosting of much of the user-generated content (both good and bad) on the web and social media.

The CDA expressly treats online providers that host or “publish” third party content differently than their offline counterparts, and frees online providers from certain obligations associated with moderating the flood of user-generated content that is uploaded to their servers. The immunities under CDA Section 230 have facilitated the growth of e-commerce and social media, but at the same time has also allowed for the proliferation of fake content and hateful speech. In recent years, the CDA has reached a crossroads of sorts, with the [passage of FOSTA in 2018](#) and with more and more federal legislators on both sides of the aisle calling for “Silicon

Valley” to be reined in and Section 230 to be curtailed or amended. One wonders, however, how curtailing the CDA would affect the vibrancy of the internet. If the present or future Congress reaches some consensus and tinkers with CDA Section 230, would that intentionally (or unintentionally) change the online “rules” that many entities have come to rely on since the CDA was passed over 20 years ago?

* * * * *

Brady C. Toensing
Senior Counsel
Office of Legal Policy
U.S. Department of Justice

(m (b) (6))
o (b) (6)
(b) (6)

From: Toensing, Brady (OLP)
Sent: Friday, May 29, 2020 5:03 PM
To: Grieco, Christopher (ODAG) (b) (6) >; Willard, Lauren (OAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) (b) (6) (OLA) (b) (6) >; Herlihy, Brianna (PAO) (b) (6) >
Subject: RE: Section 230 call today

Joe Biden has said it too.

* * * * *

Brady C. Toensing
Senior Counsel
Office of Legal Policy
U.S. Department of Justice

(m (b) (6))
o (b) (6)
(b) (6)

From: Grieco, Christopher (ODAG) (b) (6) >
Sent: Friday, May 29, 2020 4:51 PM
To: Willard, Lauren (OAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) (b) (6) (OLA) (b) (6) >; Herlihy, Brianna (PAO) (b) (6) >
Subject: RE: Section 230 call today

Yup. He said it twice this morning I believe.

From: Willard, Lauren (OAG) (b) (6) >
Sent: Friday, May 29, 2020 4:50 PM
To: Shores, Ryan (ODAG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Feith,

Daniel (ODAG) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) (b) (6) (OLA) (b) (6) >; Herlihy, Brianna (PAO) (b) (6) >

Subject: RE: Section 230 call today

Also keeping life interesting, Dan just flagged the following, which I had missed in the flurry of today's activity:



Follow

REVOKE 230!

8:15 AM - 29 May 2020

This doesn't change our current path forward, but thought I'd share.

Best,
Lauren

From: Willard, Lauren (OAG)

Sent: Friday, May 29, 2020 1:09 PM

To: Shores, Ryan (ODAG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) (b) (6) . (OLA) (b) (6) >; Herlihy, Brianna (PAO) (b) (6) >

Subject: RE: Section 230 call today

Duplicative Information - See Document ID 0.7.2270.7830

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Saturday, May 30, 2020 12:21 PM
To: Gelber, Alexandra (CRM); Downing, Richard (CRM); Goldfoot, Josh (CRM); Toensing, Brady (OLP); Hardee, Christopher (NSD); Raman, Sujit (ODAG); Motta, Thomas G. (DO) (FBI); Wallace, Benjamin (OLC); Grieco, Christopher (ODAG); Champoux, Mark (OLP); Whitaker, Henry C. (OLC); Wiegmann, Brad (NSD); Winn, Peter A. (OPCL); Pandya, Brian (OASG); Feith, Daniel (ODAG); Shores, Ryan (ODAG); Ramsden, Michelle (OPCL); Proia, Andrew (OPCL); Eyler, Gustav W (b)(6), (7)(C) per FBI (OGC) (FBI); Jones, Darrin E. (ITID) (FBI); Peck, Jessica (CRM); Sabol, Sherry E. (OGC) (FBI)
Subject: RE: Section 230 // May 26 Update
Attachments: (b)(3), (b)(6) per SEC

Hi team,

(b)(3) per SEC

Happy Saturday!

Best,
Lauren

From: Willard, Lauren (OAG)
Sent: Thursday, May 28, 2020 6:03 PM
To: Gelber, Alexandra (CRM) (b) (6) >; Downing, Richard (CRM) (b) (6) >; Goldfoot, Josh (CRM) (b) (6) >
Cc: Toensing, Brady (OLP) (b) (6) >; Hardee, Christopher (NSD) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Motta, Thomas G. (DO) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Wallace, Benjamin (OLC) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Champoux, Mark (OLP) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wiegmann, Brad (NSD) (b) (6) >; Winn, Peter A. (OPCL) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Ramsden, Michelle (OPCL) (b) (6) >; Proia, Andrew (OPCL) (b) (6) >; Eyler, Gustav W. (b) (6) >; (b)(6), (7)(C) per FBI (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Jones, Darrin E. (ITID) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Peck, Jessica (CRM) (b) (6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >
Subject: RE: Section 230 // May 26 Update

Duplicative Information - See Document ID 0.7.2270.7342

Pandya, Brian (OASG)

From: Pandya, Brian (OASG)
Sent: Saturday, May 30, 2020 1:52 PM
To: Willard, Lauren (OAG)
Cc: Toensing, Brady (OLP); Raman, Sujit (ODAG)
Subject: Re: Section 230 call today
Attachments: image001.png

Agree with both of you on timing and outreach.

Sent from my iPhone

On May 30, 2020, at 12:57 PM, Willard, Lauren (OAG) (b) (6) > wrote:

Thanks! I think that's right. Don't want a false start if we do change directions, but can chat earlier if anyone proactively reaches out to us (or starts saying anything publicly we need to address).

Best,
Lauren

From: Toensing, Brady (OLP) (b) (6) >
Sent: Saturday, May 30, 2020 12:55 PM
To: Willard, Lauren (OAG) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >
Subject: RE: Section 230 call today

Hi, Lauren. No worries on the email – just waiting for the spaceship to launch. I am happy to reach out to (b) (6). But I think we should wait, if possible, until we settle on any changes, if any, we may decide to make on our proposal – so wait until we see how things shake out. Best, b

* * * * *

Brady C. Toensing
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
(m (b) (6)
o (b) (6)
(b) (6)

From: Willard, Lauren (OAG) (b) (6) >
Sent: Saturday, May 30, 2020 12:13 PM
To: Toensing, Brady (OLP) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >
Subject: FW: Section 230 call today

Apologies for email on a Saturday, but wanted to quickly touch base with this group on outreach plans.

Given last week's events, I think it would be helpful to have follow up conversations with our experts (especially those that were supportive of our legislative proposal). These will of course be delicate conversations, so it might be helpful to strategize in advance on approach (which may depend on the person). I'm hoping the message will be that we are (b) (5)

[REDACTED]

[REDACTED]

The key people I think we need to reach out to next week are the following – categorized by main contact

Sujit (b) (5)
Brian (b) (5)
Brady (b) (5)

I also want to follow up with (b) (5) who I spoke to with Peter just last Wednesday.

Welcome this group's thoughts on whether it is worth reaching out to them sooner or if we can wait a bit to see how things shake out Monday/Tuesday. Also, please let me know if you get any incoming calls or emails from any of our experts.

Best,
Lauren

From: Willard, Lauren (OAG)
Sent: Friday, May 29, 2020 4:50 PM
To: Shores, Ryan (ODAG) (b) (6); Grieco, Christopher (ODAG) (b) (6); Feith, Daniel (ODAG) (b) (6); Raman, Sujit (ODAG) (b) (6); Pandya, Brian (OASG) (b) (6); Whitaker, Henry C. (OLC) (b) (6); Wallace, Benjamin (OLC) (b) (6); Toensing, Brady (OLP) (b) (6); Hankey, Mary Blanche (OLA) (b) (6); (b) (6) (OLA) (b) (6); Herlihy, Brianna (PAO) (b) (6)
Subject: RE: Section 230 call today

Also keeping life interesting, Dan just flagged the following, which I had missed in the flurry of today's activity:

<image001.png>

This doesn't change our current path forward, but thought I'd share.

Best,
Lauren


From: Willard, Lauren (OAG)
Sent: Friday, May 29, 2020 1:09 PM

To: Shores, Ryan (ODAG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) >; (b) (6) (OLA) (b) (6) >; Herlihy, Brianna (PAO) (b) (6) >

Subject: RE: Section 230 call today

Duplicative Information - See Document ID 0.7.2270.7830



Donald J. Trump 

@realDonaldTrump

[Follow](#)



REVOKE 230!

8:15 AM - 29 May 2020

Document ID: 0.7.2270.7338-000001

Gelber, Alexandra (CRM)

From: Gelber, Alexandra (CRM)
Sent: Monday, June 1, 2020 8:19 AM
To: Toensing, Brady (OLP); Willard, Lauren (OAG); Downing, Richard (CRM); Goldfoot, Josh (CRM); Hardee, Christopher (NSD); Raman, Sujit (ODAG); Motta, Thomas G. (DO) (FBI); Wallace, Benjamin (OLC); Grieco, Christopher (ODAG); Champoux, Mark (OLP); Whitaker, Henry C. (OLC); Wiegmann, Brad (NSD); Winn, Peter A. (OPCL); Pandya, Brian (OASG); Feith, Daniel (ODAG); Shores, Ryan (ODAG); Ramsden, Michelle (OPCL); Proia, Andrew (OPCL); Eyler, Gustav W. (b)(6), (7)(C) per FBI (OGC) (FBI); Jones, Darrin E. (ITID) (FBI); Peck, Jessica (CRM); Sabol, Sherry E. (OGC) (FBI)
Subject: RE: Section 230 // May 26 Update

One nuance about the NCMEC data. I spoke to them last week, and they attribute the astonishing increase in CyberTips in part to the viral distribution of some CSAM in an effort by individuals to try to locate the children depicted in the material. So not all of this is due to COVID.

Alexandra R. Gelber
Child Exploitation and Obscenity Section

From: Toensing, Brady (OLP)
Sent: Sunday, May 31, 2020 11:39 AM
To: Willard, Lauren (OAG) (b)(6) >; Gelber, Alexandra (CRM) (b)(6) >; Downing, Richard (CRM) (b)(6) >; Goldfoot, Josh (CRM) (b)(6) >; Hardee, Christopher (NSD) (b)(6) >; Raman, Sujit (ODAG) (b)(6) >; Motta, Thomas G. (DO) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Wallace, Benjamin (OLC) (b)(6) >; Grieco, Christopher (ODAG) (b)(6) >; Champoux, Mark (OLP) (b)(6) >; Whitaker, Henry C. (OLC) (b)(6) >; Wiegmann, Brad (NSD) (b)(6) >; Winn, Peter A. (OPCL) (b)(6) >; Pandya, Brian (OASG) (b)(6) >; Feith, Daniel (ODAG) (b)(6) >; Shores, Ryan (ODAG) (b)(6) >; Ramsden, Michelle (OPCL) (b)(6) >; Proia, Andrew (OPCL) (b)(6) >; Eyler, Gustav W. (b)(6) >; (b)(6), (7)(C) per FBI (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Jones, Darrin E. (ITID) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Peck, Jessica (CRM) (b)(6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >
Subject: RE: Section 230 // May 26 Update

From the WSJ this morning.

https://www.wsj.com/articles/as-children-spend-more-time-online-predators-follow-11590926401?mod=hp_featst_pos4

“... Reports of online child exploitation have risen since the start of the [coronavirus pandemic](#). In March, the National Center for Missing and Exploited Children received two million reports of online child exploitation, up from 983,000 a year earlier. In April, the nonprofit received 4.1 million reports of child online exploitation, up from around 1 million the year-earlier month. The majority of such reports are made regarding child sexual abuse material, as federal law requires, by companies that operate online services.

A spokeswoman for Facebook, which owns Instagram, said, “Under all circumstances, including Covid-19, keeping young people safe and removing child exploitative content is our top priority across our services. During the pandemic sharing on our platforms has increased overall, and we have detected and removed more child exploitative content as a result.”

Mrs. Gross said she reported the incidents with her daughter to Instagram via a reporting feature in the app. Facebook said it doesn’t have a record of a report but that it has removed an account for violating policies against inappropriate interactions with children after an inquiry by The Wall Street Journal.

Law-enforcement officials say the rise in abuse is likely happening because both children and adults are spending more time online these days, as schools are closed and many working parents don’t have access to child-care services. ...”

Brady C. Toensing
Senior Counsel
Office of Legal Policy
U.S. Department of Justice

(m) (b)(6)
o (b)(6)
(b)(6)

From: Willard, Lauren (OAG) (b)(6) >
Sent: Saturday, May 30, 2020 12:21 PM
To: Gelber, Alexandra (CRM) (b)(6) >; Downing, Richard (CRM) (b)(6) >; Goldfoot, Josh (CRM) (b)(6) >; Toensing, Brady (OLP) (b)(6) >; Hardee, Christopher (NSD) (b)(6) >; Raman, Sujit (ODAG) (b)(6) >; Motta, Thomas G. (DO) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Wallace, Benjamin (OLC) (b)(6) >; Grieco, Christopher (ODAG) (b)(6) >; Champoux, Mark (OLP) (b)(6) >; Whitaker, Henry C. (OLC) (b)(6) >; Wiegmann, Brad (NSD) (b)(6) >; Winn, Peter A. (OPCL) (b)(6) >; Pandya, Brian (OASG) (b)(6) >; Feith, Daniel (ODAG) (b)(6) >; Shores, Ryan (ODAG) (b)(6) >; Ramsden, Michelle (OPCL) (b)(6) >; Proia, Andrew (OPCL) (b)(6) >; Eyler, Gustav W. (b)(6) >; (b)(6), (7)(C) per FBI (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Jones, Darrin E. (ITID) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Peck, Jessica (CRM) (b)(6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >

Duplicative Information - See Document ID 0.7.2270.6494

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Monday, June 1, 2020 9:36 PM
To: Gelber, Alexandra (CRM); Downing, Richard (CRM); Goldfoot, Josh (CRM); Toensing, Brady (OLP); Hardee, Christopher (NSD); Raman, Sujit (ODAG); Motta, Thomas G. (DO) (FBI); Wallace, Benjamin (OLC); Grieco, Christopher (ODAG); Champoux, Mark (OLP); Whitaker, Henry C. (OLC); Wiegmann, Brad (NSD); Winn, Peter A. (OPCL); Pandya, Brian (OASG); Feith, Daniel (ODAG); Shores, Ryan (ODAG); Ramsden, Michelle (OPCL); Proia, Andrew (OPCL); Eyler, Gustav W. (b)(6), (7)(C) per FBI (OGC) (FBI); Jones, Darrin E. (ITID) (FBI); Peck, Jessica (CRM); Sabol, Sherry E. (OGC) (FBI)
Subject: RE: Section 230 // May 26 Update
Attachments: Section 230 Key Takeaways Recommendations_6.1.pdf

Hi everyone,

Tomorrow's Section 230 call will be completely optional. There is a lot going on right now, so please feel free to prioritize more pressing matters.

But I'll try dial in and be able to answer questions for anyone that wants to join, given all the events of last week.

Also attached is the nicely formatted version of our Key Takeaways (with many thanks to ODAG paralegal Steffanie Lee). Still hopeful we can get our work product out there in the near term.

Hope everyone is staying safe!

Best,
Lauren

From: Willard, Lauren (OAG)
Sent: Saturday, May 30, 2020 12:21 PM
To: Gelber, Alexandra (CRM) (b) (6) >; Downing, Richard (CRM) (b) (6) >; Goldfoot, Josh (CRM) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Hardee, Christopher (NSD) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Motta, Thomas G. (DO) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Wallace, Benjamin (OLC) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Champoux, Mark (OLP) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wiegmann, Brad (NSD) (b) (6) >; Winn, Peter A. (OPCL) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Ramsden, Michelle (OPCL) (b) (6) >; Proia, Andrew (OPCL) (b) (6) >; Eyler, Gustav W. (b) (6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (7)(C) per FBI (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Jones, Darrin E. (ITID) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Peck, Jessica (CRM) (b) (6) >;
Subject: RE: Section 230 // May 26 Update

Duplicative Information - See Document ID 0.7.2270.6494

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Monday, June 1, 2020 9:44 PM
To: Jones, Darrin E. (ITID) (FBI)
Subject: Re: Section 230 // May 26 Update
Attachments: image001.jpg

Yes, I've heard that too. Thanks for everything you all our doing to keep the city safe — take care!

Best,
Lauren

On Jun 1, 2020, at 9:41 PM, Jones, Darrin E. (STB) (FBI) (b)(7)(E) per FBI > wrote:

Thank you Lauren. You're right, we are consumed at the moment with civil unrest issues. Thanks for keeping this on the front burner on your side of the street. I heard the lawful access piece is delayed a week, I think that's also wise. Darrin

-

On Jun 1, 2020 9:36 PM, "Willard, Lauren (OAG)" (b) (6) > wrote:

Duplicative Information - See Document ID 0.7.2270.6684



Grieco, Christopher (ODAG)

From: Grieco, Christopher (ODAG)
Sent: Tuesday, June 2, 2020 8:38 AM
To: Willard, Lauren (OAG); Whitaker, Henry C. (OLC); Wallace, Benjamin (OLC)
Subject: RE: Connecting on section 230

(b)(5) per OLC
[REDACTED]

From: Hankey, Mary Blanche (OLA) (b) (6) >
Sent: Monday, June 1, 2020 6:13 PM
To: Willard, Lauren (OAG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >
Subject: RE: Connecting on section 230

[More from Hawley's staff.](#)

"We discussed the issue of whether terms of service create a binding contract related to section 230. Several cases have held that section 230 grants immunity for contractual claims, so terms of service alone are unlikely to afford relief in many jurisdictions. *E.g.*, *Lancaster v. Alphabet Inc*, No. 15-cv-05299-HSG, 2016 WL 3648608, at *5 (N.D. Cal., July 8, 2016); *King v. Facebook*, Doc. 44, No. 19-cv-01987 (N.D. Cal., Sept. 05, 2019).

From: Hankey, Mary Blanche (OLA)
Sent: Friday, May 29, 2020 10:07 PM
To: Willard, Lauren (OAG) (b) (6) >; Christopher Grieco (ODA) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >
Subject: FW: Connecting on section 230

[Hi All—Please see below from Hawley's office. Thanks!](#)

From: Divine, Josh (Hawley) (b) (6) >
Sent: Friday, May 29, 2020 3:36 PM
To: Hankey, Mary Blanche (OLA) (b) (6) >
Cc: Ehrett, John (Hawley) (b) (6) (OLA) >; Reses, Jacob (Hawley) (b) (6) >
Subject: Re: Connecting on section 230

Mary, can you pass along this article to the rest of the DOJ team that we were talking to earlier? The last two sections before the conclusion argue that the benefits of behavioral advertising are minimal or unclear and discuss behavioral advertising in the context of section 230.

<https://knightcolumbia.org/content/first-things-first-online-advertising-practices-and-their-effects-on-platform-speech>

Josh Divine | Deputy Counsel

U.S. Senator for Missouri, Josh Hawley

Desk (b) (6)

Email (b) (6)



From: "Hankey, Mary Blanche (OLA)" (b) (6) >
Date: Friday, May 29, 2020 at 12:49 PM
To: "Reses, Jacob (Hawley)" (b) (6) >, "Divine, Josh (Hawley)" (b) (6) >, "Plotkin, Kyle (Hawley)" (b) (6) >, "Ford, Natalie (Hawley)" (b) (6) >
Cc: "Ehrett, John (Hawley)" (b) (6) (OLA)" (b) (6) >
Subject: RE: Connecting on section 230

Great. We can use the conference line below.

For Audio Connection Dial (b) (6)

Attendee Access Code (b) (6)

From: Reses, Jacob (Hawley) (b) (6) >
Sent: Friday, May 29, 2020 12:46 PM
To: Divine, Josh (Hawley) (b) (6) >; Plotkin, Kyle (Hawley) (b) (6) >; Ford, Natalie (Hawley) (b) (6) >
Cc: Hankey, Mary Blanche (OLA) (b) (6) >; Ehrett, John (Hawley) (b) (6) (OLA) (b) (6) >
Subject: Re: Connecting on section 230

Our chief of staff Kyle Plotkin will also be joining.

Jacob Reses

Senior Policy Advisor

U.S. Senator for Missouri Josh Hawley

On May 29, 2020, at 12:40 PM, Divine, Josh (Hawley) (b) (6) > wrote:

Yes. 130 should work for us.

Josh Divine | Deputy Counsel

U.S. Senator for Missouri, Josh Hawley

Desk (b) (6)

Email (b) (6)

<image001.png><image002.png><image003.png><image004.png><image005.png>

From: "Hankey, Mary Blanche (OLA)" (b) (6) >
Date: Friday, May 29, 2020 at 12:40 PM
To: "Divine, Josh (Hawley)" (b) (6) >
Cc: "Reses, Jacob (Hawley)" (b) (6) >, "Ehrett, John (Hawley)" (b) (6) (b) (6) (OLA)" (b) (6) >
Subject: RE: Connecting on section 230

Josh—Are you all available at 1:30 for a call with some of our SMEs?

From: Hankey, Mary Blanche (OLA)
Sent: Friday, May 29, 2020 12:01 PM
To: Divine, Josh (Hawley) (b) (6) >
Cc: Reses, Jacob (Hawley) (b) (6) >; Ehrett, John (Hawley) (b) (6) (b) (6) (OLA) (b) (6) >
Subject: RE: Connecting on section 230

Hi Josh,

Thanks for reaching out. I have removed most of the other DOJ folks, as we try to keep all communications with the Hill coming through OLA.

As previously discussed, I am attaching a draft proposal. Please note that the Department is continuing to refine the language and this should be considered a work in progress. We are also asking for your office to keep it confidential as we work together. To that end, the attachment is password protected. I will follow up in a separate message with the password.

Understanding your office's limitation this afternoon, we are working to find a time that works for the group. We will circle back once we are able to finalize. Please feel free to reach out to me (b) (6) at any time.

Thanks,

Mary Blanche

From: Willard, Lauren (OAG) (b) (6) >
Sent: Friday, May 29, 2020 11:22 AM
To: Divine, Josh (Hawley) (b) (6) >
Cc: Grieco, Christopher (ODAG) (b) (6) >; Reses, Jacob (Hawley) (b) (6) >; Ehrett, John (Hawley) (b) (6) >; (b) (6) (OLA) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) >
Subject: RE: Connecting on section 230

Josh, thanks again! Mary Blanche, CC'd here, is going to find a time for all of us to chat before 3 today and send along something in advance.

We've also had some further thoughts since our last discussion that aren't yet reflected in any work product, but may be helpful to chat through together.

From: Willard, Lauren (OAG)
Sent: Friday, May 29, 2020 11:13 AM
To: Divine, Josh (Hawley) (b) (6) >
Cc: Grieco, Christopher (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Reses, Jacob (Hawley) (b) (6) >; Ehrett, John (Hawley) (b) (6) (OLA) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >
Subject: RE: Connecting on section 230

Great! I'll work with our folks and send around a calendar invite and dial-in shortly. We will try to find a time before 3.

Best,
Lauren

From: Divine, Josh (Hawley) (b) (6) >
Sent: Friday, May 29, 2020 11:10 AM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Grieco, Christopher (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Reses, Jacob (Hawley) (b) (6) >; Ehrett, John (Hawley) (b) (6) (OLA) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >
Subject: Re: Connecting on section 230

On our end, we can chat at any time today *except* 3-4.

Josh Divine | Deputy Counsel

U.S. Senator for Missouri, Josh Hawley

Desk (b) (6)

Email (b) (6)

[!\[\]\(aa53ad6fea213b8b2226d3077e30533a_img.jpg\) <image006.png>](#)[!\[\]\(a1c2189b125458bd8fa8822d0c2da6bc_img.jpg\) <image007.png>](#)[!\[\]\(2fd953c3ecfc88f2692d4bd02c4e8bdc_img.jpg\) <image008.png>](#)[!\[\]\(aae91f6df6753c5c553ea412ecfb91bc_img.jpg\) <image009.png>](#)[!\[\]\(0f3706b37117ecf113ff7aea6af0ad36_img.jpg\) <image010.png>](#)

From: "Willard, Lauren (OAG)" (b) (6) >
Date: Friday, May 29, 2020 at 11:04 AM
To: "Divine, Josh (Hawley)" (b) (6) >
Cc: "Grieco, Christopher (ODAG)" (b) (6) >, "Shores, Ryan (ODAG)" (b) (6) >, "Reses, Jacob (Hawley)" (b) (6) >, "Ehrett, John (Hawley)" (b) (6) >, "Grieco, Christopher (ODAG)" (b) (6) (OLA)" (b) (6) >, "Whitaker, Henry C. (OLC)" (b) (6) >, "Wallace, Benjamin (OLC)" (b) (6) >
Subject: RE: Connecting on section 230

Hi Josh,

We were about to do the same! Adding a few more folks working on this project with me. What time

works for you all?

We were also going to send over some written materials following up on our last discussion, which I can try to do before our chat.

Best,
Lauren

From: Divine, Josh (Hawley) (b) (6) >
Sent: Friday, May 29, 2020 11:01 AM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Shores, Ryan (ODAG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Reses, Jacob (Hawley) (b) (6) >; Ehrett, John (Hawley) (b) (6) >
Subject: Connecting on section 230

Lauren,

Senator Hawley asked me to reach out to you to discuss section 230 matters. Are you available to chat soon?

Josh Divine | Deputy Counsel

U.S. Senator for Missouri, Josh Hawley

Desk (b) (6)

Emai (b) (6)

[<image011.png><image012.png><image013.png><image014.png><image015.png>](#)

Grieco, Christopher (ODAG)

From: Grieco, Christopher (ODAG)
Sent: Tuesday, June 2, 2020 8:52 AM
To: Whitaker, Henry C. (OLC); Willard, Lauren (OAG); Wallace, Benjamin (OLC)
Subject: RE: Connecting on section 230

I just read the two cases cited below (b)(5) per OLC

. I thin (b) (5)

. These strike me as (b) (5)

From: Whitaker, Henry C. (OLC) (b) (6) >

Sent: Tuesday, June 2, 2020 8:47 AM

To: Grieco, Christopher (ODAG) (b) (6) >; Willard, Lauren (OAG) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >

Subject: RE: Connecting on section 230

We have been very busy with (b)(5) per OLC and many other things. But will try to take a look.

From: Grieco, Christopher (ODAG) (b) (6) >

Sent: Tuesday, June 2, 2020 8:38 AM

To: Willard, Lauren (OAG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >

Subject: RE: Connecting on section 230

Duplicative Information - See Document ID 0.7.2270.7466

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Tuesday, June 2, 2020 8:55 AM
To: Grieco, Christopher (ODAG)
Cc: Whitaker, Henry C. (OLC); Wallace, Benjamin (OLC)
Subject: Re: Connecting on section 230

Agreed, and thanks for reading cases. I asked OLA to reach back out to Hawley staff to see if they want to chat again this week and we can discuss this point further.

On Jun 2, 2020, at 8:53 AM, Grieco, Christopher (ODAG) (b) (6) > wrote:

Agreed. These cases seem lik (b) (5)

From: Willard, Lauren (OAG) (b) (6) >
Sent: Tuesday, June 2, 2020 8:50 AM
To: Grieco, Christopher (ODAG) (b) (6) >
Cc: Whitaker, Henry C. (OLC) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >
Subject: Re: Connecting on section 230

I thin (b) (5)

This is also a different point than they made on the phone. They originally said courts have interpreted ToS not to be contracts under which a user could sue for breach (regardless of Section 230 (b) (5)

I think OLC is slammed, but agree looking at the cases would be helpful. Maybe I can ask on call today if anyone has availability.

On Jun 2, 2020, at 8:38 AM, Grieco, Christopher (ODAG) (b) (6) > wrote:

Duplicative Information - See Document ID 0.7.2270.7466

Pandya, Brian (OASG)

From: Pandya, Brian (OASG)
Sent: Tuesday, June 2, 2020 9:46 AM
To: Willard, Lauren (OAG)
Subject: RE: Section 230 // May 26 Update

Thanks. I have to jump on another call at 10 AM, so I'll sit out today's call. I should have the one-pager we discussed yesterday by EOD today.

From: Willard, Lauren (OAG) (b) (6) >
Sent: Monday, June 1, 2020 9:36 PM
To: Gelber, Alexandra (CRM) (b) (6) >; Downing, Richard (CRM) (b) (6) >; Goldfoot, Josh (CRM) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Hardee, Christopher (NSD) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Motta, Thomas G. (DO) (FBI) (b) (6), (7)(C), (7)(E) per FBI >; Wallace, Benjamin (OLC) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Champoux, Mark (OLP) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wiegmann, Brad (NSD) (b) (6) >; Winn, Peter A. (OPC) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Ramsden, Michelle (OPC) (b) (6) >; Proia, Andrew (OPC) (b) (6) >; Eyler, Gustav W. (b) (6) >; Sabol, Sherry E. (OGC) (FBI) (b) (6), (7)(C), (7)(E) per FBI >; Jones, Darrin E. (ITID) (FBI) (b) (6), (7)(C), (7)(E) per FBI >; Peck, Jessica (CRM) (b) (6) >
Subject: RE: Section 230 // May 26 Update

Duplicative Information - See Document ID 0.7.2270.6684

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Wednesday, June 3, 2020 4:25 PM
To: Herlihy, Brianna (PAO)
Subject: RE: draft press release
Attachments: 230 TPs_6.3.docx; 05-05-20_Section 230 Press Release (lsw edits).docx; Section 230 Key Takeaways Recommendations_6.1.pdf

Hi Brianna,

Apologies if I missed it, but did you have any thoughts on edits to the draft press release? We may want to work in some new points about (b) (5). I'm attaching really rough draft TPs that may be helpful. Also the latest draft of the Takeaways.

Also welcome your thoughts on how the website looks when you get a chance. Unless you've heard otherwise, I still think we don't plan to raise to the Kerri/AG level until tomorrow. But there may be appetite to do something on Friday or Monday, so want to make sure I have my ducks in a row.

Best,
Lauren

From: Willard, Lauren (OAG)
Sent: Wednesday, May 27, 2020 6:36 PM
To: Herlihy, Brianna (PAO) (b) (6) >
Subject: draft press release

Brianna,

Here is the draft press release that Alexei started with a few edits on top. The "executive summary" of the Key Takeaways is also a good resource to draw from (first 4 pages of other attachment).

Thanks!
Lauren

Lauren S. Willard
Counselor to the Attorney General
U.S. Department of Justice
M (b) (6)
(b) (6)

(b) (5)

- (b) (5)
- (b) (5)
- (b) (5)
- (b) (5)
- (b) (5)
- The DOJ's proposed reforms to Section 230 will (b) (5)

(b) (5)

Section 230 Generally

- When Section 230 of the Communications Decency Act was enacted, almost 25 years ago, immunity was seen as vital to protecting new technology in its infancy. Section 230 sought to ensure that websites acting in “good faith” to take down obscene or unlawful content that would be harmful to children would not become “publishers” and thereby strictly liable for *all* third-party content on their services.
- Over time, however, online platforms have evolved significantly from simple online bulletin boards to actively curated forums with sophisticated algorithms. Several online platforms have transformed into the nation’s largest and most valuable companies, and serve as primary conduits for how we receive and share information.
- Changes in technology have been accompanied by the courts’ expansive interpretation of Section 230, stretching that immunity to go well beyond the statute’s original purpose to protect and encourage “Good Samaritan” behavior.
- This combination has left online platforms both immune for a wide array of harms caused by their third-party content and free to censor third-party content with little transparency or accountability.
- The call for Section 230 has been bipartisan. Both Republicans and Democrats have recognized that the sweeping scope of Section

230 is outdated in light of current technology and that changes need to be made.

- This is also not a new issue. The Department has been analyzing these concerns and this problem since last summer.
- But with the COVID pandemic, the need for reform is even more important as more citizens—including our children—are relying on the internet for daily activities. It is imperative that we maintain the internet as an open, but safe space for our society.

Section 230 & Presidential EO

- The President’s Executive Order is an important step to clarify the proper scope of Section 230 immunity and to ensure that powerful online platforms may not abuse this protection at the expense of the public interest and free speech.
- The Department will (b) (5) [REDACTED]
[REDACTED]
- (b) (5) [REDACTED]
[REDACTED]
[REDACTED]

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Wednesday, June 3, 2020 4:59 PM
To: Whitaker, Henry C. (OLC)
Cc: Shores, Ryan (ODAG); Feith, Daniel (ODAG); Grieco, Christopher (ODAG); Toensing, Brady (OLP); Pandya, Brian (OASG); Wallace, Benjamin (OLC); Raman, Sujit (ODAG); Liu, Jeffrey (OLC)
Subject: Re: 230 new legislative text

Thanks!! Sorry thought Jeff was already on this chain.

Sent from my iPhone

On Jun 3, 2020, at 4:56 PM, Whitaker, Henry C. (OLC) (b) (6) > wrote:

Adding Jeff.

From: Willard, Lauren (OAG) (b) (6) >
Sent: Wednesday, June 3, 2020 4:37 PM
To: Shores, Ryan (ODAG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >
Subject: RE: 230 new legislative text

Yes, I think th (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

Also, did folks have any reactions to the Snap article?
<https://www.nytimes.com/2020/06/03/technology/snapchat-trump.html?action=click&module=Top%20Stories&pgtype=Homepage>

Snap's selective decisions of who to promote and not promote seem distinct from selective decisions about what content to take down. One might argue that the active promotion of some users' snaps and not others should render Snap responsible for any unlawful content that sponsored users post. A potential counterargument on the policy side is that Snap may likely choose not to promote any users for fear of intermediary liability, which (arguable) creates an inferior product from the users' perspective.

Best,
Lauren

From: Shores, Ryan (ODAG) (b) (6) >
Sent: Wednesday, June 3, 2020 4:27 PM

(b) (5) [Redacted]
[Redacted]

(b) (5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

(b) (5) [Redacted]
[Redacted]

(b) (5) [Redacted] [Redacted]
[Redacted]
[Redacted]
[Redacted]

(b) (5) [Redacted]
[Redacted]
[Redacted]

(b) (5) [Redacted]
[Redacted]
[Redacted]

(b) (5) [Redacted]
[Redacted]
[Redacted]

(b) (5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

[Redacted]
[Redacted]

(b) (5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

Meanwhile, rulemaking can address the following (and thank you to Brady who is currently working on a fuller proposal):

- (1) (b) (5) [Redacted]

(b) (5)

(2) (b) (5)

(3) (b) (5)

(4) (b) (5)

From: Shores, Ryan (ODAG) (b) (6) >
Sent: Tuesday, June 2, 2020 6:28 PM
To: Willard, Lauren (OAG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >
Subject: RE: 230 new legislative text

I see Henry's point, which pushes me more toward (b) (5). If we do that, then I would strongly urge (b) (5) (I still want to think about whether we want (b) (5).) Under Option 1, we would have (b) (5).

In general, I would try (b) (5), but appreciate you are trying to find some middle ground. Will give it some further thought.

From: Willard, Lauren (OAG) (b) (6) >
Sent: Tuesday, June 2, 2020 6:07 PM
To: Whitaker, Henry C. (OLC) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >
Subject: RE: 230 new legislative text

Would a third option to be (b) (5) That could (b) (5). Just a thought.

From: Whitaker, Henry C. (OLC) (b) (6) >
Sent: Tuesday, June 2, 2020 6:02 PM
To: Willard, Lauren (OAG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Grieco, Christopher (ODAG)

(b) (6) >; Toensing, Brady (OLP) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >
Subject: RE: 230 new legislative text

If the problem with the current wording of option 1 is tha (b) (5)
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. The problem is that once
yo (b) (5)
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

From: Willard, Lauren (OAG) (b) (6) >
Sent: Tuesday, June 2, 2020 5:54 PM
To: Feith, Daniel (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >
Subject: RE: 230 new legislative text

Deliberative Process / Pre-Decisional

Thanks Ryan! I thin (b) (5)
[REDACTED]. But let me know if not.

The one point I'll flag is th (b) (5)
[REDACTED]. So the question is whether we ca (b) (5)
[REDACTED] That could be something
we propose back to the Hill rather than have in our own OMB draft. The concern abo (b) (5)
[REDACTED].

Maybe somethin (b) (5)
[REDACTED]
That mean (b) (5)
Thoughts?

From: Feith, Daniel (ODAG) (b) (6) >
Sent: Tuesday, June 2, 2020 5:49 PM
To: Shores, Ryan (ODAG) (b) (6) >; Willard, Lauren (OAG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >
Subject: RE: 230 new legislative text

I fully agree with these points.

From: Shores, Ryan (ODAG) (b) (6) >
Sent: Tuesday, June 2, 2020 5:45 PM
To: Willard, Lauren (OAG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >
Subject: RE: 230 new legislative text

A few thoughts from me:

- (1) In terms of which approach to take – i.e., ed (b) (5) directly or amen (b) (5) – I pref (b) (5) as it seems simpler and more consistent with our original approach (i.e. (b) (5)).
- (2) I like Brady’s edits to the amende (b) (5) language and would remove the bracketed language.
- (3) With respect to the OLC proposal, I think we wan (b) (5). Specifically, I thin (b) (5).
(b) (5)
(b) (5)
(b) (5)
(b) (5)
(b) (5)
(b) (5)
- (4) I have a similar thought about (C) in the OLC proposal: (b) (5)
(b) (5)
(b) (5)
(b) (5)
(b) (5)

From: Willard, Lauren (OAG) (b) (6) >
Sent: Tuesday, June 2, 2020 5:07 PM
To: Feith, Daniel (ODAG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >
Subject: RE: 230 new legislative text

Thanks all.

I’ve put this in a word document to ease review. I think we have two avenues for edits that go towards editorializing – either amen (b) (5) directly or amend the information o (b) (5)

O (b) (5) I tried Chris’ suggestion of just puttin (b) (5) in front of for now.

The edits to the Good Faith definition are at the end.

To the point about (b) (5) this was an edit proposed by both MA Franks and Hawley’s staff to clarify

that h (b) (5) . I thin (b) (5) – but welcome views of if there are reasons not to adopt that edit (which is a smaller tweak than others).

Best,
Lauren

From: Feith, Daniel (ODAG) (b) (6) >
Sent: Tuesday, June 2, 2020 5:01 PM
To: Grieco, Christopher (ODAG) (b) (6) >; Willard, Lauren (OAG) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >
Subject: RE: 230 new legislative text

A few reactions to Lauren's proposed edits:

- I think the edits (b) (5) are generally fine in substance, though I might chang (b) (5) to (b) (5) to make cle (b) (5). I also agree with the suggestion (b) (5).
- Fo (b) (5), is the wor (b) (5) meant to be limited (b) (5)? If so, that strikes me as quite a high bar. The practical impact of the change is somewhat blunted by h (b) (5) language, given ho (b) (5), but it seems like there' (b) (5). I also favor leavin (b) (5) instead of replacing it with (b) (5).
- I agree that the last sentence of h (b) (5) definition goes too far.

From: Grieco, Christopher (ODAG) (b) (6) >
Sent: Tuesday, June 2, 2020 4:57 PM
To: Willard, Lauren (OAG) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >
Subject: RE: 230 new legislative text

I agree in removing the last bracketed clause in the definition below. Also, I second Brian's question. If we do edit this definition, are the other changes (b) (5) provision still necessary?

From: Willard, Lauren (OAG) (b) (6) >
Sent: Tuesday, June 2, 2020 4:17 PM
To: Toensing, Brady (OLP) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >
Subject: RE: 230 new legislative text

Thanks Chris, Brady, Brian, and OLC for the feedback so far. I'm going to try to move this to a Word document tonight that combines the various proposals, but before doing so wanted to see if Ryan, Sujit, or Dan had thoughts on the current options (or if anyone had reactions to OLC's recent draft).

Best,
Lauren

From: Toensing, Brady (OLP) (b) (6) >
Sent: Tuesday, June 2, 2020 3:36 PM
To: Pandya, Brian (OASG) (b) (6) >; Willard, Lauren (OAG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >
Subject: RE: 230 new legislative text

Below are some small suggestions (in purple) to Brian's proposal for "information content provider." And I agree the last sentence (b) (5). As for (b) (5), I vote to stick with (b) (5) (and include a definition along the lines of what Lauren proposes (b) (5)). If we keep (b) (5) it should be defined.

(b) (5)
(b) (5)
(b) (5)
(b) (5)
(b) (5)
(b) (5)
(b) (5)
(b) (5)
(b) (5)
(b) (5)

* * * * *

Brady C. Toensing
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
(m (b) (6))
(o (b) (6))
(b) (6)

From: Pandya, Brian (OASG) (b) (6) >
Sent: Tuesday, June 2, 2020 2:36 PM
To: Willard, Lauren (OAG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Feith, Daniel

(ODAG) (b) (6) >

Subject: RE: 230 new legislative text

I like the proposed revision (b) (5). If we're revisin (b) (5), do we really need to chang (b) (5)?

On the definition o (b) (5), the last sentence might b (b) (5). I also fear it could b (b) (5)

(b) (5). I suggest revising as follows:

(b) (5)
(b) (5)
(b) (5)
(b) (5)
(b) (5)
(b) (5)
(b) (5)
(b) (5)
(b) (5)

From: Willard, Lauren (OAG) (b) (6) >

Sent: Tuesday, June 2, 2020 11:00 AM

To: Grieco, Christopher (ODAG) (b) (6) >; Toensing, Brady (OLP)

(b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >

Subject: RE: 230 new legislative text

A few quick reactions, but welcome others' thoughts.

- We aren't wedded to anything yet – these are just for discussion based on the various discussions on Friday.
- The current language i (b) (5) – which I think would be hard in light of current events. So we can strike altogether or chang (b) (5) (b) (5). This was NSD's add to addres (b) (5).
- (b) (5) seemed redundant, but if we lim (b) (5) then they aren't completely the same.
- [X] is a placeholder as I wasn't sure where we would end up putting h (b) (5) provision.

From: Grieco, Christopher (ODAG) (b) (6) >

Sent: Tuesday, June 2, 2020 10:55 AM

To: Willard, Lauren (OAG) (b) (6) >; Toensing, Brady (OLP)

(b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Pandya, Brian

(OASG) (b) (6) >

Subject: RE: 230 new legislative text

So are we wedded to changin (b) (5) now and putting in place h (b) (5) as opposed to keeping them separate as we had? I think the new language on that point looks fine although I might suggest switching up the order of the two clauses so the new clause comes second, and move the (b) (5) to h (b) (5), so it looks like we are keep more of the original.

Th (b) (5) is going to be a tricky one given the online world of the last few days. And I agree tha (b) (5) is probably preferable, but I don't think we ca (b) (5). I wonder if we can just pu (b) (5) in fron o (b) (5) to make it clear tha (b) (5). That at least would (b) (5)

What is the new clause in h (b) (5) supposed to get at? I am not sure what the [X] is for in new clause?

From: Willard, Lauren (OAG) (b) (6) >

Sent: Tuesday, June 2, 2020 10:32 AM

To: Toensing, Brady (OLP) (b) (6) >; Grieco, Christopher (ODAG)

(b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Wallace, Benjamin (OLC)

(b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Raman, Sujit

(ODAG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Pandya, Brian

(OASG) (b) (6) >

Subject: 230 new legislative text

Deliberative Process / Pre-Decisional

As Dan and OLC have been tied up, sending ideas on new legislative next to full tiger team for thoughts. I don't think we necessarily have to include these in the draft to OMB, but it would be helpful to have worked up just in case. Original text in black, current OMB proposal in red, and new language in green. These edits address (1) EO; (2) input from WHCO; (3) input from Hawley staff; (4) tweak proposed by NSD o (b) (5).

Best,
Lauren

(b) (5)

(b) (5)

(b) (5)

(b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Notes on requirements from EO:

1. Current definition of “good faith” already seems t (b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. But can consider whether shoul (b) (5) [REDACTED]
2. May need more to clarify th (b) (5) [REDACTED]
[REDACTED].

Lauren S. Willard
Counselor to the Attorney General
U.S. Department of Justice
M (b) (6) [REDACTED]
(b) (6) [REDACTED]

Pandya, Brian (OASG)

From: Pandya, Brian (OASG)
Sent: Wednesday, June 3, 2020 6:20 PM
To: Shores, Ryan (ODAG); Willard, Lauren (OAG)
Cc: Grieco, Christopher (ODAG); Barnett, Gary (OAG)
Subject: RE: Section 230 EO responsibilities for DOJ
Attachments: Social Media EO Implementation (DRAFT 3 June 2020).docx

Here is a further revised one-pager for implementation of Section 5 of the EO. Key changes ar (b) (5)

-----Original Message-----

From: Pandya, Brian (OASG)
Sent: Wednesday, June 3, 2020 10:43 AM
To: Shores, Ryan (ODAG) (b) (6) >; Willard, Lauren (OAG) (b) (6) >
Cc: Grieco, Christopher (ODAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >
>
Subject: RE: Section 230 EO responsibilities for DOJ

Yes, let's discuss that further. If n (b) (5)

Revised outline attache (b) (5). Let me know if you want to discuss further.

-----Original Message-----

From: Shores, Ryan (ODAG) (b) (6) >
Sent: Wednesday, June 3, 2020 10:35 AM
To: Willard, Lauren (OAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >
Cc: Grieco, Christopher (ODAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >
>
Subject: RE: Section 230 EO responsibilities for DOJ

We should discu (b) (5)

-----Original Message-----

From: Willard, Lauren (OAG) (b) (6) >
Sent: Wednesday, June 3, 2020 10:24 AM
To: Pandya, Brian (OASG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >
Cc: Grieco, Christopher (ODAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >
>
Subject: RE: Section 230 EO responsibilities for DOJ

Agree (b) (5)

-----Original Message-----

From: Pandya, Brian (OASG) (b) (6) >

Sent: Wednesday, June 3, 2020 10:22 AM

To: Willard, Lauren (OAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >

Cc: Grieco, Christopher (ODAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >

Subject: RE: Section 23O EO responsibilities for DOJ

That was my thinking o (b) (5)

-----Original Message-----

From: Willard, Lauren (OAG) (b) (6) >

Sent: Wednesday, June 3, 2020 10:10 AM

To: Shores, Ryan (ODAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >

Cc: Grieco, Christopher (ODAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >

Subject: RE: Section 23O EO responsibilities for DOJ

But to Ryan's point - perhaps we ca (b) (5). Welcome others' views.

-----Original Message-----

From: Willard, Lauren (OAG)

Sent: Wednesday, June 3, 2020 10:09 AM

To: Shores, Ryan (ODAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >

Cc: Grieco, Christopher (ODAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >

Subject: RE: Section 23O EO responsibilities for DOJ

(b) (5)

Best,
Lauren

-----Original Message-----

From: Shores, Ryan (ODAG) (b) (6) >

Sent: Wednesday, June 3, 2020 10:03 AM

To: Willard, Lauren (OAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >
Cc: Grieco, Christopher (ODAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >
>
Subject: RE: Section 230 EO responsibilities for DOJ

One quick reaction (b) (5)

-----Original Message-----

From: Willard, Lauren (OAG) (b) (6) >
Sent: Wednesday, June 3, 2020 9:54 AM
To: Pandya, Brian (OASG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >
Cc: Grieco, Christopher (ODAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >
>
Subject: RE: Section 230 EO responsibilities for DOJ

Thanks Brian! Can folks email me any quick reactions before 10:30 if possible? (Of course not if you are dealing with something urgent).

Best,
Lauren

-----Original Message-----

From: Pandya, Brian (OASG) (b) (6) >
Sent: Wednesday, June 3, 2020 9:38 AM
To: Willard, Lauren (OAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >
Cc: Grieco, Christopher (ODAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >
>
Subject: RE: Section 230 EO responsibilities for DOJ

Here is the "one-pager" with thoughts on how we would implement Section 5 of the EO.

-----Original Message-----

From: Willard, Lauren (OAG) (b) (6) >
Sent: Monday, June 1, 2020 10:26 AM
To: Shores, Ryan (ODAG) (b) (6) >
Cc: Grieco, Christopher (ODAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >
>; Pandya, Brian (OASG) (b) (6) >
Subject: RE: Section 230 EO responsibilities for DOJ

All,

Following Chris' helpful outline, it seems to me that the work flow from the EO falls into 3 categories. We can discuss further at 11:30, but wanted to tee up for discussion.

1. Report of DOJ spending on online platforms (w/in 30 days) and review of viewpoint-based restrictions of platforms (following OMB compilation). (b) (5).
2. Coordinate with NTIA on petition for rulemaking (w/in 60 days) and develop model legislation on Section 230. (b) (5)

3. Establish Working Group to develop model state legislation for unfair and deceptive practices; receive censorship complaints and share; invite State AGs. (b) (5) .

Best,
Lauren

-----Original Message-----

From: Willard, Lauren (OAG)

Sent: Sunday, May 31, 2020 9:48 PM

To: Shores, Ryan (ODAG) (b) (6) >

Cc: Grieco, Christopher (ODAG) (b) (6) >; Barnett, Gary (OAG) (b) (6)

>; Pandya, Brian (OASG) (b) (6) >

Subject: Re: Section 230 EO responsibilities for DOJ

Gary and Brian, are you both free at 11:30? Alternatively we could use the Tech Review standing meeting time to discuss.

Sent from my iPhone

> On May 31, 2020, at 9:44 PM, Shores, Ryan (ODAG) (b) (6) > wrote:

>

> I am free 11:30 - 1:30.

>

>> On May 31, 2020, at 3:40 PM, Grieco, Christopher (ODAG) (b) (6) > wrote:

>>

>> Our moot is now from 2-4 on Monday. I'm free before the tech meeting

>> or 1130-1:30. Afternoon looks pretty shot until 5:15 or 5:30

>>

>>> On May 29, 2020, at 5:33 PM, Willard, Lauren (OAG) (b) (6) > wrote:

>>>

>>> Hi all,

>>>

>>> Can we circle up next Monday at 2pm to discuss rolling out DOJ's action items under last Thursday's EO? Chris helpfully put together a summary of DOJ-relevant items from the EO in the attached.

>>>

>>> Best,

>>> Lauren

>>> <Summary of EO on Prevent Online Censorship, draft.docx>

>>> <meeting.ics>

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Thursday, June 4, 2020 11:40 AM
To: Gelber, Alexandra (CRM); Downing, Richard (CRM); Goldfoot, Josh (CRM); Toensing, Brady (OLP); Hardee, Christopher (NSD); Raman, Sujit (ODAG); Motta, Thomas G. (DO) (FBI); Wallace, Benjamin (OLC); Grieco, Christopher (ODAG); Champoux, Mark (OLP); Whitaker, Henry C. (OLC); Wiegmann, Brad (NSD); Winn, Peter A. (OPCL); Pandya, Brian (OASG); Feith, Daniel (ODAG); Shores, Ryan (ODAG); Ramsden, Michelle (OPCL); Proia, Andrew (OPCL); Eyler, Gustav W. (b)(6), (7)(C) per FBI (OGC) (FBI); Jones, Darrin E. (STB) (FBI); Peck, Jessica (CRM); Sabol, Sherry E. (OGC) (FBI)
Cc: Herlihy, Brianna (PAO)
Subject: RE: Section 230 // May 26 Update

Hi all,

Peter had asked on Tuesday's call for talking points in case we are asked about our Section 230 efforts by the experts we have already engaged in. Apologies for delay, but below are two TPs that people could use off-the-record. As our timing for roll-out is still not finalized, we ask that no one speak on the record yet, but feel free to reach out to me and Brianna (our OPA person) if you have any questions/concerns.

General off-the-record (b) (5)
[Redacted]
[Redacted]
[Redacted]
[Redacted]

Off-record to our experts (b) (5)
[Redacted]
[Redacted]
[Redacted]

From: Willard, Lauren (OAG)
Sent: Monday, June 1, 2020 9:36 PM
To: Gelber, Alexandra (CRM) (b) (6); [Redacted] >; Downing, Richard (CRM) (b) (6); [Redacted] >; Goldfoot, Josh (CRM) (b) (6); [Redacted] >; Toensing, Brady (OLP) (b) (6); [Redacted] >; Hardee, Christopher (NSD) (b) (6); [Redacted] >; Raman, Sujit (ODAG) (b) (6); [Redacted] >; Motta, Thomas G. (DO) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Wallace, Benjamin (OLC) (b) (6); [Redacted] >; Grieco, Christopher (ODAG) (b) (6); [Redacted] >; Champoux, Mark (OLP) (b) (6); [Redacted] >; Whitaker, Henry C. (OLC) (b) (6); [Redacted] >; Wiegmann, Brad (NSD) (b) (6); [Redacted] >; Winn, Peter A. (OPCL) (b) (6); [Redacted] >; Pandya, Brian (OASG) (b) (6); [Redacted] >; Feith, Daniel (ODAG) (b) (6); [Redacted] >; Shores, Ryan (ODAG) (b) (6); [Redacted] >; Ramsden, Michelle (OPCL) (b) (6); [Redacted] >; Proia, Andrew (OPCL) (b) (6); [Redacted] >; Eyler, Gustav W. (b) (6); [Redacted] (b)(6), (7)(C) per FBI (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Jones, Darrin E. (ITID) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Peck, Jessica (CRM) (b) (6); [Redacted] >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >
Subject: RE: Section 230 // May 26 Update

Duplicative Information - See Document ID 0.7.2270.6684

Winn, Peter A. (OPCL)

From: Winn, Peter A. (OPCL)
Sent: Thursday, June 4, 2020 12:51 PM
To: Willard, Lauren (OAG)
Subject: RE: Section 230 // May 26 Update

I expect to be interacting with Danielle later this afternoon. I will let you know how it goes

From: Willard, Lauren (OAG) (b) (6) >
Sent: Thursday, June 04, 2020 12:40 PM
To: Winn, Peter A. (OPCL) (b) (6) >
Subject: RE: Section 230 // May 26 Update

Sorry for delay! This week got away from me, hope the virtual conference goes well!

From: Winn, Peter A. (OPCL) (b) (6) >
Sent: Thursday, June 4, 2020 12:36 PM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Herlihy, Brianna (PAO) (b) (6) >; Gelber, Alexandra (CR) (b) (6) >; Downing, Richard (CR) (b) (6) >; Goldfoot, Josh (CR) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Hardee, Christopher (NSD) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Motta, Thomas G. (DO) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Wallace, Benjamin (OLC) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Champoux, Mark (OLP) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wiegmann, Brad (NSD) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Ramsden, Michelle (OPCL) (b) (6) >; Proia, Andrew (OPCL) (b) (6) >; Eyler, Gustav W. (b) (6) (b)(6), (7)(C) per FBI (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Jones, Darrin E. (STB) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Peck, Jessica (CR) (b) (6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >
Subject: RE: Section 230 // May 26 Update

Nicely done, Lauren.

From: Willard, Lauren (OAG) (b) (6) >
Sent: Thursday, June 04, 2020 11:40 AM
To: Gelber, Alexandra (CR) (b) (6) >; Downing, Richard (CR) (b) (6) >; Goldfoot, Josh (CRM) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Hardee, Christopher (NSD) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Motta, Thomas G. (DO) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Wallace, Benjamin (OLC) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Champoux, Mark (OLP) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wiegmann, Brad (NSD) (b) (6) >; Winn, Peter A. (OPCL) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Ramsden, Michelle (OPCL) (b) (6) >; Proia, Andrew (OPCL) (b) (6) >; Eyler, Gustav W. (b) (6) (b)(6), (7)(C) per FBI (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Jones, Darrin E. (STB) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Peck, Jessica (CR) (b) (6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >
Cc: Herlihy, Brianna (PAO) (b) (6) >
Subject: RE: Section 230 // May 26 Update

Duplicative Information - See Document ID 0.7.2270.6946

Downing, Richard (CRM)

From: Downing, Richard (CRM)
Sent: Thursday, June 4, 2020 5:08 PM
To: Willard, Lauren (OAG); Gelber, Alexandra (CRM); Goldfoot, Josh (CRM); Toensing, Brady (OLP); Hardee, Christopher (NSD); Raman, Sujit (ODAG); Motta, Thomas G. (DO) (FBI); Wallace, Benjamin (OLC); Grieco, Christopher (ODAG); Champoux, Mark (OLP); Whitaker, Henry C. (OLC); Wiegmann, Brad (NSD); Winn, Peter A. (OPCL); Pandya, Brian (OASG); Feith, Daniel (ODAG); Shores, Ryan (ODAG); Ramsden, Michelle (OPCL); Proia, Andrew (OPCL); Eyler, Gustav W (b)(6), (7)(C) per FBI (OGC) (FBI); Jones, Darrin E. (STB) (FBI); Peck, Jessica (CRM); Sabol, Sherry E. (OGC) (FBI)
Cc: Herlihy, Brianna (PAO)
Subject: RE: Section 230 // May 26 Update
Attachments: WSJ-Article.docx

From a few days ago: Australian courts rule against media companies hosting comments. (No CDA-230-analog there, apparently, so defamation applies).

RICHARD W. DOWNING | Criminal Division | (b) (6)

From: Willard, Lauren (OAG) (b) (6) >
Sent: Thursday, June 4, 2020 11:40 AM
To: Gelber, Alexandra (CRM) (b) (6) >; Downing, Richard (CRM) (b) (6) >; Goldfoot, Josh (CRM) (b) (6) >; Toensing, Brady (OL) (b) (6) >; Hardee, Christopher (NSD) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Motta, Thomas G. (DO) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Wallace, Benjamin (OLC) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Champoux, Mark (OL) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wiegmann, Brad (NSD) (b) (6) >; Winn, Peter A. (OPCL) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Ramsden, Michelle (OPCL) (b) (6) >; Proia, Andrew (OPCL) (b) (6) >; Eyler, Gustav W. (b) (6) (b)(6), (7)(C) per FBI (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Jones, Darrin E. (STB) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Peck, Jessica (CRM) (b) (6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >
Cc: Herlihy, Brianna (PAO) (b) (6) >
Subject: RE: Section 230 // May 26 Update

Duplicative Information - See Document ID 0.7.2270.6946

News Outlets Are Liable for Others' Facebook Comments, Australian Court Rules

Australian court says newspapers, TV stations that post their own articles should be considered publishers of defamatory comments

By Mike Cherney, Wall Street Journal, Updated June 1, 2020 8:45 am ET

SYDNEY—Newspapers and television stations that post their own articles on Facebook Inc.'s FB 0.35% platform are liable for other Facebook users' defamatory comments on those posts, an Australian court ruled, presenting a fresh dilemma for traditional publishers in the social-media age.

Media companies encourage and facilitate comments that can be seen by other Facebook users, said the highest court in the Australian state of New South Wales, which includes Sydney. That means, it ruled Monday, that the companies should be considered publishers of the comments, responsible for their content.

The media companies that were defendants in the original lawsuit, which include News Corp NWS 0.65% Australia as well as the publisher of the Sydney Morning Herald, said they are considering a further appeal to the country's highest court.

"Today's decision means the media cannot share any story via Facebook without fear of being sued for comments which they did not publish and have no control over," they said. "It also creates the extraordinary situation where every public Facebook page—whether it be held by politicians, businesses or courts—is now liable for third-party comments on those pages."

News Corp Australia is a subsidiary of News Corp, which also owns Dow Jones & Co., publisher of The Wall Street Journal.

The decision could also threaten social-media platforms like Facebook, which count on news articles for traffic and ad revenue. In April, Australian authorities said they would require Facebook and Alphabet Inc.'s Google to pay local media organizations for their content, amid a broader debate over whether the tech companies are unfairly benefiting from news articles on their platforms.

Australia has also moved to hold social-media companies themselves responsible for what users post. After a live stream of a shooting spree at New Zealand mosques last year was posted on Facebook, Australia passed legislation that allows social-media platforms to be fined if they don't remove violent content quickly.

Monday's case was initially brought by Dylan Voller, who was detained in a juvenile detention center and became the subject of media attention. Articles about Mr. Voller that media outlets posted on Facebook drew comments from other Facebook users falsely accusing him of serious crimes, according to his lawyer, Peter O'Brien.

The court heard evidence that traditional media companies use Facebook to drive traffic to their own websites, Mr. O'Brien's statement said: "With this strong commercial imperative driving them, it really is a no-brainer that the media companies lent their assistance to the publication of third-party comments."

In the U.S., Section 230 of the Communications Decency Act broadly exempts social-media companies like Facebook from legal liability for what people post on the site. However, after Twitter Inc. last month applied a fact-checking notice to tweets by President Trump, the president signed an executive order that could curb some of those legal protections.

Michael Douglas, a defamation lawyer and senior lecturer at the University of Western Australia, said if Monday's ruling stands, traditional media companies could be forced to beef up monitoring of third-party comments on their social-media posts. Aside from an appeal, Mr. Douglas said he would expect the companies to lobby state and federal governments to change defamation laws. A review of the laws is already under way.

"It's a big challenge to the business model of publishers, because it means there is a greater risk any time you create content which is in any way controversial," he said. "There is a risk that users will write something objectionable, which will open up the entity behind the account to being sued for defamation."

The media companies said Monday that the court's ruling failed to acknowledge that Facebook doesn't give media companies the ability to turn off comments. Facebook should be held responsible for content posted by users, they said.

Facebook pages generally offer some ability to moderate content, including hiding and deleting comments.

"We are aware of the court's decision today and we are reviewing it carefully," Facebook said.

Monday's ruling, which upheld a decision from last year, didn't determine whether the Facebook comments regarding Mr. Voller were in fact defamatory.

Write to Mike Cherney at mike.cherney@wsj.com

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Thursday, June 4, 2020 6:35 PM
To: Grieco, Christopher (ODAG)
Subject: Fwd: Section 230 // May 26 Update

Any chance you want to handle? ...

Begin forwarded message:

From: "Motta, Thomas G. (DO) (FBI)" (b)(7)(E) per FBI >
Date: June 4, 2020 at 6:29:40 PM EDT
To: "Willard, Lauren (OAG) (JMD)" (b) (6) >
Cc: "Downing, Richard (CRM)" (b) (6) >, "Gelber, Alexandra (CRM)" (b) (6) >, "Goldfoot, Josh (CRM)" (b) (6) >, "Toensing, Brady (OLP) (JMD)" (b) (6) >, "Hardee, Christopher (NSD) (JMD)" (b) (6) >, "Raman, Sujit (ODAG) (JMD)" (b) (6) >, "Wallace, Benjamin (OLC) (JMD)" (b) (6) >, "Grieco, Christopher (ODAG) (JMD)" (b) (6) >, "Champoux, Mark (OLP) (JMD)" (b) (6) >, "Whitaker, Henry C. (OLC) (JMD)" (b) (6) >, "Wiegmann, Brad (NSD) (JMD)" (b) (6) >, "Winn, Peter A. (OPCL) (JMD)" (b) (6) >, "Pandya, Brian (OASG) (JMD)" (b) (6) >, "Feith, Daniel (ODAG) (JMD)" (b) (6) >, "Shores, Ryan (ODAG) (JMD)" (b) (6) >, "Ramsden, Michelle (OPCL) (JMD)" (b) (6) >, "Proia, Andrew (OPCL) (JMD)" (b) (6) >, "Eyler, Gustav W. (CIV)" (b) (6) (b)(6), (7)(C) per FBI (OGC) (FBI)" (b)(6), (7)(C), (7)(E) per FBI >, "Jones, Darrin E. (STB) (FBI)" (b)(6), (7)(C), (7)(E) per FBI >, "Peck, Jessica (CRM)" (b) (6) >, "Sabol, Sherry E. (OGC) (FBI)" (b)(6), (7)(C), (7)(E) per FBI >, "Herlihy, Brianna (PAO) (JMD)" (b) (6) >
Subject: RE: Section 230 // May 26 Update

Respectfully,

(b)(5) per FBI
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

(b)(5) per FBI

(b)(5) per FBI

(b)(5) per FBI

(b)(5) per FBI

(b)(5) per FBI

From: Willard, Lauren (OAG) [[mailto:](#)(b) (6)]

Sent: Thursday, June 04, 2020 5:50 PM

To: Motta, Thomas G. (DO) (FBI) (b)(7)(E) per FBI >

Cc: Downing, Richard (CR) (b) (6) >; Gelber, Alexandra (CRM)

(b) (6) >; Goldfoot, Josh (CR) (b) (6) >; Toensing, Brady

(OLP) (JMD) (b) (6) >; Hardee, Christopher (NSD) (JMD) (b) (6) >; Raman, Sujit (ODAG) (JMD) (b) (6) >; Wallace, Benjamin (OLC) (JMD) (b) (6) >; Grieco, Christopher (ODAG) (JMD) (b) (6) >; Champoux, Mark (OLP) (JMD) (b) (6) >; Whitaker, Henry C. (OLC) (JMD) (b) (6) >; Wiegmann, Brad (NSD) (JMD) (b) (6) >; Winn, Peter A. (OPCL) (JMD) (b) (6) >; Pandya, Brian (OASG) (JMD) (b) (6) >; Feith, Daniel (ODAG) (JMD) (b) (6) >; Shores, Ryan (ODAG) (JMD) (b) (6) >; Ramsden, Michelle (OPCL) (JMD) (b) (6) >; Proia, Andrew (OPCL) (JMD) (b) (6) >; Eyster, Gustav W. (CIV) (b) (6) (b)(6), (7)(C) per FBI (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Jones, Darrin E. (STB) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Peck, Jessica (CR) (b) (6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Herlihy, Brianna (PAO) (JMD) (b) (6) >
Subject: Re: Section 230 // May 26 Update

I'm not aware of any attempt by NAAG or others. NAAG's only interest I'm aware of so far is to carve out state criminal law from the statute.

I don't know if anyone in this group has done the legal research either. Our proposal is largely aimed at

(b) (5)
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. Perhaps courts w (b) (5)
[REDACTED].

On Jun 4, 2020, at 5:36 PM, Motta, Thomas G. (DO) (FBI) (b)(7)(E) per FBI > wrote:

The article states:

Mr. Douglas said he would expect the companies to lobby state and federal governments to change defamation laws. A review of the laws is already under way.

(b)(5) per FBI
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

From: Downing, Richard (CRM) [[mailto:\(b\) \(6\)](#)]
Sent: Thursday, June 04, 2020 5:08 PM
To: Willard, Lauren (OAG) (JMD) (b) (6) >; Gelber, Alexandra (CRM) (b) (6) >; Goldfoot, Josh (CR) (b) (6) >; Toensing, Brady (OLP) (JMD) (b) (6) >; Hardee, Christopher (NSD)

(JMD) (b) (6) >; Raman, Sujit (ODAG) (JMD)
(b) (6) >; Motta, Thomas G. (DO) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Wallace,
Benjamin (OLC) (JMD) (b) (6) >; Grieco, Christopher (ODAG) (JMD)
(b) (6) >; Champoux, Mark (OLP) (JMD)
(b) (6) >; Whitaker, Henry C. (OLC) (JMD)
(b) (6) >; Wiegmann, Brad (NSD) (JMD)
(b) (6) >; Winn, Peter A. (OPCL) (JMD) (b) (6) >;
Pandya, Brian (OASG) (JMD) (b) (6) >; Feith, Daniel (ODAG) (JMD)
(b) (6) >; Shores, Ryan (ODAG) (JMD) (b) (6) >;
Ramsden, Michelle (OPCL) (JMD) (b) (6) >; Proia, Andrew (OPCL)
(JMD) (b) (6) >; Eyler, Gustav W. (CIV) (b) (6) >;
(b)(6), (7)(C) per FBI (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Jones, Darrin E. (STB) (FBI)
(b)(6), (7)(C), (7)(E) per FBI >; Peck, Jessica (CR) (b) (6) >; Sabol, Sherry E. (OGC)
(FBI) (b)(6), (7)(C), (7)(E) per FBI >
Cc: Herlihy, Brianna (PAO) (JMD) (b) (6) >
Subject: RE: Section 230 // May 26 Update

Duplicative Information - See Document ID 0.7.2270.9634

Grieco, Christopher (ODAG)

From: Grieco, Christopher (ODAG)
Sent: Friday, June 5, 2020 6:07 PM
To: Willard, Lauren (OAG)
Subject: RE: Divino

A badge of honor.

From: Willard, Lauren (OAG) (b) (6) >
Sent: Friday, June 5, 2020 6:06 PM
To: Grieco, Christopher (ODAG) (b) (6) >
Subject: RE: Divino

Should we take "clever bunch" as a compliment? 😊

From: Grieco, Christopher (ODAG) (b) (6) >
Sent: Friday, June 5, 2020 6:03 PM
To: Willard, Lauren (OAG) (b) (6) >
Subject: RE: Divino

Goldman on the EO: <https://blog.ericgoldman.org/archives/2020/05/trumps-preventing-online-censorship-executive-order-is-pro-censorship-political-theater.htm>

"Section 6 says: "The Attorney General shall develop a proposal for Federal legislation that would be useful to promote the policy objectives of this order." Based on [the DOJ Section 230 roundtable from February](#), I assumed they were already doing this. It's a little hard to imagine that the DOJ has anti-Section 230 things on its wishlist that aren't already part of [the EARN IT Act](#), but they are a clever bunch. Any proposed legislation that may emerge from the DOJ will get serious attention."

From: Willard, Lauren (OAG) (b) (6) >
Sent: Friday, June 5, 2020 6:00 PM
To: Morrell, David M. (CIV) (b) (6) >; Guarnieri, Matthew (OSG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >
Cc: Barnett, Gary (OAG) (b) (6) >
Subject: RE: Divino

Thank you!

From: Morrell, David M. (CIV) (b) (6) >
Sent: Friday, June 5, 2020 5:38 PM
To: Willard, Lauren (OAG) (b) (6) >; Guarnieri, Matthew (OSG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >
Cc: Barnett, Gary (OAG) (b) (6) >

Duplicative Information - See Document ID 0.7.2270.6528

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Friday, June 5, 2020 6:13 PM
To: Grieco, Christopher (ODAG); Barnett, Gary (OAG); Pandya, Brian (OASG)
Subject: FW: Divino
Attachments: ndcal 19cv4749 Rule 12(b)(6) mot hrg tr (2020-06-02).pdf

Dropping to smaller group

(b)(5) per CIV

[REDACTED]

(b)(5) per CIV

[REDACTED]

(b)(5) per CIV

[REDACTED]

Best,
Lauren

From: Morrell, David M. (CIV) (b) (6) >
Sent: Friday, June 5, 2020 5:38 PM
To: Willard, Lauren (OAG) (b) (6) >; Guarnieri, Matthew (OSG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >
Cc: Barnett, Gary (OAG) (b) (6) >
Subject: RE: Divino

Lauren—transcript attached.

From: Willard, Lauren (OAG) (b) (6) >
Sent: Wednesday, June 3, 2020 3:38 PM
To: Guarnieri, Matthew (OSG) (b) (6) >; Morrell, David M. (CIV) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >
Cc: Barnett, Gary (OAG) (b) (6) >
Subject: Divino

FYI – this article was just flagged for me. Was there a hearing on Monday that discussed the EO? Is there a transcript?

<https://www.bnnbloomberg.ca/in-youtube-censorship-case-u-s-backs-internet-law-trump-scorns-1.1444387>

Relevant text:

Divino Group on Monday asked the court to address Trump's executive order because it directs the Justice Department to "act in a manner that is substantially different from the arguments advanced" in the government's filing in the YouTube case.

At the hearing, Justice Department attorney Indraneel Sur noted that the executive order states that it isn't "enforceable."

The provisions of the order "are all points about policy, essentially directing various executive branch actors to various things, but don't go into any question of constitutionality," Sur said.

Lauren S. Willard

Counselor to the Attorney General

U.S. Department of Justice

M (b) (6)

(b) (6)

1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN JOSE DIVISION

4 DIVINO GROUP LLC, ET AL.,

5 PLAINTIFFS,

CASE NO. CV-19-4749-VKD

6 VS.

SAN JOSE, CALIFORNIA

7 GOOGLE LLC, ET AL.,

JUNE 2, 2020

8 DEFENDANT.

PAGES 1 - 51

9 TRANSCRIPT OF ZOOM PROCEEDINGS
10 BEFORE THE HONORABLE VIRGINIA K. DEMARCHI
11 UNITED STATES DISTRICT JUDGE

12 A-P-P-E-A-R-A-N-C-E-S BY ZOOM

13 FOR THE PLAINTIFFS: BROWNE GEORGE ROSS LLP
14 BY: PETER OBSTLER
15 44 MONTGOMERY STREET
16 SUITE 1280
17 SAN FRANCISCO, CALIFORNIA 94104

18 BY: DEBI ANN RAMOS
19 801 S. FIGUEROA ST., SUITE 2000
20 LOS ANGELES, CALIFORNIA 90067

21 FOR THE DEFENDANTS: WILSON SONSINI GOODRICH & ROSATI
22 BY: BRIAN M. WILLEN
23 1301 AVENUE OF THE AMERICA, 40TH
24 FLOOR
25 NEW YORK, NEW YORK 10019-6022

BY: LAUREN G. WHITE
650 PAGE MILL ROAD
PALO ALTO, CALIFORNIA 94304-1050

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER: IRENE L. RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY,
TRANSCRIPT PRODUCED WITH COMPUTER.

A P P E A R A N C E S BY ZOOM: (CONT'D)

FOR INTERESTED PARTY:

US DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
BY: INDRANEEL SUR
1100 L ST.
RM. 12010
WASHINGTON, DC 20530

SAN JOSE, CALIFORNIA

JUNE 2, 2020

P R O C E E D I N G S

(COURT CONVENED AT 10:24 A.M.)

THE CLERK: THE NEXT MATTER IS DIVINO GROUP VERSUS
GOOGLE, CASE NUMBER 19-CV-4749.

THE COURT: GOOD MORNING. I'M WAITING FOR THE PRIOR
MATTER AND ALSO WITH OUR TECHNOLOGY.

WHO WILL BE SPEAKING ON BEHALF OF DIVINO GROUP TODAY?

MR. OBSTLER, YOU'RE ON MUTE.

MR. OBSTLER: SORRY ABOUT THAT, YOUR HONOR. THIS IS
THE MOST NERVE-RACKING PART OF THE WHOLE HEARING IS TRYING TO
GET THIS THING TO WORK.

(LAUGHTER.)

MR. OBSTLER: PETER OBSTLER, MYSELF, WILL BE
SPEAKING ON BEHALF OF THE DIVINO PLAINTIFFS, YOUR HONOR.

THE COURT: OKAY. WHO WILL BE SPEAKING ON BEHALF OF
GOOGLE TODAY?

MR. WILLEN: GOOD MORNING, YOUR HONOR. THIS IS
BRIAN WILLEN. ME AND MY COLLEAGUE, MS. WHITE, WILL BOTH BE
SPEAKING FOR GOOGLE.

I WILL BE ADDRESSING ANY ISSUES RELATED TO SECTION 230,
AND MS. WHITE WILL BE ADDRESSING ANY ISSUES RELATED TO THE
UNDERLYING CAUSES OF ACTION.

THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

AND I DO HAVE MR. SUR ON BEHALF OF THE UNITED STATES.

10:25AM 1 ALL RIGHT. SO WE ARE HERE ON THE DEFENDANTS' MOTION TO
10:25AM 2 DISMISS THE SECOND AMENDED COMPLAINT.

10:25AM 3 I WILL HEAR FROM ALL PARTIES, BUT I WOULD LIKE TO START
10:25AM 4 JUST BY IDENTIFYING THE ISSUES THAT I AM MOST INTERESTED IN
10:25AM 5 HEARING ABOUT, AND THEN I'LL LET YOU MAKE YOUR ARGUMENTS, AND I
10:25AM 6 HAVE SOME VERY SPECIFIC QUESTIONS.

10:25AM 7 SO PLAINTIFFS HAVE EIGHT CLAIMS FOR RELIEF, REALLY SEVEN
10:25AM 8 CLAIMS FOR RELIEF SINCE THE EIGHTH ONE IS A REQUEST FOR
10:25AM 9 DECLARATORY RELIEF AND MORE OF A REQUEST FOR A REMEDY.

10:25AM 10 MY PRINCIPAL CONCERN IS THE PRAGER DECISION. IT DOES SEEM
10:25AM 11 THAT THE NINTH CIRCUIT'S DECISION IN PRAGER IS DISPOSITIVE WITH
10:25AM 12 RESPECT TO THE FEDERAL CLAIMS AND PERHAPS THE CALIFORNIA
10:25AM 13 CONSTITUTION CLAIM BECAUSE OF THE FINDING THAT THE
10:25AM 14 NINTH CIRCUIT MADE THAT GOOGLE AND YOUTUBE ARE NOT STATE
10:25AM 15 ACTORS. THAT CONCLUSION SEEMS TO ELIMINATE THOSE CLAIMS.

10:25AM 16 THE CALIFORNIA CONSTITUTION CLAIMS ARE ALSO PREMISED ON
10:26AM 17 THE IDEA THAT GOOGLE AND YOUTUBE ARE STATE ACTORS, SO THAT ONE
10:26AM 18 ALSO SEEMS TO BE ELIMINATED BY THIS DECISION.

10:26AM 19 AND THEN WITH RESPECT TO THE LANHAM ACT CLAIM, THE FINDING
10:26AM 20 THAT THE TERMS OF SERVICE AND COMMUNITY GUIDELINES ARE NOT
10:26AM 21 COMMERCIAL ADVERTISING OR PROMOTION AND THAT THE OTHER
10:26AM 22 STATEMENTS THAT ARE CONTAINED -- THAT ARE HIGHLIGHTED IN THE
10:26AM 23 SECOND AMENDED COMPLAINT ARE OPERATIONAL OR PUFFERY MEANS THAT
10:26AM 24 THE PLAINTIFFS COULD NOT PREVAIL ON THE LANHAM ACT CLAIM.

10:26AM 25 SO I WOULD LIKE TO UNDERSTAND THE PARTIES' VIEWS ON THE

SIGNIFICANCE OF PRAGER. THAT'S THE FIRST THING.

AND THE SECOND ITEM THAT CAUGHT MY ATTENTION WAS THE UNRAH ACT CLAIM WHICH DOESN'T HAVE -- DOESN'T GIVE MUCH DISCUSSION IN THE PARTIES' PAPERS, BUT HERE'S MY QUESTION ABOUT THE UNRAH ACT CLAIM, OR QUESTIONS.

DOES IT ACTUALLY APPLY TO THE GOOGLE YOUTUBE PLATFORM? AND IF SO, UNDER WHAT SPECIFIC THEORY?

IF I CONSTRUE THE SECOND AMENDED COMPLAINT AS ALLEGING AN UNWRITTEN POLICY TO DISCRIMINATE AGAINST THE LGBTQ CONTENT CREATORS, IS THAT REALLY WITHIN THE SCOPE OF PUBLISHING ACTIVITY UNDER SECTION 230(C) (1) OR (C) (2), WHICH HAS A GOOD FAITH REQUIREMENT?

IS THAT KIND OF AN UNWRITTEN POLICY SUFFICIENT TO STATE A CLAIM EVEN IF GOOGLE AND YOUTUBE'S OFFICIAL WRITTEN POLICY IS VIEWPOINT NEUTRAL?

SO I HAVE SOME QUESTIONS AROUND THE UNRAH ACT CLAIM THAT I WOULD LIKE THE PARTIES TO FOCUS ON.

AND THEN FINALLY I DID SEE THAT THE PLAINTIFFS DID FILE YESTERDAY A REQUEST FOR JUDICIAL NOTICE ABOUT THE RECENT EXECUTIVE ORDER, AND I'LL PERMIT THE PARTIES TO ADDRESS THAT, ALTHOUGH I DO NOT SEE HOW THAT HAS ANY BEARING ON THE MOTION TO DISMISS.

BUT THOSE ARE MY HIGH-LEVEL OBSERVATIONS AND FLAGGING THOSE ISSUES FOR YOUR CONSIDERATION, BUT I WILL LET YOU ARGUE HOWEVER YOU WOULD LIKE TO ARGUE.

10:28AM 1 AND SINCE IT'S THE DEFENDANTS' MOTION, I WILL GO AHEAD AND
10:28AM 2 LET GOOGLE START.

10:28AM 3 SO MR. WILLEN.

10:28AM 4 MR. WILLEN: YES. THANK YOU, YOUR HONOR.

10:28AM 5 I THINK I SHOULD PROBABLY TAKE YOUR FIRST SET OF QUESTIONS
10:28AM 6 FIRST WHICH HAS TO DO WITH THE IMPACT OF THE NINTH CIRCUIT'S
10:28AM 7 DECISION IN PRAGER, AND SINCE I THINK THAT RELATES TO THE
10:28AM 8 MERITS OF THE CAUSES OF ACTION RATHER THAN SECTION 230, I WILL
10:28AM 9 LET MY COLLEAGUE, MS. WHITE, ADDRESS THAT IN THE FIRST
10:28AM 10 INSTANCE.

10:28AM 11 THE COURT: ALL RIGHT. VERY WELL.

10:28AM 12 MS. WHITE: THANK YOU, YOUR HONOR.

10:28AM 13 TAKING YOUR QUESTIONS IN ORDER, I'LL BEGIN WITH THE FIRST
10:28AM 14 AMENDMENT. WE ABSOLUTELY AGREE WITH YOUR SUGGESTION THAT THE
10:28AM 15 NINTH CIRCUIT'S DECISION FORECLOSES PLAINTIFFS' FIRST AMENDMENT
10:28AM 16 CLAIM.

10:28AM 17 THEIR CLAIM IS PREDICATED ON AN INFRINGEMENT OF THEIR OWN
10:28AM 18 FIRST AMENDMENT RIGHTS, AND OF COURSE THE CASE LAW IS EXTREMELY
10:29AM 19 CLEAR FOLLOWING THE SUPREME COURT'S DECISION IN HALLECK AND NOW
10:29AM 20 THE NINTH CIRCUIT'S DECISION IN PRAGER, WHICH WAS BROUGHT BY
10:29AM 21 COUNSEL FOR PLAINTIFFS HERE AND ASSERTED CLAIMS BASED ON THE
10:29AM 22 SAME PRODUCTS AND SERVICES ON YOUTUBE'S PLATFORM THAT ARE AT
10:29AM 23 ISSUE IN THIS CASE.

10:29AM 24 THERE'S SIMPLY NO PATH FORWARD IN LIGHT OF THE COURT'S
10:29AM 25 HOLDING TO -- FOR THE COURT TO CONCLUDE THAT YOUTUBE IS A STATE

10:29AM 1 ACTOR.

10:29AM 2 AND PLAINTIFFS HAVE FILED A SURREPLY ADDRESSING THAT
10:29AM 3 DECISION, ALTHOUGH THEY DID NOT ADDRESS JUDGE KOH'S UNDERLYING
10:29AM 4 DECISION THAT THE NINTH CIRCUIT AFFIRMED IN THEIR OPPOSITION
10:29AM 5 BRIEF.

10:29AM 6 AND IN THEIR SURREPLY THEY CLAIM THAT THIS CASE IS
10:30AM 7 DIFFERENT BECAUSE THEY HAVE ARTICULATED A DIFFERENT STATE
10:30AM 8 ACTION THEORY UNDER THE SO-CALLED ENDORSEMENT TEST UNDER THE
10:30AM 9 SUPREME COURT SKINNER DECISION.

10:30AM 10 BUT WHETHER THE COURT CONSIDERS THE ENDORSEMENT TEST OR
10:30AM 11 THE PUBLIC FUNCTION TEST THAT WAS ARGUED IN PRAGER, THE
10:30AM 12 PARTY -- THE PLAINTIFFS MUST SHOW THAT IN ORDER TO SHOW STATE
10:30AM 13 ACTION, THAT THE CONDUCT THAT ALLEGEDLY DEPRIVED THEM OF THEIR
10:30AM 14 RIGHTS CAN FAIRLY BE ATTRIBUTED TO THE STATE OR THE GOVERNMENT.

10:30AM 15 AND THERE IS NO BASIS TO ARGUE THAT YOUTUBE, IN MONITORING
10:30AM 16 ITS SERVICE AND MODERATING CONTENT ON ITS SERVICE WAS SOMEHOW
10:30AM 17 ACTING WITH THE GOVERNMENT'S ENDORSEMENT. AND SECTION 230 BY
10:30AM 18 ITS EXPRESS TERMS, AND THE LEGISLATIVE HISTORY CONFIRMS, THAT
10:31AM 19 THE GOVERNMENT WAS, IN FACT, SEEKING TO TAKE ITSELF OUT OF THE
10:31AM 20 PROCESS OF CONTENT MODERATION ONLINE. SO THERE IS NO BASIS FOR
10:31AM 21 THE COURT TO CONCLUDE THAT SECTION 230 SOMEHOW PUTS A THUMB ON
10:31AM 22 THE SCALE IN FAVOR OF THE CONTENT MODERATION DECISIONS THAT
10:31AM 23 YOUTUBE MADE WITH RESPECT TO THE PLAINTIFFS' CONTENT HERE.

10:31AM 24 THE COURT: IT SEEMS ALMOST LIKE AN ABSENCE OF
10:31AM 25 ENDORSEMENT, SORT OF AN EXPLICIT NON-ENDORSEMENT OF ANY

1 PARTICULAR MONITORING OR POLICING OR CENSORSHIP OR RESTRICTION.
2 IT'S LEAVING IT UP TO THE PLATFORM OR THE SERVICE PROVIDER IN
3 THIS CASE.

4 SO I TAKE YOUR POINT ABOUT THE ENDORSEMENT THEORY. IT
5 DOESN'T SEEM TO FIT, BUT I WILL HEAR FROM THE PLAINTIFFS ON
6 THAT.

7 OKAY. SO IN YOUR VIEW -- IN DEFENDANTS' VIEW DOES THE
8 PRAGER DECISION TAKE CARE OF THE FIRST AMENDMENT CLAIM AS WELL
9 AS THE CALIFORNIA CONSTITUTION CLAIM?

10 I MEAN, IT DOESN'T SPECIFICALLY ADDRESS THE CALIFORNIA
11 CONSTITUTION, THE NINTH CIRCUIT DOES NOT. THAT WAS THE
12 PRAGER II DECISION.

13 MR. WILLEN: THAT'S RIGHT, YOUR HONOR. WE THINK IT
14 DOES. CALIFORNIA STATE COURTS HAVE MADE CLEAR THAT THE
15 CALIFORNIA CONSTITUTION HAS A STATE ACTION REQUIREMENT JUST
16 LIKE THE FIRST AMENDMENT.

17 AND AS THE NINTH CIRCUIT IN PRAGER HELD, THAT TO FIND A
18 PRIVATE PLATFORM INVOLVED IN HOSTING EXPRESSIVE CONDUCT A STATE
19 ACTOR WOULD ESSENTIALLY BE A PARADIGM SHIFT AND THAT HOLDING
20 BEARS ON THE CALIFORNIA CONSTITUTION CLAIM AS WELL.

21 NOW, PLAINTIFFS HAVE INVOKED THIS NARROW AND 40-YEAR-OLD
22 EXCEPTION ARTICULATED BY THE CALIFORNIA SUPREME COURT IN
23 ROBINS VERSUS PRUNEYARD, BUT THAT DECISION WAS APPLIED TO REAL
24 PROPERTY GIVEN THE NATURE OF REAL PROPERTY AND HAS NEVER BEEN
25 EXTENDED BEYOND THE SCOPE OF REAL PROPERTY.

1 AND, IN FACT, EVERY CASE THAT HAS CONSIDERED SIMILAR
2 EFFORTS TO EXPAND ITS SCOPE TO ONLINE SERVICES HAS REJECTED
3 THOSE EFFORTS. IN ADDITION TO PRAGER II THERE WAS THE DOMEN
4 CASE IN THE SOUTHERN DISTRICT OF NEW YORK AND JUDGE CHEN IN THE
5 HIQ DECISION.

6 THE COURT: ALL RIGHT. THANK YOU.

7 AND THE LANHAM ACT ISSUE?

8 MS. WHITE: YES. ON THAT, YOUR HONOR, I DON'T
9 ENTIRELY UNDERSTAND PLAINTIFFS' ARGUMENTS IN THEIR SURREPLY FOR
10 ATTEMPTING TO DISTINGUISH THE LANHAM ACT, BUT THERE'S
11 ESSENTIALLY FOUR CATEGORIES OF STATEMENTS AT ISSUE IN THEIR
12 CLAIM, AND THEY ALL RELATE TO STATEMENTS THAT THE NINTH CIRCUIT
13 CONSIDERED IN PRAGER, THOSE DEALING WITH THE TERMS OF SERVICE
14 DESCRIPTIONS OF RESTRICTED MODE AND SOME IMPLICIT STATEMENT BUT
15 NO ACTUAL STATEMENT REGARDING THE DECISION TO MAKE CERTAIN OF
16 PLAINTIFFS' VIDEOS UNAVAILABLE IN RESTRICTED MODE.

17 THE NINTH CIRCUIT ADDRESSED EACH OF THOSE CATEGORIES OF
18 STATEMENTS AND CLEARLY HELD THAT NO LANHAM ACT CLAIM COULD
19 PROCEED ON THE BASIS OF ANY OF THEM. THEY ARE NOT MADE IN
20 COMMERCIAL OR PROMOTIONAL CONTEXTS AND THEY, WITH RESPECT TO
21 YOUTUBE'S PROMOTIONAL STATEMENTS AND MISSION STATEMENTS, ARE
22 NOT -- ARE ESSENTIALLY NONACTIONABLE PUFFERY.

23 THE COURT: AND IF GOOGLE WERE TO ACT OR HAVE AN
24 INTERNAL UNWRITTEN POLICY THAT WAS INCONSISTENT WITH THOSE
25 PUBLIC STATEMENTS, WOULD THE ANSWER STILL BE THE SAME UNDER THE

10:35AM 1 LANHAM ACT? DOES IT MATTER? THOSE ARE -- THE STATEMENTS THAT
10:35AM 2 ARE PUBLIC FACING AND DESCRIBE THE PLATFORM AS BEING VIEWPOINT
10:35AM 3 NEUTRAL, THAT'S NOT ADVERTISING, THAT'S NOT PROMOTION, SO IT
10:35AM 4 DOESN'T MATTER IF, IN FACT, THAT'S NOT THE WAY IT WORKS AND
10:35AM 5 THERE'S SOME UNWRITTEN POLICY THAT DISCRIMINATES AGAINST THE
10:35AM 6 LGBT CONTENT CREATORS AND STILL NOT ACTIONABLE UNDER THE
10:35AM 7 LANHAM ACT WOULD BE YOUR VIEW?

10:35AM 8 MS. WHITE: THAT'S RIGHT, YOUR HONOR. TO STATE A
10:35AM 9 CLAIM UNDER THE LANHAM ACT FOR FALSE ADVERTISING, WHICH IS WHAT
10:35AM 10 I UNDERSTAND THE PLAINTIFFS CLAIM TO BE HERE, THEY HAVE TO TIE
10:35AM 11 THE CLAIM TO SOME ACTUAL STATEMENT.

10:35AM 12 SO IMPLICIT OR ABSTRACT MOTIVE IS NOT SUFFICIENT TO STATE
10:35AM 13 A CLAIM UNDER THE LANHAM ACT.

10:35AM 14 THE COURT: ALL RIGHT. SO I DID HAVE A QUESTION
10:35AM 15 ABOUT TRYING TO FOCUS IN ON THIS ISSUE OF PLAINTIFFS ALLEGE
10:36AM 16 DISCRIMINATION BASED ON THEIR IDENTITY AS OPPOSED TO CONTENT.

10:36AM 17 AND I DON'T KNOW IF THIS IS A QUESTION FOR YOU OR
10:36AM 18 MR. WILLEN BECAUSE IT REALLY DOES GET INTO THE QUESTION OF WHAT
10:36AM 19 IS IMMUNIZED AND WHAT IS NOT.

10:36AM 20 PLAINTIFFS SAY IN THEIR COMPLAINT THAT THEIR CONTENT IS
10:36AM 21 BLOCKED OR RESTRICTED IN SOME WAY NOT BECAUSE OF THE CONTENT
10:36AM 22 ITSELF BUT BECAUSE THE CREATORS OF THE CONTENT ARE GAY OR ARE
10:36AM 23 SEEKING TO HAVE THEIR CONTENT VIEWED BY THE LGBT COMMUNITY, SO
10:36AM 24 THEY'RE TARGETING CONTENT TO THE LGBT COMMUNITY.

10:36AM 25 SO THAT MAKES ME WONDER WHETHER THAT KIND OF CONDUCT IS,

1 AS I ASKED FROM THE BEGINNING, SO IF I CREDIT THAT AS AN
2 ALLEGATION THAT I MUST ACCEPT AS TRUE THAT IT'S A
3 DISCRIMINATION BASED ON IDENTITY, IS THAT WITHIN THE SCOPE OF
4 THE PUBLISHING ACTIVITIES UNDER SECTION (C) (1)?

5 AND THE SECOND PART IS IF YOU HAVE TO SHOW GOOD FAITH
6 UNDER (C) (2), IS THAT KIND OF DISCRIMINATION, IS THERE A
7 QUESTION WHETHER THAT KIND OF DISCRIMINATION IS NOT GOOD FAITH
8 UNDER (C) (2)?

9 SO THOSE ARE QUESTIONS FOR MR. WILLEN.

10 MR. WILLEN: SURE. I'D BE HAPPY TO ADDRESS THOSE,
11 YOUR HONOR.

12 SO WITH RESPECT TO (C) (1), THE COURT IS NOT WRITING ON A
13 BLANK SLATE HERE. WE'VE HAD A SERIES OF DECISIONS, AT LEAST
14 SIX CASES IN THE LAST TWO OR THREE YEARS ALL OF WHICH HAVE
15 APPLIED SECTION 230(C) (1) TO CLAIMS UNDER VARIOUS
16 DISCRIMINATION LAWS, INCLUDING THE UNRAH ACT.

17 SO, FOR EXAMPLE, THE DOMEN CASE THAT MS. WHITE MENTIONED
18 IN THE SOUTHERN DISTRICT OF NEW YORK WAS A CLAIM OF THE
19 UNRAH ACT SPECIFICALLY HELD THAT THE STATE, YOU KNOW,
20 DISCRIMINATION LAWS AND CLAIMS ARISING UNDER THEM ARE WITHIN
21 THE SCOPE OF PUBLISHING ACTIVITY AT LEAST IN CERTAIN CONTEXTS
22 UNDER (C) (1) .

23 WE HAVE THE SIKHS FOR JUSTICE CASE, JUDGE KOH'S DECISION,
24 WHICH HELD THE SAME THING AS DID TITLE II OF THE FEDERAL CIVIL
25 RIGHTS ACT, AND THAT DECISION WAS AFFIRMED IN AN UNPUBLISHED

10:38AM 1 DECISION BY THE NINTH CIRCUIT, WHICH SPECIFICALLY SAID THERE'S
10:38AM 2 NO, THERE'S NO REASON TO EXEMPT THIS CLAIM FROM SECTION 230.

10:38AM 3 PRAGER HELD THE SAME THING. SIKHS VERSUS FACEBOOK, THE
10:38AM 4 FEDERAL NEWS AGENCY CASE, ALSO A JUDGE KOH DECISION. SO
10:38AM 5 THERE'S A LONG SERIES OF CASES THAT HAVE HELD THIS.

10:38AM 6 AND WHAT THAT REFLECTS IS THAT I THINK YOU HAVE TO LOOK IN
10:38AM 7 A CASE LIKE THIS, AS THOSE COURTS DID, AT THE NATURE OF THE
10:38AM 8 ACTIVITY THAT IS GIVING RISE TO THE CLAIM.

10:38AM 9 HERE PRIMARILY WHAT THE PLAINTIFFS ARE ALLEGING IS A
10:38AM 10 CHALLENGE TO TWO THINGS:

10:38AM 11 ONE IS THE DECISIONS THAT YOUTUBE MADE WITH RESPECT TO
10:38AM 12 RESTRICTED MODE, AND THAT'S THE EXCLUSION OF CERTAIN VIDEOS
10:38AM 13 FROM BEING ELIGIBLE TO BEING SHOWN IN YOUTUBE'S RESTRICTED
10:38AM 14 MODE;

10:39AM 15 AND THE SECOND IS THE DECISION TO DEMONETIZE SOME VIDEOS,
10:39AM 16 ALTHOUGH NOT ALL OF THE VIDEOS.

10:39AM 17 SO MS. WHITE CAN CERTAINLY ADDRESS WHETHER THOSE
10:39AM 18 ALLEGATIONS EVEN STATE A CLAIM UNDER THE UNRAH ACT, BUT
10:39AM 19 ASSUMING THAT THEY DID, THAT CHALLENGE, THE SPECIFIC ISSUES AT
10:39AM 20 ISSUE HERE, PLAINLY QUALIFY AS PUBLISHING ACTIVITY AS IT'S BEEN
10:39AM 21 DEFINED BY THE NINTH CIRCUIT AND THE SERIES OF NORTHERN
10:39AM 22 DISTRICT OF CALIFORNIA AND OTHER CASES THAT I MENTIONED.

10:39AM 23 SO WITH RESPECT TO RESTRICTED MODE, THAT WAS THE EXPRESS
10:39AM 24 HOLDING OF THE PRAGER II STATE COURT DECISION CHALLENGED THE
10:39AM 25 RESTRICTED MODE CLEARLY COMES UNDER SECTION 230(C) (2) AS

10:39AM 1 PUBLISHING CONDUCT, EXCUSE ME, AND LIKEWISE THE SAME THING WITH
10:39AM 2 RESPECT TO DEMONETIZATION, AND THAT WAS CONFIRMED EVEN MORE
10:39AM 3 RECENTLY BY JUDGE KIM'S DECISION IN THE LEWIS CASE WHICH WE
10:39AM 4 SUBMITTED AS SUPPLEMENTAL AUTHORITY. AND THAT WAS A CASE
10:40AM 5 INVOLVING DEMONETIZATION, AND THE COURT THERE EXPLAINED VERY
10:40AM 6 CLEARLY I THINK THAT DEMONETIZATION IS A FORM OF PUBLISHER
10:40AM 7 ACTIVITY.

10:40AM 8 THE COURT: LET ME PAUSE YOU RIGHT THERE,
10:40AM 9 MR. WILLEN, BECAUSE I GET THE POINT THAT OTHER CASES HAVE HELD
10:40AM 10 THAT PUBLISHING ACTIVITY ENCOMPASSES QUITE A BROAD SWATH OF
10:40AM 11 ACTIVITY, I UNDERSTAND THAT POINT.

10:40AM 12 BUT TO PUT A REALLY FINE POINT ON IT HERE, WHAT I'M
10:40AM 13 CONCERNED ABOUT IS IF, IF THE ALLEGATION IS, AND I KNOW THAT
10:40AM 14 GOOGLE DISPUTES THAT THIS IS REALLY WHAT IS ALLEGED, BUT IF THE
10:40AM 15 ALLEGATION IS THAT, A, SOMEONE WHO DOES ALL OF THOSE PUBLISHING
10:40AM 16 ACTIVITIES IS NEVERTHELESS DISCRIMINATING ON THE BASIS OF THE
10:40AM 17 AUTHOR'S IDENTITY, THE CONTENT CREATOR'S IDENTITY, REGARDLESS
10:40AM 18 OF WHAT IT IS THAT THE CONTENT HAS IN IT, IF THAT'S THE
10:40AM 19 ALLEGATION, ARE YOU SAYING THAT THAT IS PUBLISHING ACTIVITY,
10:40AM 20 DISCRIMINATION ON THE BASIS OF, LET'S JUST SAY SEXUAL
10:41AM 21 ORIENTATION OF THE CONTENT CREATOR, THAT'S WITHIN PUBLISHING
10:41AM 22 ACTIVITY UNDER (C) (1)?

10:41AM 23 MR. WILLEN: WELL, I WOULD SAY TWO THINGS. SO,
10:41AM 24 FIRST OF ALL, I THINK IT'S ACTUALLY CLEAR FROM THE FACTS
10:41AM 25 ALLEGED IN THE COMPLAINT AS OPPOSED TO KIND OF RHETORIC IN THE

COMPLAINT THAT THAT'S NOT WHAT IS PLAUSIBLY ALLEGED HERE.

YOU KNOW, WE KNOW, FOR EXAMPLE, THAT ALL OF THE -- NONE OF THE PLAINTIFFS HERE HAVE HAD ALL OF THEIR VIDEOS EXCLUDED FROM RESTRICTED MODE, NONE OF THEM HAVE ALL OF THEIR VIDEOS NOT ELIGIBLE FOR MONETIZATION.

SO CLEARLY IF YOU ACTUALLY LOOK AT WHAT IS GOING ON IN THIS CASE, IT'S VERY HARD TO SAY THAT THERE IS ANY SORT OF IDENTITY OR USER BASE DISCRIMINATION. SO I THINK THAT'S AN IMPORTANT POINT.

BUT AGAIN, WITH RESPECT TO SORT OF THE LEGAL QUESTION UNDER SECTION 230, I MEAN I THINK IT DOES FOLLOW, AND THERE MAY BE SOME CASES WHERE THIS COULD NOT BE THE CASE DEPENDING ON THE PARTICULAR CIRCUMSTANCES.

BUT THE NINTH CIRCUIT HAS BEEN VERY CLEAR THAT SECTION 230(C) (1) APPLIES WITHOUT REGARD TO THE NATURE OF THE CAUSE OF ACTION.

THE THING THAT YOU'RE LOOKING AT IS WHAT IS THE DUTY THAT THE CAUSE OF ACTION IMPOSES AND WHERE THAT DUTY TAKES THE FORM OF A COMMAND EITHER TO PUBLISH OR NOT TO PUBLISH. THAT IS PRECISELY WHAT SECTION 230(C) (1) PROTECTS AGAINST. SO WITHDRAWING CONTENT FROM PUBLICATION, CLEAR PUBLIC ACTIVITY.

SO WHERE A DISCRIMINATION CLAIM TAKES THE FORM OF SEEKING TO IMPOSE A DUTY ON THE PLATFORM TO EITHER PUBLISH OR NOT TO WITHDRAW FROM PUBLICATION A PARTICULAR PIECE OF CONTENT OR A PARTICULAR USER'S CONTENT, THAT I THINK JUST UNDER THE

10:42AM 1 ESTABLISHED LAW APPLIES AND KICKS THE IMMUNITY IN.

10:42AM 2 THE COURT: THAT'S WHY I WAS ASKING THIS QUESTION IN
10:42AM 3 THE CONTEXT OF THE UNRAH ACT BECAUSE THAT TO ME SEEMED LIKE THE
10:42AM 4 ONLY -- IT'S NOT -- IT CAN'T BE A FIRST AMENDMENT ISSUE. WE
10:43AM 5 KNOW THAT FROM PRAGER.

10:43AM 6 MR. WILLEN: YEAH.

10:43AM 7 THE COURT: I DIDN'T REALLY SEE HOW . THERE'S A 14TH
10:43AM 8 AMENDMENT ISSUE. IT'S NOT REALLY PLED THAT WAY.

10:43AM 9 IT'S MORE OF AS A RESPONSE TO THE AFFIRMATIVE RESPONSE
10:43AM 10 UNDER 230 (C) . SO THAT'S WHY I WAS FOCUSING ON THE UNRAH ACT
10:43AM 11 BECAUSE IMAGINE THAT A PUBLISHER WAS DISCRIMINATING AGAINST A
10:43AM 12 CONTENT CREATOR BASED ON RACE, AND JUST MAKE IT REAL
10:43AM 13 STRAIGHTFORWARD, AND THAT WAS THE ALLEGATION.

10:43AM 14 SO LET'S JUST REMOVE IT FROM THE ACTUAL CASE HERE, BECAUSE
10:43AM 15 I KNOW THAT GOOGLE HAS A DIFFERENT VIEW OF WHAT ACTUALLY IS
10:43AM 16 PLED AND WHAT WAS PLAUSIBLY PLED, AND I JUST WANTED TO AVOID
10:43AM 17 THAT ISSUE.

10:43AM 18 I'M ASKING YOU A HYPOTHETICAL QUESTION. A PUBLISHER IS
10:43AM 19 DISCRIMINATING AGAINST A CONTENT CREATOR ON THE BASIS OF RACE,
10:43AM 20 NOT ON CONTENT, IS THAT PUBLISHING ACTIVITY UNDER (C) (1) AND IS
10:43AM 21 IT IMMUNIZED -- WOULD IT ALSO BE IMMUNIZED UNDER (C) (2) ?

10:43AM 22 MR. WILLEN: YEAH. SO I THINK THE (C) (2) QUESTION
10:43AM 23 IS A DIFFICULT ONE BECAUSE OF THE GOOD FAITH LANGUAGE.

10:44AM 24 OBVIOUSLY WE HAVE NOT SPECIFICALLY RAISED (C) (2) IN
10:44AM 25 CONNECTION WITH THIS MOTION. I THINK THIS ISSUE HAS NOT

1 SPECIFICALLY COME UP IN THE (C) (2) CONTEXT. I CAN IMAGINE SOME
2 COURTS TAKING THE POSITION THAT A PROPERLY PLEADED CLAIM OF THE
3 SORT THAT YOU DESCRIBE AS SORT OF FACIAL RACE DISCRIMINATION
4 CLAIM MAY NOT BE GOOD FAITH UNDER (C) (2), I CAN IMAGINE A COURT
5 TAKING THAT POSITION.

6 I THINK AGAIN, THOUGH, (C) (1) DOES NOT HAVE A GOOD FAITH
7 PROVISION, AND IT APPLIES WITH CIRCUMSTANCES AND APPLIES
8 DIFFERENTLY.

9 I THINK WE HAVE TO LOOK AT THE CARVE-OUTS THAT DO EXIST
10 UNDER (C) (1). WE HAVE PARTICULAR STATUTES THAT CONGRESS CHOSE
11 TO EXEMPT, INTELLECTUAL PROPERTY, FEDERAL INTELLECTUAL PROPERTY
12 CLAIMS, CRIMINAL PROSECUTIONS, CLAIMS UNDER THE STORED
13 COMMUNICATIONS AND ELECTRONIC COMMUNICATIONS PRIVACY ACT.
14 DISCRIMINATION CLAIMS OBVIOUSLY ARE NOT, NOT THERE.

15 I THINK THERE COULD BE SOME STARK CASES WHERE A COURT
16 MIGHT FIND UNDER A PARTICULAR SET OF CIRCUMSTANCES THAT SOME
17 ALLEGED DISCRIMINATION DIDN'T TAKE THE FORM OF A PUBLISHER OF
18 ACTUALLY TARGETING PUBLISHER CONDUCT, AND, THEREFORE, DIDN'T
19 COME WITHIN (C) (1).

20 I THINK THIS CASE, WHICH IS THE CASE THAT WE HAVE TO LOOK
21 AT, IS I THINK CLEARLY ON THE OTHER SIDE OF THE LAW GIVEN THE
22 NATURE OF THE ALLEGATIONS FOCUSSED SPECIFICALLY ON RESTRICTED
23 MODE, FOCUSSED ON DEMONETIZATION.

24 WE KNOW FROM THE CASES THAT THOSE ARE CORE PUBLISHER
25 ACTIVITIES, AND WE KNOW FROM THE CASES THAT THE DISCRIMINATION

1 CLAIMS THAT ARE TARGETING THOSE KINDS OF ACTIVITIES HAVE BEEN
2 REPEATEDLY PRECLUDED BY SECTION 230 (C) (1) .

3 SO I DON'T THINK THERE'S ANY BASIS IN THIS CASE, GIVEN
4 THESE ALLEGATIONS, TO DEPART FROM THAT CONSENSUS.

5 THE COURT: ALL RIGHT. LET ME JUST ASK, DOES ANYONE
6 ON BEHALF OF GOOGLE WISH TO ADDRESS THE REQUEST FOR UNUSUAL
7 NOTICE?

8 MR. WILLEN: SURE. I'D BE HAPPY TO TALK ABOUT THAT
9 AS WELL. YEAH, I THINK WE SHARE YOUR SENSE, YOUR HONOR, THAT
10 THE EXECUTIVE ORDER REALLY HAS NOTHING TO DO WITH THE ISSUES ON
11 THIS MOTION.

12 THE EXECUTIVE ORDER SEEMS TO US, AT LEAST THE ONLY
13 PROVISION OF IT THAT PURPORTS TO HAVE ANY ACTUAL PRESENT
14 EFFECT, WHICH IS PARAGRAPH 2, IS ADDRESSED TO AN INTERPRETATION
15 OF SECTION 230 (C) (2) (A) , WHICH SEEMS TO REDUCE TO IF YOU DON'T
16 QUALIFY FOR PROTECTION UNDER 230 (C) (2) (A) , YOU'RE NOT PROTECTED
17 BY SECTION 230 (C) (2) (A) .

18 SO I DON'T THINK THAT HAS ANY BEARING ON THIS MOTION WHICH
19 DOESN'T RELY ON SECTION 230 (C) (2) AT ALL.

20 EVERYTHING ELSE IN THE ORDER IS SORT OF DIRECTED TO THINGS
21 THAT MIGHT HAPPEN IN THE FUTURE AND DIRECTIVES FOR RULE MAKING,
22 ET CETERA.

23 SO I DON'T THINK THERE'S ANYTHING TO DO WITH IT. I DON'T
24 THINK IT HAS ANY BEARING ON THESE ISSUES, AND CERTAINLY IT
25 DOESN'T DISPLACE AND IT'S REALLY NOT CAPABLE OF DISPLACING

10:47AM 1 EITHER THE TEXT OF THE STATUTE OR THE LAW THAT HAS BEEN
10:47AM 2 ESTABLISHED WITH RESPECT TO (C) (1) .

10:47AM 3 THE COURT: ALL RIGHT. THANK YOU FOR THAT.
10:47AM 4 IS THERE ANYTHING ELSE THAT YOU WOULD LIKE TO ARGUE IN
10:47AM 5 SUPPORT OF YOUR MOTION THAT I HAVEN'T FOCUSSED ON IN PARTICULAR
10:47AM 6 OR THAT YOU THINK NEEDS FURTHER ELABORATION AT THIS TIME?

10:47AM 7 MR. WILLEN: I THINK THE ONLY THING, AND OBVIOUSLY I
10:47AM 8 WANT TO HEAR FROM THE PLAINTIFFS AND RESPOND TO WHAT THEY MIGHT
10:47AM 9 SAY, BUT I DO THINK THAT THE QUESTION OF THE CONSTITUTION, THE
10:47AM 10 CONSTITUTIONAL CHALLENGE TO SECTION 230 THAT THEY HAVE RAISED I
10:47AM 11 THINK, AS THE COURT RECOGNIZED, THE FINDING OF NO STATE ACTION
10:47AM 12 IN THE PRAGER CASE MAKING CLEAR THAT YOUTUBE IS A PRIVATE FORUM
10:48AM 13 AND NOT A GOVERNMENT ACTOR, I THINK THAT FINDING EQUALLY BARS
10:48AM 14 NOT JUST THE FIRST AMENDMENT CLAIM BUT ALSO ANY CHALLENGE TO
10:48AM 15 CONSTITUTIONALITY OF SECTION 230.

10:48AM 16 I THINK THE DECISION THAT IS PROBABLY MOST DIRECTLY ON
10:48AM 17 POINT IN EXPLAINING WHY THAT CHALLENGE FAILS IS THE
10:48AM 18 NINTH CIRCUIT'S DECISION IN ROBERTS VERSUS AT&T MOBILITY WHICH
10:48AM 19 WAS NOT A CASE THAT WE WERE ABLE TO CITE IN OUR PAPERS BECAUSE
10:48AM 20 IT RELATES TO AN ARGUMENT THAT THE PLAINTIFFS MADE IN THEIR
10:48AM 21 SURREPLY AND IN THEIR RESPONSE TO THE GOVERNMENT, BUT I THINK
10:48AM 22 THAT CASE WAS VERY HELPFUL.

10:48AM 23 THE COURT: ALL RIGHT. THANK YOU. THANK YOU VERY
10:48AM 24 MUCH.

10:48AM 25 MR. OBSTLER, I WOULD LIKE FOR YOU TO HAVE IN MIND THE

10:48AM 1 QUESTIONS THAT THE COURT ASKED AT THE BEGINNING, SO JUST TO
10:48AM 2 REVIEW THE SIGNIFICANCE OF THE PRAGER DECISION ON YOUR FEDERAL
10:48AM 3 CLAIMS AND POSSIBLY THE CALIFORNIA CONSTITUTION CLAIM AS WELL;
10:48AM 4 THE QUESTIONS THAT THE COURT HAD ABOUT THE APPLICATION OF
10:49AM 5 230(C)(1) AND (2) AND THE CONTEXT OF THE INTENTIONAL
10:49AM 6 DISCRIMINATION, AND I FRAMED IT AS A QUESTION UNDER THE
10:49AM 7 UNRAH ACT, BUT YOU MAY THINK OF IT DIFFERENTLY, AND THEN I'LL
10:49AM 8 ALSO GIVE YOU AN OPPORTUNITY TO -- I WOULD LIKE YOU TO ADDRESS
10:49AM 9 YOUR REQUEST FOR JUDICIAL NOTICE AND LET ME KNOW WHY YOU THINK
10:49AM 10 IT MATTERS TO THE MOTION TO DISMISS. AND MAYBE IT'S JUST
10:49AM 11 SPECIFICALLY TO THE GOVERNMENT'S POSITION ON THE MOTION TO
10:49AM 12 INTERVENE, BUT I'D LIKE TO JUST UNDERSTAND THAT, AND ANYTHING
10:49AM 13 ELSE THAT YOU WOULD LIKE TO ARGUE. ALL RIGHT.

10:49AM 14 MR. OBSTLER: THANK YOU SO MUCH, YOUR HONOR.

10:49AM 15 I REALLY APPRECIATE AN OPPORTUNITY TO GET A HEARING ON
10:49AM 16 THIS CASE BECAUSE I THINK THERE ARE A LOT OF MISCONCEPTIONS
10:49AM 17 ABOUT WHAT WE HAVE ALLEGED IN 126 PAGES AND 354 PARAGRAPHS.

10:49AM 18 I'M GOING TO ANSWER ALL OF YOUR QUESTIONS, BUT I'M GOING
10:49AM 19 TO REFER VERY CLOSELY TO THE COMPLAINT IN DOING THAT BECAUSE I
10:49AM 20 THINK A LOT OF WHAT THEY'RE REALLY ARGUING WHEN YOU PEEL BACK
10:50AM 21 THE ONION IS FACT BASED. IF THEY'RE DISCRIMINATING, THESE
10:50AM 22 ARGUMENTS FALL APART.

10:50AM 23 I'LL START WITH THE PRAGER CASE. I THINK WAY TOO MUCH
10:50AM 24 TIME -- AND I BEAR A LOT OF RESPONSIBILITY FOR THIS BECAUSE I
10:50AM 25 LITIGATED THE PRAGER CASE -- IS BEING SPENT ON STATE ACTION.

1 I'M GOING TO SUBMIT HERE ON STATE ACTION. I DON'T WANT TO
2 WASTE ANY MORE TIME ON IT. I THINK YOUR HONOR HAS HER VIEWS.

3 MY ONLY ISSUE WITH THE STATE ACTION DECISIONS THAT HAVE
4 COME DOWN SO FAR IS THAT THERE IS NOT A CLEAR PLEADING STANDARD
5 ON WHAT YOU WOULD HAVE TO PLEAD TO PLEAD PUBLIC FUNCTION OR TO
6 PLEAD ENDORSEMENT.

7 SO IF I COULD KNOW THAT, I COULD THEN MAKE A GOOD FAITH
8 DECISION AS TO WHETHER OR NOT I CAN ALLEGE THOSE TYPES OF
9 FACTS. I WOULD LIKE TO HOLD, THOUGH, UNLESS THE COURT REALLY
10 WANTS TO HEAR FROM ME NOW ON THAT ISSUE, I WOULD REALLY LIKE TO
11 HOLD THAT TO THE END BECAUSE, FRANKLY, I'M PRETTY MUCH PREPARED
12 TO SUBMIT ON THAT. WE'RE GOING TO HAVE TO GO UP ON THIS, AND
13 IT MAY BE THAT PRAGER AND HALLECK ENDS EVERYTHING. I
14 UNDERSTAND THAT. OKAY. I DON'T THINK THAT'S THE KEY ISSUE IN
15 MY CASE AT THIS POINT.

16 THE COURT: THE STATE ACTION ISSUE MAKES YOUR FIRST
17 AMENDMENT CLAIM YOUR WEAKEST CLAIM.

18 MR. OBSTLER: I WOULD ABSOLUTELY AGREE WITH THAT,
19 YOUR HONOR. I THINK SKINNER AND THE CONSTITUTIONALITY -- AND
20 SO SKINNER IS SORT OF UPSIDE-DOWN ON THE CONSTITUTIONALITY
21 ARGUMENT, BUT I WOULD AGREE THAT THAT, OF ALL OF THE CLAIMS IN
22 THIS CASE AT THIS POINT, DEPENDING ON WHAT THE STANDARD IS, IF
23 THAT'S THE WEAKEST CLAIM IN THIS CASE.

24 NOW, I WILL SAY THEY HAVE MERGED THEIR TERMS OF SERVICE
25 RECENTLY SO A VIOLATION ON YOUTUBE CAN ALSO LEAD TO THEM TAKING

10:51AM 1 ANDROID DEVICES AWAY, CAN LEAD TO THEM SHUTTING DOWN ALL SORTS
10:51AM 2 OF GOOGLE SERVICES. THEY'RE VERY INVOLVED IN ELECTIONS. WE
10:51AM 3 KNOW THAT FOR WHAT WENT ON IN THE DISASTER THAT HAPPENED IN THE
10:51AM 4 CAUCUSES.

10:51AM 5 THE COURT: I WOULD RATHER NOT GET INTO THINGS THAT
10:51AM 6 ARE NOT ALLEGED IN YOUR COMPLAINT.

10:51AM 7 MR. OBSTLER: YOUR HONOR, WE HAVE ALLEGED THAT THEY
10:51AM 8 ARE INVOLVED IN THESE FUNCTIONS. WE HAVE ALLEGED THAT. IF I
10:51AM 9 NEED TO ALLEGE MORE SPECIFICITY BECAUSE I'VE GOT SOME VERY
10:51AM 10 STRINGENT PLEADING REQUIREMENTS HERE, WE CAN TAKE A LOOK AT
10:52AM 11 THAT.

10:52AM 12 SO MY ONLY REQUEST ON THAT IS THAT THE COURT ARTICULATE
10:52AM 13 THE STANDARD WHY WE FAIL AND GIVE US LEAVE TO CONSIDER WHETHER
10:52AM 14 WE CAN AMEND, BUT OTHERWISE WE'RE PREPARED TO GO UP ON THAT
10:52AM 15 ISSUE, YOUR HONOR.

10:52AM 16 THE COURT: ALL RIGHT. LET'S HEAR ABOUT YOUR
10:52AM 17 ARGUMENTS THAT DON'T RELY ON STATE ACTION.

10:52AM 18 MR. OBSTLER: OKAY. LET'S START WITH LANHAM. THEY
10:52AM 19 SEEM TO BE FOCUSED VERY MUCH ON THE STATEMENTS ABOUT FREEDOM
10:52AM 20 OF EXPRESSION AND ALL THIS TYPE OF STUFF. THAT'S NOT THE BASIS
10:52AM 21 FOR A LANHAM CLAIM.

10:52AM 22 THE BASIS FOR A LANHAM CLAIM IS THEY WEAR TWO HATS.
10:52AM 23 THEY'RE ONE OF THE LARGEST CONTENT CREATORS ON THE YOUTUBE
10:52AM 24 PLATFORM. THEY HAVE PREFERRED CONTENT DEALS WITH MAJOR, MAJOR
10:52AM 25 MAINSTREAM PUBLISHERS. SO THEY'RE WEARING TWO HATS.

10:52AM 1 AND WHAT THEY'RE DOING, YOUR HONOR, AND I HOPE YOU CAN SEE
10:52AM 2 THIS, THIS IS WHAT APPEARS --

10:52AM 3 THE COURT: THAT'S OKAY. I HAVE THE COMPLAINT. YOU
10:52AM 4 DON'T NEED TO PUT IT ON THE VIDEO.

10:52AM 5 MR. OBSTLER: YEAH. THEY ARE SAYING TO ALL SORTS OF
10:52AM 6 VIEWERS AND AUDIENCES AROUND THE COUNTRY THAT MY CLIENT'S
10:52AM 7 VIDEOS ARE INAPPROPRIATE BECAUSE THEY CONTAIN SHOCKING CONTENT,
10:53AM 8 SEXUAL OR NUDITY, DRUGS, VIOLENCE, ET CETERA. THAT'S WHAT THEY
10:53AM 9 ARE TELLING THE AUDIENCES WHEN THEY RESTRICT THOSE VIDEOS.

10:53AM 10 THIS CASE, BY THE WAY, IS NOT JUST ABOUT RESTRICTED MODE.
10:53AM 11 IT'S ABOUT EVERY SINGLE SERVICE THAT GOOGLE AND YOUTUBE OFFER
10:53AM 12 WHERE THE TRIGGER TO OBTAIN THE SERVICE IS BASED ON A CONTENT
10:53AM 13 BASED REVIEW OR CONTENT BASED PROCEDURE.

10:53AM 14 SO MY ARGUMENT IN LANHAM IS THAT THEY'RE USING THEIR ROLE
10:53AM 15 AS CONTENT REGULATORS TO BRAND OUR CONTENT AS INAPPROPRIATE, SO
10:53AM 16 WHEN THE READER LOOKS TO SEE WHAT IS ON RESTRICTED MODE, THEY
10:53AM 17 HAVE A LIST AND THAT IS AN AFFIRMATIVE STATEMENT THAT THEY HAVE
10:53AM 18 REVIEWED THE CONTENT AND THAT THEY HAVE FOUND THE CONTENT TO
10:53AM 19 VIOLATE THAT RULE.

10:53AM 20 THE COURT: SO LET ME PAUSE YOU THERE FOR A MOMENT
10:53AM 21 AND LET ME MAKE SURE THAT I UNDERSTAND WHAT YOU'RE SAYING THE
10:53AM 22 LANHAM ACT CLAIM IS.

10:53AM 23 IS IT A FALSE ADVERTISING CLAIM UNDER 1125(A) (1) (B) ?

10:54AM 24 MR. OBSTLER: YES, YES.

10:54AM 25 THE COURT: OKAY. SO THEN YOU HAVE TO GO THROUGH

10:54AM 1 THE ELEMENTS.

10:54AM 2 SO IF YOU HAD TO TELL ME AN ANSWER TO THIS QUESTION, WHAT
10:54AM 3 IS THE FALSE OR MISLEADING STATEMENT?

10:54AM 4 MR. OBSTLER: THE FALSE OR MISLEADING STATEMENT THAT
10:54AM 5 THEY'RE MAKING IS THAT MY CLIENT'S VIDEOS ARE INAPPROPRIATE
10:54AM 6 SEXUALLY, CONTAIN SEXUAL NUDITY OR MATERIAL, CONTAIN VIOLENCE,
10:54AM 7 WHEN, IN FACT, THAT IS NOT TRUE BECAUSE THEY'RE NOT EVEN
10:54AM 8 LOOKING AT THE CONTENT.

10:54AM 9 THE COURT: AND YOU'RE SAYING THAT THE STATEMENT IS
10:54AM 10 IMPLICIT BECAUSE A SCREEN DISPLAY THAT INDICATES TO THE VIEWER
10:54AM 11 THAT THAT IS BLOCKED, OR NOT AVAILABLE IN RESTRICTED MODE,
10:54AM 12 IMPLIES THAT IT MUST MEET ONE OF THOSE CATEGORIES OF CONTENT
10:54AM 13 THAT GOOGLE WILL NOT PERMIT TO BE SHOWN IN THAT MODE.

10:54AM 14 IS THAT THE THEORY?

10:54AM 15 MR. OBSTLER: THAT IS CORRECT, YOUR HONOR.

10:54AM 16 BUT IT GOES A LITTLE DEEPER THAN THAT, OKAY? BECAUSE IT
10:54AM 17 ALSO -- AND THIS OVERLAPS WITH THE (C) (1) (A) ISSUE, AND WE'VE
10:55AM 18 ALLEGED THIS AND THE FROSCH DECLARATION CONTAINS IT, TOO.

10:55AM 19 THEY'RE NOT ONLY USING DISCRIMINATORY ALGORITHMS TO DO
10:55AM 20 THIS. THEY'RE ACTUALLY EMBEDDING METADATA INTO MY CLIENT'S
10:55AM 21 VIDEOS THAT ALLOW THE ALGORITHM TO DO THE PROFILE.

10:55AM 22 AGAIN, UNTIL WE DO DISCOVERY, THIS IS GOING TO BE A VERY
10:55AM 23 COMPLICATED CASE, AND WE'RE SAYING SHOW US THE CODE AND SHOW US
10:55AM 24 HOW THIS WORKS.

10:55AM 25 BUT WE DID A TEA VIDEO, AS YOUR HONOR KNOWS, WHERE WE

10:55AM 1 ALLEGED AND WHERE WE PUT IN BOTH TAG LINES AND THEN WE PUT IT
10:55AM 2 IN WITHOUT THE TAG LINES AND ALL IT SAYS IS WE LIKE TEA. IT
10:55AM 3 GOT RESTRICTED.

10:55AM 4 AND AS MS. FROSCH WAS TOLD AT THE MEETINGS, HOW COULD THAT
10:55AM 5 HAVE HAPPENED UNLESS SOMEBODY PUT SOME METADATA IN THERE THAT
10:55AM 6 ALLOWED THAT ALGORITHM TO FIND YOU.

10:55AM 7 AND SO WHAT WE'RE SAYING IS THAT BECAUSE THEY'RE SUCH
10:56AM 8 LARGE CONTENT CREATORS, AND THEY'RE USING THEIR ROLE AS CONTENT
10:56AM 9 REGULATORS TO ALSO FALSELY BRAND CONTENT THAT IS ABSOLUTELY
10:56AM 10 APPROPRIATE AS INAPPROPRIATE, AND THAT BLOCKS OUR REACH, AND
10:56AM 11 THAT'S HOW THEY'RE COMPETING WITH US.

10:56AM 12 THE COURT: RIGHT. SO THAT DOESN'T SOUND SO MUCH
10:56AM 13 LIKE FALSE ADVERTISING, AND SO THAT'S WHY I WAS ASKING YOU, IS
10:56AM 14 IT A FALSE ADVERTISING CLAIM OR IS IT SOMETHING ELSE?

10:56AM 15 MR. OBSTLER: WHEN YOU SAY THAT THAT DOESN'T SOUND
10:56AM 16 LIKE FALSE ADVERTISING --

10:56AM 17 THE COURT: YOU'RE SAYING -- SO YOU'RE FALSELY
10:56AM 18 BRANDING -- YOUR THEORY IS THAT GOOGLE AND YOUTUBE ARE FALSELY
10:56AM 19 BRANDING YOUR CLIENT'S CONTENT?

10:56AM 20 MR. OBSTLER: THAT'S CORRECT, BUT THEY'RE DOING IT
10:56AM 21 BY SHOWING EVERY VIEWER WHO GOES THERE (INDICATING).

10:56AM 22 MY WIFE THE OTHER DAY ACTUALLY GOT A RESTRICTED MODE
10:56AM 23 NOTICE ON HER FACEBOOK PAGE. SO THE RESTRICTED MODE IS NOW
10:56AM 24 GOING ACROSS PLATFORM. AND SHE LOOKED IT UP AND SHE SAID WHAT
10:56AM 25 IS GOING ON HERE?

10:56AM 1 THE POINT IS -- I'M SORRY, THE POINT IS --

10:57AM 2 THE COURT: AGAIN, I'M JUST TRYING TO FIGURE OUT HOW
10:57AM 3 YOUR CLAIM FITS THE CLAIM THAT YOU'VE ALLEGED UNDER THE
10:57AM 4 LANHAM ACT, HOW YOUR FACTS FIT THAT CLAIM. I'M STILL
10:57AM 5 STRUGGLING A LITTLE BIT WITH ALL OF THE ELEMENTS THAT YOU HAVE
10:57AM 6 TO SHOW FOR THE LANHAM ACT.

10:57AM 7 THE QUESTION THAT THE NINTH CIRCUIT FOCUSSED ON WAS THAT
10:57AM 8 THE STATEMENTS, AND THE SAME ARGUMENTS WERE MADE IN THAT CASE
10:57AM 9 AS FAR AS I CAN TELL, THE STATEMENTS WERE NOT MADE IN
10:57AM 10 COMMERCIAL ADVERTISING OR PROMOTION.

10:57AM 11 MR. OBSTLER: YEP.

10:57AM 12 THE COURT: THE FALSE STATEMENTS.

10:57AM 13 RATHER, THE STATEMENTS THAT WERE MADE WERE DESCRIBING
10:57AM 14 TRUTHFULLY WHAT HAD HAPPENED AS IN THIS GOT FLAGGED AS
10:57AM 15 SOMETHING THAT WOULD BE EXCLUDED FROM RESTRICTED MODE.

10:57AM 16 SO -- AND THE IMPLEMENTATION OF THAT, THE GUIDELINES THAT
10:57AM 17 RESULTED IN THAT DISPLAY BEING AS YOU DESCRIBE WERE NOT
10:58AM 18 ADVERTISING OR PROMOTION.

10:58AM 19 SO IN LIGHT OF PRAGER, HOW DO YOU AVOID THE CONCLUSIONS
10:58AM 20 THAT THAT COURT REACHED? HOW DO YOU AVOID THOSE AND
10:58AM 21 EFFECTIVELY HAVE A CLAIM IN THIS CASE THAT DOESN'T HIT THOSE
10:58AM 22 SAME BARRIERS?

10:58AM 23 MR. OBSTLER: BECAUSE THE COURT IN PRAGER MADE AN
10:58AM 24 INAPPROPRIATE FACTUAL FINDING.

10:58AM 25 THE COURT: OKAY. SO WHAT IS THE INAPPROPRIATE

10:58AM 1 FACTUAL FINDING?

10:58AM 2 MR. OBSTLER: YEAH. IT SAID THERE WAS NO
10:58AM 3 RELATIONSHIP BETWEEN THE STATEMENT THAT IS RESTRICTED IN ANY
10:58AM 4 ADVERTISING OR STATEMENT ABOUT THE QUALITY OF THE VIDEO. THAT
10:58AM 5 WAS PLED IN THE COMPLAINT.

10:58AM 6 I ADMIT IT SHOULD HAVE BEEN MORE CLEARER. WE EXPRESSLY
10:58AM 7 PLED THAT HERE, AND IT IS BY IMPLICATION AS YOU POINTED OUT
10:58AM 8 UNDER THE GRUBBS DECISION OR WHATEVER.

10:58AM 9 I MEAN, THIS IS THE INTERNET AND THEY'RE USING -- THEY'RE
10:58AM 10 RESTRICTING THE VIDEO. THE PERSON LOOKED AT THAT RESTRICTION
10:58AM 11 AND WHAT IS IT -- WHY WOULD THEY RESTRICT THE VIDEO? THERE HAS
10:58AM 12 TO BE SOMETHING WRONG WITH THAT VIDEO AND PEOPLE SEE THAT.

10:59AM 13 AND I THINK THAT IT IS A FACTUAL ISSUE AS TO WHETHER OR
10:59AM 14 NOT THERE IS A CONNECTION BETWEEN THIS STATEMENT OF FACT "MY
10:59AM 15 VIDEO IS RESTRICTED" AND A STATEMENT OF FACT ABOUT WHETHER OR
10:59AM 16 NOT THAT VIDEO CONTAINS INAPPROPRIATE MATERIAL, SHOCKING AND
10:59AM 17 SEXUALLY EXPLICIT, OR AS THE FLOOR MANAGER FOR GOOGLE SAID
10:59AM 18 "BECAUSE YOU'RE GAY" AND PUTTING THAT OUT ON THE NETWORK TO
10:59AM 19 EVERYBODY.

10:59AM 20 SECOND OF ALL, IF I WOULD GET LEAVE TO AMEND BECAUSE WE
10:59AM 21 JUST LEARNED THIS, RESTRICTED MODE SWEEPS BROADER THAN WHAT
10:59AM 22 THEY'VE TOLD US AND WHAT THEY'VE REPRESENTED TO THE COURT. WE
10:59AM 23 NOW HAVE EVIDENCE THAT RESTRICTED MODE IS GOING TO PEOPLE WHO
10:59AM 24 DON'T EVEN HAVE IT ON, AND IT'S GOING ACROSS THE PLATFORM.

10:59AM 25 I'M SORRY, I LEARNED THAT RECENTLY. THIS CASE HAS BEEN

10:59AM 1 EVOLVING. WE HAVEN'T GOTTEN A SINGLE LICK OF DISCOVERY ON THIS
10:59AM 2 TO DATE, YOUR HONOR.

10:59AM 3 THE COURT: RIGHT. IT'S NOT UNUSUAL THAT AT THE
10:59AM 4 PLEADING STAGE YOU WOULDN'T HAVE HAD DISCOVERY.

10:59AM 5 MR. OBSTLER: FAIR ENOUGH.

11:00AM 6 THE COURT: THAT'S WHY WE'RE AT THE PLEADING STAGE.

11:00AM 7 MR. OBSTLER: YEAH.

11:00AM 8 THE COURT: SO THE ISSUE I STILL THINK IS
11:00AM 9 CHALLENGING FOR YOU IS CHARACTERIZING THESE STATEMENTS AS
11:00AM 10 ADVERTISING OR PROMOTION. I THINK THAT'S STILL A CHALLENGING
11:00AM 11 POINT.

11:00AM 12 AND EVEN IF YOU HAD DISCOVERY ABOUT HOW RESTRICTED MODE IS
11:00AM 13 BEING APPLIED OR MISAPPLIED IN YOUR VIEW, OR OVERINCLUSIVE OR
11:00AM 14 UNDERINCLUSIVE, HOW IS THAT ADVERTISING OR PROMOTION IF WHAT
11:00AM 15 APPLE -- I'M SORRY, APPLE -- IF WHAT GOOGLE AND YOUTUBE ARE
11:00AM 16 DOING ARE SIMPLY SAYING THIS IS THE RESULT OF WHATEVER IT IS
11:00AM 17 BEHIND THE SCENES THAT RESULTED IN AN EXCLUSION FROM RESTRICTED
11:00AM 18 MODE, WHETHER IT'S A HUMAN DOING IT OR AN ALGORITHM DOING IT OR
11:00AM 19 A COMMUNITY FLAG, OR WHATEVER THE MECHANISM IS, THEY'RE
11:00AM 20 REPORTING ON THAT BLACK SCREEN THAT THAT PARTICULAR CONTENT IS
11:00AM 21 SUBJECT TO RESTRICTED MODE.

11:00AM 22 THAT'S A FACTUAL STATEMENT.

11:01AM 23 MR. OBSTLER: CORRECT, YOUR HONOR.

11:01AM 24 THE COURT: AND SO -- YOU KNOW, IT'S A LITTLE BIT --
11:01AM 25 WE CAN GET TO THE QUESTION OF WHETHER, YOU KNOW, WHAT THE

1 INTERSECT IS WITH SECTION 230, BUT JUST FOCUSING ON JUST THE
2 LANHAM ACT CLAIM ITSELF AND WHETHER YOU MEET THE ELEMENTS, I'M
3 STILL HAVING TROUBLE WITH THE ALLEGATION THAT THAT IS REALLY
4 COMMERCIAL ADVERTISING OR PROMOTION.

5 MR. OBSTLER: BUT THAT IS EXACTLY WHAT THE COURT
6 STRUGGLED WITH IN GRUBBS. THAT IS EXACTLY WHAT THE COURT
7 STRUGGLED WITH IN THE DECISIONS THAT ARE CITED IN PRAGER AND
8 EVERY SINGLE ONE OF THEM WAS DONE ON A FACTUAL RECORD. THERE
9 ISN'T A MOTION TO DISMISS IN ANY OF THOSE CASES.

10 NOW, I HAD TO MAKE A STRATEGIC DECISION OBVIOUSLY, AS TO
11 WHETHER WE WERE GOING TO MOVE FOR RECONSIDERATION WITH THE
12 NINTH CIRCUIT IN PRAGER. WE CHOSE NOT TO DO SO. THAT'S NOT
13 THIS CASE. IT SHOULDN'T BE HERE, BUT YOU WERE ASKING ABOUT THE
14 CONSEQUENCES OF PRAGER.

15 FOR PRAGER PURPOSES WE CAN HAVE A LEGITIMATE DISPUTE, BUT
16 I THINK HERE WE ARE EXPRESSING ALLEGING THAT THESE ARE
17 STATEMENTS OF FACT THAT ARE BRANDING OUR VIDEOS AS
18 INAPPROPRIATE AT THE SAME TIME THAT THEY ARE NOT RESTRICTING
19 THEIR VIDEOS AND PUTTING THAT STUFF ON THEIR STUFF AND THAT TO
20 ME IS IMPLICIT FALSE ADVERTISING UNDER GRUBBS AND UNDER THE
21 OTHER CASES.

22 AND IF WE DEVELOP A RECORD, AND IT'S PRETTY CLEAR THAT
23 THIS IS NOT EVEN IN THE BALLPARK, YOUR HONOR, I'LL DISMISS THE
24 CLAIM. BUT I THINK WE SHOULD GET AN OPPORTUNITY TO DO SOME
25 DISCOVERY ON THAT CLAIM. I THINK THIS IS COMMERCIAL

11:02AM 1 ADVERTISING AS ALLEGED, AND I BELIEVE THAT BASED ON DISCOVERY
11:02AM 2 AND IF YOU LOOK AT THE CASES AND IF YOU LOOK AT WHAT THEY
11:02AM 3 CONSIDERED IN THOSE CASES, THIS IS NOT A ONE SIZE FITS ALL.
11:02AM 4 THIS CASE IS EXTREMELY DIFFERENT AND ESPECIALLY GIVEN THE
11:02AM 5 NATURE OF MY CLIENTS AND WHAT THAT STATEMENT MEANS ON THEIR
11:02AM 6 VIDEOS.

11:02AM 7 THE COURT: ALL RIGHT. LET ME JUST ASK BECAUSE
11:02AM 8 THERE SEEMS TO BE SOME AMBIGUITY ABOUT THIS IN THE BRIEFING.

11:02AM 9 DO THE PLAINTIFFS ALSO ALLEGE AN 1125(A) (1) (A) FALSE
11:02AM 10 ASSOCIATION CLAIM OR ARE YOU LIMITING YOUR CLAIM UNDER THE
11:02AM 11 LANHAM ACT TO FALSE ADVERTISING?

11:03AM 12 MR. OBSTLER: AT THIS POINT WE'RE LIMITING UNDER
11:03AM 13 FALSE ADVERTISING.

11:03AM 14 THE COURT: OKAY.

11:03AM 15 MR. OBSTLER: I HAVEN'T THOUGHT ABOUT THE FALSE
11:03AM 16 ASSOCIATION CLAIM TO BE HONEST, YOUR HONOR.

11:03AM 17 THE COURT: OKAY.

11:03AM 18 MR. OBSTLER: THE CONCERN IS, AND IT GOES TO THE
11:03AM 19 THEORY IN THE WHOLE CASE, IS THAT WE THINK THAT THE WEARING OF
11:03AM 20 THE TWO HATS AND THE USE OF THE COMPUTERS, BECAUSE THEY CAN'T
11:03AM 21 HAVE HUMANS DO THIS STUFF, HAS GOTTEN TO THE POINT WHERE IT HAS
11:03AM 22 GOTTEN ANTICOMPETITIVE.

11:03AM 23 I UNDERSTAND THE LIMITS OF A LANHAM ACT CLAIM AS OPPOSED
11:03AM 24 TO AN ANTITRUST OR A UCL CLAIM, AND I RESPECT THAT. I
11:03AM 25 UNDERSTAND THE ISSUE HERE IS COMMERCIAL ADVERTISING. I

11:03AM 1 UNDERSTAND THAT IT IS VERY LEGITIMATE FOR YOUR HONOR TO SAY,
11:03AM 2 BOY, IT'S A FACT -- IT'S SAYING YOU'RE RESTRICTED.

11:03AM 3 BUT THE QUESTION IS, YOUR HONOR, DON'T YOU ASK YOURSELF
11:03AM 4 WHY WHEN YOU SEE THAT? ISN'T IT REASONABLE TO SUGGEST THAT
11:03AM 5 PEOPLE ARE SAYING WHY?

11:03AM 6 AND FURTHERMORE, IF THE VIDEO ISN'T CONTAINING THAT
11:03AM 7 MATERIAL, WHY IS IT BEING RESTRICTED? THAT IN AND OF ITSELF IS
11:04AM 8 A FALSE STATEMENT. IT MAY NOT BE FALSE ADVERTISING.

11:04AM 9 THE COURT: I UNDERSTAND YOUR THESIS FOR THE LANHAM
11:04AM 10 ACT CLAIM.

11:04AM 11 SO LET ME ASK YOU TO ADDRESS THE QUESTION THAT I HAD
11:04AM 12 RAISED AND THAT MR. WILLEN AND I SPENT SOME TIME DISCUSSING,
11:04AM 13 WHICH IS THAT WHETHER THERE IS IMMUNITY UNDER 230(C) (1) AND (2)
11:04AM 14 IN THE CONTEXT OF A CLAIM FOR INTENTIONAL DISCRIMINATION BASED
11:04AM 15 ON IDENTITY.

11:04AM 16 MR. OBSTLER: YES, YOUR HONOR. THIS IS PROBABLY THE
11:04AM 17 MOST IMPORTANT ISSUE IN THIS CASE, ABSOLUTELY THE MOST
11:04AM 18 IMPORTANT ISSUE IN THIS CASE AND ONE OF THE MOST IMPORTANT
11:04AM 19 ISSUES FOR THE INTERNET.

11:04AM 20 IT'S DIFFICULT FOR ME TO BELIEVE, AND I START WITH THIS
11:04AM 21 PREMISE THAT CONGRESS ENACTED THE LAW IN WHICH IT ALLOWED
11:04AM 22 INTERNET COMPANIES, EVEN IF THEY WANTED, TO SELF-REGULATE TO DO
11:04AM 23 SO BY FILTERING PEOPLE AND NOT CONTENT.

11:04AM 24 THERE IS NOTHING IN THE LANGUAGE OF (C) (1) OR (C) (2) THAT
11:04AM 25 PERMITS THIS TYPE OF BEHAVIOR. NOTHING. IT SAYS MATERIAL, IT

11:05AM 1 DOESN'T SAY PEOPLE.

11:05AM 2 OUR ALLEGATION IN THIS CASE IS THEY'RE FILTERING PEOPLE.

11:05AM 3 THEY'RE NOT FILTERING -- SO GOING TO (C) (1), LET ME MAKE ONE

11:05AM 4 POINT BEFORE WE GET INTO THE STATUTORY CONSTRUCTION OF THE

11:05AM 5 WHOLE THING.

11:05AM 6 ON (C) (1), THE REASON THAT, THAT PRAGER II, JUDGE WALSH

11:05AM 7 DISMISSED THE CLAIM WAS THAT HE SAID THAT THERE WAS NO

11:05AM 8 ALLEGATION THAT GOOGLE ADDED ANYTHING TO THE CONTENT.

11:05AM 9 WE HAVE THAT ALLEGATION IN THIS CASE.

11:05AM 10 THE COURT: I'M SORRY, NO ALLEGATION THAT GOOGLE

11:05AM 11 ADDED ANYTHING --

11:05AM 12 MR. OBSTLER: ANYTHING TO MY CLIENT'S CONTENT. HE'S

11:05AM 13 SAYING UNDER (C) (1), UNDER ROOMMATES, IF YOU'RE INVOLVED IN ANY

11:05AM 14 ASPECT OF WHAT THE CONTENT IS THAT IS BEING CENSORED, RIGHT,

11:05AM 15 THEN YOU DON'T GET IMMUNITY. EVERYBODY AGREES IN ROOMMATES.

11:05AM 16 IN FACT, GOOGLE --

11:05AM 17 THE COURT: ARE YOU REFERRING TO YOUR ALLEGATION

11:05AM 18 THAT GOOGLE OR YOUTUBE IS ADDING METADATA TO YOUR CLIENT'S

11:06AM 19 CONTENT.

11:06AM 20 MR. OBSTLER: YES. YES.

11:06AM 21 THE COURT: AND THAT IS WHAT YOU'RE SAYING IS THE

11:06AM 22 ADDITION OF CONTENT AS WITH PUBLISHING OR MAKING DECISIONS

11:06AM 23 ABOUT PUBLISHING?

11:06AM 24 MR. OBSTLER: YES, BECAUSE THE METADATA IS WHAT THE

11:06AM 25 ALGORITHM IS USING TO MAKE THE DECISION.

11:06AM 1 THE COURT: DOES A PUBLISHER NOT GET TO EDIT?

11:06AM 2 MR. OBSTLER: YES, BUT A PUBLISHER WHO HAS A
11:06AM 3 CONTRACT WITH ITS AUTHOR THAT IT'S GOING TO BE VIEWPOINT
11:06AM 4 NEUTRAL DOESN'T GET TO DISCRIMINATE.

11:06AM 5 IN OTHER WORDS, IN OTHER WORDS, CAN THE -- CAN
11:06AM 6 SIMON & SCHUSTER GET YOUR LICENSING RIGHTS BY YOU AGREEING TO A
11:06AM 7 TERM OF SERVICE AND SAYING WE'RE GOING TO GIVE YOU VIEWPOINT
11:06AM 8 NEUTRAL EDITING OF YOUR STUFF AND THEN TURN AROUND AND BREACH
11:06AM 9 THAT?

11:06AM 10 THE COURT: SO THAT'S A DIFFERENT QUESTION. IF
11:06AM 11 YOU'RE SAYING THAT THERE'S A BREACH OF CONTRACT HERE BETWEEN A
11:06AM 12 PUBLISHER AND AN AUTHOR, THAT WOULD BE ONE THING, BUT THAT'S
11:06AM 13 NOT WHAT WE'RE FOCUSSED ON RIGHT NOW.

11:06AM 14 WE'RE TALKING ABOUT WHAT IS ENCOMPASSED WITHIN (C) (1) IN
11:07AM 15 TERMS PUBLISHING, AND I RAISED THIS QUESTION VERY DIRECTLY WITH
11:07AM 16 GOOGLE'S LAWYERS, DOES PUBLISHING INCLUDE DISCRIMINATING BASED
11:07AM 17 ON THE AUTHOR'S IDENTITY? WHAT DOES THAT LOOK LIKE?

11:07AM 18 AND IS THAT AMONG THE FUNCTIONS A PUBLISHER IS ALLOWED TO
11:07AM 19 CONDUCT IN ITS ROLE AS A PUBLISHER AND THAT IS IMMUNIZED UNDER
11:07AM 20 (C) (1)?

11:07AM 21 (C) (2) HAS A GOOD FAITH REQUIREMENT. (C) (1) DOES NOT.
11:07AM 22 YOUR ARGUMENT MAY BE SUBSTANTIALLY STRONGER UNDER (C) (2), BUT
11:07AM 23 UNDER (C) (1), IF THE PUBLISHER CAN CHOOSE WHAT TO PUBLISH AND
11:07AM 24 HOW, IT'S A VERY DIFFICULT ARGUMENT TO MAKE, AND THAT'S WHY I
11:07AM 25 WAS VERY INTERESTED IN THE QUESTION OF -- AND MR. WILLEN MADE

11:07AM 1 THE POINT THAT THERE ARE CERTAIN KINDS OF CAUSES OF ACTION THAT
11:07AM 2 TAKE CONDUCT OUTSIDE OF THE SCOPE OF 230(C) (1), IS THAT -- IF I
11:08AM 3 WERE TO CONSTRUE YOUR CLAIM THIS WAY, AND THERE'S A DEBATE
11:08AM 4 ABOUT WHETHER IT'S APPROPRIATE TO CONSTRUE IT THIS WAY GIVEN
11:08AM 5 THE FACTS THAT ARE ALLEGED IN YOUR COMPLAINT, THAT THERE WAS
11:08AM 6 INTENTIONAL DISCRIMINATION BASED ON IDENTITY AS OPPOSED TO
11:08AM 7 CONTENT, WHAT IS YOUR BEST CASE FOR SAYING THAT 230(C) (1) DOES
11:08AM 8 NOT ENCOMPASS THAT?

11:08AM 9 MR. OBSTLER: THE QUESTION IS DOES 230(C) (1)
11:08AM 10 IMMUNIZE THEM AS TO THE SPECIFIC CAUSES OF ACTION IN THE CASE;
11:08AM 11 RIGHT?

11:08AM 12 THE COURT: YES. YES. SO THE UNRAH ACT IS THE ONLY
11:08AM 13 ONE THAT I THINK GIVES YOU A LEG TO STAND ON.

11:08AM 14 MR. OBSTLER: WHAT ABOUT BREACH OF CONTRACT,
11:08AM 15 YOUR HONOR?

11:08AM 16 THE COURT: I'M SORRY?

11:08AM 17 MR. OBSTLER: WHAT ABOUT BREACH OF CONTRACT?

11:08AM 18 THE COURT: SO YOU DON'T HAVE BREACH OF CONTRACT.
11:08AM 19 YOU HAVE BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR
11:08AM 20 DEALING, WHICH THAT'S A HARD ONE IN ANY CIRCUMSTANCE,
11:08AM 21 ESPECIALLY GIVEN THE ALLEGED CONTRACT TERMS THAT YOU CITE
11:08AM 22 SAYING THAT THERE WAS A BREACH OF THE IMPLIED COVENANT IS
11:09AM 23 REALLY DIFFICULT JUST ON A 12(B) (6) BASIS.

11:09AM 24 SO YOU DON'T HAVE A BREACH OF CONTRACT CLAIM.

11:09AM 25 MR. OBSTLER: WELL, YOUR HONOR, WOULD YOU GIVE ME

11:09AM 1 LEAVE TO AMEND AND ADD IT?

11:09AM 2 THE COURT: WELL, BEFORE WE GET TO THAT, I'M JUST

11:09AM 3 REALLY VERY INTERESTED IN THIS QUESTION.

11:09AM 4 MR. OBSTLER: I AM, TOO, YOUR HONOR. LET ME TAKE

11:09AM 5 ANOTHER SHOT AT IT, PLEASE, IF I COULD.

11:09AM 6 THE COURT: SO WHAT IS THE BEST CASE THAT YOU HAVE?

11:09AM 7 MR. OBSTLER: OKAY. NUMBER ONE, THERE IS NO (C) (1)

11:09AM 8 COVERAGE HERE BECAUSE THEY'RE ADDING OUR CONTENT, SO JUST ON

11:09AM 9 THE FACE OF THE STATUTE.

11:09AM 10 NUMBER TWO, CAN CONGRESS ENACT A LAW THAT IMMUNIZES

11:09AM 11 PUBLISHERS FROM RACE DISCRIMINATION IN THE ACT OF PUBLISHING?

11:09AM 12 IS THAT LAW CONSTITUTIONAL?

11:09AM 13 I WOULD SAY THAT UNDER DENVER AREA IT IS NOT. THAT'S MY

11:09AM 14 ARGUMENT.

11:09AM 15 THE COURT: YOUR RESPONSE TO THE COURT'S QUESTION

11:09AM 16 WOULD BE IF (C) (1) DOES ALLOW IT, IT HAS TO BE

11:09AM 17 UNCONSTITUTIONAL?

11:09AM 18 MR. OBSTLER: THAT'S CORRECT.

11:09AM 19 THE COURT: IT DOES IMMUNIZE THAT KIND OF -- LET'S

11:09AM 20 CALL IT INTENTIONAL DISCRIMINATION BASED ON SOME PROTECTED

11:10AM 21 CHARACTERISTIC, THAT KIND OF STATUTE HAS TO BE

11:10AM 22 UNCONSTITUTIONAL?

11:10AM 23 MR. OBSTLER: YES, YOUR HONOR.

11:10AM 24 THE COURT: WHY?

11:10AM 25 MR. OBSTLER: BECAUSE UNDER DENVER AREA THE COURT

11:10AM 1 SAID THAT A CONGRESSIONAL ACT THAT DOES PERMISSIVE SPEECH
11:10AM 2 REGULATION AND THE GRANTING OF IMMUNITY THAT THEY -- I MEAN, I
11:10AM 3 WOULD BE ABLE TO SUE THEM, RIGHT, BUT FOR THE CDA.

11:10AM 4 SO THEY ARE -- WHAT THE COURT SAID IN DENVER AREA, WHICH
11:10AM 5 HAS OFTEN BEEN CITED, AND IT'S WHY WE CAME TO THE GAME LATE IN
11:10AM 6 DENVER, AND I WANT TO APOLOGIZE ON THAT. I HAVE TO ADMIT I
11:10AM 7 WITHDREW EARLY ON THAT ONE.

11:10AM 8 DENVER AREA WAS A FIGHT INITIALLY OVER WHETHER OR NOT,
11:10AM 9 EXACTLY WHAT THE GOVERNMENT AND MR. WILLEN ARE MAKING, WHETHER
11:10AM 10 OR NOT THEY'RE STATE ACTORS AND WHETHER STATE ACTORS -- AND THE
11:10AM 11 CABLE COMPANY SAID THEY'RE NOT STATE ACTORS. HOW CAN THEIR
11:10AM 12 PERMISSION TO BLOCK THINGS THAT ARE INDECENT BE IN ANY WAY BE
11:10AM 13 SUBJECT TO THE FIRST AMENDMENT?

11:11AM 14 AND WHAT JUSTICE BREYER AND SIX JUDGES ON THE SUPREME
11:11AM 15 COURT SAID IS, YES, IT'S BEING DONE FOR A CONGRESSIONAL ACT,
11:11AM 16 BUT FOR THAT ACT YOU AND I ARE NOT HAVING THAT DISCUSSION. WE
11:11AM 17 MAY BE HAVING A DISCUSSION ABOUT WHETHER I STATED A CLAIM, BUT
11:11AM 18 FOR CONGRESSIONAL LAW THAT ALLOWS THEM IMMUNITY ON THESE
11:11AM 19 CLAIMS, WE'RE NOT HAVING THIS DISCUSSION.

11:11AM 20 SO IF THEY'RE GETTING IMMUNITY UNDER THIS STATUTE, IT'S
11:11AM 21 NOT A STATE ACTION ISSUE, IT'S WHETHER THE STATUTE PASSES
11:11AM 22 MUSTER JUST LIKE SECTION 10(C) OF THE CABLE ACT UNDER
11:11AM 23 DENVER AREA.

11:11AM 24 WHAT DID THE COURT SAY? THREE THINGS.

11:11AM 25 GOT TO BE VIEWPOINT NEUTRAL. NOT VIEWPOINT NEUTRAL IN

11:11AM 1 THIS CASE.

11:11AM 2 GOT TO BE NARROWLY TAILORED SO THERE'S NO RISK OF AN
11:11AM 3 IMPROPER VETO.

11:11AM 4 AND MOST IMPORTANTLY, IT CANNOT INTERFERE WITH PREEXISTING
11:11AM 5 LEGAL RELATIONSHIPS.

11:11AM 6 THIS IS SPOT ON WITH DENVER, AND THIS STATUTE CANNOT
11:11AM 7 WITHSTAND SCRUTINY UNDER DENVER. IT IS A PERMISSIVE SPEECH
11:12AM 8 STATUTE JUST LIKE SECTION 10(C) OF THE CABLE ACT.

11:12AM 9 THE COURT: OKAY. THAT SEEMS LIKE A STRETCH
11:12AM 10 HONESTLY, THAT THAT -- THAT THIS CASE FITS THE MOLD OF
11:12AM 11 PERMISSIVE REGULATION IN DENVER AREA.

11:12AM 12 I'LL LET THE GOOGLE FOLKS RESPOND ON THAT POINT, BUT LET
11:12AM 13 ME JUST MAKE SURE YOU DON'T HAVE ANYTHING FURTHER THAT YOU
11:12AM 14 WOULD LIKE TO MAKE SURE THAT THE COURT HEARS IN TERMS OF YOUR
11:12AM 15 ARGUMENT, ANYTHING YOU WOULD LIKE TO ADDRESS FURTHER IN SUPPORT
11:12AM 16 OF YOUR OPPOSITION.

11:12AM 17 MR. OBSTLER: WELL, I WANTED TO TALK ABOUT THE
11:12AM 18 EXECUTIVE ORDER.

11:12AM 19 THE COURT: OH, YES.

11:12AM 20 MR. OBSTLER: BUT I WANT TO COME BACK TO THIS POINT,
11:12AM 21 YOUR HONOR, BECAUSE YOU SAY IT SOUNDS LIKE A STRETCH. AND I'D
11:12AM 22 BE CURIOUS IN KNOWING WHY YOUR HONOR BELIEVES THAT BECAUSE I
11:12AM 23 DON'T UNDERSTAND THE DIFFERENCE BETWEEN A STATUTE THAT WAS
11:12AM 24 ENACTED TO REGULATE IN INDECENT MATERIAL ON CABLE TELEVISION
11:12AM 25 CHANNELS AND A STATUTE THAT WAS ENACTED OSTENSIBLY TO ALLOW

11:12AM 1 PRIVATE PARTIES TO REGULATE OFFENSIVE MATERIAL ON THE INTERNET.

11:13AM 2 THE COURT: I THINK AT LEAST ONE OF THE KEY
11:13AM 3 DISTINCTIONS HERE IS THAT SECTION 230(C) PERMITS PRIVATE
11:13AM 4 PARTIES TO DO THEIR OWN SELF-REGULATION. THERE'S NO MANDATE.
11:13AM 5 THERE'S NOTHING -- THERE'S NOTHING THAT IS REQUIRED. THEY MAY
11:13AM 6 OR MAY NOT. AND IF THEY DO, THEY'RE IMMUNIZED.

11:13AM 7 IT PROVIDES PROTECTION FROM LIABILITY. THAT'S WHAT IT IS.
11:13AM 8 IT'S NOT A MANDATE TO REGULATE IN ANY WAY, SHAPE OR FORM.

11:13AM 9 MR. OBSTLER: I AGREE WITH YOU.

11:13AM 10 THE COURT: I THINK IT'S AN IMPORTANT DISTINCTION.

11:13AM 11 MR. OBSTLER: THAT'S EXACTLY THE POINT THAT
11:13AM 12 JUSTICE BREYER MADE. HE SAID THIS IS A PERMISSIVE PORTION.
11:13AM 13 THERE WAS A MANDATORY PORTION AND A PERMISSIVE PORTION. 10(C)
11:13AM 14 WAS THE PERMISSIVE PORTION. IT DOESN'T REQUIRE THEM TO DO IT
11:13AM 15 BUT THEY'RE PERMITTED TO DO IT, AND THE COURT SAID THAT IS
11:13AM 16 UNCONSTITUTIONAL.

11:13AM 17 I COMPLETELY AGREE WITH THE DISTINCTION THAT YOUR HONOR IS
11:13AM 18 MAKING, AND I THINK THAT'S SQUARE WITH DENVER ON THE SECTION
11:14AM 19 10(C) CLAIM.

11:14AM 20 THE COURT: WELL, I'LL HEAR FROM GOOGLE ON THAT
11:14AM 21 POINT, BUT LET ME GIVE YOU AN OPPORTUNITY TO ADDRESS THE OTHER
11:14AM 22 MATTERS THAT YOU SAID YOU WANTED TO ADDRESS, THE EXECUTIVE
11:14AM 23 ORDER.

11:14AM 24 MR. OBSTLER: THE REASON WE CAME IN WITH THE
11:14AM 25 EXECUTIVE ORDER IS THAT WE JUST WEREN'T CLEAR REALLY ON WHAT

11:14AM 1 THE GOVERNMENT'S POSITION REALLY IS.

11:14AM 2 THE COURT: ALL RIGHT.

11:14AM 3 MR. OBSTLER: THEY FILED THIS BRIEF, RIGHT, AND THEY
11:14AM 4 SAY IT CAN APPLY TO THE VIEWPOINT, IT'S CONSTITUTIONAL, IT CAN
11:14AM 5 APPLY TO A VIEWPOINT, IT CAN APPLY TO DISCRIMINATION.

11:14AM 6 AND THEN I READ SECTION 2 OF THE EXECUTIVE ORDER SAYING
11:14AM 7 IT'S THE POLICY OF THE UNITED STATES AND THE DEPARTMENT OF
11:14AM 8 JUSTICE IS DIRECTED TO DO EVERYTHING THAT THEY ARE ALLEGING IN
11:14AM 9 THEIR BRIEF.

11:14AM 10 SO I ONLY BRING IT UP TO SAY IF THE ORDER IS ENFORCEABLE
11:14AM 11 AT SOME POINT THEN I DON'T KNOW IF WE HAVE A NEW ISSUE HERE OR
11:14AM 12 WHAT. AND IF THE ORDER IS NOT ENFORCEABLE, THEN THEY'RE
11:14AM 13 ARGUING THAT THE EXECUTIVE ORDER IS JUST SIMPLY NOT
11:14AM 14 ENFORCEABLE. I'M NOT GOING TO TAKE A VIEW ON THAT, AND I DON'T
11:14AM 15 REALLY CARE. AND I AGREE WITH YOUR HONOR, I DON'T THINK IT
11:15AM 16 REALLY MATTERS BECAUSE I THINK AT THE END OF THE DAY I THINK
11:15AM 17 THE STATUTE ON ITS FACE DOESN'T APPLY, AND I THINK THE STATUTE
11:15AM 18 IS UNCONSTITUTIONAL.

11:15AM 19 BUT THE ONLY REASON I BROUGHT IT UP WAS JUST I COULD NOT
11:15AM 20 SQUARE THAT EXECUTIVE ORDER AND HIM DIRECTING THE DEPARTMENT OF
11:15AM 21 JUSTICE AND SITTING THERE WITH BILL BARR WHEN THEY ANNOUNCED
11:15AM 22 THE ORDER WITH WHAT WAS IN THEIR BRIEF. THAT WAS THE ONLY
11:15AM 23 REASON WE WANTED TO.

11:15AM 24 THE COURT: WELL, LET ME GIVE MR. SUR AN OPPORTUNITY
11:15AM 25 TO ADDRESS THE EXECUTIVE ORDER BUT ALSO ANY OTHER MATTERS

11:15AM 1 RAISED IN THE GOVERNMENT'S MEMORANDUM ON THE CONSTITUTIONALITY
11:15AM 2 QUESTION.

11:15AM 3 MR. SUR.

11:15AM 4 MR. SUR: THANK YOU VERY MUCH.

11:15AM 5 SINCE THE EXECUTIVE ORDER HAS COME UP, I GUESS I WILL
11:15AM 6 START THERE BUT MAYBE JUST TRY TO REITERATE IN OUR BRIEF IN
11:15AM 7 POINT ONE WE SIMPLY ARE RELYING ON ONE OF SEVERAL DOCTRINES OF
11:15AM 8 CONSTITUTIONAL AVOIDANCE, THE DOCTRINE THAT SAYS DECIDE THE
11:15AM 9 STATUTORY QUESTIONS FIRST.

11:15AM 10 MUCH OF THE DISCUSSION TODAY WAS ABOUT THE POTENTIAL
11:16AM 11 NUANCES OF THE STATUTE AND, RECENTLY OR NOT, TAKING A POSITION
11:16AM 12 ON THAT.

11:16AM 13 BUT OF COURSE THE PARTIES ARE WELL VERSED ON THAT AND SO
11:16AM 14 YOUR HONOR HAS BEEN WELL FURNISHED, I THINK, BY THE OPPOSING
11:16AM 15 VIEWS ON THE STATUTORY QUESTION, SIMILARLY WITH THE STATE LAW
11:16AM 16 CLAIMS AS WELL.

11:16AM 17 POINT TWO SIMPLY ARGUES THAT IF THE COURT DOES REACH THE
11:16AM 18 CONSTITUTIONAL QUESTION, THAT THERE REALLY IS NO PRECEDENT THAT
11:16AM 19 WOULD SUPPORT HOLDING THE STATUTE TO BE UNCONSTITUTIONAL,
11:16AM 20 PRINCIPALLY FOR THE REASONS THAT HAVE ALREADY BEEN DISCUSSED ON
11:16AM 21 THAT.

11:16AM 22 BUT JUST THE ONE NOTE I WOULD ADD IS DENVER AREA DID NOT
11:16AM 23 TRANSFORM THE NOTION OF STATE ACTION. JUDGE KOH IN THE OPINION
11:16AM 24 THAT THE COURT OF APPEALS AFFIRMED IN PRAGER UNIVERSITY,
11:16AM 25 ALTHOUGH THE COURT OF APPEALS OPINION DIDN'T ADDRESS

11:16AM 1 DENVER AREA, JUDGE KOH DID REJECT RELIANCE ON IT IN THE
11:16AM 2 UNPUBLISHED OPINION THAT THEN WENT UP TO THE NINTH CIRCUIT AND
11:17AM 3 SO I DO NOTE THAT.

11:17AM 4 AND AS HAS ALREADY BEEN MENTIONED, BUT I WILL REITERATE,
11:17AM 5 THE NINTH CIRCUIT'S OPINION IN ROBERTS VERSUS AT&T MOBILITY,
11:17AM 6 WHICH IS AT 877 F.3D 833, WAS REALLY A DETAILED ANALYSIS OF
11:17AM 7 THE, QUOTE, "SPLINTERED DECISION" IN DENVER AREA, AND REALLY
11:17AM 8 INFORMS ANY ATTEMPT TO APPLY IT CERTAINLY FOR THE COURTS WITHIN
11:17AM 9 THE NINTH CIRCUIT.

11:17AM 10 SO WE THINK THAT VERY HELPFULLY CLARIFIES THAT THE
11:17AM 11 DENVER AREA DOESN'T TRANSFORM THE NOTION OF THE STATE ACTION IN
11:17AM 12 A WAY THAT WOULD REALLY, REALLY CHANGE ANYTHING THAT WE HAVE
11:17AM 13 SAID IN THE BRIEF.

11:17AM 14 HAVING MADE THOSE POINTS, LET ME THEN TURN VERY BRIEFLY TO
11:17AM 15 THE EXECUTIVE ORDER.

11:17AM 16 I THINK IT IS HELPFUL TO CONSIDER THE TEXT OF THE ORDER AS
11:17AM 17 A WHOLE AND IN THAT RESPECT I DO THINK THAT IT IS NOT
11:17AM 18 INSIGNIFICANT THAT THE ORDER HAS A SET OF GENERAL PROVISIONS AT
11:18AM 19 THE END THAT APPLY TO ANY ATTEMPT TO READ THE ORDER ANYWHERE.

11:18AM 20 SO ONE OF THOSE GENERAL PROVISIONS, AND I REALIZE IT
11:18AM 21 BECAUSE THEY APPEAR OFTEN IN GENERAL PROVISIONS, MAYBE THEY
11:18AM 22 DON'T GET THAT MUCH ATTENTION, BUT IT DOES WARRANT SPECIAL
11:18AM 23 ATTENTION IN THE ATTEMPT TO RELY ON HERE.

11:18AM 24 SECTION 8, LETTER C SAYS THAT THE ORDER IS NOT INTENDED TO
11:18AM 25 AND DOES NOT CREATE ANY RIGHT OR BENEFIT, SUBSTANTIVE OR

11:18AM 1 PROCEDURAL, ENFORCEABLE AT LAW OR IN EQUITY BY ANY PARTY
11:18AM 2 AGAINST THE UNITED STATES, ITS DEPARTMENTS, AGENCIES OR
11:18AM 3 ENTITIES, ITS OFFICERS, EMPLOYEES OR AGENTS OR ANY OTHER
11:18AM 4 PERSON. SO I THINK WE HAVE TO START THERE.

11:18AM 5 THEN EVEN IF ONE WERE TO ASSUME IN THE ALTERNATIVE THAT
11:18AM 6 SECTION 8 (C) SOMEHOW DIDN'T APPLY, I DO THINK TAKING EACH
11:19AM 7 SECTION IN TURN, THE COURT WILL SEE THAT THESE ARE ABOUT POLICY
11:19AM 8 AND THEY MAY BE EXPRESSED AT LENGTH, BUT THEY ARE ALL POINTS
11:19AM 9 ABOUT POLICY AND ESSENTIALLY DIRECTING VARIOUS EXECUTIVE BRANCH
11:19AM 10 ACTORS TO DO VARIOUS THINGS BUT DON'T GO INTO ANY QUESTION OF
11:19AM 11 CONSTITUTIONALITY.

11:19AM 12 REALLY THE ONLY POINT I WOULD MAKE ABOUT POLICY IS THAT
11:19AM 13 REALLY WHAT IT BRINGS OUR ATTENTION BACK TO IS PAGE 999 OF THE
11:19AM 14 OPINION OF THE COURT OF APPEALS IN PRAGER WHERE BEFORE THEY
11:19AM 15 CONCLUDED THEIR DISCUSSION OF A FIRST AMENDMENT THEY SAID THAT
11:19AM 16 THE PARTIES IN PRAGER UNIVERSITY HAD PROVIDED EXTENSIVE
11:19AM 17 ARGUMENTS ABOUT WHAT MIGHT HAPPEN IF THE COURT RULED ONE WAY OR
11:19AM 18 ANOTHER AND WHILE THOSE POLICY CONCEPTS WERE, QUOTE,
11:19AM 19 "IMPORTANT," THE COURT OF APPEALS IN THE NINTH CIRCUIT FOCUSSED
11:19AM 20 ON THE FIRST AMENDMENT DOCTRINE.

11:19AM 21 I THINK A SIMILAR CONCLUSION IS APPROPRIATE HERE THAT AT
11:19AM 22 MOST THE EXECUTIVE ORDER INDICATES THAT THERE MAY BE IMPORTANT
11:19AM 23 POLICY ISSUES SOMEWHERE IN THE GENERAL REALM OF SECTION 230,
11:20AM 24 BUT THAT THOSE ARE NOT BEFORE THE COURT IN ASSESSING THE
11:20AM 25 CONSTITUTIONALITY OF THE STATUTE.

11:20AM 1 REALLY WITH THAT I WILL CONCLUDE, UNLESS THE COURT HAS ANY
11:20AM 2 FURTHER QUESTION.

11:20AM 3 THE COURT: THANK YOU VERY MUCH, MR. SUR. THAT WAS
11:20AM 4 VERY HELPFUL. I APPRECIATE IT.

11:20AM 5 MR. SUR: THANK YOU.

11:20AM 6 THE COURT: ALL RIGHT. SO I WOULD LIKE TO HEAR FROM
11:20AM 7 GOOGLE, YOUTUBE BUT -- WELL, ANYTHING THAT YOU WOULD LIKE TO
11:20AM 8 RESPOND TO FROM MY CONVERSATION WITH MR. OBSTLER, BUT I AM
11:20AM 9 INTERESTED IN THE -- IF YOU HAVE ANYTHING FURTHER TO ADD ON THE
11:20AM 10 DENVER AREA POINT AND ITS SIGNIFICANCE.

11:20AM 11 MR. WILLEN: SURE. SO WHY DON'T I START WITH THAT
11:20AM 12 AND TALK ABOUT A COUPLE OF THINGS RELATED TO SECTION 230, AND I
11:20AM 13 CAN LET MS. WHITE TALK ABOUT THINGS RELATED TO THE UNRAH ACT
11:20AM 14 AND THE LANHAM ACT.

11:20AM 15 WITH RESPECT TO DENVER AREA, I THINK MR. OBSTLER HAS
11:20AM 16 RIGHTLY POINTED TO THE NINTH CIRCUIT'S DECISION IN ROBERTS
11:20AM 17 WHICH AT LENGTH EXPLAINS THE VERY, VERY LIMITED, IF ANY, IMPORT
11:21AM 18 OF DENVER AREA ON THE QUESTION OF STATE ACTION.

11:21AM 19 SO ROBERTS POINTS OUT, FIRST OF ALL, THAT THERE'S NO
11:21AM 20 MAJORITY OPINION IN THE DENVER AREA CASE. THE OPINION THAT
11:21AM 21 MR. OBSTLER IS RELYING ON IS JUSTICE BREYER'S OPINION FOR FOUR
11:21AM 22 JUSTICES THAT DOES NOT SPEAK FOR THE COURT. JUSTICE KENNEDY
11:21AM 23 AND JUSTICE GINSBERG SUPPLIED TWO ADDITIONAL VOTES BUT ON A
11:21AM 24 VERY, VERY DIFFERENT THEORY.

11:21AM 25 SO JUSTICE BREYER'S OPINION DOESN'T BY ITS OWN TERMS SAY

11:21AM 1 THAT PERMISSIVE SPEECH REGULATION IS SUBJECT TO SOME BRAND NEW
11:21AM 2 FIRST AMENDMENT SCRUTINY. IT CONSTRUES A VERY, VERY SPECIFIC
11:21AM 3 PROVISION OF THE CABLE ACT, AND I THINK THE MOST IMPORTANT
11:21AM 4 POINT ABOUT THAT IS THAT IN ALLOWING THE CABLE COMPANIES TO
11:21AM 5 CENSOR, IT ALLOWED THEM TO CENSOR ONLY A PARTICULAR CONTENT
11:21AM 6 BASED SET OF MATERIALS, WHICH WAS SEXUALLY EXPLICIT CONTENT, SO
11:22AM 7 IT WAS VERY LIMITED IN THAT RESPECT, AND THE STATUTE WAS
11:22AM 8 ENACTED AGAINST A BACKDROP THAT THE CASE INVOLVED PUBLIC ACCESS
11:22AM 9 CHANNELS AND ACCESS CHANNELS ON CABLE NETWORK AND THE VERY
11:22AM 10 SPECIFIC CONTEXT.

11:22AM 11 ONE, THESE CHANNELS WERE HEAVILY REGULATED AND THE COURT
11:22AM 12 AND JUSTICE BREYER'S OPINION NOTED AND RELIED ON.

11:22AM 13 SECONDLY, AND I THINK EVEN MORE IMPORTANTLY, PRIOR TO THE
11:22AM 14 ENACTMENT OF THE STATUTE IN QUESTION, THE LAW FORBAD THE CABLE
11:22AM 15 COMPANIES FROM ENGAGING IN ANY CONTENT BASED OR ANY REAL
11:22AM 16 EDITORIAL DISCRETION WITH RESPECT TO THESE CHANNELS.

11:22AM 17 SO IT COMPLETELY CHANGED THE BACKGROUND LEGAL PRINCIPLES
11:22AM 18 WITH RESPECT TO THE RIGHT OF THE CABLE COMPANIES TO ENGAGE IN
11:22AM 19 CONTENT RESTRICTION.

11:22AM 20 THAT'S COMPLETELY DIFFERENT FROM WHAT WE HAVE HERE. WE
11:22AM 21 HAVE A STATUTE THAT IS NOT CONTENT BASED. SECTION 230(C) (1),
11:22AM 22 AS I THINK THE COURT POINTED OUT, SIMPLY SAYS THAT YOU CANNOT
11:22AM 23 BE TREATED AS A PUBLISHER FOR ANY SPEECH, SO WHETHER YOU ARE
11:23AM 24 RESTRICTING ACCESS TO CONTENT, WHETHER YOU ARE NOT RESTRICTING
11:23AM 25 ACCESS TO CONTENT, AND CERTAINLY NOT WITH RESPECT TO ANY GIVEN

11:23AM 1 CATEGORY OF CONTENT, SECTION 230(C) WILL PROTECT YOU. SO IT'S
11:23AM 2 NOT EVEN CLOSE TO CONTENT BASED AND VIEWPOINT BASED.

11:23AM 3 AND THEN SECONDLY, AND JUST AS IMPORTANTLY, THE BACKGROUND
11:23AM 4 PRIOR TO SECTION 230 WAS THAT ONLINE PLATFORMS, PARTICULARLY
11:23AM 5 PLATFORMS, THE PROGENITORS OF WHAT WE HAVE NOW, GOOGLES AND
11:23AM 6 TWITTERS, HAD FULL DISCRETION, COMPLETE EDITORIAL DISCRETION
11:23AM 7 AND INDEED A FIRST AMENDMENT RIGHT TO MAKE EDITORIAL
11:23AM 8 DETERMINATIONS ABOUT WHAT SPEECH APPEARS ON THEIR PLATFORM.

11:23AM 9 SO SECTION 230 WASN'T CREATING SOME NEW EDITORIAL RIGHT
11:23AM 10 THAT DIDN'T EXIST BEFORE WHEREAS DENVER AREA VERY MUCH WAS. SO
11:23AM 11 THAT'S THE FIRST GENERAL POINT.

11:23AM 12 THE SECOND POINT IS WITH RESPECT TO JUSTICE KENNEDY'S
11:23AM 13 OPINION WHICH SUPPLIED THE SORT OF DECISIVE VOTES FOR THE
11:23AM 14 PROPOSITION THAT AT LEAST THE ONE PROVISION WAS
11:24AM 15 UNCONSTITUTIONAL, THAT WHOLE DECISION WAS BASED ON THE
11:24AM 16 PROPOSITION THAT AT LEAST IN PUBLIC ACCESS CHANNELS WERE A
11:24AM 17 PUBLIC FORUM UNDER THE CONSTITUTION BECAUSE IT WAS SO HEAVILY
11:24AM 18 REGULATED AND WHAT I JUST MENTIONED.

11:24AM 19 JUSTICE BREYER'S OPINION DIDN'T GET INTO THAT, BUT THAT'S
11:24AM 20 REALLY IMPORTANT HERE BECAUSE WE KNOW -- THE THING WE KNOW FROM
11:24AM 21 PRAGER IS THAT YOUTUBE IS NOT A CONSTITUTIONAL PUBLIC FORUM.
11:24AM 22 SO GIVEN THAT, IT'S A COMPLETELY DIFFERENT CASE.

11:24AM 23 AND I THINK IT'S QUITE TELLING THAT IN THE HALLECK CASE,
11:24AM 24 OF COURSE THE SUPREME COURT'S MOST RECENT DISCUSSION OF STATE
11:24AM 25 ACTION, THE ONE REFERENCE TO DENVER AREA THAT IS MOST --

11:24AM 1 THE OPERATOR: THE RECORDING HAS STOPPED.

11:24AM 2 MR. WILLEN: EXCUSE ME. CITING DENVER AREA, AND

11:24AM 3 THIS IS A QUOTE FOR THE PROPOSITION THAT THE FREE SPEECH DOES

11:24AM 4 NOT PROHIBIT PRIOR ABRIDGEMENT OF SPEECH.

11:24AM 5 SO THE SUPREME COURT HAS SPOKEN TO THIS. TO THE EXTENT

11:25AM 6 THAT DENVER AREA HAS ANY SIGNIFICANCE, IT'S SIMPLY LIMITED TO

11:25AM 7 ITS UNIQUE FACTS AND DOESN'T APPLY HERE. SO THAT IS

11:25AM 8 DENVER AREA.

11:25AM 9 THE OTHER COUPLE THINGS I WOULD WANT TO SAY IN RESPONSE TO

11:25AM 10 MR. OBSTLER, WE DIDN'T GET A CHANCE TO TALK ABOUT SECTION

11:25AM 11 230(C)(2)(D). WE SPENT MOST OF OUR TIME TALKING ABOUT SECTION

11:25AM 12 230(C)(1).

11:25AM 13 AS WE ARGUED, SECTION 230(C)(2)(B) IS SORT OF A SEPARATE

11:25AM 14 IMMUNITY THAT CLEARLY APPLIES, AS WE KNOW FROM THE

11:25AM 15 PRAGER DECISION, WITH RESPECT TO ANY CLAIM ARISING FROM

11:25AM 16 RESTRICTED MODE. AND I THINK FOR THE REASONS SET OUT IN

11:25AM 17 JUDGE DAVILA'S RECENT OPINION IN ASURVIO VERSUS MALWAREBYTES

11:25AM 18 CASE, THE ALLEGATIONS HERE THAT THERE IS SOME SORT OF

11:25AM 19 COMPETITIVE RELATIONSHIP JUST AREN'T ENOUGH TO GET PLAINTIFFS

11:25AM 20 OUTSIDE OF SECTION 230(C)(2)(B), SO THE COURT HAS ANOTHER PATH

11:25AM 21 AT LEAST WITH RESPECT TO A LOT OF THE CLAIMS HERE.

11:26AM 22 AND THEN I GUESS THE ONLY OTHER POINT I WOULD MAKE IS THAT

11:26AM 23 MR. OBSTLER WAS, TELLINGLY, NOT ABLE TO CITE ANY CASE THAT

11:26AM 24 HELPED HIM ON THE PROPOSITION THAT SECTION 230(C)(1) WOULDN'T

11:26AM 25 APPLY TO A CLAIM UNDER THE UNRAH ACTS UNDER THE CIRCUMSTANCES

11:26AM 1 THAT WE HAVE HERE, AND THAT'S WHY HE RESORTED TO THE ARGUMENT
11:26AM 2 THAT THE STATUTE WOULD BE UNCONSTITUTIONAL IF APPLIED THAT WAY,
11:26AM 3 AND I DON'T THINK IT WOULD. AND I DON'T THINK THERE'S ANY
11:26AM 4 SERIOUS ARGUMENT THAT IT WOULD, BUT HIS INABILITY TO POINT TO
11:26AM 5 ANY CASE LAW THAT HELPS HIM ON THE APPLICATION OF THE --

11:26AM 6 THE OPERATOR: THIS MEETING IS BEING RECORDED.

11:26AM 7 MR. WILLEN: -- I THINK IS VERY TELLING.

11:26AM 8 SO WITH THAT I WILL TURN IT OVER TO MS. WHITE AND LET HER
11:26AM 9 TALK ABOUT THE LANHAM ACT AND ANYTHING ELSE THAT SHE WANTS TO
11:26AM 10 SAY IN RESPONSE TO WHAT WE HAVE HEARD.

11:26AM 11 THE COURT: THANK YOU, MR. WILLEN.

11:26AM 12 MS. WHITE.

11:26AM 13 MS. WHITE: THANK YOU.

11:26AM 14 I'LL BEGIN JUST BRIEFLY ON THE LANHAM ACT QUESTION. AS
11:27AM 15 YOUR HONOR CORRECTLY RECOGNIZED, TO STATE A CLAIM UNDER THAT
11:27AM 16 STATUTE PLAINTIFFS HAVE TO ALLEGE THAT YOUTUBE MADE A FALSE OR
11:27AM 17 MISLEADING STATEMENT IN COMMERCIAL ADVERTISING, AND THEY
11:27AM 18 HAVEN'T DONE THAT. THEY REFER TO STATEMENTS ABOUT WHAT
11:27AM 19 RESTRICTED MODE DOES AND WHAT RESTRICTED GUIDELINES ARE, BUT
11:27AM 20 THOSE STATEMENTS ARE WHAT THE NINTH CIRCUIT HELD WERE NOT
11:27AM 21 COMMERCIAL ADVERTISING IN PRAGER.

11:27AM 22 THEY ALSO SUGGEST THAT THE DESIGNATION OF SOME OF
11:27AM 23 PLAINTIFFS' VIDEOS, AND I'LL NOTE THAT I THINK ONLY FOUR OF THE
11:27AM 24 NAMED PLAINTIFFS SPECIFICALLY ALLEGE THAT ANY OF THEIR VIDEOS
11:27AM 25 HAVE BEEN MADE UNAVAILABLE IN UNRESTRICTED MODE, BUT WITH

11:27AM 1 RESPECT TO THOSE, THEY ARGUE THAT THAT DESIGNATION SOMEHOW
11:27AM 2 BRANDS THEM IN A NEGATIVE LIGHT, BUT THE NINTH CIRCUIT
11:27AM 3 ADDRESSED THAT ARGUMENT DIRECTLY AS WELL AND HELD THAT THAT
11:27AM 4 DESIGNATION IS NOT MADE IN COMMERCIAL ADVERTISING PROMOTION AND
11:28AM 5 THAT'S ON PAGE 1,000 OF THE COURT'S OPINION.

11:28AM 6 FINALLY, ANY IMPLICIT STATEMENT ABOUT THE REASON FOR WHY
11:28AM 7 PLAINTIFFS' VIDEOS WERE MADE UNAVAILABLE IN RESTRICTED MODE,
11:28AM 8 ONE, THOSE REASONS WERE NOT MADE PUBLIC, AND, TWO, THOSE
11:28AM 9 REASONS WOULD BE A MATTER OF OPINION WHICH WOULD NOT BE
11:28AM 10 ACTIONABLE AS A FALSE STATEMENT, AND, AGAIN, NOT A STATEMENT
11:28AM 11 MADE IN FURTHERANCE OF COMMERCIAL ADVERTISING OR PROMOTION.

11:28AM 12 SO UNLESS YOUR HONOR HAS ANY FURTHER QUESTIONS ABOUT THE
11:28AM 13 LANHAM ACT, I'LL JUST CONCLUDE BY ADDRESSING THE QUESTIONS
11:28AM 14 ABOUT THE UNRAH ACT CLAIM.

11:28AM 15 AS MY COLLEAGUE EXPLAINED, WE DO THINK THERE'S NO REASON
11:28AM 16 WHY SECTION 230(C)(1) AND (C)(2)(B) SHOULD NOT APPLY WITH
11:28AM 17 RESPECT TO PLAINTIFFS' CLAIM UNDER THE UNRAH ACT BUT IN
11:29AM 18 ADDITION TO THAT THE PLAINTIFFS HAVE NOT COME CLOSE TO STATING
11:29AM 19 A CLAIM.

11:29AM 20 THE UNRAH ACT, WHEN PLED HERE AS SEPARATE FROM AN ADA
11:29AM 21 VIOLATION, IS AN INTENTIONAL DISCRIMINATION STATUTE.
11:29AM 22 CALIFORNIA COURTS HAVE CLEARLY HELD THAT FACIALLY NEUTRAL
11:29AM 23 POLICIES ARE NOT ACTIONABLE AND THAT ALLEGATIONS OF DISPARATE
11:29AM 24 IMPACT ARE NOT ENOUGH.

11:29AM 25 THE COURT: OKAY. SO LET'S PAUSE THERE. THAT WAS

11:29AM 1 THE ARGUMENT YOU MADE IN YOUR BRIEF. THEIR ARGUMENT IS NOT
11:29AM 2 THERE'S A DISPARATE IMPACT, BUT THAT THERE'S AN ACTUAL POLICY
11:29AM 3 OF DISCRIMINATION AGAINST LGBT CONTENT CREATORS.

11:29AM 4 SO I KNOW YOU DON'T THINK THAT THAT'S ACTUALLY WHAT THEY
11:29AM 5 HAVE ALLEGED. BUT IF THAT'S THE ALLEGATION, DO YOU ALSO HAVE A
11:29AM 6 12(B) (6) ARGUMENT AGAINST -- FOR THE FAILURE TO STATE A CLAIM
11:29AM 7 UNDER THE UNRAH ACT ISSUE?

11:29AM 8 MS. WHITE: IF THERE WERE AN ALLEGATION THAT THERE
11:29AM 9 WERE AN ACTUAL AFFIRMATIVE POLICY TO DISCRIMINATE THAT MAY
11:29AM 10 STATE A CLAIM FOR THE UNRAH ACT, BUT THERE'S NOTHING CLOSE TO
11:30AM 11 THAT HERE. AND THERE'S A LOT OF RHETORIC. THE COMPLAINT IS --

11:30AM 12 THE COURT: RIGHT. WELL, HERE'S THE QUESTION THAT
11:30AM 13 NOBODY WAS TALKING ABOUT IN THEIR PAPERS, BUT I JUST WONDERED,
11:30AM 14 THE UNRAH ACT, YOU KNOW, IN THE ADA CONTEXT YOU HAVE TO HAVE A
11:30AM 15 PUBLIC ACCOMMODATION AND YOU WOULD HAVE TO HAVE A BUSINESS.

11:30AM 16 DOES THIS PLATFORM QUALIFY FOR -- IN THAT CONTEXT UNDER
11:30AM 17 THE LANGUAGE OF THE STATUTE?

11:30AM 18 MS. WHITE: SO THE UNRAH ACT APPLIES TO ALL BUSINESS
11:30AM 19 SERVICES AND THE CALIFORNIA COURTS HAVE HELD THAT THEY DIDN'T
11:30AM 20 APPLY TO WEBSITES.

11:30AM 21 I THINK THERE IS SOME AMBIGUITY IN PLAINTIFFS' CLAIMS
11:30AM 22 ABOUT EXACTLY WHAT -- WHO IS BEING DISCRIMINATED AGAINST AND ON
11:30AM 23 WHAT BASIS THAT THEY REFER TO MAINLY LGBTQ IDENTITIES. THEY
11:30AM 24 ALSO REFER TO VIEWPOINTS.

11:30AM 25 I THINK WHILE THE UNRAH ACT IS INTENDED TO BE CONSTRUED

11:31AM 1 BROADLY, THERE MAY BE SOME CATEGORIES OF PERSONS TO WHOM IT
11:31AM 2 WOULDN'T APPLY, BUT GIVEN THEIR FAILURE TO ALLEGE THAT THERE IS
11:31AM 3 IN FACT A POLICY OF DISCRIMINATION OR THAT THESE PLAINTIFFS
11:31AM 4 DISCRIMINATED AGAINST BASED ON THEIR SEXUAL IDENTITIES, THE
11:31AM 5 COURT DOESN'T NEED TO REACH THOSE QUESTIONS IN THIS CASE.

11:31AM 6 THE COURT: ALL RIGHT. THANK YOU.

11:31AM 7 MR. OBSTLER, I'LL GIVE YOU A VERY BRIEF RESPONSE. I DON'T
11:31AM 8 WANT TO HEAR ANYTHING YOU HAVE TOLD ME BEFORE, BUT IF THERE'S A
11:31AM 9 VERY BRIEF RESPONSE YOU WOULD LIKE TO MAKE, I'LL LET YOU HAVE
11:31AM 10 THE LAST WORD.

11:31AM 11 MR. OBSTLER: THANK YOU SO MUCH, YOUR HONOR. AGAIN,
11:31AM 12 I REALLY APPRECIATE IT. AND YOUR QUESTIONS ARE DEAD ON ON
11:31AM 13 THIS.

11:31AM 14 FIRST OF ALL, ON DENVER AREA, IT WAS A SIX TO THREE
11:31AM 15 DECISION ON THE 10(C) PART OF THE OPINION AND PLEASE READ THE
11:31AM 16 OPINION.

11:31AM 17 THE COURT: I WILL MAKE SURE THAT I AM WELL VERSED
11:31AM 18 ON THE EXACT HOLDINGS OF --

11:31AM 19 THE OPERATOR: THE RECORDING HAS STOPPED.

11:32AM 20 MR. OBSTLER: ON THE UNRAH ACT ISSUE --

11:32AM 21 THE OPERATOR: THIS MEETING IS BEING RECORDED.

11:32AM 22 MR. OBSTLER: ON THE UNRAH ACT ISSUE, THE THING THAT
11:32AM 23 REALLY BOTHERS ME HERE IS THAT I FEEL LIKE I'M ARGUING A
11:32AM 24 FACTUAL ISSUE ON A 12(B)(6) MOTION.

11:32AM 25 WE HAVE ALLEGED THAT WE HAD A CLIENT WHO, OR WE WILL

11:32AM 1 ALLEGE IF YOU TAKE THE DECLARATION, WHO WENT TO A MEETING ON
11:32AM 2 2017 AND WAS TOLD TO HER FACE FOUR TIMES THAT THE ALGORITHM
11:32AM 3 IS --

11:32AM 4 THE COURT: YOU KNOW, I WILL READ -- I WILL MAKE
11:32AM 5 SURE THAT I LOOK AT ALL OF THE MANY, MANY ALLEGATIONS IN YOUR
11:32AM 6 COMPLAINT. SO I DON'T NEED YOU TO ARGUE AGAIN ABOUT WHETHER
11:32AM 7 THERE IS A POLICY OF DISCRIMINATION ALLEGED OR NOT.

11:32AM 8 I THINK I AM -- I HAVE THE COMPLAINT, AND I'M GOING TO
11:32AM 9 RELY ON THE COMPLAINT. THE PARTIES BRIEFED THAT ISSUE
11:32AM 10 EXTENSIVELY.

11:32AM 11 I'M REALLY TRYING TO SORT OUT THE LEGAL ISSUES HERE.

11:32AM 12 SO IS THERE SOMETHING FURTHER ON WHAT THE UNRAH ACT
11:33AM 13 REQUIRES OR NOT, THAT IS WHAT I'M LOOKING FOR. IF THERE'S
11:33AM 14 NOTHING ELSE, YOU DON'T HAVE TO HAVE ANYTHING.

11:33AM 15 MR. OBSTLER: THERE IS ONE OTHER THING.

11:33AM 16 THE COURT: OKAY.

11:33AM 17 MR. OBSTLER: YOU DON'T HAVE TO PLEAD THERE'S A
11:33AM 18 POLICY UNDER THE UNRAH ACT. ALL I HAVE TO SHOW UNDER THE
11:33AM 19 UNRAH ACT IS THAT THERE WAS AN ACT OF DISCRIMINATION, AND I
11:33AM 20 THINK WE HAVE DONE THAT. THAT WOULD BE MY LAST POINT.

11:33AM 21 THERE DOESN'T HAVE TO BE A WRITTEN POLICY UNDER THE
11:33AM 22 UNRAH ACT. I DON'T THINK ANYBODY WOULD HAVE SUCH A POLICY.
11:33AM 23 OKAY.

11:33AM 24 THE COURT: ALL RIGHT. THANK YOU ALL VERY MUCH. I
11:33AM 25 APPRECIATE ALL OF THE PRESENTATIONS AND THE EXTENSIVE BRIEFING.

11:33AM 1 AND I APPRECIATE YOU BEARING WITH OUR VERY FIRST ZOOM
11:33AM 2 WEBINAR. I WILL TAKE THIS MATTER UNDER SUBMISSION, AND I'LL
11:33AM 3 ISSUE A WRITTEN ORDER. ALL RIGHT. THANK YOU VERY MUCH.

11:33AM 4 MR. WILLEN: THANK YOU, YOUR HONOR.

11:33AM 5 MR. OBSTLER: THANK YOU, YOUR HONOR. WE APPRECIATE
11:33AM 6 YOUR TIME.

11:33AM 7 (ZOOM COURT CONCLUDED AT 11:33 A.M.)

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1
2
3 CERTIFICATE OF REPORTER
4
5
6

7 I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED
8 STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
9 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
10 CERTIFY:

11 THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS
12 A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
13 ABOVE-ENTITLED MATTER.

14 
15

16 IRENE RODRIGUEZ, CSR, RMR, CRR
17 CERTIFICATE NUMBER 8074
18

19 DATED: JUNE 4, 2020
20
21
22
23
24
25

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Tuesday, June 9, 2020 6:12 PM
To: Boyd, Stephen E. (OLA); Hankey, Mary Blanche (OLA (b) (6) (OLA); Barnett, Gary (OAG); Levi, William (OAG)
Subject: FW: Connecting on section 230
Attachments: 6-9-20 Section 230 Key Takeaways Recommendations.pdf; Section 230 Redline Proposal (DELIBERATIVE) DRAFT 6.3.DOCX

FYI, just got a call from Hawley staffer on my cell. Apparently staff wasn't aware of the call so nothing to report. I think we just prep the AG based on our staff conversation last Friday.

For this group's benefit, attached is the redline OMB draft and our Key Takeaways. I'm working on a revised one-pager tonight for the AG that I'll circulate by tomorrow morning.

Best,
Lauren

From: Willard, Lauren (OAG)
Sent: Tuesday, June 9, 2020 6:00 PM
To: Reses, Jacob (Hawley) (b) (6) >
Cc: Divine, Josh (Hawley) (b) (6) >; Ehrett, John (Hawley) (b) (6) (b) (6) (OLA) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) >
Subject: RE: Connecting on section 230

Thanks Jacob! Really appreciate it. Even just a few minutes touch base would be really helpful.

Best,
Lauren

Lauren S. Willard
Counselor to the Attorney General
U.S. Department of Justice
M (b) (6)
(b) (6)

From: Reses, Jacob (Hawley) (b) (6) >
Sent: Tuesday, June 9, 2020 5:58 PM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Divine, Josh (Hawley) (b) (6) >; Ehrett, John (Hawley) (b) (6) (b) (6) (OLA) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) >
Subject: Re: Connecting on section 230

Let's touch base tomorrow morning - it's a pretty rough one on our end and my schedule is pretty stacked.

Jacob Reses
Senior Policy Advisor
U.S. Senator for Missouri Josh Hawley

On Jun 9, 2020, at 5:31 PM, Willard, Lauren (OAG (b) (6)) > wrote:

Hi all,

Hope everyone is having a good week so far. I just heard that Senator Hawley is going to talk to the AG tomorrow about Section 230, and it would be great if we could quickly touch base at the staff level tonight or tomorrow morning.

I'm free anytime this evening, and tomorrow any time except 10-11 or after 4pm.

Many thanks!
Lauren

From: Willard, Lauren (OAG)
Sent: Monday, June 1, 2020 9:26 PM
To: 'Reses, Jacob (Hawley)' (b) (6) >; 'Divine, Josh (Hawley)' (b) (6) >; 'Ehrett, John (Hawley)' (b) (6) >
C (b) (6) (OLA) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) >
Subject: RE: Connecting on section 230

Hi all,

Thanks for following up with the Section 230 cases on terms of services, which I understand from Mary Blanche are *Lancaster v. Alphabet Inc.*, No. 15-cv-05299-HSG, 2016 WL 3648608, at *5 (N.D. Cal., July 8, 2016) and *King v. Facebook*, Doc. 44, No. 19-cv-01987 (N.D. Cal., Sept. 05, 2019).

Just a quick response that we have also seen similar cases, which is part of the reason why we believe that breach of contract actions for violations of terms of service should be explicitly carved out of Section 230. If a platform is removing content in violation of its own terms of service, it should not be able to turn around and assert Section 230 blanket immunity. An easy way to address this issue would be through providing a clear definition of "good faith," but there may be other routes as well.

I know everyone is busy at the moment, but let us know if it would be useful to set up another call this week. We have been thinking further in light of Friday's conversation. I'll let Mary Blanche (b) (6) from OLA coordinate on timing.

Hope everyone is staying safe!

Best,
Lauren

From: Willard, Lauren (OAG)
Sent: Friday, May 29, 2020 11:27 AM
To: Reses, Jacob (Hawley) (b) (6) >

Cc: Divine, Josh (Hawley) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Ehrett, John (Hawley) (b) (6) (b) (6) (OLA) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) >
Subject: RE: Connecting on section 230

Thanks for flagging!

From: Reses, Jacob (Hawley) (b) (6) >
Sent: Friday, May 29, 2020 11:26 AM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Divine, Josh (Hawley) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Ehrett, John (Hawley) (b) (6) (b) (6) (OLA) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wallace, Benjamin (OLC) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) >
Subject: Re: Connecting on section 230

Looking forward to this.

Also you may find this article interesting: <https://www.theverge.com/2020/5/29/21273191/trump-twitter-social-media-censorship-executive-order-analysis-bias>

The pro-230 side presents itself as more knowledgeable about the intricacies here than the 230 skeptics but there's a lot of confusion in this article, reflective of broader confusion in this debate, about how 230 has been interpreted in practice by courts w/r/t the conduct of the platforms themselves. Very few people recognize the problems that have been generated by courts' tortured interpretation of it. To the extent you guys are doing a public push on explaining the EO, pushing back on the claims in this article might be useful.

Jacob Reses
Senior Policy Advisor
U.S. Senator for Missouri Josh Hawley

On May 29, 2020, at 11:22 AM, Willard, Lauren (OAG) (b) (6) > wrote:

Duplicative Information - See Document ID 0.7.2270.7466



From: Willard, Lauren (OAG)
Sent: Tuesday, June 9, 2020 7:10 PM
To: Levi, William (OAG); Barnett, Gary (OAG); Kupec, Kerri (OPA); Herlihy, Brianna (PAO); Boyd, Stephen E. (OLA); Hankey, Mary Blanche (OLA (b) (6) (OLA)
Subject: Section 230 Materials and Roll-Out Plan
Attachments: Section 230 OLA Cover Letter_Draft 5.28.docx; Section 230 Section by Section (DELIBERATIVE) 5.28.docx; Section 230 Redline Proposal (DELIBERATIVE) DRAFT 6.3.DOCX; 6-8-20 Section 230 Summary of Public Workshop & Private Roundtable.pdf; Section 230 Workshop Participant Written Submissions_with cover.pdf; Section 230 Roundtable Bios.pdf; Section 230 Workshop Agenda & Bios.pdf; Section+230+Roundtable+Bios.pdf; 6-9-20 Section 230 Key Takeaways Recommendations.pdf; Section 230 Reform Proposal One-Pager.docx; One Page Summary of DOJ Report.docx

Deliberative Process / Pre-Decisional

All,

I thought I would send this group a single email that has all of our draft materials on Section 230, in advance of a roll-out next week. Most of you have seen these already, but wanted to put in one place all the current versions. I've also proposed a roll-out plan below targeting a release date of next Tuesday, June 16. (Our originally launch date of May 28 had to be pushed in light of the EO, but the process is similar to what I've discussed with most of you before). (We are also continuing to work on the Executive Order and proposed rulemaking related to Section 230. Feel free to reach out with any questions on those, but leaving separate for the purpose of this email.)

As a reminder, there are two related work streams **(1) OMB legislative packet** and **(2) Public DOJ Report and related materials**. The goal of the public-facing documents is to provide a readout of our February Section 230 Workshop and our findings, as well as to describe at a high level (and with more reasoning) our legislative proposal. The documentation of our hard work (over the past 10 months) hopefully will illustrate that DOJ's reform proposal is a thoughtful and credible contribution to this debate.

OMB LEGISLATIVE PACKET (cleared internal DOJ and ODAG)

1. Draft redline
2. Section by Section
3. Cover Letter
4. For internal purposes only – I've provided a one-page summary of our legislative approach

DOJ Public Materials

1. Landing Website: draft here: <https://edit.justice.gov/ag/departments-justice-s-review-section-230-communications-decency-act-1996> (and copied below email for those that can't access) - we will still need to add hyperlinks to the other PDFs, but that can only be done shortly before launch
 - a. Website will have executive summary of our findings, the high-level of the areas ripe for reform, and column with all the relevant DOJ actions and hyperlinks.
2. Link to Livestream to our DOJ February Section 230 Workshop and Agenda/Bios
3. Section 230 Workshop Summary (both public and private sessions)
4. Section 230 Bios of Participants
5. Key Takeaways and Recommendations Documents **(THIS IS THE KEY PUBLIC DOCUMENT)**
 - a. For internal purposes only – I've tried to reduce this 20 page document into a single page also attached.
6. Press Release (Brianna working on current draft – will circulate to this group)

I'd like to lock down all the materials as soon as we can this week. The high-priority document for this group to review (and be comfortable with) is the "Key Takeaways" document and the OMB legislation. We are doing a final proofread of Key Takeaways tomorrow, so I can incorporate any critical edits from this group. Let me know if you need a word version, or can also take handwritten edits in the office ☺

If we can get the OK to launch early next week, I propose the following roll-out plan.

Roll-Out Plan (assuming June 16 launch)

June 11-15

Thursday-Monday: Reach back out to friendly experts, interagency folks, and Hill staff on timing and substance

June 15

Monday AM: AG final briefing on Section 230 legislation and public documents.
Make any edits or changes i/l/o AG feedback

Monday PM: Send package to OMB

Monday PM: Begin Press Background Conversations

Monday PM: Give Section 230 Workshop Participants Notice (we will be publishing their written submissions, so need to give them a heads up)

June 16

Tuesday AM: Additional Press Background Conversations

Tuesday AM: Hill conversations (if appropriate)

Tuesday midday: *Public posting of report and related materials*

June 16-18:

Tuesday-Thursday: Follow-up press as appropriate

About the Office

Meet the Attorney

General

Press Room

Selected Publications

OAG FOIA

ACT OF 1996

ViewOutline

As part of its broader review of market-leading online platforms, the Department of Justice analyzed [Section 230 of the Communications Decency Act of 1996](#), which provides immunity to online platforms from civil liability based on third-party content as well as immunity for removal of content in certain circumstances. The statute was originally enacted to nurture a nascent industry while also incentivizing online platforms to remove harmful content. The combination of significant technological changes since 1996 and the expansive interpretation that courts have given Section 230, however, has left online platforms both immune for a wide array of illicit activity on their services and free to moderate content with little transparency or accountability.

The Department of Justice has concluded that the time is ripe to realign the scope of Section 230 with the realities of the modern internet. Reform is important now more than ever. With the COVID-19 pandemic, more citizens—including young children—are relying on the internet for everyday activities, while online criminal activity continues to grow. We must ensure that the internet is both an open, but also safe space for our society. Based on its engagement with experts, industry, thought leaders, lawmakers, and the public, the Department has identified a set of concrete reform proposals to provide stronger incentives for online platforms to address harmful illicit material on their services, while continuing to foster innovation and free speech.

Read More

AREAS RIPE FOR SECTION 230 REFORM

(b)(5)

OVERVIEW OF DEPARTMENT OF JUSTICE ACTIONS ON SECTION 230

The Department of Justice's review of Section 230 of the Communications Decency Act has included a number of different components, including:

- 1. Public Workshop.** On February 19, 2020 the Department held a public workshop on Section 230 titled "[Section 230: Nurturing Innovation or Fostering Unaccountability](#)," bringing together thought leaders from diverse viewpoints. [See Section 230 Workshop Livestream](#); [\[Section 230 Workshop Agenda\]](#); [\[Section 230 Workshop Summary\]](#)
- 2. Expert Roundtable.** In the afternoon of February 19, the Department also hosted a Chatham House Rule roundtable with additional experts and thought leaders to further discuss Section 230 and potential reforms. [See \[Section 230 Workshop Summary\]](#); [\[Biographies of Experts\]](#)
- 3. Written Submissions.** Participants in the morning Workshop and afternoon Roundtable were also invited to submit short written statements with their views on Section 230, which the Department reviewed. [See \[Participant Written Submissions\]](#)
- 4. Industry Listening Sessions.** Following the Workshop, the Department met individually with a diverse group of businesses that had attended the public event or otherwise expressed interest in Section 230. Meetings were private and confidential to foster frank discussions about their use of Section 230 and thoughts on potential reform.
- 5. Key Takeaways.** The Department distilled lessons learned from its engagement and research in its [\[Key Takeaways and Recommendations\]](#), which outline a set of key principles.

Lauren S. Willard
Counselor to the Attorney General
U.S. Department of Justice
M (b) (6)
(b) (6)

From: Willard, Lauren (OAG)
Sent: Tuesday, June 9, 2020 7:19 PM
To: Shores, Ryan (ODAG); Grieco, Christopher (ODAG); Raman, Sujit (ODAG); Feith, Daniel (ODAG); Pandya, Brian (OASG); Toensing, Brady (OLP); Liu, Jeffrey (OLC); Whitaker, Henry C. (OLC)
Subject: FW: Section 230 Materials and Roll-Out Plan
Attachments: Section 230 OLA Cover Letter_Draft 5.28.docx; Section 230 Section by Section (DELIBERATIVE) 5.28.docx; Section 230 Redline Proposal (DELIBERATIVE) DRAFT 6.3.DOCX; 6-8-20 Section 230 Summary of Public Workshop & Private Roundtable.pdf; Section 230 Workshop Participant Written Submissions_with cover.pdf; Section 230 Roundtable Bios.pdf; Section 230 Workshop Agenda & Bios.pdf; Section+230+Roundtable+Bios.pdf; 6-9-20 Section 230 Key Takeaways Recommendations.pdf; Section 230 Reform Proposal One-Pager.docx; One Page Summary of DOJ Report.docx

Deliberative Process / Pre-Decisional

Hi Tiger Team,

I thought I would send this group a single email that has all of our draft materials on Section 230, in advance of a roll-out (hopefully) next week. I've also proposed a roll-out plan below targeting a release date of next Tuesday, June 16.

The documents fall into our two related work streams **(1) OMB legislative packet** and **(2) Public DOJ Report and related materials**. As this group knows, the goal of the public-facing documents is to provide a readout of our February Section 230 Workshop and our findings, as well as to describe at a high level (and with more reasoning) our legislative proposal. The documentation of our hard work (over the past 10 months) hopefully will illustrate that DOJ's reform proposal is a thoughtful and credible contribution to this debate.

We are doing final proofreads of the Key Takeaways document tomorrow. Brady is helpful tracking down a case for the proposition that courts have upheld Section 230 immunity even in the face of a court judgment. I have a few nits to input from folks, but welcome any final thoughts. Error corrections welcome, but the bar is pretty high for other changes ☺ Let me know if you need a word document to edit. (Will also accept handwritten edits in person or scanned).

Thoughts are also welcome on the website layout and substance below.

OMB LEGISLATIVE PACKET (cleared internal DOJ and ODAG)

1. Draft redline
2. Section by Section
3. Cover Letter
4. For internal purposes only – I've provided a one-page summary of our legislative approach

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June 11-15

Thursday-Monday: Reach back out to friendly experts, interagency folks, and Hill staff on timing and substance (Ryan, Chris, Sujit, Brian, and Brady – once we get the “green light,” let's coordinate on scheduling calls with the various folks we have already spoken with).

June 15

Monday AM: AG final briefing on Section 230 legislation and public documents.

Make any edits or changes i/l/o AG feedback

Monday PM: Send package to OMB

Monday PM: Begin Press Background Conversations

Monday PM: Give Section 230 Workshop Participants Notice (we will be publishing their written submissions, so need to give them a heads up)

June 16

Tuesday AM: Additional Press Background Conversations

Tuesday AM: Hill conversations (if appropriate)

Tuesday midday: Public posting of report and related materials

June 16-18:

Tuesday-Thursday: Follow-up press as appropriate

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► [Read More](#)

AREAS RIPE FOR SECTION 230 REFORM

(b) (5)

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The Department of Justice's review of Section 230 of the Communications Decency Act has included a number of different components, including:

1. Public Workshop. On February 19, 2020 the Department held a public workshop on Section 230 titled "[Section 230: Nurturing Innovation or Fostering Unaccountability](#)," bringing together thought leaders from diverse viewpoints. See [Section 230 Workshop Livestream](#); [\[Section 230 Workshop Agenda\]](#); [\[Section 230 Workshop Summary\]](#)

2. Expert Roundtable. In the afternoon of February 19, the Department also hosted a Chatham House Rule roundtable with additional experts and thought leaders to further discuss Section 230 and potential reforms. See [\[Section 230 Workshop Summary\]](#); [\[Biographies of Experts\]](#)

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5. Key Takeaways. The Department distilled lessons learned from its engagement and research in its [\[Key Takeaways and Recommendations\]](#), which outline a set of key principles.

(b) (6) [REDACTED]

Grieco, Christopher (ODAG)

From: Grieco, Christopher (ODAG)
Sent: Wednesday, June 10, 2020 10:11 AM
To: Willard, Lauren (OAG)
Cc: Shores, Ryan (ODAG); Feith, Daniel (ODAG); Pandya, Brian (OASG); Whitaker, Henry C. (OLC)
Subject: RE: One Pager on (c)(1)
Attachments: Section 230 One-Pager on Examples c1, 6.10.20.docx

Lauren, a few short additions on advertising

From: Willard, Lauren (OAG) (b) (6) >
Sent: Tuesday, June 9, 2020 5:57 PM
To: Grieco, Christopher (ODAG) (b) (6) >
Cc: Shores, Ryan (ODAG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >
Subject: RE: One Pager on (c)(1)

Ryan and Chris,

Thanks again for this two-pager on TPs for the moderation point. It's really helpful. Could you also put together a few TPs f (b) (5) by tomorrow afternoon?

Best,
Lauren

From: Grieco, Christopher (ODAG) (b) (6) >
Sent: Tuesday, June 2, 2020 6:27 PM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Shores, Ryan (ODAG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >
Subject: One Pager on (c)(1)

Attached is a mis-named one pager that Ryan and I worked on, that addresses potential issues wit (b) (5)

[REDACTED]

[REDACTED]

Happy to Discuss.

Chris

Grieco, Christopher (ODAG)

From: Grieco, Christopher (ODAG)
Sent: Wednesday, June 10, 2020 5:06 PM
To: Willard, Lauren (OAG)
Subject: FW: Citron Franks Article on Section 230
Attachments: SSRN-id3532691.pdf

THE INTERNET AS A SPEECH MACHINE AND OTHER MYTHS CONFOUNDING SECTION 230 SPEECH REFORM

Boston University School of Law
Public Law & Legal Theory Paper No. 20-8

January 2020

Danielle Keats Citron
Boston University School of Law

Mary Anne Franks
University of Miami School of Law

Appearing in the University of Chicago Legal Forum (forthcoming 2020)

The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform

Danielle Keats Citron* and Mary Anne Franks**

Abstract

A robust public debate is currently underway about the responsibility of online platforms. We have long called for this discussion, but only recently has it been seriously taken up by legislators and the public. The debate begins with a basic question: should platforms should be responsible for user-generated content? If so, under what circumstances? What exactly would such responsibility look like? Under consideration is Section 230 of the Communications Decency Act—a provision originally designed to encourage tech companies to clean up “offensive” online content. The public discourse around Section 230, however, is riddled with misconceptions. As an initial matter, many people who opine about the law are unfamiliar with its history, text, and application. This lack of knowledge impairs thoughtful evaluation of the law’s goals and how well they have been achieved. Accordingly, Part I of this Article sets the stage with a description of Section 230 – its legislative history and purpose, its interpretation in the courts, and the problems that current judicial interpretation raises. A second, and related, major source of misunderstanding is the conflation of Section 230 and the First Amendment. Part II details how this conflation distorts discussion in three ways: it assumes all Internet activity is protected speech; it treats private actors as though they were government actors; and it presumes that regulation will inevitably result in less speech. These distortions must be addressed in order to pave the way for clear-eyed policy reform. Part III offers potential solutions to help Section 230 achieve its legitimate goals.

Introduction

A robust public debate is currently underway about the responsibility of online platforms. We have long called for this discussion,¹ but only recently has it been seriously taken up by legislators and the public. The debate begins with a basic question: should platforms should be responsible for user-generated content?² If so, under what circumstances? What exactly would such responsibility look like?

* Professor of Law, Boston University School of Law, Vice President, Cyber Civil Rights Initiative.

** Professor of Law & Dean’s Distinguished Scholar, University of Miami School of Law, President, Cyber Civil Rights Initiative. Deep thanks to the editors of the University of Chicago Legal Forum for including us in the symposium. Genevieve Lakier, Brian Leiter, and symposium participants provided helpful comments. It was a particular pleasure to engage with co-panelists Amy Adler, Leslie Kendrick, and Fred Schauer.

¹ DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014); Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 FORDHAM L. REV. 401 (2017); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009); Mary Anne Franks, *Sexual Harassment 2.0*, Md. L. Rev. (2012).

² That is, beyond the select avenues that currently are not shielded from liability, such as intellectual property, federal criminal law, the Electronic Communications Privacy Act, and the knowing facilitation of sex trafficking.

Under consideration is Section 230 of the Communications Decency Act—a provision originally designed to encourage tech companies to clean up “offensive” online content. At the dawn of the commercial internet, federal lawmakers wanted the internet to be open and free, but they realized that such openness risked noxious activity.³ In their estimation, tech companies were essential partners in any effort to “clean up the Internet.”

A troubling 1995 judicial decision, however, imperiled the promise of self-regulation in ruling that any attempt to moderate content increased an online service’s risk of liability.⁴ Lawmakers devised Section 230 as a direct repudiation of that ruling. The idea was to incentivize—not penalize—private efforts to filter, block, or otherwise address noxious activity.⁵ Section 230 provided that incentive, securing a shield from liability for “Good Samaritans” that under- or over-filtered “offensive” content.⁶

Over the past two (plus) decades, Section 230 has helped secure a variety of opportunities for online engagement, but individuals and society have not been the clear winners. Regrettably, state and lower federal courts have extended Section 230’s legal shield far beyond what the law’s words, context, and purpose support.⁷ Platforms have been shielded from liability even when they encourage illegal action, deliberately keep up manifestly harmful content, or take a cut of users’ illegal activities.⁸

No matter, because for many, Section 230 is an article of faith. Section 230 has been hailed as “the most important law protecting internet speech” and online innovation.⁹ For years, to question Section 230’s value proposition was viewed as sheer folly.

No longer. Politicians across the ideological spectrum are raising concerns about the leeway provided content platforms under Section 230.¹⁰ Conservatives claim that Section 230 gives tech companies a license to silence speech based on viewpoint.¹¹ Liberals criticize Section 230 for giving platforms the freedom to profit from harmful speech and conduct.

³ Written Testimony of Danielle Keats Citron before House Energy and Commerce Committee in “Fostering a Healthier Internet to Protect Consumers” hearing (October 16, 2019), available at, <https://docs.house.gov/meetings/IE/IE16/20191016/110075/HHRG-116-IE16-Wstate-CitronD-20191016.pdf>.

⁴ See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). For a superb history of Section 230 and the cases leading to its passage, see JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (2019).

⁵ CITRON, *HATE CRIMES IN CYBERSPACE*, *supra* note, at 170-73.

⁶ Citron & Wittes, *supra* note, at 404-06.

⁷ *Id.*

⁸ *Id.*

⁹ CDA 230: The Most Important Law Protecting Internet Speech, Electronic Frontier Found., <https://www.eff.org/issues/cda230>.

¹⁰ Danielle Citron & Quinta Jurecic, Platform Justice, Hoover Institute.

¹¹ https://www.cruz.senate.gov/?p=press_release&id=4630

Although their assessment of the problem differs, lawmakers agree that Section 230 needs fixing. In a testament to the shift in attitudes, the House Energy and Commerce Committee held a hearing on October 16, 2019 on how to make the internet “healthier” for consumers, bringing together academics (including one of us, Citron), advocates, and social media companies to discuss whether and how to amend Section 230.¹² The Department of Justice is holding an event devoted to Section 230 reform in February 2020. Needless to say, these developments are unique.

In a few short years, Section 230 reform efforts have turned from academic fantasy to legislative reality.¹³ One might think that we would cheer this opportunity. But we approach it with caution. Congress cannot fix what it does not understand. Sensible policymaking depends on a clear-eyed view of the interests at stake. As advisers to federal lawmakers on both sides of the aisle, we can attest to the need to dispel misunderstandings to clear the ground for meaningful policy discussions.

The public discourse around Section 230 is riddled with misconceptions.¹⁴ As an initial matter, many people who opine about the law are unfamiliar with its history, text, and application. This lack of knowledge impairs thoughtful evaluation of the law’s goals and how well they have been achieved. Accordingly, Part I of this Article sets the stage with a description of Section 230 – its legislative history and purpose, its interpretation in the courts, and the problems that current judicial interpretation raises. A second, and related, major source of misunderstanding is the conflation of Section 230 and the First Amendment. Part II of this Article details how this conflation distorts discussion in three ways: it assumes all Internet activity is protected speech; it treats private actors as though they were government actors; and it presumes that regulation will inevitably result in less speech. These distortions must be addressed in order to pave the way for clear-eyed policy reform. This is the subject of Part III, which offers potential solutions to help Section 230 achieve its legitimate goals.

I. Section 230: A Complex History

¹² Witnesses also included computer scientist Hany Farid of University of California at Berkeley, Gretchen Petersen of the Alliance to Counter Crime Online, Corynne McSherry of the Electronic Frontier Foundation, Steve Huffman of Reddit, and Katie Oyama of Google. At that hearing, one of us (Citron) took the opportunity to combat myths around Section 230 and offer sensible reform possibilities, which we explore in Part III. <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-fostering-a-healthier-internet-to-protect-consumers>

¹³ There are several House and Senate proposals to amend or remove Section 230’s legal shield.

¹⁴ This is not to say that every lawmaker misunderstands Section 230. Nancy Pelosi, the House Speaker, has agreed that Section 230 should be rethought because companies are not “treating it with respect” and “being responsible enough.” <https://www.techdirt.com/articles/20190411/18521741986/nancy-pelosi-joins-ted-cruz-louis-gohmert-attacking-cda-230.shtml>. Pelosi’s comments suggest that she has a clear sense of the problem—that tech companies are not acting as responsible Good Samaritans as Section 230’s drafters hoped—unlike far too many of her colleagues.

Tech policy reform is often a difficult endeavor. Sound tech policy reform depends upon a clear understanding of the technologies and varied interests at stake. As recent hearings on Capitol Hill have shown, lawmakers often struggle to effectively address fast-moving technological developments.¹⁵ Part of the problem stems from age and habits.¹⁶ The slowness of the lawmaking process further complicates matters.¹⁷ Lawmakers may be tempted to throw up their hands in the face of technological change that seems destined to outpace their efforts.

This Part highlights the developments that bring us to this moment of reform. Section 230 was devised to incentivize responsible content moderation practices.¹⁸ And yet its drafting fell short of that goal by failing to explicitly condition the legal shield on responsible practices. This has led to an overbroad reading of Section 230, with significant costs to individuals and society.

A. Reviewing the History Behind Section 230

In 1996, Congress faced a challenge. Lawmakers wanted the internet to be open and free, but they also knew that openness risked the posting of illegal and “offensive” material. They knew that federal agencies could not deal with it all “noxious material” on their own and that they needed tech companies to help moderate content. Congress devised an incentive: a shield from liability for “Good Samaritans” that did an incomplete or overly aggressive job in their efforts to “clean up the Internet.”¹⁹

The Communications Decency Act (CDA), part of the Telecommunications Act of 1996, was introduced to make the internet safer for children and to address concerns about

¹⁵ The 2018 congressional hearings on the Cambridge Analytica data leak poignantly illustrate the point. For instance, Facebook CEO Mark Zuckerberg testified for several days before the House and the Senate. During the questioning, lawmakers made clear that they had never used social network and had little understanding of online advertising, which is how the dominant tech companies make money. Senator Orrin Hatch asked Zuckerberg how his company made money since it does not charge users for its services. <https://money.cnn.com/2018/04/10/technology/senate-mark-zuckerberg-testimony/index.html>. As is clear from committee hearings and our work, there are indeed lawmakers and staff devoted to tackling tech policy including Senator Kamala Harris, Senator Richard Blumenthal, Congresswoman Jackie Speier, and Congresswoman Kathleen Clark.

¹⁶ We know from experience that staff endeavor to remedy those deficits.

¹⁷ A widely known quip is that federal laws take on average seven years to get passed. Not so of course with urgent matters, especially when lawmakers’ selfish interests hang in the balance. The Video Privacy Protection Act’s rapid-fire passage is an obvious case in point. That law passed in mere months after the failed nomination of Judge Robert Bork to the Supreme Court revealed that journalists could easily obtain people’s video rental records. Lawmakers fearing that their video rental records would be released to the public passed VPPA in short order. See William McGeeveran, *Data Privacy and Policy* (2017).

¹⁸ Or at least this is the most generous reading of its history. One of us (Franks) is somewhat more skeptical about the narrative that Section 230’s flaws were not evident at its inception. See Mary Anne Franks, *The Cult of the Constitution*, *supra* note, at.

¹⁹ Citron & Wittes, *supra* note, at.

pornography.²⁰ Besides proposing criminal penalties for the distribution of sexually explicit material online, members of Congress underscored the need for private sector help in reducing the volume of “offensive” material online. Then-Representatives Christopher Cox and Ron Wyden offered an amendment to the CDA entitled “Protection for Private Blocking and Screening of Offensive Material.”²¹ The Cox-Wyden Amendment, codified as Section 230, provided immunity from liability for “Good Samaritan” online service providers that over- or under-filtered objectionable content.²²

Section 230(c), entitled “Good Samaritan blocking and filtering of offensive content,” has two key provisions. Section 230(c)(1) specifies that providers or users of interactive computer services will not be treated as publishers or speakers of user-generated content.²³ Section 230(c)(2) says that online service providers will not be held liable for good-faith filtering or blocking of user-generated content.²⁴ Section 230 also carves out limitations for its immunity provisions: its protections do not apply to violations of federal criminal law, intellectual property law, the Electronic Privacy Communications Act, and, as of 2018, the facilitation of sex trafficking.²⁵

In 1996, lawmakers could hardly have imagined the role that the internet would play in modern life. Yet Section 230’s authors were prescient. In their view, “if this amazing new thing – the Internet – [was] going to blossom,” companies should not be “punished for *trying* to keep things clean.”²⁶ Cox recently explained that, “the original purpose of [Section 230] was to help clean up the Internet, not to facilitate people doing bad things on the Internet.”²⁷ The key to Section 230, Wyden agreed, was “making sure that companies in return for that protection – that they wouldn’t be sued indiscriminately – were being responsible in terms of policing their platforms.”²⁸

B. Explaining the Judiciary’s Interpretation of Section 230

The judiciary’s interpretation of Section 230 has not squared with this vision. Rather than a legal shield for responsible moderation efforts, courts have stretched Section 230 far beyond what its words, context, and purpose support.²⁹ Section 230 has been read to immunize platforms from liability that:

²⁰ Citron & Wittes, *supra* note, at.

²¹ *Id.*

²² *Id.*

²³ 47 U.S.C. § 230(c)(1).

²⁴ 47 U.S.C. § 230(c)(2).

²⁵ 47 U.S.C. § 230(e).

²⁶ See Citron & Jurecic, *supra* note.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Citron & Wittes, *supra* note, at 406-10; Mary Anne Franks, *How the Internet Unmakes the Law*, Ohio S. Tech. L. J. (forthcoming 2020).

- knew about users' illegal activity, deliberately refused to remove it, and ensured that those responsible could not be identified;³⁰
- solicited users to engage in tortious and illegal activity;³¹ and
- designed their sites to enhance the visibility of illegal activity and to ensure that the perpetrators could not be identified and caught.³²

Courts have attributed this broad-sweeping approach to the fact that "First Amendment values [drove] the CDA."³³ For support, courts have pointed to Section 230's "findings" and "policy" sections, which highlight the importance of the "vibrant and competitive free market that presently exists" for the internet and the internet's role in facilitating "myriad avenues for intellectual activity" and the "diversity of political discourse."³⁴ As one of us (Franks) has underscored, Congress' stated goals also included the:

development of technologies that "maximize user control over what information is received" by Internet users, as well as the "vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking and harassment by means of the computer." In other words, the law [wa]s intended to promote the values of privacy, security and liberty alongside the values of open discourse.³⁵

Section 230's liability shield has been extended to activity that has little or nothing to do with free speech, such as the sale of dangerous products.³⁶ Consider Armslist.com, the self-described "firearms marketplace."³⁷ Unlicensed gun sellers use the site to find buyers who cannot pass background checks.³⁸ Armslist.com is where Radcliffe Haughton illegally purchased a gun.³⁹ Haughton's estranged wife obtained a restraining order against him that banned him from legally purchasing a firearm.⁴⁰ Haughton used Armslist.com, to easily find a gun seller that did not require a background check.⁴¹ He

³⁰ *Id.*

³¹ *Id.*

³² Citron, *Section 230's Challenge to Civil Rights and Civil Liberties*. See generally Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 1 (2017).

³³ *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18 (1st Cir. 2016), cert. denied, 137 S. Ct. 622 (2017).

³⁴ See, e.g., *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009).

³⁵ Mary Anne Franks, *The Lawless Internet? Myths and Misconceptions About CDA Section 230*, HUFFINGTON POST (Feb. 17, 2014).

³⁶ See, e.g., *Hinton v. Amazon.com, LLC*, 72 F. Supp. 3d 685, 687, 690 (S.D. Miss. 2014); Franks, *How the Internet*, supra __ at __.

³⁷ <https://www.armslist.com/>

³⁸ See Mary Anne Franks, *Our Collective Responsibility for Mass Shootings*, N.Y. TIMES, October 11, 2019, available at <https://www.nytimes.com/2019/10/09/opinion/mass-shooting-responsibility.html>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

used the gun he purchased to murder his estranged wife and her two co-workers.⁴² The Wisconsin Supreme Court found Armslist immune from liability based on Section 230, despite the fact that its activities – i.e., knowingly profiting from illegal firearms purchases – were conduct, not speech.⁴³

Extending Section 230's shield from liability to platforms that refuse to prohibit, and in some cases deliberately encourage, unlawful activity directly contradicts the stated goals of the CDA. Armslist.com can hardly be said to "provide 'educational and informational resources' or contribute to 'the diversity of political discourse.'" ⁴⁴ Immunizing from liability enterprises that have nothing to do with moderating online speech, such as marketplaces that connect sellers of deadly weapons with prohibited buyers for a cut of the profits, is unjustifiable.

C. *Evaluating the Status Quo*

Section 230's overbroad interpretation means that platforms have scant legal incentive to combat online abuse. Rebecca Tushnet put it well a decade ago: Section 230 ensures that platforms enjoy "power without responsibility."⁴⁵

Market forces alone are unlikely to encourage responsible content moderation. Platforms make their money through online advertising generated when users like, click, and share.⁴⁶ Allowing attention-grabbing abuse to remain online often accords with platforms' rational self-interest.⁴⁷ Platforms "produce nothing and sell nothing except advertisements and information about users, and conflict among those users may be good for business."⁴⁸ If a company's analytics suggest that people pay more attention to content that makes them sad or angry, then the company will highlight such content.⁴⁹ Research shows that people are more attracted to negative and novel information.⁵⁰ Thus, keeping up destructive content may make the most sense for a company's bottom line.

⁴² *Id.*

⁴³ *Id.* The non-profit organization the Cyber Civil Rights Initiative, of which one of us (Franks) is the President and one of us (Citron) is the Vice President, filed an amicus brief in support of the petitioner's request for writ of certiorari in the Supreme Court. Brief of Amicus Curiae of Cyber Civil Rights Initiative and Legal Academics in Support of Petitioners in Yasmine Daniel v. Armslist.com, *available at* https://www.supremecourt.gov/DocketPDF/19/19-153/114340/20190830155050530_Brief.PDF.

⁴⁴ Amicus Curiae of Cyber Civil Right Initiative, *supra* note, at 16.

⁴⁵ Rebecca Tushnet, *Power without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986 (2008).

⁴⁶ Mary Anne Franks, *Justice Beyond Dispute*, 131 HARV. L. REV. 1374, 1386 (2018) (reviewing ETHAN KATSH & ORNA RABINOVICH-EINY, *DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES* (2017)).

⁴⁷ Danielle Keats Citron, *Cyber Mobs, Disinformation, and Death Videos: The Internet As It Is (and as It Should Be)*, 118 MICH. L. REV. (forthcoming 2020).

⁴⁸ *Id.*

⁴⁹ Dissenting Statement of Commissioner Rohit Chopra, *In re Facebook, Inc.*, Commission File No. 1823109, at 2 (July 24, 2019).

⁵⁰ *Id.*

As Federal Trade Commissioner Rohit Chopra warned in his powerful dissent from the agency's 2019 settlement with Facebook, the behavioral advertising business model is the "root cause of [social media companies'] widespread and systemic problems."⁵¹ Online behavioral advertising generates profits by "turning users into products, their activity into assets," and their platforms into "weapons of mass manipulation."⁵² Tech companies "have few incentives to stop [online abuse], and in some cases are incentivized to ignore or aggravate [it]."⁵³

To be sure, the dominant tech companies have moderated certain content by shadow banning, filtering, or blocking it.⁵⁴ What often motivates these efforts is pressure from the European Commission to remove hate speech and terrorist activity.⁵⁵ The same companies have banned certain forms of online abuse, such as nonconsensual pornography⁵⁶ and threats, in response to pressure from users, advocacy groups, and advertisers.⁵⁷ They have expended resources to stem abuse when it has threatened their bottom line.⁵⁸

Yet the online advertising business model continues to incentivize revenue-generating content that causes significant harm to the most vulnerable among us. Online abuse generates traffic, clicks, and shares because it is salacious and negative.⁵⁹ Deep fake pornography sites⁶⁰ as well as revenge porn and gossip sites⁶¹ thrive thanks to advertising revenue.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Franks, *Justice Beyond Dispute*, *supra* note, at 1386.

⁵⁴ Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035 (2018); Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for the Information Age*, 91 B.U. L. REV. 1435, 1468-71 (2011).

⁵⁵ Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, *supra* note, at 1038-39.

⁵⁶ See Mary Anne Franks, *Revenge Porn Reform: A View from the Front Lines*, Fla. L. Rev. (2017).

⁵⁷ *Id.* at 1037.

⁵⁸ CITRON, *HATE CRIMES IN CYBERSPACE*, *supra* note, at 229 (discussing how Facebook changed its position on pro rape pages after fifteen companies threatened to pull their ads); Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251 (2017).

⁵⁹ For instance, eight of the top ten pornography websites host deepfake pornography, and there are nine deepfake pornography websites hosting 13,254 fake porn videos (mostly featuring female celebrities without their consent). These sites generate income from advertising. Indeed, as the first comprehensive study of deepfake video and audio explains, "deepfake pornography represents a growing business opportunity, with all of these websites featuring some form of advertising." Deeptrace Labs, *The State of Deepfakes: Landscape, Threats, and Impact* 6 (September 2019), available at <https://storage.googleapis.com/deeptrace-public/Deeptrace-the-State-of-Deepfakes-2019.pdf>.

⁶⁰ *Id.*

⁶¹ See, e.g., *Erna Besic Psycho Mom of Two!*, THE DIRTY (Oct. 9, 2019, 10:02 AM), <https://thedirty.com/#post-2374229>.

Without question, Section 230 has been valuable to innovation and expression.⁶² It has enabled vast and sundry businesses. It has led to the rise of social media companies that many people find valuable, such as Facebook, Twitter, and Reddit.

At the same time, Section 230 has subsidized platforms whose business is online abuse. It enables platforms to make money off of abuse without having to bear the costs that its business externalizes.⁶³ It takes away the leverage that victims might have had to get harmful content take down.

This laissez-faire approach has been costly to individuals, groups, and society. As more than ten years of research have shown, cyber mobs and individual harassers target individuals with sexually threatening and sexually humiliating online abuse.⁶⁴ According to a 2017 Pew Research Center study, one in five U.S. adults have experienced online harassment that includes stalking, threats of violence, or cyber sexual harassment.⁶⁵ More often, targeted individuals are women—particularly women of color and bisexual women— and other sexual minorities.⁶⁶

Victims of online abuse do not feel safe on- or offline.⁶⁷ They experience anxiety and severe emotional distress. They suffer damage to their reputations, their intimate relationships, their employment and educational opportunities. Some victims are forced to relocate, change jobs, or even change their names.⁶⁸ In the face of online assaults, victims have difficulty finding employment or keeping their jobs because the abuse appears in searches of their names.⁶⁹

Failing to address online abuse does not just inflict economic, physical, and psychological harms on victims – it also jeopardizes their right to free speech. Online abuse silences victims.⁷⁰ Targeted individuals often shut down social media profiles and email accounts

⁶² CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at.

⁶³ See Mary Anne Franks, Moral Hazard on Stilts, Knight Institute of the First Amendment (2019).

⁶⁴ See generally CITRON, HATE CRIMES IN CYBERSPACE, *supra* note. The 2017 Pew study found that one in four Black individuals say they have been subject to online harassment due to their race; one in ten Hispanic individuals have said the same. For white individuals, the share is far lower: just three percent. Women are twice as likely as men to say they have been targeted online due to their gender (11 percent versus 5 percent). Duggan, *supra* note. Other studies have made clear that LGBTQ individuals are particularly vulnerable to online harassment, CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, and nonconsensual pornography. Data & Society, Online Harassment, Digital Abuse, and Cyberstalking in America (November 21, 2016), available at https://innovativepublichealth.org/wp-content/uploads/2_Online-Harassment-Report_Final.pdf.

⁶⁵ Maeve Duggan, Online Harassment 2017 Study, Pew Research Center (July 11, 2017).

⁶⁶ CITRON, HATE CRIMES IN CYBERSPACE, *supra* note.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Jonathon W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L.J. 117, 125–26 (2016); see also Jonathon W. Penney, *Internet Surveillance, Regulation, and Chilling Effects Online: A*

and withdraw from public discourse.⁷¹ Those with political ambitions are deterred from running for office.⁷² Journalists refrain from reporting on controversial topics. Sexual assault victims are discouraged from holding perpetrators accountable.

An overly capacious view of Section 230 has undermined equal opportunity in employment, politics, journalism, education, cultural influence, and free speech.⁷³ The benefits Section 230's immunity has enabled likely could have been secured at a lesser price.⁷⁴

II. Debunking the Myths about Section 230

After writing about overbroad interpretations of Section 230 for more than a decade, we have eagerly anticipated the moment when federal lawmakers would begin listening to concerns about Section 230. Today, finally, lawmakers are questioning the received wisdom that any tinkering with Section 230 would lead to a profoundly worse society.

Yet we approach this moment with a healthy dose of skepticism. Nothing is gained if Section 230 is changed to indulge bad faith claims, address fictitious concerns, or disincentivize content moderation. We have been down this road before and it is not pretty.⁷⁵ Yes, Section 230 is in need of reform, but not if it would make matters worse.

Our reservations stem from misconceptions riddling the debate. Those now advocating repealing or amending Section 230 often dramatically claim that broad platform immunity betrays free speech guarantees by sanctioning the censorship of political views. By contrast, Section 230 absolutists oppose any effort to amend Section 230 on the grounds that broad platform immunity is indispensable to free speech guarantees. Both sides tend to conflate the First Amendment and Section 230, though to very different ends. This conflation reflects and reinforces three major misconceptions. One is the presumption that all Internet activity is speech. The second is the treatment of private actors as if they were government actors. The third is the assumption that any regulation of online conduct will inevitably result in less speech. This Part identifies and debunks these prevailing myths.

Comparative Case Study, 6 INTERNET POL'Y REV., May 26, 2017, at 1, 3. See generally CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at; Danielle Keats Citron, *Civil Rights In Our Information Age*, in THE OFFENSIVE INTERNET (Saul Levmore & Martha C. Nussbaum, eds. 2010); Citron & Richards, *supra* note, at 1365 ("[N]ot everyone can freely engage online. This is especially true for women, minorities, and political dissenters who are more often the targets of cyber mobs and individual harassers."); Citron & Franks, *supra* note, at 385; Citron, *Cyber Civil Rights*, *supra* note.

⁷¹ *Id.*

⁷² Katie Hill, for instance, resigned from Congress after her vengeful ex shared intimate photos of her and a woman who she and her husband were engaged in a consensual relationship.

⁷³ MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION (2019).

⁷⁴ Citron & Wittes, *supra* note.

⁷⁵ FOSTA-SESTA as case in point.

A. *The Internet as a Speech Machine*

Both detractors and supporters agree that Section 230 provides online intermediaries broad immunity from liability for third-party content. The real point of contention between the two groups is whether this broad immunity is a good or a bad thing. While critics of Section 230 point to the extensive range of harmful activity that the law's deregulatory stance effectively allows to flourish, Section 230 enthusiasts argue that the law's laissez-faire nature is vital to ensuring a robust online marketplace of ideas.

Section 230 enthusiast Elizabeth Nolan Brown argues that "Section 230 is the Internet's First Amendment."⁷⁶ David Williams, president of the Taxpayers Protection Alliance, similarly contends that, "The internet flourishes when social media platforms allow for discourse and debate without fear of a tidal wave of liability. Ending Section 230 would shutter this marketplace of ideas at tremendous cost."⁷⁷ Eric Goldman contends that Section 230 is "even better than the First Amendment."⁷⁸

The view of Section 230 presumes that the Internet is primarily, if not exclusively, a medium of speech. The text of Section 230 reinforces this characterization through the use of the terms "publishers" and "speakers" in 230(c)(2) as well as the finding that the "Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."⁷⁹

But the assertion that the Internet is primarily a medium of speech should be interrogated.⁸⁰ When Section 230 was passed, it may have made sense to think of the Internet that way. In 1996, the Internet had for most of its history been text-based and limited to non-commercial activity. Only 20 million American adults had Internet access, and these users spent less than half an hour a month online. By comparison, in 2019, 293 million Americans were using the Internet,⁸¹ and they were using it not only to communicate, but also to buy and sell merchandise, find dates, make restaurant reservations, watch television, read books, stream music, and look for jobs.⁸² As one Section 230 proponent has described it,

⁷⁶ <https://reason.com/2019/07/29/section-230-is-the-internets-first-amendment-now-both-republicans-and-democrats-want-to-take-it-away/>

⁷⁷ <https://www.theverge.com/2019/7/10/20688778/congress-section-230-conservative-internet-law-content-moderation>

⁷⁸ Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 Notre Dame L. Rev. Reflections (2019).

⁷⁹ § 230(a)(3).

⁸⁰ See Franks, *How the Internet Unmakes the Law*.

⁸¹ J. Clement, *Internet usage in the United States - Statistics & Facts*, Statista (Aug. 20, 2019) <https://www.statista.com/topics/2237/internet-usage-in-the-united-states/>.

⁸² J. Clement, *Most popular online activities of adult internet users in the United States as of November 2017*, Statista (Nov. 7, 2018), <https://www.statista.com/statistics/183910/internet-activities-of-us-users/>.

the entire suite of products we think of as the internet—search engines, social media, online publications with comments sections, Wikis, private message boards, matchmaking apps, job search sites, consumer review tools, digital marketplaces, Airbnb, cloud storage companies, podcast distributors, app stores, GIF clearinghouses, crowdsourced funding platforms, chat tools, email newsletters, online classifieds, video sharing venues, and the vast majority of what makes up our day-to-day digital experience—have benefited from the protections offered by Section 230.

Many of these activities have very little to do with speech, and indeed many of the offline cognates would not be considered protected speech for First Amendment purposes. “Like any other rule, the First Amendment does not regulate the full range of human behavior.”⁸³ The First Amendment draws a line, contested though it might be, between speech and conduct. While some actions are sufficiently expressive to be considered speech for First Amendment purposes,⁸⁴ “[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.”⁸⁵ The Court has made clear that conduct is not automatically protected simply because it involves language in some way: “it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”⁸⁶

That is, while many Supreme Court free speech cases are focused on whether a particular kind of speech is protected, and to what degree, by the First Amendment, whether an act is speech *at all* for the purposes of the First Amendment is an even more fundamental question. When presented with cases involving the wearing of black armbands, setting flags on fire, making financial contributions to political campaigns, or burning draft cards, the Court has first engaged with the question of whether the acts in question are being regulated as speech before turning to the degree of protection that speech is afforded. The answer to the question “is it speech” can often be, once one is no longer dealing with the spoken or printed word, very complicated. As one of us (Citron) has written, “[a]dvances in law and technology . . . complicate this distinction as they make more actions achievable through ‘mere’ words.”⁸⁷ Because so much online activity involves elements that are not unambiguously speech-related, whether such activities are in fact speech should be a subject of express inquiry.

⁸³ Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 Wm. & Mary L. Rev. 1613, 1617–18 (2015).

⁸⁴ See, e.g., *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (wearing of black armbands conveyed message regarding a matter of public concern).

⁸⁵ *Texas v. Johnson*, 491 U.S. 397, 406, 109 S.Ct. 2533, 2540, 105 L.Ed.2d 342 (1989); see also *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

⁸⁶ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

⁸⁷ Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61, 99 (2009).

But the conflation of Section 230 and the First Amendment short-circuits this inquiry. Intermediaries invoking Section 230 implicitly characterize the acts or omissions at issue as speech, and courts allow them to do so without challenge. When “courts routinely interpret Section 230 to immunize all claims based on third-party content,” including “negligence; deceptive trade practices, unfair competition, and false advertising; the common law privacy torts; tortious interference with contract or business relations; intentional infliction of emotional distress; and dozens of other legal doctrines,”⁸⁸ they grant online intermediaries a presumption not available to offline intermediaries, thereby establishing a two-track system of liability.

In addition to short-circuiting the analysis of whether particular content qualifies as speech at all, an overly indulgent view of Section 230 also short-circuits the analysis of whether the speech is or should be protected. This view treats all online activity as normatively significant free expression. It supposes that all user-generated content involves presumptively protected speech. Under this view, collateral censorship is inevitable as is the destruction of the “marketplace of ideas.”

This view reflects what Leslie Kendrick describes as “First Amendment expansionism” – the tendency to treat speech as normatively significant no matter the actual speech in question.⁸⁹ As Kendrick wisely observes, First Amendment expansionism is likely “in an information economy where many activities and products involve communication.”⁹⁰ The debate over Section 230 bears this out.

Viewing all online speech as normatively significant or presumptively protected elides the different reasons why certain speech is viewed as distinctly important in our system of free expression.⁹¹ Some speech matters for self-expression, but not all speech does.⁹² Some speech is important for the search for truth or for self-governance, but not all speech serves those values. Also, as Kenneth Abraham and Edward White argue, the “all speech is free speech” view devalues the special cultural and social salience of speech about matters of public concern.⁹³ And it disregards the fact that speech about private individuals about purely private matters may not remotely implicate free speech values

⁸⁸ (Goldman, *supra*, at 6)

⁸⁹ Leslie Kendrick, *First Amendment Expansionism*, 56 William & Mary L. Rev. 1199, 1212 (2015). As Leslie Kendrick explains, freedom of speech is a “term of art that does not refer to all speech activities, but rather designates some area of activity that society takes, for some reason, to have special importance.”

⁹⁰ *Id.*

⁹¹ Kendrick, *supra* note, at.

⁹² *Id.*

⁹³ Kenneth S. Abraham & Edward G. White,

at all. As the Court has repeatedly observed, not all speech receives full protection under the First Amendment.⁹⁴

The indulgent approach to Section 230 veers far away from the public discourse values at the core of the First Amendment, as well as from the original intentions of Section 230's sponsors. Christopher Cox, a former Republican Congressman who co-sponsored Section 230, has been openly critical of "how many Section 230 rulings have cited other rulings instead of the actual statute, stretching the law," asserting that "websites that are 'involved in soliciting' unlawful materials or 'connected to unlawful activity should not be immune under Section 230.'" ⁹⁵ The Democratic co-sponsor of Section 230, Senator Ron Wyden, has similarly emphasized that he "wanted to guarantee that bad actors would still be subject to federal law. Whether the criminals were operating on a street corner or online wasn't going to make a difference." ⁹⁶

There is no justification for treating the Internet as a magical speech conversion machine: if the conduct would not be speech protected by the First Amendment if it occurs offline, it should not be transformed into speech merely because it occurs online. Content that unquestionably qualifies as speech should not be presumed to be doctrinally or normatively protected. Intermediaries seeking to take advantage of Section 230's protections – given that those protections were intended to foster free speech values – should have to demonstrate, rather than merely tacitly assert, that the content at issue is in fact speech.

B. Neutrality and the State Action Doctrine

The conflation of the First Amendment and Section 230, and Internet activity with speech, contributes to another common misconception about the law, which is that it requires tech companies to act as "neutral public forums" in order to receive the benefit of immunity. Stated slightly differently, the claim here is that tech companies receive Section 230's legal shield only if they refrain, as the First Amendment generally requires the government to refrain, from viewpoint discrimination. On this view, a platform's removal, blocking, or muting of user-generated content based on viewpoint amounts to impermissible censorship under the First Amendment that should deprive the platform of its statutory protection against liability.⁹⁷

⁹⁴ See *United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (noting existence of "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942))).

⁹⁵ Alina Selyukh, *Section 230: A Key Legal Shield For Facebook, Google Is About To Change*, NPR (Mar. 21, 2018), <https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change>.

⁹⁶ Ron Wyden, *Floor Remarks: CDA 230 and SESA*, Medium (Mar. 21, 2018), <https://medium.com/@RonWyden/floor-remarks-cda-230-and-sesta-32355d669a6e>.

⁹⁷ <https://www.lawfareblog.com/ted-cruz-vs-section-230-misrepresenting-communications-decency-act>

This misconception is twofold: first, there is nothing in the legislative history or text of Section 230 that supports such an interpretation.⁹⁸ Not only does Section 230 not require platforms to act neutrally vis-à-vis political viewpoints as state actors should, it urges exactly the opposite. Under Section 230(b)(4), one of the statute's policy goals includes "remov[ing] disincentives for the development and utilization of blocking and filtering technologies."⁹⁹

Secondly, the "neutral platform" myth completely ignores the state action doctrine, according to which the obligations created by the First Amendment fall only upon government actors, not private actors. Attempting to extend First Amendment obligations to private actors is not only constitutionally incoherent, but endangers the First Amendment rights of private actors against compelled speech.¹⁰⁰

High-profile examples of the "neutral platform" argument include Representative Gianforte denouncing Facebook's refusal to run a gun manufacturer's ads as blatant "censorship of conservative views."¹⁰¹ Senator Ted Cruz has argued that "big tech enjoys an immunity from liability on the assumption they would be neutral and fair. If they're not going to be neutral and fair, if they're going to be biased, we should repeal the immunity from liability so they should be liable like the rest of us."¹⁰² Along these lines, Representative Louie Gohmert contended that "Instead of acting like the neutral platforms they claim to be in order obtain their immunity . . . social media companies have use[d their] platforms and algorithms to silence and prevent income to conservatives."¹⁰³

It is not just politicians who fall under the spell of the viewpoint neutrality myth. The Daily Wire's Editor, Chief Josh Hammer, tweeted: "It is not government overreach to demand that Silicon Valley tech giants disclose their censorship algorithms in exchange for continuing to receive CDA Sec. 230 immunity."¹⁰⁴

⁹⁸ As Rep. Cox recently underscored, "nowhere, nowhere, nowhere does the law say anything about [neutrality]." <https://www.nbcnews.com/politics/congress/why-republicans-even-couple-democrats-want-throw-out-tech-s-n1043346>

⁹⁹ 230(b)(4).

¹⁰⁰ See *West Virginia v. Barnette*; *Manhattan Corp. v. Halleck*.

¹⁰¹ <https://www.c-span.org/video/?465331-1/google-reddit-officials-testify-internet-consumer-protection>

¹⁰² <https://www.fastcompany.com/90252598/ted-cruz-made-it-clear-he-supports-repealing-tech-platforms-safe-harbor>. Democratic Senators have also reinforced this myth. For instance, Senator Mark Warner claimed that "there was a decision made that social media companies, and their connections, were going to be viewed as kind of just dumb pipes, not unlike a telco." <https://www.techdirt.com/articles/20190929/00171443090/senator-mark-warner-repeats-senator-ted-cruzs-mythical-made-up-incorrect-claims-about-section-230.shtml>

¹⁰³ <https://gohmert.house.gov/news/documentsingle.aspx?DocumentID=398676>.

¹⁰⁴ <https://www.vox.com/2019/6/26/18691528/section-230-josh-hawley-conservatism-twitter-facebook>

Several legislative proposals endeavor to reset Section 230 to incentivize platforms to act as quasi-governmental actors with a commitment to viewpoint neutrality. Consider Senator Josh Hawley's bill "Ending Support for Internet Censorship Act."¹⁰⁵ Under the Hawley proposal, Section 230's legal shield would be conditioned on companies of a certain size obtaining FTC certification of their "political neutrality." Under Representative Gohmert's proposal, Section 230 immunity would be conditioned on a content platform's posting of user-generated content in chronological order. Making judgments—in other words, moderating—about content's prominence and visibility would mean the loss of the legal shield.¹⁰⁶

It is important to note that there is no empirical basis for the claim that conservative viewpoints are being suppressed on social media. Facebook, responding to concerns about anti-conservative bias, hired former Senator John Kyl and lawyers at Covington & Burling to conduct an independent audit of potential anti-conservative bias.¹⁰⁷ The Covington Interim Report did not conclude that Facebook had anti-conservative bias.¹⁰⁸ As Siva Vaidhyanathan observes, there is no evidence for accusations that social media companies are disproportionately silencing conservative speech: the complaints are "simply false" and that studies suggest that conservative political campaigns have in fact leveraged social media to much greater advantage than their adversaries.¹⁰⁹

But even if the claims of anti-conservative bias on platforms did have basis in reality, the "neutral platform" interpretation of Section 230 takes two forms that actually serve to undermine, not promote, First Amendment values. The first involves the conflation of private companies with state actors, while the second is the characterization of social media platforms with public forums. Tech companies are not governmental or quasi-governmental entities, and social media companies and most online service providers are not publicly owned or operated.¹¹⁰ Both of these forms of misidentification ignore private actors' own First Amendment rights to decide what content they wish to endorse or promote.

¹⁰⁵ Hawley claimed in a tweet that Section 230's legal shield was predicated on platforms serving as "for[a] for a true diversity of political discourse." <https://reason.com/2019/07/29/section-230-is-the-internets-first-amendment-now-both-republicans-and-democrats-want-to-take-it-away/>

¹⁰⁶ <https://gohmert.house.gov/news/documentsingle.aspx?DocumentID=398676>

¹⁰⁷ Senator John Kyl, Covington Interim Report, available at <https://fbnewsroomus.files.wordpress.com/2019/08/covington-interim-report-1.pdf>.

¹⁰⁸ *Id.* The audit found Facebook's advertising policies prohibiting shocking and sensational content resulted in the rejection of pro-life ads focused on survival stories of infants born before full-term. Facebook adjusted its enforcement of this policy to focus on prohibiting ads only when the ad shows someone in visible pain or distress or where blood and bruising is visible.

¹⁰⁹ <https://www.theatlantic.com/ideas/archive/2019/07/conservatives-pretend-big-tech-biased-against-them/594916/>.

¹¹⁰ Citron & Richards, *supra* note, at 1361 (exploring how entities comprising our digital infrastructure, including search engines, browsers, hosts, transit providers, security providers, internet service providers, and content platforms, are privately-owned with certain exceptions like the Internet Corporation for Assigned Names and Numbers).

Neither Section 230 nor judicial doctrine equates “interactive computer services” with state guarantors of First Amendment protections. As private actors, social media companies are no more required to uphold the First Amendment rights of their users than would be bookstores or restaurants to their patrons.¹¹¹ As Eugene Kontorovich testified before the Senate Judiciary Committee’s hearing on “Stifling Free Speech: Technological Censorship and the Public Discourse:”

If tech platforms “engage in politically biased content-sorting . . . it is not a First Amendment issue. The First Amendment only applies to censorship by the government. . . . The conduct of private actors is entirely outside the scope of the First Amendment. If anything, ideological content restrictions are editorial decisions that would be protected by the First Amendment. Nor can one say that the alleged actions of large tech companies implicate ‘First Amendment values,’ or inhibits the marketplace of ideas in ways analogous to those the First Amendment seeks to protect against.”¹¹²

The alternative argument attempts to treat social media platforms as traditional public forums like parks, streets, or sidewalks. The public forum has a distinct purpose and significance in our constitutional order. The public forum is owned by the public and operated for the benefit of all.¹¹³ The public’s access to public parks, streets, and sidewalks is a matter of constitutional right.¹¹⁴ The public forum doctrine is premised on the notion that parks, streets, and sidewalks have been open for speech “immemorially . . . time out of mind.”¹¹⁵ For that reason, denying access to public parks, streets, and sidewalks on the basis of the content or viewpoint of speech is presumptively unconstitutional.¹¹⁶ But wholly privately-owned social media platforms have never been designated as “neutral public forums.”¹¹⁷

As one of us (Franks) has written, the attempt to turn social media controversies into debates over the First Amendment is an yet another example of what Frederick Schauer describes as “the First Amendment’s cultural magnetism”¹¹⁸ It suggests that “because

¹¹¹ See *Manhattan Community Access v. Halleck*, 139 S. Ct. 1321 (2019) (finding privately-owned cable television channel not a state actor).

¹¹² Written Testimony of Professor Eugene Kontorovich Before Senate Judiciary Committee for “Stifling Free Speech: Technological Censorship and the Public Discourse” (April 10, 2019).

¹¹³ Danielle Keats Citron & Neil M. Richards, *Four Principles for Digital Expression (You Won’t Believe #3!)*, 95 Wash. U. L. Rev. 1353, 1360 (2018).

¹¹⁴ *Id.*

¹¹⁵ *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515 (1939).

¹¹⁶ Cf. *Commonwealth v. Davis*, 39 N.E. 113, 113 (Mass. 1895), *aff’d*, *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897).

¹¹⁷ <https://www.lawfareblog.com/ted-cruz-vs-section-230-misrepresenting-communications-decency-act>

¹¹⁸ Mary Anne Franks, *The Free Speech Black Hole: Can the Internet Escape the Gravitational Pull of the First Amendment?*, Knight Institute, available at <https://knightcolumbia.org/content/the-free-speech-black-hole-can-the-internet-escape-the-gravitational-pull-of-the-first-amendment>.

private companies like Facebook, Twitter, and Google have become “state like” in many ways, even exerting more influence in some ways than the government, they *should* be understood as having First Amendment obligations, even if the First Amendment’s actual text or existing doctrine would not support it.”¹¹⁹ Under this view, the First Amendment should be expanded beyond its current borders.

But the erosion of the state action doctrine would actually undermine First Amendment rights, by depriving private actors of “a robust sphere of individual liberty,” as Justice Gorsuch recently expressed it in *Halleck*.¹²⁰ An essential part of the right to free speech is the right to choose what to say, when to say it, and to whom. Indeed, the right not to speak at all is a fundamental aspect of the First Amendment’s protections. As the Court famously held in *West Virginia v. Barnette*, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹²¹

If content platforms are treated as governmental actors or their services deemed public fora, then they could not act as “Good Samaritans” to block online abuse. This would directly contravene the will of Section 230’s drafters.¹²² They could not combat spam, doxing, nonconsensual pornography, or deep fakes.¹²³ They could not prohibit activity that chases people offline. In our view, it is desirable for content platforms to address online abuse that imperils people’s ability to enjoy life’s crucial opportunities, including the ability to engage with others online.

At the same time, the power that social media companies and other content platforms have over digital expression should not proceed unchecked, as it does in some respects. Currently, Section 230(c)(1)—the provision related to under-filtering content—shields companies from liability without any limit or condition, unlike Section 230(c)(2) that conditions the immunity for under-filtering on a showing of “good faith.” In Part III, we offer legislative reforms that would check that power afforded content platforms. The legal shield should be cabined to interactive computer services that wield their content-moderation powers responsibly, as the drafters of Section 230 wanted.¹²⁴

¹¹⁹ *Id.*; Citron & Richards, *supra* note, at 1371.

¹²⁰ *Manhattan Cmty. Access Corp. v. Halleck* (2019).

¹²¹ *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943)

¹²² Citron & Richards, *supra* note, at 1371.

¹²³ In connection with our work with CCRI, we have helped tech companies do precisely that. See Danielle Keats Citron, *Sexual Privacy*, Yale LJ (2019); Mary Anne Franks, “*Revenge Porn*” Reform: A View from the Front Lines, 69 FLA. L. REV. 1251 (2017).

¹²⁴ Of course, not all companies involved in providing our online experiences are alike in their power and privilege. Citron & Richards, *supra* note, at 1374. “As a company’s power over digital expression grows closer to total (meaning there are few to no alternatives to express oneself online), the greater the responsibilities (via regulation) attendant to that power.” *Id.* Companies running the physical infrastructure of the internet, such as internet service and broadband providers, have power over digital

We would lose much and gain little if Section 230 were replaced with the Hawley or Gohmert proposals. Section 230 already has a mechanism to address the unwarranted silencing of viewpoints. Under Section 230(c)(2), users or providers of interactive computer services enjoy immunity from liability for over-filtering or over-blocking speech only if they acted in “good faith.” Under current law, platforms could face liability for removing or blocking content without “good faith” justification, if a theory of relief exists on which they can be sued.¹²⁵

C. The Myth that Any Change to Section 230 Would Destroy Free Speech

Another myth is that any Section 230 reform would jeopardize free speech in a larger sense, even if not strictly in the sense of violating the First Amendment. It is certainly true that free speech is a cultural as well as a constitutional matter. It is shaped by non-legal as well as legal norms, and tech companies play an outsized role in establishing those norms. We agree that there is good reason to be concerned about the influence of tech companies and other powerful private actors over the ability of individuals to express themselves. This is an observation we have been making for years – that some of the most serious threats to free speech come not from the government, but from non-state actors.¹²⁶ Marginalized groups in particular, including women and racial minorities, have long battled with private censorial forces as well as governmental ones. But the unregulated Internet – or rather, the selectively regulated Internet – is exacerbating, not ameliorating, this problem. The current state of Section 230 may ensure free speech for the privileged few, but protecting free speech for all will require reform.

The concept of “cyber civil rights”¹²⁷ speaks precisely to the reality that the Internet has rolled back many gains made for racial and gender equality. The anonymity, amplification, and aggregation possibilities offered by the Internet have allowed private actors to discriminate, harass, and threaten vulnerable groups on a massive scale.¹²⁸ There is abundant empirical evidence showing that the Internet has been used to further chill

expression tantamount to governmental power. In locations where people only have one broadband provider in their area, being banned from that provider would mean no broadband internet access at all. The (now-abandoned) net neutrality rules were animated by precisely those concerns. And, as Genevieve Lakier and Frank Pasquale have argued, the power of search engines may warrant far more regulation than currently exists. See Genevieve Lakier, *The Problem Isn't Analogies but the Analogies that Courts Use*, Knight Institute; FRANK PASQUALE, *THE BLACK BOX SOCIETY* (2014). Although social media companies are powerful, they do not have the kind of control over our online experiences as broadband providers or even search engines do. Users banned on Facebook could recreate a social network elsewhere, though it would be time consuming and likely incomplete. Dissatisfaction with Facebook has inspired people's migration to upstart social network services like MeWe. See Citron & Richards, *supra* note, at 1374 (exploring different non-constitutional ways that law can protect digital expression).

¹²⁵ At the symposium, Brian Leiter provided helpful comments on this point.

¹²⁶ See Franks, *Democratic Surveillance; Beyond Free Speech for the White Man*

¹²⁷ See Citron, *Cyber Civil Rights*, *supra* note, at.

¹²⁸ Id.; Franks, *Unwilling Avatars*

the intimate, artistic, and professional expression of individuals whose rights were already under assault offline.

Even as the Internet has multiplied the possibilities of expression, it multiplied the possibilities of repression.¹²⁹ The new forms of communication offered by the Internet have been used to unleash a regressive and censorious backlash against women, racial minorities, sexual minorities, and any other groups seeking to assert their rights of expression. The Internet lowers the costs of engaging in abuse by providing abusers with anonymity and social validation, while providing new ways to increase the range and impact of that abuse. The online abuse of women in particular amplifies sexist stereotyping and discrimination, compromising gender equality online and off.

The reality of unequal free speech rights demonstrates why regulation not only may not chill speech, but can, when done carefully and well, enhance speech and encourage more people to freely engage in speech. According to a 2017 study, regulating online abuse “may actually facilitate and encourage more speech, expression, and sharing by those who are most often the targets of online harassment: women.” The study’s author suggests that when women “feel less likely to be attacked or harassed,” they become more “willing to share, speak, and engage online.” Knowing that there are laws criminalizing online harassment and stalking “may actually lead to more speech, expression, and sharing online among adult women online, not less.” As expressed in the title of a recent article by one of us (Citron) and Jonathon Penney, sometimes “law frees us to speak.”¹³⁰

III. Moving Beyond the Myths: A Menu of Potential Solutions

Having addressed misconceptions about the relationship between Section 230 and the First Amendment, state and private actors, and regulation and free speech outcomes, we turn to reform proposals that address the problems that actually exist and are legitimately concerning. This Part explores different possibilities for fixing the overbroad interpretation of Section 230.

A. *Against Carveouts*

Some reformers urge Congress to maintain Section 230’s immunity, but to create an explicit exception from its legal shield for certain types of behavior. A recent example of that approach is the Stop Enabling Sex Traffickers Act (SESTA), which passed by an overwhelming vote in 2016. The bill amended Section 230 by rendering websites liable for knowingly hosting sex trafficking content.

That law, however, is flawed. By effectively pinning the legal shield on a platform’s lack of knowledge of sex trafficking, the law reprises the dilemma that led Congress to pass

¹²⁹ Franks, *Cult of the Constitution*, *supra* note, at..

¹³⁰ Jonathon W. Penney & Danielle Keats Citron, *When Law Frees us to Speak*, *Fordham L. Rev.* (2018).

Section 230 in the first place. To avoid liability, platforms have resorted to either filtering everything related to sex or sitting on their hands so they cannot be said to have knowingly facilitated sex trafficking.¹³¹ That is the opposite of what the drafters of Section 230 wanted – responsible content moderation practices.

Olivier Sylvain offers another potential route for reform, who urges Congress to maintain Section 230's immunity but to create an explicit exception from the legal shield for civil rights violations.¹³² He argues that other exceptions could be added, such as those related to combating nonconsensual pornography or child sexual exploitation.

While we sympathize with the impulse to address particularly egregious harms, we argue that the best way to reform Section 230 is not through a piecemeal approach. The carveout approach is inevitably underinclusive, establishing a normative hierarchy of harms that leaves other harmful conduct to be addressed another day. Such an approach requires that Section 230's exceptions would need to be regularly updated, an impractical option given the slow pace of congressional efforts and partisan deadlock.¹³³

B. A Modest Proposal – Speech, not Content

In light of the observations made in Part II.A., one simple reform of Section 230 would be to make explicitly clear that the statute's protections only apply to speech. The statutory fix is simple: replace the word "information" in (c)(1) with the word "speech." Thus, that section of the statute would read:

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any **speech** provided by another information content provider.

This revision would put all parties in a Section 230 case on notice that the classification of content as speech is not a given, but a fact to be demonstrated. If a platform cannot make a showing that the content or information at issue is speech, then it should not be able to take advantage of Section 230 immunity.

C. Excluding Bad Samaritans

Another effective and modest adjustment would involve amending Section 230 to exclude bad actors from its legal shield. There are a few ways to do this. One possibility would be to deny the immunity to online service providers that "deliberately leave up

¹³¹ Citron & Jurecic, *supra* note.

¹³² Sylvain, *supra* note, at.

¹³³ See Citron, <https://knightcolumbia.org/content/section-230s-challenge-civil-rights-and-civil-liberties>.

unambiguously unlawful content that clearly creates a serious harm to others.”¹³⁴ Another would be to exclude from the immunity “the very worst actors:” sites encouraging illegality *or* that principally host illegality.¹³⁵

A variant on this theme would deny the legal shield to cases involving platforms that have solicited or induced unlawful content. This approach takes a page from intermediary liability rules in trademark and copyright law. As Stacey Dogan observed in that context, inducement doctrines allow courts to target bad actors whose business models center on infringement.¹³⁶ Providers that solicit or induce unlawful content should not enjoy immunity from liability. This approach targets the harmful activity while providing breathing space for protected expression.¹³⁷

A version of this approach is embraced in the SHIELD Act, which one of us (Franks) assisted in drafting and the other (Citron) supported in advising lawmakers on behalf of CCRI. Because SHIELD is a federal criminal statute, Section 230 cannot be used as a defense against it. However, the statute creates a separate liability standard for providers of communications services that effectively grants them Section 230 immunity so long as the provider does not intentionally solicit, or knowingly and predominantly distribute, content that the provider actually knows is in violation of the statute.¹³⁸

D. Conditioning the Legal Shield on Reasonable Content Moderation

There is a broader legislative fix that Benjamin Wittes and one of us (Citron) have proposed. Under that proposal, platforms would enjoy immunity from liability *if* they could show that their content-moderation practices writ large are reasonable. The revision to Section 230(c)(1) would read as follows:

No provider or user of an interactive computer service that *takes reasonable steps to address unlawful uses of its service that clearly create serious harm to others* shall be treated as the publisher or speaker of any information provided by another information content provider *in any action arising out of the publication of content provided by that information content provider*.

If adopted, the question before the courts in a motion to dismiss on Section 230 grounds would be whether a defendant employed reasonable content moderation practices in the face of unlawful activity that manifestly causes harm to individuals.

¹³⁴ E-mail from Geoffrey Stone, Professor of Law, Univ. of Chi., to author (Apr. 8, 2018).

¹³⁵ Citron, Hate Crimes in Cyberspace, *supra* note, at. One of us (Citron) supported this approach as an important interim step to broader reform. *Id.*

¹³⁶ Stacey Dogan, *Principled Standards vs. Boundless Discretion: A Tale of Two Approaches to Intermediary Trademark Liability Online*, 37 COLUM. J.L. & ARTS 503, 507-08 (2014).

¹³⁷ *Id.* at 508-09.

¹³⁸ H.R. 2896: SHIELD Act of 2019; *see also* Franks, Revenge Porn Reform (explaining the exception).

The question would *not* be whether a platform acted reasonably with regard to a specific use of the service. Instead, the court would ask whether the provider or user of a service engaged in reasonable content moderation practices writ large with regard to unlawful uses that clearly create serious harm to others.¹³⁹

Congressman Deven Nunes has argued that reasonableness is a vague and unworkable policy.¹⁴⁰ Eric Goldman considers the proposal a “radical change that would destroy Section 230.” In Goldman’s estimation, “such amorphous eligibility standards” makes “Section 230 litigation far less predictable, and it would require expensive and lengthy factual inquiries into all evidence probative of the reasonableness of defendant’s behavior.”¹⁴¹

Yes, a reasonableness standard would require evidence of a site’s content moderation practices. But impossibly vague or amorphous—it is not. Courts have assessed the reasonableness of practices in varied fields, from tort law to the Fourth Amendment’s ban on unreasonable searches and seizures.¹⁴² In a wide variety of contexts, the judiciary has invested the concept of reasonableness with meaning.¹⁴³

Courts are well suited to address the reasonableness of a platform’s speech policies and practices vis-à-vis particular forms of illegality that cause clear harm to others (at the heart of a litigant’s claims). The reasonableness inquiry would begin with the alleged wrongdoing and liability. To state the obvious, platforms are not strictly liable for all content posted on their sites. Plaintiffs need a theory of relief to assert against content platforms. Section 230’s legal shield would turn on whether the defendant employed reasonable content moderation practices to deal with the kind of harmful illegality alleged in the suit.

¹³⁹ Tech companies have signaled their support as well. For instance, IBM issued a statement saying that Congress should adopt the proposal and wrote a tweet to that effect as well. Ryan Hagemann, *A Precision Approach to Stopping Illegal Online Activities*, IBM THINK POLICY (July 10, 2019), <https://www.ibm.com/blogs/policy/cda-230/>; see also @RyanLeeHagemann, TWITTER (July 10, 2019, 3:14 PM), <https://twitter.com/RyanLeeHagemann/status/1149035886945939457?s=20> (“A special shoutout to @daniellecitron and @benjaminwittes, who helped to clarify what a moderate, compromise-oriented approach to the #Section230 debate looks like.”).

¹⁴⁰ See Congressman Deven Nunes’ questioning of one of us at a House Intelligence Committee hearing about deep fakes in June 2018, <https://www.c-span.org/video/?c4802966/user-clip-danielle-citron-explains-content-moderation>. As Benjamin Zipursky explains, “For a term or a phrase to fall short of clarity because of vagueness is quite different from having no meaning at all, and both are different from having multiple meanings—being ambiguous.” Benjamin C. Zipursky, *Reasonableness In and Out of Negligence Law*, 163 Penn. L. Rev. 2131 (2015).

¹⁴¹ Goldman, *supra* note, at 45.

¹⁴² Reasonableness is the hallmark of negligence claims. Benjamin C. Zipursky, *Reasonableness In and Out of Negligence Law*, 163 PENN. L. REV. 2131, 2135 (2015) (“The range of uses of “reasonableness” in law is so great that a list is not an efficient way to describe and demarcate it.”).

¹⁴³ This is not to suggest that all uses of the concept of reasonableness are sound or advisable. There is a considerable literature criticizing various features of reasonableness inquiries. In this piece, we endeavor to tackle the most salient critiques of reasonableness in the context of content moderation practices.

Let's take an example. Suppose a social network is sued for defamation and negligent enablement of a crime. In the complaint, the plaintiff alleges that her nude photos were posted on defendant's site without consent. Plaintiff further alleges that the photos and deep fake videos appeared alongside her name and address. Hundreds of strangers rang the plaintiff's doorbell at night, demanding sex. One man broke into her house and plaintiff had to call the police. Regrettably, defendant failed to respond to her reports of abuse. The defendant filed a motion to dismiss on Section 230 grounds, alleging that its terms of service (TOS) bans stalking and sexual-privacy invasions like nonconsensual pornography and the site has procedures in place that enables it to respond to complaints quickly.

The question before the court would be whether the defendant's content moderation practices towards the kind of harm-causing conduct alleged in the suit – defamation and sexual-privacy invasions – were reasonable. Defendant submits evidence showing it has a clear policy against cyber stalking and sexual privacy invasions. On average, the site's content moderators respond to complaints about sexual-privacy invasions and cyberstalking within a week's time. The site has an easy-to-use process to report abuse. It uses a hashing process to prevent the reposting of nude images determined by the site to violate the site's TOS.¹⁴⁴ Defendant acknowledges that its moderators did not act quickly enough in plaintiff's case but that generally speaking its speech rules and procedures satisfy the reasonableness inquiry.

The court would likely grant the defendant's motion to dismiss on Section 230 grounds. The defendant has clearly stated standards and a systematic process to consider complaints. The court would likely find the site's moderation practices reasonable given its systematic process to deal with the harmful conduct of the sort alleged in the complaint even though the site had fallen short of that standard in the plaintiffs' case. The key is the reasonableness of the site's practices writ large, not its response in any given case.

There isn't a one-size-fits-all approach to reasonable content moderation. Reasonableness is tailored to the harmful conduct at hand and the size and nature of the platform. A reasonable approach to sexual-privacy invasions would be different from a reasonable approach to fraud or spam. Crucially, the assessment of reasonable content-moderation practices would take into account differences among content platforms. A blog with a few postings a day and a handful of commenters is in a different position than a social network with millions of postings a day. The social network could not plausibly respond to complaints of abuse immediately, let alone within a day or two, whereas the blog

¹⁴⁴ For a discussion of Facebook's hashing process as an illustration of an effective market response to nonconsensual pornography, see Danielle Keats Citron, *Sexual Privacy*, Yale LJ (2019).

could. On the other hand, the social network and the blog could deploy technologies to detect and filter content that they previously determined was unlawful.¹⁴⁵

A reasonableness standard would not “effectively ‘lock in’ certain approaches, even if they are not the best or don’t apply appropriately to other forms of content,” as critics suggest.¹⁴⁶ The promise of a reasonableness approach is its elasticity. As technology and content moderation practices changes, so will the reasonableness of practices. As new kinds of harmful online activity emerge so will the strategies for addressing them.

A reasonable standard of care will reduce opportunities for abuse without interfering with the further development of a vibrant internet or unintentionally turning innocent platforms into involuntary insurers for those injured through their sites. Approaching the problem as one of setting an appropriate standard of care more readily allows differentiating between different kinds of online actors. Websites that solicit illegality or that refuse to address unlawful activity that clearly creates serious harm should not enjoy immunity from liability. On the other hand, social networks that have safety and speech policies that are transparent and reasonably executed at scale should enjoy the immunity from liability as the drafters of Section 230 intended.

Conclusion

A crucial task in any reform project is clear-eyed thinking. And yet clear-eyed thinking about the Internet is often difficult. The Section 230 debate is, like many other tech policy reform projects, beset by misconceptions. We have taken this opportunity to dispel myths around Section 230 so that this reform moment, a long time coming and anticipated, is not wasted.

Reforming Section 230 is long overdue. Law should change to ensure that such power is wielded responsibly. With Section 230, Congress sought to provide incentives for “Good Samaritans” engaged in efforts to moderate content. Their goal was laudable. Section 230 should be amended to condition the immunity on reasonable moderation practices rather than the free pass that exists today. Market pressures and morals are not always enough, and they should not have to be.

¹⁴⁵ Citron, *Sexual Privacy*, *supra* note (discussing Facebook’s hashing initiative to address nonconsensual distribution of intimate images).

¹⁴⁶ Mike Masnick, *supra* note, at.

(b) (6) (OLA)

From: (b) (6) (OLA)
Sent: Friday, June 12, 2020 9:38 AM
To: Willard, Lauren (OAG)
Subject: FW: Schatz-Thune Section 230 Bill
Attachments: Schatz-Thune CDA 230 bill - confidential text.pdf; Schatz-Thune CDA 230 Bill Summary.pdf

Hi Lauren – Just received the Thune-Schatz 230 proposal. I let staff know that we would be willing to hop on a call to provide feedback, if they were interested in our thoughts.

(b) (6)

From: Barnhart, Christianna (Schatz) (b) (6) >
Sent: Thursday, June 11, 2020 7:44 PM
T (b) (6) (OLA) (b) (6) >
Cc: Sachtjen, Alex (Thune) (b) (6) >; Van Beek, Jason (Thune) (b) (6) >; Terpeluk, Peter (Thune) (b) (6) >; Mehta, Ishan (Schatz) (b) (6) >; Peterson, Blake (Schatz) (b) (6) >
Subject: Schatz-Thune Section 230 Bill

Dea (b) (6)

Thank you for arranging a meeting last month for the offices of Senators Schatz and Thune to discuss Section 230 with DOJ experts. As you know, we have been carefully considering legislative options to amend Section 230, and the insights the DOJ team provided were very helpful.

As discussed during the call, attached is our Section 230 bill for your review, along with a one-page summary. Given the DOJ's interest in this issue, we would greatly appreciate DOJ's input and feedback on the proposals outlined in the bill.

We are hoping to introduce this bill soon and would appreciate receiving any inputs or feedback you have by next week.

Thanks again for your continued assistance and collaboration!

Best,
Christi

Christianna Lewis Barnhart
Senior Counsel for Technology & Communications Policy
Office of U.S. Senator Brian Schatz
Te (b) (6)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Platform Accountability and Consumer Protection and Transparency Act of 2020” or the “PACT Act”.

SEC. 2. DEFINITIONS.

In this Act:

(1) COMMISSION.—Except as otherwise provided, the term “Commission” means the Federal Trade Commission.

(2) DEMONETIZE.—The term “demonetize”, with respect to content on an interactive computer service, means to take action to prohibit the information content provider that generated or disseminated the content from receiving financial benefit based on the content.

(3) DEPRIORITIZE.—The term “deprioritize”, with respect to content on an interactive computer service, means to take action or use certain techniques to reduce the priority level of the content.

(4) ILLEGAL ACTIVITY.—The term “illegal activity” means activity conducted by an information content provider that has been determined by a Federal or State court to violate Federal criminal or civil law.

(5) ILLEGAL CONTENT.—The term “illegal content” means information provided by an information content provider that has been determined by a Federal or State court to violate—

(A) Federal criminal or civil law; or

(B) State defamation law.

(6) INFORMATION CONTENT PROVIDER.—The term “information content provider” has the meaning given the term in section 230 of the Communications Act of 1934 (47 U.S.C. 230).

(7) INTERACTIVE COMPUTER SERVICE.—The term “interactive computer service” has the meaning given the term in section 230 of the Communications Act of 1934 (47 U.S.C. 230).

(8) POTENTIALLY POLICY-VIOLATING CONTENT.—The term “potentially policy-violating content” means content that may violate the acceptable use policy of the provider of an interactive computer service.

SEC. 3. FINDINGS.

Congress finds the following:

(1) Technological advancements involving the internet and interactive computer service providers have led to innovations that offer substantial benefit to the people and the economy of the United States.

(2) People in the United States increasingly rely on the internet and other interactive

computer services to communicate, gather information, and conduct transactions that are central to many aspects of economic, political, social, and cultural life.

(3) The decisions made by providers of interactive computer services shape the online information ecosystem available to people in the United States and impact the environment for free expression.

(4) The people of the United States benefit from understanding the choices that interactive computer service providers make in maintaining their services, including by removing, blocking, amplifying, or otherwise modifying information provided by other users.

(5) Online consumers are not adequately protected in the United States because, with the exception of Federal criminal statutes, providers of interactive computer services are immune from the enforcement of most Federal statutes.

(6) Federal and State court decisions and Federal statutes that apply to offline commerce do not always govern online commerce and communications.

(7) The rights of consumers should extend to online commerce and communications to provide a level playing field for all consumers and companies, and to prevent wrongdoing and victimization of people in the United States.

SEC. 4. POLICY.

It is the policy of the United States—

(1) to preserve the internet and other interactive computer services as forums for diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual and commercial activity;

(2) to encourage providers of interactive computer services to develop technologies that offer users a degree of control over the information they receive, their personal and sensitive information, and the online environment they experience;

(3) to ensure consumers have easily accessible and clear information about the acceptable use policies of interactive computer services to inform consumer decisions on participation in, or engagement with, those services through accountability and transparency measures;

(4) to encourage the development and use of technologies that minimize illegal activities and content and potentially policy-violating content; and

(5) to ensure that the consumer rights of users of interactive computer services are maintained and extended to activities that the users may participate in online.

SEC. 5. TRANSPARENCY AND PROCESS REQUIREMENTS.

(a) Acceptable Use Policy.—

(1) PUBLICATION OF ACCEPTABLE USE POLICY.—A provider of an interactive computer service shall publish an acceptable use policy in accordance with paragraph (2) in a location that is easily accessible to the user.

(2) CONTENTS OF POLICY.—The acceptable use policy of a provider of an interactive computer service shall—

(A) reasonably inform users about the types of content that are allowed on the interactive computer service, which shall be in accordance with how the provider has marketed the service to users;

(B) explain the steps the provider takes to ensure content complies with the acceptable use policy;

(C) explain the means by which users can notify the provider of potentially policy-violating content or illegal content, which shall include—

(i) subject to subsection (e), making available a live company representative to take user complaints through a toll-free telephone number during regular business hours for not fewer than 8 hours per day and 5 days per week;

(ii) an email address or relevant intake mechanism to handle user complaints; and

(iii) a complaint system described in subsection (b); and

(D) include publication of a semiannual transparency report outlining actions taken to enforce the policy, as described in subsection (d).

(b) Complaint System.—A provider of an interactive computer service shall provide a system that is easily accessible to a user through which the user may submit a complaint and track the status of the complaint, including a complaint regarding—

(1) potentially policy-violating content or illegal content; or

(2) a decision of the interactive computer service provider to remove content posted by the information content provider.

(c) Processing of Complaints.—

(1) COMPLAINTS REGARDING ILLEGAL CONTENT, ILLEGAL ACTIVITY, OR POTENTIALLY POLICY-VIOLATING CONTENT.—

(A) ILLEGAL CONTENT OR ILLEGAL ACTIVITY.—If a provider of an interactive computer service receives notice of illegal content or illegal activity on the interactive computer service that substantially complies with the requirements under paragraph (3)(A)(ii) of section 230(c) of the Communications Act of 1934 (47 U.S.C. 230(c)), as added by section 6(a), the provider shall remove the content within 24 hours of receiving that notice.

(B) POTENTIALLY POLICY-VIOLATING CONTENT.—If a provider of an interactive computer service receives notice of potentially policy-violating content on the interactive computer service, the provider shall, not later than 14 days after receiving that notice—

(i) review the content;

(ii) make a determination based on the acceptable use policy of the provider; and

(iii) take appropriate action based on the determination made under clause (ii).

(2) PROCESS AFTER REMOVAL OF CONTENT.—

(A) REMOVAL BASED ON USER COMPLAINT.—

(i) IN GENERAL.—Subject to clause (ii), if a provider of an interactive computer service removes content based on a user complaint, the provider of the interactive computer service shall, concurrently with the removal—

(I) notify the information content provider and the complainant of the removal and explain why the content was removed;

(II) allow the information content provider to appeal the decision; and

(III) notify the information content provider and the complainant of—

(aa) the determination regarding the appeal under subclause (II); and

(bb) in the case of a reversal of the decision to remove the content in question, the reason for the reversal.

(ii) EXCEPTION.—A provider of an interactive computer service shall not be required to provide an information content provider with notice or an opportunity to appeal under clause (i) if the provider of the interactive computer service is unable to contact the information content provider after taking reasonable steps to do so.

(B) INFORMATION CONTENT PROVIDER COMPLAINT REGARDING REMOVAL.—If a provider of an interactive computer service receives notice, through a complaint from the information content provider, that the provider of the interactive computer service removed content of the information content provider that the information content provider believes was not illegal content or potentially policy-violating content, the provider of the interactive computer service shall, not later than 14 days after receiving notice—

(i) review the content;

(ii) make a determination based on the acceptable use policy of the provider of the interactive computer service;

(iii) take appropriate action based on the determination made under clause (ii); and

(iv) notify the information content provider regarding the determination made under clause (ii) and action taken under clause (iii).

(d) Semiannual Transparency Report.—

(1) IN GENERAL.—Subject to subsection (e), as part of the acceptable use policy required under section 5(a), a provider of an interactive computer service shall publish a semiannual transparency report in accordance with paragraph (2) of this subsection.

(2) REQUIREMENTS.—A provider of an interactive computer service shall include in the report required under paragraph (1), with respect to the preceding 6-month period—

(A) the total number of instances in which illegal or potentially policy-violating

content was flagged—

(i) due to a user complaint; or

(ii) internally, by—

(I) an employee or contractor of the provider; or

(II) an internal automated detection tool;

(B) the number of instances in which the interactive computer service provider took action with respect to illegal content or potentially policy-violating content, including removal, demonetization, deprioritization, appending with an assessment, or account suspension, categorized by—

(i) the category of rule violated;

(ii) the source of the flag, including government, user, internal automated detection tool, coordination with other interactive computer service providers, or personnel employed or contracted for by the provider;

(iii) the country of information content providers; and

(iv) coordinated campaign, if applicable;

(C) the number of instances in which an information content provider appealed the decision to remove content, and the result of each appeal; and

(D) a description of each tool, practice, action, or technique used in enforcing the acceptable use policy.

(3) FORMAT.—A provider of an interactive computer service shall publish the information described in paragraph (2) with an open license, in a machine-readable and open format, and in a location that is easily accessible to consumers.

(e) Exceptions.—Subsections (a)(2)(C)(i) and (d)(1) shall not apply to a provider of an interactive computer service that, during the most recent 24-month reporting period—

(1) received fewer than 1,000,000 monthly active users or monthly visitors; or

(2) accrued revenue of less than \$25,000,000.

(f) Enforcement by Commission.—

(1) UNFAIR OR DECEPTIVE ACTS OR PRACTICES.—A violation of this section shall be treated as a violation of a rule defining an unfair or deceptive act or practice under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

(2) POWERS OF COMMISSION.—

(A) IN GENERAL.—Except as provided in subparagraph (C), the Commission shall enforce this section in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this Act.

(B) PRIVILEGES AND IMMUNITIES.—Except as provided in subparagraph (C), any person who violates this section shall be subject to the penalties and entitled to the

privileges and immunities provided in the Federal Trade Commission Act (15 U.S.C. 41 et seq.).

(C) NONPROFIT ORGANIZATIONS AND COMMON CARRIERS.—Notwithstanding section 4, 5(a)(2), or 6 of the Federal Trade Commission Act (15 U.S.C. 44, 45(a)(2), 46) or any jurisdictional limitation of the Commission, the Commission shall also enforce this section, in the same manner provided in subparagraphs (A) and (B) of this paragraph, with respect to—

(i) organizations not organized to carry on business for their own profit or that of their members; and

(ii) common carriers subject to the Communications Act of 1934 (47 U.S.C. 151 et seq.) and any Act amendatory thereof or supplementary thereto.

(3) LIMITATION ON AUTHORITY.—In enforcing this section, the Commission may not review a decision made by a provider of an interactive computer service relating to the application of the acceptable use policy of the provider.

(g) NIST Voluntary Framework.—

(1) IN GENERAL.—Not later than 18 months after the date of enactment of this Act, the Director of the National Institute of Standards and Technology shall develop a voluntary framework, with input from relevant experts, that consists of nonbinding standards, guidelines, and best practices to manage risk and shared challenges related to, for the purposes of this Act, good faith moderation practices by interactive computer service providers.

(2) CONTENTS.—The framework developed under paragraph (1) shall include—

(A) technical standards and processes for the sharing of information among providers of an interactive computer service;

(B) recommendations on automated detection tools and the appropriate nature and level of human review to correct for machine error in assessing nuanced or context-specific issues;

(C) standards and processes for providing researchers access to data to conduct scientific, historical, or statistical research, including with respect to content that is removed, demonetized, or deprioritized by the provider of an interactive computer service; and

(D) methods to strengthen the capacity of a provider of an interactive computer service to authenticate documentation of a determination by a court that content or an activity violates Federal law or State defamation law.

SEC. 6. INTERMEDIARY LIABILITY.

(a) Intermediary Liability Standard.—Section 230(c) of the Communications Act of 1934 (47 U.S.C. 230(c)) is amended by adding at the end the following:

“(3) INTERMEDIARY LIABILITY STANDARD.—

“(A) IN GENERAL.—The protection under paragraph (1) shall not apply to a provider

of an interactive computer service, with respect to illegal content shared or illegal activity occurring on the interactive computer service, if the provider—

“(i) has knowledge of the illegal content or illegal activity; and

“(ii) does not remove the illegal content or stop the illegal activity within 24 hours of acquiring that knowledge.

“(B) NOTIFICATION OF ILLEGAL CONTENT OR ILLEGAL ACTIVITY.—

“(i) IN GENERAL.—A provider of an interactive computer service shall be deemed to have knowledge of illegal content or illegal activity for purposes of subparagraph (A) if the provider receives a notification of such content or activity that substantially complies with the requirements under clause (ii) of this subparagraph.

“(ii) ELEMENTS.—A notification of illegal content or illegal activity provided to a provider of an interactive computer service as described in clause (i) shall be in writing and include the following:

“(I) Documentation of the order of a Federal or State court under which the content or activity was determined to violate Federal law or State defamation law.

“(II) Identification of the illegal content or illegal activity, and information reasonably sufficient to permit the provider to locate the content or each account involved.

“(III) Information reasonably sufficient to permit the provider to contact the complaining party, which shall include—

“(aa) if the complaining party is a user of the interactive computer service, information identifying the user account; and

“(bb) if the complaining party is not a user of the interactive computer service, an email address of the complaining party.

“(IV) A statement that the complaining party has a good faith belief that the content or activity complained of has been determined by a Federal or State court to be illegal.

“(V) A statement that the information in the notification is accurate.

“(C) MONITORING OR AFFIRMATIVE FACT-SEEKING NOT REQUIRED.—Nothing in this paragraph shall be construed to condition the applicability of paragraph (1) to a provider of an interactive computer service on the provider monitoring the interactive computer service or affirmatively seeking facts indicating illegal content or illegal activity in order to identify instances of noticed activity or content additional to any instances about which the provider has received a notification.”.

(b) Definitions.—Section 230(f) of the Communications Act of 1934 (47 U.S.C. 230(f)) is amended by adding at the end the following:

“(5) ILLEGAL ACTIVITY.—The term ‘illegal activity’ means activity conducted by an information content provider that has been determined by a Federal or State court to violate

Federal criminal or civil law.

“(6) ILLEGAL CONTENT.—The term ‘illegal content’ means information provided by an information content provider that has been determined by a Federal or State court to violate Federal criminal or civil law or State defamation law.”.

(c) Technical Corrections.—Section 230(c)(2)(B) of the Communications Act of 1934 (47 U.S.C. 230(c)(2)(B)) is amended by striking “paragraph (1)” and inserting “subparagraph (A)”.

SEC. 7. FEDERAL AND STATE ENFORCEMENT.

(a) In General.—Section 230(e) of the Communications Act of 1934 (47 U.S.C. 230(e)) is amended—

(1) in paragraph (1)—

(A) in the heading, by striking “Criminal Law” and inserting “Federal Criminal or Civil Law”; and

(B) by striking “Federal criminal statute” and inserting “Federal or civil statute”; and

(2) by adding at the end the following:

“(6) ENFORCEMENT BY STATE ATTORNEYS GENERAL.—The attorney general of a State alleging a violation of a federal criminal or civil law that affects or may affect such State or its residents, may bring an action on behalf of the residents of the State in any United States district court for the district in which the defendant is found or transacts business if the underlying charge or claim would constitute a violation of criminal or civil law in that State.

[SEC. 8. WHISTLEBLOWER PROTECTIONS.]

[(a) Definitions.—In this subsection:]

[(1) COVERED ACTION.—The term “covered action” means any administrative or judicial action, or set of related administrative or judicial actions, brought by the Commission that results in aggregate monetary sanctions of more than \$1,000,000.]

[(2) MONETARY SANCTIONS.—The term “monetary sanctions” means monies, including penalties and interest, ordered or agreed to be paid.]

[(3) ORIGINAL INFORMATION.—The term “original information” means information that—]

[(A) is derived from the independent knowledge or analysis of an individual;]

[(B) is not known to the Commission from any other source, unless the individual described in clause (i) is the original source of the information; and]

[(C) is not exclusively derived from an allegation made in an administrative or judicial action, government report, hearing, audit, or investigation, or from the news media, unless the individual described in clause (i) is the [original?] source of the information.]

[(4) SUCCESSFUL RESOLUTION.—The term “successful resolution”, with respect to a covered action, includes any settlement or adjudication of the covered action.]

1 [(5) WHISTLEBLOWER.—The term “whistleblower” means any employee or contractor of
2 a provider of an interactive computer service who voluntarily provides to the Commission
3 original information relating to—]

4 [(A) any unfair or deceptive act or practice within the meaning of the Federal Trade
5 Commission Act (15 U.S.C. 41 et seq.); or]

6 [(B) any violation or alleged violation of section 5 of this Act.]

7 [(b) Awards.—]

8 [(1) IN GENERAL.—If original information provided by one or more whistleblowers to the
9 Commission leads to a successful resolution of a covered action, the Commission may pay
10 an award to any such whistleblower in accordance with subparagraph (B).]

11 [(2) AMOUNT.—The aggregate amount of any awards paid to one or more whistleblowers
12 with respect to a covered action under subparagraph (A) shall be—]

13 [(A) not less than 10 percent of the total amount of monetary sanctions collected;
14 and]

15 [(B) not more than 30 percent of the total amount of monetary sanctions collected.]

16 [(3) PAYMENT OF AWARDS.—Any amount payable under this paragraph shall be paid
17 from the monetary sanctions collected, and any monetary sanctions so collected shall be
18 available for such payment.]

19 [(c) Nullity of Nondisclosure Agreements.—]

20 [(1) IN GENERAL.—No person may take any action to impede an individual from
21 communicating directly with an employee of the Commission regarding [a possible
22 violation of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) - Note: this is even
23 broader than the language in the definition of “whistleblower” above, which is “any unfair
24 or deceptive act or practice within the meaning of the Federal Trade Commission Act (15
25 U.S.C. 41 et seq.)”. As wanted?], including by enforcing, or threatening to enforce, a
26 confidentiality agreement with respect to that communication.]

27 [(2) NO DUTY TO COMMUNICATE WITH PROVIDER COUNSEL.—In the case of a
28 whistleblower who is a director, officer, member, agent, or employee of an interactive
29 computer service provider [that has counsel - Note: meaning the provider employs or has
30 retained the services of an attorney, generally? Or is represented by counsel with respect to
31 a particular matter?], and who has initiated communication with the Commission relating to
32 a [possible violation of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) - Note: see
33 above], an employee of the Commission may communicate directly with the whistleblower
34 regarding the possible violation without first seeking the consent of the counsel for the
35 provider.]

PACT Act Summary

Enacted in 1996, Section 230 of the Communications Act of 1934 offers broad immunity to “interactive computer services” (i.e., online platforms) for hosting user-generated online content. It also provides protection for online platforms that take an active role moderating content on their sites. In this way, Section 230 promotes the dissemination and promotion of speech online, while allowing platforms the opportunity to moderate users’ content.

Twenty-four years after Section 230’s enactment, its protections to promote and disseminate speech continue to be an important bedrock of the internet. At the same time, these protections have led to opaque content moderation practices, a lack of accountability about the treatment of content online, and an inability to enforce federal regulations that impact consumers in the digital world. Accordingly, Senators Brian Schatz and John Thune plan to introduce the Platform Accountability and Consumer Transparency “PACT” Act, which will ensure Section 230 protections and related content moderation practices put the consumer first.

The PACT Act will promote *transparency* by:

- Requiring online platforms to explain their content moderation practices in an acceptable use policy that is easily accessible to consumers;
- Implementing a semi-annual reporting requirement for online platforms about their content moderation practices; and
- Promoting open collaboration and sharing of industry best practices and guidelines through a National Institute of Standards and Technology-led voluntary framework.

The PACT Act will promote *accountability* by:

- Requiring online platforms to provide due process protections to consumers by having a defined complaint system that processes reports and notifies users of decisions within 14 days, and allows consumers to appeal content moderation decisions; and
- Requiring online platforms to remove content that a court has deemed illegal within 24 hours or they would lose Section 230 protections related to that content.

The PACT Act will promote *consumer protections* by:

- Exempting Section 230 immunity from federal civil actions or investigations of online platforms in order to uncover wrongdoing against consumers;
- Allowing state Attorneys General to enforce violations of state law that mirror federal laws and regulations; and
- Establishing whistleblower awards and protections for employees or contractors of online platforms who voluntarily provide information regarding unfair and deceptive acts and practices under Section 5 of the Federal Trade Commission Act.

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Friday, June 12, 2020 9:53 AM
To: Gelber, Alexandra (CRM); Downing, Richard (CRM); Goldfoot, Josh (CRM); Toensing, Brady (OLP); Hardee, Christopher (NSD); Raman, Sujit (ODAG); Motta, Thomas G. (DO) (FBI); Wallace, Benjamin (OLC); Grieco, Christopher (ODAG); Champoux, Mark (OLP); Whitaker, Henry C. (OLC); Wiegmann, Brad (NSD); Winn, Peter A. (OPCL); Pandya, Brian (OASG); Feith, Daniel (ODAG); Shores, Ryan (ODAG); Ramsden, Michelle (OPCL); Proia, Andrew (OPCL); Eyler, Gustav W. (b)(6), (7)(C) per FBI (OGC) (FBI); Jones, Darrin E. (ITID) (FBI); Peck, Jessica (CRM); Sabol, Sherry E. (OGC) (FBI)
Subject: RE: Section 230 // June 12 update
Attachments: Schatz-Thune CDA 230 Bill Summary.pdf; Schatz-Thune CDA 230 bill - confidential text.pdf

Deliberative Process / Pre-Decisional / CLOSE HOLD

Just received the attached draft legislation from Senators Schatz and Thune on the Senate Commerce Committee on Section 230 we just received. We had a high level conversation with their staff a couple weeks ago, but hadn't yet seen their proposal. I haven't fully dug in, but did notice they took our carve-out for federal civil enforcement idea.

We hope to provide them technical assistance early next week, so appreciate this group's thoughts and reactions to the draft legislation by **Tuesday, June 16**. And we can plan to discuss on our standing Tuesday call.

We still hope to put our own DOJ proposal to OMB and publish Key Takeaways as some point later next week, or the following.

Best,
Lauren

From: Willard, Lauren (OAG)
Sent: Monday, June 1, 2020 9:36 PM
To: Gelber, Alexandra (CRM) (b)(6) >; Downing, Richard (CRM) (b)(6) >; Goldfoot, Josh (CRM) (b)(6) >; Toensing, Brady (OLP) (b)(6) >; Hardee, Christopher (NSD) (b)(6) >; Raman, Sujit (ODAG) (b)(6) >; Motta, Thomas G. (DO) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Wallace, Benjamin (OLC) (b)(6) >; Grieco, Christopher (ODAG) (b)(6) >; Champoux, Mark (OLP) (b)(6) >; Whitaker, Henry C. (OL) (b)(6) >; Wiegmann, Brad (NSD) (b)(6) >; Winn, Peter A. (OPCL) (b)(6) >; Pandya, Brian (OASG) (b)(6) >; Feith, Daniel (ODAG) (b)(6) >; Shores, Ryan (ODAG) (b)(6) >; Ramsden, Michelle (OPCL) (b)(6) >; Proia, Andrew (OPCL) (b)(6) >; Eyler, Gustav W. (b)(6) (b)(6), (7)(C) per FBI (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Jones, Darrin E. (ITID) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Peck, Jessica (CRM) (b)(6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >
Subject: RE: Section 230 // May 26 Update

Duplicative Information - See Document ID 0.7.2270.6684

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Friday, June 12, 2020 10:05 AM
To: Feith, Daniel (ODAG); Toensing, Brady (OLP)
Subject: Fwd: Section 230 // June 12 update
Attachments: Schatz-Thune CDA 230 Bill Summary.pdf; ATT00001.htm; Schatz-Thune CDA 230 bill - confidential text.pdf; ATT00002.htm

The bill has transparency reporting requirements, so would be particularly interested in your views in light of ou (b) (5) draft.

Best,
Lauren

Sent from my iPhone

Begin forwarded message:

From: "Willard, Lauren (OAG)" (b) (6) >
Date: June 12, 2020 at 9:53:06 AM EDT
To: "Gelber, Alexandra (CRM)" (b) (6) >, "Downing, Richard (CRM)" (b) (6) >, "Goldfoot, Josh (CRM)" (b) (6) >, "Toensing, Brady (OLP)" (b) (6) >, "Hardee, Christopher (NSD)" (b) (6) >, "Raman, Sujit (ODAG)" (b) (6) >, "Motta, Thomas G. (DO) (FBI)" (b)(6), (7)(C), (7)(E) per FBI >, "Wallace, Benjamin (OLC)" (b) (6) >, "Grieco, Christopher (ODAG)" (b) (6) >, "Champoux, Mark (OLP)" (b) (6) >, "Whitaker, Henry C. (OLC)" (b) (6) >, "Wiegmann, Brad (NSD)" (b) (6) >, "Winn, Peter A. (OPCL)" (b) (6) >, "Pandya, Brian (OASG)" (b) (6) >, "Feith, Daniel (ODAG)" (b) (6) >, "Shores, Ryan (ODAG)" (b) (6) >, "Ramsden, Michelle (OPCL)" (b) (6) >, "Proia, Andrew (OPCL)" (b) (6) >, "Eyler, Gustav W." (b) (6) (b)(6), (7)(C) per FBI (OGC) (FBI)" (b)(6), (7)(C), (7)(E) per FBI >, "Jones, Darrin E. (ITID) (FBI)" (b)(6), (7)(C), (7)(E) per FBI >, "Peck, Jessica (CRM)" (b) (6) >, "Sabol, Sherry E. (OGC) (FBI)" (b)(6), (7)(C), (7)(E) per FBI >
Subject: RE: Section 230 // June 12 update

Duplicative Information - See Document ID 0.7.2270.6398

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Friday, June 12, 2020 10:08 AM
To: Liu, Jeffrey (OLC)
Cc: Whitaker, Henry C. (OLC)
Subject: Fwd: Section 230 // June 12 update
Attachments: Schatz-Thune CDA 230 Bill Summary.pdf; ATT00001.htm; Schatz-Thune CDA 230 bill - confidential text.pdf; ATT00002.htm

Jeff, forwarding recent draft 230 legislation we received. Apologies, I used an old group email and don't think you were on it yet.

Would definitely be interested in your and Henry's reactions!

Best,
Lauren

Begin forwarded message:

From: "Willard, Lauren (OAG)" (b) (6) >
Date: June 12, 2020 at 9:53:06 AM EDT
To: "Gelber, Alexandra (CRM)" (b) (6) >, "Downing, Richard (CRM)" (b) (6) >, "Goldfoot, Josh (CRM)" (b) (6) >, "Toensing, Brady (OLP)" (b) (6) >, "Hardee, Christopher (NSD)" (b) (6) >, "Raman, Sujit (ODAG)" (b) (6) >, "Motta, Thomas G. (DO) (FBI)" (b)(6), (7)(C), (7)(E) per FBI >, "Wallace, Benjamin (OLC)" (b) (6) >, "Grieco, Christopher (ODAG)" (b) (6) >, "Champoux, Mark (OLP)" (b) (6) >, "Whitaker, Henry C. (OLC)" (b) (6) >, "Wiegmann, Brad (NSD)" (b) (6) >, "Winn, Peter A. (OPCL)" (b) (6) >, "Pandya, Brian (OASG)" (b) (6) >, "Feith, Daniel (ODAG)" (b) (6) >, "Shores, Ryan (ODAG)" (b) (6) >, "Ramsden, Michelle (OPCL)" (b) (6) >, "Proia, Andrew (OPCL)" (b) (6) >, "Eyler, Gustav W." (b) (6) (b)(6), (7)(C) per FBI (OGC) (FBI)" (b)(6), (7)(C), (7)(E) per FBI >, "Jones, Darrin E. (ITID) (FBI)" (b)(6), (7)(C), (7)(E) per FBI >, "Peck, Jessica (CRM)" (b) (6) >, "Sabol, Sherry E. (OGC) (FBI)" (b)(6), (7)(C), (7)(E) per FBI >
Subject: RE: Section 230 // June 12 update

Duplicative Information - See Document ID 0.7.2270.6398

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Friday, June 12, 2020 10:15 AM
To: Barnett, Gary (OAG)
Subject: FW: Schatz-Thune Section 230 Bill
Attachments: Schatz-Thune CDA 230 bill - confidential text.pdf; Schatz-Thune CDA 230 Bill Summary.pdf

FYI. This just in. Still reading through. They took our idea for federal civil enforcement, but is a slightly different approach. I'm having the Section 230 WG review and provide reactions by next Tuesday AM. I'll as (b) (6) to set up a call Tuesday or Wednesday with their staff.

They seem to want to move on this quickly. It may impact when we want to drop our proposal.

Best,
Lauren

From (b) (6) (OLA) (b) (6) >
Sent: Friday, June 12, 2020 9:38 AM
To: Willard, Lauren (OAG) (b) (6) >
Subject: FW: Schatz-Thune Section 230 Bill

Duplicative Information - See Document ID 0.7.2270.6467



Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Friday, June 12, 2020 1:49 PM
To: Barnett, Gary (OAG); Boyd, Stephen E. (OLA (b) (6) (OLA); Hankey, Mary Blanche (OLA); Grieco, Christopher (ODAG)
Subject: 230 update / Hawley
Attachments: Schatz-Thune CDA 230 Bill Summary.pdf; Schatz-Thune CDA 230 bill - confidential text.pdf

Deliberative Process / Pre-Decisional

Hi all,

We had a good call with Hawley staff just now (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

They said not to hold up sending it to OMB for them. So I think we should continue to plan to go forward with that early next week (maybe Tuesday?). And I think we need t (b) (5)

[REDACTED]. But we can continue t (b) (5)

[REDACTED] (b) (6)/Chris feel free to add any points I missed)

There is a lot of other movement on the Hill on 230 though, so I also don't think we want t (b) (5)

[REDACTED]. And we should move quickly to make sure our views are considered while still relevant. For example, attached is the Shatz-Thune bill th (b) (6) forwarded this morning.

Welcome OLA's thoughts on these developments, including how to engage with Shatz-Thune, and anyone else we should closely coordinate with.

Best,
Lauren

Lauren S. Willard
Counselor to the Attorney General
U.S. Department of Justice
M (b) (6)
(b) (6)

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Friday, June 12, 2020 2:56 PM
To: Guarnieri, Matthew (OSG); Morrell, David M. (CIV); Wall, Jeffrey B. (OSG); Mooppan, Hashim (CIV)
Cc: Pandya, Brian (OASG); Grieco, Christopher (ODAG); Barnett, Gary (OAG)
Subject: Section 230 Public Report and Draft Legislation
Attachments: Section 230 Key Takeaways_DRAFT 6.12_Clean.docx; Section 230 Redline Proposal (DELIBERATIVE) DRAFT 6.12.DOCX

Deliberative Process / Pre-Decisional

Hi all,

We may be moving forward with our Section 230 OMB legislation and public read-out of our February Workshop and 230 findings next week (b)(5) per CIV [REDACTED]
[REDACTED]

(b)(5) per CIV [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(b)(5) per CIV [REDACTED]
[REDACTED]. Feel free to reach out with any questions!

Best,
Lauren

Lauren S. Willard
Counselor to the Attorney General
U.S. Department of Justice
M (b) (6) [REDACTED]
(b) (6) [REDACTED]

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Friday, June 12, 2020 3:23 PM
To: Toensing, Brady (OLP)
Cc: Freeman, Lindsey (OLP); Grieco, Christopher (ODAG)
Subject: RE: EO 13925 -- Reporting on Advertising and Marketing

Many thanks! Chris has been coordinating with Lee Lofthus about DOJ's response. Also appreciate OLP's offer for help. Will defer to Chris on what more is needed, and appreciate the heads up on the guidance email.

Best,
Lauren

From: Toensing, Brady (OLP) (b) (6) >
Sent: Friday, June 12, 2020 3:20 PM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Freeman, Lindsey (OLP) (b) (6) >
Subject: EO 13925 -- Reporting on Advertising and Marketing

Hi, Lauren – I was speaking to Lindsey today about the advertising/marketing reporting requirements of EO 13925 (see email from OMB below) and she suggested I touch base with you to see who is handling this matter for the Department and to offer our assistance in putting together a response. Best, bt

From: Paoletta, Mark R. EOP/OMB (b) (6) >
Sent: Monday, June 8, 2020 5:23 PM
To: Gammello, Joseph A. EOP/OMB (b) (6) >
Cc: Paoletta, Mark R. EOP/OMB (b) (6) >
Subject: Reporting Requirements Concerning Certain Agency Legal Authorities Under Executive Order 13925 on Preventing Online Censorship

Dear General Counsel/Deputy General Counsel,

On May 28, 2020, the President issued Executive Order 13925, "Preventing Online Censorship." Sections 3(a) and (b) of the Executive Order ("EO") require each executive department and agency ("agency") to conduct a review of its Federal spending on advertising and marketing paid to online platforms and to provide the Office of Management and Budget ("OMB") with a report on its findings by June 27, 2020. The EO specifies that this report to OMB shall include the amount of money spent by the agency, the online platforms that receive Federal dollars from the agency, and the legal authorities available to the agency to restrict online platforms' receipt of advertising and marketing dollars. OMB issued Budget Data Request No. 20-26 on June 5, 2020, to collect the information on agency spending to online platforms.

The purpose of this email is to advise you on how to carry out your agency's reporting obligations under Sections 3(a) and (b) of the EO regarding the legal authorities available to your agency to restrict online platforms' receipt of advertising and marketing dollars. By June 27, 2020, your agency should (1) review and identify all statutory and regulatory authorities available to your agency to restrict online platforms' receipt of advertising and marketing dollars, and (2) email a list of any authorities identified, with a description of how each authority could be used to restrict online platforms' receipt of advertising and marketing dollars, to Joe Gammello in my office (b) (6).

If you have any questions about the requirements of EO 13925, please contact Joe Gammello at the email address provided above.

Thank you for your attention to this matter.

Mark

Mark Paoletta
General Counsel
Office of Management & Budget
(b) (6)

* * * * *

Brady C. Toensing
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
(m) (b) (6)
o (b) (6)
(b) (6)

Toensing, Brady (OLP)

From: Toensing, Brady (OLP)
Sent: Friday, June 12, 2020 4:22 PM
To: Grieco, Christopher (ODAG); Freeman, Lindsey (OLP); Willard, Lauren (OAG)
Subject: RE: EO 13925 -- Reporting on Advertising and Marketing

Sure thing.

* * * * *

Brady C. Toensing
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
(m (b) (6))
o (b) (6)
(b) (6)

From: Grieco, Christopher (ODAG) (b) (6) >
Sent: Friday, June 12, 2020 3:57 PM
To: Freeman, Lindsey (OLP) (b) (6) >; Willard, Lauren (OAG) (b) (6) >; Toensing, Brady (OLP) (b) (6) >
Subject: RE: EO 13925 -- Reporting on Advertising and Marketing

Brady, do you mind forwarding that email to Lee and cc'ing myself, and just note that you know that Lee had been working on this with me. That should be enough to make sure he sees it. We can come back to it closer to the due date as well, but JMD has already started on this so we should be in good shape.

Thanks all

From: Freeman, Lindsey (OLP) (b) (6) >
Sent: Friday, June 12, 2020 3:42 PM
To: Grieco, Christopher (ODAG) (b) (6) >; Willard, Lauren (OAG) (b) (6) >; Toensing, Brady (OLP) (b) (6) >
Subject: RE: EO 13925 -- Reporting on Advertising and Marketing

Hi Chris,

Happy to hear it's being tracked! Beth received it, which is why I asked Brady to check in with the Section 230 team to make sure everyone was aware of it. Not sure who else, if anyone, received that email from Mark.

As Brady noted, just let OLP know how we can be helpful. Until then, we'll stand down.

Best,
Lindsey

From: Grieco, Christopher (ODAG) (b) (6) >

Sent: Friday, June 12, 2020 3:40 PM

To: Willard, Lauren (OAG) (b) (6) >; Toensing, Brady (OLP) (b) (6) >

Cc: Freeman, Lindsey (OLP) (b) (6) >

Subject: RE: EO 13925 -- Reporting on Advertising and Marketing

Yup. I have been tracking with JMD. Who at DOJ did Mark send that email too?

From: Willard, Lauren (OAG) (b) (6) >

Sent: Friday, June 12, 2020 3:23 PM

To: Toensing, Brady (OLP) (b) (6) >

Cc: Freeman, Lindsey (OLP) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >

Subject: RE: EO 13925 -- Reporting on Advertising and Marketing

Duplicative Information - See Document ID 0.7.2270.8881

Freeman, Lindsey (OLP)

From: Freeman, Lindsey (OLP)
Sent: Friday, June 12, 2020 6:12 PM
To: Willard, Lauren (OAG)
Subject: RE: EO 13925 -- Reporting on Advertising and Marketing

I am very lucky to be working with Brady and Anthony on these – my only goal will be to support them and stay out of the way as much as possible!

A virtual “coffee” date sounds amazing! Is there a day or time that would be good for you next week? After Monday my week isn’t too bad, so just let me know what would be best for you. Really looking forward to catching up!

From: Willard, Lauren (OAG) (b) (6) >
Sent: Friday, June 12, 2020 3:52 PM
To: Freeman, Lindsey (OLP) (b) (6) >
Subject: RE: EO 13925 -- Reporting on Advertising and Marketing

Hi! Hope you are doing well, and agree it has been way too long! Would be happy to catch up, and hope this means you aren’t too stretched thin...

Let me know when works best for you. Fortunately much of what Mark was working on in my portfolio has been really well supported by either Brady or Anthony.

Maybe a virtual “coffee” date?

From: Freeman, Lindsey (OLP) (b) (6) >
Sent: Friday, June 12, 2020 3:34 PM
To: Willard, Lauren (OAG) (b) (6) >
Subject: RE: EO 13925 -- Reporting on Advertising and Marketing

Hi Lauren,

I hope you are well! It has been way too long since we’ve caught up. This gives us the perfect excuse though – with Mark’s departure today (which I still can’t believe!), I’ll be stepping in to help cover some of his substantive portfolios. Brady will still be the main representative for OLP, I’ll just be here to help. I know you are incredibly busy, but do you have some time next week (doesn’t have to be long) to chat about the portfolio and ways I and/or OLP can be helpful?

No pressure, just let me know what might work. I look forward to catching up and really look forward to working together!

Best,
Lindsey

From: Willard, Lauren (OAG) (b) (6) >
Sent: Friday, June 12, 2020 3:23 PM
To: Toensing, Brady (OLP) (b) (6) >
Cc: Freeman, Lindsey (OLP) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >

Subject: RE: EO 13925 -- Reporting on Advertising and Marketing

Duplicative Information - See Document ID 0.7.2270.8881



Grieco, Christopher (ODAG)

From: Grieco, Christopher (ODAG)
Sent: Monday, June 15, 2020 1:26 PM
To: Willard, Lauren (OAG); Shores, Ryan (ODAG)
Subject: Hawley

VALLEY TALK -- “Josh Hawley readying broadside against big tech’s ad business, legal shield,” by Cristiano Lima: “[T]he proposal would make industry protections under Section 230 of the Communications Decency Act — a 1996 law that shields online businesses from lawsuits over user content — contingent for some platforms on not allowing advertisers to target users based on behavioral data, which includes information such as web-browsing history and online activity.” [POLITICO](#)

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Monday, June 15, 2020 3:26 PM
To: Gelber, Alexandra (CRM); Downing, Richard (CRM); Goldfoot, Josh (CRM); Toensing, Brady (OLP); Hardee, Christopher (NSD); Raman, Sujit (ODAG); Motta, Thomas G. (DO) (FBI); Grieco, Christopher (ODAG); Champoux, Mark (OLP); Whitaker, Henry C. (OLC); Wiegmann, Brad (NSD); Winn, Peter A. (OPCL); Pandya, Brian (OASG); Feith, Daniel (ODAG); Shores, Ryan (ODAG); Ramsden, Michelle (OPCL); Proia, Andrew (OPCL); Eyler, Gustav W. (b)(6), (7)(C) per FBI (OGC) (FBI); Jones, Darrin E. (ITID) (FBI); Peck, Jessica (CRM); Sabol, Sherry E. (OGC) (FBI); Liu, Jeffrey (OLC)
Subject: RE: Section 230 // June 12 update
Attachments: Schatz-Thune CDA 230 Bill Summary.pdf; Schatz-Thune CDA 230 bill - confidential text.pdf

Deliberative Process / Pre-Decisional

Gentle reminder to please send reactions to the Shatz-Thune legislation by tomorrow (and be ready to discuss on 10am call). I've reattached the draft text and summary for reference. We are scheduled to provide technical assistance this Wednesday.

Best,
Lauren

From: Willard, Lauren (OAG)
Sent: Friday, June 12, 2020 9:53 AM
To: Gelber, Alexandra (CRM) (b) (6) >; Downing, Richard (CRM) (b) (6) >; Goldfoot, Josh (CRM) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Hardee, Christopher (NSD) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Motta, Thomas G. (DO) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Wallace, Benjamin (OLC) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Champoux, Mark (OLP) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wiegmann, Brad (NSD) (b) (6) >; Winn, Peter A. (OPCL) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Feith, Daniel (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Ramsden, Michelle (OPCL) (b) (6) >; Proia, Andrew (OPCL) (b) (6) >; Eyler, Gustav W. (b) (6) (b)(6), (7)(C) per FBI (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Jones, Darrin E. (ITID) (FBI) (b)(6), (7)(C), (7)(E) per FBI >; Peck, Jessica (CRM) (b) (6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (7)(C), (7)(E) per FBI >
Subject: RE: Section 230 // June 12 update

Duplicative Information - See Document ID 0.7.2270.6398

Willard, Lauren (OAG)

From: Willard, Lauren (OAG)
Sent: Monday, June 15, 2020 3:41 PM
To: Gelber, Alexandra (CRM); Downing, Richard (CRM); Goldfoot, Josh (CRM); Toensing, Brady (OLP); Hardee, Christopher (NSD); Raman, Sujit (ODAG); Motta, Thomas G. (DO) (FBI); Grieco, Christopher (ODAG); Champoux, Mark (OLP); Whitaker, Henry C. (OLC); Wiegmann, Brad (NSD); Winn, Peter A. (OPCL); Pandya, Brian (OASG); Feith, Daniel (ODAG); Shores, Ryan (ODAG); Ramsden, Michelle (OPCL); Proia, Andrew (OPCL); Eyler, Gustav W (b)(6), (7)(C) per FBI (OGC) (FBI); Jones, Darrin E. (ITID) (FBI); Peck, Jessica (CRM); Sabol, Sherry E. (OGC) (FBI); Liu, Jeffrey (OLC)
Subject: RE: Section 230 // June 12 update
Attachments: 6-12-20 Section 230 Key Takeaways & Recommendations.pdf

Deliberative Process / Pre-Decisional

We are also getting our website ready for when we go live. Below is the current draft text that has 3 elements (1) background overview [which expands and full section copied again below]; (2) summary of areas ripe for reform; and (3) overview of our actions and links to key documents. Text is taken from our Key Takeaways document.

Feel free to send any nits or typos as we do final scrubbing.

Best,
Lauren



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DEPARTMENT OF JUSTICE'S REVIEW OF SECTION 230 OF THE COMMUNICATIONS DECECY ACT OF 1996

View Outline

As part of its broader review of market-leading online platforms, the Department of Justice analyzed *Section 230 of the Communications Decency Act of 1996*, which provides immunity to online platforms from civil liability based on third-party content as well as immunity for removal of content in certain circumstances. The statute was originally enacted to nurture a nascent industry while also incentivizing online platforms to remove harmful content. The combination of significant technological changes since 1996 and the expansive interpretation that courts have given Section 230, however, has left online platforms both immune for a wide array of illicit activity on their services and free to moderate content with little transparency or accountability.

The Department of Justice has concluded that the time is ripe to realign the scope of Section 230 with the realities of the modern internet. Reform is important now more than ever. With the COVID-19 pandemic, more citizens—including young children—are relying on the internet for everyday activities, while online criminal activity continues to grow. We must ensure that the internet is both an open, but also safe space for our society. Based on its engagement with experts, industry, thought leaders, lawmakers, and the public, the Department has identified a set of concrete reform proposals to provide stronger incentives for online platforms to address harmful illicit material on their services, while continuing to foster innovation and free speech.

[Read More](#)

AREAS RIPE FOR SECTION 230 REFORM

(b) (5)

OVERVIEW OF DEPARTMENT OF JUSTICE ACTIONS ON SECTION 230

The Department of Justice's review of Section 230 of the Communications Decency Act has included a number of different components, including:

- 1. Public Workshop.** On February 19, 2020 the Department held a public workshop on Section 230 titled "*Section 230: Nurturing Innovation or Fostering Unaccountability*," bringing together thought leaders from diverse viewpoints. See [Section 230 Workshop Livestream](#); [\[Section 230 Workshop Agenda\]](#); [\[Section 230 Workshop Summary\]](#)
- 2. Expert Roundtable.** In the afternoon of February 19, the Department also hosted a Chatham House Rule roundtable with additional experts and thought leaders to further discuss Section 230 and potential reforms. See [\[Section 230 Workshop Summary\]](#); [\[Biographies of Experts\]](#)
- 3. Written Submissions.** Participants in the morning Workshop and afternoon Roundtable were also invited to submit short written statements with their views on Section 230, which the Department reviewed. See [\[Participant Written Submissions\]](#)

(b) (5)

4. Industry Listening Sessions. Following the Workshop, the Department met individually with a diverse group of businesses that had attended the public event or otherwise expressed interest in Section 230. Meetings were private and confidential to foster frank discussions about their use of Section 230 and thoughts on potential reform.

5. Key Takeaways. The Department distilled lessons learned from its engagement and research in its (Key Takeaways and Recommendations), which outline a set of key principles, specific areas for reform, and ideas for further consideration.

♦♦

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DEPARTMENT OF JUSTICE'S REVIEW OF SECTION 230 OF THE COMMUNICATIONS DECECY ACT OF 1996

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The Department of Justice has concluded that the time is ripe to realign the scope of Section 230 with the realities of the modern internet. Reform is important now more than ever. With the COVID-19 pandemic, more citizens—including young children—are relying on the internet for everyday activities, while online criminal activity continues to grow. We must ensure that the internet is both an open, but also safe space for our society. Based on its engagement with experts, industry, thought leaders, lawmakers, and the public, the Department has identified a set of concrete reform proposals to provide stronger incentives for online platforms to address harmful illicit material on their services, while continuing to foster innovation and free speech.

[Read More](#)

The Department's review of Section 230 arose in the context of its broader review of market-leading online platforms and their practices, announced in July 2019. While competition has been a core part of the Department's review, we also recognize that not all concerns raised about online platforms (including internet-based businesses and social media platforms) fall squarely within the U.S. antitrust laws. Our review has therefore looked broadly at other legal and policy frameworks applicable to online platforms. One key part of that legal landscape is Section 230, which provides immunity to online platforms from civil liability based on third-party content as well as immunity for removal of content in certain circumstances.

Drafted in the early years of internet commerce, Section 230 was enacted in response to a problem that incipient online platforms were facing. In the years leading up to Section 230, courts had held that an online platform that passively hosted third-party content was not liable as a publisher if any of that content was defamatory, but that a platform would be liable as a publisher for all its third-party content if it exercised discretion to remove any third-party material. Platforms therefore faced a dilemma: They could try to moderate third-party content but risk being held liable for any and all content posted by third parties, or choose not to moderate content to avoid liability but risk having their services overrun with obscene or unlawful content. Section 230 was enacted in large part to resolve this quandary by providing that online platforms are not liable for the third-party content on their services or for their removal of certain categories of content. This immunity was meant to nurture emerging internet businesses while also incentivizing them to regulate harmful online content.

The internet has changed dramatically in the 25 years since Section 230's enactment in ways that no one, including the drafters of Section 230, could not have predicted. Several online platforms have transformed into some of the nation's largest and most valuable companies, and today's online services bear little resemblance to the rudimentary offerings in 1996. Platforms no longer function as simple forums for posting third-party content, but instead use sophisticated algorithms to suggest content and connect users according to users. Platforms also now offer an ever-expanding array of services, playing an increasingly essential role in how Americans communicate, access media, engage in commerce, and generally carry on their everyday lives.

These developments have brought enormous benefits to society. But they have also had downsides, as criminals and other wrongdoers have used online platforms to advance illicit and harmful schemes. Criminals are increasingly turning to online platforms, including social media networks and messaging platforms, to engage in a host of unlawful activities, including child sexual exploitation, selling illicit drugs, cyberstalking, human trafficking, and terrorism. At the same time, courts have interpreted the scope of Section 230 immunity very broadly, diverging from its original purpose. This expansive statutory interpretation, combined with technological developments, has reduced the incentives of online platforms to address illicit activity on their services and, at the same time, free to moderate harmful content without transparency or accountability. The time has therefore come to realign the scope of Section 230 with the realities of the modern internet so that it not only continues to foster innovation and free speech but also provides stronger incentives for online platforms to address harmful illicit material on their services.

Much of the modern debate over Section 230 has been at one extreme or the other. Many have called for an outright repeal of the statute in light of the changed technological landscape and growing online harms. Others, meanwhile, have insisted that Section 230 be left alone and claimed that any reform will crumble the tech industry. Based on its engagement with experts, industry, thought leaders, lawmakers, and the public, the Department of Justice believes there is productive middle ground. The Department has identified a set of measured, but concrete proposals that would help address many of the harms and concerns raised about the breadth of Section 230 immunity.

A reassessment of America's laws governing the internet could not be timelier as America is confronted with the COVID-19 pandemic. The pandemic has increased the importance of the internet. Citizens are relying on the internet more than ever for commerce, entertainment, education, employment, communication, and public discourse. In fact, school closings mean that children are spending more time online, at times unsupervised, while more and more criminal activity is moving online. All of these factors make it imperative that we maintain the internet as an open, but safe space for the general public and our children.

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