Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Monday, June 15, 2020 5:28 PM
To:	Levi, William (OAG); Barnett, Gary (OAG)
Subject:	RE: 230
Attachments:	Section 230 One-Pager_6.15.docx

Boyd had to miss the OLA call, so didn't get more insight from them on the Hawley bill. Put together the attached one-pager on current status. Also made a small "master" binder with the OMB package and Key takeaways (and relevant 1-page summaries) for the AG to have on hand.

Gary – per our discussion earlier, sent a calendar invite to discuss at 11am tomorrow.

From: Willard, Lauren (OAG)
Sent: Monday, June 15, 2020 3:07 PM
To: Levi, William (OAG) (b) (6) >
Cc: Barnett, Gary (OAG) (b) (6) >
Subject: RE: 230

https://www.axios.com/white-house-taps-hawley-to-take-aim-at-230-facfc584-ec1a-45b2-af4d-f7ff6d853104.html

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From: Willard, Lauren (OAG)
Sent: Monday, June 15, 2020 2:33 PM
To: Levi, William (OAG) (b) (6) >
Cc: Barnett, Gary (OAG) (b) (6) >
Subject: RE: 230

(b) (5) . We are having a call at 5pm with Boyd and others to get OLA's perspective.

From: Levi, William (OAG) (b) (6) >
Sent: Monday, June 15, 2020 2:26 PM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Barnett, Gary (OAG) (b) (6) >
Subject: Re: 230

I don't thin (b) (5) is a good idea, but interested in what Gary thinks

> On Jun 15, 2020, at 2:13 PM, Willard, Lauren (OAG) (b) (6) > wrote:
>
> Heard that Hawley may be moving to introduce a Section 230 bill as early as tomorrow. Also that Cotton is interested in DOJ's proposal. Sounds like there may have been outreach from the WH to

Senators last week. Have either of you heard anything?

We may need t (b) (5) [redacted]

I know today is slammed, but let me know if there is a good window to chat later.

Best,
Lauren

Document ID: 0.7.2270.5146

Current Status of Section 230 Activity – June 15, 2020

1. **DOJ Legislative Proposal Status**
    a. OMB packet is ready for to go pending your approval (ideally send tomorrow to OMB)
    b. Legislation is a set of measured, but concrete reforms that address a range of harms (including both the growing amount of illicit content online and platforms engaging in censorship)

2. **Public DOJ Section 230 Report and Related Materials**
    a. Set of public documents ready to release after bill sent to OMB, including summary of Workshop and a report of DOJ's findings, which describes at a high level (and with more reasoning) our legislative proposal, and identifies a few topics for further consideration
    b. The goal is provide a read-out of our Workshop and to document our hard work over the past 10 months to show that DOJ's proposal is a thoughtful and credible contribution to the debate.

3. **Hill Activity**
    a. **Hawley** (b) (5) [redacted]
        i. Intel suggests Hawley may move forward shortly on narrower 230 bill that requires platforms that are "edge providers" to have clear terms of service, and abide by terms of service (similar to DOJ's "good faith" definition)
        ii. Hawley may also be considering a proposal to exclude firms that use behavioral advertising (b) (5) [redacted]
    b. **Shatz/Thune.** Sent a draft bill to DOJ. Bill requires platforms to have clear terms of service, semi-annual reporting requirements, have a complaint mechanism, and to take down illegal content within 24 hours. Includes DOJ's proposal to carve out federal civil enforcement. Also allows state AGs to enforce state laws with federal equivalent (b) (5) [redacted]
    c. **EARN IT Act**. Graham and Blumenthal introduced the EARN IT Act in March. Would create an expert committee to create standards for addressing child exploitation that companies would have to abide by in order to get immunity. Has been criticized by industry as creating "backdoor" to ban encryption. Has been criticized by others as being a "pig-in-a-poke." (b) (5) [redacted]
    d. **Other Hill conversations** (b) (5) [redacted]

4. **Executive Order**
    a. The four main asks to DOJ in May 28 Section 230 EO are all in progress
        i. Actively coordinating with NTIA on FCC rulemaking petition to ensure that rulemaking petition is consistent and complementary to legislative efforts.
        ii. Had call with Texas State AG staff last week to discuss ideas on working group.
    b. Nonprofit filed a lawsuit last week in DDC alleging that May 28 Executive Order was unconstitutional. Case assigned to Judge Trevor McFadden

Document ID: 0.7.2270.5146-000001

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Monday, June 15, 2020 5:46 PM
To:	Freeman, Lindsey (OLP)
Subject:	RE: Section 230 // June 12 update
Attachments:	Section 230 Redline Proposal (DELIBERATIVE) DRAFT 6.12.DOCX; 6-12-20 Section 230 Key Takeaways & Recommendations.pdf; Section 230 Key Takeaways_DRAFT 6.12_Clean v2.docx

Of course! Just so you have it handy, here is our current redline bill and our "Key Takeaways" public report document (PDF and word version attached). We still are doing final scrubbing on the Takeaways, so to the extent you have any fresh reactions, they would be welcome (but not required!)

From: Freeman, Lindsey (OLP) (b) (6) >
Sent: Monday, June 15, 2020 5:42 PM
To: Willard, Lauren (OAG) (b) (6) >
Subject: RE: Section 230 // June 12 update

Thanks, Lauren! Really appreciate you looping me in on this.

From: Willard, Lauren (OAG) (b) (6) >
Sent: Monday, June 15, 2020 5:37 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), (b)(7)(C), (b)(7)(E) per FBI >; Grieco, Christopher (ODAG) (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), (b)(7)(C), (b)(7)(E) per FBI (OGC) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Jones, Darrin E. (ITID) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Peck, Jessica (CRM) (b) (6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Liu, Jeffrey (OLC) (b) (6) >; Freeman, Lindsey (OLP) (b) (6) >
Subject: RE: Section 230 // June 12 update

Deliberative Process / Pre-Decisional

I thought I would go ahead and share a concern flagged, which I also noted.

(b) (5)

(b) (5)

Document ID: 0.7.2270.6196

(b) (5)

DOJ's draft proposal tries to navigate these issues b (b) (5)

Best,
Lauren

From: Willard, Lauren (OAG)
Sent: Monday, June 15, 2020 3:26 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), (b)(7)(C), (b)(7)(E) per FBI >; 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), (b)(7)(C), (b)(7)(E) per FBI (OGC) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Jones, Darrin E. (ITID) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Peck, Jessica (CRM) (b) (6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Liu, Jeffrey (OLC) (b) (6) >
Subject: RE: Section 230 // June 12 update

Duplicative Information - See Document ID 0.7.2270.6543

Freeman, Lindsey (OLP)

From:	Freeman, Lindsey (OLP)
Sent:	Monday, June 15, 2020 5:49 PM
To:	Willard, Lauren (OAG)
Subject:	RE: EO 13925 -- Reporting on Advertising and Marketing

Perfect! I just sent you and invite. If you can sign into Skype, I can video call you. (I can explain on the phone how to do that if you haven't before). Either way, looking forward to chatting!

From: Willard, Lauren (OAG) [(b) (6) >
Sent: Monday, June 15, 2020 5:47 PM
To: Freeman, Lindsey (OLP) [(b) (6) >
Subject: RE: EO 13925 -- Reporting on Advertising and Marketing

Will do! I don't know how to set up a Skype call, but I should be able to join one ☺ After 3:30 may be easiest on my end.

From: Freeman, Lindsey (OLP) [(b) (6) >
Sent: Monday, June 15, 2020 5:45 PM
To: Willard, Lauren (OAG) [(b) (6) >
Subject: RE: EO 13925 -- Reporting on Advertising and Marketing

Wednesday is perfect! I'm free all morning or after 3:30 pm. Let me know which you prefer and I'll send a calendar invite. Happy to give you a call or Skype if we want to try and do it virtually?

And thanks for looping me in! I would love to be on all calls/emails going forward, if that's ok with you. Brady did a great job sending me some background materials so I can try to get up-to-speed, so no need to do that. But looping me in as things come up would be great. Again, Brady is still our lead – I'm just trying to help oversee/fill in for Mark.

Looking forward to catching up!

Best,
Lindsey

From: Willard, Lauren (OAG) [(b) (6) >
Sent: Monday, June 15, 2020 5:38 PM
To: Freeman, Lindsey (OLP) [(b) (6) >
Subject: RE: EO 13925 -- Reporting on Advertising and Marketing

Does Wednesday work? I just added you to an email chain on Section 230 that Mark is usually on. No need to do anything, but keeping you in the loop. Let me know if you want me to include you on the call tomorrow morning or send any other 230-related material!

Best,
Lauren

From: Freeman, Lindsey (OLP) [(b) (6) >
Sent: Friday, June 12, 2020 6:12 PM

To: Willard, Lauren (OAG) (b) (6) >
Subject: RE: EO 13925 -- Reporting on Advertising and Marketing

Duplicative Information - See Document ID 0.7.2270.6174

Herlihy, Brianna (PAO)

From:	Herlihy, Brianna (PAO)
Sent:	Tuesday, June 16, 2020 3:17 PM
To:	Willard, Lauren (OAG)
Cc:	Levi, William (OAG); Kupec, Kerri (OPA); Boyd, Stephen E. (OLA); Hankey, Mary Blanche (OLA (b) (6) (OLA); Barnett, Gary (OAG)
Subject:	Re: 230 release
Attachments:	6-16-20 Section 230 Key Takeaways & Recommendations v4.pdf; ATT00001.htm; Section 230 Redline Proposal (DELIBERATIVE) DRAFT 6.16.DOCX; ATT00002.htm

Works for me.

On Jun 16, 2020, at 3:04 PM, Willard, Lauren (OAG) (b) (6) > wrote:

Hi all,

Fingers crossed, I think we may be in a position to send the draft Section 230 legislation to OMB later tonight, and follow with our public report tomorrow afternoon.

Will – Gary and I are hoping to get a few minutes with the AG at the end of the day for his final approval. May be helpful to include Stephen and Kerri (or at least have him be able to call) in case he has any OLA or OPA questions. Does that work? AG has the "master binder" of key materials on his desk.

Stephen – any news on Hill movement (particular (b) (5))? Any concerns with going ahead with our bill (attached as Word doc).

Kerri/Brianna – any OPA reason not to start reaching out to reporters tomorrow morning and launch public report in afternoon (main document attached as PDF)? I assume Wednesday may be better press day than Thursday, but welcome views.

Thanks everyone for their patience and help as we get this 10-month project to the finish line!

Best,
Lauren

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

Document ID: 0.7.2270.5212

[redacted] **(OLA)**

From: [redacted] (OLA)
Sent: Tuesday, June 16, 2020 5:28 PM
To: Willard, Lauren (OAG)
Subject: FW: Call re: Schatz-Thune 230 Proposal
Attachments: PACT Act with revisions 6.16.docx

Updated Thune-Schatz 230 proposal for tomorrow's convo.

-Ryan

From: Barnhart, Christianna (Schatz) [redacted]>
Sent: Tuesday, June 16, 2020 5:23 PM
T [redacted] (OLA) [redacted]>; Sachtjen, Alex (Thune) [redacted]>; Terpeluk, Peter (Thune) [redacted]>; Mehta, Ishan (Schatz) [redacted]>; Peterson, Blake (Schatz) [redacted]>; Van Beek, Jason (Thune) [redacted]>; Willard, Lauren (OAG) [redacted]>; Grieco, Christopher (ODAG) [redacted]>; Barnett, Gary (OAG) [redacted]>
Subject: RE: Call re: Schatz-Thune 230 Proposal

[redacted]

We look forward to chatting with the DOJ team tomorrow about our proposed Section 230 legislation. We've attached a revised version to this email with our edits in redline.

We would especially appreciate the team's insights on changes we've made to Section 7, titled Federal and State Enforcement, in which we've specifically limited enforcement of civil laws to just federal agencies. We also revised the bill so that the State AG enforcement of federal laws was limited to just the enforcement of federal civil statutes.

Thanks again for your time.

Christi

-----Original Appointment-----
From [redacted] (OLA) [redacted]>
Sent: Friday, June 12, 2020 2:41 PM
T [redacted] (OLA); Sachtjen, Alex (Thune); Terpeluk, Peter (Thune); Mehta, Ishan (Schatz); Peterson, Blake (Schatz); Barnhart, Christianna (Schatz); Van Beek, Jason (Thune); Willard, Lauren (OAG); Grieco, Christopher (ODAG); Barnett, Gary (OAG)
Subject: Call re: Schatz-Thune 230 Proposal
When: Wednesday, June 17, 2020 3:00 PM-4:00 PM (UTC-05:00) Eastern Time (US & Canada).
Wher [redacted]

OLA Conference Line Information
Conference line [redacted]
Attendee access code [redacted]

Document ID: 0.7.2270.7907

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 Transparency Act" 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 in response to potentially policy violating 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) 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).

(7) 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).

(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.

(9) FEDERAL AGENCY—The term "federal agency" means an executive agency or an establishment in the legislative or judicial branch of the Government.

(10) SMALL BUSINESS— The term "small business" means an entity that can establish during the most recent 24-month reporting period that is has received fewer than 1,000,000 monthly active users or monthly visitors and accrued revenue of less than $25,000,000.

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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 and regulations.

(6) Federal and State court decisions and Federal statutes and regulations 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.

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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, illegal content, [or illegal activity,?] 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~~

(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, illegal content[, or illegal activity]; 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.—Subject to subsection (e), i~~I~~f 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 or stop the activity within 24 hours of receiving that notice subject to reasonable exceptions based on concerns about the legitimacy of the notice.

(B) POTENTIALLY POLICY-VIOLATING CONTENT.— Subject to subsection (e), i~~I~~f a provider of an interactive computer service receives notice of potentially policy-

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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 about whether content adheres to ~~based on~~ the acceptable use policy of the provider; and

(iii) take appropriate ~~action~~ steps 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 potentially policy-violating 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—if the provider of the interactive computer service is unable to contact the information content provider after taking reasonable steps to do so;

(B) ~~I~~REMOVAL BASED ON MODERATION DECISIONS OF THE INTERACTIVE COMPUTER SERVICE ~~NFORMATION 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 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~~ about whether content adheres to ~~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

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under clause (ii) and action taken under clause (iii)?].

(d) [Quarterly]~~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~~quarterly 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 3~~6~~-month period—

(A) the total number of instances in which illegal content, illegal activity, 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, illegal activity, or known potentially policy-violating content, including, with respect to such content, removal, demonetization, deprioritization, or appending with an assessment, with respect to such activity, stopping the activity, or with respect to such content or activity, account suspension, or account removal, 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 the information content provider; and

(iv) coordinated campaign, if applicable;

(C) the number of instances in which an information content provider appealed the decision to remove potentially policy-violating content, and the percentage of appeals that resulted in restoration of content~~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) ~~SMALL BUSINESS EXEMPTION~~~~Exceptions~~.—

(1) Subsections (a)(2)(C)(i) and (d) shall not apply to provider of an interactive computer service that meets the requirements of the small business exemption as defined by Section 1(10).

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(2) Notwithstanding the provisions of Subsection (c), an interactive computer service provider that meets the requirements of the small business exemption as defined by Section 1(10) must process complaints regarding illegal content, illegal activity, or potentially policy-violating content within a reasonable period of time based on the size and capacity of the provider.

~~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) UNFAIR OR DECEPTIVE ACTS OR PRACTICES.—

(A) A violation of (c)(1)(B) and (d) ~~this section~~ shall be treated as a violation of a rule 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)).

(B) Limitation on Authority—Pursuant to Section 230(c)(2), the Commission may not review any action or decision by a provider of an interactive computer service related to the application of the acceptable use policy of the provider as provided in paragraph (c)(1)(B) of this section.

(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.~~

(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—

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(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, [and other relevant 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) Copy ~~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 and to the extent available any references substantiating the order's validity, such as the web addresses of public court docket information.

"(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.

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"(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, under penalty of perjury (James-can you add the appropriate citation – is it 18 U.S.C. 1621(2)?), ~~that~~ by 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.

"(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) Federal Enforcement.—Section 230(e)(1) of the Communications Act of 1934 (47 U.S.C. 230(e)) is amended—

(1) in the heading, by striking "Criminal Law" and inserting "Federal Criminal or Civil Law"; and

(2) by striking "Federal criminal statute" and inserting "Federal criminal or civil ~~statute~~ provisions of law by a Federal Agency".

(b) Enforcement of Federal Civil Laws by State Attorneys General.—Section 230 of the Communications Act of 1934 (47 U.S.C. 230) is amended by adding at the end the following:

"(g) Enforcement of Federal Civil Laws by State Attorneys General.—Notwithstanding any other provision of this section, the attorney general of a State alleging a violation by a provider of an interactive computer service of a Federal ~~[criminal or]~~ civil law that affects or may affect the State or the residents of the State may bring a ~~[criminal prosecution or]~~ civil action on behalf of the residents of the State in any district court of the United States for the district in which the

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provider is found or transacts business if the underlying ~~[charge or]~~ claim would constitute a ~~[criminal or]~~ civil law of the 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.]

[(5) WHISTLEBLOWER.—The term "whistleblower" means any employee or contractor of a provider of an interactive computer service who voluntarily provides to the Commission original information relating to—]

[(A) any unfair or deceptive act or practice within the meaning of the Federal Trade Commission Act (15 U.S.C. 41 et seq.); or]

[(B) any violation or alleged violation of section 5 of this Act.]

[(b) Awards.—]

[(1) IN GENERAL.—If original information provided by one or more whistleblowers to the Commission leads to a successful resolution of a covered action, the Commission may pay an award to any such whistleblower in accordance with subparagraph (B).]

[(2) AMOUNT.—The aggregate amount of any awards paid to one or more whistleblowers with respect to a covered action under subparagraph (A) shall be—]

[(A) not less than 10 percent of the total amount of monetary sanctions collected; and]

[(B) not more than 30 percent of the total amount of monetary sanctions collected.]

[(3) PAYMENT OF AWARDS.—Any amount payable under this paragraph shall be paid from the monetary sanctions collected, and any monetary sanctions so collected shall be available for such payment.]

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[(c) Nullity of Nondisclosure Agreements.—]

[(1) IN GENERAL.—No person may take any action to impede an individual from communicating directly with an employee of the Commission regarding [a possible violation of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) - Note: this is even broader than the language in the definition of "whistleblower" above, which is "any unfair or deceptive act or practice within the meaning of the Federal Trade Commission Act (15 U.S.C. 41 et seq.)". As wanted?], including by enforcing, or threatening to enforce, a confidentiality agreement with respect to that communication.]

[(2) NO DUTY TO COMMUNICATE WITH PROVIDER COUNSEL.—In the case of a whistleblower who is a director, officer, member, agent, or employee of an interactive computer service provider [that has counsel - Note: meaning the provider employs or has retained the services of an attorney, generally? Or is represented by counsel with respect to a particular matter?], and who has initiated communication with the Commission relating to a [possible violation of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) - Note: see above], an employee of the Commission may communicate directly with the whistleblower regarding the possible violation without first seeking the consent of the counsel for the provider.]

Document ID: 0.7.2270.7907-000001

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Tuesday, June 16, 2020 7:24 PM
To:	Barnett, Gary (OAG)
Subject:	FW: Tweet by Josh Hawley on Twitter
Attachments:	05-05-20_Section 230 Press Release (lsw bh edits) (004).docx

The press release was drafted before. I can try to jazz up tonight, but also welcome your thoughts.

From: Herlihy, Brianna (PAO) (b) (6) >
Sent: Tuesday, June 16, 2020 6:39 PM
To: Willard, Lauren (OAG) (b) (6) >
Subject: RE: Tweet by Josh Hawley on Twitter

Super. Minor edit in attached – can we add timeframe? Have a meeting at 7:20 until about 8pm but free after that.

Brianna Herlihy
Public Affairs Officer
Department of Justice
c (b) (6)
o (b) (6)

From: Willard, Lauren (OAG) (b) (6) >
Sent: Tuesday, June 16, 2020 6:19 PM
To: Herlihy, Brianna (PAO) (b) (6) >
Subject: RE: Tweet by Josh Hawley on Twitter

Thanks! Did you have press release FYI? We should be getting "green light" to send draft legislation to OMB tonight, and publicly release our public documents tomorrow afternoon. Let's chat in a bit about press backgrounders.

From: Herlihy, Brianna (PAO) (b) (6) >
Sent: Tuesday, June 16, 2020 6:18 PM
To: Willard, Lauren (OAG) (b) (6) >
Subject: Tweet by Josh Hawley on Twitter

FYSA

Josh Hawley
@HawleyMO

Wait, wait - you want to treat the @FDRLST comment section, which they don't curate, as THEIR speech but

simultaneously say the content you directly host and modify IS NOT your speech under Section 230? Wow, this is getting really interesting

6/16/20, 5:36 PM

Download the Twitter app

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Tuesday, June 16, 2020 7:41 PM
To:	(b) (6) (OLA)
Subject:	RE: Need AG signature for OLA cover letter?

May Davis and Devin Debacker at WHCO

From: Willard, Lauren (OAG)
Sent: Tuesday, June 16, 2020 7:40 PM
T (b) (6) (OLA) (b) (6) >
Subject: RE: Need AG signature for OLA cover letter?

This draft legislation comes out of the DOJ's 10-month review of Section 230 of the Communications Decency Act, including its February 19, 2020 Public Workshop and Expert Roundtable. This is also responsive to the Executive Order [ ] calling for legislation on Section 230.

From: Willard, Lauren (OAG)
Sent: Tuesday, June 16, 2020 7:38 PM
T (b) (6) (OLA) (b) (6) >
Subject: RE: Need AG signature for OLA cover letter?

https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/

From (b) (6) (OLA) (b) (6) >
Sent: Tuesday, June 16, 2020 7:15 PM
To: Willard, Lauren (OAG) (b) (6) >
Subject: Re: Need AG signature for OLA cover letter?

Its probably best if we send both, that they have everything at once and prevent any back and forth. Do you mind if I call you in about 10-15 minutes?

(b) (6)
Office of Legislative Affairs
(b) (6)
(b) (6) (o)
(b) (6) (c)

Document ID: 0.7.2270.6730

On Jun 16, 2020, at 6:52 PM, Willard, Lauren (OAG) [redacted] wrote:

Do you need PDFs, Word Docs, or both?

Also if you have a second, we can chat about OMB strategy too. I'm at the number below.

Lauren S. Willard
Counselor to the Attorney General
U.S. Department of Justice
M [redacted]
[redacted]

From: Willard, Lauren (OAG)
Sent: Tuesday, June 16, 2020 6:41 PM
T [redacted] (OLA) [redacted]
Cc: Hankey, Mary Blanche (OLA) [redacted]; Boyd, Stephen E. (OLA) [redacted]; Watson, Theresa (OAG) [redacted]; Levi, William (OAG) [redacted]; Barnett, Gary (OAG) [redacted]
Subject: RE: Need AG signature for OLA cover letter?

Great thank you! One less thing to bother the AG/Theresa about ☺

Let's plan to send tonight. We are making "final, final" edits to Section-by-Section. Will try to get you everything by 7:30 at the latest.

Defer to Stephen on timeline and whether 2 weeks will be sufficient. The faster, the better, and we can give heads up to our interagency folks that have been working on these issues.

Best,
Lauren

From [redacted] (OLA) [redacted]
Sent: Tuesday, June 16, 2020 6:37 PM
To: Willard, Lauren (OAG) [redacted]
Cc: Hankey, Mary Blanche (OLA) [redacted]; Boyd, Stephen E. (OLA) [redacted]; Watson, Theresa (OAG) [redacted]; Levi, William (OAG) [redacted]; Barnett, Gary (OAG) [redacted]
Subject: Re: Need AG signature for OLA cover letter?

Hello Lauren,

Sorry for my delay- Because this is still a proposal, we won't need the AG's signature at this point. We will get this over to OMB, and they may have feedback after circulation, or they may route it via a unique track (like we did). I can either send it around 7:30 tonight or wait and hit send tomorrow morning. Either way, I'm available. If, however, there is anyone in particular that we've been talking to that I should alert my OMB contact about, that may help grease the wheels as well!

Also, one more thing- What's our timeline? OMB usually requests about two weeks, and given everything going on, they may adhere strictly to that as a minimum. I will, however, let them know it's

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an AG-level priority in hopes that keeps it moving faster.

Thank you,
(b) (6)

(b) (6)
Office of Legislative Affairs
(b) (6)
(b) (6) (o)
(b) (6) (c)

On Jun 16, 2020, at 6:31 PM, Willard, Lauren (OAG) (b) (6) > wrote:

> All,
>
> Do we need to format the attached OLA letter and have the AG sign before sending to OMB? Or can we send as is? Sorry not to flag earlier, but just thinking about final steps.
>
> If so, please let me know ASAP!
>
> Best,
> Lauren
>
> **Lauren S. Willard**
> Counselor to the Attorney General
> U.S. Department of Justice
> M (b) (6)
> (b) (6)
>
> <Section 230 OLA Cover Letter (DELIBERATIVE) DOJ FINAL Draft 6.16.docx>

Document ID: 0.7.2270.6730

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Tuesday, June 16, 2020 8:25 PM
To:	(b) (6) (OLA); Barnett, Gary (OAG)
Subject:	RE: Section 230 Legislative Proposal

Thanks so much!

From (b) (6) (OLA) (b) (6) >
Sent: Tuesday, June 16, 2020 8:23 PM
To: Willard, Lauren (OAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >
Subject: FW: Section 230 Legislative Proposal
Importance: High

Hello Lauren and Gary,

Forwarding my email to OMB re: Section 230. I gave a call over there as well, and it is likely it will go out into circulation first thing tomorrow, once they review and get that teed up, but I will follow up to let you know when it goes out officially.

Please feel free to reach out if you have questions or need anything else between now and then, otherwise, have a lovely evening!

Thank you,
(b) (6)

From (b) (6) (OLA)
Sent: Tuesday, June 16, 2020 8:20 PM
To: Damis, Rody EOP/OMB (b) (6) >
Subject: Section 230 Legislative Proposal
Importance: High

Good Evening Rody,

I am reaching out on behalf of DOJ with a legislative proposal on Section 230 for OMB clearance. Attached here, you will find our (1) Cover Letter; (2) Redline; and (3) Section-by-Section Analysis.

For some background, this draft legislation comes out of the DOJ's 10-month review of Section 230 of the Communications Decency Act, including its February 19, 2020 Public Workshop and Expert Roundtable. Additionally, this is responsive to the Executive Order calling for legislation on Section 230 (https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/).

I know there are tons of Requests for Views floating around right now, but we are please requesting a brief, 1 week passback on comments/feedback because this is a major AG priority. To that end, our leadership team has linked up and worked with folks in WHCO already, specifically, May Davis and Devin Debacker (if that helps!), regarding this proposal, and I believe many involved are anticipating this circulation.

I'm honestly not sure if you have the bandwidth to get this out tonight, or if tomorrow morning is more realistic, but

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would you be able to please confirm with me when it is circulated? It will helps us gauge where we stand, and as you can suspect, there is a tremendous amount of interest on my end. Finally, while we've provided the Word Docs attached, if you need anything else before circulating, please feel free to reach out to me.

As always, thank you so much for your help, and shout if you need more from us!

Thank you!
(b) (6)

(b) (6)
Office of Legislative Affairs
(b) (6)
(b) (6) (o)
(b) (6) (c)

Document ID: 0.7.2270.7321

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Tuesday, June 16, 2020 8:27 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); 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), (b)(7)(C) per FBI (OGC) (FBI); Jones, Darrin E. (ITID) (FBI); Peck, Jessica (CRM); Sabol, Sherry E. (OGC) (FBI); Liu, Jeffrey (OLC); Freeman, Lindsey (OLP)
Subject:	Section 230 OMB Legislative Packet
Attachments:	Section 230 Section by Section (DELIBERATIVE) DOJ FINAL DRAFT_6.16.pdf; Section 230 Redline (DELIBERATIVE) DOJ FINAL DRAFT_6.16.pdf; Section 230 OLA Cover Letter (DELIBERATIVE) DOJ FINAL Draft 6.16.pdf; DOJ Section 230 Key Takeaways & Recommendations_DRAFT 6.16.20.pdf

Hi everyone,

After many, many months of hard work and collaboration by this group, we finally received the green light to send our draft legislative packet to OMB to start the interagency process. (Yay!) Attached is the draft redline, cover letter, and section by section. There were a few minor edits as this was officially cleared by DOJ Leadership, but is extremely close to what everyone has seen numerous times already.

I really appreciate this team's intellect, patience, and creative thinking. I know the draft isn't exactly what everyone wanted, but I think it is a credible and thoughtful contribution to the Section 230 debate and represents well our DOJ equities.

This is also not the end of the road. We will have an opportunity to engage with our interagency colleagues through the OMB process and can reconsider critical language as appropriate. We will also have the next steps of engaging with the Hill, and thanks again to everyone for the productive call on the Schatz-Thune proposal this morning.

Finally, we hope to release our public report and related materials this week (maybe even as early as tomorrow afternoon). I've attached the latest draft of that report. If anyone has any final edits on that document or on the draft website (sent earlier), please feel free to let me know.

At some point, when appropriate, I'd also like to have an official celebration to thank everyone for their contributions. In the meantime, virtual high fives to you all for the great and continued work on this project!!

Best,
Lauren

Lauren S. Willard

Document ID: 0.7.2270.6337

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

Document ID: 0.7.2270.6337

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Tuesday, June 16, 2020 8:53 PM
To:	Barnett, Gary (OAG); Grieco, Christopher (ODAG)
Subject:	RE: I'll call Gary and conference in Lauren
Attachments:	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; DOJ Section 230 Key Takeaways & Recommendations_DRAFT 6.16.20.pdf

(b) (5) ? Anything else to flag?

****

May and Devin,

Following up on my earlier note. Attached are the draft documents associated with DOJ's Section 230 Public Workshop and review of the statute. As discussed before, these documents are intended to follow up from our public workshop, private expert roundtable, and industry listening sessions, as well as provide high level reasoning for why DOJ thinks Section 230 needs to be reformed, key principles for reform efforts, areas ripe for reform, and ideas under further consideration. We hope these documents will demonstrate that the reform proposal is sufficiently supported by external engagement and extensive internal analysis. The documents attached include: (1) summary of public workshop and private roundtable; (2) written submissions from Workshop participants; (3) bios from participants; (4) workshop agenda; and (5) DOJ's key takeaways and recommendations. We will also have a link to the livestream of the February 19 event. These various documents all will be linked from a centralized Section 230 DOJ website.

Since the documents were mostly drafted over a month ago, we took another pass through to ensure they are consistent/complementary to the Executive Order and recent discussions. We are planning to launch the website with the various documents tomorrow afternoon or possibly Thursday morning. Part of the timing consideration is to make sure we get can the arguments in favor of reform out there publicly before the tech industry has a chance to build opposition (in case the OMB draft leaks). We also have been sitting on these for a while in light of COVID and other events, so would be helpful to finally have the follow-through from our February event.

Also, as discussed, the DOJ legislative reform proposal is in addition to the ongoing efforts o (b) (5) We have also framed our legislative proposal as largely clarifying the original purpose and text of Section 230, which should help assist our regulatory efforts.

Feel free to reach out with any questions or concerns!

Best,

From: Willard, Lauren (OAG)
Sent: Tuesday, June 16, 2020 8:13 PM
To: Barnett, Gary (OAG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >
Subject: RE: I'll call Gary and conference in Lauren

FYI Will overruled waiting until tomorrow. So working on a note to send to May tonight with relevant materials.

From: Barnett, Gary (OAG) (b) (6) >
Sent: Tuesday, June 16, 2020 5:58 PM
To: Grieco, Christopher (ODAG) (b) (6) >
Cc: Willard, Lauren (OAG) (b) (6) >
Subject: Re: I'll call Gary and conference in Lauren

I'm walking over to Lauren's office

> On Jun 16, 2020, at 5:57 PM, Grieco, Christopher (ODAG) (b) (6) > wrote:

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Tuesday, June 16, 2020 9:36 PM
To:	Levi, William (OAG)
Subject:	FW: Section 230 OMB Package
Attachments:	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; DOJ Section 230 Key Takeaways & Recommendations_DRAFT 6.16.20.pdf

FYI only.

From: Willard, Lauren (OAG)
Sent: Tuesday, June 16, 2020 9:20 PM
To: Davis, May M. EOP/WHO (b) (6) >; DeBacker, Devin A. EOP/WHO (b) (6) >
Cc: Grieco, Christopher (ODAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >
Subject: RE: Section 230 OMB Package

May and Devin,

Following up on my earlier note. Attached are the draft documents associated with DOJ's Section 230 Public Workshop and review of the statute. As discussed before, these documents are intended to follow up from our public workshop, private expert roundtable, and industry listening sessions, as well as provide high level reasoning for why DOJ thinks Section 230 needs to be reformed, key principles for reform efforts, areas ripe for reform, and ideas under further consideration. We hope these documents will demonstrate that the reform proposal is sufficiently supported by external engagement and extensive internal analysis. The documents attached include: (1) summary of public workshop and private roundtable; (2) written submissions from Workshop participants; (3) bios from participants; (4) workshop agenda; and (5) DOJ's key takeaways and recommendations. We will also have a link to the livestream of the February 19 event. These various documents all will be linked from a centralized Section 230 DOJ website.

Since the documents were mostly drafted over a month ago, we took another pass through to ensure they are consistent/complementary to the Executive Order and recent discussions. We hope to launch the website with the various documents tomorrow late afternoon. Part of the timing consideration is to make sure we get can the arguments in favor of reform out there publicly before the tech industry has a chance to build opposition (in case the OMB draft leaks). We also have been sitting on these for a while in light of COVID and other events, so would be helpful to finally have the follow-through from our February event.

As discussed, the DOJ legislative reform proposal is in addition to the ongoing efforts on the NTIA petition for FCC rulemaking, which can address other issues. We have framed our legislative proposal as largely clarifying the original purpose and text of Section 230, which should also help reinforce our regulatory efforts.

Feel free to reach out with any questions!

Best,
Lauren

Document ID: 0.7.2270.5342

From: Willard, Lauren (OAG)
Sent: Tuesday, June 16, 2020 8:30 PM
To: Davis, May M. EOP/WHO (b) (6) >; DeBacker, Devin A. EOP/WHO (b) (6) >
Cc: Grieco, Christopher (ODAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >
Subject: Section 230 OMB Package

May and Devin,

Per the discussion this afternoon, we just send the DOJ Section 230 legislative reform package to OMB. Attached are the relevant documents for reference. I'll also aim to follow up this evening with our public-facing materials coming out of the DOJ Workshop and review.

Best,
Lauren

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

Document ID: 0.7.2270.5342

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Wednesday, June 17, 2020 11:02 AM
To:	Mooppan, Hashim (CIV); Morrell, David M. (CIV)
Subject:	FW: Section 230 Public Report and Draft Legislation
Attachments:	DOJ Section 230 Key Takeaways & Recommendations_DRAFT 6.16.20.pdf; Section 230 Redline (DELIBERATIVE) DOJ FINAL DRAFT_6.16.pdf

Hash and Dave,

Per my email belo (b)(5) per CIV

From: Willard, Lauren (OAG)
Sent: Friday, June 12, 2020 2:56 PM
To: Guarnieri, Matthew (OSG) (b) (6) >; Morrell, David M. (CIV) (b) (6) >; Wall, Jeffrey B. (OSG) (b) (6) >; Mooppan, Hashim (CIV) (b) (6) >
Cc: Pandya, Brian (OASG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >
Subject: Section 230 Public Report and Draft Legislation

Duplicative Information - See Document ID 0.7.2270.7824

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Wednesday, June 17, 2020 11:05 AM
To:	Guarnieri, Matthew (OSG)
Cc:	Wall, Jeffrey B. (OSG); Whitaker, Henry C. (OLC); Liu, Jeffrey (OLC); Barnett, Gary (OAG)
Subject:	RE: Section 230 Public Report and Draft Legislation

Fantastic, thank you!

From: Guarnieri, Matthew (OSG) (b) (6) >
Sent: Wednesday, June 17, 2020 11:04 AM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Wall, Jeffrey B. (OSG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Liu, Jeffrey (OLC) (b) (6) >; Barnett, Gary (OAG) (b) (6) >
Subject: RE: Section 230 Public Report and Draft Legislation

(b)(5) per CIV .

Thanks,
Matt

From: Willard, Lauren (OAG) (b) (6) >
Sent: Wednesday, June 17, 2020 10:51 AM
To: Guarnieri, Matthew (OSG) (b) (6) >
Cc: Wall, Jeffrey B. (OSG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Liu, Jeffrey (OLC) (b) (6) >; Barnett, Gary (OAG) (b) (6) >
Subject: RE: Section 230 Public Report and Draft Legislation

Matt/Jeff – we need to move shortly on releasing our report. Hopefully the highlighted language below i (b) (5) , but let me know ASAP if not. Thanks!

From: Willard, Lauren (OAG)
Sent: Tuesday, June 16, 2020 4:25 PM
To: Guarnieri, Matthew (OSG) (b) (6) >
Cc: Wall, Jeffrey B. (OSG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Liu, Jeffrey (OLC) (b) (6) >; Barnett, Gary (OAG) (b) (6) >
Subject: RE: Section 230 Public Report and Draft Legislation

Thanks!

To save Jeff from having to read the full document (b)(5) per CIV (highlighted below). Gary, please feel free to chime in with any additional tweaks.

Best,
Lauren

Document ID: 0.7.2270.6595

(b)(5) per CIV

(b)(5) per CIV

(b)(5) per CIV

(b)(5) per CIV

(b)(5) per CIV

(b)(5) per CIV

From: Guarnieri, Matthew (OSG) (b) (6)
Sent: Tuesday, June 16, 2020 4:15 PM
To: Willard, Lauren (OAG) (b) (6)
Cc: Wall, Jeffrey B. (OSG) (b) (6); Whitaker, Henry C. (OLC) (b) (6); Liu, Jeffrey (OLC) (b) (6); Barnett, Gary (OAG) (b) (6)
Subject: RE: Section 230 Public Report and Draft Legislation

Document ID: 0.7.2270.6595

(b)(5) per CIV . Let us take a look, and we'll get back to you shortly.

Matt

From: Willard, Lauren (OAG) (b) (6)
Sent: Tuesday, June 16, 2020 3:58 PM
To: Guarnieri, Matthew (OSG) (b) (6)
Cc: Wall, Jeffrey B. (OSG) (b) (6); Whitaker, Henry C. (OLC) (b) (6); Liu, Jeffrey (OLC) (b) (6); Barnett, Gary (OAG) (b) (6)
Subject: RE: Section 230 Public Report and Draft Legislation

OLC has been closely involved in the Section 230 project – CC'ing Henry and Jeff here (who took over for Ben Wallace) (b)(5) per CIV

Also, Gary was wondering whether we coul (b) (5) . Did OSG have any concerns wit (b) (5) ?

Best,
Lauren

From: Guarnieri, Matthew (OSG) (b) (6)
Sent: Tuesday, June 16, 2020 3:45 PM
To: Willard, Lauren (OAG) (b) (6)
Cc: Wall, Jeffrey B. (OSG) (b) (6)
Subject: RE: Section 230 Public Report and Draft Legislation

Hi Lauren,

(b)(5) per OSG

(b)(5) per OSG; (b)(5) per CIV

Best,
Matt

From: Willard, Lauren (OAG) (b) (6)
Sent: Friday, June 12, 2020 2:56 PM
To: Guarnieri, Matthew (OSG) (b) (6); Morrell, David M. (CIV) (b) (6); Wall, Jeffrey B. (OSG) (b) (6); Mooppan, Hashim (CIV) (b) (6)
Cc: Pandya, Brian (OASG) (b) (6); Grieco, Christopher (ODAG) (b) (6); Barnett, Gary (OAG) (b) (6)
Subject: Section 230 Public Report and Draft Legislation

Duplicative Information - See Document ID 0.7.2270.7824

Timmons, Mollie R. (PAO)

From:	Timmons, Mollie R. (PAO)
Sent:	Wednesday, June 17, 2020 1:19 PM
To:	Willard, Lauren (OAG); Herlihy, Brianna (PAO)
Cc:	Barnett, Gary (OAG); Levi, William (OAG); Kupec, Kerri (OPA)
Subject:	RE: press release final
Attachments:	230 final release.docx

Here is final, minus AG quote.

From: Willard, Lauren (OAG) (b) (6) >
Sent: Wednesday, June 17, 2020 1:11 PM
To: Herlihy, Brianna (PAO) (b) (6) >
Cc: Timmons, Mollie R. (PAO) (b) (6) >; Barnett, Gary (OAG) (b) (6) >; Levi, William (OAG) (b) (6) >; Kupec, Kerri (OPA) (b) (6) >
Subject: RE: press release final

Change "Echoing" to "Responding to" and Gary's most recent edit. Otherwise OK by me, pending approval by Will/Kerri on AG quote

---

From: Herlihy, Brianna (PAO) (b) (6) >
Sent: Wednesday, June 17, 2020 1:08 PM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Timmons, Mollie R. (PAO) (b) (6) >
Subject: press release final

Lauren – can you confirm this is final release (understanding still waiting on AG quote).

Brianna Herlihy
Public Affairs Officer
Department of Justice
c (b) (6)
o (b) (6)

Document ID: 0.7.2270.5203

Department of Justice

FOR IMMEDIATE RELEASE
WEDNESDAY, JUNE 17, 2020
WWW.JUSTICE.GOV

AG
(202) 514-2007
TTY (866) 544-5309

REFORMS STRIKE BALANCE OF PROTECTING CITIZENS WHILE PRESERVING ONLINE INNOVATION AND FREE SPEECH

WASHINGTON – The Department of Justice released today a set of reform proposals to update the outdated immunity for online platforms under Section 230 of the Communications Decency Act of 1996. Responding to bipartisan concerns about the scope of 230 immunity, the department identified a set of concrete reform proposals to provide stronger incentives for online platforms to address illicit material on their services while continuing to foster innovation and free speech.

The department's review of Section 230 over the last ten months arose in the context of its broader review of market-leading online platforms and their practices, which were announced in July 2019. The department held a large public workshop and expert roundtable in February 2020, as well as dozens of listening sessions with industry, thought leaders, and policy makers, to gain a better understanding of the uses and problems surrounding Section 230.

Section 230 was originally enacted to protect developing technology by providing that online platforms were not liable for the third-party content on their services or for their removal of such content in certain circumstances. This immunity was meant to nurture emerging internet businesses and to overrule a judicial precedent that rendered online platforms liable for *all* third-party content on their services if they restricted *some* harmful content.

However, the combination of 25 years of drastic technological changes and an expansive statutory interpretation left online platforms unaccountable for a variety of harms flowing from content on their platforms and with virtually unfettered discretion to censor third-party content with little transparency or accountability. Following the completion of its review, the Department of Justice determined that Section 230 is ripe for reform and identified and developed four categories of wide-ranging recommendations.

Incentivizing Online Platforms to Address Illicit Content

The first category of recommendations is aimed at incentivizing platforms to address the growing amount of illicit content online, while preserving the core of Section 230's immunity for defamation claims. These reforms include a carve-out for bad actors who purposefully facilitate or solicit content that violates federal criminal law or are willfully blind to criminal content on

Document ID: 0.7.2270.5203-000001

their own services. Additionally, the department recommends a case-specific carve out where a platform has actual knowledge that content violated federal criminal law and does not act on it within a reasonable time, or where a platform was provided with a court judgment that the content is unlawful, and does not take appropriate action.

Promoting Open Discourse and Greater Transparency

A second category of proposed reforms is intended to clarify the text and revive the original purpose of the statute in order to promote free and open discourse online and encourage greater transparency between platforms and users. One of these recommended reforms is to provide a statutory definition of "good faith" to clarify its original purpose. The new statutory definition would limit immunity for content moderation decisions to those done in accordance with plain and particular terms of service and consistent with public representations. These measures would encourage platforms to be more transparent and accountable to their users.

Clarifying Federal Government Enforcement Capabilities

The third category of recommendations would increase the ability of the government to protect citizens from unlawful conduct, by making it clear that Section 230 does not apply to civil enforcement actions brought by the federal government.

Promoting Competition

A fourth category of reform is to make clear that federal antitrust claims are not, and were never intended to be, covered by Section 230 immunity. Over time, the avenues for engaging in both online commerce and speech have concentrated in the hands of a few key players. It makes little sense to enable large online platforms (particularly dominant ones) to invoke Section 230 immunity in antitrust cases, where liability is based on harm to competition, not on third-party speech.

* * *

(b) (5)

[redacted]

Document ID: 0.7.2270.5203-000001

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Wednesday, June 17, 2020 2:14 PM
To:	Herlihy, Brianna (PAO)
Cc:	Grieco, Christopher (ODAG); Barnett, Gary (OAG)
Subject:	Re: Updating the 230 Website

(b) (5)

Sent from my iPhone

On Jun 17, 2020, at 2:13 PM, Herlihy, Brianna (PAO) (b) (6) > wrote:

https://www.justice.gov/opa/pr/justice-department-issues-recommendations-section-230-reform

On Jun 17, 2020, at 2:12 PM, Grieco, Christopher (ODAG) (b) (6) > wrote:

To the extent any reporters ask about the Hawley bill and ours, we shoul (b) (5) .

From: Herlihy, Brianna (PAO) (b) (6) >
Sent: Wednesday, June 17, 2020 2:06 PM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Grieco, Christopher (ODAG) (b) (6) >
Subject: Re: Updating the 230 Website

Yes as soon as it's up (any second now) I'll ping reporters who already have stories so they have it

On Jun 17, 2020, at 1:58 PM, Willard, Lauren (OAG) (b) (6) > wrote:

We didn't give them the link yet. Adding Brianna. I think they will have link when the press release is issued.

From: Grieco, Christopher (ODAG) (b) (6) >
Sent: Wednesday, June 17, 2020 1:58 PM

Document ID: 0.7.2270.8884

To: Willard, Lauren (OAG) [redacted]>
Subject: RE: Updating the 230 Website

It's odd that none of these stories link to our report.

From: Willard, Lauren (OAG) [redacted]>
Sent: Wednesday, June 17, 2020 1:57 PM
To: Grieco, Christopher (ODAG) [redacted]>
Subject: RE: Updating the 230 Website

Not that I've seen. It's in Kerri's hands.

From: Grieco, Christopher (ODAG) [redacted]>
Sent: Wednesday, June 17, 2020 1:56 PM
To: Willard, Lauren (OAG) [redacted]>
Subject: RE: Updating the 230 Website

Did the press release go out? Did I miss it?

From: Willard, Lauren (OAG) [redacted]>
Sent: Wednesday, June 17, 2020 1:54 PM
To: Solomon, Gail D (JMD) [redacted]>; Herlihy, Brianna (PAO) [redacted]>; Barnett, Gary (OAG) [redacted]>; Timmons, Mollie R. (PAO) [redacted]>; Lloyd, Matt (PAO) [redacted]>
Cc: Grieco, Christopher (ODAG) [redacted]>
Subject: RE: Updating the 230 Website

Yay, thank you so much to everyone!!

From: Solomon, Gail D (JMD) [redacted]>
Sent: Wednesday, June 17, 2020 1:49 PM
To: Willard, Lauren (OAG) [redacted]>; Herlihy, Brianna (PAO) [redacted]>; Barnett, Gary (OAG) [redacted]>; Timmons, Mollie R. (PAO) [redacted]>; Lloyd, Matt (PAO) [redacted]>
Cc: Grieco, Christopher (ODAG) [redacted]>
Subject: RE: Updating the 230 Website

All,
The page is live: https://www.justice.gov/ag/department-justice-s-review-section-230-communications-decency-act-1996

The link is also live on https://www.justice.gov/ag/selected-publications.

Please let me know if you need any additional assistance.

Take care,
Gail

Gail D. Solomon | Content Manager, Justice.gov
OCIO | Collaboration and Web Services

Document ID: 0.7.2270.8884

(b) (6) (cell)

From: Willard, Lauren (OAG) (b) (6)
Sent: Wednesday, June 17, 2020 12:46 PM
To: Solomon, Gail D (JMD) (b) (6); Herlihy, Brianna (PAO) (b) (6); Barnett, Gary (OAG) (b) (6); Timmons, Mollie R. (PAO) (b) (6); Lloyd, Matt (PAO) (b) (6)
Cc: Grieco, Christopher (ODAG) (b) (6)
Subject: RE: Updating the 230 Website
Importance: High

OPA Folks – can you assist Gail with the linking question, so we can be ready to go live?

Many thanks!

From: Solomon, Gail D (JMD) (b) (6)
Sent: Wednesday, June 17, 2020 11:41 AM
To: Willard, Lauren (OAG) (b) (6); Grieco, Christopher (ODAG) (b) (6); Lee, Steffanie G. (ODAG) (b) (6); Toensing, Brady (OLP) (b) (6)
Cc: Flanagan, Cathy (JMD) (b) (6); Herlihy, Brianna (PAO) (b) (6); Barnett, Gary (OAG) (b) (6); Timmons, Mollie R. (PAO) (b) (6)
Subject: RE: Updating the 230 Website

This is more about where else to link to it so it's not only in a press release.

Gail D. Solomon | Content Manager, Justice.gov
OCIO | Collaboration and Web Services
(b) (6) (cell)

From: Willard, Lauren (OAG) (b) (6)
Sent: Wednesday, June 17, 2020 11:30 AM
To: Solomon, Gail D (JMD) (b) (6); Grieco, Christopher (ODAG) (b) (6); Lee, Steffanie G. (ODAG) (b) (6); Toensing, Brady (OLP) (b) (6)
Cc: Flanagan, Cathy (JMD) (b) (6); Herlihy, Brianna (PAO) (b) (6); Barnett, Gary (OAG) (b) (6); Timmons, Mollie R. (PAO) (b) (6)
Subject: RE: Updating the 230 Website

Defer to OPA on linking question with the press release.

From: Solomon, Gail D (JMD) (b) (6)
Sent: Wednesday, June 17, 2020 11:29 AM
To: Willard, Lauren (OAG) (b) (6); Grieco, Christopher (ODAG) (b) (6); Lee, Steffanie G. (ODAG) (b) (6); Toensing, Brady (OLP) (b) (6)

Cc: Flanagan, Cathy (JMD) [redacted]>; Herlihy, Brianna (PAO) [redacted]>; Barnett, Gary (OAG) [redacted]>
Subject: RE: Updating the 230 Website

I know this will be linked from a press release but let me know where else it should be linked. There is always the option of adding a link on https://www.justice.gov/ag/selected-publications.

- Gail

Gail D. Solomon | Content Manager, Justice.gov
OCIO | Collaboration and Web Services
[redacted] (cell)

From: Willard, Lauren (OAG) [redacted]>
Sent: Wednesday, June 17, 2020 11:28 AM
To: Solomon, Gail D (JMD) [redacted]>; Grieco, Christopher (ODAG) [redacted]>; Lee, Steffanie G. (ODAG) [redacted]>; Toensing, Brady (OLP) [redacted]>
Cc: Flanagan, Cathy (JMD) [redacted]>; Herlihy, Brianna (PAO) [redacted]>; Barnett, Gary (OAG) [redacted]>
Subject: RE: Updating the 230 Website

Fantastic. Any last concerns from this group? Adding Gary too. Otherwise, please stand by for the "go live" ☺

https://edit.justice.gov/ag/department-justice-s-review-section-230-communications-decency-act-1996

From: Solomon, Gail D (JMD) [redacted]>
Sent: Wednesday, June 17, 2020 11:14 AM
To: Grieco, Christopher (ODAG) [redacted]>; Willard, Lauren (OAG) [redacted]>; Lee, Steffanie G. (ODAG) [redacted]>; Toensing, Brady (OLP) [redacted]>
Cc: Flanagan, Cathy (JMD) [redacted]>; Herlihy, Brianna (PAO) [redacted]>
Subject: RE: Updating the 230 Website

The two links to the Key Takeaways have been added.
https://edit.justice.gov/ag/department-justice-s-review-section-230-communications-decency-act-1996

Thanks,
Gail

Gail D. Solomon | Content Manager, Justice.gov

Document ID: 0.7.2270.8884

OCIO | Collaboration and Web Services
(b) (6) (cell)

From: Grieco, Christopher (ODAG) (b) (6)
Sent: Wednesday, June 17, 2020 11:08 AM
To: Willard, Lauren (OAG) (b) (6); Solomon, Gail D (JMD) (b) (6); Lee, Steffanie G. (ODAG) (b) (6); Toensing, Brady (OLP) (b) (6)
Cc: Flanagan, Cathy (JMD) (b) (6); Herlihy, Brianna (PAO) (b) (6)
Subject: RE: Updating the 230 Website

Just noting that it looks like some of the links are not in there yet.

From: Willard, Lauren (OAG) (b) (6)
Sent: Wednesday, June 17, 2020 11:03 AM
To: Solomon, Gail D (JMD) (b) (6); Lee, Steffanie G. (ODAG) (b) (6); Toensing, Brady (OLP) (b) (6)
Cc: Flanagan, Cathy (JMD) (b) (6); Grieco, Christopher (ODAG) (b) (6); Herlihy, Brianna (PAO) (b) (6)
Subject: RE: Updating the 230 Website

Great! Will the website be ready by 12:30pm? Adding other Brianna from OPA for final review of website.

https://edit.justice.gov/ag/department-justice-s-review-section-230-communications-decency-act-1996

From: Solomon, Gail D (JMD) (b) (6)
Sent: Wednesday, June 17, 2020 10:54 AM
To: Lee, Steffanie G. (ODAG) (b) (6); Toensing, Brady (OLP) (b) (6); Willard, Lauren (OAG) (b) (6)
Cc: Flanagan, Cathy (JMD) (b) (6); Grieco, Christopher (ODAG) (b) (6)
Subject: RE: Updating the 230 Website

Thanks, Steffanie. Double-checking accessibility now and then I'll post it.

- Gail

Gail D. Solomon | Content Manager, Justice.gov
OCIO | Collaboration and Web Services
(b) (6) (cell)

From: Lee, Steffanie G. (ODAG) (b) (6)
Sent: Wednesday, June 17, 2020 10:37 AM
To: Solomon, Gail D (JMD) (b) (6); Toensing, Brady (OLP) (b) (6); Willard, Lauren (OAG)

Document ID: 0.7.2270.8884

(b) (6) >
Cc: Flanagan, Cathy (JMD) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >
Subject: RE: Updating the 230 Website

Hi Gail, Please see the updated Key Takeaways attached. Thanks!

Steffanie Lee
(b) (6)

From: Solomon, Gail D (JMD) (b) (6) >
Sent: Wednesday, June 17, 2020 9:49 AM
To: Toensing, Brady (OLP) (b) (6) >; Lee, Steffanie G. (ODAG) (b) (6) >; Willard, Lauren (OAG) (b) (6) >
Cc: Flanagan, Cathy (JMD) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >
Subject: RE: Updating the 230 Website

I've added the hyphen and also text at the end of the second paragraph to go to the Key Takeaways. For accessibility it is a best practice to use language other than "click here" so I changed it to "Read."

Both that new language and the Key Takeaways item in #1 on the right column will be links to the document once we receive it.

- Gail

Gail D. Solomon | Content Manager, Justice.gov
OCIO | Collaboration and Web Services
(b) (6) (cell)

From: Toensing, Brady (OLP) (b) (6) >
Sent: Wednesday, June 17, 2020 9:42 AM
To: Lee, Steffanie G. (ODAG) (b) (6) >; Willard, Lauren (OAG) (b) (6) >
Cc: Solomon, Gail D (JMD) (b) (6) >; Flanagan, Cathy (JMD) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >
Subject: RE: Updating the 230 Website

Yes, I agree. Key takeaways looks good in the first spot (I assume it will include a live link ultimately). One nit – 2nd paragraph. Line 4 on page – "thought-leaders" should have a hyphen.

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

1. 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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2. 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

3. 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

4. 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

5. 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.

* * * * * * * * * * * * * * * * * * *

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

From: Lee, Steffanie G. (ODAG) (b) (6)>
Sent: Wednesday, June 17, 2020 9:38 AM
To: Willard, Lauren (OAG) (b) (6)>
Cc: Solomon, Gail D (JMD) (b) (6)>; Flanagan, Cathy (JMD) (b) (6)>; Toensing, Brady (OLP) (b) (6)>; Grieco, Christopher (ODAG) (b) (6)>
Subject: Re: Updating the 230 Website

Yes, I'm working on it!

Steffanie Lee
(b) (6)

> On Jun 17, 2020, at 8:50 AM, Willard, Lauren (OAG) (b) (6)> wrote:
>
> Thanks! There is a weird breaking space on the first line. I think we can also take out the Stratton footnote, as the cases are cited in the Takeaways text.
>
> Otherwise, looking good. Thanks for quick work!

Document ID: 0.7.2270.8884

Steffanie – can you send the PDF of the Key Takeaways as soon as you get a chance this morning?

From: Solomon, Gail D (JMD) (b) (6) >
Sent: Wednesday, June 17, 2020 8:28 AM
To: Willard, Lauren (OAG) (b) (6) >; Lee, Steffanie G. (ODAG) (b) (6) >
Cc: Flanagan, Cathy (JMD) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >
Subject: RE: Updating the 230 Website

Lauren,
In addition to reviewing the new text, you can now see the active links to the files in the right column, with the exception of the Key Takeaways document.

Thanks,
Gail

Gail D. Solomon | Content Manager, Justice.gov
OCIO | Collaboration and Web Services
(b) (6) (cell)

From: Solomon, Gail D (JMD)
Sent: Wednesday, June 17, 2020 8:07 AM
To: Willard, Lauren (OAG) (b) (6) >; Lee, Steffanie G. (ODAG) (b) (6) >
Cc: Flanagan, Cathy (JMD) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >
Subject: RE: Updating the 230 Website

Good morning, Lauren,
Please review the two revised sections:
https://edit.justice.gov/ag/department-justice-s-review-section-230-communications-decency-act-1996

Thank you,
Gail

Gail D. Solomon | Content Manager, Justice.gov
OCIO | Collaboration and Web Services
(b) (6) (cell)

From: Willard, Lauren (OAG) (b) (6) >
Sent: Wednesday, June 17, 2020 8:03 AM
To: Solomon, Gail D (JMD) (b) (6) >; Lee, Steffanie G. (ODAG) (b) (6) >
Cc: Flanagan, Cathy (JMD) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >

Document ID: 0.7.2270.8884

Subject: RE: Updating the 230 Website

Let's also do the same thing about replace the whole text in the Areas Ripe for reform. Revised language below in the same formatting as website. Many thanks!

***

The Department identified four areas ripe for reform:

1. Incentivizing Online Platforms to Address Illicit Content

The first category of potential reforms is aimed at incentivizing platforms to address the growing amount of illicit content online, while preserving the core of Section 230's immunity for defamation.

a. Bad Samaritan Carve-Out. First, the Department proposes denying Section 230 immunity to truly bad actors. The title of Section 230's immunity provision—"Protection for 'Good Samaritan' Blocking and Screening of Offensive Material"—makes clear that Section 230 immunity is meant to incentivize and protect responsible online platforms. It therefore makes little sense to immunize from civil liability an online platform that purposefully facilitates or solicits third-party content or activity that would violate federal criminal law.

b. Carve-Outs for Child Abuse, Terrorism, and Cyber-Stalking. Second, the Department proposes exempting from immunity specific categories of claims that address particularly egregious content, including (1) child exploitation and sexual abuse, (2) terrorism, and (3) cyber-stalking. These targeted carve-outs would halt the over-expansion of Section 230 immunity and enable victims to seek civil redress in causes of action far afield from the original purpose of the statute.

c. Case-Specific Carve-outs for Actual Knowledge or Court Judgments. Third, the Department supports reforms to make clear that Section 230 immunity does not apply in a specific case where a platform had actual knowledge or notice that the third party content at issue violated federal criminal law or where the platform was provided with a court judgment that content is unlawful in any

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respect.

2. Clarifying Federal Government Enforcement Capabilities to Address Unlawful Content

A second category reform would increase the ability of the government to protect citizens from harmful and illicit conduct. These reforms would make clear that the immunity provided by Section 230 does not apply to civil enforcement actions brought by the federal government. Civil enforcement by the federal government is an important complement to criminal prosecution.

3. Promoting Competition

A third reform proposal is to clarify that federal antitrust claims are not covered by Section 230 immunity. Over time, the avenues for engaging in both online commerce and speech have concentrated in the hands of a few key players. It makes little sense to enable large online platforms (particularly dominant ones) to invoke Section 230 immunity in antitrust cases, where liability is based on harm to competition, not on third-party speech.

4. Promoting Open Discourse and Greater Transparency

A fourth category of potential reforms is intended to clarify the text and original purpose of the statute in order to promote free and open discourse online and encourage greater transparency between platforms and users.

a. Replace Vague Terminology in (c)(2). First, the Department supports replacing the vague catch-all "otherwise objectionable" language in Section 230(c)(2) with "unlawful" and "promotes terrorism." This reform would focus the broad blanket immunity for content moderation decisions on the core objective of Section 230—to reduce online content harmful to children—while limiting a platform's ability to remove content arbitrarily or in ways inconsistent with its terms or service simply by deeming it "objectionable."

b. Provide Definition of Good Faith. Second, the Department proposes adding a statutory definition of "good faith," which would limit immunity for content moderation decisions to those done in accordance with plain and particular terms of service and accompanied by a reasonable explanation, unless such notice would impede law enforcement or risk imminent harm to others. Clarifying the meaning of "good faith" should encourage platforms to be more transparent and accountable to their users, rather than

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hide behind blanket Section 230 protections.

c. Explicitly Overrule Stratton Oakmont *to Avoid Moderator's Dilemma.* Third, the Department proposes clarifying that a platform's removal of content pursuant to Section 230(c)(2) or consistent with its terms of service does not, on its own, render the platform a publisher or speaker for all other content on its service.

From: Solomon, Gail D (JMD) (b) (6) >
Sent: Wednesday, June 17, 2020 7:55 AM
To: Willard, Lauren (OAG) (b) (6) >; Lee, Steffanie G. (ODAG) (b) (6) >
Cc: Flanagan, Cathy (JMD) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >
Subject: RE: Updating the 230 Website

OK, thank you.

- Gail

Gail D. Solomon | Content Manager, Justice.gov
OCIO | Collaboration and Web Services
(b) (6) (cell)

From: Willard, Lauren (OAG) (b) (6) >
Sent: Wednesday, June 17, 2020 7:51 AM
To: Solomon, Gail D (JMD) (b) (6) >; Lee, Steffanie G. (ODAG) (b) (6) >
Cc: Flanagan, Cathy (JMD) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >
Subject: RE: Updating the 230 Website

These should be the right file EXCEPT for the Key Takeaways (we will have a new version).

From: Solomon, Gail D (JMD) (b) (6) >
Sent: Wednesday, June 10, 2020 10:08 AM
To: Lee, Steffanie G. (ODAG) (b) (6) >; Willard, Lauren (OAG) (b) (6) >
Cc: Flanagan, Cathy (JMD) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >
Subject: RE: Updating the 230 Website

Hi Steffanie and Lauren,
I just wanted to confirm that the attached are now what we have for posting.

Document ID: 0.7.2270.8884

If you'd like, I'm happy to go ahead and add the files to the draft page so that you can review everything. We can keep the files out of search indexes and since they aren't linked from a live page they wouldn't be able to be found unless someone were given the exact URL.

Thank you,
Gail

Gail D. Solomon | Content Manager, Justice.gov
OCIO | Collaboration and Web Services
(b) (6) (cell)

From: Lee, Steffanie G. (ODAG) (b) (6) >
Sent: Wednesday, June 10, 2020 9:36 AM
To: Solomon, Gail D (JMD) (b) (6) >; Willard, Lauren (OAG) (b) (6) >
Cc: Flanagan, Cathy (JMD) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >
Subject: RE: Updating the 230 Website

Hi Gail,

Please find an updated PDF attached. I went ahead and added in those two pages.

Thanks,

Steffanie Lee
(b) (6)

From: Solomon, Gail D (JMD) (b) (6) >
Sent: Wednesday, June 10, 2020 8:05 AM
To: Willard, Lauren (OAG) (b) (6) >; Lee, Steffanie G. (ODAG) (b) (6) >
Cc: Flanagan, Cathy (JMD) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >
Subject: RE: Updating the 230 Website

Lauren and Steffanie,
I'm attaching what we have that is ready to go live. Please review and let me know if the two pages Lauren sent yesterday need to be added.

Thanks,
Gail

Gail D. Solomon | Content Manager, Justice.gov
OCIO | Collaboration and Web Services
(b) (6) (cell)

Document ID: 0.7.2270.8884

From: Willard, Lauren (OAG) (b) (6)>
Sent: Tuesday, June 9, 2020 6:37 PM
To: Lee, Steffanie G. (ODAG) (b) (6)>; Solomon, Gail D (JMD) (b) (6)>
Cc: Flanagan, Cathy (JMD) (b) (6)>; Toensing, Brady (OLP) (b) (6)>; Grieco, Christopher (ODAG) (b) (6)>
Subject: RE: Updating the 230 Website

Hi all,

I just realized PDF of the Written Submissions may be missing the attached two pages. Steffanie – can you check in the morning? If so, to avoid having the developer team re-do the whole document, could they just be added to the end and compliance just done on those? Let me know what is easiest!

Best,
Lauren

From: Lee, Steffanie G. (ODAG) (b) (6)>
Sent: Thursday, May 28, 2020 11:19 AM
To: Solomon, Gail D (JMD) (b) (6)>
Cc: Flanagan, Cathy (JMD) (b) (6)>; Toensing, Brady (OLP) (b) (6)>; Grieco, Christopher (ODAG) (b) (6)>; Willard, Lauren (OAG) (b) (6)>
Subject: RE: Updating the 230 Website

Hi Gail,

Attached is the Written Submissions document with the cover sheet inserted. I've also just attached the cover sheet in case it is easier for you to add it in to the version Lauren sent last night.

Thanks!

Steffanie Lee
(b) (6)

From: Solomon, Gail D (JMD) (b) (6)>
Sent: Thursday, May 28, 2020 8:04 AM
To: Willard, Lauren (OAG) (b) (6)>
Cc: Lee, Steffanie G. (ODAG) (b) (6)>; Flanagan, Cathy (JMD) (b) (6)>; Toensing, Brady (OLP) (b) (6)>; Grieco, Christopher (ODAG) (b) (6)>
Subject: RE: Updating the 230 Website

Great, we'll wait for updated content and meanwhile work on converting the file you sent to an accessible version. Could you please provide a link for Stratton? It should be a link to a .gov

Document ID: 0.7.2270.8884

site, assuming it's a reference to a case.

Thanks!
Gail

Gail D. Solomon | Content Manager, Justice.gov
OCIO | Collaboration and Web Services
(b) (6) (cell)

From: Willard, Lauren (OAG) (b) (6)>
Sent: Thursday, May 28, 2020 7:59 AM
To: Solomon, Gail D (JMD) (b) (6)>
Cc: Lee, Steffanie G. (ODAG) (b) (6)>; Flanagan, Cathy (JMD) (b) (6)>; Toensing, Brady (OLP) (b) (6)>; Grieco, Christopher (ODAG) (b) (6)>
Subject: Re: Updating the 230 Website

All great ideas! Let me see if I can work on shortening intro and where to put the collapsible parts today, but agree with approach.

Links to the statute and Stratton would be great!

Sent from my iPhone

On May 28, 2020, at 7:56 AM, Solomon, Gail D (JMD) (b) (6)> wrote:

> Good morning all,
> Thank you for sending the file and the content for the landing page.
>
> I have a few thoughts/questions on the content.
>
> 1) I would suggest including a link to the Act in the first sentence for reference. https://www.govinfo.gov/app/details/USCODE-2011-title47/USCODE-2011-title47-chap5-subchapII-partI-sec230/summary
> 2) There is a lot of text on the page. How do you feel about using a collapsible function for the first section so that the four reforms would be collapsed until someone clicks on them? You can see an example of collapsible text on https://www.justice.gov/agencies/list
> 3) Linking from the word "here" presents an accessibility challenge since it is not a descriptive link. Those sentences can be reformatted to remove the word "here" and change the text to the link in each

Document ID: 0.7.2270.8884

case.

4) Did you want to provide a link to Stratton Oakmont for reference?

Please confirm that the title of the page should be "Department of Justice's Review of Section 230 of the Communications Decency Act of 1996"

Thanks much,
Gail

Gail D. Solomon | Content Manager, Justice.gov
OCIO | Collaboration and Web Services
(b) (6) (cell)

From: Willard, Lauren (OAG) (b) (6) >
Sent: Wednesday, May 27, 2020 10:36 PM
To: Lee, Steffanie G. (ODAG) (b) (6) >; Solomon, Gail D (JMD) (b) (6) >; Flanagan, Cathy (JMD) (b) (6) >
Cc: Toensing, Brady (OLP) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >
Subject: RE: Updating the 230 Website

Hi all,

Many thanks for everyone's help as we start getting ready to launch our work product from our Section 230 Workshop and related efforts.

I just sent this to Steffanie, but wanted to share with this group the combined PDF of Participant Written Submissions. We will want to add a cover page, but didn't want to hold up sending the bulk of the material for 508 review. Hopefully this is easier than providing links to separate PDFs for each.

On the website lay-out, I am open to suggestions but had thought we could put the executive summary on the homepage, with links to the other parts of the work product (highlighted below), along the following lines.

We will not want any of this publicly available until we are officially ready to launch, but would be great to get it teed up in case we are ready to go as early as Friday.

Best,

Document ID: 0.7.2270.8884

Lauren

Department of Justice's Review of Section 230 of the Communications Decency Act of 1996

(b) (5) [redacted]

(b) (5) [redacted]

(b) (5) [redacted]

(b) (5) [redacted]

Document ID: 0.7.2270.8884

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

1) (b) (5)

(b) (5)

a. (b) (5)

(b) (5)

b. (b) (5)

c. (b) (5)

2) (b) (5)

(b) (5)

3) (b) (5)

(b) (5)

4) (b) (5)

(b) (5)

a. (b) (5)

(b) (5)

b. (b) (5)

c. (b) (5)

* * *

(b) (5)

Document ID: 0.7.2270.8884

(b) (5) [redacted]

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. (b) (5) [redacted]

2. (b) (5) [redacted]

3. (b) (5) [redacted]

Document ID: 0.7.2270.8884

(b) (5) .

4. (b) (5)

5. (b) (5)

From: Lee, Steffanie G. (ODAG) (b) (6)>
Sent: Wednesday, May 27, 2020 2:21 PM
To: Solomon, Gail D (JMD) (b) (6)>; Flanagan, Cathy (JMD) (b) (6)>
Cc: Toensing, Brady (OLP) (b) (6)>; Grieco, Christopher (ODAG) (b) (6)>; Willard, Lauren (OAG) (b) (6)>
Subject: RE: Updating the 230 Website

Hi Gail and Cathy,

We are working on consolidating the submissions into one PDF and will get that to you as soon as possible. In the meantime, attached are two documents that are ready for 508 compliance review.

Thank you,

Steffanie Lee

Document ID: 0.7.2270.8884

(b) (6)

From: Solomon, Gail D (JMD)
(b) (6) >
Sent: Wednesday, May 27, 2020 10:49 AM
To: Grieco, Christopher (ODAG)
(b) (6) >; Lee, Steffanie G. (ODAG) (b) (6) >
Cc: Rose, Rebecca (OJP)
(b) (6) >; Toensing, Brady (OLP) (b) (6) >; Flanagan, Cathy (JMD) (b) (6) >
Subject: RE: Updating the 230 Website

We can us (b) (6)
Passcod (b) (6)

(hopefully that will work, I haven't used it in a while)

Gail D. Solomon | Content Manager, Justice.gov
OCIO | Collaboration and Web Services
(b) (6) (cell)

From: Grieco, Christopher (ODAG)
(b) (6) >
Sent: Wednesday, May 27, 2020 10:47 AM
To: Solomon, Gail D (JMD)
(b) (6) >; Lee, Steffanie G. (ODAG) (b) (6) >
Cc: Rose, Rebecca (OJP)
(b) (6) >; Toensing, Brady (OLP) (b) (6) >; Flanagan, Cathy (JMD) (b) (6) >
Subject: RE: Updating the 230 Website

Can we circulate a call in number for 10:50 and I will join before my 11?

From: Solomon, Gail D (JMD)
(b) (6) >
Sent: Wednesday, May 27, 2020 10:47 AM
To: Lee, Steffanie G. (ODAG)
(b) (6) >; Grieco, Christopher (ODAG) (b) (6) >
Cc: Rose, Rebecca (OJP)
(b) (6) >; Toensing, Brady (OLP) (b) (6) >; Flanagan, Cathy (JMD) (b) (6) >
Subject: RE: Updating the 230 Website

Steffanie,

Document ID: 0.7.2270.8884

Cathy and I are available now. Do you want to use Skype? We are obviously in different places. A bridge would work as well.

- Gail

Gail D. Solomon | Content Manager, Justice.gov
OCIO | Collaboration and Web Services
(b) (6) (cell)

From: Lee, Steffanie G. (ODAG) (b) (6)>
Sent: Wednesday, May 27, 2020 10:32 AM
To: Solomon, Gail D (JMD) (b) (6)>; Grieco, Christopher (ODAG) (b) (6)>
Cc: Rose, Rebecca (OJP) (b) (6)>; Toensing, Brady (OLP) (b) (6)>; Flanagan, Cathy (JMD) (b) (6)>
Subject: RE: Updating the 230 Website

That would be great! Thanks, Gail! I can jump on a call at 11 or before regardless. I'll give you a call at 11 unless I hear from you.

Steffanie Lee
(b) (6)

From: Solomon, Gail D (JMD) (b) (6)>
Sent: Wednesday, May 27, 2020 10:29 AM
To: Grieco, Christopher (ODAG) (b) (6)>; Lee, Steffanie G. (ODAG) (b) (6)>
Cc: Rose, Rebecca (OJP) (b) (6)>; Toensing, Brady (OLP) (b) (6)>; Flanagan, Cathy (JMD) (b) (6)>
Subject: RE: Updating the 230 Website

I can also let you know if my meeting is short and I'm free earlier.

- Gail

Gail D. Solomon | Content Manager, Justice.gov
OCIO | Collaboration and Web Services
(b) (6) (cell)

From: Grieco, Christopher (ODAG) (b) (6)>
Sent: Wednesday, May 27, 2020 10:28 AM
To: Solomon, Gail D (JMD) (b) (6)>; Lee, Steffanie G.

(ODAG) (b) (6) >
Cc: Rose, Rebecca (OJP)
(b) (6) >; Toensing, Brady (OLP) (b) (6) >; Flanagan, Cathy (JMD) (b) (6) >
Subject: RE: Updating the 230 Website

Ok. Steffanie, can you and Gail talk at 11? I have a call at 11 but may be able to join after or can follow up.

From: Solomon, Gail D (JMD)
(b) (6) >
Sent: Wednesday, May 27, 2020 10:27 AM
To: Grieco, Christopher (ODAG)
(b) (6) >; Lee, Steffanie G. (ODAG) (b) (6) >
Cc: Rose, Rebecca (OJP)
(b) (6) >; Toensing, Brady (OLP) (b) (6) >; Flanagan, Cathy (JMD) (b) (6) >
Subject: RE: Updating the 230 Website

I should be available around 11, Chris.

For planning, we'll need to create for you a linking page with text explaining what the PDFs are and we'll need to make sure the PDFs are accessible before posting. As to making the PDFs accessible our team can assist but depending on the size of the files it can take time to do that, unless you're sending us accessible PDFs.

Best,
Gail

Gail D. Solomon | Content Manager, Justice.gov
OCIO | Collaboration and Web Services
(b) (6) (cell)

From: Grieco, Christopher (ODAG)
(b) (6) >
Sent: Wednesday, May 27, 2020 10:21 AM
To: Solomon, Gail D (JMD)
(b) (6) >; Lee, Steffanie G. (ODAG) (b) (6) >
Cc: Rose, Rebecca (OJP)
(b) (6) >; Toensing, Brady (OLP) (b) (6) >; Flanagan, Cathy (JMD) (b) (6) >
Subject: RE: Updating the 230 Website

Document ID: 0.7.2270.8884

When are you free after your 10:30?

This is not for a registration but to upload PDF documents and such that summarize the event.

From: Solomon, Gail D (JMD) [(b) (6)]
Sent: Wednesday, May 27, 2020 10:14 AM
To: Lee, Steffanie G. (ODAG) [(b) (6)]; Grieco, Christopher (ODAG) [(b) (6)]
Cc: Rose, Rebecca (OJP) [(b) (6)]; Toensing, Brady (OLP) [(b) (6)]; Flanagan, Cathy (JMD) [(b) (6)]
Subject: RE: Updating the 230 Website

Hi Steffanie,
Sure we can talk. I have a meeting at 10:30 and then I'm in a training class from 1-4pm.

Is this to reopen the form that was located at https://edit.justice.gov/ag/webform/section-230-workshop-registration? We don't have the fields available any longer if it is to be a registration form so we would need those fields in addition to any updated content for the page.

- Gail

Gail D. Solomon | Content Manager, Justice.gov
OCIO | Collaboration and Web Services
(b) (6) (cell)

From: Lee, Steffanie G. (ODAG) [(b) (6)]
Sent: Wednesday, May 27, 2020 10:08 AM
To: Grieco, Christopher (ODAG) [(b) (6)]; Solomon, Gail D (JMD) [(b) (6)]
Cc: Rose, Rebecca (OJP) [(b) (6)]; Toensing, Brady (OLP) [(b) (6)]
Subject: RE: Updating the 230 Website
Importance: High

+Gail Solomon

Hi Gail, Hope all is well! ODAG and OAG need the Section 230 webpage on justice.gov to be live again as early as tomorrow morning. Do you have a few minutes to talk about getting this up and

Document ID: 0.7.2270.8884

going?

Thanks!

Steffanie Lee
(b) (6)

From: Grieco, Christopher (ODAG)
(b) (6) >
Sent: Wednesday, May 27, 2020 9:46 AM
To: Rose, Rebecca (OJP)
(b) (6) >; Toensing, Brady (OLP) (b) (6) >; Lee, Steffanie G. (ODAG) (b) (6) >
Subject: Updating the 230 Website

Hi all,

We are rapidly approaching having all our materials ready for an update to the 230 website. Currently the website is down, but we will need to a) get it back live again b) upload all our documents and such and c) make sure the link to the workshop video is active. Ideally we could stage all of these things before it went live to the public.

Who do we need to work with to start up the website again and to make changes to the website?

We may need to go live on the website as soon as tomorrow morning, so would like to get started on this.

Thanks

Chris

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Document ID: 0.7.2270.8884

[1] (b) (5) [redacted]

Kupec, Kerri (OPA)

From:	Kupec, Kerri (OPA)
Sent:	Wednesday, June 17, 2020 5:11 PM
To:	Ahern, Bill (OAG); Levi, William (OAG)
Cc:	Watson, Theresa (OAG)
Subject:	Solid coverage of Sec 230
Attachments:	Section 230 Clips.docx

Networks have been covering, too. Strong first wave.

Section 230 Articles:

What is Section 230 of the Communications Decency Act, and why is it under fire? *Fox*
DOJ proposes legislation to hold Big Tech accountable for 'illicit activity' on sites *Fox*
Justice Department recommends new legislation holding Facebook, Google and Twitter liable for some online content *Washington Post*
Justice Dept. Urges Rolling Back Legal Shield for Tech Companies *New York Times*
Trump administration is seeking rollbacks on tech company protections *Associated Press*
DOJ proposes crackdown on tech industry's legal shield *Politico*
Justice Dept. proposes rolling back protections for Facebook, Google *Reuters*
DOJ takes aim at law that shields tech companies from lawsuits over material their users post *CNBC*
Senator wants easier path for lawsuits against tech firms over perceived political bias *Washington Examiner*
Senate Republicans propose Big Tech regulation overhaul *Washington Times*
DOJ to Unveil Recommendations for Curbing Tech Platforms' Section 230 Protections: Report *National Review*
Hawley Proposes Bill to Scale Back Section 230 Protections for Tech Companies with Large Audiences *National Review*
DOJ Plans To Roll Back Tech Monopoly Legal Protections Over Left-Wing Speech Policing *Federalist*
REPORT: DOJ to Propose Rolling Back Big Tech's Legal Immunity *Breitbart*
Hawley Announces Bill Targeting Bad-Acting Tech Companies Hours After Google, NBC Demonetization Dispute Over The Federalist *Daily Caller*
DOJ Asks Congress to Hold Social Media Firms Liable *Crime Report*
Justice Department plans to curb Section 230 protections for internet firms *Apple Insider*
Justice Department proposes rolling back protections for social media platforms *Yahoo*
Justice Department, senators propose reducing tech giants' Section 230 protections *Silicon Angle*

Full Articles:

What is Section 230 of the Communications Decency Act, and why is it under fire? *Fox*
Brian Flood
Section 230 of the Communications Decency Act of 1996 is under a harsh new spotlight in the wake of Google's move to force conservative news site The Federalist to remove its comments section or risk being demonetized, and a new bill would stop tech giants from taking advantage of the controversial piece of legislation.

Document ID: 0.7.2270.5005

Section 230 states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

The section has been pivotal in the rise of today's social media giants by allowing not only Internet service providers – but also Google, Twitter, Facebook, YouTube and others – to be shielded from liability from content posted on their platforms by third parties, in most cases.

But some critics feel that Google should no longer benefit from protections of Section 230 if the tech giant will not extend the same protections to other sites — and Google did not offer those protections to The Federalist.

President Trump also signed an executive order in May that could remove some big tech protections if companies engage in "selective censorship" harmful to national discourse. The order came shortly after Twitter attached fact-check warnings to some of the president's tweets.

"Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike," the executive order stated.

“Critics says Section 230 gives tech companies too much power over what is and is not allowed on their sites. Supporters — including a wide range of Internet companies, free-speech advocates and open-Internet proponents — say that without the law, online communication would be stifled and social media as we know it would cease to exist,” Washington Post's Rachel Lerman wrote last month when reporting the executive order.

Section 230 has many defenders in its current state, and Trump's attempts to alter how social media platforms are regulated have been met with resistance. For example, the Electronic Frontier Foundation calls Section 230 "one of the most valuable tools for protecting freedom of expression and innovation on the Internet."

However, Google's move to force The Federalist to remove its comments section or risk being demonetized has raised new questions.

Google controls the majority of online advertising and essentially has the ability to dictate what media organizations can publish, because they depend on the tech giant for revenue.

“If you’re in the news business, you obey Google. When Google tells you to do something, you do it. You have no choice. They can bankrupt you in a minute,” Fox News' Tucker Carlson explained on Tuesday.

For that reason, critics of Section 230 think Google is the key reason why changes need to take place.
WHAT IS SECTION 230?

“Google makes one of the strongest arguments yet for Section 230 reform,” Federal Communications Commission head Brendan Carr tweeted Tuesday to kick off a series of messages.

Brendan Carr
✓
@BrendanCarrFCC

Document ID: 0.7.2270.5005

Replying to @BrendanCarrFCC
2. Big Tech has long argued that it needs Section 230's unique set of liability protections because websites simply couldn't operate if they were held liable for comments or user-generated posts.

1,510
6:14 PM - Jun 16, 2020
Twitter Ads info and privacy
586 people are talking about this

Brendan Carr
✓
@BrendanCarrFCC
Replying to @BrendanCarrFCC
3. Not so, according to Google's own ad policy!

Google is now holding The Federalist responsible for comments and user-generated posts, and Google will be demonetizing the website as a result.

1,548
6:14 PM - Jun 16, 2020
Twitter Ads info and privacy
607 people are talking about this

Brendan Carr
✓
@BrendanCarrFCC
Replying to @BrendanCarrFCC
4. Google has no problem treating The Federalist as the publisher of comments and user-generated posts on that website for purposes of Google's own ad policy.

Yet Google expends significant resources to protect its own platforms from that type of treatment under Section 230.

1,590
6:48 PM - Jun 16, 2020
Twitter Ads info and privacy
664 people are talking about this

Brendan Carr
✓
@BrendanCarrFCC
Replying to @BrendanCarrFCC
5. This also appears to be an example of established media gatekeepers attempting to regain control of the political narrative - not through persuasion but coercion.

A legacy media outlet lobbied Big Tech to punish a new media competitor.

Document ID: 0.7.2270.5005

1,604
7:00 PM - Jun 16, 2020
Twitter Ads info and privacy
622 people are talking about this

Brendan Carr
✓
@BrendanCarrFCC
Replying to @BrendanCarrFCC
6. For Google, the hypocrisy here is stunning.

It has no problem providing a platform for Communist China propaganda, & it has censored posts the regime wouldn't like.

Yet it draws a line on the comment section of a conservative publication in America.https://twitter.com/brendancarrfcc/status/1265336881564221442?s=21 … https://twitter.com/brendancarrfcc/status/1265336881564221442 …

Brendan Carr
✓
@BrendanCarrFCC
Oopsie. We did a propaganda. https://twitter.com/verge/status/1265331737032364041 …

1,990
7:06 PM - Jun 16, 2020
Twitter Ads info and privacy
1,020 people are talking about this
The latest calls for Section 230 reform came after NBC News reported on Tuesday that Google was allegedly removing two conservative news sites from its ad platform.

NBC News reported that Google was taking action against both The Federalist and ZeroHedge for articles that apparently "pushed unsubstantiated claims" about the Black Lives Matter movement and violated the search engine's policies that forbid the monetization of sites that provide "derogatory content."

The Federalist takes down comments section after Google deems it dangerous and derogatoryVideo
Google insisted however that The Federalist was "never demonetized" and that it was the site's comments section that was in question, not any articles published by the site. ZeroHedge had already been demonetized.

As a result, Sen. Josh Hawley, R-Mo., introduced legislation Wednesday to give Americans the ability to sue major tech companies like Facebook, Google and Twitter if they engage in selective censorship of political speech.

The Limiting Section 230 Immunity to Good Samaritans Act, cosponsored by Sens. Marco Rubio, R-Fla., Mike Braun, R-Ind., and Tom Cotton, R-Ark., would stop such companies from receiving immunity under section 230 of the Communications Decency Act, unless they update their terms of service to promise to operate in good faith.

Document ID: 0.7.2270.5005

“For too long, Big Tech companies like Twitter, Google and Facebook have used their power to silence political speech from conservatives without any recourse for users,” Hawley said in a statement. “Section 230 has been stretched and rewritten by courts to give these companies outlandish power over speech without accountability. Congress should act to ensure bad actors are not given a free pass to censor and silence their opponents.”

The bill would allow users to sue companies for breaching that contractual duty of good faith, and it would make them pay $5,000 plus legal fees to each user who prevails in a case against them.

DOJ proposes legislation to hold Big Tech accountable for 'illicit activity' on sites *Fox*
Andrew O’Reilly and Jake Gibson
The Department of Justice is pushing Congress to pass new legislation that would hold Facebook, Twitter and other tech behemoths accountable for what is posted on their platforms – a move that if passed would roll back protections Silicon Valley has had for decades.

The Justice Department’s proposals, unveiled Wednesday afternoon, want online platforms to better police their sites for illicit and harmful material, and to take a more objective approach in deciding what content they deem objectionable and decide to take down. The DOJ, in a news release, said it was calling for lawmakers to "update the outdated immunity for online platforms" under Section 230 of the Communications Decency Act of 1996.

“These reforms will ensure that Section 230 immunity incentivizes online platforms to be responsible actors,” Attorney General William P. Barr said in a statement. “These reforms are targeted at platforms to make certain they are appropriately addressing illegal and exploitive content while continuing to preserve a vibrant, open, and competitive Internet.

He added: “These twin objectives of giving online platforms the freedom to grow and innovate while encouraging them to moderate content responsibly were the core objectives of Section 230 at the outset."

Section 230 refers to a part of the Communications Decency Act of 1996 that gave tech companies the sweeping protections they currently enjoy. The companies are given a broad ability to monitor their sites as they see fit and are generally not held liable for actions their users take on the sites.

The DOJ’s proposal wants Section 230 to hold tech companies liable for material used in criminal acts like child sex trafficking.

“Criminals and other wrongdoers are increasingly turning to online platforms to engage in a host of unlawful activities, including child sexual exploitation, selling illicit drugs, cyberstalking, human trafficking, and terrorism,” the proposal states.

It continues: “The time has therefore come to realign the scope of Section 230 with the realities of the modern internet so that it continues to foster innovation and free speech but also provides stronger incentives for online platforms to address illicit material on their services.”

The DOJ’s proposal comes as President Trump and many conservative lawmakers in Congress have been sharply critical of the alleged bias by tech companies against right-wing material on their platforms.

Critics call on tech industry to expand diversity among employees and leadershipVideo
Sen. Josh Hawley, R-Mo., introduced legislation Wednesday to give Americans the ability to sue major tech companies like Facebook, Google and Twitter if they engage in selective censorship of political speech.

The Limiting Section 230 Immunity to Good Samaritans Act, cosponsored by Sens. Marco Rubio, R-Fla., Mike Braun, R-Ind., and Tom Cotton, R-Ark., would stop such companies from receiving immunity under section 230 of the Communications Decency Act, unless they update their terms of service to promise to operate in good faith.

“For too long, Big Tech companies like Twitter, Google and Facebook have used their power to silence political speech from conservatives without any recourse for users,” Hawley said in a statement. “Section 230 has been stretched and rewritten by courts to give these companies outlandish power over speech without accountability. Congress should act to ensure bad actors are not given a free pass to censor and silence their opponents.”

Why is big tech censoring Americans who are criticizing China?Video
Trump signed an executive order this month that interprets Section 230 as not providing statutory liability protections for tech companies that engage in censorship and political conduct -- though DOJ officials say the department has been working on the legislative recommendations for months and they are not a direct result of Trump’s order.

"My executive order calls for new regulations under Section 230 of the Communications Decency Act to make it so that social media companies that engage in censoring any political conduct will not be able to keep their liability shield," the president said at the time.

The president's order, which also cuts federal funding for social media platforms that censor users' political views, came after Twitter took the unprecedented step of slapping a "misleading" warning label on two of Trump's tweets concerning the fraud risks of nationwide mail-in balloting.

Tech tools Americans are turning to during the coronavirus pandemicVideo
Some lawmakers, including House Speaker Nancy Pelosi, D-Calif., have already begun pondering rollbacks to Section 230, and a bipartisan group of senators currently is pushing legislation to force Internet companies to take more stringent steps to block online child sexual exploitation in order to qualify for full protection under the provision.

Justice Department recommends new legislation holding Facebook, Google and Twitter liable for some online content *Washington Post*
Tony Romm
The Justice Department on Wednesday urged Congress to adopt new legislation that could punish Facebook, Google and Twitter for a wide array of harmful content posted online, threatening to erode a long-cherished legal immunity that Silicon Valley says is critical to the future of the internet.

The new legislation would target Section 230, a decades-old portion of law that spares social media sites from being held liable for the posts, photos and videos uploaded to their sites by their users. The proposal would pave the way for steep sanctions on major online platforms if they don’t act to remove a range of illicit content, from child exploitation to terrorism, according to Justice Department officials, who spoke on the condition of anonymity Wednesday.

The agency also seeks to force tech giants to be more transparent about their content-moderation decisions and more consistent in their enforcement of them, according to a report the department released Wednesday. The move might offer the U.S. government a new avenue to probe and punish companies over allegations of political bias.

And the new proposal further raises the possibility that tech companies could lose their legal protections if their security practices, including their use of end-to-end encryption, hamstrings law enforcement. Such technology allows only the sender and recipient of a message to view a conversation's content. Tech giants including Facebook increasingly have adopted encryption to protect users' privacy, especially in messaging apps, but Justice Department officials say the technology allows harmful content to evade detection.

For months, Attorney General William P. Barr had teased such recommendations, questioning whether Section 230 had spared "titans" in the tech industry from accountability for their misdeeds. But the department's efforts took on new urgency this month after President Trump signed an executive order that seeks to introduce more government oversight of political speech on the Web.

Trump issued his highly controversial directive out of concern that Facebook, Google and major social media sites are systematically censoring conservatives, a charge that each of those tech giants long has denied. The resulting debate has triggered a groundswell of concern that the White House, Justice Department and other government agencies are pursuing policies that could ultimately threaten free expression online.

Spokesmen for Facebook, Google and Twitter declined to comment. The Internet Association, a Washington-based trade group representing those companies and other online services, sharply rebuked the Justice Department for its proposal.

"Rolling back Section 230 protections will make it harder, not easier, for online platforms to make their platforms safe," Jon Berroya, interim president of the group, said in a statement. "The threat of litigation for every content moderation decision would hamper IA member companies' ability to set and enforce community guidelines and quickly respond to new challenges in order to make their services safe, enjoyable places for Americans."

The Justice Department proposal illustrates Washington's fast-growing, wide-ranging apprehensions about the way Silicon Valley conducts business. Federal regulators in recent years have become more attuned to the dangers posed by large technology companies, including the ways that social media sites can be weaponized to spread harmful, false content at scale.

The agency embarked on its broad review of Big Tech beginning last year, an inquiry that has also included antitrust issues at a time when the government is preparing to file a lawsuit against Google on competition grounds, The Washington Post previously has reported. In hearing from tech companies and critics alike, the Justice Department quickly determined the industry had outpaced one of its own foundational laws.

"The time has therefore come to realign the scope of Section 230 with the realities of the modern internet so that it continues to foster innovation and free speech but also provides stronger incentives for online platforms to address illicit material on their services," the department said in a report issued Wednesday.

With Section 230, however, the agency's proposal rests entirely in the hands of Congress, where the Trump

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administration's actions targeting the tech industry at times have invited more skepticism than support — even among lawmakers who share a belief that Silicon Valley should be more aggressively regulated.

On one hand, Democrats and Republicans alike have found rare accord in attacking Section 230, fearing the decades-old legal shield has outlived its usefulness. Congress adopted the 1990s-era law to spare Internet companies in their infancy from a raft of lawsuits they never would have survived. But the rules now protect some of the most profitable companies in the world from being held liable for some of their missteps, including their failures to crack down on political falsehoods, election disinformation and hate speech.

Such concerns led lawmakers from both parties to unveil a bill that could strip Section 230 protections from companies that fail to crack down on child sexual exploitation online. But their loose consensus on the need for reform often has broken down because of politics, as Trump and his Republican allies allege Facebook, Google and Twitter unfairly target their enforcement actions against right-leaning users and websites. Democrats see the allegations as an attempt to score preferential treatment online in the heat of an election year.

"I've certainly been one of Congress' loudest critics of Section 230, but I have no interest in being an agent of Bill Barr's speech police," said Democratic Sen. Richard Blumenthal (Conn.), one of the authors of bipartisan legislation to reform the law, in a statement Wednesday. "I'm deeply concerned that President Trump and Attorney General Barr are exploiting Big Tech's complicity in human misery to advance their own political agenda."

Trump lashes out at social media companies after Twitter labels tweets with fact checks

Adding to the tensions, Trump signed an executive order this month that could open the door for the U.S. government to assume oversight of political speech on the Web. The president issued the directive days after Twitter took the rare step of labeling one of his tweets as violating its policies.

Lawmakers, conservative advocacy groups, free-speech experts and tech giants blasted Trump for the order, and an organization backed by Facebook and Twitter soon challenged it in federal court as a violation of the First Amendment.

Some Republicans, in contrast, have championed Trump's action and in recent days have sought to further needle the industry. A new bill sponsored by Sen. Josh Hawley (R-Mo.) would open the door for Web users to sue Facebook, Google and Twitter for wrongly taking down their content online, the senator announced Wednesday.

Justice Dept. Urges Rolling Back Legal Shield for Tech Companies *New York Times*
Cecilia Kang
WASHINGTON — The Justice Department released recommendations on Wednesday to pare back the legal shield for online platforms that has been crucial to their growth since the earliest days of the internet, taking a direct shot at companies like Facebook, Twitter and YouTube that have come into the cross hairs of the Trump administration.

In a 25-page recommendation, the agency called on lawmakers to repeal parts of a law that has given sites broad immunity from lawsuits for words, images and videos people have posted on their services.

The changes to the law, Section 230 of the Communications Decency Act of 1996, would put the onus on

social media and other online platforms to more strongly police harmful content and conduct while also being consistent about their moderation.

The Justice Department proposal, reported earlier by The Wall Street Journal, is a legislative plan that would have to be adopted by Congress. It adds to growing calls in Washington, from elected officials of both parties, to change Section 230.

Last month, President Trump signed an executive order to limit protections for online platforms. Joe Biden, the presumptive Democratic nominee for president, has criticized the law before, too. On Capitol Hill, Republicans have become increasingly critical of Facebook, Google and Twitter for abusing the safe harbor to take down content that employees disagree with, including conservative views.

The size of the largest tech companies, the agency said in its recommendation, "has raised valid questions of whether those large tech companies still require the blanket immunity of Section 230 provided to the nascent internet industry."

The tech industry criticized the agency's proposal on Wednesday as a political ploy meant to aid Mr. Trump's battle against social media firms. Mr. Trump announced his social media executive order after Twitter labeled his tweets last month for violating the company's rules against voter suppression and the glorification of violence.

Internet companies say they are already liable to some degree for criminal content and a reinterpretation of the 1996 legislation would constrain their ability to moderate harmful and problematic third-party content without fear of more liability.

"This is a coordinated attack by the administration against tech businesses to sidestep the First Amendment," said Carl Szabo, vice president of the tech lobbying organization NetChoice.

The Justice Department recommendation is part of a sweeping review of big tech announced last July by Attorney General William P. Barr. As part of that review, the agency is expected to bring an antitrust monopolization case against Google in the coming months.

The proposal is based on a 10-month investigation into online platforms and their record on monitoring and ridding sites of harmful content, including child exploitation and pornography. Earlier this year, Mr. Barr also instructed his staff to review Section 230, which was created to help encourage the growth of internet start-ups. In February, Mr. Barr held a daylong workshop focused on how to revise the law.

"A driving motivation behind our broader perspective, including Section 230, is the need for the department's enforcement efforts to keep up with rapidly changing technological landscape around us," Mr. Barr said at the February event. "No longer are tech companies the underdog upstarts; they have become titans of U.S. industry."

The law generally shields websites from legal action for images, text and videos posted by users. The law also gives the website broad immunity for taking down that material.

The agency's proposal, if passed by Congress, would open the door to civil lawsuits for posts with illegal and harmful content. It explicitly calls for an end to immunity on the most egregious content online, such as child

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exploitation and abuse, terrorist content and cyberstalking.

The agency's proposal would also put greater scrutiny on the moderation of content, the focus of Mr. Trump's complaints. He and other Republicans have accused Twitter, Google and Facebook of suppressing and removing the materials of conservative public figures and media outlets. The agency proposes to strike language in the law that allows platforms to take down a broad array of "otherwise objectionable" content.

The Justice Department said in its recommendation that technology has become essential to society and that several online platforms have become the nation's biggest and most valuable companies. It proposed reforms that would bar the biggest tech platforms from using Section 230 speech protections in its defense in antitrust cases.

Their use of sophisticated algorithms for targeting and connecting users and a broad interpretation of the law by courts have "reduced the incentives of online platforms to address illicit activity on their services and, at the same time, left them free to moderate lawful content without transparency or accountability," the agency said in its report.

Trump administration is seeking rollbacks on tech company protections *Associated Press*
Michael Balsamo, and Marcy Gordon
The Justice Department is proposing that Congress roll back legal protections for online platforms such as Facebook, Google and Twitter that generally could not be held legally responsible for what people post on the sites.

The proposed changes to Section 230 of a major telecommunication overhaul from 1996 come weeks after President Donald Trump signed an executive order challenging the protections that have served as a bedrock for unfettered speech on the internet.

Companies such as Twitter and Facebook are granted liability protection under the Communications Decency Act because they are treated as "platforms," rather than "publishers," which can face lawsuits over content. Without that shield, companies could face lawsuits from people who feels wronged by something someone else has posted.

One of the administration's requests is that Congress strip the civil immunity protections for tech companies that may be complicit in unlawful activity on their platforms, according to a Justice Department official. For example, the proposal would remove the legal protection if an online platform purposefully solicited third parties to sell illegal drugs to minors, exchange sexually explicit photos or video of children or engage in other criminal activity, the official said.

The official was not authorized to discuss the matter publicly before the formal announcement and spoke on condition of anonymity.

The department said its proposals are aimed "at incentivizing platforms to address the growing amount of illicit content online, while preserving the core of Section 230's immunity for defamation."

The administration contends that the broad immunity should not apply to companies that don't "respect public safety by ensuring its ability to identify unlawful content or activity occurring on its services," according to a department memo obtained by the AP.

"Further, the provider must maintain the ability to assist government authorities to obtain content (i.e., evidence) in a comprehensible, readable, and usable format pursuant to court authorization (or any other lawful basis)," the document says.

DOJ proposes crackdown on tech industry's legal shield *Politico*
Leah Nylen, Betsy Woodruff Swan
The Justice Department proposed a major update Wednesday to the law that shields internet companies from liability for content on their sites — a move that is even broader than President Donald Trump's attempts to hold platforms like Twitter and Facebook to account for decisions found to be politically biased.

DOJ's proposal, which would need Congress' blessing, would address a wide range of criticisms of the protections that digital companies have enjoyed under Section 230 of the Communications Decency Act, a 1996 law that has been critical to the online industry's wealth and power.

Among the changes: Sites or platforms that facilitate third-party content that violates federal law would no longer be able to claim immunity from lawsuits. Users could sue companies in cases that involve child sexual abuse, terrorism and cyberstalking. It also would be easier for users to sue over platforms' decisions to take down their content, a change intended to push companies to be more fair in removing content they find objectionable.

The Justice Department also proposed changes to clarify that companies can't use Section 230 to get out of civil suits by the federal government, or antitrust suits.

Dozens of lawmakers of both parties have expressed concerns about the broad protections given to internet firms under Section 230, though they disagree what aspects are problematic and how it should be fixed.

The Clinton-era legal shield has been heralded as the law that helped build the internet, but Attorney General Bill Barr and others have raised questions about the scope of the law and whether tech companies have used Section 230 to absolve themselves of responsibility for policing their platforms. Trump and his presumptive Democratic rival, former Vice President Joe Biden, have both called for Congress to repeal Section 230 entirely — though for much different reasons.

In February, the Justice Department held a workshop on Section 230 where prominent critics of the law outlined how companies have avoided liability for posts that allegedly aided terrorism, sex trafficking and revenge porn.

Last month, Trump signed an executive order targeting social media companies that he accuses of censoring conservative viewpoints. The order came after Twitter posted fact-checks on his tweets. An industry-funded tech nonprofit has challenged the order's constitutionality.

The proposal unveiled Wednesday is intended both as a follow-up to the February workshop and a response to Trump's executive order. DOJ has submitted a proposed bill to the Office of Management and Budget, which will consult with other Trump administration agencies before sending the legislation to Congress, a senior DOJ official said.

The Wall Street Journal initially reported Wednesday that the DOJ was offering the legislative proposal.

Sens. Lindsey Graham (R-S.C.) and Richard Blumenthal (D-Conn.) in March unveiled their own legislation that would remove digital firms' legal immunity over users' posts if they fail to prove they are doing enough to curtail sexual exploitation of children online.

Justice Dept. proposes rolling back protections for Facebook, Google *Reuters*
Diane Bartz and Alexander Alper
WASHINGTON – The U.S. Justice Department proposed on Wednesday that Congress take up legislation to curb protections that big tech platforms like Alphabet's Google and Facebook have had for decades, a senior official said, following through on U.S. President Donald Trump's bid to crack down on tech giants.

The goal of the proposal, which is being finalized, is to push tech companies to address criminal content on their platforms and boost transparency for users when the outlets take down lawful material, the senior Justice Department official said, speaking on condition of anonymity. But to become law, U.S. lawmakers would need to propose and approve legislation based on the department's recommendations.

The president, who has battled Twitter and other tech companies over alleged censorship of conservative voices on social media platforms, said in late May he would propose legislation that may scrap or weaken the law shielding internet companies, in an extraordinary attempt to regulate the outlets where he has been criticized.

Trump wants to "remove or change" a provision of a law known as Section 230. Under the 1996 Communications Decency Act, Section 230 does not generally hold platforms responsible for what their users post and allows them to moderate the content of their sites as they see fit.

The Wall Street Journal first reported the proposal.

Trump has attacked Twitter for tagging his tweets about unsubstantiated claims of fraud about mail-in voting with a warning prompting readers to fact-check the posts.

The White House welcomed news of the Justice Department proposal. "The president expressly called on DOJ to develop such model legislation in the Executive Order signed recently, and yes, President Trump is pleased to see the department following through," said White House spokesman Judd Deere.

Google, Facebook and Twitter did not immediately respond to requests for comment.

Carl Szabo, general counsel of NetChoice which counts Google and Facebook among its members, said any such bill would make it harder for companies like Google, which owns YouTube, to moderate content to remove, for example, videos used to recruit terrorists.

"Because this would prevent platforms from removing objectionable content, the House (of Representatives) won't take it up," he said.

Also on Wednesday, Senator Josh Hawley joined with three other Republicans to introduce a bill that would allow people to sue tech companies if they feel that their speech has been censored.

DOJ takes aim at law that shields tech companies from lawsuits over material their users post *CNBC*
Lauren Feiner

The Department of Justice is taking aim at tech's liability shield with a new set of legislative proposals released Wednesday.

The proposed reforms are the latest action aiming to weaken legal protection established through Section 230 of the Communications Decency Act, a 1990s-era law. The statute protects online platforms, such as Facebook, Twitter and Google's YouTube, from being held liable for content their users post on their sites, and also allows them to moderate content in good faith.

The DOJ's proposed reforms, which would have to be passed by Congress to go into effect, would limit the broad protections Section 230 typically provides to the tech industry.

Platforms could lose immunity if they facilitate or solicit federal criminal activity, like trafficking illicit drugs. It would also create carve-outs for child exploitation, terrorism and cyberstalking, holding tech companies accountable for taking action on such content.

The proposal also would make clear that Section 230 protections cannot be used to dispute antitrust claims, a significant statement as the Justice Department is reportedly preparing an antitrust suit against Google for as soon as this summer. Facebook has also disclosed an antitrust investigation by the Federal Trade Commission.

"Changing significantly ... the balance of responsibilities and provisions about liability in Section 230 would, in our view, mean less speech of all kinds appearing online," said Nick Clegg, Facebook's vice president of global affairs and communications, in a call with reporters on Wednesday afternoon.

It's unclear how much support the proposals will gain in Congress. Both Republicans and Democrats have argued that Section 230, which was initially envisioned as a way to protect upstart tech companies from a deluge of lawsuits, now appears outdated as it protects powerful companies worth hundreds of billions of dollars.

But while Democratic concerns have focused more on holding companies accountable for keeping users safe, Republicans have also placed emphasis on alleged censorship of conservative voices. Tech companies have repeatedly denied that they censor political speech, but instances where they have removed posts in error have fueled such criticism.

Sen. Mark Warner, D-Va., a former venture capitalist and a frequent critic of Section 230, said in a statement to CNBC that he is wary of reforms brought by the Trump administration.

"While I believe reform of this outdated law is needed, I have serious concerns that under the supervision of Attorney General Barr this effort has been politicized and will be used by the Trump Administration to cow platforms into allowing Trump, dark money groups, and right-wing militias to continue to exploit their tools to sow disinformation, engage in targeted harassment, and suppress voter participation," Warner said.

Earlier on Wednesday, Sen. Josh Hawley, R-Mo., another leading critic of Big Tech and Section 230, introduced a new bill that would require platforms to promise to act in good faith in their terms of service. That would open tech companies up to potential lawsuits from users claiming breaches of contract.

The move follows Trump's executive order
Last month, President Donald Trump signed an executive order instructing the Federal Communications

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Commission to write rules regulating how social media companies can remove content from their sites while maintaining Section 230 immunity, and encouraging the Federal Trade Commission to take action against companies engaging in “deceptive” acts of communication.

At the time, Attorney General Bill Barr indicated the DOJ would seek to sue social media companies and said Section 230 “has been stretched way beyond its original intention.” Barr held a forum at the DOJ earlier this year, inviting experts to weigh in on potential reform of the law. He told a gathering of the National Association of Attorneys General in December that the department was “studying Section 230 and its scope.”

A White House spokesperson said in a statement that “President Trump is pleased to see the department following through” on legislation modeled after the executive order.

Without legislative reform, little is likely to change. Courts have consistently upheld Section 230 protections under current law. Bills aiming to amend the law have already drawn tremendous pushback from the tech industry, which claims that cracking down on Section 230 will ultimately stifle speech, since platforms will have to remove any content that might leave them open to legal repercussions.

The tech industry has also pointed out that Section 230 already allows tech companies to be held criminally liable for illegal activity. But the DOJ’s proposal would allow victims of online scams or child exploitation, for example, to pursue civil action against a platform if they believe the company had knowledge of the illegal activity and did not take steps to remove it.

Congress did successfully introduce reform to Section 230 in 2018 with the passage of FOSTA-SESTA. The pair of bills from the House and Senate aimed to crack down on online sex trafficking by creating a carve-out to Section 230 immunity for ads promoting sex work. While the bills gained wide support in Congress at the time, they have been criticized by sex worker advocates for making their livelihood less safe by removing websites where they would vet potential clients.

Senator wants easier path for lawsuits against tech firms over perceived political bias *Washington Examiner*
Kerry Picket
Sen. Josh Hawley wants people to be sue big tech companies he says are selectively censoring political speech and hiding content created by their competitors.

The Missouri Republican's bill, introduced Wednesday, would forbid big tech firms from receiving immunity unless they update their terms of service to promise to operate in good faith and pay a $5,000 fine if they violate that promise. That immunity is enshrined in a 1996 telecommunications law known as Section 230.

“For too long, Big Tech companies like Twitter, Google and Facebook have used their power to silence political speech from conservatives without any recourse for users," said Hawley, a frequent tech industry critic, in a statement. "Section 230 has been stretched and rewritten by courts to give these companies outlandish power over speech without accountability. Congress should act to ensure bad actors are not given a free pass to censor and silence their opponents.”

The legislation by Hawley, elected to the Senate in 2018 after two years as Missouri's attorney general, is co-sponsored by Republican Sens. Mike Braun of Indiana, Tom Cotton of Arkansas, and Marco Rubio of Florida.

Nonprofits seek permanent tax break from pandemic emergency measure

The senators crafted the legislation in the wake of an NBC News report that said Google was banning the Federalist from its advertising platform as a result of claiming the tech giant was profiting from false narratives about the Black Lives Matter demonstrations.

According to NBC, the Federalist, as well as the conservative financial blog Zero Hedge, violated Google's protocols on race-related content. While Google cut Zero Hedge's ability to generate revenue through Google Ads, the Federalist was forced by Google to remove its comments section in order to maintain its monetization agreement through Google Ads.

Senate Republicans propose Big Tech regulation overhaul *Washington Times*
Ryan Lovelace
Senate Republicans seek to strip protections shielding Big Tech companies from lawsuits unless the companies change their terms of service to agree to operate in good faith and to pay a $5,000 fine if they fail to live up to the agreement.

Section 230 of the Communications Decency Act has long afforded Big Tech companies shelter from legal liability from material posted by users on their platform.

The Limiting Section 230 Immunity to Good Samaritans Immunity Act was introduced by Sen. Josh Hawley, Missouri Republican, on Wednesday and had three GOP cosponsors: Sens. Mike Braun of Indiana, Tom Cotton of Arkansas, and Marco Rubio of Florida.

"For too long, Big Tech companies like Twitter, Google, and Facebook have used their power to silence political speech from conservatives without any recourse for users," Mr. Hawley said in a statement. "Section 230 has been stretched and rewritten by courts to give these companies outlandish power over speech without accountability. Congress should act to ensure bad actors are not given a free pass to censor and silence their opponents."

The proposal does not eliminate Section 230 protections completely, which some Big Tech allies have feared may still happen. Mr. Rubio said in a statement that he thinks Section 230 still serves an important purpose, but it should not be weaponized as a tool of political censorship and activism.

The Justice Department is also preparing to release a proposal of how it wants to limit Section 230. The department is looking to roll back civil immunity to tech companies across several different circumstances, including those that host third-party content involving online scammers and trafficking in illicit drugs, the Wall Street Journal reported.

The competing visions of Big Tech regulation have emerged in response to President Trump's recent social media executive order. Mr. Trump's order directed the Federal Communications Commission to draft regulation that could scrap legal liability protections for Big Tech companies if they censor or edit content online.

Mr. Trump's order also took aim at Section 230, which the president said was necessary to restore fairness online.

DOJ to Unveil Recommendations for Curbing Tech Platforms' Section 230 Protections: Report *National Review*
Tobias Hoonhout

The Justice Department will unveil a legislative plan as soon as Wednesday to limit Section 230 protections for tech companies in the wake of President Trump's executive order and Google's publicized threat to ban ad revenue to The Federalist, according to the Wall Street Journal.

According to an unnamed DOJ official, the legislative package will include provisions that could strip protections under Section 230, which exempts social-media companies from civil liability for third-party content containing false or misleading information.

The official said that if platforms "facilitate or solicit" third-party content that violates federal criminal law, such as online scams, drug or sex trafficking, online child exploitation, terrorism, or cyberstalking, they would lose protections to "allow victims to seek redress."

The proposal also aims to force platforms to adhere to "reasonable rules and explanations" in policing content and potential violations, and will target politically biased content-moderation by revising a federal provision that allows tech platforms to delete content based merely on an "objectionable" standard.

The news comes after Google threatened to ban conservative outlet The Federalist from generating advertising revenue on the company's platform over materials in its comments section that Google deemed "dangerous or derogatory content." After The Federalist was forced to delete its comments section to comply, Google said the matter was "resolved."

The threat came after NBC News contacted Google and flagged a report on hate speech and disinformation from a British think tank called the "Center for Countering Digital Hate" (CCDH). The reporter from NBC's "Verification Center" who broke the story then congratulated the CCDH and its subsidiary project "Stop Funding Fake News" on the action.

In May, sources told the Journal that the DOJ is planning an antitrust lawsuit against Google that could be launched as soon as this summer.

Last month, Trump signed an executive order that challenged protections for social-media companies, and asked Attorney General Bill Barr to "develop a proposal for Federal legislation that would be useful to promote the policy objectives of this order."

At the unveiling of the order, Barr warned that while platforms "held themselves out as free public forums, where a variety of diverse voices can come on and be heard," they "have become these very powerful networks…they've now switched, and [are] using that market power to force particular viewpoints." The comments came after he told DOJ colleagues in February that "valid questions have been raised on whether Section 230's broad immunity is still necessary, at least in its current form."

Hawley Proposes Bill to Scale Back Section 230 Protections for Tech Companies with Large Audiences
National Review
Zachary Evans
Senator Josh Hawley (R., Mo.) is proposing legislation that would set conditions for big tech companies to receive Section 230 immunity, Axios reported on Wednesday.

The proposal comes less than a day after Google threatened to demonetize the right-wing political news website

The Federalist unless the site removed its comments section.

The legislation would require tech companies with over 30 million U.S. users per month, and an annual worldwide income of over $1.5 billion, to publish all of their content moderation policies and publicly pledge to act in "good faith" in accordance with those policies. Users who charge that the companies are not implementing content moderation policies fairly would be able to sue for $5,000 plus attorney fees.

Hawley, who has previously floated revoking Section 230 immunity entirely, was joined by co-sponsors Marco Rubio (R., Fla.), Mike Braun (R., In.) and Tom Cotton (R., Ark.).

Section 230 of the Communications Decency Act provides tech platforms with immunity for libelous or misleading content posted by a third party.

President Trump and conservative lawmakers have threatened to revoke this immunity following a string of instances in which tech companies were perceived to be unfairly limiting right-wing content through editorial actions like fact-checking.

Trump signed an executive order demanding a review of Section 230 by the Federal Communications Commission, after Twitter placed a fact-check label on a tweet-thread by the president. Cotton revealed on Wednesday that Twitter had threatened to delete his account after the senator called for "no quarter" for looters and rioters taking advantage of George Floyd demonstrations. Twitter claimed that some users may have interpreted Cotton's words as a call to shoot demonstrators — an interpretation that Cotton claims is implausible.

The Justice Department will soon release a legislative plan to curb Section 230 immunity on social media companies, the Wall Street Journal reported Wednesday.

DOJ Plans To Roll Back Tech Monopoly Legal Protections Over Left-Wing Speech Policing *Federalist*
Jordan Davidson
The Justice Department announced plans Wednesday to make legislative recommendations for changes to the legal protections surrounding big tech companies.

The decision comes just a day after Google Ads attempted to demonetize The Federalist over "race based content" and just a month after President Trump signed an executive order with intentions to curb the cut back on the protections after alleged censorship of conservative news outlets. Attorney General William Barr, according to the Wall Street Journal, also "has repeatedly voiced concerns about online-platform immunity."

According to the WSJ, the proposal "would remove legal protections when platforms facilitate or solicit third-party content or activity that violates federal criminal law, such as online scams and trafficking in illicit or counterfeit drugs" and rescind monetary damage immunity from companies that knowingly allow illicit activity to continue. It would also ensure that companies "don't have immunity in civil-enforcement actions brought by the federal government, and can't use immunity as a defense against antitrust claims that they removed content for anticompetitive reasons."

Despite claims by many tech companies that Section 230 of the Communications Decency Act, the section that grants them protection, is necessary, the proposal's goal "would be to require platforms to adhere to their terms of service as well as their public claims about their practices. Platforms also would have to provide reasonable

explanations of their decisions."

Lawmakers in Congress are already examining ways to crack down on big tech censorship. On Wednesday, Sen. Joshua Hawley (R-M0.) along with Sens. Marco Rubio, Mike Braun, and Tom Cotton debuted new legislation that would allow "users who believe the provider is not 'operating in good faith' by consistently and fairly applying its content rules could sue for $5,000 and attorneys' fees."

REPORT: DOJ to Propose Rolling Back Big Tech's Legal Immunity *Breitbart*
Allum Bokhari
The Department of Justice is preparing proposals to roll back the legal immunities enjoyed by Big Tech companies under Section 230 of the Communications Decency Act (CDA), in measures that will be announced as early as Wednesday, sources told the Wall Street Journal.

The Justice Department is set to propose a rollback of legal protections that online platforms have enjoyed for more than two decades, in an effort to make tech companies more responsible in how they police their content, according to a Trump administration official.

Section 230 gives Big Tech companies immunity from lawsuits arising from user-generated content. If a person is defamed on Google, YouTube, Facebook, Instagram, Twitter, or other big tech platforms like Reddit, those platforms are not legally liable for the content like a traditional publisher might be. This allows social media platforms to host billions of posts from users without a potentially crippling legal risk.

As Big Tech platforms have grown increasingly interested in censoring content posted by their users, however, many lawmakers have argued that they are behaving like traditional publishers, censoring and editing and approving their users' posts. As such, a growing number of lawmakers have argued that the legal immunities of Section 230 should be contingent on platforms maintaining a hands-off approach to the speech of their users.

Another problematic element of Section 230 is subsection c-2, which grants tech companies immunity from lawsuits arising from their censorship of "objectionable" content. This immunity gives them broad leeway to censor users, leaving no legal recourse for those who are censored — even if their social media accounts are critical to their livelihood or career.

However, according to the Wall Street Journal, the Justice Department's proposals go beyond merely addressing the question of censorship:

The department's proposal, for instance, would remove legal protections when platforms facilitate or solicit third-party content or activity that violates federal criminal law, such as online scams and trafficking in illicit drugs. The department also wouldn't confer immunity to platforms in instances involving online child exploitation and sexual abuse, terrorism or cyberstalking. Those carve-outs are needed to curtail immunity for internet companies to allow victims to seek redress, the official said.

The Justice Department also will seek to make clear that tech platforms don't have immunity in civil-enforcement actions brought by the federal government, and can't use immunity as a defense against antitrust claims that they removed content for anticompetitive reasons.

According to the report, it also appears that the Justice Department won't try to strip tech companies of their immunity for censoring "objectionable" content, instead aim to spur Big Tech to be "fairer and more consistent

in their decisions to take down content they find objectionable."

Hawley Announces Bill Targeting Bad-Acting Tech Companies Hours After Google, NBC Demonetization Dispute Over The Federalist *Daily Caller*
Mary Margaret Olohan
Republican Missouri Sen. Josh Hawley announced Wednesday that he is introducing a bill aimed at fighting bad-acting tech companies hours after Google threatened a conservative publication with demonetization.

The Limiting Section 230 Immunity to Good Samaritans Act, cosponsored by Republican Sens. Marco Rubio of Florida, Mike Braun of Indiana and Tom Cotton of Arkansas, would prevent big tech companies from receiving Section 230 immunities unless the companies updated their terms of service, promised to operate in good faith and promised to pay a $5,000 fine if they violated their promise.

"For too long, Big Tech companies like Twitter, Google and Facebook have used their power to silence political speech from conservatives without any recourse for users," Hawley said in a statement. "Section 230 has been stretched and rewritten by courts to give these companies outlandish power over speech without accountability. Congress should act to ensure bad actors are not given a free pass to censor and silence their opponents."

Hawley's announcement came a day after Google threatened to ban The Federalist and ZeroHedge from its ad platform, Google Ads, after NBC News published a story saying that Google had banned both The Federalist and ZeroHedge. (RELATED: In Scramble Amid Backlash, NBC, Google Both Release Contradictory Messages)

Google alerted The Federalist that Google was planning to block the news site from using Google Ads over a Federalist article on protests following the death of George Floyd, according to NBC's report.

Google Communications
✓
@Google_Comms
The Federalist was never demonetized.

3,016
5:00 PM - Jun 16, 2020
Twitter Ads info and privacy
3,245 people are talking about this
Floyd was a black man who died after a Minneapolis police officer knelt on his neck for several minutes, video of the incident showed. Derek Chauvin, the officer, was fired and arrested on second-degree murder and manslaughter charges.

NBC's story initially caused backlash, but raised even more questions after Google disputed the claim that The Federalist had already been demonetized from the Google Ads platform — though the NBC story had quoted a Google spokesperson who said that both ZeroHedge and The Federalist had been demonetized. (RELATED: Google To Ban Ads On The Federalist After NBC News Raises Concerns About George Floyd Protest Articles)

“To be clear, The Federalist is not currently demonetized,” a Google spokesperson confirmed to the Daily Caller News Foundation on Tuesday. “We do have strict publisher policies that govern the content ads can run on, which includes comments on the site. This is a longstanding policy.”

NBC has since reworded the top half of its story. The latest version of the article includes two statements: the first saying that Google removed “removed both sites’ ability to monetize with Google” and the second saying that “Google backtracked” and that The Federalist “has three days to remove the violations before the ban goes into effect.”

DOJ Asks Congress to Hold Social Media Firms Liable *Crime Report*
The Justice Department is asking Congress to enact legislation that would hold Facebook, Google and Twitter liable for a wide array of content posted online, eroding a long-cherished legal immunity that Silicon Valley says is critical to the future of the internet, the Washington Post reports. DOJ is proposing sweeping changes to the law, known as Section 230, on Wednesday, after President Donald Trump signed an executive order that sought to introduce more government oversight of political speech on the web out of concern that Facebook, Twitter and major social-media sites are politically biased against conservatives. in February, Attorney General William Barr said tech firms had failed to crack down on terrorist content, child exploitation and illicit drug sales, areas the DOJ’s recommendation is expected to address.

Democrats and Republicans alike have found rare accord in attacking Section 230, saying the decades-old legal shield has outlived its usefulness. The law, adopted to spare tech companies in their infancy from a raft of lawsuits they never would have survived, now protects some of the most profitable companies in the world from liability. Democrats say the law effectively allows Facebook, Google, Twitter and a wide array of sites to skirt accountability for allowing political falsehoods, election disinformation, hate speech and other harmful content to go viral. Republicans have focused on perceived political censorship against conservatives, possibly undermining a loose consensus on a need to reform federal law. Tech-industry critics have challenged Trump’s orders in federal court as a violation of the First Amendment.

Justice Department plans to curb Section 230 protections for internet firms *Apple Insider*
William Gallagher
Social media, internet firms, and forum hosts could lose key immunity protection under new proposed legislation changes suspected to be announced soon by the US Justice Department.

Following President Trump's Executive Order intended to limit long-held legal protections for social media and internet companies, including Apple, the Justice Department is now expected to propose legislature.

According to the Wall Street Journal, the department is very shortly to announce reforms that would make technology firms more legally responsible for the content that users post on them.

As with the Executive Order, the proposed new legislation focuses primarily on Section 230 of the Communications Decency Act of 1996. Among other considerations, Section 230 broadly says that technology firms are required to police their own online sites. The proposal of the modification to Section 230 doesn't alter that, but rather, more stringently enforces the requirement to do so.

There is already a bipartisan investigation into whether the Section 230, which was written in the earliest days of the internet, is still adequate or relevant. That investigation is broadly concerned with whether Section 230

facilitates online child abuse, but the Department of Justice's plans are believed to be more specific.

The Wall Street Journal reports that a key aim of the Department of Justice legislation plans is to prevent technology firms from being able to arbitrarily remove content that users have posted. It isn't clear how this reported Department of Justice angle dovetails with the stated goals of the modification, which would require more stringent moderation to keep legal protections of Section 230.

President Trump's Executive Order is similarly focused on the technology firms' rights to remove or edit content. However, it specifically argues that such companies should be regarded as publishers. The reclassification would remove the Section 230 protections, and require the FCC to investigate removal of content as potential censorship — but that reclassification would require modifications to Section 230.

Neither the President nor the Department of Justice may unilaterally change Section 230. Any modifications to the law would need to get the full approval of the House and Senate, and signed into law by the President.

There have been bipartisan rumblings about altering Section 230 for the last decade, but the proposals so far have been scattershot. Proposals have ranged from a light-touch modification, to wholesale repeal.

At present, it isn't clear how much bipartisan support that the Department of Justice proposal has, nor is it clear if the Wall Street Journal has all of the details correct.

Justice Department proposes rolling back protections for social media platforms *Yahoo*
Allison Matyus
The U.S. Department of Justice (DOJ) has proposed rolling back the protections that social media platforms and tech companies have — a move that could make them legally responsible for what people post on their platforms.

These changes seek to make social media platforms like Facebook and Twitter better address content on their sites when it comes to what is acceptable and what should be taken down, according to the policy document released Wednesday.

Conservatives have long alleged that major tech companies are biased against their voices; tech giants like Facebook and Google have denied these claims.

The DOJ proposal specifically cites the protections of Section 230 in the Communications Decency Act of 1996, which prevent tech companies from being held civilly liable for content their users post.

“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, left them free to moderate lawful content without transparency or accountability,” the proposal reads. “The time has, therefore, come to realign the scope of Section 230 with the realities of the modern internet so that it continues to foster innovation and free speech but also provides stronger incentives for online platforms to address illicit material on their services.”

The proposal would scale back some of the protections these platforms have, including making them more responsible for third-party content and requiring them to be fair and consistent with what kind of content is taken down. Platforms would have to provide reasonable explanations for their decisions.

The DOJ has requested that companies no longer be allowed to remove "otherwise objectionable" content from their sites. Instead, tech companies would only be able to remove content if it was "obscene, lewd, lascivious, filthy, excessively violent, harassing" or if it violated federal law or promoted violence or terrorism.

The plan would strictly define Section 230's "good faith" requirement, saying that platforms must have clear terms of use and must abide by those terms of use, and that any content that is removed must fit within the more stringent definition of what can be moderated. It also says that platforms must provide notice to the user explaining why their content was moderated.

Earlier today, a group of Republican senators also introduced limitations on Section 230 via the Limiting Section 230 Immunity to Good Samaritans Act. The proposed bill would allow users who don't believe that a platform is "operating in good faith," by being inconsistent and unfair with what content is acceptable or taken down, to sue these companies for $5,000 plus attorneys' fees.

Both of these proposed limitations and changes come on the heels of President Donald Trump signing an executive order last month to remove the protections of Section 230 in the Communications Decency Act of 1996.

Section 230 says: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

Trump's executive order resulted from Twitter attaching a fact-check message to Trump's tweet about how a mail-in ballot system would promote voter fraud, and was seen by some critics as retaliation against tech companies that had moderated his comments.

Justice Department, senators propose reducing tech giants' Section 230 protections *Silicon Angle*
Maria Deutscher
The U.S. Department of Justice and senator Josh Hawley today introduced legislative proposals that aim to restrict the legal protections afforded to tech giants under Section 230.

Section 230 is a statute in the Communications Decency Act, a piece of legislation dating back to the 1990s, that limits internet companies' liability over content posted to their services by users. It allows social networks and others to remove content without fear of being sued if they believe it to be "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable."

The legislation submitted by Senator Hawley, which was made public shortly before the Justice Department's proposals, would limit the scope of Section 230 protections. It's called the Limiting Section 230 Immunity to Good Samaritans Act.

The bill would require companies to operate in "good faith" to be shielded from lawsuits related to their content moderation policies. Under the proposal, a firm such a social network wouldn't be considered to be acting in good faith if it engages in "intentionally selective enforcement" of its terms of service when it comes to removing content. In such situations, users would be allowed to sue for up to $5,000 plus attorney fees.

Hawley's bill appears to take direct aim at tech giants, with the proposed rules only applying to services with more than 30 million monthly users in the U.S. or 300 million worldwide, plus at least $1.5 billion in global

revenue. The proposal is also sponsored by senators Marco Rubio, Mike Braun and Tom Cotton.

The Section 230 reforms that the Justice Department introduced today have a similar focus. The Justice Department is asking Congress to limit internet companies' lawsuit protection under Section 230 to moderation decisions they make in "good faith," a definition that requires content removals to closely align with a service's terms of service.

The Justice Department is pushing for additional changes as well. Among other things, it wants Congress to codify that Section 230 protections can't be used to dispute antitrust claims, like those the Justice Department is reportedly considering to bring against Google. Officials are also seeking to remove the term "otherwise objectionable" from the portion of Section 230 that affords companies protections for removing content they find to be "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable."

There's considerable doubt about the prospects for such changes, however, as some observers say it could unleash a flood of frivolous lawsuits and others claiming it's little more than a Republican attempt to limit the spread of liberal and progressive ideas.

From: Kupec, Kerri (OPA) [(b) (6)]>
Sent: Wednesday, June 17, 2020 3:10 PM
To: Clark, Melissa D. (PAO) [(b) (6)]>
Cc: Lloyd, Matt (PAO) [(b) (6)]>; Herlihy, Brianna (PAO) [(b) (6)]>
Subject: Need round-up of Section 230 clips

Would be great to have them between 5 and 6 pm. Thanks!

Document ID: 0.7.2270.5005

Kupec, Kerri (OPA)

From:	Kupec, Kerri (OPA)
Sent:	Wednesday, June 17, 2020 5:32 PM
To:	Willard, Lauren (OAG)
Cc:	Herlihy, Brianna (PAO)
Subject:	FW: Solid coverage of Sec 230
Attachments:	Section 230 Clips.docx

Duplicative Information - See Document ID 0.7.2270.5005

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Wednesday, June 17, 2020 5:33 PM
To:	Kupec, Kerri (OPA)
Cc:	Herlihy, Brianna (PAO)
Subject:	RE: Solid coverage of Sec 230

Thanks to you both for all the great work!! (Hopefully Brianna can get some sleep soon ☺)

From: Kupec, Kerri (OPA) (b) (6) >
Sent: Wednesday, June 17, 2020 5:32 PM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Herlihy, Brianna (PAO) (b) (6) >
Subject: FW: Solid coverage of Sec 230

Duplicative Information - See Document ID 0.7.2270.6148

Levi, William (OAG)

From:	Levi, William (OAG)
Sent:	Wednesday, June 17, 2020 5:41 PM
To:	Willard, Lauren (OAG); Barnett, Gary (OAG)
Subject:	RE: Solid coverage of Sec 230

Fantastic. Thanks for all the hard work on this.

From: Willard, Lauren (OAG) (b) (6) >
Sent: Wednesday, June 17, 2020 5:34 PM
To: Levi, William (OAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >
Subject: FW: Solid coverage of Sec 230

FYI. Good press as far as I can tell.

From: Kupec, Kerri (OPA) (b) (6) >
Sent: Wednesday, June 17, 2020 5:32 PM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Herlihy, Brianna (PAO) (b) (6) >
Subject: FW: Solid coverage of Sec 230

Duplicative Information - See Document ID 0.7.2270.6148

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Friday, June 19, 2020 12:06 AM
To:	Toensing, Brady (OLP)
Subject:	Fwd: call this morning
Attachments:	5 - 2020-05-29 FB Petition for Writ of Mandamus.pdf; ATT00001.htm; 6 - 2020-05-29 FB Motion for Temporary Relief.pdf; ATT00002.htm; 7 - Response_to_Mandamus_in_Facebook_20-0434.pdf; ATT00003.htm; 8 - Response_to_Facebook_s_Motion_for_Temporary_Relief_No_20-0434.pdf; ATT00004.htm

FYI

Sent from my iPhone

Begin forwarded message:

From: "Annie McAdams" <annie@mcadamspc.com>
To: "Willard, Lauren (OAG)" (b) (6) >
Cc: "TeamAMC" <TeamAMC@mcadamspc.com>
Subject: RE: call this morning

My apologies for the late reply. Attached please find: Facebook's Mandamus to the Texas Supreme Court, Facebook's Motion for Stay, Jane Doe's Reply to the Mandamus, and Jane Doe's Reply to the Motion to Stay.

All of this simply on the pleadings and our client's right to have this case heard in state court. Of course, we would be humbly welcome any amicus assistance.

Annie McAdams

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From: Willard, Lauren (OAG) (b) (6) >
Sent: Thursday, June 18, 2020 10:35 AM
To: Annie McAdams <annie@mcadamspc.com>
Cc: TeamAMC <TeamAMC@mcadamspc.com>
Subject: call this morning

Hi Annie,

Did you still have time to chat this morning. Let me know if you are having any problems with the dial-in.

Document ID: 0.7.2270.7449

Best,
Lauren

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

Document ID: 0.7.2270.7449

No. _____

In the Supreme Court of Texas

IN RE FACEBOOK, INC. and FACEBOOK, INC. d/b/a INSTAGRAM,
Relator.

Original Proceeding from Cause Nos. 2018-69816 & 2018-82214,
334th District Court, Harris County, Texas, and
Cause No. 2019-16262, 151st District Court, Harris County, Texas

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PETITION FOR WRIT OF MANDAMUS

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Document ID: 0.7.2270.7449-000001

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Online Sex Trafficking and the Communications Decency Act: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary, Serial No. 115-43, 115th Cong. (2017) 6, 19

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Tex. R. Civ. P. 91a 6

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STATEMENT OF THE CASE

Nature of the Case: Three Jane Doe plaintiffs allege that online predators contacted them on Facebook or Instagram and lured them into sex trafficking through communications via messaging functions on those platforms. MR1–44; MR444–516, MR849–93. Plaintiffs assert identical state-law claims for negligence, gross negligence, products liability, and violations of section 98.002 of the Texas Civil Practice and Remedies Code. MR32–36; MR499–503; MR882–87.

Facebook moved to dismiss plaintiffs' claims under Rule 91a based on section 230 of the Communications Decency Act, 47 U.S.C. § 230 (App. E), which (1) grants interactive computer service providers—like Facebook—immunity from suits seeking to hold providers liable for content communicated, posted, or generated by third parties, and (2) expressly preempts state-law actions that would impose such liability. Facebook cited hundreds of cases holding that claims like these—seeking to hold interactive computer service providers liable for third-party content—are barred by section 230.

Trial Court: Hon. Steven Kirkland, 334th District Court, Harris County (Cause Nos. 2018-69816 & 2018-82214).

Hon. Mike Engelhart, 151st District Court, Harris County (Cause No. 2019-16262).

Course of Proceedings: Judge Kirkland denied Facebook's motions to dismiss in Cause Nos. 2018-69816 & 2018-82214. App. A–B. Judge Engelhart similarly denied Facebook's motion to dismiss in Cause No. 2019-16262, except that he dismissed plaintiff's products-liability claim on other grounds. App. C.

Facebook sought mandamus relief in the court of appeals on October 25, 2019, and November 1, 2019. The Fourteenth Court denied relief in a four-paragraph, per curiam memorandum opinion joined by Justices Spain and Poissant; Justice Christopher dissented and would have granted the writ. *In re Facebook, Inc*., 2020 WL 2037193 (Tex. App.—Houston [14th Dist.] Apr. 28, 2020) (App. D).

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STATEMENT OF JURISDICTION

This Court has jurisdiction under Texas Government Code § 22.002(a). This petition previously was presented to the Fourteenth Court of Appeals at Houston, which denied relief. *See* Tex. R. App. P. 52.3(e).

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ISSUE PRESENTED

Federal law extends "broad immunity" to interactive computer services like Facebook "for all claims stemming from their publication of information created by third parties." *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (Clement, J.) (citing 47 U.S.C. § 230(c)(1), (e)(3)). The issue presented is:

Did the trial courts clearly abuse their discretion—and leave Facebook with no adequate remedy at law—by denying Facebook's motions to dismiss, where section 230 affords Facebook immunity from suit that would be irretrievably lost by delaying review until after trial?

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INTRODUCTION

The internet provides virtually limitless opportunities for communication, education, and commerce. But like anything else, it is subject to abuse—including, tragically, by online child predators. Both state and federal law provide mechanisms to ensure that predators can be held accountable and victims can obtain justice.

To ensure that interactive computer service providers such as Facebook are not subject to protracted litigation over claims related to content created by third parties, Congress granted providers *immunity from suit*—not merely a defense to liability. *See* 47 U.S.C. § 230. Unless courts give effect to the immunity from suit provided by section 230 at the earliest stage of litigation, that immunity will be irretrievably lost.

Absent mandamus relief, that is exactly what will happen here—a result that is contrary to the plain text of the statute, the overwhelming weight of precedent construing it, and Congress's sound policy considerations in enacting it. Section 230 required the trial courts to dismiss plaintiffs' suits because each suit necessarily depends on content allegedly communicated and posted by third parties through Facebook's platforms. But the trial courts below refused to do so, and the court of

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appeals failed to correct their error. Justice Christopher dissented, "urg[ing] [this] Court to review these cases" because "Facebook has federal statutory immunity from these suits." 2020 WL 2037193, at *1 (Christopher, J., dissenting).

Hundreds of courts throughout Texas and across the nation—including the Fifth Circuit—have dismissed materially indistinguishable suits based on section 230 immunity. This Court should grant the petition, issue the writ, and restore uniformity to Texas law on this exceedingly important, nationwide issue of statutory construction and statutory immunity.

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STATEMENT OF FACTS

I. Statutory background

In 1996, Congress enacted section 230 of the Communications Decency Act, which grants immunity to interactive computer service providers against state-law claims that would impose liability based on third-party content posted on or communicated through the services. *See* 47 U.S.C. § 230 (b)(1)–(2) ("It is the policy of the United States—(1) to promote the continued development of the Internet and other interactive computer services and other interactive media; [and] (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").

Section 230 implements Congress's legislative policy judgments in two ways. First, it immunizes interactive computer services from claims seeking to hold them liable for content generated or communicated by third parties:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230(c)(1).

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Second, to enforce this broad immunity, section 230 bars all suits that seek to hold providers liable for third-party content:

> No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

47 U.S.C. § 230(e)(3).

Congress took this step because, in its judgment, "[i]t would be impossible for service providers to screen each of their millions of postings for possible problems," and "[f]aced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

Congress also wanted to encourage service providers to make efforts to control or prevent harmful content on their platforms without the fear of liability if those efforts proved imperfect. *See Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (Congress sought to "remove disincentives for the development and utilization of blocking and filtering technologies"); *accord Zeran*, 129 F.3d at 331 (Congress was concerned that "the specter of liability" would "deter service providers from blocking and screening offensive material").

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Courts construing section 230 have held that it applies broadly to search engines like Google and Yahoo!;[1] email and private messaging services like those offered by Twitter, Facebook, and Google;[2] and social networking sites like Facebook, Instagram, MySpace, and Twitter.[3]

In 2018, Congress enacted the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA).[4] FOSTA expressly exempts three specific types of lawsuits from section 230 immunity:

> (1) civil suits for facilitating sex trafficking under the existing federal sex-trafficking statutes, 18 U.S.C. §§ 1591, 1595;
>
> (2) state criminal prosecutions for sex trafficking where the conduct alleged would also violate 18 U.S.C. § 1591; and
>
> (3) *parens patriae* enforcement actions by state attorneys general under 18 U.S.C. § 1595.

See 47 U.S.C. § 230(e)(5).

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[1] *See*, *e.g.*, *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1268 (D.C. Cir. 2019); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102–03 (9th Cir. 2009).

[2] *See*, *e.g.*, *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1127–29 (N.D. Cal. 2016) (direct messaging), *aff'd on other grounds*, 881 F.3d 739 (9th Cir. 2018); *Mitan v. A. Neumann & Assocs., LLC*, 2010 WL 4782771, at *4 (D.N.J. Nov. 17, 2010) (email); *accord Beyond Sys., Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 528, 536–37 (D. Md. 2006) (private messaging).

[3] *See*, *e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 68 (2d Cir. 2019); *Franklin v. X Gear 101, LLC*, 2018 WL 4103492, at *7 (S.D.N.Y. Aug. 28, 2018) (Instagram); *MySpace*, 528 F.3d at 422; *Crosby v. Twitter, Inc.*, 921 F.3d 617, 627 n.7 (6th Cir. 2019).

[4] Pub. L. No. 115-164, 132 Stat. 1253 (2018).

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Congress considered—but rejected—also exempting state-law civil suits like the suits here. *See* H.R. 1865 § 3(a)(2)(C), 115th Cong. (as introduced in House, Apr. 3, 2017). Congress rejected that approach because it wanted a "uniform national policy" rather than a "patchwork of 50 different laws."[5]

II. Factual background

In Cause No. 2018-69816, Jane Doe alleges that in 2012, when she was 15, an adult stranger sent her a "friend" request on Facebook and thereafter exchanged messages with her on Facebook's messaging service. MR27–28.[6] He made false promises of financial security and a better life through modeling, and then invited her to meet him offline. MR28. He then raped and beat her, and ultimately forced her into sex trafficking. MR29.

In Cause No. 2018-82214, Jane Doe alleges that in 2017, when she was 14, a stranger "friended" her on Instagram and then used Instagram's messaging service to make false promises of love and a better

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[5] *Online Sex Trafficking and the Communications Decency Act: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary*, Serial No. 115-43, 115th Cong. 7, 9 (2017).

[6] The facts that follow are plaintiffs' allegations, which are "taken as true" for purposes of Facebook's Rule 91a motions. Tex. R. Civ. P. 91a.

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future to lure her into an offline meeting. MR474. Thereafter, assailants forced her into sex trafficking, posted her for sale online using partially nude photographs of her, arranged dates, and sexually exploited her. MR475, 498. After she was rescued from trafficking, her traffickers continued using her Instagram profile to traffic others. MR475.

In Cause No. 2019-16262, Jane Doe alleges that in 2016, when she was 14, a stranger "friended" her on Instagram and exchanged messages with her via Instagram's messaging service. MR877–78. He convinced her to meet him in person and then raped, abused, and trafficked her. MR878–79.

The petitions acknowledge that Facebook takes a variety of measures to block content related to explicit material, sexual exploitation, and human trafficking;[7] blocks users who post sexually explicit content;[8] reports instances of abuse to the National Center for Missing and Exploited Children and responds to subpoenas from law enforcement;[9] has rules prohibiting abusive content, including content that exploits minors;[10]

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[7] MR4–5, 12; MR450, 457; MR853–54, 861.

[8] MR5; MR450; MR854.

[9] MR4, 12; MR449–50, 457; MR853, 861.

[10] MR14–15; MR459–61; MR863–64.

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and takes a number of other special precautions to protect minors.[11] Plaintiffs nonetheless allege that Facebook should have done more—for example, by providing additional warnings, adding more robust parental controls, and taking other, similar measures. MR22–24; MR469–71; MR872–73.

Plaintiffs asserted five state-law causes of action against Facebook:

(1) negligently failing to warn of or prevent online sex trafficking;

(2) gross negligence for the same conduct;

(3) intentionally or knowingly benefiting from participation in a sex-trafficking venture under Texas Civil Practice & Remedies Code § 98.002;

(4) negligently undertaking to provide warnings and employing inadequate screening features; and

(5) strict products liability for providing defective warnings.

MR32–36; MR499–503; MR882–87.

Facebook moved to dismiss each petition under Rule 91a, relying on section 230 immunity. The motions were denied by both trial courts. App. A–C.[12]

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[11] MR9; MR455; MR858–59.

[12] Although plaintiffs have amended their petitions since Facebook filed its motions to dismiss, Facebook cites plaintiffs' live petitions because none of those amendments affects Facebook's requested relief—dismissal of the claims against

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Facebook sought mandamus relief and, on April 28, 2020, a Fourteenth Court panel majority issued a four-paragraph, per curiam memorandum opinion denying relief, stating only that "Facebook has not established that it is entitled to mandamus relief." 2020 WL 2037193, at *1 (Spain and Poissant, JJ.).

Justice Christopher dissented, explaining that "these suits have no basis in law, and dismissal under Texas Rule of Procedure 91a is proper," because section 230 "grants Facebook immunity from suits such as these." *Id.* at *1 (Christopher, J., dissenting) ("I urge the Texas Supreme Court to review these cases.").

MANDAMUS STANDARD

"[M]andamus is proper when the trial court has abused its discretion by committing a clear error of law for which appeal is an inadequate remedy." *In re Ford Motor Co.*, 211 S.W.3d 295, 297–98 (Tex. 2006). A "trial court has no 'discretion' in determining what the law is or

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Facebook as barred by section 230. While Facebook's Rule 91a motions were pending in the 334th Court, plaintiffs in Cause Nos. 2018-69816 and 2018-82214 filed amended petitions adding negligence and strict-liability failure-to-warn claims. *Compare* MR94–98, *and* MR499–503, *with* MR159–62, *and* MR567–68. These claims were addressed by the court in its order denying Facebook's motion. MR391, 794. In early 2020 (after mandamus briefing closed in the Fourteenth Court), plaintiffs dismissed their claims against other defendants—in Cause No. 2018-82214 by non-suit and, in Cause Nos. 2018-69816 and 2019-16262, by amendment. MR1–44; MR847–93.

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applying the law to the facts"—such as when it construes a statute's plain text. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004).

Appeal is an inadequate remedy where requiring the defendant to stand trial and await review until after final judgment would effectively defeat immunity from suit. *CSR Ltd. v. Link*, 925 S.W.2d 591, 599 (Tex. 1996) ("cases involving sovereign immunity" appropriate for mandamus relief); *In re Perry*, 60 S.W.3d 857, 862 (Tex. 2001) (granting writ to correct erroneous denial of legislative immunity); *Marshall v. Wilson*, 616 S.W.2d 932, 934 (Tex. 1981) (same where statute immunized defendant from collateral litigation). As the U.S. Supreme Court has explained, immunity from suit "is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

ARGUMENT

Section 230 requires dismissal of lawsuits like plaintiffs' that seek to impose liability on interactive computer services for harmful content posted or communicated on their platforms by third parties. The Fifth Circuit, hundreds of other courts nationwide, and virtually every court in Texas all agree: Artful pleading cannot defeat section 230's plain language. Mandamus is needed to correct the clear abuse of discretion

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by the courts below in misapplying the law and failing to dismiss these cases as section 230 requires. *See In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (courts lack discretion to disregard the law).

Absent mandamus, the legal error below will effectively destroy Facebook's statutory immunity from suit and leave it without an adequate appellate remedy. *See In re Geomet Recycling LLC*, 578 S.W.3d 82, 91 (Tex. 2019). The whole purpose of immunity from suit is to protect against having to litigate a case at all. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009) ("Section 230 immunity . . . is generally accorded effect at the first logical point in the litigation process" because "*immunity from suit* . . . is effectively lost if a case is erroneously permitted to go to trial") (quoting *Mitchell*, 472 U.S. at 526).

Indeed, erroneously "compelling a [defendant] to proceed to trial . . . will generally constitute irreparable injury not because of the expense of litigation, but because of the irretrievable loss of immunity from suit." *McSurely v. McClellan*, 697 F.2d 309, 317 n.13 (D.C. Cir. 1982) (Scalia and Wald, JJ.). That is why this Court grants mandamus relief when immunity precludes a plaintiff's suit. *See*, *e.g.*, *In re Essex Ins. Co.*, 450

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S.W.3d 524, 528 (Tex. 2014); *In re Schmitz*, 285 S.W.3d 451, 459 (Tex. 2009). It should do so here, not only to preserve Facebook's statutory immunity, but also to restore uniformity to Texas law on a recurring, important question of statutory construction that impacts the ability of the internet to continue functioning as we know it.

I. The trial courts clearly abused their discretion by not dismissing these lawsuits, which are barred by statutory immunity.

The plain text of section 230, the legislative policies it furthers, and the overwhelming weight of authority (including Fifth Circuit precedent) compel the conclusion that the trial courts clearly abused their discretion by not dismissing these lawsuits.

A. Section 230's plain text grants Facebook immunity from suit.

Section 230's plain text makes clear that it immunizes interactive computer services from *suit*, not just from *liability*: "'No cause of action may be brought,' [section 230] says, 'and no liability may be imposed under any State or local law,' for any claim that purports to treat an 'interactive computer service' 'as the publisher or speaker of any information provided' by someone else." *O'Kroley v. Fastcase, Inc.*, 831 F.3d 352, 354–55 (6th Cir. 2016) (Sutton, J.) (quoting 47 U.S.C. § 230(c), (e)(3)).

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Plaintiffs' state-law claims against Facebook are therefore barred. There is no dispute that Facebook is a "provider" of "an interactive computer service." 47 U.S.C. § 230(f)(2); *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) ("Facebook qualifies as an interactive computer service because it is a service that provides information to 'multiple users' by giving them 'computer access . . . to a computer server.'") (alteration in original) (quoting 47 U.S.C. § 230(f)(2)). And plaintiffs seek to hold Facebook liable for "information provided by another information content provider"—*i.e.*, the messages written and sent by the online predators. 47 U.S.C. § 230(c)(1), (f)(3) ("information content provider" means "any person" "responsible" "for the creation" of "information provided through" an "interactive computer service").

A suit seeking to hold Facebook liable for transmitting messages generated by third parties is precisely what section 230 was enacted to prohibit—and artful pleading cannot overcome the statute's plain language. 2020 WL 2037193, at *1 (Christopher, J., dissenting) ("artful pleading . . . should not prevail over the statute"); *MySpace*, 528 F.3d at 420 ("seek[ing] to hold MySpace liable for its failure to implement measures that would have prevented [plaintiff] from communicating with

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[an online predator] . . . [is] merely another way of claiming that MySpace was liable for publishing the communications").

"Congress provided broad immunity" in section 230, the Fifth Circuit has explained, and courts have consistently "construed the immunity provisions in [section] 230 broadly." *MySpace*, 528 F.3d at 418; *see also Klayman*, 753 F.3d at 1359. And courts "aim to resolve the question of [section] 230 immunity at the earliest possible stage of the case because that immunity protects websites not only from 'ultimate liability,' but also from 'having to fight costly and protracted legal battles.'" *Nemet Chevrolet*, 591 F.3d at 255.[13]

The Fifth Circuit's *MySpace* decision is closely on point. There, the plaintiff alleged that her minor daughter was contacted on MySpace, lured into meeting a child predator offline, and then sexually assaulted. 528 F.3d at 416. Just like plaintiffs here, the MySpace plaintiff alleged that

[13] Cases granting section 230 dismissals are legion—including decisions from twelve different U.S. Courts of Appeals. *See*, *e.g.*, *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 415 (1st Cir. 2007); *Herrick v. Grindr LLC*, 765 F. App'x 586, 591 (2d Cir. 2019); *Green v. Am. Online (AOL)*, 318 F.3d 465, 468 (3d Cir. 2003); *Nemet Chevrolet*, 591 F.3d at 252–53 (4th Cir.); *MySpace*, 528 F.3d at 415 (5th Cir.); *O'Kroley*, 831 F.3d at 354 (6th Cir.); *Chi. Lawyers' Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2008); *Johnson v. Arden*, 614 F.3d 785, 787, 792 (8th Cir. 2010); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1265–66 (9th Cir. 2016); *Getachew v. Google, Inc.*, 491 F. App'x 923, 925–26 (10th Cir. 2012); *Dowbenko v. Google Inc*, 582 F. App'x 801, 803 (11th Cir. 2014); *Klayman*, 753 F.3d at 1355 (D.C. Cir.).

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the service provider "failed to implement basic safety measures to prevent sexual predators from communicating with minors on its Web site." *Id.*

In an opinion authored by Judge Clement and joined by Judges Elrod and Garwood, the Fifth Circuit affirmed the dismissal of the case on the pleadings, ruling that section 230 extends "broad immunity" "to Web-based service providers for all claims stemming from their publication of information created by third parties." *Id.* at 418. "Parties complaining that they were harmed by a Web site's publication of user-generated content have recourse," the court explained—"they may sue the third-party user who generated the content, but not the interactive computer service that enabled them to publish the content online." *Id.* at 419.

The court rejected the plaintiff's attempt to avoid that result by arguing that her claims extended only to MySpace's failure to implement safety measures, noting that her theory was "merely another way of claiming that MySpace was liable for publishing the communications." *Id.* at 420.

So too here. There is no allegation that Facebook's involvement extends beyond providing a means for third-party users to communicate

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with one another—activity squarely protected by section 230. And no discovery will change that outcome. Holding a provider liable for *failing to prevent* third-party communications is indistinguishable from holding it liable *for the content* of those communications. *See id.* Section 230 bars both claims—each "derives from [the provider's] role as a publisher" and is therefore "prohibited by [section] 230(c)(1), no matter how artfully pled." *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 726 (Wis. 2019).

B. The overwhelming weight of authority supports dismissal based on statutory immunity.

The failure to dismiss these lawsuits (and the court of appeals' refusal to correct that legal error) creates an untenable conflict with over twenty decisions by state and federal courts throughout Texas—including three decisions by Texas courts of appeals and one by the Fifth Circuit.[14] None of these decisions allowed a lawsuit based on third-party

[14] *MySpace*, 528 F.3d at 420; *see Davis v. Motiva Enters., L.L.C.*, 2015 WL 1535694, at *4–5 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (affirming Rule 91a dismissal based on section 230); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 760–61 (Tex. App.—Beaumont 2014, pet. denied); *Milo v. Martin*, 311 S.W.3d 210, 215–18 (Tex. App.—Beaumont 2010, no pet.); *see also Gartner v. Amazon.com, Inc.*, 2020 WL 1896703, at *8 (S.D. Tex. Jan. 7, 2020); *Takhvar v. Page*, 2018 WL 4677808, at *2 (E.D. Tex. Feb. 25, 2018), *adopted by* 2018 WL 4677799 (E.D. Tex. Mar. 6, 2018); *Inge v. Walker*, 2017 WL 4838981, at *4 (N.D. Tex. Oct. 26, 2017); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 995 (S.D. Tex. 2017); *Wiswell v. VerticalScope, Inc.*, 2012 WL 13136295, at *5 n.7 (W.D. Tex. Aug. 1, 2012); *Int'l Cotton Mktg., Inc. v. Commodity Credit Corp.*, 2009 WL 10705346, at *5 (N.D. Tex. June 15, 2009); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663, 664–65 (E.D. Tex. 2009); *GW Equity LLC v. Xcentric*

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content to proceed despite section 230's broad statutory immunity. The only decision allowing such a suit to proceed was reversed on interlocutory review. *See GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752 (Tex. App.—Beaumont 2014, pet. denied).

In addition to the Fifth Circuit's *MySpace* decision, courts across the nation consistently have dismissed state-law suits against interactive computer service providers based on third-party content—including claims involving drugs, weapons, and sex trafficking. *See Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019) (citing cases); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18–24 (1st Cir. 2016); *Doe II v. MySpace Inc.*, 96 Cal. Rptr. 3d 148, 149–50 (Ct. App. 2009); *see also supra* note 13 (citing cases). Mandamus is needed to correct the failure to dismiss the claims here, too.

Ventures LLC, 2009 WL 62173, at *13 (N.D. Tex. Jan. 9, 2009); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 849–50 (W.D. Tex. 2007); *Doe v. Bates*, 2006 WL 3813758, at *4–5 (E.D. Tex. Dec. 27, 2006); *Prickett v. InfoUSA, Inc.*, 561 F. Supp. 2d 646, 652 (E.D. Tex. 2006); *Cisneros v. Sanchez*, 403 F. Supp. 2d 588, 593 (S.D. Tex. 2005); *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, 2004 WL 833595, at *10 (N.D. Tex. Apr. 19, 2004).

Some of the Texas cases address procedural issues rather than the merits. *See, e.g.*, *A.R.K. v. La Petite Acad.*, 2018 WL 2059531, at *2–3 (W.D. Tex. May 2, 2018) (section 230 insufficient to support federal jurisdiction); *R.L. Lackner, Inc. v. Sanchez*, 2005 WL 3359356, at *3 (S.D. Tex. Dec. 9, 2005) (same); *Edwards v. Wyatt*, 2009 WL 10669430, at *6–7 (W.D. Tex. July 6, 2009) (section 230 immunity subject to waiver if not timely raised).

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C. FOSTA confirms that section 230 bars plaintiffs' claims.

Plaintiffs argued below that the 2018 FOSTA amendments allow claims like theirs. But if anything, FOSTA makes even clearer that plaintiffs' claims are barred.

FOSTA created three express exemptions from section 230 for three specific types of actions—federal civil actions, state criminal prosecutions, and state attorney-general actions—but left undisturbed section 230's broad immunity from state-law civil suits. 47 U.S.C. § 230(e)(5); *see supra* notes 4–5 & accompanying text.

None of those exemptions applies here. Congress carefully enumerated specific categories of exempt claims—but did *not* include state-law civil suits like those here, which is a clear indication that Congress did not exempt such claims. *See Law v. Siegel*, 571 U.S. 415, 424 (2014) (Scalia, J.) (Congress's "meticulous . . . enumeration of exemptions and exceptions . . . confirms that courts are not authorized to create additional exceptions").

Were that not enough, Congress expressly considered—and *rejected*—an earlier version of FOSTA that *would* have exempted state-law civil suits from section 230's scope. *See* H.R. 1865 § 3(a)(2)(C).

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Instead, Congress adopted uniform national standards to avoid a "patchwork" of state laws and state-law claims. *See* H.R. Serial No. 115-43 at 7, 9 (cited *supra* note 5).

As the U.S. Supreme Court has explained, when "Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23–24 (1983); *accord INS v. Cardozo-Fonseca*, 480 U.S. 421, 442–43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.").

In sum, FOSTA allows claims that plaintiffs either could not or did not bring here—*i.e.*, claims by state prosecutors and civil claims under the federal sex-trafficking statutes. It did not alter section 230's prohibition on the claims plaintiffs did bring.

II. Facebook has no adequate appellate remedy.

Absent mandamus relief, Facebook's immunity from suit will be permanently lost. A successful appeal after discovery and trial will come far too late. *See McSurely*, 697 F.2d at 317 n.13 (Scalia and Wald, JJ.)

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(forcing a defendant "to proceed to trial . . . will generally constitute irreparable injury not because of the expense of litigation, but because of the irretrievable loss of immunity from suit").

The whole point of section 230's "[n]o cause of action may be brought" language is to protect interactive computer service providers like Facebook *from suit*. *Nemet Chevrolet*, 591 F.3d at 254–55. Forcing Facebook to litigate plaintiffs' claims is squarely contrary to Congress's purpose in providing broad immunity from suit—and at this stage can be avoided only through mandamus relief from this Court. *See id.* ("Section 230 immunity . . . is generally accorded effect at the first logical point in the litigation process" because "*immunity from suit* . . . is effectively lost if a case is erroneously permitted to go to trial").

As this Court and others have recognized, statutory immunity from suit embodies a legislative policy judgment—relieving defendants of the burden of *litigation* altogether. *E.g.*, *Zeran*, 129 F.3d at 330 ("Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. . . . Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the

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medium to a minimum."). As the U.S. Supreme Court has stressed, the refusal to enforce immunity from suit is effectively unreviewable on appeal from final judgment—"it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526.

Where, as here, trial courts refuse to enforce statutory immunity, mandamus is not just an appropriate remedy—it is the *only* remedy. *See Perry*, 60 S.W.3d at 859–62; *Marshall*, 616 S.W.2d at 934. As this Court has explained, the "most frequent use we have made of mandamus relief involves cases in which the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved." *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 465 (Tex. 2008). Granting relief in such cases "spare[s] private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." *In re Hou. Specialty Ins. Co.*, 569 S.W.3d 138, 142 (Tex. 2019).

Facebook has been forced to litigate these cases for the past eighteen months—contrary to the plain text of section 230 and the overwhelming weight of authority interpreting it. Federal law bars these lawsuits, and waiting for relief until after a trial and final judgment will deprive Facebook of the very immunity that section 230 provides.

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PRAYER

Facebook respectfully requests that the Court issue a writ of mandamus directing the trial courts to dismiss plaintiffs' claims against it.

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Dated: May 29, 2020

Respectfully submitted,

/s/ Allyson N. Ho

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COUNSEL FOR RELATOR

* Motion for admission *pro hac vice* forthcoming.

Document ID: 0.7.2270.7449-000001

RULE 52.3(j) CERTIFICATE OF COMPLIANCE

I have reviewed this petition and concluded that every factual statement is supported by competent evidence included in the appendix or record. *See* Tex. R. App. P. 52.3(j).

/s/ *Allyson N. Ho*
Allyson N. Ho

RULE 9.4(i) CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2), I certify that this petition contains 4,474 words, excluding the portions exempted by Rule 9.4(i)(1).

/s/ *Allyson N. Ho*
Allyson N. Ho

Document ID: 0.7.2270.7449-000001

CERTIFICATE OF SERVICE

I certify that, on May 29, 2020, a true and correct copy of the foregoing petition for writ of mandamus was served via electronic service on all counsel of record.

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/s/ *Allyson N. Ho*
Allyson N. Ho

Document ID: 0.7.2270.7449-000001

No. _____

In the Supreme Court of Texas

IN RE FACEBOOK, INC. and FACEBOOK, INC. d/b/a INSTAGRAM,
Relator.

Original Proceeding from Cause Nos. 2018-69816 & 2018-82214,
334th District Court, Harris County, Texas, and
Cause No. 2019-16262, 151st District Court, Harris County, Texas

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APPENDIX TO PETITION FOR WRIT OF MANDAMUS

APPENDIX INDEX

Tab	Mandamus Record (if applicable)	Document
A	MR390–392	Order Denying Facebook's Rule 91a Motion in Cause No. 2018-26918, 334th District Court
B	MR793–795	Order Denying Facebook's Rule 91a Motion in Cause No. 2018-82214, 334th District Court
C	MR1521	Order Granting in Part and Denying in Part Facebook's Rule 91a Motion in Cause No. 2019-16262, 151st District Court
D	—	Court of Appeals Opinion, *In re Facebook, Inc.*, Nos. 14-19-00845-cv, 14-19-00847-cv, 14-19-00886-cv, 2020 WL 2037193 (Tex. App.—Houston [14th Dist.] Apr. 28, 2020)
E	—	47 U.S.C. § 230 (2018)

Document ID: 0.7.2270.7449-000001

TAB A

Document ID: 0.7.2270.7449-000001

NO. 2018-69816

Jane Doe	§	**IN THE DISTRICT COURT OF**
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
Facebook, Inc; et al	§	**334th JUDICIAL DISTRICT**

NO. 2018-82214

Jane Doe,	§	**IN THE DISTRICT COURT OF**
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
Facebook, Inc., dba Instagram, Inc. et al	§	**334th JUDICIAL DISTRICT**

Order

Defendant Facebook seeks dismissal of these two cases pursuant to 91a of the Texas Rules of Civil Procedure. This motion is one of several procedural preliminary hurdles that the parties advise will be filed and argued in these cases prior to full litigation of the underlying claims. While a ruling in Facebook's favor may end the case for Facebook, a ruling for the Plaintiffs only allows the case to proceed to the next level.

Rule 91a requires dismissal of a claim if the action "has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle a claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded." Tex. R. Civ. P. 91a.1. The Court may not consider evidence, but only the allegations in the petition and arguments of counsel in their motions and responses. At this stage, Facebook is not arguing the facts, but rather claims it is not liable to the Plaintiffs because of the immunity granted internet service providers under Section 230 of the Federal Communications Decency Act, 47 U.S.C. § 230 (the "Act").

47 USC § 230(c)(1) provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." In 2018, Congress added exclusions to this broad grant of immunity to ensure that sex trafficking laws were not impacted. The parties debate the extent of the exclusions.

The parties do not dispute that Facebook is an interactive computer service as defined in the statute at 47 § USC 230(f)(2). The question presented to the Court is

Document ID: 0.7.2270.7449-000001

whether the claims raised by Plaintiffs treat Facebook as the publisher or speaker of information provided by another.

Plaintiffs have brought causes of action sounding in negligence, gross negligence and statutory damages under the Texas Civil Practice and Remedies Code Chapter 98, which allows for damages from persons who engage in trafficking or knowingly or intentionally benefit from such traffic. Plaintiffs contend that Facebook facilitates and/or was used by predators to find, groom, target, recruit and kidnap children into the sex trade. Plaintiffs allege that Facebook profits from the collection of data and the use of the data to target and promote interactions between Facebook users. These interactions include minors and sexual predators. Each of the Plaintiffs are victims of human trafficking to whom Plaintiffs contend Facebook owes a variety of duties which have been breached leading to the Plaintiffs being victimized in human trafficking. Plaintiffs contend they are not seeking to impose liability for the publication of the third party communications, but rather they seek to impose liability for Facebook's independent actions or failure to act, specifically failure to warn, negligence in undertaking to protect potential victims of sex trafficking, and for knowingly facilitating and benefiting from the sex trade.

Facebook contends that all of Plaintiffs' claims turn entirely on the communications Plaintiffs had with malicious third parties. Because Plaintiffs' injuries are dependent on those communications, Facebook contends they are all barred by the immunity granted internet service providers under the Act.

The language of the statute is broad and both parties have cited cases that support their positions. Facebook points to the broad grants of immunity articulated in *Zeran v. America Online Inc.* 129 F.3d 327 (4th Cir. 1997) (republishing defamation) and *Doe v. MySpace, Inc.* 528 F.3d 413 (5th Cir. 2008) (negligence—failure to implement safety measures), among others. Plaintiffs points to the more narrow immunity recognized in *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016) (ISP not immune to failure to warn claim) and *Huon v. Denton*, 841F.3d 733 (7th Cir. 2016) (ISP not immune to defamation in content it generated).

While the injuries presented in the 9th and 5th Circuit cases are similar to those presented in this case, the failure to warn cause of action presented in this case mirrors that presented in the 9th Circuit case. None of the cases deal with the statutory cause of action pled in this case, and all of the cases pre-dated the amendments adopted in 2018.

The few Texas cases that have addressed the issue come out of the Beaumont Court of Appeals and none of these deal with the same causes of action or facts as are presented in this case. See *Milo v. Martin*, 311 S.W.3d 210 (Tex. App.—Beaumont 2010, no pet.) (defamation); *GoDaddy.com LLC v. Toups*, 429 S.W.3d 752 (Tex. App.—Beaumont 2014, pet. denied) (intentional infliction of emotional distress); and, *Davis v. Motiva Enterprises LLC*, No. 09-14-00434-CV, 2015 WL 1535694 (Tex. App.—Beaumont April 2, 2015, pet. denied) (failure to supervise employees' internet use).

Document ID: 0.7.2270.7449-000001

In reviewing the statute and the cases cited by the parties, the Court concludes that Plaintiffs have plead causes of action that would not be barred by the immunity granted under the Act. Accordingly, Defendants' Rule 91A Motions to Dismiss are denied.

[redacted]

Signed:
5/23/2019

STEVEN KIRKLAND
Judge Presiding

FILED
Marilyn Burgess
District Clerk
MAY 22 2019
Time:
Harris County, Texas
By
Deputy

Document ID: 0.7.2270.7449-000001

TAB B

Document ID: 0.7.2270.7449-000001

P3

NO. 2018-69816

Jane Doe	§	**IN THE DISTRICT COURT OF**
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
Facebook, Inc; et al	§	**334th JUDICIAL DISTRICT**

NO. 2018-82214

Jane Doe,	§	**IN THE DISTRICT COURT OF**
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
Facebook, Inc., dba Instagram, Inc. et al	§	**334th JUDICIAL DISTRICT**

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Document ID: 0.7.2270.7449-000001

whether the claims raised by Plaintiffs treat Facebook as the publisher or speaker of information provided by another.

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Document ID: 0.7.2270.7449-000001

In reviewing the statute and the cases cited by the parties, the Court concludes that Plaintiffs have plead causes of action that would not be barred by the immunity granted under the Act. Accordingly, Defendants' Rule 91A Motions to Dismiss are denied.

[redacted]

Signed:
5/23/2019

STEVEN KIRKLAND
Judge Presiding

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TAB C

Document ID: 0.7.2270.7449-000001

6/16/2019 11:55 PM
Marilyn Burgess - District Clerk Harris County
Envelope No. 34408570
By: VERONICA GONZALEZ
Filed: 6/17/2019 12:00 AM

CAUSE NO. 2019-16262

JANE DOE AS NEXT FRIEND OF J.D. #19, A MINOR SEX TRAFFICKING SURVIVOR	§	IN THE DISTRICT COURT OF
Plaintiff,	§	HARRIS COUNTY, TEXAS
vs.	§	
FACEBOOK, INC. d/b/a INSTAGRAM; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; and G6 HOSPITALITY INC., d/b/a MOTEL 6 2900 W SAM HOUSTON PARKWAY	§	
Defendants.	§	151st JUDICIAL DISTRICT

INTERLOCUTORY

~~PROPOSED~~ ORDER

It is hereby ORDERED that:

Defendant Facebook, Inc.'s Amended Motion to Dismiss Pursuant to Rule 91a is GRANTED. IN PART AND DENIED IN PART.

Plaintiff Jane Doe's products liability claims against Facebook, Inc. are hereby DISMISSED with prejudice. **

So ordered this ____ day of _____, 2019.

As for Jane Doe's remaining claims against Facebook that are the subject of Facebook's TRCP 91a Motion to Dismiss, the Court rules as follows:

The Court has reviewed (1) the Plaintiff's claims in light of the case law interpreting the pre-2018 amendments to the CDA section 230 et seq.; (2) the 2018 FOSTA Amendments including the pre and post amendment statutory language itself, the enacting language, the sense of Congress language, and the legislative history; (3) federal preemption law; and (4) the parties' scholarly briefing on the interplay between the enacting and sense of Congress language and the statutory language of the amendments. The Court concludes that Plaintiff's remaining challenged state civil claims may be brought in this Court and are in fact consistent with and preserved by the statute, as amended.

It is therefore ORDERED that Facebook's Motion is hereby DENIED as to Plaintiff's remaining challenged claims aside from Plaintiff's products liability claims.

It is further ORDERED that the parties should promptly brief and set for submission any remaining matters pertaining to attorney's fees and costs to be awarded under TRCP 91a.7, if no agreement can be reached in that regard in light of the split nature of the Court's ruling herein. Briefing on that subject should not exceed 10 total double-spaced pages per side.

Signed: 10/4/2019

Hon. Mike Engelhart

MR1521

TAB D

Document ID: 0.7.2270.7449-000001

Petitions for Writ of Mandamus Denied and Memorandum Majority and Dissenting Opinions filed April 28, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00845-CV

NO. 14-19-00847-CV

IN RE FACEBOOK, INC. AND FACEBOOK, INC. D/B/A INSTAGRAM, Relators

---

ORIGINAL PROCEEDING
WRIT OF MANDAMUS
334th District Court
Harris County, Texas
Trial Court Cause Nos. 2018-69816, 2018-82214

NO. 14-19-00886-CV

IN RE FACEBOOK INC. D/B/A INSTAGRAM, Relator

ORIGINAL PROCEEDING
WRIT OF MANDAMUS
151st District Court
Harris County, Texas
Trial Court Cause No. 2019-16262

Document ID: 0.7.2270.7449-000001

MEMORANDUM MAJORITY OPINION

Each plaintiff in the underlying cases is a minor who connected on Facebook or Instagram (collectively, "Facebook") with individuals who forced them into human trafficking. The plaintiffs seek to hold Facebook liable for damages resulting from being victimized by trafficking. Facebook filed a Rule 91a[1] motion to dismiss each plaintiff's case against Facebook based on an immunity provision under a Federal statute known as the Communications Decency Act. *See* 47 U.S.C. § 230.

Facebook filed two petitions for writ of mandamus in this court. *See* Tex. Gov't Code Ann. § 22.221; *see also* Tex. R. App. P. 52. In the first petition filed in our case numbers 14-19-00845-CV and 14-19-00847-CV, Facebook asks this court to compel the Honorable Steven Kirkland, presiding judge of the 334th District Court of Harris County, to set aside his May 23, 2019 orders denying Facebook's Rule 91a motions to dismiss.

In the second petition filed in our case number 14-19-00886-CV, Facebook asks this court to compel the Honorable Mike Englehart, presiding judge of the 151st District Court of Harris County, to set aside his October 4, 2019 order denying Facebook's Rule 91a motion to dismiss.

Facebook has not established that it is entitled to mandamus relief. Accordingly, we deny Facebook's petitions for writ of mandamus. We also lift our stays issued on November 14, 2019, and November 19, 2019.

PER CURIAM

Panel consists of Justices Christopher, Spain, and Poissant. (Christopher, J., dissenting).

[1] *See* Tex. R. Civ. P. 91a.

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MEMORANDUM DISSENTING OPINION

I respectfully dissent from these denials of mandamus and I urge the Texas Supreme Court to review these cases. Federal law grants Facebook immunity from suits such as these. *See* 47 U.S.C. § 230. Because Facebook has immunity, these suits have no basis in law, and dismissal under Texas Rule of Procedure 91a is proper.

The Real Parties in Interest urge our court to adopt a construction of Section 230 that has been adopted by only a few courts. The vast majority of the courts reviewing this law have adopted the arguments made by Facebook. The artful pleading by the Real Parties in Interest should not prevail over the statute.

Fewer cases discuss the 2018 amendments to Section 230 known as the Fight Online Sex Trafficking Act of 2017 ("FOSTA"). However, this exception to immunity—on its face—does not apply to a civil action in state court.

Because Facebook has federal statutory immunity from these suits, I respectfully dissent.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Spain, and Poissant.

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TAB E

Document ID: 0.7.2270.7449-000001

Subsec. (c)(7)(D). Pub. L. 103–414, § 303(a)(14), which directed substitution of ''conversation'' for ''conservation'' in par. (6)(D), was executed by making the substitution in par. (7)(D) to reflect the probable intent of Congress and the redesignation of par. (6) as (7) by Pub. L. 103–414, § 303(a)(13). See above.

EFFECTIVE DATE OF 1996 AMENDMENT

Pub. L. 104–104, title VII, § 701(a)(3), Feb. 8, 1996, 110 Stat. 147, provided that: ''The amendments made by paragraph (1) [amending this section] shall take effect on the date of enactment of this Act [Feb. 8, 1996].''

REGULATIONS

Pub. L. 104–104, title VII, § 701(a)(2), Feb. 8, 1996, 110 Stat. 147, provided that: ''The Federal Communications Commission shall revise its regulations to comply with the amendment made by paragraph (1) [amending this section] not later than 180 days after the date of enactment of this Act [Feb. 8, 1996].''

§ 229. Communications Assistance for Law Enforcement Act compliance

(a) In general

The Commission shall prescribe such rules as are necessary to implement the requirements of the Communications Assistance for Law Enforcement Act [47 U.S.C. 1001 et seq.].

(b) Systems security and integrity

The rules prescribed pursuant to subsection (a) shall include rules to implement section 105 of the Communications Assistance for Law Enforcement Act [47 U.S.C. 1004] that require common carriers

(1) to establish appropriate policies and procedures for the supervision and control of its officers and employees

(A) to require appropriate authorization to activate interception of communications or access to call-identifying information; and

(B) to prevent any such interception or access without such authorization;

(2) to maintain secure and accurate records of any interception or access with or without such authorization; and

(3) to submit to the Commission the policies and procedures adopted to comply with the requirements established under paragraphs (1) and (2).

(c) Commission review of compliance

The Commission shall review the policies and procedures submitted under subsection (b)(3) and shall order a common carrier to modify any such policy or procedure that the Commission determines does not comply with Commission regulations. The Commission shall conduct such investigations as may be necessary to insure compliance by common carriers with the requirements of the regulations prescribed under this section.

(d) Penalties

For purposes of this chapter, a violation by an officer or employee of any policy or procedure adopted by a common carrier pursuant to subsection (b), or of a rule prescribed by the Commission pursuant to subsection (a), shall be considered to be a violation by the carrier of a rule prescribed by the Commission pursuant to this chapter.

(e) Cost recovery for Communications Assistance for Law Enforcement Act compliance

(1) Petitions authorized

A common carrier may petition the Commission to adjust charges, practices, classifications, and regulations to recover costs expended for making modifications to equipment, facilities, or services pursuant to the requirements of section 103 of the Communications Assistance for Law Enforcement Act [47 U.S.C. 1002].

(2) Commission authority

The Commission may grant, with or without modification, a petition under paragraph (1) if the Commission determines that such costs are reasonable and that permitting recovery is consistent with the public interest. The Commission may, consistent with maintaining just and reasonable charges, practices, classifications, and regulations in connection with the provision of interstate or foreign communication by wire or radio by a common carrier, allow carriers to adjust such charges, practices, classifications, and regulations in order to carry out the purposes of this chapter.

(3) Joint board

The Commission shall convene a Federal-State joint board to recommend appropriate changes to part 36 of the Commission's rules with respect to recovery of costs pursuant to charges, practices, classifications, and regulations under the jurisdiction of the Commission.

(June 19, 1934, ch. 652, title II, § 229, as added Pub. L. 103 414, title III, § 301, Oct. 25, 1994, 108 Stat. 4292.)

REFERENCES IN TEXT

The Communications Assistance for Law Enforcement Act, referred to in subsecs. (a) and (e), is title I of Pub. L. 103–414, Oct. 25, 1994, 108 Stat. 4279, which is classified generally to subchapter I (§ 1001 et seq.) of chapter 9 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of this title and Tables.

This chapter, referred to in subsecs. (d) and (e)(2), was in the original ''this Act'', meaning act June 19, 1934, ch. 652, 48 Stat. 1064, known as the Communications Act of 1934, which is classified principally to this chapter. For complete classification of this Act to the Code, see section 609 of this title and Tables.

§ 230. Protection for private blocking and screening of offensive material

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) 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.

Document ID: 0.7.2270.7449-000001

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(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 information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[1]

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

[1] So in original. Probably should be "subparagraph (A)."

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit

(A) any claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions

As used in this section:

(1) Internet

The term ''Internet'' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term ''interactive computer service'' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term ''information content provider'' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

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(4) Access software provider

The term ''access software provider'' means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(June 19, 1934, ch. 652, title II, § 230, as added Pub. L. 104 104, title V, § 509, Feb. 8, 1996, 110 Stat. 137; amended Pub. L. 105 277, div. C, title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681 739; Pub. L. 115 164, § 4(a), Apr. 11, 2018, 132 Stat. 1254.)

REFERENCES IN TEXT

The Electronic Communications Privacy Act of 1986, referred to in subsec. (e)(4), is Pub. L. 99–508, Oct. 21, 1986, 100 Stat. 1848, as amended. For complete classification of this Act to the Code, see Short Title of 1986 Amendment note set out under section 2510 of Title 18, Crimes and Criminal Procedure, and Tables.

CODIFICATION

Section 509 of Pub. L. 104–104, which directed amendment of title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) by adding section 230 at end, was executed by adding the section at end of part I of title II of the Act to reflect the probable intent of Congress and amendments by sections 101(a), (b), and 151(a) of Pub. L. 104–104 designating §§ 201 to 229 as part I and adding parts II (§ 251 et seq.) and III (§ 271 et seq.) to title II of the Act.

AMENDMENTS

2018—Subsec. (e)(5). Pub. L. 115–164 added par. (5).

1998—Subsec. (d). Pub. L. 105–277, § 1404(a)(3), added subsec. (d). Former subsec. (d) redesignated (e).

Subsec. (d)(1). Pub. L. 105–277, § 1404(a)(1), inserted ''or 231'' after ''section 223''.

Subsecs. (e), (f). Pub. L. 105–277, § 1404(a)(2), redesignated subsecs. (d) and (e) as (e) and (f), respectively.

EFFECTIVE DATE OF 2018 AMENDMENT

Pub. L. 115–164, § 4(b), Apr. 11, 2018, 132 Stat. 1254, provided that: ''The amendments made by this section [amending this section] shall take effect on the date of the enactment of this Act [Apr. 11, 2018], and the amendment made by subsection (a) shall apply regardless of whether the conduct alleged occurred, or is alleged to have occurred, before, on, or after such date of enactment.''

EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105–277 effective 30 days after Oct. 21, 1998, see section 1406 of Pub. L. 105–277, set out as a note under section 223 of this title.

SAVINGS

Pub. L. 115–164, § 7, Apr. 11, 2018, 132 Stat. 1255, provided that: ''Nothing in this Act [see Short Title of 2018 Amendment note set out under section 1 of Title 18, Crimes and Criminal Procedure] or the amendments made by this Act shall be construed to limit or preempt any civil action or criminal prosecution under Federal law or State law (including State statutory law and State common law) filed before or after the day before the date of enactment of this Act [Apr. 11, 2018] that was not limited or preempted by section 230 of the Communications Act of 1934 (47 U.S.C. 230), as such section was in effect on the day before the date of enactment of this Act.''

SENSE OF CONGRESS

Pub. L. 115–164, § 2, Apr. 11, 2018, 132 Stat. 1253, provided that: ''It is the sense of Congress that—

''(1) section 230 of the Communications Act of 1934 (47 U.S.C. 230; commonly known as the 'Communications Decency Act of 1996') was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims;

''(2) websites that promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking victims and have done nothing to prevent the trafficking of children and victims of force, fraud, and coercion; and

''(3) clarification of such section is warranted to ensure that such section does not provide such protection to such websites.''

§ 231. Restriction of access by minors to materials commercially distributed by means of World Wide Web that are harmful to minors

(a) Requirement to restrict access

(1) Prohibited conduct

Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.

(2) Intentional violations

In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(3) Civil penalty

In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(b) Inapplicability of carriers and other service providers

For purposes of subsection (a), a person shall not be considered to make any communication for commercial purposes to the extent that such person is

(1) a telecommunications carrier engaged in the provision of a telecommunications service;

(2) a person engaged in the business of providing an Internet access service;

(3) a person engaged in the business of providing an Internet information location tool; or

(4) similarly engaged in the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication made by another person, without selection or alteration of the content of the communication, except that such person's deletion of a particular communication or material made by another person in a manner consistent with subsection (c) or section 230 of this title shall not constitute such selection or alteration of the content of the communication.

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No. _____

In the Supreme Court of Texas

IN RE FACEBOOK, INC. and FACEBOOK, INC. d/b/a INSTAGRAM,
Relator.

Original Proceeding from Cause Nos. 2018-69816 & 2018-82214,
334th District Court, Harris County, Texas, and
Cause No. 2019-16262, 151st District Court, Harris County, Texas

MOTION FOR TEMPORARY RELIEF

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MOTION FOR TEMPORARY RELIEF

Relator Facebook, Inc., respectfully moves for temporary relief pending this Court's disposition of its Petition for Writ of Mandamus. Tex. R. App. P. 52.10. Temporary relief is necessary because, absent a stay, the immunity from suit mandated by 47 U.S.C. § 230(e)(3) will be irretrievably lost. *See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009).

Plaintiffs' claims fall squarely within the scope of section 230 and should have been dismissed. Pet. 12–19. But in conflict with virtually every other Texas court—as well as the Fifth Circuit—the trial courts here refused to dismiss these actions. And the court of appeals, over Justice Christopher's dissent, declined to correct that clear abuse of discretion.

The Court should stay the proceedings below while it considers the mandamus petition, as is appropriate in "cases in which the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved." *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 465 (Tex. 2008); *see*, *e.g.*, *In re Ford Motor Co.*, 165 S.W.3d 315, 322 (Tex. 2005) (granting temporary stay to review denial of motion for continuance because attorney needed to attend Legislature); *In re*

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Automated Collection Techs., Inc., 156 S.W.3d 557, 558 (Tex. 2004) (granting temporary stay to review order refusing to enforce forum-selection clause); *In re Allied Chem. Corp*., 227 S.W.3d 652, 658 (Tex. 2007) (granting temporary stay to review discovery rulings that curtailed defendant's ability to prepare defense); *cf*. Tex. Civ. Prac. & Rem. Code § 51.014 (providing *automatic* stay of underlying proceedings when denial of governmental immunity is appealed).[1]

1. "Congress provided broad immunity under [section 230] to Web-based service providers for *all claims* stemming from their publications of information created by third parties . . . . Indeed, '*[n]o cause of action* may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.'" *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (Clement, J.) (emphases added; second alteration in original) (quoting 47 U.S.C. § 230(e)(3)); *see also Nemet Chevrolet*, 591 F.3d at 255 (section 230 "immunity protects [providers] not only from 'ultimate liability,' but also from 'having to fight costly and protracted legal battles'"). Yet each day these cases remain

[1] Facebook agrees to an expedited briefing schedule to further minimize any delay in this Court's consideration of its mandamus petition.

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pending in the trial courts, that statutory immunity is compromised. Absent a stay, Facebook will be forced to continue litigating cases against which it has statutorily mandated immunity—a serious injury that this Court should correct via Facebook's mandamus petition and that Facebook will be unable to ameliorate on final appeal. A stay is necessary and appropriate both to prevent irreparable harm to Facebook and to safeguard this Court's jurisdiction.

2. Each of the three suits at issue here involves (1) allegations that plaintiffs were lured into sex trafficking and sexually assaulted by online predators after exchanging messages with them on Facebook's or Instagram's private messaging service, and (2) state-law claims alleging that Facebook failed to prevent plaintiffs from receiving those messages or to warn plaintiffs not to respond. Facebook moved to dismiss the claims against it because they are all barred by section 230, which provides:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> . . .
>
> No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

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47 U.S.C. § 230(c)(1), (e)(3). It is undisputed that Facebook is a "provider" of "interactive computer service[s]." And it is undisputed that the "information" at issue was provided by "another information content provider"—i.e., the online predators who wrote and sent the online messages—not Facebook.

3. Courts across the State and across the nation repeatedly have held that section 230 bars suits like these because seeking to hold an interactive computer service provider liable for *failing to prevent* third-party communications is no different than seeking to hold it liable *for the content* of those communications. *E.g.*, *MySpace*, 528 F.3d at 420 (section 230 barred claims alleging MySpace failed "to implement measures that would have prevented [plaintiff] from communicating" with her abuser because such claims were "merely another way of claiming that MySpace was liable for publishing the communications"); *Green v. Am. Online (AOL)*, 318 F.3d 465, 470–71 (3d Cir. 2003) (section 230 barred claims alleging AOL failed to prevent users from transmitting certain content). Section 230 bars both types of claims—each "derives from [the provider's] role as a publisher" and is therefore "prohibited . . . no matter how artfully pled." *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 726 (Wis. 2019).

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Hundreds of state and federal courts—including the Fifth Circuit—have dismissed claims indistinguishable from those asserted here. *See*, *e.g.*, *MySpace*, 528 F.3d at 420.[2] With one exception, no court in Texas has allowed lawsuits like these to go forward in the face of section 230 immunity—until now, when the trial courts refused to dismiss these lawsuits, and the court of appeals denied mandamus relief over Justice Christopher's dissent. And in the only other instance, the trial court's order was reversed and the case dismissed on interlocutory review. *See*

---

[2] *See also Davis v. Motiva Enters., L.L.C.*, 2015 WL 1535694, at *4–5 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (affirming Rule 91a dismissal based on section 230); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 760–61 (Tex. App.—Beaumont 2014, pet. denied); *Milo v. Martin*, 311 S.W.3d 210, 215–18 (Tex. App.—Beaumont 2010, no pet.); *Gartner v. Amazon.com, Inc.*, 2020 WL 1896703, at *8 (S.D. Tex. Jan. 7, 2020); *Takhvar v. Page*, 2018 WL 4677808, at *2 (E.D. Tex. Feb. 25, 2018), *adopted by* 2018 WL 4677799 (E.D. Tex. Mar. 6, 2018); *Inge v. Walker*, 2017 WL 4838981, at *4 (N.D. Tex. Oct. 26, 2017); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 995 (S.D. Tex. 2017); *Wiswell v. VerticalScope, Inc.*, 2012 WL 13136295, at *5 n.7 (W.D. Tex. Aug. 1, 2012); *Int'l Cotton Mktg., Inc. v. Commodity Credit Corp.*, 2009 WL 10705346, at *5 (N.D. Tex. June 15, 2009); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663, 664–65 (E.D. Tex. 2009); *GW Equity LLC v. Xcentric Ventures LLC*, 2009 WL 62173, at *13 (N.D. Tex. Jan. 9, 2009); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 849–50 (W.D. Tex. 2007), *aff'd*, 528 F.3d 413 (5th Cir. 2008); *Doe v. Bates*, 2006 WL 3813758, at *4–5 (E.D. Tex. Dec. 27, 2006); *Prickett v. InfoUSA, Inc.*, 561 F. Supp. 2d 646, 652 (E.D. Tex. 2006); *Cisneros v. Sanchez*, 403 F. Supp. 2d 588, 593 (S.D. Tex. 2005); *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, 2004 WL 833595, at *10 (N.D. Tex. Apr. 19, 2004).

Some of the Texas cases address procedural issues rather than the merits. *See*, *e.g.*, *A.R.K. v. La Petite Acad.*, 2018 WL 2059531, at *2–3 (W.D. Tex. May 2, 2018) (section 230 insufficient to support federal jurisdiction); *R.L. Lackner, Inc. v. Sanchez*, 2005 WL 3359356, at *3 (S.D. Tex. Dec. 9, 2005) (same); *Edwards v. Wyatt*, 2009 WL 10669430, at *6–7 (W.D. Tex. July 6, 2009) (section 230 immunity subject to waiver if not timely raised).

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GoDaddy.com, LLC v. Toups, 429 S.W.3d 752, 760–61 (Tex. App.—Beaumont 2014, pet. denied).

4. Justice Christopher "urge[d]" this Court "to review these cases" because "[f]ederal law grants Facebook immunity from suits such as these." 2020 WL 2037193, at *1 (Christopher, J., dissenting) (citing 47 U.S.C. § 230). But that immunity will be severely curtailed, even if this Court ultimately *grants* Facebook's mandamus petition, unless the Court stays the underlying proceedings in the meantime. *See Nemet Chevrolet*, 591 F.3d at 254–55 ("Section 230 immunity . . . is generally accorded effect at the first logical point in the litigation process" because "*immunity from suit* . . . is effectively lost if a case is erroneously permitted to go to trial") (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

5. As with other immunities from suit, a stay pending review is essential to avoid compromising section 230. *See* 47 U.S.C. § 230(e)(3) ("No cause of action may be brought . . ."); *cf.* Tex. Civ. Prac. & Rem. Code § 51.014 (providing automatic stay of underlying proceedings during interlocutory appeal of order denying governmental immunity); *see also Tarrant Reg'l Water Dist. v. Gragg*, 962 S.W.2d 717, 718 (Tex. App.—Waco 1998, no pet.) (granting temporary stay after trial court confirmed

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trial setting on claims to which immunity attached). A stay pending this Court's disposition of the mandamus petition is essential to preserve the immunity from suit afforded by Congress through section 230.

6. A stay is also needed to preserve this Court's ability to afford Facebook the full relief to which it is entitled under section 230.[3] Absent the requested stay, Facebook will be forced to continue litigating the cases below—destroying its "entitlement not to stand trial or face the other burdens of litigation," *Mitchell*, 472 U.S. at 526, and encroaching on this Court's ability to provide meaningful appellate review. *See McSurely v. McClellan*, 697 F.2d 309, 317 n.13 (D.C. Cir. 1982) (Scalia and Wald, JJ.) ("compelling a [defendant] to proceed to trial . . . will generally constitute irreparable injury not because of the expense of litigation, but because of the irretrievable loss of immunity from suit").

A temporary stay is necessary and appropriate both to prevent irreparable harm to Facebook and to protect this Court's jurisdiction.

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[3] This Court's denial of Facebook's previous stay motion has no bearing on the merits of this one. The previous request asked this Court to stay the trial-court proceedings pending this Court's review of the Fourteenth Court's decision to deny a stay pending its resolution of Facebook's mandamus petition. Here, by contrast, Facebook is asking this Court to protect its own jurisdiction by staying the proceedings below while it resolves Facebook's mandamus petition filed in this Court.

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PRAYER

For these reasons, Facebook respectfully requests that the Court grant its motion for temporary relief and stay all proceedings below until the mandamus petition is resolved.

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Dated: May 29, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Relator seeks temporary relief pursuant to Rule 52.10(a). Accordingly, I certify that Relator has made a diligent effort to notify all parties by expedited means that a motion for temporary relief has been filed. *See* Tex. R. App. P. 52.10(a).

/s/ Allyson N. Ho
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CERTIFICATE OF SERVICE

I certify that, on May 29, 2020, a true and correct copy of the foregoing motion for temporary relief was served via electronic service on all counsel of record:

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In the Supreme Court of Texas

IN RE FACEBOOK, INC. AND FACEBOOK, INC. D/B/A INSTAGRAM,

Relators.

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STATEMENT OF THE CASE

Nature of the Case:	Three Jane Doe plaintiffs brought suit against Facebook after they became victims of sex trafficking through their use of Facebook and Instagram. MR1-44, 444-516, 847-93. Plaintiffs brought suit against Facebook for negligent and grossly negligent failure to warn, negligent undertaking, knowingly benefitting from the facilitation of human trafficking in violation of Chapter 98 of the Texas Civil Practice and Remedies Code, and strict products liability. MR32-36, 499-503, 882-87.
Trial Courts:	Hon. Steven Kirkland, 334th District Court, Harris County (Cause Nos. 2018-69816 & 2018-82214). Hon. Mike Engelhart, 151st District Court, Harris County (Cause No. 2019-16262).
Trial Courts' Disposition:	Facebook moved to dismiss the Jane Doe plaintiffs' claims under Texas Rule of Civil Procedure 91a on the basis that they are preempted by Section 230 of the Communications Decency Act, 47 U.S.C. § 230. MR177-94, 584-601, 965-96. The trial courts denied Facebook's motions to dismiss the failure to warn, negligent undertaking, and facilitation of human trafficking claims. Pet.App.A-C. In Cause No. 2019-16262, the trial court granted Facebook's Rule 91a motion on the products liability claim on other grounds. Pet.App.C. In Cause Nos. 2018-82214 and 2018-69816, Facebook did not challenge Jane Doe's products liability claim. MR177-94, 584-601. Accordingly, the products liability claims are not before this Court.
Court of Appeals:	Fourteenth Court of Appeals. Per curiam opinion joined by Justices Spain and Poissant. Dissenting opinion by Justice Christopher.
Court of Appeals' Disposition:	The court of appeals denied Facebook's petition for writ of mandamus. *See* Pet.App.D; *In re Facebook, Inc.*, No. 14-19-00845-CV, 2020 WL 2037193 (Tex. App.—Houston [14th Dist.] Apr. 28, 2020, orig. proceeding).

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ISSUE PRESENTED

Three Jane Doe plaintiffs brought claims against Facebook for violating Texas statutory and common law by knowingly benefiting from facilitating their victimization by sex traffickers and failing to warn them of the dangers of sex trafficking on Facebook's products. Did the trial court clearly abuse its discretion in denying Facebook's motion to dismiss and rejecting Facebook's argument that the Jane Doe plaintiffs' claims were preempted by Section 230 of the Communications Decency Act?

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INTRODUCTION

Facebook claims that Section 230 of the Communications Decency Act (CDA) gives it immunity from suit arising out of the sex trafficking of three children that occurred through its products. This position finds no support in the legislative history or language of Section 230. The CDA was enacted in 1996 to protect minors from obscene materials on the internet. The CDA had nothing to say about human trafficking—a concept unheard of at the time.

When courts later interpreted Section 230 to shield companies like Facebook from liability for human trafficking, Congress amended Section 230 to clarify that Section 230 had *no effect* on sex trafficking law and was never intended to protect websites that facilitate sex trafficking. Nonetheless, Facebook claims that Section 230 immunizes it from liability for claims arising out of sex trafficking of minors. Facebook's position turns the CDA on its head. The CDA was enacted to *protect* minors. Yet Facebook attempts to use the CDA to prevent minors who are victims of sex trafficking from bringing claims for injuries that occurred because Facebook failed to implement proper safeguards and warnings to protect them. This perverse result was never intended by Congress and should be rejected.

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STATEMENT OF FACTS

I. Facebook And Human Trafficking

A. Facebook connects people—including minors and sex traffickers

Facebook views "its company mission to connect people in order to create profit." MR465. Facebook collects and sells user data to enable marketers to reach targeted groups of potential customers and it sells ads that appear on Facebook, Instagram, or other products. MR467.

Facebook provides sex traffickers with unfiltered access to minor users. MR464. Those traffickers use Facebook to "stalk, exploit, recruit, groom, and extort children into the sex trade," and it is frequently the first point of contact. MR464. Traffickers "friend" a victim's acquaintances—classmates, for instance—and use them as a bridge to victims "through 'shared' friends." MR464. Traffickers can then recruit or groom a target by gaining her trust. MR468-69.

This grooming process involves repeated messages that are inappropriate for an adult to send to a minor, such as:

- "I love you,"
- "I think you're beautiful, I'll encourage you to show your body,"
- "I'll encourage you to take risks, you're an adult,"
- "I'll protect you," or
- "I'll make you successful."

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MR468-69. These are widely recognized law enforcement "red flags" that Facebook could identify in contexts that "indicate human trafficking." MR469. The technology to detect these messages has existed for years. MR470.

B. Facebook knows that human traffickers use its products to find victims

Facebook knows and acknowledges that traffickers use its products "to identify, cultivate, and then exploit human trafficking victims." MR468. The characteristic internet interactions between predators and their victims and the increasing use of social media as a channel for sex trafficking has been well-known in law enforcement and social services communities for some time.[1] MR464, 468.

Facebook has the tools and resources to warn potential victims of danger. MR466. Facebook collects data on every action taken by users on its products and obtains detailed dossiers on users from commercial data brokers. MR466. Facebook can target users by "age, gender, locations, interest, and behaviors." MR466. Additionally, Facebook has made the situation worse by preventing adults from getting access to their children's Instagram accounts and does not require parental authorization to open an account. MR471.

[1] Similarly, it is well-known that human trafficking is a "serious and escalating public health issue in the United States, particularly in Texas." Tex. H.R. Con. Res. 35, 86th Leg., R.S. (human trafficking resolution).

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II. Sex Traffickers Used Facebook's Products To Victimize The Jane Doe Plaintiffs

This case involves three Jane Doe plaintiffs who became victims of sex trafficking through Facebook and Instagram.

A. Jane Doe in Cause No. 2019-16262

Jane Doe was a 14-year-old Instagram user who became a sex trafficking victim. MR877-79. She was "friended" through Instagram by a male user more than twice her age. MR877. Over the next two years, the male user manipulated and "groomed" Doe. MR878. In 2018, the male user convinced Doe to leave her home with him. MR878. She was taken to a Houston motel, posted on Backpage.com by the male user within hours, and repeatedly raped by men responding to the advertisement. MR878-79. Backpage.com was the leading online marketplace for human trafficking and sexual exploitation of minors until it was seized and shut down by the FBI. MR475-79.

B. Jane Doe in Cause No. 2018-82214

Jane Doe was a 14-year-old Facebook and Instagram user who became a sex trafficking victim. MR474. She was "friended" through Instagram by another user "well over the age of 18." MR474. This Instagram friend told Doe he loved her and promised her a better future. MR474. Facebook also knew that "these sorts of messages were precisely the ones it should be warning against" and were red flags of human trafficking. MR474-75.

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Doe's traffickers used Instagram to sell Doe to men looking for sex with minors. MR475. Those encounters were arranged by posting partially nude photographs of her on Instagram. MR475. She was repeatedly trafficked and raped. MR475.

C. Jane Doe in Cause No. 2018-69816

Jane Doe was a 15-year-old when she became a sex trafficking victim through Facebook. MR27-30. Her trafficker was another Facebook user "well over the age of 18" who friended her on Facebook. MR27-30. His Facebook page features images indicative of human trafficking, such as provocatively clad girls in sexual positions with money stuffed in their mouths and other troubling content. MR29-30.

He communicated with Doe on Facebook Messenger to gain her trust. MR28-29. He told her she was "pretty enough to be a model" and that a modeling career would bring her a better life. MR28. As Facebook knew, studies and law enforcement identified these messages as red flags of human trafficking. MR28. After Doe had an argument with her mother, he told her she could make money as a model to rent her own apartment. MR28. He convinced her to let him pick her up. MR28-29. Within hours, Doe was raped, beaten, and photographed for Backpage.com for sex trafficking. MR29.

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III. The Jane Doe Plaintiffs' Liability Allegations Against Facebook

Facebook enabled the traffickers to find and groom the Jane Doe plaintiffs. MR464. Facebook has a duty to warn of the known dangers of sex traffickers using its products, but Facebook did not target warnings to the Jane Doe plaintiffs. MR466-67. The Jane Doe plaintiffs did not know about these dangers. MR474-75. In addition to providing warnings, Facebook could have conducted awareness campaigns to ensure users were aware that sex traffickers used its products. MR469-72, 499-500. It also could have implemented safeguards to prevent adults from connecting with minors they did not know, or verified the identity and age of users and prevented unauthorized adults from contacting minors. MR469. It could have reported suspicious messages between minors and adults, required that minor accounts be linked to an adult, or prevented known sex traffickers from having Facebook accounts. MR469.

The Jane Doe plaintiffs have asserted causes of action against Facebook for:

- Negligent and grossly negligent failure to warn;
- Negligent undertaking;
- Knowingly facilitating human trafficking in violation of Texas Civil Practice and Remedies Code Chapter 98; and
- Strict products liability based on marketing defects, *i.e.*, failures to warn.

MR499-503.

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IV. The Trial Courts Deny Facebook's Motions To Dismiss On Preemption

Facebook moved to dismiss the Jane Doe plaintiffs' claims, alleging that they were preempted under Section 230 of the CDA and Facebook was immune from liability. The trial courts denied Facebook's motions to dismiss. Pet.App.A-C.

SUMMARY OF THE ARGUMENT

Facebook asks this Court to use Section 230 to grant it broad immunity from liability for the sex trafficking of minors occurring through its products. As Facebook asks this Court to do now, courts previously took an expansive view of Section 230 that provided internet companies with immunity from sex trafficking claims. Recognizing that this was never the intent behind the CDA, Congress responded with the 2018 Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA). FOSTA amended Section 230 to clarify that it had "no effect on sex trafficking law." Congress stated that its purpose for amending Section 230 was to clarify that it "does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking…." The "sense of Congress" was that Section 230 was never intended to provide legal protection for facilitating trafficking. The FOSTA amendment demonstrates sex trafficking claims are unaffected by Section 230.

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Because the Jane Doe plaintiffs' claims are consistent with Section 230, they are not preempted. In any event, they do not raise claims for defamation that treat Facebook as a "publisher" as prohibited by Section 230. The Jane Doe plaintiffs do not seek to hold Facebook liable for exercising editorial functions over its users' communications, but instead seek to hold Facebook liable for its conduct in failing to properly warn minor users of the dangers of sex trafficking and for knowingly benefiting from facilitating sex trafficking. Congress did not intend to prevent sex trafficking victims from bringing these types of claims. If there is any ambiguity as to Congress's intent to preempt these claims, this Court should presume that no preemption was intended.

ARGUMENT

I. Mandamus Is An Extraordinary Remedy Available Only To Correct A Clear Abuse Of Discretion.

Mandamus is "an extraordinary remedy, available only in limited circumstances." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). To obtain relief, Facebook has the burden to show that the trial court clearly abused its discretion and it lacks an adequate remedy at law. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004). A motion to dismiss under Rule 91a is proper where the plaintiff's cause of action "has no basis in law or fact." TEX. R. CIV. P. 91a.1. Here, the ultimate question is "whether the pleadings, liberally construed according to the pleader's intent, allege facts that trigger federal preemption." *In re*

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Union Pac. R.R., 582 S.W.3d 548, 550-51 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding).

II. Facebook Bears The Heavy Burden Of Establishing That Congress Intended To Preempt State Law In An Area Of Traditional State Regulation.

A. There is a strong presumption against preemption unless preemption is the clear and manifest intent of Congress.

The Supremacy Clause invalidates state laws that are "contrary" to federal law. U.S. CONST. art. VI, cl. 2. In determining whether federal law preempts state law, the "ultimate touchstone" of the analysis is Congressional intent. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). Congressional intent is primarily discerned from the statutory language and framework. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996).

"The exercise of federal supremacy is not lightly to be presumed." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). To the contrary, there is a strong presumption against preemption, particularly in fields which the states have traditionally occupied. *Medtronic*, 518 U.S. at 485. Thus, the preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The presumption against preemption applies to both the initial question of whether Congress preempted state law and, when Congress intended preemption, to "the

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scope of its intended invalidation of state law." *Medtronic*, 518 U.S. at 485. "If the extent of Congress's preemptive intent is unclear, the presumption favors a finding of limited preemption." *Barnes ex rel. Estate of Barnes v. Koppers, Inc.*, 534 F.3d 357, 363 (5th Cir. 2008).

B. The presumption against preemption applies to an express preemption provision.

The Supreme Court has explained that while express preemptive language "means that [the Court] need not go beyond that language to determine whether Congress intended…to pre-empt at least some state law," the Court "must nonetheless 'identify the domain expressly pre-empted' by that language," and the Court invokes the presumption against preemption to do so. *Medtronic*, 518 U.S. at 484; *see also, e.g.*, *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (applying the presumption against preemption to an express preemption provision).

III. Section 230 Of The CDA Does Not Preempt The Jane Doe Plaintiffs' Claims.

A. Historical background of the Communications Decency Act.

Section 230 was adopted as part of the Communications Decency Act, an amendment to the Telecommunications Act of 1996. Pub. L. 104-104, § 509, 110 Stat. 56, 137-39. The internet was a small part of the Telecommunications Act. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 857-58 (1997). Section 230 was primarily concerned with preventing minors from accessing pornography and other obscene materials on the internet. 110 Stat. at 137-39. Section 230(b)(3)-(4) sought

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to achieve this goal by empowering parents to determine the content of communications their children receive through interactive computer services. *Id.* at 138.

Section 230(c)(1) was adopted to overrule *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710, at *3-4 (N.Y. Sup. Ct. May 24, 1995). 141 Cong. Rec. H8468-72. In *Stratton Oakmont*, Prodigy had exercised editorial control akin to a publisher by promulgating content guidelines and using screening software, which subjected it to defamation liability despite its lack of knowledge of the content. Congress responded with Section 230 to protect interactive computer services providers from liability for restricting access to objectionable material. 141 Cong. Rec. H8471-72 (Section 230 "removes the liability of providers such as Prodigy who currently make a good faith effort to edit the smut from their systems."); H.R. Rep. No. 104-458 at 194 (1996). Section 230 was intended to *encourage* interactive computer services providers to screen offensive material from their products. The notion that Section 230 provides broad *immunity* to interactive computer services providers for any claims related to content on their products turns this Congressional intent on its head, effectively removing any motivation for those companies to police the content on their products. *See infra* Part III.B.2.

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B. Section 230 as amended does not preempt state civil claims for human trafficking.

1. *The relevant statutory language.*

There are three provisions of the CDA that are critical to the preemption analysis. First, Section 230(c)(1) states:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

Facebook contends this provision grants "immunity" to interactive computer services from any claim for content generated or communicated by third parties. Pet.ix, 3. Such a construction would effectively immunize internet and technology companies from *any liability* for torts committed, regardless of the company's level of knowledge or involvement. The plain statutory language, construed in light of its history and context, does not support such an all-encompassing construction.

Second, Section 230(e)(3) contains the so-called preemption clause and a savings clause that precedes it:

> Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

Facebook ignores the savings clause and only cites the preemption clause. Pet.ix, 4. This is an unusual preemption provision in that it appears to merely reiterate the principle that a federal statute preempts inconsistent state law.

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Third, Section 230(e)(5)—added in the FOSTA amendment—clarified that Section 230 has no effect on sex trafficking law. Although the CDA, as originally passed in 1996, did not preempt state law civil sex trafficking claims, the 2018 FOSTA amendment reemphasized that intent in light of the large body of federal cases holding that the CDA barred many varieties of civil and criminal cases against internet companies.

In FOSTA, Congress amended Section 230 by adding subsection 230(e)(5), which is entitled "No effect on sex trafficking law." It states that nothing in Section 230 "shall be construed to impair or limit":

- Civil claims under federal law, 18 U.S.C. § 1595, for facilitating sex trafficking (if the underlying conduct violates 18 U.S.C. § 1591);
- Criminal prosecutions under state law if the conduct violates the federal sex trafficking statute, 18 U.S.C. § 1591; and
- Criminal prosecutions under state law for violating the federal online prostitution statute, 18 U.S.C. § 2421A.

2. ***There is a split of authority on whether Section 230 provides immunity.***

Facebook relies on Section 230(c)(1) to argue internet companies have a broad "immunity" from any suit arising from content generated by third parties. Pet.ix, xi, 1, 3, 12-16. Facebook does not tell the Court that there is a split of authority on whether Section 230 provides "immunity" at all.

As several courts have observed, the word "immunity" appears nowhere in Section 230(c)(1). *See City of Chi. v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir.

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2010); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009); *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003). That word originates with the Fourth Circuit's decision in *Zeran v. America Online, Inc*., 129 F.3d 327, 330 (4th Cir. 1997). Unfortunately, courts parroted *Zeran*'s language, expanding a narrow protection into broad immunity. But some courts declined to read so much into Congress's words. The Seventh Circuit, for example, held that "subsection (c)(1) does not create an 'immunity' of any kind," but "limits who may be called the publisher of information that appears online." *StubHub!*, 624 F.3d at 366. Providing immunity every time a website uses information from a third party would eviscerate the statute. *Barnes*, 570 F.3d at 1100 (citing *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1171 (9th Cir. 2008) (en banc)). Courts should not rest on broad statements of immunity, but should rather rely on a careful interpretation of statutory language. *Id.*

3. ***The Jane Doe plaintiffs' claims are consistent with the federal sex trafficking statute.***

Any analysis of Section 230's preemptive scope must consider the effect of the FOSTA amendments in Section 230(e)(5). *See Cipollone*, 505 U.S. at 520-21 (statute had different preemptive scope after amendment). Section 230(e)(5) explicitly exempted certain claims from preemption under Section 230, including claims under the federal sex trafficking statute, Section 1595. The CDA preemption provision, Section 230(e)(3), confirms that "any State law that is consistent" with

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Section 230 is not preempted. Because the FOSTA amendment is part of Section 230, state laws that are consistent with the amendment are not preempted. Thus, state laws that are consistent with the exemptions in Section 230(e)(5), such as the exemption for claims under Section 1595, are not preempted.

Section 1595 imposes civil liability on "whoever knowingly benefits…from participation in a venture which that person knew or should have known has engaged in [sex trafficking]." 18 U.S.C. § 1595(a). The Jane Doe plaintiffs allege that Facebook knowingly benefited from facilitating sex trafficking in violation of the parallel Texas statute to Section 1595. MR499-500. The Jane Doe plaintiffs also allege Facebook breached a duty to warn them of known dangers posed by sex traffickers on its products. MR500-01. Because these state law claims are the same sort of claims Congress protected against preemption, the claims are consistent with Section 230(e)(5), and they are not preempted.

4. ***FOSTA's language reinforces the lack of preemption.***

FOSTA repeatedly confirms that Congress intended to remove *all* obstacles in the CDA to fighting human trafficking, including those that prevented victims from asserting civil claims under state law. Congress stated its purpose for amending Section 230 in FOSTA's enacting clause:

> To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and *State* criminal and

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civil law relating to sexual exploitation of children or sex trafficking, and for other purposes.

Pub. L. No. 115-164, 132 Stat. 1253, 1253 (2018) (emphasis added). A statutory preamble or statement of purpose is a valid means of supporting a narrow scope of preemption. *Medtronic,* 518 U.S. at 474, 487, 490.

Section 2 of FOSTA further states the "sense of Congress" that Section 230 "was never intended to provide legal protection to…websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims" and that "clarification of such section is warranted to ensure that such section does not provide such protection to such websites." 132 Stat. at 1253; *see also Doe*, 347 F.3d at 660 ("Why should a law designed to eliminate [an internet company's] liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?"). Congress did not distinguish between state or federal claims.

Next, Section 4 of FOSTA, amending Section 230, is titled:

> SEC. 4. ENSURING ABILITY TO ENFORCE FEDERAL AND STATE CRIMINAL AND CIVIL LAW RELATING TO SEX TRAFFICKING.

132 Stat. at 1254. State civil law is expressly included in the title and tied directly to the amendments. FOSTA also contains its own savings clause in Section 7: "Nothing in this Act or the amendments made by this Act shall be construed to limit or preempt any civil action or criminal prosecution under Federal law or State law

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(including State statutory law and State common law)." 132 Stat. at 1255. Thus, Congress confirmed that there are civil actions under state common law and statutory law that are not preempted.

FOSTA's legislative history reinforces the lack of preemption. Courts must interpret the statutory text "against the backdrop of regulatory activity undertaken by state legislatures and [the] federal [government]." *Cipollone*, 505 U.S. at 519. When Congress passed Section 230 in 1996, human trafficking was an unknown legal concept. By the time FOSTA was introduced, however, every state had enacted criminal laws prohibiting human trafficking and nearly three-quarters had enacted civil remedies. Congress also knew that websites had "become one of the primary channels of sex trafficking." H.R. Rep. No. 115-572, at 3 (2018). Congress knew technology companies had been improperly shielded from liability by the CDA. *Id.* at 4.

5. ***The presumption against preemption requires that Facebook's construction be rejected.***

Even if Facebook's construction of Section 230 was plausibly supported by the statutory text—"indeed, even if its alternative were just as plausible as [the Jane Doe plaintiffs'] reading of that text—[the Court] would nevertheless have a duty to accept the reading that disfavors pre-emption." *Bates*, 544 U.S. at 449. When multiple interpretations of an express preemption provision are possible, the presumption against preemption supports "the appropriateness of a narrow reading"

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of the provision. *Cipollone*, 505 U.S. at 518; *see also supra* Part II.A. At minimum, the legislative history of the CDA and FOSTA raise significant questions as to whether Congress intended to prevent sex trafficking victims from pursuing non-defamation claims against internet companies whose services facilitated their victimization. *See supra* Part III.A, III.B.1, 4. If there is any ambiguity in Congress's preemptive intent, the presumption against preemption requires this Court to favor "limited preemption." *Barnes*, 534 F.3d at 363.

C. The sex trafficking claims do not treat Facebook as a publisher or speaker.

Claims consistent with those found in Section 230(e)(5) are not preempted regardless of whether they treat an internet company as the publisher of third-party content. *See supra* Part III.B.3. But even if that provision did not apply, the Jane Doe plaintiffs' claims would still not be preempted because they do not treat Facebook as the publisher of third-party content under a proper construction of Section 230(c)(1).

1. *There is a split of authority as to the meaning of the term "publisher" in Section 230(c)(1).*

There is a split of authority regarding what types of activities by an internet computer service provider make it a "publisher." Some circuits, like those cited by Facebook, apply preemption to any activity in which a firm in the publishing business may engage. Pet.16-17. Other circuits disagree, holding that only core

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editorial functions, like deciding what content to accept or whether to publish the content, would be entitled to immunity. *See Johnson v. Arden*, 614 F.3d 785, 791-92 (8th Cir. 2010); *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003); *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *see also Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014).

There is an obvious difference between preempting traditional editorial functions, such as deciding whether to accept or remove a third-party submission, and granting immunity broadly to any activity that could fall within the business of publication. The narrow interpretation of Section 230(c)(1) limits publisher immunity to decisions to publish, withdraw, postpone, or alter content. The law requires this Court to prefer this narrow interpretation of Section 230's preemptive scope. *See supra* Part II, III.B.5.

Under the proper interpretation of "publisher," therefore, the claims here are not preempted. The claims are not based on Facebook's decision to publish or alter certain content, but are instead based on Facebook failing to provide adequate warnings to its users about the dangers of sex trafficking and knowingly benefiting from the facilitation of sex trafficking.

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2. *The terms "publisher" and "speaker" relate to defamation.*

The CDA does not define "publisher" or "speaker," so the words must be given their ordinary meaning by examining the context, legislative history, and judicial constructions of the words in other contexts. *See Yates v. United States*, 574 U.S. 528, 535-47 (2015). Properly construed, this is the language of defamation law. The context in which the words are used concerns liability for information provided online by third parties. And the statute's legislative history shows the kind of liability Congress had in mind. *See supra* Part III.A (Section 230 was adopted to overrule *Stratton Oakmont*, where an internet company was held liable for defamation for attempting to screen objectionable content).

In this context, to treat an internet company as a "publisher or speaker" is to impose liability on it (1) for defamatory content provided by a third party (2) of which it had no knowledge (3) because it acted as a "Good Samaritan" by trying to screen objectionable material. The Jane Doe plaintiffs assert no claim for defamation. They allege Facebook *knew* of dangers posed by sex traffickers on its products and breached a duty to warn them. MR470-72, 474-75, 500-01. Section 230 does not convey a "clear and manifest purpose" by Congress to preempt anything other than defamation and similar claims for which publication is an essential element. *Medtronic,* 518 U.S. at 485. Therefore, the Jane Doe plaintiffs' claims are not preempted regardless of FOSTA's effect on the statute.

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PRAYER

For these reasons, Real Parties In Interest request that this Court deny Relators' petition for writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4(i)(3), I certify that this response complies with TEX. R. APP. P. 9.4(i)(2)(D) because it consists of 4,447 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

/s/ Warren W. Harris
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CERTIFICATE OF SERVICE

I certify that a copy of Real Parties in Interests' Response to Petition for Writ of Mandamus was served on the following by eFile on the 16th day of June 2020.

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APPENDIX

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APPENDIX A

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AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

PUBLIC LAW 104–104—FEB. 8, 1996

TELECOMMUNICATIONS ACT OF 1996

Document ID: 0.7.2270.7449-000005

Public Law 104–104
104th Congress

An Act

Feb. 8, 1996
[S. 652]

To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Telecommunications Act of 1996.
Intergovernmental relations.
47 USC 609 note.

SECTION 1. SHORT TITLE; REFERENCES.

(a) SHORT TITLE.—This Act may be cited as the ''Telecommunications Act of 1996''.

(b) REFERENCES.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

Sec. 1. Short title; references.
Sec. 2. Table of contents.
Sec. 3. Definitions.

TITLE I TELECOMMUNICATION SERVICES

Subtitle A Telecommunications Services

Sec. 101. Establishment of part II of title II.

''PART II DEVELOPMENT OF COMPETITIVE MARKETS

''Sec. 251. Interconnection.
''Sec. 252. Procedures for negotiation, arbitration, and approval of agreements.
''Sec. 253. Removal of barriers to entry.
''Sec. 254. Universal service.
''Sec. 255. Access by persons with disabilities.
''Sec. 256. Coordination for interconnectivity.
''Sec. 257. Market entry barriers proceeding.
''Sec. 258. Illegal changes in subscriber carrier selections.
''Sec. 259. Infrastructure sharing.
''Sec. 260. Provision of telemessaging service.
''Sec. 261. Effect on other requirements.''
Sec. 102. Eligible telecommunications carriers.
Sec. 103. Exempt telecommunications companies.
Sec. 104. Nondiscrimination principle.

Subtitle B Special Provisions Concerning Bell Operating Companies

Sec. 151. Bell operating company provisions.

''PART III SPECIAL PROVISIONS CONCERNING BELL OPERATING COMPANIES

''Sec. 271. Bell operating company entry into interLATA services.
''Sec. 272. Separate affiliate; safeguards.

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TITLE V—OBSCENITY AND VIOLENCE

Communications Decency Act of 1996.
Law enforcement and crime.
Penalties.

Subtitle A—Obscene, Harassing, and Wrongful Utilization of Telecommunications Facilities

SEC. 501. SHORT TITLE.

47 USC 609 note.

This title may be cited as the ''Communications Decency Act of 1996''.

SEC. 502. OBSCENE OR HARASSING USE OF TELECOMMUNICATIONS FACILITIES UNDER THE COMMUNICATIONS ACT OF 1934.

Section 223 (47 U.S.C. 223) is amended—

(1) by striking subsection (a) and inserting in lieu thereof:

''(a) Whoever—

''(1) in interstate or foreign communications—

''(A) by means of a telecommunications device knowingly—

''(i) makes, creates, or solicits, and

''(ii) initiates the transmission of,

any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person;

''(B) by means of a telecommunications device knowingly—

''(i) makes, creates, or solicits, and

''(ii) initiates the transmission of,

any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

''(C) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications;

''(D) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

''(E) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication; or

''(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.''; and

(2) by adding at the end the following new subsections:

''(d) Whoever—

''(1) in interstate or foreign communications knowingly—

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''(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

''(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

''(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

''(e) In addition to any other defenses available by law:

''(1) No person shall be held to have violated subsection (a) or (d) solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.

''(2) The defenses provided by paragraph (1) of this subsection shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate this section, or who knowingly advertises the availability of such communications.

''(3) The defenses provided in paragraph (1) of this subsection shall not be applicable to a person who provides access or connection to a facility, system, or network engaged in the violation of this section that is owned or controlled by such person.

''(4) No employer shall be held liable under this section for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such conduct, authorizes or ratifies such conduct, or (B) recklessly disregards such conduct.

''(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d), or under subsection (a)(2) with respect to the use of a facility for an activity under subsection (a)(1)(B) that a person—

''(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

''(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

''(6) The Commission may describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications under subsection (d). Nothing in

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this section authorizes the Commission to enforce, or is intended to provide the Commission with the authority to approve, sanction, or permit, the use of such measures. The Commission shall have no enforcement authority over the failure to utilize such measures. The Commission shall not endorse specific products relating to such measures. The use of such measures shall be admitted as evidence of good faith efforts for purposes of paragraph (5) in any action arising under subsection (d). Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers.

''(f)(1) No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this section or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

''(2) No State or local government may impose any liability for commercial activities or actions by commercial entities, nonprofit libraries, or institutions of higher education in connection with an activity or action described in subsection (a)(2) or (d) that is inconsistent with the treatment of those activities or actions under this section: *Provided, however*, That nothing herein shall preclude any State or local government from enacting and enforcing complementary oversight, liability, and regulatory systems, procedures, and requirements, so long as such systems, procedures, and requirements govern only intrastate services and do not result in the imposition of inconsistent rights, duties or obligations on the provision of interstate services. Nothing in this subsection shall preclude any State or local government from governing conduct not covered by this section.

''(g) Nothing in subsection (a), (d), (e), or (f) or in the defenses to prosecution under subsection (a) or (d) shall be construed to affect or limit the application or enforcement of any other Federal law.

''(h) For purposes of this section—

''(1) The use of the term 'telecommunications device' in this section—

''(A) shall not impose new obligations on broadcasting station licensees and cable operators covered by obscenity and indecency provisions elsewhere in this Act; and

''(B) does not include an interactive computer service.

''(2) The term 'interactive computer service' has the meaning provided in section 230(e)(2).

''(3) The term 'access software' means software (including client or server software) or enabling tools that do not create or provide the content of the communication but that allow a user to do any one or more of the following:

''(A) filter, screen, allow, or disallow content;

''(B) pick, choose, analyze, or digest content; or

''(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

''(4) The term 'institution of higher education' has the meaning provided in section 1201 of the Higher Education Act of 1965 (20 U.S.C. 1141).

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''(5) The term 'library' means a library eligible for participation in State-based plans for funds under title III of the Library Services and Construction Act (20 U.S.C. 355e et seq.).''.

SEC. 503. OBSCENE PROGRAMMING ON CABLE TELEVISION.

Section 639 (47 U.S.C. 559) is amended by striking ''not more than $10,000'' and inserting ''under title 18, United States Code,''.

SEC. 504. SCRAMBLING OF CABLE CHANNELS FOR NONSUBSCRIBERS.

Part IV of title VI (47 U.S.C. 551 et seq.) is amended by adding at the end the following:

47 USC 560.

''SEC. 640. SCRAMBLING OF CABLE CHANNELS FOR NONSUBSCRIBERS.

''(a) SUBSCRIBER REQUEST.—Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

''(b) DEFINITION.—As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.''.

SEC. 505. SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

(a) REQUIREMENT.—Part IV of title VI (47 U.S.C. 551 et seq.), as amended by this Act, is further amended by adding at the end the following:

47 USC 561.

''SEC. 641. SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

''(a) REQUIREMENT.—In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

Children and youth.

''(b) IMPLEMENTATION.—Until a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

''(c) DEFINITION.—As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.''.

47 USC 561 note.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect 30 days after the date of enactment of this Act.

SEC. 506. CABLE OPERATOR REFUSAL TO CARRY CERTAIN PROGRAMS.

(a) PUBLIC, EDUCATIONAL, AND GOVERNMENTAL CHANNELS.—Section 611(e) (47 U.S.C. 531(e)) is amended by inserting before the period the following: '', except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity''.

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(b) CABLE CHANNELS FOR COMMERCIAL USE.—Section 612(c)(2) (47 U.S.C. 532(c)(2)) is amended by striking ''an operator'' and inserting ''a cable operator may refuse to transmit any leased access program or portion of a leased access program which contains obscenity, indecency, or nudity and''.

SEC. 507. CLARIFICATION OF CURRENT LAWS REGARDING COMMUNICATION OF OBSCENE MATERIALS THROUGH THE USE OF COMPUTERS.

(a) IMPORTATION OR TRANSPORTATION.—Section 1462 of title 18, United States Code, is amended—

(1) in the first undesignated paragraph, by inserting ''or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934)'' after ''carrier''; and

(2) in the second undesignated paragraph—

(A) by inserting ''or receives,'' after ''takes'';

(B) by inserting ''or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934)'' after ''common carrier''; and

(C) by inserting ''or importation'' after ''carriage''.

(b) TRANSPORTATION FOR PURPOSES OF SALE OR DISTRIBUTION.—The first undesignated paragraph of section 1465 of title 18, United States Code, is amended—

(1) by striking ''transports in'' and inserting ''transports or travels in, or uses a facility or means of,'';

(2) by inserting ''or an interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934) in or affecting such commerce'' after ''foreign commerce'' the first place it appears;

(3) by striking '', or knowingly travels in'' and all that follows through ''obscene material in interstate or foreign commerce,'' and inserting ''of''.

(c) INTERPRETATION.—The amendments made by this section are clarifying and shall not be interpreted to limit or repeal any prohibition contained in sections 1462 and 1465 of title 18, United States Code, before such amendment, under the rule established in United States v. Alpers, 338 U.S. 680 (1950). 18 USC 1462 note.

SEC. 508. COERCION AND ENTICEMENT OF MINORS.

Section 2422 of title 18, United States Code, is amended—

(1) by inserting ''(a)'' before ''Whoever knowingly''; and

(2) by adding at the end the following:

''(b) Whoever, using any facility or means of interstate or foreign commerce, including the mail, or within the special maritime and territorial jurisdiction of the United States, knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years to engage in prostitution or any sexual act for which any person may be criminally prosecuted, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.''.

SEC. 509. ONLINE FAMILY EMPOWERMENT.

Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

''SEC. 230. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL. 47 USC 230.

''(a) FINDINGS.—The Congress finds the following:

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''(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

''(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

''(3) 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.

''(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

''(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

''(b) POLICY.—It is the policy of the United States—

''(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

''(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

''(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

''(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

''(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

''(c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.—

''(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 information provided by another information content provider.

''(2) CIVIL LIABILITY.—No provider or user of an interactive computer service shall be held liable on account of—

''(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

''(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

''(d) EFFECT ON OTHER LAWS.—

''(1) NO EFFECT ON CRIMINAL LAW.—Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating

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to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

''(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW.—Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

''(3) STATE LAW.—Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

''(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW.—Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

''(e) DEFINITIONS.—As used in this section:

''(1) INTERNET.—The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

''(2) INTERACTIVE COMPUTER SERVICE.—The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

''(3) INFORMATION CONTENT PROVIDER.—The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

''(4) ACCESS SOFTWARE PROVIDER.—The term 'access software provider' means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

''(A) filter, screen, allow, or disallow content;

''(B) pick, choose, analyze, or digest content; or

''(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.''.

Subtitle B—Violence

SEC. 551. PARENTAL CHOICE IN TELEVISION PROGRAMMING.

47 USC 303 note.

(a) FINDINGS.—The Congress makes the following findings:

(1) Television influences children's perception of the values and behavior that are common and acceptable in society.

(2) Television station operators, cable television system operators, and video programmers should follow practices in connection with video programming that take into consideration that television broadcast and cable programming has established a uniquely pervasive presence in the lives of American children.

(3) The average American child is exposed to 25 hours of television each week and some children are exposed to as much as 11 hours of television a day.

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(4) Studies have shown that children exposed to violent video programming at a young age have a higher tendency for violent and aggressive behavior later in life than children not so exposed, and that children exposed to violent video programming are prone to assume that acts of violence are acceptable behavior.

(5) Children in the United States are, on average, exposed to an estimated 8,000 murders and 100,000 acts of violence on television by the time the child completes elementary school.

(6) Studies indicate that children are affected by the pervasiveness and casual treatment of sexual material on television, eroding the ability of parents to develop responsible attitudes and behavior in their children.

(7) Parents express grave concern over violent and sexual video programming and strongly support technology that would give them greater control to block video programming in the home that they consider harmful to their children.

(8) There is a compelling governmental interest in empowering parents to limit the negative influences of video programming that is harmful to children.

(9) Providing parents with timely information about the nature of upcoming video programming and with the technological tools that allow them easily to block violent, sexual, or other programming that they believe harmful to their children is a nonintrusive and narrowly tailored means of achieving that compelling governmental interest.

(b) ESTABLISHMENT OF TELEVISION RATING CODE.—

(1) AMENDMENT.—Section 303 (47 U.S.C. 303) is amended by adding at the end the following:

''(w) Prescribe—

''(1) on the basis of recommendations from an advisory committee established by the Commission in accordance with section 551(b)(2) of the Telecommunications Act of 1996, guidelines and recommended procedures for the identification and rating of video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children: *Provided,* That nothing in this paragraph shall be construed to authorize any rating of video programming on the basis of its political or religious content; and

''(2) with respect to any video programming that has been rated, and in consultation with the television industry, rules requiring distributors of such video programming to transmit such rating to permit parents to block the display of video programming that they have determined is inappropriate for their children.''.

47 USC 303 note.

(2) ADVISORY COMMITTEE REQUIREMENTS.—In establishing an advisory committee for purposes of the amendment made by paragraph (1) of this subsection, the Commission shall—

(A) ensure that such committee is composed of parents, television broadcasters, television programming producers, cable operators, appropriate public interest groups, and other interested individuals from the private sector and is fairly balanced in terms of political affiliation, the points of view represented, and the functions to be performed by the committee;

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(B) provide to the committee such staff and resources as may be necessary to permit it to perform its functions efficiently and promptly; and

(C) require the committee to submit a final report of its recommendations within one year after the date of the appointment of the initial members. Reports.

(c) REQUIREMENT FOR MANUFACTURE OF TELEVISIONS THAT BLOCK PROGRAMS.—Section 303 (47 U.S.C. 303), as amended by subsection (a), is further amended by adding at the end the following:

''(x) Require, in the case of an apparatus designed to receive television signals that are shipped in interstate commerce or manufactured in the United States and that have a picture screen 13 inches or greater in size (measured diagonally), that such apparatus be equipped with a feature designed to enable viewers to block display of all programs with a common rating, except as otherwise permitted by regulations pursuant to section 330(c)(4).''.

(d) SHIPPING OF TELEVISIONS THAT BLOCK PROGRAMS.—

(1) REGULATIONS.—Section 330 (47 U.S.C. 330) is amended—

(A) by redesignating subsection (c) as subsection (d); and

(B) by adding after subsection (b) the following new subsection (c):

''(c)(1) Except as provided in paragraph (2), no person shall ship in interstate commerce or manufacture in the United States any apparatus described in section 303(x) of this Act except in accordance with rules prescribed by the Commission pursuant to the authority granted by that section.

''(2) This subsection shall not apply to carriers transporting apparatus referred to in paragraph (1) without trading in it.

''(3) The rules prescribed by the Commission under this subsection shall provide for the oversight by the Commission of the adoption of standards by industry for blocking technology. Such rules shall require that all such apparatus be able to receive the rating signals which have been transmitted by way of line 21 of the vertical blanking interval and which conform to the signal and blocking specifications established by industry under the supervision of the Commission.

''(4) As new video technology is developed, the Commission shall take such action as the Commission determines appropriate to ensure that blocking service continues to be available to consumers. If the Commission determines that an alternative blocking technology exists that—

''(A) enables parents to block programming based on identifying programs without ratings,

''(B) is available to consumers at a cost which is comparable to the cost of technology that allows parents to block programming based on common ratings, and

''(C) will allow parents to block a broad range of programs on a multichannel system as effectively and as easily as technology that allows parents to block programming based on common ratings,

the Commission shall amend the rules prescribed pursuant to section 303(x) to require that the apparatus described in such section be equipped with either the blocking technology described in such

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section or the alternative blocking technology described in this paragraph.''.

(2) CONFORMING AMENDMENT.—Section 330(d), as redesignated by subsection (d)(1)(A), is amended by striking ''section 303(s), and section 303(u)'' and inserting in lieu thereof ''and sections 303(s), 303(u), and 303(x)''.

47 USC 330.

47 USC 303 note.

(e) APPLICABILITY AND EFFECTIVE DATES.—

(1) APPLICABILITY OF RATING PROVISION.—The amendment made by subsection (b) of this section shall take effect 1 year after the date of enactment of this Act, but only if the Commission determines, in consultation with appropriate public interest groups and interested individuals from the private sector, that distributors of video programming have not, by such date—

(A) established voluntary rules for rating video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children, and such rules are acceptable to the Commission; and

(B) agreed voluntarily to broadcast signals that contain ratings of such programming.

(2) EFFECTIVE DATE OF MANUFACTURING PROVISION.—In prescribing regulations to implement the amendment made by subsection (c), the Federal Communications Commission shall, after consultation with the television manufacturing industry, specify the effective date for the applicability of the requirement to the apparatus covered by such amendment, which date shall not be less than two years after the date of enactment of this Act.

47 USC 303 note.

SEC. 552. TECHNOLOGY FUND.

It is the policy of the United States to encourage broadcast television, cable, satellite, syndication, other video programming distributors, and relevant related industries (in consultation with appropriate public interest groups and interested individuals from the private sector) to—

(1) establish a technology fund to encourage television and electronics equipment manufacturers to facilitate the development of technology which would empower parents to block programming they deem inappropriate for their children and to encourage the availability thereof to low income parents;

(2) report to the viewing public on the status of the development of affordable, easy to use blocking technology; and

(3) establish and promote effective procedures, standards, systems, advisories, or other mechanisms for ensuring that users have easy and complete access to the information necessary to effectively utilize blocking technology and to encourage the availability thereof to low income parents.

Subtitle C—Judicial Review

47 USC 223 note.

SEC. 561. EXPEDITED REVIEW.

(a) THREE-JUDGE DISTRICT COURT HEARING.—Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title, or any provision thereof, shall be heard by a district

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for the performance of activities described in section 9(a) of the Communications Act of 1934.

(c) FUNDING AVAILABILITY.—Section 309(j)(8)(B) (47 U.S.C. 309(j)(8)(B)) is amended by adding at the end the following new sentence: ''Such offsetting collections are authorized to remain available until expended.''.

Approved February 8, 1996.

LEGISLATIVE HISTORY S. 652 (H.R. 1555):

HOUSE REPORTS: No. 104 204, Pt. 1 accompanying H.R. 1555 (Comm. on Commerce).

SENATE REPORTS: Nos. 104 23 (Comm. on Commerce, Science, and Transportation) and 104 230 (Comm. of Conference).

CONGRESSIONAL RECORD:

Vol. 141 (1995): June 7, 8, 12 15, considered and passed Senate.
Aug. 2, 4, H.R. 1555 considered and passed House.
Oct. 12, S. 652 considered and passed House, amended, in lieu of H.R. 1555.

Vol. 142 (1996): Feb. 1, House and Senate agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 32 (1996):

Feb. 8, Presidential remarks and statement.

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APPENDIX B

Document ID: 0.7.2270.7449-000005

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Public Law 115–164
115th Congress

An Act

To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes.

Apr. 11, 2018
[H.R. 1865]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

Allow States and Victims to Fight Online Sex Trafficking Act of 2017.
18 USC 1 note.

This Act may be cited as the "Allow States and Victims to Fight Online Sex Trafficking Act of 2017".

SEC. 2. SENSE OF CONGRESS.

47 USC 230 note.

It is the sense of Congress that—

(1) section 230 of the Communications Act of 1934 (47 U.S.C. 230; commonly known as the "Communications Decency Act of 1996") was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims;

(2) websites that promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking victims and have done nothing to prevent the trafficking of children and victims of force, fraud, and coercion; and

(3) clarification of such section is warranted to ensure that such section does not provide such protection to such websites.

SEC. 3. PROMOTION OF PROSTITUTION AND RECKLESS DISREGARD OF SEX TRAFFICKING.

(a) PROMOTION OF PROSTITUTION.—Chapter 117 of title 18, United States Code, is amended by inserting after section 2421 the following:

"§ 2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking

18 USC 2421A.

"(a) IN GENERAL.—Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in defined in section 230(f) the Communications Act of 1934 (47 U.S.C. 230(f))), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.

"(b) AGGRAVATED VIOLATION.—Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate

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or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in defined in section 230(f) the Communications Act of 1934 (47 U.S.C. 230(f))), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person and—

"(1) promotes or facilitates the prostitution of 5 or more persons; or

"(2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of 1591(a),

shall be fined under this title, imprisoned for not more than 25 years, or both.

"(c) CIVIL RECOVERY.—Any person injured by reason of a violation of section 2421A(b) may recover damages and reasonable attorneys' fees in an action before any appropriate United States district court.

"(d) MANDATORY RESTITUTION.—Notwithstanding sections 3663 or 3663A and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any violation of subsection (b)(2). The scope and nature of such restitution shall be consistent with section 2327(b).

"(e) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (a), or subsection (b)(1) where the defendant proves, by a preponderance of the evidence, that the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted.".

18 USC prec. 2421.

(b) TABLE OF CONTENTS.—The table of contents for such chapter is amended by inserting after the item relating to section 2421 the following:

"2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking.".

SEC. 4. ENSURING ABILITY TO ENFORCE FEDERAL AND STATE CRIMINAL AND CIVIL LAW RELATING TO SEX TRAFFICKING.

(a) IN GENERAL.—Section 230(e) of the Communications Act of 1934 (47 U.S.C. 230(e)) is amended by adding at the end the following:

"(5) NO EFFECT ON SEX TRAFFICKING LAW.—Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

"(A) any claim in a civil action brought under section 1595 of title 18, United States Code, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

"(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18, United States Code; or

"(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, United States Code, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.".

Applicability. 47 USC 230 note.

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act, and the amendment made by subsection (a) shall apply regardless of

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whether the conduct alleged occurred, or is alleged to have occurred, before, on, or after such date of enactment.

SEC. 5. ENSURING FEDERAL LIABILITY FOR PUBLISHING INFORMATION DESIGNED TO FACILITATE SEX TRAFFICKING OR OTHERWISE FACILITATING SEX TRAFFICKING.

Section 1591(e) of title 18, United States Code, is amended—

(1) by redesignating paragraphs (4) and (5) as paragraphs (5) and (6), respectively; and

(2) by inserting after paragraph (3) the following:

"(4) The term 'participation in a venture' means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).". Definition.

SEC. 6. ACTIONS BY STATE ATTORNEYS GENERAL.

(a) IN GENERAL.—Section 1595 of title 18, United States Code, is amended by adding at the end the following:

"(d) In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person who violates section 1591, the attorney general of the State, as parens patriae, may bring a civil action against such person on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief.".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—Section 1595 of title 18, United States Code, is amended—

(1) in subsection (b)(1), by striking "this section" and inserting "subsection (a)"; and

(2) in subsection (c), in the matter preceding paragraph (1), by striking "this section" and inserting "subsection (a)".

SEC. 7. SAVINGS CLAUSE. 47 USC 230 note.

Nothing in this Act or the amendments made by this Act shall be construed to limit or preempt any civil action or criminal prosecution under Federal law or State law (including State statutory law and State common law) filed before or after the day before the date of enactment of this Act that was not limited or preempted by section 230 of the Communications Act of 1934 (47 U.S.C. 230), as such section was in effect on the day before the date of enactment of this Act.

SEC. 8. GAO STUDY. Time period. Reports.

On the date that is 3 years after the date of the enactment of this Act, the Comptroller General of the United States shall conduct a study and submit to the Committees on the Judiciary of the House of Representatives and of the Senate, the Committee on Homeland Security of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate, a report which includes the following:

(1) Information on each civil action brought pursuant to section 2421A(c) of title 18, United States Code, that resulted in an award of damages, including the amount claimed, the nature or description of the losses claimed to support the amount claimed, the losses proven, and the nature or description of the losses proven to support the amount awarded.

(2) Information on each civil action brought pursuant to section 2421A(c) of title 18, United States Code, that did not result in an award of damages, including—

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(A) the amount claimed and the nature or description of the losses claimed to support the amount claimed; and

(B) whether the case was dismissed, and if the case was dismissed, information describing the reason for the dismissal.

(3) Information on each order of restitution entered pursuant to section 2421A(d) of title 18, United States Code, including—

(A) whether the defendant was a corporation or an individual;

(B) the amount requested by the Government and the justification for, and calculation of, the amount requested, if restitution was requested; and

(C) the amount ordered by the court and the justification for, and calculation of, the amount ordered.

(4) For each defendant convicted of violating section 2421A(b) of title 18, United States Code, that was not ordered to pay restitution—

(A) whether the defendant was a corporation or an individual;

(B) the amount requested by the Government, if restitution was requested; and

(C) information describing the reason that the court did not order restitution.

Approved April 11, 2018.

LEGISLATIVE HISTORY—H.R. 1865:

HOUSE REPORTS: No. 115–572, Pt. 1 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 164 (2018):
Feb. 27, considered and passed House.
Mar. 21, considered and passed Senate.
DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS (2018):
Apr. 11, Presidential remarks.

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APPENDIX C

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business on certain occasions and say, 'It's not just about competition, it's about the public interest.'"—Reed Hundt, Federal Communications Commission Chair as quoted in The New Yorker

Mr. CONYERS. Mr. Chairman, I yield such time as she may consume to the gentlewoman from Michigan [Miss COLLINS].

(Miss COLLINS of Michigan asked and was given permission to revise and extend her remarks.)

Miss COLLINS of Michigan. Mr. Chairman, I rise in strong support of the Conyers amendment and urge my colleagues to adopt it.

Many have argued during this debate that we must deregulate the telecommunications industry, and by eliminating any role for the Department of Justice in determining Regional Bell operating company entry into long distance, we are working toward and goal. Well I think you are making a terrible mistake if you confuse forbidding the proper anti-trust role of the Department of Justice with deregulation.

The Republicans in this body should recall it was under the Reagan administration that the Department of Justice broke up the Bell system over a decade ago. That decision has been an undisputed success. Without the role played by the Department of Justice, consumers would still be renting large rotary black phones and paying too much for long distance services. The Department of Justice actions promoted competition, not regulation.

Without the Department of Justice role, we can expect those communication's attorneys to be in court, fighting endless anti-trust battles. The role we give the Department of Justice in this amendment will make it less likely that we will end up back in court, and the Department will ensure that anti-trust violations would be minimal, prior to the decision granting a Bell operating company the ability to offer long distance service.

Calling this amendment regulatory, is doing a disservice to the potential for true deregulation—which is full competition in all markets. The structure provided by the Department of Justice ensures that the markets will develop quickly, and with less litigation.

Mr. Chairman, I urge my colleagues to support this amendment. I yield back the balance of my time.

Mr. CONYERS. Mr. Chairman, I yield 30 seconds to the gentleman from New York [Mr. HINCHEY].

(Mr. HINCHEY asked and was given permission to revise and extend his remarks.)

Mr. HINCHEY. Mr. Chairman, this bill has been described as a clash between the super rich and the super wealthy. That Is unquestionably true, but in the clash of these titans, the question is, who stands for the American public?

The answer to that question is, without the Conyers amendment, no one. The American people stand naked before the potential excesses of these giants unless we have some protection from them offered by the Justice Department.

There is an incredibly high standard in this bill, Mr. Chairman. There must be a dangerous probability of substantially impeding justice before the Justice Department comes in. Let us pass the Conyers amendment and protect the American people.

Mr. CONYERS. Mr. Chairman, I yield 30 seconds to the gentleman from Pennsylvania [Mr. KLINK].

Mr. KLINK. Mr. Chairman, I thank the gentleman from Michigan [Mr. CONYERS] for yielding the time.

The FCC is essentially the agency that would be able to consult with the Department of Justice under the manager's mark that we passed this morning. But when we talk about going from a monopoly industry, which telecom was after 1934, to a competition-based industry, the competition agency, those who keep the rule, those who decide if there is a dangerous probability, if those gigantic billionaires players are being fair, is the Department of Justice.

Mr. Chairman, I simply say that the Conyers amendment makes sure that fairness is done, that the referee is in place. I urge my colleagues to support the Conyers amendment.

Mr. BLILEY. Mr. Chairman, I yield 2½ minutes to the gentleman from Ohio [Mr. OXLEY] for purposes of closing the debate on our side.

(Mr. OXLEY asked and was given permission to revise and extend his remarks.)

Mr. OXLEY. Mr. Chairman, I rise in opposition to the Conyers amendment. This bill in all of its forms does not repeal the Sherman Act. We have had the Sherman Act for over 100 years.

It does not repeal the Clayton Act passed in 1914. Anticompetitive behavior will be reviewed by the Justice Department, whether it is the telecommunications industry or whether it is the trucking industry or any other kind of industry that we are talking about. The Justice Department is not going away.

What we are trying to do, Mr. Chairman, or what the Conyers amendment seeks to do, is basically replace one court with another, except a different standard.

This amendment guts the underlying concept of this bill, which is pure competition, and the idea to get Congress back into the decisionmaking process. How long do we have to have telecommunications policy made by an unelected Federal judge who has no accountability to anyone; when are we going to get back to providing the kind of responsible decisionmaking that we are elected to do?

Mr. Chairman, I suggest to my colleagues that the underlying bill provides that kind of ability and accountability for the duly elected representatives of the people.

This amendment creates needless bureaucracy by having not one, but two Federal agencies review the issue of Bell Co. entry into long distance. The purpose of this legislation is to create conditions for a competitive market and get the heavy hand of Government regulation out of the way. This Conyers amendment is inconsistent with that purpose.

Mr. Chairman, this is a huge opportunity to provide competitive forces in the marketplace away from Government. If we believe that competition and not bureaucracy is the answer to modernizing our telecommunications policy, to providing more choice in the marketplace, to providing lower prices, to making America the most competitive telecommunications industry in the entire world, we will vote against the Conyers amendment and support the underlying bill.

Mr. Chairman, I ask my colleagues to join me in opposition to the Conyers amendment.

The CHAIRMAN. All time on this amendment has expired.

The question is on the amendment offered by the gentleman from Michigan [Mr. CONYERS], as modified.

The question was taken; and the chairman announced that the ayes appeared to have it.

Mr. BLILEY. Mr. Chairman, I demand a recorded vote.

The CHAIRMAN. Pursuant to the rule, further proceedings on the amendment offered by the gentleman from Michigan [Mr. CONYERS], as modified, will be postponed until after the vote on amendment 2 4 to be offered by the gentleman from Massachusetts [Mr. MARKEY].

It is now in order to consider the amendment, No. 2 3, printed in part 2 of House Report 104 223.

AMENDMENT OFFERED BY MR. COX OF CALIFORNIA

Mr. COX of California. Mr. Chairman, I offer an amendment numbered 2 3.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment number 2–3 offered by Mr. COX of California:'

Page 78, before line 18, insert the following new section (and redesignate the succeeding sections and conform the table of contents accordingly):

SEC. 104. ONLINE FAMILY EMPOWERMENT.

Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

"SEC. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL; FCC REGULATION OF COMPUTER SERVICES PROHIBITED.

"(a) FINDINGS.—The Congress finds the following:

"(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

"(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

"(3) 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.

"(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

"(5) Increasingly Americans are relying on interactive media for a variety of political,

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educational, cultural, and entertainment services.

''(b) POLICY.—It is the policy of the United States to—

''(1) promote the continued development of the Internet and other interactive computer services and other interactive media;

''(2) preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by State or Federal regulation;

''(3) encourage the development of technologies which maximize user control over the information received by individuals, families, and schools who use the Internet and other interactive computer services;

''(4) remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

''(5) ensure vigorous enforcement of criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

''(c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.—No provider or user of interactive computer services shall be treated as the publisher or speaker of any information provided by an information content provider. No provider or user of interactive computer services shall be held liable on account of—

''(1) any action voluntarily taken in good faith to restrict access to material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

''(2) any action taken to make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

''(d) FCC REGULATION OF THE INTERNET AND OTHER INTERACTIVE COMPUTER SERVICES PROHIBITED.—Nothing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to content or any other regulation of the Internet or other interactive computer services.

''(e) EFFECT ON OTHER LAWS.—

''(1) NO EFFECT ON CRIMINAL LAW.—Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

''(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW.—Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

''(3) IN GENERAL.—Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.

''(f) DEFINITIONS.—As used in this section:

''(1) INTERNET.—The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

''(2) INTERACTIVE COMPUTER SERVICE.—The term 'interactive computer service' means any information service that provides computer access to multiple users via modem to a remote computer server, including specifically a service that provides access to the Internet.

''(3) INFORMATION CONTENT PROVIDER.—The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided by the Internet or any other interactive computer service, including any person or entity that creates or develops blocking or screening software or other techniques to permit user control over offensive material.

''(4) INFORMATION SERVICE.—The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.''.

The CHAIRMAN. Pursuant to the rule, the gentleman from California [Mr. COX] will be recognized for 10 minutes, and a Member opposed will be recognized for 10 minutes. Who seeks time in opposition?

PARLIAMENTARY INQUIRY

Mr. COX of California. Mr. Chairman, I have a parliamentary inquiry.

The CHAIRMAN. The gentleman will state it.

Mr. COX of California. Mr. Chairman, given that no Member has risen in opposition, would the Chair entertain a unanimous-consent request?

The CHAIRMAN. If no Members seeks time in opposition, by unanimous consent another Member may be recognized for the other 10 minutes, or the gentleman may have the other 10 minutes.

Let me put the question again: Is there any Member in the Chamber who wishes to claim the time in opposition?

If not, is there a unanimous-consent request for the other 10 minutes?

Mr. WYDEN. There is, Mr. Chairman. Although I am not in opposition to this amendment, I would ask unanimous consent to have the extra time because of the many Members who would like to speak on it.

The CHAIRMAN. Is there objection to the request of the gentleman from Oregon?

There was no objection.

The CHAIRMAN. The gentleman from California [Mr. COX] will be recognized for 10 minutes, and the gentleman from Oregon [Mr. WYDEN] will be recognized for 10 minutes.

The Chair recognizes the gentleman from California [Mr. COX].

Mr. COX of California. Mr. Chairman, I wish to begin by thanking my colleague, the gentleman from Oregon [Mr. WYDEN], who has worked so hard and so diligently on this effort with all of our colleagues.

We are talking about the Internet now, not about telephones, not about television or radios, not about cable TV, not about broadcasting, but in technological terms and historical terms, an absolutely brand-new technology.

The Internet is a fascinating place and many of us have recently become acquainted with all that it holds for us in terms of education and political discourse.

We want to make sure that everyone in America has an open invitation and feels welcome to participate in the Internet. But as you know, there is some reason for people to be wary because, as a Time Magazine cover story recently highlighted, there is in this vast world of computer information, a literal computer library, some offensive material, some things in the bookstore, if you will, that our children ought not to see.

As the parent of two, I want to make sure that my children have access to this future and that I do not have to worry about what they might be running into on line. I would like to keep that out of my house and off of my computer. How should we do this?

Some have suggested, Mr. Chairman, that we take the Federal Communications Commission and turn it into the Federal Computer Commission, that we hire even more bureaucrats and more regulators who will attempt, either civilly or criminally, to punish people by catching them in the act of putting something into cyberspace.

Frankly, there is just too much going on on the Internet for that to be effective. No matter how big the army of bureaucrats, it is not going to protect my kids because I do not think the Federal Government will get there in time. Certainly, criminal enforcement of our obscenity laws as an adjunct is a useful way of punishing the truly guilty.

Mr. Chairman, what we want are results. We want to make sure we do something that actually works. Ironically, the existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so.

I will give you two quick examples: A Federal court in New York, in a case involving CompuServe, one of our online service providers, held that CompuServe would not be liable in a defamation case because it was not the publisher or editor of the material. It just let everything come onto your computer without, in any way, trying to screen it or control it.

But another New York court, the New York Supreme Court, held that Prodigy, CompuServe's competitor, could be held liable in a $200 million defamation case because someone had posted on one of their bulletin boards, a financial bulletin board, some remarks that apparently were untrue about an investment bank, that the investment bank would go out of business and was run by crooks.

Prodigy said, ''No, no; just like CompuServe, we did not control or edit that information, nor could we, frankly. We have over 60,000 of these messages each day, we have over 2 million subscribers, and so you cannot proceed with this kind of a case against us.''

The court said, ''No, no, no, no, you are different; you are different than CompuServe because you are a family-friendly network. You advertise yourself as such. You employ screening and blocking software that keeps obscenity off of your network. You have people who are hired to exercise an emergency delete function to keep that kind of

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material away from your subscribers. You don't permit nudity on your system. You have content guidelines. You, therefore, are going to face higher, stricker liability because you tried to exercise some control over offensive material.''

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Mr. Chairman, that is backward. We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see. This technology is very quickly becoming available, and in fact every one of us will be able to tailor what we see to our own tastes.

We can go much further, Mr. Chairman, than blocking obscenity or indecency, whatever that means in its loose interpretations. We can keep away from our children things not only prohibited by law, but prohibited by parents. That is where we should be headed, and that is what the gentleman from Oregon [Mr. WYDEN] and I are doing.

Mr. Chairman, our amendment will do two basic things: First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem. Second, it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government. In this fashion we can encourage what is right now the most energetic technological revolution that any of us has ever witnessed. We can make it better. We can make sure that it operates more quickly to solve our problem of keeping pornography away from our kids, keeping offensive material away from our kids, and I am very excited about it.

There are other ways to address this problem, some of which run head-on into our approach. About those let me simply say that there is a well-known road paved with good intentions. We all know where it leads. The message today should be from this Congress we embrace this new technology, we welcome the opportunity for education and political discourse that it offers for all of us. We want to help it along this time by saying Government is going to get out of the way and let parents and individuals control it rather than Government doing that job for us.

Mr. Chairman, I reserve the balance of my time.

Mr. WYDEN. Mr. Chairman, I rise to speak on behalf of the Cox-Wyden amendment. In beginning, I want to thank the gentleman from California [Mr. COX] for the chance to work with him. I think we all come here because we are most interested in policy issues, and the opportunity I have had to work with the gentleman from California has really been a special pleasure, and I want to thank him for it. I also want to thank the gentleman from Michigan [Mr. DINGELL], our ranking minority member, for the many courtesies he has shown, along with the gentleman from Massachusetts [Mr. MARKEY], and, as always, the gentleman from Virginia [Mr. BLILEY] and the gentleman from Texas [Mr. FIELDS] have been very helpful and cooperative on this effort.

Mr. Chairman and colleagues, the Internet is the shining star of the information age, and Government censors must not be allowed to spoil its promise. We are all against smut and pornography, and, as the parents of two small computer-literate children, my wife and I have seen our kids find their way into these chat rooms that make their middle-aged parents cringe. So let us all stipulate right at the outset the importance of protecting our kids and going to the issue of the best way to do it.

The gentleman from California [Mr. COX] and I are here to say that we believe that parents and families are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats. Parents can get relief now from the smut on the Internet by making a quick trip to the neighborhood computer store where they can purchase reasonably priced software that blocks out the pornography on the Internet. I brought some of this technology to the floor, a couple of the products that are reasonably priced and available, simply to make clear to our colleagues that it is possible for our parents now to childproof the family computer with these products available in the private sector.

Now what the gentleman from California [Mr. COX] and I have proposed does stand in sharp contrast to the work of the other body. They seek there to try to put in place the Government rather than the private sector about this task of trying to define indecent communications and protecting our kids. In my view that approach, the approach of the other body, will essentially involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected. The fact of the matter is that the Internet operates worldwide, and not even a Federal Internet censorship army would give our Government the power to keep offensive material out of the hands of children who use the new interactive media, and I would say to my colleagues that, if there is this kind of Federal Internet censorship army that somehow the other body seems to favor, it is going to make the Keystone Cops look like crackerjack crime-fighter.

Mr. Chairman, the new media is simply different. We have the opportunity to build a 21st century policy for the Internet employing the technologies and the creativity designed by the private sector.

I hope my colleagues will support the amendment offered by gentleman from California [Mr. COX] and myself, and I reserve the balance of my time.

Mr. COX of California. Mr. Chairman, I yield 1 minute to the gentleman from Texas [Mr. BARTON].

(Mr. BARTON of Texas asked and was given permission to revise and extend his remarks.)

Mr. BARTON of Texas. Mr. Chairman, Members of the House, this is a very good amendment. There is no question that we are having an explosion of information on the emerging superhighway. Unfortunately part of that information is of a nature that we do not think would be suitable for our children to see on our PC screens in our homes.

Mr. Chairman, the gentleman from Oregon [Mr. WYDEN] and the gentleman from California [Mr. COX] have worked hard to put together a reasonable way to provide those providers of the information to help them self-regulate themselves without penalty of law. I think it is a much better approach than the approach that has been taken in the Senate by the Exon amendment. I would hope that we would support this version in our bill in the House and then try to get the House-Senate conference to adopt the Cox-Wyden language.

So, Mr. Chairman, it is a good piece of legislation, a good amendment, and I hope we can pass it unanimously in the body.

Mr. WYDEN. Mr. Chairman, I yield 1 minute to the gentlewoman from Missouri [Ms. DANNER] who has also worked hard in this area.

Ms. DANNER. Mr. Chairman, I wish to engage the gentleman from Oregon [Mr. WYDEN] in a brief colloquy.

Mr. Chairman, I strongly support the gentleman's efforts, as well as those of the gentleman from California [Mr. COX], to address the problem of children having untraceable access through on-line computer services to inappropriate and obscene pornographic materials available on the Internet.

Telephone companies must inform us as to whom our long distance calls are made. I believe that if computer on-line services were to include itemized billing, it would be a practical solution which would inform parents as to what materials their children are accessing on the Internet.

It is my hope and understanding that we can work together in pursuing technology based solutions to the problems

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we face in dealing with controlling the transfer of obscene materials in cyberspace.

Mr. WYDEN. Mr. Chairman, will the gentlewoman yield?

Ms. DANNER. I yield to the gentleman from Oregon.

Mr. WYDEN. Mr. Chairman, I thank my colleague for her comments, and we will certainly take this up with some of the private-sector firms that are working in this area.

Mr. COX of California. Mr. Chairman, I yield 1 minute to the gentleman from Washington [Mr. WHITE].

Mr. WHITE. Mr. Chairman, I would like to point out to the House that, as my colleagues know, this is a very important issue for me, not only because of our district, but because I have got four small children at home. I got them from age 3 to 11, and I can tell my colleagues I get E-mails on a regular basis from my 11-year-old, and my 9-year-old spends a lot of time surfing the Internet on America Online. This is an important issue to me. I want to be sure we can protect them from the wrong influences on the Internet.

But I have got to tell my colleagues, Mr. Chairman, the last person I want making that decision is the Federal Government. In my district right now there are people developing technology that will allow a parent to sit down and program the Internet to provide just the kind of materials that they want their child to see. That is where this responsibility should be, in the hands of the parent.

That is why I was proud to cosponsor this bill, that is what this bill does, and I urge my colleagues to pass it.

Mr. WYDEN. Mr. Chairman, I yield 1 minute to the gentlewoman from California [Ms. LOFGREN].

Ms. LOFGREN. Mr. Chairman, I will bet that there are not very many parts of the country where Senator EXON's amendment has been on the front page of the newspaper practically every day, but that is the case in Silicon Valley. I think that is because so many of us got on the Internet early and really understand the technology, and I surf the Net with my 10-year-old and 13-year-old, and I am also concerned about pornography. In fact, earlier this year I offered a life sentence for the creators of child pornography, but Senator EXON's approach is not the right way. Really it is like saying that the mailman is going to be liable when he delivers a plain brown envelope for what is inside it. It will not work. It is a misunderstanding of the technology. The private sector is out giving parents the tools that they have. I am so excited that there is more coming on. I very much endorse the Cox-Wyden amendment, and I would urge its approval so that we preserve the first amendment and open systems on the Net.

Mr. WYDEN. Mr. Chairman, I yield 1 minute to the gentleman from Virginia [Mr. GOODLATTE].

(Mr. GOODLATTE asked and was given permission to revise and extend his remarks.)

Mr. GOODLATTE. Mr. Chairman, I thank the gentleman from Oregon [Mr. WYDEN] for yielding this time to me, and I rise in strong support of the Cox-Wyden amendment. This will help to solve a very serious problem as we enter into the Internet age. We have the opportunity for every household in America, every family in America, soon to be able to have access to places like the Library of Congress, to have access to other major libraries of the world, universities, major publishers of information, news sources. There is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong. This will cure that problem, and I urge the Members to support the amendment.

□ 1030

Mr. WYDEN. Mr. Chairman, I yield 1 minute to the gentleman from Massachusetts [Mr. MARKEY], the ranking member of the subcommittee.

Mr. MARKEY. Mr. Chairman, I want to congratulate the gentleman from Oregon and the gentleman from California for their amendment. It is a significant improvement over the approach of the Senator from Nebraska, Senator EXON.

This deals with the reality that the Internet is international, it is computer-based, it has a completely different history and future than anything that we have known thus far, and I support the language. It deals with the content concerns which the gentlemen from Oregon and California have raised.

Mr. Chairman, the only reservation which I would have is that they add in not only content but also any other type of registration. I think in an era of convergence of technologies where telephone and cable may converge with the Internet at some point and some ways it is important for us to ensure that we will have an opportunity down the line to look at those issues, and my hope is that in the conference committee we will be able to sort those out.

Mr. WYDEN. Mr. Chairman, I yield 30 seconds to the gentleman from Texas [Mr. FIELDS].

Mr. FIELDS of Texas. Mr. Chairman, I just want to take the time to thank him and also the gentleman from California for this fine work. This is a very sensitive area, very complex area, but it is a very important area for the American public, and I just wanted to congratulate him and the gentleman from California on how they worked together in a bipartisan fashion.

Mr. WYDEN. Mr. Chairman, I yield myself such time as I may consume. I thank the gentleman for his kindness.

Mr. Chairman, in conclusion, let me say that the reason that this approach rather than the Senate approach is important is our plan allows us to help American families today.

Under our approach and the speed at which these technologies are advancing, the marketplace is going to give parents the tools they need while the Federal Communications Commission is out there cranking out rules about proposed rulemaking programs. Their approach is going to set back the effort to help our families. Our approach allows us to help American families today.

Mr. COX of California. Mr. Chairman, I yield myself such time as I may consume.

Mr. Chairman, I would just like to respond briefly to the important point in this bill that prohibits the FCC from regulating the Internet. Price regulation is at one with usage of the Internet.

We want to make sure that the complicated way that the Internet sends a document to your computer, splitting it up into packets, sending it through myriad computers around the world before it reaches your desk is eventually grasped by technology so that we can price it, and we can price ration usage on the Internet so more and more people can use it without overcrowding it.

If we regulate the Internet at the FCC, that will freeze or at least slow down technology. It will threaten the future of the Internet. That is why it is so important that we not have a Federal computer commission do that.

Mr. GOODLATTE. Mr. Chairman, Congress has a responsibility to help encourage the private sector to protect our children from being exposed to obscene and indecent material on the Internet. Most parents aren't around all day to monitor what their kids are pulling up on the net, and in fact, parents have a hard time keeping up with their kids' abilities to surf cyberspace. Parents need some help and the Cox-Wyden amendment provides it.

The Cox-Wyden amendment is a thoughtful approach to keep smut off the net without government censorship.

We have been told it is technologically impossible for interactive service providers to guarantee that no subscriber posts indecent material on their bulletin board services. But that doesn't mean that providers should not be given incentives to police the use of their systems. And software and other measures are available to help screen out this material.

Currently, however, there is a tremendous disincentive for online service providers to create family friendly services by detecting and removing objectionable content. These providers face the risk of increased liability where they take reasonable steps to police their systems. A New York judge recently sent the online services the message to stop policing by ruling that Prodigy was subject to a $200 million libel suit simply because it did exercise some control over profanity and indecent material.

The Cox-Wyden amendment removes the liability of providers such as Prodigy who currently make a good faith effort to edit the smut

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from their systems. It also encourages the online services industry to develop new technology, such as blocking software, to empower parents to monitor and control the information their kids can access. And, it is important to note that under this amendment existing laws prohibiting the transmission of child pornography and obscenity will continue to be enforced.

The Cox-Wyden amendment empowers parents without Federal regulation. It allows parents to make the important decisions with regard to what their children can access, not the government. It doesn't violate free speech or the right of adults to communicate with each other. That's the right approach and I urge my colleagues to support this amendment.

The Chairman. All time on this amendment has expired.

The question is on the amendment offered by the gentleman from California [Mr. COX].

The question was taken; and the Chairman announced that the ayes appeared to have it.

Mr. COX of California. Mr. Chairman, I demand a recorded vote.

The CHAIRMAN. Pursuant to the rule, further proceedings on the amendment offered by the gentleman from California [Mr. COX] will be postponed until after the vote on amendment 2 4 to be offered by the gentleman from Massachusetts [Mr. MARKEY].

It is now in order to consider amendment No. 2 4 printed in part 2 of House Report 104 223.

AMENDMENT NO. 2–4 OFFERED BY MR. MARKEY

Mr. MARKEY. Mr. Chairman, I offer an amendment, numbered 2 4.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment offered by Mr. MARKEY of Massachusetts: page 126, after line 16, insert the following new subsection (and redesignate the succeeding subsections and accordingly):

(f) STANDARD FOR UNREASONABLE RATES FOR CABLE PROGRAMMING SERVICES.—Section 623(c)(2) of the Act (47 U.S.C. 543(c)) is amended to read as follows:

''(2) STANDARD FOR UNREASONABLE RATES.—The Commission may only consider a rate for cable programming services to be unreasonable if such rate has increased since June 1, 1995, determined on a per-channel basis, by a percentage that exceeds the percentage increase in the Consumer Price Index for All Urban Consumers (as determined by the Department of Labor) since such date.''.

Page 127, line 4, strike ''or 5 percent'' and all that follows through ''greater,'' on line 6.

Page 129, strike lines 16 through 21 and insert the following:

''(d) UNIFORM RATE STRUCTURE.—A cable operator shall have a uniform rate structure throughout its franchise area for the provision of cable services.''.

Page 130, line 16, insert ''and'' after the semicolon, and strike line 20 and all that follows through line 2 on page 131 and insert the following:

''directly to subscribers in the franchise area and such franchise area is also served by an unaffiliated cable system.''.

Page 131, strike line 6 and all that follows through line 21, and insert the following:

''(m) SMALL CABLE SYSTEMS.—

''(1) SMALL CABLE SYSTEM RELIEF.—A small cable system shall not be subject to subsections (a), (b), (c), or (d) in any franchise area with respect to the provision of cable programming services, or a basic service tier where such tier was the only tier offered in such area on December 31, 1994.

''(2) DEFINITION OF SMALL CABLE SYSTEM.—For purposes of this subsection, 'small cable system' means a cable system that—

''(A) directly or through an affiliate, serves in the aggregate fewer than 250,000 cable subscribers in the United States; and

''(B) directly serves fewer than 10,000 cable subscribers in its franchise area.''.

The CHAIRMAN. Pursuant to the rule, the gentleman from Massachusetts [Mr. MARKEY] will be recognized for 15 minutes, and a Member opposed will be recognized for 15 minutes.

Does the gentleman from Virginia [Mr. BLILEY] seek the time in opposition?

Mr. BLILEY. Mr. Chairman, I do.

The CHAIRMAN. The gentleman from Virginia [Mr. BLILEY] will be recognized for 15 minutes.

The Chair recognizes the gentleman from Massachusetts [Mr. MARKEY].

Mr. MARKEY. Mr. Chairman, I yield myself at this point 3 minutes.

Mr. Chairman, the consumers of America should be placed upon red alert. We now reach an issue which I think every person in America can understand who has even held a remote control clicker in their hands.

The bill that we are now considering deregulates all cable rates over the next 15 months. But for rural America, rural America, the 30 percent of America that considers itself to the rural, their rates are deregulated upon enactment of this bill.

Now, the proponents are going to tell you, do not worry, there is going to be plenty of competition in cable. That will keep rates down. For those of you in rural America, ask yourself this question: In two months do you think there will be a second cable company in your town? Because if there is not a second cable company in your town, your rates are going up because your cable company, as a monopoly, will be able to go back to the same practices which they engaged in up to 1992 when finally we began to put controls on this rapid increase two and three and four times the rate of inflation of cable rates across this country.

The gentleman from Connecticut [Mr. SHAYS] and I have an amendment that is being considered right now on the floor of Congress which will give you your one shot at protecting our cable ratepayers against rate shock this year and next across this country, whether you be rural or urban or suburban.

We received a missive today from the Governor of New Jersey, Christine Whitman. She wants an aye vote on the Markey-Shays bill. Christine Whitman. She does not want her cable rates to go up because she knows, and she says it right here, there is no competition on the horizon for most of America.

So this amendment is the most important consumer protection vote which you will be taking in this bill and one of the two or three most important this year in the U.S. Congress.

Make no mistake about it. There will be no competition for most of America. There will be no control on rates going up, and you will have to explain why, as part of a telecommunications bill that was supposed to reduce rates, you allowed for monopolies, monopolies in 97 percent of the communities in America to once again go back to their old practices.

Mr. BLILEY. Mr. Chairman, I yield myself 1 minute.

The Markey amendment, Mr. Chairman, tracks the disastrous course of the 1992 cable law by requiring the cable companies to jump through regulatory hoops to escape the burdensome rules imposed on them after the law was enacted.

The Markey amendment fails to take into account the changing competitive video marketplace that has evolved in the last 2 years. Direct broadcast satellite has taken off, particularly in rural areas, and there will be nearly 5-million subscribers by the end of the year. With the equipment costs now being folded into the monthly charge for this service, this competitive technology will explode in the next few years.

The telephone industry will be permitted to offer cable on the date of enactment and will provide formidable competition immediately. There are numerous market and technical trials going on now to ramp up to that competition.

The Markey amendment turns back the clock. It seeks to continue the government regulation and micromanagement that has unfairly burdened the industry over the past several years.

Vote ''no'' on Markey and duplicate the Senate, they overwhelmingly voted it down over there.

Mr. MARKEY. Mr. Chairman, I yield 1 minute to the gentleman from Tennessee [Mr. CLEMENT].

Mr. CLEMENT. Mr. Chairman, it's Christmas in August in Washington. On the surface, the Communications Act of 1995 looks like a Christmas gift to the people and the communications industries. You've heard the buzz words: competition, lower rates, and more choices. But a closer look reveals another story.

While the cable provisions in the bill will give a sweet gift to the cable industry, the American consumer, and especially those in rural America, will wake up on Christmas morning to nothing more than less competition, higher cable rates, and less choice.

The bill as it stands immediately deregulates rate controls on small cable systems those which serve an average of almost 30 percent of cable subscribers in America and account for at least 70 percent of all cable systems. This bill discourages competition in these markets because it deregulates these cable companies regardless of

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APPENDIX D

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104TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
104–458

TELECOMMUNICATIONS ACT OF 1996

JANUARY 31, 1996. Ordered to be printed

Mr. BLILEY, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 652]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SECTION 1. SHORT TITLE; REFERENCES.

(a) SHORT TITLE.—This Act may be cited as the ''Telecommunications Act of 1996''.

(b) REFERENCES.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

Sec. 1. Short title; references.
Sec. 2. Table of contents.
Sec. 3. Definitions.

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House amendment

Section 104 of the House amendment protects from civil liability those providers and users of interactive computer services for actions to restrict or to enable restriction of access to objectionable online material.

Conference agreement

The conference agreement adopts the House provision with minor modifications as a new section 230 of the Communications Act. This section provides ''Good Samaritan'' protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont* v. *Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.

These protections apply to all interactive computer services, as defined in new subsection 230(e)(2), including non-subscriber systems such as those operated by many businesses for employee use. They also apply to all access software providers, as defined in new section 230(e)(5), including providers of proxy server software.

The conferees do not intend, however, that these protections from civil liability apply to so-called ''cancelbotting,'' in which recipients of a message respond by deleting the message from the computer systems of others without the consent of the originator or without having the right to do so.

SUBTITLE B—VIOLENCE

SECTION 551—PARENTAL CHOICE IN TELEVISION PROGRAMMING

Senate bill

Sections 501–505 of Senate bill gives the industry one year to voluntarily develop a ratings system for TV programs. If the industry fails to do so, a Federal TV Ratings Commission would set the ratings. The Commission would be appointed by the President, subject to confirmation by the Senate and would establish rules for rating the level of violence and other objectionable content in programs. The Board would also establish rules for TV broadcasters and cable systems to transmit the ratings to viewers. The Commission would be authorized funds necessary to carry out its duties. The Senate bill requires TV manufacturers to equip all 13 inch or greater TV sets with circuitry to block rated shows.

House amendment

Section 305 of the House amendment gives the cable and broadcast industries one year to develop voluntary ratings for video programming containing violence, sex and other indecent materials and to agree voluntarily to broadcast signals containing such ratings. If the industry fails to come up with an acceptance plan, the

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LARRY PRESSLER,
TED STEVENS,
SLADE GORTON,
TRENT LOTT,
FRITZ HOLLINGS,
DANIEL K. INOUYE,
WENDELL FORD,
J.J. EXON,
JAY ROCKEFELLER,
Managers on the Part of the Senate.

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APPENDIX E

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115TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPT. 115–572
Part 1

ALLOW STATES AND VICTIMS TO FIGHT ONLINE SEX TRAFFICKING ACT OF 2017

FEBRUARY 20, 2018.—Committed to the Whole House on the State of the Union and ordered to be printed

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Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 1865]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1865) to amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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79–006

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The Amendment

The amendment is as follows:

Strike all that follows after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Allow States and Victims to Fight Online Sex Trafficking Act of 2017".

SEC. 2. SENSE OF CONGRESS.

It is the sense of Congress that—

(1) section 230 of the Communications Act of 1934 (47 U.S.C. 230; commonly known as the "Communications Decency Act of 1996") was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and contribute to sex trafficking;

(2) websites that promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking victims and have done nothing to prevent the trafficking of children and victims of force, fraud, and coercion; and

(3) clarification of such section is warranted to ensure that such section does not provide such protection to such websites.

SEC. 3. PROMOTION OF PROSTITUTION AND RECKLESS DISREGARD OF SEX TRAFFICKING.

(a) PROMOTION OF PROSTITUTION.—Chapter 117 of title 18, United States Code, is amended by inserting after section 2421 the following:

"§ 2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking

"(a) IN GENERAL.—Whoever uses or operates a facility or means of interstate or foreign commerce or attempts to do so with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.

"(b) AGGRAVATED VIOLATION.—Whoever uses or operates a facility or means of interstate or foreign commerce with the intent to promote or facilitate the prostitution of another person and—

"(1) promotes or facilitates the prostitution of 5 or more persons; or

"(2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of 1591(a),

shall be fined under this title, imprisoned for not more than 25 years, or both.

"(c) CIVIL RECOVERY.—Any person injured by reason of a violation of section 2421A(b) may recover damages and reasonable attorneys' fees in an action before any appropriate United States district court. Consistent with section 230 of the Communications Act of 1934 (47 U.S.C. 230), a defendant may be held liable, under this subsection, where promotion or facilitation of prostitution activity includes responsibility for the creation or development of all or part of the information or content provided through any interactive computer service.

"(d) MANDATORY RESTITUTION.—Notwithstanding sections 3663 or 3663A and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this section.

"(e) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (a) where the defendant proves, by a preponderance of the evidence, that the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted.".

(b) TABLE OF CONTENTS.—The table of contents for such chapter is amended by inserting after the item relating to section 2421 the following:

"2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking.".

SEC. 4. COMMUNICATIONS DECENCY ACT.

Section 230(e) of the Communications Act of 1934 (47 U.S.C. 230(e)) is amended by adding at the end the following:

"(5) NO EFFECT ON STATE LAWS CONFORMING TO 18 U.S.C. 1591(A) OR 2421A.—Nothing in this section shall be construed to impair or limit any charge in a criminal prosecution brought under State law—

"(A) if the conduct underlying the charge constitutes a violation of section 2421A of title 18, United States Code, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted; or

"(B) if the conduct underlying the charge constitutes a violation of section 1591(a) of title 18, United States Code.".

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SEC. 5. SAVINGS CLAUSE.

Nothing in this Act or the amendments made by this Act shall be construed to limit or preempt any civil action or criminal prosecution under Federal law or State law (including State statutory law and State common law) filed before or after the day before the date of enactment of this Act that was not limited or preempted by section 230 of the Communications Act of 1934 (47 U.S.C. 230), as such section was in effect on the day before the date of enactment of this Act.

Purpose and Summary

H.R. 1865, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, is designed to combat online sex trafficking by providing new tools to law enforcement through a new federal criminal statute and by making it easier for states to prosecute criminal actor websites by amending section 230 of the Communications Decency Act, 47 U.S.C. § 230.

Background and Need for the Legislation

Since the expansion of the Internet, a number of classified advertising websites have developed and are now a popular and widely-used alternative to traditional print advertising in newspapers. Sites like Craigslist, Backpage.com, and eBay Classifieds provide users with a forum for buying and selling goods and services to a broader audience on the web. These websites group advertisements by location and category, similar to print advertisements. The use of these websites has grown exponentially as Internet use increases. Unfortunately these websites, including online classified sites like Backpage.com, Eros, Massage Troll, and cityxguide, have also become one of the primary channels of sex trafficking. This is in part due to technological advances on the Internet that make information easily accessible and provide a forum for anonymity, which allows traffickers to post advertisements of minors for a world of customers to see with ease and security. Some websites have gone beyond merely hosting advertisements, however, and have purposely created platforms designed to facilitate prostitution and sex trafficking.

Because of protections provided to "interactive computer services" by the Communications Decency Act (CDA), 47 U.S.C. § 230, it has been challenging to hold bad-actor websites accountable criminally (at the state level) and civilly. Congress passed the CDA in 1996, in an attempt to "remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material."[1] At the same time, Congress sought to "promote the continued development of the Internet and other interactive computer services and other interactive media."[2]

The CDA provides broad immunity for interactive computer services and states that no "provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[3] An interactive computer service is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service

[1] 47 U.S.C. § 230(b)(4).
[2] 47 U.S.C. § 230(b)(1).
[3] 47 U.S.C. § 230(c)(1).

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or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[4] An information content provider is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[5] Courts construing § 230(c)(1) frequently have employed a three-prong test that asks whether: (1) the online entity uses or provides an interactive computer service; (2) the entity is an information content provider with respect to the disputed activity or objectionable content; and (3) whether the plaintiff seeks to treat it as the "publisher or speaker" of information originating with a third party.[6] It has been uniformly held that Internet service providers are "interactive computer service" providers.[7] Courts have concluded that a Web site operator, search engine, or other entity was or was not a provider of an "interactive computer service" depending on whether there was a sufficient indication before the court that it "provided or enabled computer access by multiple users to a computer server" within the meaning of the definition found at § 230(f)(2).

The CDA further provides that:

> Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

47 U.S.C. § 230(e)(3). It thus places limits on when states may enforce both criminal and civil laws. It only allows state laws to be enforced in cases in which they are deemed "consistent" with the CDA.

With respect to combatting websites promoting prostitution and facilitating sex trafficking, § 230 has complicated enforcement. In civil litigation, bad-actor websites have been able to successfully invoke this immunity provision despite engaging in actions that go far beyond publisher functions. In 2014, three minor Jane Does filed a civil suit in the U.S. District Court in Massachusetts under the Trafficking Victims Protection Reauthorization Act, alleging that that Backpage's platform, categories, and filters "assist[ed] in the crafting, placement, and promotion of illegal advertisements offering plaintiffs for sale." The District Court dismissed their Complaint, holding that § 230 of the CDA barred the lawsuit. The Second Circuit affirmed, concluding that although the plaintiffs "ha[d] made a persuasive case" that "Backpage has tailored its website to make sex trafficking easier," it nevertheless upheld the dismissal of the suit under § 230 on the grounds that it had not gone beyond being a publisher. Notably, the plaintiffs in this case chose only to argue Backpage was not a publisher; they did not argue that Backpage was an information content provider and would therefore not be entitled to immunity.

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[4] 47 U.S.C. § 230(f)(2).
[5] 47 U.S.C. § 230(f)(3).
[6] *See* Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia,* 20 Harvard Journal of Law & Technology 163 (2006).
[7] Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532 (E.D. Va. 2003), *summarily aff'd,* 2004 WL 602711 (4th Cir. 2004).

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Subsequently, the Senate Permanent Subcommittee on Investigations launched a 20-month investigation into Backpage. It found that Backpage had knowingly concealed evidence of criminality by systematically editing its "Adult" ads—that is, Backpage knew it facilitated prostitution and child sex trafficking—and that it had been sold to its CEO Carl Ferrer through foreign shell companies. Backpage would automatically delete incriminating words, such as "amber alert," from sex ads prior to publication, moderators then manually deleted incriminating language that filters missed, and the website coached its users on how to post "clean" ads to cover illegal transactions. Further, in July 2017, the *Washington Post* published a story revealing that a contractor for Backpage had been aggressively soliciting and creating sex-related ads, despite Backpage's repeated insistence that it had no role in the content of ads posted on its site. In sum, Backpage had engaged in a ruse, holding itself out to be a mere conduit, but in fact actively engaged in content creation and purposely concealing illegality in order to profit off of advertisements. There had been no criminal investigation up until the Senate investigation to uncover exactly what Backpage was doing, which is what this bill aims to remedy.

Further, courts have blocked states from enforcing state criminal laws on the grounds that the state laws were not consistent with the CDA. Backpage successfully invoked § 230 in federal-preemption challenges to state criminal laws in Washington, Tennessee, and New Jersey criminalizing the advertisement of minors for sex. A California state court also denied the government from proceeding against Backpage on pimping charges because it deemed the California statue "inconsistent" with the CDA.

Importantly, current federal criminal law, which is unaffected by the CDA, presently lacks proper prosecutorial tools to combat these websites. Though under 18 U.S.C. § 1591, a website may be held criminally liable for knowingly advertising sex trafficking, this knowledge standard is difficult to prove beyond a reasonable doubt. This is so because online advertisements rarely, if ever, indicate that sex trafficking is involved. The advertisements neither directly nor implicitly state that force, fraud, or coercion was used against the victim, nor do they say that the person depicted being prostituted is actually under the age of 18. Because these indicia of knowledge of criminality are typically lacking in the advertisements, federal prosecutors usually cannot demonstrate beyond a reasonable doubt that the website operators knew that the advertisements involved sex trafficking. Further, general knowledge that sex trafficking occurs on a website will not suffice as the knowledge element must be proven as to a specific victim. Moreover, sex trafficking cases are often difficult to prosecute because the victims are often uncooperative due to the traumatic effects of having been trafficked, may have issues with illegal substances, and may sometimes appear unsympathetic to juries. A new statute that instead targets promotion and facilitation of prostitution is far more useful to prosecutors. Prostitution and sex trafficking are inextricably linked, and where prostitution is legalized or tolerated, there is a greater demand for human trafficking victims and nearly always an increase in the number of women and children trafficked into commercial sex slavery.

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H.R. 1865 will allow vigorous criminal enforcement against all bad-actor websites, not just Backpage.com, through the creation of a new federal law and by explicitly permitting states to enforce criminal laws that mirror this new federal law and current federal sex trafficking law. With this robust criminal enforcement, victims will have more opportunities to obtain restitution. Furthermore, this enforcement will also provide victims with information that will be sufficient to establish successful civil pleadings, by revealing the extent of content development in which these websites engage.

Hearings

The Committee on the Judiciary held a hearing on the intersection between the Communications Decency Act and online sex trafficking, the subject matter of H.R. 1865, on October 3, 2017. Testimony was received from the Honorable Chris Cox, Outside Counsel, NetChoice; Mr. Jeff Kosseff, Assistant Professor, United States Naval Academy; Ms. Mary Leary, Professor of Law, Catholic University Columbus School of Law; and, Mr. Evan Engstrom, Executive Director, Engine.

Committee Consideration

On December 12, 2017, the Committee met in open session and ordered the bill (H.R. 1865) favorably reported by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 1865.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2228, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

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U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 7, 2018.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1865, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

KEITH HALL.

Enclosure.

cc: Honorable Jerrold Nadler
Ranking Member

H.R. 1865—Allow States and Victims to Fight Online Sex Trafficking Act of 2017

As ordered reported by the House Committee on the Judiciary on December 12, 2017

H.R. 1865 would broaden the coverage of current laws against sex trafficking. As a result, the government might be able to pursue cases that it otherwise would not be able to prosecute. CBO expects that the bill would apply to a relatively small number of offenders, however, so any increase in costs for law enforcement, court proceedings, or prison operations would not be significant. Any such spending would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under H.R. 1865 could be subject to criminal fines, the federal government might collect additional fines under the bill. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent without further appropriation action. CBO expects that any additional revenues and associated direct spending would not be significant because the bill would probably affect only a small number of cases.

Because enacting H.R. 1865 would affect direct spending and revenues, pay-as-you-go procedures apply. However, CBO estimates that any such effects would be insignificant in any year.

CBO estimates that enacting H.R. 1865 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 1865 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

On January 10, 2018, CBO transmitted a cost estimate for S. 1693, the Stop Enabling Sex Traffickers Act of 2017, as ordered reported by the Senate Committee on Commerce, Science, and Transportation on November 8, 2017. CBO's estimates of the budgetary effects of the two bills are identical.

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The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 1865 establishes or reauthorizes a program of the Federal government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee finds that H.R. 1865 contains no directed rule making within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1865 combats online sex trafficking by providing new tools to law enforcement through a new federal criminal statute and by making it easier for states to prosecute criminal actor websites by amending section 230 of the Communications Decency Act.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1865 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

Section 1. Short title. Section 1 sets forth the short title of the bill as the "Allow States and Victims to Fight Online Sex Trafficking Act of 2017."

Sec. 2. Section 2 states that it is the sense of Congress that:

(1) Section 230 of the Communications Act of 1934 was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims;

(2) websites that promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking victims and have done nothing to prevent the trafficking of children and victims of force, fraud, and coercion; and

(3) Clarification is warranted to ensure Section 230 does not provide liability protection to such websites described in (2)

Sec. 3. Promotion of Prostitution and Reckless Disregard of Sex Trafficking

Adds a new statute within the Mann Act, 18 U.S.C. § 2421A, to create a statutory maximum of 10 years imprisonment for the use or operation of an interstate facility with the intent to promote or facilitate the prostitution of another person. This promotion or facilitation must be deliberate; thus, the operator of a facility or

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means of interstate or foreign commerce shall not be deemed to have the "intent to promote or facilitate the unlawful prostitution of another person," as that phrase is used in sections 2421A(a) and 2421A(b), based on the appearance of material promoting unlawful prostitution of another person, where the material appears despite the operator's good faith efforts to moderate, remove, or restrict such material from appearing on or through the facility.

Creates as an aggravating factor: (1) the intent to promote or facilitate the trafficking of five or more persons; or (2) acting in reckless disregard of the fact that the conduct of using or operating a commercial facility contributed to sex trafficking (a violation of 18 U.S.C. § 1591(a)).

- These aggravating circumstances carry a fine and/or statutory maximum sentence of 25 years imprisonment. A website that promotes or facilitates prostitution will be liable under subsection (b)(2) where it operates in reckless disregard of the fact that its promotion or facilitation of prostitution is a factor, even if not the primary cause, that plays a part in producing sex trafficking.
- Creates a civil recovery mechanism by which injured persons may recover damages if they were a victim of a violation of subsection (b)(2).
- Provides for mandatory restitution for an offense under this section.
- States that it is an affirmative defense to a prosecution under subsection (a) and (b)(1) for the defendant to prove, by a preponderance of the evidence, that the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted. Many websites promoting prostitution are targeted to specific geographic areas, though the website itself may be accessible nationwide. Mere accessibility to a website with targeted advertisements from another locality where promotion or facilitation of prostitution is illegal, alone, will not undermine a defendant's successfully established affirmative defense.

Sec. 4. Communications Decency Act

Amends § 230(e) of the Communications Decency Act (47 U.S.C. § 230(3)) to allow states to enforce certain criminal laws without litigating the application of § 230. States that nothing in this section shall be construed to impair or limit any charge in a criminal prosecution brought under state law if:

(1) The conduct underlying the charge violates 18 U.S.C. § 2421A and prostitution is illegal where the defendant's promotion or facilitation of prostitution was targeted; or

(2) The conduct underlying the charge violates 18 U.S.C. § 1591(a).

Under § 230, a state criminal law may be enforced against an interactive computer service (i.e., a website) as long as it is "consistent" with § 230. This provision, however, has been problematic in cases in which states have sought to enforce certain state criminal laws against websites. While the newly created law, and the federal sex trafficking law, should both be considered consistent with § 230, as applied to certain bad-actor websites, in order to allow immediate and unfettered use of this provision, included is an explicit carve out to permit state criminal prosecutions. The lan-

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guage used in the carve out is designed to ensure that interactive computer services are subject to one set of criminal laws, rather than a patchwork of various state laws. In order to qualify for this carve out, a state law's elements should mirror those in 2421A and 1591(a).

Sec. 5. Savings Clause

Clarifies that nothing in this Act shall be construed to limit or preempt any civil action or criminal prosecution under federal or state law that was not limited or preempted by § 230 of the Communications Decency Act.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * * * *

PART I—CRIMES

* * * * * * *

CHAPTER 117—TRANSPORTATION FOR ILLEGAL SEXUAL ACTIVITY AND RELATED CRIMES

Sec.
2421. Transportation generally.
2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking.

* * * * * * *

§ 2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking

(a) IN GENERAL.—Whoever uses or operates a facility or means of interstate or foreign commerce or attempts to do so with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.

(b) AGGRAVATED VIOLATION.—Whoever uses or operates a facility or means of interstate or foreign commerce with the intent to promote or facilitate the prostitution of another person and—

(1) promotes or facilitates the prostitution of 5 or more persons; or

(2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of 1591(a),

shall be fined under this title, imprisoned for not more than 25 years, or both.

(c) CIVIL RECOVERY.—Any person injured by reason of a violation of section 2421A(b) may recover damages and reasonable attorneys' fees in an action before any appropriate United States district court.

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Consistent with section 230 of the Communications Act of 1934 (47 U.S.C. 230), a defendant may be held liable, under this subsection, where promotion or facilitation of prostitution activity includes responsibility for the creation or development of all or part of the information or content provided through any interactive computer service.

(d) MANDATORY RESTITUTION.—Notwithstanding sections 3663 or 3663A and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this section.

(e) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (a) where the defendant proves, by a preponderance of the evidence, that the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted.

* * * * * * *

COMMUNICATIONS ACT OF 1934

* * * * * * *

TITLE II—COMMON CARRIERS

PART I—COMMON CARRIER REGULATION

* * * * * * *

SEC. 230. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.

(a) FINDINGS.—The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) 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.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) POLICY.—It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

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(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) PROTECTION FOR "GOOD SAMARITAN" BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.—

(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 information provided by another information content provider.

(2) CIVIL LIABILITY.—No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) OBLIGATIONS OF INTERACTIVE COMPUTER SERVICE.—A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) EFFECT ON OTHER LAWS.—

(1) NO EFFECT ON CRIMINAL LAW.—Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW.—Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) STATE LAW.—Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW.—Nothing in this section shall be construed to limit the application of the

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Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) NO EFFECT ON STATE LAWS CONFORMING TO 18 U.S.C. 1591(A) OR 2421A.—Nothing in this section shall be construed to impair or limit any charge in a criminal prosecution brought under State law—

(A) if the conduct underlying the charge constitutes a violation of section 2421A of title 18, United States Code, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted; or

(B) if the conduct underlying the charge constitutes a violation of section 1591(a) of title 18, United States Code.

(f) DEFINITIONS.—As used in this section:

(1) INTERNET.—The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) INTERACTIVE COMPUTER SERVICE.—The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) INFORMATION CONTENT PROVIDER.—The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) ACCESS SOFTWARE PROVIDER.—The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

* * * * * * *

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APPENDIX F

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H.C.R. No. 35

HOUSE CONCURRENT RESOLUTION

WHEREAS, Human trafficking is a serious and escalating public health issue in the United States, particularly in Texas; and

WHEREAS, It is estimated that there are more than 300,000 victims of human trafficking in the State of Texas, and nearly 80,000 of those are identified as minors; and

WHEREAS, The number of cases reported rose 82 percent from 2015 to 2017, giving Texas the second-highest number of human trafficking reports in the country, with explosive growth occurring across all segments of our society in every ethnicity, gender, and age, regardless of immigration, socioeconomic, or family status; and

WHEREAS, Victims of human trafficking experience a severe and complex trauma that is recognized by the medical community as one of the most challenging to effectively treat; it requires long-term counseling, therapy, and often inpatient treatment, which is complicated by the fact that relatively few facilities in Texas are trained in trauma-informed care; and

WHEREAS, The health problems engendered by human trafficking are a crisis that impacts a substantial number of Texans in communities across the state; sexual exploitation of women and children account for 84 percent of cases and cost the state an estimated $6.6 billion in additional physical and mental health care and social services; this also creates additional strain on our health care and law enforcement systems; and

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WHEREAS, Gangs and cartels have combined drug and human trafficking operations to become a primary controlling influence in both, with the traffickers involved proving to be some of the most dangerous and violent criminals to whom thousands more innocent victims fall prey each year; and

WHEREAS, All forms of human trafficking are criminal acts, and it is imperative that this issue be appropriately addressed so that we may bring an end to this atrocious crime and help survivors to move forward with their lives; now, therefore, be it

RESOLVED, That the 86th Legislature of the State of Texas hereby recognize human trafficking as a public health issue.

Miller
Shaheen
Anderson

Document ID: 0.7.2270.7449-000005

_____ _____

President of the Senate Speaker of the House

I certify that H.C.R. No. 35 was adopted by the House on April 26, 2019, by the following vote: Yeas 139, Nays 0, 2 present, not voting.

_____

Chief Clerk of the House

I certify that H.C.R. No. 35 was adopted by the Senate on May 21, 2019, by the following vote: Yeas 31, Nays 0.

_____

Secretary of the Senate

APPROVED: _____

Date

_____

Governor

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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 20-0434

In the Supreme Court of Texas

IN RE FACEBOOK, INC. AND FACEBOOK, INC. D/B/A INSTAGRAM,

Relators.

REAL PARTIES IN INTEREST'S RESPONSE TO MOTION FOR TEMPORARY RELIEF

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Document ID: 0.7.2270.7449-000007

INTRODUCTION

This case concerns claims brought against Facebook arising out of the sex trafficking of three young girls that occurred on Facebook's products. Facebook moved to dismiss on the grounds that it was immune from suit. The trial courts in the underlying proceedings denied Facebook's motions, and Facebook sought mandamus relief.

Facebook now moves for this Court to stay the underlying proceedings pending the resolution of its mandamus petition. The court of appeals denied Facebook's stay requests in the mandamus proceedings below. This Court has previously considered a stay request from Facebook and determined that a stay of the underlying proceedings was unnecessary.

In Facebook's current motion, Facebook fails to cite any authority to support its position that its claimed entitlement to immunity supports the issuance of a stay of the trial court proceedings. While Facebook claims it would suffer irreparable harm in the absence of a stay, Facebook fails to identify any such harm. Further, Facebook fails to come forward with any reason why a stay is necessary to protect this Court's jurisdiction. This Court should reject Facebook's request for a stay of the proceedings below.

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ARGUMENT

I. Facebook cites no authority to support the grant of a stay.

Facebook claims that a stay of underlying proceedings is necessary because it is entitled to immunity from suit under 47 U.S.C. § 230 and therefore should not be required to proceed in the trial court. Facebook dedicates the majority of its motion to explaining why it should succeed on the merits of its claim to immunity. Real Parties In Interest's merits position is detailed in its response to Facebook's petition. In short, Facebook's claimed "immunity" appears nowhere in the actual language of Section 230 and is directly at odds with the relevant legislative history. *See* Response to Petition at 13-14 (noting a split of authority regarding whether Section 230 provides any "immunity" at all); *see also City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) ("[S]ubsection [230](c)(1) does not create an 'immunity' of any kind. It limits who may be called the publisher of information that appears online." (citations omitted)). More importantly, however, Facebook's extensive merits arguments are an attempt to distract this Court from the only relevant question presented by Facebook's motion: whether it is entitled to stay relief.

Facebook fails to come forward with authority to support the proposition that a stay of proceedings is appropriate where a defendant claims to have "immunity" from suit. Facebook cites this Court's opinion in *McAllen* to argue that "[t]he Court

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should stay proceedings below while it considers the mandamus proceeding, as is appropriate in 'cases in which the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved.'" Motion at 1 (quoting *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 465 (Tex. 2008) (orig. proceeding)). But this Court in *McAllen* was merely making a general statement about situations in which *mandamus relief* is proper. No motion for stay relief was filed in *McAllen*. This Court's opinion does not even mention stays of trial court proceedings, let alone purport to comment regarding when stays of proceedings are appropriate. Similarly, Facebook cites other authorities that do not address stays of underlying proceedings. *See* Motion at 1, 7 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254-55 (4th Cir. 2009)).

When Facebook does cite cases in which stays were granted, the cited opinions do not explain why the stays were appropriate and do not involve analogous situations. *See* Motion at 1-2 (citing *In re Ford Motor Co.*, 165 S.W.3d 315, 322 (Tex. 2005) (orig. proceeding) (trial court's denial of a motion for legislative continuance); *In re Automated Collection Techs., Inc.,* 156 S.W.3d 557, 558 (Tex. 2004) (orig. proceeding) (trial court's failure to enforce forum-selection agreement); *In re Allied Chem. Corp.*, 227 S.W.3d 652, 658 (Tex. 2007) (orig. proceeding) (trial court's decision to set trial in mass tort case shortly after plaintiff provided inadequate discovery responses)). These opinions shed no light on when a stay of

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underlying proceedings should issue, and certainly do not support the proposition that a stay of underlying proceedings is appropriate whenever a relator invokes a purported immunity from suit.

The only authority Facebook cites holding that a claimed immunity from suit supports a stay is *Tarrant Regional Water District v. Gragg*, 962 S.W.2d 717 (Tex. App.—Waco 1998, no pet.). But in that case a stay of trial pending appeal was *mandatory* by statute. *See id.* at 718-19 ("[T]he stay is statutory and allows no room for discretion."). No similar statutory scheme exists here, and therefore *Tarrant* says nothing about whether this Court should exercise its discretion to stay the underlying proceedings in this case. While Facebook also cites *McSurely v. McClellan*, which concerned whether a public official was immune from suit, the court in that case *denied* a request for stay pending appeal. 697 F.2d 309, 317-18 (D.C. Cir. 1982). Moreover, the court noted that a "stay is not essential" with respect to an appeal of a motion for summary judgment on immunity grounds made "well before trial." *Id.* at 318 n.17. Thus, *McSurely* shows that a stay pending the resolution of this mandamus proceeding is unnecessary in these cases, which are currently set for trial 7-9 months from now.

In sum, while Facebook has argued at length that it should succeed on the merits of its petition, Facebook has come forward with no authority establishing that a stay is appropriate under these circumstances.

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II. Facebook fails to identify any irreparable harm that it would suffer in the absence of a stay.

Facebook's motion states in conclusory fashion that it will suffer "irreparable harm" in the absence of a stay. Motion at 3, 7. Facebook appears to suggest that permitting the trial court proceedings to continue at all would constitute irreparable harm to support a stay. Even assuming simply litigating this case in the trial court would constitute "harm" to Facebook, Facebook has provided no argument or authority to support the conclusion that this harm would be "irreparable." To the contrary, Facebook's own authority makes clear that permitting the trial court proceedings to continue would not constitute irreparable harm. *See McSurely*, 697 F.2d at 317 n.13 ("Litigation costs, standing alone, do not rise to the level of irreparable injury.").

While Facebook appears to argue and cite authority that there is a harm associated with erroneously proceeding *to trial*, there is no indication that there is any likelihood this case will proceed to trial while Facebook's mandamus petition is pending. Motion at 1, 6-7 (citing *Nemet Chevrolet, Ltd.*, 591 F.3d at 254; *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d at 465; *McSurely*, 697 F.2d at 317 n.13); *see also* Petition at 21 ("[W]aiting for relief until after a trial and final judgment will deprive Facebook of the very immunity that section 230 provides."). Indeed, although all of the underlying cases have been pending for over a year, the cases are

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still at an early stage due to Facebook's relentless efforts to stall their progress. As noted above, the underlying cases are not even set for trial for at least 7-9 months from now. Therefore, there is certainly no imminent trial setting in this case such as would justify a complete stay of trial court proceedings at this time. Facebook has identified no legitimate concern that it will suffer irreparable harm in the absence of a stay.

III. A stay of proceedings is not necessary to protect this Court's jurisdiction.

Finally, Facebook makes a passing statement that a stay is necessary to "protect this Court's jurisdiction," but does not explain how this Court's jurisdiction is in jeopardy. Motion at 7. A stay of underlying proceedings may be appropriate to protect this Court's jurisdiction to consider the merits of a pending mandamus proceeding where permitting the underlying proceedings to go forward would effectively moot the petition. As explained above, however, the first trial setting in the underlying cases is currently set in the distant future. Therefore, there is no legitimate concern that the subject of Facebook's mandamus petition will become moot while this Court is considering it. Accordingly, stay relief is unnecessary in order to protect this Court's jurisdiction over the issues presented in Facebook's petition.

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PRAYER

For these reasons, Real Parties In Interest request that this Court deny Relators' motion for temporary relief.

Respectfully submitted,

/s/ *Annie McAdams*
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CERTIFICATE OF SERVICE

I certify that a copy of Real Parties in Interests' Response to Motion for Temporary Relief was served on the following by eFile on the 16th day of June 2020.

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Attorneys for Relators, Facebook, Inc. and Facebook, Inc. d/b/a Instagram

Honorable Steven Kirkland
Judge, 334th District Court
Honorable Mike Engelhart
Judge, 151st District Court
Harris County Civil Courthouse
201 Caroline
Houston, Texas 77002
Respondents

/s/ Warren W. Harris
Warren W. Harris

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Associated Case Party: Hon. Mike Engelhart

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Vu, Jessica (Blackburn)

From:	Vu, Jessica (Blackburn)
Sent:	Monday, June 22, 2020 9:26 AM
To:	(b) (6) (OLA)'
Cc:	Willard, Lauren (OAG); Adame, Jon (Blackburn)
Subject:	Sen. Blackburn letter to AG Barr re: Google antitrust probe
Attachments:	Blackburn to DOJ Google Letter 06222020.pdf

Good mornin (b) (6) and Lauren,
Please see the attached letter from Senator Blackburn to Attorney General Barr regarding the Google antitrust investigation and competition in the news media industry. Please let us know if there's any additional information we can provide.

Thanks,
Jessica

Jessica Vu
Chief Counsel
Senator Marsha Blackburn
(b) (6)

Document ID: 0.7.2270.6755

MARSHA BLACKBURN
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COMMITTEES:
ARMED SERVICES
COMMERCE, SCIENCE, AND TRANSPORTATION
JUDICIARY
VETERANS' AFFAIRS

June 22, 2020

Honorable William P. Barr
The Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Barr:

I write to you today to draw the Justice Department's attention to the tremendous threat that Google and its parent company, Alphabet, pose to a free and fair press in America. As your antitrust investigation of Google intensifies, I urge you to thoroughly scrutinize how the company's anticompetitive practices could lead to the crippling of journalistic freedom. I also ask that your probe examine abuses in both the online advertising and online search markets, and to take enforcement action swiftly before further economic harm results.

Google leverages the power of its ad platform GoogleAds to harm consumers and competitors alike. Last week, Google took actions towards demonetizing two conservative news media organizations based on the sites' third-party user comments. A NBC article incorrectly reported that *The Federalist* and *ZeroHedge* were being banned from the GoogleAds platform for publishing racist articles, and a Google representative claimed that the punishment was for the publication of "derogatory content that promotes hatred, intolerance, violence or discrimination based on race."[1] In reality, the takedown pretext was based on user comments and not on news content. While *The Federalist* was allowed to remain on GoogleAds after suspending the user comment function, *ZeroHedge*'s entire site was blocked. Google knows it holds clients' livelihoods in the palm of its hands, as publishers have no meaningful choice to generate ad revenue. Google has no qualms falsely labeling news publishers as racist as a convenient way to turn off their sites and scare writers from debating controversial ideas.

These two illustrations exemplify how Google arbitrarily flexes its control of online advertising to stifle speech that does not align with the company's social agenda. Ironically, the YouTube platform owned by Google's parent Alphabet is notorious for inadequately policing its comments section, a veritable Wild West of reprehensible user posts that include links to child sexual exploitation videos and imagery.[2] Behold the hypocrisy. Google fails to hold its own platform to the same standards, and gives preferential treatment to news publishers that more closely align with its own progressive political ideology.

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These are not isolated incidents. Using the power of its search algorithm, Google repeatedly suppresses search result rankings for right-leaning media voices such as *The Wall Street Journal* and *Breitbart*.[3] But even more pernicious, particularly in an election year, Google is placing its thumb on the scale, harming the ability of news publishers to fairly compete and produce journalistic content to inform Americans' political opinions. According to the News Media Alliance, Google leverages its search engine dominance to force news publishers to provide content to Google News at discounted, disadvantageous terms—lest they face demotion in Google Search results.[4] To add to the injustice, publishers held hostage to Google Search rankings must also compete with Google News to survive. There is no escaping the Google-run ecosystem.

I applaud the Department's initiative in putting forth a proposal to roll back liability shields under Section 230 of the Communications Decency Act. Congress will act soon, and tech giants are on notice that they can no longer hide behind such immunities to silence speech or avoid antitrust enforcement. But Google's encroachment on competitors and grip on public discourse cannot be stopped by Section 230 reforms alone. The rampant abuse of its dominant position spreads across multiple markets, and the harm is felt acutely across the news industry. In 2019, Google revenue from online search and advertising nearly topped $100 billion. In 2020, thousands of newsroom workers were hit by layoffs, furloughs or pay cuts; McClatchy declared bankruptcy; and online censors unfairly crushed competition from conservative outlets.

Google must be held accountable for such anticompetitive conduct. Both the American free market and the openness of our democracy are presently at stake. As the Department decides which actions to pursue, I urge mounting a full investigation that examines the company's control over vast sectors of the Internet economy, from online advertising to online search. Lastly, I encourage you to speak to the representatives of the news publishers mentioned in this letter.

Sincerely,

Marsha Blackburn

Marsha Blackburn
United States Senator

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[1] Adele-Momoko Fraser. "Google bans website ZeroHedge from its ad platform over comments on protest articles." NBC NEWS. June 16, 2020. https://www.nbcnews.com/tech/tech-news/google-bans-two-websites-its-ad-platform-over-protest-articles-n1231176.

[2] Julia Alexander. "YouTube still can't stop child predators in its comments." THE VERGE. February 19, 2019. https://www.theverge.com/2019/2/19/18229938/youtube-child-exploitation-recommendation-algorithm-predators.

[3] Kirsten Grind, Sam Schechner, Robert McMillan & John West. "How Google Interferes With Its Search Algorithms and Changes Your Results." WALL ST. J. Nov. 15, 2019. https://www.wsj.com/articles/how-google-interferes-with-its-search-algorithms-and-changes-your-results-11573823753.

[4] News Media Alliance White Paper: "How Google Abuses Its Position as a Market Dominant Platform to Strong-Arm News Publishers and Hurt Journalism." June 18, 2020. http://www.newsmediaalliance.org/wp-content/uploads/2020/06/Final-Alliance-White-Paper-June-18-2020.pdf.

Document ID: 0.7.2270.6755-000001

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Monday, June 22, 2020 10:24 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); Grieco, Christopher (ODAG); 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), (b)(7)(C) per FBI (OGC) (FBI); Jones, Darrin E. (ITID) (FBI); Peck, Jessica (CRM); Sabol, Sherry E. (OGC) (FBI); Liu, Jeffrey (OLC); Freeman, Lindsey (OLP)
Cc:	(b) (6) (OLA); Herlihy, Brianna (PAO)
Subject:	Section 230 Update // June 22
Attachments:	Section 230 Talking Points_DRAFT 6.18.docx; Section 230 Q&A.docx; Ending Support for Internet Censorship (ESIC) Act - Hawley.pdf; BILLS-116s3398is.pdf

Deliberative Process / Pre-Decisional

Morning team!

Hope everyone had a good weekend. Last week was a busy week on the Section 230 front. Many thanks again for everyone's hard work, insightful thoughts, and patience to get us to this point.

While the heaviest lift is done in getting our draft legislation and report/summaries out the door, we are now turning to the next phase. A few action items below, and we can recap and connect during our standing call tomorrow morning.

Responding to Critiques / Affirmative Messaging

- Overall, I think the press was pretty good and fair with the rollout last week. Working with OPA to get a compilation of articles, which we can send to this group. For anyone that still reads paper newspapers, we made it on the front page of the WSJ above the fold on Thursday ☺
- But not surprisingly, some of the tech industry and other experts have come out to critique parts of DOJ's Section 230 proposal. Some of these have been the expected criticisms from the Section 230 absolutists. Other criticisms seem to misunderstand our proposal and need responses. And some may be worth considering as we finalize the legislative text through the OMB process.
- To that end, it would be helpful to collect a list of the main criticisms and our responses. Some of these are reflected in the draft Q&A attached. (Also attached a draft set of TPs for reference).
- Please forward to me and the group any critiques you think we need to counter, and proposed responses. I may also reach out to various folks for help in counterarguments.
- We have had a number of productive discussions with experts from our Public Workshop that support our proposal, in whole or in part. If you all have other ideas of experts, litigators, academics, companies, or policymakers that would be helpful supporters or worth talking to, please feel free to send along.

OMB Process

- Once we get comments and edits from the interagency process, I will forward along to the Working Group for consideration. I should know more on timing by tomorrow's call.

Technical Assistance on Hill Legislation

Document ID: 0.7.2270.6407

- **Schatz-Thune.** Thanks again to everyone for the feedback on the draft Schatz-Thune bill last Tuesday. They were very appreciative and receptive to most of our comments. As a next step, we will try to provide more specific redline language on their next turn. We can discuss further on the call tomorrow.
- **Hawley.** You may have also seen that Hawley dropped a bill on the same day as our roll-out. Would appreciate this group's thoughts on that proposal as well (b) (5) [redacted]
- **EARN IT.** We should also continue to think about which of our DOJ proposals to advocate to Graham-Blumenthal for inclusion in the EARN IT Act. I've attached the version that was introduced for reference. Welcome thoughts on the most important (and also most likely to be accepted) aspects of our draft bill.

Best,
Lauren

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

Document ID: 0.7.2270.6407

Title: To amend the Communications Act of 1934 to provide accountability for bad actors who abuse the Good Samaritan protections provided under that Act, and for other purposes.

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 "Limiting Section 230 Immunity to Good Samaritans Act".

SEC. 2. SCOPE OF PROTECTION.

Section 230 of the Communications Act of 1934 (47 U.S.C. 230) is amended—

(1) in subsection (c)—

(A) in paragraph (1)—

(i) by striking "No provider" and inserting the following:

"(A) IN GENERAL.—Subject to subparagraph (B), no provider"; and

(ii) by adding at the end the following:

"(B) CONDITION.—With respect to an edge provider, subparagraph (A) shall only apply if the provider adopts and maintains written terms of service that—

"(i) take precedence over other such terms in case of any conflict between the sets of terms;

"(ii) describe any policies of the edge provider relating to restricting access to or availability of material; and

"(iii) promise that the edge provider shall—

"(I) design and operate the provided service in good faith; and

"(II) if the provider is found, in a civil action brought in Federal or State court, or by an arbitrator, to breach the promise made under subclause (I) with respect to a claimant user, pay that user—

"(aa) the greater of—

"(AA) damages of not less than $5,000; or

"(BB) actual damages; and

"(bb) with respect to litigation or arbitration by the user to enforce the promise—

"(AA) a reasonable attorney's fee; and

"(BB) costs and other expenses described in sections 1821 and 1920 of title 28, United States Code (or, in the case of an action brought in State court or through arbitration, any similar costs and other expenses).''; and

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(B) by adding at the end the following:

"(3) GOOD FAITH.—For the purposes of this subsection, a provider of an interactive computer service—

"(A) acts in good faith if the provider acts with an honest belief and purpose, observes fair dealing standards, and acts without fraudulent intent; and

"(B) does not act in good faith if the provider takes an action that includes—

"(i) the intentionally selective enforcement of the terms of service of the interactive computer service, including the intentionally selective enforcement of policies of the provider relating to restricting access to or availability of material;

"(ii) enforcing the terms of service of the interactive computer service, including enforcing policies of the provider to restrict access to or availability of material, against a user by employing an algorithm that selectively enforces those terms, if the provider knows, or acts in reckless disregard of the fact, that the algorithm selectively enforces those terms;

"(iii) the intentional failure to honor a public or private promise made by, or on behalf of, the provider; or

"(iv) any other intentional action taken by the provider without an honest belief and purpose, without observing fair dealing standards, or with fraudulent intent.";

(2) in subsection (e), by adding at the end the following:

"(6) NO EFFECT ON LEGAL PROMISES.—Nothing in this section shall be construed to impair or limit any claim for breach of contract, promissory estoppel, or breach of a duty of good faith."; and

(3) in subsection (f), by adding at the end the following:

"(5) EDGE PROVIDER.—The term 'edge provider'—

"(A) means an entity that—

"(i) provides an interactive computer service—

"(I) through a website, online application, or mobile application (including a single interactive computer service that is provided through more than 1 such website or application);

"(II) through which information provided by another information content provider is distributed; and

"(III) that, in any month during the most recently completed 12-month period—

"(aa) more than 30,000,000 users in the United States accessed, without regard to the means by which the users accessed the service; or

"(bb) more than 300,000,000 users worldwide accessed, without regard to the means by which the users accessed the service; and

"(ii) during the most recently completed taxable year, had more than

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$1,500,000,000 in global revenue; and

"(B) does not include an organization described in section 501(c) of the Internal Revenue Code of 1986 that is exempt from taxation under section 501(a) of such Code.".

Document ID: 0.7.2270.6407-000003

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
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116TH CONGRESS
2D SESSION

S. 3398

To establish a National Commission on Online Child Sexual Exploitation Prevention, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 5, 2020

Mr. GRAHAM (for himself, Mr. BLUMENTHAL, Mr. CRAMER, Mrs. FEINSTEIN, Mr. HAWLEY, Mr. JONES, Mr. CASEY, Mr. WHITEHOUSE, Mr. DURBIN, and Ms. ERNST) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To establish a National Commission on Online Child Sexual Exploitation Prevention, and for other purposes.

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 "Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020" or the "EARN IT Act of 2020".

SEC. 2. DEFINITIONS.

In this Act:

Document ID: 0.7.2270.6407-000004

(1) COMMISSION.—The term ''Commission'' means the National Commission on Online Child Sexual Exploitation Prevention.

(2) INTERACTIVE COMPUTER SERVICE.—The term ''interactive computer service'' has the meaning given the term in section 230(f)(2) of the Communications Act of 1934 (47 U.S.C. 230(f)(2)).

SEC. 3. NATIONAL COMMISSION ON ONLINE CHILD SEXUAL EXPLOITATION PREVENTION.

(a) ESTABLISHMENT.—There is established a National Commission on Online Child Sexual Exploitation Prevention.

(b) PURPOSE.—The purpose of the Commission is to develop recommended best practices that providers of interactive computer services may choose to implement to prevent, reduce, and respond to the online sexual exploitation of children, including the enticement, grooming, sex trafficking, and sexual abuse of children and the proliferation of online child sexual abuse material.

(c) MEMBERSHIP.—

(1) COMPOSITION.—

(A) IN GENERAL.—The Commission shall be composed of 19 members.

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(B) AGENCY HEADS.—The following Federal officials shall serve as members of the Commission:

(i) The Attorney General or his or her representative.

(ii) The Secretary of Homeland Security or his or her representative.

(iii) The Chairman of the Federal Trade Commission or his or her representative.

(C) OTHER MEMBERS.—Of the remaining 16 members of the Commission—

(i) 4 shall be appointed by the majority leader of the Senate, of whom—

(I) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(A);

(II) 1 shall have the qualifications required under paragraph (2)(B);

(III) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(C); and

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(IV) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(D);

(ii) 4 shall be appointed by the minority leader of the Senate, of whom—

(I) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(A);

(II) 1 shall have the qualifications required under paragraph (2)(B);

(III) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(C); and

(IV) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(D);

(iii) 4 shall be appointed by the Speaker of the House of Representatives, of whom—

(I) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(A);

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(II) 1 shall have the qualifications required under paragraph (2)(B);

(III) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(C); and

(IV) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(D); and

(iv) 4 shall be appointed by the minority leader of the House of Representatives, of whom—

(I) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(A);

(II) 1 shall have the qualifications required under paragraph (2)(B);

(III) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(C); and

(IV) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(D).

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(2) QUALIFICATIONS.—Of the 16 members of the Commission appointed under paragraph (1)(C)—

(A) 4 shall have current experience in investigating online child sexual exploitation crimes, of whom—

(i) 2 shall have such experience in a law enforcement capacity; and

(ii) 2 shall have such experience in a prosecutorial capacity;

(B) 4 shall be survivors of online child sexual exploitation, or have current experience in providing services for victims of online child sexual exploitation in a non-governmental capacity;

(C)(i) 2 shall have current experience in matters related to constitutional law, consumer protection, or privacy; and

(ii) 2 shall have current experience in computer science or software engineering related to matters of cryptography, data security, or artificial intelligence in a non-governmental capacity; and

(D) 4 shall be individuals who each currently work for an interactive computer service

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that is unrelated to each other interactive computer service represented under this subparagraph, representing diverse types of businesses and areas of professional expertise, of whom—

(i) 2 shall have current experience in addressing online child sexual exploitation and promoting child safety at an interactive computer service with not less than 30,000,000 registered monthly users in the United States; and

(ii) 2 shall have current experience in addressing online child sexual exploitation and promoting child safety at an interactive computer service with less than 10,000,000 registered monthly users in the United States.

(3) DATE.—The initial appointments of members to the Commission under paragraph (1)(C) shall be made not later than 90 days after the date of enactment of this Act.

(d) PERIOD OF APPOINTMENT; VACANCIES.—

(1) PERIOD OF APPOINTMENT.—A member of the Commission shall be appointed for a term of 5 years.

(2) VACANCIES.—

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(A) EFFECT ON COMMISSION.—Any vacancy in the Commission shall not affect the powers of the Commission.

(B) FILLING OF VACANCIES.—A vacancy in the Commission shall be filled in the same manner as the original appointment under subsection (c)(1).

(e) INITIAL MEETING.—The Commission shall hold the first meeting of the Commission not later than 60 days after the date on which a majority of the members of the Commission have been appointed.

(f) CHAIRPERSON.—The Attorney General or his or her representative shall serve as the Chairperson of the Commission.

(g) QUORUM.—A majority of the members of the Commission shall constitute a quorum, but a lesser number of members may hold a meeting.

(h) MEETINGS.—The Commission shall meet at the call of the Chairperson.

(i) AUTHORITY OF COMMISSION.—The Commission may, for the purpose of carrying out this section and section 4, hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers appropriate.

(j) INFORMATION FROM FEDERAL AGENCIES.—

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(1) IN GENERAL.—The Commission may secure directly from any Federal department or agency such information as the Commission considers necessary to carry out this section and section 4.

(2) FURNISHING INFORMATION.—Upon request of the Chairperson of the Commission for information under paragraph (1), the head of a Federal department or agency shall furnish the information to the Commission, unless the information is subject to an active investigation or otherwise privileged or confidential.

(k) TRAVEL EXPENSES.—A member of the Commission shall serve without compensation, but shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from the home or regular places of business of the member in the performance of services for the Commission.

(l) DURATION.—Section 14 of the Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Commission.

SEC. 4. DUTIES OF THE COMMISSION.

(a) RECOMMENDED BEST PRACTICES.—

(1) INITIAL RECOMMENDATIONS.—

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(A) IN GENERAL.—Not later than 18 months after the date on which a majority of the members of the Commission required to be appointed under section 3(c)(1)(C) have been so appointed, the Commission shall develop and submit to the Attorney General recommended best practices that providers of interactive computer services may choose to engage in to prevent, reduce, and respond to the online sexual exploitation of children, including the enticement, grooming, sex trafficking, and sexual abuse of children and the proliferation of online child sexual abuse material.

(B) REQUIREMENTS.—

(i) ALTERNATIVE BEST PRACTICES.—The best practices required to be developed and submitted under subparagraph (A) shall include alternatives that take into consideration—

(I) the size, type of product, and business model of a provider of an interactive computer service;

(II) whether an interactive computer service—

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(aa) is made available to the public;

(bb) is primarily responsible for the transmission and storage of information on behalf of other interactive computer services; or

(cc) provides the capability to transmit data to and receive data from all or substantially all internet endpoints on behalf of a consumer; and

(III) whether a type of product, business model, product design, or other factors related to the provision of an interactive computer service could make a product or service susceptible to the use and facilitation of online child sexual exploitation.

(ii) SCOPE.—Notwithstanding paragraph (3), the alternatives described in clause (i) of this subparagraph may exclude certain matters required to be addressed under paragraph (3), as the Commission determines appropriate based on the nature of particular products or serv-

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ices or other factors relevant to the purposes of this Act.

(2) SUPPORT REQUIREMENT.—The Commission may only recommend the best practices under paragraph (1) if not fewer than 14 members of the Commission support the best practices.

(3) MATTERS ADDRESSED.—The matters addressed by the recommended best practices developed and submitted by the Commission under paragraph (1) shall include—

(A) preventing, identifying, disrupting, and reporting child sexual exploitation;

(B) coordinating with non-profit organizations and other providers of interactive computer services to preserve, remove from view, and report child sexual exploitation;

(C) retaining child sexual exploitation content and related user identification and location data;

(D) receiving and triaging reports of child sexual exploitation by users of interactive computer services, including self-reporting;

(E) implementing a standard rating and categorization system to identify the type and severity of child sexual abuse material;

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(F) training and supporting content moderators who review child sexual exploitation content for the purposes of preventing and disrupting online child sexual exploitation;

(G) preparing and issuing transparency reports, including disclosures in terms of service, relating to identifying, categorizing, and reporting child sexual exploitation and efforts to prevent and disrupt online child sexual exploitation;

(H) coordinating with voluntary initiatives offered among and to providers of interactive computer services relating to identifying, categorizing, and reporting child sexual exploitation;

(I) employing age rating and age gating systems to reduce child sexual exploitation;

(J) offering parental control products that enable customers to limit the types of websites, social media platforms, and internet content that are accessible to children; and

(K) contractual and operational practices to ensure third parties, contractors, and affiliates comply with the best practices.

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(4) RELEVANT CONSIDERATIONS.—In developing best practices under paragraph (1), the Commission shall consider—

(A) the cost and technical limitations of implementing the best practices;

(B) the impact on competition, product and service quality, data security, and privacy;

(C) the impact on the ability of law enforcement agencies to investigate and prosecute child sexual exploitation and rescue victims; and

(D) the current state of technology.

(5) PERIODIC UPDATES.—Not less frequently than once every 5 years, the Commission shall update and resubmit to the Attorney General recommended best practices under paragraph (1).

(6) RESUBMISSION AFTER DENIAL OR FAILURE TO APPROVE.—

(A) IN GENERAL.—If, with respect to recommended best practices submitted under paragraph (1), the best practices are denied under subsection (b)(1)(A) or a bill that contains the best practices is not enacted under the expedited procedures under subsection (c), the Commission may resubmit recommended best prac-

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tices to the Attorney General until the applicable deadline.

(B) APPLICABLE DEADLINE.—

(i) INITIAL BEST PRACTICES.—For purposes of subparagraph (A), in the case of resubmission of initial recommended best practices that were submitted under paragraph (1) before any bill that contains best practices has been enacted under the expedited procedures under subsection (c), the applicable deadline is the later of—

(I) the deadline described in paragraph (1)(A) of this subsection; or

(II) the date that is 60 days after, as applicable—

(aa) the date of the denial; or

(bb) the last day on which a bill containing the best practices could have been enacted under the expedited procedures under subsection (c).

(ii) UPDATED BEST PRACTICES.—For purposes of subparagraph (A), in the case

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of resubmission of updated recommended best practices that were submitted under paragraph (1) in accordance with paragraph (5), the applicable deadline is the later of—

(I) the deadline described in paragraph (5); or

(II) the date that is 60 days after, as applicable—

(aa) the date of the denial; or

(bb) the last day on which a bill containing the best practices could have been enacted under the expedited procedures under subsection (c).

(b) PUBLICATION OF BEST PRACTICES.—

(1) IN GENERAL.—Not later than 30 days after the date on which the Commission submits recommended best practices under subsection (a), including updated recommended best practices under paragraph (5) of that subsection, the Attorney General, upon agreement with the Secretary of Homeland Security and the Chairman of the Federal Trade Commission, shall—

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(A) approve or deny the recommended best practices; and

(B) if approved—

(i) publish the recommended best practices on the website of the Department of Justice and in the Federal Register; and

(ii) submit the recommended best practices to Congress, including to—

(I) the Committee on the Judiciary and the Committee on Commerce, Science, and Transportation of the Senate; and

(II) the Committee on the Judiciary and the Committee on Energy and Commerce of the House of Representatives.

(2) CONSIDERATIONS.—In determining whether to approve or deny recommended best practices under paragraph (1), the Attorney General shall consider—

(A) the purpose of the Commission, as set forth in section 3(b); and

(B) the relevant considerations set forth in subsection (a)(4) of this section.

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(3) WRITTEN FINDINGS.—Any denial of the recommended best practices by the Attorney General under paragraph (1) shall be accompanied by public written findings setting forth the basis for, and reasons supporting, the denial.

(c) CONGRESSIONAL APPROVAL.—

(1) DEFINITION.—In this subsection, the term ''covered bill'' means a bill that—

(A) contains only the recommended best practices that have been submitted to Congress under subsection (b), in their entirety; and

(B) is introduced under paragraph (3) of this subsection.

(2) RULES OF HOUSE OF REPRESENTATIVES AND SENATE.—This subsection is enacted by Congress—

(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a covered bill, and it supersedes other rules only to the extent that it is inconsistent with such rules; and

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(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) in the same manner, and to the same extent, as in the case of any other rule of that House.

(3) INTRODUCTION.—

(A) IN GENERAL.—On the day on which recommended best practices are submitted to Congress under subsection (b), a covered bill containing those best practices shall be introduced—

(i) in the Senate by—

(I) the majority leader of the Senate, for himself or herself and the minority leader of the Senate; or

(II) Members of the Senate designated by the majority leader and minority leader of the Senate; and

(ii) in the House of Representatives by—

(I) the majority leader of the House of Representatives, for himself or herself and the minority leader of

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the House of the House of Representatives; or

(II) Members of the House of Representatives designated by the majority leader and minority leader of the House of the House of Representatives.

(B) NOT IN SESSION.—If either House is not in session on the day on which recommended best practices are submitted to Congress under subsection (b), a covered bill containing the best practices shall be introduced in that House, as provided in subparagraph (A), on the first day thereafter on which that House is in session.

(C) REFERRAL.—A covered bill introduced under this paragraph shall be referred by the Presiding Officers of the respective Houses to the appropriate committee, or, in the case of a bill containing provisions within the jurisdiction of 2 or more committees, jointly to such committees for consideration of those provisions within their respective jurisdictions.

(4) FAST TRACK CONSIDERATION IN HOUSE OF REPRESENTATIVES.—

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(A) REPORTING AND DISCHARGE.—Any committee of the House of Representatives to which a covered bill is referred shall report it to the House not later than 45 calendar days after the date of introduction under paragraph (3). If a committee fails to report the covered bill within that period, the committee shall be discharged from further consideration of the covered bill and the covered bill shall be referred to the appropriate calendar.

(B) PROCEEDING TO CONSIDERATION.—After each committee authorized to consider a covered bill reports it to the House or has been discharged from its consideration, it shall be in order, not later than 60 calendar days after the date of introduction under paragraph (3), to move to proceed to consider the covered bill in the House. All points of order against the motion are waived. Such a motion shall not be in order after the House has disposed of a motion to proceed on the covered bill. The previous question shall be considered as ordered on the motion to its adoption without intervening motion. The motion shall not be debatable. A mo-

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tion to reconsider the vote by which the motion is disposed of shall not be in order.

(C) CONSIDERATION.—The covered bill shall be considered as read. All points of order against the covered bill and against its consideration are waived. The previous question shall be considered as ordered on the covered bill to its passage without intervening motion except 10 hours of debate equally divided and controlled by the proponent and an opponent. A motion to reconsider the vote on passage of the covered bill shall not be in order.

(5) FAST TRACK CONSIDERATION IN SENATE.—

(A) REPORTING AND DISCHARGE.—Any committee of the Senate to which a covered bill is referred shall report it to the Senate not later than 45 calendar days after the date of introduction under paragraph (3). If a committee fails to report the covered bill within that period, the committee shall be discharged from further consideration of the covered bill and the covered bill shall be referred to the appropriate calendar.

(B) PLACEMENT ON CALENDAR.—After each committee authorized to consider a cov-

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ered bill reports it to the Senate or has been discharged from its consideration, it shall be in order, not later than 60 calendar days after the date of introduction under paragraph (3) of this subsection, to place the covered bill on the calendar.

(C) FLOOR CONSIDERATION.—

(i) IN GENERAL.—Notwithstanding Rule XXII of the Standing Rules of the Senate, it is in order at any time during the period beginning on the 60th day after the date on which the covered bill was introduced under paragraph (3) and ending on the 65th day after the date on which the covered bill was introduced under that paragraph (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the covered bill, and all points of order against the covered bill (and against consideration of the covered bill) are waived. The motion to proceed is not debatable. The motion is not subject to a motion to postpone. A motion to reconsider the vote by which the motion is agreed to or dis-

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agreed to shall not be in order. If a motion to proceed to the consideration of the covered bill is agreed to, the covered bill shall remain the unfinished business until disposed of.

(ii) DEBATE.—Debate on the covered bill, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours, which shall be divided equally between the majority and minority leaders or their designees. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the covered bill is not in order.

(iii) VOTE ON PASSAGE.—The vote on passage shall occur immediately following the conclusion of the debate on a covered bill, and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the Senate.

(iv) RULINGS OF THE CHAIR ON PROCEDURE.—Appeals from the decisions of

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the Chair relating to the application of the rules of the Senate, as the case may be, to the procedure relating to a covered bill shall be decided without debate.

(6) RULES RELATING TO SENATE AND HOUSE OF REPRESENTATIVES.—

(A) COORDINATION WITH ACTION BY OTHER HOUSE.—If, before the passage by one House of a covered bill of that House, that House receives from the other House a covered bill, then the following procedures shall apply:

(i) The covered bill of the other House shall not be referred to a committee.

(ii) With respect to a covered bill of the House receiving the bill—

(I) the procedure in that House shall be the same as if no covered bill had been received from the other House; but

(II) the vote on passage shall be on the covered bill of the other House.

(B) TREATMENT OF COVERED BILL OF OTHER HOUSE.—If one House fails to introduce or consider a covered bill under this section, the

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covered bill of the other House shall be entitled to expedited floor procedures under this section.

(C) TREATMENT OF COMPANION MEASURES.—If, following passage of the covered bill in the Senate, the Senate then receives the companion measure from the House of Representatives, the companion measure shall not be debatable.

(d) CERTIFICATION OF BEST PRACTICES.—Not later than 1 year after the date on which a bill that contains recommended best practices submitted to Congress under subsection (b) is enacted under the expedited procedures under subsection (c), and annually thereafter, an officer of a provider of an interactive computer service may submit a written certification to the Attorney General stating that the provider—

(1) has conducted a thorough review of the implementation and operation of the best practices; and

(2) has a reasonable basis to conclude that review does not reveal any material non-compliance with the requirements of the best practices.

(e) PUBLICATION OF CERTIFIED INTERACTIVE COMPUTER SERVICE PROVIDERS.—The Attorney General shall maintain on the website of the Department of Justice a

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public list of each provider of an interactive computer service for which a certification has been submitted under subsection (d).

(f) CIVIL INVESTIGATIVE DEMANDS.—

(1) ISSUANCE; SERVICE; PRODUCTION OF MATERIAL; TESTIMONY.—

(A) IN GENERAL.—Whenever the Attorney General has reason to believe that an officer of a provider of an interactive computer service has filed a false certification under subsection (d), the Attorney General may issue in writing, and cause to be served upon the provider, a civil investigative demand requiring the provider to—

(i) produce any documentary material relevant to such certification for inspection and copying;

(ii) answer in writing written interrogatories with respect to such documentary material;

(iii) give oral testimony concerning such documentary material; or

(iv) furnish any combination of such material, answers, or testimony.

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(B) SERVICE.—If a civil investigative demand issued under subparagraph (A) is an express demand for any product of discovery, the Attorney General shall—

(i) cause to be served, in any manner authorized under section 3733 of title 31, United States Code, a copy of the demand upon the person from whom the discovery was obtained; and

(ii) notify the person to whom the demand is issued of the date on which the copy was served.

(2) CONTENTS; RETURN DATE FOR DEMAND FOR PRODUCT OF DISCOVERY.—

(A) IN GENERAL.—Each civil investigative demand issued under paragraph (1) shall—

(i) state the nature of the Attorney General's belief that a false certification has been filed under subsection (d);

(ii) if the demand is for production of documentary material—

(I) describe the class or classes of documentary material to be produced thereunder with such definiteness and

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certainty as to permit such material to be fairly identified;

(II) prescribe a return date or dates that will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(III) identify the custodian to whom the material shall be made available;

(iii) if the demand is for answers to written interrogatories—

(I) propound with definiteness and certainty the written interrogatories to be answered;

(II) prescribe a date or dates at which time answers to written interrogatories shall be submitted; and

(III) identify the custodian to whom the answers shall be submitted; and

(iv) if the demand is for the giving of oral testimony—

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(I) prescribe a date, time, and place at which oral testimony shall be commenced; and

(II) identify—

(aa) an investigator who shall conduct the examination; and

(bb) the custodian to whom the transcript of the examination shall be submitted.

(B) RETURN DATE FOR PRODUCT OF DISCOVERY.—Any civil investigative demand issued under paragraph (1) that is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of the demand has been served upon the person from whom the discovery was obtained.

(3) APPLICABILITY OF OTHER PROVISIONS.—

(A) IN GENERAL.—Subject to subparagraph (B), subsections (b) through (l) of section 3733 of title 31, United States Code, shall apply with respect to a civil investigative demand issued under paragraph (1) of this subsection in the same manner as those subsections apply to a civil investigative demand

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issued under subsection (a) of such section 3733.

(B) FALSE CLAIMS REFERENCES.—For purposes of subparagraph (A), a reference in section 3733 of title 31, United States Code, to—

(i) a violation of a false claims law shall be deemed to be a reference to the filing of a false certification under subsection (d) of this section;

(ii) a false claims law investigation shall be deemed to be a reference to an inquiry into whether any person is or has been engaged in filing a false certification under subsection (d) of this section; and

(iii) a false claims law investigator shall be deemed to be a reference to—

(I) any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect this section; or

(II) any officer or employee of the United States acting under the direction and supervision of an attorney

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or investigator described in subclause (I) in connection with an inquiry into whether any person is or has been engaged in filing a false certification under subsection (d) of this section.

SEC. 5. ENFORCEMENT.

(a) OFFENSE.—It shall be unlawful for an officer of a provider of an interactive computer service to knowingly submit a written certification under section 4(d) that contains a false statement.

(b) CRIMINAL PENALTIES.—Any person who violates subsection (a) shall be fined in accordance with title 18, United States Code, imprisoned for not more than 2 years, or both.

SEC. 6. EARNING IMMUNITY.

(a) IN GENERAL.—Section 230(e) of the Communications Act of 1934 (47 U.S.C. 230(e)) is amended by adding at the end the following:

''(6) NO EFFECT ON CHILD SEXUAL EXPLOITATION LAW.—

''(A) LIABILITY OF PROVIDERS OF INTERACTIVE COMPUTER SERVICE.—Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

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"(i) any claim in a civil action brought against a provider of an interactive computer service under section 2255 of title 18, United States Code, if the conduct underlying the claim—

"(I) constitutes a violation of section 2252 or section 2252A of that title; or

"(II) is considered a violation of section 2252 or section 2252A of that title by operation of subsection (a)(2) of such section 2255;

"(ii) any charge in a criminal prosecution brought against a provider of an interactive computer service under State law if the conduct underlying the charge would constitute a violation of section 2252 or section 2252A of title 18, United States Code; or

"(iii) any claim in a civil action brought against a provider of an interactive computer service under State law if the conduct underlying the claim—

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"(I) would constitute a violation of section 2252 or section 2252A of title 18, United States Code; or

"(II) would be considered a violation of section 2252 or section 2252A of title 18, United States Code, for purposes of subsection (a)(1) of section 2255 of that title, by operation of subsection (a)(2) of such section 2255.

"(B) SAFE HARBOR.—Subparagraph (A) shall not apply to a claim in a civil action or charge in a State criminal prosecution brought against a provider of an interactive computer service if—

"(i) an officer of the provider has elected to certify to the Attorney General under section 4(d) of the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020 that the provider has implemented, and is in compliance with, the child sexual exploitation prevention best practices contained in a law enacted under the expedited procedures under section 4(c) of such Act and such

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certification was in force at the time of any alleged acts or omissions that are the subject of a claim in a civil action or charge in a State criminal prosecution brought against such provider; or

''(ii) the provider has implemented reasonable measures relating to the matters described in section 4(a)(3) of the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020, subject to the exceptions authorized under section 4(a)(1)(B)(ii) of that Act, to prevent the use of the interactive computer service for the exploitation of minors.''.

(b) MENS REA FOR CIVIL SUITS.—Section 2255 of title 18, United States Code, is amended—

(1) by redesignating subsection (a) as paragraph (1) and adjusting the margin accordingly;

(2) by inserting before paragraph (1), as so designated, the following:

''(a) RIGHT OF ACTION.—''; and

(3) in subsection (a), as so designated, by adding at the end the following:

''(2) CIVIL REMEDY FOR CERTAIN ACTIVITIES RELATING TO MATERIAL INVOLVING THE SEXUAL

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EXPLOITATION OF MINORS.—Conduct by a provider of an interactive computer service (as defined in section 230 of the Communications Act of 1934 (47 U.S.C. 230)) that would violate section 2252 or section 2252A if that section were applied by substituting 'recklessly' for 'knowingly' each place that term appears shall be considered a violation of section 2252 or section 2252A for purposes of paragraph (1) of this subsection.''.

(c) EFFECTIVE DATE.—The amendments made by this section shall—

(1) take effect on the earlier of—

(A) the date that is 1 year after the date on which a bill that contains best practices submitted under section 4(b) is enacted under the expedited procedures under section 4(c); or

(B) the date that is 4 years after the date of enactment of this Act; and

(2) only apply to a claim in a civil action or charge in a criminal prosecution brought against a provider of an interactive computer service if the alleged acts or omissions occurred after the effective date described in paragraph (1).

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SEC. 7. USE OF TERM "CHILD SEXUAL ABUSE MATERIAL".

(a) SENSE OF CONGRESS.—It is the sense of Congress that the term ''child sexual abuse material'' has the same legal meaning as the term ''child pornography'', as that term was used in Federal statutes and case law before the date of enactment of this Act.

(b) AMENDMENTS.—

(1) TITLE 5, UNITED STATES CODE.—Chapter 65 of title 5, United States Code, is amended—

(A) in section 6502(a)(2)(B), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(B) in section 6504(c)(2)(F), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(2) HOMELAND SECURITY ACT OF 2002.—The Homeland Security Act of 2002 (6 U.S.C. 101 et seq.) is amended—

(A) in section 307(b)(3)(D) (6 U.S.C. 187(b)(3)(D)), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(B) in section 890A (6 U.S.C. 473)—

(i) in subsection (b)(2)(A)(ii), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

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(ii) in subsection (e)(3)(B)(ii), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(3) IMMIGRATION AND NATIONALITY ACT.—Section 101(a)(43)(I) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)(I)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(4) SMALL BUSINESS JOBS ACT OF 2010.—Section 3011(c) of the Small Business Jobs Act of 2010 (12 U.S.C. 5710(c)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(5) BROADBAND DATA IMPROVEMENT ACT.—Section 214(a)(2) of the Broadband Data Improvement Act (15 U.S.C. 6554(a)(2)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(6) CAN-SPAM ACT OF 2003.—Section 4(b)(2)(B) of the CAN-SPAM Act of 2003 (15 U.S.C. 7703(b)(2)(B)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(7) TITLE 18, UNITED STATES CODE.—Title 18, United States Code, is amended—

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(A) in section 1956(c)(7)(D), by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material'';

(B) in chapter 110—

(i) in section 2251(e), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(ii) in section 2252(b)—

(I) in paragraph (1), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(II) in paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(iii) in section 2252A—

(I) in the section heading, by striking ''**child pornography**'' and inserting ''**child sexual abuse material**'';

(II) in subsection (a)—

(aa) in paragraph (1), by striking ''child pornography'' and inserting ''child sexual abuse material'';

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(bb) in paragraph (2)—

(AA) in subparagraph (A), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(BB) in subparagraph (B), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(cc) in paragraph (3), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(dd) in paragraph (4)—

(AA) in subparagraph (A), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(BB) in subparagraph (B), by striking ''child pornography'' and inserting

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''child sexual abuse material'';

(ee) in paragraph (5)—

(AA) in subparagraph (A), by striking ''an image of child pornography'' and inserting ''child sexual abuse material''; and

(BB) in subparagraph (B), by striking ''an image of child pornography'' and inserting ''child sexual abuse material''; and

(ff) in paragraph (7)—

(AA) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(BB) by striking the period at the end and inserting a comma;

(III) in subsection (b)—

(aa) in paragraph (1), by striking ''child pornography'' and

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inserting ''child sexual abuse material''; and

(bb) in paragraph (2), by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material''; and

(IV) in subsection (c)—

(aa) in paragraph (1)(A), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(bb) in paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(cc) in the undesignated matter following paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(V) in subsection (d)(1), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

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(VI) in subsection (e), by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material'';

(iv) in section 2256(8)—

(I) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(II) by striking the period at the end and inserting a semicolon;

(v) in section 2257A(h)—

(I) in paragraph (1), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(II) in paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(vi) in section 2258A—

(I) in subsection (a)(2)—

(aa) in subparagraph (A), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(bb) in subparagraph (B), by striking ''child pornography''

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and inserting ''child sexual abuse material'';

(II) in subsection (b)—

(aa) in paragraph (4)—

(AA) in the paragraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(BB) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(bb) in paragraph (5), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(III) in subsection (g)(2)(B), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(vii) in section 2258C—

(I) in the section heading, by striking ''**child pornography**'' and inserting ''**child sexual abuse material**'';

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(II) in subsection (a)—

(aa) in paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(bb) in paragraph (3), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(III) in subsection (d), by striking ''child pornography visual depiction'' and inserting ''child sexual abuse material visual depiction''; and

(IV) in subsection (e), by striking ''child pornography visual depiction'' and inserting ''child sexual abuse material visual depiction'';

(viii) in section 2259—

(I) in paragraph (b)(2)—

(aa) in the paragraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL'';

(bb) in the matter preceding subparagraph (A), by striking

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''child pornography'' and inserting ''child sexual abuse material''; and

(cc) in subparagraph (A), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(II) in subsection (c)—

(aa) in paragraph (1)—

(AA) in the paragraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(BB) by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material'';

(bb) in paragraph (2), in the matter preceding subparagraph (A), by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material''; and

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(cc) in paragraph (3)—

(AA) in the paragraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(BB) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(III) in subsection (d)(1)—

(aa) in subparagraph (A)—

(AA) by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material''; and

(BB) by striking ''Child Pornography'' and inserting ''Child Sexual Abuse Material'';

(bb) in subparagraph (B), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

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(cc) in subparagraph (C)—

(AA) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(BB) by striking ''Child Pornography'' and inserting ''Child Sexual Abuse Material'';

(ix) in section 2259A—

(I) in the section heading, by striking ''**child pornography**'' and inserting ''**child sexual abuse material**'';

(II) in subsection (a)—

(aa) in paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(bb) in paragraph (3), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(III) in subsection (d)(2)(B), by striking ''child pornography'' and in-

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serting ''child sexual abuse material''; and

(x) in section 2259B—

(I) in the section heading, by striking ''**Child pornography**'' and inserting ''**Child sexual abuse material**'';

(II) in subsection (a), by striking ''Child Pornography'' each place the term appears and inserting ''Child Sexual Abuse Material'';

(III) in subsection (b), by striking ''Child Pornography'' each place the term appears and inserting ''Child Sexual Abuse Material'';

(IV) in subsection (c), by striking ''Child Pornography'' and inserting ''Child Sexual Abuse Material''; and

(V) in subsection (d), by striking ''Child Pornography'' and inserting ''Child Sexual Abuse Material'';

(C) in chapter 117—

(i) in section 2423(f)(3), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

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(ii) in section 2427—

(I) in the section heading, by striking ''**child pornography**'' and inserting ''**child sexual abuse material**''; and

(II) by striking ''child pornography'' and inserting ''child sexual abuse material'';

(D) in section 2516—

(i) in paragraph (1)(c), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(ii) in paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(E) in section 3014(h)(3), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(F) in section 3509—

(i) in subsection (a)(6), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(ii) in subsection (m)—

(I) in the subsection heading, by striking ''CHILD PORNOGRAPHY'' and

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inserting ''CHILD SEXUAL ABUSE MATERIAL'';

(II) in paragraph (1), by striking ''child pornography'' and inserting ''constitutes a child sexual abuse material'';

(III) in paragraph (2), by striking ''child pornography'' and inserting ''constitutes a child sexual abuse material''; and

(IV) in paragraph (3), by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material''; and

(G) in section 3632(d)(4)(D)(xlii), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(8) TARIFF ACT OF 1930.—Section 583(a)(2)(B) of the Tariff Act of 1930 (19 U.S.C. 1583(a)(2)(B)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(9) ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965.—Section 4121 of the Elementary and

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Secondary Education Act of 1965 (20 U.S.C. 7131) is amended—

(A) in subsection (a)—

(i) in paragraph (1)(A)(ii), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(ii) in paragraph (2)(A)(ii), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(B) in subsection (e)(5)—

(i) in the paragraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(ii) by striking ''child pornography'' and inserting ''child sexual abuse material''.

(10) MUSEUM AND LIBRARY SERVICES ACT.—Section 224(f) of the Museum and Library Services Act (20 U.S.C. 9134(f)) is amended—

(A) in paragraph (1)—

(i) in subparagraph (A)(i)(II), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

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(ii) in subparagraph (B)(i)(II), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(B) in paragraph (7)(A)—

(i) in the subparagraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(ii) by striking ''child pornography'' and inserting ''child sexual abuse material''.

(11) OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968.—Section 3031(b)(3) of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (34 U.S.C. 10721(b)(3)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(12) JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT OF 1974.—Section 404(b)(1)(K) of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11293(b)(1)(K)) is amended—

(A) in clause (i)(I)(aa), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

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(B) in clause (ii), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(13) VICTIMS OF CRIME ACT OF 1984.—Section 1402(d)(6)(A) of the Victims of Crime Act of 1984 (34 U.S.C. 20101(d)(6)(A)) is amended by striking ''Child Pornography'' and inserting ''Child Sexual Abuse Material''.

(14) VICTIMS OF CHILD ABUSE ACT OF 1990.—The Victims of Child Abuse Act of 1990 (34 U.S.C. 20301 et seq.) is amended—

(A) in section 212(4) (34 U.S.C. 20302(4)), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(B) in section 214(b) (34 U.S.C. 20304(b))—

(i) in the subsection heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(ii) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(C) in section 226(c)(6) (34 U.S.C. 20341(c)(6)), by striking ''child pornography'' and inserting ''child sexual abuse material''.

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(15) SEX OFFENDER REGISTRATION AND NOTIFICATION ACT.—Section 111 of the Sex Offender Registration and Notification Act (34 U.S.C. 20911) is amended—

(A) in paragraph (3)(B)(iii), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(B) in paragraph (7)(G), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(16) ADAM WALSH CHILD PROTECTION AND SAFETY ACT OF 2006.—Section 143(b)(3) of the Adam Walsh Child Protection and Safety Act of 2006 (34 U.S.C. 20942(b)(3)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(17) PROTECT OUR CHILDREN ACT OF 2008.—Section 105(e)(1)(C) of the PROTECT Our Children Act of 2008 (34 U.S.C. 21115(e)(1)(C)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(18) SOCIAL SECURITY ACT.—Section 471(a)(20)(A)(i) of the Social Security Act (42 U.S.C. 671(a)(20)(A)(i)) is amended by striking

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''child pornography'' and inserting ''offenses involving child sexual abuse material''.

(19) PRIVACY PROTECTION ACT OF 1980.—Section 101 of the Privacy Protection Act of 1980 (42 U.S.C. 2000aa) is amended—

(A) in subsection (a)(1), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(B) in subsection (b)(1), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(20) CHILD CARE AND DEVELOPMENT BLOCK GRANT ACT OF 1990.—Section 658H(c)(1) of the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858f(c)(1)) is amended—

(A) in subparagraph (D)(iii), by striking ''child pornography'' and inserting ''offenses relating to child sexual abuse material''; and

(B) in subparagraph (E), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(21) COMMUNICATIONS ACT OF 1934.—Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended—

(A) in section 223 (47 U.S.C. 223)—

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(i) in subsection (a)(1)—

(I) in subparagraph (A), in the undesignated matter following clause (ii), by striking ''child pornography'' and inserting ''which constitutes child sexual abuse material''; and

(II) in subparagraph (B), in the undesignated matter following clause (ii), by striking ''child pornography'' and inserting ''which constitutes child sexual abuse material''; and

(ii) in subsection (d)(1), in the undesignated matter following subparagraph (B), by striking ''child pornography'' and inserting ''that constitutes child sexual abuse material''; and

(B) in section 254(h) (47 U.S.C. 254(h))—

(i) in paragraph (5)—

(I) in subparagraph (B)(i)(II), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(II) in subparagraph (C)(i)(II), by striking ''child pornography'' and

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inserting ''child sexual abuse material'';

(ii) in paragraph (6)—

(I) in subparagraph (B)(i)(II), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(II) in subparagraph (C)(i)(II) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(iii) in paragraph (7)(F)—

(I) in the subparagraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(II) by striking ''child pornography'' and inserting ''child sexual abuse material''.

(c) TABLE OF SECTIONS AMENDMENTS.—

(1) CHAPTER 110 OF TITLE 18.—The table of sections for chapter 110 of title 18, United States Code, is amended—

(A) by striking the item relating to section 2252A and inserting the following:

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''2252A. Certain activities relating to material constituting or containing child sexual abuse material.'';

(B) by striking the item relating to section 2258C and inserting the following:

''2258C. Use to combat child sexual abuse material of technical elements relating to reports made to the CyberTipline.'';

(C) by striking the item relating to section 2259A and inserting the following:

''2259A. Assessments in child sexual abuse material cases.'';

and

(D) by striking the item relating to section 2259B and inserting the following:

''2259B. Child sexual abuse materials victims reserve''.

(2) CHAPTER 117 OF TITLE 18.—The table of sections for chapter 117 of title 18, United States Code, is amended by striking the item relating to section 2427 and inserting the following:

''2427. Inclusion of offenses relating to child sexual abuse material in definition of sexual activity for which any person can be charged with a criminal offense.''.

SEC. 8. MODERNIZING THE CYBERTIPLINE.

Chapter 110 of title 18, United States Code, is amended—

(1) in section 2258A—

(A) in subsection (a)—

(i) in paragraph (1)(B)(ii), by inserting after ''facts or circumstances'' the following: '', including any available facts or

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circumstances sufficient to identify and locate each minor and each involved individual,''; and

(ii) in paragraph (2)(A)—

(I) by inserting ''1591 (if the violation involves a minor),'' before ''2251,''; and

(II) by striking ''or 2260'' and inserting ''2260, or 2422(b)'';

(B) in subsection (b)—

(i) in paragraph (1)—

(I) by inserting ''or location'' after ''identity''; and

(II) by striking ''other identifying information,'' and inserting ''other information which may identify or locate the involved individual,'';

(ii) by redesignating paragraphs (2) through (5) as paragraphs (3) through (6), respectively;

(iii) by inserting after paragraph (1) the following:

''(2) INFORMATION ABOUT THE INVOLVED MINOR.—Information relating to the identity or location of any involved minor, which may, to the extent

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reasonably practicable, include the electronic mail address, Internet Protocol address, uniform resource locator, or any other information which may identify or locate any involved minor, including self-reported identifying information.''; and

(iv) by adding at the end the following:

''(7) FORMATTING OF REPORTS.—When in its discretion a provider voluntarily includes any content described in this subsection in a report to the CyberTipline, the provider shall use best efforts to ensure that the report conforms with the structure of the CyberTipline.''; and

(C) in subsection (d)(5)(B)—

(i) in clause (i), by striking ''forwarded'' and inserting ''made available''; and

(ii) in clause (ii), by striking ''forwarded'' and inserting ''made available'';

(2) in section 2258B(a)—

(A) by striking ''arising from the performance'' and inserting the following: '', may not be brought in any Federal or State court if the claim or charge arises from—

''(1) the performance'';

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(B) in paragraph (1), as so designated, by striking ''may not be brought in any Federal or State court.'' and inserting a semicolon; and

(C) by adding at the end the following:

''(2) compliance with a search warrant, court order, or other legal process; or

''(3) research voluntarily undertaken by the provider or domain name registrar using any material being preserved under section 2258A(h), if the research is only for the purpose of—

''(A) improving or facilitating reporting under this section, section 2258A, or section 2258C; or

''(B) stopping the online sexual exploitation of children.''; and

(3) in section 2258C—

(A) in the section heading, by striking ''**the CyberTipline**'' and inserting ''**NCMEC**'';

(B) in subsection (a)—

(i) in paragraph (1)—

(I) by striking ''NCMEC'' and inserting the following:

''(A) PROVISION TO PROVIDERS.—NCMEC'';

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(II) in subparagraph (A), as so designated, by inserting ''or submission to the child victim identification program described in section 404(b)(1)(K)(ii) of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11293(b)(1)(K)(ii))'' after ''CyberTipline report''; and

(III) by adding at the end the following:

''(B) PROVISION TO NON-PROFIT ENTITIES.—NCMEC may provide hash values or similar technical identifiers associated with visual depictions provided in a CyberTipline report or submission to the child victim identification program described in section 404(b)(1)(K)(ii) of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11293(b)(1)(K)(ii)) to a non-profit entity for the sole and exclusive purpose of preventing and curtailing the online sexual exploitation of children.''; and

(ii) in paragraph (2)—

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(I) by inserting ''(A)'' after ''(1)'';

(II) by inserting ''or submission to the child victim identification program described in section 404(b)(1)(K)(ii) of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11293(b)(1)(K)(ii))'' after ''CyberTipline report''; and

(III) by adding at the end the following: ''The elements authorized under paragraph (1)(B) shall be limited to hash values or similar technical identifiers associated with visual depictions provided in a CyberTipline report or submission to the child victim identification program described in section 404(b)(1)(K)(ii) of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11293(b)(1)(K)(ii)).''; and

(C) in subsection (d), by inserting ''or to the child victim identification program described in section 404(b)(1)(K)(ii) of the Juve-

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nile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11293(b)(1)(K)(ii))'' after ''CyberTipline''.

SEC. 9. RULE OF CONSTRUCTION.

Nothing in this Act or the amendments made by this Act shall be construed to require a provider of an interactive computer service to search, screen, or scan for instances of online child sexual exploitation.

SEC. 10. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as may be necessary to carry out this Act.

SEC. 11. SEVERABILITY.

If any provision of this Act or any amendment made by this Act, or any application of such provision or amendment to any person or circumstance, is held to be unconstitutional, the remainder of the provisions of this Act and the amendments made by this Act, and the application of the provision or amendment to any other person or circumstance, shall not be affected.

○

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Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Tuesday, June 23, 2020 10:00 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); Grieco, Christopher (ODAG); 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), (b)(7)(C) per FBI (OGC) (FBI); Jones, Darrin E. (ITID) (FBI); Peck, Jessica (CRM); Sabol, Sherry E. (OGC) (FBI); Liu, Jeffrey (OLC); Freeman, Lindsey (OLP)
Cc:	(b) (6) (OLA); Herlihy, Brianna (PAO); Barnett, Gary (OAG)
Subject:	RE: Section 230 Update // June 22
Attachments:	Section 230 Clips 06232020.docx

Thanks to OPA, also have a new round up of clips.

This may overlap, but also noted a few items of interest below:

https://twitter.com/hashtag/VictimsAgainstSection230?src=hashtag_click;
https://twitter.com/cagoldberglaw/status/1275063770864214021

https://www.counterextremism.com/press/cep-applauds-justice-department%E2%80%99s-move-limit-section-230-legal-protections-tech-industry

https://www.cnet.com/news/democrats-and-republicans-agree-that-section-230-is-flawed/

https://www.lawfareblog.com/justice-departments-thoughtful-proposals-section-230-reform

http://broadbandbreakfast.com/2020/06/under-section-230-should-tech-platforms-be-able-to-exercise-editorial-control-and-still-avoid-liability/

https://www.natlawreview.com/article/communication-decency-act-and-doj-s-proposed-solution-no-easy-answers

https://www.commondreams.org/newswire/2020/06/17/justice-department-proposal-overhaul-section-230-protections-unworkable

https://www.reuters.com/article/us-usa-tech-230/us-justice-department-proposes-rolling-back-protections-for-big-tech-idUSKBN23O29D

From: Willard, Lauren (OAG)
Sent: Tuesday, June 23, 2020 9:26 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)(7)(E) per FBI >; Grieco, Christopher (ODAG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wiegmann, Brad (NSD) (b) (6) >; Winn, Peter A. (OPCL) (b) (6) >; Pandya, Brian (OASG)

Document ID: 0.7.2270.6287

(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), (b)(7)(C), (b)(7)(E) per FBI (OGC) (FBI)
(b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Jones, Darrin E. (ITID) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Peck, Jessica (CRM)
(b) (6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Liu, Jeffrey (OLC)
(b) (6) >; Freeman, Lindsey (OLP) (b) (6) >
C (b) (6) (OLA) (b) (6) >; Herlihy, Brianna (PAO)
(b) (6) >; Barnett, Gary (OAG) (b) (6) >
Subject: RE: Section 230 Update // June 22

Deliberative Process / Pre-Decisional

Hi all,

Proposed agenda for today's call:

1. Last Week's Roll-Out
2. EARN IT Act
3. Schatz-Thune Legislation
4. Hawley Bill

Best,
Lauren

From: Willard, Lauren (OAG)
Sent: Monday, June 22, 2020 9:13 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), (b)(7)(C), (b)(7)(E) per FBI >; Grieco, Christopher (ODAG)
(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), (b)(7)(C), (b)(7)(E) per FBI (OGC) (FBI)
(b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Jones, Darrin E. (ITID) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Peck, Jessica (CRM)
(b) (6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Liu, Jeffrey (OLC)
(b) (6) >; Freeman, Lindsey (OLP) (b) (6) >
C (b) (6) (OLA) (b) (6) >; Herlihy, Brianna (PAO) (b) (6) >
Subject: RE: Section 230 Update // June 22

Deliberative Process / Pre-Decisional

We can discuss more tomorrow, but it looks like the draft bill is still missing a few of our proposed changes, including our idea f (b) (5) . They did add a variation of ou (b) (5) . Would be helpful to work on draft redline language tomorrow for anything further we would recommend changing.

Best,
Lauren

Document ID: 0.7.2270.6287

(ii) EXCEPTIONS.—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)—

(I) if the provider of the interactive computer service is unable to contact the information content provider after taking reasonable steps to do so; or

(II) if the provider of the interactive computer service knows that the potentially policy-violating content relates to an ongoing law enforcement investigation.

Document ID: 0.7.2270.6287

"(g) ENFORCEMENT OF FEDERAL CIVIL LAWS BY STATE ATTORNEYS GENERAL.—Notwithstanding any other provision of this section, and in consultation with the Attorney General, the attorney general of a State alleging a violation by a provider of an interactive computer service of a Federal civil law that affects or may affect the State or the residents of the State may bring a civil action on behalf of the residents of the State in any district court of the United States for the district in which the provider is found or transacts business if the underlying claim would constitute a violation of the substantive, nonjurisdictional elements of a civil law of the State.".

From: Willard, Lauren (OAG)
Sent: Monday, June 22, 2020 5:22 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), (b)(7)(C), (b)(7)(E) per FBI >; Grieco, Christopher (ODAG) (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), (b)(7)(C), (b)(7)(E) per FBI (OGC) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Jones, Darrin E. (ITID) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Peck, Jessica (CRM) (b) (6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Liu, Jeffrey (OLC) (b) (6) >; Freeman, Lindsey (OLP) (b) (6) >
C (b) (6) (OLA) (b) (6) >; Herlihy, Brianna (PAO) (b) (6) >
Subject: RE: Section 230 Update // June 22

Deliberative Process / Pre-Decisional

And as promised, here is the revised Schatz-Thune proposal that they are seeking input from DOJ from. Have yet to review the changes, but would be great if folks have a minute to skim before the call tomorrow.

A particular question they had is what statutes DOJ enforces civilly that would be impacted by the Section 230 federal enforcement carve out.

Document ID: 0.7.2270.6287

Best,
Lauren

From: Willard, Lauren (OAG)
Sent: Monday, June 22, 2020 4:21 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), (b)(7)(C), (b)(7)(E) per FBI >; Grieco, Christopher (ODAG) (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), (b)(7)(C), (b)(7)(E) per FBI (OGC) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Jones, Darrin E. (ITID) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Peck, Jessica (CRM) (b) (6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Liu, Jeffrey (OLC) (b) (6) >; Freeman, Lindsey (OLP) (b) (6) >
C (b) (6) (OLA) (b) (6) >; Herlihy, Brianna (PAO) (b) (6) >
Subject: RE: Section 230 Update // June 22

Update for the group. Looks like EARN IT will be marked-up next week. Please give thought to which of our proposals can be best modified as an amendment to EARN IT that we can propose to Graham.

Best,
Lauren

From: Willard, Lauren (OAG)
Sent: Monday, June 22, 2020 10:24 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), (b)(7)(C), (b)(7)(E) per FBI >; Grieco, Christopher (ODAG) (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), (b)(7)(C), (b)(7)(E) per FBI (OGC) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Jones, Darrin E. (ITID) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Peck, Jessica (CRM) (b) (6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Liu, Jeffrey (OLC) (b) (6) >; Freeman, Lindsey (OLP) (b) (6) >
C (b) (6) (OLA) (b) (6) >; Herlihy, Brianna (PAO) (b) (6) >
Subject: Section 230 Update // June 22

Duplicative Information - See Document ID 0.7.2270.6407

Section 230 Clips:

The Defining Law of the Internet Age *Wall Street Journal*

Justice Department Proposes Limiting Internet Companies' Protections *Wall Street Journal*

Justice Department takes aim at Big Tech's shield *Axios*

Justice Department recommends reforms to legal shield for tech companies *CBS*

What is Section 230 of the Communications Decency Act, and why is it under fire? *Fox*

DOJ proposes legislation to hold Big Tech accountable for 'illicit activity' on sites *Fox*

Justice Department wants to upend Silicon Valley's legal shield *CNN*

Justice Department recommends new legislation holding Facebook, Google and Twitter liable for some online content *Washington Post*

Justice Dept. Urges Rolling Back Legal Shield for Tech Companies *New York Times*

Trump administration is seeking rollbacks on tech company protections *Associated Press*

DOJ proposes crackdown on tech industry's legal shield *Politico*

Justice Dept. proposes rolling back protections for Facebook, Google *Reuters*

DOJ takes aim at law that shields tech companies from lawsuits over material their users post *CNBC*

Justice Department proposes reforming online company protections under Section 230 *Washington Examiner*

DOJ to Unveil Recommendations for Curbing Tech Platforms' Section 230 Protections: Report *National Review*

DOJ Plans To Roll Back Tech Monopoly Legal Protections Over Left-Wing Speech Policing *Federalist*

REPORT: DOJ to Propose Rolling Back Big Tech's Legal Immunity *Breitbart*

DOJ Asks Congress to Hold Social Media Firms Liable *Crime Report*

Justice Department plans to curb Section 230 protections for internet firms *Apple Insider*

Justice Department proposes rolling back protections for social media platforms *Yahoo*

Justice Department, senators propose reducing tech giants' Section 230 protections *Silicon Angle*

Google 'spin' after ad crackdown undercuts Section 230 argument: The Federalist co-founder *Fox Business* **Also Seen On:** *Yahoo*

Twitter says it won't fact-check Trump's latest mail-in voting tweets *Yahoo Finance*

Document ID: 0.7.2270.6287-000001

The Communication Decency Act and the DOJ's Proposed Solution: No Easy Answers *National Law Review*

FCC commissioner claims Big Tech has 'weaponized' federal law to push 'partisan political agenda' *Fox News*

Barr: DOJ Changes To Big Tech Protections Are Meant To Protect Free Speech *The Federalist*

AG Barr on tech companies censoring viewpoints: 'There's something very disturbing about what's going on' *Fox News*

Justice Department Proposal to Overhaul Section 230 Protections Is Unworkable, Unconstitutional and Would Make the Internet Unusable – *Common Dreams*

Full Articles:

The Defining Law of the Internet Age *Wall Street Journal*

Jacob Gershman

The Justice Department's proposal to give online platforms less legal protection from lawsuits is the latest effort to revamp the defining law of the internet age.

At issue is Section 230 of the Communications Decency Act, a 1996 statute that gives internet-service providers, social-media sites and streaming services a powerful shield from lawsuits over content generated by others.

Congress passed the law largely in response to a 1995 New York court decision against now-defunct online service Prodigy that said internet-service providers could be held liable for defamatory online content generated by a third party.

The enactment of Section 230 ensured that the emerging internet industry wasn't crippled by financially ruinous lawsuits. It was also intended to encourage websites to moderate and filter offensive content and do so without fear of litigation.

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Congress amended the law in 2018 when it clarified that Section 230's immunity didn't apply to civil or criminal claims alleging violations of laws against the sexual exploitation of children and sex trafficking.

"Section 230 is the foundation of the internet we use every day," said Eric Goldman, a law professor at Santa Clara University who has written extensively about the statute.

Section 230 has two main provisions. The more important one says that, with limited exceptions, internet companies can't be treated as the publisher of information created by a third party. That protection applies to anything from a tweet to a consumer review or reader comment.

Another section says that an internet site can't be held liable for screening content it finds objectionable.

Internet companies have used the law to dismiss lawsuits ranging from defamation claims to negligence suits, including efforts to hold online platforms responsible for allowing terrorist groups to spread propaganda on their platforms.

The statute's immunity isn't boundless. Section 230 doesn't apply to claims of intellectual-property infringement, nor does it restrict federal criminal prosecutions.

Justice Department Proposes Limiting Internet Companies' Protections *Wall Street Journal*

Brent Kendal and John McKinnon

WASHINGTON—The Justice Department proposed a rollback of legal protections that online platforms have enjoyed for more than two decades, in an effort to make tech companies more responsible in how they police their content.

The department's changes, unveiled Wednesday, are designed to spur online platforms to be more aggressive in addressing illicit and harmful conduct on their sites, and to be fairer and more consistent in their decisions to take down content they find objectionable, a Trump administration official said.

Document ID: 0.7.2270.6287-000001

The Justice Department proposal is a legislative plan that would have to be adopted by Congress.

The move represents an escalation in the continuing clash between the Trump administration and big tech firms such as Twitter Inc., Alphabet Inc.'s Google unit and Facebook Inc.

Last month, President Trump signed an executive order that sought to target the legal protections of social-media companies, responding to concerns among some conservatives about alleged online censorship by the platforms. The executive order sought to impose limits on legal immunity for social-media companies when they are deemed to unfairly curb users' speech, for instance by deleting their posts or suspending their accounts. The administration, however, can't impose many of these changes unilaterally.

The Justice Department's proposed changes will address the type of speech concerns raised by Mr. Trump, but they also extend more broadly, seeking to strip civil immunity afforded to tech companies in a range of other circumstances if online platforms are complicit in unlawful behavior taking place on their networks, the administration official said.

The department's proposal, for instance, would remove legal protections when platforms facilitate or solicit third-party content or activity that violates federal criminal law, such as online scams and trafficking in illicit or counterfeit drugs.

Facebook and Twitter have taken different stances on moderating President Trump on their platforms. It's the latest controversy in an ongoing debate about the responsibility tech companies have in policing speech online. Photo illustration: Carter McCall/WSJ

Internet companies would lose immunity if they have knowledge that unlawful conduct is taking place on their platforms or show reckless disregard for how users are behaving on their sites. Without those legal protections, tech companies could be exposed to claims for monetary damages from people allegedly harmed by online fraud and other illegal activity.

The department also wouldn't confer immunity to platforms in instances involving online child exploitation and sexual abuse, terrorism or cyberstalking. Those carve-outs are needed to curtail immunity for internet companies to allow victims to seek redress, the official said.

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Attorney General William Barr has repeatedly voiced concerns about online-platform immunity, citing, for example, a terrorism case in which courts ruled Facebook wasn't civilly liable because its algorithms allegedly matched the Hamas organization with people that supported its cause.

The Justice Department also will seek to make clear that tech platforms don't have immunity in civil-enforcement actions brought by the federal government, and can't use immunity as a defense against antitrust claims that they removed content for anticompetitive reasons.

Twitter and Facebook representatives on Wednesday reiterated their past statements in support of longstanding legal protections.

Twitter last month said removing the protections would "threaten the future of online speech and Internet freedoms." Facebook has said that cutting platform immunity would restrict more speech online "by exposing companies to potential liability for everything that billions of people around the world say."

The sweeping protections now enjoyed by tech companies were established by Congress in the internet's early days, through a provision known as Section 230 of the Communications Decency Act of 1996. Under that law, tech platforms are generally not legally liable for actions of their users, except in relatively narrow circumstances. Internet platforms also are given broad ability to police their sites as they see fit under the current law.

Those protections would be scaled back in significant ways under the Justice Department's proposal, which seeks, in essence, to prevent platforms from taking down content without offering reasonable rules and explanations—and following them consistently. It also would make platforms more responsible for third-party content in other areas such as online commerce.

For instance, the department will propose to strike from federal law a provision that allows platforms to delete content that they merely deem to be "objectionable."

The proposal also would give some teeth to an existing "good faith" standard that platforms are supposed to use in their content-moderation decisions. The aim would be to require platforms to adhere to their terms of service as well as their public claims about their practices. Platforms also would have to provide reasonable explanations of their decisions.

Document ID: 0.7.2270.6287-000001

Section 230's broad protections have drawn increasing criticism from both the right and the left in recent years. Many critics contend the protections are outdated and no longer needed in an age of internet giants.

For their part, the tech companies contend that Section 230 is fundamental to the internet economy's smooth functioning.

Some lawmakers—including House Speaker Nancy Pelosi of California—have begun weighing rollbacks of Section 230. A bipartisan group of senators currently is pushing legislation encouraging internet companies to take special steps to block online child sexual exploitation in order to qualify for full protection.

Mr. Trump's executive order focused on encouraging more action to curb Section 230 by federal regulators, including the Federal Communications Commission and the Federal Trade Commission. It also seeks to convene a working group of state attorneys general to look into complaints by users.

As expected, the order was quickly challenged in federal court by an online-rights group; that challenge remains pending.

Justice Department takes aim at Big Tech's shield *Axios*

Margaret Harding McGill

The Trump administration is turning up the heat on one of Big Tech's most important legal protections, as the Justice Department convenes a debate over changing a law that protects platforms from suits over content their users post.

Why it matters: The threat to remove immunity granted by Section 230 of the Communications Decency Act is one of a handful of weapons that Washington is mulling using against Facebook, Google, and other tech giants. Trump administration enthusiasm for revoking or revising the protection could give such proposals a boost in Congress.

Driving the news: The DOJ is convening policy experts for a workshop Wednesday titled "Section 230 — Nurturing Innovation or Fostering Unaccountability?"

The event features a public morning session focused on whether the law "encourages or discourages" platforms to address online harms like child exploitation.

A private session in the afternoon will examine content moderation, free speech, online conduct and illicit activity, according to a person familiar with the event.

Speakers invited to the cl0sed-door portion include Internet Association deputy counsel Elizabeth Banker, former 21st Century Fox lobbyist Rick Lane and former Facebook chief security officer Alex Stamos, according to a list obtained by Axios.

The big picture: Republicans and Democrats in Congress frustrated with how tech companies handle content moderation have been debating changes to 230 to address a range of issues, including child exploitation.

Senate Judiciary Chairman Lindsey Graham is working on draft legislation that would require tech companies to "earn" 230 protections by following best practices for fighting child exploitation, with the Justice Department in a key role to determine those guidelines.

"Many companies are not adequately incentivized to be proactive about moderating, do not use best practices, and sometimes act recklessly to the harm suffered by children on their sites," said Yiota Souras, general counsel for the National Center for Missing & Exploited Children, who will speak at the workshop.

Yes, but: Supporters of Section 230 have questioned the motives of the DOJ and proponents of changing the law, including critics from some industries that have clashed with tech — including many in the news media.

The threat to remove Section 230 protection is being used as a lever by competitors like media companies that want tech platforms to share ad revenue — and also by law enforcement agencies, who want the platforms to build encryption backdoors, said Neil Chilson, a senior research fellow at the Charles Koch Institute, another workshop speaker.

Of note: Attorney General William Barr has been campaigning for tech platforms to build back doors into their encryption systems so that law enforcement can better monitor communications while investigating child exploitation and terrorism, and some critics say he is using the Section 230 debate as a pressure tactic.

"Granting broad immunity to platforms that take no efforts to mitigate unlawful behavior or, worse, that purposefully blind themselves — and law enforcers — to illegal conduct occurring on, or facilitated by, the online spaces they create, is not consistent with" the law's intent," Barr said in a December speech.

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The other side: Sen. Ron Wyden (D-Ore.), a co-author of Section 230, sees the move to change the law as a blow against free speech being promoted by "big legacy companies," as he wrote in the Washington Post.

"Under the guise of getting rid of lies and protecting children, they're working with the Trump administration and top Republicans to undermine Americans' rights and give the government unprecedented control over online speech."

— Sen. Ron Wyden

Flashback: Section 230 was enacted in 1996 as part of a broader online regulation law that was eventually overturned by the Supreme Court, leaving the liability shield as the only remnant still in force.

An earlier court decision had left a muddy precedent suggesting that the only way online service providers could protect themselves legally was to not moderate their content at all.

230's authors wanted to make it clear that online services could actively police their users' content without assuming liability for it.

For the record: Then and now, Section 230 protects platforms from civil suits over user content, but not from criminal prosecution for content that breaks federal law.

Justice Department recommends reforms to legal shield for tech companies *CBS*

Clare Hymes

Washington — The Justice Department proposed a series of recommendations to lawmakers that would take aim at immunity protections enjoyed by internet companies for content created by users, the latest salvo in the Trump administration's battle against the leading online platforms.

The department's proposed reforms would make internet companies more responsible for policing illicit content that is posted on their platforms. Tech giants like Facebook, Twitter and Google have been in the crosshairs of the administration, and these recommendations would reduce their immunity under current law.

The reforms, which would require an act of Congress, target a portion of the Communications Decency Act of 1996, known as Section 230. The provision grants online platforms immunity from civil liability based on the content posted to the sites by users.

Document ID: 0.7.2270.6287-000001

The department's recommendations would require online platforms to tighten requirements for policing illicit content and increase transparency about their moderation policies, including a reassessment of how they moderate content that is perceived to be "otherwise objectionable."

"This reform would focus the broad blanket immunity for content moderation decisions on the core objective of Section 230 — to reduce online content harmful to children — while limiting a platform's ability to remove content arbitrarily or in ways inconsistent with its terms or service simply by deeming it 'objectionable,'" the proposal said.

Last month, President Trump signed an executive order which sought to impose limitations on the legal shield that protects social media companies from liability. That order came after Twitter appended a link fact-checking two of the president's tweets, the first time the company had taken such a step.

A DOJ official said on Wednesday that the recommendations have been in the works for about 10 months, and include those mentioned in the president's executive order. These recommendations, the official said, are aimed at policing egregious and illegal behavior online without taking down lawful speech.

The proposed changes to how companies moderate third-party content are substantial. The department recommends changing the language of the statute by replacing the word "objectionable" with "unlawful" and "promotes terrorism."

The goal of these reforms is to force online companies to come up with a uniform standard for moderating content, placing more of the onus on the tech companies to take responsibility for third-party material on their site.

"When it comes to issues of public safety, the government is the one who must act on behalf of society at large. Law enforcement cannot delegate our obligations to protect the safety of the American people purely to the judgment of profit-seeking private firms," Attorney General William P. Barr said in a statement Wednesday. "We must shape the incentives for companies to create a safer environment, which is what Section 230 was originally intended to do."

The Justice Department's recommendations would revoke civil immunity for a platform that "facilitates or solicits" illegal and illicit material published on their sites by a third-party, such as terrorism, drug trafficking or child exploitation. The same revocation would apply to companies that are "willfully blind" to such conduct. Platforms that enable crimes like cyber-stalking or sex

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trafficking would also have their immunity revoked, thus opening up their liability to claims for civil redress from victims.

The recommendations also include precluding companies from claiming Section 230 exemptions when faced with federal civil or antitrust claims.

Critics of the administration's efforts to roll back Section 230 argue that the government already has plenty of tools to go after harmful actors online. Aaron Mackey, a staff attorney at the Electronic Freedom Foundation, a nonprofit that promotes online civil liberties, said the proposed reforms are "dangerous" and would give the government "a weapon to retaliate against online services they dislike."

"The proposal would eviscerate Section 230's protections that give platforms discretion to remove harmful material such as spam, malware, or other offensive content without first having to know for certain that the material is illegal," Mackey said in a statement to CBS News. "It would also empower federal agencies, including the DOJ, to bring civil enforcement actions against platforms, which officials could use as a cudgel against platforms they do not like.

The administration's reforms represent yet another skirmish in the administration's ongoing battle with social media companies, which has attracted some allies in Congress. Republican Senators Marco Rubio of Florida and Josh Hawley of Missouri introduced legislation on Wednesday that would require companies to adhere to their own content moderation policies or risk losing protections under Section 230.

What is Section 230 of the Communications Decency Act, and why is it under fire? *Fox*

Brian Flood

Section 230 of the Communications Decency Act of 1996 is under a harsh new spotlight in the wake of Google's move to force conservative news site The Federalist to remove its comments section or risk being demonetized, and a new bill would stop tech giants from taking advantage of the controversial piece of legislation.

Section 230 states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

The section has been pivotal in the rise of today's social media giants by allowing not only Internet service providers – but also Google, Twitter, Facebook, YouTube and others – to be shielded from liability from content posted on their platforms by third parties, in most cases.

But some critics feel that Google should no longer benefit from protections of Section 230 if the tech giant will not extend the same protections to other sites — and Google did not offer those protections to The Federalist.

President Trump also signed an executive order in May that could remove some big tech protections if companies engage in "selective censorship" harmful to national discourse. The order came shortly after Twitter attached fact-check warnings to some of the president's tweets.

"Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike," the executive order stated.

“Critics says Section 230 gives tech companies too much power over what is and is not allowed on their sites. Supporters — including a wide range of Internet companies, free-speech advocates and open-Internet proponents — say that without the law, online communication would be stifled and social media as we know it would cease to exist,” Washington Post's Rachel Lerman wrote last month when reporting the executive order.

Section 230 has many defenders in its current state, and Trump's attempts to alter how social media platforms are regulated have been met with resistance. For example, the Electronic Frontier Foundation calls Section 230 "one of the most valuable tools for protecting freedom of expression and innovation on the Internet."

However, Google's move to force The Federalist to remove its comments section or risk being demonetized has raised new questions.

Google controls the majority of online advertising and essentially has the ability to dictate what media organizations can publish, because they depend on the tech giant for revenue.

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“If you’re in the news business, you obey Google. When Google tells you to do something, you do it. You have no choice. They can bankrupt you in a minute,” Fox News' Tucker Carlson explained on Tuesday.

For that reason, critics of Section 230 think Google is the key reason why changes need to take place.

WHAT IS SECTION 230?

“Google makes one of the strongest arguments yet for Section 230 reform,” Federal Communications Commission head Brendan Carr tweeted Tuesday to kick off a series of messages.

Brendan Carr

✓

@BrendanCarrFCC

Replying to @BrendanCarrFCC

2. Big Tech has long argued that it needs Section 230’s unique set of liability protections because websites simply couldn’t operate if they were held liable for comments or user-generated posts.

1,510

6:14 PM - Jun 16, 2020

Twitter Ads info and privacy

586 people are talking about this

Brendan Carr

✓

@BrendanCarrFCC

Replying to @BrendanCarrFCC

3. Not so, according to Google’s own ad policy!

Document ID: 0.7.2270.6287-000001

Google is now holding The Federalist responsible for comments and user-generated posts, and Google will be demonetizing the website as a result.

1,548

6:14 PM - Jun 16, 2020

Twitter Ads info and privacy

607 people are talking about this

Brendan Carr

✓

@BrendanCarrFCC

Replying to @BrendanCarrFCC

4. Google has no problem treating The Federalist as the publisher of comments and user-generated posts on that website for purposes of Google's own ad policy.

Yet Google expends significant resources to protect its own platforms from that type of treatment under Section 230.

1,590

6:48 PM - Jun 16, 2020

Twitter Ads info and privacy

664 people are talking about this

Brendan Carr

✓

@BrendanCarrFCC

Replying to @BrendanCarrFCC

Document ID: 0.7.2270.6287-000001

5. This also appears to be an example of established media gatekeepers attempting to regain control of the political narrative - not through persuasion but coercion.

A legacy media outlet lobbied Big Tech to punish a new media competitor.

1,604

7:00 PM - Jun 16, 2020

Twitter Ads info and privacy

622 people are talking about this

Brendan Carr

✓

@BrendanCarrFCC

Replying to @BrendanCarrFCC

6. For Google, the hypocrisy here is stunning.

It has no problem providing a platform for Communist China propaganda, & it has censored posts the regime wouldn't like.

Yet it draws a line on the comment section of a conservative publication in America.https://twitter.com/brendancarrfcc/status/1265336881564221442?s=21 … https://twitter.com/brendancarrfcc/status/1265336881564221442 …

Brendan Carr

✓

@BrendanCarrFCC

Oopsie. We did a propaganda. https://twitter.com/verge/status/1265331737032364041 …

1,990

Document ID: 0.7.2270.6287-000001

7:06 PM - Jun 16, 2020

Twitter Ads info and privacy

1,020 people are talking about this

The latest calls for Section 230 reform came after NBC News reported on Tuesday that Google was allegedly removing two conservative news sites from its ad platform.

NBC News reported that Google was taking action against both The Federalist and ZeroHedge for articles that apparently "pushed unsubstantiated claims" about the Black Lives Matter movement and violated the search engine's policies that forbid the monetization of sites that provide "derogatory content."

The Federalist takes down comments section after Google deems it dangerous and derogatoryVideo

Google insisted however that The Federalist was "never demonetized" and that it was the site's comments section that was in question, not any articles published by the site. ZeroHedge had already been demonetized.

As a result, Sen. Josh Hawley, R-Mo., introduced legislation Wednesday to give Americans the ability to sue major tech companies like Facebook, Google and Twitter if they engage in selective censorship of political speech.

The Limiting Section 230 Immunity to Good Samaritans Act, cosponsored by Sens. Marco Rubio, R-Fla., Mike Braun, R-Ind., and Tom Cotton, R-Ark., would stop such companies from receiving immunity under section 230 of the Communications Decency Act, unless they update their terms of service to promise to operate in good faith.

“For too long, Big Tech companies like Twitter, Google and Facebook have used their power to silence political speech from conservatives without any recourse for users,” Hawley said in a statement. “Section 230 has been stretched and rewritten by courts to give these companies outlandish power over speech without accountability. Congress should act to ensure bad actors are not given a free pass to censor and silence their opponents.”

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The bill would allow users to sue companies for breaching that contractual duty of good faith, and it would make them pay $5,000 plus legal fees to each user who prevails in a case against them.

DOJ proposes legislation to hold Big Tech accountable for 'illicit activity' on sites *Fox*

Andrew O'Reilly and Jake Gibson

The Department of Justice is pushing Congress to pass new legislation that would hold Facebook, Twitter and other tech behemoths accountable for what is posted on their platforms – a move that if passed would roll back protections Silicon Valley has had for decades.

The Justice Department's proposals, unveiled Wednesday afternoon, want online platforms to better police their sites for illicit and harmful material, and to take a more objective approach in deciding what content they deem objectionable and decide to take down. The DOJ, in a news release, said it was calling for lawmakers to "update the outdated immunity for online platforms" under Section 230 of the Communications Decency Act of 1996.

"These reforms will ensure that Section 230 immunity incentivizes online platforms to be responsible actors," Attorney General William P. Barr said in a statement. "These reforms are targeted at platforms to make certain they are appropriately addressing illegal and exploitive content while continuing to preserve a vibrant, open, and competitive Internet.

He added: "These twin objectives of giving online platforms the freedom to grow and innovate while encouraging them to moderate content responsibly were the core objectives of Section 230 at the outset."

Section 230 refers to a part of the Communications Decency Act of 1996 that gave tech companies the sweeping protections they currently enjoy. The companies are given a broad ability to monitor their sites as they see fit and are generally not held liable for actions their users take on the sites.

The DOJ's proposal wants Section 230 to hold tech companies liable for material used in criminal acts like child sex trafficking.

“Criminals and other wrongdoers are increasingly turning to online platforms to engage in a host of unlawful activities, including child sexual exploitation, selling illicit drugs, cyberstalking, human trafficking, and terrorism,” the proposal states.

It continues: “The time has therefore come to realign the scope of Section 230 with the realities of the modern internet so that it continues to foster innovation and free speech but also provides stronger incentives for online platforms to address illicit material on their services.”

The DOJ’s proposal comes as President Trump and many conservative lawmakers in Congress have been sharply critical of the alleged bias by tech companies against right-wing material on their platforms.

Critics call on tech industry to expand diversity among employees and leadershipVideo

Sen. Josh Hawley, R-Mo., introduced legislation Wednesday to give Americans the ability to sue major tech companies like Facebook, Google and Twitter if they engage in selective censorship of political speech.

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Why is big tech censoring Americans who are criticizing China?Video

Trump signed an executive order this month that interprets Section 230 as not providing statutory liability protections for tech companies that engage in censorship and political conduct -- though DOJ officials say the department has been working on the legislative recommendations for months and they are not a direct result of Trump’s order.

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"My executive order calls for new regulations under Section 230 of the Communications Decency Act to make it so that social media companies that engage in censoring any political conduct will not be able to keep their liability shield," the president said at the time.

The president's order, which also cuts federal funding for social media platforms that censor users' political views, came after Twitter took the unprecedented step of slapping a "misleading" warning label on two of Trump's tweets concerning the fraud risks of nationwide mail-in balloting.

Tech tools Americans are turning to during the coronavirus pandemicVideo

Some lawmakers, including House Speaker Nancy Pelosi, D-Calif., have already begun pondering rollbacks to Section 230, and a bipartisan group of senators currently is pushing legislation to force Internet companies to take more stringent steps to block online child sexual exploitation in order to qualify for full protection under the provision.

Justice Department wants to upend Silicon Valley's legal shield *CNN*

Brian Fung

(CNN Business)The Justice Department on Wednesday proposed a sweeping set of policy recommendations seeking to curtail legal protections of Facebook, Google and other major tech platforms, marking the latest move in Washington's escalating attempts to rein in social media companies.

The proposals, if adopted by Congress, could ultimately expose Silicon Valley giants to more litigation by removing their ability to invoke a critical 1996 law to shield themselves from lawsuits arising over terrorist content, child abuse material, cyberstalking and other user posts that appear on their platforms and violate federal law.

"A reassessment of America's laws governing the internet could not be timelier," read a document released by the Justice Department outlining the proposals. The pandemic, it argues, has forced Americans to rely on internet services "more than ever."

The initiative aims to place limits on Section 230 of the Communications Decency Act, which has previously been called the 26 words that "created the internet." And it would establish more specific criteria for how platforms could qualify for liability protections, such as requiring platforms to cooperate more closely with law enforcement requests for user data.

The proposals from the Justice Department come as Democrats and Republicans in Congress are ratcheting up their criticisms of the major tech platforms -- and in some cases calling to rethink how liable these platforms should be.

Missouri Sen. Josh Hawley on Wednesday introduced his own legislation that would give consumers the ability to sue tech platforms over allegations of anti-conservative bias. Hawley, who is also critical of Section 230, said Facebook (FB), Google (GOOGL) and Twitter (TWTR) have used their power to "silence political speech from conservatives without any recourse." Despite the allegations, user engagement data suggests conservative voices are in fact among the loudest and most engaged on platforms like Facebook.

On the other side of the aisle, Rhode Island Democratic Rep. David Cicilline, who chairs the House subcommittee on competition currently investigating the tech industry for potential antitrust violations, also suggested openness to removing liability protections for the tech platforms in remarks this week.

"We should question whether companies that serve as increasingly essential communication networks should have business models that profit from this harmful content in the first place," he said during a virtual event Tuesday hosted by George Washington University. "Whether it's changing a business model that creates powerful incentives to turn a blind eye to this content, restricting the ability of platforms to harvest people's data to serve people advertisements, or removing liability protections that shield platforms from liability, it's critical that policymakers around the world confront this issue in a serious and meaningful way."

Tech platforms enjoyed a brief reprieve from scrutiny and even some renewed goodwill earlier this year as they held high-level meetings with White House officials, worked to tackle coronavirus misinformation and built digital tools to help fight the pandemic. But in recent weeks, Twitter was attacked by some on the right for flagging a number of Trump's tweets and Facebook was criticized by people on the left for not doing so.

In response to the proposals from Hawley and the Justice Department, Facebook's VP of global affairs and communications, Nick Clegg, told reporters Wednesday that Section 230 is what allows the company to moderate all forms of content.

"Changing significantly, or eliminating the balance of responsibilities and provisions about liability in Section 230, means in the end less speech of all kinds appearing online," he said.

Under the DOJ's proposal, tech companies would also be unable to cite Section 230 to wriggle out of antitrust lawsuits or civil suits brought by federal agencies.

Last month, Trump signed an executive order that called for re-envisioning Section 230 in hopes of exposing companies like Facebook and Twitter to more lawsuits. That order also helped lay the groundwork for the DOJ's legislative proposals on Wednesday.

In addition to calling for rethinking the tech industry's legal shield, some lawmakers, including House Speaker Nancy Pelosi, are also pushing for an advertiser boycott with the potential to undermine the platforms' core businesses.

On Tuesday, Pelosi said she believed a "combination" of economic and other pressure by brands could persuade the company to crack down on conspiracy theories, misinformation and content

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that amplifies political divisions. Citing Facebook's billions of dollars in advertising revenue, Pelosi said advertisers have "tremendous leverage" — and should use it.

Pelosi's comments come as advocacy groups, including the NAACP, the Anti-Defamation League and Color of Change, have called for brands and marketers to pull their funding from Facebook. On Wednesday, a group led by the NAACP and the ADL launched #StopHateforProfit, a campaign urging companies to pause their Facebook advertising in the month of July.

Justice Department recommends new legislation holding Facebook, Google and Twitter liable for some online content *Washington Post*

Tony Romm

The Justice Department on Wednesday urged Congress to adopt new legislation that could punish Facebook, Google and Twitter for a wide array of harmful content posted online, threatening to erode a long-cherished legal immunity that Silicon Valley says is critical to the future of the internet.

The new legislation would target Section 230, a decades-old portion of law that spares social media sites from being held liable for the posts, photos and videos uploaded to their sites by their users. The proposal would pave the way for steep sanctions on major online platforms if they don’t act to remove a range of illicit content, from child exploitation to terrorism, according to Justice Department officials, who spoke on the condition of anonymity Wednesday.

The agency also seeks to force tech giants to be more transparent about their content-moderation decisions and more consistent in their enforcement of them, according to a report the department released Wednesday. The move might offer the U.S. government a new avenue to probe and punish companies over allegations of political bias.

And the new proposal further raises the possibility that tech companies could lose their legal protections if their security practices, including their use of end-to-end encryption, hamstrings law enforcement. Such technology allows only the sender and recipient of a message to view a conversation’s content. Tech giants including Facebook increasingly have adopted encryption to protect users’ privacy, especially in messaging apps, but Justice Department officials say the technology allows harmful content to evade detection.

For months, Attorney General William P. Barr had teased such recommendations, questioning whether Section 230 had spared “titans” in the tech industry from accountability for their

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misdeeds. But the department's efforts took on new urgency this month after President Trump signed an executive order that seeks to introduce more government oversight of political speech on the Web.

Trump issued his highly controversial directive out of concern that Facebook, Google and major social media sites are systematically censoring conservatives, a charge that each of those tech giants long has denied. The resulting debate has triggered a groundswell of concern that the White House, Justice Department and other government agencies are pursuing policies that could ultimately threaten free expression online.

Spokesmen for Facebook, Google and Twitter declined to comment. The Internet Association, a Washington-based trade group representing those companies and other online services, sharply rebuked the Justice Department for its proposal.

"Rolling back Section 230 protections will make it harder, not easier, for online platforms to make their platforms safe," Jon Berroya, interim president of the group, said in a statement. "The threat of litigation for every content moderation decision would hamper IA member companies' ability to set and enforce community guidelines and quickly respond to new challenges in order to make their services safe, enjoyable places for Americans."

The Justice Department proposal illustrates Washington's fast-growing, wide-ranging apprehensions about the way Silicon Valley conducts business. Federal regulators in recent years have become more attuned to the dangers posed by large technology companies, including the ways that social media sites can be weaponized to spread harmful, false content at scale.

The agency embarked on its broad review of Big Tech beginning last year, an inquiry that has also included antitrust issues at a time when the government is preparing to file a lawsuit against Google on competition grounds, The Washington Post previously has reported. In hearing from tech companies and critics alike, the Justice Department quickly determined the industry had outpaced one of its own foundational laws.

"The time has therefore come to realign the scope of Section 230 with the realities of the modern internet so that it continues to foster innovation and free speech but also provides stronger incentives for online platforms to address illicit material on their services," the department said in a report issued Wednesday.

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With Section 230, however, the agency's proposal rests entirely in the hands of Congress, where the Trump administration's actions targeting the tech industry at times have invited more skepticism than support — even among lawmakers who share a belief that Silicon Valley should be more aggressively regulated.

On one hand, Democrats and Republicans alike have found rare accord in attacking Section 230, fearing the decades-old legal shield has outlived its usefulness. Congress adopted the 1990s-era law to spare Internet companies in their infancy from a raft of lawsuits they never would have survived. But the rules now protect some of the most profitable companies in the world from being held liable for some of their missteps, including their failures to crack down on political falsehoods, election disinformation and hate speech.

Such concerns led lawmakers from both parties to unveil a bill that could strip Section 230 protections from companies that fail to crack down on child sexual exploitation online. But their loose consensus on the need for reform often has broken down because of politics, as Trump and his Republican allies allege Facebook, Google and Twitter unfairly target their enforcement actions against right-leaning users and websites. Democrats see the allegations as an attempt to score preferential treatment online in the heat of an election year.

"I've certainly been one of Congress' loudest critics of Section 230, but I have no interest in being an agent of Bill Barr's speech police," said Democratic Sen. Richard Blumenthal (Conn.), one of the authors of bipartisan legislation to reform the law, in a statement Wednesday. "I'm deeply concerned that President Trump and Attorney General Barr are exploiting Big Tech's complicity in human misery to advance their own political agenda."

Trump lashes out at social media companies after Twitter labels tweets with fact checks

Adding to the tensions, Trump signed an executive order this month that could open the door for the U.S. government to assume oversight of political speech on the Web. The president issued the directive days after Twitter took the rare step of labeling one of his tweets as violating its policies.

Lawmakers, conservative advocacy groups, free-speech experts and tech giants blasted Trump for the order, and an organization backed by Facebook and Twitter soon challenged it in federal court as a violation of the First Amendment.

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Some Republicans, in contrast, have championed Trump's action and in recent days have sought to further needle the industry. A new bill sponsored by Sen. Josh Hawley (R-Mo.) would open the door for Web users to sue Facebook, Google and Twitter for wrongly taking down their content online, the senator announced Wednesday.

Justice Dept. Urges Rolling Back Legal Shield for Tech Companies *New York Times*

Cecilia Kang

WASHINGTON — The Justice Department released recommendations on Wednesday to pare back the legal shield for online platforms that has been crucial to their growth since the earliest days of the internet, taking a direct shot at companies like Facebook, Twitter and YouTube that have come into the cross hairs of the Trump administration.

In a 25-page recommendation, the agency called on lawmakers to repeal parts of a law that has given sites broad immunity from lawsuits for words, images and videos people have posted on their services.

The changes to the law, Section 230 of the Communications Decency Act of 1996, would put the onus on social media and other online platforms to more strongly police harmful content and conduct while also being consistent about their moderation.

The Justice Department proposal, reported earlier by The Wall Street Journal, is a legislative plan that would have to be adopted by Congress. It adds to growing calls in Washington, from elected officials of both parties, to change Section 230.

Last month, President Trump signed an executive order to limit protections for online platforms. Joe Biden, the presumptive Democratic nominee for president, has criticized the law before, too. On Capitol Hill, Republicans have become increasingly critical of Facebook, Google and Twitter for abusing the safe harbor to take down content that employees disagree with, including conservative views.

The size of the largest tech companies, the agency said in its recommendation, "has raised valid questions of whether those large tech companies still require the blanket immunity of Section 230 provided to the nascent internet industry."

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The tech industry criticized the agency's proposal on Wednesday as a political ploy meant to aid Mr. Trump's battle against social media firms. Mr. Trump announced his social media executive order after Twitter labeled his tweets last month for violating the company's rules against voter suppression and the glorification of violence.

Internet companies say they are already liable to some degree for criminal content and a reinterpretation of the 1996 legislation would constrain their ability to moderate harmful and problematic third-party content without fear of more liability.

"This is a coordinated attack by the administration against tech businesses to sidestep the First Amendment," said Carl Szabo, vice president of the tech lobbying organization NetChoice.

The Justice Department recommendation is part of a sweeping review of big tech announced last July by Attorney General William P. Barr. As part of that review, the agency is expected to bring an antitrust monopolization case against Google in the coming months.

The proposal is based on a 10-month investigation into online platforms and their record on monitoring and ridding sites of harmful content, including child exploitation and pornography. Earlier this year, Mr. Barr also instructed his staff to review Section 230, which was created to help encourage the growth of internet start-ups. In February, Mr. Barr held a daylong workshop focused on how to revise the law.

"A driving motivation behind our broader perspective, including Section 230, is the need for the department's enforcement efforts to keep up with rapidly changing technological landscape around us," Mr. Barr said at the February event. "No longer are tech companies the underdog upstarts; they have become titans of U.S. industry."

The law generally shields websites from legal action for images, text and videos posted by users. The law also gives the website broad immunity for taking down that material.

The agency's proposal, if passed by Congress, would open the door to civil lawsuits for posts with illegal and harmful content. It explicitly calls for an end to immunity on the most egregious content online, such as child exploitation and abuse, terrorist content and cyberstalking.

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The agency's proposal would also put greater scrutiny on the moderation of content, the focus of Mr. Trump's complaints. He and other Republicans have accused Twitter, Google and Facebook of suppressing and removing the materials of conservative public figures and media outlets. The agency proposes to strike language in the law that allows platforms to take down a broad array of "otherwise objectionable" content.

The Justice Department said in its recommendation that technology has become essential to society and that several online platforms have become the nation's biggest and most valuable companies. It proposed reforms that would bar the biggest tech platforms from using Section 230 speech protections in its defense in antitrust cases.

Their use of sophisticated algorithms for targeting and connecting users and a broad interpretation of the law by courts have "reduced the incentives of online platforms to address illicit activity on their services and, at the same time, left them free to moderate lawful content without transparency or accountability," the agency said in its report.

Trump administration is seeking rollbacks on tech company protections *Associated Press*

Michael Balsamo, and Marcy Gordon

The Justice Department is proposing that Congress roll back legal protections for online platforms such as Facebook, Google and Twitter that generally could not be held legally responsible for what people post on the sites.

The proposed changes to Section 230 of a major telecommunication overhaul from 1996 come weeks after President Donald Trump signed an executive order challenging the protections that have served as a bedrock for unfettered speech on the internet.

Companies such as Twitter and Facebook are granted liability protection under the Communications Decency Act because they are treated as "platforms," rather than "publishers," which can face lawsuits over content. Without that shield, companies could face lawsuits from people who feels wronged by something someone else has posted.

One of the administration's requests is that Congress strip the civil immunity protections for tech companies that may be complicit in unlawful activity on their platforms, according to a Justice Department official. For example, the proposal would remove the legal protection if an online platform purposefully solicited third parties to sell illegal drugs to minors, exchange sexually explicit photos or video of children or engage in other criminal activity, the official said.

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The official was not authorized to discuss the matter publicly before the formal announcement and spoke on condition of anonymity.

The department said its proposals are aimed "at incentivizing platforms to address the growing amount of illicit content online, while preserving the core of Section 230's immunity for defamation."

The administration contends that the broad immunity should not apply to companies that don't "respect public safety by ensuring its ability to identify unlawful content or activity occurring on its services," according to a department memo obtained by the AP.

"Further, the provider must maintain the ability to assist government authorities to obtain content (i.e., evidence) in a comprehensible, readable, and usable format pursuant to court authorization (or any other lawful basis)," the document says.

DOJ proposes crackdown on tech industry's legal shield *Politico*

Leah Nylen, Betsy Woodruff Swan

The Justice Department proposed a major update Wednesday to the law that shields internet companies from liability for content on their sites — a move that is even broader than President Donald Trump's attempts to hold platforms like Twitter and Facebook to account for decisions found to be politically biased.

DOJ's proposal, which would need Congress' blessing, would address a wide range of criticisms of the protections that digital companies have enjoyed under Section 230 of the Communications Decency Act, a 1996 law that has been critical to the online industry's wealth and power.

Among the changes: Sites or platforms that facilitate third-party content that violates federal law would no longer be able to claim immunity from lawsuits. Users could sue companies in cases that involve child sexual abuse, terrorism and cyberstalking. It also would be easier for users to sue over platforms' decisions to take down their content, a change intended to push companies to be more fair in removing content they find objectionable.

The Justice Department also proposed changes to clarify that companies can't use Section 230 to get out of civil suits by the federal government, or antitrust suits.

Dozens of lawmakers of both parties have expressed concerns about the broad protections given to internet firms under Section 230, though they disagree what aspects are problematic and how it should be fixed.

The Clinton-era legal shield has been heralded as the law that helped build the internet, but Attorney General Bill Barr and others have raised questions about the scope of the law and whether tech companies have used Section 230 to absolve themselves of responsibility for policing their platforms. Trump and his presumptive Democratic rival, former Vice President Joe Biden, have both called for Congress to repeal Section 230 entirely — though for much different reasons.

In February, the Justice Department held a workshop on Section 230 where prominent critics of the law outlined how companies have avoided liability for posts that allegedly aided terrorism, sex trafficking and revenge porn.

Last month, Trump signed an executive order targeting social media companies that he accuses of censoring conservative viewpoints. The order came after Twitter posted fact-checks on his tweets. An industry-funded tech nonprofit has challenged the order's constitutionality.

The proposal unveiled Wednesday is intended both as a follow-up to the February workshop and a response to Trump's executive order. DOJ has submitted a proposed bill to the Office of Management and Budget, which will consult with other Trump administration agencies before sending the legislation to Congress, a senior DOJ official said.

The Wall Street Journal initially reported Wednesday that the DOJ was offering the legislative proposal.

Sens. Lindsey Graham (R-S.C.) and Richard Blumenthal (D-Conn.) in March unveiled their own legislation that would remove digital firms' legal immunity over users' posts if they fail to prove they are doing enough to curtail sexual exploitation of children online.

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Justice Dept. proposes rolling back protections for Facebook, Google *Reuters*

Diane Bartz and Alexander Alper

WASHINGTON – The U.S. Justice Department proposed on Wednesday that Congress take up legislation to curb protections that big tech platforms like Alphabet's Google and Facebook have had for decades, a senior official said, following through on U.S. President Donald Trump's bid to crack down on tech giants.

The goal of the proposal, which is being finalized, is to push tech companies to address criminal content on their platforms and boost transparency for users when the outlets take down lawful material, the senior Justice Department official said, speaking on condition of anonymity. But to become law, U.S. lawmakers would need to propose and approve legislation based on the department's recommendations.

The president, who has battled Twitter and other tech companies over alleged censorship of conservative voices on social media platforms, said in late May he would propose legislation that may scrap or weaken the law shielding internet companies, in an extraordinary attempt to regulate the outlets where he has been criticized.

Trump wants to "remove or change" a provision of a law known as Section 230. Under the 1996 Communications Decency Act, Section 230 does not generally hold platforms responsible for what their users post and allows them to moderate the content of their sites as they see fit.

The Wall Street Journal first reported the proposal.

Trump has attacked Twitter for tagging his tweets about unsubstantiated claims of fraud about mail-in voting with a warning prompting readers to fact-check the posts.

The White House welcomed news of the Justice Department proposal. "The president expressly called on DOJ to develop such model legislation in the Executive Order signed recently, and yes, President Trump is pleased to see the department following through," said White House spokesman Judd Deere.

Google, Facebook and Twitter did not immediately respond to requests for comment.

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Carl Szabo, general counsel of NetChoice which counts Google and Facebook among its members, said any such bill would make it harder for companies like Google, which owns YouTube, to moderate content to remove, for example, videos used to recruit terrorists.

"Because this would prevent platforms from removing objectionable content, the House (of Representatives) won't take it up," he said.

Also on Wednesday, Senator Josh Hawley joined with three other Republicans to introduce a bill that would allow people to sue tech companies if they feel that their speech has been censored.

DOJ takes aim at law that shields tech companies from lawsuits over material their users post
CNBC

Lauren Feiner

The Department of Justice is taking aim at tech's liability shield with a new set of legislative proposals released Wednesday.

The proposed reforms are the latest action aiming to weaken legal protection established through Section 230 of the Communications Decency Act, a 1990s-era law. The statute protects online platforms, such as Facebook, Twitter and Google's YouTube, from being held liable for content their users post on their sites, and also allows them to moderate content in good faith.

The DOJ's proposed reforms, which would have to be passed by Congress to go into effect, would limit the broad protections Section 230 typically provides to the tech industry.

Platforms could lose immunity if they facilitate or solicit federal criminal activity, like trafficking illicit drugs. It would also create carve-outs for child exploitation, terrorism and cyberstalking, holding tech companies accountable for taking action on such content.

The proposal also would make clear that Section 230 protections cannot be used to dispute antitrust claims, a significant statement as the Justice Department is reportedly preparing an antitrust suit against Google for as soon as this summer. Facebook has also disclosed an antitrust investigation by the Federal Trade Commission.

“Changing significantly ... the balance of responsibilities and provisions about liability in Section 230 would, in our view, mean less speech of all kinds appearing online,” said Nick Clegg, Facebook’s vice president of global affairs and communications, in a call with reporters on Wednesday afternoon.

It’s unclear how much support the proposals will gain in Congress. Both Republicans and Democrats have argued that Section 230, which was initially envisioned as a way to protect upstart tech companies from a deluge of lawsuits, now appears outdated as it protects powerful companies worth hundreds of billions of dollars.

But while Democratic concerns have focused more on holding companies accountable for keeping users safe, Republicans have also placed emphasis on alleged censorship of conservative voices. Tech companies have repeatedly denied that they censor political speech, but instances where they have removed posts in error have fueled such criticism.

Sen. Mark Warner, D-Va., a former venture capitalist and a frequent critic of Section 230, said in a statement to CNBC that he is wary of reforms brought by the Trump administration.

“While I believe reform of this outdated law is needed, I have serious concerns that under the supervision of Attorney General Barr this effort has been politicized and will be used by the Trump Administration to cow platforms into allowing Trump, dark money groups, and right-wing militias to continue to exploit their tools to sow disinformation, engage in targeted harassment, and suppress voter participation,” Warner said.

Earlier on Wednesday, Sen. Josh Hawley, R-Mo., another leading critic of Big Tech and Section 230, introduced a new bill that would require platforms to promise to act in good faith in their terms of service. That would open tech companies up to potential lawsuits from users claiming breaches of contract.

The move follows Trump’s executive order

Last month, President Donald Trump signed an executive order instructing the Federal Communications Commission to write rules regulating how social media companies can remove content from their sites while maintaining Section 230 immunity, and encouraging the Federal Trade Commission to take action against companies engaging in “deceptive” acts of communication.

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At the time, Attorney General Bill Barr indicated the DOJ would seek to sue social media companies and said Section 230 "has been stretched way beyond its original intention." Barr held a forum at the DOJ earlier this year, inviting experts to weigh in on potential reform of the law. He told a gathering of the National Association of Attorneys General in December that the department was "studying Section 230 and its scope."

A White House spokesperson said in a statement that "President Trump is pleased to see the department following through" on legislation modeled after the executive order.

Without legislative reform, little is likely to change. Courts have consistently upheld Section 230 protections under current law. Bills aiming to amend the law have already drawn tremendous pushback from the tech industry, which claims that cracking down on Section 230 will ultimately stifle speech, since platforms will have to remove any content that might leave them open to legal repercussions.

The tech industry has also pointed out that Section 230 already allows tech companies to be held criminally liable for illegal activity. But the DOJ's proposal would allow victims of online scams or child exploitation, for example, to pursue civil action against a platform if they believe the company had knowledge of the illegal activity and did not take steps to remove it.

Congress did successfully introduce reform to Section 230 in 2018 with the passage of FOSTA-SESTA. The pair of bills from the House and Senate aimed to crack down on online sex trafficking by creating a carve-out to Section 230 immunity for ads promoting sex work. While the bills gained wide support in Congress at the time, they have been criticized by sex worker advocates for making their livelihood less safe by removing websites where they would vet potential clients.

Justice Department proposes reforming online company protections under Section 230
Washington Examiner

Jerry Dunleavy

The Justice Department issued a report proposing that the laws governing internet companies should be reformed and some immunities should be rolled back to help incentivize internet businesses to be "responsible actors."

Attorney General William Barr said Wednesday that Section 230 of the Communications Decency Act of 1996 must be updated after nearly two decades.

“When it comes to issues of public safety, the government is the one who must act on behalf of society at large. Law enforcement cannot delegate our obligations to protect the safety of the American people purely to the judgment of profit-seeking private firms. We must shape the incentives for companies to create a safer environment, which is what Section 230 was originally intended to do,” Barr said. “Taken together, these reforms will ensure that Section 230 immunity incentivizes online platforms to be responsible actors. These reforms are targeted at platforms to make certain they are appropriately addressing illegal and exploitive content while continuing to preserve a vibrant, open, and competitive internet.”

Barr added, “These twin objectives of giving online platforms the freedom to grow and innovate while encouraging them to moderate content responsibly were the core objectives of Section 230 at the outset."

Recommended For You

The national media will have a field day with Coach Tuberville

The Justice Department’s 28-page report, titled Section 230 — Nurturing Innovation or Fostering Unaccountability?, was the culmination of a 10-month review. It comes shortly after President Trump’s late May executive order, which claimed that Twitter, Facebook, Instagram, and YouTube “wield immense, if not unprecedented, power to shape the interpretation of public events” and that “online platforms are engaging in selective censorship that is harming our national discourse.”

The DOJ report said it aimed to “update the outdated immunity for online platforms” under Section 230 and “identified a set of concrete reform proposals to provide stronger incentives for online platforms to address illicit material on their services while continuing to foster innovation and free speech.”

Republican Sen. Josh Hawley of Missouri also introduced a bill on Wednesday to enable U.S. citizens to sue Big Tech companies who act in bad faith by selectively censoring political speech. The bill would forbid Big Tech companies such as Google, Facebook, or Twitter from receiving Section 230 immunity unless they update their terms of service to promise to operate in good faith.

Document ID: 0.7.2270.6287-000001

Republicans have increasingly argued that Section 230 needs to be updated in light of claims that social media companies unfairly censor conservative content or ban conservative users.

The two key provisions of Section 230 are that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," and "no provider or user of an interactive computer service shall be held liable on account of … any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."

The Justice Department report said some of its proposed reforms are "intended to clarify the text and original purpose of the statute in order to promote free and open discourse online and encourage greater transparency between platforms and users." The Justice Department suggested replacing the "vague catch-all" phrase "otherwise objectionable" in Section 230 by replacing it with "unlawful" and "promotes terrorism." The agency said, "This reform would focus the broad blanket immunity for content moderation decisions on the core objective of Section 230 — to reduce online content harmful to children — while limiting a platform's ability to remove content arbitrarily or in ways inconsistent with its terms or service simply by deeming it objectionable."

The Justice Department explained its reasoning in a press release, emphasizing that it was simultaneously looking to encourage the free flow of ideas while discouraging illegal activities.

The American Civil Liberties Union has repeatedly argued against Republican proposals to reform Section 230, saying that "setting aside the obvious constitutional problems with a government entity judging the political content of speech, or dictating the censorship decisions of online platforms, these proposals would make it far less palatable for online services to host others' speech at all." The group previously argued that "if enacted, the internet's marketplace of ideas — and our freedom to communicate online — would suffer."

But the Justice Department says changes are needed.

"Section 230 was originally enacted to protect developing technology by providing that online platforms were not liable for the third-party content on their services or for their removal of such content in certain circumstances. This immunity was meant to nurture emerging internet businesses and to overrule a judicial precedent that rendered online platforms liable for all third-party content on their services if they restricted some harmful content," the agency said.

Document ID: 0.7.2270.6287-000001

“However, the combination of 25 years of drastic technological changes and an expansive statutory interpretation left online platforms unaccountable for a variety of harms flowing from content on their platforms and with virtually unfettered discretion to censor third-party content with little transparency or accountability.”

Other reforms proposed by the Justice Department on Wednesday included “denying Section 230 immunity to truly bad actors” such as child abusers, terrorists, and cyberstalkers, and the reforms would “enable victims to seek civil redress.” The Justice Department said that it “supports reforms to make clear that Section 230 immunity does not apply in a specific case where a platform had actual knowledge or notice that the third party content at issue violated federal criminal law.”

The report said that the law should make clear that “the immunity provided by Section 230 does not apply to civil enforcement by the federal government." The Justice Department also proposed clarifying that federal antitrust claims “are not covered by Section 230 immunity” because “it makes little sense to enable large online platforms (particularly dominant ones) to invoke Section 230 immunity in antitrust cases.”

Last summer, the Justice Department opened a sweeping antitrust review into online platforms, potentially threatening some of Silicon Valley's most powerful companies. The tech giants under scrutiny likely include Amazon, Google, Facebook, and others. Democrats such as Sen. Elizabeth Warren of Massachusetts have said both Facebook and Amazon should be split up. Republicans, too, have raised concerns that major online companies have gained too much power.

All 50 state attorneys general and territories banded together last September to launch an antitrust investigation into Google, and the Justice Department is reportedly exploring filing an antitrust lawsuit against Google and possibly other companies.

Senate Republicans propose Big Tech regulation overhaul *Washington Times*

Ryan Lovelace

Senate Republicans seek to strip protections shielding Big Tech companies from lawsuits unless the companies change their terms of service to agree to operate in good faith and to pay a $5,000 fine if they fail to live up to the agreement.

Section 230 of the Communications Decency Act has long afforded Big Tech companies shelter from legal liability from material posted by users on their platform.

The Limiting Section 230 Immunity to Good Samaritans Immunity Act was introduced by Sen. Josh Hawley, Missouri Republican, on Wednesday and had three GOP cosponsors: Sens. Mike Braun of Indiana, Tom Cotton of Arkansas, and Marco Rubio of Florida.

"For too long, Big Tech companies like Twitter, Google, and Facebook have used their power to silence political speech from conservatives without any recourse for users," Mr. Hawley said in a statement. "Section 230 has been stretched and rewritten by courts to give these companies outlandish power over speech without accountability. Congress should act to ensure bad actors are not given a free pass to censor and silence their opponents."

The proposal does not eliminate Section 230 protections completely, which some Big Tech allies have feared may still happen. Mr. Rubio said in a statement that he thinks Section 230 still serves an important purpose, but it should not be weaponized as a tool of political censorship and activism.

The Justice Department is also preparing to release a proposal of how it wants to limit Section 230. The department is looking to roll back civil immunity to tech companies across several different circumstances, including those that host third-party content involving online scammers and trafficking in illicit drugs, the Wall Street Journal reported.

The competing visions of Big Tech regulation have emerged in response to President Trump's recent social media executive order. Mr. Trump's order directed the Federal Communications Commission to draft regulation that could scrap legal liability protections for Big Tech companies if they censor or edit content online.

Mr. Trump's order also took aim at Section 230, which the president said was necessary to restore fairness online.

DOJ to Unveil Recommendations for Curbing Tech Platforms' Section 230 Protections: Report
National Review

Tobias Hoonhout

Document ID: 0.7.2270.6287-000001

The Justice Department will unveil a legislative plan as soon as Wednesday to limit Section 230 protections for tech companies in the wake of President Trump's executive order and Google's publicized threat to ban ad revenue to The Federalist, according to the Wall Street Journal.

According to an unnamed DOJ official, the legislative package will include provisions that could strip protections under Section 230, which exempts social-media companies from civil liability for third-party content containing false or misleading information.

The official said that if platforms "facilitate or solicit" third-party content that violates federal criminal law, such as online scams, drug or sex trafficking, online child exploitation, terrorism, or cyberstalking, they would lose protections to "allow victims to seek redress."

The proposal also aims to force platforms to adhere to "reasonable rules and explanations" in policing content and potential violations, and will target politically biased content-moderation by revising a federal provision that allows tech platforms to delete content based merely on an "objectionable" standard.

The news comes after Google threatened to ban conservative outlet The Federalist from generating advertising revenue on the company's platform over materials in its comments section that Google deemed "dangerous or derogatory content." After The Federalist was forced to delete its comments section to comply, Google said the matter was "resolved."

The threat came after NBC News contacted Google and flagged a report on hate speech and disinformation from a British think tank called the "Center for Countering Digital Hate" (CCDH). The reporter from NBC's "Verification Center" who broke the story then congratulated the CCDH and its subsidiary project "Stop Funding Fake News" on the action.

In May, sources told the Journal that the DOJ is planning an antitrust lawsuit against Google that could be launched as soon as this summer.

Last month, Trump signed an executive order that challenged protections for social-media companies, and asked Attorney General Bill Barr to "develop a proposal for Federal legislation that would be useful to promote the policy objectives of this order."

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At the unveiling of the order, Barr warned that while platforms "held themselves out as free public forums, where a variety of diverse voices can come on and be heard," they "have become these very powerful networks…they've now switched, and [are] using that market power to force particular viewpoints." The comments came after he told DOJ colleagues in February that "valid questions have been raised on whether Section 230's broad immunity is still necessary, at least in its current form."

DOJ Plans To Roll Back Tech Monopoly Legal Protections Over Left-Wing Speech Policing
Federalist

Jordan Davidson

The Justice Department announced plans Wednesday to make legislative recommendations for changes to the legal protections surrounding big tech companies.

The decision comes just a day after Google Ads attempted to demonetize The Federalist over "race based content" and just a month after President Trump signed an executive order with intentions to curb the cut back on the protections after alleged censorship of conservative news outlets. Attorney General William Barr, according to the Wall Street Journal, also "has repeatedly voiced concerns about online-platform immunity."

According to the WSJ, the proposal "would remove legal protections when platforms facilitate or solicit third-party content or activity that violates federal criminal law, such as online scams and trafficking in illicit or counterfeit drugs" and rescind monetary damage immunity from companies that knowingly allow illicit activity to continue. It would also ensure that companies "don't have immunity in civil-enforcement actions brought by the federal government, and can't use immunity as a defense against antitrust claims that they removed content for anticompetitive reasons."

Despite claims by many tech companies that Section 230 of the Communications Decency Act, the section that grants them protection, is necessary, the proposal's goal "would be to require platforms to adhere to their terms of service as well as their public claims about their practices. Platforms also would have to provide reasonable explanations of their decisions."

Lawmakers in Congress are already examining ways to crack down on big tech censorship. On Wednesday, Sen. Joshua Hawley (R-M0.) along with Sens. Marco Rubio, Mike Braun, and Tom Cotton debuted new legislation that would allow "users who believe the provider is not

'operating in good faith' by consistently and fairly applying its content rules could sue for $5,000 and attorneys' fees."

REPORT: DOJ to Propose Rolling Back Big Tech's Legal Immunity *Breitbart*

Allum Bokhari

The Department of Justice is preparing proposals to roll back the legal immunities enjoyed by Big Tech companies under Section 230 of the Communications Decency Act (CDA), in measures that will be announced as early as Wednesday, sources told the Wall Street Journal.

The Justice Department is set to propose a rollback of legal protections that online platforms have enjoyed for more than two decades, in an effort to make tech companies more responsible in how they police their content, according to a Trump administration official.

Section 230 gives Big Tech companies immunity from lawsuits arising from user-generated content. If a person is defamed on Google, YouTube, Facebook, Instagram, Twitter, or other big tech platforms like Reddit, those platforms are not legally liable for the content like a traditional publisher might be. This allows social media platforms to host billions of posts from users without a potentially crippling legal risk.

As Big Tech platforms have grown increasingly interested in censoring content posted by their users, however, many lawmakers have argued that they are behaving like traditional publishers, censoring and editing and approving their users' posts. As such, a growing number of lawmakers have argued that the legal immunities of Section 230 should be contingent on platforms maintaining a hands-off approach to the speech of their users.

Another problematic element of Section 230 is subsection c-2, which grants tech companies immunity from lawsuits arising from their censorship of "objectionable" content. This immunity gives them broad leeway to censor users, leaving no legal recourse for those who are censored — even if their social media accounts are critical to their livelihood or career.

However, according to the Wall Street Journal, the Justice Department's proposals go beyond merely addressing the question of censorship:

The department's proposal, for instance, would remove legal protections when platforms facilitate or solicit third-party content or activity that violates federal criminal law, such as online scams and trafficking in illicit drugs. The department also wouldn't confer immunity to platforms in instances involving online child exploitation and sexual abuse, terrorism or cyberstalking. Those carve-outs are needed to curtail immunity for internet companies to allow victims to seek redress, the official said.

The Justice Department also will seek to make clear that tech platforms don't have immunity in civil-enforcement actions brought by the federal government, and can't use immunity as a defense against antitrust claims that they removed content for anticompetitive reasons.

According to the report, it also appears that the Justice Department won't try to strip tech companies of their immunity for censoring "objectionable" content, instead aim to spur Big Tech to be "fairer and more consistent in their decisions to take down content they find objectionable."

DOJ Asks Congress to Hold Social Media Firms Liable *Crime Report*

The Justice Department is asking Congress to enact legislation that would hold Facebook, Google and Twitter liable for a wide array of content posted online, eroding a long-cherished legal immunity that Silicon Valley says is critical to the future of the internet, the Washington Post reports. DOJ is proposing sweeping changes to the law, known as Section 230, on Wednesday, after President Donald Trump signed an executive order that sought to introduce more government oversight of political speech on the web out of concern that Facebook, Twitter and major social-media sites are politically biased against conservatives. in February, Attorney General William Barr said tech firms had failed to crack down on terrorist content, child exploitation and illicit drug sales, areas the DOJ's recommendation is expected to address.

Democrats and Republicans alike have found rare accord in attacking Section 230, saying the decades-old legal shield has outlived its usefulness. The law, adopted to spare tech companies in their infancy from a raft of lawsuits they never would have survived, now protects some of the most profitable companies in the world from liability. Democrats say the law effectively allows Facebook, Google, Twitter and a wide array of sites to skirt accountability for allowing political falsehoods, election disinformation, hate speech and other harmful content to go viral. Republicans have focused on perceived political censorship against conservatives, possibly undermining a loose consensus on a need to reform federal law. Tech-industry critics have challenged Trump's orders in federal court as a violation of the First Amendment.

Justice Department plans to curb Section 230 protections for internet firms *Apple Insider*

William Gallagher

Social media, internet firms, and forum hosts could lose key immunity protection under new proposed legislation changes suspected to be announced soon by the US Justice Department.

Following President Trump's Executive Order intended to limit long-held legal protections for social media and internet companies, including Apple, the Justice Department is now expected to propose legislature.

According to the Wall Street Journal, the department is very shortly to announce reforms that would make technology firms more legally responsible for the content that users post on them.

As with the Executive Order, the proposed new legislation focuses primarily on Section 230 of the Communications Decency Act of 1996. Among other considerations, Section 230 broadly says that technology firms are required to police their own online sites. The proposal of the modification to Section 230 doesn't alter that, but rather, more stringently enforces the requirement to do so.

There is already a bipartisan investigation into whether the Section 230, which was written in the earliest days of the internet, is still adequate or relevant. That investigation is broadly concerned with whether Section 230 facilitates online child abuse, but the Department of Justice's plans are believed to be more specific.

The Wall Street Journal reports that a key aim of the Department of Justice legislation plans is to prevent technology firms from being able to arbitrarily remove content that users have posted. It isn't clear how this reported Department of Justice angle dovetails with the stated goals of the modification, which would require more stringent moderation to keep legal protections of Section 230.

President Trump's Executive Order is similarly focused on the technology firms' rights to remove or edit content. However, it specifically argues that such companies should be regarded as publishers. The reclassification would remove the Section 230 protections, and require the FCC to investigate removal of content as potential censorship — but that reclassification would require modifications to Section 230.

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Neither the President nor the Department of Justice may unilaterally change Section 230. Any modifications to the law would need to get the full approval of the House and Senate, and signed into law by the President.

There have been bipartisan rumblings about altering Section 230 for the last decade, but the proposals so far have been scattershot. Proposals have ranged from a light-touch modification, to wholesale repeal.

At present, it isn't clear how much bipartisan support that the Department of Justice proposal has, nor is it clear if the Wall Street Journal has all of the details correct.

Justice Department proposes rolling back protections for social media platforms *Yahoo*

Allison Matyus

The U.S. Department of Justice (DOJ) has proposed rolling back the protections that social media platforms and tech companies have — a move that could make them legally responsible for what people post on their platforms.

These changes seek to make social media platforms like Facebook and Twitter better address content on their sites when it comes to what is acceptable and what should be taken down, according to the policy document released Wednesday.

Conservatives have long alleged that major tech companies are biased against their voices; tech giants like Facebook and Google have denied these claims.

The DOJ proposal specifically cites the protections of Section 230 in the Communications Decency Act of 1996, which prevent tech companies from being held civilly liable for content their users post.

“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, left them free to moderate lawful content without transparency or accountability,” the proposal reads. “The time has, therefore, come to realign the scope of Section 230 with the realities of the modern internet so that it continues to foster innovation and free speech but also provides stronger incentives for online platforms to address illicit material on their services.”

The proposal would scale back some of the protections these platforms have, including making them more responsible for third-party content and requiring them to be fair and consistent with what kind of content is taken down. Platforms would have to provide reasonable explanations for their decisions.

The DOJ has requested that companies no longer be allowed to remove "otherwise objectionable" content from their sites. Instead, tech companies would only be able to remove content if it was "obscene, lewd, lascivious, filthy, excessively violent, harassing" or if it violated federal law or promoted violence or terrorism.

The plan would strictly define Section 230's "good faith" requirement, saying that platforms must have clear terms of use and must abide by those terms of use, and that any content that is removed must fit within the more stringent definition of what can be moderated. It also says that platforms must provide notice to the user explaining why their content was moderated.

Earlier today, a group of Republican senators also introduced limitations on Section 230 via the Limiting Section 230 Immunity to Good Samaritans Act. The proposed bill would allow users who don't believe that a platform is "operating in good faith," by being inconsistent and unfair with what content is acceptable or taken down, to sue these companies for $5,000 plus attorneys' fees.

Both of these proposed limitations and changes come on the heels of President Donald Trump signing an executive order last month to remove the protections of Section 230 in the Communications Decency Act of 1996.

Section 230 says: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

Trump's executive order resulted from Twitter attaching a fact-check message to Trump's tweet about how a mail-in ballot system would promote voter fraud, and was seen by some critics as retaliation against tech companies that had moderated his comments.

Justice Department, senators propose reducing tech giants' Section 230 protections *Silicon Angle*

Document ID: 0.7.2270.6287-000001

Maria Deutscher

The U.S. Department of Justice and senator Josh Hawley today introduced legislative proposals that aim to restrict the legal protections afforded to tech giants under Section 230.

Section 230 is a statute in the Communications Decency Act, a piece of legislation dating back to the 1990s, that limits internet companies' liability over content posted to their services by users. It allows social networks and others to remove content without fear of being sued if they believe it to be "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable."

The legislation submitted by Senator Hawley, which was made public shortly before the Justice Department's proposals, would limit the scope of Section 230 protections. It's called the Limiting Section 230 Immunity to Good Samaritans Act.

The bill would require companies to operate in "good faith" to be shielded from lawsuits related to their content moderation policies. Under the proposal, a firm such a social network wouldn't be considered to be acting in good faith if it engages in "intentionally selective enforcement" of its terms of service when it comes to removing content. In such situations, users would be allowed to sue for up to $5,000 plus attorney fees.

Hawley's bill appears to take direct aim at tech giants, with the proposed rules only applying to services with more than 30 million monthly users in the U.S. or 300 million worldwide, plus at least $1.5 billion in global revenue. The proposal is also sponsored by senators Marco Rubio, Mike Braun and Tom Cotton.

The Section 230 reforms that the Justice Department introduced today have a similar focus. The Justice Department is asking Congress to limit internet companies' lawsuit protection under Section 230 to moderation decisions they make in "good faith," a definition that requires content removals to closely align with a service's terms of service.

The Justice Department is pushing for additional changes as well. Among other things, it wants Congress to codify that Section 230 protections can't be used to dispute antitrust claims, like those the Justice Department is reportedly considering to bring against Google. Officials are also seeking to remove the term "otherwise objectionable" from the portion of Section 230 that affords companies protections for removing content they find to be "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable."

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There’s considerable doubt about the prospects for such changes, however, as some observers say it could unleash a flood of frivolous lawsuits and others claiming it’s little more than a Republican attempt to limit the spread of liberal and progressive ideas.

Google 'spin' after ad crackdown undercuts Section 230 argument: The Federalist co-founder
Fox Business
Google's "spin" after blocking or warning conservative sites' about access to its ad platform undercuts the tech giant's arguments about Internet regulation, The Federalist co-founder Ben Domenech said on Monday.

Continue Reading Below

WHAT IS SECTION 230?

"Google in this case, I think embarrassed by the whole situation, came up with a spin that it was because of our comment section," Domenech told "Mornings with Maria." "That's something that actually undercuts all of their arguments about Section 230, which Attorney General Barr addressed with Maria [Bartiromo] this weekend in a way that I think clearly sets up a situation where that aspect of our law is going to be reformed."

In this Nov. 12, 2015, file photo, a man walks past a building on the Google campus in Mountain View, Calif. (AP Photo/Jeff Chiu, File)

Last week, Google blocked financial blog ZeroHedge from its advertising platform and warned The Federalist, saying content in their comment sections violated its policies.

NBC NEWS UNDER FIRE FOR APPARENTLY PUSHING GOOGLE TO REMOVE CONSERVATIVE SITES FROM AD PLATFORM

Document ID: 0.7.2270.6287-000001

NBC News published a story with the help of London-based Center for Countering Digital Hate on Google taking action against the sites, but Google disputed part of the story. In addition, the story's author faced backlash for thanking the Center for Countering Digital Hate for "their hard work and collaboration" when the story went live.

Adele-Momoko Fraser

✓

@AMFraserNBC

NEW -- from @NBC_VC. Thanks to @SFFakeNews and @CCDHate for their hard work and collaboration! https://twitter.com/NBC_VC/status/1272962743436374016 …

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@NBC_VC

Two far-right sites, ZeroHedge and The Federalist, will no longer be able to generate revenue from any advertisements served by Google Ads.@AMFraserNBC reports.https://www.nbcnews.com/tech/tech-news/google-bans-two-websites-its-ad-platform-over-protest-articles-n1231176 …

263

3:43 PM - Jun 16, 2020

Twitter Ads info and privacy

2,901 people are talking about this

"These companies held themselves out as open to all comers. That's how they built up all of their membership and networks, saying we have a wide variety of views," Domenech said. "Then they've switched, now they are being more selective and they are starting to censor different viewpoints."

The crackdown comes as both the left and the right are pushing to more tightly regulate big tech companies. Earlier this year, President Trump signed an executive order that could remove some tech companies' liability protections if they engage in "selective censorship" harmful to national discourse.

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“We have clear content policies and we enforce them without regard to political viewpoint. Our platforms have empowered a wide range of people and organizations from across the political spectrum, giving them a voice and new ways to reach their audiences," a Google spokesperson said at the time.

"Undermining Section 230 in this way would hurt America's economy and its global leadership on internet freedom," the spokesperson continued.

Section 230 of the Communications Decency Act states that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

Twitter says it won’t fact-check Trump’s latest mail-in voting tweets *Yahoo Finance*
Paul Squire
Twitter said Monday that it will not flag President Donald Trump’s tweet about mail-in voting as misinformation. Trump’s morning tweet made similar claims to an earlier one claiming the election would be “rigged” due to mail-in ballots — one that Twitter eventually labeled with a fact-check.

Trump — who has railed against expanding mail-in voting — claimed without evidence in the morning tweet that mail-in voting would lead to a “rigged 2020 election.”

Donald J. Trump

✓

@realDonaldTrump

RIGGED 2020 ELECTION: MILLIONS OF MAIL-IN BALLOTS WILL BE PRINTED BY FOREIGN COUNTRIES, AND OTHERS. IT WILL BE THE SCANDAL OF OUR TIMES!

239K

7:16 AM - Jun 22, 2020

Twitter Ads info and privacy

172K people are talking about this

Trump also said the coronavirus was being used as an excuse to “cheat” the election.

Donald J. Trump

✓

@realDonaldTrump

Because of MAIL-IN BALLOTS, 2020 will be the most RIGGED Election in our nations history - unless this stupidity is ended. We voted during World War One & World War Two with no problem, but now they are using Covid in order to cheat by using Mail-Ins!

159K

9:45 AM - Jun 22, 2020

Twitter Ads info and privacy

102K people are talking about this

But Twitter told Digital Trends the tweets did not violate its Civic Integrity Policy, which states that tweets containing “broad, non-specific statements about the integrity of elections or civic processes (such as unsubstantiated claims that an election is ‘rigged’)” would not be moderated.

A Twitter spokesperson said the tweets “are currently not in violation of the Twitter Rules and will not be labeled” since they don’t reference a specific state’s processes on mail-in voting.

Last month, Trump tweeted: “There is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent,” while also falsely claiming that mailboxes will be robbed, ballots forged and “illegally printed and fraudulently signed,” and wrongly accusing California of sending ballots to “anyone living in the state.”

That led Twitter to fact-check his tweet for the first time, adding a label linking to facts about voting by mail.

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Donald J. Trump

✓

@realDonaldTrump

There is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent. Mail boxes will be robbed, ballots will be forged & even illegally printed out & fraudulently signed. The Governor of California is sending Ballots to millions of people, anyone.....

132K

8:17 AM - May 26, 2020

Twitter Ads info and privacy

83.2K people are talking about this

Trump responded by threatening to strip legal protections from Twitter and other tech giants. He signed an executive order that urged regulators to alter Section 230, which protects tech companies from being held civilly liable for the content their users post.

During the signing ceremony for the executive order, Trump remarked that he wished he could shut Twitter down.

Trump's Republican allies and his administration's Justice Department have also proposed changes to the law designed to combat alleged anti-conservative bias at social media companies. The changes would need to be approved by Congress before taking effect.

Tech companies and advocates said the changes would radically alter the internet as we know it and stifle innovation.

The Communication Decency Act and the DOJ's Proposed Solution: No Easy Answers *National Law Review*
Jeffrey D. Neuburger
Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. §230, enacted in 1996, is often cited as the most important law supporting the Internet, e-commerce and the online economy. Yet, it continues to be subject to intense criticism, including from politicians from both sides of the aisle. Many argue that the CDA has been applied in situations far beyond the original intent of Congress when the statue was enacted. Critics point to the role the CDA has

played in protecting purveyors of hate speech, revenge porn, defamation, disinformation and other objectionable content.

Critics of the CDA raise valid concerns. But what is the right way to address them? One must remember that for organizations that operate websites, mobile apps, social media networks, corporate networks and other online services, the CDA's protections are extremely important. Many of those businesses could be impaired if they were subject to liability (or the threat of liability) for objectionable third party content residing on their systems.

The criticism surrounding the CDA hit a fever pitch on May 28, 2020 when the President weighed in on the issue by signing an Executive Order attempting to curtail legal protections under Section 230. While the Executive Order was roundly labelled as political theater – and is currently being challenged in court as unconstitutional – it notably directed the Justice Department to submit draft proposed legislation (i.e., a CDA reform bill) to accomplish the policy objectives of the Order. This week, on June 17, 2020, the DOJ announced "that the time is ripe to realign the scope of Section 230 with the realities of the modern internet" and released a document with its recommendations for legislative reform of Section 230. This is on the heels of a recent initiative by several GOP lawmakers to introduce their own version of a reform bill.

In its recommendations, the DOJ stated that, in its view, the benefits of CDA immunity to the online ecosystem should not outweigh the cost of enabling serious offenses without giving affected individuals a more substantial form of redress. The DOJ believes that Section 230 should distinguish between its "core immunity" for defamation-type torts and those claims against providers that knowingly host or are willfully blind to third-party content that facilitates federal criminal activity.

The DOJ's 28-page recommendations outline several proposals for reforms that, in its view, provide "incentives for online platforms to address illicit material on their services, while continuing to foster innovation and free speech." Some highlights include the following:

Enact "Bad Samaritan" Carve-Outs. The DOJ suggests that the CDA should not be extended to so-called "bad actors." This would include explicit carve-outs for civil claims concerning "egregious conduct," such as child exploitation, terrorism and cyber-stalking, or in instances where a platform purposefully facilitates or solicits third-party content or activity that would violate federal criminal law. In particular, the recommendations propose that online platforms should not be protected by the CDA in cases where the platform "had actual knowledge or notice that the third party content at issue violated federal criminal law or where the platform was provided with a court judgment that content is unlawful in any respect." To assist providers with

Document ID: 0.7.2270.6287-000001

gaining knowledge of illegal content, the DOJ recommends that providers be required to offer users a tool to flag such content. The proposal also suggests that the law be amended to expressly state that the CDA would not prevent the federal government from pursuing civil enforcement actions against platforms regarding unlawful content. Of course, as noted by the DOJ, the CDA currently precludes immunity in a federal criminal enforcement action.

Narrow Good Samaritan Protections. This proposal would narrow the Good Samaritan protections for online providers under 47 U.S.C. §230(c)(2) by eliminating the broad catchall in the statute that affords providers leeway in filtering decisions to screen out "objectionable content" and replace it with examples of content which can be screened out with impunity, namely content that is "unlawful" or "promotes terrorism." The proposed change would also define "good faith" within §230(c)(2) to limit content moderation decisions to those done within online terms of service and expressly provide that content removal done in accordance with online terms would not render a platform the publisher or speaker of third party content.

Preserve Antitrust Claims. The proposal also suggests that the Good Samaritan provisions of the CDA, which protect providers from suits over filtering of objectionable content and for offering filtering tools to others, should not be interpreted as barring antitrust-related claims.

The Difficulty of Striking the Proper Balance

It remains to be seen how much traction the DOJ's proposal gets in Congress, particularly in an election year and as legislators are currently focused on the virus response and the economic slowdown. Certainly, the most ambitious attacks to CDA immunity, on first glance, appear counterproductive when it comes to "cleaning up the internet" and would not be widely embraced. However, a bipartisan group of legislators could perhaps coalesce around a narrow set of limitations to CDA immunity that root out troubling content circulated online without otherwise affecting a dynamic online realm. Even this modest goal can be difficult as it's not always apparent which providers are the "bad actors" cited by the DOJ.

So, where should the line drawn? The passage of FOSTA drew one line, and the DOJ's proposal urges that additional areas of undesirable third party content should also be excised from the CDA's protection. Are we comfortable with the fact that the vibrancy of the internet may be diminished, that "good" platforms that foster the online marketplace of ideas would likely be adversely impacted and possibly forced out of business, and that the online experience will be more limited? Are we comfortable with a legislative definition of "good" and "bad" content? Or, rather, for the greater good of our society and to sustain greater exchange of ideas online, we are willing to maintain the CDA's broad immunity, even knowing that occasionally those of questionable ethics or moral standing will benefit.

Some Illustrations of the Challenge

Document ID: 0.7.2270.6287-000001

A review of the decades of CDA decisions clearly illustrates the problem we face in navigating this issue, as broad immunity has been afforded to both the vile and the virtuous. Indeed, as the DOJ states, under the current expansive interpretation of Section 230, even websites designed to promote or facilitate illegal conduct can still enjoy the protections of Section 230 immunity (citing both the Armslist case, where the Wisconsin Supreme Court ruled that the CDA barred tort claims against a classified advertising website where an individual purchased what turned out to be a murder weapon from a private seller, and Sixth Circuit's TheDirty ruling which found that the CDA protected a trashy gossip site from defamation claims). But these cases do not tell the entire story, for online platforms do not always fall into easy categories. For example, a review of two recent cases — the application of the CDA in another case involving TheDirty, juxtaposed against the application of the CDA to protect a #MeToo era whisper network — illustrates the difficulty in drawing that line.

TheDirty is a website that has served as the posterchild for what some people view as the CDA's overbroad application to protect less-than-honorable conduct by service providers. We last wrote about the site with respect to the decision cited by the DOJ in its recommendations. In that 2014 opinion, the Sixth Circuit ruled that even though the gossip site selected and edited user-generated posts for posting and added non-defamatory, albeit sophomoric, comments following each post, the site was protected by CDA immunity because it was neither the creator nor the developer of the challenged defamatory posts and did not materially contribute to the defamatory nature of the user postings. This past April, an Arizona district court dismissed another lawsuit against the operator of TheDirty for hosting an allegedly defamatory third party posting. (Laake v. Dirty World LLC, No. 19-05444 (D. Ariz. Apr. 14, 2020)). In the case, the plaintiff brought defamation claims and copyright claims against the website operator, Dirty World, LLC ("Dirty World"), for displaying an anonymous post that contained false claims about the plaintiff alongside plaintiff's own acting headshot that the anonymous poster had apparently screen-grabbed from the web. The complaint argued that Dirty World "specifically encourages" users to upload "dirt" and unfounded accusations and speculated that perhaps Dirty World was the actual author of the post.

The content of the TheDirty website can be characterized as offensive and misogynistic, appealing to a particular audience, and as TheDirty has proven, a site of its nature can use the CDA to shield itself from civil liability for the third party content that it hosts. Simply put, as an interactive computer service displaying third party content, it was entitled to protection of CDA Section 230. But if Congress decided to carve providers like TheDirty from the CDA, the amendment could sweep away protection for users and operators of other social media or user communication platforms, including sites that are the antithesis of TheDirty. For example, in one recent case, Comyack v. Giannella, No. SOM-L-1356-19 (N.J. Superior Ct., Somerset Cty, Apr. 21, 2020), the court dismissed defamation claims against members of a women's network

Document ID: 0.7.2270.6287-000001

that disseminated and republished third party reports about the plaintiff-bartender's allegedly predatory behavior that had been previously posted on social media and an industry website/bulletin board. Among other things, the court applied CDA Section 230 to dismiss the defamation claims, finding that CDA Section 230 barred such claims because the network contained mere republications of the original non-party posts (with limited or no commentary) and the members of the women's network could be considered "users" of an interactive computer service. The court rejected the plaintiff's argument that the network members should not be protected by the CDA, concluding that even if the defendants "reposted messages originated by anonymous users or users whose identities were known to them does not affect the broad immunity granted to them by the CDA."

As these cases illustrate, how will a judgement call be made – what is "good" content and what is "bad" content?

* * *

These are just some a few of the many recent CDA cases decided recently, but these examples illustrates how difficult it is to surgically amend the CDA to eliminate "bad" content while maintaining robust protection for the beneficial internet.

Whatever the approach, it will not be easy. Congress has lately had trouble reaching consensus on technology-related and privacy-related legislation, so the DOJ's CDA reform proposal may not likely advance toward any meaningful debate. The drumbeat calling for some regulation of the excesses of the internet has been steady for several years, so it's not entirely improbable that a narrow CDA reform bill could see support (recall, Congress overwhelmingly passed FOSTA in 2018). Still, akin to the First Amendment, regulating freedom can be a messy affair, and the carve-outs for unwanted content that the DOJ proposes, if not carefully drafted, can have far-reaching effects. Other proposals heard over the years for a content takedown regime modeled on the DMCA safe harbors could potentially be misused. Remembering the adage of "bad facts make bad law," we think that it is important for the dialogue on amending the CDA be robust and take into consideration all of the viewpoints at issue, rather than be a knee-jerk political reaction to any particular distasteful application of the law.

One thing is certain. The CDA – intended to serve as a shield against liability – has been the source of countless legal disputes over the years in often-doomed attempts to pierce that shield. If that shield is ultimately chipped away by Congress, the litigation surrounding the CDA – including both frivolous, new-fangled attempts at eroding what's left of the immunity, as well as meritorious actions against no-longer-protected platforms – will ultimately mushroom.

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As a result, the only certain result of any amendment to the CDA will be more litigation.

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FCC commissioner claims Big Tech has 'weaponized' federal law to push 'partisan political agenda' *Fox News*
Joshua Nelson
FCC Commissioner Brendan Carr told “America’s Newsroom” on Friday that social media companies have amassed more control over more speech than any other entity in human history.

Carr suggested that those companies are making “a big bet that they can get away with exercising that power in a biased way for two reasons. One, if they cozy up to left-leaning causes, progressives won’t take action and ... Republicans will just sit on their hands and do nothing."

However, the commissioner added, those days are “over.”

“We’re now seeing bipartisan consensus to take action, whether it is from an antitrust perspective, competition perspective, or, reforming this piece of legislation known as section 230," said Carr, referring to Section 230 of the Communications Decency Act of 1996.

TRUMP SIGNS SOCIAL MEDIA EXECUTIVE ORDER THAT CALLS FOR REMOVAL OF LIABILITY PROTECTIONS OVER 'CENSORING'

That legislation shields internet service providers and social media companies from liability from content posted on their platforms by third parties in most cases.

"When 230 was first adopted, remember, it was a shield to, sort of, frivolous litigation and now what we're seeing," Carr said, "is that social media companies that have weaponized Section 230 and are using it as a sword to carry out their own partisan political agenda."

On Thursday, Facebook said it had removed posts and ads from President Trump's reelection campaign for violating its policy against organized hate.

The ads showed a red inverted triangle with text asking Facebook users to sign a petition against the far-left movement Antifa. They were run on pages belonging to Trump and Vice President Mike Pence, and also appeared in ads and organic posts on the “Team Trump” page.

Jonathan Greenblatt

✓

@JGreenblattADL

The Nazis used red triangles to identify their political victims in concentration camps. Using it to attack political opponents is highly offensive. @POTUS' campaign needs to learn its history, as ignorance is no excuse for using Nazi-related symbols.
https://www.washingtonpost.com/politics/2020/06/18/trump-campaign-runs-ads-with-marking-once-used-by-nazis-designate-political-prisoners/ …

Trump campaign runs ads with marking once used by Nazis to designate political prisoners

The red inverted triangle was first used to identify Communists, and applied as well to members of other opposition parties.

washingtonpost.com

2,909

12:47 PM - Jun 18, 2020

Twitter Ads info and privacy

2,420 people are talking about this

“The Nazis used red triangles to identify their political victims in concentration camps," Anti-Defamation League CEO Jonathan Greenblatt said in a statement. "Using it to attack political opponents is highly offensive.”

Document ID: 0.7.2270.6287-000001

“Our policy prohibits using a banned hate group’s symbol to identify political prisoners without the context that condemns or discusses the symbol,” said a Facebook company spokesperson.

“The inverted red triangle is a symbol used by Antifa, so it was included in an ad about Antifa,” Tim Murtaugh, a spokesman for the Trump campaign, said in an email.

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"These entities get to have their own political views," Carr said in response to the dust-up. "What no business gets to do though is run rough shot over their own terms of service to go after politicians on the left or right.

“I think this goes to a broader issue which is you have all sorts of world leaders using these platforms whether it is [Iran Supreme Leader] Khamenei or Chinese Communist propagandists, and it seems like these platforms are narrowly focused on taking these actions against Trump.”

Barr: DOJ Changes To Big Tech Protections Are Meant To Protect Free Speech *The Federalist*
Tristan Justice
Attorney General William Barr said Sunday that the primary motive behind the Justice Department’s push to reform Section 230 liability protections for big tech corporations is to preserve free speech following a progressive trend in selective censorship.

Barr said on Fox News with Maria Bartiromo that the idea behind the initial protections provided under Section 230 of the 1996 Communications Decency Act was to encourage platforms to take down obscene content while promoting an open forum to all users. Recent events however, encapsulated in last week’s attempts by Google and NBC News to de-platform The Federalist show online companies abusing Section 230 protections to censor unwelcome narratives.

“We wanted to encourage platforms to take off obscene material or harassing material or other kinds of offensive material,” Barr said, explaining that doing so would prevent a company from being deemed a publisher. “Unfortunately, [companies] started taking down view points and

Document ID: 0.7.2270.6287-000001

started really being selective and based on whether they agreed with the viewpoint or not taking it down, and that should make them a publisher."

Benny

✓

@bennyjohnson

AG Barr talks about proposed changes to Section 230 protections for Big Tech companies including requiring platforms to be more clear about violations of their terms of service and having a better process to dispute the violation.

Embedded video

589

11:17 AM - Jun 21, 2020

Twitter Ads info and privacy

296 people are talking about this

The Justice Department unveiled several reforms last week aiming to curb big tech immunity to secure free and open access to the 21st century public square monopolized by tech giants in the Silicon Valley. The department is requesting that corporations clarify websites' terms of service and have a reasonably based reason for stripping down content while preserving companies' rights to take down unlawful posts. Barr said companies also must give people notice that their content will be ripped off the site with a process to dispute the action.

Tristan Justice is a staff writer at The Federalist focusing on the 2020 presidential campaigns. Follow him on Twitter at @JusticeTristan or contact him at Tristan@thefederalist.com.

AG Barr on tech companies censoring viewpoints: 'There's something very disturbing about what's going on' *Fox News*
Talia Kaplan
"There's something very disturbing about what's going on," Attorney General William Barr told Maria Bartiromo in an exclusive interview responding to recent incidents where technology companies, including Google and Twitter, tried to censor content.

Document ID: 0.7.2270.6287-000001

Barr made the statement during the interview, which aired on “Sunday Morning Futures,” reacting to NBC’s apparent influence over Google in punishing two conservative news sites over what was deemed offensive coverage of the protests following the death of George Floyd, the Minneapolis man who died in police custody on May 25.

In a report published Tuesday afternoon, NBC News claimed Google "banned" The Federalist and ZeroHedge from Google Ads for "pushing unsubstantiated claims" about the Black Lives Matter movement. Google later pushed back, claiming that The Federalist "was never demonetized," and adding, "We worked with them to address issues on their site related to the comments section."

Bartiromo also brought up the fact that Sen. Tom Cotton, R-Ark., said last week that Twitter “tried to permanently lock down” his account if he “refused to censor” his tweets "on the topic of riots and looting," referencing the violent demonstrations sparked by Floyd's death.

“To some extent there was a bait-and-switch over the past couple of decades,” Barr explained.

Sen. Tom Cotton on bill targeting Big Tech companies over perceived political biasVideo

He went on to say the tech companies got their “strong market position” by marketing themselves as “open to all comers.”

SEN. TOM COTTON: TWITTER TRIED TO CENSOR ME -- AND THEY LOST

Barr noted that when the companies first surfaced “they built up all their membership and their networks [by] saying, ‘We have a wide variety of views. People can come in and post their views and their positions and their statements.’”

“Then they've switched,” Barr added. “Now they're being more selective and they're starting to censor different viewpoints.”

Document ID: 0.7.2270.6287-000001

He noted that there is a “concentration of these very large companies that have that kind of influence on the sharing of information and viewpoints on our society.”

Barr explained that that is a “fundamental problem” because “our republic was founded on the idea, and the whole rationale was that there'd be a lot of diversity of voices and it would be hard for someone to be able to galvanize, big faction in the United States that could dominate politically and oppress a minority, and yet now we have with the Internet and with these big concentrations of power, the ability to do just that, to quickly galvanize people's views because they're only presenting one viewpoint and they can push the public in a particular direction very quickly.”

Barr went on to explain that “our whole Constitution insists the system was based on not having that and having a wide diversity of voices.”

He then said that “one way this can be addressed is through the antitrust laws and challenging companies that engage in monopolistic practices.”

The Department of Justice is pushing Congress to pass new legislation that would hold Facebook, Twitter and other tech behemoths accountable for what is posted on their platforms – a move that if passed would roll back protections Silicon Valley has had for decades.

The Justice Department’s proposals, unveiled Wednesday, want online platforms to better police their sites for illicit and harmful material, and to take a more objective approach in deciding what content they deem objectionable and decide to take down.

The DOJ, in a news release, said it was calling for lawmakers to "update the outdated immunity for online platforms" under Section 230 of the Communications Decency Act of 1996.

Exclusive: Maria Bartiromo interviews AG Barr on police reform, Big Tech censorship, Durham investigationVideo

Document ID: 0.7.2270.6287-000001

Bartiromo noted that “the DOJ plans to roll back … the monopoly, legal protections that technology companies enjoy” and asked, “What prompted this?”

In response, Barr said “problems” with Section 230 were arising “so we've proposed a change to address that.”

“During the early days of the Internet, we wanted to encourage platforms to take off obscene material or harassing material or other kinds of offensive material like that and so what we said was in the law, Section 230, if you take that down, that doesn't make you a publisher, if you take down objectionable material like that,” Barr explained.

“Unfortunately, they [tech companies] started taking down viewpoints and started really being selective and based on whether they agreed with a viewpoint or not taking it down and that should make them a publisher, but they said under Section 230, they weren't.”

Barr noted that what the DOJ is stressing is that tech companies can take down content that “is unlawful” or that “does not accord” with their terms of service, but the companies must make their “terms of service clear.”

“You have to have a reasonably based reason for taking down the particular content and show that it violated your terms of service and you need to give someone notice and a process whereby they can dispute that,” Barr said.

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Sen. Josh Hawley, R-Mo., introduced legislation on Wednesday that would give Americans the ability to sue major tech companies like Facebook, Google and Twitter if they engage in selective censorship of political speech.

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Tuesday, June 23, 2020 4:37 PM
To:	Herlihy, Brianna (PAO)
Subject:	FW: Cruz podcast
Attachments:	Section 230 Q&A.docx

Brianna,

Any thoughts on whether there are new Q&As we should add to the attached for the AG's podcast with Sen Cruz?

Best,
Lauren

From: Willard, Lauren (OAG)
Sent: Tuesday, June 23, 2020 11:29 AM
To: Kupec, Kerri (OPA) (b) (6) >; Levi, William (OAG) (b) (6) >
Cc: Herlihy, Brianna (PAO) (b) (6) >
Subject: RE: Cruz podcast

Kerri – I haven't been able to find a time to chat with Cruz staff yet this week. What would be most helpful for AG prep? Is someone in OPA familiar with the topics/details I should connect with?

One Section 230 point that would be helpful for the AG to lean in a bit more on ar (b) (5) [redacted]. We need to bot (b) (5) [redacted] *and* (b) (5) [redacted]

Best,
Lauren

From: Kupec, Kerri (OPA) (b) (6) >
Sent: Monday, June 22, 2020 1:09 PM
To: Willard, Lauren (OAG) (b) (6) >; Levi, William (OAG) (b) (6) >
Cc: Herlihy, Brianna (PAO) (b) (6) >
Subject: RE: Cruz podcast

Thanks

From: Willard, Lauren (OAG) (b) (6) >
Sent: Monday, June 22, 2020 10:41 AM
To: Kupec, Kerri (OPA) (b) (6) >; Levi, William (OAG) (b) (6) >
Cc: Herlihy, Brianna (PAO) (b) (6) >
Subject: Cruz podcast

Hi all,

I noticed the AG may be doing a podcast with Sen Cruz on Wednesday. We have been talking to Cruz' chief counsel on the Section 230 / content moderation issues. I wouldn't be surprised if that's something that comes up on the podcast. Let me know how we can be helpful in prepping the AG. I thought he did a great job on the Fox interview.

Happy to chat whenever convenient. In the interim, I'm going to keep revising, adding to the Q&A, and can work up a few background points on Cruz' perspectives on the issue (working with OLA).

Best,
Lauren

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

Document ID: 0.7.2270.6895

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Tuesday, June 23, 2020 4:46 PM
To:	Kupec, Kerri (OPA); Levi, William (OAG)
Cc:	Herlihy, Brianna (PAO)
Subject:	RE: Cruz podcast
Attachments:	2020.06.17 - Letter to Google re The Federalist - SFV.pdf

Also FYI before tomorrow: https://www.cruz.senate.gov/?p=press_release&id=5197

From: Willard, Lauren (OAG)
Sent: Tuesday, June 23, 2020 11:29 AM
To: Kupec, Kerri (OPA) (b) (6) >; Levi, William (OAG) (b) (6) >
Cc: Herlihy, Brianna (PAO) (b) (6) >
Subject: RE: Cruz podcast

Duplicative Information - See Document ID 0.7.2270.6895

TED CRUZ
TEXAS

United States Senate

COMMITTEES:
FOREIGN RELATIONS
COMMERCE
JUDICIARY
RULES AND ADMINISTRATION
JOINT ECONOMIC COMMITTEE

June 17, 2020

Mr. Sundar Pichai
Chief Executive Officer
Google LLC
Mountain View, CA 94043

Dear Mr. Pichai:

The recent actions of Google to "demonetize" a conservative media publisher, *The Federalist*, raise serious concerns that Google is abusing its monopoly power in an effort to censor political speech with which it disagrees.

This is part of a bigger problem. The culture of free speech in this country is under attack, and Google is helping lead the charge. Whereas Americans once understood that the best response to speech was more speech, some Americans, with the help of some of the most powerful companies on the planet, are now pressing to silence and punish those expressing views that do not align with the prevailing and ever-shifting progressive orthodoxy. These individuals demand that people with different views lose their livelihoods if they step out of line. Employers must fire dissenters. Companies like Google must—to use a most Orwellian term— "demonetize" them.

As evidenced by its actions yesterday, Google seems more than happy to play this censorship role by trying to break the financial back of a media publication with which it disagrees. As NBC News reported, *The Federalist*—a conservative media organization and publisher—was banned from generating revenue from any advertisements served by Google Ads. According to the report, Google took this action after NBC News Verification Unit, apparently working at the behest of the so-called Center for Countering Digital Hate notified Google that *The Federalist* had published an article claiming that "the media had been lying about looting and violence during the protests, which were both included in the report sent to Google."[1]

Whether or not one agrees with this characterization, destroying the publisher's ability to use advertising to reach willing readers should be wholly beyond the pale. The so-called "Center for Countering Digital Hate" is now actively fundraising off its success enlisting Google in its efforts to silence views contrary to its political agenda.

Perhaps knowing that its actions were indefensible, Google appears to have backtracked, saying that the decision to "demonetize" *The Federalist* is not due to the article itself, but instead due to offensive reader comments that allegedly violated Google advertising policies. Google reportedly gave *The Federalist* three days to eliminate the offensive comments, or face immediate "demonetization." Moreover, Google apparently stated that *The Federalist* could use Google Ads if it simply turned off its comments section. This is no better.

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[1] *Google Bans Website ZeroHedge from its Ad Platform over Comments on Protest Articles*, Adele-Momoko Fraser, NBC News, June 16, 2020, *available at* https://www.nbcnews.com/tech/tech-news/google-bans-two-websites-its-ad-platform-over-protest-articles-n1231176

Document ID: 0.7.2270.5341-000001

Google's decision to target *The Federalist* is transparently politically motivated. Numerous "progressive" media outlets allow comments, including, *Huffington Post*, *Mother Jones*, *Daily Kos*, *Talking Points Memo*, *Wonkette*, *Slate*, *Jezebel*, *The Root*, *Salon*, *The Intercept*, *The Young Turks*, and many others. I don't know what the objectionable comments were that individual users might have posted on *The Federalist*, but any objective review would no doubt demonstrate at least as many profane, racist, or indefensible user comments on these other sites that would equally violate Google's alleged standards.

But one need not look that far. On any given day, there are thousands of profane, racist, and indefensible comments posted on YouTube, which is a wholly owned subsidiary of Google.

It is also deeply ironic that Google is financially punishing a website for speech that appears on its platform. Google has defended section 230's grant of immunity to Big Tech by arguing that "the best way to protect online speech—and indeed the internet itself—is to allow platforms to set and enforce standards for appropriate speech on their services, and to do so generally free from . . . the threat of private litigation."[2] But while Google demands that it cannot be held financially accountable for unlawful speech on its own platform, it is all too willing to use its market power to hold a conservative media outlet financially responsible for allowing disfavored speech on its platform.

Google's actions yesterday were antithetical to American values. The Constitution Subcommittee of the Senate Judiciary Committee is charged with protecting the Constitution and the Bill of Rights; Google's facially discriminatory conduct is contrary to the principles of Free Speech embodied in the First Amendment, and may well violate federal antitrust laws as well.

Within seven days, by June 24, 2020, Google is requested to provide to the Subcommittee the following:

1. All communications in the past year between Google and the NBC News Verification Unit concerning *The Federalist.*

2. All communications in the past year between Google and the Center for Countering Digital Hate concerning *The Federalist.*

3. All internal communications or deliberations in the past year at Google or YouTube concerning *The Federalist*.

Google is also requested to answer, in writing, by June 24, 2020, the following questions:

1. Has Google examined the comments sections of any of the "progressive" organizations listed in this letter and made any assessment whatsoever how they compare to the comments on *The Federalist* that were claimed as a basis for demonetization?

---

[2] Brief of Internet Association as *Amicus Curiae* in Support of Petitioner, at 2, *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, No. 19-1284 (2020), *available at* https://internetassociation.org/wp-content/uploads/2020/06/IA_Amicus-Brief-of-IA-ISO-Petitioner-Malwarebytes-Section-230_19-1284_06-12-2020_content-moderation.pdf.

Document ID: 0.7.2270.5341-000001

2. Will Google apply the same standards to all media organizations, or just those with which it has political disagreements?

3. Does Google believe Section 230 protects *The Federalist*? Why or why not?

4. If any offensive comments appear on YouTube, will Google begin immediately demonetizing its subsidiary? Within three days, the deadline given to *The Federalist*?

5. Is Google's preferential treatment to YouTube, on far more favorable terms than those extended to *The Federalist*, consistent with the Sherman Act? Why or why not?

Thank you for your attention to this matter. I look forward to your response.

Regards,

Ted Cruz
Chairman, Constitution Subcommittee
Senate Judiciary Committee

Cc: William Barr, United States Attorney General
Joseph Simons, Chairman, Federal Trade Commission

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WASHINGTON, DC 20510
(202) 224–5922

Document ID: 0.7.2270.5341-000001

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Tuesday, June 23, 2020 6:27 PM
To:	Kupec, Kerri (OPA); Levi, William (OAG)
Cc:	Herlihy, Brianna (PAO)
Subject:	RE: Cruz podcast
Attachments:	Section 230 Q&A.docx; Section 230 Talking Points_DRAFT 6.23.docx

Deliberative Process / Pre-Decisional

Will and Kerri,

Updated draft TPs and Q&As on Section 230 for the Cruz podcast and any other press events in the coming week. I've also added some Antitrust Q&As at the top, as I could see that being an area Cruz would ask.

Welcome thoughts on any other topics that need to be covered.

Thanks!
Lauren

From: Willard, Lauren (OAG)
Sent: Tuesday, June 23, 2020 4:46 PM
To: Kupec, Kerri (OPA) (b) (6) >; Levi, William (OAG) (b) (6) >
Cc: Herlihy, Brianna (PAO) (b) (6) >
Subject: RE: Cruz podcast

Duplicative Information - See Document ID 0.7.2270.5341

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Tuesday, June 23, 2020 6:42 PM
To:	Kupec, Kerri (OPA); Newman, Ryan D. (OAG)
Cc:	Herlihy, Brianna (PAO)
Subject:	RE: Cruz podcast
Attachments:	Section 230 Q&A.docx; Section 230 Talking Points_DRAFT 6.23.docx

Dropping Will and adding Ryan to chat lawful access. Do we think the AG needs TPS on lawful access in light of the Graham bill that just dropped? He knows this issue so well, so probably not but wanted to check. Also welcome Ryan's thoughts as former Cruz-er on any potential tech topics to prepare AG for other than antitrust and content moderation / Section 230.

From: Willard, Lauren (OAG)
Sent: Tuesday, June 23, 2020 6:27 PM
To: Kupec, Kerri (OPA) (b) (6) >; Levi, William (OAG) (b) (6) >
Cc: Herlihy, Brianna (PAO) (b) (6) >
Subject: RE: Cruz podcast

Duplicative Information - See Document ID 0.7.2270.5077

Eyler, Gustav W.

From:	Eyler, Gustav W.
Sent:	Tuesday, June 23, 2020 9:28 PM
To:	Willard, Lauren (OAG)
Cc:	Pandya, Brian (OASG); Grieco, Christopher (ODAG); Toensing, Brady (OLP); (b) (6) (OLA); Davis, Ethan P. (CIV)
Subject:	RE: Sec. 230
Attachments:	20_6_23_Section 230 Enforcement Examples_Draft.docx

Lauren,

Attached please find a draft discussion of examples in whic (b)(5) per CIV

As to the call, I would be happy to join it if you like.

All best,
Gus
(b) (6)

From: Willard, Lauren (OAG) (b) (6) >
Sent: Monday, June 22, 2020 5:35 PM
To: Eyler, Gustav W. (b) (6) >
Cc: Pandya, Brian (OASG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Toensing, Brady (OLP) (b) (6) (b) (6) (OLA) (b) (6) >; Davis, Ethan P. (CIV) (b) (6) >
Subject: RE: Sec. 230

Thanks! If there are a few quick examples we can get by tomorrow afternoon that would be great, and then we may be able to have more time on a fuller list. Essentially would want t (b) (5) . Nothing formal required, just the ideas we can pass along in the form of technical assistance. May also be helpful to have you or someone else on the next call, if you feel comfortable.

Best,
Lauren

From: Eyler, Gustav W. (b) (6) >
Sent: Monday, June 22, 2020 5:29 PM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Pandya, Brian (OASG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Toensing, Brady (OLP) (b) (6) (b) (6) (OLA) (b) (6) >; Davis, Ethan P. (CIV) (b) (6) >

Document ID: 0.7.2270.6211

Subject: RE: Sec. 230

Lauren,

Yes, we can pull together a list. By when do you need it?

Best,
Gus

From: Willard, Lauren (OAG) (b) (6) >
Sent: Monday, June 22, 2020 5:20 PM
To: Eyler, Gustav W. (b) (6) >
Cc: Pandya, Brian (OASG) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Toensing, Brady (OLP) (b) (6) (b) (6) (OLA) (b) (6) >
Subject: FW: Sec. 230

Gus,

Can you or someone else in CIV help come up with a list of statutes that DOJ enforces civilly that could be impacted by Section 230?

Many thanks!
Lauren

From (b) (6) (OLA) (b) (6) >
Sent: Monday, June 22, 2020 5:17 PM
To: Willard, Lauren (OAG) (b) (6) >
Subject: FW: Sec. 230

Updated Schatz/Thune proposal attached.

Working on setting up this call. See below for discussion points.

From: Barnhart, Christianna (Schatz) (b) (6) >
Sent: Monday, June 22, 2020 5:06 PM
T (b) (6) (OLA) (b) (6) >
Cc: Peterson, Blake (Schatz) (b) (6) >; Mehta, Ishan (Schatz) (b) (6) >
Subject: RE: Sec. 230

(b) (6)

Thanks for reaching out. We are working on a new bill that we'd love the DOJ's input on. I've attached the revised draft to this email that incorporates some of the edits discussed.

In particular, it would be helpful to hear from the DOJ how exempting civil laws from Section 230 would help DOJ enforcement activities. In particular, people have asked if we had a particular set of enforcement activities that were being prevented because of Section 230. Do you have a list of statutes that the DOJ is seeking to better enforce?

Christi

Document ID: 0.7.2270.6211

From (b) (6) (OLA) (b) (6) >
Sent: Monday, June 22, 2020 12:58 PM
To: Barnhart, Christianna (Schatz) (b) (6) >
Subject: Sec. 230

Hi Christianna,

Touching base to see if you have an updated draft of the PACT Act you could share and also whether you are awaiting any feedback from us. I think we may have promised you something on the call last week, so let us know how we can be of help, if needed.

Thanks,

(b) (6) | Counsel | U.S. Department of Justice, Office of Legislative Affairs | (b) (6) (b) (6)
(*Telework* (b) (6))

Document ID: 0.7.2270.6211

Jon Schweppe

From:	Jon Schweppe
Sent:	Wednesday, June 24, 2020 5:03 PM
To:	(b)(6) Lauren Willard
Subject:	Sec. 230
Attachments:	Section 230 Amendment JS CP (1).docx

Hi Lauren!

Would you be free next week for a 30 minute call to discuss DOJ's policy efforts on Sec. 230? I'm attaching some of my organization's work on it, including model legislation we have developed.

APP's primary policy goal with regard to pornography is to get sites that host pornography to implement an age screening system. We think the best way to do this (while adhering to SCOTUS precedent) is to get the sites to do it voluntarily by having Congress amend Sec. 230 and make their immunity from civil liability conditional. There are a couple ways we can do that, but it sounds like DOJ's proposal might effectively do the same thing?

We also care about the free speech/free expression issue, as you'll see in our blueprint paper. Happy to talk about both aspects of the issue.

APP's paper: https://americanprinciplesproject.org/wp-content/uploads/2020/06/APP-Sec230-paper.pdf

Model legislation that we've been circulating on the Hill is attached.

Here are a couple pieces I've authored recently on the issue, mostly focusing on the free speech side of things:

- *New York Post*: https://nypost.com/2020/06/14/how-to-force-social-media-to-respect-free-speech-or-pay-big/
- *The Federalist*: https://thefederalist.com/2020/02/14/heres-a-small-government-solution-to-section-230s-big-tech-problem/

--
Thanks,

Jon Schweppe
Director of Policy and Government Affairs
American Principles Project
(c (b) (6)
@JonSchweppe

Document ID: 0.7.2270.6263

An Act to Amend 47 U.S.C. § 230 (c)

Craig Parshall / Jon Schweppe

Discussion Draft
Latest Revisions: June 10, 2020 (JS)
New language added after (c)(2) beginning with (c)(3).

(c) **Protection for "Good Samaritan" blocking and screening of offensive material**

(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 information provided by another information content provider.

(2) **Civil liability.**
No provider or user of an interactive computer service shall be held liable on account of -

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(3) **Exceptions to subsection (1): facilitation of illegal conduct**

(A) A provider or user who creates, materially contributes to, actively participates in, or induces another to create, post, materially contribute to, or actively participate in, illegal online conduct, shall be barred from claiming protection under this section from criminal or civil liability.

(B) The protections of subsection (1) in any criminal or civil action shall not apply to an interactive computer service that knowingly permits or facilitates an adult having contact with someone he or she knows to be a child or with someone he or she believes to be a child via a computer wireless service or Internet service, including but not limited to, a local bulletin board service, Internet chat room, e-mail, or instant messaging service, and the contact involves any matter containing explicit verbal descriptions or narrative accounts of sexually explicit nudity, sexual conduct, sexual excitement, or sadomasochistic abuse that is intended to arouse or satisfy the sexual desire of either the adult or the child. [1]

[1] Similar criminal statute upheld in *Scott v. State*, 299 Ga. 568, 788 S.E. 2nd 468 (Ga. 2016)

Document ID: 0.7.2270.6263-000001

(C) The protections in subsection (1) shall not apply in any criminal or civil action to a provider or user of an interactive computer service that permits or facilitates the distribution of content that is indecent, obscene, or harmful to minors [2] which has been made readily accessible to minors [3] by its failure to implement a system designed to effectively screen users aged 17 and younger from accessing such content to the extent feasible with the developing capabilities of technology.

(4) **Exceptions to subsection (2): stifling free expression**
The good faith provisions in (2)(A) shall be deemed to have been breached and the civil protections in (2)(A) shall not apply to a provider of an interactive computer service that is in the business or practice of communicating user-generated content if –

(A) such provider is dominant in its market; and

(B) such provider fails to make content moderation decisions pursuant to policies and practices reasonably consistent with the First Amendment under established Supreme Court law applicable to state actors.

(5) **Enforcement of subsection (4) by private right of action.**
If any information content provider that uses a provider of interactive computer services that is dominant in its market under (4)(A) has its content banned, blocked, down-ranked, demonetized in its advertising or otherwise subjected to similar adverse treatment by a provider of an interactive computer service by reason of the service's failure to conform its policies and practices to (4)(B), it may enforce that subsection by civil action against such provider of an interactive computer service and collect compensatory and economic damages, or collect liquidated damages in the amount of $500,000 for each adverse incident, whichever is greater. In addition, in such civil action:

(A) Such provider of interactive computer services shall be liable for punitive damages caused by its reckless failure to implement the policies and practices in (4)(B).

(B) Such provider of interactive computer services shall be liable for treble damages available for a knowing failure to implement policies and practices required in (4)(B).

(C) Class actions shall be available to enforce private rights of action under this subsection.

(6) **Rules of construction.**

(A) The duties of an interactive computer service required under subsection (3) for civil immunity shall be broadly construed to advance the

[2] *Ginsberg v. New York*, 390 U.S. 629, 641 (1968)
[3] *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)

Document ID: 0.7.2270.6263-000001

purposes of this subsection for the deployment of new technologies and policies to block or filter offensive material such as indecency, obscenity, pornography, or sexually explicit content readily accessible to children.

(B) The duties of an interactive computer service under subsection (4) for civil immunity shall be broadly construed to advance the purposes of this subsection in encouraging the growth of the Internet as a forum for a true diversity of discourse, unique opportunities for cultural development, and myriad of avenues for intellectual activity.

(7) **Certification.**
Any provider of an interactive computer service with net assets or annual net revenue exceeding $500,000,000 may apply to the Federal Trade Commission acting with the concurrence of the Department of Justice through its Assistant Attorney General in charge of Antitrust, for a review and certification that it is not dominant in its respective market; or, if it is determined to be dominant, that its policies and practices regarding content decisions as applied to information content providers using its service are reasonably consistent with the First Amendment under clearly established Supreme Court law governing state actors.

(A) A determination or certification under this subsection may be admissible in any civil action brought under subsection (5) in the discretion of the trial court, but shall not be determinative on the issue.

(B) The review and certification process in this subsection shall be established by the Federal Trade Commission and the Department of Justice in accordance with 5 U.S.C. § 553 [rule-making] consistent with this subsection as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to make determinations and certifications under this subsection.

(d) **Obligations of interactive computer services**

A provider of an interactive computer service shall, at the time of entering an agreement with a customer for the provision of the interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify or provide the customer with access to information identifying, current providers of such protections.

(e) **Effect on other laws**

(1) **No effect on criminal law**
Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual

Document ID: 0.7.2270.6263-000001

exploitation of children) of Title 18, or any other Federal criminal statute, including civil remedies available under such statutes.

(2) **No effect on intellectual property law**
Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) **State law**
Nothing in this section shall be construed to prevent –

(A) any State from enforcing any State criminal statute, including civil remedies available under such statutes, if a user or provider of an interactive computer service has aided and abetted violation; or

(B) any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) **No effect on communications privacy law**
Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) **No effect on sex trafficking law**
Nothing in this section (other than subsection (c)(2)(A) shall be construed to impair or limit –

(A) any claim in a civil action brought under section 1595 of Title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of Title 18; or

(C) any charge in a criminal prosecution under state law if the conduct underlying the charge would constitute a violation of section 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(D) Any claim in a civil action brought under section 2421A(c) of Title 18, if the conduct underlying the claim constitutes a violation of section 2421A(b).

(f) **Definitions**

As used in this section:

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(1) **Internet**
The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) **Interactive computer service**
The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) **Information content provider**
The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) **Access software provider**
The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) Filter, screen, allow, or disallow content;
(B) Pick, choose, analyze, or digest content; or
(C) Transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(5) **Dominant in its market**
The term “dominant in its market” means that an interactive computer service has gained substantial, sustained market power over any competitors. Actual monopoly control over a market is not required to satisfy this definition.

Document ID: 0.7.2270.6263-000001

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Wednesday, June 24, 2020 5:14 PM
To:	Jon Schweppe
Subject:	RE: Sec. 230
Attachments:	6-16-20section230keytakeawaysrecommendations.pdf

Happy to! I'm pretty flexible next Wednesday and Thursday. Feel free to propose a day and time that works best for you. Thanks for forwarding the materials below, which I look forward to reading.

In case you missed it, the DOJ's report Section 230 is available here https://www.justice.gov/ag/department-justice-s-review-section-230-communications-decency-act-1996?utm_medium=email&utm_source=govdelivery and attached.

Best,
Lauren

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

From: Jon Schweppe (b) (6) >
Sent: Wednesday, June 24, 2020 5:03 PM
To: Willard, Lauren (OAG) (b) (6) >
Subject: Sec. 230

Duplicative Information - See Document ID 0.7.2270.6263

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Wednesday, June 24, 2020 5:17 PM
To:	Grieco, Christopher (ODAG); Barnett, Gary (OAG); Herlihy, Brianna (PAO)
Subject:	FW: Sec. 230
Attachments:	Section 230 Amendment JS CP (1).docx

FYI. Let me know if you all would like to join a call next week. I haven't read the materials yet, but sounds like there may be some overlap in approaches. This stemmed from a call I just was on with John Moran and Gregg Sofer about obscenity enforcement. I mentioned Section 230 and Lawful Access policy initiatives as they relate to CSAM and illicit obscenity. The groups seemed very supportive of DOJ's proposal. I offered folks to follow up if they wanted to chat further.

Here's a list of the groups.

Patrick A. Trueman, President, **National Center on Sexual Exploitation**
- Pat served as Chief of CEOS, 1988-1993

Laila Mickelwait, Director of Abolition & Founder of #Traffickinghub Campaign, **Exodus Cry**
- A petition Laila started to shut down PornHub for hosting CSAM and videos of sex trafficking victims gained over 1,000,000 signors in a few months; See her article in today's *New York Post*: Big Porn cashes in on racism and anti-Semitism

Donna Rice Hughes, Founder and Executive Director, **Enough is Enough**
- Donna circulated the Children's Internet Safety Pledge to presidential candidates in 2016. President Trump signed it: Children's Internet Safety Presidential Pledge

Doreen Denny, Vice President of Government Relations, **Concerned Women for America**
and
Mario Diaz, General Counsel, **Concerned Women for America**

Buddy Smith, Senior Vice President, **American Family Association**

Travis Weber, Vice President for Policy and Government Affairs, Director of the Center for Religious Liberty, **Family Research Council**

Jon Schweppe, Director of Policy and Government Affairs, **American Principles Project**

Ben Bull, General Counsel, **National Center on Sexual Exploitation**

From: Jon Schweppe (b) (6) >
Sent: Wednesday, June 24, 2020 5:03 PM
To: Willard, Lauren (OAG) (b) (6) >
Subject: Sec. 230

Duplicative Information - See Document ID 0.7.2270.6263

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Wednesday, June 24, 2020 6:51 PM
To:	Herlihy, Brianna (PAO)
Subject:	Fwd: Cruz podcast
Attachments:	Section 230 Q&A.docx; ATT00001.htm; Section 230 Talking Points_DRAFT 6.23.docx; ATT00002.htm; DOJ Supports Lawful Access Legislation that Protects Privacy and Civil Liberties.docx; ATT00003.htm; 2020.06.17 - Letter to Google re The Federalist - SFV.pdf; ATT00004.htm

Begin forwarded message:

From: "Willard, Lauren (OAG)" (b) (6) >
Date: June 24, 2020 at 10:00:29 AM EDT
To: "Kupec, Kerri (OPA)" (b) (6) >, "Levi, William (OAG)" (b) (6) >, "Boyd, Stephen E. (OLA)" (b) (6) >, "Escalona, Prim (OAG)" (b) (6) >
Subject: RE: Cruz podcast

Looping in Stephen and Prim.

For discussion with Cruz today, we may want to use opportunity to plug AG's views on both Section 230 and lawful access.

23 (b) (5) [redacted]

Lawful Acces (b) (5) [redacted]. And timely given the Graham bill dropping yesterday. https://www.justice.gov/opa/pr/statement-attorney-general-william-p-barr-introduction-lawful-access-bill-senate

Antitrust. Cruz is also very interested in antitrust. We need t (b) (5) [redacted]. FYI Cruz sent a letter to Google last week about TheFederalist issue, and raised both content moderation and antitrust concerns.

Best,
Lauren

From: Willard, Lauren (OAG)

Document ID: 0.7.2270.7212

Sent: Tuesday, June 23, 2020 6:27 PM
To: Kupec, Kerri (OPA) (b) (6) >; Levi, William (OAG) (b) (6) >
Cc: Herlihy, Brianna (PAO) (b) (6) >
Subject: RE: Cruz podcast

Duplicative Information - See Document ID 0.7.2270.5077

Grieco, Christopher (ODAG)

From:	Grieco, Christopher (ODAG)
Sent:	Monday, June 29, 2020 1:47 PM
To:	Willard, Lauren (OAG)
Subject:	FW: Facebook Materials
Attachments:	Exhibit B - Summary of EO.docx; Exhibit A - Key Takeaways.docx; Verizon pulling advertising from Facebook and Instagram.pdf; Facebook Support of SESTA.docx; Facebook Forms Independent Board to Oversee Content Decisions - WSJ.pdf

FYI

From: Grieco, Christopher (ODAG)
Sent: Friday, June 26, 2020 1:05 PM
To: Hovakimian, Patrick (ODAG) (b) (6) >
Cc: Shores, Ryan (ODAG) (b) (6) >; Suero, Maya A. (ODAG) (b) (6) >
Subject: Facebook Materials

Pat,

Attached are some materials for the DAG to prep for Monday's meeting with Facebook on Section 230. Ryan and I will be there on Monday to discuss the meeting with the DAG and lay out some ideas for engagement with Facebook, but these documents should provide some helpful background.

Let me know if you need anything else.

Thanks

Chris

A: Key Takeaways from our 230 Report
B: Summary of DOJ Requirements under the EO
C: Facebook support of SESTA (clippings from various sources on why Facebook decided to support adding an exclusion for sex trafficking to Section 230)
D: Background article on Facebook's newly created content moderation board.
E: Recent article about Verizon (and others) pulling ads from Facebook because of content.

Document ID: 0.7.2270.6596

EXHIBIT B
Pre-Decisional / Deliberative

Summary of EO on Preventing Online Censorship

The following is a summary of the President's Executive Order on Preventing Online Censorship signed on May 28, 2020. The headings, numbers, and subsections in this outline correspond to each section and subsection of the EO, with the italicized sections focusing on the tasks given to DOJ.

1. Policy: To support Presidential commitment "to free and open debate on the internet"

2. Protections Against Online Censorship a. Key policy "When an interactive computer service provider removes or restricts access to content and its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial conduct. It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider."

   b. DOJ to work with NTIA for a *complaint* to FCC within 60 days for rulemaking on
      i. "the interaction between subparagraphs (c)(1) and (c)(2) of section 230, in particular to clarify and determine the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c)(2)(A) may also not be able to claim protection under subparagraph (c)(1)"
      ii. "Good faith"- when actions "restricting access to or availability of material" are not taken in "Good faith"

3. Protecting Federal Taxpayer Dollars from Financing Online Platforms That Restrict Free Speech
   a. All Departments must review online platforms receiving Federal advertising dollars, the amount spent, and the statutory authorities available to restrict their receipt of advertising dollars.
   b. Report to OMB
   c. The Department of Justice shall *review the viewpoint-based speech restrictions imposed by each online platform* identified in the report described in subsection (b) of this section *and assess whether any online platforms are problematic vehicles for government speech* due to viewpoint discrimination, deception to consumers, or other bad practices.

4. Federal Review of Unfair or Deceptive Acts or Practices: FTC review of deceptive practices
   a. Policy: Online platforms should support and "not restrict protected speech."
   b. "In just weeks, the White House received over 16,000 complaints of online platforms censoring or otherwise taking action against users based on their political viewpoints. The White House *will submit such complaints received to the Department of Justice* and the Federal Trade Commission (FTC)."
   c. FTC will consider taking action on platforms that restrict speech using Section 230 under deceptive means or in ways that don't align with their public statements.
   d. FTC "shall consider developing a report describing such complaints."

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5. State Review of Unfair or Deceptive Acts or Practices and Anti-Discrimination Laws
    a. The Attorney General shall establish *a working group regarding the potential enforcement of State statutes* that prohibit online platforms from engaging in unfair or deceptive acts or practices. The working group shall also *develop model legislation for consideration* by legislatures in States where existing statutes do not protect Americans from such unfair and deceptive acts and practices. The working group shall invite *State Attorneys General for discussion* and consultation, as appropriate and consistent with applicable law.
    b. DOJ will share complaints with the State working group, and collect publicly available information on a variety of issues related to online platforms.

6. Legislation: DOJ will develop a *proposal for Federal legislation* that would be useful to promote the policy objectives of this order.

Document ID: 0.7.2270.6596-000001

SECTION 230 KEY TAKEAWAYS

PART 1: GENERAL OBSERVATIONS AND KEY PRINCIPLES ON SECTION 230 REFORM

1. Recognize That Large Tech Platforms Are No Longer Nascent or Fragile.
2. Keep Core Immunity for Defamation To Foster Free Speech.
3. Distinguish between Hosting Defamatory Content and Enabling Criminal Activity.
4. Preserve Competition.
5. Recognize That Removing Immunity Is Not the Same as Imposing Liability.

PART II: ISSUES RIPE FOR LEGISLATIVE REFORM

1. Carve-Out for Bad Actors Who Purposefully Solicit or Facilitate Criminal Material.
2. Carve-Out For Actors Who Are Willfully Blind to Criminal Content.
3. Carve-Out for Terrorism Laws.
4. Carve-Out for Child Sex Abuse Laws.
5. Carve-Out for Cyber Stalking.
6. Carve-Out for Antitrust Laws.
7. Case-Specific Carve-Out for Actual Knowledge of Federal Criminal Material or Activity.
8. Case-Specific Carve-Out to Encourage Compliance with Court Judgments.
9. Carve-Out for Federal Civil Enforcement.
10. Replace "Otherwise Objectionable" with "Unlawful" and "Promotes Terrorism or Violence."
11. Provide Definition of Good Faith
    a. Must abide by terms of service and public representations, have an objectively reasonable belief content falls under (c)(2), and provides adequate notice.
12. Require Platforms to Provide Users With Mechanisms to Flag Unlawful Content.
13. Platforms that Take Down Content Consistent with Terms of Service Will Not Be Automatically Turned into Publisher or Speaker for All Content on Service.

PART III: IDEAS UNDER FURTHER CONSIDERATION

1. Distinguish Between Different Types of Internet Services.
2. Distinguish Between First Party and Third Party Speech.
3. Address Republication Liability.
4. Sunsetting May be Appropriate.
5. Earning Immunity and Immunity Safe Harbor through Standard Setting with Government Certification.
6. Transparency Reporting Requirements Regarding Content Moderation.

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These stocks could soar during the recovery, Bank of America says

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BREAKING NEWS

TECH

Verizon is pulling advertising from Facebook and Instagram

PUBLISHED THU, JUN 25 2020•5:19 PM EDT UPDATED THU, JUN 25 2020•9:59 PM EDT

Megan Graham
@MEGANCGRAHAM

SHARE

KEY POINTS

Verizon said on Thursday it is pulling advertising on Facebook and Instagram.

On Thursday, the Anti-Defamation League released an open letter that mentioned, in part, that it had found an advertisement for Verizon "appearing next to a video from the conspiracy group QAnon drawing on hateful and

Document ID: 0.7.2270.6596-000003

These stocks could soar during the recovery, Bank of America says

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VIDEO 06:41

Verizon pulling ads from Facebook

Verizon said on Thursday it is pulling advertising on Facebook until the company "can create an acceptable solution that makes us comfortable."

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A company spokesperson said the pause applies to both Facebook and Instagram. It comes as marketers including Ben & Jerry's, Patagonia and REI have also said they plan to pause advertising on the platforms.

Facebook's stock was down nearly 2% Thursday evening.

Last week, a group of six organizations called on Facebook advertisers to pause their

Document ID: 0.7.2270.6596-000003

These stocks could soar during the recovery, Bank of America says

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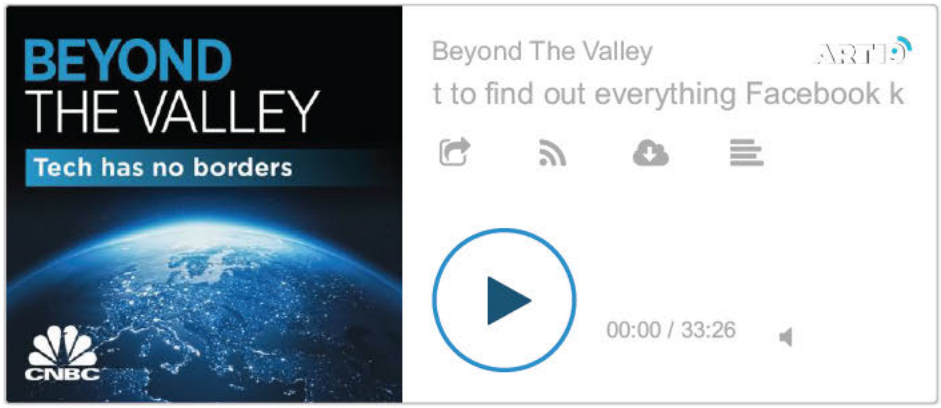

On Thursday, the Anti-Defamation League addressed an open letter to companies advertising on Facebook, signed by the organization's CEO and National Director Jonathan Greenblatt. In the letter, the organization said it "found an advertisement for Verizon appearing next to a video from the conspiracy group QAnon drawing on hateful and antisemitic rhetoric, warning that the Federal Emergency Management Agency (FEMA) is planning to bring on civil war with concentration camps and coffins at the ready and claiming Americans are already quarantined in militarized districts."

"We have strict content policies in place and have zero tolerance when they are breached, we take action," Verizon's chief media officer John Nitti said in a statement. "We're pausing our advertising until Facebook can create an acceptable solution that makes us comfortable and is consistent with what we've done with YouTube and other partners."

According to marketing analytics company Pathmatics, Verizon spent an estimated $406,600 in Instagram ads between May 22 and June 20. The firm said Verizon spent $1,460,300 on Facebook in that same time period.

Facebook didn't immediately return a request for comment Thursday. According to the Wall Street Journal, the company sent a memo from the company's VP of global business Carolyn Everson to advertisers last week saying that it does not "make policy

Document ID: 0.7.2270.6596-000003

These stocks could soar during the recovery, Bank of America says

GET ACCESS NOW CNBC PRO

"We respect any brand's decision, and remain focused on the important work of removing hate speech and providing critical voting information," Everson said in an emailed statement sent by the company Thursday. "Our conversations with marketers and civil rights organizations are about how, together, we can be a force for good."

Retail investors are playing the stock market for 'entertainment,' says behavioral finance pro

Tue, 23 Jun 2020 12:30:33 GMT

Watch Now

TRENDING NOW

Stocks making the biggest moves in the premarket: Nike, Albertsons, Amazon

Document ID: 0.7.2270.6596-000003

These stocks could soar during the recovery, Bank of America says

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Ford unveils new F-150 as tech-savvy pickup with hands-free driving, integrated power generator

Lamborghini wrecked just 20 minutes after leaving the showroom

New York Gov. Cuomo to other states: 'You played politics with this virus, and you lost'

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These stocks could soar during the recovery, Bank of America says

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Deliberative Process
Draft

Facebook Support of SESTA/FOSTA

Sheryl Sandberg

November 7, 2017 at 6:54 PM ·

I care deeply about ending the suffering that comes from sex trafficking and sexual exploitation on the internet – and we at Facebook are committed to fighting it every way we can. That's why we're grateful that members of Congress have reached an agreement on the Stop Enabling Sex Traffickers Act. This important piece of legislation allows platforms to fight sex trafficking while giving victims the chance to seek justice against companies that don't.

Thank you to lawmakers in both parties – particularly Senators Portman and Blumenthal – and to the dedicated anti- trafficking advocates for all their hard work. As this moves through the Senate and the House, we're here to support it – and to make sure that the internet becomes a safer place for all vulnerable girls, children, women, and men who deserve to be protected.

From a NYT report:

. . ."Definers had established a Silicon Valley outpost earlier that year, led by Tim Miller, a former spokesman for Jeb Bush who preached the virtues of campaign-style opposition research. For tech firms, he argued in one interview, a goal should be to "have positive content pushed out about your company and negative content that's being pushed out about your competitor."

Facebook quickly adopted that strategy. In November 2017, the social network came out in favor of a bill called the Stop Enabling Sex Traffickers Act, which made internet companies responsible for sex trafficking ads on their sites.

Google and others had fought the bill for months, worrying it would set a cumbersome precedent. But the sex trafficking bill was championed by Senator John Thune, a Republican of South Dakota who had pummeled Facebook over accusations that it censored conservative content, and Senator Richard Blumenthal, a Connecticut Democrat and senior commerce committee member who was a frequent critic of Facebook.

Facebook broke ranks with other tech companies, hoping the move would help repair relations on both sides of the aisle, said two congressional staffers and three tech industry officials.

When the bill came to a vote in the House in February, Ms. Sandberg offered public support online, urging Congress to "make sure we pass meaningful and strong legislation to stop sex trafficking." . . .

Document ID: 0.7.2270.6596-000004

https://www.nytimes.com/2018/11/14/technology/facebook-data-russia-election-racism.html

From a leading 230 advocate and tech blogger post-SESTA:

. . . "It is becoming very hard to trust Facebook as a partner in addressing the complex issues its business choices raise when the company itself seems to lack any coherent understanding of what those choices are. After all, what exactly is the business of Facebook? Is it to aggregate data, or to connect people and intermediate their speech? Or something else? These competing agendas antagonize users and cloud the regulatory waters, leading to overreactions like SESTA that end up hurting everyone. The bitter irony of SESTA, of course, is that it only punishes the good things Facebook does—the being a global platform facilitating speech and interpersonal connections around the world—that benefit our lives, and not those that give us pause. *But it also makes sure that no one else will be able to come along and perform any of these functions any better.*

Furthermore, it should not be forgotten that, as a matter of politics, Facebook allowed this regulatory travesty to happen. Its shocking endorsement of these dysfunctional policies undermined the resistance that the speakers and innovators were trying to mount against these policies that so that threaten them. *Facebook may be foolish enough to believe it can endure the regulatory shift SESTA will bring, but even if it were correct, no one else can*." (italics and underlining added)

From the same critic, on Facebook and the Internet Association

. . . "The Internet Association -- the trade group that represents the largest internet companies (but not the smaller ones) surprised many people by coming out in favor of a modestly update version of SESTA. As we pointed out at the time, this was selling out the internet way too early and way too cheaply. There are a few different explanations of how this happened making the rounds, but one that has come up repeatedly is that Facebook threw in the towel, believing two things (1) that it's getting hit so hard on so many things, it couldn't risk (falsely) being labeled as "soft on sex trafficking" and (2) it knew that it could survive whatever legal mess was created by SESTA. Some smaller internet companies believe that this second point is one that Facebook actually likes because it knows that smaller competitors will be hobbled. To say that these companies are pissed off at Facebook and the Internet Association would not accurately convey the level of anger that came across. But it wasn't just Facebook. We heard that a few other Internet Association members -- mainly those who don't rely quite as much on CDA 230 -- wanted to just "get past" the issue, and supported the Internet Association cutting whatever deal it could and moving on.

This has greatly pissed off a lot of people -- including many other (smaller) Internet Association members who feel that their own trade association sold them out. And it has greatly pissed off many other groups, including other trade groups representing internet organizations and especially public interest, civil society and free speech organizations,

who historically have aligned well with the Internet Association on efforts to protect an open internet. Within these groups, a feeling of trust with the Internet Association has been broken. There is plenty of support for the idea that the Internet Association, with the help of Facebook, got played and made a huge strategic mistake in settling. The Internet Association wouldn't go on record with me, but suffice it to say the organization disputes my characterization of what happened and would really, really prefer I didn't write this post. However, after talking to multiple other people who were deeply involved in negotiations over SESTA, there is a general feeling that the Internet Association caved and did so way too quickly when better, more workable solutions were still on the table. But, in caving, most of those discussions were tossed aside. Many people are mad that the Internet Association, with the help of Facebook, seemed to get desperate and got played right into a bad deal that harms the internet."

Note: the Internet Association is currently without a head and there is significant internal divisions within the association.

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https://www.wsj.com/articles/facebook-forms-independent-board-to-oversee-content-decisions-11568752897

BUSINESS

Facebook Forms Independent Board to Oversee Content Decisions

Panel will weigh enforcement of standards on hate speech and other prohibited content

'As an independent organization, we hope it gives people confidence that their views will be heard,' Facebook CEO Mark Zuckerberg said.

PHOTO: MARCIO JOSE SANCHEZ/ASSOCIATED PRESS

By Jeff Horwitz

Updated Sept. 17, 2019 5:29 pm ET

Facebook Inc. FB 0.71% ▲ will give an independent board the ability to review and potentially overturn content-moderation decisions, the social-network operator said Tuesday, giving authority to outsiders to oversee some of the thorniest issues the company has faced in recent years.

The new board, which will be funded through an outside trust, will consist of 40 paid, part-time members who will "seek to consider cases that have the greatest potential to guide future decisions and policies," the board's charter states.

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the full board will make binding decisions on specific pieces of content as well as issue broader policy recommendations that the company must publicly address.

Initial board members will be announced within the next few months, with review panels aiming to begin issuing decisions on content by early next year, Facebook said.

"As an independent organization, we hope it gives people confidence that their views will be heard, and that Facebook doesn't have the ultimate power over their expression," Chief Executive Mark Zuckerberg said of the initiative, which he proposed last year. "I'm looking forward to seeing how the board evolves."

The question of content moderation has bedeviled Twitter Inc. and Google's YouTube as well, with social-media platforms taking heat both for their failure to staff moderation efforts adequately and for sometimes overreaching on particular decisions.

Though Facebook began with a broad and permissive approach to speech, the company has had to change its content policies frequently in response to bruising criticism by news outlets, national governments and its 2.3 billion users world-wide.

Among the controversies the company has faced: whether to treat an iconic photograph of a naked Vietnamese child fleeing a napalm bombing as child pornography; whether a woman's live streaming of her boyfriend's death at the hands of police should be taken down; and whether conspiracy theorist and far-right talk show host Alex Jones should remain on the platform.

In designing the oversight board's framework, Facebook held six workshops, hosted 22 roundtable events, conducted 250 one-on-one interviews and reviewed 1,200 written comments.

Kate Klonick, a law professor at St. John's University in New York who Facebook allowed to sit in on portions of the oversight board's creation process, said a recurring point of tension was whether the board could set policy rather than simply ruling on whether content violated Facebook's standards.

"People said, 'Yes, we want the board to be able to dictate policy more directly,'" she said,

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Nonetheless, Ms. Klonick called the requirement that Facebook publicly respond to the board's policy recommendations an unprecedented step, as the company has traditionally responded to complaints from users, civil society and groups in private, if at all.

"That's a huge moment of accountability and transparency they haven't had," she said.

While Facebook's announcement marks its most concrete description of its plan for independent content adjudication to date, key details remain unsettled. Facebook plans to name 11 initial board members later this year, and those people will in turn help to select additional members. Potential members could be drawn from the ranks of academia as well as judges, Facebook group moderators and former journalists. Facebook will accept nominations from the public.

How much board members will be paid and the size of the board's operating budget haven't been determined. Facebook said only that it is spending millions of dollars on the effort.

In a call with reporters Tuesday, Facebook governance and global affairs director Brent Harris said the group's membership will reflect their independence and the breadth of Facebook's geographic reach. Board members will include "some who hold real criticism as to the way we've operated," he said. "We fully anticipate the board will overturn us."

Until its initial board members have had time to hire a permanent staff, Facebook may lend it employees. If the initiative succeeds, other platforms, both those owned by Facebook such as Instagram and WhatsApp, as well as competitors including Snap Inc. and Twitter, could eventually opt in.

"We've set up so that the trust can accommodate other social media platforms if they want to join," Mr. Harris said.

Write to Jeff Horwitz at Jeff.Horwitz@wsj.com

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Toensing, Brady (OLP)

From:	Toensing, Brady (OLP)
Sent:	Tuesday, June 30, 2020 1:43 PM
To:	Willard, Lauren (OAG)
Subject:	RE: EO # 13925
Attachments:	Executive Order 13925 Section 230.docx

Sorry. Just saw this.

* * * * * * * * * * * * * * * * * * *

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: Tuesday, June 30, 2020 12:23 PM
To: Toensing, Brady (OLP) (b) (6) >
Subject: EO #

Brady,

What is the number of the Executive Order on online censorship? I think I remember you had that handy.

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

Document ID: 0.7.2270.6648

HTTPS://WWW.WHITEHOUSE.GOV/PRESIDENTIAL-ACTIONS/EXECUTIVE-ORDER-PREVENTING-ONLINE-CENSORSHIP/

EXECUTIVE ORDERS

Executive Order on Preventing Online Censorship

INFRASTRUCTURE & TECHNOLOGY

Issued on: May 28, 2020

ALL NEWS

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. Free speech is the bedrock of American democracy. Our Founding Fathers protected this sacred right with the First Amendment to the Constitution. The freedom to express and debate ideas is the foundation for all of our rights as a free people.

In a country that has long cherished the freedom of expression, we cannot allow a limited number of online platforms to hand pick the speech that Americans may access and convey on the internet. This practice is fundamentally un-American and anti-democratic. When large, powerful social media companies censor opinions with which they disagree, they exercise a dangerous power. They cease functioning as passive bulletin boards, and ought to be viewed and treated as content creators.

The growth of online platforms in recent years raises important questions about applying the ideals of the First Amendment to modern communications technology. Today, many Americans follow the news, stay in touch with friends and family, and share their views on current events through social media and other online platforms. As a result, these platforms function in many ways as a 21st century equivalent of the public square.

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Twitter, Facebook, Instagram, and YouTube wield immense, if not unprecedented, power to shape the interpretation of public events; to censor, delete, or disappear information; and to control what people see or do not see.

As President, I have made clear my commitment to free and open debate on the internet. Such debate is just as important online as it is in our universities, our town halls, and our homes. It is essential to sustaining our democracy.

Online platforms are engaging in selective censorship that is harming our national discourse. Tens of thousands of Americans have reported, among other troubling behaviors, online platforms "flagging" content as inappropriate, even though it does not violate any stated terms of service; making unannounced and unexplained changes to company policies that have the effect of disfavoring certain viewpoints; and deleting content and entire accounts with no warning, no rationale, and no recourse.

Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias. As has been reported, Twitter seems never to have placed such a label on another politician's tweet. As recently as last week, Representative Adam Schiff was continuing to mislead his followers by peddling the long-disproved Russian Collusion Hoax, and Twitter did not flag those tweets. Unsurprisingly, its officer in charge of so-called 'Site Integrity' has flaunted his political bias in his own tweets.

At the same time online platforms are invoking inconsistent, irrational, and groundless justifications to censor or otherwise restrict Americans' speech here at home, several online platforms are profiting from and promoting the aggression and disinformation spread by foreign governments like China. One United States company, for example, created a search engine for the Chinese Communist Party that would have blacklisted searches for "human rights," hid data unfavorable to the Chinese Communist Party, and tracked users determined appropriate for surveillance. It also established research partnerships in China that provide direct benefits to the Chinese military. Other companies have accepted advertisements paid for by the Chinese government that spread false information about China's mass imprisonment of religious minorities, thereby enabling these abuses of human rights. They have also amplified China's propaganda abroad, including by allowing Chinese government officials to use their platforms to spread misinformation regarding the origins of the COVID-19 pandemic, and to undermine pro-democracy protests in Hong Kong.

As a Nation, we must foster and protect diverse viewpoints in today's digital communications environment where all Americans can and should have a voice. We must seek transparency and accountability from online platforms, and encourage standards and tools to protect and preserve the integrity and openness of American discourse and freedom of expression.

Sec. 2. Protections Against Online Censorship. (a) It is the policy of the United States to foster clear ground rules promoting free and open debate on the internet. Prominent among the ground rules governing that debate is the immunity from liability created by section 230(c) of the Communications Decency Act (section 230(c)). 47 U.S.C. 230(c). It is the policy of the United States that the scope of that immunity should be clarified: the immunity should not extend

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beyond its text and purpose to provide protection for those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints.

Section 230(c) was designed to address early court decisions holding that, if an online platform restricted access to some content posted by others, it would thereby become a "publisher" of all the content posted on its site for purposes of torts such as defamation. As the title of section 230(c) makes clear, the provision provides limited liability "protection" to a provider of an interactive computer service (such as an online platform) that engages in "'Good Samaritan' blocking" of harmful content. In particular, the Congress sought to provide protections for online platforms that attempted to protect minors from harmful content and intended to ensure that such providers would not be discouraged from taking down harmful material. The provision was also intended to further the express vision of the Congress that the internet is a "forum for a true diversity of political discourse." 47 U.S.C. 230(a)(3). The limited protections provided by the statute should be construed with these purposes in mind.

In particular, subparagraph (c)(2) expressly addresses protections from "civil liability" and specifies that an interactive computer service provider may not be made liable "on account of" its decision in "good faith" to restrict access to content that it considers to be "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable." It is the policy of the United States to ensure that, to the maximum extent permissible under the law, this provision is not distorted to provide liability protection for online platforms that — far from acting in "good faith" to remove objectionable content — instead engage in deceptive or pretextual actions (often contrary to their stated terms of service) to stifle viewpoints with which they disagree. Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike. When an interactive computer service provider removes or restricts access to content and its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial conduct. It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider.

(b) To advance the policy described in subsection (a) of this section, all executive departments and agencies should ensure that their application of section 230(c) properly reflects the narrow purpose of the section and take all appropriate actions in this regard. In addition, within 60 days of the date of this order, the Secretary of Commerce (Secretary), in consultation with the Attorney General, and acting through the National Telecommunications and Information Administration (NTIA), shall file a petition for rulemaking with the Federal Communications Commission (FCC) requesting that the FCC expeditiously propose regulations to clarify:

(i) the interaction between subparagraphs (c)(1) and (c)(2) of section 230, in particular to clarify and determine the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c)(2)(A) may also not be able to claim protection under subparagraph (c)(1), which merely states that a

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provider shall not be treated as a publisher or speaker for making third-party content available and does not address the provider's responsibility for its own editorial decisions;

(ii) the conditions under which an action restricting access to or availability of material is not "taken in good faith" within the meaning of subparagraph (c)(2)(A) of section 230, particularly whether actions can be "taken in good faith" if they are:

(A) deceptive, pretextual, or inconsistent with a provider's terms of service; or

(B) taken after failing to provide adequate notice, reasoned explanation, or a meaningful opportunity to be heard; and

(iii) any other proposed regulations that the NTIA concludes may be appropriate to advance the policy described in subsection (a) of this section.

Sec. 3. Protecting Federal Taxpayer Dollars from Financing Online Platforms That Restrict Free Speech. (a) The head of each executive department and agency (agency) shall review its agency's Federal spending on advertising and marketing paid to online platforms. Such review shall include the amount of money spent, the online platforms that receive Federal dollars, and the statutory authorities available to restrict their receipt of advertising dollars.

(b) Within 30 days of the date of this order, the head of each agency shall report its findings to the Director of the Office of Management and Budget.

(c) The Department of Justice shall review the viewpoint-based speech restrictions imposed by each online platform identified in the report described in subsection (b) of this section and assess whether any online platforms are problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices.

Sec. 4. Federal Review of Unfair or Deceptive Acts or Practices. (a) It is the policy of the United States that large online platforms, such as Twitter and Facebook, as the critical means of promoting the free flow of speech and ideas today, should not restrict protected speech. The Supreme Court has noted that social media sites, as the modern public square, "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Communication through these channels has become important for meaningful participation in American democracy, including to petition elected leaders. These sites are providing an important forum to the public for others to engage in free expression and debate. *Cf. PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-89 (1980).

(b) In May of 2019, the White House launched a Tech Bias Reporting tool to allow Americans to report incidents of online censorship. In just weeks, the White House received over 16,000 complaints of online platforms censoring or otherwise taking action against users based on their political viewpoints. The White House will submit such complaints received to the Department of Justice and the Federal Trade Commission (FTC).

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(c) The FTC shall consider taking action, as appropriate and consistent with applicable law, to prohibit unfair or deceptive acts or practices in or affecting commerce, pursuant to section 45 of title 15, United States Code. Such unfair or deceptive acts or practice may include practices by entities covered by section 230 that restrict speech in ways that do not align with those entities' public representations about those practices.

(d) For large online platforms that are vast arenas for public debate, including the social media platform Twitter, the FTC shall also, consistent with its legal authority, consider whether complaints allege violations of law that implicate the policies set forth in section 4(a) of this order. The FTC shall consider developing a report describing such complaints and making the report publicly available, consistent with applicable law.

Sec. 5. State Review of Unfair or Deceptive Acts or Practices and Anti-Discrimination Laws. (a) The Attorney General shall establish a working group regarding the potential enforcement of State statutes that prohibit online platforms from engaging in unfair or deceptive acts or practices. The working group shall also develop model legislation for consideration by legislatures in States where existing statutes do not protect Americans from such unfair and deceptive acts and practices. The working group shall invite State Attorneys General for discussion and consultation, as appropriate and consistent with applicable law.

(b) Complaints described in section 4(b) of this order will be shared with the working group, consistent with applicable law. The working group shall also collect publicly available information regarding the following:

(i) increased scrutiny of users based on the other users they choose to follow, or their interactions with other users;

(ii) algorithms to suppress content or users based on indications of political alignment or viewpoint;

(iii) differential policies allowing for otherwise impermissible behavior, when committed by accounts associated with the Chinese Communist Party or other anti-democratic associations or governments;

(iv) reliance on third-party entities, including contractors, media organizations, and individuals, with indicia of bias to review content; and

(v) acts that limit the ability of users with particular viewpoints to earn money on the platform compared with other users similarly situated.

Sec. 6. Legislation. The Attorney General shall develop a proposal for Federal legislation that would be useful to promote the policy objectives of this order.

Sec. 7. Definition. For purposes of this order, the term "online platform" means any website or application that allows users to create and share content or engage in social networking, or any general search engine.

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Sec. 8. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

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(b) (6) **(OLA)**

From: (b) (6) (OLA)
Sent: Wednesday, July 1, 2020 3:37 PM
To: Willard, Lauren (OAG); Grieco, Christopher (ODAG); Raman, Sujit (ODAG)
Cc: Lee, Steffanie G. (ODAG); Plack, Laura (ODAG); Wilson, Ashley (OASG); Assefi, Omeed (OASG); Escalona, Prim F. (OLA); Hankey, Mary Blanche (OLA (b) (6) (OLA); Shores, Ryan (ODAG); Pandya, Brian (OASG); Harris, Stacie B. (ODAG (b) (6) (OLA)
Subject: RE: EARN IT Markup with OJJDP Language
Attachments: EARN IT Sub OLL20670.pdf

Latest EARN IT Manager's Amendment attached.

From: Willard, Lauren (OAG) (b) (6)>
Sent: Wednesday, July 1, 2020 1:44 PM
To: Grieco, Christopher (ODAG) (b) (6) (b) (6) (OLA) (b) (6)>; Raman, Sujit (ODAG) (b) (6) (b) (6) (OLA) (b) (6)>
Cc: Lee, Steffanie G. (ODAG) (b) (6)>; Plack, Laura (ODAG) (b) (6)>; Wilson, Ashley (OASG) (b) (6)>; Assefi, Omeed (OASG) (b) (6)>; Escalona, Prim F. (OLA) (b) (6)>; Hankey, Mary Blanche (OLA) (b) (6) (b) (6) (OLA) (b) (6)>; Shores, Ryan (ODAG) (b) (6)>; Pandya, Brian (OASG) (b) (6)>; Harris, Stacie B. (ODAG) (b) (6)>
Subject: RE: EARN IT Markup with OJJDP Language

Also, that change completely undermines their argument for not including the Bad Samaritan carve-out we proposed earlier.

From: Grieco, Christopher (ODAG) (b) (6)>
Sent: Wednesday, July 1, 2020 1:05 PM
To: Willard, Lauren (OAG) (b) (6) (b) (6) (OLA) (b) (6)>; Raman, Sujit (ODAG) (b) (6) (b) (6) (OLA) (b) (6)>
Cc: Lee, Steffanie G. (ODAG) (b) (6)>; Plack, Laura (ODAG) (b) (6)>; Wilson, Ashley (OASG) (b) (6)>; Assefi, Omeed (OASG) (b) (6)>; Escalona, Prim F. (OLA) (b) (6)>; Hankey, Mary Blanche (OLA) (b) (6) (b) (6) (OLA) (b) (6)>; Shores, Ryan (ODAG) (b) (6)>; Pandya, Brian (OASG) (b) (6)>; Harris, Stacie B. (ODAG) (b) (6)>
Subject: RE: EARN IT Markup with OJJDP Language

That's quiet the change…

Do we have a copy of the Managers' ?

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

Sent: Wednesday, July 1, 2020 1:01 PM
T (b) (6) (OLA) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; (b) (6) (OLA) (b) (6) >
Cc: Lee, Steffanie G. (ODAG) (b) (6) >; Plack, Laura (ODAG) (b) (6) >; Wilson, Ashley (OASG) (b) (6) >; Assefi, Omeed (OASG) (b) (6) >; Escalona, Prim F. (OLA) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) (b) (6) (OLA) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Harris, Stacie B. (ODAG) (b) (6) >
Subject: RE: EARN IT Markup with OJJDP Language

Wow!

From (b) (6) (OLA) (b) (6) >
Sent: Wednesday, July 1, 2020 1:00 PM
To: Raman, Sujit (ODAG) (b) (6) (b) (6) (OLA) (b) (6) >
Cc: Lee, Steffanie G. (ODAG) (b) (6) >; Willard, Lauren (OAG) (b) (6) >; Plack, Laura (ODAG) (b) (6) >; Wilson, Ashley (OASG) (b) (6) >; Assefi, Omeed (OASG) (b) (6) >; Escalona, Prim F. (OLA) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) (b) (6) (OLA) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Harris, Stacie B. (ODAG) (b) (6) >
Subject: RE: EARN IT Markup with OJJDP Language

Per Graham staff – yesterday the Minority pressed for the removal of Sec. 6(b)(3) of the proposed bill eliminating the ability to apply a "reckless" knowledge standard to providers in civil suits related to the sexual exploitation of minors. Under the latest draft of EARN IT, the mens rea requirement would now be "knowlingly" across the board.

From: Raman, Sujit (ODAG) (b) (6) >
Sent: Wednesday, July 1, 2020 12:43 PM
T (b) (6) (OLA) (b) (6) >
Cc: Lee, Steffanie G. (ODAG) (b) (6) >; Willard, Lauren (OAG) (b) (6) >; Plack, Laura (ODAG) (b) (6) >; Wilson, Ashley (OASG) (b) (6) >; Assefi, Omeed (OASG) (b) (6) >; Escalona, Prim F. (OLA) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) (b) (6) (OLA) (b) (6) (b) (6) (OLA) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Harris, Stacie B. (ODAG) (b) (6) >
Subject: Re: EARN IT Markup with OJJDP Language

Do we have any insight into this?

https://www.protocol.com/earn-it-act-encryption-section-230

On Jun 30, 2020, at 1:03 PM (b) (6) (OLA) (b) (6) > wrote:

Good Afternoon!

Some quick follow-up- Sen. Graham's staffer reached out because they plan to circulate this as a manager's amendment this afternoon, and was seeking a little additional feedback beforehand. As discussed, I shared the points we noted this morning on the call (specifically, that this authorizes funding for a program from existing funds, and DOJ is concerned that this could detract funds from current programs like MEC and Amber Alerts) on top of the comments we expressed seeking clarification in the text.

The staffer indicated that because there are different allocations for funding for the abovementioned programs (like the $32 m to ICAC, MEC also gets a certain amount), this bill was more so directed at the $10-15 million in the "other" category, and they were looking for Congress to give more specific direction to those funds. She went on to say that she was unaware of a scenario in which this would take funding dollars away from a program like MEC or Amber Alerts, as they would still have the allocated funds mentioned above. I said I would check back here with the group to see if there are any particular scenarios or concrete examples that we were envision when we formulated our comments. Do we have any practical examples to highlight how the funding to existing programs would be impacted if this legislation were to be enacted?

We mentioned on the call this morning that we would be happy to provide redlines to the bill text, but given the urgency, perhaps Stacie, or others, would want to jump on a call to discuss? The staffer has indicated she is free until 2 today and I could set that up if it would be easier.

I asked for her thoughts/feedback on the clarifying language we proposed, and she is still checking with Sen. Feinstein's office.

Please let me know your thoughts on how best to proceed or if you have any questions!

Thank you,
(b) (6)

From: Lee, Steffanie G. (ODAG) (b) (6) >
Sent: Tuesday, June 30, 2020 8:58 AM
To: Willard, Lauren (OAG) (b) (6) (b) (6) (OLA) (b) (6) >
Cc: Plack, Laura (ODAG) (b) (6) >; Wilson, Ashley (OASG) (b) (6) >; Assefi, Omeed (OASG) (b) (6) >; Escalona, Prim F. (OLA) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) (b) (6) (OLA) (b) (6) (b) (6) (OLA) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Harris, Stacie B. (ODAG) (b) (6) >
Subject: RE: EARN IT Markup with OJJDP Language

+ Stacie Harris

Hi all,

FYI we also circulated to Stacie for review and she cleared for the CEOS perspective.

Thank you,

Steffanie Lee
(b) (6)

Document ID: 0.7.2270.6165

From: Willard, Lauren (OAG) (b) (6) >
Sent: Monday, June 29, 2020 9:17 PM
T (b) (6) (OLA) (b) (6) >
Cc: Plack, Laura (ODAG) (b) (6) >; Lee, Steffanie G. (ODAG) (b) (6) >; Wilson, Ashley (OASG) (b) (6) >; Assefi, Omeed (OASG) (b) (6) >; Escalona, Prim F. (OLA) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) (b) (6) (OLA) (b) (6) (b) (6) (OLA) (b) (6) >; Grieco, Christopher (ODAG) (b) (6) >; Shores, Ryan (ODAG) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >
Subject: Re: EARN IT Markup with OJJDP Language

Welcome others' input, but ok to preliminarily share from my perspective (with caveats that hasn't been fully discussed). We have a call to discuss with our working group at 10am tomorrow, and can give additional feedback by 10:30 at latest.

Chris - can you ad (b) (6) to tomorrow's call so she can quickly get back feedback?

Sent from my iPhone

On Jun 29, 2020, at 8:59 PM (b) (6) (OLA) (b) (6) > wrote:

> Good Evening,
>
> I just heard back from Sen. Graham's staffer. She indicated that noon will be too late to get the comments, and ten tomorrow morning is as late as they can wait. Is it OK for me to share these comments between now and then perhaps offer our additional feedback from the Section 230 meeting subsequently? Please let me know what you think is best.
>
> Thank you!
> (b) (6)
>
> (b) (6)
> Office of Legislative Affairs
> (b) (6)
> (b) (6) (o)
> (b) (6) (c)
>
> On Jun 29, 2020, at 3:51 PM, Willard, Lauren (OAG) (b) (6) > wrote:
>
> > (b) (6) ,
> >
> > Adding a few more Section 230 OASG and ODAG folks. I'm unfortunately tied up in meetings until 6pm, any chance we can get back to them by tomorrow morning? We have a standing 230 working group call at 10am, so can get feedback during the call and connect with Graham immediately after.

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If others approve – we can also send along CEOS comments with the caveat that we may follow up further tomorrow.

Also, any word from Graham staff on the other potential amendments, including federal civil carve out and court judgments? There continues to be pretty broad support for those two narrow modifications from the industry folks we have discussed with.

Best,
Lauren

From (b) (6) (OLA) (b) (6) >
Sent: Monday, June 29, 2020 3:36 PM
To: Plack, Laura (ODAG) (b) (6) >; Lee, Steffanie G. (ODAG) (b) (6) >; Wilson, Ashley (OASG) (b) (6) >; Assefi, Omeed (OASG) (b) (6) >; Willard, Lauren (OAG) (b) (6) >
Cc: Escalona, Prim F. (OLA) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) (b) (6) (OLA) (b) (6) (b) (6) (OLA) (b) (6) >
Subject: EARN IT Markup with OJJDP Language

Hello ODAG, OASG, and OAG,

Sen. Graham's staffer reached out to us with the attached draft, which they are hoping to include as an amendment in the markup of the EARN It Act, scheduled for this week. It requires "the Administrator of the Office of Juvenile Justice and Delinquency Prevention to enable the development of information technology solutions and the creation and acquisition of innovative tools to enhance efforts to combat online child exploitation."

We checked with CEOS and OJJDP for their input, and CEOS provided the following comments, which we cleared through OJJDP. Because we would like to get this to the staffer in advance of the markup, can you please review and let me know by 6 pm tonight if these are cleared to share with the staffer or if you have any additional edits? If you have any questions, please feel free to contact me.

Thank you!
(b) (6)

(b) (6)
Office of Legislative Affairs
(b) (6)
(b) (6) (o)
(b) (6) (c)

<OLL20496 (002).pdf>

<DOJ Comments on S. __ EARN IT Amendment.docx>

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AMENDMENT NO._____ Calendar No._____

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—116th Cong., 2d Sess.

S. 3398

To establish a National Commission on Online Child Sexual Exploitation Prevention, and for other purposes.

Referred to the Committee on _____ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended to be proposed by Mr. GRAHAM (for himself and Mr. BLUMENTHAL)

Viz:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020'' or the ''EARN IT Act of 2020''.

SEC. 2. DEFINITIONS.

In this Act:

(1) COMMISSION.—The term ''Commission'' means the National Commission on Online Child Sexual Exploitation Prevention.

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(2) INTERACTIVE COMPUTER SERVICE.—The term ''interactive computer service'' has the meaning given the term in section 230(f)(2) of the Communications Act of 1934 (47 U.S.C. 230(f)(2)).

SEC. 3. NATIONAL COMMISSION ON ONLINE CHILD SEXUAL EXPLOITATION PREVENTION.

(a) ESTABLISHMENT.—There is established a National Commission on Online Child Sexual Exploitation Prevention.

(b) PURPOSE.—The purpose of the Commission is to develop recommended best practices that providers of interactive computer services may choose to implement to prevent, reduce, and respond to the online sexual exploitation of children, including the enticement, grooming, sex trafficking, and sexual abuse of children and the proliferation of online child sexual abuse material.

(c) MEMBERSHIP.—

(1) COMPOSITION.—

(A) IN GENERAL.—The Commission shall be composed of 19 members.

(B) AGENCY HEADS.—The following Federal officials shall serve as members of the Commission:

(i) The Attorney General or his or her representative.

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(ii) The Secretary of Homeland Security or his or her representative.

(iii) The Chairman of the Federal Trade Commission or his or her representative.

(C) OTHER MEMBERS.—Of the remaining 16 members of the Commission—

(i) 4 shall be appointed by the majority leader of the Senate, of whom—

(I) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(A);

(II) 1 shall have the qualifications required under paragraph (2)(B);

(III) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(C); and

(IV) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(D);

(ii) 4 shall be appointed by the minority leader of the Senate, of whom—

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(I) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(A);

(II) 1 shall have the qualifications required under paragraph (2)(B);

(III) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(C); and

(IV) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(D);

(iii) 4 shall be appointed by the Speaker of the House of Representatives, of whom—

(I) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(A);

(II) 1 shall have the qualifications required under paragraph (2)(B);

(III) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(C); and

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(IV) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(D); and

(iv) 4 shall be appointed by the minority leader of the House of Representatives, of whom—

(I) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(A);

(II) 1 shall have the qualifications required under paragraph (2)(B);

(III) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(C); and

(IV) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(D).

(2) QUALIFICATIONS.—Of the 16 members of the Commission appointed under paragraph (1)(C)—

(A) 4 shall have current experience in investigating online child sexual exploitation crimes, of whom—

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(i) 2 shall have such experience in a law enforcement capacity; and

(ii) 2 shall have such experience in a prosecutorial capacity;

(B) 4 shall be survivors of online child sexual exploitation, or have current experience in providing services for victims of online child sexual exploitation in a non-governmental capacity;

(C)(i) 2 shall have current experience in matters related to consumer protection, civil liberties, civil rights, or privacy; and

(ii) 2 shall have current experience in computer science or software engineering related to matters of cryptography, data security, or artificial intelligence in a non-governmental capacity; and

(D) 4 shall be individuals who each currently work for an interactive computer service that is unrelated to each other interactive computer service represented under this subparagraph, representing diverse types of businesses and areas of professional expertise, of whom—

(i) 2 shall have current experience in addressing online child sexual exploitation

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and promoting child safety at an interactive computer service with not less than 30,000,000 monthly users in the United States; and

(ii) 2 shall have current experience in addressing online child sexual exploitation and promoting child safety at an interactive computer service with less than 10,000,000 monthly users in the United States.

(3) DATE.—The initial appointments of members to the Commission under paragraph (1)(C) shall be made not later than 90 days after the date of enactment of this Act.

(d) PERIOD OF APPOINTMENT; VACANCIES.—

(1) PERIOD OF APPOINTMENT.—A member of the Commission shall be appointed for a term of 5 years.

(2) VACANCIES.—

(A) EFFECT ON COMMISSION.—Any vacancy in the Commission shall not affect the powers of the Commission.

(B) FILLING OF VACANCIES.—A vacancy in the Commission shall be filled in the same

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manner as the original appointment under subsection (c)(1).

(e) INITIAL MEETING.—The Commission shall hold the first meeting of the Commission not later than 60 days after the date on which a majority of the members of the Commission have been appointed.

(f) CHAIRPERSON.—The Attorney General or his or her representative shall serve as the Chairperson of the Commission.

(g) QUORUM.—A majority of the members of the Commission shall constitute a quorum, but a lesser number of members may hold a meeting.

(h) MEETINGS.—The Commission shall meet at the call of the Chairperson.

(i) AUTHORITY OF COMMISSION.—The Commission may, for the purpose of carrying out this section and section 4, hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers appropriate.

(j) INFORMATION FROM FEDERAL AGENCIES.—

(1) IN GENERAL.—The Commission may secure directly from any Federal department or agency such information as the Commission considers necessary to carry out this section and section 4.

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(2) FURNISHING INFORMATION.—Upon request of the Chairperson of the Commission for information under paragraph (1), the head of a Federal department or agency shall furnish the information to the Commission, unless the information is subject to an active investigation or otherwise privileged or confidential.

(k) TRAVEL EXPENSES.—A member of the Commission shall serve without compensation, but shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from the home or regular places of business of the member in the performance of services for the Commission.

(l) DURATION.—Section 14 of the Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Commission.

SEC. 4. DUTIES OF THE COMMISSION.

(a) RECOMMENDED BEST PRACTICES.—

(1) INITIAL RECOMMENDATIONS.—

(A) IN GENERAL.—Not later than 18 months after the date on which a majority of the members of the Commission required to be appointed under section 3(c)(1)(C) have been so

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appointed, the Commission shall develop and submit to the Attorney General recommended best practices that providers of interactive computer services may choose to engage in to prevent, reduce, and respond to the online sexual exploitation of children, including the enticement, grooming, sex trafficking, and sexual abuse of children and the proliferation of online child sexual abuse material.

(B) REQUIREMENTS.—

(i) ALTERNATIVE BEST PRACTICES.—The best practices required to be developed and submitted under subparagraph (A) shall include alternatives that take into consideration—

(I) the size, type of product, and business model of a provider of an interactive computer service;

(II) whether an interactive computer service—

(aa) is made available to the public;

(bb) is primarily responsible for hosting, storage, display, and retrieval of information on behalf

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of third parties, including providers of other interactive computer services; or

(cc) provides the capability to transmit data to and receive data from all or substantially all internet endpoints on behalf of a consumer; and

(III) whether a type of product, business model, product design, or other factors related to the provision of an interactive computer service could make a product or service susceptible to the use and facilitation of online child sexual exploitation.

(ii) SCOPE.—Notwithstanding paragraph (3), the alternatives described in clause (i) of this subparagraph may exclude certain matters required to be addressed under paragraph (3), as the Commission determines appropriate based on the nature of particular products or services, the factors described in such clause (i), or other factors relevant to the purposes of this Act.

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(2) SUPPORT REQUIREMENT.—The Commission may only recommend the best practices under paragraph (1) if not fewer than 14 members of the Commission support the best practices.

(3) MATTERS ADDRESSED.—The matters addressed by the recommended best practices developed and submitted by the Commission under paragraph (1) shall include—

(A) preventing, identifying, disrupting, and reporting online child sexual exploitation;

(B) coordinating with non-profit organizations and other providers of interactive computer services to preserve, remove from view, and report online child sexual exploitation;

(C) retaining child sexual exploitation content and related user identification and location data;

(D) receiving and triaging reports of online child sexual exploitation by users of interactive computer services, including self-reporting;

(E) implementing a standard rating and categorization system to identify the type and severity of child sexual abuse material;

(F) training and supporting content moderators who review child sexual exploitation con-

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tent for the purposes of preventing and disrupting online child sexual exploitation;

(G) preparing and issuing transparency reports, including disclosures in terms of service, relating to identifying, categorizing, and reporting online child sexual exploitation and efforts to prevent and disrupt online child sexual exploitation;

(H) coordinating with voluntary initiatives offered among and to providers of interactive computer services relating to identifying, categorizing, and reporting online child sexual exploitation;

(I) employing age rating and age gating systems to reduce online child sexual exploitation;

(J) offering parental control products that enable customers to limit the types of websites, social media platforms, and internet content that are accessible to children; and

(K) contractual and operational practices to ensure third parties, contractors, and affiliates comply with the best practices.

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(4) RELEVANT CONSIDERATIONS.—In developing best practices under paragraph (1), the Commission shall consider—

(A) the cost and technical limitations of implementing the best practices;

(B) the impact on competition, product and service quality, data security, and privacy;

(C) the impact on the ability of law enforcement agencies to investigate and prosecute child sexual exploitation and rescue victims; and

(D) the current state of technology.

(5) PERIODIC UPDATES.—Not less frequently than once every 5 years, the Commission shall update and resubmit to the Attorney General recommended best practices under paragraph (1).

(b) PUBLICATION OF BEST PRACTICES.—Not later than 30 days after the date on which the Commission submits recommended best practices under subsection (a), including updated recommended best practices under paragraph (5) of that subsection, the Attorney General shall publish the recommended best practices on the website of the Department of Justice and in the Federal Register.

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SEC. 5. PROTECTING VICTIMS OF ONLINE CHILD SEXUAL ABUSE.

Section 230(e) of the Communications Act of 1934 (47 U.S.C. 230(e)) is amended by adding at the end the following:

"(6) NO EFFECT ON CHILD SEXUAL EXPLOITATION LAW.—Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

"(A) any claim in a civil action brought against a provider of an interactive computer service under section 2255 of title 18, United States Code, if the conduct underlying the claim constitutes a violation of section 2252 or section 2252A of that title;

"(B) any charge in a criminal prosecution brought against a provider of an interactive computer service under State law regarding the advertisement, promotion, presentation, distribution, or solicitation of child sexual abuse material, as defined in section 2256(8) of title 18, United States Code; or

"(C) any claim in a civil action brought against a provider of an interactive computer service under State law regarding the advertisement, promotion, presentation, distribution, or

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solicitation of child sexual abuse material, as defined in section 2256(8) of title 18, United States Code.''.

SEC. 6. USE OF TERM "CHILD SEXUAL ABUSE MATERIAL".

(a) SENSE OF CONGRESS.—It is the sense of Congress that the term ''child sexual abuse material'' has the same legal meaning as the term ''child pornography'', as that term was used in Federal statutes and case law before the date of enactment of this Act.

(b) AMENDMENTS.—

(1) TITLE 5, UNITED STATES CODE.—Chapter 65 of title 5, United States Code, is amended—

(A) in section 6502(a)(2)(B), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(B) in section 6504(c)(2)(F), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(2) HOMELAND SECURITY ACT OF 2002.—The Homeland Security Act of 2002 (6 U.S.C. 101 et seq.) is amended—

(A) in section 307(b)(3)(D) (6 U.S.C. 187(b)(3)(D)), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

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(B) in section 890A (6 U.S.C. 473)—

(i) in subsection (b)(2)(A)(ii), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(ii) in subsection (e)(3)(B)(ii), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(3) IMMIGRATION AND NATIONALITY ACT.—Section 101(a)(43)(I) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)(I)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(4) SMALL BUSINESS JOBS ACT OF 2010.—Section 3011(c) of the Small Business Jobs Act of 2010 (12 U.S.C. 5710(c)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(5) BROADBAND DATA IMPROVEMENT ACT.—Section 214(a)(2) of the Broadband Data Improvement Act (15 U.S.C. 6554(a)(2)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(6) CAN-SPAM ACT OF 2003.—Section 4(b)(2)(B) of the CAN-SPAM Act of 2003 (15 U.S.C. 7703(b)(2)(B)) is amended by striking ''child

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pornography'' and inserting ''child sexual abuse material''.

(7) TITLE 18, UNITED STATES CODE.—Title 18, United States Code, is amended—

(A) in section 1956(c)(7)(D), by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material'';

(B) in chapter 110—

(i) in section 2251(e), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(ii) in section 2252(b)—

(I) in paragraph (1), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(II) in paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(iii) in section 2252A—

(I) in the section heading, by striking ''**child pornography**'' and inserting ''**child sexual abuse material**'';

(II) in subsection (a)—

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(aa) in paragraph (1), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(bb) in paragraph (2)—

(AA) in subparagraph (A), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(BB) in subparagraph (B), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(cc) in paragraph (3), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(dd) in paragraph (4)—

(AA) in subparagraph (A), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

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(BB) in subparagraph (B), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(ee) in paragraph (5)—

(AA) in subparagraph (A), by striking ''an image of child pornography'' and inserting ''child sexual abuse material''; and

(BB) in subparagraph (B), by striking ''an image of child pornography'' and inserting ''child sexual abuse material''; and

(ff) in paragraph (7)—

(AA) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(BB) by striking the period at the end and inserting a comma;

(III) in subsection (b)—

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(aa) in paragraph (1), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(bb) in paragraph (2), by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material''; and

(IV) in subsection (c)—

(aa) in paragraph (1)(A), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(bb) in paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(cc) in the undesignated matter following paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material'';

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(V) in subsection (d)(1), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(VI) in subsection (e), by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material'';

(iv) in section 2256(8)—

(I) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(II) by striking the period at the end and inserting a semicolon;

(v) in section 2257A(h)—

(I) in paragraph (1), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(II) in paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(vi) in section 2258A—

(I) in subsection (a)(2)—

(aa) in subparagraph (A), by striking ''child pornography''

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and inserting ''child sexual abuse material''; and

(bb) in subparagraph (B), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(II) in subsection (b)—

(aa) in paragraph (4)—

(AA) in the paragraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(BB) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(bb) in paragraph (5), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(III) in subsection (g)(2)(B), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(vii) in section 2258C—

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(I) in the section heading, by striking ''**child pornography**'' and inserting ''**child sexual abuse material**'';

(II) in subsection (a)—

(aa) in paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(bb) in paragraph (3), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(III) in subsection (d), by striking ''child pornography visual depiction'' and inserting ''child sexual abuse material visual depiction''; and

(IV) in subsection (e), by striking ''child pornography visual depiction'' and inserting ''child sexual abuse material visual depiction'';

(viii) in section 2259—

(I) in paragraph (b)(2)—

(aa) in the paragraph heading, by striking ''CHILD PORNOG-

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RAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL'';

(bb) in the matter preceding subparagraph (A), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(cc) in subparagraph (A), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(II) in subsection (c)—

(aa) in paragraph (1)—

(AA) in the paragraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(BB) by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material'';

(bb) in paragraph (2), in the matter preceding subparagraph

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(A), by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material''; and

(cc) in paragraph (3)—

(AA) in the paragraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(BB) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(III) in subsection (d)(1)—

(aa) in subparagraph (A)—

(AA) by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material''; and

(BB) by striking ''Child Pornography'' and inserting ''Child Sexual Abuse Material'';

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(bb) in subparagraph (B), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(cc) in subparagraph (C)—

(AA) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(BB) by striking ''Child Pornography'' and inserting ''Child Sexual Abuse Material'';

(ix) in section 2259A—

(I) in the section heading, by striking ''**child pornography**'' and inserting ''**child sexual abuse material**'';

(II) in subsection (a)—

(aa) in paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(bb) in paragraph (3), by striking ''child pornography'' and

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inserting ''child sexual abuse material''; and

(III) in subsection (d)(2)(B), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(x) in section 2259B—

(I) in the section heading, by striking ''**Child pornography**'' and inserting ''**Child sexual abuse material**'';

(II) in subsection (a), by striking ''Child Pornography'' each place the term appears and inserting ''Child Sexual Abuse Material'';

(III) in subsection (b), by striking ''Child Pornography'' each place the term appears and inserting ''Child Sexual Abuse Material'';

(IV) in subsection (c), by striking ''Child Pornography'' and inserting ''Child Sexual Abuse Material''; and

(V) in subsection (d), by striking ''Child Pornography'' and inserting ''Child Sexual Abuse Material'';

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(C) in chapter 117—

(i) in section 2423(f)(3), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(ii) in section 2427—

(I) in the section heading, by striking ''**child pornography**'' and inserting ''**child sexual abuse material**''; and

(II) by striking ''child pornography'' and inserting ''child sexual abuse material'';

(D) in section 2516—

(i) in paragraph (1)(c), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(ii) in paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(E) in section 3014(h)(3), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(F) in section 3509—

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(i) in subsection (a)(6), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(ii) in subsection (m)—

(I) in the subsection heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL'';

(II) in paragraph (1), by striking ''child pornography'' and inserting ''constitutes a child sexual abuse material'';

(III) in paragraph (2), by striking ''child pornography'' and inserting ''constitutes a child sexual abuse material''; and

(IV) in paragraph (3), by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material''; and

(G) in section 3632(d)(4)(D)(xlii), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(8) TARIFF ACT OF 1930.—Section 583(a)(2)(B) of the Tariff Act of 1930 (19 U.S.C.

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1583(a)(2)(B)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(9) ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965.—Section 4121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7131) is amended—

(A) in subsection (a)—

(i) in paragraph (1)(A)(ii), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(ii) in paragraph (2)(A)(ii), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(B) in subsection (e)(5)—

(i) in the paragraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(ii) by striking ''child pornography'' and inserting ''child sexual abuse material''.

(10) MUSEUM AND LIBRARY SERVICES ACT.—Section 224(f) of the Museum and Library Services Act (20 U.S.C. 9134(f)) is amended—

(A) in paragraph (1)—

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(i) in subparagraph (A)(i)(II), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(ii) in subparagraph (B)(i)(II), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(B) in paragraph (7)(A)—

(i) in the subparagraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(ii) by striking ''child pornography'' and inserting ''child sexual abuse material''.

(11) OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968.—Section 3031(b)(3) of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (34 U.S.C. 10721(b)(3)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(12) JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT OF 1974.—Section 404(b)(1)(K) of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11293(b)(1)(K)) is amended—

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(A) in clause (i)(I)(aa), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(B) in clause (ii), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(13) VICTIMS OF CRIME ACT OF 1984.—Section 1402(d)(6)(A) of the Victims of Crime Act of 1984 (34 U.S.C. 20101(d)(6)(A)) is amended by striking ''Child Pornography'' and inserting ''Child Sexual Abuse Material''.

(14) VICTIMS OF CHILD ABUSE ACT OF 1990.—The Victims of Child Abuse Act of 1990 (34 U.S.C. 20301 et seq.) is amended—

(A) in section 212(4) (34 U.S.C. 20302(4)), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(B) in section 214(b) (34 U.S.C. 20304(b))—

(i) in the subsection heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(ii) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

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(C) in section 226(c)(6) (34 U.S.C. 20341(c)(6)), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(15) SEX OFFENDER REGISTRATION AND NOTIFICATION ACT.—Section 111 of the Sex Offender Registration and Notification Act (34 U.S.C. 20911) is amended—

(A) in paragraph (3)(B)(iii), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(B) in paragraph (7)(G), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(16) ADAM WALSH CHILD PROTECTION AND SAFETY ACT OF 2006.—Section 143(b)(3) of the Adam Walsh Child Protection and Safety Act of 2006 (34 U.S.C. 20942(b)(3)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(17) PROTECT OUR CHILDREN ACT OF 2008.—Section 105(e)(1)(C) of the PROTECT Our Children Act of 2008 (34 U.S.C. 21115(e)(1)(C)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

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(18) SOCIAL SECURITY ACT.—Section 471(a)(20)(A)(i) of the Social Security Act (42 U.S.C. 671(a)(20)(A)(i)) is amended by striking ''child pornography'' and inserting ''offenses involving child sexual abuse material''.

(19) PRIVACY PROTECTION ACT OF 1980.—Section 101 of the Privacy Protection Act of 1980 (42 U.S.C. 2000aa) is amended—

(A) in subsection (a)(1), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(B) in subsection (b)(1), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(20) CHILD CARE AND DEVELOPMENT BLOCK GRANT ACT OF 1990.—Section 658H(c)(1) of the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858f(c)(1)) is amended—

(A) in subparagraph (D)(iii), by striking ''child pornography'' and inserting ''offenses relating to child sexual abuse material''; and

(B) in subparagraph (E), by striking ''child pornography'' and inserting ''child sexual abuse material''.

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(21) COMMUNICATIONS ACT OF 1934.—Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended—

(A) in section 223 (47 U.S.C. 223)—

(i) in subsection (a)(1)—

(I) in subparagraph (A), in the undesignated matter following clause (ii), by striking ''child pornography'' and inserting ''which constitutes child sexual abuse material''; and

(II) in subparagraph (B), in the undesignated matter following clause (ii), by striking ''child pornography'' and inserting ''which constitutes child sexual abuse material''; and

(ii) in subsection (d)(1), in the undesignated matter following subparagraph (B), by striking ''child pornography'' and inserting ''that constitutes child sexual abuse material''; and

(B) in section 254(h) (47 U.S.C. 254(h))—

(i) in paragraph (5)—

(I) in subparagraph (B)(i)(II), by striking ''child pornography'' and in-

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serting ''child sexual abuse material''; and

(II) in subparagraph (C)(i)(II), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(ii) in paragraph (6)—

(I) in subparagraph (B)(i)(II), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(II) in subparagraph (C)(i)(II) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(iii) in paragraph (7)(F)—

(I) in the subparagraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(II) by striking ''child pornography'' and inserting ''child sexual abuse material''.

(c) TABLE OF SECTIONS AMENDMENTS.—

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(1) CHAPTER 110 OF TITLE 18.—The table of sections for chapter 110 of title 18, United States Code, is amended—

(A) by striking the item relating to section 2252A and inserting the following:

''2252A. Certain activities relating to material constituting or containing child sexual abuse material.'';

(B) by striking the item relating to section 2258C and inserting the following:

''2258C. Use to combat child sexual abuse material of technical elements relating to reports made to the CyberTipline.'';

(C) by striking the item relating to section 2259A and inserting the following:

''2259A. Assessments in child sexual abuse material cases.'';

and

(D) by striking the item relating to section 2259B and inserting the following:

''2259B. Child sexual abuse materials victims reserve''.

(2) CHAPTER 117 OF TITLE 18.—The table of sections for chapter 117 of title 18, United States Code, is amended by striking the item relating to section 2427 and inserting the following:

''2427. Inclusion of offenses relating to child sexual abuse material in definition of sexual activity for which any person can be charged with a criminal offense.''.

SEC. 7. MODERNIZING THE CYBERTIPLINE.

Chapter 110 of title 18, United States Code, is amended—

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(1) in section 2258A—

(A) in subsection (a)—

(i) in paragraph (1)(B)(ii), by inserting after ''facts or circumstances'' the following: '', including any available facts or circumstances sufficient to identify and locate each minor and each involved individual,''; and

(ii) in paragraph (2)(A)—

(I) by inserting ''1591 (if the violation involves a minor),'' before ''2251,''; and

(II) by striking ''or 2260'' and inserting ''2260, or 2422(b)'';

(B) in subsection (b)—

(i) in paragraph (1)—

(I) by inserting ''or location'' after ''identity''; and

(II) by striking ''other identifying information,'' and inserting ''other information which may identify or locate the involved individual,'';

(ii) by redesignating paragraphs (2) through (5) as paragraphs (3) through (6), respectively;

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(iii) by inserting after paragraph (1) the following:

''(2) INFORMATION ABOUT THE INVOLVED MINOR.—Information relating to the identity or location of any involved minor, which may, to the extent reasonably practicable, include the electronic mail address, Internet Protocol address, uniform resource locator, or any other information which may identify or locate any involved minor, including self-reported identifying information.''; and

(iv) by adding at the end the following:

''(7) FORMATTING OF REPORTS.—When in its discretion a provider voluntarily includes any content described in this subsection in a report to the CyberTipline, the provider shall use best efforts to ensure that the report conforms with the structure of the CyberTipline.''; and

(C) in subsection (d)(5)(B)—

(i) in clause (i), by striking ''forwarded'' and inserting ''made available''; and

(ii) in clause (ii), by striking ''forwarded'' and inserting ''made available'';

(2) in section 2258B—

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(A) in subsection (a)—

(i) by striking ''arising from the performance'' and inserting the following: '', may not be brought in any Federal or State court if the claim or charge is directly attributable to—

''(1) the performance'';

(ii) in paragraph (1), as so designated, by striking ''may not be brought in any Federal or State court.'' and inserting a semicolon; and

(iii) by adding at the end the following:

''(2) transmitting, distributing, or mailing child sexual abuse material to any Federal, State, or local law enforcement agency, or giving such agency access to child sexual abuse material, in response to a search warrant, court order, or other legal process issued by such agency; or

''(3) research voluntarily undertaken by the provider or domain name registrar using any material being preserved under section 2258A(h), if the research is only for the purpose of—

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''(A) improving or facilitating reporting under this section, section 2258A, or section 2258C; or

''(B) stopping the online sexual exploitation of children.''; and

(B) in subsection (b)(2)(C)—

(i) by striking ''the performance of'';

(ii) by inserting ''described in or performed'' after ''function''; and

(iii) by striking ''this section, sections'' and inserting ''this section or section''; and

(3) in section 2258C—

(A) in the section heading, by striking ''**the CyberTipline**'' and inserting ''**NCMEC**'';

(B) in subsection (a)—

(i) in paragraph (1)—

(I) by striking ''NCMEC'' and inserting the following:

''(A) PROVISION TO PROVIDERS.—NCMEC'';

(II) in subparagraph (A), as so designated, by inserting ''or submission to the child victim identification

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program described in section 404(b)(1)(K)(ii) of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11293(b)(1)(K)(ii))'' after ''CyberTipline report''; and

(III) by adding at the end the following:

''(B) PROVISION TO NON-PROFIT ENTITIES.—NCMEC may provide hash values or similar technical identifiers associated with visual depictions provided in a CyberTipline report or submission to the child victim identification program described in section 404(b)(1)(K)(ii) of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11293(b)(1)(K)(ii)) to a non-profit entity for the sole and exclusive purpose of preventing and curtailing the online sexual exploitation of children.''; and

(ii) in paragraph (2)—

(I) by inserting ''(A)'' after ''(1)'';

(II) by inserting ''or submission to the child victim identification pro-

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gram described in section 404(b)(1)(K)(ii) of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11293(b)(1)(K)(ii))'' after ''CyberTipline report''; and

(III) by adding at the end the following: ''The elements authorized under paragraph (1)(B) shall be limited to hash values or similar technical identifiers associated with visual depictions provided in a CyberTipline report or submission to the child victim identification program described in section 404(b)(1)(K)(ii) of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11293(b)(1)(K)(ii)).''; and

(C) in subsection (d), by inserting ''or to the child victim identification program described in section 404(b)(1)(K)(ii) of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11293(b)(1)(K)(ii))'' after ''CyberTipline''.

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SEC. 8. ELIMINATING NETWORK DISTRIBUTION OF CHILD EXPLOITATION.

Section 2258A(h) of title 18, United States Code, is amended—

(1) in paragraph (1), by striking ''90 days'' and inserting ''180 days''; and

(2) by adding at the end the following:

''(5) EXTENSION OF PRESERVATION.—A provider of a report to the CyberTipline may voluntarily preserve the contents provided in the report (including any comingled content described in paragraph (2)) for longer than 180 days after the submission to the CyberTipline for the purpose of reducing the proliferation of online child sexual exploitation or preventing the online sexual exploitation of children.''.

SEC. 9. IT SOLUTIONS RELATING TO COMBATING ONLINE CHILD EXPLOITATION.

Title IV of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11291 et seq.) is amended—

(1) by redesignating section 409 (34 U.S.C. 11297) as section 410; and

(2) by inserting after section 408 (34 U.S.C. 11296) the following:

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''SEC. 409. IT SOLUTIONS RELATING TO COMBATING ONLINE CHILD EXPLOITATION.

''(a) DEVELOPMENT OF IT SOLUTIONS.—The Administrator shall enable the development of information technology solutions and the creation and acquisition of innovative tools to implement updates, improvements, and modernization needed to enhance efforts to combat online child exploitation in order to ensure that consistent, actionable information is provided to law enforcement agencies, including Internet Crimes Against Children (commonly known as 'ICAC') task forces.

''(b) CONSULTATION WITH PARTNERS.—In developing the information technology solutions under subsection (a), the Administrator shall solicit input from all partners in the effort to combat online child exploitation, including the Center, ICAC task forces, the Federal Bureau of Investigation, the Department of Homeland Security, U.S. Immigration and Customs Enforcement, Homeland Security Investigations, and the United States Marshals Service.

''(c) FUNDING.—Each fiscal year, the Administrator shall carry out this section using not less than $1,000,000 of the amounts made available to carry out this title for that fiscal year.''.

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SEC. 10. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as may be necessary to carry out this Act.

SEC. 11. SEVERABILITY.

If any provision of this Act or any amendment made by this Act, or any application of such provision or amendment to any person or circumstance, is held to be unconstitutional, the remainder of the provisions of this Act and the amendments made by this Act, and the application of the provision or amendment to any other person or circumstance, shall not be affected.

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Pandya, Brian (OASG)

From:	Pandya, Brian (OASG)
Sent:	Wednesday, July 1, 2020 7:45 PM
To:	Willard, Lauren (OAG); Grieco, Christopher (ODAG); Barnett, Gary (OAG)
Subject:	RE: Section 230 touch base
Attachments:	Social Media EO Implementation (DRAFT 3 June 2020).docx

Here is the most recent draft of the working plan. Yes, a separate WH meeting is good idea because they want this to be inter-agency.

And I'm happy to email Texas. Let me know.

From: Willard, Lauren (OAG) (b) (6) >
Sent: Wednesday, July 1, 2020 5:58 PM
To: Grieco, Christopher (ODAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >
Subject: RE: Section 230 touch base

Brian, do you have an updated work plan on the State AG working group? I imagine WH will ask about that as well. Maybe we can plan a DOJ-WH meeting next week to discuss separately.

We can also reach back out to TX. I'm happy to do so, or Brian have you take lead.

Best,
Lauren

From: Willard, Lauren (OAG)
Sent: Wednesday, July 1, 2020 5:55 PM
To: Grieco, Christopher (ODAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >
Subject: FW: Section 230 touch base

FYI, my email stemmed from a conversation with Adam Candeub. Let me know if anyone wants to hop on a phone to discuss.

Best,
Lauren

From: Davis, May M. EOP/WHO (b) (6) >
Sent: Wednesday, July 1, 2020 5:53 PM
To: Willard, Lauren (OAG) (b) (6) >; DeBacker, Devin A. EOP/WHO (b) (6) >; Sherk, James B. EOP/WHO (b) (6) >; Candeub, Adam (b) (6) >
Cc: Grieco, Christopher (ODAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >
Subject: RE: Section 230 touch base

11-2 works for me.

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May Davis
C (b) (6)

From: Willard, Lauren (OAG) (b) (6) >
Sent: Wednesday, July 1, 2020 5:52 PM
To: Davis, May M. EOP/WHO (b) (6) >; DeBacker, Devin A. EOP/WHO (b) (6) >; Sherk, James B. EOP/WHO (b) (6) >; Candeub, Adam (b) (6) >
Cc: Grieco, Christopher (ODAG) (b) (6) >; Barnett, Gary (OAG) (b) (6) >; Pandya, Brian (OASG) (b) (6) >
Subject: Section 230 touch base

Deliberative

Hi all,

Hope everyone is doing well, and looking forward to the holiday weekend. Do folks have time tomorrow between 11-2 to circle up on Section 230 and the EO? In particular, thought it could be useful to talk through some of the draft regulation ideas and the relationship between the FCC petition and OMB legislation.

If more convenient, happy to set up a time for next week as well!

Please feel free to loop in anyone else that should be involved.

Many thanks,
Lauren

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

Document ID: 0.7.2270.6636

Implementing Section 5 of the Executive Order on Preventing Online Censorship

Background: Section 5 imposes two sets of requirements on DOJ.

First, Section 5(a) imposes three requirements: "[t]he Attorney General [i] shall establish a working group regarding the potential enforcement of State statutes that prohibit online platforms from engaging in unfair or deceptive acts or practices. The working group [ii] shall also develop model legislation for consideration by legislatures in States where existing statutes do not protect Americans from such unfair and deceptive acts and practices. The working group [iii] shall invite State Attorneys General for discussion and consultation, as appropriate and consistent with applicable law."

Second, Section 5(b) provides that "incidents of online censorship" reported through the White House's previous Tech Bias Reporting tool "will be shared with the working group." The Working Group "shall also collect publicly available information regarding . . . (i) increased scrutiny of users based on the other users they choose to follow, or their interactions with other users; (ii) algorithms to suppress content or users based on indications of political alignment or viewpoint; (iii) differential policies allowing for otherwise impermissible behavior, when committed by accounts associated with the Chinese Communist Party or other anti-democratic associations or governments; (iv) reliance on third-party entities, including contractors, media organizations, and individuals, with indicia of bias to review content; and (v) acts that limit the ability of users with particular viewpoints to earn money on the platform compared with other users similarly situated."

Recommended Steps to Implement EO Section 5:

1. (b) (5) [redacted]
2. (b) (5) [redacted]
3. (b) (5) [redacted]

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4. (b) (5) [redacted]

5. (b) (5) [redacted]

6. (b) (5) [redacted]

7. (b) (5) [redacted]

8. (b) (5) [redacted]

//

DRAFT

Document ID: 0.7.2270.6636-000001

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Thursday, July 2, 2020 10:24 AM
To:	Moran, John (OAG)
Subject:	RE: DOJ Accomplishments - Request for Any Suggestions by COB Today

To the extent someone else doesn't mention it, we should also include the COVID Fraud Task Force.

From: Willard, Lauren (OAG)
Sent: Thursday, July 2, 2020 10:09 AM
To: Moran, John (OAG) (b) (6) >
Subject: RE: DOJ Accomplishments - Request for Any Suggestions by COB Today

Hi John,

I'm out today, but here are quick thoughts not sure to see if these are worth including. Can formalize language later today if needed. General theme is trying to address outdated law and policy approaches to significant changes in technology and the concentration of power in the hands of a few large tech platforms, particularly in the areas of competition and combatting online crime.

Big Tech Items (since I started last summer)

1. **[Big Tech Review]** Opened review of market-leading online platforms in July 2019. Broad review includes examining competition and other legal and policy issues related to the big tech platforms. [I don't think we can say anything publicly since the investigations are ongoing, but w (b) (5)]
2. **[Section 230]** Conducted review of Section 230 of the Communications Decency Act, hosted large Public Workshop and Expert Roundtable, and proposed legislative reform to incentive online platforms to be more responsible in addressing illicit online content and to be more transparent and accountable in their content moderation decisions. [note: OMB draft legislation still not released]
3. **[Voluntary Principles]** In March 2019, launched Voluntary Principles to Combat Online Child Exploitation and Abuse with international partners and leading technology platforms.
4. **[Lawful Access]** Hosted Lawful Access Summit in October 2019. [Can ask Sujit for better description of (b) (5) if we want to include, some we can't say publicly]

Let me go to ATR to see what few cases they would want to highlight. Thought on how many you would want?

Best,
Lauren

From: Moran, John (OAG) (b) (6) >
Sent: Thursday, July 2, 2020 9:42 AM
To: Barnett, Gary (OAG) (b) (6) >; Escalona, Prim (OAG) (b) (6) >; Favitta, Jeff (OAG) (b) (6) >; Hamilton, Gene (OAG) (b) (6) >; Michel, Christopher (OAG) (b) (6) >; Newman, Ryan D. (OAG) (b) (6) >; Sofer, Gregg (OAG) (b) (6) >; Willard, Lauren (OAG) (b) (6) >; Kupec, Kerri (OPA) (b) (6) >
Cc: Levi, William (OAG) (b) (6) >; Bissex, Rachel (OAG) (b) (6) >; DuCharme, Seth

(ODAG) (b) (6) >; Hovakimian, Patrick (ODAG) (b) (6) >; Murray, Claire M. (OASG) (b) (6) >; Assefi, Omeed (OASG) (b) (6) >
Subject: DOJ Accomplishments - Request for Any Suggestions by COB Today

All:

In OAG, we are pulling together a list of DOJ accomplishments over the last 3+ years, along the lines of the attached from Ed.

If you have any accomplishments from your components / portfolios that you think should be included, please let me know by **COB Today**. This can include regulatory actions, policy announcements, litigation victories, or anything else concrete that you think the AG may like to highlight.

Feel free to reach out if you have any questions.

Regards,

John S. Moran
Deputy Chief of Staff & Counselor to the Attorney General
U.S. Department of Justice
(b) (6) (W)
(b) (6) (C)
(b) (6)

Document ID: 0.7.2270.11514

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Monday, July 6, 2020 4:28 PM
To:	Hankey, Mary Blanche (OLA)
Cc:	Escalona, Prim (OAG); Boyd, Stephen E. (OLA)
Subject:	RE: Cruz/AG call
Attachments:	Cruz TPs.docx

Thanks! At this point, we can try again tomorrow morning. I'm putting the attached in the prep binder, but if there are edits I can try to switch out before he leaves for the day.

Many thanks!
Lauren

From: Hankey, Mary Blanche (OLA) (b) (6) >
Sent: Monday, July 6, 2020 4:26 PM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Escalona, Prim (OAG) (b) (6) >; Boyd, Stephen E. (OLA) (b) (6) >
Subject: Re: Cruz/AG call

Still no response from Cruz's office. I will ping again.

> On Jul 6, 2020, at 3:27 PM, Willard, Lauren (OAG) (b) (6) > wrote:
>
> https://www.cruz.senate.gov/?p=video&id=5196. This was also a recent FoxNews piece that may be relevant.
>
> I'm going to defer to OLA to lead prep meeting tomorrow, but I can be ready to answer subject-matter specific questions.
>
> Best,
> Lauren
>
> ---
>
> **From:** Willard, Lauren (OAG)
> **Sent:** Monday, July 6, 2020 3:27 PM
> **To:** Hankey, Mary Blanche (OLA) (b) (6) >; Escalona, Prim (OAG) (b) (6) >; Boyd, Stephen E. (OLA) (b) (6) >
> **Subject:** RE: Cruz/AG call
>
> Adding back in Stephen. Assuming we still haven't heard from Cruz' office, I tried to guess about potential topics and draft up the attached one-pager. Can you all take a quick look and propose any edits or changes so I can drop into the AG's prep binder?
>
> Many thanks!

Document ID: 0.7.2270.7890

Lauren

From: Willard, Lauren (OAG)
Sent: Monday, July 6, 2020 2:18 PM
To: Hankey, Mary Blanche (OLA) [redacted]>; Escalona, Prim (OAG) [redacted]>
Subject: RE: Cruz/AG call

Looping in Prim as well! Prim – the AG has a call with Senator Cruz tomorrow to discuss Google.

Do you happen to know what hearings Cruz has held related to Google in the past year (or an easy way of finding out)? I'm trying to get a few talking points compiled by 3pm to include in the AG's prep binder for this evening.

Welcome any thoughts!

Best,
Lauren

From: Hankey, Mary Blanche (OLA) [redacted]>
Sent: Monday, July 6, 2020 1:54 PM
To: Willard, Lauren (OAG) [redacted]>
Subject: RE: Cruz/AG call

OK. I'm still waiting to hear back from them, so I'll add this to the discussion.

From: Willard, Lauren (OAG) [redacted]>
Sent: Monday, July 6, 2020 1:52 PM
To: Hankey, Mary Blanche (OLA) [redacted]>
Subject: RE: Cruz/AG call

Also I'm having trouble getting on the Cruz main website, but wanted to see what hearings or other actions he has taken in the past year re Google other than the letter last month. I think he held a hearing last July on censorship, but there may have been others.

Best,
Lauren

From: Willard, Lauren (OAG)
Sent: Monday, July 6, 2020 11:38 AM
To: Hankey, Mary Blanche (OLA) [redacted]>; Boyd, Stephen E. (OLA) [redacted]>
Subject: RE: Cruz/AG call

Thanks! If there is anything OLA wants to put in the AG prep binder for tonight, feel free to let me know. I was planning on including Cruz' letter to Google about The Federalist (attached), which CC'd the AG and the FTC Chairman.

From: Hankey, Mary Blanche (OLA) [redacted]>
Sent: Monday, July 6, 2020 11:34 AM

Document ID: 0.7.2270.7890

To: Willard, Lauren (OAG) (b) (6) >; Boyd, Stephen E. (OLA) (b) (6) >
Subject: RE: Cruz/AG call

Hi Lauren—Thanks for reaching out. I'm looking into this and will circle back shortly.

From: Willard, Lauren (OAG) (b) (6) >
Sent: Monday, July 6, 2020 9:12 AM
To: Boyd, Stephen E. (OLA) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) >
Subject: Cruz/AG call

Do we know what Senator Cruz wants to talk to the AG about regarding Google? Just want to make sure we have the right material for the prep with the AG tomorrow. Should we try to get in touch with his staff today? Also want to make sure we are clear that we can't talk about th (b) (5) .

Hope you both had a great July 4th!

Best,
Lauren

Document ID: 0.7.2270.7890

Backgrounder for Call with Senator Cruz

Senator Cruz Recent Actions re Google

- (b) (5)
    - June 17, 2020 – Senator Cruz wrote letter to Google CEO about actions it took to "demonetize" *The Federalist*, CC'ing the AG and FTC Chairman
        - Google is applying different standard to comment section in *The Federalist* than comment section of YouTube (which it owns)
        - Senator Cruz believes Google's action violates antitrust laws
    - Senator Cruz chaired a series of Senate subcommittee hearings on big tech censorship
- (b) (5)
- (b) (5)

Key Talking Point (b) (5)

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

Document ID: 0.7.2270.7890-000001

Escalona, Prim (OAG)

From:	Escalona, Prim (OAG)
Sent:	Monday, July 6, 2020 6:07 PM
To:	Willard, Lauren (OAG)
Subject:	Fwd: Cruz/AG call
Attachments:	July 2019 Senate Judiciary Subcommittee on the Constitution holds Hearing on Google and Search Engine Censorship.pdf; ATT00001.htm

See below

Sent from my iPhone

Begin forwarded message:

From (b) (6) (OLA)" (b) (6) >
Date: July 6, 2020 at 5:26:07 PM EDT
To: "Escalona, Prim (OAG)" (b) (6) >
Subject: RE: Cruz/AG call

Did some digging! Senator Cruz held a Senate Judiciary Subcommittee on the Constitution Hearing on Google and Search Engine Censorship on **July 16, 2019**. I have attached the transcript.

"Google's control over what people here, watch, read and say is unprecedented. Almost 90 percent of internet searches in the United States use Google. Google's domination of the search engine market is so complete that to "Google" is now a commonplace verb. With that market power, Google can and often does control our discourse. And sometimes tech companies talk about their products and the effects of those products as though they're forces outside of Big Text control."

"One thing is certain, Congress never intended to empower large technology companies to control our speech when it passed Section 230 of the Communications Decency Act. That provision--Section 230--gave tech companies special privileges that nobody else gets. If the New York Times or the Wall Street Journey were to publish an Op Ed that libeled a private citizen, they can be held responsible. This is the case even when those organizations don't write the content that breaks the law. They can be held responsible merely for publishing it.

"Not so for companies like Google and YouTube. If someone uses one of those services to commit slander, or to transmit classified material, or to traffic guns, or drugs, far too often Google is off the hook. Section 230 makes it immune.

"Big Tech gets a perk--a subsidy--that no one else does--Fox News, MSNBC, or anybody else. This immunity, however, was part of a deal. It was a trade. Section 230--the text of it--refers to the internet as "a forum for a true diversity of political discourse". That was the trade at the heart of Section 230. This is because we expected tech companies in the business of carrying other's speech wouldn't favor any side when they did so."

From: Escalona, Prim (OAG) (b) (6) >

Document ID: 0.7.2270.6771

Sent: Monday, July 6, 2020 4:56 PM
T (b) (6) (OLA) (b) (6) >
Subject: Re: Cruz/AG call

Thanks. Can you see if there were any SJC hearings on this issue?

Sent from my iPhone

On Jul 6, 2020, at 4:40 PM (b) (6) (OLA) (b) (6) > wrote:

Senator Cruz chairs the SJC Subcommittee on the Constitution. He does not sit on the subcommittee on Antritrust. I cannot find any committee work he has been directly involved in regarding Google over the last year. However, I have attached the letter he sent to the Google CEO last month (AG cced) regarding censorship over the Federalist.

From: Escalona, Prim (OAG) (b) (6) >
Sent: Monday, July 6, 2020 4:24 PM
T (b) (6) (OLA) (b) (6) >
Subject: Fwd: Cruz/AG call

Can you please see what you can find quickly?

Sent from my iPhone

Begin forwarded message:

From: "Willard, Lauren (OAG)" (b) (6) >
Date: July 6, 2020 at 2:18:00 PM EDT
To: "Hankey, Mary Blanche (OLA)" (b) (6) >, "Escalona, Prim (OAG)" (b) (6) >
Subject: RE: Cruz/AG call

Duplicative Information - See Document ID 0.7.2270.7890

Senate Judiciary Subcommittee on the Constitution holds Hearing on Google and Search Engine Censorship

LIST OF PANEL MEMBERS AND WITNESSES

CRUZ:
This hearing's called to order. Good afternoon. Let me say to folks who are attending, I apologize the hearing was delayed in our start time. We had a series of votes on the Senate floor that just concluded.

And so, welcome. Welcome to our witnesses. This past April, this Subcommittee held a hearing on social media bias with witnesses from Facebook and Twitter. As I noted then, any inquiry into Big Text censorship practices must take an especially hard look at Google. That's what we're doing here today.

Google's control over what people here, watch, read and say is unprecedented. Almost 90 percent of internet searches in the United States use Google. Google's domination of the search engine market is so complete that to "Google" is now a commonplace verb. With that market power, Google can and often does control our discourse. And sometimes tech companies talk about their products and the effects of those products as though they're forces outside of Big Text control.

As we've heard time and time again, Big Text favorite defense is, "It wasn't me. The algorithm did it." But Google Search engine isn't some supernatural force. It's a computer program written and maintained by people.

So, every time we search on Google, we see only the webpages that Google decides we should see in the order that Google decides we should see them. Type a few letters into the

search bar and Google will tell you what you should be looking for.

The same is true of Google's subsidiary, YouTube--the second most visited webpage in existence. When you search on YouTube, programs written by people at YouTube provide you with the results.

When you watch a video, a program written by the people at YouTube suggests what you should watch next.

And when you submit a video, people at YouTube determine whether you've engaged in so-called "hate speech"--an ever-changing and vague standard meant to give censorship an air of legitimacy. This is a staggering amount of power to ban speech, to manipulate search results, to destroy rivals and to shape culture. More and more, Americans are demanding accountability from Big Tech for that massive power.

One thing is certain, Congress never intended to empower large technology companies to control our speech when it passed Section 230 of the Communications Decency Act. That provision--Section 230--gave tech companies special privileges that nobody else gets. If the New York Times or the Wall Street Journey were to publish an Op Ed that libeled a private citizen, they can be held responsible. This is the case even when those organizations don't write the content that breaks the law. They can be held responsible merely for publishing it.

Not so for companies like Google and YouTube. If someone uses one of those services to commit slander, or to transmit classified material, or to traffic guns, or drugs, far too often Google is off the hook. Section 230 makes it immune.

Big Tech gets a perk--a subsidy--that no one else does--Fox News, MSNBC, or anybody else. This immunity, however, was part of a deal. It was a trade. Section 230--the text of it--refers to the internet as "a forum for a true diversity of political discourse". That was the trade at the heart of Section 230. This is because we expected tech companies in the business of carrying other's speech wouldn't favor any side when they did so.

There wouldn't be a conservative internet and a liberal internet. There'd just be the internet. That bargain today is falling apart. Big Tech continues to reap the benefits of a Section 230

subsidy, but the American people do not.

The American people are instead subject to both overt censorship and covert manipulation. I believe it's time to rethink that deal. If Big Tech cannot provide with evidence--clear, compelling data evidence--that it's not playing Big Brother with its vast, immense powers, there's no reason on earth why Congress should give them a special subsidy through Section 230.

And that takes us to the heart of the problem. Big Tech is anything, but transparent. Google is happy to collect data on everyone, everywhere constantly--on you, on me, on all of us. They make sure they know what you search, what you shop for online, what you like. They track your location within a matter of feet, so that they know when you visit a physical store.

But the information sharing is a one-way street. This must change. Google cannot simply hide behind its algorithms. Big Tech's algorithms and search engines only do what humans at companies like Google tell them to do. Just as Big Tech needs and wants data on all of us, the American people need and want data on Big Tech.

They need it to profit. We need it to protect free speech. And I hope that today, Google will start to answer some of our questions fully and candidly, so that we can assess how we can work together to protect the robust marketplace of ideas that American political discourse has been built upon. Senator Hirono.

HIRONO:
Thank you, Mr. Chairman. The calendar says it's July 16th, but it feels like Groundhog Day in the United States Senate. A little more than three months ago, this Subcommittee held a hearing to explore allegations of anti-conservative bias in the tech industry. My friends on the other side were critical of witnesses from Facebook and Twitter. They claimed a vast conspiracy to silence conservative voices.

After listening to some of the comments from that hearing, you might think that someone that's a real mastermind sets up the controls of those platforms looking at 510,000

Facebook posts and 350,000 Tweets posted every minute and removes anything that might other--align with the Republican Party platform.

I repeat now what I said then. Claims of anti-conservative bias in the tech industry are baseless. Study after study has debunked suggestions of political bias on the part of Facebook, Google and Twitter.

In June of this year, the economists released the findings of a year-long analysis that ran on search results on Google's news tab. It found no evidence that Google biased its results against conservatives.

In April, Media Matters completed a 37-week study into alleged conservative censorship on Facebook. It found that right-leaning pages actually outperformed--outperformed left-leaning pages in terms of overall interactions with users.

Earlier this year, Twitter performed a five-week analysis of tweets sent by all members of the House and Senate. It found no statistically significant difference between the number of times a tweet by a Democratic member is viewed as compared to a tweet by a Republican member.

One of our witnesses, Professor Francesca Tripodi has done her own research in this area and she found no evidence that Google censors conservative content either in its main search product or on YouTube.

In fact, she's found that conservative commentators like Mr. Prager--another of the witnesses today--are extremely adept at optimizing their content for Google Search engine allowing them to capture massive audiences.

Undeterred by this evidence, here we are again. Three months after that initial hearing with Facebook and Twitter, it is now Google's turn to be raked over the coals. Google will be accused of political motives for some common-sense actions that are entirely within their rights.

Document ID: 0.7.2270.6771-000001

Just like we saw at the president's so-called "Social--Social Media Summit" last week, President Trump invited a rogue's gallery of social media's leading racist (PH) and conspiracy theorists to hear about supposed censorship by tech companies. But none of these people had actually been banned from any platform. Each remains free to use the megaphone social media provides to spread their messages of conspiracy and hate.

This toting at windmills comes at a cost. After years of being tarred as biased have made tech companies hesitant to deal with the real problems of racist and harassing content on their platforms.

According to a report by Vice, Twitter is afraid to use a proactive algorithmic approach it uses to remove ISIS-related content, to rid the platform of white supremacist content. The reason?

Twitter is afraid it might also catch content posted by Republican politicians.

YouTube dragged its feet before taking any action against conservative commentator, Steven Crowder despite being informed of Crowder's two-year homophobic harassment campaign against journalist Carla Masa (PH). When YouTube did finally take action, it took the half measure of removing advertisements from Crowder's videos rather than removing him from the platform entirely.

Browbeating the tech industry for a problem that does not exist also draws attention away from the real problems with Google and other tech companies. Last month, a New York Times investigation found that YouTube's recommendation engine served as a roadmap for pedophiles to find videos of younger and younger girls sometimes as young as five or six years old.

That followed a wired report on the way that pedophiles use the comments section of YouTube videos to identify and share videos of children.

A recent Wall Street Journal investigation found that YouTube is overrun by videos pushing fake claims for account secures. This is after YouTube stoked the flames of the antivax movement to the point that measles has returned to this country.

Another New York Times feature documented the radicalization of a young man who followed YouTube's recommended videos down an outright rabbit hole.

Google is a big, successful company. It employs some of the smartest people in the country. There is no question in my mind that it can solve these problems--real problems. Unfortunately, as long as we're make--busy making Google defend itself from clear and--with clear and convincing evidence no less, from bogus claims of anti-conservative bias it has no incentive to address these real issues.

I'm hoping another of our witnesses can shine some light in this area. Andy Parker is the father of journalist Allison Parker. Allison worked for CBS affiliate WDBJ in Roanoke, Virginia. On August 26th, 2015 she and her colleague, Adam Ward were conducting a live interview when they were attacked by a gunman. Allison and Adam died at the scene.

Video of the shooting quickly spread on social media including Google's YouTube. For the past four years, Andy has sent letters to Google. He has met with Google. He has flagged videos on YouTube. He has begged and pleaded that these videos come down.

Despite Andy's efforts, you can still find video of the tragedy on YouTube to this day and I want Google to tell us why that is. I look forward to hearing from Andy. His work to shine a light on Google's failures honors Allison's memory.

It also provides a great public service as I hope this Subcommittee, the full Judiciary Committee, and the Senate at large start to focus on the real problems presented by the tech industry and demand action.

Thank you, Mr. Chairman.

CRUZ:
Thank you. Now I'm happy to introduce our first witness, Mr. Karan Bhatia from Google. Karan Bhatia currently heads Google's Global Public Policy & Public Relations department.

Before joining Google, he served as Deputy Undersecretary of Commerce for Industry and Security from 2001-2003, as Assistant Secretary of Transportation for Aviation and

International Affairs from 2003-2005, as Deputy U.S. Trade Representative from 2005-2007 and as Head of General Electric's Government Affairs division from 2008-2018.

He's--he is a graduate of Princeton University and Columbia Law School.

Thank you for joining us, Mr. Bhatia. And would you please stand and be sworn in?

Raise your right hand. Do you swear or affirm that the testimony you are about to give before this Committee will be the truth, the whole truth and nothing but the truth so help you God?

BHATIA:
(OFF MIC)

CRUZ:
Mr. Bhatia, you may make your opening statement.

BHATIA:
Thank you, Senators. My name is Karan Bhatia. I lead the Government Affairs & Public Policy function at Google. Previously as mentioned, I served in the George W. Bush Administration and earlier in my career, I spent time at the Heritage Foundation and the Clairmont Institute. And in college, I was Editor of our conservative publication The Princeton Tory.

I am a first-generation American. My parents imparted to me an abiding passion for the principles of free speech, Democracy and free markets. And this same passion makes me enormously gratified to work at Google--a company that embodies these values every day around the world.

Google is a proudly American company growing across the U.S. We're investing more than $13 buck--billion to expand our presence in 14 states this year creating thousands of American jobs.

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We are also a global company and a big American exporter competing vigorously with competitors from around the world. Through our Grow with Google program, we are proud to work with thousands of small American businesses enabling them to tap into the commercial opportunity of the internet.

We are a company focused on the future as well investing billions of dollars annually in R & D and innovating new products to help people live better lives. For example, by applying artificial intelligence to enable earlier detection of cancer or predict natural disaster.

But above all, we are a company of more than 100,000 people with a wide range of views, nationalities, and backgrounds dedicated to the company's mission of organizing the world's information and making it universally accessible and useful.

We live in an amazing time for the free flow of ideas. Never before in the history of mankind has it been possible for so many people to share so many ideas with so many others at so low a cost and through so many different avenues. Internet platforms have been transformative and powerful tools for the marketplace of ideas.

Among the many beneficiaries of the internet have been political groups. From the Tea Party movement in the United States to the Arab spring, the internet has enabled people to spread political messages and build political communities.

Providing a platform for sharing a broad range of information is core to our mission. It is also core to our business model. Google needs to be useful for everyone regardless of race, nationality, or political leanings. We have a strong business incentive to prevent anyone from interfering with the integrity of our products or the results we provide to our users.

So, let me be clear. Google is not politically biased. Indeed, we go to extraordinary lengths to build our products and enforce our policies in an analytically objective apolitical way. Our platforms reflect the online world that exists. Our job--which we take very seriously--is to deliver to users the most relevant and authoritative information out there.

And studies have shown that we do just that. Objective third-party studies including most recently a comprehensive year-long assessment by The Economist of Google's results have

found no evidence of bias in either direction.

Additionally, in May of this year, our data scientists analyze daily clickthrough rates on search results to the official websites of members of Congress. The data showed no difference in these metrics whether the member was a Republican or a Democrat.

We also analyzed official YouTube channels for all senators who had them and we consistently found a balance between Republicans and Democrats.

Our platform such as Google Search or YouTube deal with massive amounts of information and to manage these volumes, we rely on algorithms, and implement testing, and evaluation by third-party raters.

None of our systems are designed to filter out individuals or groups based on political viewpoints. Operating at the scale we do, we're bound to get criticism from both sides and we do.

From time-to-time for example, political ads may violate our advertising guidelines. And we've disallowed ads from both Democrats and Republicans.

From time-to-time our knowledge panels which help you find quick facts when you search for information about topics like Hillary Clinton or the California Republican Party may reflect erroneous information from the web and will need to be corrected.

We work hard to learn from our mistakes and improve our products. But these mistakes have effected both parties and are not the product of bias.

As technology continues to play an increasingly essential role in the lives of Americans, we know that users expect the highest degree of integrity from our products and that we must meet that expectation every day. If we don't, our users will go elsewhere. And that is why we invest so heavily in these systems and tools that help us service the content that is most relevant to our users in an analytically objective a political way.

Thank you for this opportunity. I look forward to answering your questions.

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CRUZ:
Thank you, Mr. Bhatia. My first question will not surprise you and it's a simple question. Does Google consider itself a neutral public forum?

BHATIA:
Senator, we operate a number of platforms. And they are constructed and operated to be politically neutral or--or apolitical.

CRUZ:
So--so, let me--does Google--the Google Search page--let's just focus on that for a moment.

BHATIA:
Uh-huh.

CRUZ:
Does Google consider the Google Search page to be a neutral public forum?

BHATIA:
It--we--we construct it. We build it and we operate it to be politically neutral.

CRUZ:
Does Google consider YouTube to be a neutral public forum?

BHATIA:
Similarly, Senator we build and construct it, maintain it with our algorithms to be politically neutral.

CRUZ:

Document ID: 0.7.2270.6771-000001

Mr. Bhatia, I'm going to ask my staff to--to give you a hard copy of a document that was released recently that--that we also sent to you ahead of time. So, this should not be a surprise. It is a document that at least purports to be authored by Google.

The title of the document is "The Good Censor: How Can Google Reassure the World That it Protects Users From Harmful Comment--Content While Still Supporting Free Speech?" And it's dated March of 2018. Is this document in fact, a document that was--that was prepared within Google?

BHATIA:
I--I--I've seen the document before, Senator. I've seen references to it. I understand that it was, yeah.

CRUZ:
Okay. So, I want to refer you--and the copy you have, the only alteration to it is we've written page numbers on it just for ease of reference. So, those are handwritten. Other than that, this is identical from what we printed from online. And with no objection, I'm going to enter a copy of this in the record with a notation that we did write page numbers on it.

I want to refer you initially to page 14 wherein page 14 this Google document says, "An important U.S. federal statute from 1996 supports this position of neutrality" and it describes how section--under Section 230 of the Communications Decency Act tech firms have legal immunity from the majority of the content posted on their platforms. This protection has empowered YouTube, Facebook, Twitter and Reddit to create spaces for free speech without fear of legal action. So, Google itself understood on the face of this document that Section 230--that immunity is predicated upon--as the title of this page says--neutrality.

I'd now like to refer you to page 65 of the document. Put this chart up as well. So, in page 65 of the document, this Google document says, "Tech forms--tech firms are performing a balancing act between two incompatible positions. On the one side, they create an

unmediated marketplace of ideas, 100 percent commit to the American tradition that prioritizes free speech for Democracy, not civility creating spaces where all values including civility norms are always open for debate." That's on the one side in Google's own assessment.

On the other side is "create well-ordered spaces for safety and civility, 100 percent commit to the European tradition that favors dignity over liberty and civility over freedom by censoring--" and I will note this is Google's word "--censoring racial and religious patriot even when there's no provocation to violence."

Now this Google document lays this out as a balancing act between two incompatible positions. But yet, two pages later in the document on page 67, Google concludes "In the eyes of Big Tech, which side has won out?"

And indeed, according to Google's document "The Good Sensor" Google says, "Tech firms have gradually shifted away from unmediated free speech and towards censorship in moderation." So, I guess--and my first question, is this accurate? Does Google engage in--using your own words--"censorship in moderation"?

BHATIA:
So, Senator, first just to place this document in context, this was--as I understand it--sort of the thought experiment and sort of a discussion was underway among our marketing team. It was a marketing document and it was thinking about sort of this broader tension that exists between on the one hand, being a forum for free speech and on the other hand, seeking to introduce certain rule of the road or--or community guidelines to make sure that the online environment is one that is, you know, one that users will want to participate in.

And so, it was discussing that tension. It is not reflective necessarily of the views of the company as a whole. It is not--

CRUZ:

Let me--let me ask my question again, Mr. Bhatia. Is this document prepared within Google--is it accurate? Is Google engaged in--and the terms used are censorship in moderation and the moderation in this context, I understand not to mean being moderate, but rather actively moderating the speech that occurs. Is that in fact what Google is doing which is censoring and moderating speech on its platform?

BHATIA:
So, I would not say that we are censoring the speech on our platform. In fact, there is a direct, you know, the--the--the--as I mentioned in my opening remarks, remarkable opportunities for every part of the political spectrum to be able to participate through online--through the online platforms.

We do have come--for instance, let's take our YouTube platform. We do have community guidelines that precludes for instance, people from uploading videos that might contain violent extremism, that might contain--and might contain hate speech that would prescribe or encourage/insight violence against protecting--

CRUZ:
And let's be clear. This is not--given also that you're prepared. You've got the logos if I'm recognizing them correctly for Facebook, for Twitter, for Google and YouTube all on the side towards censorship and moderation. And in fact, the chart goes on to say "Create well-ordered spaces for safety and civil--civility." And then, it gives--has three words--politicized, editor and publisher. Are those accurate descriptions? Is--is Google or YouTube editors and publishers?

BHATIA:
No, sir, Senator. I don't believe we are. And again, I'm not sure the context in which those words were placed up there. But--but no, we--we are not.

CRUZ:

So--so, this Google document, your position is it's just wrong and is that correct?

BHATIA:
My--my position is that this is--there are many documents that get produced where you have teams to go off and think about what's going on in the ecosystem. And I think this document reflects thinking, you know, that's being done by a marketing team.

CRUZ:
And--and in fact, the next page of--of this slide deck--which I don't think I have in larger form, but I'll read it for--for you. It's page 68 in the version in front of you says, "For a long time we thought of censorship in terms of government and nation states. And I think we're now in an era in which people are starting to realize that private companies probably more than ever before control people's ability to amplify their voices and whether or not their speech stays up or comes down, also what they see, and what they can listen to, and what they can read."

Now there has been considerable debate including an argument by the Ranking Member of this Committee just a few minutes ago that there is no censorship, that no one is engaging in--in--in a censorship. This document--and infer--fact the quote I just read I think reflects the concerns of a great many people that Google--a massive company with monopoly power is choosing whether to amplify people's voices, whether their speech stays up or comes down, what they see, what they can listen to, and what they can read. Do you agree that's in fact what Google's doing?

BHATIA:
No, Senator and this just to be clear, obviously is not--it's a quote from some third party. It's not--

CRUZ:
To be clear--

BHATIA:
--somebody at Google.

CRUZ:
But Google put it in this presentation, so it presumably--

BHATIA:
To--to--to reflect the obvious discussion that is going out in general in--in society about whether platforms in general which, you know, have on the one hand in many cases a mission--a goal--of trying to be available for free speech for--for new voices, for diversity voices to be heard.

And on the other hand, creating spaces where certain kinds of speech--violent extremists speech as an example which is clearly potentially damaging, and threatening to society, and to the community of users is not permitted. So, that's a tension--a natural tension that exists and I think it's, you know. Again, it's not our quote, but it's not an unreasonable thing to expect companies to be thinking about that.

CRUZ:
All right, so let me ask the last question--my last question for the first round. You have repeatedly made reference to violent extremism and hate speech. One of the companies that has been demonetized by Google repeatedly is Prager University. And is Prager is sitting here, he will be testifying on the next panel. Mr. Prager is in my judgment, a highly learned, araldite (PH) individual, studied and well-thought on a great many issues.

And in my experience, I've always found that I learn when listening to Mr. Prager whether I happen to agree with a particular issue or yet--or not. And yet, YouTube actively censors the content Mr. Prager is producing. Is it your view that Mr. Prager is somehow disseminating dangerous ideas or--or ideas that fit into the buckets you were talking about of violent extremism or hate speech?

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BHATIA:
No, Senator. Maybe if I can just explain. Mr.--

CRUZ:
Please.

BHATIA:
Mr. Prager is a YouTube success story. Mr. Tay (PH) Prager has more than two million followers as I understand it. Mr. Prager is--and--and all of Mr. Prager's content is available on YouTube--the--the--the--the main YouTube channel.

We do have a very small percent of our subscribers who opt for what we call Restricted Mode. These are mostly institutions like churches or perhaps schools where there's certain more mature content that they choose not to have access to.

Now this is less than 2 percent of the overall YouTube watchers, but we do feel it's important that--to give those--those institutions that degree of control. There is a small percent of Mr. Prager's overall content--as I understand it, less than a quarter of his content that is deemed to be in that category of "more mature".

And so, for that very small percentage, they will not have access to Mr. Prager's more mature content. Other than that, it is completely--and that--and just to be clear, these are--this is content for instance, maybe perfectly acceptable to watch. But for those with perhaps references to violence, or war, or rape, things like that.

So, that's the--

CRUZ:
So, my understanding just for the record--

BHATIA:

That's the basis.

CRUZ:
--is that Prager U. has produced 320 five-minute videos and that YouTube has censored 56 of them--so, roughly 20 percent. Among those that are censored include a video on the Ten Commandments.

Another one censored includes a history on the Nation of Israel.

The restrictions are purportedly for blocking things like pornography. But apparently, in YouTube's world, talking about the Ten Commandments and the Nation of Israel is comparable and--and--and should be blocked?

BHATIA:
Respectfully Senator, that's not right.

CRUZ:
Okay.

BHATIA:
What I--

CRUZ:
Well, please explain.

BHATIA:
So, what I--what I--what I was trying to explain is that all of Mr. Prager--those--those--the Ten Commandments--all those are available to 98 percent of YouTube viewers--98.5 I believe.

1.5 percent of our viewers have in--have activated again, this Restricted Mode--churches, schools, maybe libraries that don't want to have their viewers exposed to more mature content.

The video--I believe the Ten Commandments video for instance, contains references to murder and I believe potentially Nazi-ism or World War II, something along those lines. There are other videos that have--in that category in the number that you referenced--56--whatever it is--that may make reference to rape. That's the reason.

But they're not censored. They are simply--they're available to everybody who's using normal YouTube. They are not available to the small subset who have chosen to activate Restricted Mode.

CRUZ:
Senator Hirono?

HIRONO:
Thank you. It's very clear that all of these platforms does--they do remove certain kinds of content. That is not the issue that the Chairman is trying to focus upon. And really, the premise of this hearing is not the removal of--of for example, violent speech. But the premise of this hearing is the targeted removal of conservative speech or content. So, you know, that's what the Chair would like to focus us on.

And apparently, the Ten Commandments video has Nazi imagery, so that may be one of the reasons that it's restricted. Does Google discriminate against conservatives in some way? Do you have actually have algorithm that somehow identifies--I don't know--the--the world of conservative content?

Because you just mentioned that Mr. Prager who puts a lot of this kind of content on various platforms--that he has what? Five--two million followers and most of his content is totally available on YouTube?

So, I find it really amazing that he is here to testify that he's being targeted for content removal. So anyway, does Google discriminate against conservatives whether on Google Search, YouTube or any other platform?

BHATIA:
No, Madame Senator.

HIRONO:
Does Google Search discriminate against conservative content?

BHATIA:
No, Madame Senator. We--we don't factor political leanings what--into our algorithms at all.

HIRONO:
What role does a user's political party affiliation play in applications of Google's content moderation policies?

BHATIA:
We don't know our users political, you know. We--it bears no relevance into our political--into our algorithmic returns.

HIRONO:
You mentioned obviously, you're familiar with Dennis Prager. He is a witness on the second panel and he has sued Google for alleged censorship of his videos on YouTube. So, are you--you're familiar with his organization, Prager U?

BHATIA:
I am.

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HIRONO:
Approximately, how many Prager U's videos are available on YouTube?

BHATIA:
I don't have the exact number.

HIRONO:
Does 672 sound, right?

BHATIA:
That could be right. Yes, ma'am.

HIRONO:
How much does Prager U pay to host those videos on YouTube?

BHATIA:
I don't believe we charge anything.

HIRONO:
How many times have Prager U's videos been viewed on YouTube?

BHATIA:
I don't have a numb--an exact number for how many views. All of them have. But again, I know that he has millions of subscribers.

HIRONO:
Well, would it surprise you to learn that Prager U's videos have been viewed nearly one billion times on YouTube?

BHATIA:
No, it would not.

HIRONO:
Have any Prager U video--Prager U's videos been removed from YouTube--totally removed?

BHATIA:
No, ma'am.

HIRONO:
So, I want to show you a chart. This is a version of a chart Google submitted in the lawsuit by Mr. Prager. It shows the percentage of different organizations videos that are not available in Restrictive Mode--Restrictive Mode due to mature content. So, it shows that fewer than 23 percent of Prager U's videos are unavailable in Restrictive Mode and this is less of the percentage of videos unavailable in Restricted Mode from the Huffington Post, Fox Com--.com, The Daily Show, the Young Turks (PH), and other organizations are--that are generally viewed as liberal.

You notice that a lot more of those so-called liberal sites are--have a higher percentage. So, to your understanding, is this chart--which was submitted under penalty of perjury--accurate?

BHATIA:
Yes, Senator.

HIRONO:
So, if--if Google's treatment of Prager U is meant to show Google's anti-conservative bias, Google isn't doing a very good job of it.

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So, to go further, Andy Parker is in the audience and will be a witness on the second panel. Andy's daughter, Allison as I mentioned was murdered on live television while conducting an interview in 2015. Footage of that murder can still be found on YouTube today.

I understand that when Andy first approached Google about having the footage taken down, Google's response was that Andy himself should identify any videos of the murder and flag them to Google for a takedown. Google is an $8 billion company with nearly 100,000 employees. Why should a father have to search for, watch and flag videos of his daughter's murder in order to have it removed from YouTube? Why can't Google do this itself?

BHATIA:
So, Senator, first of all, let me start by expressing my own--and on behalf of Google, you know, deepest sympathy for Mr. Parker for what he's gone through. The--and we have indeed, engaged with him over the course of time.

There are a number of sets of potential concerns with different kinds of videos. So, if I can explain. The first are videos that are hoax videos. So, there were videos that were put out that is--essentially, tried to make the case that the shooting of his daughter had not happened. This videos we--violate our policies and we have indeed, taken all of those down.

The second set of videos that you're referencing are a variety of videos that may be for instance, news footage or other things of the--the shooting. And there--there are a couple of concern, you know. One is the question of copyright. In other words, are these videos that are owned potentially by Mr. Parker. I understand there is some evidence of that.

If there is, obviously we would seek to respect the copyright holder's desires. But where there are simply news videos that a major news network might have put out that would contain sort of portions of footage, that then becomes sort of the portion that we would generally tend to leave up. So, that's I think what we're trying to work our way through.

HIRONO:
So, you have taken down some of this footage and the ones that you legally can take down.

BHATIA:
Yes.

HIRONO:
You have any--can you give us any idea of how many--what--what--whatever the right term is--how many of these individual posts that have been put up that--that you all take down?

BHATIA:
With respect to this video, I--I don't have the number. But I can happily get back to you on that.

HIRONO:
I mean, are we talking about what? 100,000 of these?

BHATIA:
We--in general, if you're talking about videos that--that we take down, I mean, there are hundreds of thousands of videos that get--seem to get uploaded every--every day--every week that we take down for--

HIRONO:
So--

BHATIA:
--violation of our terms one way or another. There are--just to put it into scale, every minute there are 500 hours' worth of video that is sought to be uploaded to YouTube, so.

HIRONO:
Are you still taking down these kinds of videos relating to--

BHATIA:
Where we--

HIRONO:
--Allison's murder?

BHATIA:
--find videos and we deploy--we deploy machine tools, you know, make algorithmic tools to make--try to capture what is violative of our--of--of--of legal restriction or policy. And we do indeed try to take them down based on those tools.

HIRONO:
So, are you taking action really to--to do these or is it only as somebody points out that, "Oh, there's another video"?

BHATIA:
No. No, Senator. I mean, there again, given the--the quantity of video that we have out there, we have to depend upon machines effectively to try and spot--create fingerprints and then spot videos that are violative of our policies or community guidelines rather.

So, we certainly use that as a first instance. We then also do look to members of the community to inform us or point us to things that they also think should be taken down. And when pointed out to us, we have human reviewers look at them and--and take them down as well where violative.

HIRONO:
So--so when Mr. Parker first came to you, it was more than unfortunate that the message he got from Google is, "Go out there and find all these yourself." That was definitely not a good thing--

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BHATIA:
Understood.

HIRONO:
--a good approach for you folks.

Thank you, Mr. Chairman.

CRUZ:
Thank you. Senator Blackburn?

HIRONO:
I'm sorry. Do we have seven-minute rounds?

CRUZ:
We do have seven-minute rounds if you want to take some more time.

HIRONO:
Sure. I thought we were on five minutes. Okay.

So, just this week we've been able to find more footage on Allison's murder on YouTube. And--and again, you know, it seems as though vis-a-vis Mr. Parker that Google has infinite resources--near infinite resources. And I would like to know that you are actively taking down on your own volition these videos.

And I think I have a screenshot of one of the videos still available on YouTube. And the person who posted the video made no attempt to hide his content. This--the title is "Breaking: WDBJ Shooting Video Footage". It's like screaming out there. And the description states, "A gunman is on the loose after killing two broadcast journalists in a shooting that was captured on live television."

And so, I understand that content moderation can be a difficult task. But it doesn't look like it should be in this case. It's right out there. What possible explanation does Google have for why this video slipped through the cracks and has remained available on YouTube since August of 2015?

BHATIA:
Again, I--I'm not familiar with this specific video--video that you've got a picture of up there, Senator. It--it--it--again, would depend upon the nature of the video that had been put up. If it was again, a hoax video of some type it clearly would transgress our policies, and would come down, and, you know, should come down.

If it is news footage that another organization had put up--

HIRONO:
Well, this--this--this is not any of those categories that you keep--

BHATIA:
If it violates--just to be clear, if it violates our policies, it should come down. I--and I wouldn't know why it would be up.

HIRONO:
Uh-huh.

BHATIA:
If it doesn't violate our policies, obviously would--would be a different matter.

HIRONO:
So, isn't that--in and of itself, breaking the shooting footage, wouldn't that just raise--

BHATIA:

I--I--I--

HIRONO:
--a lot of red flags? Wouldn't it--

BHATIA:
It would--

HIRONO:
--violate--

BHATIA:
It would depend really upon the nature of the video in all honesty. There are sometimes news events that would be things that might be difficult for viewers to watch, but nonetheless would be, you know, put out there on major news channels and would be probably appropriately included. But again, I can't really tell from looking at this.

HIRONO:
Well, is it the same screenshot that I'm referring to?

So again, this is a screenshot from May 30, 2019. It's pretty recent showing that Andy flagged this video for Google. It appears that the only thing Google did in response is label the video as adult content and ask users to confirm their age before watching the video.

Shouldn't--I would think this would be just taken down. And what is Google going to do to ensure that this video and others like it are removed from YouTube quickly and that they don't come back?

So, why would you allow people to view something like this rather than taking it down?

BHATIA:

Again, Senator it's difficult to comment on this specific video without knowing what it is. I--there will be videos that will be news footage that may be disturbing to people, but nonetheless is legitimate news footage in which case giving it the appropriately label may be the, you know, outcome consistent with our policies.

On the other hand, if it is--violates and transgresses one of our policies whether it's be--whether it's the--the--the policy against hoax videos, whether it's, you know, any of the other policies that we might have, we would then look to take it down.

So again, difficult for me to say. But we're happy to look into this.

HIRONO:
Why don't you look into this?

BHATIA:
Yeah.

HIRONO:
Because I started again, I'm not sure where I am on the timeframe here. I think I had about two minutes left.

CRUZ:
You were at seven when you stopped.

HIRONO:
Oh. I'm so sorry! Oh.

(LAUGHTER)

Well, you all are being very nice. Thank you.

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BHATIA:
Thank you.

CRUZ:
Senator Blackburn?

BLACKBURN:
Thank you, Mr. Chairman. Mr. Bhatia, thank you for being here.

BHATIA:
Thank you, Senator.

BLACKBURN:
We appreciate it. About a year ago I said that I felt like 2018 marked the end of the age of innocence for the internet. And if you look forward to this summer, we've got Facebook that has been hit with the $5 billion fine from the FTC. In my opinion, that's not enough. It should've been $50 billion. We all know they've been in violation of their privacy agreements.

You all at Google are facing a Justice Department inquiry and if Microsoft's experience with their 20-year anti-trust saga is any indication, then, you know, I hope you realize this is very serious and it's a serious inquiry.

And it seems like the problems around Big Tech--as it has become a mature industry--that they're just mushrooming. And when we talk about privacy or lack thereof, data security, lack thereof, offenders that are the biggest and the worst offenders, unfortunately for you all, people put Google at the top of the list.

So, we appreciate that you are--that you're here. I want to start with you and talk a little bit about prioritization of search results. I think this is important to do because I will tell you I

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feel like you all push the boundaries until your hand gets slapped. As a mom and a grand mom , I would tell my kids, you know, "Don't do that again". And they would try it again and they would try it again. And that's kind of what I see with you all.

But a big business company like you ought not to be having such childish behavior where you do something and you get your hand slapped waiting to see if we are going to get after you or a federal agency is going to reign you back in. You're always out there pushing to the limit.

And in doing this, you have a practice that seems that you suppress competition. And we know that you have--that Google has--through Google Plus you have prioritized search results over Yelp and Trip Advisor. You did that until local search providers really pushed back on you and said, "You can't do that".

Now we see what you're doing is consolidating many of the travel offerings together. And so, you're trying to push forward to dominance in the travel market and you're doing that through an app called Trips. And now, you're going to be armed with all of these details, all of this data--all of this search data from people that use your service. And you're going to use that prioritization to wipe out competition from travel booking sites. And I'm concerned about the threat to competition that Google poses and how search prioritization harms new startups that are seeking to enter the marketplace.

So, let me ask you a couple of things. Does Google actively prioritize Google's own local search results, yes or no?

BHATIA:
We seek to provide users, Senator with responses to their queries that are most relevant--

BLACKBURN:
Sir, yes or no?

BHATIA:

--and authoritative, so.

BLACKBURN:
Yes or no? Do you prioritize?

BHATIA:
No. No, un--unless our services--what we would put forward would be more relative and authoritative.

BLACKBURN:
Thank you. Does Google know if its own search results are better than the third-party competitors?

BHATIA:
It would depend entirely on the different search that you're, you know, queries that you're looking--

BLACKBURN:
So, you have all the data. You're not quantifying and you're not prioritizing.

BHATIA:
There are billions of searches that get run every day. Sometimes we would surface--

BLACKBURN:
Okay.

BHATIA:
--information that we would have, sometimes others.

BLACKBURN:
The answer is yes, you do prioritize and yes you do use that information. People--people aren't dumb. They can check how those search results come in.

When the FTC investigated Google from 2011-2013, it discovered a business practice that is called Co-Occurrence Signals. That is Google products would be triggered to appear above the 10 blue links when the appearance of a competitor occurred in the page rank results. Does Google still use any fur--any form of co-occurrence signals to suppress the competition in search results?

BHATIA:
Senator, I--you're--you're deeper into that than I--I know the immediate answer to. I have to get back to you on that and I will tell you that the FTC--

BLACKBURN:
Why don't you submit a--something in writing then for the Committee, so that we have that. This is a practice you're not supposed to be conducting at this point. You've been investigated for it.

Okay. On Monday, you claimed in an Op Ed that Google is not politically biased. Yet you acknowledge that Google took down or limited the reach of conservative content and accounts, and only did so mistakenly.

If you want us to believe that Google is an equal opportunity search engine and not an equal opportunity offender, let me clarify exactly what an equal playing field would look like for you all at Google. Google should equally promote video reporting in its search results whether the article is from CNN or Fox News. Do you agree?

BHATIA:
We have both CNN and Fox News--

BLACKBURN:
In other words--

BHATIA:
--in our news corps.

BLACKBURN:
Okay. Should Google equally promote news articles in its search results whether the article be from The Huffington Post or Breitbart?

BHATIA:
I--the--the--we surface the results--

BLACKBURN:
Okay. You don't know the answer to that one too. Did YouTube equally promote videos from Diamond and Silk at the same time as videos from John Oliver?

BHATIA:
Again, both are in the corpus. What gets surfaced is most responsive.

BLACKBURN:
Okay. You don't know the answer to that one. Thank you. I'll move on.

In December 2018, reports surfaced that Google employees sought to block Breitbart from Google ads since less than one month after President Trump took office. Google employees sought to use what they called "hate speech" as a pretense for banning Breitbart from taking part the emails show.

Ultimately, these Google employees did not succeed in their efforts to censor Breitbart. Has your advertising platform ever enacted policy that tended to favor certain viewpoints over

others?

BHATIA:
No, Madame Senator. We don't use political indicia to influence our ads.

BLACKBURN:
Okay. Has Google ever blacklisted or attempted to blacklist a company, group, individual or outlet from its advertising partners or its search results for political reasons?

BHATIA:
No, ma'am. We don't use blacklists/whitelists to influence our search results or--

BLACKBURN:
For what reason does Google blacklist a company?

BHATIA:
We--as I said per your previous question, we do not utilize blacklists or whitelists in our search results to favor political outcomes. It's not--doesn't happen.

BLACKBURN:
I have one last question, Mr. Chairman if I have permission.

In March 2019, Google set out to form a council on the future of artificial intelligence. That is something very important to us here at this Committee. One topic was fairness in machine learning.

BHATIA:
Yes, ma'am.

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BLACKBURN:
Of the eight members appointed to the council, only one conservative was appointed. That was Kay Cole James. She's the president of the Heritage Foundation. She is widely respected as a leader in the conservative movement.

BHATIA:
Yes.

BLACKBURN:
Her appointment caused 2,500 Google employees to sign onto a letter opposing her appointment. The A.I. panel fell apart after Ms. James was unfairly tarred and targeted for her policies.

These days we hear a lot about implicit bias.

BHATIA:
Uh-huh.

BLACKBURN:
What has Google done to address the widespread implicit bias against conservative values that persist throughout your corporate culture? And we understand this is in the physical sense and in the virtual sense.

BHATIA:
So, first of all, with respect to our corporate culture, let me again, emphasize we're 100,000 people. We are in many states around the United States including Tennessee. We are a diverse group of people with many different views.

But we do recognize that there could potentially be challenges with implicit bias and that's precisely the reason that we construct our search engines, construct our platforms in such a

way that bias does not get built in.

And so--and core to that--core to that is the system of making sure that any change in the algorithm that could be proposed or is used is run based through a rating system--a system of search raters that consists of thousands of people throughout the United States. I think 49 states throughout the U.S. at any change to promote one change to the algorithm that's made more authoritative would need to be reviewed by all of them.

BLACKBURN:
We appreciate that. And at this Committee, we're going to be looking and doing a deep dive into the issues of privacy, data security, antitrust, competition, censorship, prioritization. And we hope that you will come with an open mind to the table and be willing to work with us. I yield back.

BHATIA:
Thank you.

CRUZ:
Thank you. Senator Blumenthal?

BLUMENTHAL:
Thank you, Mr. Chairman and thank you for having this meeting. Welcome to the Committee--

BHATIA:
Thank you, Senator.

BLUMENTHAL:
--and thank you for being here. I want to first ask you about an allegation which actually, the president surfaced on Monday. The president threatened to launch a treason investigation

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into Google for allegedly working with the Chinese government. The claim appears to be based on a comment and I'll ask that report of that comment be entered into the record if there's no objection.

CRUZ:
Without objection.

BLUMENTHAL:
A political article dated July 16th, the claim appears to be based on Peter Thiel's allegation that Google has been somehow involved in treason. We know it's been a target of Chinese hacking most prominently in 2009. Have you found any evidence of infiltration of your management or your private data by Chinese intelligence?

BHATIA:
Absolutely not, Senator.

BLUMENTHAL:
Has Google made any decision about its contracts with United States government based on pressure or in consultation with China?

BHATIA:
Absolutely not.

BLUMENTHAL:
Has Google turned over or in any way turned a blind eye to a leak of its software or private data to Chinese intelligence?

BHATIA:

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Absolutely not. The take extremely seriously that the--the threat of any penetration of our systems.

BLUMENTHAL:
And if Google software, private data or management is breached by a foreign intelligence agency including China, will you commit to notifying this Committee immediately?

BHATIA:
Certainly, sir. And indeed, we work closely with the law enforcement agencies of the U.S.

BLUMENTHAL:
And other appropriate--

BHATIA:
Yes.

BLUMENTHAL:
And other appropriate agencies?

BHATIA:
Yes.

BLUMENTHAL:
Thank you. You know, I want to make an observation which I think perhaps you've already sensed from the hearing, but also from comments made well prior to this hearing by myself over months, years. But my colleagues today on both sides of the aisle, the hourglass has run out on antitrust, on privacy, on moral imperative.

Big Tech--most particularly Google--is right now in midst of a perfect storm. And it will require a restructuring and repurposing of what you do. And I hope that you are thinking

radically--if I may use that term. Not radically politically, but radically in terms of the role and responsibility that you have in modern American society because I think it has to be changed profoundly.

My complaint about the Facebook settlement so far as what we know of it right now is not the abjectly inadequate amount of the proposed penalty. Five billion dollars is barely a tap--not even a slap on the wrist. But the--the apparent lack of any structural behavior or leadership reform that will be required. We don't know precisely what the outcome will be, but I think that it is more than a missed opportunity. It is a forsaken obligation if there is no radical order to restructure and change Facebook.

On the issue that brings us here today, I want to first disclose that Robbie Parker is a former constituent of mine. His eldest daughter--his six-year-old daughter, Emily was killed in a shooting that is painful for any of us to recall, but most especially for him. So, I want to thank him, and pay tribute to his bravery, and his courage for being here a second time.

Also, in the interest of full disclosure I should tell you that the Connecticut firm representing him in his lawsuit against Alex Jones is one where one of my son's--my oldest son--works as a lawyer. But he and I have not discussed this case.

Mr. Parker and other parents of those children repeatedly went to Google when Alex Jones and others used YouTube--YouTube to--and I'm quoting him--"regurgitate demonstrably and undeniably false information about the Sandy Hook shooting while simultaneously attacking victims' families for profit".

These lies were more than just false. They were malicious. They were cruel. They incited harassment, physical threats. They forced this family literally every day to relive their loss. And as Robbie Parker told us last time he was here, for too long Google and its peers were "complacent to the threats".

This stuff is not speech. It's incitement, harassment, defamation. I respectfully suggest whatever your machines are, they're not working. Would you agree?

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BHATIA:
Senator, if I may just again, our hearts go out to Mr. Parker and his family for that tragedy. We--and absolutely, we believe that hoax videos of the kind that you reference and more where he had to experience have no place on any of our platforms. And we have taken the--the challenge--the--the--the--the need to address that very seriously including most recently amending our policies earlier this year or--or--or community guidelines to make clear that any such video that comes up will be taken down immediately.

We do--again, due to the quantity of video that gets uploaded at any point in time, we have to depend on tools--on---on machines to--to try and spot those videos. We constantly are trying to improve them and--and they are improving.

Where we miss something and it gets caught by another, you know, a--a viewer, we then take action against it.

BLUMENTHAL:
Well, speaking for Mr. Robbie Parker who's not here today, but Andy Parker is, these kinds of policies, guidelines--forgive me--platitudes are no substitute for affective enforcement. And I have said--if I've said it once, I've said it 100 times. The best policies--the best laws that we make are dead letter unless they're effectively enforced.

I say that as someone who spent most of my time--

BHATIA:
Yeah.

BLUMENTHAL:
--in enforcement, not legislative. And I have to conclude given what I saw before today and then what Senator Hirono showed you, that the machines are not working and that you are dependent as much on the victims coming to you. And then, often the victim's not believed

or not heeded. And I guess I'm looking for a commitment that you'll do better machines or you'll have different ways of detecting and different ways of enforcing.

But again, not just guidelines or policies, but actually investing in what's needed to make these policies and guidelines real.

BHATIA:
Senator, you absolutely have our commitment--my commitment that we continue--will continue to invest in that space. I--I--I--all I can tell you is that we don't want those kinds of videos up. There's--there's--there is an--it's certainly not conducive to the kind of a community we're looking to build at YouTube.

It is--given the sheer quantity of video that gets uploaded, it is a tough computer science challenge. But we--

BLUMENTHAL:
But you're the ones that upload it.

BHATIA:
Well, individuals will be.

BLUMENTHAL:
You're the ones that are responsible for it. You happen to have a provision of law that dates from the inception of the internet that gives you--in my view---a very excessively broad shield of immunity. We can debate the merits of Section 230 at another time.

But you can't simply unleash the monster and say, "It's too big to control." You have a moral responsibility even if you have that legal protection. And again, with all due respect, I think there is a moral imperative here and the hourglass has run out.

BHATIA:

We--we agree that it is a responsibility that we and all platforms have to make sure that, you know, videos like that don't appear on our system.

BLUMENTHAL:
And what specific steps are you going to take besides guidelines and policies?

BHATIA:
I--I--it--it can take--it's--it--it--a lot of it will come down to improving the--the algorithms--excuse me--improving the--the--the--the--effectively the tools that make the machine learning tools that we have to spot videos--to spot violative videos.

Again, I--I will say that there's dramatic improvements happening in this space as technology improves and we are already catching far more. People will sometimes put up videos that contain snippets or will contain a bit of video and then enter slice--spliced with other forms of video and then back to the video.

And so, there are all sorts of tools that people sometimes try to utilize to get around our policies. And again, we're training machines to try and catch those as well. Ultimately, technology is going to have to be a part of the solution here and we're--we're, you know, working.

BLUMENTHAL:
My time is limited, but I want to ask you just a couple of more questions. Has Google committed to an independent audit of how it enforces these policies as Facebook and Twitter have promised?

BHATIA:
We consult with many people on trying to figure out what the best way of meeting these challenges are, Senator, you know. So, we--we, you know, them--we look to them for input on how we're doing. We're looking for advice on how to best to make the challenges.

BLUMENTHAL:
What about an independent audit? Facebook and Twitter promised it. Have you committed to it? I think the answer is no.

BHATIA:
Not along the lines of what exactly you're--you're referencing, I think.

BLUMENTHAL:
Yeah.

BHATIA:
But we do--

BLUMENTHAL:
The answer is no. Why not?

BHATIA:
Well, are you talking about against hoax videos specifically, Senator?

BLUMENTHAL:
Well, they've committed to an independent audit of how their policies and guidelines are enforced.

BHATIA:
We--we--again, the--there are a lot of

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individual policies and guidelines that we apply. So, YouTube community guidelines is an example. Our advertising guidelines, our search rater guidelines--there are a lot of different guidelines. Each one we utilize different forms of effectively testing and verification to see how we're doing.

So, I'm not sure that a single audit of the entirety of what our guidelines--our policies are would be--would be viable.

BLUMENTHAL:
Well, they--they committed to an audit of policy guidelines on--specifically on Civil Rights which is what has brought us here today.

BHATIA:
So--

BLUMENTHAL:
Will Google commit to that same kind of audit?

BHATIA:
We--we have not yet. I think it's something that we will be looking at. We certainly have a great deal of, you know. We look to--we look to the civil--we have engaged with the Civil Rights community with leadership in that community to figure out how are--

BLUMENTHAL:
My time is limited, so I want to ask you and I apologize for--

BHATIA:
Please.

BLUMENTHAL:

Last month, one of your colleagues told the Commerce Committee-and I was doing some of the questioning--that recommendations for harmful misinformation have dropped "by over 50 percent in the United States". These are views from YouTube's recommendation system directed by YouTube itself from systems that it controls. Why have the number of views for harmful content dropped by only one half? Doesn't that--why hasn't the amount of traffic that YouTube itself is driving dropped to zero? You can control that.

BHATIA:
I'm not sure I entirely follow the question, Senator. But let me see. So, the--the recommendation system that you're referencing beforehand--

BLUMENTHAL:
Right.

BHATIA:
--we have seen a significant diminution (PH) as we've implicated policies earlier this year that are designed to sort of get at some of these kinds of, you know, content that you're referencing before. So, maybe hoax videos or content that tends to be, you know, anti-vax kind of content, you know, marginal content significantly deprioritized as we have improved our algorithms for what is recommended. So, we have seen a significant decrease in that. We're going to continue to work on it.

With respect to--I'm sorry. The second--I didn't follow the other part of the question.

BLUMENTHAL:
Well, I guess the question is why haven't you reduced it to zero? And I'm going to yield back, Mr. Chairman because I (INAUDIBLE).

CRUZ:
Thank you. I'll continue to engage. Thank you, Senator.

BLUMENTHAL:
(INAUDIBLE) or we can pursue it in writing.

BHATIA:
Please. Happy to. Thank you.

CRUZ:
Thank you. Senator Hawley?

HAWLEY:
Thank you, Mr. Chairman. You said that Google takes its content moderation responsibilities very seriously. That's your testimony here today, is that fair to say?

BHATIA:
We--

HAWLEY:
You started to be even-handed and neutral.

BHATIA:
We--yes, we construct our--our algorithms to be politically neutral to say--

HAWLEY:
And "politically objective and apolitical" I think were your exact words.

BHATIA:
Exactly, yes.

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HAWLEY:
Is that right? And you don't--you don't oppose filters based on your political viewpoints, that's your testimony?

BHATIA:
That's correct.

HAWLEY:
And despite the fact that almost exclusively, your executive's employees donate to one political party. I think 1 percent of the donations that came from Google in 2016 went to Republicans or Donald Trump. All the rest went to the other party, Hillary Clinton, the Democrats. It is your testimony that you do--you never use content moderation to advance an ideological agenda, is that correct?

BHATIA:
Yes, Senator and it's, you know. We--we--it is both contrary to our mission, contrary to our business interest and it would be incompatible with the systems that we build to work political bias in there which I think is why we have third party studies--

HAWLEY:
Right.

BHATIA:
--including the ones that I referenced that demonstrate that we do not have political bias in our products.

HAWLEY:
And inconsistent with your basic values I imagine you would say as well?

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BHATIA:
Inconsistent with our values.

HAWLEY:
Except for when you do it in China, right?

BHATIA:
We have no--

HAWLEY:
I mean, you're happy to censor for the oppressive, authoritarian Chinese regime like for instance, with Google.cn happy to censor away any mention of Tiananmen Square, happy to help the Chinese government maintain control of all information within the company--the country, happy to help them control the information flow to their own citizens. You're happy to do all of that. Would you call that censorship with an ideological agenda?

BHATIA:
Senator, we don't offer almost any of our products in China. We don't offer search--

HAWLEY:
Google.CN--wait. Wait. Wait. Are you saying that Google.CN did not include censorship tools based on what the Chinese regime asked for? Is that your testimony?

BHATIA:
Google--

HAWLEY:
Just remind you, you're under oath now.

BHATIA:
We have not--we have not--

HAWLEY:
Google.CN did not offer--did not include censorship material?

BHATIA:
Senator, I don't know what you're--

HAWLEY:
You're not familiar with Google.CN?

BHATIA:
I--I am--I'm using--I'm referencing the fact that we exited China in 2010 and we did so because Google at that point, we--in addition to being under attack, we felt that the censorship requirements that were being applied to Google were not compatible with this--with the products that we were able to offer.

HAWLEY:
But you did offer Google.CN. You developed it and it included censorship tools that would've screened out things like mentions of Tiananmen Square, is that correct?

BHATIA:
I--I'm sorry, Senator. Are you referring to Project Dragonfly? Is that--

HAWLEY:
Well, since you--I wasn't, but since you--

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BHATIA:
Okay.

HAWLEY:
--because that's a separate thing.

BHATIA:
Yeah.

HAWLEY:
But since you mention Project Dragonfly, why don't you tell us about it? Is it active right now?

BHATIA:
It's not, Senator.

HAWLEY:
You're able to say that for the record it's not active? You've abandoned Project Dragonfly?

BHATIA:
I mean, yes. We have--we have terminated that, so.

HAWLEY:
Are--are you willing to commit today here that Google will not agree to participate in any form of censorship with the Chinese regime in China against Chinese citizens or will you commit to that? You will not agree to any information or--or restrictions on data flow in China--the Chinese market?

BHATIA:
Senator, I don't--I can probably imagine hypothetically what you're referencing. We don't--

HAWLEY:
Well, I was talking about Google.CN for instance.

BHATIA:
We don't represent--reference China's search in China. Fundamentally in China, we actually do very little today certainly compared to any other major technology company. We really--

HAWLEY:
So, you won't block search terms for (INAUDIBLE) in concentration camps or Tiananmen Square? You won't do that in any venture--

BHATIA:
We--

HAWLEY:
--any venture going forward?

BHATIA:
We--we--we don't--

HAWLEY:
No, I'm not ask--I'm not ask--

BHATIA:

--Senator.

HAWLEY:
--I'm asking you won't because we know you have in the past. That's what Google.CN was, you know. You've contemplated it with Project Dragonfly. I'm asking you now for a commitment. I'm glad to hear you say that Project Dragonfly's been cancelled. I think that's news. So, that's good to hear because there's been news reports that it's still active, so I'm delighted to hear that.

BHATIA:
We've made clear that we have no current plans to go into China in the search market.

HAWLEY:
That's great. So, that--that's great. And you're committing to me here today that you will not in the future do so and you will not engage in censorship in China, is that correct?

BHATIA:
What I--what--what--what we are willing--

HAWLEY:
That's a yes or no actually. Yes or no.

BHATIA:
--to commit to Senator is that any decision at ever look at going back into the China search market is one that we would take only in consultation with key stakeholders.

HAWLEY:
Yeah. That's what you said in response to Senator Blumenthal's questions about whether or not you submit to an audit. It was the longest no in the English language. Now you're not

giving me a yes or a no.

Are--are you--let me just come back to a question that--that Senator Blumenthal asked I thought was interesting. You're confident that Google hasn't been infiltrated by a Chinese intelligence?

BHATIA:
We see no evidence of that, Senator.

HAWLEY:
What--what do you think about General Dunford of the Joint Chiefs of Staff comment at the Atlantic Council a few months ago that typically--I'm quoting him, "Typically, if a company does business in China, they are automatically going to be required to have the cell of the Communist Party in that company and that is going to lead to intellectual property from that company finding its way to the Chinese military." Do you--do you think he's right about that? Wrong about that?

BHATIA:
Senator, we don't--we do as I mentioned before, barely any business in China. So, I don't understand the basis.

HAWLEY:
But you have and you have tried.

BHATIA:
In 2010, we exited the country.

HAWLEY:
That wasn't--that wasn't that long ago.

BHATIA:
Ten years ago.

HAWLEY:
Okay. Well, you've been--my point is this. You've been more than willing to engage in ideologic censorship in the largest market in the world. You have been more than happy to partner with the most repressive, authoritarian regime on the planet all for profits--whatever it is that is good for Google. Why would anybody believe you now when you say you won't--you won't submit to a third-party audit. You just answered Senator Blumenthal no to that.

You won't commit to me that you won't engage in censorship when it suits your purposes in China and the Chinese market for instance, in the future. Why would anybody believe you now when you say, "We don't ever impose an ideological agenda"? What assurances can you give us?

BHATIA:
Senator, I think what I can tell you is that in China today, we don't offer any of the products that you're referencing that would--

HAWLEY:
No, I mean here. What assurances--why would we believe you now when you say in the United States or anywhere that you do business--why would we believe anything that Google says about what it does or does not do in terms of promoting an ideological agenda?

We know you've done it in the past. We know you do it when it suits your--your bottom line. Why would we believe you now? What assurances can you--besides your own testimony?

BHATIA:
Senator, I--I fundamentally disagree that we're doing, you know, that these are practices for a bottom line. I--I--I will tell you that the--Google has a demonstrated track record of

building search engines that meet the needs of consumers here and around the world. We are a trusted brand, you know.

I--I don't know what answer you're looking for, but it's--

HAWLEY:
Uh-huh. Well, what I'm looking for is a little honesty and what I'm also looking for is some accountability. So, let me just ask. Let me give you another shot at Senator Blumenthal's question. Will you submit to an independent third-party audit about your content moderation practices?

BHATIA:
Again, we have plenty of people looking at our content moderation.

HAWLEY:
You just (INAUDIBLE) which is basically a no.

BHATIA:
The Economist just did a year-long study on--

HAWLEY:
The Economist is not an independent audit. They're not--

BHATIA:
It was entirely independent of Google.

HAWLEY:
So, is that a yes?

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BHATIA:

I mean, if--

HAWLEY:

If you're happy to do it, if--

BHATIA:

If third parties want to moderate--

HAWLEY:

You'll open your books to them?

BHATIA:

--and look at us--

HAWLEY:

This is big news we're going to make today. Is this a yes?

BHATIA:

I--

HAWLEY:

Is this a yes? We're going to need a yes.

BHATIA:

No, I'm--I'm telling you that

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that Google--that Google's content moderation has been looked at by--

HAWLEY:
So sad. Let me--so sad.

Let me ask you about YouTube and some other difficult decisions. China seems to be difficult for you. YouTube is also apparently very difficult for you. Why isn't it--what is so hard about ending the automatic referral of videos featuring minors to pedophiles? Why is that difficult? Why doesn't YouTube just do it? You--you--you know you can stop it. Why? Why won't--why won't you just do it?

BHATIA:
Senator, I'm not sure. We--we--

HAWLEY:
You're not familiar with this issue?

BHATIA:
No, I'm familiar with the issue that you're referring to. Based on our policy decisions that we've made earlier this year, we have eliminated referencing or recommending videos that contain minors in risky situations--risky--risky conditions.

HAWLEY:
Wait. So, you're telling me that you've--you've turned off the auto--you've taken them out of the algorithm, you've turned off the auto referral? You're no longer recommending them to minors?

BHATIA:
Yes, not all minors. There will be situations where there's perfectly legitimate video footage containing minors. But videos that contain minors in risky situations--risky conditions-- we

have stopped recommending those videos.

HAWLEY:
How--how much money does YouTube make from videos featuring children?

BHATIA:
I--we don't breakdown money that way, Senator.

HAWLEY:
You don't? You don't know the--you don't know what the--really? Because I thought the response to the New York Times was that it would not be--it--it--it would be devastating for your business model?

BHATIA:
I--I don't know--

HAWLEY:
You don't know?

BHATIA:
--that reference. We don't--that--I can tell you that the kinds of videos that you're referencing, we don't. We have no desire to see pedophiles utilizing YouTube or--

HAWLEY:
I wouldn't have thought so either.

BHATIA:
--for--and that's the reason we've taken a number of steps.

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HAWLEY:
How about this? Will you support--you may know that I've introduced a bill that would--that would citify (PH) this into law--steps sounds like the ones you say you've voluntarily taken.

So, will Google support that bill that would stop any company, yours or others, from automatically referring videos featuring minors in this way?

BHATIA:
I'd be happy to. I haven't looked at the bill, but I would be happy to look at it and certainly it's an area, it sounds like that we have a common interest in working towards successful outcome on.

HAWLEY:
Well, it's certainly an area in which the American people have an interest to protect the children, just as the American people have an interest in getting inform news--information that is free and fair. Just as the American people have an interest in having their data promote--protected.

BHATIA:
Absolutely.

HAWLEY:
Just as the American people have an interest in having companies that describe themselves as a probably American company. Those are your words.

BHATIA:
Absolutely.

HAWLEY:

From not doing business with, sharing secrets with, or otherwise promoting the worst most authoritarian regime on the planet, which is China. So, you know I'll disassociate myself with the remarks, but I think all of my colleagues here, clearly, trust inpatients in your company and the behavior of your monopoly has run out. It has certainly run out with me and I think it's time for some accountability. Thank you, Mr. Chairman.

CRUZ:
Thank you, Senator Hawley. Mr. Bhatia, you talked about the Google values being a trusted band--brand. I will tell you; I think that trust has been severely eroded. Google as I understand it was founded on a motto of don't be evil. There are more than a few Americans who have skepticism that Google is living up to that promise. You answered Senator Hawley that, well, gosh the economist and others have done studies. Did the economist have access to Google's internal records?

BHATIA:
No, Senator. I believe it was done externally. They looked--they ran a series of tests based on results that they were plugging into our search engines.

CRUZ:
So, one of the very frustrating things about this topic is there are very limited data. Much of this topic gets argued by anecdote, which is a less than satisfying way to consider any topic or to consider any analysis and it yields things such as Democratic Senator saying there is no censorship. The problem is Google has all the data, as does Facebook, as does Twitter. Let me--let's--let's see if we can get a little bit of that the data. In the year 2018, how many ads by Republican officeholders did Google block?

BHATIA:
How many political ads?

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CRUZ:
How many ads by Republican officeholders did Google bach--block?

BHATIA:
I don't have the number off the top of my head. I would say the vast majority of ads that gets submitted, get.

CRUZ:
Will you commit to answering that question?

BHATIA:
We--we would be happy to come back to you.

CRUZ:
And I want the same answer. How many ads by Democrats did Google block? How many video--how many videos by Republican officeholders did the YouTube block? How many videos by Democratic officeholders did you to block? Those are objective. Data--

BHATIA:
Yeah. On the latter question, I did--we looked into that. There are--there were no videos blocked by Republicans or Democrat members of--of the Congress.

CRUZ:
Okay. So, my understanding actually is one of the members of this committee Senator Marsha Blackburn, had one of her ads blocked because you deemed it shocking content. What--

BHATIA:

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Ads--ads again, distinguish ad from videos. I thought you divided those two. Ads, we have had both Democrats and Republicans on occasion be blocked. In the case of Senator Blackburn, yes, there was an ad that she submitted. It involved one of the people on the ad voicing an obscenity that--

CRUZ:
Although that was bleeped out. Is that correct?

BHATIA:
That violates our policies. Well, it was clear what it was apparently and that was fine. And so, we went back, we talked to the Senator office and fix that.

CRUZ:
So--let me--let me say, I appreciate your commitment to answer these questions and I'm going to ask them to you in writing.

BHATIA:
Um-hum.

CRUZ:
If Google will answer some straightforward questions, that provide the data, that may go a long way either to exonerating Google or to demonstrating there's a real problem. And--and not only on the metric of Republicans versus Democrats, also on the metric of how many pro-life ads has Google refused to run.

We--this committee has heard testimony, for example, is the movie Unplanned. The true story about a former employee of Planned Parenthood. Google refused to run their ads. So, that's a question I like an answer to. How many pro-life ads did Google refused to run and how many pro-choice ads did Google refuse to run?

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Likewise, how many pro-Israel ads has Google refused to run? How many--how many anti-Israel ads? Those data--right now, Google is a black box, and nobody knows. Let me ask another question. What was the average add rate Google charged the Trump Campaign in--in the 2016 campaign?

BHATIA:
Add--ad rates Senator are set by auction. So, Democrats, Republicans, it's--it's entirely based on when they would want to run it.

CRUZ:
There is an average ad rate, that is a number. It would be the average of the rate you charged across the board. And I'm going to ask you in writing, what was the average ad rate the Trump Campaign paid and the--the Clinton Campaign paid? And if those two numbers are roughly equal, that will indicate one thing. If those two numbers are wildly different, that may indicate something else. And right now, it is Google that knows that. And--and as far as I know nobody else.

BHATIA:
If I may again, just on ads specifically, all ads or not the same. In other words, if you are running a banner headline on YouTube that may be a higher price than a lower, less price.

CRUZ:
If--if--you like--

BHATIA:
So, it's a matter of going to be like for like.

CRUZ:

That would be fabulous. And you're more than welcome to break it down the average banner ad rate for the Trump Campaign was X and the average--if they're three--three different types of ads, break it down and whatever category, but compare apples to apples.

BHATIA:
And if I could also Senator, we do have all of the advertising spending for all members on our website, where we publicize this. There's a transparency report that we put out annually on spending by--candidates. It's all up there. Welcome to--we would be happy to point it out to your staff.

CRUZ:
Now--now--now let me ask you. You know, some have asked well, gosh who would possibly think that Google was discriminating against conservative views. --The senior leadership at Google, does it lean left, or does it lean right?

BHATIA:
Senator, senior leadership that the whole team consists of people from a variety of different perspectives, from outside the United States, from Americans--

CRUZ:
Mr. Bhatia, you are doing something rather remarkable, which is your man--managing to be less candid than Mark Zuckerberg.

(LAUGHTER)

Mr. Zuckerberg, when he testified before this committee ,admitted Silicon Valley is overwhelmingly liberal and anyone operating in the realm of--of simple reality would acknowledge that. Would you agree with that?

BHATIA:

Senator, I go back to 100,000 people, 70, 80 different countries, leadership teams pulled from all over the world, I don't think it's an--a matter of easy caricature. The days when we were just a Silicon Valley company has changed.

CRUZ:
Okay. Let--let--let--let's--let's focus on--on some simple data. It's where data is helpful. I did a FEC analysis in 2016, of senior executives at Google. People who had the title of some form of Executive, Vice President, or Director, found at least 88 unique senior--senior officials at Google who made contributions to the Hillary Clinton Campaign. 88. Do you know how many--how many senior executives at Google made contributions to the Trump Campaign?

BHATIA:
Senator, it's not my business to look into that.

CRUZ:
Care to field a guess? Zero. Goose egg. Not a single one. This isn't close that you can't say, gosh, I don't know anything about the politics here. That--that is disconnected from reality. Let's look at other--at another example. Senator Blackburn asked about the Advisory Council that you put together on artificial intelligence. One of the people on the Advisory Council was Kay Coles James.

BHATIA:
Um-hum.

CRUZ:
Who is the head of the Heritage Foundation?

BHATIA:

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Yes sir.

CRUZ:
You worked at the Heritage Foundation; I believe you said.

BHATIA:
I did.

CRUZ:
Do you consider the Heritage Foundation some fringe organization?

BHATIA:
No, Senator. I consider it a conservative organization.

CRUZ:
So, 2500 Google employees signed a petition to have Ms. James removed from the Council and they said, "by appointing James to the ATEA, Google elevates and endorses her views, implying that hers is a valid perspective, worthy of inclusion in its decision-making." This is unacceptable. So, you have 2500 employees at Google saying that Ms. James, who by the way is an African American woman, was one of the first women to desegregate the Richmond Public Schools. 2500 Google employees saying that her view is not valid or worthy of inclusion. Google in response to this dissolved the entire committee. Do you understand when you see that kind of bias saying a conservative African American woman's views are not valid and not worthy of inclusion, that the American people would say these guys are silencing voices they disagree with?

BHATIA:
Senator, the 2300 amounts to something around 2 percent of the Google employees.

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CRUZ:
But Google acted on their recommendations.

BHATIA:
No, Senator.

CRUZ:
They dissolved the committee.

BHATIA:
We did not, Senator. What happened in that situation was it was a committee that consisted of a number of--of members. As time progressed, a number of members of the committee, other than Ms. James decided to--re--to--to fall off the committee--to withdraw from the committee. So--

CRUZ:
So, is--is it your testimony, Mr. Bhatia because I'm finding this--this--this difficult to credit. Is it your testimony that you--that Google did not dissolve the committee because your employees were mad that anyone right of center was included?

BHATIA:
We dissolved the committee, Senator. I think we were clear at the end of the day that--that--that it was not going to be viable to continue the--the--the Council given what we were seeing happening with other members of the committee.

CRUZ:
In March 18 email, to at least 17 other Google employees, Google employee Liam hot--Hopkins stated that, "pay--Prager U, Jordan Peterson, and Shapiro at all are all Nazis." This

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is a quote. "Are using dog whistles." He further suggested that Google isolate this quote far right content. Is it your judgment that Mr. Prager, Mr. Peterson, and Mr. Shapiro are Nazis?

BHATIA:
No Senator.

CRUZ:
At least two of the three Mr. Prager and Mr. Shapiro are Orthodox Jews. Are you familiar with any Orthodox Jews who are Nazis?

BHATIA:
No Senator.

CRUZ:
Is that not a horrifically offensive nutty statement?

BHATIA:
Senator, we have 100,000 people in the company and there are 5,7 times the number of people who work in Congress. We have people who will say things on you know chat rooms, and other things that--

CRUZ:
So, there were--there were at least 17 Google employees on that email. Did even one of them object to this characterization?

BHATIA:
I don't know whether they did or not, Senator. We have a lot of these chat rooms that go on. People say things in chat rooms that certainly don't reflect the views of the company. You know, that--it's--it's not unlike many other workplaces around the world. What--people may

say things that--you know don't reflect the views of the leadership team and management. We're--you know, it is what it is.

CRUZ:
Do you understand why people would be skeptical of Google's judgment and the radical politics of Google employees when you believe Orthodox Jews like Mr. Prager and Mr. Shapiro are secretly Nazis.

BHATIA:
Again, Senator, this is a statement that was made by an individual employee on some chat room, board.

CRUZ:
Google Executive Jen Gennai, was videoed saying that Google is "training its algorithms" with an eye to prevent something like 2016 from happening again. Is that what Google is working to do? Oh, and here--here's the quote. "We're also training our ag--algorithms, like, if 2016 happened again, would we have, would the outcome be different."

BHATIA:
So, Senator, this was taken I believe from the project Veritas videos. Where Mr. Gennai was--who is a--Google employee without responsibility for our search algorithms, was secretly videotaped without her consent. Her reference that you're quoting here and that the video subsequent made, was to activities that we have undertaken to make sure that election interference that would seem foreign state interference in elections that was seen in 2016, does not happen again. That's what the reference is to.

CRUZ:
Well, I--I think one of the best things to come out of this hearing, is your commitment to answer the clear and direct questions from this committee, with real numbers and specific

hard data on Google's practices. That will go a long way to providing transparency that has for too long been missing. And let me echo both Senator Blumenthal and Senator Hawley, that I would strongly advise Google to submit to an independent third-party audit, that has no bias, that has no ax to grind, with access to Google's records. An audit that doesn't have access to the record is meaningless. Your competitors are doing so, and I believe the American people expect transparency from all of Big Tech. Senator Hirono.

HIRONO:
Just for clarification. So, my understanding is that Google has a very different business model than Twitter or Facebook. So, while those entities can agree to a third-party audit that would include I guess content, looking into their--their records in a way that--that they can that--that still enables them to retain their, I don't know the business methods or whatever it is, but you're in a very different kind of category. Is that why you are having such a hard time saying that you would sub--submit to a third--party audit of--your content moderation practices?

BHATIA:
Well, Senator, we are in a very different business. We're not a social media platform, the way you--the other companies Facebook and Twitter you referenced are. We're actually many different platforms that we have Gmail, Android.

HIRONO:
Um-hum.

BHATIA:
So, there are a lot of different parts to our business. Certainly, that adds to the complication.

HIRONO:

So, you--you were asked whether--regarding your ads. Okay. I understand that--that the business motto is--is very different. So, you were asked whether you know you've taken down pro-life, pro-choice, pro-Israel, anti-Israel ads. Do you have an algorithm that actually flags out these words?

BHATIA:
No.

HIRONO:
Or--

BHATIA:
No Senator.

HIRONO:
So, how would you even be able to respond to a question if your--your algorithms don't even flag out these kinds of--these adds based on these identifying terms.

BHATIA:
Yeah, we--again, we--we--are--as I explained before, what we do trying to do is--what we do is create algorithms to try and surface the most responsive results. We don't factor in you know whether they contain the word Israel or abortion or any of the other thing. So, it's--it's--they're not constructed that way.

HIRONO:
So, Google is a multibillion-dollar business. So, regardless of your employees exercising their First Amendment rights to put whatever--whatever things that they want to put out there, you don't even agree with I mean Google is a business. Does it even--does it make

business sense for Google to start doing content moderation that's based on somebody's political affiliations or that--their views? Does that even make sense?

BHATIA:
Absolutely not. And you know if we--if we lose user trust, it will be damaging to our business.

HIRONO:
Thank you.

BHATIA:
Thank you.

CRUZ:
All right. Thank you, Mr. Bhatia.

BHATIA:
Thank you.

CRUZ:
Thank you for your testimony. I appreciate you coming. The Senate is right now in the midst of three--three votes. So, what we're going to do is we're going to briefly recess this committee, go and--and cast those votes.

HIRONO:
(OFF-MIC) Three votes.

CRUZ:

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There's three votes, so we're at the tail end of the first vote and so we will vote on those three. I will ask the members of the committee to vote at the very beginning of the third vote and as soon as we do so, we will come back and convene the second panel. So, but--but for now, the--the committee is temporarily recessed.

BHATIA:
Thank you.

(RECESS)

CRUZ:
Good afternoon everyone and welcome back. I would ask each of the witnesses for the second panel to please take your seats. I apologize for that delay. While we went through the three votes we had. We will now begin the second panel of five witnesses. Each witness will have a five-minute opening statement, followed by rounds of questions.

Our first witness is Mr. Dennis Prager. Dennis Prager is a best-selling author, a columnist, and a nationally syndicated radio talk--talk show host. He is also the co-founder Prager University, an institution of higher learning on the Internet that produces five-minute videos in which experts distill complex topics in political science, history, philosophy, religion, economics, and psychology. Mr. Prager was previously appointed by President Ronald Reagan to the U.S. Delegation to the Vienna Review Conference on the Helsinki Accords. He was also appointed by President George W. Bush to the U.S. Holocaust Memorial Council.

Our second witness is Jason Kint. Jason Kint is the CEO of Digital Content Next, a trade association that serves the unique needs of digital content companies. Before joining Digital Content Next in 2014, Mr. Kint served in various executive roles, including as General Manager and Senior Vice President at CBS Interactive and as the Director of Online Publishers Association. He is a graduate of Washington University in St. Louis.

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Our third witness is Mr. Andy Parker. Mr. Parker is the father of Allison Parker. In 2015, Allison was tragically shot and killed during a live TV broadcast. Mr. Parker now travels across the country to advocate on gun control issues and have been working tirelessly to remove footage of his daughter's murder from YouTube and other Internet sites. Mr. Parker recently published a book about his daughter's life and leg--legacy entitled For Allison: The Murder of a Young Journalist and a Father's Fight for Gun Safety.

Our third witness is Doctor Francesca Tripodi, who is an Assistant Professor of Sociology at James Madison University and an Affiliated Researcher at Data and Society. Doctor Tripodi's research focuses on how partisan groups interact with the media and the role that community plays in understanding what constitutes news and information. Both She received a PhD and an MA from the University of Virginia, an MA in Communication, Culture, and Technology from Georgetown University, and a BA in Communications from the University of Southern California.

Our final witness is Doctor Robert Epstein. Doctor Epstein is the--an Author, Editor, and longtime Psychology Researcher and Professor. He is currently a Senior Research Psychologist at the American Institute for Behavioral Research and Technology and he is a Contributing Editor for the Scientific American Mind. He is also the Founder and Director Emeritus of the Cambridge Center for Behavioral Studies in Massachusetts and the Former Editor-in-Chief of Psychology today.

Mr. Prager, we'll start with you.

PRAGER:
(OFF-MIC) Thank you, Mr. Chairman (INAUDIBLE--)

HIRONO:
Microphone.

PRAGER:

(OFF-MIC) Oh, I thought I'd put it on. Ah, okay. Do I get my 20 seconds back?

CRUZ:
You--you--you would think a radio host would know how to do that.

PRAGER:
You would. You would.

(LAUGHTER)

That is a very fine point. I have no response.

(LAUGHTER)

I will take just a moment, because my opening comment is under five minutes, just to respond on the issue of the 10 commend mint--10 Commandments video that was placed on the restricted list by Google. The representative from Google mentioned that--a reason that it would be on the restricted list was that it contains mentions of murder. So, I was thinking. I have a solution that will I think appeal to Google. I will re-release it as the nine commitments.

(LAUGHTER)

That should solve the problem of including murder in my discussion of the 10 Commandments. And as regards to swastika. Yes, there is a swastika. It is again in the commandment of do not murder wherein that murder--there are people that believe murder is all right even today and I use the swastika and the--and the hammer and sickle as two examples. I would think we would want young people to associate the swastika with evil. That was why I had a swastika.

It is an honor to be invited to speak in the United States Senate, but I wish I were not so honored. Because the subject of this hearing Google and YouTube, and for that matter Twitter and Facebook, suppression of Internet content on ideological grounds threatens the future of America more than external enemy. In fact, never in American history has there

been a stronger threat to freedom of speech as there is today. Before addressing this, however, I think it important that you know a bit about me and the organization I co-founded.

Prager University, Prager U as it is often referred to. I was born in Brooklyn, New York. My late father Max Prager was a CPA and an Orthodox Jew, who volunteered to serve in the U.S. Navy at the start of World War II. My father's senior class thesis at the City College of New York, was on anti-Semitism in America. Yet despite his keen awareness of the subject, he believed that Jews living in America were the luckiest Jews to have ever lived.

He was right. Having taught Jewish History at Brooklyn College, written a book on anti-Semitism, and fought Jew hatred my whole life. I thank God for living in America. It breaks my heart that a vast number of young Americans have not only not been taught how lucky they are to be Americans but have been taught either how unlucky they are or how ashamed they should be. It breaks my heart for them because contempt for one's country leaves a terrible the hole in one's soul and because ungrateful people always become unhappy and angry people. And it breaks my heart for America because no good country can survive when its people have contempt for it.

I have been communicating this appreciation of America for 35 years, as a radio talk show host. The last 20 in National Syndication with the Salem Radio Network, an organization that is a blessing in American life. One reason I started Prager U was to communicate America's moral purpose and moral achievements. Both for young Americans and to young people around the world. With 1 billion views a year and with more than half of the viewers under age 35, Prager U has achieved some success.

My philosophy of life is easily summarized, God wants us to be good. Period. God without goodness is fanaticism and goodness without God will not long endure. Everything I and Prager U do emanates from belief in the importance of being a good person. That some label us extreme or "haters" only reflects on the character and the broken moral compass of those making such accusations. They are the haters and extremists.

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Prager U releases a five-minute video every week. Our presenters include three former Prime Minister's, four Pulitzer Prize Winners, Liberals, Conservatives, Gays, Blacks, Latinos, Atheists, Believers, Jews, Christians, Muslims, and professors and scientists from MIT, Harvard, Stanford, and a dozen other universities. Do you think the Secretary General of NATO or the former Prime Ministers of Norway, Canada, or Spain, or the late Charles Krauthammer, or Philip Hamburger, distinguished Professor of Law at Columbia Law school would make a video for extreme or hate filled site? The idea is not only preposterous, it is a smear.

Yet Google, which owns YouTube has restricted access to 56 of our 325-minute videos and to other videos we produce. Restrictive means families that have a filter to avoid pornography and violence cannot see that video. It also means that no school or library can show that video. Google has even restricted access to a video on the 10 Commandments as we have seen. Yes, the 10 Commandments.

We have repeatedly asked Google, why our videos are restricted. No explanation is ever given, but of course we know why. Because they come from a conservative perspective. The liberals and conservatives differ on many issues, but they have always agreed that free speech must be preserved.

While the left has never supported free-speech, liberals always have. I therefore appealed to liberals to join us in fighting on behalf of America's crowning glory, free speech. Otherwise, I promise you one day you will say, first they came after conservatives, and I said nothing. And then, they came after me, and there was no one left to speak up for me. Thank you.

CRUZ:
Thank you, Mr. Prager. Mr. Kint.

KINT:
Good afternoon, Senator Cruz, Ranking Member Hirono, and Members of the Committee. Thank you, for the opportunity to appear before you today.

I am the CEO of Digital Content Next and I'm here to speak on behalf of high-quality digital publishers. DCN is the only association is conclusively focused on the future of publishing. Our members include some of the most trusted brands on the web. Hundreds of them large and small, old and new. From the Wall Street Journal to the New York Times, Disney, Warner Media, NBC, and Fox. To native digital publishers like the Insider and IJR in the Texas Tribune.

I was invited here today to specifically address Google, a company which reaches billions of people across its platforms on which it determines the rules and limits access to its massive data pool. At the same time, Google leverages this data to "compete" against those who depend on its platforms. The web was supposed to be competitive and open, but it simply lost much of that vision as Google's dominance has grown. Google is the primary gatekeeper to any digital content business in four ways which I'll cover today. I'll call them the four D's. Discovery and design of the content and then the data and the dollars that come from consuming the content.

First, discovery. Prior to my move to Washington, I spent over 20 years running digital media businesses. Like publishers today, we had entire teams focused on optimizing content for the maximum clicks from Google search. As it controls more than 90 percent of the search market. Over time, Google has pushed search results off the first screen in favor of more lucrative Google ads and Google's own properties.

Second, design. Google more than any company influences the design of our members content. Google's web browser chrome is responsible for more than 60 percent of the traffic on the web. Therefore, publishers design their websites to work best inside of Google's browser. With the-- with the increase of mobile device usage, Google even developed its own code for the mobile web, which promises even better search results for the publishers who choose to adopt it furthering their grip on the web.

Third, data. Today personal data is collected and used to micro target users across the web as cheaply as possible. Our industries opaque data-driven ecosystem has mostly benefited intermediaries, primarily Google, at the expense of publishers and advertisers. Last month,

for the first time, we saw empirical research that demonstrated this. Google's revenue concentration ties directly to its ability to collect day--to collect data in ways that no one else can.

It's important to understand that Google owns the top five domains on the web that track us, on more than 75 percent of the top 1 million websites. They see much of what we do. Data is the source of Google's power and the leverage it to the hilt. With this in mind, the industry's rules around privacy and data are heavily determined by Google's best interest. Legal teams at publishers are forced to adopt Google's rules or choose not to do business with Google. In other words, there is no choice.

Finally, and forth the dollars. We've been on record since 2015, describing the duopoly of digital advertising, where almost all the incremental growth in our industry is going to Google and Facebook. But in the case of Google, it has cornered the advertising server market. On the supply side, advertising teams are optimizing for Google's ad server and the often-opaque business rules and measurements that Google establishes.

And on the demand side, because Google oversees more advertising demand than any of the top five advertising agencies, Google is able to in effect set the prices of ads in the auction markets. Google determines the rules of their auctions with full knowledge whether or not they will help Google, or they will help publishers. It can't be both. To make matters worse, all these products hinge on Google's algorithms, which are shrouded in a proprietary black box of secrecy, which absorbs most of the data across the web and spits out profits according to how Google decides to tune them.

In closing, I want to thank Chairman Cruz and Ranking Member Hirono, for convening today's hearing. From my perspective, it's abundantly clear that Google dominates the digital landscape and uses that dominance to enhance its own bottom line, to the detriment of the marketplace, and most importantly consumers. In the absence of meaningful competition or constraints, the question we as a society must be asking ourselves, is whether we're comfortable with the world Google is creating for us. It is time to end Google's stranglehold on digital media. I thank you and I look forward to your questions.

CRUZ:
Thank you, Mr. Kint. Mr. Parker.

PARKER:
Mr. Chairman, Ranking mender--Member Hirono, and Senator Blackburn. Thank you all for hearing my testimony today. In August 2015, my daughter, Journalist Allison Parker was shot and murdered while recording on live television. The unimaginable pain felt by my family was amplified after the killer uploaded a first-person video of the murderer to YouTube.

I pledge to honor my daughter's memory and advocate for sensible gun laws, so that others wouldn't suffer the same fate as Allison. In response to my advocacy, countless people have targeted me, my family, and Allison's boyfriend online. Claiming that Allison's death was part of the con-spirit--conspiracy to seize their guns. They have taken the gruesome footage of my daughter's murder, edited it into videos and flooding YouTube and other social media platforms with hate filled diatribes maligning us.

As the company with a virtual monopoly on Internet search and online video hosting, Google has a duty to make sure the information they make accessible to the world is based on facts and not harmful conspiracy theories. I implored Google and YouTube to take down the footage of her murder and the related conspiratorial cons--content. Their response was to suggest that I view and flag the content I found offensive. Instead of self-policing, they put the onus on me. In essence, they wanted me to watch my daughter's murder and explain to a robot why it should be removed. I never have, nor ever--nor will I ever watch any of it, for obvious reasons.

So, in 2017, I reached out to Lenny Posner, whose son Noah was murdered in Sandy--the Sandy Hook shooting and the honor network who worked long hours flagging videos, so--so that I was spared. Although hundreds of videos have been taken down due to their diligence. They are often stymieing even--even with an enforceable copyright. I've engaged

in direct communications with Google regarding the proliferation of these videos, but while they profess a desire to help, in reality they do nothing.

On May 1st, of this year, in the company of Georgetown University civil rights Law clinic, I had videoconferences--conference with representatives from Google regarding specific content and our attempts to have it removed. Their response was, we're really trying. Since that meeting there has been nothing but silence until coincidental--coincidentally not so, but today we got an email from them at 9:47 AM. Thanks to section 230, Google has complete immunity and therefore no incentive to respond and you saw some of the examples earlier in utter fail--failure of their AI, one video self-flagged by Google, then later the flag was removed.

Some videos were not removed and instead given this label: this video may be inappropriate for some users. That was also shown today. Which is tantamount to a perverse invitation to click and watch. The video has had over 700,000 views and was still--and was specifically pointed out to Google and our teleconference and it's still up as we speak.

I understand that the general purpose of this hearing is to consider whether Internet gatekeepers such as Google should or should not censor the speech of the politically unpopular. However, it is important to note that turning a blind eye to targeted harassment over the Internet. In the name of preserving free speech, has real world and life altering consequences. Furthermore, this harassment itself is--has a significant chilling effect on free speech and public advocacy of the people these conspiracy theorists target. Even though some on this committee may not agree with my cause, they must recognize that the harassment and threats of violence I faced, was an attempt to attempt--to intimidate me, prevent me from telling Allison's story, and speaking out against gun violence, and to silence my free speech rights.

I recognize the First Amendment gives everyone the right to publicly speculate that the moon landing didn't happen or the Earth is flat, but there's a difference between someone venting about a favorite conspiracy theory and Google turning its platforms over to anonymous users for them to target and harass victims of public tragedies. The former is

free speech. The latter is violence. As more and more public tragedies and horrific mass shootings occur, they will be recorded, broadcasted, and disseminated on platforms like YouTube. Like so much cheap entertainment for Google to use to add a few more millions to their bottom line.

Google--profits massively off of lack of reg--regulation. If it cannot properly protect citizens from online harassment, hate speech, and moment of death videos, I call on Congress to step in and make sure these--that proper protections are in place for private citizens like me, who are continually harassed and exploited. Currently, platforms like Google are protecting against civil or criminal liability under section 230 of the Communications Decency Act. Removing the section 230 protection, will allow users to hold Google responsible for the conspirial--conspiratorial content it allows on its platforms.

Mr. Chairman, there may not be a lot of issues that you and I agree on, philosophically that is, but we do agree on this. We should protect the First Amendment, but it's time for Google and social media to be regulated. It's the original founders as you mentioned earlier, had a motto. Their original motto was "don't be evil." This motto was replaced in 2015, by "do the right thing." Google fails miserably on both counts. Thank you, sir.

CRUZ:
Thank you, Mr. Parker and thank you for sharing your powerful story and--and your powerful testament to your daughter.

PARKER:
Thank you.

CRUZ:
Doctor Tripodi.

TRIPODI:

Good evening. It is an honor to return before the Senate Committee to discuss my research. During the last hearing and today, conservatives have claimed that Google is biased. Scholars, such as Doctor Epstein, argue that this bias has the capacity to sway elections.

My research also confirms that people trust algorithmic output. But where we differ is that my research demonstrates that the phrases we choose are encoded with bias before they hit the browser. Epistemological frameworks shape what we will search for, how, and why. And simple shifts and syntax's, dramatically change what Google will return to us.

For example, in the fall of 2017, if one were to Google NFL ratings down. All of the top returns supported President Trumps claims that the anthem protest hurt NFL ratings. However, if you searched, NFL ratings up. Google returned entirely different headlines, supporting the position.

When you Google for information about conservative censorship, the top returns are conservative news that support this claim. Google the phrase Prager U, and you get their website, their twitter account, there YouTube channel, and their Wikipedia check--page. Those interested in learning more from conservative thinkers have ample access to show--do so. My data show, that users, shape our own realities. Because we teach Google what we want to see based on the keywords that we enter.

My findings also indicate that the process of matching keywords to content can be gamed to maximize exposure. For example, the phrase AOC, returns conservative videos on YouTube. Even though this is the Twitter handle of Representative Ocasio-Cortez. This matching is not accidental.

By partnering with the data scientist, I have obtained and analyzed to the metadata of 13 different YouTube channels, including thousands of videos and in this data you can see that Fox News is 6.7 times more likely to use AOC as a search engine optimization tag than MSNBC. Thereby increasing the probability that searching for the phrase will link audiences to conservative news coverage of a liberal politician. YouTube have a vested interest in keeping people on the site for as long as possible, and intentionally feeds audiences content they can't stop watching. Producers also want to commodify their content, to maximize

exposure and conservative channels cross promote guests and ideas in order to feed these algorithmic connections.

Now, as a marketing strategy, this is not nefarious. But because they also host far right thinkers and provide them a platform to validate their opinions. It amplifies those ideas is well. That is because YouTube is a social media network of content creators, featured guest, as well as users who comment, like, or share the videos.

Freedom of speech is one of the fundamental rights designed by our forefathers. It is crucial for allowing Americans to express both widely accepted and unpopular opinions, without fear of government punishment or censorship. However, privately held corporations like Facebook, Google, and Twitter are not the new public square. They are sophisticated advertising firms designed to profit from the data we provide to them.

They are also spaces where people can create mass followings and those who want to profit from YouTube must adhere to their terms of service. These terms are not written to disenfranch--to disenfranchise conservatives. These policies were created in the interest of safeguarding members of protected groups and are designed to reduce hatred, harassment, discrimination, and violence.

In sum, what we get from Google depends primarily on what we search and depending on what you search conservatism thrives online. For progressive nonprofits, conservative media are the Goliaths. Well-funded companies with large production budgets and sophisticated digital marketing campaigns. This is why YouTube's top returns for phrases like gender identity or social justice are conservative videos. Click on these videos and YouTube doesn't try to steer the audience left, it auto plays a steady stream of conservative ideas.

Simply put, if content is readily available, it is not being suppressed. What conservatives who are arguing censorship are frustrated with, is not the constitutional right to free speech, but is actually a grievance against a free market economy. The right for everyone to speak their ideas does not guarantee the right to captivate a large audience, nor the right to profit from them. Given how YouTube tries to keep audiences on their platform.

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I think we can all agree that a more pressing issue for this committee to pay attention to, is how metadata can amplify hate speech, pedophilia, conspiracy theories, and disinformation. Thank you, so much for your time.

CRUZ:
Thank you. Dr. Epstein.

EPSTEIN:
(OFF-MIC) I am indeed Dr. Robert Evan Stein--

CRUZ:
Please--please turn your microphone on.

EPSTEIN:
I am indeed Dr. Robert Epstein. The most important thing for you to know about me is that I'm the father of five wonderful children. As it happens, I'm also a Research Psychologist at the American Institute for Behavioral Research and Technology. I have been center, center left my whole adult life, but I value my country and democracy more than I value any party or candidate. That is why I'm speaking out today. I'm here to explain why Google poses a serious threat to democracy, how monitoring systems can protect us from companies like Google, and how Congress can immediately end Google's worldwide monopoly on search.

My plan for ending that monopoly was published, just yesterday, in Business Week. I respectfully request that my article be entered into the congressional record. It's attached to my full testimony.

CRUZ:
It will be entered without objection.

EPSTEIN:

I've been a Research Psychologist for nearly 40 years. My PhD is from Harvard and since 1981, I've published extensively on AI and other topics. Some of my research has focused on Google. On the company's massive surveillance operations, censorship capabilities, and unprecedented ability to manipulate the thinking of 2.5 billion people. Soon to be four plus billion.

I've written article--articles about Google for Time Magazine, USA Today, that kind of thing, but also for the Daily Caller and even Russia's Sputnik News. I reach out to diverse audiences because I believe the threats posed by Google and to a lesser extent Facebook, are so serious that everyone needs to know about them. Here are just three disturbing findings for my research, which adheres to the very highest standards of scientific integrity.

Number one. In 2016, Google search algorithm likely impacted undecided voters in a way that shifted at least 2.6 million votes to Hillary Clinton, whom I supported. I know this because I preserved more than 13,000 election related searches prior to election day and Google's search results were significantly biased in favor of Secretary Clinton. I know the number of votes that shifted because I've conducted dozens of controlled experiments that measure how opinions shift when search results are biased. I call the shift SEME, the Search Engine Manipulation Effect, which I first published in the proceedings of the National Academy of Sciences in 2015.

Biased search results can easily produce shifts in the opinions and voting preferences of undecided voters by up to 80 percent in some demographic groups because people blindly trust high-ranking search results over lower ones. SEME is an especially dangerous form of influence because it is in effect subliminal. It also leaves no paper trail for authorities to trace. It's an example of a short-lived or "ephemeral experience."

That's a phrase you'll find in internal emails that have leaked recently from Google. I'm now studying seven such manipulations like SEME and unlike billboards or those Russian placed ads, these manipulations are invisible and noncompetitive. They're controlled entirely by Big Tech companies and there is no way to counteract them.

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Number two. On election day in 2018, the Go Vote reminder that Google displayed on its homepage, gave one political party at least 800,000 more votes, than it gave the other party. That reminder was not a public service. It was a vote manipulation.

Number three. In the weeks leading up to the 2018 election, bias in Google search results may have shifted upwards of 78.2 million votes, spread across many races, to the candidates of one political party. This number is based on bias in data captured by my 2018 monitoring system, which preserved more than 47,000 election related searches conducted by a diverse group of American voters. I know how to stop Big Tech in its tracks. And that brings me briefly here to monitoring systems and the proposal I published yesterday. A 2015, phone call from the Attorney General of Mississippi, prompted me to start a year's long project, in which I have learned how to capture online ephemeral experiences.

In early 2016, I deployed a system that allowed my team to look over people's shoulders as they conducted online searches with their permission, I deployed a more sophisticated system in 2018, and I'm raising funds now to build a much more comprehiss--comprehensive system in 2020. One that will allow us to catch Big Tech in the act, to instantly spot when Facebook is biasing newsfeeds, or when Twitter is suppressing tweets sent by Ann Coulter or Elizabeth Warren. This system must be built to keep an eye on Big Tech in 2020, because if these companies all support the same candidate, they will have the power to shift 15 million votes to that candidate. To let Big Tech, get away with subliminal manipulation on this scale, would be to make the free and fair election meaningless.

Finally, regarding yesterday's article. Congress can quickly end Google's worldwide monopoly on search by declaring Google's massive search index, the database the company uses to generate search results to be a public comment, access--accessible by all. Just as in 1956, consent decree forced AT&T to share all its patents. There is precedent in both law and Google's business practices to justify taking this step, which will make online search competitive again and dramatically diminish Google's power worldwide.

In 1961, Eisenhower warned about the possible rise of a technological elite that would control public policy without people's awareness. That elite now exists, and you must

determine where we go from here. Chairman Cruz, Ranking Member Hirono, Mrs. Blackburn, other Members of the Committee. Democracy as originally conceived cannot survive Big Tech as currently empowered. I look forward to your questions.

CRUZ:
Thank you, very much for that fascinating testimony. Senator Blackburn has asked that she might go earlier, so I'll yield my time to her and I'll ask my questions later in this round.

BLACKBURN:
Thank you, Mr. Chairman. I appreciate that. We've got a telephone town hall with Tennesseans and I--but I did not want to miss hearing your testimony because I think this is a tremendously important topic and one that Congress--time has arrived for Congress to take some action and to focus on appropriate light touch regulation to hold Big Tech responsible.

And Mr. Epstein--Dr. Epstein, I agree with you. They are manipulators. It is not lost on me that Mark Zuckerberg at one point said Facebook worked more like a government than a corporation, and it is a very manipulative one.

And Dr. Tripodi, I--I will tell you I agree with you too. They are nothing but big advertising companies and you know their business model is pretty much built on greed.

And Mr. Parker, I say my heart breaks for you. I very much remember--very vividly remember seeing that footage with Allison and I can only imagine is a mom and a grand mom, I can only imagine what you and your family have lived through. And so, I thank you for your courage in speaking up.

Mr. Kent, I will say to you, privacy is important, and I think probably it is time that we do something on privacy. I have had the Browser Act. I introduced that when I was in the House. It is light touch regulation, but what it does is to give the consumer the opportunity to own as I call it, their virtual you, which is you and your presence online. It gives you

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control over that and I think this body would be well advised to move forward with legislation, such as that.

Mr. Prager, I have been to your website. Know your work and I share your frustration with Google and YouTube, and I know that you filed a lawsuit against both companies in 2017, and I feel for you and sharing your frustration. As you probably know, I have borne the worst of Google's culture--their corporate culture and their employees political bias.

And yes indeed Dr. Tripodi, you and I can have a good discussion about this, but they do bring that bias to work and it does inform those algorithms. And one of their Senior Engineers actually singled me out, for my political views and then double down on that. And then Google came along and refused to put up an ad from the Tennessee Republican Party in support of my campaigns. So, is there bias? Yes. Have I experienced firsthand? Yes, I have and--but Mr. Prager, I've got just a couple of questions before we move on and I want to go through these quickly. How did Google and YouTube censorship harm your ability to communicate your message online?

PRAGER:
Well, it's--it's fairly evident. If--if things cannot be seen by any family that restricts pornography and violence, if no school can see it by definition, if it's on the restricted list, if no library can show it, that--that's a very serious restriction. Especially given that our target audience is young people, so they're depriving us of the--of the very people that we most want to touch with our message. So, that's pretty dramatic.

BLACKBURN:
And so, how did your viewership go down, after they restricted you?

PRAGER:
Well, I can't give you a number, obviously. There's no way of knowing what number of people are in homes that have already--already have filters and don't even therefore know about a video because it just can't be--accessed. We know that many teachers try to show

our videos in classes, and they come up--they can do it on their own, but they can't do it through the school.

BLACKBURN:
What explanation has Google given you for the restrictions?

PRAGER:
That's--well, you--you used the great word, frustration.

(LAUGHTER)

We have gotten none--and actually it's almost unbelievable. Because if you look at the list, and--and like the 10 Commandments being a perfect example of--of how people will go you have got to be kidding. Well, I finally found out today, you did. We all heard. The Representative of Google told us why the 10 Commandments video was taken down. Because it contains murder.

So, as I said we have a solution. We'll put up one without thou shall not murder in it, but it--it--it is--that's so absurd as to be hilarious. This is--this will be something I will replay on my radio show for years. It--it--it--it's--that is the level of absurdity. I feel like I'm in a Monty Python skit here, when--when he says something like that. They're--the--the only possible explanation for all of this is they don't like Prager U, because we're a very, very influential conservative voice touching a lot of lives. There is no other explanation.

BLACKBURN:
I thank you all. My time's expired but thank you for your attention to the issue.

PRAGER:
Thank you.

BLACKBURN:

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And Mr. Chairman, thank you for the focus on--on this. I yield my time.

CRUZ:
Thank you. Senator Hirono.

HIRONO:
Thank you, Mr. Chairman and--and Mr. Parker, of course you have all of our sympathies and empathies for all that you've been going through. You did hear the Google witness say that they are proactively eliminating that--the--this kind of content and you said though that--I think you testified that they're doing nothing. They've done nothing.

PARKER:
That's--yes. And--and that is correct and--and his testimony was not accurate at all. They are not doing anything. They continue to--well, you heard a lot of responses from--from him today that tap danced around your questions. It's similar to what I've experienced over the last 2 1/2 years.

HIRONO:
So, Mr. Parker, then is it still all on you, basically. And--and--and you have hired someone to help you. Because it's an engineer to help who specializes in AI, to help track down copies of the video.

PARKER:
Well, I haven't hi--I've gotten thankfully volunteers. There's a gentleman here that's an engineer Eric Feinberg (SP) whose flagged a lot of these videos. Lenny Posner, again, has--and his--and his group have flagged videos, but essentially yeah. The--the onus is still on me. And--and the--the people that--and the volunteers to--to take this stuff down.

HIRONO:

(INAUDIBLE)

PARKER:
And when they do self--and when they do quote on quote "self-flag something." There was one that literally it was flagged to be taken down and then two days--two or three days later it was back up again.

HIRONO:
I think in--in listening to both your perspective and that of the Google witness, there's obviously not a meeting of the minds and I think--it bears further inquiry on it though. At least on my part. I understand that the TV station that was involved has--has given you the copyright to the video.

PARKER:
Yes.

HIRONO:
In order to assist efforts. So, why was it necessary for you to resort to claiming copyright infringement. Don't the YouTube community guidelines already prohibit violent or graphic content?

PARKER:
They do, but that was a--a--another avenue for us to say, well, wait a minute. If you're not going to remove violent content and--and moment of death. That was--you know they have a certificate that you apply to these videos that say--says. If you apply the moment of death video or certificate, then we take it down. Except that they don't. They--it's--it's--what they've done is purely ad hoc, arbitrary, random, there's no rhyme or reason to it. So, that was one avenue to turn. You know, if--if we can get them to--to flag content. Then we'll you

know we'll go after them from copyright infringement. We own the digital rights to this, and they ignore that too. Again, because they can.

HIRONO:
So, the--the basis of this hearing is that--that the of the Chairman is trying to show that these platforms set--figure out a way to--to seek out conservative content. That is not your question.

PARKER:
That is not my issue.

HIRONO:
That is not your issue at all.

PARKER:
Right. And I think it's--it's a much more--I mean, not that this isn't important--your issue is it important, but you know the fact that they're showing murder and execution on--on you know on the web. You know, section 230 was--my understanding is that--that it had been addressed, but with--with child photography and there was some legislation on that. And I think if we can take--I would implore this committee and--and Congress to take--at least address a narrow issue with this. Similar to that--to that precedent and--and say, you can't show this stuff.

HIRONO:
So, are--are you suggesting that section 230. They make exceptions to the Immunity from Liability be expanded.

PARKER:
Yes.

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HIRONO:
Possibly that we should?

PARKER:
Absolutely.

HIRONO:
Sure.

PARKER:
Yes.

HIRONO:
I agree with that. So, for Dr. Tripodi. I think you know it's very clear that from the examples you gave that the inquiry that what--that you put in can come up with totally different results. So, I--I have to say that when--that when we're told that when search results are biased but the results are not biased. It's--it what--what you're asking. That results and the and they--they--whatever information you get. So, there's a lot of stuff on all these platforms and this past summer, President Trump tweeted that Google raise its search results in favor of supposedly liver--liberal. I'm sorry. In favor of liberal news outlets, but you testified that the results depend on what inquiry you put in. So, you can put in a totally innocuous kind of result and get a lot of what would be called conservative content. So, based on your research, does Google really good its search results against conservatives?

TRIPODI:
So, based on my research. I don't look specifically at rigging within my research, but I look at how algorithms are working. And so, algorithms are a product of both the input plus the output and for me and what my research demonstrates is that the input, which is largely driven by the user does determine the kind of output that you're going to receive.

HIRONO:
Yeah. So, I think that's why--to show that there--there's--there's an actual bias in--in how they do a moderate the content to issues it's not so easy. Not to mention that I think I should--you know I--I showed in the draft--graph rather. The chart that I showed that actually there seems to be a lot more content that put in the restrictive mode. Not of Prager U, but of these other entities that are deemed a lot more liberal. So, I'm really not understanding Mr. Prager's concerns.

Before I end Mr. Chairman, I would like to get unanimous consent to enter the following into the record. A report titled Searching for Alternative Facts Analyzing's Scriptural internal--Inference and Conservative News Practices, writ--written by Dr. Tripodi.

CRUZ:
(OFF-MIC) Without object--without objection.

HIRONO:
An article entitled No big tet is--Big Tech, sorry, Isn't Silencing Conservatism. Also written by Dr. Tripodi.

CRUZ:
Without objection.

HIRONO:
And I ask for unanimous consent to enter the following statements into the record. The statement of Steve DelBianco of NetChoice.

CRUZ:
All--all of the statements--will be entered.

HIRONO:
Okay. Thank you. And the statement Baron Soca of Tech Freedom and the statement of--Caleb Watney of R Street, and then, finally, I ask unanimous consent to enter into the record an editorial that ran in the Washington Post on July 13th, titled How Congress Can Destroy Social Media.

CRUZ:
All of those will be entered into the record.

HIRONO:
Thank you, Mr. Chairman.

CRUZ:
Thank you, to each of the witnesses. Mr. Parker, I want to thank you again for--for sharing your story and your daughter story and--and I will say I very much agree with you, that you ought to be able to sue the heck out of Google and YouTube.

PARKER:
Yep.

CRUZ:
And if anybody else, other than Big Tech, did what they have done to you. If any other citizen delivered a VHS tape of the murder of her daughter to you and your neighbors, you would have a common-law torque for intentional infliction of emotional distress, and you could recover very significant damages. There is one group in the United States that is allowed to do what it's doing to you and that is Big Tech because Congress has given them a special subsidy. An immunity from liability, so they don't bear the consequences of their actions. And I think this hearing has underscored the need for Congress to revisit that.

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PARKER:
And I hope you will do so, sir.

CRUZ:
As do I. Mr. Prager, you described YouTube restricting various videos. I guess a total of I believe it is 56 videos produced by Prager University on topics like the 10 Commandments. Another topic, as I understand it, that was restricted was one in which noted Liberal Professor Alan Dershowitz, who was a professor of mine in law school, did a video for you historical account of Israel's founding and--and as I understand it, YouTube restricted that video as well. Does YouTube ever explained why it is restricting these--videos?

PRAGER:
(OFF-MIC) It explains nothing.

(LAUGHTER)

It explains nothing. This was the first explanation I heard. The incorporation of murder into the 10 Commandments. With regard to Professor--

CRUZ:
You would think that we would want young people--

PRAGER:
We--we would. We would.

CRUZ:
Hearing thou shall not murder.

PRAGER:
I have to admit.

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CRUZ:
That seems like a really good--

PRAGER:
It was an argument for the alternative universe at that moment for me. I had never accepted the possibility of one, but I agree with you, that is exactly what young people should here. Murd--God doesn't want you to murder, but so be it.

As regard to Professor Dershowitz and the video on Israel's founding, we--we have 320 videos, 15 of them concern Israel and half of them have at one time or another been restricted. There is clearly a--a loathing of Israel at Google. I--I suspect there is a loathing of America as well. Virtually every video that we have put out that depicts America in a favorable way. It has also been at some time or another on the restricted list.

My favorite example for years, was Viktor Davis Hanson, this remarkable Professor of Classics and he--he made a video. He's one of the calmest speaking humans I have ever met. He is the opposite of--of a grenade throwing speaker and the subject was the Korean War. The Korean War in five minutes and it is no longer on the restricted. They go in and out, apparently in some cases, and that was on the restricted list because--so, I try to think why would that be like?

And I--I could only come up with the fact that it shows how noble America's cause in--in core--Korea was. The 37,000 Americans died to keep half of the Korean Peninsula free. How many people even know that. The Korean War is--is--is--is it--is--is in the--the rubbish bin of history so as London used to put it. It's--it's just unknown. So, we want people to be proud of America, not proud of its evils. Of course, America's had evils because it's composed of people and people do evil. But it's largely been extraordinarily good, and they don't want us to depict that.

CRUZ:

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And--and Mr. Prager, could you describe what the effect is when a video is placed on the restricted list? We heard the representative from Google say, oh, it's no big deal. It just 2 percent, you should be just fine with it. What is--what is the effect of Google arbitrarily placing videos (INAUDIBLE--)

PRAGER:
Well, as I explained earlier it can't--it can't be seen by--vast numbers of parents have filters. Totally understandably given how much junk is on the--on the--on the Internet. So, we're--we're--this is what so--very important. It not only hurts us in that that family can't see that video. It hurts us because then it is a statement by Google that Prager University produces videos on the moral level of pornography. I mean, that's a--that's a--

CRUZ:
And there's no appeal. There's no remedy when--

PRAGER:
No, there is none.

CRUZ:
The (INAUDIBLE) exercises arbitrary power--

PRAGER:
We have actually spoken to representatives of theirs that after they say algorithm if we actually get someone on the phone. We--we have had humans review it at Google and keep it up. Why? That's a--a community standards. Your video violated community standards. Well, how exactly does the founding of Israel by a Harvard Law Professor, violate community standards? It just does.

CRUZ:

You know, I have to say it reminds me of the--the famous adage about the Supreme Court. We are not infallible because we are final, but rather we--we--we are--we are not final because we're infallible, but rather we're infallible because we are final. And--and that--that appears to be the same approach at Google.

Dr. Epstein, I found your testimony incredibly powerful and incredibly concerning and--and if anyone draws new out of this hearing. I would encourage you to review very carefully, Dr. Epstein's testimony and I'd like to take a moment to make clear several things. First of all, as--as I understand your background. You're not a Republican and--and nor are you a conservative. Is that accurate?

EPSTEIN:
That would be an understatement.

(LAUGHTER)

CRUZ:
And indeed, you're the Former Editor in Chief of Psychology today.

EPSTEIN:
Correct.

CRUZ:
So, you are a respected academic. You testified before this committee, that Google's manipulation of votes gave at least 2.6 million additional votes to Hillary Clinton in the year 2016. Is that correct?

EPSTEIN:
That's correct.

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CRUZ:
And--and--and I want to make sure I understand. You personally supported and voted for Hillary Clinton.

EPSTEIN:
I was a very strong public supporter of Hillary Clinton. Yes.

CRUZ:
So, you're not dis--dismayed that people voted for her, but your testimony is that Google is through bias in search results, manipulating voters in a way they're not aware of.

EPSTEIN:
On a massive scale. And what I'm saying is that I believe in democracy. I believe in the free and fair election, more than I have any kind of allegiance to a candidate or party.

CRUZ:
And--and looking forward, if I understood--stood your testimony correctly. You said in subsequent elections Google, and Facebook, and Twitter, and Big Techs manipulation could manipulate as many as 15 million votes in a subsequent election.

EPSTEIN:
In 2020, if all of these companies are supporting the same candidate, there are 15 million votes on the line that can be shifted without people's knowledge and without leaving a paper trail for authorities to trace.

CRUZ:
Now--now, you describe the Go Vote reminder and you said it wasn't a public service announcement, but rather manipulation. Can explain how? --I'm not sure everyone followed the details of that.

EPSTEIN:
Well, sure. If on election day in 2016. If Mark Zuckerberg, for example, had chosen to send out a Go Vote Reminder. Say just to Democrats, and no one would've known if he had done this, that would have given that day an additional at least 450,000 votes to Democrats and we know this without doubt because of Facebook's own published data. Because they did an experiment that they didn't tell anyone about during the 2010 election. They published it in 2012. It had 60 million Facebook users involved. They sent out a Go Vote Reminder and they got something like 360,000 more people to get off their sofas and go vote, who otherwise would have stayed home.

The point is I don't think that Mr. Zuckerberg sent out that reminder in 2016. I think he was overconfident. I think Google--Google was overconfident, all these companies were. I don't think he sent that out. Without monitoring systems in place, we'll never know what these companies are doing.

But the point is in 2018, I'm sure they were more aggressive. We have lots of data to support that. And in 2020, you can bet that all of these companies are going to go all out and the methods that they're using are invisible, their subliminal, their more powerful than most any effects I've ever seen in the behavioral sciences and I've been in the behavioral sciences for almost 40 years.

CRUZ:
You know, our Democratic colleagues on this committee often talk about what they view as the pernicious effect of big money and big corporate dollars. What you are testifying to is that a handful of Silicon Valley billionaires and giant corporations are able to spend millions of dollars, if not billions of dollars collectively. Massively influencing the results of elections and there's no accountability. You said, we don't know. We have no way of knowing if Google or Facebook or Twitter, sends it's--sends its Democrats or Republicans or how they bias it because it's a black box with--with--with--with no transparency or accountability whatsoever. I mean, in my understanding you correctly.

EPSTEIN:
Senator, with respect, I must correct you.

CRUZ:
Please.

EPSTEIN:
If Mark Zuckerberg chooses to send out a Go Vote Reminder just to Democrats on election day. That doesn't cost him a dime.

CRUZ:
Fair enough. Do you happen to know who the Hillary Clinton Campaign's number one financial supporter was in the year of 2016?

EPSTEIN:
I think I do, but please remind me.

CRUZ:
The number one financial supporter of the Hillary Clinton Campaign in the 2016 election was the parent company of Google Alphabetical.

EPSTEIN:
Oh, yeah.

CRUZ:
Who was our first witness. They were her number one financial donor and your testimony is through their deceptive search methods. They moved 2.6 million votes in her direction. I would think anybody whether or not you favor one candidate, or another should be deeply

dismayed about a handful of Silicon Valley billionaires having that much power over our elections to silently and deceptively shift vote outcomes.

EPSTEIN:
Again, with respect. I must correct you. The 2.6 million is a rock bottom minimum. The range is between 2.6 and 10.4 million, depending on how aggressively they use the techniques that I've been studying over 6 1/2 years.

CRUZ:
Wow. Could--could you just say that again, please? Just--

EPSTEIN:
The 2.6 million is a rock bottom minimum. The range is between 2.6 and 10.4 million votes, depending on how aggressive they were in using the techniques that I've been studying. Such as the search engine manipulation affect, the search suggestion affect, the answer bought affect, and a number of others. They control these and no one can counteract them. These are not competitive. These are tools that they have at their disposal exclusively.

CRUZ:
If any head--headline comes out of this hearing, that should be it. Senator Hirono.

HIRONO:
I have just one clarifying question for Dr. Tripodi. So, we've heard from Dr. Epstein and he has published research that substantiates what he says. Although I haven't--there is a question as to whether or not he used all the results that actually he should have used, but are you familiar with--with his methodology?

TRIPODI:
Yes.

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HIRONO:
Do you agree with Dr. Epstein's conclusions.

c: I would say we would come to different conclusions, but I'm not sure because we do not know what the search terms that were used in this study. So, I read at length the testimony as well as the reports that he has submitted and based on what I see, and we can go through it together. But there's a couple of things that draw out to me. One, when they--we run through how the experimental studies were run. It seems that people were given in advance which search terms to study--to--to search and as far as my research demonstrates that different search terms will yield different kinds of results.

HIRONO:
Well, that--that is your--the whole point of what your testimony is from what I gather. You can get all kinds of results based on what your inquiry is and if people actually got to the--if they were told what's--what in--inquiry to put in, I think you are going to get different kind of results.

TRIPODI:
And Senator, excuse me just for a second. These are very simple shifts in syntax that have very different ideological bases, so something like gun rights versus gun-control have different ideological positions encoded into them.

EPSTEIN:
Senator, may I reply brief--briefly?

HIRONO :
(OFF-MIC)

EPSTEIN:

Yes. Well, we're aware of that. So, obviously, we started with more than 500 terms. We narrowed it down to 250 and we had those rated by independent raters. We only use search terms that were not biased in one direction or another. And again, that's based on ratings by independent readers. We are--we're--acutely aware of these kinds of issues and we control for them.

HIRONO:
Are you going to possibly undertake a study of how Russia's interference with our election's. What kind of impact that had? Are you embarking on that study?

EPSTEIN:
We've looked into that, Senator. I'm very interested in it. I think it's reprehensible that this kinds of thing--this kind of thing happens, but in fact Russia was using several techniques, but mainly targeted ads and the problem there is there now in a world--in an environment that's highly, highly, highly competitive. People also can see ads, so they can you know use their judgment and have confirmation bias plays a role in how they react to abs and--

HIRONO:
(OFF-MIC) --study you did that--that you talked about probably has all those kinds of factors as--as being--complicating the picture. Thank you, Mr. Chairman.

CRUZ:
Dr. Epstein, Senator Hirono questioned your methodology and--and--and also said that all there were similar problems with search results as there are with ads. I--I want to give you a full opportunity simply to--to respond to those criticisms and--and explain the methodology you used.

EPSTEIN:

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Well sure. Ads and fake news stories for that matter, they are visible and they're competitive. So, there have always been those kinds of manipulations that go back hundred years. There have always been fake ads. There have always been fake news stories and they are competitive.

That's a competitive environment. You put your--your billboard, I put up my billboard. The problem with the techniques that I've been discovering, and quantifying is that they are brand-new. The Internet has made them possible. They've never been possible before in human history and they're controlled entirely and exclusively by Google and to a lesser extent Facebook.

Their brand-new. I had--I've had to put names on them one by one, as I've discovered them because they're so bizarre. One quick example, we've shown in our experiments, that just by manipulating search suggestions those phrases that are flashed at you when you're typing in a search term. We can turn a 50-50 split among undecided voters into a 90-10 split, with no one having the slightest idea that they have been manipulated.

We have reason to believe--

CRUZ:
Can you--can you put some specificity on that? I don't know if that example can be flushed out, but.

EPSTEIN:
Well, yes, in fact, we did that using the names of presidential candidates and we flashed search suggestions as people were typing letters. And we deliberately withheld negative search suggestions from some of our participants and with other participants now and then we allowed a negative to show up on the list. Well, when you show a negative on the list and right now, if you look up Donald Trump is, you will find one negative. When you put a negative on the list, that draws 10 to 15 times as many clicks as neutral or positive terms.

So, if your algorithm suppresses negative search terms--search suggestions I should say, for one candidate, as we know will did for Hillary Clinton, my candidate, in 2016. But you allow negatives to appear now and then for the opposing candidate. Those negative search suggestions draw a tremendous amount of traffic to websites that show that candidate in a negative light. And what I'm telling you is we have shown that using this technique, we can turn a 50-50 split among undecided voters into a 90-10 split with no one having the slightest idea they have been manipulated. We have reason to believe that Google is knowingly, deliberately, strategically manipulating people's thinking and behavior from the very first character people type into the search box.

CRUZ:
And--and Dr. Epstein, can--can you elaborate? You said, we have reason to believe that Google is doing this knowingly and deliberately. Can--can you explain why--why we have reason to believe that?

EPSTEIN:
Well, pull out your cell phones. If you--if you type the letter A into Google search box. By the way, you should never, ever use Google.com. Never because it tracks you.

You should use either something like DuckDuckGo or my favorite is called Startpage. Startpage.com, which has full access to Google's index. But the point is, if you type the letter A into the search box, depending on your relationship with Google and how much they know about you. There's a very good chance that you're going to see Amazon listed in the first position, second position, third position, maybe all three positions.

Guess what. Amazon is Google's largest advertiser and Google sends more traffic to Amazon than any other company. These are business partners and Google is trying to send you to Amazon when you type the letter A. Type in the G.

CRUZ:
And for what it's worth, I just typed A. I got Amazon, Area 51 raid--

(LAUGHTER)

And Amazon prime. So, those are the three Google suggestions, two of which are Amazon.

EPSTEIN:
Wow. That's--that's actually something because I'm assuming you don't block them in any--anyway. So, they know all about you and they're still trying to send you to Amazon and Amazon prime. But type in the G and you'll get something different. If you type in the G, there's a good chance you're going to get a list of Google products. They're trying to send you to Google and the lesson here for all of us is, if you start a company make sure the name of it does not begin with the G.

(LAUGHTER)

CRUZ:
Thank you very much. Thank you, to each of you for a very illuminating testimony and I appreciate your being here. I want to thank all the witnesses who testified before the subcommittee. We will be keeping the hearing record open for additional two weeks, which means the record will be close at the end of the business day on Tuesday, July 30, 2019. Senators may submit follow-up questions to witnesses by that date and--and if there are follow-up questions. The witnesses are asked to respond as soon as possible and--in writing. And with that this hearing was not sponsored by the letter G.

(LAUGHTER)

And this hearing is adjourned.

(GAVEL)

List of Panel Members and Witnesses

PANEL MEMBERS:
SEN. TED CRUZ (R-TEXAS), CHAIRMAN

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SEN. JOHN CORNYN (R-TEXAS)

SEN. MIKE LEE (R-UTAH)

SEN. BEN SASSE (R-NEB.)

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SEN. MARSHA BLACKBURN (R-TENN.)

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SEN. CHRIS COONS (D-DEL.)

SEN. KAMALA HARRIS (D-CALIF.)

SEN. DIANNE FEINSTEIN (D-CALIF.), EX-OFFICIO

WITNESSES:

GOOGLE, INC. GOVERNMENT AFFAIRS & PUBLIC POLICY VICE PRESIDENT KARAN BHATIA

PRAGER UNIVERSITY CO-FOUNDER DENNIS PRAGER

DIGITAL CONTENT NEXT CEO JASON KINT

ADVOCATE FOR SENSIBLE REFORM AUTHOR ANDY PARKER

JAMES MADISON UNIVERSITY SOCIOLOGY ASSISTANT PROFESSOR FRANCESCA TRIPODI

AMERICAN INSTITUTE FOR BEHAVIORAL RESEARCH AND TECHNOLOGY SENIOR RESEARCH PSYCHOLOGIST ROBERT EPSTEIN

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Raman, Sujit (ODAG)

From:	Raman, Sujit (ODAG)
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To:	Willard, Lauren (OAG); Gelber, Alexandra (CRM); Pollak, Jeffrey (CRM); Shults, Anthony M. (OLP); Grocki, Steve (CRM); Ciobanu, Ileana (OLP); Harris, Stacie B. (ODAG); Kueter, Dean (OLA); Braese, Molly (CRM); Jones, Darrin E. (ITID) (FBI); Hodge, Jennifer (CRM (b)(6) per NSD (NSD (b) (6) (OLA); Downing, Richard (CRM); Wiegmann, Brad (NSD); Kjergaard, Alison (OPA (b)(6), (b)(7)(C), (b)(7)(E) per FBI (DO) (OGA) (FBI); Lloyd, Matt (PAO); Sabol, Sherry E. (OGC) (FBI); Hale, Brian Patrick (DO) (FBI (b)(6), (b)(7)(C), (b)(7)(E) per FBI (DO) (FBI (b)(6), (b)(7)(C), (b)(7)(E) per FBI (WF) (FBI (b)(6), (b)(7)(C), (b)(7)(E) per FBI (OGC) (FBI (b)(6), (b)(7)(C), (b)(7)(E) per FBI (DO) (FBI (b)(6), (b)(7)(C), (b)(7)(E) per FBI (OGC) (FBI (b) (6) (DO) (FBI (b)(6), (b)(7)(C), (b)(7)(E) per FBI. (ITB) (FBI (b) (6) (OLA); (b) (6) (OLA); Hankey, Mary Blanche (OLA); Raimondi, Marc (OPA); (b)(6) per NSD (NSD (b) (6) (OLA); Cronin, Matthew J. (USAEO); (b)(6), (b)(7)(C), (b)(7)(E) per FBI (OGC) (FBI (b) (6) (OLA); Williams, Douglas A. Jr. (DO) (FBI); OLA Master Calendar; Newman, Ryan D. (OAG (b)(6), (b)(7)(C), (b)(7)(E) per FBI (OGC) (OGA) (FBI); McNally, Joseph (OLP); Motta, Thomas G. (DO) (FBI (b)(6), (b)(7)(C), (b)(7)(E) per FBI (b)(6), (b)(7)(C), (b)(7)(E) (DO) (FBI); Goldfoot, Josh (CRM); Freeman, Lindsey (OLP); Antell, Kira M. (OLA); Smith, David L. (USAEO); McNally, Joseph (USACAC)
Subject:	FW: Amendment to EARN IT
Attachments:	OLL20683.pdf; EARN IT Sub OLL20670.pdf

Colleagues:

I received the below language from Rich DiZinno earlier today. It looks like he's trying t (b) (5)

We will, of course, make sure Rich is aware o (b) (5) .

But in the spirit of engaging with Rich, any thoughts on the below language? (**Red** edits are mine; **black** edits are Rich's.)

Please let me know. Thanks, Sujit

OPTION #1

(b) (5)

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Document ID: 0.7.2270.6649

(b) (5)

OPTION #2

(b) (5)

-

(b) (5)

Document ID: 0.7.2270.6649

AMENDMENT NO._____ Calendar No._____

Purpose: To exclude encryption from the increased liability for providers of interactive computer services.

IN THE SENATE OF THE UNITED STATES—116th Cong., 2d Sess.

S. 3398

To establish a National Commission on Online Child Sexual Exploitation Prevention, and for other purposes.

Referred to the Committee on _____ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by _____

Viz:

On page 16, line 3, strike the quotation marks and the second period and insert the following:

''(7) CYBERSECURITY PROTECTIONS DO NOT GIVE RISE TO LIABILITY.—Notwithstanding paragraph (6), a provider of an interactive computer service shall not be deemed to be in violation of section 2252 or 2252A of title 18, United States Code, for the purposes of subparagraph (A) of such paragraph (6), and shall not otherwise be subject to any charge in a criminal prosecution under State law under subparagraph (B) of such paragraph (6), or any claim in a civil action under State law under

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subparagraph (C) of such paragraph (6), because the provider—

''(A) utilizes full end-to-end encrypted messaging services, device encryption, or other encryption services;

''(B) does not possess the information necessary to decrypt a communication; or

''(C) fails to take an action that would otherwise undermine the ability of the provider to offer full end-to-end encrypted messaging services, device encryption, or other encryption services.''.

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AMENDMENT NO._____ Calendar No._____

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—116th Cong., 2d Sess.

S. 3398

To establish a National Commission on Online Child Sexual Exploitation Prevention, and for other purposes.

Referred to the Committee on _____ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended to be proposed by Mr. GRAHAM (for himself and Mr. BLUMENTHAL)

Viz:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020'' or the ''EARN IT Act of 2020''.

SEC. 2. DEFINITIONS.

In this Act:

(1) COMMISSION.—The term ''Commission'' means the National Commission on Online Child Sexual Exploitation Prevention.

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(2) INTERACTIVE COMPUTER SERVICE.—The term ''interactive computer service'' has the meaning given the term in section 230(f)(2) of the Communications Act of 1934 (47 U.S.C. 230(f)(2)).

SEC. 3. NATIONAL COMMISSION ON ONLINE CHILD SEXUAL EXPLOITATION PREVENTION.

(a) ESTABLISHMENT.—There is established a National Commission on Online Child Sexual Exploitation Prevention.

(b) PURPOSE.—The purpose of the Commission is to develop recommended best practices that providers of interactive computer services may choose to implement to prevent, reduce, and respond to the online sexual exploitation of children, including the enticement, grooming, sex trafficking, and sexual abuse of children and the proliferation of online child sexual abuse material.

(c) MEMBERSHIP.—

(1) COMPOSITION.—

(A) IN GENERAL.—The Commission shall be composed of 19 members.

(B) AGENCY HEADS.—The following Federal officials shall serve as members of the Commission:

(i) The Attorney General or his or her representative.

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(ii) The Secretary of Homeland Security or his or her representative.

(iii) The Chairman of the Federal Trade Commission or his or her representative.

(C) OTHER MEMBERS.—Of the remaining 16 members of the Commission—

(i) 4 shall be appointed by the majority leader of the Senate, of whom—

(I) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(A);

(II) 1 shall have the qualifications required under paragraph (2)(B);

(III) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(C); and

(IV) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(D);

(ii) 4 shall be appointed by the minority leader of the Senate, of whom—

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(I) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(A);

(II) 1 shall have the qualifications required under paragraph (2)(B);

(III) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(C); and

(IV) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(D);

(iii) 4 shall be appointed by the Speaker of the House of Representatives, of whom—

(I) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(A);

(II) 1 shall have the qualifications required under paragraph (2)(B);

(III) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(C); and

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(IV) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(D); and

(iv) 4 shall be appointed by the minority leader of the House of Representatives, of whom—

(I) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(A);

(II) 1 shall have the qualifications required under paragraph (2)(B);

(III) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(C); and

(IV) 1 shall have the qualifications required under clause (i) or (ii) of paragraph (2)(D).

(2) QUALIFICATIONS.—Of the 16 members of the Commission appointed under paragraph (1)(C)—

(A) 4 shall have current experience in investigating online child sexual exploitation crimes, of whom—

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(i) 2 shall have such experience in a law enforcement capacity; and

(ii) 2 shall have such experience in a prosecutorial capacity;

(B) 4 shall be survivors of online child sexual exploitation, or have current experience in providing services for victims of online child sexual exploitation in a non-governmental capacity;

(C)(i) 2 shall have current experience in matters related to consumer protection, civil liberties, civil rights, or privacy; and

(ii) 2 shall have current experience in computer science or software engineering related to matters of cryptography, data security, or artificial intelligence in a non-governmental capacity; and

(D) 4 shall be individuals who each currently work for an interactive computer service that is unrelated to each other interactive computer service represented under this subparagraph, representing diverse types of businesses and areas of professional expertise, of whom—

(i) 2 shall have current experience in addressing online child sexual exploitation

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and promoting child safety at an interactive computer service with not less than 30,000,000 monthly users in the United States; and

(ii) 2 shall have current experience in addressing online child sexual exploitation and promoting child safety at an interactive computer service with less than 10,000,000 monthly users in the United States.

(3) DATE.—The initial appointments of members to the Commission under paragraph (1)(C) shall be made not later than 90 days after the date of enactment of this Act.

(d) PERIOD OF APPOINTMENT; VACANCIES.—

(1) PERIOD OF APPOINTMENT.—A member of the Commission shall be appointed for a term of 5 years.

(2) VACANCIES.—

(A) EFFECT ON COMMISSION.—Any vacancy in the Commission shall not affect the powers of the Commission.

(B) FILLING OF VACANCIES.—A vacancy in the Commission shall be filled in the same

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manner as the original appointment under subsection (c)(1).

(e) INITIAL MEETING.—The Commission shall hold the first meeting of the Commission not later than 60 days after the date on which a majority of the members of the Commission have been appointed.

(f) CHAIRPERSON.—The Attorney General or his or her representative shall serve as the Chairperson of the Commission.

(g) QUORUM.—A majority of the members of the Commission shall constitute a quorum, but a lesser number of members may hold a meeting.

(h) MEETINGS.—The Commission shall meet at the call of the Chairperson.

(i) AUTHORITY OF COMMISSION.—The Commission may, for the purpose of carrying out this section and section 4, hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers appropriate.

(j) INFORMATION FROM FEDERAL AGENCIES.—

(1) IN GENERAL.—The Commission may secure directly from any Federal department or agency such information as the Commission considers necessary to carry out this section and section 4.

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(2) FURNISHING INFORMATION.—Upon request of the Chairperson of the Commission for information under paragraph (1), the head of a Federal department or agency shall furnish the information to the Commission, unless the information is subject to an active investigation or otherwise privileged or confidential.

(k) TRAVEL EXPENSES.—A member of the Commission shall serve without compensation, but shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from the home or regular places of business of the member in the performance of services for the Commission.

(l) DURATION.—Section 14 of the Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Commission.

SEC. 4. DUTIES OF THE COMMISSION.

(a) RECOMMENDED BEST PRACTICES.—

(1) INITIAL RECOMMENDATIONS.—

(A) IN GENERAL.—Not later than 18 months after the date on which a majority of the members of the Commission required to be appointed under section 3(c)(1)(C) have been so

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appointed, the Commission shall develop and submit to the Attorney General recommended best practices that providers of interactive computer services may choose to engage in to prevent, reduce, and respond to the online sexual exploitation of children, including the enticement, grooming, sex trafficking, and sexual abuse of children and the proliferation of online child sexual abuse material.

(B) REQUIREMENTS.—

(i) ALTERNATIVE BEST PRACTICES.—The best practices required to be developed and submitted under subparagraph (A) shall include alternatives that take into consideration—

(I) the size, type of product, and business model of a provider of an interactive computer service;

(II) whether an interactive computer service—

(aa) is made available to the public;

(bb) is primarily responsible for hosting, storage, display, and retrieval of information on behalf

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of third parties, including providers of other interactive computer services; or

(cc) provides the capability to transmit data to and receive data from all or substantially all internet endpoints on behalf of a consumer; and

(III) whether a type of product, business model, product design, or other factors related to the provision of an interactive computer service could make a product or service susceptible to the use and facilitation of online child sexual exploitation.

(ii) SCOPE.—Notwithstanding paragraph (3), the alternatives described in clause (i) of this subparagraph may exclude certain matters required to be addressed under paragraph (3), as the Commission determines appropriate based on the nature of particular products or services, the factors described in such clause (i), or other factors relevant to the purposes of this Act.

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(2) SUPPORT REQUIREMENT.—The Commission may only recommend the best practices under paragraph (1) if not fewer than 14 members of the Commission support the best practices.

(3) MATTERS ADDRESSED.—The matters addressed by the recommended best practices developed and submitted by the Commission under paragraph (1) shall include—

(A) preventing, identifying, disrupting, and reporting online child sexual exploitation;

(B) coordinating with non-profit organizations and other providers of interactive computer services to preserve, remove from view, and report online child sexual exploitation;

(C) retaining child sexual exploitation content and related user identification and location data;

(D) receiving and triaging reports of online child sexual exploitation by users of interactive computer services, including self-reporting;

(E) implementing a standard rating and categorization system to identify the type and severity of child sexual abuse material;

(F) training and supporting content moderators who review child sexual exploitation con-

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tent for the purposes of preventing and disrupting online child sexual exploitation;

(G) preparing and issuing transparency reports, including disclosures in terms of service, relating to identifying, categorizing, and reporting online child sexual exploitation and efforts to prevent and disrupt online child sexual exploitation;

(H) coordinating with voluntary initiatives offered among and to providers of interactive computer services relating to identifying, categorizing, and reporting online child sexual exploitation;

(I) employing age rating and age gating systems to reduce online child sexual exploitation;

(J) offering parental control products that enable customers to limit the types of websites, social media platforms, and internet content that are accessible to children; and

(K) contractual and operational practices to ensure third parties, contractors, and affiliates comply with the best practices.

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(4) RELEVANT CONSIDERATIONS.—In developing best practices under paragraph (1), the Commission shall consider—

(A) the cost and technical limitations of implementing the best practices;

(B) the impact on competition, product and service quality, data security, and privacy;

(C) the impact on the ability of law enforcement agencies to investigate and prosecute child sexual exploitation and rescue victims; and

(D) the current state of technology.

(5) PERIODIC UPDATES.—Not less frequently than once every 5 years, the Commission shall update and resubmit to the Attorney General recommended best practices under paragraph (1).

(b) PUBLICATION OF BEST PRACTICES.—Not later than 30 days after the date on which the Commission submits recommended best practices under subsection (a), including updated recommended best practices under paragraph (5) of that subsection, the Attorney General shall publish the recommended best practices on the website of the Department of Justice and in the Federal Register.

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SEC. 5. PROTECTING VICTIMS OF ONLINE CHILD SEXUAL ABUSE.

Section 230(e) of the Communications Act of 1934 (47 U.S.C. 230(e)) is amended by adding at the end the following:

"(6) NO EFFECT ON CHILD SEXUAL EXPLOITATION LAW.—Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

"(A) any claim in a civil action brought against a provider of an interactive computer service under section 2255 of title 18, United States Code, if the conduct underlying the claim constitutes a violation of section 2252 or section 2252A of that title;

"(B) any charge in a criminal prosecution brought against a provider of an interactive computer service under State law regarding the advertisement, promotion, presentation, distribution, or solicitation of child sexual abuse material, as defined in section 2256(8) of title 18, United States Code; or

"(C) any claim in a civil action brought against a provider of an interactive computer service under State law regarding the advertisement, promotion, presentation, distribution, or

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solicitation of child sexual abuse material, as defined in section 2256(8) of title 18, United States Code.''.

SEC. 6. USE OF TERM "CHILD SEXUAL ABUSE MATERIAL".

(a) SENSE OF CONGRESS.—It is the sense of Congress that the term ''child sexual abuse material'' has the same legal meaning as the term ''child pornography'', as that term was used in Federal statutes and case law before the date of enactment of this Act.

(b) AMENDMENTS.—

(1) TITLE 5, UNITED STATES CODE.—Chapter 65 of title 5, United States Code, is amended—

(A) in section 6502(a)(2)(B), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(B) in section 6504(c)(2)(F), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(2) HOMELAND SECURITY ACT OF 2002.—The Homeland Security Act of 2002 (6 U.S.C. 101 et seq.) is amended—

(A) in section 307(b)(3)(D) (6 U.S.C. 187(b)(3)(D)), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

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(B) in section 890A (6 U.S.C. 473)—

(i) in subsection (b)(2)(A)(ii), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(ii) in subsection (e)(3)(B)(ii), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(3) IMMIGRATION AND NATIONALITY ACT.—Section 101(a)(43)(I) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)(I)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(4) SMALL BUSINESS JOBS ACT OF 2010.—Section 3011(c) of the Small Business Jobs Act of 2010 (12 U.S.C. 5710(c)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(5) BROADBAND DATA IMPROVEMENT ACT.—Section 214(a)(2) of the Broadband Data Improvement Act (15 U.S.C. 6554(a)(2)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(6) CAN-SPAM ACT OF 2003.—Section 4(b)(2)(B) of the CAN-SPAM Act of 2003 (15 U.S.C. 7703(b)(2)(B)) is amended by striking ''child

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pornography'' and inserting ''child sexual abuse material''.

(7) TITLE 18, UNITED STATES CODE.—Title 18, United States Code, is amended—

(A) in section 1956(c)(7)(D), by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material'';

(B) in chapter 110—

(i) in section 2251(e), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(ii) in section 2252(b)—

(I) in paragraph (1), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(II) in paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(iii) in section 2252A—

(I) in the section heading, by striking ''**child pornography**'' and inserting ''**child sexual abuse material**'';

(II) in subsection (a)—

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(aa) in paragraph (1), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(bb) in paragraph (2)—

(AA) in subparagraph (A), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(BB) in subparagraph (B), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(cc) in paragraph (3), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(dd) in paragraph (4)—

(AA) in subparagraph (A), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

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(BB) in subparagraph (B), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(ee) in paragraph (5)—

(AA) in subparagraph (A), by striking ''an image of child pornography'' and inserting ''child sexual abuse material''; and

(BB) in subparagraph (B), by striking ''an image of child pornography'' and inserting ''child sexual abuse material''; and

(ff) in paragraph (7)—

(AA) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(BB) by striking the period at the end and inserting a comma;

(III) in subsection (b)—

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(aa) in paragraph (1), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(bb) in paragraph (2), by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material''; and

(IV) in subsection (c)—

(aa) in paragraph (1)(A), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(bb) in paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(cc) in the undesignated matter following paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material'';

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(V) in subsection (d)(1), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(VI) in subsection (e), by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material'';

(iv) in section 2256(8)—

(I) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(II) by striking the period at the end and inserting a semicolon;

(v) in section 2257A(h)—

(I) in paragraph (1), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(II) in paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(vi) in section 2258A—

(I) in subsection (a)(2)—

(aa) in subparagraph (A), by striking ''child pornography''

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and inserting ''child sexual abuse material''; and

(bb) in subparagraph (B), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(II) in subsection (b)—

(aa) in paragraph (4)—

(AA) in the paragraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(BB) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(bb) in paragraph (5), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(III) in subsection (g)(2)(B), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(vii) in section 2258C—

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(I) in the section heading, by striking ''**child pornography**'' and inserting ''**child sexual abuse material**'';

(II) in subsection (a)—

(aa) in paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(bb) in paragraph (3), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(III) in subsection (d), by striking ''child pornography visual depiction'' and inserting ''child sexual abuse material visual depiction''; and

(IV) in subsection (e), by striking ''child pornography visual depiction'' and inserting ''child sexual abuse material visual depiction'';

(viii) in section 2259—

(I) in paragraph (b)(2)—

(aa) in the paragraph heading, by striking ''CHILD PORNOG-

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RAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL'';

(bb) in the matter preceding subparagraph (A), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(cc) in subparagraph (A), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(II) in subsection (c)—

(aa) in paragraph (1)—

(AA) in the paragraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(BB) by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material'';

(bb) in paragraph (2), in the matter preceding subparagraph

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(A), by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material''; and

(cc) in paragraph (3)—

(AA) in the paragraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(BB) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(III) in subsection (d)(1)—

(aa) in subparagraph (A)—

(AA) by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material''; and

(BB) by striking ''Child Pornography'' and inserting ''Child Sexual Abuse Material'';

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(bb) in subparagraph (B), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(cc) in subparagraph (C)—

(AA) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(BB) by striking ''Child Pornography'' and inserting ''Child Sexual Abuse Material'';

(ix) in section 2259A—

(I) in the section heading, by striking ''**child pornography**'' and inserting ''**child sexual abuse material**'';

(II) in subsection (a)—

(aa) in paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(bb) in paragraph (3), by striking ''child pornography'' and

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inserting ''child sexual abuse material''; and

(III) in subsection (d)(2)(B), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(x) in section 2259B—

(I) in the section heading, by striking ''**Child pornography**'' and inserting ''**Child sexual abuse material**'';

(II) in subsection (a), by striking ''Child Pornography'' each place the term appears and inserting ''Child Sexual Abuse Material'';

(III) in subsection (b), by striking ''Child Pornography'' each place the term appears and inserting ''Child Sexual Abuse Material'';

(IV) in subsection (c), by striking ''Child Pornography'' and inserting ''Child Sexual Abuse Material''; and

(V) in subsection (d), by striking ''Child Pornography'' and inserting ''Child Sexual Abuse Material'';

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(C) in chapter 117—

(i) in section 2423(f)(3), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(ii) in section 2427—

(I) in the section heading, by striking ''**child pornography**'' and inserting ''**child sexual abuse material**''; and

(II) by striking ''child pornography'' and inserting ''child sexual abuse material'';

(D) in section 2516—

(i) in paragraph (1)(c), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(ii) in paragraph (2), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(E) in section 3014(h)(3), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(F) in section 3509—

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(i) in subsection (a)(6), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(ii) in subsection (m)—

(I) in the subsection heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL'';

(II) in paragraph (1), by striking ''child pornography'' and inserting ''constitutes a child sexual abuse material'';

(III) in paragraph (2), by striking ''child pornography'' and inserting ''constitutes a child sexual abuse material''; and

(IV) in paragraph (3), by striking ''child pornography'' each place the term appears and inserting ''child sexual abuse material''; and

(G) in section 3632(d)(4)(D)(xlii), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(8) TARIFF ACT OF 1930.—Section 583(a)(2)(B) of the Tariff Act of 1930 (19 U.S.C.

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1583(a)(2)(B)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(9) ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965.—Section 4121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7131) is amended—

(A) in subsection (a)—

(i) in paragraph (1)(A)(ii), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(ii) in paragraph (2)(A)(ii), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(B) in subsection (e)(5)—

(i) in the paragraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(ii) by striking ''child pornography'' and inserting ''child sexual abuse material''.

(10) MUSEUM AND LIBRARY SERVICES ACT.—Section 224(f) of the Museum and Library Services Act (20 U.S.C. 9134(f)) is amended—

(A) in paragraph (1)—

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(i) in subparagraph (A)(i)(II), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(ii) in subparagraph (B)(i)(II), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(B) in paragraph (7)(A)—

(i) in the subparagraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(ii) by striking ''child pornography'' and inserting ''child sexual abuse material''.

(11) OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968.—Section 3031(b)(3) of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (34 U.S.C. 10721(b)(3)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(12) JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT OF 1974.—Section 404(b)(1)(K) of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11293(b)(1)(K)) is amended—

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(A) in clause (i)(I)(aa), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(B) in clause (ii), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(13) VICTIMS OF CRIME ACT OF 1984.—Section 1402(d)(6)(A) of the Victims of Crime Act of 1984 (34 U.S.C. 20101(d)(6)(A)) is amended by striking ''Child Pornography'' and inserting ''Child Sexual Abuse Material''.

(14) VICTIMS OF CHILD ABUSE ACT OF 1990.—The Victims of Child Abuse Act of 1990 (34 U.S.C. 20301 et seq.) is amended—

(A) in section 212(4) (34 U.S.C. 20302(4)), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(B) in section 214(b) (34 U.S.C. 20304(b))—

(i) in the subsection heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(ii) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

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(C) in section 226(c)(6) (34 U.S.C. 20341(c)(6)), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(15) SEX OFFENDER REGISTRATION AND NOTIFICATION ACT.—Section 111 of the Sex Offender Registration and Notification Act (34 U.S.C. 20911) is amended—

(A) in paragraph (3)(B)(iii), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(B) in paragraph (7)(G), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(16) ADAM WALSH CHILD PROTECTION AND SAFETY ACT OF 2006.—Section 143(b)(3) of the Adam Walsh Child Protection and Safety Act of 2006 (34 U.S.C. 20942(b)(3)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

(17) PROTECT OUR CHILDREN ACT OF 2008.—Section 105(e)(1)(C) of the PROTECT Our Children Act of 2008 (34 U.S.C. 21115(e)(1)(C)) is amended by striking ''child pornography'' and inserting ''child sexual abuse material''.

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(18) SOCIAL SECURITY ACT.—Section 471(a)(20)(A)(i) of the Social Security Act (42 U.S.C. 671(a)(20)(A)(i)) is amended by striking ''child pornography'' and inserting ''offenses involving child sexual abuse material''.

(19) PRIVACY PROTECTION ACT OF 1980.—Section 101 of the Privacy Protection Act of 1980 (42 U.S.C. 2000aa) is amended—

(A) in subsection (a)(1), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(B) in subsection (b)(1), by striking ''child pornography'' and inserting ''child sexual abuse material''.

(20) CHILD CARE AND DEVELOPMENT BLOCK GRANT ACT OF 1990.—Section 658H(c)(1) of the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858f(c)(1)) is amended—

(A) in subparagraph (D)(iii), by striking ''child pornography'' and inserting ''offenses relating to child sexual abuse material''; and

(B) in subparagraph (E), by striking ''child pornography'' and inserting ''child sexual abuse material''.

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(21) COMMUNICATIONS ACT OF 1934.—Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended—

(A) in section 223 (47 U.S.C. 223)—

(i) in subsection (a)(1)—

(I) in subparagraph (A), in the undesignated matter following clause (ii), by striking ''child pornography'' and inserting ''which constitutes child sexual abuse material''; and

(II) in subparagraph (B), in the undesignated matter following clause (ii), by striking ''child pornography'' and inserting ''which constitutes child sexual abuse material''; and

(ii) in subsection (d)(1), in the undesignated matter following subparagraph (B), by striking ''child pornography'' and inserting ''that constitutes child sexual abuse material''; and

(B) in section 254(h) (47 U.S.C. 254(h))—

(i) in paragraph (5)—

(I) in subparagraph (B)(i)(II), by striking ''child pornography'' and in-

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serting ''child sexual abuse material''; and

(II) in subparagraph (C)(i)(II), by striking ''child pornography'' and inserting ''child sexual abuse material'';

(ii) in paragraph (6)—

(I) in subparagraph (B)(i)(II), by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(II) in subparagraph (C)(i)(II) by striking ''child pornography'' and inserting ''child sexual abuse material''; and

(iii) in paragraph (7)(F)—

(I) in the subparagraph heading, by striking ''CHILD PORNOGRAPHY'' and inserting ''CHILD SEXUAL ABUSE MATERIAL''; and

(II) by striking ''child pornography'' and inserting ''child sexual abuse material''.

(c) TABLE OF SECTIONS AMENDMENTS.—

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(1) CHAPTER 110 OF TITLE 18.—The table of sections for chapter 110 of title 18, United States Code, is amended—

(A) by striking the item relating to section 2252A and inserting the following:

''2252A. Certain activities relating to material constituting or containing child sexual abuse material.'';

(B) by striking the item relating to section 2258C and inserting the following:

''2258C. Use to combat child sexual abuse material of technical elements relating to reports made to the CyberTipline.'';

(C) by striking the item relating to section 2259A and inserting the following:

''2259A. Assessments in child sexual abuse material cases.'';

and

(D) by striking the item relating to section 2259B and inserting the following:

''2259B. Child sexual abuse materials victims reserve''.

(2) CHAPTER 117 OF TITLE 18.—The table of sections for chapter 117 of title 18, United States Code, is amended by striking the item relating to section 2427 and inserting the following:

''2427. Inclusion of offenses relating to child sexual abuse material in definition of sexual activity for which any person can be charged with a criminal offense.''.

SEC. 7. MODERNIZING THE CYBERTIPLINE.

Chapter 110 of title 18, United States Code, is amended—

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(1) in section 2258A—

(A) in subsection (a)—

(i) in paragraph (1)(B)(ii), by inserting after ''facts or circumstances'' the following: '', including any available facts or circumstances sufficient to identify and locate each minor and each involved individual,''; and

(ii) in paragraph (2)(A)—

(I) by inserting ''1591 (if the violation involves a minor),'' before ''2251,''; and

(II) by striking ''or 2260'' and inserting ''2260, or 2422(b)'';

(B) in subsection (b)—

(i) in paragraph (1)—

(I) by inserting ''or location'' after ''identity''; and

(II) by striking ''other identifying information,'' and inserting ''other information which may identify or locate the involved individual,'';

(ii) by redesignating paragraphs (2) through (5) as paragraphs (3) through (6), respectively;

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(iii) by inserting after paragraph (1) the following:

''(2) INFORMATION ABOUT THE INVOLVED MINOR.—Information relating to the identity or location of any involved minor, which may, to the extent reasonably practicable, include the electronic mail address, Internet Protocol address, uniform resource locator, or any other information which may identify or locate any involved minor, including self-reported identifying information.''; and

(iv) by adding at the end the following:

''(7) FORMATTING OF REPORTS.—When in its discretion a provider voluntarily includes any content described in this subsection in a report to the CyberTipline, the provider shall use best efforts to ensure that the report conforms with the structure of the CyberTipline.''; and

(C) in subsection (d)(5)(B)—

(i) in clause (i), by striking ''forwarded'' and inserting ''made available''; and

(ii) in clause (ii), by striking ''forwarded'' and inserting ''made available'';

(2) in section 2258B—

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(A) in subsection (a)—

(i) by striking ''arising from the performance'' and inserting the following: '', may not be brought in any Federal or State court if the claim or charge is directly attributable to—

''(1) the performance'';

(ii) in paragraph (1), as so designated, by striking ''may not be brought in any Federal or State court.'' and inserting a semicolon; and

(iii) by adding at the end the following:

''(2) transmitting, distributing, or mailing child sexual abuse material to any Federal, State, or local law enforcement agency, or giving such agency access to child sexual abuse material, in response to a search warrant, court order, or other legal process issued by such agency; or

''(3) research voluntarily undertaken by the provider or domain name registrar using any material being preserved under section 2258A(h), if the research is only for the purpose of—

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''(A) improving or facilitating reporting under this section, section 2258A, or section 2258C; or

''(B) stopping the online sexual exploitation of children.''; and

(B) in subsection (b)(2)(C)—

(i) by striking ''the performance of'';

(ii) by inserting ''described in or performed'' after ''function''; and

(iii) by striking ''this section, sections'' and inserting ''this section or section''; and

(3) in section 2258C—

(A) in the section heading, by striking ''**the CyberTipline**'' and inserting ''**NCMEC**'';

(B) in subsection (a)—

(i) in paragraph (1)—

(I) by striking ''NCMEC'' and inserting the following:

''(A) PROVISION TO PROVIDERS.—NCMEC'';

(II) in subparagraph (A), as so designated, by inserting ''or submission to the child victim identification

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program described in section 404(b)(1)(K)(ii) of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11293(b)(1)(K)(ii))'' after ''CyberTipline report''; and

(III) by adding at the end the following:

''(B) PROVISION TO NON-PROFIT ENTITIES.—NCMEC may provide hash values or similar technical identifiers associated with visual depictions provided in a CyberTipline report or submission to the child victim identification program described in section 404(b)(1)(K)(ii) of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11293(b)(1)(K)(ii)) to a non-profit entity for the sole and exclusive purpose of preventing and curtailing the online sexual exploitation of children.''; and

(ii) in paragraph (2)—

(I) by inserting ''(A)'' after ''(1)'';

(II) by inserting ''or submission to the child victim identification pro-

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gram described in section 404(b)(1)(K)(ii) of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11293(b)(1)(K)(ii))'' after ''CyberTipline report''; and

(III) by adding at the end the following: ''The elements authorized under paragraph (1)(B) shall be limited to hash values or similar technical identifiers associated with visual depictions provided in a CyberTipline report or submission to the child victim identification program described in section 404(b)(1)(K)(ii) of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11293(b)(1)(K)(ii)).''; and

(C) in subsection (d), by inserting ''or to the child victim identification program described in section 404(b)(1)(K)(ii) of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11293(b)(1)(K)(ii))'' after ''CyberTipline''.

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SEC. 8. ELIMINATING NETWORK DISTRIBUTION OF CHILD EXPLOITATION.

Section 2258A(h) of title 18, United States Code, is amended—

(1) in paragraph (1), by striking ''90 days'' and inserting ''180 days''; and

(2) by adding at the end the following:

''(5) EXTENSION OF PRESERVATION.—A provider of a report to the CyberTipline may voluntarily preserve the contents provided in the report (including any comingled content described in paragraph (2)) for longer than 180 days after the submission to the CyberTipline for the purpose of reducing the proliferation of online child sexual exploitation or preventing the online sexual exploitation of children.''.

SEC. 9. IT SOLUTIONS RELATING TO COMBATING ONLINE CHILD EXPLOITATION.

Title IV of the Juvenile Justice and Delinquency Prevention Act of 1974 (34 U.S.C. 11291 et seq.) is amended—

(1) by redesignating section 409 (34 U.S.C. 11297) as section 410; and

(2) by inserting after section 408 (34 U.S.C. 11296) the following:

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"SEC. 409. IT SOLUTIONS RELATING TO COMBATING ONLINE CHILD EXPLOITATION.

''(a) DEVELOPMENT OF IT SOLUTIONS.—The Administrator shall enable the development of information technology solutions and the creation and acquisition of innovative tools to implement updates, improvements, and modernization needed to enhance efforts to combat online child exploitation in order to ensure that consistent, actionable information is provided to law enforcement agencies, including Internet Crimes Against Children (commonly known as 'ICAC') task forces.

''(b) CONSULTATION WITH PARTNERS.—In developing the information technology solutions under subsection (a), the Administrator shall solicit input from all partners in the effort to combat online child exploitation, including the Center, ICAC task forces, the Federal Bureau of Investigation, the Department of Homeland Security, U.S. Immigration and Customs Enforcement, Homeland Security Investigations, and the United States Marshals Service.

''(c) FUNDING.—Each fiscal year, the Administrator shall carry out this section using not less than $1,000,000 of the amounts made available to carry out this title for that fiscal year.''.

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SEC. 10. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as may be necessary to carry out this Act.

SEC. 11. SEVERABILITY.

If any provision of this Act or any amendment made by this Act, or any application of such provision or amendment to any person or circumstance, is held to be unconstitutional, the remainder of the provisions of this Act and the amendments made by this Act, and the application of the provision or amendment to any other person or circumstance, shall not be affected.

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(b) (6) **(OLA)**

From:	(b) (6) (OLA)
Sent:	Monday, July 13, 2020 10:03 AM
To:	Newman, Ryan D. (OAG (b)(6) per NSD (NSD); Hardee, Christopher (NSD); Antell, Kira M. (OLA); Raman, Sujit (ODAG); Goldfoot, Josh (CRM); Kjergaard, Alison (OPA); Andrews, Kelli (NSD); Smith, David L. (USAEO); Willard, Lauren (OAG (b) (6) (OLA); Braese, Molly (CRM (b)(6), (b)(7)(C) per FBI (DO) (FBI); Raimondi, Marc (OPA); Pollak, Jeffrey (CRM); Wiegmann, Brad (NS (b)(6), (b)(7)(C) per FBI (DO) (FBI); Lloyd, Matt (PAO); Freeman, Lindsey (OLP); Harris, Stacie B. (ODAG); Downing, Richard (CRM); Motta, Thomas G. (DO) (FBI); Jones, Darrin E. (ITID) (FBI); Cronin, Matthew J. (USAEO); Hickey, Adam (NSD); Shults, Anthony M. (OLP); Hodge, Jennifer (CRM (b)(6), (b)(7)(C) per FBI (DO) (OGA) (FBI)
Subject:	Lawful Access Prep/Moot for Briefers
Attachments:	Lawful Access Briefing-Related Meeting today.eml

Good morning:

The prep/moot for the lawful access briefings this will be at 2:30 p.m. We will conduct the briefing by telephone (not in-person). Call-in information is below. Please be prepared to ask questions like a moot. I have attached the email that I sent last week when we had the mini-prep. It contains helpful attachments. In addition, I have listed below the briefing schedule to date.

Call-in information:

INFORMATION FOR PARTICIPANTs (Attendees) ONLY
For Audio Connection Dial (b) (6)
Attendee Access Code (b) (6)

Briefing Schedule:

Thursday, July 15, 2020:

- 10:30 to 11:30, Sen. Ernst (R-IA)
- 1:00 to 2:00, Sen. Cornyn (R-TX)

Friday, July 16, 2020:

- 11:00 to 11:30, Sen. Kennedy (R-LA)
- 2:30 to 3:30, Sen. Sasse (R-NE)

Monday, July 20:

- 2:30 to 3:30, Sen. Grassley (R-IA)

Thank you,

(b) (6)
(b) (6) work cell
***Note: Please forward this invite/email to others, as appropriate.*

Document ID: 0.7.2270.6641

(b) (6) **(OLA)**

Subject:	Lawful Access Prep/Moot for Briefers
Location:	Phone Meeting
Start:	Monday, July 13, 2020 2:30 PM
End:	Monday, July 13, 2020 4:00 PM
Show Time As:	Tentatively accepted
Recurrence:	(none)
Meeting Status:	Not yet responsed
Organizer:	(b) (6) (OLA)
Required Attendees:	Newman, Ryan D. (OAG (b)(6) per NSD (NSD); Hardee, Christopher (NSD); Antell, Kira M. (OLA); Raman, Sujit (ODAG); Goldfoot, Josh (CRM); Kjergaard, Alison (OPA); Andrews, Kelli (NSD); Smith, David L. (USAEO); Willard, Lauren (OAG (b) (6) (OLA); Braese, Molly (CRM); (b)(6), (b)(7)(C) per FBI (DO) (FBI); Raimondi, Marc (OPA); Pollak, Jeffrey (CRM); Wiegmann, Brad (NSD (b)(6), (b)(7)(C) per FBI (DO) (FBI); Lloyd, Matt (PAO); Freeman, Lindsey (OLP); Harris, Stacie B. (ODAG); Downing, Richard (CRM); Motta, Thomas G. (DO) (FBI); Jones, Darrin E. (ITID) (FBI); Cronin, Matthew J. (USAEO); Hickey, Adam (NSD); Shults, Anthony M. (OLP); Hodge, Jennifer (CRM (b)(6), (b)(7)(C) per FBI (DO) (OGA) (FBI)
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Call-in information:

INFORMATION FOR PARTICIPANTs (Attendees) ONLY
For Audio Connection Dial (b) (6)
Attendee Access Code (b) (6)

Briefing Schedule:

Thursday, July 15, 2020:

- 10:30 to 11:30, Sen. Ernst (R-IA)
- 1:00 to 2:00, Sen. Cornyn (R-TX)

Document ID: 0.7.2270.5021

Friday, July 16, 2020:

- 11:00 to 11:30, Sen. Kennedy (R-LA)
- 2:30 to 3:30, Sen. Sasse (R-NE)

Monday, July 20:

- 2:30 to 3:30, Sen. Grassley (R-IA)

Thank you,

(b) (6)
(b) (6) work cell
***Note: Please forward this invite/email to others, as appropriate.*

Document ID: 0.7.2270.5021

(b)(6) Dan Shefet

From: (b)(6) Dan Shefet
Sent: Tuesday, July 14, 2020 6:10 AM
To: (b)(6) Lauren Willard
Cc: Gretchen Peters; Cabinet Shefet
Subject: Submission CDA 230
Attachments: 2020 - CDA contribution_Shefet.pdf

Dear Lauren Willard,

Gretchen Peters from Cintoc (https://www.cintoc.org) recommended that we contact you with regard to our enclosed submission on the planned revision of 230.

As you know a similar exercise is taking place in Europe. The Commission intends to propose a Digital Services Act replacing the E-commerce Directive.

I thank you in advance for your attention to our submission and would be glad to provide further information / clarification.

Best regards,

Dan Shefet

Document ID: 0.7.2270.7920

Department of Justice
Office of Public Affairs

Re: Hearings on the Communications Decency Act

By email: workshop@usdoj.gov

I act in my capacity as President of the Paris based Association for Accountability and Internet Democracy (AAID) as well as in my private capacity.

We thank you for the opportunity to submit proposals as part of the public hearing on the revision of the Communications Decency Act.

Below are our three concrete proposals:

I. Civil litigation in case of failure to take down "manifestly illicit content" or to employ preemptive measures.

a)
Our first proposal relates to the reinforcement of liability of social media and online platform by judicial action (as opposed to administrative).

Since the adoption of the 1996 Communications Decency Act ("CDA")[1] in the United States and the e-commerce directive[2] in the European Union, it has been almost impossible to secure judicial redress against platforms or search engines for third party content.

In the U.S. "federal crimes" have rarely been invoked:

> ***(c) Protection for "Good Samaritan" blocking and screening of offensive material***
>
> ***(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 information provided by another information content provider.*
> ***(2) Civil liability***
> *No provider or user of an interactive computer service shall be held liable on account of—*
> ***(A)** any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or*
> ***(B)** any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).*

[1] Telecommunications Act of 1996, Title V – Obscenity and violence – Sec. 501 SHORT TITLE "This title may be cited as the `Communications Decency Act of 1996." codified at 47 U.S.C. § 230.

[2] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

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(d) Obligations of interactive computer service
A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws
(1) No effect on criminal law
Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.
(2) No effect on intellectual property law
Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.
(3) State law
Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

The CDA overrides the material support provisions of the Patriot Act[3].

Likewise, the European experience has shown that the difficulties related to the "manifestly illicit" criterion as well as the absence of a class action remedy have caused liability under the e-commerce directive to be rare.

The manifestly illicit content requirement has led to - strictly limited - administrative regulation (pedophile and terroristic content) and these regulations encounter significant practical and ethical difficulties in so far as they invest an administrative body with certain blocking rights (the German Network Enforcement Act or NetzDG[4] which came into effect on January 1, 2018 is an example of such a law and so was the French Hate Speech[5] which was partly censored by the *Conseil Constitutionel*[6] for infringing freedom of speech in disproportionately by arguably encouraging online platforms to censor content whether manifestly illicit or not.

Failure to provide adequate judicial oversight with suspensive effect invariably gives rise to significant free speech concerns in terms of collateral filtering.

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3 Among the different cases upholding CDA immunity against the material support provision under the Ante-Terrorism Act ("ATA"), 18 U.S.C.§2333 it may be cited: Gonzalez v. Google, Inc., 2017 WL 4773366 (N.D. Cal. Oct. 23, 2017) and the third amended complaint (See Gonzalez v. Google, Inc., 335 F.Supp.3d 1156 (N.D. Cal. 2018)).

4 Netzwerkdurchsetzungsgesetz, 1st September 2017.

5 *LOI n° 2020-766 du 24 juin 2020 visant à lutter contre les contenus haineux sur internet*.

6 *Conseil Constitutionnel*, Decision n° 2020-801 DC, 18th June 2020.

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b)
On the basis of experience accrued over the past 20 years and the dynamic changes of technology my proposal is to replace administrative measures by judicial sanctions and in addition possibly extend consumer class actions to such cases.

The reason why such civil remedies have so far been excluded is largely founded on the American CompuServe[7] and the Prodigy case[8]

These cases caused the United States' Congress to pass the CDA (section 230C in particular) in 1996 and inspired the e-commerce Directive's immunity provisions.

Since then significant technological progress has been made (AI etc.) and an industry diligence standard may now be developed (a distinction could be made within this standard between smaller and bigger companies).

In addition and in accordance with the *Conseil d'État*'s opinion of 16 May 2019[9] on the French Hate Speech Bill new actors have emerged on the internet (social media and search engines) and they play an active role in facilitating posting and sharing of content by applying algorithmic processes of "hierarchization" and optimization without however meeting the qualification of editors or publishers. This causes the current rules which are based on the neutrality of such actors with regard to content to be partly outdated[10].
A third category should therefore be introduced in addition to the existing "Host" and "ISP"[11].

c)
The social function of language was already identified by Aristotle. We communicate because we are, and to a large extent we are, because we communicate.

Speech is not simply a vector of arguments and opinions engaged in some metaphysical marketplace of ideas pitted against each other and subject to arbitration by a *deus ex machina*, tech platform or Darwinistic selection process, which ensures the survival of the fittest (an estranged notion that fails to take into account the existence of echo chambers defating the market place illusion).

Accountability (both penal and civil) increases the operational costs of tech corporations — just like money laundering compliance has increased the cost of banking and environmental protection and has added to the cost of industry and transport.

---

7 Cubby Inc. v CompuServe Inc. 776 F. Supp. 135 (S.D.N.Y. 1991).

8 Stratton Oakmont Inc. v. Prodigy Services Co., 1995 WL 805178 (N.Y. Sup., Dec. 11, 1995).

9 Avis n° 397368 du 16 mai 2019 sur la proposition de loi visant à lutter contre la haine sur Internet.

10 *« L'apparition de nouveaux acteurs (réseaux sociaux et moteurs de recherche) qui, en tant qu'intermédiaires actifs permettant le partage de contenus et en accélérant l'accès par leurs processus algorithmiques de hiérarchisation et d'optimisation, ne se bornent pas à un rôle purement technique, sans pour autant pouvoir être qualifiés d'éditeurs de contenus, rend le régime actuel, fondé sur la neutralité des prestataires de services de communication au public en ligne à l'égard des contenus, en partie dépassé.* »

11 To be more precise the following terminology is used in the e-commerce directive : "Section 4: Liability of intermediary service providers" and "mere conduit" and "Information Society Service", "Intermediary Service Providers" Article 12 and "storage of information provided by a recipient of the service", Article 14.

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This additional cost is probably the main reasons why tech corporations embrace free speech as their governing value.

Speech derives its value from the values it promotes, and the right to speak against power and authority (vertical speech) should not be confused with a right to hurt your fellowman or woman (horizontal speech).

Immunity is consistently justified by reference to the value of vertical speech, but such arguments are alien to horizontal speech and harm.
Horizontal harm is directed against groups or individuals who hold no power over the author.

The distinction between horizontal and vertical harm should be introduced in the revised CDA.

d)
Allowing civil claims would create a legitimate remedy against harm and enable effective judicial review including appeals and thereby to a very large extent address the legitimate censorship concerns. The final decision would be left to the judiciary (which would of course have to meet established independence criteria).

It may be argued that government censorship has been replaced by corporate censorship and culling of information. The public space is controlled by private corporations and there is a reason for concern that such gatekeeper power will impact true freedom of expression, of opinions and thoughts.

Civil remedy must therefore also be made available against arbitrary take down decisions.

Immunity is denial of justice and nothing is more dangerous to democracy and the survival of our institutions than a sense of injustice.

II. Reinforcement of the presumption of innocence

My second proposal relates to the presumption of innocence.

This fundamental Human Right knows no exceptions or limitations under any circumstances, yet it is also the right, which is most exposed and constantly infringed on the Internet.

In my private practice, I have dealt with numerous cases of victims of violations of this basic and exception-less presumption.

These are not instances of “simple defamation”, but of accusations of criminal acts made on social media and/or private blogs or websites.

The overwhelming majority of those accusations is perfectly groundless and never leads to actual indictments. To the extent indictments are actually raised a large number never result in guilty verdicts. The harm is however done and very often it is irreparable: the victim will

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have lost access/right to a bank account almost immediately and his/her family, including children, will be bullied and treated as pariahs at school, at the workplace (prior to losing their job which is an almost automatic consequence) and in social interaction. They are ostracized by society and subject to a string of tragedies causing some to commit suicide.

Accusing and sentencing innocent people of crimes they did not commit is obviously not a new phenomenon. History abounds with such shameful decisions.

Because of current tech scalability, the problem has however reached hitherto unrivaled dimensions and it is essential that policy makers take resolute action to defend this critical human right without which democracy cannot prosper. A sense of injustice and arbitrariness will invariably lead to general distrust in democratically elected institutions and democracy as such.

Steps have been taken in the EU in recognition of these vital challenges. The "Stockholm programme 2009" (on the "Procedural Rights Roadmap") led to the reinforcement of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings. Pursuant to the roadmap, Directive 2016/343/EU has been adopted. The thrust of the directive as provided in Article 4 (1) is public references to guilt (in other words "vertical violations of the presumption of innocence"):

> *Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty. This shall be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence.*

Unfortunately, the directive - admirable as it may be - does not provide protection from the growing current problem of horizontal violation of the presumption of innocence *i.e.* dissemination on the internet by private parties (as opposed to *public authorities)* of information about an arrest or an indictment implying that a decision on guilt has been made.

Similarly, no such protection from the violation of the presumption of innocence on the internet is provided under U.S. Law.

The motivations driving such dissemination are most often of a vindictive or tactical nature and attempt to influence the final judicial decision (unfortunately judges may be influenced: see the article I have authored in the American Law Institute: Profiling of Judges.

In the light of the above, we propose the following approach:

(1) In case an individual were to post content (including but not limited to social media) relating that preliminary penal procedural steps (*e.g.* arrest or indictment) have been taken against a named individual, said act would in itself constitute a penal offence sanctioned by penalties in addition to fixed minimum damages in favor of the victim (fixed due to the practical difficulties of proving actual monetary loss and harm).

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The offence would be that of violating the presumption of innocence per se (different from defamation given that the information is true) and would be unaffected by a possible conviction at a later stage.

(2) Social media and search engines which do not diligently comply with a notice to take down/dereference such content would be committing the penal offence of facilitating the violation of the presumption of innocence and be exposed to the same penalties and damages unless the author produces a final judgment in favor of the impugned post within 24 hours from notice.

Above points could be included in the revised CDA as part of its reinforcement of Human Rights.

III. The creation of an Internet Ombudsman

Finally, in order to introduce an additional safeguard given the due process and appeal requirements which will invariably cause delays and at the same time accommodate the legitimate and growing concern that some content may cause immediate and irreparable harm we recommend the creation of an Internet Ombudsman.

There is wide consensus that certain categories of content regulation are vague.
Again, the European example is striking: the "Right to be forgotten" (enshrined by the ECJ on 13 May 2014 and codified in Article 17 of the General Data Protection Regulation (GDPR)) contains very vague wording. Article 17 of the GDPR uses language like: "*no longer necessary*", "*unlawfully processed*" balanced against "*freedom of expression*".

Other grounds to request deletion or dereferencing (we shall only refer to "platforms" but the remit of the Internet Ombudsman should include search engines) may likewise create uncertainty and give rise to difficult judgment calls. This is the case for instance for hate speech and defamatory content. Platforms may find it difficult in good faith to determine whether the disputed content is illicit.

The difficulty is compounded by interpreting international law requirements. For example, the International Covenant on Civil and Political Rights (1966), Article 20(2). The International Convention on the Elimination of All Forms of Racial Discrimination (1965) and the Additional Protocol to the Convention on Cybercrime, concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems (2013).

The right to offend, shock or disturb must continue to be protected.

It is not easy to determine legality, *i.e.* the notions constituting the offence and the exceptions that may apply (this problem also arises in intellectual property law but here the notions are less vague). The difficulty is compounded by notions like "necessity" and "proportionality".

Against this background of increased regulation and the ever-growing need for guidance and clarity with regard to the assessment of online content and in recognition of the proportionally

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growing threat to free speech and the delays involved in judicial action it is essential to develop new institutions which may allow these often conflicting rights to coexist in cyberspace.

The general context should also take into account that to a certain extent such regulation tends to constitute delegation to the Private Sector of Public Law Enforcement.

Practical aspects of the creation of an Internet Ombudsman

Potential advantages for the public (including the victims of presumably illegal content)

Access to justice and the right to an effective remedy are crucial principles and constitute the core of democracy. Late justice is no justice and the harm done by dissemination of content on the Internet may quickly become irreversible.

The Internet Ombudsman institution represents clear advantages for the public in that it will expedite the handling of judgment calls. The review procedure would guarantee a faster way to remove contentious content directly harming an individual or a group of individuals or the public overall while at the same time prevent over-blocking.

It would ensure that effective protection against hurtful content be achieved on an egalitarian basis as opposed to present day reputation techniques which may be extremely costly (Search Engine Optimization for instance) or corporate censorship.

Further, the stifling effect of the Internet "never forgiving" may also impact artistic expression. History abounds with examples of artists fulfilling their indispensable role in democracy by provoking change. Artistic expression is almost by definition not "politically correct". An effective means of deleting content which could later cause harm to such artists in terms of funding, access to media and other reputational risks is critical to true democratic discourse.

Potential advantages for social media and search engines

Currently, users flag/report content to the platform which they deem illegal or in breach of its policies or community guidelines after which the platform's staff (sometimes subcontracted) reviews the content and decides whether or not to remove it. Users report to NGOs (*e.g.* IWF in the U.K. or the "*internet-beschwerdestelle*" in Germany) or to government agencies like Pharos in France or directly to law enforcement.

In addition, platforms increasingly employ techniques like Artificial Intelligence to intercept illicit content features.

The Internet Ombudsman institution would represent an advantage particularly for social media companies considering that they would be able to apply to this institution in cases where they may lack the necessary legal expertise to make an informed decision in relation to specific requests for removal or blocking (in particular start-ups). In this case, the platform would initiate the procedure by submitting a request for an assessment of the impugned content before the Internet Ombudsman. The latter would then deliver an assessment on its qualification in the form of an Opinion (not a binding decision). The platform would be free to follow this Opinion. Acting in accordance with the Opinion would relieve the platform from

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future penal or civil sanctions including claims made by victims, authors, editors, publishers or any other party relative to the specific content covered by the Opinion. The Opinion would not impact recourse against the author, editor or publisher.

Independence and impartiality of the judiciary may guide us in formulating the basic principles that should apply also to the Internet Ombudsman.

The Ombudsman Institution could be combined with an advisory board encouraging users to actively participate in the effort.

The Internet Ombudsman and the judiciary

It is important to stress that the Opinion of the Internet Ombudsman would be of a non-binding nature. It may therefore be argued that rules of due process *i.e.* contradictory and public proceedings with rights of representation and appeal are not necessary.
In view of the difficulty in some cases of qualifying specific content as licit or illicit platforms should not be liable for failure to take down or block access to content unless they disregard the Opinion of the Internet Ombudsman.

The "content qualification assessment procedure" the Internet Ombudsman would follow should be characterized neither as a judgement, nor as a decision or as an arbitration award, but as authoritative guidance - without having a legal effect.

The Internet Ombudsman's Opinion would have a disculpating effect on the intentional element, *i.e.* good faith, but the prosecution and the judiciary would retain full competence against the author, publisher, editor and the IP in case of - later - judicially determined infringement.

Should the Internet Ombudsman not consider the content to be illicit and render an Opinion in this sense, the platform would be in good faith to follow said Opinion and not take measures against the content. In this regard, it would also be highly unlikely that a later judgment were to find the content in question to constitute a violation of a victim's individual rights in the eventuality that the victim initiates a case against the platform (which would be his/ her right notwithstanding the Ombudsman's Opinion).

Bad faith is part of the intentional element and must apply when finding vicarious liability. It is a fundamental rule of criminal law that criminal liability is principally attributed to the perpetrator of the offence and that complicity requires an element of intent. Thus, even if the courts were to consider the content to be illicit, the platform concerned would be in indisputable good faith. Hence, it should not be held liable for not taking measures to prevent the content from being accessible or referenced. In other words, acting in accordance with the Opinion would relieve platforms from any future penal or civil sanctions including claims made by authors, editors, publishers or any third party relative to the specific content covered by the Opinion. However, the Opinion of the Internet Ombudsman would not impact the legal rights and obligations of the author of the content or any other third party.

Finally, the Internet Ombudsman's remit should be limited to the following issues:

- Hate Speech/Incitement (including xenophobia, racism, anti-Semitism, sexism, etc.).

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- Extremist content/Radicalization,
- The Right to be Forgotten,
- Cyberbullying,
- Harassment,
- Defamation.

The Internet Ombudsman should not cover opinions on the interpretation or the reach of the National Security Exemption (ICCPR, Article 19(3)(b)). The remit should be limited to the assessment of offences as inchoate crimes (not requiring an analysis of causation) where the element of intent ("*mens rea*") is not decisive. The analysis of content legality should be objectivized to the largest content possible taking into account both semantics and context.
Also, fake news and propaganda should not be part of the Internet Ombudsman's remit. These questions are related to facts and not to the legal qualification of content.

The role of the Internet Ombudsman would precisely be that of enhancing legal certainty, prevent over-blocking and thereby allowing increased regulation and civil recourse by establishing a true partnership with industry which would perform the role of obligated gatekeepers while society at the same time lifts its share of the burden.

In order for the Internet Ombudsman to function optimally, transparency should be ensured. This should apply both to the Opinions of the Internet Ombudsman and the decisions of platforms to comply or not with the Ombudsman's Opinions. Such transparency would allow public debate and create awareness. It would also provide information to advertisers thus incorporating the platform's business model in attaining the desired result while not restricting free speech.

The Internet Ombudsman would be the corollary of content regulation.

Yours sincerely,

Dan Shefet

President of the Association for Accountability and Internet Democracy
Advisor to UNESCO/Mahatma Gandhi Institute of Education for Peace and Sustainable Development (MGIEP)
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From:	Willard, Lauren (OAG)
Sent:	Tuesday, July 14, 2020 9:58 AM
To:	Toensing, Brady (OLP); Goldfoot, Josh (CRM); Hardee, Christopher (NSD); Raman, Sujit (ODAG); Motta, Thomas G. (DO) (FBI); Grieco, Christopher (ODAG); Whitaker, Henry C. (OLC); Wiegmann, Brad (NSD); Gelber, Alexandra (CRM); Winn, Peter A. (OPCL); Pandya, Brian (OASG); Sabol, Sherry E. (OGC) (FBI); Feith, Daniel (ODAG); Shores, Ryan (ODAG); Ramsden, Michelle (OPCL); Proia, Andrew (OPCL); Eyler, Gustav W (b)(6), (b)(7)(C) per FBI (OGC) (FBI); Sabol, Sherry E. (OGC) (FBI); Jones, Darrin E. (ITID) (FBI); Peck, Jessica (CRM); Liu, Jeffrey (OLC); Freeman, Lindsey (OLP); Barnett, Gary (OAG (b) (6) (OLA (b) (6) (OLA)
Subject:	230 Workshop Submission
Attachments:	2020 - CDA contribution_Shefet.pdf

Also, in case anyone is interested, we have our first submission to our DOJ Workshop address in response to our Key Takeaways ☺

Best,
Lauren

From: Willard, Lauren (OAG)
Sent: Tuesday, July 14, 2020 9:34 AM
To: Toensing, Brady (OLP) (b) (6) >; Goldfoot, Josh (CRM) (b) (6) >; Hardee, Christopher (NSD) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Motta, Thomas G. (DO) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Grieco, Christopher (ODAG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wiegmann, Brad (NSD) (b) (6) >; Gelber, Alexandra (CRM) (b) (6) >; Winn, Peter A. (OPCL) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; 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), (b)(7)(C), (b)(7)(E) per FBI (OGC) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Jones, Darrin E. (ITID) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Peck, Jessica (CRM) (b) (6) >; Liu, Jeffrey (OLC) (b) (6) >; Freeman, Lindsey (OLP) (b) (6) >; Barnett, Gary (OAG) (b) (6) (b) (6) (OLA) (b) (6) (b) (6) (OLA) (b) (6) >
Subject: RE: Response due by 5PM today (TH, 7/9) Last Call for Feedback on OMB Section 230 Passback

Deliberative

Sending package again with Section-by-Section. Absent any objections from this group this morning, OLA will prep for submission to OMB. Again, many thanks to everyone for their feedback and help!

Best,
Lauren

From: Willard, Lauren (OAG)
Sent: Monday, July 13, 2020 9:40 PM
To: Toensing, Brady (OLP) (b) (6) >; Goldfoot, Josh (CRM) (b) (6) >;

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Subject: RE: Response due by 5PM today (TH, 7/9) Last Call for Feedback on OMB Section 230 Passback

Deliberative Process / Pre-Decisional

Hi all,

Since everyone has been working quite hard on all the Section 230 efforts over the past few weeks, I thought I would give folks a break and pull down the call for tomorrow morning. I did, however, want to share the current draft of the OMB Passback that we plan to send OMB tomorrow by noon. If anyone has any questions, concerns, or final edits, feel free to let me know.

Attached is the Redline with comments, the supplementary document on our willful blindness and terrorism points, and the cover letter. We are still working on updating the Section-by-Section, but that should have minimal edits. Thanks so much to everyone who contributed to the response package!

In case it's easier to review, I tried to summarize the key new changes below (new changes in dark blue; original in red). Feel free to chime in if I missed anything important below.

Key Changes

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(b) (5)

(b) (5)

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(b) (5)

(b) (5)

Declined edits

(b) (5)

(b) (5)

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(b) (5)

From: Toensing, Brady (OLP) (b) (6) >
Sent: Thursday, July 9, 2020 12:26 PM
To: Willard, Lauren (OAG) (b) (6) >; Goldfoot, Josh (CRM) (b) (6) >; Hardee, Christopher (NSD) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Motta, Thomas G. (DO) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Grieco, Christopher (ODAG) (b) (6) >; Whitaker, Henry C. (OLC) (b) (6) >; Wiegmann, Brad (NSD) (b) (6) >; Gelber, Alexandra (CRM) (b) (6) >; Winn, Peter A. (OPCL) (b) (6) >; Pandya, Brian (OASG) (b) (6) >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; 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), (b)(7)(C), (b)(7)(E) per FBI (OGC) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Sabol, Sherry E. (OGC) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Jones, Darrin E. (ITID) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI >; Peck, Jessica (CRM) (b) (6) >; Liu, Jeffrey (OLC) (b) (6) >; Freeman, Lindsey (OLP) (b) (6) >
Subject: Response due by 5PM today (TH, 7/9) Last Call for Feedback on OMB Section 230 Passback

Pre-decisional / Deliberative / Draft

Dear Section 230 Working Group – We are in the process of finalizing the edits to the OMB Section 230 passback. Attached is the most up-to-date version. Some of you have already reviewed and sent us back comments, or we are already in communications with you about your feedback (thank you).

For anyone else, please send us your edits or comments by **5PM today (Thursday, July 9).** **Please note --**

- comments should be sent back to me in the body of an email, or edits and comments made in the document should be marked in yellow highlight. (The document has become dense with comments and I want/need to be able to identify any new comments quickly and with certitude.)
- If you need time beyond the 5PM deadline, please let me know as soon as possible and I will do what I can to extend the dealine.

Thank you for your review. Best, bt

* * * * * * * * * * * * * * * * * * * *

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

Kimberly Carleste Newman, Lisa Cabrera, Catherine Jones, and Denotra Nicole Lewis,

Plaintiffs,

vs.

Google LLC, YouTube LLC, Alphabet Inc, and DOES 1 through 100, inclusive,

Defendants.

Case No.

CLASS ACTION COMPLAINT FOR DECLARATORY JUDGMENT, RESTITUTION AND DAMAGES

Trial Date: None Set

Document ID: 0.7.2270.7339-000001

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Plaintiffs, Kimberly Carleste Newman, Lisa Cabrera, Catherine Jones, and Denotra Nicole Lewis, bring this lawsuit (the "Lawsuit"), individually and on behalf of a putative class of similarly situated persons, against Defendant YouTube LLC ("YouTube"), and its parent companies, Google LLC ("Google") and Alphabet Inc. (collectively referred to as "Google/YouTube" or "Defendants," unless otherwise specified).

Substantial overlaps exists between the claims, allegations, putative classes and issues in this Lawsuit with case pending before this Court captioned *Divino Group, LLC et al., v. Google, LLC, et al*, Case No. 5:19-cv-004749 – VKD (N.D. Cal.) ("*Divino*"). After reviewing Civil L.R. 3-12 governing related cases, it is unclear whether this Lawsuit technically meets the specific criteria and elements required for relation under Local Rule 3-12. Specifically, this Lawsuit does not involve *all* of "the same parties," or the identical "property" owned by the same parties in *Divino.* It is also unclear whether the "transactions" are the same within the meaning of Local Rule 3-12 or whether the "events" consist of the identical unlawful conduct of restricting of access to the YouTube platform based on the profiling and discriminatory use of a person's personal identity or viewpoint in *Divino* that may be different from the racial identity profiling and discrimination against Plaintiffs and the members of the Class in this Lawsuit. Consequently, while Plaintiffs do not believe that all of the requirements for designating the Lawsuit "related" come within the definition of Local Rule 3-12, Plaintiffs are not opposed to having this Lawsuit related to, or otherwise coordinated with, the pending proceedings in *Divino*.

I. INTRODUCTION AND PREFATORY STATEMENT OF THE CASE

1. Plaintiffs are African American content creators, viewers, and consumers who bring this Lawsuit to redress overt, intentional, and systematic racial discrimination perpetrated by Google/YouTube to deny them and other members of a protected racial classification under the law equal access to YouTube, the most "ubiquitous" provider of public video content and internet access services in the history of the world.

2. Defendants are members of the largest business enterprise, private or public, in the world. Through this enterprise, Defendants exercise complete, absolute, and "unfettered" control over access to approximately 95% of all video content that is available to the public. This includes

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absolute control over any and all posting, viewing, engagement, advertising, personal data, and revenue monetization rights of the 2.3 billion consumers who access and use YouTube.

3. Defendants are also the largest creators, promoters, and sponsors of video content on YouTube. Thus, in addition to hosting and regulating video content and services on YouTube, Defendants compete directly with Plaintiffs and their content for the same access, audiences, viewership, advertising, marketing, and revenue based services on YouTube.

4. In exercising these unprecedented powers, Defendants contract with Plaintiffs and all persons similarly situated to provide equal access to YouTube and all of its related services, subject only to viewpoint neutral content rules and criteria that apply equally to all.

5. In reality, however, Defendants' access restrictions and denials imposed on Plaintiffs and all persons similarly situated are not the result of an identity and viewpoint blind review and application of the rules to actual video material. Instead, Defendants have an irreconcilable commercial conflict of interest: on the one hand, Defendants act as content creators or sponsors of video content, competing directly with Plaintiffs and all persons similarly situated for the same services, audiences, advertisers, and revenue streams on the YouTube platform; on the other hand, Defendants act as absolute regulators and monetizers of all YouTube content and services, and exercise unfettered authority to determine viewer and service access by enforcing their Community Guidelines and Terms of Service (the "TOS") against their competitors, based on the identity or viewpoint of Plaintiffs and all other persons similarly situated.

6. Under the pretext of honest content and service regulation, Defendants rig the game, by using their power to restrict and block Plaintiffs and other similarly situated competitors, based on racial identity or viewpoint discrimination for profit. Defendants also abuse their power by not subjecting their own videos to the same Community Guidelines and TOS that they apply to all other YouTube users. As a result, Defendants are not subject to filtering or blocking restrictions, even where Defendants' videos contain material that violates their own rules.

7. Among the many abuses that Defendants have perpetrated against Plaintiffs and all other persons similarly situated, are Defendants' practices of allowing racist hate speech to go unregulated on Plaintiffs' channels, resulting in lost subscribers and viewership, and the

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surreptitious "bugging" of Plaintiffs' videos by the insertion, attachment, appending, or embedding of metadata and other signals that allow Defendants' filtering tools to target Plaintiffs and all other persons similarly situated, based on race, identity and/or the viewpoint of the creator, her channel subscribers, and viewers.

8. This intentional and systematic racial discrimination violates Defendants' legal obligations under the contract(s), and is unlawful under federal and state antidiscrimination laws, false advertising, unlawful business practices, and free speech laws. It is unlawful whether it is done for profit, or out of ideological animus.

9. Interfering with the contractual and legal rights of Plaintiffs and all persons similarly situated to access and use YouTube based in any way, part, or degree on their race, identity or viewpoint, violates YouTube's TOS and is unlawful under the strict prohibitions against racial discrimination in contract and business practices enshrined in federal and California law. That is racism, overt intentional and systematic.

10. Defendants knowingly, intentionally, and systematically employ artificial intelligence ("A.I."), algorithms, computer and machine based filtering and review tools to "target" Plaintiffs and all other persons similarly situated, by using information about their racial, identity and viewpoint to restrict access and drive them off YouTube.

11. Under the pretext of finding that videos violate some vague, ambiguous, and non-specific video content rule, Defendants use computer driven racial, identity and viewpoint profiling and filtering tools to restrict, censor, and denigrate Plaintiffs and all persons similarly situated on YouTube, wholly or in part, because they are African American, black, members of a protected racial classification under the law, or identify as such, or with a related viewpoint.

12. Since at least 2017, Defendants' filtering and review tools and procedures are embedded with computer code or other machine based "triggers" that profile the personal racial identity or viewpoint of the user. Defendants admit that their filtering tools use information about the identity of the YouTube creators, subscribers and viewers to "target" members of protected racial classifications under the law and impose access restrictions on them that are not racially, identity or viewpoint neutral; nor are they based on, or supported by actual material in the videos;

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and Defendants treat such videos as if they violate YouTube's content based Community Guidelines and TOS, by denying full YouTube platform access and related services.

13. On March 19, 2017, Defendants publicly admitted that they improperly censored videos using their "Restricted Mode" filtering that were posted or produced by members of the LGBTQ+ Community, based upon the identity and orientation of the speaker, rather than upon the content of the video. Defendants also promised to remove all restricted filtering on videos posted or produced by LGBTQ+ members and groups, and changed their filtering algorithm, and manual review policies and practices to address the risk that videos posted by LGBTQ+ vloggers were being censored because of the identity or viewpoint of the speaker.

14. On April 27, 2017, Johanna Wright, Vice President of Product Management for Google/YouTube, took to the airwaves and news media to promise the global "YouTube Community," that Defendants would ensure that "Restricted Mode" would not "filter out content belonging to individuals or groups based on certain attributes like gender, gender identity, political viewpoints, race, religion or sexual orientation." While Ms. Wright conceded that "Restricted Mode will never be perfect, [Google/YouTube] hope to build on [their] progress so far to continue making [their] systems more accurate and the overall "Restricted Mode" experience better over time."

15. On September 14, 2017, Defendants invited independent YouTubers and content creators to address concerns that the platform's video review algorithm and practices discriminated against certain minority groups, including LGBTQ+, African American, and other users of color or vulnerable minorities. At the meeting, Defendants admitted that their content filtering and review tools were "targeting" African American, LGBTQ+, and other "minority" users. They further admitted that this resulted in the application of erroneous or unwarranted blocking restrictions and access denials for users that were based, at least in part, on the user's racial or sexual identity or viewpoints, rather than a content violation of YouTube's rules or Terms of Service.

16. Defendants also represented that they were working on a "fix," and that neither user identity nor viewpoint has any role in the application of YouTube's content based access rules and

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restrictions or should otherwise interfere with a user's right to access the myriad of services that Defendants offer to users.[1]

17. But things have only gotten worse with respect to Defendants' racial profiling and "targeting" of African American and members of other protected racial classifications under the law who use YouTube.

18. In January 2018, Defendants got caught red handed. During a recorded call between a user and a supervisor, who Defendants now identify as the "Floor Manager" for their customer service advertising services center in Bangalore, India, Defendants represented to the user that its "holiday special" video was not eligible for advertising services because the filtering tools had identified the user as being involved with the "gay thing." Under what the manager expressly stated was "company policy," the filtering algorithm determined that the video contained "shocking" or "sexually explicit" content, not because of any actual material in the video, but because the "company" considered video content created by a "gay" user or content that discussed the "gay thing" as ineligible for advertising or promotion. Defendants considered content created or viewed by "gay" persons to be "shocking" or "sexually explicit."

19. This pattern and practice or "policy" of denying users equal access to YouTube based on their racial, sexual, or other individual identities or viewpoints occurred to the same user after the January 2018 call with Defendants, on at least five other occasions. The pattern and practice has become so pervasive that many prominent and quality content creators have lost more than 90% of their viewers, advertisers, revenue, and other access rights in the last 24 months solely

[1] One of the persons who attended the meeting is Stephanie Frosch, a prominent and popular LGBTQ+ content creator on YouTube. Ms. Frosch is a named plaintiff in another class action lawsuit pending in this District, captioned *Divino Group, et al. v. Google LLC, et al.*, Case No. 5:19-cv-004749-VKD (N.D. Cal.). In that case, Ms. Frosch testified under oath the she and the other attendees were required to execute multiple non-disclosure agreements (the "NDAs") before and at the event. The NDAs prevented her, and any anyone else who attended the meeting, from disclosing any information about the meeting. On March 23, 2020, after Plaintiffs threatened to move to set aside the NDAs as void and unenforceable, Defendants agreed to release her from her obligations under the NDAs. *See* Declaration of Stephanie Frosch Submitted in Support of Plaintiffs' Application to File a Sur Reply to Address New Authority. A true and correct copy of the Declaration of Stephanie Frosch (Dkt. #40) is attached as Exhibit A.

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because they are identified as African American, LGBTQ+ or other protected racial classifications under the law.

20. The Plaintiffs in this Lawsuit also face the same sort of overt, intentional, and systemic identity and viewpoint discrimination, with one important difference: Defendants do not discriminate against Plaintiffs only because of sex based identity or viewpoint profiling, but primarily because they identify as African American, or with other protected racial classifications under the law.

21. This is unlawful race discrimination. Unlike any other form of prohibited discrimination, it has been outlawed in the United States since 1865, when Congress enacted section 1981 and other civil rights laws intended to wipe out, prohibit, and make any and all racial discrimination in contracts and business practices unlawful.

22. Defendants know and admit that they discriminate, including admissions that since at least 2017, they use content based filtering and access review tools, systems, and practices that "target" African Americans and other members of protected racial classifications under the law.

23. Nonetheless, Defendants have failed to "fix" the discriminatory defects in their content and access review systems and stop the "targeting" as promised. Defendants continue to knowingly, intentionally, and systematically block, demonetize, and deny Plaintiffs and other persons similarly situated, their contractual and other legal rights to access YouTube based on the color of their skin or other protected racial traits, rather than the material in their videos.

24. Defendants also abuse their dual roles as content reviewers and content creators on YouTube. Specifically, under the pretext of unfettered "discretion" to serve as sole "censors" of content on the YouTube platform, Defendants use racial profiling to restrict the reach and access of Plaintiffs and other third party users who compete directly with Defendants and their sponsored video content for click per minute ("CPM"), advertising, and other revenue stream and services on YouTube.

25. Instead of "fixing" the digital racism that pervades the filtering, restricting, and blocking of user content and access on YouTube, Defendants have decided to double down and continue their racist and identity based practices because they are profitable. By utilizing their

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unilateral control over 95% of the world's public video content, Defendants unlawfully misappropriate viewers, CPM, advertising, and other revenues that belong to, or would otherwise be available to, Plaintiffs and other third party users, but for the discriminatory restrictions that unlawfully restrict and block Plaintiffs' content and access to YouTube services.

26. This is race discrimination. It is knowing and intentional. Defendants knowingly used and continue to use discriminatory content filtering review tools and procedures that "target" Plaintiffs and other persons similarly situated, for access restrictions because they are African American, persons of color, or are identified by Defendants as having an ethnicity or other personal immutable traits and/or viewpoints, not because the actual video content or material violates YouTube's purportedly neutral content rules.

27. Defendants' racist profiling and practices are also systematic. By using A.I., algorithms and other computerized machine based filtering tools (in lieu of having humans perform the "ubiquitous" task of reviewing and deciding whether the material or content in billions of hours of videos uploaded daily to YouTube) to sanction Plaintiffs, Defendants engage in a knowing and intentional practice that unlawfully discriminates against users based on race or other protected racial classifications under the law, or viewpoints.

28. Defendants' conduct is knowing, intentional, and systematic, regardless of whether Defendants are motivated by ideological animus towards black and members of other protected racial classifications under the law, or they merely use racial and identity profiling to restrict access for profit, and/or to save costs, resources, labor, and time necessary to lawfully review actual video content and determine, in a viewpoint neutral manner, whether a rule violation has occurred that triggers a content based access restriction or sanction on YouTube. In short, Defendants' use of racism for profit is every bit unlawful as ideological racism, since, in either case, it discriminates against Plaintiffs because they are African Americans or members of other protected racial classifications under the law.

29. Defendants do not disagree. Susan Wojcicki, YouTube's CEO, has taken to the airwaves over the last three years to repeatedly and unequivocally deny that Defendants discriminate against anyone when it comes to content or access restrictions to YouTube, while

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insisting that all decisions, wrong or right, are the product of good faith, viewpoint neutral, and identity blind content reviews and decisions.

30. On or about June 14, 2020, Wojcicki publicly announced that in conjunction with Alphabet, Defendant YouTube was starting a $100 million fund "dedicated to amplifying and developing the voices of Black creators and artists and their stories." In a blog post Thursday, Wojcicki said, "At YouTube, we believe Black lives matter and we all need to do more to dismantle systemic racism." *See* https://www.marketwatch.com/story/youtube-is-starting-a-100-million-fund-for-black-creators-artists-2020-06-11.

31. Given Defendants' stated concerns regarding systemic racism, Defendants have some serious explaining to do when it comes to the Plaintiffs and the other persons similarly situated using YouTube. Plaintiffs would prefer that Defendants spend their money to stop the racist practices that pervade the YouTube platform, including:

a. **Abusing Artificial Intelligence Programs, Algorithms and Other Filtering Tools** to digitally profile, redline, and target Plaintiffs and all persons similarly situated on the YouTube platform, for access restrictions, blocking, demonetization, suspensions and removals from the platform based on the racial identity or viewpoint of the video creator, her subscribers, and/or the viewers of her videos by inserting or appending to individual videos race, identity or viewpoint based metadata, thereby forcing Plaintiffs to self-censor and refrain from posting videos regarding issues and current events which are important to the African American community, such as requiring Plaintiffs to avoid or hide references to abbreviations like "BLM," "KKK;" terms such as "Black," "White," "Racism," "Boogaloo," "White Supremacy," "Racial Profiling," "Police Shootings," "Police Brutality," "Black Lives Matter;" names of individuals such as those killed by law enforcement, "Bill Cosby," "Louis Farrakhan;" names of organizations such as "Ku Klux Klan," "Nazi," "Neo-Nazi," "Aryan Brotherhood," and/or other euphemisms that are known and particular to the African American community, despite the fact that the videos involved do not contain any hate speech, profanity, or nudity, and at most, contain very short references or quotations from recognized news sources, which are properly attributed.

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b. **Preventing Full Revenue Generation** for videos of Plaintiffs and all persons similarly situated who are not afforded full monetization, Channel Membership and Livestream donations for videos that are otherwise eligible under Defendants' rules, but have been demonetized or limited in monetization because of Defendants' addition of metadata and use of algorithms and filtering tools that profile creators, subscribers and viewers based on their race or viewpoint, rather than on the actual content of the video.

c. **Misapplying "Restricted Mode"** to the videos of Plaintiffs and all persons similarly situated, which address or discuss issues of importance to their communities, merely because the videos have titles or tags which include "abbreviations like "BLM," "KKK;" terms such as "Black," "White," "Racism," "Boogaloo," "White Supremacy," "Racial Profiling," "Police Shootings," "Police Brutality," "Black Lives Matter;" names of individuals such as those killed by law enforcement, "Bill Cosby," "Louis Farrakhan;" names of organizations such as "Ku Klux Klan," "Nazi," "Neo-Nazi," "Aryan Brotherhood," and/or other euphemisms that are known and particular to the African American community, despite the fact that the videos do not contain materials which discuss drug use or the abuse or drinking of alcohol; overly detailed conversations about or depictions of sexual activity; graphic depictions of violence, violent acts; natural disasters or tragedies or violence in the news; specific details about events related to terrorism, war, crime and political conflicts that resulted in death or serious injury, even if no graphic imagery is shown; inappropriate language, including profanity, or content that is gratuitously incendiary, inflammatory, or demeaning toward an individual or group.

d. **Shadow Banning Entire Channels And Individual Videos** of Plaintiffs and all persons similarly situated on the YouTube platform based on the race, identity or viewpoint of the video creator, her subscribers, and/or the viewers of her videos, so that the channel and/or individual videos do not appear in searches using the YouTube search application, and viewers cannot locate new videos which discuss issues and current events that are important to the communities of African Americans and members of other protected racial classifications under the law.

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e. **Deputizing Other YouTube Users To Flag Channels And Videos** on the YouTube platform in order to restrict, block, and/or censor the videos of Plaintiffs and all persons similarly situated, and then, in acting on false or unconfirmed complaints of purported rule violations, Defendants remove, restrict, and/or demonetize, individual videos and/or suspend the channels without first verifying that the flagged video contains material that violates a specific Community Guideline or Term of Service.

f. **Interfering With Livestream Broadcasts** of Plaintiffs and all persons similarly situated by inserting new voice content and/or visual images into the video stream, unrelated to the Livestream topic; throttling, interrupting or cutting off the Livestream broadcast while in progress; deleting positive viewer comments; and promoting, sponsoring, allowing and/or inserting offensive, misogynistic, racist, or obscene comments or engagement in direct violation of YouTube's Community Guidelines based on the race of the creators, channel subscribers and/or viewers, or their viewpoints.

g. **Excluding From "Trending" And "Up Next" YouTube Video Recommendations** the videos of Plaintiffs and all persons similarly situated which, even though they comply with Defendants' Community Guidelines and TOS, are excluded from Defendants' promotional applications based on the race, identities, and viewpoints of the creators, channel subscribers and/or viewers. Defendants' practices muffle the voices of Plaintiffs and all persons similarly situated on the YouTube platform and reduce the racial diversity of the opinions and information posted on the platform.

h. **Freezing Analytic Numbers Of Subscribers And Viewers** for the channels of Plaintiffs and all persons similarly situated. In suspending the accurate analytic information for the channels of Plaintiffs and all persons similarly situated, Defendants prevent them from qualifying for YouTube Partnership benefits such as monetization, mobile Livestreaming, Channel Membership, and SuperChat; as well as deprive them of the opportunity to grow their channels and generate revenue.

i. **Promoting And Profiting From Hate Speech** by allowing racist and misogynist hate speech videos that target Plaintiffs and all persons similarly situated on the

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YouTube platform in direct violation of Defendants' Community Guidelines and TOS, and affording such videos monetization, despite the fact that such videos have been flagged by Plaintiffs and/or their subscribers as violating Defendants' standards, and despite having received repeated complaints regarding those videos.

j. **Interfering With, Obstructing, Delaying And Ignoring Appeals** to prevent Plaintiffs and all persons similarly situated from obtaining a timely manual review of video content and reversal of Defendants' erroneous decisions to suspend their channels and to remove, restrict monetization, or restrict access to videos deprives them of their rights to communicate with their intended audience and/or to earn revenue, unless and until, Defendants lift the suspension, removal, and/or restriction, if ever.

32. Regardless of what Defendants' internal motivations are, Defendants are not above the law nor are they too big to "self-regulate" by complying with the law, including the long established prohibition on race discrimination in contract.

33. Until such time as Defendants make good on their promises, representations, and obligations to "fix" this racism and compensate Plaintiffs and other similarly situated victims of Defendants' unlawful and repugnant discriminatory conduct, Defendants will continue to engage in intentional race discrimination that violates their agreements with Plaintiffs, as well as established federal and state laws that govern the relationship between the parties.

34. Plaintiffs can no longer wait for Defendants to implement the "fix" they promised years ago. Nor should they have to. Whether Defendants' "motive" for refusing to do so is based on profit, ideology, or "no reason at all," the knowing use of a person's, race, skin color or some other immutable personal trait or viewpoint to filter and review access to YouTube, is digital racial profiling, redlining, and discrimination. It is illegal.

35. It is time for Ms. Wojcicki, and the other senior officers of Google YouTube, to put up or shut up. If Defendants truly believe that they are engaged in good faith, viewpoint neutral content regulation on YouTube, then Defendants should produce the computer code and permit an expert review of that code to examine the "triggers" for review and restriction of content. Defendants can then, under oath in deposition and other sworn testimony, and through other

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discovery, explain to Plaintiffs, the Court, and the public why their prior admissions and other evidence of "targeting" African Americans and members of other protected racial classifications under the law, are not true.

36. Until that time, Defendants' unsupported denials, or recent portrayal of the discriminatory conduct as "mistakes" or the result of a "he said, she said" misunderstanding between its employees and officers, is not a lawful reason to deny Plaintiffs their day in court.

37. Despite a whole lot of "telling," Defendants have made no attempt to "show" that their actions do not discriminate based on the race, identity or viewpoint of Plaintiffs or the hundreds of millions of other users who fall victim to discrimination by Defendants.

38. Defendants' refusal to do so is mystifying, if not damning. The computer code and information about how Defendants' A.I., algorithms, and other machine based filtering operate, developed and have changed since Defendants purchased YouTube in 2007. Such evidence will resolve the extent to which Defendants use filtering tools to profile and discriminate against YouTube users based on their race, identity or viewpoints.

39. For whatever reason, Defendants do not deny they are engaged in intentional and systematic racial discrimination on YouTube, but only that they can be held to account under the law. Despite informal and formal legal requests for the computer code and information about how content filtering works on YouTube, Defendants claim that section 230(c) of the Communication Decency Act (47 U.S.C., § 230(c)) ("Section 230(c)") is both a sword and a shield to hide the computer code and other evidence that will show, once and for all, whether Ms. Wojcicki's denials of unlawful conduct are in fact true, or are just another in a line of false, misleading, and deceptive statements to the YouTube Community.

40. Defendants' use of Section 230(c) to immunize them from having to account for intentional discrimination against African Americans and other members of protected racial classifications under the law, based on the users' race, sex, or other identity or viewpoint, is itself unlawful.

41. Under the First Amendment, the United States Supreme Court in *Denver Area Educational Telecommuns. Consortium, Inc. v. Federal Communications Comm'n*, 518 U.S. 727,

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766-67 (1996), confirmed the obvious: a congressional law that permits a private party to regulate speech is unlawful and unconstitutional unless the law (i) is applied in a viewpoint neutral manner, (ii) is narrowly tailored so as not to create a risk of an erroneous private veto over speech, **and** (iii) does not interfere with or otherwise alter or obstruct the parties' existing legal relationship, obligations, and rights or the enforcement of those rights and obligations in a court of law.

42. Defendants' assertion that Section 230(c) permits them to use a person's race, identity or viewpoint to block access to YouTube is unconstitutional because, at least as applied to this Lawsuit, the law is neither (i) viewpoint neutral, (ii) narrowly tailored to prevent against an erroneous veto of speech by Defendants under its rules, and/or (iii) interferes with and eviscerates Defendants' preexisting legal obligations to Plaintiffs under state and federal law, including antidiscrimination, false advertising, consumer protection, and the express and implied promises set forth in Defendants' operative contract(s) with Plaintiffs.

43. Plaintiffs file this lawsuit, therefore, to hold Defendants to account for their intentional and systemic racist conduct and practices, by asserting claims for legal and equitable relief:

(i.) Breach of contract, implied breach of contract covenant, and promissory estoppel;

(ii.) Racial discrimination in contract in violation of federal law under 42 U.S.C. § 1981;

(iii.) Racial discrimination in violation of the Unruh Civil Rights Act, Cal. Civ. Code § 51, *et seq.*;

(iv.) Unlawful, deceptive, and unfair discriminatory business practices in violation of the Unfair Competition Laws under California Business and Professions Code § 17200, *et seq.*;

(v.) False advertising and commercial disparagement in violation of the Lanham Act, 15 U.S.C. § 1125, *et seq.*;

(vi) Discrimination in violation of the Liberty of Speech Clause under Article I, Section 2 of the California Constitution; and

(vii) Discrimination in violation of First Amendment of the U.S. Constitution arising from Defendants' use of Section 230(c) to immunize them from liability for discrimination.

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44. In addition, Plaintiffs also seek a declaratory judgment that: either (i) the plain language Section 230(c) does not apply to racial profiling and discriminatory access restrictions that are based on a person's race, identity, or viewpoints, rather than the "on line material" that actually appears on YouTube; or (ii) if Section 230(c) is construed to permit on line racial, identity or viewpoint based discrimination restrictions against YouTube users, Section 230(c) is unconstitutional because it violates the First Amendment's limits on permissive private party speech regulation.

II. PARTIES

45. Plaintiff Kimberly Carleste Newman, also known as Kimberly Santana ("Plaintiff Newman"), is an African American woman residing in the State of California who is the creator and owner of "The True Royal Family," and "True Royal," two YouTube channels dedicated to developing and posting videos that discuss and present information regarding issues and current events which are important to the African American community. Plaintiff Newman created "The True Royal Family" channel in 2015, followed by "True Royal," in 2016. Since its creation, Plaintiff Newman's "The True Royal Family" channel has posted more than 1654 separate videos, only 954 of which are still posted because Defendants removed 700 or more individual videos and have refused to restore them; the "True Royal" channel has posted 209 videos. "The True Royal Family" channel has garnered a total of 4.4 million views since creation, and the "True Royal" channel has garnered 583,000 views since creation. Plaintiff Newman is a YouTube "partner," and has generated total revenue of $2,672.68 for videos posted on "The True Royal Family," and $123.96 for videos posted on "True Royal."

46. Plaintiff Lisa Cabrera ("Plaintiff Cabrera") is an African American woman residing in the State of New Jersey who is the creator and owner of "Lisa Cabrera" and "Lisa C," two YouTube channels dedicated to developing and posting videos that discuss and present information regarding issues and current events which are important to the African American community. Plaintiff Cabrera created the "Lisa Cabrera" channel in 2015. Since creation, Plaintiff Cabrera's "Lisa Cabrera" channel has posted 4,423 videos (68 of which Defendants archived for unknown

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reasons and can no longer be viewed by anyone), which have garnered 20 million views. Plaintiff Cabrera is a YouTube partner who has generated a total of $25,500 for videos posted on the "Lisa Cabrera" channel.

47. Plaintiff Catherine Jones ("Plaintiff Jones") is an African American woman residing in the State of Vermont who is the creator and owner of "Cooking with Carmen Caboom," a YouTube cooking channel for African Americans, and "Carmen Caboom," and "Carmen Caboom Reloaded," two YouTube channels dedicated to developing and posting both parodies and serious videos that discuss and present information about issues and current events which are important to the African American community. Plaintiff Jones created the "Carmen Caboom" channel in 2010, a backup "Carmen Caboom" channel in 2014, the "Cooking with Carmen Caboom" channel in 2015 and the "Carmen Caboom Reloaded," channel in 2018. Defendants improperly removed the original "Carmen Caboom" channel for purported nudity when no video posted to the channel included any nudity. Plaintiff Jones is a YouTube partner. Since creation, Plaintiff Jones' 2014 "Carmen Caboom" channel has posted numerous videos, several of which Defendants improperly removed as hate speech, the remaining videos have garnered approximately 500 -1,200 views per video overall which have generated approximately $500 per year.

48. Plaintiff Denotra Nicole Lewis ("Plaintiff Lewis") is an African American woman residing in the State of Texas who is the creator and owner of "Nicole's View," a YouTube channel dedicated to developing and posting videos that discuss and present information regarding issues and current events which are important to the African American community. Plaintiff Lewis created the "Nicole's View" channel in 2006. She became a YouTube partner sometime between 2016 and 2017. Plaintiff Lewis has uploaded 748 videos to the "Nicole's View" channel, 17 of which Defendants wrongly removed or archived for unknown reasons, the remainder of which have generated 10.6 million views and has generated approximately $6,000-7,000 in revenue per year, approximately $25,000 over the life of the channel.

49. Defendant YouTube, LLC is a for-profit limited liability corporation, wholly owned by Google LLC, and organized under the laws of the State of Delaware. YouTube's principal place of business is Mountain View, California and it regularly conducts business throughout California,

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including Santa Clara County, California. Defendant YouTube, LLC operates the largest and most popular internet video viewer site, platform, and service in California, the United States, and the world, and holds itself out as one of the most important and largest public forums for the expression of ideas and exchange of speech available to the public. Plaintiffs are informed and believe that at all relevant times Defendant YouTube, LLC acts as an agent of Defendant Google LLC and uses, relies on, and participates with Defendant Google LLC in restricting speech on the YouTube site, platform, or service.

50. Defendant Google LLC is a for-profit, limited liability company organized under the laws of the State of Delaware, with its principal place of business in Mountain View, California; it regularly conducts business throughout California, including Santa Clara County. Plaintiffs are informed and believe, and thereon allege that, at all relevant times, Defendant Google LLC has acted as an agent of Defendant YouTube, LLC, and controls or participates in censoring and restricting speech on the YouTube service or platform.

51. Defendant Alphabet Inc. is a for-profit American multinational corporation conglomerate incorporated under the laws of the State of Delaware, with its principal place of business in Mountain View, California. According to Defendants, Alphabet Inc. was created as art of a corporate restructuring of Defendants Google, YouTube, and other subsidiary or affiliate entities on October 2, 2015. At that time, Alphabet Inc. became the parent company of Google and other former Google subsidiary or affiliated entities, including Defendant YouTube. Defendants also claim that the creation and establishment of Alphabet Inc. was prompted by the desire to make Defendants' core businesses "cleaner and more accountable" while allowing greater autonomy to group companies that operate in businesses other than internet services.

52. The true names and capacities, whether individual, corporate, associate, or otherwise, of Defendants Does 1 through 100, inclusive, are presently unknown to Plaintiffs, and for that reason these Defendants are sued by such fictitious names. Plaintiffs are informed and believe and thereon allege that each of the Doe Defendants is in some way legally responsible for the violations of law, injuries, and harm caused, as alleged herein. If, and when appropriate,

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Plaintiffs will seek leave of the Court to amend this Complaint when the true names and capacities of said defendants are known.

III. JURISDICTION AND VENUE

53. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337(a), and 2201. The Complaint includes Federal questions, and the amount in controversy arising from the claims asserted on behalf of Plaintiffs and all other persons similarly situated exceeds $5 million, exclusive of interest and costs. Plaintiffs and all other persons similarly situated also challenge the construction and constitutionality of 47 U.S.C. § 230(c)(1) and (2), and seek a declaratory judgment that this statute does not immunize Defendants for overt intentional and systematic racial discrimination on the YouTube platform.

54. Venue is proper in the Northern District of California (San Jose Division) under 28 U.S.C. § 1391. Defendants reside and/or transact business in the County of Santa Clara, and are within the jurisdiction of this Court for purposes of service of process. Defendants' TOS require that Plaintiffs and all other persons similarly situated file this Lawsuit in a court of competent jurisdiction located within Santa Clara County.

IV. FACTS COMMON TO ALL CLAIMS

55. On June 2, 2020, this Court held a hearing on Defendants' Motion to Dismiss in *Divino*. At the hearing, the Court asked Defendants if they were claiming immunity from liability for denying access to YouTube based on the user's race. In response, Defendants' counsel conceded that a case involving intentional race discrimination by an ISP may not be covered by Section 230(c):

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

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> I CAN IMAGINE SOME COURTS TAKING THE POSITION THAT A PROPERLY PLEADED CLAIM OF THE SORT THAT YOU DESCRIBE AS SORT OF FACIAL RACE DISCRIMINATION CLAIM MAY NOT BE GOOD FAITH UNDER (C)(2), I CAN IMAGINE A COURT TAKING THAT POSITION.

Attached as Exhibit E is a true and correct copy of the June 2, 2020-Transcript of Oral Argument before the Hon. Virginia DeMarchi; Exhibit E at 10:45 15-22.

56. This Lawsuit is that "stark case." Defendants are engaged in intentional race discrimination against Plaintiffs and other persons similarly situated, that violates Defendants' contractual promises not to discriminate, and also violates long established laws that prohibit racism for profit.

57. The central allegation in this Lawsuit is that Defendants engage in identity and viewpoint-based filtering and service access restrictions that utilize and base access restrictions on Plaintiffs' race, identity, and/or viewpoints.

58. Defendants profile, use, and consider Plaintiffs' race, personal identity, or viewpoint, in order to interfere with, restrict, or block video viewing, promotion, advertising, engagement, and/or monetization services because Plaintiffs are African American. This is unlawful and cannot be immunized by Congress.

59. Defendants' profiling, review, use, and consideration of Plaintiffs' race, ethnicity, religion, political affiliations or personal identity or viewpoints is prohibited not only under Defendants' TOS and other related agreements with Plaintiffs, but it also violates laws dating back to the Civil War which prohibit racial discrimination in contract and business relationships.

A. The Governing Agreements

60. Each time that Plaintiffs (or any other member of the public) access the YouTube user interface, Plaintiffs and Defendants execute binding contract(s) that govern the parties respective rights and obligations on YouTube, including the TOS.

61. The provisions in the TOS and other agreements are part of a uniform consumer contract that every one of YouTube's 2.3 billion users must execute and agree to upon accessing the website.

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62. The TOS and other agreement(s) are governed by California law.

63. Under the agreement(s), Defendants designate YouTube as a "passive website," that is open to the public, provided that any person who "uses or visits" the YouTube website or "any YouTube products software, data feeds, and services provided" consents and legally agrees to YouTube's "TOS," "Google's Privacy Policy," and "Community Guidelines," as "incorporated by reference" and are further clarified or modified by Defendants "without notice" (collectively the "Agreement").

64. The contract(s) allow Defendants not only collect, store, analyze, and organize the personal, financial, political, and other data for each of the YouTube Platform users, but Defendants also use and sell that data to third parties on the open market.

65. In 2018, Defendants' authorized representatives testified under oath to Congress and confirmed that YouTube is "a neutral public forum" in which Defendants "enforce [their] policies in a politically neutral way."

66. Among other statements, Defendants affirmatively represent to the public and YouTube users that all access rules and restrictions apply equally to all without consideration of the race, personal identity, or viewpoint of the user and that YouTube is a "forum" where the public can engage in "freedom of expression," to communicate and interact with other users subject to viewpoint neutral content based filtering and regulations that apply equally to all.

67. As of the filing date of this lawsuit, YouTube's CEO and other senior officers of Defendants continue to represent and insist to the public that YouTube's regulation and restriction of access to its services is undertaken solely by "viewpoint neutral" application of specific content based rules limited to actual video content and does not use, consider, or take into account the user's race, sexual identity, political or religious association, or any other personal identity trait or viewpoint of the user.

68. Based on Plaintiffs' experience, and the experience of other YouTube users who are members of other protected racial classifications under the law, that is a lie. And Defendants have admitted as much on multiple occasions dating back to at least 2017.

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1. The General Terms Of Use And Contract-Based Promises

69. As with many large public consumer businesses, Defendants contract with users through the use of an online, consumer form service contract(s).

70. Like many other consumer service contracts, the TOS and other related agreement(s) that govern the consumer's respective obligations and rights is not a beacon of clarity. Specifically, Defendants utilize a myriad of confusing, ambiguous, vague, overbroad, overlapping, interconnected, and inconsistent provisions to govern the parties' respective rights and obligations, including integrating or incorporating service and access provisions that are not specific to the YouTube platform, but apply to any service or product that Defendant Google provides or markets to the public.

71. In or about December 2019, Defendant Google merged its general terms of service for its products and services with that of YouTube's TOS for all purposes. Consequently, access actions, restrictions, or blocking that occur on YouTube may also be used by Defendants to review, restrict, block, or deny any service that either entity provides, including Android devices and use, personal email, publisher advertising, confidential health record data storage and access, all applications sold in Google's Android App store, election monitoring services, public health and law enforcement services search, and any and all other communication or information services that Google, YouTube, or their affiliates provide to consumers or the public.

72. The result is a complex and indecipherable web of service provisions that are not readily available to users and require each user to locate and navigate as part of a convoluted, confusing and complicated disclosure process, which may not be functionally accessible to the user.

73. The user is also required to figure out what agreements and provisions govern what conduct and restrictions, and which agreements are in place at the time to govern the specific conduct.

74. This is virtually impossible, because as is the case here, Defendants routinely change or amend the provisions of these agreements and do so unilaterally, without adequate notice to users.

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75. Because each Plaintiff executed a new TOS agreement every time they access YouTube on their internet browsers, only Defendants know what versions of the agreements and policies apply to the conduct at issue during the period of time governing the claims in this Lawsuit.

76. The TOS and other agreement(s) exist as electronic, on line documents. The agreements are executed electronically from drop down menus. Consequently, users often do not have access to or understand the TOS or agreement(s), let alone which version of the TOS and other agreement(s) may govern a particular action or conduct that occurs on a particular date.

77. One fundamental provision of the TOS and agreement(s), however, has not changed. In every TOS or agreement during the relative period of this Lawsuit, Defendants promise users equal and full access to all YouTube services, subject only to viewpoint neutral content-based rules that apply equally to all.

78. On January 17, 2018, Defendants testified to Congress under oath that access to all services offered by Defendants in connection with YouTube are available to Plaintiffs, and all users, subject only to viewpoint neutral content-based rules that apply equally to all users:

> **Senator Cruz**: Thank you Mr. Chairman. Welcome to each of the witnesses. I'd like to start by asking each of the company representatives a simple question, which is: do you consider your companies to be neutral public fora?
>
> * * * *
>
> **Senator Cruz**: I'm just looking for a yes or no whether you consider yourself to be a neutral public forum.
>
> **Senator Cruz**: Ms. Downs?
>
> **Ms. Downs**: Yes, our goal is to design products for everyone, subject to our policies and the limitations they impose on the types of content that people may share on our products.
>
> **Senator Cruz**: So, you're saying you do consider YouTube to be a neutral public forum?
>
> **Ms. Downs**: ***Correct.*** We enforce our policies in a politically neutral way. Certain things are prohibited by our Community Guidelines, which are spelled out and provided publicly to all of our users.

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* * * *

Ms. Downs: ***As I mentioned, we enforce our policies in a politically neutral way.*** In terms of the specifics of Prager University, it's a subject of ongoing litigation so I'm not free to comment on the specifics of that case.

See https://www.c-span.org/video/?439849-1/facebook-twitter-youtube-officials-testify-combating-extremism and https://www.c-span.org/video/?448566-1/house-judiciary-committee-examines-social-media-filtering-practices at 02:34:28 – 02:35:29 of the full hearing recording (emphasis added).

79. Before and after that date, up to the time of the filing of this lawsuit, YouTube's CEO Susan Wojcicki and other senior officers of Defendants have repeatedly reaffirmed and maintained that all of access decisions are based on viewpoint neutral application of the content based rules governing the service that apply equally to all.

80. Thus, whatever ambiguity exists in their agreements with Plaintiffs, Defendants admit that all of the agreements and the application of the provisions in those agreements are governed by a core and fundamental promise: access to the YouTube platform and all services is open and available to any member of the public who uses YouTube, subject only to viewpoint neutral content based rules that apply equally to all.

81. That promise governs all of a user's content based rights and obligations associated with YouTube and all services. It applies not only to Plaintiffs and to all public users, but also to Defendants, who sponsor video content that competes directly with Plaintiffs and other public users for CPMs, viewer reach and expansion, promotion and advertising, and monetization of revenue generated by each video that is posted on the YouTube platform and/or is available through viewer subscription services.

82. Defendants' core, fundamental promise of ensuring equal access to YouTube, under neutral content-based rules is illusory, false, and unenforceable.

83. Defendants exercise "unfettered discretion" when applying YouTube's content-based service rules and provisions and determining what access to give each user. Defendants

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admit that at least since 2016, the exercise of this "unfettered discretion" by Defendants is not viewpoint or identity neutral.

84. Since at least 2017, Defendants have grudgingly admitted that they "target" and deny access or services to Plaintiffs based, not on the video content posted by a Plaintiff, but "for any reason, or no reason," including the race, personal identity, or personal viewpoint, of YouTube content creators, viewers, and users.

85. The practice of using its "discretion" to deny access to any Plaintiffs, or any user, based on race, identity, or viewpoint, rather than video content, violates and breaches the express and implied promises set forth in YouTube's TOS and other service or access agreements, because those agreements are governed in their entirety by California law, and expressly limit the exercise of Defendants' "discretion" to that "permitted" by law.

86. Thus, Defendants' admissions that they are engaged in identity and viewpoint based access denials and targeting, breach the express and implied promises that discretionary access decision must be viewpoint neutral in application and comply with all federal and state laws prohibiting discrimination in contract, including 42 U.S.C. § 1981, the Unruh Act, and §§17200, *et seq*. of the California Business & Professions Code.

2. The License Provisions

87. The current (and/or prior versions) of YouTube's TOS at issue in this discrimination case require Plaintiffs to "grant" Defendants a renewable, "irrevocable" and "perpetual" license to any and all video content or communication that occurs on YouTube. This includes, but is not limited to, the property rights for all personal data and other revenue streams that Plaintiffs hold an interest in or otherwise derive from the posting, viewing, advertising, or monetization of their videos on YouTube.

88. Under the TOS, Plaintiffs "grant" Defendants a "worldwide, non-exclusive, royalty-free, sublicensable and transferable license to use that Content . . . in connection with the Service and YouTube's . . . . business . . . ."

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89. The TOS also grant other YouTube "users" a "non-exclusive, royalty-free license to access" content, "reproduce, distribute, prepare derivative works, display, and perform it . . . as enabled by a feature of the Service."

90. This license includes the right of Defendants and other users to post and monetize Plaintiffs' "[c]ontent or other material" that makes Plaintiffs (i) "solely responsible for" the content and its "consequences," including (ii) all intellectual property rights and restrictions on the video content, and (iii) not posting content or seeking access to services in a manner that is "contrary to the YouTube Community Guidelines."

91. In applying these provisions, Defendants reserve "the right to decide whether Content violates these Terms," including, "but not limited to, pornography, obscenity, or excessive length," and, "in so doing, remove such Content and/or terminate a user's account" if, "in its sole discretion . . . submitting such material is determined to be "in violation of these Terms."

92. Defendants' acquisition of the licensing rights to 95% of the world's public video content along with the personal and financial information data that belongs to the 2.3 billion users who post or view the content is not free or a gift to the largest and most powerful tech enterprise in the history of the world. Rather, the license rights are obtained through for tangible and valuable consideration: the right of the licensor or user to equal access to the YouTube platform and all of its services, subject to and limited only by the viewpoint neutral application of YouTube's content-based rules.

93. Thus, under the TOS, Defendants' license agreement binds and requires them to apply and impose access restrictions for viewpoint neutral content based violations of a third party's intellectual property rights, Defendants' Community Guidelines, and other content based terms of YouTube's service, and to do so in a manner "permitted" by the law.

94. Defendants' past, present, and continuing violations of the TOS is a fundamental and material breach of the trillion dollar licensing provisions by which Defendants obtained perpetual" and "irrevocable" right to use, display, and monetize 95% of the public's video content that exists or has ever existed in the world, as well as the personal and proprietary data of the 2.3 billion people who use or access the site.

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B. Defendants Are Engaged In Anti-Competitive, Unlawful, Deceptive And Unfair Business Practices

95. Defendants shuffle between three conflicting and irreconcilable roles in connection with YouTube:

a. When Defendants put on their "ISP" hat, Defendants host, review, curate, and monetize the video content of third party users who license their content, and the personal data property rights of these users, in return for providing equal access to YouTube content and services, subject only to viewpoint neutral rules that apply equally to all.

b. When Defendants put on their "creator" hat, Defendants create videos and partner with hand-picked creators to sponsor their content, and both operate and act as the largest and most powerful of YouTube users to compete directly and aggressively with Plaintiffs and other third party users for views, reach, engagements, CPM revenue, advertisers, and a host of other user based revenue streams on YouTube.

c. When Defendants put on their "advertiser" hat, Defendants review, categorize, and classify the video content of third party users for purposes of selling advertisements on the YouTube platform in connection with individual videos and/or YouTube channels, based on demographic information in the form of Defendants' metadata that they generate for individual videos which is gleaned from video titles and tags (posted by Plaintiffs when the individual videos are posted to the platform), Plaintiffs' channel profiles (which were input when the channels were first created), the profiles of Plaintiffs' subscribers (which individual subscribers input when they first registered with Defendants) and the subscribers' video viewing histories (which Defendants gather, analyze and summarize in the form of metadata), as well as the profiles of other users who view Plaintiffs' videos (which were input when they first registered with Defendants) and the viewers' video viewing histories (which Defendants also gather, analyze and summarize in the form of metadata). Using the enormous wealth of information Defendants have about the Plaintiffs, their subscribers and the viewers of their videos, Defendants can identify, price and sell advertising space on the YouTube platform in connection with individual videos posted, based on the demographics of the channel subscribers and video viewers. In this way, Defendants can

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identify, market and sell advertising based on the race, identity and viewpoints of the YouTube users and generate revenue for Defendants, their affiliated creators, and affluent white YouTube creators, without ever reviewing any of the millions of individual videos posted on the YouTube platform. In short, Defendants divvy up the video content on the platform by race, identity and viewpoint in order to sell advertisements to third parties without regard to the actual content of videos; moreover, Defendants fully monetize those creators whose subscribers and viewers fit the "right demographic," paying them collectively millions of dollars each month regardless of whether their individual videos comply with Defendants' own Community Guidelines and TOS.

96. Defendants' multiple roles create platform wide conflicts of interest, in which Defendants utilize their unfettered authority to curate third party content on YouTube as a pretext to impose access and content restrictions on Plaintiffs and all other persons similarly situated, that are not imposed on content posted or sponsored directly or derivatively by Defendants or other parties with whom they contract with for sponsorship.

97. In the last four years, Defendants have invested in and expanded their business to become the largest a production and media company in the world. *See* https://www.feedough.com/youtube-business-model-how-does-youtube-make-money/.

98. Among other things, Defendants announced that "[t]he company has partnered with its top content creators who wanted to charge a subscription rental or purchase fees for their content and made their uploaded content as paid content which requires users to pay for a subscription or purchase fees to access the content of the channel." Furthermore, Defendants decided to partner with "affiliates" whose "related product" advertisements are placed with some videos on YouTube. These products link to the affiliate partners, which pay a commission to Defendants if their products are purchased.

99. Defendants understand that the YouTube Platform has effectively surpassed its user saturation point, and that monetizing and profiting from YouTube by merely hosting content on the platform is no longer financially feasible to satisfy Defendants' insatiable lust for revenue and profits.

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100. Thus, in addition to hosting their own video channels on YouTube, Defendants have entered into lucrative preferred provider production deals with other global media companies, including PBS, MSNBC, HBO, Fox News, Breitbart, and other media and entertainment conglomerates.

101. Defendants have also entered the digital TV market with the advent of YouTube TV. Defendants use their control over third party user content, on and access to the YouTube platform to induce consumers to purchase their TV and entertainment services by using the YouTube hosting platform, user interface to that platform, and content curation powers to induce consumers to use YouTube for all digital based TV or video content, including movies, music, sports, and entertainment.

102. Defendants compete for that public audience or viewership unfairly and unlawfully, in a manner which gives their "preferred content" a competitive advantage, by among other things, using their filtering tools and criteria to restrict the access and reach of the smaller third-party users it hosts on YouTube. Thus, under the pretext of making the site safe for their users, Defendants arbitrarily, capriciously, and deceptively restrict access and audience reach to the videos of their competitors on the platform, like Plaintiffs, while at the same time allowing their own content to avoid those same restrictions and restraints -- even when that content violates their own guidelines. In so doing, Defendants effectively clear space on the platform for content which they, or their preferred users supply, to better reach the sites' 2.3 billion users, by censoring the content of their competitors.

C. Defendants' Tool Kit For Unlawful Conduct

103. Defendants utilize a series of discriminatory, anticompetitive and unlawful suppression practices and conduct to grow their profits, financial, interests, and unprecedented consolidation and control over information, speech, advertising, expression, and internet viewership.

1. Artificial Intelligence Algorithm Restrictions

104. The central mechanism used by Defendants to achieve these objectives are A.I. based algorithms ("A.I."), and computer driven filtering tools that profile, regulate, restrict, flag,

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and block creator content and access on YouTube. Defendants surreptitiously collect information regarding Plaintiffs and all other persons similarly situated, their subscribers, and the viewers of their videos, and generate metadata that is embedded, appended or associated with individual videos to facilitate Defendants' unlawful discriminatory and anticompetitive filtering and review tools to restrict or block the video content and access to the YouTube platform by Plaintiffs and all other persons similarly situated, both as YouTube creators and as viewers.

105. Defendants ***claim*** that these algorithms are viewpoint and identity neutral, and that they ensure that the "same standards apply equally to all" when it comes to the content regulation of speech on YouTube. Defendants claim that their employees conduct "manual reviews" to supplement the electronic filtering and regulation of video content.

106. But the evidence, including statements by Defendants' employees familiar with both electronic and manual filtering and regulation of speech that takes place on the YouTube Platform, suggests that Defendants' representations of neutral viewpoint and identity-based content regulation are ***also*** false. The A.I. and algorithmic filtering tools are embedded with code that regulates content based on purely subjective, viewpoint, topic, and identity animus, and other unlawful criteria. Even before October 2016, Defendants' engineers began making changes to the code and operations of the algorithms and filtering tools in order to ensure that Defendants could filter videos and regulate access to video content based upon overt discrimination based on race, sexual or gender orientation, ethnic, political or religious animus, as well as for financial and/or anticompetitive purposes.

107. Similarly, Defendants' viewpoint bias, animus, and discrimination towards the user's identity or viewpoint is institutionally and culturally rampant in Defendants' work place and employment practices. Among other things, Defendants operate and administer "Restricted Mode" through employees, including engineers and content reviewers, and independent contractors. These people work in what has been widely reported and acknowledged as a dysfunctional work environment and often work outside of the United States in countries and cultural settings where discrimination against Plaintiffs and all other persons similarly situated is not only condoned but is deeply embedded in social mores.

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108. Internal emails by and between Defendants' employees show that many employees are routinely subjected to harassment, threats, blacklisting, discipline, and hazing based on their race, or political or religious viewpoints. The dysfunction and viewpoint bias emanate from, and are enforced at, the highest ranks of Defendants' upper management, and drive the actions of employee supervisors, co-workers, third-party affiliates, and advertisers.

109. Consequently, even when manual employee reviews of video content are used to check and audit restrictions on videos generated from the digital algorithms or from flagging by other YouTube users, Defendants apply "Restricted Mode" and other discretionary and vague content based criteria, to restrict access to Plaintiffs' videos using vague and undefined terms such as "mature" or "sensitive" for certain audiences, solely because the video discusses a topic involving abbreviations like "BLM," "KKK;" terms such as "Black," "White," "Racism," "Boogaloo," "White Supremacy," "Racial Profiling," "Police Shootings," "Police Brutality," "Black Lives Matter;" names of individuals such as those killed by law enforcement, "Bill Cosby," "Louis Farrakhan;" names of organizations such as "Ku Klux Klan," "Nazi," "Neo-Nazi," "Aryan Brotherhood," and/or other euphemisms that are known and particular to the African American Community, or the video's title or tag words includes these trigger words.

110. Defendants' conduct creates censorship, restraint of speech, and discrimination based on the race, identity, and/or viewpoint of Plaintiffs and all other persons similarly situated, not based upon video content which might violate a narrow, neutral, objective, and specifically verifiable criteria that furthers a compelling and legitimate public interest.

111. Defendants' conduct also forces Plaintiffs and all other persons similarly situated to self-censor and to avoid not only using abbreviations like "BLM," "KKK;" terms such as "Black," "White," "Racism," "Boogaloo," "White Supremacy," "Racial Profiling," "Police Shootings," "Police Brutality," "Black Lives Matter;" names of individuals such as those killed by law enforcement, "Bill Cosby," "Louis Farrakhan;" names of organizations such as "Ku Klux Klan," "Nazi," "Neo-Nazi," "Aryan Brotherhood," and/or other euphemisms that are known and particular to the African American Community in video titles and tag words, but to avoid mentioning these in the video content, in order to avoid having Defendants remove videos or issue a "strike" against the

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channel, purportedly for posting "hate speech" or violating one or more of Defendants' unidentified Community Guidelines and TOS.

112. Defendants' A.I. tools and practices effectively silence the voices of Plaintiffs and all other persons similarly situated concerning some of the most important issues and current events affecting their communities.

113. Because Defendants' A.I. tools and practices single out the videos of Plaintiffs and all other persons similarly situated for adverse treatment (e.g., removal, restricted access if any, and/or limited or no monetization), the Plaintiffs and class members cannot generate sufficient viewers or subscribers to grow their channels so as to qualify for all of the Defendants' special programs and perks, such as YouTube partnership, Channel Membership, mobile Livestreaming, or SuperChat applications, resulting in the creation of a ghetto tier of YouTube creators based on their race, identity and/or viewpoints, who are doomed to create videos for very limited audiences for little to no money.

2. Excluding Channels And Videos From Full Revenue Generation

114. In addition to creating and using metadata to racially profile Plaintiffs and all other persons similarly situated, as well as their subscribers and viewers, for purposes of restricting access to the YouTube platform, Defendants use the same or similar metadata to limit the revenue which can be generated from individual videos. Defendants use A.I., algorithms, and filtering tools and practices in conjunction with the metadata they create, to prevent Plaintiffs and other persons similarly situated from earning money from videos merely because the metadata reflects the video title and/or tags include abbreviations like "BLM," "KKK;" terms such as "Black," "White," "Racism," "Boogaloo," "White Supremacy," "Racial Profiling," "Police Shootings," "Police Brutality," "Black Lives Matter;" names of individuals such as those killed by law enforcement, "Bill Cosby," "Louis Farrakhan;" names of organizations such as "Ku Klux Klan," "Nazi," "Neo-Nazi," "Aryan Brotherhood," and/or other euphemisms that are known and particular to the African American Community. Defendants also use the same or similar metadata to limit or prevent revenue generation from videos posted by Plaintiffs or other persons similarly situated, simply because the videos were created by Plaintiffs or members of other races, by other similar

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communities, or by those sharing the same viewpoints, or because the videos were posted on channels that are popular with members of Plaintiffs' communities, or are widely viewed by viewers who share Plaintiffs' race, identity, and/or viewpoints.

115. Because Defendants use metadata based on video titles and tags to flag videos for limited monetization or demonetization, Plaintiffs and other persons similarly situated self-censor and either avoid posting videos regarding issues and current events that are important to their community (e.g., videos regarding the deaths of unarmed African Americans at the hands of law enforcement, healthcare providers' refusals to test or treat African Americans for the Covid-19 virus, the disparate infection, death and unemployment rates experienced by African Americans as a result of the Covid-19 pandemic), or they misspell key words like "Black," "White," "Race," "Racist," and "Racism," or they rely on euphemisms known only to the African American community.

116. Defendants' conduct and practices cause Plaintiffs and other persons similarly situated to lose revenue which their fully compliant videos would otherwise have generated, as well to lose subscribers and viewers, and the opportunity to grow their channels and to qualify for full access to all of the perks that Defendants offer others.

3. Misapplying "Restricted Mode"

117. Defendants also use the same or similar metadata to restrict access to the full YouTube platform and related benefits by misapplying "Restricted Mode" to the videos of Plaintiffs and all persons similarly situated. "Restricted Mode" is one of Defendants' primary tools for platform control and curation. "Restricted Mode" affects tens of millions of YouTube users every single day.

118. According to Alice Wu, a Senior Manager of Trust & Safety at YouTube, LLC, about 1.5 percent of YouTube's daily views (or approximately 75 million of the nearly 5 billion views every single day) come from people who have activated Defendants' "Restricted Mode."

119. According to Defendants, "Restricted Mode" is supposed to function much like a curtain that blocks access to the hardcore pornography section at the corner video rental shop,

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limiting viewer access by younger, sensitive audiences to video content that contains certain specifically enumerated "mature" aspects.

120. Defendants assert that "Restricted Mode" is a tool "to help institutions like schools as well as people who wanted to better control the content they see on YouTube with an option to choose an intentionally limited YouTube experience." "Restricted Mode" also can be activated by system administrators to restrict all access on computer networks to all users and electronic devices connected to the network, including viewers who seek to access video content in public libraries, schools, and other public institutions or private workplaces.

121. While Defendants claim that viewers control the use of "Restricted Mode," and can choose to turn on "Restricted Mode" for their personal accounts, there is growing evidence that it sweeps more broadly. In certain instances, for viewers who do not have YouTube accounts and seek to view videos posted on YouTube by Plaintiffs and other persons similarly situated, Defendants have applied "Restricted Mode" to prevent those viewers from accessing videos through links posted on other social media platforms that are not owned or controlled by Defendants, as well as to prevent YouTube users who have not activated "Restricted Mode" from accessing those videos.

122. According to Defendants, "Restricted Mode" can be applied to videos in three ways.

a. First, Defendants examine certain "signals" like the video's metadata, title, and tag words associated with the video. When creators post videos, Defendants invite them to include certain information in the title or to input "tag" words which are purportedly designed to help viewers find videos in which they are interested, such as a title reflecting the subject of the video, and tag words indicating the video's themes or content. Plaintiffs and other persons similarly situated unwittingly provide Defendants with such titles and tag words along with their posted videos. Defendants then generate metadata which is additional content that they insert into, append to, or associate with the videos that are posted, which allows Defendants apply A.I., algorithms and other filtering tools to profile Plaintiffs, their subscribers and viewers, as well as other persons similarly situated, and to sort them by race, identity and viewpoints. Defendants ultimately apply "Restricted Mode" to the otherwise compliant videos posted by Plaintiffs and

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other persons similarly situated, because the videos have titles or tag words that reflect issues of importance to African American or other racial communities, and those who simply watch videos popular in such communities – essentially relegating these videos to a limited audience which excludes white, conservative and/or "more sensitive viewers," simply because the videos were made by or for members of protected racial classifications under the law.

b. Second, Defendants claim that such metadata "signals" identify videos which violate Defendants' Community Guidelines or TOS. However, these "signals" are used by Defendants as a pretext to segregate disfavored content using "Restricted Mode," regardless of whether the video contains material which is unsuitable for children, younger audiences or more sensitive viewers. Defendants themselves create all such metadata and insert, embed or associate that metadata which reflects demographic information regarding the video creators, channel subscribers and viewers, along with individual videos to create more "signals" for A.I., algorithms, and filtering tools to utilize. Thus, in certain cases, videos that would otherwise pass through the filtering process without incident, are flagged for restrictions by Defendants; not because of anything in the video content, but because of metadata or other "signal" information that Defendants themselves have inserted, embedded or associated with the video. These signals include information about the race, identity and/or individual viewpoint of the video creator, her subscribers, and her viewers.

c. Third, Defendants also purportedly use "Restricted Mode" to passively restrict a video if it is "flagged" as "inappropriate" by anyone in the "community" of YouTube users. According to Defendants, the so-called "flagged" videos are subsequently reviewed by a "team" of human reviewers for "violations" of Community Guidelines and/or TOS. But flagged videos are subject to Defendants' own internal review procedures that are race, identity and viewpoint based, so that many flagged videos posted by Plaintiffs and other persons similarly situated may never receive an independent content review by a human being, much less a YouTube employee.

123. As shown below, when a network administrator or an individual viewer activates "Restricted Mode," each video subject to "Restricted Mode" appears with Defendant's custom

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stamp of disapproval, including a red face including a red square bearing a foreboding facial expression, together with text showing "This video is unavailable with Restricted Mode enabled. To view this video, you will need to disable Restricted Mode."

124. Defendants' stamp of disapproval thus makes a specific and falsifiable misrepresentation to viewers of videos posted by Plaintiffs and other persons similarly situated, that the specific video that they have attempted to access contains content that is so inappropriate, shocking and outrageous, that the viewer must be protected from that content and that the YouTuber creator who has posted that content is responsible for having created and uploaded such inappropriate, shocking, and outrageous content.

125. These specific and falsifiable factual representations are by no means limited to Defendants' "Restricted Mode" stamp of disapproval. Viewers who attempt to ascertain why a particular video has been subjected to "Restricted Mode" are told by Defendants that videos are eliminated from "Restricted Mode" when they include specific pieces of content, including content (1) talking about drug use or abuse, or drinking alcohol in videos; (2) overly detailed conversations about or depictions of sex or sexual activity; (3) graphic descriptions of violence, violent acts, natural disasters and tragedies, or even violence in the news; (4) videos that cover specific details about events related to terrorism, war, crime, and political conflicts that resulted in death or serious injury, even if no graphic imagery is shown; (5) inappropriate language, including profanity; and (6) video content that is gratuitously incendiary, inflammatory, or demeaning towards an individual or group.

126. In reality Defendants' definition of "Restricted Mode" is applied in a significantly over inclusive and under inclusive manner, which has caused significant damage to Plaintiffs and other persons similarly situated. Even the most simple examination of Plaintiffs' videos subject to "Restricted Mode" shows that Defendants are not only dead wrong in their representations to the public concerning African American videos that Defendants subject to the "Restricted Mode" stamp of disapproval, but Defendants are hiding from the public valuable content and are doing so in bad faith.

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127. To the extent that videos which have titles or tags which include "abbreviations like "BLM," "KKK;" terms such as "Black," "White," "Racism," "Boogaloo," "White Supremacy," "Racial Profiling," "Police Shootings," "Police Brutality," "Black Lives Matter;" names of individuals such as those killed by law enforcement, "Bill Cosby," "Louis Farrakhan;" names of organizations such as "Ku Klux Klan," "Nazi," "Neo-Nazi," "Aryan Brotherhood," and/or other euphemisms that are known and particular to the African American Community," Defendants apply the "Restricted Mode" filter to these videos and limit viewer access to many compliant videos posted by Plaintiffs and other persons similarly situated, which contain content of interest to the African American community. Defendants do so, despite the fact that the videos do not contain materials which discuss drug use or abuse or drinking alcohol; overly detailed conversations about or depictions of sexual activity; graphic depictions of violence, violent acts; natural disasters or tragedies or violence in the news; specific details about events related to terrorism, war, crime and political conflicts that resulted in death or serious injury even if no graphic imagery is shown; inappropriate language, including profanity, or content that is gratuitously incendiary, inflammatory, or demeaning toward an individual or group.

128. Defendants effectively use "Restricted Mode" as a damper to quiet the voices of Plaintiffs and other persons similarly situated, from being heard by all YouTube users and to limit Plaintiffs' reach, thereby preventing them from growing their channels, increasing subscribers and viewers, generating revenue, and meeting minimum participation standards to qualify for Defendants' other benefits such as YouTube partnership, Channel Membership, Mobile Streaming and SuperChat.

129. Once Defendants apply "Restricted Mode" to a video, Plaintiffs and other persons similarly situated are then forced to spend time and effort to appeal Defendants' decision and persuade a human being to actually look at the content of the video. Even when the appeal is won, Plaintiffs and other persons similarly situated lose the opportunity to generate interest in and revenue from the new video for a period of weeks to months, and to thereby grow their channel during the period that the video is restricted. Defendants never compensate for the erroneous

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application of "Restricted Mode," regardless of the length of time it takes for Defendants to actually review the restricted video content.

130. Defendants impose these restrictions to justify anticompetitive and unlawful actions intended to gain a competitive advantage for their own video content and/or to ensure that their sponsored creators, content partners, and advertisers have an unfair competitive advantage in the YouTube video market. By placing no restrictions on the monetization of their own videos or those of Defendants' sponsored creators, content partners and preferred advertisers, Defendants gain a competitive advantage by restricting the financial reach of Plaintiffs and other disfavored users, while simultaneously ensuring that their own video content (and those of their sponsored creators, content partners and preferred advertisers) are not subjected to the same (or any) Advertising Restrictions.

131. Defendants also impose these restrictions to facilitate their advertising practices, whereby they profile videos by the race, identity and viewpoint of creators, subscribers and viewers so as to identify the videos with the most valuable demographics which command the highest prices from most advertisers, without regard to whether there are any advertisers which are willing to purchase spots associated with videos posted by Plaintiffs and other persons similarly situated.

132. Defendants' actual practices unlawfully provide Defendants with monopoly power over the video posting and viewership market, the video advertising market, and the ability to manipulate, bully, and falsely denigrate legitimate YouTube users, like Plaintiffs and other persons similarly situated, by subjectively designating their speech as "inappropriate," because Defendants do not like or agree with the speakers' race, identity or point of view; or because Defendants are too cheap to actually review the videos posted to the platform, and desire to rely on inexpensive A.I., algorithms, and other filtering tools for purposes of selling advertisements and curating videos on YouTube.

4. Shadow Banning Channels And Videos

133. Defendants treat videos that present or discuss serious issues and current events that are important to the communities of the Plaintiffs and all other persons similarly situated as "not family friendly," and as if they are inappropriate for all audiences simply because they were

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uploaded by creators whose races, identities, and/or viewpoints are disfavored by Defendants. Defendants are not merely removing, restricting access to or limiting monetization for videos posted by Plaintiffs and all other persons similarly situated, Defendants are making those videos, and some channels invisible on the YouTube Platform, despite the fact that the videos comply with all of Defendants' Community Guidelines and TOS.

134. In shadow banning videos, Defendants effectively prevent Plaintiffs' subscribers and potential viewers from locating new videos which discuss issues and current events that are followed by the African American community; by excluding such videos from the YouTube search function on the platform, Defendants are preventing creators like Plaintiffs and all other persons similarly situated from growing their channels by securing the necessary subscriber and viewer numbers required to qualify for Defendants' special programs and perks, such as YouTube partnership, channel membership, mobile Livestreaming, or SuperChat applications, and are preventing them from generating revenue from their videos.

135. Defendants also shadow ban entire channels belonging to Plaintiffs and other similarly situated persons, by making the channels unsearchable on the platform. Without a link to Plaintiffs' channels, subscribers and viewers cannot access Plaintiffs' videos. As a result of shadow banning of channels, many Plaintiffs and other persons similarly situated can only attract new subscribers or viewers by "word of mouth," and referrals from other members of their community, or from other social media platforms where links to Plaintiffs' YouTube channels are posted.

136. Defendants' shadow bans not only impair the growth of channels belonging to, and revenue generated from videos posted by Plaintiffs and other persons similarly situated, Defendants' conduct both effectively reduces the audience for videos posted by Plaintiffs and muffles their voices across the platform, making it impossible for new YouTube viewers to locate video content that is important to their specific communities. As a result, Plaintiffs, as African American creators, and other persons similarly situated, cannot expand subscriber and viewer numbers sufficient to grow their channels and fully enjoy full access to the YouTube platform and all of the benefits Defendants offer others.

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5. Delegating Content Review And Regulation To Racists And White Supremacists

137. Defendants have configured the YouTube platform to allow any user to "report" or "flag" videos which they believe violate the Google/YouTube Community Guidelines or TOS, e.g., video content which contains hate speech, nudity, profanity, graphic depictions of sexuality or violence, disparaging remarks, content which violates existing copyrights or trademarks held by persons other than the creator posting the video, or descriptions of violent events and scenes which may disturb younger or more sensitive viewers. Defendants not only allow users to "report" or "flag" videos posted by Plaintiffs and other persons similarly situated, Defendants take action based on those third-party reports and flags and proceed to remove, restrict, and/or demonetize individual videos; issue community "strikes;" and to suspend, and/or remove whole channels of Plaintiffs and other persons similarly situated. Defendants do so without first verifying that the flagged video violates a specific Community Guideline or Term of Service. In effect, Defendants deputize YouTube users, including racists, sexists, white supremacists, Neo-Nazis, and other hate speech trolls. These delegated and affiliated users, exercise censorship powers on YouTube, including reporting, flagging, bullying and threatening creators whenever Plaintiffs and other persons similarly situated post content with which Defendants' racist agents disagree.

138. In allowing third parties to wield the power to report or flag a video as violating the applicable Community Guidelines and TOS, Defendants have deprived Plaintiffs and other persons similarly situated, of equal access to the YouTube platform and all of the services Defendants make available to others by creating the presumption that any flagged video does in fact contain content which violates the Community Guidelines and/or TOS. After being flagged by a third party, Plaintiffs and other persons similarly situated are forced to spend substantial time and effort to appeal the flag in order to restore the channel/video, remove the restriction, or obtain full monetization for channel/video, which, but for the flag, would have reached a wide audience and would have generated substantial revenue.

139. Because of Defendants' conduct and practices, trolls regularly appear on the channels of Plaintiffs and other persons similarly situated, threaten to shut down the channels – and

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within a few days, the trolls succeed in getting Defendants to suspend the channels. As a result, Plaintiffs and other persons similarly situated engage in self-censorship and avoid posting videos that address issues of historical, political, cultural, and educational significance to their communities. Recently, Plaintiffs and other persons similarly situated have avoided timely topics such as the denial of Covid-19 testing and treatment to African American healthcare workers, the inability of African American businesses to apply for CARE loans, and the disparate enforcement of stay at home orders against African American communities. Defendants' conduct therefore encourages and enables the agendas of racists, white supremacists, and Neo-Nazis on YouTube, by silencing the voices of Plaintiffs and other persons similarly situated.

6. Interfering With Livestream Broadcasts

140. Livestream broadcasts are videos that are posted in a streaming live format which are controlled exclusively by creators or by the moderators designated and authorized by individual creators to review, edit, and remove viewer comments which appear as the video progresses over time. Livestream broadcasts allow real time viewer participation in discussions on YouTube channels and often involve hundreds of people all making comments regarding important issues, current events, or topics. YouTube's Livestream broadcast application allows the video creator and her designated moderators to control the content of the broadcast. They control the viewer participation in the comments section of the screen while the Livestream is played.

141. Because Defendants routinely restrict viewer access to and revenue generation from videos posted by Plaintiffs and other persons similarly situated, depressing subscriber and viewer numbers, many African American channels do not generate significant income from advertising or Channel Membership. They must rely on other applications to generate revenue, such as Defendants' SuperChat, Livestream Donations or Patreon Donations. As a result, Livestream broadcasts have become a primary revenue generator.

142. Defendants regularly interfere with the Livestream broadcasts by Plaintiffs and all persons similarly situated, either using employees or independent contractors which Defendants hire. Defendants' Livestream interference includes such tactics as: (a) stopping Livestream broadcasts, and forcing the creator to restart the broadcast, at the loss of viewers and to the

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irritation of subscribers; (b) throttling (intentionally slowing) broadcasting speeds during Livestream which distorts the oral discussion and disrupts viewer comments on the screen; (c) inserting new voice content and/or visual images into the video which are entirely unrelated to the decisions and choices of the channel creator and her chosen moderators, often such new voice overs and images are unrelated to the Livestream topic, and are offensive, misogynistic, racist, or obscene; (d) removing positive comments from viewers; and (e) disconnecting individual viewers who are in the process of leaving positive comments, thereby silencing viewers who would otherwise support the video or make monetary donations on the Livestream broadcast.

143. For the past two years, until stay at home orders for nonessential businesses were imposed in the Bay Area in March of this year, Defendants' Livestream broadcast interference was relentless, causing Plaintiffs either to suspend Livestream broadcasts, to self-censor and refrain from discussing issues or current events of interest to the African American community, or to conduct them at odd hours without prior announcements. Defendants' conduct in interfering with Livestream broadcasts has reduced subscriber and viewer numbers for the channels of Plaintiffs and other persons similarly situated, has reduced revenue generated from Livestream broadcasts and from the channels overall, and has prevented the African American community from receiving information about and discussing issues and current events which are important to members of that community.

144. Notably, for the weeks while stay at home orders were in place for the Bay Area, Plaintiffs were able to conduct Livestream broadcasts unmolested. However, Defendants' interference has recommenced with the lifting of stay at home orders. Defendants' interference is now ongoing.

7. Excluding Videos From "Trending" And "Up Next" Video Recommendations

145. Defendants routinely exclude videos posted by Plaintiffs and all persons similarly situated from YouTube's "Trending" and "Up Next" Recommendations which appear on users' screens when they watch videos on YouTube. While Defendants exclude the videos of Plaintiffs and other persons similarly situated, they include in the "Trending" and "Up Next" applications

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both reaction videos which copy, pirate, or parody the videos of Plaintiffs, and videos which violate Defendants' Community Guidelines and/or TOS in so far as the videos contain hate speech, obscene, misogynistic, violent, threatening, or disparaging content which is directed specifically at Plaintiffs and other persons similarly situated. Defendants have continued to include these videos posted by third parties over the repeated flags, written objections, and complaints by Plaintiffs and their subscribers, and they have fully monetized many such videos despite having received flags, objections and complaints that the videos violate Defendants' Community Guidelines and TOS.

8. Freezing Channel Analytics Re Subscribers And Viewers

146. Defendants have stopped reporting accurate current data on the "Analytics" pages for the channels of Plaintiffs and other persons similarly situated. For the past two years, many of the Plaintiffs' "Analytics" have remained the same or have varied by very small increments with respect to the number of subscribers, viewers, and view time. This has been the case regardless of the number of videos posted or the number of Livestream events broadcast on the channel.

147. As with the Defendants' interference with Livestream broadcasts, during the period of time that stay at home orders were in effect in the Bay Area in the Spring of 2020, new and larger numbers have been appearing on the "Analytics" pages for some of the channels of Plaintiffs and other persons similarly situated. Whether the "Analytics" pages will continue to be updated after the lifting of stay at home orders remains to be seen.

148. Because Defendants stopped reporting accurate data regarding the number of subscribers, viewers and view time for the channels of Plaintiffs and other persons similarly situated, Plaintiffs have been unable to grow their channels, to demonstrate that they qualify for Defendants' additional benefits and perks such as monetization, Channel Membership, Mobile Access, or SuperChat. Plaintiffs and other persons similarly situated have also lost revenue as they are unable to prove to Defendants the number of viewers for their videos which have at least limited monetization.

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9. Promoting And Profiting From Hate Speech

149. Defendants regularly promote and monetize hate speech targeting Plaintiffs and all persons similarly situated on the YouTube platform in direct violation of Defendants' Community Guidelines and TOS, and ignore repeated flags, reports and complaints regarding those videos.

150. Many hate speech videos targeting the African American community on YouTube include identifying information regarding Plaintiffs and other persons similarly situated, including without limitation their telephone numbers, residential addresses, registered trademarks, original copyrighted material, or personal likenesses, in direct violation of Defendants' Community Guidelines and TOS. Plaintiffs and other persons similarly targeted on the YouTube platform have followed Defendants' published procedures to remove the hate speech, including flagging the videos, reporting the violations of Defendants' Community Guidelines and Terms of Use by email, and sending follow up emails complaining of both the videos and the channels on which the videos are posted. The subscribers of Plaintiffs have reported that they too have flagged, reported and written follow up emails to Defendants complaining of the hate speech videos and their related channels.

151. Despite having received repeated, multiple flags, reports and written complaints over a period of months concerning specific hate speech videos posted by Defendants' favored partners, Defendants have refused to do anything to enforce their own published Community Guidelines and TOS and have not removed the videos or suspended the channels posting such videos. To this day, many hate speech videos remain posted without restriction, and fully monetized to generate revenue for their creators, despite having content that is patently false, racist, and/or sexist, violent, abusive or obscene. Some of the hate speech videos include threats of bodily harm or death specifically directed at the Plaintiffs and other persons similarly situated. Some hate speech videos are posted in a way that falsely indicates that it was posted by Plaintiffs.

152. Among the many YouTube channels which Defendants insulate for enforcement of Community Guidelines and TOS, the channels of Tommy Sotomayor and Candace Owens particularly stand out for their hateful, racist, and misogynist video content. Tommy Sotomayor regularly posts videos which promote violence against members of the African American

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community. Candace Owens regularly posts videos disparaging male members of the African American community. Though Plaintiffs, their subscribers and other persons similarly situated repeated flagged, reported and complained about these two channels and their posted videos, as wells as their trolls who engage in abusive, bullying conduct directed to YouTube users who mention Sotomayor or Owens, Defendants nonetheless regularly include videos posted by Sotomayor and by Owens in the "Trending," and "Up Next" recommendation applications on the screens of African American viewers. Defendants have rendered "flag proof" the channels of Sotomayor and Owens, and videos posted there.

153. Defendants' refusal to enforce their own Community Guidelines and TOS equally to all YouTube users to eliminate hate speech videos; Defendants' continued promotion of hate speech videos by including them in the "Trending," and "Up Next" applications; and Defendants' continued monetization of hate speech videos and profiting from the sale of advertisements in connection with such videos have substantially reduced racial diversity on the YouTube platform and have endangered YouTube users like Plaintiffs and other persons similarly situated. Defendants' conduct has stifled the voices of Plaintiffs and other persons similarly situated, who are unable to reach their intended audiences or to post videos which address or discuss issues and current events of concern to the African American community because while Plaintiffs' compliant videos are wrongly removed, restricted and demonetized as "hate speech," Defendants protect, promote and profit from vile, vicious, hate speech, and personal attacks on Plaintiffs and other persons similarly situated. Plaintiffs have received harassing telephone calls and written communications, forcing them to change their telephone numbers and to move from their homes. They have also lost subscribers, viewers and revenue as a result of Defendants' failure and refusal to enforce their own Community Guidelines and TOS equally on all YouTube users.

10. Interfering With, Obstructing, Ignoring And Delaying Appeals

154. Following Defendants' actions to limit monetization or demonetize a video, or to remove or restrict a video, or to issue a strike against or to suspend a channel, Plaintiffs and other persons similarly situated are forced to spend time and effort to appeal Defendants' decision and to persuade a human being to actually look at the otherwise compliant video(s) in question. Often,

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appeals by Plaintiffs and other persons similarly situated drag on for months before Defendants respond to the appeal, but Defendants often do not even respond to Plaintiffs' appeals and either ignore them entirely or confirm the action out of hand, without having a human being review the video content that was the basis for Defendants' actions. In reality, Plaintiffs and other persons similarly situated often have no real appeal at all.

155. On those rare events when an appeal filed by Plaintiffs or other persons similarly situated are successful, after a human being actually review the video content in question and concludes that Defendants' action was wrongly imposed, Defendants do not reimburse the creator for lost revenue from the video(s) or the channel during the appeal process. Defendants therefore have a perverse incentive built in their platform regulation, filtering and curation process: by automating the application of "Restricted Mode," the monetization limitation process, and authorizing members of the YouTube community to flag videos and channels following, which Defendants automatically rely and act on those flags without first verifying videos/channels are in violation of Community Guidelines or TOS, Defendants don't have to pay the affected creators for the use of their video content, and can withhold payment unless and until a success appeal occurs. At each step of the appeal process, Defendants continue to withhold payment of revenue generated by the affected videos, profiting from their own improper decisions. Defendants absolutely control the process: they can ignore an appeal, delay the process by weeks, months or even years, or simply confirm the adverse action without ever examining the offending video content – there is no oversight, no higher authority, no way to force Defendants to follow their own Community Guidelines or TOS.

156. Defendants' conduct in interfering with, obstructing, ignoring and/or delaying appeals has deprived Plaintiffs and all persons similarly situated of the use of hundreds of their own videos which Defendants have wrongly removed from the YouTube platform or placed in archives where they cannot be viewed by anyone, have deprived Plaintiffs and all persons similarly situated of subscriber and viewer numbers generated from their channels which Defendants have wrongly suspended or removed from the YouTube platform, and have deprived Plaintiffs and all persons similarly situated of the full financial benefits from all of their otherwise compliant videos which

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Defendants have improperly removed, restricted or demonetized for any period of time. Defendants operate the YouTube platform like a Las Vegas casino, ensuring that "the house always wins," no matter how much time, effort, or value Plaintiffs and other persons similarly situated contribute to the platform because in the end, Defendants pick the winners based on race and other immutable identity traits, and viewpoints; Defendants write and rewrite the Community Guidelines and TOS; Defendants determine which users are exempt from those Community Guidelines and TOS; and Defendants define the appeal process to be whatever they want for any given YouTube user.

D. Defendants Have Violated And Continue To Violate The Rights Of Plaintiffs And The Class

1. Kimberly Carleste Newman

157. Plaintiff Newman has been a registered YouTube user since 2015, creating and posting approximately 1,654 videos on her "The True Royal Family" YouTube channel; and since 2016, creating and posting 209 videos on her "True Royal" YouTube channel. Plaintiff Newman is an African American woman who identifies as such.

158. Plaintiff Newman makes and posts videos that discuss and present information regarding issues and current events which are important to the African American community, from a Black perspective. While her videos are pro-Black, they are not intended solely to inform and entertain the African American Community; they are suitable for members of other communities who are sympathetic to or curious about issues and current events as perceived from a Black perspective. "The True Royal Family" channel has generated approximately 1 million views annually. The "True Royal" channel has generated approximately 200,000 views annually. Notwithstanding the substantial annual viewer numbers generated by her channels, Plaintiff Newman has only generated total revenues of $2,672.68 for videos posted on "The True Royal Family," and $123.96 for videos posted on the "True Royal" channel.

159. Plaintiff Newman is informed and believes that Defendants have gathered extensive information in order to generate metadata and then insert, embed, append, or associate such metadata with the videos posted to "The True Royal Family," and "True Royal." Defendants

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gathered information regarding her race (Defendants know that Plaintiff Newman is an African American woman); that she makes and posts videos which have as a subject, relate to or discuss issues and current events that are important to members of the African American community; her subscribers either self-identify as members of the African American community or watch many videos posted by other creators who have self-identified as members of the African American community; and many of those who view her videos either self-identify as members of the African American community or watch videos posted by other creators who have self-identified as members of the African American community.

160. Plaintiff Newman is informed and believes that Defendants have applied "Restricted Mode" and have limited monetization for videos she posted to "The True Royal Family" and "True Royal" because Defendants have a policy and practice of using A.I., algorithms, and other filtering tools to classify, curate, censor, and sell advertisements for YouTube videos based on metadata Defendants create from information regarding the race, identity and viewpoint of creators, subscribers and viewers, rather than the content of the videos posted to the YouTube platform.

161. Defendants have applied "Restricted Mode" and have limited monetization to nearly all of the videos which remain visible to viewers on "The True Royal Family," and nearly all of the videos posted to "True Royal," despite the fact that each of the videos fully complies with all of Defendants' Community Guidelines and TOS, and contain no nudity, sexualized scenes or language, graphic depictions of sex or violence, drug abuse, or alcohol consumption. Defendants have applied "Restricted Mode" to most of the videos posted, and have allowed only very limited monetization for some videos, without any explanation or rationale for doing so. Plaintiff Newman is informed and believes that the sole reason that Defendants have acted in this fashion is that Defendants discriminate against Plaintiffs and other persons similarly situated based on race, e.g., the videos were created by an African American; the videos relate to issues and events of concern to the African American community, and the videos are viewed by large numbers of members of the African American community.

162. For various periods, off and on, throughout the past five years, Defendants have shadow banned both individual videos posted by Plaintiff Newman, and her channels, "The True

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Royal Family," and "True Royal." Viewers have informed Plaintiff Newman that they were unable to locate individual videos using YouTube search applications and terms such as "Kimberly Santana," "The True Royal Family," "True Royal," or using as search terms the names of individual videos posted by Plaintiff Newman. Viewers have further informed Plaintiff Newman that when they searched for "African American" video content, YouTube search applications produced videos posted by Tommy Sotomayor consisting of hate speech and content which disparages members of the African American Community.

163. Defendants do not provide any receipt or record of any kind when YouTubers "flag," report, or complain about videos posted by other YouTube creators. Because of Defendants' practices regarding such YouTube users' efforts to obtain redress for violations of their rights, individual creators like Plaintiffs and other persons similarly situated are not able to prove that they, in fact, flagged any individual video or channel. For those users whom Defendants disfavor, the videos and channels are not automatically removed, restricted or demonetized, and the injured YouTube user cannot prove that she flagged the noncompliant or infringing video or channel. Rather, disfavored users like Plaintiffs and other persons similarly situated are left to make repeated written reports and complaints regarding the noncompliant or infringing video or channel, often, to no effect whatsoever. Defendants merely ignore those written reports and complaints too.

164. Plaintiff Newman registered "The True Royal Family" name and an associated image as trademarks. As part of the channel creation process, Defendants ask YouTube creators if they are using marks which have been registered as a trademark. When she created "The True Royal Family" channel, Plaintiff Newman informed Defendants that she had registered her channel name and a specific image used with thumbnail tiles as trademarks. Nonetheless, Defendants refused to remove videos using Plaintiff Newman's registered trademark image from the channels of other YouTube creators in response to Plaintiff's repeatedly flagging such videos, reporting the trademark infringement for the mark by the channel, and repeated unauthorized uses of "The True Royal Family" name. For a period of years, Defendants have ignored Plaintiff Newman's

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complaints and allowed other YouTube users to infringe on her trademarks with impunity, in violation of Defendants' own Community Guidelines and TOS.

165. While Defendants refuse to protect the intellectual property of Plaintiffs and other persons similarly situated, Defendants routinely flag or remove videos, and suspend channels for violating the intellectual property of others. Defendants flagged a video posted by Plaintiff Newman in which she personally sings acapella a song written by Stevie Wonder on grounds that she was infringing the copyright for the song. Plaintiff's channel was suspended for two weeks for the purported infringement.

166. In September 2019, a third party hacked "The True Royal Family" channel and removed over 600 of Plaintiff Newman's videos so that neither the public nor Plaintiff Newman could view, access, or download any of the videos or portions thereof. Plaintiff Newman promptly applied to Defendants, asking that they restore the videos to "The True Royal Family" channel. Defendants agreed to return the videos, but has not done so.

167. Months later, in 2020, rather than restoring the original 600+ videos, Defendants removed another group of videos from the channel totaling more than 100 individual videos. Plaintiff Newman again appealed to Defendants to restore or return all of the 700+ missing videos removed from "The True Royal Family," but Defendants have failed and refused to do so without any explanation as to why the original 600+ videos have not been restored, why the additional 100+ videos were removed, or why they have not been restored or returned.

168. Plaintiff Newman has been deprived of subscribers, viewers and revenue from the 700+ missing videos for more than nine months, and Defendants have done nothing to address her ongoing injury or lost revenue.

169. Defendants have used A.I., algorithms, and filtering tools to restrict the reach of her videos and to prevent her from increasing subscriber and viewer numbers to grow her channels and generate revenue. For the past several years, the analytics page reflecting subscriber and viewer numbers for "The True Royal Family" channel have remained steady, varying little from month to month regardless of the number of new videos posted or the Livestream broadcasts. To avoid the impact of Defendant' A.I., algorithms and filtering tools on Defendants' metadata generated from

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video titles and tags, Plaintiff Newman intentionally self-censors: (a) she avoids using controversial video titles; (b) she avoids using abbreviations like "BLM," "KKK;" terms such as "Black," "White," "Racism," "Boogaloo," "White Supremacy," "Racial Profiling," "Police Shootings," "Police Brutality," "Black Lives Matter;" names, such as those of individuals such as those killed by law enforcement, "Bill Cosby," "Louis Farrakhan;" names of organizations such as "Ku Klux Klan," "Nazi," "Neo-Nazi," "Aryan Brotherhood," and euphemisms that are known and particular to the African American Community; she intentionally misspells terms such as "Black," "White," "Race," "Racism," and "Racial Profiling," because Defendants routinely flags such terms.

170. Despite her efforts to self-censor and avoid the reach of Defendants' A.I., algorithms, and filtering tools, most of the videos posted on "The True Royal Family" and "True Royal" have only limited monetization, if any, and produce next to no revenue.

171. Plaintiff Newman has increasingly turned to Livestream broadcasts to generate revenue from her video content. Viewers can make monetary donations to YouTube creators like Plaintiffs using SuperChat during Livestream broadcasts. However, for the past two years, Defendants have been interfering with Livestream broadcasts on "The True Royal Family." Subscribers to "The True Royal Family" have informed Plaintiff Newman that their favorable comments have been interrupted or removed, they have been booted off of the Livestream or prevented from posting comments, and they have been prevented from making donations during Livestream broadcasts. The subscribers' experiences, as related to Plaintiff Newman, involve conduct which is the exclusive province of the channel owner or their designated moderator(s). Plaintiff Newman had not designated any moderator for the Livestream broadcasts which were the subjects of subscriber complaints. Defendants also have been throttling, interrupting and even cutting off Livestream video broadcasts in the middle of the event. Additionally, Defendants have been inserting voice and visual content which blocks out that which Plaintiff Newman is posting live.

172. Defendants' conduct during "The True Royal Family" Livestream broadcasts have reduced subscriber participation and interest in such events, have reduced new viewer participation,

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and have reduced the number and size of viewer donations to "The True Royal Family" channel depriving Plaintiff Newman of new subscribers and revenue.

173. Plaintiff Newman has also experienced significant and extended bullying, harassment, disparaging remarks and threats of physical violence on YouTube, both in the form of trolls leaving comments on "The True Royal Family" channel, and in the form of abusive and threating videos posted by other YouTube creators. Videos bearing Plaintiff Newman's name, and containing profanity and obscene content have been posted on the YouTube platform. A video threating to kill her was also posted on the platform. Such videos violate Defendants' Community Guidelines and TOS, and should be removed as such. However, Defendants' A.I., algorithm, and other filtering tools not only failed to identify these violations of the applicable rules, Defendants failed and refused to respond to efforts by Plaintiff and her subscribers to flag the videos, or to written reports and complaints regarding the disparaging and threatening videos, much less to enforce Defendants' own public standards and remove the videos or suspend the channels responsible for posting the videos.

174. As a direct and proximate result of Defendants' racial discrimination and wrongful conduct, "The True Royal Family" and "True Royal" have not substantially increased their respective subscriber and viewer numbers in recent years. Plaintiff Newman has suffered, and continues to suffer from the loss of 700+ individual videos, improper application of Defendants' A.I., algorithms, and other filtering tools resulting in the shadow banning of her videos and her channels, the misapplication of "Restricted Mode," the improper limitations on monetization for most of her videos, violations of her intellectual property rights and personal disparagement and threats to her person. Defendants' conduct is willful, intentional and unlawful in discriminating against Plaintiff based on her race, identity and viewpoints, and those of her subscribers and viewers in limiting access to the YouTube platform, related benefits, and opportunities to generate revenue.

2. Lisa Cabrera

175. Plaintiff Cabrera has been a registered YouTube creator since 2015 when she created the "Lisa Cabrera" channel. Plaintiff Cabrera registered "Lisa Cabrera" as a trademark in

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connection with her YouTube channel. 4,423 individual videos have been posted to the "Lisa Cabrera" channel, 68 of those videos were archived by Defendants. The "Lisa Cabrera" videos have generated more than 20 million views, with 830,000 views in just the past 28 days.

176. Plaintiff Cabrera is a YouTube partner. She creates and posts videos about current events and news on her channels, displaying pictures and news clips in her videos with original voice over commentary and narration accompanying the visual images. Despite the substantial number of total and monthly views generated by the "Lisa Cabrera" channel, it has only generated revenue totaling $25,500 over the past four years.

177. Plaintiff Cabrera is informed and believes that Defendants have gathered extensive information in order to generate metadata and then insert, embed, append, or associate such metadata with the videos posted to "Lisa Cabrera," and "Lisa C." Defendants gathered information regarding her race (Defendants know that Plaintiff Cabrera is an African American woman); that she makes and posts videos which have as a subject, relate to or discuss news and current events that are important to members of the African American community; her subscribers either self-identify as members of the African American community or watch many videos posted by other creators who have self-identified as members of the African American community; and many of those who view her videos either self-identify as members of the African American community or watch videos posted by other creators who have self-identified as members of the African American community.

178. Plaintiff Cabrera is informed and believes that Defendants have applied "Restricted Mode" and have limited monetization for videos she posted to "Lisa Cabrera" and "Lisa C" because Defendants have a policy and practice of using A.I., algorithms, and other filtering tools to classify, curate, censor, and sell advertisements for YouTube videos based on metadata Defendants create from information regarding the race, identity and viewpoint of creators, subscribers and viewers, rather than the content of the videos posted to the YouTube platform.

179. Defendants have applied "Restricted Mode" and have limited monetization to most of the videos on "Lisa Cabrera," despite the fact that each of the videos fully complies with all of Defendants' Community Guidelines and TOS, and contains no nudity, sexualized scenes or

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language, graphic depictions of sex or violence, drug abuse, or alcohol consumption. Defendants have applied "Restricted Mode" to most of the videos posted, and have allowed only very limited monetization for some videos, without any explanation or rationale for doing so. Plaintiff Cabrera is informed and believes that the sole reason that Defendants have acted in this fashion is that Defendants discriminate against Plaintiffs and other persons similarly situated based on race, e.g., Defendants restrict and demonetize the videos because they were created by an African American; they relate to issues and events of concern to the African American community, and they are viewed by large numbers of members of the African American community.

180. In addition to the Defendants' efforts to reduced Plaintiff Cabrera's reach by misapplication of "Restricted Mode," for various periods, off and on, throughout the past five years, Defendants have shadow banned both individual videos posted by Plaintiff Cabrera, and her channels, "Lisa Cabrera," and "Lisa C" in their entirety. Viewers have informed Plaintiff that they were unable to locate individual videos using YouTube search applications and terms such as "Lisa Cabrera," "Lisa C," or using as search terms the names of individual videos posted by Plaintiff Cabrera.

181. Because Defendants single out Plaintiffs and other persons similarly situated for rigorous enforcement of Defendants' Community Guidelines and TOS, to avoid receiving a "strike" for copyright infringement and related channel suspension, Plaintiff Cabrera is careful about complying with 'fair use' rules when using clips from someone else's videos: she keeps news clips short, averaging 1-4 minutes in length; she does not alter the original material in any way; she always gives full credit in the video to the source of the original material of others.

182. Sometimes, Plaintiff Cabrera posts identical videos both on the "Lisa Cabrera" channel and the "Lisa C" back up channel to see if they generate similar viewer numbers and are treated the same by Defendants' A.I., algorithms and other filtering tools. Sometimes, the identical videos posted on the "Lisa C" channel generate more viewers and revenue than those posted on the "Lisa Cabrera" channel. On six different occasions, Defendants flagged the "Lisa C" channel for posting "100% of the video of another YouTube creator, despite the fact that the video was created by Plaintiff Cabrera, registered owner of both channels, and despite Plaintiff Cabrera's written

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communications to Plaintiffs notifying them that she had given permission to "Lisa C" to repost each of the videos. Ultimately, Plaintiff was forced to archive each of the six videos that Defendants had flagged on the "Lisa C" channel simply because Defendants claimed that she was violating her own copyright on her own channel.

183. Defendants removed 68 of Plaintiff Cabrera's videos without notice, explanation or justification other than the videos involved copyright infringements. Though she promptly appealed each removal, she was unable to have Defendants resolve the removal of the videos. Defendants permanently archived those 68 videos. Now they cannot be viewed, accessed or copied by anyone. They are simply "lost" to Plaintiff Cabrera. Defendants never informed Plaintiff whether someone had flagged any of these videos; who, if anyone, asserted a copyright interest in any content of any individual video; what, if anything, in the video triggered the Defendants' conduct. Without such information, Plaintiff Cabrera could neither understand the Defendants' strike against any one video or attempt to resolve the strike for any video.

184. Defendants wrongly suspended the "Lisa Cabrera" channel for "hate speech in connection with a video Plaintiff posted commenting on a report by NBC regarding the purchase of illicit narcotics on the dark web. Plaintiff Cabrera promptly appealed the suspension. Defendants rejected the appeal and refused to actually watch the video. It was only after Plaintiff Cabrera filed a case against Defendants in small claims court that Defendants finally contacted Plaintiff Cabrera and informed her that the suspension was erroneous. In all, "Lisa Cabrera" was suspended and fully demonetized for six weeks due to Defendants' error.

185. Following the lifting of the suspension for the "Lisa Cabrera" channel, the channel remained demonetized, without the SuperChat application, and with 0 subscribers listed for the channel. Defendants waited two additional weeks to restore monetization for individual videos, SuperChat and the prior existing subscribers for the channel. In all, Plaintiff Cabrera lost 8 weeks of revenue due to Defendants' wrongful conduct and refusal to even look at the video content that they had improperly flagged as "hate speech." Defendants never offered to compensate her for the lost revenue they caused.

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186. Defendants deputize YouTube users (those who are not members of disfavored groups like those to which Plaintiffs and other persons similarly situated belong) to flag videos and channels that purportedly violate Defendants' Community Guidelines and TOS, and then automatically remove, restrict, or demonetize flagged videos, and suspend or remove flagged channels, without verifying that the videos or channels in question actually violate any published standard. As a result of Defendants' abdication to anonymous YouTubers of responsibility for enforcing applicable standards, Plaintiffs and other persons similarly situated are subjected to racist, misogynist, abusive trolls who target Plaintiffs' videos and channels for adverse action by Defendants.

187. In January of this year, Defendants again suspended all monetization for videos posted to "Lisa Cabrera" following a threat made by YouTube user, Oxyman, during a Livestream broadcast on his channel where he vowed, "I'm gonna make sure [Lisa Cabrera's] channel gets demonetized." Plaintiff Cabrera is informed and believes that Oxyman flagged her channel purportedly for violating Defendants' Community Guidelines or TOS. Without taking any steps to verify the flag or reported violation, Defendants then demonetized the "Lisa Cabrera" channel in January of this year without any prior notification or explanation given to Plaintiff.

188. Thereafter, Plaintiff Cabrera promptly appealed the Defendants' action. Defendants informed her that she could reapply for access to monetization only after waiting 30 days.

189. After 60 days, Defendants restored monetization for the "Lisa Cabrera" channel videos without any explanation as to why they had demonetized the channel to begin with. Defendants never offered to compensate her for the lost revenue they caused by blindly assuming the validity of Oxyman's flag on the "Lisa Cabrera" channel.

190. To compound the financial injury to Plaintiff Cabrera, during this same period, Defendants were running advertisements for the World Health Organization regarding Covid-19 prevention, and receiving advertising revenue at the same time that "Lisa Cabrera" was completely demonetized.

191. Plaintiff Cabrera has also been the subject of improper posts by YouTube creator, Michael Anderson, a known white supremacist. Michael Anderson posted a false video which had

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as a subject Plaintiff Cabrera and disparaged her personally. Mr. Anderson also posted Plaintiff's name and residential address in the comments section of his video. After recording an image of the video displaying Lisa Cabrera's name and address in the comments section; Mr. Anderson then removed the video and reposted it without Lisa Cabrera's address.

192. Following Mr. Anderson's posting of the video and Plaintiff Cabrera's residential address, numerous additional copies of the video with the address in the comments section appeared on multiple additional YouTube channels.

193. Plaintiff Cabrera used Defendants' reporting tool, which sent links to the video to Defendants. Defendants never responded to Plaintiff. Approximately fifty of the subscribers to the "Lisa Cabrera" channel informed Plaintiff that they too had reported links to the video to Defendants using the reporting tool. Defendants took no apparent steps to remove the disparaging video featuring Plaintiff Cabrera's name and false information regarding her, despite the fact that the video clearly violated Defendants' Community Guidelines and TOS, while ignoring dozens of reports with links flagging the Michael Anderson video.

194. On another occasion, Michael Anderson made and posted another video which had Plaintiff Cabrera as the subject, and "Lisa Cabrera" in the video's title. This video featured an image of Mr. Anderson in a car brandishing a revolver and talking about Plaintiff Cabrera. Again, Plaintiff Cabrera used Defendants' reporting tool and sent to Defendants a link to the video which communicated a clear threat of violence by Mr. Anderson against Plaintiff Cabrera. Again multiple subscribers to "Lisa Cabrera" communicated to Plaintiff that they too had flagged the video using Defendants' reporting tool. And again, Defendants did absolutely nothing to remove the video, or to suspend or remove Michael Anderson's channel for violating Defendants' Community Guidelines or TOS.

195. As a direct and proximate result of Defendants' blatant and overt racial discrimination and wrongful conduct, "Lisa Cabrera" has not grown in subscriber numbers, viewer numbers or view times as the channel would have otherwise grown absent Defendants' conduct. Plaintiff Cabrera has been subjected to public disparagement, racist and misogynist abuse, public posting of her private contact information and overt threats of physical violence – all of which has

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occurred with the tacit, if not overt, approval of Defendants who have repeatedly refused to enforce their own Community Guidelines and TOS. Plaintiff Cabrera has suffered lost revenue directly due to Defendants' racist profiling, A.I., algorithms and other filtering tools, while her channel was demonetized, while her channel was suspended, while Defendants have held her 68 videos in "archive," and Defendants continue to misapply "Restricted Mode" and limited monetization to individual videos she has posted.

3. Catherine Jones

196. Plaintiff Catherine Jones ("Plaintiff Jones") is an African American woman residing in the State of Vermont who is the creator and owner of "Cooking with Carmen Caboom," a YouTube cooking channel for African Americans, and "Carmen Caboom," and "Carmen Caboom Reloaded," two YouTube channels dedicated to developing and posting both parodies and serious videos which discuss and present information regarding issues and current events which are important to the African American community.

197. Plaintiff Jones created the "Carmen Caboom" channel in 2010, a backup "Carmen Caboom" channel in 2014, the "Cooking with Carmen Caboom" channel in 2015 and the "Carmen Caboom Reloaded," channel in 2018. Defendants improperly removed the original "Carmen Caboom" channel for purported nudity when no video posted to the channel included any nudity.

198. Plaintiff Jones is also a YouTube partner. Since creation, Plaintiff Jones" 2014 "Carmen Caboom" channel has posted many videos, several of which Defendants improperly removed as hate speech, the remaining videos have garnered approximately 500 -1,200 views per video overall which have generated approximately $500 per year.

4. Denotra Nicole Lewis

199. Plaintiff Lewis has been a registered YouTube user since 2006 and has posted her own videos on her YouTube channel, "Nicole's View" since 2016. When she registered "Nicole's View," Plaintiff Lewis answered Defendants' online questionnaire and self-identified as African American or Black. Had Defendants not requested that she provide personal information about herself for her profile, Plaintiff Lewis would not have done so. When she provided this information, she had no idea that Defendants would use information about her race to generate

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metadata about her, the videos she watched, and the videos she posted or that Defendants would insert, embed or associate such metadata with videos she posted, with her subscribers or with her viewers, much less that Defendants would do so to sell advertising based on race, identity or viewpoint; or that Defendants would filter, censor or restrict her videos based on information regarding her race, identity or viewpoint.

200. Plaintiff Lewis creates and posts videos to inform and entertain the African American community with respect to current events and issues of import to Black Americans. To date, she has posted 748 videos to her channel, some of which Defendants have removed from the platform, leaving only 731 of which remain available to be viewed by the public. While "Nicole's View" has generated in excess of 10.6 million views since 2016, she has generated approximately $25,000 in all from those views.

201. Plaintiff Lewis is informed and believes that Defendants have gathered extensive information in order to generate metadata based on that information, and then insert, embed, append, or associate such metadata with videos posted on "Nicole's View." Defendants gathered information regarding her race (Defendants know that Plaintiff Lewis is an African American woman); that she makes and posts videos which have as a subject, relate to or discuss issues and current events that are important to members of the African American community; her subscribers either self-identify as members of the African American community or watch many videos posted by other creators who have self-identified as members of the African American community; and many of those who view her videos either self-identify as members of the African American community or watch videos posted by other creators who have self-identified as members of the African American community.

202. Plaintiff Lewis is informed and believes that Defendants have applied "Restricted Mode" and have limited monetization for the videos she posted to "Nicole's View" because Defendants have a policy and practice of using A.I., algorithms, and other filtering tools to classify, curate, censor, and sell advertisements for YouTube videos based metadata Defendants create from information regarding the race, identity and viewpoint of creators, subscribers and viewers, rather than the content of the videos.

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203. Defendants routinely limit viewer access by applying "Restricted Mode" and by limiting monetization to most of the videos posted on the "Nicole's View" channel, despite the fact that the videos fully comply with all of Defendants' Community Guidelines and TOS, and contain no nudity, sexualized scenes or language, graphic depictions of sex or violence, drug abuse, or alcohol consumption. Defendants have applied "Restricted Mode" to most of the videos posted, and have allowed only limited monetization to some videos, without any explanation or rationale other than to indicate that the "content identified is unsuitable for most advertisers." Plaintiff Lewis is informed and believes that the sole reason that Defendants find the content is "unsuitable for most advertisers," is because Defendants discriminate against Plaintiffs and other persons similarly situated based on race, e.g., the content was created by an African American, relates to issues and events of concern to the African American community, and is viewed by many members of the African American community.

204. For certain periods over the past four years, Defendants have shadow banned certain individual compliant videos posted by Plaintiff Lewis on "Nicole's View." During various periods of time, those videos did not appear in YouTube searches using the terms "Nicole Lewis," or "Nicole's View," or using their individual video titles as search terms.

205. "Nicole's View" video content consists roughly of 75% pre-recorded videos and 25% Livestream broadcasts. For Livestream broadcasts, she sometimes has as many as 1000 viewers participating. Plaintiff Lewis employs designated moderators to monitor, control and censor viewer comments to ensure compliance with Defendants' Community Guidelines and TOS, promptly removing any non-compliant comments and blocking offending participants.

206. For the past two years, Defendants have used A.I., algorithms, and filtering tools to restrict the reach of videos posted on "Nicole's View," resulting in stagnant subscriber and viewer numbers. "Nicole's View" is no longer growing. The channel's analytics page from month to month reflects only minor changes to the numbers of subscribers, viewers, and view times. To avoid the impact of Defendant' A.I., algorithms and filtering tools on Defendants' metadata generated from video titles and tags, Plaintiff Lewis intentionally self-censors: (a) she avoids using controversial video titles; (b) she avoids using abbreviations like "BLM," "KKK;" terms such as

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"Black," "White," "Racism," "Boogaloo," "White Supremacy," "Racial Profiling," "Police Shootings," "Police Brutality," "Black Lives Matter;" names, such as those of individuals such as those killed by law enforcement, "Bill Cosby," "Louis Farrakhan;" names of organizations such as "Ku Klux Klan," "Nazi," "Neo-Nazi," "Aryan Brotherhood," and euphemisms that are known and particular to the African American Community; she intentionally misspells terms such as "Black," "White," "Race," "Racism," and "Racial Profiling," because Defendants routinely flags such terms.

207. Despite Plaintiff Lewis' efforts to self-censor and avoid the reach of Defendants' A.I., algorithms, and filtering tools, most of the videos posted on "Nicole's View" have only limited monetization, if any.

208. On February 11, 2020, Plaintiff Lewis received an email from Defendants indicating that "SuperChat was disabled," purportedly because "Nicole's View" was using the original content of other YouTubers. However, after a week, it became apparent that Defendants had not merely disabled SuperChat, but had completely demonetized the entire "Nicole's View" channel. Defendants did so without notice or explanation. Plaintiff Lewis promptly filed an appeal of the decision to disable SuperChat and to demonetize the entire channel.

209. Mindful of the stringent standards which Defendants have always applied to the channels of Plaintiffs and other persons similarly situated, Plaintiff Lewis has always followed Defendants' Community Guidelines, and TOS. Whenever she uses a news clip, she limits the clip to several minutes and generates her own original commentary as video content to accompany the clip. The originators of all news clips incorporated into videos posted by Plaintiff Lewis are always accorded full proper and credit in the video so that there is no possibility of viewers confusing the news clip with her original commentary or content.

210. Defendants did not respond to Plaintiff Lewis' appeal. On or about June 7, 2020, she suddenly noticed that Defendants had resumed placing advertisements on videos posted to "Nicole's View." When she checked the channel's analytics page, it reflected that her monetized videos were again generating revenue and her Livestream broadcasts were generating donations. Defendants have neither explained why the channel was fully demonetized for nearly two months,

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nor why it was remonetized; nor have they offered compensation for the revenue which the channel lost during that period.

211. As a direct and proximate result of Defendants' racial discrimination and wrongful conduct, "Nicole's View" has not grown in subscriber numbers, viewer numbers or view times and it would have grown otherwise and Plaintiff Lewis has been deprived of significant revenue from Defendants' sale of advertising, SuperChat and Livestream donations over the life of her channel. Plaintiff Lewis' videos were all fully demonetized between February 11, 2020 and June 7, 2020, during which period "Nicole's View" generated no income whatsoever.

V. CLASS ALLEGATIONS

212. Plaintiffs bring this action on behalf of themselves and a putative class of similarly situated persons who use or have used YouTube or any of the services that Defendants offer in connection with YouTube and who come within the definition or classification of a protected class of persons under 42 U.S.C. 1981 (the "Class").

213. Each and every claim alleged in this case is also alleged on behalf of every member of the Class.

214. The Class seeks both monetary damages, restitution, and/or other injunctive relief on behalf of any persons who fall within the Class Definition:

All persons or entities in the United States who are or were:

(i) a person or entity defined or classified as a protected class or person under 42 U.S.C. §1981; and

(ii) are members, users and or consumers of YouTube who uploaded, posted, or viewed video content on YouTube subject to Google/YouTube's Terms of Service, Mission Statement, Community Guidelines, and/or any other content-based filtering, monetization, distribution, personal data use policies, advertising or regulation and practices any other regulations or practices that are related to the YouTube Platform on or after January 1, 2015 and continuing through to June 16, 2020 (the "Class Period").

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Excluded from the Class are Defendants and their employees, affiliates, parents, subsidiaries, and co-conspirators, whether or not named in this Complaint, and the United States government.

215. Class certification for the Class is authorized under Federal Rule of Civil Procedure 23 and applies to both claims for injunctive and equitable relief, including restitution, under Rule 23(b) (2) and for monetary damages under Rule 23(b)(3).

216. There are at least 42 million members of the Class.

217. The number of persons who fall within the definitions of the Class are so numerous and geographically dispersed so as to make joinder of all members of the Class or Subclass in their individual capacities impracticable, inefficient, and unmanageable, and without class wide relief, each member of the Class would effectively be denied his, her, its, or their rights to prosecute and obtain legal and equitable relief based on the claims and allegations averred in this Complaint.

218. There are questions of law and fact common to the Class that relate to and/or are dispositive of the nature and allegations of unlawful conduct alleged in the Complaint, and the nature, type and common pattern of injury and harm caused by that unlawful conduct and sustained by the putative members of the Class and Subclass including, but not limited to:

a. Whether Defendants' regulations and content-based restrictions violate the free speech, antidiscrimination, consumer fraud and unfair competition, and contractual rights of the members of the Class with respect to each cause of action averred by the Plaintiffs below.

b. Whether Defendants concealed, misrepresented or omitted to disclose material policies and practices regarding the unlawful regulation of video content, advertising, distribution, monetization, contractual obligations, and characteristics of the YouTube Platform to the members of the Class;

c. Whether Defendants use or have used unlawful, discriminatory, anticompetitive and fraudulent, deceptive, unfair, and/or bad faith filtering tools and practices, in the code and operation of their machine based, algorithmic, or A.I. filtering tools, and/or other practices and procedures to review, regulate, and restrict content, and/or regulate and restrict the advertising, monetization, distribution, and property rights of the Class;

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d. Whether Defendants are or have engaged in discriminatory practices against the members of the Class based on protected characteristics under 42 U.S.C § 1981 or the Unruh Civil Rights Act;

e. Whether Defendants breached or are in breach of their form consumer contracts and obligations to the Class;

f. Whether Defendants have or are engaged in unlawful, deceptive, unfair, or anticompetitive practices that violate federal or California law, and harmed and injured the Class;

g. Whether the conduct of Defendants, as alleged in this Complaint, caused injury to the business and property of Plaintiffs and the members of the Class;

h. Whether Defendants' alleged regulations, practices, and conduct have caused or threaten to cause irreparable harm to the speech of the Class so as to warrant the issuing of temporary, preliminary and/or final injunctive relief and corresponding declaratory relief with respect to the legal rights of the Class;

i. The scope, nature, substance, and enforcement of injunctive and equitable relief sought by the Class;

j. Whether Defendants were unjustly enriched or obtained profits or ill-gotten financial gains as a result of the unlawful, discriminatory, deceptive, unfair, or anticompetitive practices perpetrated against the Class;

k. Whether Defendants breached or are in breach of their contractual obligations, implied duty of good faith and fair dealing, and or other promises under the consumer form contracts entered into with members of the Class during the Class Period;

l. Whether Defendants' content-based regulations and filtering practices, on their face and/or as applied, violate the free speech rights of Plaintiffs and the Class under California or federal law; and

m. whether the Class is entitled to declaratory and other relief based on Defendants' assertion of immunity from liability under the Communications Decency Act, 15 U.S.C. § 230 (c) (the "CDA"), with respect to any of the claims or allegations asserted by Plaintiffs and the Class in this Lawsuit.

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219. Each of individual named Plaintiffs is a person protected under 42 U.S.C. § 1981, and a member of the Class.

220. The claims of Plaintiffs are typical of and identical to those of the Class.

221. Plaintiffs will fairly and adequately protect the interests of the members of the Class.

222. Plaintiffs are represented by counsel who are competent and experienced in the prosecution and defense of similar claims and litigation, including class actions filed, prosecuted, defended, or litigated in under California and federal law, in California and federal courts, in connection with claims and certification of consumer and civil rights classes composed of members who reside in California and/or the United States.

223. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications.

224. The questions of law and fact common to the members of the Class predominate over any questions of law or fact affecting only individual members of the Class or Subclass, including legal and factual issues relating to liability and the nature of the harm caused by Defendants' unlawful actions.

225. The questions of law and fact common to the members of the Class also predominate over any questions of law or fact affecting only individual members of the Class because all claims in this Lawsuit are governed under California or controlling federal law, including legal and factual issues relating to liability and the nature of the harm caused by Defendants' unlawful actions.

226. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Treatment as a class action will permit a large number of similarly situated persons to adjudicate their common claims in a single forum simultaneously, efficiently and without the duplication of effort and expense that numerous individual actions would engender.

227. Certification of the Class is also superior to other available methods for the fair and efficient adjudication of this controversy because and all claims in this Lawsuit must be brought and venued in a court of competent jurisdiction located Santa Clara County.

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228. The Class are readily definable and are categories for which records should and do exist in the files of Defendants.

229. The prosecution as a class action will also eliminate the possibility of repetitious litigation.

230. Class treatment will also permit the adjudication of smaller claims by members of the Class who otherwise could not afford to litigate or assert the claims asserted by Plaintiffs in this Lawsuit.

VI. INDIVIDUAL CAUSES OF ACTION

FIRST CAUSE OF ACTION
REQUEST FOR A DECLARATORY JUDGMENT THAT SECTION 230(c) IMMUNITY IS INAPPLICABLE TO DISCRIMINATION CLAIMS
(On Behalf Of Each Plaintiff Individually And The Class)

231. Plaintiffs re-allege and incorporate herein by reference, as though set forth in full, each of the allegations set forth in paragraphs 1 through 230 above.

A. Procedural Background Facts

232. The CDA provides "**Protection for 'Good Samaritan' blocking and screening of offensive material:"**

(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 information provided by another information content provider.

(2) **Civil liability**

No provider or user of an interactive computer service shall be held liable on account of — (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1). 47 U.S.C. § 230(c).

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233. On November 19, 2019, the Honorable Brian C. Walsh, Judge of the Superior Court of the County of Santa Clara (the "State Court"), ruled in *Prager University v. Google LLC*, Santa Clara County Superior Court Case No. 19CV340667,that 47 U.S.C. § 230(c) "immunizes service providers [such as Defendants] who endeavor to restrict access to material deemed objectionable," by employing filters to remove users' content from their platforms based on the political, religious, or other personal identity or viewpoint of the user rather than the actual online content posted by the user on the platform. 2019 WL 8640569, at *7 (Cal. Super. Ct. Nov. 19, 2019).

234. Furthermore, the State Court ruled that, notwithstanding the express good faith language in Section 230(c)(2)(A), the content filtering and restrictions that internet service providers like Defendants engage in are not subject to any good faith, objective judicial review of the underlying content, or the internet providers filtering or restriction practices, but reside within and are left to the sole, unfettered discretion of the internet provider who acts to filter and restrict content at its whim. 2019 WL 8640569, at *10-11.

235. In *Prager*, therefore, at least one state trial court has construed Section 230(c) as granting Defendants absolute immunity for all content curation decisions, including decisions based not on the actual on line material, but on the race, sex, or other identity and dismissing plaintiffs' claims without leave to amend despite detailed factual allegations, evidence, and party admissions of identity and viewpoint based discrimination and animus in regulating and filtering speech on YouTube). 2019 WL 8640569, at *10-12.

236. A true and correct copy of the November 19, 1919-Order issued by the Hon. Brian Walsh, granting Defendants' immunity and dismissing all of plaintiffs' claims for relief without leave to amend is attached as Exhibit B hereto.

237. On December 19, 2019, plaintiff timely filed a notice of appeal. The notice of appeal rendered state court decision uncitable and of no precedential or legal value unless and until the California appellate courts affirm the application of Section 230(c) to intentional discrimination and the federal courts, which are the final authority on federal questions of law, concur in that decision.

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238. On May 18, 2020, the United States Department of Justice intervened in the *Divino* case and filed a brief defending the application of Section 230(c) to ISP's who filter, review, restrict, bock, or censor on line speech based on a user's racial, sexual, or other identity or viewpoint without regard to whether the online speech of the user violated the content based rules of the internet site or the provisions of Section 230(c). A true and correct copy of the United States Department of Justice's Notice of Intervention (Dkt.# 46) and Memorandum of Law in Support (Dkt.#47) are attached as Exhibit C.

239. On May 28, 2020 the President of The United States issued an Executive Order repudiating both the State Court decisions in *Prager* and contradicting the United States' position that Section 230(c) applies or can be applied to an ISP who engages in intentional race , sex or other identity or viewpoint based discrimination alleged in this Lawsuit and *Divino*.

240. In the May 28 Order, the President directed the U.S. Department of Justice ("DOJ") and other Article 2 agencies or departments to enforce the "policy of the United States" that immunity law may not be applied or enforced with respect to any on line, publishing, filtering, blocking, or censorship conduct undertaken by an Internet Service Provider (ISP) that was based in any part on the user's race, sex, or other personal identity or viewpoint.

241. The May 28 Executive Order states in pertinent part:

> **Section 2 Protections Against Online Censorship.**
>
> **(a)** It is the policy of the United States to foster clear ground rules promoting free and open debate on the internet. Prominent among the ground rules governing that debate is the immunity from liability created by section 230(c) of the Communications Decency Act (section 230(c)). 47 U.S.C. 230(c). It is the policy of the United States that the scope of that immunity should be clarified: the immunity should not extend beyond its text and purpose to provide protection for those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints. * * * *

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242. In particular, subparagraph (c)(2) expressly addresses protections from "civil liability" and specifies that an interactive computer service provider may not be made liable "on account of" its decision in "good faith" to restrict access to content that it considers to be "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable." It is the policy of the United States to ensure that, to the maximum extent permissible under the law, this provision is not distorted to provide liability protection for online platforms that -- far from acting in "good faith" to remove objectionable content -- instead engage in deceptive or pretextual actions (often contrary to their stated TOS) to stifle viewpoints with which they disagree. Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike. When an interactive computer service provider removes or restricts access to content and its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial conduct. It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider.

(b) To advance the policy described in subsection (a) of this section, all executive departments and agencies should ensure that their application of section 230(c) properly reflects the narrow purpose of the section and take all appropriate actions in this regard. In addition, within 60 days of the date of this order, the Secretary of Commerce (Secretary), in Case 5:19-cv-04749-VKD Document 57 Filed 06/01/20 Page 6 of 8 consultation with the Attorney General, and acting through the National Telecommunications and Information Administration (NTIA), shall file a petition for rulemaking with the Federal Communications Commission (FCC) requesting that the FCC expeditiously propose regulations to clarify:

(i) the interaction between subparagraphs (c)(1) and (c)(2) of section 230, in particular to clarify and determine the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not

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specifically protected by subparagraph (c)(2)(A) may also not be able to claim protection under subparagraph (c)(1), which merely states that a provider shall not be treated as a publisher or speaker for making third-party content available and does not address the provider's responsibility for its own editorial decisions; (ii) the conditions under which an action restricting access to or availability of material is not "taken in good faith" within the meaning of subparagraph (c)(2)(A) of section 230, particularly whether actions can be "taken in good faith" if they are: **(A)** deceptive, pretextual, or inconsistent with a provider's terms of service; or **(B)** taken after failing to provide adequate notice, reasoned explanation, or a meaningful opportunity to be heard; and **(iii)** any other proposed regulations that the NTIA concludes may be appropriate to advance the policy described in subsection (a) of this section. **(c)** The Department of Justice shall review the viewpoint-based speech restrictions imposed by each online platform identified in the report described in subsection (b) of this section and assess whether any online platforms are problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices. * * * * **Sec. 4. Federal Review of Unfair or Deceptive Acts or Practices.** (a) It is the policy of the United States that large online platforms, such as Twitter and Facebook, as the critical means of promoting the free flow of speech and ideas today, should not restrict protected speech. The Supreme Court has noted that social media sites, as the modern public square, "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Communication through these channels has become important for meaningful participation in American democracy, including to petition elected leaders. These sites are providing an important forum to the public for others to engage in free expression and debate. *Cf. PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-89 (1980). * * *Sec. 5. State Review of Unfair or Deceptive Acts or Practices and Anti-Discrimination Laws.

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> **(a)** The Attorney General shall establish a working group regarding the potential enforcement of State statutes that prohibit online platforms from engaging in unfair or deceptive acts or practices. The working group shall also develop model legislation for consideration by legislatures in States where existing statutes do not protect Americans from such unfair and deceptive acts and practices. The working group shall invite State Attorneys General for discussion and consultation, as appropriate and consistent with applicable law.
>
> **(b)** Complaints described in section 4(b) of this order will be shared with the working group, consistent with applicable law. The working group shall also collect publicly available information regarding the following:
>
> (i) increased scrutiny of users based on the other users they choose to follow, or their interactions with other users;
>
> (ii) algorithms to suppress content or users based on indications of political alignment or viewpoint;
>
> (iii) differential policies allowing for otherwise impermissible behavior, when committed by accounts associated with the Chinese Communist Party or other anti-democratic associations or governments;
>
> (iv) reliance on third-party entities, including contractors, media organizations, and individuals, with indicia of bias to review content; and
>
> (v) acts that limit the ability of users with particular viewpoints to earn money on the platform compared with other users similarly situated.

A true and correct copy of the President's Executive Order is attached as Exhibit D to this Complaint.

243. In *Divino*, the "related" case to this Lawsuit, the LGBTQ+ plaintiffs asserted a claim for a declaratory judgment under 28 U.S.C. § 2201, *et seq*. asking this Court to declare that the immunity provision of Section 230(c) does not extend to intentional identity or viewpoint discrimination conduct by an ISP and, if not so construed, the law is unconstitutional, both as applied and on its face, under *Denver Area* and progeny.

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244. On June 2, 2020, this Court held a hearing in the *Divino* case on, among other things, the extent to which Section 230(c) applies, if at all, to intentional identity or viewpoint based discrimination by Defendants.

245. Defendants argued that Section 230(c)(1) immunizes them from identity and viewpoint based discrimination because such discrimination is "publishing conduct" that Congress enacted Section 230(c)(1) to protect.

246. Defendants contended that Section 230(c)(1) grants absolute immunity to an ISP for "publishing conduct" that includes discriminating against user based on the person's racial or sexual identity to filter, review, or block the access of the online user or its content on a website that is otherwise open to the general public.

247. Although Defendants conceded at the oral argument that immunity might not be available in limited but unspecified "circumstances" involving race discrimination, Defendants maintained that intentional and systematic discrimination used to profile, review, and block the access and content of LGBTQ+ users was a traditional publishing function that comes within the conduct that Congress intended to protect under Section 230(c)(1).

248. The LGBTQ+ plaintiffs in *Divino* argued that Section 230(c)(1) does not prevent the enforcement of contractual promises and other preexisting legal relationships between an ISP and user, including contractual based promises that Defendants may only filter, review and impose access restrictions on users based on the content of the video under specific rules that apply equally to all without reference or consideration of the user's identity or viewpoint.

249. The breaching of these legally enforceable promises and obligations, express or implied, in a contract and license agreements between a user and an the ISP, and the other obligations and rights codified in the state or federal laws that regulate businesses that prohibit discrimination based on identity are neither specific or unique to publishers or traditional editorial function, and do not implicate liability for third party defamation or wrongs, but are legal obligations that apply to all business under contract and other legal obligations imposed on any business and its customer or consumer.

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250. The *Divino* plaintiffs also argued, as the Plaintiffs and all persons similarly situated argue in this Lawsuit, that Section 230(c) applies only to the filtering, reviewing, restricting, or blocking of on line "material" not to or based upon a person's identity or viewpoint, because racial profiling and identity or viewpoint censorship has nothing to do with and does not further the express statutory purpose of protecting minors from "offensive material" on the internet.

251. The extension of Section 230(c)(1) beyond a limited immunity for defamation and other liabilities that arise from the failure to block unlawful third party content also renders Section 230(c)(2) statutory limits prohibiting bad faith or discriminatory filtering and blocking of on line appropriate content unenforceable, meaningless, and pure statutory surplussage.

252. Finally, as in *Divino*, the application of either Section 230(c)(1) or (2) to immunize an ISP that uses identity or viewpoint discrimination to regulate on line speech is an unconstitutional permissive speech regulation law violates the First Amendment under *Denver Area* and progeny.

253. The use of Section 230(c) to censor users based on their race, identity, or viewpoint is not viewpoint neutral, narrowly tailored to protect children from "offensive" material without creating a risk of erroneous private veto over otherwise appropriate speech, and eviscerates the pre-existing legal relationships, including the contractual and statutory obligations, and rights of the parties that would otherwise be enforceable in a court of law.

254. The Court has taken the arguments under submission.

255. A true and correct copy of the transcript of the Section 230(c) arguments recorded at the hearing in *Divino* is attached as Exhibit E to this complaint.

B. Justiciable Legal Controversies Currently Exist Regarding The Construction And Constitutionality Of 47 U.S.C. § 230(c).

256. At least four actual controversies now exist between the parties regarding the proper construction, scope, application, and constitutionality of the CDA statutory immunity granted to internet service providers given the unique allegations and claims asserted against Defendants in this case.

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257. Each of the controversies arise from a dispute about the extent to which Section 230(c) immunizes an internet service provider that discriminates against users because of the user's race, personal identity or viewpoints, including any profiling or consideration of Plaintiffs' race in making access decisions on YouTube

1. An Actual Controversy Exist As To Whether The Provisions Of Section 230(c) Immunize Defendants From Race, Personal Identity, or Viewpoint Discrimination In Filtering And Blocking On line Content And Access

258. A justiciable controversy exist as to whether Section 230(c)(1) or (2) grants immunity to an ISP that breaches and express or implied contractual promises not to discriminate against users based on a person's identity, or viewpoint when reviewing, restricting, or denying access to YouTube under license and use agreements between the user and the ISP.

2. An Actual Controversy Exists As To Whether Section 230(c) Immunizes Defendants For Conduct That Violates

259. A second justiciable controversy exists as to whether the provisions of Section 230(c)(1) or (2) permit Defendants to engage unlawful conduct that uses person's race, identity, or viewpoint to restrict on line material and access in contravention of established federal and state laws prohibiting such discrimination in contract, 42 U.S.C. § 1981 and Unruh Civil Rights Act, Cal. Civ. Code §§51, *et seq.*, unlawful, deceptive or anticompetitive business practices, including conduct prohibited under section 1124 of the Lanham Act and section 17200 of the California Business and Professions Code, and discriminatory censorship in violation of the Liberty of Speech Clause enshrined in Article 1, Section 2 of the California Constitution.

3. The Provisions And/or Application Of Any Part Of Section 230(c) To Claims Arising Out Of Race, Identity, Or Viewpoint Discrimination Is Unconstitutional

260. As a third justiciable controversy exists as to whether Section 230(c) is unconstitutional because it violates the First Amendment and/or Equal Protection clause of the U.S. Constitution on its face and/or as applied to this Lawsuit.

261. Construing any provision of the "Good Samaritan Immunity For Blocking On line Material" under Section 230(c) as permitting an ISP to use a person's race, identity, or viewpoint to

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filter, review, or block on line access or content is unconstitutional under the test governing the constitutionality of permissive private party speech laws.

262. Section 230(c) (1) and (2) is congressional law that was enacted to permit a private party to regulate on line speech. Consequently, under *Denver Area* and progeny, the law cannot be applied in a manner that is NOT identity or viewpoint neutral, must be narrowly tailored and applied to avoid the risk of erroneous private censorship, and may not be used to interfere or alter the pre-existing legal relationships between the parties.

4. The Executive Order Precludes The Government From Arguing Or Enforcing Section 230(c) To Claims Based On Intentional Identity Or Viewpoint Discrimination.

263. A fourth justiciable controversy exists as to legal effect of the President's Executive Order on the application of Section 230(c) to on line content and access regulation based on a user's identity and viewpoint, as is set forth in this Lawsuit.

264. In the Order, the President declares that is the policy of the United States to ensure that Section 230(c) must be applied in a manner that is viewpoint neutral and does not permit ISPs to censor on line content or block on line user access based on the identity or viewpoint of the user. If given full legal affect, the Executive Order mandates the obvious: Section 230(c) applies only to filtering and blocking "offensive material," not the persons who use the internet.

265. The Executive Order provides that its application does not create a substantive legal right that did not exist before, or otherwise alter the parties' relationships. But that language begs the question as to what rights and relationships already exist under Section 230(c) in this Lawsuit. The Executive Order directs the United States to enforce the law and promulgate regulations that preclude what Defendants want to use its provisions for in this Lawsuit: to discriminate against Plaintiffs based on their race, identity and viewpoints.

266. Consequently, the Executive Order also creates a conflict of interest for the Department of Justice under Rule 5.1. The Order specifically instructs DOJ to take all steps, including, but not limited to, promulgating regulations to ensure that Section 230(c) is not and will never be used to permit identity or viewpoint discrimination in the regulation of on line content.

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267. At the same time, DOJ has intervened and formally taken the opposite position before this Court regarding the application of Section 230(c) to the very identity and viewpoint discrimination that the President has instructed DOJ to prohibit. That position effectively precludes DOJ or any agency of the United States from promulgating and enforcing the very regulations and other steps in the Order that preclude identity and viewpoint discrimination.

268. Furthermore, because of the conflicting positions taken by DOJ in *Divino*, the United States may be judicially estopped from enforcing or giving any affect to the President's Executive Order.

C. Plaintiffs Served Rule 5.1 Notice On The U.S. Attorney General

269. In challenging the Constitutionality of the CDA, Plaintiffs must comply with Federal Rule of Civil Procedure 5.1 which requires that "[A] party . . . promptly [] file a notice of constitutional question stating the question and identifying the paper that raises," where "a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity." Fed. R. Civ. P. 5.1. Under Rule 5.1 "statute" means any congressional enactment that would qualify as an "Act of Congress."

270. Rule 5.1 requires more than the court certification provided by 28 U.S.C. § 2403; Rule 5.1 requires notice and certification to the United States Attorney General of any constitutional challenge to a federal statute, not merely to challenges of laws "affecting the public interest." 28 U.S.C. § 2403.

271. The CDA constitutes a federal statute under Rule 5.1.

272. Plaintiffs have served the Rule 5.1 Notice on the United States Attorney General stating that Plaintiffs are challenging the constitutionality of 47 U.S.C. § 230(c), identifying the CDA, and attaching a copy of this Complaint, and a copy of Judge Walsh's November 19, 2019Order.

273. Plaintiffs have served the Rule 5.1 Notice and attachments by certified mail and have sent a copy of the Notice and attachments to the United States Attorney General by overnight delivery service.

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274. 28 U.S.C. § 2403 also requires that the Court notify the United States Attorney General of Plaintiffs' First Cause of Action set forth in this Complaint: "In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein **the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General**, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality." 28 U.S.C. § 2403(a) (emphasis added).

275. Accordingly, Plaintiffs respectfully request that the Court certify to the United States Attorney General of the United States that 48 U.S.C. § 230(c), a federal statute, has been challenged by Plaintiffs on the grounds averred below.

276. At this time, United States has a potentially unwaivable conflict of interest under the applicable law and ethics rules governing conflicts of interest and divided duty of loyalty.

277. In complying with the notice requirements under Rule 5.1, Plaintiffs are not waiving but are expressly reserving their rights to assert that the United States has a conflict of interest that may preclude intervention under Rule 5.1, and/or to seek other appropriate relief, including disqualification, and oppose intervention, in this Lawsuit or any other proceeding that conflicts with the policy of the United States that Section 230(c) does not permit or immunize identity or viewpoint discrimination.

SECOND CAUSE OF ACTION
FOR BREACH OF CONTRACT
(On Behalf Of Each Plaintiff Individually And The Class)

278. Plaintiffs re-allege and incorporate by reference in whole or in part the allegations alleged in paragraphs 1 through 277.

279. The TOS and agreement(s) between Defendants and Plaintiffs governing filtering, review and access to content and services on YouTube provide that the right and obligations under

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those agreements are governed and subject to California law, including federal law that California is obligated to enforce under the supremacy clause of the U.S. Constitution.

280. The elements of a breach of contract under California law are: (1) existence of a valid contract between Plaintiffs and Defendants; (2) Plaintiffs' performance (or excuse for non-performance) under the contract; (3) Defendants' breach of the contract; and (4) proof of harm or financial injury as a result of the breach.

281. Plaintiffs and Defendants have entered into agreement, including the TOS and related agreement(s) that are enforceable contract(s) governed by and under California law;

282. Plaintiffs have performed their obligations under the TOS and/or other contract(s), including complying with YouTube's viewpoint neutral content based access rules and granting Defendants a perpetual and irrevocable license to their video content and all personal data and consumer information derived or used in connection with Plaintiffs' content on or use of YouTube.

283. Defendants have breached their promises to provide Plaintiffs' equal access to YouTube and all related services that Defendants offer to other users, and are subject only to content based rules that are viewpoint neutral and apply equally to all. Specifically, Defendants have denied and interfered with Plaintiffs' right of equal access to YouTube and its related services by profiling and using Plaintiffs' race, identity or viewpoints, not merely the material in the video content, to review, filter and restrict Plaintiffs' access to YouTube in a manner that is not permitted by federal and California law.

284. As a direct and proximate result of Defendants' breach, Plaintiffs have suffered monetary damages and other financial harms and losses in excess of $500.00 per year plus other lost revenues, the total amount of which will be determined at trial.

285. As a direct and proximate result of Defendants' breach, Plaintiffs have also suffered irreparable harm to their contractual based rights of free speech and expression provided for under the express and implied provisions of the TOS and other contract(s).

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THIRD CAUSE OF ACTION
FOR BREACH OF THE IMPLIED COVENANT
OF GOOD FAITH AND FAIR DEALING
(On Behalf Of Each Plaintiff Individually And The Class)

286. Plaintiffs re-allege and incorporate by reference in whole or in part the allegations alleged in paragraphs 1 through 285.

287. Under California law, every contract "imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *McClain v. Octagon Plaza, LLC,* 159 Cal.App.4th 784, 798 (2008) (quoting *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc*., 2 Cal.4th 342, 371– 72 (1992)).

288. The covenant "is based on general contract law and the long-standing rule that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." *Waller v. Truck Ins. Exchange, Inc*., 11 Cal.4th 1, 36 (1995). The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. When a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing" and such discretion "must be exercised in good faith." *Carma*, 2 Cal.4th at 372; *see also Perdue v. Crocker Nat'l Bank*, 38 Cal.3d 913, 923 (1985) (""where a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing").)

289. Breach of the implied covenant occurs "[w]here the terms of a contract are literally complied with but one party to the contract deliberately countervenes the intention and spirit of the contract." *Hilton Hotels Corp. v. Butch Lewis Prod., Inc*., 808 P.2d 919, 922–23 (Nev. 1991). "Establishing such a breach of the implied covenant depends upon the 'nature and purposes of the underlying contract and the legitimate expectations of the parties arising from the contract." *Integrated Storage Consulting Servs., Inc. v. NetApp, Inc.,* No. 5:12-CV-06209-EJD, 2013 WL 3974537, at *7 (N.D. Cal. July 31, 2013).

290. Five factual elements are required to establish a breach of the covenant of good faith and fair dealing: (1) the parties entered into a contract; (2) the plaintiff fulfilled his obligations

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under the contract; (3) any conditions precedent to the defendant's performance occurred; (4) the defendant unfairly interfered with the plaintiff's rights to receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant's conduct. Judicial Council of California Civil Jury Instruction 325.

291. Plaintiffs and Defendants have entered into contracts, including the TOS, in connection with Plaintiffs' use and access to YouTube and the related services Defendants offer under those contracts.

292. Plaintiffs have fulfilled their obligations under the TOS and other agreement(s) and fulfilled or performed the conditions precedent, if any, under those agreement(s), including complying with YouTube's viewpoint neutral content based access rules and granting Defendants an irrevocable and perpetual license to their video content and any personal information and data derived from Plaintiffs' use or content on YouTube, and paying Defendants other consideration for services and access.

293. Defendants unfairly interfered with Plaintiffs' rights by profiling and using their race, personal identity or viewpoint to deny them equal access to YouTube and its related services based on conduct that that is prohibited by and not permitted under California or federal law.

294. As a direct and proximate result of Defendants' breach, Plaintiffs have suffered monetary damages and other financial harms and losses in excess of $500.00 per year plus other lost revenues, including the monetary value of unlawfully acquired property and license rights to Plaintiffs' content and the personal data and information derived from Plaintiffs and their subscribers and viewers, the total amount of which will be determined at trial.

295. As a direct and proximate result of Defendants' breach, Plaintiffs have also suffered irreparable harm to their contractual based speech rights and expression provided for subject to only to viewpoint neutral content based rules as set forth in the express and implied provisions of the TOS and other contract(s).

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FOURTH CAUSE OF ACTION
FOR PROMISSORY ESTOPPEL
(On Behalf Of Each Plaintiff Individually And The Class)

296. Plaintiffs re-allege and incorporate by reference in whole or in part the allegations alleged in paragraphs 1 through 295.

297. "The elements of promissory estoppel are (1) a promise, (2) the promisor should reasonably expect the promise to induce action or forbearance on the part of the promisee or a third person, (3) the promise induces action or forbearance by the promise or a third person (which we refer to as detrimental reliance), and (4) injustice can be avoided only by enforcement of the promise. *West v. JPMorgan Chase Bank, N.A.,* 214 Cal.App.4th 780, 803 (2013).

298. Defendants have made at least 5 promises to Plaintiffs and other similarly situated users:

a. Defendants promise Plaintiffs equal access to YouTube subject only to viewpoint neutral content-based rules that apply equally to all users;

b. Defendants promise not to discriminate against Plaintiffs based on their race, sexual identity, commercial status or identity, or the personal viewpoints except as permitted under California or controlling federal law;

c. Defendants promise to provide viewer and audience reach, advertising, subscription, monetization, and content curation services to Plaintiffs and other users who comply with YouTube's viewpoint neutral content-based rules;

d. Defendants promise only to use, appropriate, or derive revenue from Plaintiffs' content and data, and that of their viewers and subscribers subject to Defendants' honoring and fulfilling their express and implied terms and obligations under the TOS and other agreement(s); and

e. Defendants promise to operate YouTube as a public forum for freedom of expression that is subject only to narrowly tailored, viewpoint neutral content based rules.

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299. Defendants made these promises with the reasonable expectation and intent of inducing Plaintiffs to grant Defendants an irrevocable license rights and other valuable consideration derived from Plaintiffs' use of YouTube.

300. Defendants also made these promises with the intent of inducing Plaintiffs, as well as their viewers, subscribers, and followers, to access and use YouTube so that Defendants can monetize, advertise, and profit from user access and use of YouTube and the related services that Defendants offer.

301. Defendants, through these promises, induced Plaintiffs to grant Defendants an irrevocable license, rights and other valuable consideration derived from Plaintiffs' use of YouTube.

302. Defendants, through these promises, induced Plaintiffs, as well as their viewers, subscribers, and followers, to access and use YouTube so that Defendants can monetize, advertise, and profit from user access and use of YouTube and the related services that Defendants offer.

303. Enforcing Defendants' promises will avoid injustices, including stopping overt, intentional, and race and sex discrimination against Plaintiffs, prohibiting from misappropriating Plaintiffs' content and data, and prohibiting Defendants to become unjustly enriched and unfairly, inequitably, and illegally obtain the benefits of promises that Defendants have failed to honor, comply with, or enforce.

304. As a proximate result of Defendants' failure to honor and fulfill each of their promises, Plaintiffs have suffered financial and monetary losses, had their intellectual and other property rights unjustly misappropriated by Defendants' own personal financial and unjust gain, and have suffered irreparable harm to speech and expression promised by Defendants, in an amount to be determined at trial.

FIFTH CAUSE OF ACTION
FOR DISCRIMINATION IN CONTRACT IN VIOLATION OF 42 U.S.C. § 1981
(On Behalf Of Each Plaintiff Individually And The Class)

305. Plaintiffs re-allege and incorporate by reference in whole or in part the allegations alleged in paragraphs 1 through 304.

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306. Title 42, Section 1981 of the U.S. Code codifies the right of each individual member of a protected racial classification to "have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981(a).

307. The statute defines "make and enforce contracts" as including "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 1981(b). The statutory protections apply to both "nongovernmental discrimination" and "impairment under color of State law." *Id.* § 1981(c).

308. The elements of a claim for relief under 42 U.S.C. § 1981 are: (1) Plaintiff is a member of a protected class; (2) impairment of a contractual relationship under which plaintiff has rights; (3) defendant impaired that relationship on account of racial discrimination (such that, but for race, plaintiff would not have suffered the loss of a legally protected right); and (4) plaintiff was deprived of such services while similarly situated persons outside the protected class were not. *See Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020); *Astre v. McQuaid*, 804 Fed. App'x 665, 666-67 (Mar. 25, 2020); *Lindsey v. SLT Los Angeles, LLC*, 447 F.3d 1138, 1145 (9th Cir. 2006).

309. Plaintiff are African Americans and are members of the protected class under section 1981.

310. Plaintiffs entered into binding and legally enforceable contracts with Defendants including the TOS and related agreement(s) under California and controlling federal law.

311. The contractual relationship between each Plaintiff and Defendants was impaired with respect to the TOS and each and every one of the related agreement(s) in at least five ways:

a. Defendants' TOS and, any other agreements, under which they claim the right to exercise "unfettered" discretion to impose content, use or services access restrictions based, in any way, on Plaintiffs' racial identity or viewpoint, violates and impairs the TOS, license agreements, and other service agreement(s) on its face;

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b. Defendants continue to breach the TOS and other agreement(s), by exercising their contractual discretion to profile, filter, restrict, and block Plaintiffs' content and access to YouTube, based on Plaintiffs' racial identity and viewpoint, in a manner that is not permitted, but is expressly prohibited under California and federal law;

c. Defendants breached and continue to breach their express and implied promises under the TOS and other related agreement(s) that, You Tube shall not profile, use, base, or impose any restrictions on Plaintiffs' content or access to YouTube based, in any way, on a user's racial identity or viewpoint, and only review, filter, and restrict Plaintiffs' videos based on on line video material that runs afoul of YouTube's viewpoint neutral content based rules;

d. Defendants' use of content filtering, review, restricting, and blocking tools and procedures to profile and use Plaintiffs' racial identity and viewpoint with respect to any provision in the TOS or related agreements, impairs each and every one of Plaintiffs' rights, express or implied, that exist in the TOS or other related agreement(s) that Defendants entered into with Plaintiffs; and

e. Defendants impaired their contractual relationship with each Plaintiff because of Defendants' intentional use of Plaintiffs' racial identity or viewpoint to review, filter, regulate, restrict, and block Plaintiffs' videos and access to YouTube under the false pretext that the material in the video was properly reviewed and found to violate one of YouTube's content based rules governing user content and access to the platform.

312. Defendants impaired their contractual relationship with each Plaintiff on account of intentional racial discrimination. Despite their promises of neutrality and a diversity of viewpoints, Defendants engage in a pattern and practice of intentional willful and malicious discrimination in the provision of their services, including discriminating against and censoring of Plaintiffs' speech, based not upon the content of speech, but on their race. Through the acts complained of herein, Defendants intentionally denied, and aided or incited in denying, Plaintiffs full and equal accommodations, advantages, privileges, and services, by discriminating against them in demonetizing Plaintiffs' content and by placing their videos in "Restricted Mode." But for their

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race, Plaintiffs would not have been subjected to Defendants' filtering or the denial of their contractual benefits under the Agreements.

313. While Defendants have impaired and denied, and continue to impair and deny, Plaintiffs' contractual benefits under the TOS and related agreement(s), similarly situated persons who are not protected under the section 1981 protected class were not similarly treated, including persons affiliated with or working for Defendants and/or their preferred users. Such persons are not being racially profiled and are not subject to the same content or access filtering, restrictions, or blocking despite material in their videos that violates YouTube's content based rules.

314. As a direct and proximate result of Defendants' unlawful discriminatory actions, Plaintiffs suffered, and continue to suffer, irreparable injury in fact, including, but not limited to: lower viewership, lost advertising opportunities otherwise available to other nonprofits, decreased ad revenue, and reputational damage, for which there exists no adequate remedy at law.

SIXTH CAUSE OF ACTION
FOR UNLAWFUL DISCRIMINATION
IN VIOLATION OF THE UNRUH CIVIL RIGHTS ACT
(On Behalf Of Each Plaintiff Individually And The Class)

315. Plaintiffs re-allege and incorporate by reference in whole or in part the allegations alleged in paragraphs 1 through 314.

316. The elements of a claim for discrimination under the Unruh Civil Rights Act, California Civil Code §§ 51, *et seq*. are: (1) Defendants denied, aided or incited a denial of full and equal accommodations or services to Plaintiffs; (2) that a motivating reason for Defendants' conduct was Plaintiffs' race or national origin; (3) that Plaintiffs were harmed and (4) that Defendants' conduct was a substantial factor in causing that harm. *Nkwuo v. Metro PCS, Inc*., No. 5:14–cv–05027–PSG, 2015 WL 4999978, at *2 (N.D. Cal. Aug. 21, 2015).

317. Defendants Google and YouTube host business establishment(s) that solicit, induce, provide, and grant members of the public like Plaintiffs the right to access and use YouTube and its services, subject only to viewpoint neutral content based rules that apply equally to all..

318. Defendants grant members of the public like Plaintiffs the right to use and access YouTube for commercial reasons and consideration, including obtaining a perpetual and

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irrevocable license to Plaintiffs' and the other public users' content and data, including the right to appropriate that content and data for sale and other forms of monetization including advertising, data information sales and services, and other revenue and profit stream on YouTube through contract and business transactions including the TOs and related agreement(s).

319. A substantial motivating reason for Defendants' conduct is Defendants' use of the racial identity, viewpoints, and other protected racial classifications under the law of Plaintiffs and other persons similarly situated to impose restrictions on their video content.

320. Defendants' conduct is the result of arbitrary, capricious, invidious, and pretext-based discrimination against Plaintiffs' political and religious identity and race, color and/or national origin and viewpoints.

321. Defendants' use of Plaintiffs' racial or other identities to restrict their right to equal access to YouTube is unlawful and fails to further any lawful, legitimate business interest, including ensuring compliance with YouTube's content based rules or protecting younger and "sensitive" audiences.

322. Defendants have censored and treated, and continue to censor and treat, Plaintiffs and their videos differently from Defendants' own or preferred content, solely because of discriminatory animus towards Plaintiffs' identities and views.

323. Specifically, Defendants use AI, Algorithm, and other filtering machines, procedures, and systems to knowingly and intentionally engage in and effectuate a pattern and practice of discrimination for profit by reviewing, filtering, restricting, and blocking Plaintiffs' content and access to YouTube based on Plaintiffs' racial or other identity or viewpoints and other traits or viewpoint that discriminate against Plaintiffs based on classifications that are protected under the Unruh Act, namely race, color and/or national origin.

324. Defendants' wrongful actions were knowing and intentional, taken with oppression, fraud and/or malice, and effectuated through algorithms, machines, and human reviews that use Plaintiffs' racial identity and viewpoints, or other protected classifications to interfere with and block Plaintiffs' content and access on YouTube under the pretextual promise that everyone has

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equal access to YouTube subject only to viewpoint t neutral content based rules that apply equally to all.

325. As a direct and proximate result of Defendants' unlawful discriminatory actions, Plaintiffs suffered, and continue to suffer, irreparable injury in fact, for which there is no complete adequate remedy at law, including, but not limited harm and injury to contract based speech rights, and lost financial and business opportunities including viewership, advertising, monetization, and other opportunities and rights to gain popularity and revenues that are otherwise available to other users who are not profiled and regulated on YouTube based on their racial identity or viewpoints.

326. As a direct and proximate result of Defendants' discriminatory acts and practices, Plaintiffs have also suffered monetary damages in an amount to be determined at trial.

327. Defendants' violations of the Unruh Act further entitle Plaintiffs to recover statutory damages of up to three times the amount of actual damages in an amount to be proven at trial, or a minimum of $4,000 per violation.

SEVENTH CAUSE OF ACTION
FOR FALSE ADVERTISING IN VIOLATION OF
THE LANHAM ACT, U.S.C. § 1125, *et seq*.
(On Behalf Of Each Plaintiff Individually And The Class)

328. Plaintiffs re-allege and incorporate by reference in whole or in part the allegations alleged in paragraphs 1 through 327.

329. The elements of a false advertising claim under the Lanham Act, 47 U.S.C. § 1125, *et seq*., are: (1) false statement of fact by defendant in a commercial advertisement about its own or another's product; (2) the false statement actually deceived or has the tendency to deceive a substantial segment of the YouTube consumers or users; (3) the false statement is material, in that it is likely to influence the purchasing decision by a YouTube user; (4) the false statement entered interstate commerce; and (5) Plaintiffs have been, and are likely, to be injured as a result of the false statement. *Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc.*, 758 F.3d 1069, 1071 (9th Cir. 2014).

330. Defendants' statements that Plaintiffs or their videos are "Restricted" is false because only videos that are reviewed and found to contain material that violates Plaintiffs' content

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based rules, including nudity, vulgarity, violence, hate, shocking or sexually explicit material are can be "Restricted." Plaintiffs' videos do not contain such "Restricted Material."

331. Defendants' statements are further false because Defendants used Plaintiffs' race, identity or viewpoint to Restrict the video rather than any material that based on a review of the video violated YouTube's rules.

332. Defendants' false statements are also "commercial advertising" because the statements were made to penetrate the market of YouTube users and have the effect of limiting or steering viewers away from Plaintiffs' channels and videos, to video content, channels, or creators who are sponsored by Defendants and for which or whom Defendants compete with Plaintiffs for viewers, advertising, monetization, and other revenue streams on YouTube.

333. Defendants' false statements are likely to deceive users and advertisers on YouTube because the expressly and implicitly insinuate that there is something inappropriate, offensive, improper, or prohibited under YouTube's viewpoint neutral rules.

334. Defendants' false statements are also material. They likely influence and affect a user's and/or advertiser's viewing/purchasing decisions. Users and/or advertisers are likely deceived that the video contains offensive material that violates YouTube's rules after Defendants reviewed the video for content violations under YouTube's Community Guidelines, Age Restrictions, and "Restricted Mode" prohibitions, when the basis for the restriction was Plaintiffs' race, identity or viewpoint and was not undertaken in compliance with YouTube's rules.

335. Defendants' false statements not only influence but categorically control every user or advertiser's purchasing decisions because the statement results blocking of a user or advertisers access to the video on YouTube and precludes the user or advertiser from ever accessing, viewing and purchasing the video or purchasing and placing and ad for the video, or otherwise making any purchasing decision contrary to that of Defendants.

336. Defendants' false statements entered internet commerce and reached millions of viewers who reside in all 50 States, U.S. Territories, and other users across the world.

337. Plaintiffs are and are likely to continue to be financially harmed by the false statements, including losing substantial amounts revenues for viewer CPMs, advertising,

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monetization, and other user or advertiser revenue streams on YouTube in an amount to be determined at trial.

EIGHTH CAUSE OF ACTION
FOR UNLAWFUL, DECEPTIVE, AND UNFAIR BUSINESS PRACTICES
CAL. BUS. & PROFS. CODE §17200, *et seq.*
(On Behalf Of Each Plaintiff Individually And The Class)

338. Plaintiffs re-allege and incorporate by reference in whole or in part the allegations alleged in paragraphs 1 through 337.

339. Defendants have committed acts of unfair competition, as defined by California Business and Professions Code § 17200, by engaging in the practices described above.

340. Defendants' profiling, filtering, restricting, and blocking Plaintiffs' content and access on YouTube based on Plaintiffs' race, identity, or viewpoint is an unlawful business practice under section 17200 because those practices, acts, and conduct violates 42 U.S.C. § 1981 and the Unruh Civil Rights Act.

341. Defendants' profiling, filtering, restricting, and blocking Plaintiffs' content and access on YouTube based on Plaintiffs' race, identity, or viewpoint are also deceptive business acts or practices as defined under section 17200 because they are based on intentionally false promises by Defendants to Plaintiffs, and other users, and advertisers that YouTube only restricts or blocks content or access based on violations of YouTube's content based rules that apply equally to all. In fact, Defendants have knowingly and intentionally use Plaintiffs' racial or other identity or viewpoint to block content and access to YouTube under the false pretext that the video was reviewed like all videos on YouTube, including those sponsored by Defendants, and that the review found that Plaintiffs' videos actually contain material that violates YouTube's viewpoint neutral rules.

342. Defendants' profiling, filtering, restricting, and blocking Plaintiffs' content and access on YouTube based on Plaintiffs' race, identity, or viewpoint are also unfair business acts or practices as defined under section 17200 because Defendants operate as both content review curators and content sponsors on YouTube. This conflict is on full display when Defendants use their "unfettered" authority to restrict or block Plaintiffs' videos based on their race, identity, or

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viewpoint but permit their own content or that of their preferred or sponsored content creators or channels to go without review, restriction, or blocking even where the content violates YouTube's content based rules.

343. This includes inserting metadata and other signals into Plaintiffs' videos that permit Defendants to profile and restrict or block content without reviewing the video and results in restrictions and blocking of Plaintiffs' content based on Defendants' embedding and creating the metadata, signals, or other racial profiling content that results in the restriction or blocking.

344. There is no utility to the public for Defendants' actions, and the unlawful, deceptive and unfair practices and conduct do not further a legitimate interest in protecting users from offensive content.

345. As a direct and proximate result of Defendants' unlawful, deceptive, and unfair practices, conduct, and acts, Plaintiffs have suffered, and continue to suffer, immediate and irreparable injury in fact, including lost income, reduced viewership, and damage to brand, reputation, and goodwill, for which there exists no adequate remedy at law.

346. Furthermore, as a result of such practices, conduct, and acts, Defendants misappropriate and are unjustly enriched by taking consideration in the form of property rights to content and data, and revenue that belongs to Plaintiffs in an amount that exceeds $5 million.

347. Plaintiffs are therefore entitled to restitution of that and other amounts, as well as other equitable relief to be determined at trial.

348. At all times Defendants' wrongful actions were taken with oppression, fraud and/or malice. Indeed, at least dating back to 2017, Defendants have admitted and known that they were targeting users like Plaintiffs, based on their race, identity, or viewpoint, in violation of their promises and rules not to discriminate based on race, or any other identity or viewpoint.

NINTH CAUSE OF ACTION
FOR VIOLATION OF CALIFORNIA CONSTITUTION ARTICLE I, SECTION 2
(On Behalf Of Each Plaintiff Individually And The Class)

349. Plaintiffs re-allege and incorporate herein by reference, as though set forth in full, each of the allegations set forth in paragraphs 1 through 348 above.

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350. Article I, section 2 of the California Constitution enshrines the right to liberty of speech: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right." Cal. Const., art. I, § 2, subd. (a).

351. The Liberty of Speech Clause is broader and more protective than the federal First Amendment. *Los Angeles Alliance for Survival v. City of Los Angeles,* 22 Cal.4th 352, 366-367 (2000).

352. The Liberty of Speech provision "grants broader rights to free expression than does the First Amendment to the United States Constitution" because it enshrines the fundamental "idea that private property can constitute a public forum for free speech if it is open to the public in a manner similar to that of public streets and sidewalks." *Fashion Valley Mall, LLC v. Nat'l Labor Relations Bd.,* 42 Cal.4th 850, 857-58 (2007).

353. Under the California Constitution, a person's Liberty of Speech enjoys full constitutional protection when it occurs on any private property that is used or designated by the owner or operator as a place similar to areas that have already been determined to be public forums. That includes privately owned internet sites.

354. Consequently, the California Constitution protects the right to free speech on private property even in cases when the federal Constitution may not.

355. The threshold element of a claim under the Liberty of Speech Clause is that the defendant property owner has so opened up his or her property for public use as to make it the functional equivalent of a traditional public forum based on three factors: (1) the nature, purpose, and primary use of the property; (2) the extent and nature of the public invitation to use the property; and (3) the relationship between the ideas sought to be presented and the purpose of the property's occupants." *Albertson's, Inc. v. Young*, 107 Cal. App. 4th 106, 119 (2003); 73 Op. Cal. Atty. Gen. 213, 222– 223 (1990).

356. Defendants operate YouTube for the express purpose of inviting the public to use the platform as a for profit "public forum" where the public is invited to engage in "freedom of expression," where everyone's voice may be heard, subject only to viewpoint neutral rules that apply equally to all and Defendants' right to monetize and profit from the expression, speech, or

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material that appears on YouTube through the property based license rights that the user must grant Defendants as the price of admission to the forum.

357. According to Defendants, the purpose, use, nature, invitation to use the forum, and relationship between that purpose and invitation, on the one hand, and the ideas sought to be presented the public, on the other, is that Defendants offer public internet service "that enables more than a billion users around the world to upload" videos, where users are urged to "Broadcast Yourself," "promote yourself" or "do the broadcasting yourself."

358. Under the TOS, Defendants also represent that YouTube is open to everyone for free expression and communication, regardless of race, identity, or viewpoint as long as the video material complies with viewpoint neutral rules that apply equally to all.

359. Based on these and other representations, Defendants have induced or attracted 2.3 billion people to use YouTube and Defendants currently use the YouTube "public forum" control and regulate 95% of the global public video content that has currently or has ever existed in the world.

360. Under California law, Defendants' regulation of speech on the YouTube platform is state action because Defendants perform an exclusively and traditionally public function: the regulation of 95% of the world's public video based speech content by designating and operating YouTube as a viewpoint neutral public forum for freedom of expression under California law.

361. Accordingly, Defendants are prohibited from arbitrarily, unreasonably, or discriminatorily excluding, regulating, or restricting videos or user access to services on YouTube on the basis of viewpoint or identity of the speaker. And any such exclusions, restrictions, or regulations must comply with protections afforded Plaintiffs' free speech and expression under the Liberty of Speech Clause, and the established jurisprudence that such protections apply to private parties who use their property for purposes similar to the use of a government owned and operated public forum.

362. Plaintiffs' video content and access services constitute expressive speech and activity that is protected by Article I, section 2 of the California Constitution.

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363. Defendants have filtered, restricted, blocked or interfered with Plaintiffs' rights to access, use, and express themselves on YouTube.

364. Defendants' filtering, restricting, and blocking on Plaintiffs' speech and expressive conduct on YouTube violates Plaintiffs' Liberty of Speech because they are not based on the platform's viewpoint neutral rules governing what content is and is not permissible, but on the race, identity or viewpoint of Plaintiffs.

365. Defendants' censorship and other speech regulation conduct harms and violates Plaintiffs' Liberty of Speech rights on YouTube in direct contravention of the procedural and substantive rules that Defendants created, published, and use to regulate that speech on YouTube.

366. Furthermore Defendants' rules, both as applied and on their face, are subjective, vague, and overbroad criteria and proscription that Defendants use with unfettered and unbridled discretion to censor speech for any reason, or no reason at all, no matter how arbitrary or capricious in further violation of Plaintiffs' Liberty of Speech rights.

367. Defendants also maliciously use and apply the rules as a pretext to censor and restrict Plaintiffs' speech for unlawful purposes including race and identity discrimination against protected classes of users and to gain a competitive advantage over Plaintiffs and other users who Defendants compete with in YouTube.

368. Defendants' conduct, including the application of purportedly viewpoint neutral rules, are arbitrary and capricious, and unlawfully restrains and harms Plaintiffs based upon racial, political, religious, or other identity or viewpoint profiling the speaker, rather than the actual content of the speakers words or expression. Defendants' actions, therefore, also violate Plaintiffs' right to free association and assembly under the Liberty of Speech Clause.

369. Defendants' actions violate Plaintiffs' right to free association and assembly because , by blocking viewers' access to videos and comments based on the identity or viewpoint of the speakers or their opinions or other content featured in their videos that do not violate YouTube's viewpoint neutral content based rules

370. No compelling, significant, or legitimate reason justifies any or all of Defendants' actions, including the purported interest claimed by Defendants for the need to protect minors or

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sensitive audiences from offensive content because Plaintiffs' content is not "offensive" or otherwise violates Defendants' purported viewpoint neutral rules.

371. And even if such interests did exist to justify Defendants' restriction and demonetization rules in theory, the conduct and restrictions imposed on Plaintiffs' speech are unconstitutional because they are not narrowly or reasonably tailored to further such interests, but sweep within their ambit speech and expression that complies with the rules that Defendants use to purportedly protect minors and sensitive audiences and are applied by Defendants with unfettered power to censor speech based in race, identity, or viewpoint or for any other discriminatory or unlawful reason or no reason at all.

372. Given Defendants' monopolistic control over search results, on line advertising, public video content, and the myriad of other information services that Defendants unilaterally control, Plaintiffs have no alternative affording it a reasonable opportunity to reach their full intended audience.

373. Defendants' discriminatory policies and application of those policies are not viewpoint-neutral, are unreasonable in time, place, and manner, and are unreasonable in relation to the nature, purpose, and use of the forum, but are unreasonable prior restraints on Plaintiffs' protected political speech, motivated by impermissible discrimination against Plaintiffs' racial identity and viewpoint.

374. Defendants' intentional and wrongful actions were taken with oppression, fraud, malice and/or are arbitrary and capricious, and as part of Defendants' normal course of business, effectuated through both algorithms, as well as through human agents. Additionally, Defendants' actions were done knowingly and intentionally to deprive Plaintiffs and their viewers of their rights under the California Constitution.

375. As a direct and proximate result of Defendants' violations of clearly established law regarding public fora, Plaintiffs and all other persons similarly situated have suffered, and continue to suffer, immediate and irreparable injury in fact to their right to Liberty of Speech, including, but not limited to financial harms of lost income, reduced viewership, and damage to brand, reputation, and goodwill, for which there exists no adequately complete remedy at law.

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TENTH CAUSE OF ACTION
FOR FREEDOM OF SPEECH UNDER THE FIRST AMENDMENT, UNITED STATES CONSTITUTION, AMENDMENT 1
(On Behalf Of Each Plaintiff Individually And The Class)

376. Plaintiffs re-allege and incorporate herein by reference, as though set forth in full, each of the allegations set forth in paragraphs 1 through 375 above.

A. Procedural Background

377. The First Amendment prohibits a party from engaging in "state action" that violates or harms a person's right to engage in speech, association, expression, or other activity protected by the Amendment.

378. Since at least 1946, the U.S. Supreme Court has held that the First Amendment protects persons from private parties who engage in "state action" to restrict speech in ways that violate the First Amendment.

379. Private parties can be state actors whose conduct is subject to judicial scrutiny and held to account under the U.S. Constitution in a number of different circumstances, including, but not limited to, a private party who (1) engages in a public function that has been traditionally reserved as the exclusive province of government, such as operating a company town or providing a service for the administration of a traditional government function like elections or law enforcement (the "Public Function Test"); and/or (2) is the beneficiary of a government law that endorses or permits the party to engage in conduct that interferes with a fundamental constitutional right in a manner that the government may not (the "Permissive Endorsement Test").

380. The issue of when a private party is engaged in "state action" under either of these or other tests, is dependent on particular circumstances and has not been applied by the courts as a one size fits all.

381. As a result, the extent to which circumstances may exist in which a private party engages in conduct that violates the First Amendment remains murky and unclear.

382. In *Manhattan Cmty. Access Corp. v. Halleck,* --- U.S. --, --, 139 S. Ct. 1921 (2019), the Supreme Court held that and private owner-operator of a public access cable channel who regulates public speech on that channel does not become a state actor solely by the mere of making

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a privately owned television channel available for as a forum for speech: "a private entity who provides a forum for speech is not transformed by that fact alone into a state actor." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930, 204 L. Ed. 2d 405 (2019).

383. In so doing, however, the Court in *Halleck* limited its 5-4 decision to the circumstances of that case and declined to overrule prior cases in which a private party who regulates speech or engages in conduct that is otherwise prohibited under the Constitution was found to be a "state actor" who was subject to constitutional scrutiny.

384. Instead, the Court "stressed" that "very few" functions fall into that category of "state action," including, "for example, running elections and operating a company town. *Id.* at 1929, 204 (citing *Terry v. Adams*, 345 U.S. 461, 468–470, 73 S. Ct. 809, 97 L. Ed. 1152 (1953) (elections); *Marsh v. Alabama*, 326 U.S. 501, 505–509, 66 S. Ct. 276, 90 L. Ed. 265 (1946) (company town); *Smith v. Allwright*, 321 U.S. 649, 662–666, 64 S. Ct. 757, 88 L. Ed. 987 (1944) (elections); *Nixon v. Condon*, 286 U.S. 73, 84–89, 52 S. Ct. 484, 76 L. Ed. 984 (1932) (elections).

385. The Court also stated that "a variety of functions do not fall into that category, including, for example: running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity." *Id.* (citing *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 55–57, 119 S. Ct. 977, 143 L.Ed.2d 130 (1999) (insurance payments); *National Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 197, n. 18, 109 S. Ct. 454, 102 L. Ed.2d 469 (1988) (college sports); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 544–545, 107 S. Ct. 2971, 97 L.Ed.2d 427 (1987) (amateur sports); *Blum*, 457 U.S. at 1011–1012, 102 S. Ct. 2777 (nursing home); *Rendell-Baker*, 457 U.S. at 842, 102 S. Ct. 2764 (special education); *Polk County v. Dodson*, 454 U.S. 312, 318–319, 102 S. Ct. 445, 70 L. Ed.2d 509 (1981) (public defender); *Flagg Bros.*, 436 U.S. at 157–163, 98 S. Ct. 1729 (private dispute resolution); *Jackson*, 419 U.S. at 352–354, 95 S. Ct. 449 (electric service).

386. Consequently, allegations that the relevant function in this case is only the operation of public access channels on a cable system, is not a "function [that is] traditionally and exclusively been performed by government to be establish "state action" under the Public Function Test. *Id.*

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387. Beyond those statements, however, the Court in *Halleck* did not specify what the pleading requirements are for establishing state action under one of the few "public functions" that would trigger constitutional scrutiny. Nor was it presented with or had occasion to consider whether the private parties conduct was undertaken under a government enacted law that permitted unlawful conduct, including race discrimination, in contravention of fundamental constitutional rights, so as to trigger a limited state action under the Permissive Endorsement Test set forth in *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 1407, 103 L. Ed. 2d 639 (1989).

388. In *Prager University v. Google LLC*, the Ninth Circuit applied *Halleck* to hold that YouTube does not "lose its private character merely because the public is generally invited to use it for designated purposes" because "YouTube may be a paradigmatic public square on the Internet, but it is 'not transformed' into a state actor solely by "provid[ing] a forum for speech." *Prager Univ. v. Google LLC*, 951 F.3d 991, 997 (9th Cir. 2020) (citing *Halleck*, 139 S. Ct. at 1930, 1934).

389. But like *Halleck*, *Prager* did not, nor could it, overrule or eliminate the Public Function Test doctrine of state action nor did it specify what the pleading requirement were for establishing one of "the few" functions that will trigger state action. And it appears that the decision may be in conflict with *Halleck* and earlier cases when it held that public forum designations are "not a matter of election by a private entity" and "[we] decline to subscribe to Prager U's novel opt-in theory of the First Amendment. *Id.* at 999 (9th Cir. 2020) (citing *Cent. Hardware*, 407 U.S. at 547, 92 S. Ct. 2238 (holding only that "[b]efore an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use").

390. Furthermore, the Ninth Circuit did not mention, or consider in any manner, the more limited theory of Permissive Endorsement "state action" based on Defendants' use of Section 230(c), a congressional speech regulation law, to unlawfully restrict speech 95% of the world's video speech based on race discrimination and other protected identity classifications or

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viewpoints that conflict with Plaintiffs' fundamental equal protection and speech rights under the Supreme Court's seminal case in *Skinner*.

391. Consequently, no Court has ruled, nor could it, that Defendants can never engage, under any circumstances, in "state action" that is subject to judicial scrutiny under the First Amendment. Nor has the pleading standards and requirement for such a claim been established, other than Defendants must be engaged in one of the few public functions identified in *Halleck* or use a congressional statute to do what they could not otherwise do under established law: discriminate against Plaintiffs' speech based on their race, identity or viewpoint.

B. Permissive Endorsement Allegations Of State Action

392. In *Skinner*, private railroad companies were preparing to implement suspicion-based breath and urine testing of their employees pursuant to recently enacted federal regulations referred to in the case as "Subpart D." *Skinner*, 489 U.S. at 611. Like Section 230(c)(2) of the CDA, Subpart D was "permissive"; it did not compel the testing, but rather left the decision to the railroads. *Id.* Crucially, however, again like Section 230(c)(2), Subpart D conferred state-law immunity: it protected railroads from being sued under state law if they chose to test. *Skinner*, 489 U.S. at 611, 614-15 (Subpart D "pre-empt[ed] state laws, rules or regulations covering the same subject matter" and thus "removed all legal barriers to the testing"). In so doing, a unanimous Supreme Court held:

> "[t]he fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one. Here, specific features of the regulations combine to convince us that the Government did more than adopt a passive position toward the underlying private conduct.

Id. at 615.

393. Under *Skinner*, the elements of a state action claim under the Permissive Endorsement Test are: (1) reliance on a government law that removes all laws and legal barriers to private conduct that would otherwise unlawful and does so in a way that impacts a fundamental constitutional right; (2) a defendant uses the law to engage in that unlawful conduct; and (3) the government shares in the fruits or benefits in some way from the unlawful conduct.

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394. Defendants rely on Section 230 to unlawfully discriminate against Plaintiffs and regulate their speech based on race, identity, viewpoint or in some other manner that violates federal or state law.

395. Defendants use Section 230(c) to pre-empt state law and obtain complete immunity in a manner that removes all legal barriers to the regulating, blocking, or restricting of content based on Plaintiffs' race, identity, or viewpoint.

396. Plaintiffs are forced to submit to race discrimination and other violations of their legal rights when they use YouTube.

397. The Communications Decency Act was, as the statute's name indicates, enacted by Congress to restrict access to "indecent" content on the Internet. 141 Cong. Rec. S8330 (daily ed. June 14, 1995) (statement of Sen. Exon).

398. The express purpose of Section 230(c)(2) is to encourage Internet platforms like Google and YouTube to "restrict" "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" material. 47 U.S.C. § 230(c)(2).

399. "The intent of Congress in enacting § 230(c)(2) was *to encourage efforts by Internet service providers to eliminate such material*." *Goddard v. Google*, No. C 08-2738 JF (PVT), 2008 WL 5245490, at *6 (N.D. Cal. Dec. 17, 2008) (emphasis added).

400. Section 230(c) makes clear Congress' "strong preference" for regulating on line speech based on race, identity or viewpoint and for allowing Defendants to discriminate against Plaintiffs in violation of established federal and state law.

401. The federal government has also made clear its "desire to share the fruits" of the unlawful and discriminatory conduct undertaken by Defendants with respect to regulating on line speech, law enforcement, information gathering, and other government services.

402. By way of one example only, in the six-month period from January to June 2017, when Defendants first admitted that they were knowingly and intentionally profiling and targeting users based on race, identity, and viewpoint, Google received almost 17,000 requests from U.S. law enforcement to turn over information regarding users' content and searches. *See Cooperation or*

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Resistance?: The Role of Tech Companies in Government Surveillance, 131 Harv. L. Rev. 1722, 1722 (2018). Google provided information to the government in some 80% of those cases.

403. Under Section 230(c), Congress allows and affirmatively endorses the unlawful discrimination and other conduct by Defendants.

404. Defendants' use of Section 230(c) to engage in discrimination and other unlawful conduct under state and federal law to regulate on line " material" on the internet is government endorsed of the unlawful conduct and renders that conduct "state action" under *Skinner* and the Permissive Endorsement Test.

C. State Action Allegations Under The Public Function Test

405. Under *Halleck* and *Prager*, the elements of state action under the Public Function Test Appear to be: (1) Defendants are engaged in functions and conduct that fall into that categories of "state action" that includes, but is not limited to, "running elections and operating a company town."

406. On or about December 2019, Defendants merged their different TOS into a single contract whereby Defendants' discretion to find a violation YouTube's content based rules can be used by Defendants to bar the user from using any or all services offered by Defendants in any way including, the purchase and use of hand held smart phone, email, search engines, applications, and information or other services that are essential for public health, safety, law enforcement, election administration, taxation, and any other service performed by governments.

407. Defendants also operate a "company town" in which they control essential information and communication services without which local, state, or federal government agencies cannot provide or otherwise administer essential services including elections.

408. Until, if ever, the Supreme Court eliminates the Public Function Test for "state action" in all cases as a matter of law, Defendants' use and regulation of speech and information services on YouTube involves the "very few" functions that satisfy the Public Function Test for "state action."

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D. Defendants' Conduct Violates The First Amendment

409. Defendants continue to filter, restrict, block and/or interfere with Plaintiffs' rights to access, use, and express themselves on YouTube.

410. Defendants' filtering, restricting, and blocking on Plaintiffs' speech and expressive conduct on YouTube violates Plaintiffs' First Amendment rights because the conduct is not based on the platform's viewpoint neutral rules governing what content is and is not permissible, but on the race, identity or viewpoint of Plaintiffs.

411. Defendants' censorship and other speech regulation conduct harms and violates Plaintiffs' speech rights on YouTube in direct contravention of the procedural and substantive viewpoint neutral content based rules that Defendants created, published, and use to regulate speech on YouTube.

412. Furthermore Defendants' rules, both as applied and on their face, are subjective, vague, and overbroad criteria and proscription that Defendants use with unfettered and unbridled discretion to censor speech for any reason, or no reason at all, no matter how arbitrary or capricious in further violation of Plaintiffs' First Amendment Rights.

413. Defendants also maliciously use and apply the Rules as a pretext to censor and restrict Plaintiffs' speech for unlawful purposes including race and identity discrimination against protected classes of users and to gain a competitive advantage over Plaintiffs and other users who Defendants compete with in YouTube.

414. Defendants' conduct, including the application of purportedly viewpoint neutral rules, are arbitrary and capricious, and unlawfully restrains and harms Plaintiffs and all other persons similarly situated, based upon racial, political, religious, or other identity or viewpoint profiling of the speaker, rather than the actual content of the speaker's words or expression. Defendants' actions, therefore, also violate Plaintiffs' right to free association and assembly under the First Amendment.

415. Defendants' actions violate Plaintiffs' right to free association and assembly because , by blocking viewers' access to videos and comments based on the identity or viewpoint of the

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speakers or their opinions or other content featured in their videos that do not violate YouTube's viewpoint neutral content based rules

416. No compelling, significant, or legitimate reason justifies any or all of Defendants' actions, including the purported interest claimed by Defendants for the need to protect minors or sensitive audiences from offensive content because Plaintiffs' content is not "offensive" or otherwise violates Defendants' purported viewpoint neutral rules.

417. And even if such interests did exist to justify Defendants' restriction and demonetization rules in theory, the conduct and restrictions imposed on Plaintiffs' speech are unconstitutional because they are not narrowly or reasonably tailored to further such interests, but sweep within their ambit speech and expression that complies with the rules that Defendants use to purportedly protect minors and sensitive audiences and are applied by Defendants with unfettered power to censor speech based in race, identity, or viewpoint or for any other discriminatory or unlawful reason or no reason at all.

418. Given Defendants' monopolistic control over search results, online advertising, public video content, and the myriad of other information services that Defendants unilaterally control, Plaintiffs have no alternative affording them a reasonable opportunity to reach their full intended audience.

419. Defendants' discriminatory policies and application of those policies are not viewpoint-neutral, are unreasonable in time, place, and manner, and are unreasonable in relation to the nature, purpose, and use of the forum, but are unreasonable prior restraints on Plaintiffs' protected political speech, motivated by impermissible discrimination against Plaintiffs' identity and viewpoint.

420. Defendants' intentional and wrongful actions were taken with oppression, fraud, malice and/or are arbitrary and capricious, and as part of Defendants' normal course of business, effectuated through both algorithms, as well as through human agents. Defendants' actions were done knowingly and intentionally to deprive Plaintiffs and their viewers of their rights under the California Constitution.

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421. As a direct and proximate result of Defendants' violations of clearly established law regarding constitutional speech regulation on YouTube, Plaintiffs have suffered, and continue to suffer, immediate and irreparable injury in fact to their right to Liberty of Speech, including, but not limited to financial harms of lost income, reduced viewership, and damage to brand, reputation, and goodwill, for which there exists no adequately complete remedy at law.

VII. PRAYER FOR RELIEF

Wherefore Plaintiffs and all other persons similarly situated request that the Court grant the following relief:

1. A declaratory judgment remedy under 28 U.S.C. § 2201, et seq. for Plaintiffs' First Cause of Action challenging the construction, application, and constitutionality of Section 230(c) of the Communications Decency Act, 47 USC § 230(c), that Section 230(c) does not grant immunity to Defendants, or otherwise apply to claims and allegations that arise from, relate to, or are based on, Defendants Google/YouTube's unlawful racial profiling and use of the user's race, or other identity or viewpoint to filter, restrict, or block content, or otherwise deny Plaintiffs' access or use of any services offered by Google/YouTube in connection with Plaintiffs' use of YouTube on the grounds that:

a. The plain language of sections 230(c)(1) and/or (2) only immunizes and ISP for filtering and blocking "offensive material," and does not immunize the regulating, restricting or blocking of material based on the racial, or other identity or viewpoint of the user posting or viewing the video;

b. Sections 230(c)(1) or (c)(2) does not immunize an ISP who engages in race based identity or viewpoint discrimination under contracts and other business conduct that violates 42 U.S.C. § 1981 or the Unruh Civil Rights Act;

c. The application of Section 230(c) in any way to permit and immunize race, sex, or other identity or viewpoint based profiling and regulation of content and access on YouTube is unconstitutional and violates the First Amendment under Denver Area 518 U.S. 727, 766-67; and/or

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d. The President's Executive Order date May 28, 2020, prohibits the application of Section 230(c) immunity to the content and access filtering, restricting, and blocking decisions and requires the Department of Justice to clarify and enforce the law in accordance with identity and viewpoint neutrality.

2. A declaratory judgment remedy under section 2201that Defendants have violated and continue to violate Plaintiffs' rights to free speech and expression subject only to viewpoint neutral content based rules that apply equally to all under Plaintiffs Second through Sixth, and Eighth through Tenth Causes of Action;

3. An injunction requiring Defendants to:

a. Cease and desist from capriciously restricting, demonetizing, or otherwise censoring any content of videos uploaded to the YouTube based on Plaintiffs' race, or other identity or viewpoint in violation of federal and California law; and

b. Cease and desist from censoring, restricting, restraining, or regulating speech based on the discretionary use or application of discriminatory, animus-based, arbitrary, capricious, vague, unspecified, or subjective criteria, rules, guidelines, and/or practices;

4. Compensatory, special, and statutory damages in an amount to be proven at trial, including statutory damages pursuant to, *inter alia*, Civil Code § 51, 51.5, 52, Civil Procedure Code § 1021.5, 15 U.S.C. § 1117, 42 U.S.C. §§ 1981, 1983;

5. A civil penalty of $2,500 for each violation pursuant to Business and Professions Code §§ 17200, 17206, and 17536;

6. Punitive damages and exemplary damages in an amount to be proven at trial;

7. Restitution of financial losses or harm caused by Defendants' conduct and ill-gotten gains, and disgorgement of profit obtained from all unlawful conduct in an amount to be proven at trial;

8. Attorneys' fees and costs of suit;

9. Prejudgment and post-judgment interest; and

10. Any and all other relief that the Court deems just and proper.

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VIII. JURY TRIAL DEMAND

Plaintiffs demand trial by jury on all issues of law so triable.

DATED: June 16, 2020

Respectfully submitted,

BROWNE GEORGE ROSS LLP
Peter Obstler
Eric M. George
Debi A. Ramos
Keith R. Lorenze

By: /s/ Peter Obstler
Peter Obstler
Attorneys for Plaintiffs Kimberly Carleste Newman, Lisa Cabrera, Catherine Jones and Denotra Nicole Lewis

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Exhibit "A"

Document ID: 0.7.2270.7339-000001

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Attorneys for LGBTQ+ Plaintiffs Divino Group LLC, Chris Knight, Celso Dulay, Cameron Stiehl, BriaAndChrissy LLC, Bria Kam, Chrissy Chambers, Chase Ross, Brett Somers, and Lindsay Amer, Stephanie Frosch, Sal Cinquemani, Tamara Johnson and Greg Scarnici

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

DIVINO GROUP LLC, a California limited liability company, CHRIS KNIGHT, an individual, CELSO DULAY, an individual, CAMERON STIEHL, an individual, BRIAANDCHRISSY LLC, a Georgia limited liability company, BRIA KAM, an individual, CHRISSY CHAMBERS, an individual, CHASE ROSS, an individual, BRETT SOMERS, an individual, and LINDSAY AMER, an individual, STEPHANIE FROSCH, an individual, SAL CINEQUEMANI, an individual, TAMARA JOHNSON, an individual, and GREG SCARNICI, an individual,

Plaintiffs,

vs.

GOOGLE LLC, a Delaware limited liability company, YOUTUBE, LLC, a Delaware limited liability company, and DOES 1-25,

Defendants.

Case No. 5:19-cv-004749-VKD

DECLARATION OF STEPHANIE FROSCH IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE SUR-REPLY BRIEF AND REQUEST FOR HEARING AND CASE MANAGEMENT CONFERENCE

(*Filed concurrently with Plaintiffs' Sur-Reply Brief; Declaration of Peter Obstler)*

Date:
Time: 10:00 a.m.
Place: Courtroom 2
Before: Magistrate Judge Virginia DeMarchi

EXHIBIT "A"

Document ID: 0.7.2270.7339-000001

I, Stephanie Frosch, declare:

1. I am a named Plaintiff in the above-captioned action. I have firsthand, personal knowledge of the facts set forth below and if called as a witness could competently testify thereto, unless other specified.

2. I am an LGBTQ internet content creator and YouTube user who is active in the YouTube Community.

3. In 2009, I became a YouTube content creator and now operate two YouTube channels: Youtube.com/ElloSteph and Youtube.com/StephFrosch.

4. From 2009 through 2016, my YouTube channels were successful. However, in 2017, I started having problems with YouTube:

a. YouTube was classifying many of my videos as subject to Restricted Mode, making them unavailable to a large number of viewers, even though the videos contained no nudity, profanity, sexual conduct, or discussions of sexual activities. YouTube also allowed other YouTube channels to copy my videos without permission, and the content in those videos was re-posted by another user and was not subjected to Restricted Mode. .

b. Many of my videos were demonetized or subject to reduced monetization despite the fact that they do not include graphic images of violence or sexuality, nudity, profanity, sexual conduct, or discussions of sexual activities.

c. YouTube was running ads on channels which were posting copies of my videos without permission.

d. At least one of the customized thumbnail images I crafted for each of my videos uploaded to my channels was removed.

e. Longtime subscribers to my channels were being dropped from my channels, and YouTube was preventing them from re-subscribing. As a result, my subscribers were not receiving notices when I posted new content.

5. YouTube no longer allows me to see the revenue I generated before October 2009. My best recollection is that I earned approximately $23,000 from YouTube ad revenue in 2009. In addition to ad revenue, I earn money from the sale of merchandise, from separate brand

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sponsorship agreements connected with videos posted on my channels, and from the sale of merchandise from the website www.districtlines.com/ellosteph. This is a separate website which sells merchandise relating to my original videos posted to YouTube.

6. In 2017, I joined with other LGBTQ+ YouTube creators to publicly raise awareness about issues and concerns regarding Defendants' discriminatory treatment of LGBTQ+ channels. Among other issues, I expressly raised the concern that changes to YouTube's algorithms and other content curation machine based procedures were disproportionately restricting and affecting access to and the reach of content, as well as affecting other YouTube services for LGBTQ+ YouTube creators and viewers who are members of what Defendants call the "YouTube Community."

7. On September 8, 2017, an LGBTQ+ YouTube content creator forwarded to me an email dated August 25, 2017, from Laura Chernikoff of the "Internet Creators Guild" inviting him to an event co-sponsored by YouTube regarding changes to YouTube's algorithm which were adversely affecting the LGBTQ+ community.

Ms. Chernikoff's invitation stated:

> You're invited to an upcoming event put on by the Internet Creators Guild, in partnership with YouTube on Thursday, September 14th at 11:00 AM.
>
> Following the advertising situation on YouTube this spring (dubbed the "Adpocalypse"), YouTube is interested in hearing about creators' experiences on the platform. In particular, it's important for creators to understand the advertising guidelines and tools that brands interact with, in order to be aware how it may affect your monetization.
>
> We've been discussing this issue with YouTube, who have been working to address creator concerns on this topic. They would like to share this presentation, which will be under NDA, in order to hear from ICG Members and creators we're in touch with as part of a small focus group.
>
> We thought you would be an engaged and thoughtful participant and hope you're able to attend.

Attached as Exhibit 1 is a true and correct copy of the email I received with the invitation to the September 14-event. Based on the email, I understood that ***before*** YouTube would even speak to me or any other members of the group of LGBTQ+ creators about the problems with the new YouTube algorithm implemented in May of 2017, ***YouTube required each of us to sign a Non-***

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Disclosure Agreement (the "NDA").

8. Ms. Chernikoff sent an email to me dated September 11, 2017 which confirms my participation in the September 14-event and states: "Please note that a non-disclosure agreement (NDA) will be sent via email by a member of the YouTube team and is required to be signed prior to the event, so keep an eye out!" Attached as Exhibit 2 is a true and correct copy of the email dated September 11, 2017 from Ms. Chernikoff.

9. On September 13, 2017, Defendants sent to me by email a request for my signature on an electronic Non-Disclosure Agreement in connection with the September 14-event. Upon signing the electronic document, I received a confirmation email which has a subject: "You have accepted Google's Non-Disclosure Agreement." The text of the email sets forth my personal information and a copy of the Non-Disclosure Agreement. Attached as Exhibit 3 is a true and correct copy of the email from Google confirming receipt of my signed Non-Disclosure Agreement.

10. The Non-Disclosure Agreement states:

> "In order to evaluate and possibly enter into a business transaction (the "Purpose"), Google Inc., for itself and its subsidiaries and affiliates, and the other party identified below hereby agree:"

At the time that I signed the agreement, I had no idea what "business transaction" the document was referring to. As a YouTube user, I had previously entered into a YouTube Terms of Service Agreement and an AdSense Agreement. As of September 13, 2017, I was not thinking about entering into any new "business transaction" with YouTube or Google, or changing the existing agreements I had with YouTube and AdSense. Neither YouTube nor Google had mentioned any new business transaction, or changes to any existing agreements. I was merely trying to meet with YouTube representatives to discuss with them the many problems that I had been having with my YouTube channel and the falling views and revenue I was experiencing as a result of changes YouTube made to their algorithm in May of 2017. I did not expect for YouTube or Google to give me trade secrets, computer codes, or any other proprietary information at the meeting. And they did not. I simply talked to YouTube and/or Google about my problems and how to resolve them.

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11. The Non-Disclosure Agreement does not define what "Confidential Information" is, except to say that it is whatever "the Discloser considers" to be "confidential." I have no way of knowing what YouTube or Google consider to be confidential, or expect me to treat as confidential. "Confidential Information" is not limited to trade secrets such as YouTube or Google's customer lists, computer codes, or processes.

12. On September 14, 2017, I went to the event at the YouTube Playa Vista Office in Los Angeles, California. Upon arrival at the September 14-event, I checked in at 11:00 a.m. YouTube provided lunch for the participants. Around 11:30, a YouTube representative announced that the YouTube analytics guy had limited time and was running late. The YouTube representative asked us to quickly sign a hard copy Non-Disclosure Agreement so that we could get started as fast as possible, and indicated that we had to move quickly so that there was time with the analytics representative. The representative then came up to me, handed me a hard copy Non-Disclosure Agreement, and asked me to sign it while he stood there waiting. I was not given time to read the document which had multiple pages and appeared to be longer and more detailed than the one I had signed online. The representative then took my signed document, and quickly approached another creator requesting their signature. YouTube did not offer me a copy of this Non-Disclosure Agreement. Immediately after signing the document, I was ushered into a large conference room.

13. The September 14 event involved 12 to 20. YouTube creators, each representing a different class of video. While I was the only LGBTQ representative creator, there were other LGBTQ creators who were posting videos in other categories. I recall there were individual representatives for cooking, comedy, and gaming videos, some of which happened to identify as LGBTQ although they were not specifically creating videos for the LGBTQ community. We were seated at a large oval conference table, and offered notebooks and pens. The presenters all identified as YouTube employees.

14. During the September 14 event, we watched a PowerPoint presentation. We heard from a man who identified himself as the YouTube employee responsible for analytics and a woman who addressed algorithm issues. Also present were Ben Cramer and someone who was

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handing out YouTube swag. In all, I recall that there were five YouTube representatives present at the event, in addition to the man who got me to sign the second Non-Disclosure Agreement before I entered the conference room for the presentation. YouTube specifically prohibited us from taking photos or recording the event.

15. The YouTube presenters stated that they wanted to work with us creators, and explained that YouTube makes money off of the creators who make the video content from advertisers, and that creators win by sharing in the advertising money. They explained that advertisers buy ads based on viewer demographics for the videos. YouTube and creators monetize off of each other and YouTube does not want to hurt creators. The YouTube presenters discussed problems with filtering video content for purposes of restricted mode, monetization and the payments for cpm (clicks per minute).

16. When asked why videos which use gay couples are getting blocked as mature content or inappropriate for all audiences, or videos are getting blocked for mentioning the word "queer," the YouTube representative made the following statements:

a. Blocking LGBTQ videos was caused when YouTube started using an artificial intelligence algorithm to filter content based on what advertisers want; it is the algorithm that is "targeting" LGBTQ videos. YouTube was not discriminating, the algorithm was discriminating. The YouTube representative was talking about the algorithm as if it were some independent video censor that was entirely unrelated to YouTube and its employees, and beyond their control; rather than a tool which YouTube specifically designed and put in place to regulate videos on the platform, which YouTube could change or remove from the platform entirely.

b. There are too many videos on YouTube to review all content manually. YouTube must use artificial intelligence to conduct the content reviews on the YouTube platform.

c. The artificial intelligence algorithm identifies people, including the racial or sexual identities or viewpoints of the creator or viewers when filtering and curating content and restricting access to YouTube services; it does not review and make restrictions based only on the video content. This is due in part to the fact that advertisers want to be able to target audiences based on the demographics of the creators and their audiences. The result is that the algorithm

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discriminates based on the identity of the creator or its intended audience when making what are supposed to be neutral content based regulations and restrictions for videos that run on YouTube.

d. Despite the problems with the algorithm, YouTube and the creators are on the "same side." The rules should apply equally to all regardless of the identity or viewpoint of the creator.

e. When the creators told YouTube representatives that they understood why an advertiser would not want a Pampers ad on video content featuring guns, they still did not understand why content from homosexual creators was being demonetized when identical content from heterosexual creators was not, the YouTube representatives said that they were "going to fix it." No details of what they were doing, or planned on doing to fix the algorithm were provided and no one (at the meeting or since) indicated when, if ever, the fix for this "problem" would be completed.

f. In response to further questions from creators, the YouTube representatives specifically acknowledged that the algorithm was looking at and profiling the sexual identities, races, disabilities, religious and political affiliations of creators, intended audiences and viewers alike.

17. The YouTube representatives discussed the example of a YouTube creator who had a chef's channel and posted cooking videos: if the creator identified as gay, or had a lot of subscribers or viewers who accessed a lot of LGBTQ related videos, the cooking video would be tagged as a "gay" video for monetization and restricted mode purposes, regardless of the actual content of the video.

18. Towards the end of the September 14-event, which lasted about 2 hours, I specifically asked the YouTube representative, "What are you doing to fix the problems we have identified?" and "When will you be done fixing the problems?" The YouTube representative responded to each question saying, "I cannot answer that question." To this date, no one at the September 14 event has ever provided me any substantive response to my questions regarding the problems or the fix.

19. As far as I can recall, no one at the September 14-event -- (a) said that what they

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were saying was "confidential" in connection with either the online or hard copy Non-Disclosure Agreements; (b) said that what they were talking about was a "trade secret;" (c) described actual YouTube's computer code or proprietary processes used in connection with YouTube, the analytics, the algorithm, or AdSense; (d) asked me not to repeat anything that was said during the event by other creators.

20. Until the time that Defendants finally released me from my NDAs in March of this year, I was prohibited by the NDAs from discussing, with anyone, including my attorneys in this case, the substance, nature, and details of the September 14-event, including the statements made by the YouTube representatives about identity and viewpoint discrimination in regulating monetization, access to content and services. Consequently, the information and statements presented at the September 14-event could not be included in the Second Amended Complaint. Even though I have no idea what, if anything Defendants claim is "confidential," I was afraid and at risk that if I ever talked about what was said at the meeting, YouTube could or would sue me for violating the NDA(s). I have also been afraid that Defendants would suspend or terminate my channel, my gmail account, or even suspend my access to Google searches if I violated the NDA(s).

21. On March 26, 2020, after my lawyers had notified YouTube that I had decided to file a motion to void or release me from the gag provisions of the NDAs, Defendants informed my lawyers in writing that they had "no intention of enforcing the NDA." Attached as Exhibit 4 is a true and correct copy of the correspondence between my lawyers and Defendants' attorneys, including the email releasing me from the NDAs.

22. Following the receipt of that email, I was finally able to inform my lawyers of the substance of what was said by the YouTube representatives at the September 14-event.

23. I have reviewed the Defendants' Motion to Dismiss the Second Amended Complaint. In the Motion to Dismiss, Defendants make a number of factual assertions which are loosely based on allegations in the Complaint. As stated below, I believe that Defendants' factual assertions are either wrong or misleading, as indicated below:

a. Defendants state in their Motion:

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> Content creators upload videos to the service free of charge, enabling YouTube's billions of users to view them, comment on them, and subscribe to their favorite creators' channels. ¶ 52. MTD at 3:2-4.

In truth, while there is no monetary charge for uploading videos, in exchange for the opportunity to use the YouTube website, Defendants required me to give them a license to use all of my original video content that is posted to the YouTube website, the right to collect data about me, and my use of the YouTube website, and also the right to collect data about people who view my videos on the YouTube website.

b. Defendants state in their Motion:

> YouTube values the perspectives and experiences that LGBTQ+ content creators bring to the platform. MTD at 3:17-18.

My experience with YouTube since 2017 is directly contrary to this statement. After the September 14-event, no one at YouTube followed up with me – no one checked to see if my problems had been resolved; no one checked to see how much the algorithm had cost me in lost subscribers, advertising revenue, cpm, or reduced viewers. In fact, no one from YouTube ever helped me solve the problems identified at the September 14-event. Rather, following the event, my subscribers, advertising revenues, cpm, and viewers continued to decline. Though my viewership was stable, AdSense revenues dropped substantially.

24. Since filing the lawsuit, YouTube shut off the analytics for the cpm so that creators like me are no longer able to calculate the lost revenue from reduced cpm due to demonetization. My viewer numbers have been cut dramatically and subscribers complain that they cannot get new video notices. Recently, I co-created a video with my girlfriend, who does not identify as LGBTQ. We both posted the same identical video at the same time. While my girlfriend earned $3,000 from the video, I earned only $300.

a. Defendants state in their Motion:

> In 2017, when LGBTQ+ creators raised issues about Restricted Mode, YouTube acknowledged that the feature was not fully working as intended and agreed to make improvements. ¶¶ 28, 87. MTD at 3:21-4:1.

Defendants' description of YouTube's "acknowledgment" is misleading. Contrary to the Motion's spin on the allegations in the Complaint, the concerns I and other LGBTQ+ creators

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raised were not limited to Restricted Mode, but extended to demonetization and cpm. In fact, at the September 14-event, YouTube's representatives acknowledged that the algorithm was discriminating against LGBTQ creators as well as other creators based on their identities and personal affiliations, as well as those of their subscribers and viewers. YouTube's representatives also stated that the feature was working as YouTube intended: it was profiling creators and viewers for YouTube's advertisers so that the advertisers could target audiences based on personal identity including whether viewers were gay, disabled, members of a racial group or affiliated with specific viewpoints or groups. YouTube's representatives confirmed that decisions regarding a video's status vis a vis restricted mode, monetization and cpm were being made on grounds that were unrelated to the actual content of the video. While the YouTube representatives agreed that they were working to fix the problems, they did not specify what they were doing to stop the discrimination in the interim or to otherwise provide a timeframe for completing the fix.

b. Defendants state in their Motion:

> As for the Plaintiffs here, YouTube has addressed their individual concerns in good faith, and often removed restrictions from their videos, when appropriate under YouTube's policies, in response to their appeals. ¶¶ 186, 223, 227, 230, 233, 236.a. MTD at 4:1-4.

Defendants' statement is grossly misleading to the extent that it suggests that YouTube actually resolved any of the complaints I (or any other LGBTQ+ creator) raised at the 2017 meeting with the Defendants. YouTube has not "addressed" my concerns, continues to profile my videos based on my identity as a member of the LGBTQ community and my affiliation with LGBTQ groups and has increased its discrimination against me by restricting the majority of my videos, and gutting my subscriber lists, viewers, ad revenue, and cpm.

c. Defendants state in their Motion:

> The use of its service is governed by rules and an array of content policies. ¶¶ 10, 248, 288. Before creating channels and uploading their content to the service, Plaintiffs acknowledge they agreed to YouTube's Terms of Service and the incorporated Community Guidelines. ¶¶ 10, 14, 59, 248,
>
> The Terms of Service provide that "YouTube reserves the right to remove Content without prior notice," including videos uploaded by content creators. Ex. 2-3. The Community Guidelines are twelve "common-sense rules" prohibiting certain kinds of content, including "[n]udity or sexual content" and "[v]ulgar language." Exs. 3-4. Google and YouTube reserve the right to remove any content that they believe to

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> be contrary to the Terms of Service and the incorporated Community Guidelines. Ex. 2. MTD at 4:6-15.
>
> YouTube allows content creators whose channels meet certain minimum viewership requirements to earn revenue from (or "monetize") their videos by running advertisements with them as part of the YouTube Partner Program. To be eligible to monetize their videos, in addition to the Terms of Service and Community Guidelines discussed above, Plaintiffs agreed to certain additional "written contracts," including YouTube's Partner Program Terms and the AdSense Terms of Service. See ¶ 331; Exs. 5-6, 10. In addition, Plaintiffs agreed to comply with YouTube's monetization policies, including the Advertiser-friendly content guidelines, which are designed to ensure that ads do not appear alongside videos with content that certain audiences might find objectionable. See ¶¶ 152, 248, 331; Exs. 5-11. YouTube uses automated software to identify content as inappropriate for advertising, and creators may appeal demonetization decisions for manual review. ¶ 94; Ex. 9. MTD at 5:9-19.

Defendants' description of the website rules is misleading and deceptive: When I agreed to Defendants' Terms of Service, Community Guidelines, Partnership Program Terms, and AdSense Terms of Service, I understood that these terms were nonnegotiable and that each YouTube user was agreeing to these same terms. YouTube stated in its Terms of Service and Community Guidelines that the rules to which I agreed would be applied equally to all YouTube users, in a neutral manner. At the September 14-event, YouTube representatives reaffirmed their commitment to the universal set of rules which apply equally to all; however, they also confirmed that they were using an artificial intelligence algorithm which discriminates against users based on their identities. As long as YouTube's algorithm profiles users, then YouTube cannot be applying the same rules equally to all users in a neutral manner.

25. YouTube did not inform me that my videos would be distributed, made available for viewing, or monetized for profit based on who I am (a lesbian educator) or on my stated views regardless of the actual content of the video posted. Nor did YouTube inform me that to the extent that it sponsored other creators, or their channels or individual videos, that those sponsored creators/channels/videos would not be subject to the same Terms of Service, Community Guidelines, Partnership Program Terms, or AdSense Terms of Service that I must follow. Nor did YouTube inform me that it would be creating Defendants' own original video content which would not be subjected to the same Terms of Service, Community Guidelines, Partnership Program Terms, or AdSense Terms of Service that I and other third-party users must follow.

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26. YouTube did not inform me that in giving Defendants a license to use the videos I posted, that it would allow other YouTube users to copy my original videos, post them on the channels of other YouTube users, or receive revenue related to my original videos.

27. Tamara Johnson, one of the named Plaintiffs, is an LGBTQ+ creator who operates the YouTube channel, SVTV Network. Ms. Johnson also owns and operates an internet online on-demand monthly subscription network https://www.svtvnetwork.com/ dedicated to original content specifically designed for LGBTQ+ audiences. Ms. Johnson is an African American. Her original web series videos feature African American members of the LGBTQ community.

28. In their Reply Brief, Defendants assert that:

> . . . Plaintiffs' opposition brief also purports to represent the interests of "African American content creators and users" (see, e.g., Opp. 1), but the Complaint does not include any actual allegations in support of any claim for racial discrimination. Reply fn.2 at p.3.

This is not true. Plaintiffs' Second Amended Complaint includes allegations that Defendants unlawfully use "data regarding the video **creators,' subscribers,' or viewers' . . . race**, ethnicity, commercial, or political identities or viewpoints" (paragraph 7 emphasis added); and Defendants "rely upon and invoke federal law under Section 230(c) to preempt and immunize unlawful filtering, regulations, and practices on the YouTube Platform, including **practices which discriminate based upon race** . . . or individual viewpoints, and in doing so, engage in unlawful discriminatory, arbitrary, and capricious repression of public speech under color of federal law." [Paragraph 289 emphasis added.] The Second Amended Complaint also alleges that Defendants are "using identity based censorship to determine who can and cannot continue to use the YouTube Platform" (paragraph 8); and that their representative "promised LGBTQ+ YouTubers that Defendants would ensure that **'Restricted Mode' should not filter out content belonging to individuals or groups based on certain attributes like** gender, gender identity, political viewpoints, **race**, religion or sexual orientation," (paragraph 29, 121, emphasis added).

29. The allegations of the Second Amended Complaint identified above are consistent with and supported by what I was told by the YouTube representatives at the September 14-event regarding racial profiling and discrimination embedded in the algorithm. When called to testify as

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a witness, I will testify specifically that the YouTube representatives at the September 14 event said that the algorithm was targeting African American creators, subscribers and viewers in the same way that it was targeting LGBTQ creators, subscribers and viewers.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and Executed this 20th day of April, 2020, at New York, New York.

STEPHANIE FROSCH

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Exhibit "1"

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From: **Steph Frosch** <ellosteph@gmail.com>
Date: Tue, Aug 20, 2019 at 12:04 AM
Subject: Fwd: Focus Group event: YouTube's Advertising Guidelines
To: Stephanie Frosch <stephfrosch@gmail.com>

---------- Forwarded message ---------
From: **Laura Chernikoff** <laura@internetcreatorsguild.com>
Date: Thu, Sep 21, 2017 at 11:46 AM
Subject: Re: Focus Group event: YouTube's Advertising Guidelines
To: Steph Frosch <ellosteph@gmail.com>

Thanks for participating in this ICG event with YouTube. We know this session had some logistical challenges with the timing and apologize. We're still experimenting with this type of event, and thinking about ways to advocate for creators about the difficult monetization and advertising guidelines challenges. We'd love to hear about your experience – you can share your honest feedback by **filling out this brief survey**.

Laura

Laura Chernikoff
Executive Director
Internet Creators Guild
internetcreatorsguild.com

On Wed, Sep 13, 2017 at 2:57 PM, Steph Frosch <ellosteph@gmail.com> wrote:
Signed and sent! Looking forward to tomorrow.

All the best,
Stephanie Frosch
YouTube.com/ElloSteph

On Wed, Sep 13, 2017 at 11:21 AM, Laura Chernikoff <laura@internetcreatorsguild.com> wrote:
Hey, I wanted to send a quick reminder to sign the NDA YouTube sent for tomorrow's event. They need everyone attending the event to sign in order to participate, so I wanted to make sure you hadn't missed it. Let me know if you have any questions or concerns!

Laura

Laura Chernikoff
Executive Director
Internet Creators Guild
internetcreatorsguild.com

On Mon, Sep 11, 2017 at 11:07 AM, Laura Chernikoff <laura@internetcreatorsguild.com> wrote:
Thanks Davey! Moving you to bcc.

Steph, we're excited to have you at this event this week. Here's a confirmation with details about the location.

Please note that a non-disclosure agreement (NDA) will be sent via email by a member of the YouTube team and is required to be signed prior to the event, so keep an eye out!

RSVP: You are confirmed.
Date: Thursday, September 14th
Check In Time: 11am
Presentation Starts: 11:30am
*Lunch and an opportunity to mingle with your fellow creators will be included.
Location: YouTube Playa Vista Office –
12400 W. Bluff Creek Drive. Los Angeles, CA 90094
Directions: At the intersection of S Centinela Ave & Jefferson Blvd, turn onto S Campus Center Dr. Drive to the end of Campus Center Dr. Turn left on West Bluff Creek Drive and make a quick right into "Lot B". US-PLV-H10 will be the building just West of the parking lot.

If you have trouble finding the office, contact **Ben Kramer:** benkramer@google.com // 650-495-7545

If your plans have changed and you are unable to attend, please let us know ASAP.

Laura

Laura Chernikoff
Executive Director
Internet Creators Guild
internetcreatorsguild.com

On Fri, Sep 8, 2017 at 5:36 PM, Davey Wavey <davey@daveywavey.tv> wrote:
Hey Laura,

CC'ing Steph Frosch on this. She'd love to attend!

On Thu, Aug 31, 2017 at 6:06 PM, Laura Chernikoff <laura@internetcreatorsguild.com> wrote:
Unfortunately this event is in-person only. Sorry to hear you can't make it, but we'll keep you in mind for similar events in the future.

Do any other LA-based creators come to mind who were effected by this issue? I know the LGBT community especially deals with this and I want to make sure their voices are well represented in that room.

Laura

Laura Chernikoff
Executive Director

Internet Creators Guild
internetcreatorsguild.com

On Tue, Aug 29, 2017 at 9:52 AM, Davey Wavey <davey@daveywavey.tv> wrote:
Hey Laura,

I'll be traveling - is there a remote option for attending?

Best,
Davey

On Fri, Aug 25, 2017 at 1:28 PM, Laura Chernikoff <laura@internetcreatorsguild.com> wrote:
Hey Davey,

You're invited to an upcoming event put on by the Internet Creators Guild, in partnership with YouTube on Thursday, September 14th at 11:00 AM.

Following the advertising situation on YouTube this spring (dubbed the "Adpocalypse"), YouTube is interested in hearing about creators' experiences on the platform. In particular, it's important for creators to understand the advertising guidelines and tools that brands interact with, in order to be aware how it may affect your monetization.

We've been discussing this issue with YouTube, who have been working to address creator concerns on this topic. They would like to share this presentation, which will be under NDA, in order to hear from ICG Members and creators we're in touch with as part of a small focus group.

We thought you would be an engaged and thoughtful participant and hope you're able to attend.

Please RSVP with either yes, no, or maybe by September 5th.

Thursday, September 14th
Check in 11:00 AM; presentation at 11:30 AM
YouTube Playa Vista Campus

Understanding YouTube's Advertising-Friendly Content Guidelines

In this session, YouTube will cover the recent changes to the platform's Advertiser-Friendly Content Guidelines and what they mean to both advertisers and creators. They will review the updated guidelines, discuss how YouTube surfaces ads, and the targeting systems advertisers leverage to place their ads. This will be followed by a Q&A, where creators will be able to ask questions, as well as share their experiences and feedback on these changes.

This event is invite-only and has limited space. If you know of other creators who would be interested in the topic and available to attend, please let me know their name, channel, and email address.

Thanks!

Laura

Document ID: 0.7.2270.7339-000001

Laura Chernikoff
Executive Director
Internet Creators Guild
internetcreatorsguild.com

--
Davey Wavey
Digital Storyteller | daveywavey.tv

--
Davey Wavey
Digital Storyteller | daveywavey.tv

Stephanie Frosch

YouTube | Instagram | Twitter

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Stephanie Frosch
she/her/hers
Storyteller || Activist || Educator ||

phone: +1 954.235.4604

Document ID: 0.7.2270.7339-000001

Exhibit "2"

Document ID: 0.7.2270.7339-000001

From: **Laura Chernikoff** <laura@internetcreatorsguild.com>
Date: Mon, Sep 11, 2017 at 1:08 PM
Subject: Re: Focus Group event: YouTube's Advertising Guidelines
To:
Cc: Steph Frosch <ellosteph@gmail.com>

Thanks Davey! Moving you to bcc.

Steph, we're excited to have you at this event this week. Here's a confirmation with details about the location.

Please note that a non-disclosure agreement (NDA) will be sent via email by a member of the YouTube team and is required to be signed prior to the event, so keep an eye out!

RSVP: You are confirmed.
Date: Thursday, September 14th
Check In Time: 11am
Presentation Starts: 11:30am
*Lunch and an opportunity to mingle with your fellow creators will be included.
Location: YouTube Playa Vista Office –
12400 W. Bluff Creek Drive. Los Angeles, CA 90094
Directions: At the intersection of S Centinela Ave & Jefferson Blvd, turn onto S Campus Center Dr. Drive to the end of Campus Center Dr. Turn left on West Bluff Creek Drive and make a quick right into “Lot B”. US-PLV-H10 will be the building just West of the parking lot.

If you have trouble finding the office, contact **Ben Kramer:** benkramer@google.com // 650-495-7545

If your plans have changed and you are unable to attend, please let us know ASAP.

Laura

Laura Chernikoff
Executive Director
Internet Creators Guild
internetcreatorsguild.com

On Fri, Sep 8, 2017 at 5:36 PM, Davey Wavey <davey@daveywavey.tv> wrote:
Hey Laura,

CC'ing Steph Frosch on this. She'd love to attend!

On Thu, Aug 31, 2017 at 6:06 PM, Laura Chernikoff <laura@internetcreatorsguild.com> wrote:
Unfortunately this event is in-person only. Sorry to hear you can't make it, but we'll keep you in mind for similar events in the future.

Do any other LA-based creators come to mind who were effected by this issue? I know the LGBT community especially deals with this and I want to make sure their voices are well represented in that room.

Laura

Laura Chernikoff
Executive Director
Internet Creators Guild
internetcreatorsguild.com

On Tue, Aug 29, 2017 at 9:52 AM, Davey Wavey <davey@daveywavey.tv> wrote:
Hey Laura,

I'll be traveling - is there a remote option for attending?

Best,
Davey

On Fri, Aug 25, 2017 at 1:28 PM, Laura Chernikoff <laura@internetcreatorsguild.com> wrote:
Hey Davey,

You're invited to an upcoming event put on by the Internet Creators Guild, in partnership with YouTube on Thursday, September 14th at 11:00 AM.

Following the advertising situation on YouTube this spring (dubbed the "Adpocalypse"), YouTube is interested in hearing about creators' experiences on the platform. In particular, it's important for creators to understand the advertising guidelines and tools that brands interact with, in order to be aware how it may affect your monetization.

We've been discussing this issue with YouTube, who have been working to address creator concerns on this topic. They would like to share this presentation, which will be under NDA, in order to hear from ICG Members and creators we're in touch with as part of a small focus group.

We thought you would be an engaged and thoughtful participant and hope you're able to attend.

Please RSVP with either yes, no, or maybe by September 5th.

Thursday, September 14th
Check in 11:00 AM; presentation at 11:30 AM
YouTube Playa Vista Campus

Understanding YouTube's Advertising-Friendly Content Guidelines

In this session, YouTube will cover the recent changes to the platform's Advertiser-Friendly Content Guidelines and what they mean to both advertisers and creators. They will review the updated guidelines, discuss how YouTube surfaces ads, and the targeting systems advertisers leverage to place their ads. This will be followed by a Q&A, where creators will be able to ask questions, as well as share their experiences and feedback on these changes.

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This event is invite-only and has limited space. If you know of other creators who would be interested in the topic and available to attend, please let me know their name, channel, and email address.

Thanks!

Laura

Laura Chernikoff
Executive Director
Internet Creators Guild
internetcreatorsguild.com

Davey Wavey
Digital Storyteller | daveywavey.tv

Davey Wavey
Digital Storyteller | daveywavey.tv

Stephanie Frosch

YouTube | Instagram | Twitter

Exhibit "3"

Document ID: 0.7.2270.7339-000001

From: **Google Legal** <nda-noreply@google.com>
Date: Wed, Sep 13, 2017 at 4:56 PM
Subject: You have accepted Google's Non-Disclosure Agreement
To: <StephFrosch@gmail.com>

You have accepted the terms and conditions presented in Google's Non-Disclosure Agreement on 2017-09-13 20:56:35.

Company Name: ElloSteph
Name: Stephanie Frosch
Title: Content Creator
Email: StephFrosch@gmail.com
Address:
1300 N Curson Ave Apt 4
West Hollywood, California, 90046
United States

Below is a copy of the Agreement for your reference:

NON-DISCLOSURE AGREEMENT

In order to evaluate and possibly enter into a business transaction (the "Purpose"), Google Inc., for itself and its subsidiaries and affiliates, and the other party identified below hereby agree:

1. The Effective Date of this agreement is the date this agreement is accepted by the party identified below.

2. A party (the "Discloser") may disclose to the other party (the "Recipient") information pertaining to the Purpose that the Discloser considers confidential ("Confidential Information").

3. Recipient may use Confidential Information only for the Purpose. Recipient must use a reasonable degree of care to protect Confidential Information and to prevent any unauthorized use or disclosure of Confidential Information. Recipient may share Confidential Information with its employees, directors, agents or third party contractors who need to know it and if they have agreed with either party in writing to keep information confidential.

4. Confidential Information does not include information that: (a) was known to Recipient without restriction before receipt from Discloser; (b) is publicly available through no fault of Recipient; (c) is rightfully received by Recipient from a third party without a duty of confidentiality; or (d) is independently developed by Recipient. A party may disclose Confidential Information when compelled to do so by law if it provides

reasonable prior notice to the other party, unless a court orders that the other party not be given notice.

5. Either party may terminate this agreement with thirty days prior written notice, but this agreement's provisions will survive as to Confidential Information that is disclosed before termination.

6. Unless the parties otherwise agree in writing, Recipient's duty to protect Confidential Information expires five years from disclosure.

7. This agreement imposes no obligation to proceed with any business transaction.

8. No party acquires any intellectual property rights under this agreement except the limited rights necessary to use the Confidential Information for the Purpose.

9. This agreement does not create any agency or partnership relationship. This agreement is not assignable or transferable by either party without the prior written consent of the other party.

10. This agreement is the parties' entire agreement on this topic, superseding any prior or contemporaneous agreements. Any amendments must be in writing. The parties may execute this agreement in counterparts, which taken together will constitute one instrument. Failure to enforce any of provisions of this agreement will not constitute a waiver.

11. This agreement is governed by the laws of the State of California, excluding its conflict-of-laws principles. The exclusive venue for any dispute relating to this agreement shall be Santa Clara County, California.

CommMutual Rev 112707

Stephanie Frosch
she/her/hers
Storyteller || Activist || Educator ||

phone: +1 954.235.4604

Document ID: 0.7.2270.7339-000001

Exhibit “4”

Document ID: 0.7.2270.7339-000001

From: White, Lauren Gallo <lwhite@wsgr.com>
Sent: Thursday, March 26, 2020 6:21 PM
To: Debi Ramos <dramos@bgrfirm.com>
Cc: Kramer, David <DKramer@wsgr.com>; Willen, Brian <bwillen@wsgr.com>; Knoll, Kelly <kknoll@wsgr.com>; Peter Obstler <pobstler@bgrfirm.com>; Grubbs, Deborah <DGrubbs@wsgr.com>; Kathleen McCormick <kmccormick@bgrfirm.com>
Subject: Re: Divino Group, LLC v Google LLC, et al. [IWOV-DOCSLA.FID349140]

Debi:

As I said in my letter, further discussion would be productive to identify whether the information Ms. Frosch wishes to disclose might be protected by her NDA with YouTube. That is because we share your position that "any protective order [cannot] be used to keep non-confidential information from being presented to the Court and the public." Your continued argument and apparent insistence on running to court despite defendants' desire to meet and confer—and despite the parties' obligation to do so—are unwarranted and improper. Nevertheless, because defendants are not aware of any confidential information that Ms. Frosch might have learned at the September 14, 2017 event that might be protected by her NDA with YouTube, defendants have no intention of enforcing the NDA against her. While it would of course be premature to introduce testimony or other evidence at the current stage of the case, in the event this case gets past the pleadings, defendants will not enforce the NDA to prevent Ms. Frosch from testifying about her September 14, 2017 meeting. But YouTube's willingness to release Ms. Frosch from her obligations is not license to you to misstate the record, make misrepresentations, or improperly offer evidence to the Court.

Best regards,
Lauren

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 801 S. Figueroa Street, Suite 2000, Los Angeles, CA 90017.

On April 20, 2020, I served true copies of the following document(s) described as

PLAINTIFFS' MOTION FOR LEAVE TO FILE SUR-REPLY BRIEF; DECLARATION OF PETER OBSTLER; DECLARATION OF STEPHANIE FROSCH; (Proposed) ORDER TO FILE SUR-REPLY

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL ON 4/21/20: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Browne George Ross LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Los Angeles, California.

BY EMAIL ON 4/20/20: I served the document via email transmission to the email address listed above and did not, within a reasonable period of time, receive notice of an unsuccessful submission.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 20, 2020, at Los Angeles, California.

Kathleen McCormick

Document ID: 0.7.2270.7339-000001

SERVICE LIST
Divino Group LLC v. Google LLC and YouTube, LLC
United States District Court - Case No. 5:19-cv-004749-VKD

INDRANEEL SUR
Trial Attorney
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20530
202-616-8488
EMAIL: indraneel.sur@usdoj.gov

Document ID: 0.7.2270.7339-000001

Exhibit "B"

Document ID: 0.7.2270.7339-000001

**Electronically Filed
by Superior Court of CA,
County of Santa Clara,
on 11/19/2019 3:51 PM
Reviewed By: R. Walker
Case #19CV340667
Envelope: 3671559**

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

PRAGER UNIVERSITY,

Plaintiff,

vs.

GOOGLE LLC, et al.,

Defendants.

Case No.: 19CV340667

ORDER AFTER HEARING ON OCTOBER 25, 2019

(1) Demurrer by Defendants Google LLC and YouTube, LLC to the First Amended Complaint
(2) Motion by Plaintiff Prager University for Preliminary Injunction

The above-entitled matter came on for hearing on Friday, October 25, 2019 at 11:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable Brian C. Walsh presiding. A tentative ruling was issued prior to the hearing. The appearances are as stated in the record. The Court has reviewed and considered the written submissions of all parties and has reflected on the oral argument of counsel, including by reviewing the transcript lodged by plaintiff on November 14, 2019. Being fully advised, the Court adopts the tentative ruling as follows:

This action arises from Prager University's allegations that YouTube, LLC and its parent company Google LLC have unlawfully restricted content created by Prager on YouTube, defendants' social media and video sharing platform. Before the Court are defendants' demurrer

EXHIBIT "B"

Document ID: 0.7.2270.7339-000001

to the operative First Amended Complaint ("FAC") and Prager's motion for a preliminary injunction. Both motions are opposed.

I. Factual and Procedural Background

As alleged in the FAC, Prager is a non-profit, 501(c)(3) tax exempt, educational organization that promotes discussion on historical, religious, and current events by disseminating educational videos intended for younger, student-based audiences between the ages of 13 and 35. (FAC, ¶ 10.) The videos depict scholars, sources, and other prominent speakers who often espouse viewpoints in the mainstream of conservative thought. (*Ibid.*)

Defendants operate YouTube as the largest and most profitable mechanism for monetizing free speech and freedom of expression in the history of the world, generating $10 to 15 billion in annual revenue by monetizing the content of users like Prager who are invited to post videos to YouTube. (FAC, ¶ 11.) Since its inception, Prager has posted more than 250 of its videos to YouTube. (*Id.* at ¶ 39.)

A. The Alleged Content Restriction Scheme

To induce users like Prager to upload video content, defendants represent that YouTube is a public place for free speech defined by "four essential freedoms" that govern the public's use of the platform:

1. **Freedom of Expression:** We believe people should be able to speak freely, share opinions, foster open dialogue, and that creative freedom leads to new voices, formats and possibilities.

2. **Freedom of Information:** We believe everyone should have easy, open access to information and that video is a powerful force for education, building understanding, and documenting world events, big and small.

3. **Freedom of Opportunity:** We believe everyone should have a chance to be discovered, build a business and succeed on their own terms, and that people—not gatekeepers—decide what's popular.

4. **Freedom to Belong:** We believe everyone should be able to find communities of support, break down barriers, transcend borders and come together around shared interests and passions.

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(FAC, ¶ 12.) Defendants further promise that YouTube is governed by content-based rules and filtering which "apply equally to all," regardless of the viewpoint, identity, or source of the speaker. (*Id.* at ¶ 13.)

However, contrary to these representations, defendants censor, restrict, and restrain video content based on animus, discrimination, profit, and/or for any other reason "or no reason." (FAC, ¶ 14.) According to Prager, an internal memo and presentation entitled "The Good Censor" shows that defendants have secretly decided to " 'migrate' away from [serving as] a hosting platform …where the public is invited to engage in freedom of expression" to become a media company that profits "by promoting Defendants' own, or their preferred content through the exercise of unfettered discretion to censor and curate otherwise public content." (*Id.* at ¶¶ 56-65.) To effectuate their discriminatory practices, defendants use clandestine filtering tools, including algorithms and other machine-based and manual review tools, that are embedded with discriminatory and anti-competitive animus-based code, including code that is used to identify and restrict content based on the identity, viewpoint, or topic of the speaker. (*Id.*, ¶ 19.) They also "ensure that the YouTube employees charged with administering the content filtering and regulation scheme … operate in a dysfunctional and politically partisan workplace environment." (*Id.* at ¶ 20.)

Against this background, Prager's rights under California law have been violated by two unlawful content-based restrictions: (i) "Restricted Mode," a filtering protocol that defendants use to block what they deem, in their sole, unfettered discretion, to be "inappropriate" for "sensitive" audiences and (ii) "Advertising Restrictions," a content-based video advertising restriction policy that prohibits potential advertisers from accessing videos that defendants deem "inappropriate" for advertising. (FAC, ¶ 17.) Defendants use these mechanisms as a pretext to restrict and censor Prager's videos, even though the content of its videos complies with YouTube's Terms of Service, Community Guidelines, and criteria for "sensitive audiences" and advertisers, while they fail to restrict the content of other preferred users, content partners, and content produced by defendants themselves that is not compliant. (*Id.* at ¶¶ 18, 23.) Defendants

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have provided no rational basis for restricting Prager's content while allowing similar or noncompliant content to go unrestricted. (*Id.* at ¶ 25.)

B. Restricted Mode

According to defendants, Restricted Mode is intended "to help institutions like schools as well as people who wanted to better control the content they see on YouTube with an option to choose an intentionally limited YouTube experience." (FAC, ¶ 68.) Viewers can choose to turn Restricted Mode on from their personal accounts, but it may also be turned on by system administrators for libraries, schools, and other institutions or workplaces. (*Ibid.*) Defendants estimate that about 1.5 percent of YouTube's daily views (or approximately 75 million views per day) come from individuals using Restricted Mode. (*Id.* at ¶ 69.) When Restricted Mode is activated, a video's name, creator or subject, and content, along with any other information related to the video, are blocked, as if the video did not exist on the YouTube platform. (*Id.* at ¶ 68.)

Defendants claim to restrict content in Restricted Mode based upon their "Restricted Mode Guidelines," which identify five criteria for determining whether content warrants restriction:

1. Talking about drug use or abuse, or drinking alcohol in videos;
2. Overly detailed conversations about or depictions of sex or sexual activity;
3. Graphic descriptions of violence, violent acts, natural disasters and tragedies, or even violence in the news;
4. Videos that cover specific details about events related to terrorism, war, crime, and political conflicts that resulted in death or serious injury, even if no graphic imagery is shown;
5. Inappropriate language, including profanity; and
6. Video content that is gratuitously incendiary, inflammatory, or demeaning towards an individual or group.

(FAC, ¶ 70.) Videos are initially restricted through an automated filtering algorithm that examines certain "signals" like the video's metadata, title, and language, or following manual review if a video is "flagged" as inappropriate by public viewers. (*Id.*, ¶ 71.)

YouTube also publishes "Community Guidelines" and "Age Based Restriction" guidelines similar to its "Restricted Mode Guidelines"; however, content that complies with

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these guidelines may nevertheless be subject to Restricted Mode. (FAC, ¶¶ 72-73.) Prager's videos have never been age restricted or found to violate YouTube's Community Guidelines. (*Id.* at ¶ 75.)

Defendants have admitted that they make "mistakes in understanding context and nuances when [assessing] which videos to make available in Restricted Mode." (FAC, ¶ 91.) For example, on March 19, 2017, they publicly admitted that they improperly restricted videos posted or produced by members of the LGBTQ community and changed their policy, filtering algorithm, and manual review policies in response to complaints from this community. (*Id.* at ¶¶ 94-96.) However, Prager alleges that defendants have continued to improperly restrict videos by LGBTQ users, which is evidence of viewpoint animus. (*Id.* at ¶¶ 97-98.)

C. Advertising Restrictions

Defendants also restrict users like Prager "from monetizing or boosting the reach or viewer distribution of [their] videos." (FAC, ¶ 78.) Prager alleges that these restrictions are ostensibly governed by the "AdSense program policies," which it suggests are "similar[ly] vague, ambiguous, and arbitrary" to the Restricted Mode Guidelines. (*Id.* at ¶¶ 78, 80.) Prager claims that, similar to their "mistakes" in applying "Restricted Mode," defendants once "denied a reach boost or ad product" on the ground of "shocking content" based on a user's sexual or gender orientation and viewpoint. (*Id.* at ¶ 81.) It alleges that the application of such an "inappropriate" or "shocking content" designation falsely and unfairly stigmatizes Prager as well. (*Id.* at ¶ 82.) (However, while Prager alleges that certain of its videos have been demonetized, it does not allege whether defendants gave specific reasons for these actions or what those reasons were.) (See *id.* at ¶ 84.)

D. The Parties' Dispute

In July of 2016, Prager discovered that defendants were restricting user access to its videos through Restricted Mode. (FAC, ¶ 101.) It raised the issue with defendants, but they have failed to offer any reasonable or consistent explanation for why Prager's videos are being restricted. (*Id.* at ¶¶ 101-117.) In 2016, at least 16 Prager videos were restricted; by 2017, a total of 21 were. (*Ibid.*) By the time the FAC was filed in May of 2019, the total had risen to 80. (*Id.*

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at ¶ 127.) Prager's videos were either "restricted as to content, demonetized, or both." (*Id.* at ¶ 116.) Defendants also discontinued Prager's "ad grants" account for more than six days in October of 2017. (*Id.* at ¶ 118.) On pages 9-17 of the FAC, Prager provides a chart listing its restricted videos by title, along with videos from defendants' "preferred content providers" with similar titles that are unrestricted. (*Id.* at ¶ 23.)

On October 23, 2017, Prager sued defendants in federal court, asserting claims for (1) violation of Article I, section 2 of the California Constitution; (2) violation of the First Amendment of the United States Constitution; (3) violation of the California Unruh Civil Rights Act ("Unruh Act"), Cal. Civ. Code. § 51 *et seq.*; (4) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*; (5) breach of the implied covenant of good faith and fair dealing; (6) violation of the Lanham Act, 15 U.S.C. § 1125 *et seq.*; and (7) declaratory relief. (*Prager University v. Google LLC* (N.D. Cal., Mar. 26, 2018, No. 17-CV-06064-LHK) 2018 WL 1471939, at *2.) It filed a motion for a preliminary injunction in the federal action on December 29, 2017. (*Id.* at *3.) On March 26, 2018, the federal court granted defendants' motion to dismiss Prager's federal claims and denied Prager's motion for a preliminary injunction, finding that Prager had failed to state a claim for violation of the First Amendment because it did not allege state action, and had also failed to state a claim under the Lanham Act. (*Id.* at *5-13.) Having dismissed all of Prager's federal claims, the court declined to exercise supplemental jurisdiction over its state law claims, explaining:

> Here, the factors of economy, convenience, fairness, and comity support dismissal of Plaintiff's remaining state law claims. This case is still at the pleading stage, and no discovery has taken place. Federal judicial resources are conserved by dismissing the state law theories of relief at this stage. Further, the Court finds that dismissal promotes comity as it enables California courts to interpret questions of state law. This is an especially important consideration in the instant case because Plaintiff asserts a claim that demands an analysis of the reach of Article I, section 2 of the California Constitution in the age of social media and the Internet.

(*Prager University v. Google LLC*, *supra,* 2018 WL 1471939, at *13.) Prager has appealed the federal court's ruling to the Court of Appeal for the Ninth Circuit, which heard argument in the matter on August 27, 2019.

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Prager filed this action on January 8, 2019, reasserting its state law claims for (1) violation of Article I, section 2 of the California Constitution; (2) violation of the Unruh Act; (3) violation of the UCL; and (4) breach of the implied covenant of good faith and fair dealing. On May 13, the Court entered a stipulated order establishing a briefing schedule for Prager's anticipated motion for a preliminary injunction and defendants' anticipated demurrer and/or special motion to strike. On May 20, pursuant to that order, Prager moved for a preliminary injunction and filed the FAC, which asserts the same four causes of action as its original complaint. Defendants filed their demurrer on June 28. Both matters are now fully briefed and came on for hearing by the Court on October 25, 2019.

II. Demurrer to the FAC

Defendants demur to each cause of action in the FAC for failure to state a claim. (Code Civ. Proc., § 430.10, subd. (e).) They contend that Prager's claims are barred by two provisions of section 230 of the Communications Decency Act (the "CDA") and by the First Amendment, and otherwise fail to state a cause of action.

Defendants' request for judicial notice, which is unopposed, is GRANTED as to public web pages displaying the terms of the various YouTube policies at issue in this action (Exhibits 1-9). (Evid. Code § 452, subd. (h); see *Pacific Employers Ins. Co. v. State of Cal.* (1970) 3 Cal.3d 573, 575, fn.1 [where portions of agreement were attached to plaintiff's complaint, the balance of that agreement was properly a subject of judicial notice]; *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1285 [judicial notice of letter and media release was proper where, although they were not attached to the complaint, they formed a basis for the claims, and the complaint excerpted quotes and summarized parts in detail, thus "it is essential that we evaluate the complaint by reference to these documents"].) Defendants' request is also GRANTED as to a transcript of a case management conference held in the federal action, although the Court is not bound by the court's comments or rulings in that case. (Evid. Code § 452, subd. (d).)

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A. Legal Standard

The function of a demurrer is to test the legal sufficiency of a pleading. (*Trs. Of Capital Wholesale Elec. Etc. Fund v. Shearson Lehman Bros.* (1990) 221 Cal.App.3d 617, 621.) Consequently, "[a] demurrer reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732, internal citations and quotations omitted; see also Code Civ. Proc., § 430.30, subd. (a).) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. … Thus, … the facts alleged in the pleading are deemed to be true, however improbable they may be." (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958, internal citations and quotations omitted.)

In ruling on a demurrer, the allegations of the complaint must be liberally construed, with a view to substantial justice between the parties. (*Glennen v. Allergan, Inc.* (2016) 247 Cal.App.4th 1, 6.) Nevertheless, while "[a] demurrer admits all facts properly pleaded, [it does] not [admit] contentions, deductions or conclusions of law or fact." (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1120.) A demurrer will lie where the allegations and matters subject to judicial notice clearly disclose some defense or bar to recovery, including a statutory immunity. (*Casterson v. Superior Court (Cardoso)* (2002) 101 Cal.App.4th 177, 183.)

B. Violation of the California Constitution

Because concepts related to the parties' speech rights under the First Amendment and California Constitution are important to other aspects of its analysis, the Court will first examine whether Prager states a claim for violation of Article I, section 2 of the California Constitution.

As urged by defendants, "California's free speech clause"—like the First Amendment—"contains a state action limitation." (*Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1023.) However, the California Constitution's protection of speech has been interpreted more broadly in this regard. (See *Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850, 862-863.) Most notably, in the

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"groundbreaking" decision of *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, the Supreme Court of California "departed from the First Amendment jurisprudence of the United States Supreme Court and extended the reach of the free speech clause of the California Constitution to privately owned shopping centers." (*Golden Gateway Center v. Golden Gateway Tenants Assn.*, *supra,* 26 Cal.4th at p. 1016.)

More than 20 years after *Robins v. Pruneyard*, *Golden Gateway Center* confirmed and began to define the scope of the state action limitation under the California Constitution, finding the requirement was not satisfied where a tenants' association sought to distribute leaflets in a private apartment complex that was "not freely open to the public." (*Golden Gateway Center v. Golden Gateway Tenants Assn.*, *supra,* 26 Cal.4th at p. 1031.) *Golden Gateway Center* looked to the reasoning of *Robins* for guidance, noting that "*Robins* relied heavily on the functional equivalence of the shopping center to a traditional public forum-the downtown or central business district," and relied on "the public character of the property," emphasizing "the public's unrestricted access." (*Id.* at pp. 1032-1033, internal citations and quotations omitted.) *Golden Gateway Center* held that this unrestricted access is a "threshold requirement for establishing state action": without it, private property "is not the functional equivalent of a traditional public forum." (*Id.* at p. 1033.) In announcing this requirement, the opinion confirmed that it "largely follow[ed] the Court of Appeal decisions construing *Robins*," including *Planned Parenthood v. Wilson* (1991) 234 Cal.App.3d 1662. (*Id.* at p. 1033.) Those decisions also emphasized *Robins*'s focus on "the unique character of the modern shopping center and … the public role such centers have assumed in contemporary society" by effectively replacing "the traditional town center business block, where historically the public's First Amendment activity was exercised and its right to do so scrupulously guarded." (*Planned Parenthood v. Wilson*, *supra,* 234 Cal.App.3d at pp. 1669-1670.) This concept was again emphasized by the California Supreme Court in *Fashion Valley*, which repeatedly referenced "[t]he idea that private property can constitute a public forum for free speech if it is open to the public in a manner similar to that of public streets and sidewalks …." (*Fashion Valley Mall, LLC v. National Labor Relations Bd.*, *supra,* 42 Cal.4th at p. 858; see also *id.* at p. 859.)

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With this fundamental principle in mind, it is apparent that Prager does not state a claim under the California Constitution. Prager contends that "YouTube is the cyber equivalent of a town square where citizens exchange ideas on matters of public interest" and that defendants have opened their platform to the public by advertising its use for this purpose. However, Prager does not allege that it has been denied access to the core YouTube service. Rather, it urges that its access to "Restricted Mode" and YouTube's advertising service has been restricted. Prager does not persuade the Court that these services are freely open to the public or are the functional equivalent of a traditional public forum like a town square or a central business district.[1] Considering "the nature, purpose, and primary use of the property; the extent and nature of the public invitation to use the property; and the relationship between the ideas sought to be presented and the purpose of the property's occupants" (*Albertson's, Inc. v. Young* (2003) 107 Cal.App.4th at p. 119), it is clear that these services are nothing like a traditional public forum. "Restricted Mode" is an optional service that enables users to limit the content that they (or their children, patrons, or employees) view in order to avoid mature content. Limiting content is the very purpose of this service, and defendants do not give content creators unrestricted access to it or suggest that they will do so. The service exists to permit users to avoid the more open experience of the core YouTube service. Similarly, the use of YouTube's advertising service is restricted to meet the preferences of advertisers. (See FAC, ¶ 80 [stated purpose of advertising restrictions "is to keep Google's content and search networks safe and clean for our advertisers …"]; Declaration of Brian M. Willen, Exs. 7-9.)

Defendants correctly urge that even to recognize the core YouTube platform as a public forum would be a dramatic expansion of *Robins*. As one federal court observed, "[t]he analogy between a shopping mall and the Internet is imperfect, and there are a host of potential 'slippery slope' problems that are likely to surface were [*Robins*] to apply to the Internet." (*hiQ Labs, Inc. v. LinkedIn Corporation* (N.D. Cal. 2017) 273 F.Supp.3d 1099, 1116 [observing that "[n]o court

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[1] Prager cites no authority that supports its position that a court can never determine the applicability of *Robins* on demurrer, and this position is incorrect. (See *Savage v. Trammell Crow Co.* (1990) 223 Cal.App.3d 1562, 1577, fn. 4 [stating that scope of *Robins* can be addressed on demurrer in appropriate circumstances].) Here, the necessary facts are alleged in the FAC and/or subject to judicial notice.

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has expressly extended [*Robins*] to the Internet generally"], *aff'd and remanded* (9th Cir. 2019) 938 F.3d 985.) However the courts of this state ultimately view that analogy with regard to a dominant, widely-used site like the core YouTube service, the analogy falls apart completely on the facts alleged here. "Restricted Mode" and YouTube's advertising service are new, inherently selective platforms that do not resemble a traditional public forum. As discussed below, even more than the core YouTube service, these platforms necessarily reflect the exercise of editorial discretion rather than serving as an open "town square."

Finally, Prager contends that cases that have deemed web sites to be "public forums" for purposes of California's "anti-SLAPP" statute require this Court to extend *Robins* to its claim. However, the anti-SLAPP statute encompasses speech "***in a place open to the public or*** a public forum in connection with an issue of public interest" (Code Civ. Proc., § 425.16, subd. (e)(3), emphasis added), and has been applied to locations that clearly do not meet the standard described in *Golden Gateway Center*. (See, e.g., *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 807 [anti-SLAPP statute applied to comments made during on-air discussion on talk radio].) "[T]he protections afforded by the anti-SLAPP statute are not coextensive with the categories of conduct or speech protected by the First Amendment or its California counterparts (Cal. Const., art. I, §§ 2–4)." (*Industrial Waste & Debris Box Service, Inc. v. Murphy* (2016) 4 Cal.App.5th 1135, 1152.) "As our high court recently reaffirmed, 'courts determining whether conduct is protected under the anti-SLAPP statute look not to First Amendment law, but to the statutory definitions in section 425.16, subdivision (e).' " (*Ibid.*, quoting *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 422.)

Defendants' demurrer to the first cause of action will accordingly be sustained without leave to amend. In addition to failing to state a claim under *Robins v. Pruneyard*, this cause of action is barred by section 230 of the CDA for the reasons discussed below. (See *In re Garcia* (2014) 58 Cal.4th 440, 452 [supremacy clause of the federal Constitution requires that any conflicting state law give way to federal statute], citing U.S. Const., art. VI, cl. 2 ["This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall

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be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding"].)

B. CDA Immunity

Section 230(c)(1) of the CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." "§ 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." (*Hassell v. Bird* (2018) 5 Cal.5th 522, 536, quoting *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 330.)

"The CDA—of which section 230 is a part—was enacted in 1996." (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 802.) "Its 'primary goal ... was to control the exposure of minors to indecent material' over the Internet." (*Ibid.*, quoting *Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1026, superseded by statute on another point as stated in *Breazeale v. Victim Services, Inc.* (9th Cir. 2017) 878 F.3d 759, 766.) "Thus, an 'important purpose of [the CDA] was to encourage [Internet] service providers to self-regulate the dissemination of offensive materials over their services.' " (*Ibid.*, quoting *Zeran v. America Online, Inc., supra,* 129 F.3d at p. 331.) Section 230(c)(2) consequently immunizes service providers[2] who endeavor to restrict access to material deemed objectionable, providing that

> [n]o provider or user of an interactive computer service shall be held liable on account of--
>
> **(A)** any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> **(B)** any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in

[2] There is no dispute that defendants are providers of "an interactive computer service" under section 230.

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paragraph (1).[3]

(47 U.S.C. § 230(c)(2).)

A second, but related, objective of the CDA "was to avoid the chilling effect upon Internet free speech that would be occasioned by the imposition of tort liability upon companies that do not create potentially harmful messages but are simply intermediaries for their delivery." (*Delfino v. Agilent Technologies, Inc.*, *supra,* 145 Cal.App.4th at pp. 802-803.) The legislative history reflects that Congress was responding to a New York trial court case where "a service provider was held liable for defamatory comments posted on one of its bulletin boards, based on a finding that the provider had adopted the role of 'publisher' by actively screening and editing postings." (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 44.) " 'Fearing that the specter of liability would ... deter service providers from blocking and screening offensive material,' " Congress forbid " 'the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.' " (*Id.*, quoting *Zeran v. America Online, Inc.*, *supra,* 129 F.3d at p. 331.) Thus, section 230(c)(1) " 'confer[s] broad immunity on Internet intermediaries' " in " 'a strong demonstration of legislative commitment to the value of maintaining a free market for online expression.' " (*Hassell v. Bird*, *supra,* 5 Cal.5th at p. 539, quoting *Barrett v. Rosenthal*, *supra,* 40 Cal.4th at p. 56.)

Of the two provisions, section 230(c)(1) has been applied more frequently and broadly, including by courts in the Northern District of California to conduct indistinguishable from that alleged in this action. Notably, in *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.* (N.D. Cal. 2015) 144 F.Supp.3d 1088, 1090, *aff'd sub nom. Sikhs for Justice, Inc. v. Facebook, Inc.* (9th Cir. 2017) 697 Fed.App'x. 526, a human rights organization alleged that Facebook blocked access to its page in India "on its own or on the behest of the Government of India," because of discrimination on the grounds of race, religion, ancestry, and national origin. Quoting *Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096 and *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC* (9th Cir. 2008) 521 F.3d 1157, the court reasoned that

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[3] It is widely agreed that section 230(c)(2)(B)'s reference to "paragraph (1)" is an error, and the provision should be interpreted to refer to section 230(c)(2)(A) or "paragraph (A)." (See, e.g., *Enigma Software Group USA, LLC v. Malwarebytes, Inc.* (9th Cir. 2019) 938 F.3d 1026, 1031, fn. 1.)

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> [p]ublication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content. Thus, a publisher decides whether to publish material submitted for publication. It is immaterial whether this decision comes in the form of deciding what to publish in the first place or what to remove among the published material. ***In other words, any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230.***

(*Sikhs for Justice "SFJ", Inc. v. Facebook, Inc., supra,* 144 F.Supp.3d at p. 1094, emphasis added, internal citations and quotations omitted.) This approach has been endorsed by the Ninth Circuit. (See *Riggs v. MySpace, Inc.* (9th Cir. 2011) 444 Fed.App'x. 986, 987 [district court properly dismissed claims "arising from MySpace's decisions to delete Riggs's user profiles on its social networking website yet not delete other profiles Riggs alleged were created by celebrity imposters," citing *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC, supra,* 521 F.3d at pp. 1170-1171 for the proposition that "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230"].) California opinions have similarly reasoned that the "type of activity" at issue here—"to restrict or make available certain material"—"is expressly covered by section 230." (*Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, 572-573 [describing "the general consensus to interpret section 230 immunity broadly, extending from *Zeran* …"]; see also *Hassell v. Bird, supra,* 5 Cal.5th at p. 537 [California "courts have followed *Zeran* in adopting a broad view of section 230's immunity provisions"].) This interpretation was recently applied again by the Northern District in *Federal Agency of News LLC v. Facebook, Inc.* (N.D. Cal., July 20, 2019, No. 18-CV-07041-LHK) --- F.Sup.3d ---, 2019 WL 3254208, where it was held that section 230(c)(1) immunized Facebook from claims arising from its removal of a Russian company's account and page due to its alleged control by an entity found to have interfered in the 2016 United States presidential election.[4]

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[4] See also *Langdon v. Google, Inc.* (D. Del. 2007) 474 F.Supp.2d 622, 630-631 (applying immunity under section 230(c)(1) and/or (2) where plaintiff alleged defendants refused to display ads on his web pages criticizing the North Carolina and Chinese governments based on political viewpoint discrimination); *Levitt v. Yelp! Inc.* (N.D. Cal., Oct. 26, 2011, No. C-10-1321 EMC) 2011 WL 5079526, at *7-9, *aff'd* (9th Cir. 2014) 765 F.3d 1123 (section 230(c)(1) immunity applied to allegations that Yelp manipulated plaintiffs' user reviews in order to induce them to pay for

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Consistent with the language of section 230(c)(1), these cases do not question the service provider's motive in deciding to remove content from its service. While Prager contends that section 230(c)(1) immunity should not be applied where a plaintiff alleges a service provider acted in bad faith or to stifle competition, it cites no persuasive authority adopting this interpretation.[5]

Courts have expressed greater concern with the issue of motive when interpreting section 230(c)(2), perhaps because paragraph (A) of that provision expressly includes a "good faith" requirement. Here, defendants rely on paragraph (B) of that provision, which they urge—like section 230(c)(1)—does not require good faith. In *Zango, Inc. v. Kaspersky Lab, Inc.* (9th Cir. 2009) 568 F.3d 1169, 1176-1177, the Ninth Circuit applied section 230(c)(2)(B) to a provider of Internet security software that deemed the plaintiff's software to be "malware," noting that the plaintiff had waived the issue of "whether subparagraph (B), which has no good faith language,

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advertising); *Lancaster v. Alphabet Inc.* (N.D. Cal., July 8, 2016, No. 15-CV-05299-HSG) 2016 WL 3648608, at *2-3 ("§ 230[(c)(1) of the CDA prohibits any claim arising from Defendants' removal of Plaintiffs' videos"); *Green v. YouTube, LLC* (D.N.H., Mar. 13, 2019, No. 18-CV-203-PB) 2019 WL 1428890, at *6, *report and recommendation adopted sub nom. Green v. YouTube, Inc.* (D.N.H., Mar. 29, 2019, No. 18-CV-203-PB) 2019 WL 1428311 (applying immunity under section 230(c)(1) where plaintiff alleged his accounts were improperly shut down); *Brittain v. Twitter, Inc.* (N.D. Cal., June 10, 2019, No. 19-CV-00114-YGR) 2019 WL 2423375, at *3 (section 230(c)(1) immunity applied where plaintiff alleged improper suspension of his Twitter accounts and that Twitter "limit[ed] users who reference new/competing networks and/or utilize Third Party API services"); *King v. Facebook, Inc.* (N.D. Cal., Sept. 5, 2019, No. 19-CV-01987-WHO) 2019 WL 4221768 (section 230(c)(1) immunity applied to theory that "Facebook has violated its (Terms of Service] in removing [plaintiff's] posts and suspending his account, and that Facebook treats black activists and their posts differently than it does other groups, particularly white supremacists and certain 'hate groups' ").

[5] To the extent *e-ventures Worldwide, LLC v. Google, Inc.* (M.D. Fla. 2016) 188 F.Supp.3d 1265 adopts Prager's view, it does so by conflating section 230(c)(1) and section 230(c)(2) with no analysis. The Court does not find this persuasive. While a subsequent, unpublished opinion in that action, *e-ventures Worldwide, LLC v. Google, Inc.* (M.D. Fla., Feb. 8, 2017, No. 214CV646FTMPAMCM) 2017 WL 2210029, *3-4 reasoned that applying section 230(c)(1) to service providers' editorial decisions regarding a plaintiff's own content would swallow "the more specific immunity in (c)(2)" with its good faith requirement, the opinion went on to grant summary judgment based on the First Amendment's protection of editorial judgments, "no matter the motive." This case does not persuade the Court to part ways with the courts that apply section 230(c)(1) to the same end based on the same reasoning.

Similarly, *Levitt v. Yelp! Inc.* (N.D. Cal., Mar. 22, 2011, No. C 10-1321 MHP) 2011 WL 13153230, at *9 deemed it "a[] close[] question … whether Yelp may be held liable for its removal of positive reviews for the alleged purpose of coercing businesses to purchase advertising," considering that this theory implicated bad faith. The court ultimately did not resolve the issue as it found the complaint otherwise failed to state a cause of action. A subsequent opinion in that case, *Levitt v. Yelp! Inc.* (N.D. Cal., Oct. 26, 2011, No. C-10-1321 EMC) 2011 WL 5079526, *9 held that section 230(c)(1) does not include a good faith requirement, and applied "even assuming Plaintiffs have adequately pled allegations stating a claim of an extortionate threat with respect to Yelp's alleged manipulation of user reviews." The Court finds the reasoning of the subsequent opinion more persuasive.

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should be construed implicitly to have a good faith component like subparagraph (A)." The concurring opinion expressed concern with extending immunity beyond the facts present in that case:

> Congress plainly intended to give computer users the tools to filter the Internet's deluge of material *users* would find objectionable, in part by immunizing the providers of blocking software from liability. *See* § 230(b)(3). But under the generous coverage of § 230(c)(2)(B)'s immunity language, a blocking software provider might abuse that immunity to block content for anticompetitive purposes or merely at its malicious whim, under the cover of considering such material "otherwise objectionable."

(*Zango, Inc. v. Kaspersky Lab, Inc.*, *supra,* 568 F.3d at p. 1178 (conc. opn. of Fisher, J.).) Noting that "[d]istrict courts nationwide have grappled with the issues discussed in *Zango*'s majority and concurring opinions, and have reached differing results," the Ninth Circuit recently held that a service provider's intent may be relevant under section 230(c)(2)(B): specifically, where a plaintiff alleges blocking by a direct competitor for anticompetitive purposes, its claims survive dismissal. (*Enigma Software Group USA, LLC v. Malwarebytes, Inc.* (9th Cir. 2019) 938 F.3d 1026.)

Here, defendants' creation of a "Restricted Mode" to allow sensitive users to voluntarily choose a more limited experience of the YouTube service is exactly the type of self-regulation that Congress sought to encourage in enacting section 230, and fits within section 230(c)(2)(B)'s immunity for "any action taken to enable or make available to … others," namely, YouTube users, "the technical means to restrict access to" material "that the provider or user considers to be obscene, … excessively violent, … or otherwise objectionable." Rather than unilaterally restricting access to material on its core platform as contemplated by section 230(c)(2)(A)—which contains a "good faith" requirement—defendants allow users to voluntarily restrict access to material that defendants deem objectionable for the stated reason that, like the categories of material enumerated by the statute, it may be inappropriate for young or sensitive viewers.[6] The

[6] Consistent with these circumstances, a page discussing options for administrators employing "Restricted Mode," which was submitted by Prager in connection with its motion for preliminary injunction, indicates that "[a]dministrators and designated approvers can now whitelist entire channels," in addition to individual videos, to ensure a channel is "watchable by your users." (Declaration of Peter Obstler, Ex. L.) Thus, it appears that users can

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Court views this as a critical difference between the two provisions and disagrees with the majority in *Enigma*,[7] who ignore the plain language of the statute by reading a good faith limitation into section 230(c)(2)(B). (See *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, *supra,* 938 F.3d at p. 1040 (dis. opn. of Rawlinson, J.) ["The majority's policy arguments are in conflict with our recognition in *Zango* that the broad language of the Act is consistent with 'the Congressional goals for immunity' as expressed in the language of the statute. [Citation.] As the district court cogently noted, we 'must presume that a legislature says in a statute what it means and means in a statute what it says there.' "].)

Finding CDA immunity here is also consistent with cases that apply it in indistinguishable circumstances based on section 230(c)(1), and with their reasoning, which recognizes that challenges to a service provider's editorial discretion "treat[]" the provider "as a publisher." (See *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, *supra,* 144 F.Supp.3d 1088 [applying section 230(c)(1) to claim under Title II of the Civil Rights Act of 1964]; *Federal Agency of News LLC v. Facebook, Inc.*, *supra,* 2019 WL 3254208 [applying section 230(c)(1) to claims under Title II of the Civil Rights Act of 1964, the Unruh Act, and for breach of the implied covenant of good faith and fair dealing].) The Court finds that immunity under section 230(c)(1) also applies here, to the allegations involving both "Restricted Mode" and defendants' advertising service.

While the Court understands Prager's argument that all three provisions of section 230 should have a good faith requirement, this argument is contrary to the plain language of the statute. (See *Hassell v. Bird*, *supra,* 5 Cal.5th at p. 540 [noting that *Barrett v. Rosenthal*, *supra,* 40 Cal.4th 33 voiced "qualms" that *Zeran*'s interpretation of section 230 provides blanket immunity for those who intentionally redistribute defamatory statements, but held "these concerns were of no legal consequence" where principles of statutory interpretation compelled a

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specifically override defendants' decisions to disable certain videos or channels in "Restricted Mode," confirming that "Restricted Mode" is a tool made available to users rather than a unilateral ban.

[7] See *People v. Williams* (1997) 16 Cal.4th 153, 190 ("Decisions of lower federal courts interpreting federal law are not binding on state courts."); *Elliott v. Albright* (1989) 209 Cal.App.3d 1028, 1034 (although at times entitled to great weight, the decisions of the lower federal courts on federal questions are merely persuasive).

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broad construction].) And while it is not this Court's role to judge the wisdom of the policy embodied by section 230, there are good reasons to support it. As the court in *Levitt v. Yelp! Inc.* (N.D. Cal., Oct. 26, 2011, No. C-10-1321 EMC) 2011 WL 5079526 reasoned,

> traditional editorial functions often include subjective judgments informed by political and financial considerations. [Citation.] Determining what motives are permissible and what are not could prove problematic. Indeed, from a policy perspective, permitting litigation and scrutin[izing] motive could result in the "death by ten thousand duck-bites" against which the Ninth Circuit cautioned in interpreting § 230(c)(1). [(*Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC, supra,* 521 F.3d at p. 1174.)]
>
> One of Congres[s]'s purposes in enacting § 230(c) was to avoid the chilling effect of imposing liability on providers by both safeguarding the "diversity of political discourse ... and myriad avenues for intellectual activity" on the one hand, and "remov[ing] disincentives for the development and utilization of blocking and filtering technologies" on the other hand. §§ 230(a), (b); *see also* S.Rep. No. 104–230, at 86 (1996) (Conf.Rep.), *available at* 1996 WL 54191, at *[194] (describing purpose of section 230 to protect providers from liability "for actions to restrict or to enable restrict[ion] of access to objectionable online material"). For that reason, "[C]lose cases ... must be resolved in favor of immunity, lest we cut the heart out of section 230 ...." [(*Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC, supra,* 521 F.3d at p. 1174.)]
>
> As illustrated by the case at bar, finding a bad faith exception to immunity under § 230(c)(1) could force Yelp to defend its editorial decisions in the future on a case by case basis and reveal how it decides what to publish and what not to publish. Such exposure could lead Yelp to resist filtering out false/unreliable reviews (as someone could claim an improper motive for its decision), or to immediately remove all negative reviews about which businesses complained (as failure to do so could expose Yelp to a business's claim that Yelp was strong-arming the business for advertising money). The Ninth Circuit has made it clear that the need to defend against a proliferation of lawsuits, regardless of whether the provider ultimately prevails, undermines the purpose of section 230.

(*Levitt v. Yelp! Inc., supra,* 2011 WL 5079526, at *8-9.) In the Court's view, these concerns are particularly salient here, where the challenged services are by definition more curated than defendants' core service and could not exist without more robust screening by defendants.

In opposition to defendants' demurrer, Prager cites a number of cases that affirm the principle applied in *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC, supra,* 521 F.3d 1157, which held that a service provider is not entitled to CDA immunity with

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regard to content it develops itself. However, this principle is inapposite here. Prager does not allege that defendants developed any of Prager's content or appended any commentary to it—to the contrary, they allege the content became completely invisible in "Restricted Mode" or was simply demonetized. Applying CDA immunity under these circumstances does not conflict with *Roommates*. (See *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, *supra,* 521 F.3d at p. 1163 [in enacting CDA immunity, "Congress sought to immunize the *removal* of user-generated content, not the *creation* of content"].)[8]

Finally, Prager contends that applying CDA immunity here would constitute an unlawful prior restraint on its speech in violation of the First Amendment. However, a federal court has already held that defendants' conduct does not violate the First Amendment, and this Court agrees with that analysis for the reasons discussed in connection with its analysis of Prager's claim under the California Constitution. Moreover, Prager does not allege that defendants prevented it from engaging in speech, even on their own platform—again, it contends that certain videos were excluded from "Restricted Mode" and/or were demonetized.

The Court consequently finds that section 230(c)(2)(B) bars Prager's claims related to "Restricted Mode" and section 230(c)(1) bars all of its claims, with the possible exception of those based on its own promises and representations, which are discussed below.[9]

C. Breach of the Implied Covenant of Good Faith and Fair Dealing and Fraud Under the UCL

Finally, Prager correctly urges that some California authority holds section 230(c)(1) of the CDA does not apply to claims based on a defendant's own promises and representations to a plaintiff, rather than its role as a publisher. (See *Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294, 313 [this immunity does not apply where "plaintiff seeks to hold Yelp liable for its own statements regarding the accuracy of its filter"]; but see *Hassell v. Bird*, *supra,* 5 Cal.5th at p. 542 [disapproving of "creative pleading" in an attempt to avoid section 230

[8] Although it does not bring a claim for defamation, Prager appears to suggest that defendants have defamed it by removing its content from "Restricted Mode" or demonetizing it. Such a claim would likely be foreclosed by the ruling in *Bartholomew v. YouTube, LLC.* (2017) 17 Cal.App.5th 1217, 1234.

[9] The Court thus does not address defendants' argument that Prager's claims are barred by the First Amendment.

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immunity].) This authority does not apply to the Court's finding of immunity under section 230(c)(2)(B). In any event, Prager's claims asserting this type of theory—namely, its claim for breach of the implied covenant of good faith and fair dealing and its claim under the fraud prong of the UCL—do not state a cause of action.

Prager does not and cannot state a claim for breach of the implied covenant of good faith and fair dealing in light of the express provisions of YouTube's Terms of Service, which provide that "YouTube reserves the right to remove Content without prior notice" and which also allow YouTube to "discontinue any aspect of the Service at any time." (See Declaration of Brian Willen, Ex. 1; *Song fi Inc. v. Google, Inc.* (N.D. Cal. 2015) 108 F.Supp.3d 876, 885 [plaintiff could not state a claim for violation of the covenant of good faith and fair dealing based on content removal in light of YouTube's Terms of Service].) Similarly, YouTube's AdSense Terms of Service reserve the right "to refuse or limit your access to the Services." (Declaration of Brian Willen, Ex. 8; see *Sweet v. Google Inc.* (N.D. Cal., Mar. 7, 2018, No. 17-CV-03953-EMC) 2018 WL 1184777, at *9-10 [plaintiff could not state a claim for violation of the covenant of good faith and fair dealing based on demonitization in light of similar reservation of rights in YouTube's Partner Program Terms].) "[C]ourts are not at liberty to imply a covenant directly at odds with a contract's express grant of discretionary power except in those relatively rare instances when reading the provision literally would, contrary to the parties' clear intention, result in an unenforceable, illusory agreement." (*Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 808.) That is not the case here, and Prager does not contend that it is. (See *Sweet v. Google Inc., supra,* 2018 WL 1184777, at *9-10 [applying *Third Story*].)

As to the UCL fraud claim, to the extent it is based on the "four essential freedoms" set forth above and similar statements, these statements are non-actionable puffery. (See *Demetriades v. Yelp, Inc., supra,* 228 Cal.App.4th at p. 311 [" 'a statement that is quantifiable, that makes a claim as to the "specific or absolute characteristics of a product," may be an actionable statement of fact while a general, subjective claim about a product is non-actionable puffery,' " quoting *Newcal Industries, Inc. v. Ikon Office Solution* (9th Cir.2008) 513 F.3d 1038, 1053]; *Prager University v. Google LLC, supra,* 2018 WL 1471939, at *11 ["None of the

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statements about YouTube's viewpoint neutrality identified by Plaintiff resembles the kinds of 'quantifiable' statements about the 'specific or absolute characteristics of a product' that are actionable under the Lanham Act."].)

Prager also alleges that defendants represented that "the 'same standards apply equally to all' when it comes to the content regulation on YouTube." (FAC, ¶ 85; see also *id.* at ¶ 13.) While this statement is arguably more than mere puffing (see *Demetriades v. Yelp, Inc.*, *supra,* 228 Cal.App.4th at p. 311-312), Prager does not allege that it suffered a loss of money or property as a result of its reliance on this statement. "There are innumerable ways in which economic injury from unfair competition may be shown," including where a plaintiff "ha[s] a present or future property interest diminished." (*Kwikset Corp. v. Superior Court (Benson)* (2011) 51 Cal.4th 310, 323; see also *Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235 Cal.App.4th 29, 38 [UCL "unlawful" plaintiffs established standing by alleging diminished credit score caused by defendant's false negative reporting to credit agencies, even where they never made payments on the loan at issue].) The "lost income, reduced viewership, and damage to brand, reputation, and goodwill" that Prager alleges (FAC, ¶ 157) would certainly satisfy this requirement if there were a causal connection between Prager's alleged reliance on defendants' statement in participating in the YouTube service and these harms. However, these injuries cannot have resulted from Prager's decision to use YouTube: they could only have been caused by YouTube's later decisions to restrict and/or demonetize Prager's content. (See *Prager University v. Google LLC*, *supra,* 2018 WL 1471939, at *11-12 ["Plaintiff has not sufficiently alleged that it 'has been or is likely to be injured as the result of the' statements about YouTube's viewpoint neutrality. [Citation.] As discussed above, any harm that Plaintiff suffered was caused by Defendants' decisions to limit access to some of Plaintiff's videos."].) These later decisions by YouTube could not have been relied on by Prager. (See *id.* at *11 ["Although Plaintiff asserts that it has suffered injury in the form of 'lower viewership, decreased ad revenue, a reduction in advertisers willing to purchase advertisements shown on Plaintiff's videos, diverted viewership, and damage to its brand, reputation and goodwill," … nothing in Plaintiff's complaint suggests that this harm flowed directly from Defendants' publication of

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their policies and guidelines. Instead, any harm that Plaintiff suffered was caused by Defendants' decisions to limit access to some of Plaintiff's videos ...."].) Moreover, recognizing this theory would appear to conflict with principles of defamation law as recently discussed in *Bartholomew v. YouTube, LLC.* (2017) 17 Cal.App.5th 1217.

Prager thus fails to state a cause of action based on the implied covenant of good faith and fair dealing or the fraud prong of the UCL.

D. Conclusion and Order

For all these reasons, the demurrer to the first through fourth causes of action is SUSTAINED WITHOUT LEAVE TO AMEND.

III. Motion for Preliminary Injunction

As discussed above, Prager has not shown a reasonable probability of success on the merits in this action. Its motion for a preliminary injunction is consequently DENIED. (See *San Francisco Newspaper Printing Co. v. Superior Court (Miller)* (1985) 170 Cal.App.3d 438, 442.)

IT IS SO ORDERED.

Dated: Nov. 19, 2019

Honorable Brian C. Walsh
Judge of the Superior Court

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Exhibit “C”

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DIVINO GROUP LLC, a California limited liability company, CHRIS KNIGHT, an individual, CELSO DULAY, an individual, CAMERON STIEHL, an individual, BRIAANDCHRISSY LLC, a Georgia limited liability company, BRIA KAM, an individual, CHRISSY CHAMBERS, an individual, CHASE ROSS, an individual, BRETT SOMERS, an individual, and LINDSAY AMER, an individual, STEPHANIE FROSCH, an individual, SAL CINEQUEMANI, an individual, TAMARA JOHNSON, an individual, and GREG SCARNICI, an individual,

Plaintiffs,

vs.

GOOGLE LLC, a Delaware limited liability company, YOUTUBE, LLC, a Delaware limited liability company, and DOES 1-25,

Defendants.

Case No. 5:19-cv-004749-VKD

UNITED STATES OF AMERICA'S NOTICE OF INTERVENTION TO DEFEND THE CONSTITTUTIONALITY OF 47 U.S.C. § 230(c)

Action Filed: August 13, 2019
Trial Date: None Set
Rule 5.1 Notice Filed: December 20, 2019

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EXHIBIT "C"

Document ID: 0.7.2270.7339-000001

Under Federal Rules of Civil Procedure 5.1(c) and 24(a)(1), and in accordance with the authorization of the Solicitor General of the United States, the United States hereby intervenes in this action for the limited purpose of defending the constitutionality of Section 230(c) of the Communications Decency Act of 1996 ("CDA") (Pub. L. No. 104-104, § 509, codified at 47 U.S.C. § 230(c)).

On December 20, 2019, Plaintiffs filed a notice of constitutional challenge regarding 47 U.S.C. § 230(c) (Doc. 21). In that Notice, Plaintiffs stated that their pleadings allege that "Section 230(c) does not, and cannot, apply in this case, under the plain language of the statute or under the Constitution, to prevent the Plaintiffs from seeking legal redress for harms and injuries caused by Defendants' discrimination against them and other similarly situated Plaintiffs and users of YouTube." *Id.* at 3. Moreover, in opposition to the motion to dismiss the operative complaint filed by Defendants (Doc. 25), Plaintiffs in their brief filed February 24, 2020 made certain contentions regarding the constitutionality of 47 U.S.C. § 230(c) (Doc. 28). The Court has not yet certified a constitutional question under Rule 5.1(b) and 28 U.S.C. § 2403.

The United States is entitled to intervene in this action under the Federal Rules of Civil Procedure and by statute. Rule 5.1(c) permits the Attorney General to intervene in an action where, as here, the constitutionality of a federal statute is challenged. *See* Fed. R. Civ. P. 5.1(c). Rule 24 further permits a non-party to intervene when the non-party "is given an unconditional right to intervene by a federal statute." Fed. R. Civ. P. 24(a)(1). The United States has an unconditional statutory right to intervene "[i]n any action . . . wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question . . . ." 28 U.S.C. § 2403(a). In such an action, "the court . . . shall permit the United States to intervene . . . for argument on the question of constitutionality." *Id.* Here, Plaintiffs have "drawn in question" the constitutionality of 47 U.S.C. § 230(c), and the United States has an unconditional right to intervene to defend the statute.

The United States will immediately hereafter file its memorandum in defense of the constitutionality of 47 U.S.C. § 230(c). The United States' intervention, including its filing

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of a memorandum in support of the constitutionality of 47 U.S.C. § 230(c), will not interfere with the timely adjudication of this action. This notification is also timely. By this Court's order of April 23, 2020, the United States' deadline for intervention is today. Doc. 44.

Accordingly, the United States hereby provides notice of intervention in this action for the purpose of defending the constitutionality of 47 U.S.C. § 230(c).

DATED: May 8, 2020

Respectfully submitted,
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By: */s/ Indraneel Sur*
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Plaintiffs,

vs.

GOOGLE LLC, a Delaware limited liability company, YOUTUBE, LLC, a Delaware limited liability company, and DOES 1-25,

Defendants.

Case No. 5:19-cv-004749-VKD

MEMORANDUM OF LAW FOR INTERVENOR UNITED STATES IN SUPPORT OF THE CONSTITUTIONALITY OF 47 U.S.C. § 230(C)

Action Filed: August 13, 2019
Trial Date: None Set
Rule 5.1 Notice Filed: December 20, 2019

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INTRODUCTION

Plaintiffs, who are video creators seeking monetary and other recovery based on the alleged editorial decisions of a popular Internet platform, YouTube, have raised a constitutional challenge to Section 230(c) of the Communications Decency Act of 1996 ("CDA") (Pub. L. No. 104-104, § 509, codified at 47 U.S.C. § 230(c)). When the World Wide Web was in its early days in 1996, Congress sought through Section 230(c) to promote and protect "Good Samaritan" blocking and screening of offensive material by limiting the liability of website owners and operators. The statute immunizes for certain liability purposes an "interactive computer service" provider from being treated as the publisher or speaker of content created by third parties and hosted by the service (47 U.S.C. § 230(c)(1)), or for removing or restricting access to certain types of offensive material (§ 230(c)(2)).

In seeking Rule 12(b)(6) dismissal of the operative complaint, YouTube has invoked the statute as an affirmative defense to Plaintiffs' claims, and Plaintiffs have responded by arguing, among other things, that the statute violates the First Amendment and the equal protection guarantee of the Fifth Amendment to the extent it shields YouTube from liability for Plaintiffs' claims. Plaintiffs also seek a declaratory judgement to that effect.

The United States intervenes today in response to Plaintiffs' constitutional challenge, and, in defense of the statute, respectfully limits this brief to two arguments.

First, under the doctrine of constitutional avoidance, this Court should start by deciding the statutory arguments presented by the parties regarding the pending Rule 12(b)(6) motion, because those non-constitutional grounds may obviate the need for decision on any constitutional question. A court should decide a constitutional question only when necessary, which would not be the situation here if the Court were to conclude that statutory grounds suffice to dispose of the case.

Second, if the Court concludes that it must reach the constitutional question, Plaintiffs' challenge should be rejected on the merits. Section 230(c) does not regulate Plaintiffs' primary conduct. Instead, the statute establishes a rule prohibiting liability for certain conduct by online platforms, including YouTube. Because the United States is intervening

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for the limited purpose of defending the constitutionality of Section 230(c), it does not take a position on whether the statute forecloses the particular claims Plaintiffs have alleged. But assuming it does, that would not violate the First Amendment's Speech Clause, because—as the Ninth Circuit squarely held in *Prager University v. Google LLC*, 951 F.3d 991 (9th Cir. 2020)—YouTube is not a state actor capable of denying the freedom of speech. In other words, Section 230(c) would not deny Plaintiffs any constitutional claim they otherwise would have. Nor do Plaintiffs' arguments find support in the First Amendment's Petition Clause or in the constitutional guarantee of equal protection. In short, however Plaintiffs' challenge to Section 230(c) is framed, it is meritless, and should be rejected.

STATEMENT

I. Statutory Background

Section 230(c) of the CDA is entitled "Protection for 'Good Samaritan' blocking and screening of offensive material." The Ninth Circuit has described the statute as "immuniz[ing] providers of interactive computer services against liability arising from content created by third parties." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1163-64 (9th Cir. 2008) (*en banc*) (footnotes omitted).

In particular, Paragraph (1) states: "No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The statute also provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3). The result is to protect online platforms from such liabilities as those the common law imposed on publishers or speakers for libel or slander. Some courts have also construed the limitation to shield online platforms against certain liabilities under federal law. *See, e.g.*, *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1096 (N.D. Cal. 2015), *aff'd sub nom. Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017). The immunity applies only when the interactive computer service provider is not also the "information content provider" of the material in question—

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i.e., the person "responsible, in whole or in part, for the creation or development of" the "offending content." *See Roommates*, 521 F.3d at 1162-63 (quoting § 230(f)(3)).

For its part, Paragraph (2) describes a separate immunity. It states:

> No provider or user of an interactive computer service shall be held liable on account of —
>
> > (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
> >
> > (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph [A].

47 U.S.C. § 230(c)(2).*

The problem Congress sought to solve in Section 230(c) arose from a New York state trial court's ruling that an internet service provider that had voluntarily deleted some messages from an online message board was then "legally responsible for the content of defamatory messages that it failed to delete." *See Roommates*, 521 F.3d at 1163 (discussing *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)). The statute responded by "immuniz[ing] the *removal* of user-generated content, not the *creation* of content." *Id.* That is, Section 230 "provides 'Good Samaritan' protections from civil liability for providers . . . of an interactive computer service for actions to restrict . . . access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton* . . . which . . . treated such providers . . . as publishers or speakers of content that is not their own because they have restricted access to objectionable material." H.R. Rep. No. 104-458 (1996) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 10.

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* The text of Paragraph (2)(B) refers to "the material described in paragraph (1)," but the Ninth Circuit "take[s] it that the reference to the 'material described in paragraph (1)' is a typographical error, and that instead the reference should be to . . . § 230(c)(2)(A)," because "Paragraph (1) pertains to the treatment of a publisher or speaker and has nothing to do with 'material,' whereas subparagraph (A) pertains to and describes material." *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1173 n.5 (9th Cir. 2009).

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According to the Ninth Circuit, Section 230(c)(1) shields the defendant from a claim wherever "the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.'" *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009). In that context, the Ninth Circuit views "publication" as "involv[ing] reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Id.*. The Ninth Circuit has remarked in an *en banc* opinion that "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune" under Section 230(c)(1). *Roommates*, 521 F.3d at 1170-71.

The Ninth Circuit has described one of the policies behind the liability shield as promotion of speech—that is, to "avoid the chilling effect upon Internet free speech that would be occasioned by the imposition of tort liability upon companies that do not create potentially harmful messages but are simply intermediaries for their delivery." *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 852 (9th Cir. 2016) (quoting *Delfino v. Agilent Techs., Inc.*, 145 Cal. App. 4th 790, 52 Cal. Rptr. 3d 376, 387 (Cal. Ct. App. 2006)). In enacting Section 230(c), Congress made findings describing online platforms as offering "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." § 230(a)(3). Accordingly, "the policy of the United States" is "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*." § 230(b)(2) (emphasis added). To be sure, Congress also determined that it was the policy of the United States "to ensure vigorous enforcement of *Federal criminal laws* to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." § 230(b)(5) (emphasis added). But in balancing the various interests, Congress sought "not to deter harmful online speech through the separate route of imposing *tort liability* on companies that serve as intermediaries for other parties' potentially injurious messages." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997) (Wilkinson, C.J.) (emphasis added).

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II. Proceedings In Plaintiffs' Case

The instant Plaintiffs are "Lesbian, Gay, Bisexual, Transgender, Transsexual or Queer internet content creators" who make videos, including many that "discuss issues which affect members of the LGBTQ+ community." 2d Am. Compl. ¶¶ 1, 41 (Doc. 20) ("SAC"). YouTube, owned by Google, is allegedly the dominant Internet video platform, hosting "roughly 95%" of global "public video-based content," and "monetizing the free speech and expression of . . . the 2.3 billion people who now use" it. SAC ¶ 15. Plaintiffs allegedly contracted with YouTube, licensing it to distribute their videos while agreeing that YouTube retained various rights—including the right to enforce its community guidelines, and the right to determine "in its sole discretion" whether the videos contained "material . . . in violation of" the agreement. Rule 12(b)(6) Opp. 4 (Doc. 28); *see* SAC ¶¶ 10, 117(d), 288. According to Plaintiffs, YouTube "monetize[s]" the videos by selling advertisements for display along with them, and some Plaintiffs have paid YouTube to promote their videos (individually or grouped into channels) to potential viewers. SAC ¶¶ 55, 89, 131. YouTube allegedly retains "unfettered and absolute discretion to restrict the viewership, reach, and monetization of [the] videos." SAC ¶ 118.

One way that YouTube allegedly exercises that discretion is through its "Restricted Mode," which works "much like a curtain" to "block[] access" by "younger, sensitive audiences to video content that contains certain specifically enumerated 'mature' aspects." SAC ¶ 77. When a viewer turns on "Restricted Mode" for a personal account (or when it is activated by a parent or system administrator, such as one acting on behalf of a public library, school, or other work place) and lands on a video placed in "Restricted Mode," instead of showing the video, YouTube displays a warning, stating that the video is unavailable and that to view the video the viewer would "need to disable Restricted Mode." SAC ¶¶ 77-79, 83, 343. YouTube allegedly tells viewers who inquire that videos are placed in "Restricted Mode" when they include, among other things, "[o]verly detailed conversations about or depictions of sex or sexual activity," "inappropriate language, including profanity," or other sensitive

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content. SAC ¶¶ 26, 85, 344, 345, 346. "On average, 1.5–2% of users view YouTube through Restricted Mode." *Prager Univ.*, 951 F.3d at 996.

YouTube has allegedly styled itself (including in testimony to Congress) as a "neutral public forum." SAC ¶¶ 61, 287, 342. But Plaintiffs allege that YouTube has used its "power over filtering" as a "censorship power to silence and crush Plaintiffs because they identify [as] LGBTQ+ and express LGBTQ+ viewpoints." SAC ¶ 21. In particular, Plaintiffs allege that YouTube placed some of their videos into "Restricted Mode," or rendered certain videos ineligible for generation of advertising revenue by "demonetizing" them, justified by YouTube's alleged false statements that the videos contained "inappropriate" or "otherwise objectionable" content. SAC ¶¶ 3, 26, 151, 345-47. According to Plaintiffs, the episodes of "Restricted Mode" and demonetization misuse they allege are not isolated; rather, YouTube purportedly has a "'company policy' of not selling ads to 'gay' content creators because the 'gay thing' render[s] [their] video[s] 'shocking' and sexually explicit regardless of the actual content of the video[s]." SAC ¶ 20; *see* SAC ¶¶ 122, 134, 146; SAC Ex. A (transcript of communication with Google Support staff in Bangalore, India allegedly describing policy).

Plaintiffs seek a declaration that 47 U.S.C. § 230(c) violates the First and Fourteenth Amendments; they allege that applying the statute as a bar on their claims would be "both an unconstitutional restraint on Plaintiffs' First Amendment rights to freedom of petition and speech, and a violation of equal protection of law under the Fourteenth Amendment." SAC ¶ 261; *see* SAC ¶¶ 280-82. Plaintiffs also assert various claims against YouTube, including two federal statutory claims—one alleging that YouTube engaged in unconstitutional "[v]iewpoint-[b]ased [d]iscrimination" remediable under 42 U.S.C. § 1983 (SAC ¶¶ 283-303), and the other alleging that YouTube engaged in false advertising and false association in violation of the Lanham Act, 15 U.S.C. § 1125 *et seq.* (SAC ¶¶ 337-48).

This Court has not yet certified any constitutional question under 28 U.S.C. § 2403 and Rule 5.1. On March 9, 2020, this Court endorsed a stipulation providing the United States until April 24, 2020 to determine whether to intervene and to file a brief, if any. Doc.

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32. On the Government's motion, the Court later enlarged the time for the United States to intervene to May 8, 2020. Doc. 44.

ARGUMENT

I. The Court Should First Decide The Potentially Dispositive Statutory Issues Because They May Obviate The Need To Address Plaintiffs' Constitutional Challenge

As an initial matter, this Court should not address the constitutionality of Section 230(c) unless it first determines that the pending motion to dismiss cannot be resolved on non-constitutional grounds. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 343 (1999) (quoting *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944)); *see id.*, 525 U.S. at 344 ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter") (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

This Court should adhere to that doctrine of constitutional avoidance here and decline to rule on the constitutionality of Section 230(c) unless the motion to dismiss cannot be resolved on other grounds. The United States has intervened solely for the purpose of defending the constitutionality of Section 230(c) and therefore takes no position on the merits of the non-constitutional issues. It is apparent, however, that the Court's resolution of those issues might obviate the need to consider Section 230(c)'s constitutionality.

Here is one example: Plaintiffs assert a Section 1983 claim (SAC ¶¶ 283-303), and Lanham Act claims for false advertising and false association (SAC ¶¶ 337-48). This Court might decide that Plaintiffs have not alleged the elements of either of those federal statutory claims in light of the Ninth Circuit's twin conclusions in *Prager University* that (1) YouTube is not a state actor constrained by the First Amendment (951 F.3d at 999), and (2) "YouTube's statements concerning its content moderation policies do not constitute 'commercial advertising or promotion'" within the meaning of the Lanham Act (*id.* at 999-1000 (quoting

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15 U.S.C. § 1125(a)(1)(B))). And this Court might similarly decide that Plaintiffs have not alleged the elements of their state law claims.

Here is another example: Plaintiffs contend that Section 230(c) does not apply to the misconduct alleged. Rule 12(b)(6) Opp. 13-21. If the Court were to conclude that YouTube's acts as alleged by Plaintiffs do not fit within the terms of either paragraph 230(c)(1) or (2), then the statute would not apply, and there would be no occasion for passing on the constitutionality of the statute.

In short, where "dispositive" statutory grounds may be available, it is "incumbent on" this Court to examine and decide the case on those grounds first. *Cf. N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 582 (1979) ("Before deciding the constitutional question, it was incumbent on [lower courts] to consider whether the statutory grounds might be dispositive.").

II. If The Court Reaches the Question, It Should Conclude That Section 230(c) Is Constitutional

If the Court were to reach the constitutional question, it should conclude that Plaintiffs' challenge fails on the merits. Section 230(c) does not regulate or limit Plaintiffs' primary conduct, such as their expressive activities. For example, Plaintiffs do not allege that Section 230(c) prevents them from creating videos or posting them on the Internet. *Cf. Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (restriction on virtual child pornography challenged by creators of erotic and nudist works). Instead, Section 230(c) establishes a substantive limitation on the liability of certain Internet companies for claims arising from certain specified conduct. But Plaintiffs cannot show that Congress violated Plaintiffs' constitutional rights by making that affirmative defense available here to YouTube, because none of the clauses of the Constitution on which Plaintiffs rely confers on Plaintiffs any right to bring an underlying claim.

First, Plaintiffs do not identify any valid underlying First Amendment speech claim they could have brought against YouTube had Section 230(c) not been in force. To the contrary, the Ninth Circuit explicitly held in *Prager University* that "YouTube is a private

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entity" that is not a state actor subject to the constraints of the First Amendment. *See* 951 F.3d at 996, 999. The Ninth Circuit observed that "courts have uniformly concluded that digital internet platforms that open their property to user-generated content do not become state actors," and held that "the state action doctrine precludes constitutional scrutiny of YouTube's content moderation pursuant to its Terms of Service and Community Guidelines." *See id.* at 997, 999. The Ninth Circuit thus concluded that "YouTube may be a paradigmatic public square on the Internet, but it is 'not transformed' into a state actor solely by 'provid[ing] a forum for speech.'" *Id.* at 997 (quoting *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930, 1934 (2019)).

The Ninth Circuit relied on the "Supreme Court's state action precedent," including "its recent teaching in *Halleck*." *Id.* In that 2019 decision, the Supreme Court explained: "[W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion over the speech and speakers in the forum." *Halleck*, 139 S. Ct. at 1930. As one illustration, the Court commented: "Benjamin Franklin did not have to operate his newspaper as 'a stagecoach, with seats for everyone.'" *Halleck*, 139 S. Ct. at 1931 (quoting F. Mott, *American Journalism* 55 (3d ed. 1962)). And the Supreme Court made clear that an "imprecise and overbroad phrase" in "passing dicta" in one of its prior decisions "should not be read to suggest that private property owners or private lessees are subject to First Amendment constraints whenever they dedicate their private property to public use or otherwise open their property for speech." *See id.* at 1931 n.3 (discussing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985)). No exception to that principle about private property owners applies to YouTube, as the Ninth Circuit reasoned. *See Prager Univ.*, 951 F.3d at 997-99.

Because YouTube is not a state actor, its alleged misconduct toward Plaintiffs does not implicate Plaintiffs' freedom of speech. And because YouTube's actions do not implicate the First Amendment, the liability protection Section 230(c) affords to YouTube likewise

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does not implicate the First Amendment. Or, put another way, Section 230(c) has not deprived Plaintiffs of any valid underlying Speech Clause claim.

Second, although Plaintiffs' Petition Clause argument lacks detailed explanation, they appear to contend that the Petition Clause requires Congress to allow them to proceed with their federal and state law claims even though the challenged statute provides an affirmative defense potentially foreclosing those claims. *See* SAC ¶ 281 (alleging that unconstitutionality stems from "Google/YouTube's use of Section 230(c) as a shield to prevent Plaintiffs from *petitioning the courts for relief* to redress violations of their civil, consumer, and contractual rights, including rights which expressly protect Plaintiffs as a class from identity or viewpoint based discrimination and speech restrictions") (emphasis added); *see also* Rule 12(b)(6) Opp. 20-21 (contending that "the [Communications Decency Act] cannot be construed to preclude Plaintiffs from *petitioning the Courts* to redress discriminatory and unlawful restrictions their rights to free speech and equal benefits and protection of the law") (emphasis added). That assertion mistakenly posits that the Petition Clause requires the Government to guarantee Plaintiffs the ability to continue to litigate the particular claims for relief they have alleged and to reach a particular outcome (here, denial of the Rule 12(b)(6) motion). Tellingly, Plaintiffs have cited no precedents construing the Petition Clause as guaranteeing such an outcome in litigation.

To be sure, the Supreme Court has observed that its "precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes. '[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.'" *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984)). "A petition," the Supreme Court has further explained, "conveys the special concerns of its author to the government and, in its usual form, requests action by the government to address those concerns." *Guarnieri*, 564 U.S. at 388-89 (citing *Sure-Tan*, 467 at 896-97).

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But the requirements of the Petition Clause have already been fully satisfied in this case, given that, by commencing this action, Plaintiffs "convey[ed] [their] special concerns . . . to the government and . . . request[ed] action by the government to address those concerns." *See Guarnieri*, 564 U.S. at 388-89. And Plaintiffs remain free to urge Congress to amend the statute. The Petition Clause, however, does not mandate the substantive response to their petition that Plaintiffs desire—*i.e.*, a decision disregarding the affirmative defense set forth in Section 230(c).

Were it otherwise, every statute or precedent limiting or preempting previously-available legal remedies would violate the Petition Clause. To the contrary: As the Supreme Court explained in interpreting the Due Process Clause of the Fourteenth Amendment, a State (and, accordingly, the Federal Government) "remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether . . . ." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982).

Plaintiffs' Petition Clause argument resembles the Due Process Clause argument the Ninth Circuit rejected in *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009). The plaintiffs there challenged a federal statute limiting the liability of firearms manufacturers in certain circumstances. In upholding the law, the Ninth Circuit concluded that Congress's "legislative determination" creating the liability protection "provides all the process that is due." *Id.* at 1141-42 (internal quotation marks omitted). The court also rejected the contention that the statutory liability limitation deprived the plaintiffs of a property right, reasoning that "a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained." *See id.* at 1140-41 (quoting *Fields v. Legacy Health Sys.*, 413 F.3d 943, 956 (9th Cir. 2005)).

Although Plaintiffs have not explicitly invoked the Due Process Clause as a basis for their challenge here, they advance an interpretation of the Petition Clause that would effectively circumvent *Logan* and *Ileto*. At least where, as here, Plaintiffs did not obtain a "final unreviewable judgment" in their favor before Section 230(c) came into force, they have no entitlement to the particular legal theories they have alleged. *See Ileto*, 565 F.3d at 1140-

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41. Congress therefore retained authority to impose limitations on those theories by enacting Section 230(c). *Logan* and *Ileto* thus provide additional confirmation that Plaintiffs' Petition Clause theory lacks merit.

Third, Plaintiffs' equal protection challenge fails for the same reasons as their First Amendment Speech and Petition claims, and does not require separate analysis under Ninth Circuit precedent. "It is generally unnecessary to analyze laws which burden the exercise of First Amendment rights by a class of persons under the equal protection guarantee, because the substantive guarantees of the Amendment serve as the strongest protection against the limitation of these rights." *Orin v. Barclay*, 272 F.3d 1207, 1213 n.3 (9th Cir. 2001) (quoting John E. Nowak, Ronald D. Rotunda & J. Nelson Young, *Handbook on Constitutional Law* (1978)). On that basis, the Ninth Circuit treated an "equal protection claim as subsumed by, and co-extensive with, [the Section 1983 plaintiff's] First Amendment claim." *Id.* This Court need go no further in rejecting Plaintiffs' equal protection theory.

CONCLUSION

For the foregoing reasons, the Court should decide Defendants' Rule 12(b)(6) motion without reaching any constitutional question if possible. If the Court reaches Plaintiffs' challenge to the constitutionality of 47 U.S.C. § 230(c), it should reject it.

DATED: May 8, 2020

Respectfully submitted,
JOSEPH H. HUNT
Assistant Attorney General

ERIC WOMACK
Assistant Branch Director

INDRANEEL SUR
Trial Attorney

By: */s/ Indraneel Sur*
INDRANEEL SUR

U.S. Department of Justice
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Exhibit “D”

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EXECUTIVE ORDER

- - - - - - -

PREVENTING ONLINE CENSORSHIP

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. Free speech is the bedrock of American democracy. Our Founding Fathers protected this sacred right with the First Amendment to the Constitution. The freedom to express and debate ideas is the foundation for all of our rights as a free people. In a country that has long cherished the freedom of expression, we cannot allow a limited number of online platforms to hand pick the speech that Americans may access and convey on the internet. This practice is fundamentally un-American and anti-democratic. When large, powerful social media companies censor opinions with which they disagree, they exercise a dangerous power. They cease functioning as passive bulletin boards, and ought to be viewed and treated as content creators.

The growth of online platforms in recent years raises important questions about applying the ideals of the First Amendment to modern communications technology. Today, many Americans follow the news, stay in touch with friends and family, and share their views on current events through social media and other online platforms. As a result, these platforms function in many ways as a 21st century equivalent of the public square.

Twitter, Facebook, Instagram, and YouTube wield immense, if not unprecedented, power to shape the interpretation of public events; to censor, delete, or disappear information; and to control what people see or do not see.

As President, I have made clear my commitment to free and open debate on the internet. Such debate is just as important online as it is in our universities, our town halls, and our homes. It is essential to sustaining our democracy.

Online platforms are engaging in selective censorship that is harming our national discourse. Tens of thousands of Americans have reported, among other troubling behaviors, online platforms "flagging" content as inappropriate, even though it does not violate any stated terms of service; making unannounced and unexplained changes to company policies that have the effect of disfavoring certain viewpoints; and deleting content and entire accounts with no warning, no rationale, and no recourse.

Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias. As has been reported, Twitter seems never to have placed such a label on another politician's tweet. As recently as last week, Representative Adam Schiff was continuing to mislead his followers by peddling the long-disproved Russian Collusion Hoax, and Twitter did not flag those tweets. Unsurprisingly, its officer in charge of so-called "Site Integrity" has flaunted his political bias in his own tweets.

At the same time online platforms are invoking inconsistent, irrational, and groundless justifications to censor or otherwise restrict Americans' speech here at home, several online platforms are profiting from and promoting the aggression and disinformation spread by foreign governments like China. One United States company, for example, created a search engine for the Chinese Communist Party that would have blacklisted searches for "human rights," hid data unfavorable to the Chinese Communist Party, and tracked users determined appropriate for surveillance. It also established research partnerships in China that provide direct benefits to the Chinese military. Other companies have accepted advertisements paid for by the Chinese government that spread false information about China's mass imprisonment of religious minorities, thereby enabling these abuses of human rights. They have also amplified China's propaganda abroad, including by allowing Chinese

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government officials to use their platforms to spread misinformation regarding the origins of the COVID-19 pandemic, and to undermine pro-democracy protests in Hong Kong.

As a Nation, we must foster and protect diverse viewpoints in today's digital communications environment where all Americans can and should have a voice. We must seek transparency and accountability from online platforms, and encourage standards and tools to protect and preserve the integrity and openness of American discourse and freedom of expression.

Sec. 2. Protections Against Online Censorship. (a) It is the policy of the United States to foster clear ground rules promoting free and open debate on the internet. Prominent among the ground rules governing that debate is the immunity from liability created by section 230(c) of the Communications Decency Act (section 230(c)). 47 U.S.C. 230(c). It is the policy of the United States that the scope of that immunity should be clarified: the immunity should not extend beyond its text and purpose to provide protection for those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints.

Section 230(c) was designed to address early court decisions holding that, if an online platform restricted access to some content posted by others, it would thereby become a "publisher" of all the content posted on its site for purposes of torts such as defamation. As the title of section 230(c) makes clear, the provision provides limited liability "protection" to a provider of an interactive computer service (such as an online platform) that engages in "'Good Samaritan' blocking" of harmful content. In particular, the Congress sought to provide protections for online platforms that attempted to protect minors from harmful content and intended to ensure that such providers would not be discouraged from taking down harmful material. The provision was also intended to further the express vision of the Congress that the internet is a "forum for a true diversity of political discourse." 47 U.S.C. 230(a)(3). The limited protections provided by the statute should be construed with these purposes in mind.

In particular, subparagraph (c)(2) expressly addresses protections from "civil liability" and specifies that an interactive computer service provider may not be made liable "on account of" its decision in "good faith" to restrict access to content that it considers to be "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable." It is the policy of the United States to ensure that, to the maximum extent permissible under the law, this provision is not distorted to provide liability protection for online platforms that -- far from acting in "good faith" to remove objectionable content -- instead engage in deceptive or pretextual actions (often contrary to their stated terms of service) to stifle viewpoints with which they disagree. Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike. When an interactive computer service provider removes or restricts access to content and its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial conduct. It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider.

(b) To advance the policy described in subsection (a) of this section, all executive departments and agencies should ensure that their application of section 230(c) properly reflects the narrow purpose of the section and take all appropriate actions in this regard. In addition, within 60 days of the date of this order, the Secretary of Commerce (Secretary), in

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consultation with the Attorney General, and acting through the National Telecommunications and Information Administration (NTIA), shall file a petition for rulemaking with the Federal Communications Commission (FCC) requesting that the FCC expeditiously propose regulations to clarify:

(i) the interaction between subparagraphs (c)(1) and (c)(2) of section 230, in particular to clarify and determine the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c)(2)(A) may also not be able to claim protection under subparagraph (c)(1), which merely states that a provider shall not be treated as a publisher or speaker for making third-party content available and does not address the provider's responsibility for its own editorial decisions;

(ii) the conditions under which an action restricting access to or availability of material is not "taken in good faith" within the meaning of subparagraph (c)(2)(A) of section 230, particularly whether actions can be "taken in good faith" if they are:

(A) deceptive, pretextual, or inconsistent with a provider's terms of service; or

(B) taken after failing to provide adequate notice, reasoned explanation, or a meaningful opportunity to be heard; and

(iii) any other proposed regulations that the NTIA concludes may be appropriate to advance the policy described in subsection (a) of this section.

Sec. 3. Protecting Federal Taxpayer Dollars from Financing Online Platforms That Restrict Free Speech. (a) The head of each executive department and agency (agency) shall review its agency's Federal spending on advertising and marketing paid to online platforms. Such review shall include the amount of money spent, the online platforms that receive Federal dollars, and the statutory authorities available to restrict their receipt of advertising dollars.

(b) Within 30 days of the date of this order, the head of each agency shall report its findings to the Director of the Office of Management and Budget.

(c) The Department of Justice shall review the viewpoint-based speech restrictions imposed by each online platform identified in the report described in subsection (b) of this section and assess whether any online platforms are problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices.

Sec. 4. Federal Review of Unfair or Deceptive Acts or Practices. (a) It is the policy of the United States that large online platforms, such as Twitter and Facebook, as the critical means of promoting the free flow of speech and ideas today, should not restrict protected speech. The Supreme Court has noted that social media sites, as the modern public square, "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017). Communication through these channels has become important for meaningful participation in American democracy, including to petition elected leaders. These sites are providing an important forum to the public for others to engage in free expression and debate. Cf. PruneYard Shopping Center v. Robins, 447 U.S. 74, 85-89 (1980).

(b) In May of 2019, the White House launched a Tech Bias Reporting tool to allow Americans to report incidents of online censorship. In just weeks, the White House received over 16,000 complaints of online platforms censoring or otherwise taking action against users based on their political viewpoints. The White House will submit such complaints received to the Department of Justice and the Federal Trade Commission (FTC).

(c) The FTC shall consider taking action, as appropriate and consistent with applicable law, to prohibit unfair or deceptive acts or practices in or affecting commerce, pursuant to section 45 of title 15, United States Code. Such unfair or deceptive acts or practice may include

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practices by entities covered by section 230 that restrict speech in ways that do not align with those entities' public representations about those practices.
(d) For large online platforms that are vast arenas for public debate, including the social media platform Twitter, the FTC shall also, consistent with its legal authority, consider whether complaints allege violations of law that implicate the policies set forth in section 4(a) of this order. The FTC shall consider developing a report describing such complaints and making the report publicly available, consistent with applicable law.
Sec. 5. State Review of Unfair or Deceptive Acts or Practices and Anti-Discrimination Laws.
(a) The Attorney General shall establish a working group regarding the potential enforcement of State statutes that prohibit online platforms from engaging in unfair or deceptive acts or practices. The working group shall also develop model legislation for consideration by legislatures in States where existing statutes do not protect Americans from such unfair and deceptive acts and practices. The working group shall invite State Attorneys General for discussion and consultation, as appropriate and consistent with applicable law.
(b) Complaints described in section 4(b) of this order will be shared with the working group, consistent with applicable law. The working group shall also collect publicly available information regarding the following:
(i) increased scrutiny of users based on the other users they choose to follow, or their interactions with other users;
(ii) algorithms to suppress content or users based on indications of political alignment or viewpoint;
(iii) differential policies allowing for otherwise impermissible behavior, when committed by accounts associated with the Chinese Communist Party or other anti-democratic associations or governments;
(iv) reliance on third-party entities, including contractors, media organizations, and individuals, with indicia of bias to review content; and
(v) acts that limit the ability of users with particular viewpoints to earn money on the platform compared with other users similarly situated.
Sec. 6. Legislation. The Attorney General shall develop a proposal for Federal legislation that would be useful to promote the policy objectives of this order.
Sec. 7. Definition. For purposes of this order, the term "online platform" means any website or application that allows users to create and share content or engage in social networking, or any general search engine.
Sec. 8. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:
(i) the authority granted by law to an executive department or agency, or the head thereof; or
(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.
(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.
DONALD J. TRUMP
THE WHITE HOUSE,
May 28, 2020.

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EXHIBIT "E"

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

DIVINO GROUP LLC, ET AL.,

PLAINTIFFS, CASE NO. CV-19-4749-VKD

VS. SAN JOSE, CALIFORNIA

GOOGLE LLC, ET AL., JUNE 2, 2020

DEFENDANT. PAGES 1 - 51

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

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

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(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.

EXHIBIT "E"

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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

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SAN JOSE, CALIFORNIA JUNE 2, 2020

P R O C E E D I N G S

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

10:24AM THE CLERK: THE NEXT MATTER IS DIVINO GROUP VERSUS GOOGLE, CASE NUMBER 19-CV-4749.

10:24AM THE COURT: GOOD MORNING. I'M WAITING FOR THE PRIOR MATTER AND ALSO WITH OUR TECHNOLOGY.

10:24AM WHO WILL BE SPEAKING ON BEHALF OF DIVINO GROUP TODAY?

10:24AM MR. OBSTLER, YOU'RE ON MUTE.

10:24AM 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.

10:24AM (LAUGHTER.)

10:24AM MR. OBSTLER: PETER OBSTLER, MYSELF, WILL BE SPEAKING ON BEHALF OF THE DIVINO PLAINTIFFS, YOUR HONOR.

10:24AM THE COURT: OKAY. WHO WILL BE SPEAKING ON BEHALF OF GOOGLE TODAY?

10:24AM MR. WILLEN: GOOD MORNING, YOUR HONOR. THIS IS BRIAN WILLEN. ME AND MY COLLEAGUE, MS. WHITE, WILL BOTH BE SPEAKING FOR GOOGLE.

10:24AM 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.

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

10:24AM AND I DO HAVE MR. SUR ON BEHALF OF THE UNITED STATES.

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

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

SO PLAINTIFFS HAVE EIGHT CLAIMS FOR RELIEF, REALLY SEVEN CLAIMS FOR RELIEF SINCE THE EIGHTH ONE IS A REQUEST FOR DECLARATORY RELIEF AND MORE OF A REQUEST FOR A REMEDY.

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

THE CALIFORNIA CONSTITUTION CLAIMS ARE ALSO PREMISED ON THE IDEA THAT GOOGLE AND YOUTUBE ARE STATE ACTORS, SO THAT ONE ALSO SEEMS TO BE ELIMINATED BY THIS DECISION.

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

SO I WOULD LIKE TO UNDERSTAND THE PARTIES' VIEWS ON THE

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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.

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AND SINCE IT'S THE DEFENDANTS' MOTION, I WILL GO AHEAD AND LET GOOGLE START.

SO MR. WILLEN.

MR. WILLEN: YES. THANK YOU, YOUR HONOR.

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

THE COURT: ALL RIGHT. VERY WELL.

MS. WHITE: THANK YOU, YOUR HONOR.

TAKING YOUR QUESTIONS IN ORDER, I'LL BEGIN WITH THE FIRST AMENDMENT. WE ABSOLUTELY AGREE WITH YOUR SUGGESTION THAT THE NINTH CIRCUIT'S DECISION FORECLOSES PLAINTIFFS' FIRST AMENDMENT CLAIM.

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

THERE'S SIMPLY NO PATH FORWARD IN LIGHT OF THE COURT'S HOLDING TO -- FOR THE COURT TO CONCLUDE THAT YOUTUBE IS A STATE

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ACTOR.

AND PLAINTIFFS HAVE FILED A SURREPLY ADDRESSING THAT DECISION, ALTHOUGH THEY DID NOT ADDRESS JUDGE KOH'S UNDERLYING DECISION THAT THE NINTH CIRCUIT AFFIRMED IN THEIR OPPOSITION BRIEF.

AND IN THEIR SURREPLY THEY CLAIM THAT THIS CASE IS DIFFERENT BECAUSE THEY HAVE ARTICULATED A DIFFERENT STATE ACTION THEORY UNDER THE SO-CALLED ENDORSEMENT TEST UNDER THE SUPREME COURT SKINNER DECISION.

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

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

THE COURT: IT SEEMS ALMOST LIKE AN ABSENCE OF ENDORSEMENT, SORT OF AN EXPLICIT NON-ENDORSEMENT OF ANY

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

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

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

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

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

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

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

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10:33AM AND, IN FACT, EVERY CASE THAT HAS CONSIDERED SIMILAR EFFORTS TO EXPAND ITS SCOPE TO ONLINE SERVICES HAS REJECTED THOSE EFFORTS. IN ADDITION TO PRAGER II THERE WAS THE DOMEN CASE IN THE SOUTHERN DISTRICT OF NEW YORK AND JUDGE CHEN IN THE HIQ DECISION.

THE COURT: ALL RIGHT. THANK YOU.

AND THE LANHAM ACT ISSUE?

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

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

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

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

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

SO IMPLICIT OR ABSTRACT MOTIVE IS NOT SUFFICIENT TO STATE A CLAIM UNDER THE LANHAM ACT.

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

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

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

SO THAT MAKES ME WONDER WHETHER THAT KIND OF CONDUCT IS,

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

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

SO THOSE ARE QUESTIONS FOR MR. WILLEN.

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

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

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

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

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DECISION BY THE NINTH CIRCUIT, WHICH SPECIFICALLY SAID THERE'S NO, THERE'S NO REASON TO EXEMPT THIS CLAIM FROM SECTION 230.

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

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

HERE PRIMARILY WHAT THE PLAINTIFFS ARE ALLEGING IS A CHALLENGE TO TWO THINGS:

ONE IS THE DECISIONS THAT YOUTUBE MADE WITH RESPECT TO RESTRICTED MODE, AND THAT'S THE EXCLUSION OF CERTAIN VIDEOS FROM BEING ELIGIBLE TO BEING SHOWN IN YOUTUBE'S RESTRICTED MODE;

AND THE SECOND IS THE DECISION TO DEMONETIZE SOME VIDEOS, ALTHOUGH NOT ALL OF THE VIDEOS.

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

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

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

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

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

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

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10:41AM COMPLAINT THAT THAT'S NOT WHAT IS PLAUSIBLY ALLEGED HERE.

10:41AM 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.

10:41AM 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.

10:41AM 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.

10:41AM BUT THE NINTH CIRCUIT HAS BEEN VERY CLEAR THAT SECTION 230(C)(1) APPLIES WITHOUT REGARD TO THE NATURE OF THE CAUSE OF ACTION.

10:42AM 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.

10:42AM 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

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ESTABLISHED LAW APPLIES AND KICKS THE IMMUNITY IN.

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

MR. WILLEN: YEAH.

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

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

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

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

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

OBVIOUSLY WE HAVE NOT SPECIFICALLY RAISED (C)(2) IN CONNECTION WITH THIS MOTION. I THINK THIS ISSUE HAS NOT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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10:47AM EITHER THE TEXT OF THE STATUTE OR THE LAW THAT HAS BEEN
10:47AM ESTABLISHED WITH RESPECT TO (C)(1).
10:47AM THE COURT: ALL RIGHT. THANK YOU FOR THAT.
10:47AM IS THERE ANYTHING ELSE THAT YOU WOULD LIKE TO ARGUE IN
10:47AM SUPPORT OF YOUR MOTION THAT I HAVEN'T FOCUSSED ON IN PARTICULAR
10:47AM OR THAT YOU THINK NEEDS FURTHER ELABORATION AT THIS TIME?
10:47AM MR. WILLEN: I THINK THE ONLY THING, AND OBVIOUSLY I
10:47AM WANT TO HEAR FROM THE PLAINTIFFS AND RESPOND TO WHAT THEY MIGHT
10:47AM SAY, BUT I DO THINK THAT THE QUESTION OF THE CONSTITUTION, THE
10:47AM CONSTITUTIONAL CHALLENGE TO SECTION 230 THAT THEY HAVE RAISED I
10:47AM THINK, AS THE COURT RECOGNIZED, THE FINDING OF NO STATE ACTION
10:47AM IN THE PRAGER CASE MAKING CLEAR THAT YOUTUBE IS A PRIVATE FORUM
10:48AM AND NOT A GOVERNMENT ACTOR, I THINK THAT FINDING EQUALLY BARS
10:48AM NOT JUST THE FIRST AMENDMENT CLAIM BUT ALSO ANY CHALLENGE TO
10:48AM CONSTITUTIONALITY OF SECTION 230.
10:48AM I THINK THE DECISION THAT IS PROBABLY MOST DIRECTLY ON
10:48AM POINT IN EXPLAINING WHY THAT CHALLENGE FAILS IS THE
10:48AM NINTH CIRCUIT'S DECISION IN ROBERTS VERSUS AT&T MOBILITY WHICH
10:48AM WAS NOT A CASE THAT WE WERE ABLE TO CITE IN OUR PAPERS BECAUSE
10:48AM IT RELATES TO AN ARGUMENT THAT THE PLAINTIFFS MADE IN THEIR
10:48AM SURREPLY AND IN THEIR RESPONSE TO THE GOVERNMENT, BUT I THINK
10:48AM THAT CASE WAS VERY HELPFUL.
10:48AM THE COURT: ALL RIGHT. THANK YOU. THANK YOU VERY
10:48AM MUCH.
10:48AM MR. OBSTLER, I WOULD LIKE FOR YOU TO HAVE IN MIND THE

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QUESTIONS THAT THE COURT ASKED AT THE BEGINNING, SO JUST TO REVIEW THE SIGNIFICANCE OF THE PRAGER DECISION ON YOUR FEDERAL CLAIMS AND POSSIBLY THE CALIFORNIA CONSTITUTION CLAIM AS WELL;

THE QUESTIONS THAT THE COURT HAD ABOUT THE APPLICATION OF 230(C)(1) AND (2) AND THE CONTEXT OF THE INTENTIONAL DISCRIMINATION, AND I FRAMED IT AS A QUESTION UNDER THE UNRAH ACT, BUT YOU MAY THINK OF IT DIFFERENTLY, AND THEN I'LL ALSO GIVE YOU AN OPPORTUNITY TO -- I WOULD LIKE YOU TO ADDRESS YOUR REQUEST FOR JUDICIAL NOTICE AND LET ME KNOW WHY YOU THINK IT MATTERS TO THE MOTION TO DISMISS. AND MAYBE IT'S JUST SPECIFICALLY TO THE GOVERNMENT'S POSITION ON THE MOTION TO INTERVENE, BUT I'D LIKE TO JUST UNDERSTAND THAT, AND ANYTHING ELSE THAT YOU WOULD LIKE TO ARGUE. ALL RIGHT.

MR. OBSTLER: THANK YOU SO MUCH, YOUR HONOR.

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

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

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

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

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

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

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

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

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

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

THE COURT: I WOULD RATHER NOT GET INTO THINGS THAT ARE NOT ALLEGED IN YOUR COMPLAINT.

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

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

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

MR. OBSTLER: OKAY. LET'S START WITH LANHAM. THEY SEEM TO BE FOCUSSED VERY MUCH ON THE STATEMENTS ABOUT FREEDOM OF EXPRESSION AND ALL THIS TYPE OF STUFF. THAT'S NOT THE BASIS FOR A LANHAM CLAIM.

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

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AND WHAT THEY'RE DOING, YOUR HONOR, AND I HOPE YOU CAN SEE THIS, THIS IS WHAT APPEARS --

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

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

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

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

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

IS IT A FALSE ADVERTISING CLAIM UNDER 1125(A)(1)(B)?

MR. OBSTLER: YES, YES.

THE COURT: OKAY. SO THEN YOU HAVE TO GO THROUGH

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THE ELEMENTS.

SO IF YOU HAD TO TELL ME AN ANSWER TO THIS QUESTION, WHAT IS THE FALSE OR MISLEADING STATEMENT?

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

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

IS THAT THE THEORY?

MR. OBSTLER: THAT IS CORRECT, YOUR HONOR.

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

THEY'RE NOT ONLY USING DISCRIMINATORY ALGORITHMS TO DO THIS. THEY'RE ACTUALLY EMBEDDING METADATA INTO MY CLIENT'S VIDEOS THAT ALLOW THE ALGORITHM TO DO THE PROFILE.

AGAIN, UNTIL WE DO DISCOVERY, THIS IS GOING TO BE A VERY COMPLICATED CASE, AND WE'RE SAYING SHOW US THE CODE AND SHOW US HOW THIS WORKS.

BUT WE DID A TEA VIDEO, AS YOUR HONOR KNOWS, WHERE WE

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ALLEGED AND WHERE WE PUT IN BOTH TAG LINES AND THEN WE PUT IT IN WITHOUT THE TAG LINES AND ALL IT SAYS IS WE LIKE TEA. IT GOT RESTRICTED.

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

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

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

MR. OBSTLER: WHEN YOU SAY THAT THAT DOESN'T SOUND LIKE FALSE ADVERTISING --

THE COURT: YOU'RE SAYING -- SO YOU'RE FALSELY BRANDING -- YOUR THEORY IS THAT GOOGLE AND YOUTUBE ARE FALSELY BRANDING YOUR CLIENT'S CONTENT?

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

MY WIFE THE OTHER DAY ACTUALLY GOT A RESTRICTED MODE NOTICE ON HER FACEBOOK PAGE. SO THE RESTRICTED MODE IS NOW GOING ACROSS PLATFORM. AND SHE LOOKED IT UP AND SHE SAID WHAT IS GOING ON HERE?

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THE POINT IS -- I'M SORRY, THE POINT IS --

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

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

MR. OBSTLER: YEP.

THE COURT: THE FALSE STATEMENTS.

RATHER, THE STATEMENTS THAT WERE MADE WERE DESCRIBING TRUTHFULLY WHAT HAD HAPPENED AS IN THIS GOT FLAGGED AS SOMETHING THAT WOULD BE EXCLUDED FROM RESTRICTED MODE.

SO -- AND THE IMPLEMENTATION OF THAT, THE GUIDELINES THAT RESULTED IN THAT DISPLAY BEING AS YOU DESCRIBE WERE NOT ADVERTISING OR PROMOTION.

SO IN LIGHT OF PRAGER, HOW DO YOU AVOID THE CONCLUSIONS THAT THAT COURT REACHED? HOW DO YOU AVOID THOSE AND EFFECTIVELY HAVE A CLAIM IN THIS CASE THAT DOESN'T HIT THOSE SAME BARRIERS?

MR. OBSTLER: BECAUSE THE COURT IN PRAGER MADE AN INAPPROPRIATE FACTUAL FINDING.

THE COURT: OKAY. SO WHAT IS THE INAPPROPRIATE

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FACTUAL FINDING?

MR. OBSTLER: YEAH. IT SAID THERE WAS NO RELATIONSHIP BETWEEN THE STATEMENT THAT IS RESTRICTED IN ANY ADVERTISING OR STATEMENT ABOUT THE QUALITY OF THE VIDEO. THAT WAS PLED IN THE COMPLAINT.

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

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

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

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

I'M SORRY, I LEARNED THAT RECENTLY. THIS CASE HAS BEEN

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EVOLVING. WE HAVEN'T GOTTEN A SINGLE LICK OF DISCOVERY ON THIS TO DATE, YOUR HONOR.

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

MR. OBSTLER: FAIR ENOUGH.

THE COURT: THAT'S WHY WE'RE AT THE PLEADING STAGE.

MR. OBSTLER: YEAH.

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

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

THAT'S A FACTUAL STATEMENT.

MR. OBSTLER: CORRECT, YOUR HONOR.

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

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

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

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

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

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

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

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

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

MR. OBSTLER: AT THIS POINT WE'RE LIMITING UNDER FALSE ADVERTISING.

THE COURT: OKAY.

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

THE COURT: OKAY.

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

I UNDERSTAND THE LIMITS OF A LANHAM ACT CLAIM AS OPPOSED TO AN ANTITRUST OR A UCL CLAIM, AND I RESPECT THAT. I UNDERSTAND THE ISSUE HERE IS COMMERCIAL ADVERTISING. I

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

BUT THE QUESTION IS, YOUR HONOR, DON'T YOU ASK YOURSELF WHY WHEN YOU SEE THAT? ISN'T IT REASONABLE TO SUGGEST THAT PEOPLE ARE SAYING WHY?

AND FURTHERMORE, IF THE VIDEO ISN'T CONTAINING THAT MATERIAL, WHY IS IT BEING RESTRICTED? THAT IN AND OF ITSELF IS A FALSE STATEMENT. IT MAY NOT BE FALSE ADVERTISING.

THE COURT: I UNDERSTAND YOUR THESIS FOR THE LANHAM ACT CLAIM.

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

MR. OBSTLER: YES, YOUR HONOR. THIS IS PROBABLY THE MOST IMPORTANT ISSUE IN THIS CASE, ABSOLUTELY THE MOST IMPORTANT ISSUE IN THIS CASE AND ONE OF THE MOST IMPORTANT ISSUES FOR THE INTERNET.

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

THERE IS NOTHING IN THE LANGUAGE OF (C)(1) OR (C)(2) THAT PERMITS THIS TYPE OF BEHAVIOR. NOTHING. IT SAYS MATERIAL, IT

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DOESN'T SAY PEOPLE.

OUR ALLEGATION IN THIS CASE IS THEY'RE FILTERING PEOPLE. THEY'RE NOT FILTERING -- SO GOING TO (C)(1), LET ME MAKE ONE POINT BEFORE WE GET INTO THE STATUTORY CONSTRUCTION OF THE WHOLE THING.

ON (C)(1), THE REASON THAT, THAT PRAGER II, JUDGE WALSH DISMISSED THE CLAIM WAS THAT HE SAID THAT THERE WAS NO ALLEGATION THAT GOOGLE ADDED ANYTHING TO THE CONTENT.

WE HAVE THAT ALLEGATION IN THIS CASE.

THE COURT: I'M SORRY, NO ALLEGATION THAT GOOGLE ADDED ANYTHING --

MR. OBSTLER: ANYTHING TO MY CLIENT'S CONTENT. HE'S SAYING UNDER (C)(1), UNDER ROOMMATES, IF YOU'RE INVOLVED IN ANY ASPECT OF WHAT THE CONTENT IS THAT IS BEING CENSORED, RIGHT, THEN YOU DON'T GET IMMUNITY. EVERYBODY AGREES IN ROOMMATES. IN FACT, GOOGLE --

THE COURT: ARE YOU REFERRING TO YOUR ALLEGATION THAT GOOGLE OR YOUTUBE IS ADDING METADATA TO YOUR CLIENT'S CONTENT.

MR. OBSTLER: YES. YES.

THE COURT: AND THAT IS WHAT YOU'RE SAYING IS THE ADDITION OF CONTENT AS WITH PUBLISHING OR MAKING DECISIONS ABOUT PUBLISHING?

MR. OBSTLER: YES, BECAUSE THE METADATA IS WHAT THE ALGORITHM IS USING TO MAKE THE DECISION.

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THE COURT: DOES A PUBLISHER NOT GET TO EDIT?

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

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

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

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

AND IS THAT AMONG THE FUNCTIONS A PUBLISHER IS ALLOWED TO CONDUCT IN ITS ROLE AS A PUBLISHER AND THAT IS IMMUNIZED UNDER (C)(1)?

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

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11:07AM THE POINT THAT THERE ARE CERTAIN KINDS OF CAUSES OF ACTION THAT
11:07AM TAKE CONDUCT OUTSIDE OF THE SCOPE OF 230(C)(1), IS THAT -- IF I
11:08AM WERE TO CONSTRUE YOUR CLAIM THIS WAY, AND THERE'S A DEBATE
11:08AM ABOUT WHETHER IT'S APPROPRIATE TO CONSTRUE IT THIS WAY GIVEN
11:08AM THE FACTS THAT ARE ALLEGED IN YOUR COMPLAINT, THAT THERE WAS
11:08AM INTENTIONAL DISCRIMINATION BASED ON IDENTITY AS OPPOSED TO
11:08AM CONTENT, WHAT IS YOUR BEST CASE FOR SAYING THAT 230(C)(1) DOES
11:08AM NOT ENCOMPASS THAT?
11:08AM MR. OBSTLER: THE QUESTION IS DOES 230(C)(1)
11:08AM IMMUNIZE THEM AS TO THE SPECIFIC CAUSES OF ACTION IN THE CASE;
11:08AM RIGHT?
11:08AM THE COURT: YES. YES. SO THE UNRAH ACT IS THE ONLY
11:08AM ONE THAT I THINK GIVES YOU A LEG TO STAND ON.
11:08AM MR. OBSTLER: WHAT ABOUT BREACH OF CONTRACT,
11:08AM YOUR HONOR?
11:08AM THE COURT: I'M SORRY?
11:08AM MR. OBSTLER: WHAT ABOUT BREACH OF CONTRACT?
11:08AM THE COURT: SO YOU DON'T HAVE BREACH OF CONTRACT.
11:08AM YOU HAVE BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR
11:08AM DEALING, WHICH THAT'S A HARD ONE IN ANY CIRCUMSTANCE,
11:08AM ESPECIALLY GIVEN THE ALLEGED CONTRACT TERMS THAT YOU CITE
11:08AM SAYING THAT THERE WAS A BREACH OF THE IMPLIED COVENANT IS
11:09AM REALLY DIFFICULT JUST ON A 12(B)(6) BASIS.
11:09AM SO YOU DON'T HAVE A BREACH OF CONTRACT CLAIM.
11:09AM MR. OBSTLER: WELL, YOUR HONOR, WOULD YOU GIVE ME

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11:09AM LEAVE TO AMEND AND ADD IT?

THE COURT: WELL, BEFORE WE GET TO THAT, I'M JUST REALLY VERY INTERESTED IN THIS QUESTION.

MR. OBSTLER: I AM, TOO, YOUR HONOR. LET ME TAKE ANOTHER SHOT AT IT, PLEASE, IF I COULD.

THE COURT: SO WHAT IS THE BEST CASE THAT YOU HAVE?

MR. OBSTLER: OKAY. NUMBER ONE, THERE IS NO (C)(1) COVERAGE HERE BECAUSE THEY'RE ADDING OUR CONTENT, SO JUST ON THE FACE OF THE STATUTE.

NUMBER TWO, CAN CONGRESS ENACT A LAW THAT IMMUNIZES PUBLISHERS FROM RACE DISCRIMINATION IN THE ACT OF PUBLISHING? IS THAT LAW CONSTITUTIONAL?

I WOULD SAY THAT UNDER DENVER AREA IT IS NOT. THAT'S MY ARGUMENT.

THE COURT: YOUR RESPONSE TO THE COURT'S QUESTION WOULD BE IF (C)(1) DOES ALLOW IT, IT HAS TO BE UNCONSTITUTIONAL?

MR. OBSTLER: THAT'S CORRECT.

THE COURT: IT DOES IMMUNIZE THAT KIND OF -- LET'S CALL IT INTENTIONAL DISCRIMINATION BASED ON SOME PROTECTED CHARACTERISTIC, THAT KIND OF STATUTE HAS TO BE UNCONSTITUTIONAL?

MR. OBSTLER: YES, YOUR HONOR.

THE COURT: WHY?

MR. OBSTLER: BECAUSE UNDER DENVER AREA THE COURT

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

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

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

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

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

WHAT DID THE COURT SAY? THREE THINGS.

GOT TO BE VIEWPOINT NEUTRAL. NOT VIEWPOINT NEUTRAL IN

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THIS CASE.

GOT TO BE NARROWLY TAILORED SO THERE'S NO RISK OF AN IMPROPER VETO.

AND MOST IMPORTANTLY, IT CANNOT INTERFERE WITH PREEXISTING LEGAL RELATIONSHIPS.

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

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

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

MR. OBSTLER: WELL, I WANTED TO TALK ABOUT THE EXECUTIVE ORDER.

THE COURT: OH, YES.

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

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PRIVATE PARTIES TO REGULATE OFFENSIVE MATERIAL ON THE INTERNET.

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

IT PROVIDES PROTECTION FROM LIABILITY. THAT'S WHAT IT IS. IT'S NOT A MANDATE TO REGULATE IN ANY WAY, SHAPE OR FORM.

MR. OBSTLER: I AGREE WITH YOU.

THE COURT: I THINK IT'S AN IMPORTANT DISTINCTION.

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

I COMPLETELY AGREE WITH THE DISTINCTION THAT YOUR HONOR IS MAKING, AND I THINK THAT'S SQUARE WITH DENVER ON THE SECTION 10(C) CLAIM.

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

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

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THE GOVERNMENT'S POSITION REALLY IS.

THE COURT: ALL RIGHT.

MR. OBSTLER: THEY FILED THIS BRIEF, RIGHT, AND THEY SAY IT CAN APPLY TO THE VIEWPOINT, IT'S CONSTITUTIONAL, IT CAN APPLY TO A VIEWPOINT, IT CAN APPLY TO DISCRIMINATION.

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

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

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

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

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RAISED IN THE GOVERNMENT'S MEMORANDUM ON THE CONSTITUTIONALITY QUESTION.

MR. SUR.

MR. SUR: THANK YOU VERY MUCH.

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

MUCH OF THE DISCUSSION TODAY WAS ABOUT THE POTENTIAL NUANCES OF THE STATUTE AND, RECENTLY OR NOT, TAKING A POSITION ON THAT.

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

POINT TWO SIMPLY ARGUES THAT IF THE COURT DOES REACH THE CONSTITUTIONAL QUESTION, THAT THERE REALLY IS NO PRECEDENT THAT WOULD SUPPORT HOLDING THE STATUTE TO BE UNCONSTITUTIONAL, PRINCIPALLY FOR THE REASONS THAT HAVE ALREADY BEEN DISCUSSED ON THAT.

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

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DENVER AREA, JUDGE KOH DID REJECT RELIANCE ON IT IN THE UNPUBLISHED OPINION THAT THEN WENT UP TO THE NINTH CIRCUIT AND SO I DO NOTE THAT.

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

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

HAVING MADE THOSE POINTS, LET ME THEN TURN VERY BRIEFLY TO THE EXECUTIVE ORDER.

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

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

SECTION 8, LETTER C SAYS THAT THE ORDER IS NOT INTENDED TO AND DOES NOT CREATE ANY RIGHT OR BENEFIT, SUBSTANTIVE OR

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

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

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

I THINK A SIMILAR CONCLUSION IS APPROPRIATE HERE THAT AT MOST THE EXECUTIVE ORDER INDICATES THAT THERE MAY BE IMPORTANT POLICY ISSUES SOMEWHERE IN THE GENERAL REALM OF SECTION 230, BUT THAT THOSE ARE NOT BEFORE THE COURT IN ASSESSING THE CONSTITUTIONALITY OF THE STATUTE.

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REALLY WITH THAT I WILL CONCLUDE, UNLESS THE COURT HAS ANY FURTHER QUESTION.

THE COURT: THANK YOU VERY MUCH, MR. SUR. THAT WAS VERY HELPFUL. I APPRECIATE IT.

MR. SUR: THANK YOU.

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

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

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

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

SO JUSTICE BREYER'S OPINION DOESN'T BY ITS OWN TERMS SAY

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

ONE, THESE CHANNELS WERE HEAVILY REGULATED AND THE COURT AND JUSTICE BREYER'S OPINION NOTED AND RELIED ON.

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

SO IT COMPLETELY CHANGED THE BACKGROUND LEGAL PRINCIPLES WITH RESPECT TO THE RIGHT OF THE CABLE COMPANIES TO ENGAGE IN CONTENT RESTRICTION.

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

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

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

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

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

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

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

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THE OPERATOR: THE RECORDING HAS STOPPED.

MR. WILLEN: EXCUSE ME. CITING DENVER AREA, AND THIS IS A QUOTE FOR THE PROPOSITION THAT THE FREE SPEECH DOES NOT PROHIBIT PRIOR ABRIDGEMENT OF SPEECH.

SO THE SUPREME COURT HAS SPOKEN TO THIS. TO THE EXTENT THAT DENVER AREA HAS ANY SIGNIFICANCE, IT'S SIMPLY LIMITED TO ITS UNIQUE FACTS AND DOESN'T APPLY HERE. SO THAT IS DENVER AREA.

THE OTHER COUPLE THINGS I WOULD WANT TO SAY IN RESPONSE TO MR. OBSTLER, WE DIDN'T GET A CHANCE TO TALK ABOUT SECTION 230(C)(2)(D). WE SPENT MOST OF OUR TIME TALKING ABOUT SECTION 230(C)(1).

AS WE ARGUED, SECTION 230(C)(2)(B) IS SORT OF A SEPARATE IMMUNITY THAT CLEARLY APPLIES, AS WE KNOW FROM THE PRAGER DECISION, WITH RESPECT TO ANY CLAIM ARISING FROM RESTRICTED MODE. AND I THINK FOR THE REASONS SET OUT IN JUDGE DAVILA'S RECENT OPINION IN ASURVIO VERSUS MALWAREBYTES CASE, THE ALLEGATIONS HERE THAT THERE IS SOME SORT OF COMPETITIVE RELATIONSHIP JUST AREN'T ENOUGH TO GET PLAINTIFFS OUTSIDE OF SECTION 230(C)(2)(B), SO THE COURT HAS ANOTHER PATH AT LEAST WITH RESPECT TO A LOT OF THE CLAIMS HERE.

AND THEN I GUESS THE ONLY OTHER POINT I WOULD MAKE IS THAT MR. OBSTLER WAS, TELLINGLY, NOT ABLE TO CITE ANY CASE THAT HELPED HIM ON THE PROPOSITION THAT SECTION 230(C)(1) WOULDN'T APPLY TO A CLAIM UNDER THE UNRAH ACTS UNDER THE CIRCUMSTANCES

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

THE OPERATOR: THIS MEETING IS BEING RECORDED.

MR. WILLEN: -- I THINK IS VERY TELLING.

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

THE COURT: THANK YOU, MR. WILLEN.

MS. WHITE.

MS. WHITE: THANK YOU.

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

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

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

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

SO UNLESS YOUR HONOR HAS ANY FURTHER QUESTIONS ABOUT THE LANHAM ACT, I'LL JUST CONCLUDE BY ADDRESSING THE QUESTIONS ABOUT THE UNRAH ACT CLAIM.

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

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

THE COURT: OKAY. SO LET'S PAUSE THERE. THAT WAS

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

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

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

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

DOES THIS PLATFORM QUALIFY FOR -- IN THAT CONTEXT UNDER THE LANGUAGE OF THE STATUTE?

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

I THINK THERE IS SOME AMBIGUITY IN PLAINTIFFS' CLAIMS ABOUT EXACTLY WHAT -- WHO IS BEING DISCRIMINATED AGAINST AND ON WHAT BASIS THAT THEY REFER TO MAINLY LGBTQ IDENTITIES. THEY ALSO REFER TO VIEWPOINTS.

I THINK WHILE THE UNRAH ACT IS INTENDED TO BE CONSTRUED

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

THE COURT: ALL RIGHT. THANK YOU.

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

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

FIRST OF ALL, ON DENVER AREA, IT WAS A SIX TO THREE DECISION ON THE 10(C) PART OF THE OPINION AND PLEASE READ THE OPINION.

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

THE OPERATOR: THE RECORDING HAS STOPPED.

MR. OBSTLER: ON THE UNRAH ACT ISSUE --

THE OPERATOR: THIS MEETING IS BEING RECORDED.

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

WE HAVE ALLEGED THAT WE HAD A CLIENT WHO, OR WE WILL

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ALLEGE IF YOU TAKE THE DECLARATION, WHO WENT TO A MEETING ON 2017 AND WAS TOLD TO HER FACE FOUR TIMES THAT THE ALGORITHM IS --

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

I THINK I AM -- I HAVE THE COMPLAINT, AND I'M GOING TO RELY ON THE COMPLAINT. THE PARTIES BRIEFED THAT ISSUE EXTENSIVELY.

I'M REALLY TRYING TO SORT OUT THE LEGAL ISSUES HERE.

SO IS THERE SOMETHING FURTHER ON WHAT THE UNRAH ACT REQUIRES OR NOT, THAT IS WHAT I'M LOOKING FOR. IF THERE'S NOTHING ELSE, YOU DON'T HAVE TO HAVE ANYTHING.

MR. OBSTLER: THERE IS ONE OTHER THING.

THE COURT: OKAY.

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

THERE DOESN'T HAVE TO BE A WRITTEN POLICY UNDER THE UNRAH ACT. I DON'T THINK ANYBODY WOULD HAVE SUCH A POLICY. OKAY.

THE COURT: ALL RIGHT. THANK YOU ALL VERY MUCH. I APPRECIATE ALL OF THE PRESENTATIONS AND THE EXTENSIVE BRIEFING.

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

MR. WILLEN: THANK YOU, YOUR HONOR.

MR. OBSTLER: THANK YOU, YOUR HONOR. WE APPRECIATE YOUR TIME.

(ZOOM COURT CONCLUDED AT 11:33 A.M.

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CERTIFICATE OF REPORTER

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

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

Irene Rodriguez

IRENE RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

DATED: JUNE 4, 2020

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

KIMBERLY CARLESTE NEWMAN, LISA CABRERA, CATHERINE JONES, and DENOTRA NICOLE LEWIS,

Plaintiffs,

v.

GOOGLE LLC, YOUTUBE, LLC, ALPHABET INC., and DOES 1-10, inclusive,

Defendants.

CASE NO.: 5:20-cv-04011-LHK

JOINT STIPULATED REQUEST TO CHANGE TIME REGARDING RESPONSE TO COMPLAINT AND SUBSEQUENT BRIEFING

Document ID: 0.7.2270.7339-000002

Plaintiffs Kimberly Carleste Newman, Lisa Cabrera, Catherine Jones, and Denotra Nicole Lewis ("Plaintiffs") and Defendants Google LLC, YouTube, LLC, and Alphabet Inc. ("Defendants") (collectively, "the Parties"), by and through their respective counsel of record, hereby stipulate as follows:

WHEREAS, Plaintiffs filed this action on June 16, 2020;

WHEREAS, Defendants received the Summons and Complaint by mail on June 22, 2020 and, according to the docket, have until July 13, 2020 to answer or otherwise respond to Plaintiffs' Complaint (*see* Dkt. 8);

WHEREAS, the Court has set an Initial Case Management Conference for this case for September 9, 2020 at 2 p.m. (*see* Dkt. 12);

WHEREAS, on July 1, 2020, Plaintiffs informed Defendants that Plaintiffs intend to seek leave of Court to file an Amended Complaint to add new parties and allegations;

WHEREAS, Plaintiffs have agreed that they will file an Amended Complaint, if any, by August 17, 2020;

WHEREAS, the Parties have agreed to meet and confer on or before August 24, 2020, regarding a briefing schedule for Defendants' anticipated motion to dismiss, any motions by Plaintiffs, and the extent to which the proceedings in this case, including the individual and class wide allegations of race discrimination under contract allegedly in violation of 42 U.S.C. § 1981, are susceptible to coordination with respect to future proceedings in this Court, as well as the U.S. Court of Appeals in Ninth Circuit, with the claims and allegations of LGBTQ+ discrimination alleged in *Divino Group LLC v. Google LLC*, No. 5:19-cv-04749-VKD (N.D. Cal.), pending before the Hon. Virginia K. DeMarchi;

WHEREAS, the Parties have agreed to file a subsequent stipulation and proposed scheduling order on or before August 28, 2020;

WHEREAS, the Parties have sought no previous extensions of time in this case;

WHEREAS, this joint request is being made in the interests of judicial economy and in good faith, is not for the purpose of delay, and will not prejudice any party;

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NOW, THEREFORE, based on the above stipulation, pursuant to Civil Local Rules 6-2 and 7-12, and with Defendants and Plaintiffs reserving all rights and defenses, the Parties respectfully ask the Court to enter the attached proposed order, which provides that:

1. Defendants' deadline to answer or otherwise respond to Plaintiffs' Complaint shall be held in abeyance pending Plaintiffs' anticipated filing of their Amended Complaint;

2. The Parties shall meet and confer on or before August 24, 2020 regarding a briefing schedule for Defendants' anticipated motion to dismiss and any motions by Plaintiffs, and coordination of the proceedings in this case with those in *Divino*; and

3. The Parties shall file a subsequent stipulation and proposed scheduling order on or before August 28, 2020.

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Dated: July 9, 2020

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: */s/ Lauren Gallo White*
LAUREN GALLO WHITE

Attorneys for Defendants
GOOGLE LLC, YOUTUBE, LLC, and
ALPHABET INC.

Dated: July 9, 2020

Respectfully submitted,

BROWNE GEORGE ROSS LLP

By: */s/ Peter Obstler*
PETER OBSTLER

Attorneys for Plaintiffs
KIMBERLY CARLESTE NEWMAN, et al.

ATTORNEY ATTESTATION

I, Lauren Gallo White, am the ECF User whose ID and password are being used to file this document. In compliance with N.D. Cal. Civil L.R. 5-1(i)(3), I hereby attest that concurrence in the filing of this document has been obtained from each of the other Signatories.

By: */s/ Lauren Gallo White*
Lauren Gallo White

Document ID: 0.7.2270.7339-000002

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

KIMBERLY CARLESTE NEWMAN, LISA CABRERA, CATHERINE JONES, and DENOTRA NICOLE LEWIS,

Plaintiffs,

v.

GOOGLE LLC, YOUTUBE, LLC, ALPHABET INC., and DOES 1-10, inclusive,

Defendants.

CASE NO.: 5:20-cv-04011-LHK

DECLARATION OF LAUREN GALLO WHITE IN SUPPORT OF JOINT STIPULATED REQUEST TO CHANGE TIME REGARDING RESPONSE TO COMPLAINT AND SUBSEQUENT BRIEFING

Document ID: 0.7.2270.7339-000002

I, Lauren Gallo White, declare as follows:

1. I am an attorney at Wilson Sonsini Goodrich & Rosati, attorneys for Defendants Google LLC, YouTube, LLC, and Alphabet Inc. ("Defendants") in this case. I make this Declaration in support of Plaintiffs Kimberly Carleste Newman, Lisa Cabrera, Catherine Jones, and Denotra Nicole Lewis ("Plaintiffs") and Defendants (collectively, "the Parties")' Joint Stipulated Request to Change Time Regarding Response to Complaint and Subsequent Briefing. I have personal knowledge of the facts set forth in this Declaration. If called as a witness, I could and would testify competently to the matters set forth herein.

2. Plaintiffs filed this action on June 16, 2020. Defendants received the Summons and Complaint by mail on June 22, 2020 and, according to the docket, have until July 13, 2020 to answer or otherwise respond to Plaintiffs' Complaint (*see* Dkt. 8).

3. The Court set an Initial Case Management Conference for this case for September 9, 2020 at 2 p.m. (*see* Dkt. 12).

4. On July 1, 2020, I conferred with counsel for Plaintiffs by telephone to explain that Defendants intend to move to dismiss the Complaint and to request an extension of time to file the anticipated motion. Plaintiffs' counsel informed me that Plaintiffs intend to file an Amended Complaint to add new parties and allegations.

5. During this telephone call, counsel for the Parties agreed that Defendants' deadline to respond to the Complaint should be held in abeyance.

6. In the course of our subsequent email correspondence, between July 6, 2020 and July 8, 2020, counsel for the Parties further agreed that:

a. Plaintiffs will file an Amended Complaint, if any, by August 17, 2020;

b. The Parties will meet and confer on or before August 24, 2020 regarding a briefing schedule for Defendants' anticipated motion to dismiss and any motions by Plaintiffs, and coordination of the proceedings in this case with those in *Divino Group LLC v. Google LLC*, No. 5:19-cv-04749-VKD (N.D. Cal.); and

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c. The Parties will file a subsequent stipulation and proposed scheduling order on or before August 28, 2020.

7. The Parties believe that holding in abeyance the deadline for Defendants' response to the Complaint will serve the interest of judicial economy and will preserve the resources of the Parties and this Court.

8. The Parties have sought no previous extensions of time in this case.

9. The requested time modification will have no effect on the schedule for this case.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of July 2020, in San Francisco, California.

/s/ Lauren Gallo White
Lauren Gallo White

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

KIMBERLY CARLESTE NEWMAN, LISA CABRERA, CATHERINE JONES, and DENOTRA NICOLE LEWIS,

Plaintiffs,

v.

GOOGLE LLC, YOUTUBE, LLC, ALPHABET INC., and DOES 1-10, inclusive,

Defendants.

CASE NO.: 5:20-cv-04011-LHK

[PROPOSED] ORDER GRANTING JOINT STIPULATED REQUEST TO CHANGE TIME REGARDING RESPONSE TO COMPLAINT AND SUBSEQUENT BRIEFING

Document ID: 0.7.2270.7339-000002

Having considered the Joint Stipulated Request to Change Time Regarding Response to Complaint and Subsequent Briefing, and all papers on file, and good cause appearing therefore, IT IS HEREBY ORDERED that the Joint Stipulated Request to Change Time Regarding Response to Complaint and Subsequent Briefing is GRANTED. The Court orders as follows:

1. Defendants' deadline to answer or otherwise respond to Plaintiffs' Complaint shall be held in abeyance pending Plaintiffs' anticipated filing of their Amended Complaint;

2. The Parties shall meet and confer on or before August 24, 2020 regarding a briefing schedule for Defendants' anticipated motion to dismiss and any motions by Plaintiffs, and coordination of the proceedings in this case with those in *Divino Group LLC v. Google LLC*, No. 5:19-cv-04749-VKD (N.D. Cal.); and

3. The Parties shall file a subsequent stipulation and proposed scheduling order on or before August 28, 2020.

IT IS SO ORDERED.

Dated: _____

_____
Honorable Lucy H. Koh
United States District Court Judge

Document ID: 0.7.2270.7339-000002

(b) (6) **(OLA)**

From: (b) (6) (OLA)
Sent: Tuesday, July 14, 2020 5:23 PM
To: Willard, Lauren (OAG)
Subject: RE: Omb draft
Attachments: RE: Passback: Section 230 Legislative Proposal.eml

I honestly ended up sending it moments ago, I apologize. I got OLA sign-off and then I reviewed (I just made tiny spacing edits here and there for consistency), and plan to call OMB tomorrow morning to follow-up. I've attached what I shared. Please let me know if you need anything else!

-----Original Message-----
From: Willard, Lauren (OAG) (b) (6) >
Sent: Tuesday, July 14, 2020 5:18 PM
T (b) (6) (OLA) (b) (6) >
Subject: Omb draft

(b) (6) , sorry to ping again, but did this ho out? Do you mind forwarding the transmittal?

What to give heads up to some colleagues once it goes out.

Sent from my iPhone

Document ID: 0.7.2270.6791

(b) (6) **(OLA)**

From: (b) (6) (OLA)
Sent: Tuesday, July 14, 2020 5:15 PM
To: Bronack, Candice M. EOP/OMB
Subject: RE: Passback: Section 230 Legislative Proposal
Attachments: (1) Section 230 OLA Cover Letter (DELIBERATIVE) passback DOJ response.docx; (2) Section 230 Redline (DELIBERATIVE) passback_DOJ response.docx; (3) Section 230 Section by Section (DELIBERATIVE) passback_DOJ response.docx; (4) Further Explanation re DOJ's Position on Willful Blindness and Terrorism Provisions.docx

Hello Candice!

Thanks for handling all of the feedback on our Section 230 proposal. We have reviewed the comments and provide a thorough response in the documents attached. Attached here are 4 documents:

(1) Updated cover letter
(2) Updated redline
(3) Updated section-by-section analysis
(4) Additional context/explanation for two provisions (willful blindness and terrorism). We are not seeking clearance on this document, we are simply providing it for context to help reviewers.

That said, it does look like we may ultimately have some fundamental disagreements that will need to be worked out. In those cases, we wanted to let you know that we'd be available to have a call (or calls) to discuss towards the end of the week, once the other reviewers had time to take a look.

I was also curious what the time frame looks like to get these materials back? We are hoping to submit this before the August recess.

As always, if you have questions or need anything from me, please just shout.

Thank you!!
(b) (6)

From: Bronack, Candice M. EOP/OM (b) (6) >
Sent: Tuesday, June 30, 2020 4:28 PM
T (b) (6) (OLA) (b) (6) >
Subject: Passback: Section 230 Legislative Proposal

Attached is a passback on the legislative package to amend the CDA with comments from Commerce, DHS, Education, ODNI, FCC, DPC, OSTP, NEC, NSC, and OMB Counsel. (I did follow up with USTR and they had no comments). Please let me know how DOJ responds to the passback. Thanks.

From (b) (6) (OLA) (b) (6) >
Sent: Friday, June 26, 2020 9:16 AM
To: Bronack, Candice M. EOP/OM (b) (6) >
Subject: RE: Section 230 Legislative Proposal

Hello Candice,

Document ID: 0.7.2270.6791-000001

I know this week has been quite hectic, but I wanted to check in and see if you had passback on this available for us? If not, any idea when we could anticipate it? Our leadership has been inquiring, so I just want to keep them up to speed.

Thank you!
(b) (6)

From (b) (6) (OLA)
Sent: Friday, June 19, 2020 10:00 AM
To: Bronack, Candice M. EOP/OMB
Subject: RE: Section 230 Legislative Proposal

That's helpful. This has a lot of interest from the AG's office, so if anything abnormal pops up, please feel free to shout. I just want to make sure I'm keeping them in the loop. Thanks for your help with this!

From: Bronack, Candice M. EOP/OM (b) (6) >
Sent: Friday, June 19, 2020 9:49 AM
T (b) (6) (OLA) (b) (6) >
Subject: Re: Section 230 Legislative Proposal

It did go out on Wednesday. It went to all the cabinet agencies, FCC, White House, and OMB offices. Please let me know if you have any other questions.

> On Jun 19, 2020, at 9:39 AM (b) (6) (OLA) (b) (6) > wrote:
>
> Hello Candice,
>
> Just wanted to confirm that the package went out on Wednesday? And, is it possible for you to share who you circulated it to?
>
> Thank you!
> (b) (6)

(b) (6)
Office of Legislative Affairs
(b) (6)
(b) (6) (o)
(b) (6) (c)

> On Jun 17, 2020, at 12:19 PM, Bronack, Candice M. EOP/OM (b) (6) > wrote:
>
> > Will, thanks.
> >
> > ---
> >
> > **From** (b) (6) (OLA) (b) (6) >
> > **Sent:** Wednesday, June 17, 2020 12:17 PM

To: Damis, Rody EOP/OM (b) (6) >
Cc: Bronack, Candice M. EOP/OM (b) (6) >
Subject: RE: Section 230 Legislative Proposal

That's helpful to know, thank you! Candice, please feel free to reach out if you need anything from me.

From: Damis, Rody EOP/OM (b) (6) >
Sent: Wednesday, June 17, 2020 11:55 AM
T (b) (6) (OLA) (b) (6) >
Cc: Bronack, Candice M. EOP/OM (b) (6) >
Subject: RE: Section 230 Legislative Proposal

Thank (b) (6) . This draft bill actually falls under a portfolio currently being covered by my colleague Candice Bronack.

As such, Candice will handle its clearance and plans to send it out to the interagency today.

From (b) (6) (OLA) (b) (6) >
Sent: Tuesday, June 16, 2020 8:20 PM
To: Damis, Rody EOP/OM (b) (6) >
Subject: Section 230 Legislative Proposal
Importance: High

Duplicative Information - See Document ID 0.7.2270.7321

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Thursday, July 16, 2020 10:51 AM
To:	Toensing, Brady (OLP)
Cc:	Freeman, Lindsey (OLP)
Subject:	RE: Sec. 230 Briefing Paper
Attachments:	Section 230 Q&A.docx; Big Tech TPs.docx; Section 230 Talking Points_DRAFT 6.23.docx

Brady,

Here is a few prior work product on Section 230/tech that you can hopefully pull from for the OLA project. I think we only need the top 3-4 likely Q&As. (You can ignore the antitrust parts of these docs).

Thanks so much for your help!

From: Toensing, Brady (OLP) (b) (6) >
Sent: Thursday, July 16, 2020 10:11 AM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Freeman, Lindsey (OLP) (b) (6) >
Subject: RE: Sec. 230 Briefing Paper

Yes. I am here. And happy to help. May I call you?

* * * * * * * * * * * * * * * * * * * *

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

From: Willard, Lauren (OAG) (b) (6) >
Sent: Thursday, July 16, 2020 9:44 AM
To: Toensing, Brady (OLP) (b) (6) >
Cc: Freeman, Lindsey (OLP) (b) (6) >
Subject: Re: Sec. 230 Briefing Paper

Hey Brady,

Thanks for checking in! Are you back in the office today? Didn't want to bother you on drive, but would love help from OLP in updating the 230 briefing papers if you have time!

On Jul 16, 2020, at 9:42 AM, Toensing, Brady (OLP) (b) (6) > wrote:

> Hi, Lauren. Can we help you with responding to this? 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: Wednesday, July 15, 2020 10:12 AM
T (b) (6) (OLA) (b) (6)>
Cc: Barnett, Gary (OAG) (b) (6)>; Toensing, Brady (OLP) (b) (6)>; Freeman, Lindsey (OLP) (b) (6)>; Grieco, Christopher (ODAG) (b) (6)>; Pandya, Brian (OASG) (b) (6)>
Subject: RE: Sec. 230 Briefing Paper

Got it, thanks!

From (b) (6) (OLA) (b) (6)>
Sent: Wednesday, July 15, 2020 10:11 AM
To: Willard, Lauren (OAG) (b) (6)>
Cc: Barnett, Gary (OAG) (b) (6)>; Toensing, Brady (OLP) (b) (6)>; Freeman, Lindsey (OLP) (b) (6)>; Grieco, Christopher (ODAG) (b) (6)>; Pandya, Brian (OASG) (b) (6)>
Subject: RE: Sec. 230 Briefing Paper

This will go straight into the AG's briefing book on Monday. ODAG does not need to "clear", so we should just include all the appropriate parties on the front-end.

From: Willard, Lauren (OAG) (b) (6)>
Sent: Wednesday, July 15, 2020 10:05 AM
T (b) (6) (OLA) (b) (6)>
Cc: Barnett, Gary (OAG) (b) (6)>; Toensing, Brady (OLP) (b) (6)>; Freeman, Lindsey (OLP) (b) (6)>; Grieco, Christopher (ODAG) (b) (6)>; Pandya, Brian (OASG) (b) (6)>
Subject: RE: Sec. 230 Briefing Paper

Thank (b) (6). Adding some more Section 230 folks to this chain. Does the paper go up through ODAG and OAG before the AG? Just want to make sure I'm chiming in at the right time, but also recognize that Section 230 is unique as not housed in a particular component.

I'll defer to OLA to update the legislative landscape per below, but we can work on TPs on the status of the draft legislation as well as implementing the Executive Order on Online Censorship. Of course, welcome OLA's expertise on the kind of questions the AG is likely to get on both.

Best,
Lauren

From (b) (6) (OLA) (b) (6)>

Sent: Wednesday, July 15, 2020 10:01 AM
To: Willard, Lauren (OAG) (b) (6) >
Subject: RE: Sec. 230 Briefing Paper

I need to return it by Friday. So if you could have your edits returned to tomorrow that would be great. Thanks!

From: Willard, Lauren (OAG) (b) (6) >
Sent: Wednesday, July 15, 2020 9:53 AM
T (b) (6) (OLA) (b) (6) >
Subject: RE: Sec. 230 Briefing Paper

Thanks! What's the timing and process?

From (b) (6) (OLA) (b) (6) >
Sent: Wednesday, July 15, 2020 9:48 AM
To: Willard, Lauren (OAG) (b) (6) >
Subject: RE: Sec. 230 Briefing Paper

Yes, it was just passed back to me yesterday with a request to address the following question in the Sec. 230 context:

(b) (5)

Could you take a first pass at the attached adding a bullet on the above and whatever you think should be added on DOJ's proposal? I will add In a bullet or two on current legislation (i.e., EARN IT) that comports with the lack of a cleared position on any pending bills and is consistent with our message on 230 reform.

Thanks!

From: Willard, Lauren (OAG) (b) (6) >
Sent: Wednesday, July 15, 2020 9:36 AM
T (b) (6) (OLA) (b) (6) >
Cc: Freeman, Lindsey (OLP) (b) (6) >; Toensing, Brady (OLP) (b) (6) >
Subject: RE: Sec. 230 Briefing Paper

(b) (6)

I wanted to follow up to see if you had what you need on the Section 230 briefing paper so far. Do you know when that is being sent up to OAG? I can take a final pass to make sure we catch any late-breaking developments. As you know, we just sent the draft back to OMB last night. So hopefully we will have something ready to go to the Hill in the next week or so.

Best,
Lauren

From: Toensing, Brady (OLP) (b) (6) >
Sent: Monday, July 6, 2020 12:19 PM

Document ID: 0.7.2270.6258

To: Willard, Lauren (OAG) (b) (6) (b) (6) (OLA) (b) (6) >
Cc: Freeman, Lindsey (OLP) (b) (6) >
Subject: RE: Sec. 230 Briefing Paper

He (b) (6) – Per Lauren's email, Lindsey and I are happy to update to reflect the release of the DOJ Key Takeaways and the EO, and whatever else you need. If you are working on it already, feel free to pass along with any gaps you want us to address. Just let us know. Also, please let us know of any deadlines for our input. 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: Monday, July 6, 2020 9:43 AM
T (b) (6) (OLA) (b) (6) >
Cc: Freeman, Lindsey (OLP) (b) (6) >; Toensing, Brady (OLP) (b) (6) >
Subject: RE: Sec. 230 Briefing Paper

Thank (b) (6) Defer to OLA on updating the background sections to reference the recent Hill activity on Section 230 – Schatz/Thune, EARN IT, etc. Also welcome OLA's thoughts on what the AG can say publicly on any of the proposals if asked (b) (5))

This should also be updated to reflect the release of the DOJ Key Takeaways and recent Executive Order. Looping in Brady and Lindsay from OLP in case you all need help updating on the substantive parts of the DOJ reforms, and welcome their perspective on responses. I can also take a pass through later today or tomorrow as needed.

Best,
Lauren

From (b) (6) (OLA) (b) (6) >
Sent: Monday, July 6, 2020 9:37 AM
To: Willard, Lauren (OAG) (b) (6) >
Subject: Sec. 230 Briefing Paper

Hi Lauren,

OLA Is updating the briefing papers for the AG's 7/28 HJC hearing. Any updates that need to be made

to the attached?

(b) (6)

Antitrust Q&A

- **Q** (b) (5) [redacted]
  - (b) (5) [redacted]
  - (b) (5) [redacted]
  - (b) (5) [redacted]
- **Q** (b) (5) [redacted]
  - (b) (5) [redacted]
  - (b) (5) [redacted]
  - (b) (5) [redacted]
- **Q** (b) (5) [redacted]
  - (b) (5) [redacted]

Document ID: 0.7.2270.6258-000001

- (b) (5) [redacted]
- (b) (5) [redacted]
- (b) (5) [redacted]

- **Q** (b) (5) [redacted]
  - (b) (5) [redacted]
  - (b) (5) [redacted]
  - (b) (5) [redacted]

- **Q** (b) (5) [redacted]
  - (b) (5) [redacted]

Document ID: 0.7.2270.6258-000001

Section 230 Q&A

- **Q** (b) (5) [redacted]
  - (b) (5) [redacted]
  - (b) (5) [redacted]
- **Q** (b) (5) [redacted]
  - (b) (5) [redacted]
  - (b) (5) [redacted]
  - (b) (5) [redacted]

Document ID: 0.7.2270.6258-000001

(b) (5)

- **Q** (b) (5)
  - (b) (5)
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- **Q** (b) (5)
  - (b) (5)
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- **Q** (b) (5)
  - (b) (5)

Document ID: 0.7.2270.6258-000001

(b) (5) [redacted]

- (b) (5) [redacted]
- (b) (5) [redacted]
- (b) (5) [redacted]
- (b) (5) [redacted]
- (b) (5) [redacted]
- (b) (5) [redacted]

Document ID: 0.7.2270.6258-000001

(b) (5)

- **Q** (b) (5)
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Document ID: 0.7.2270.6258-000001

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Document ID: 0.7.2270.6258-000001

- (b) (5)

- **Q** (b) (5)
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  - (b) (5)

Document ID: 0.7.2270.6258-000001

Big Tech Points

1. Antitrust

a. (b) (5) [redacted]

b. (b) (5) [redacted]

c. (b) (5) [redacted]

2. Lawful Access

a. (b) (5) [redacted]

b. (b) (5) [redacted]

c. (b) (5) [redacted]

3. Section 230

a. The Department of Justice recently issued a set of recommendations to update the outdated immunity for online platforms under Section 230 of the Communications Decency Act. Department conducted 10-month review of statute and proposed reforms, held large public workshop, and numerous listening sessions with experts and industry.

b. Section 230 enacted 25 years ago. Online platforms evolved significantly from simple bulletin boards to actively curated forums, and have become titans of industry. Technological change has come with the courts' expansive interpretation of Section 230 immunity, stretching it well beyond the statute's original purpose to protect and encourage "Good Samaritan" behavior.

c. Time is ripe for reform. We recommend reshaping incentives for online platforms under Section 230 in two important respects.

   i. First, we need to platforms to be better about addressing egregious *criminal* content on their platforms (child sex abuse, terrorism, drug trafficking, etc.).

   ii. Second, platforms should be more transparent and accountable when taking down *lawful* speech.

Document ID: 0.7.2270.6258-000002

Eileen Carey

From:	Eileen Carey
Sent:	Thursday, July 16, 2020 1:28 PM
To:	Willard, Lauren (OAG)
Cc:	Gretchen Peters
Subject:	Re: connecting you - ACCO drugs expert

Hi Lauren,

Wonderful - I can be free next week for a call whenever is best for you and your team. I'm based in DC and my schedule is very flexible.

The moment the DOJ published the 'Key Takeaways & Recommendations" report and website I poured through all the details. It brought such relief to see such an impressive scope & analysis of the systems. For the first time, I'm hopeful there is the leadership, energy and compassion for victims needed to fight the enormous scale of open illicit drug sales on the Internet.

Thank you so much for moving this important issue forward! Excited to dive in and connect.

Best,

Eileen

On Thu, Jul 16, 2020 at 10:57 AM Willard, Lauren (OA) (b) (6) > wrote:

> Thanks so much Gretchen for introducing us, and thanks Eileen for your offer to connect on these important issues!
>
> Would you be free to have a preliminary call early next week? I can pull together a few other colleagues as well.
>
> As you may have seen already, the DOJ issued our Key Takeaways & Recommendations on Section 230 last month (https://www.justice.gov/file/1286331/download). We are continuing to work on Section 230 reform as one of several ways to incentivize online platforms to be more responsible in addressing unlawful content and activities on their services, including the sale of illicit drugs. Your perspectives in this space would be very helpful.
>
> Best,
>
> Lauren
>
> **From:** Eileen Carey (b) (6) >
> **Sent:** Wednesday, July 15, 2020 8:09 PM
> **To:** Gretchen Peters (b) (6) >

Cc: Willard, Lauren (OA) (b) (6) >
Subject: Re: connecting you - ACCO drugs expert

Thanks so much Gretchen!

Hi Lauren,

Deeply appreciate the work you are doing with the DOJ. Have been working on the problem of drug trafficking on social media for seven years, in the private sector in cyber security and now in DC with organizations like ACCO to stop the flow of fentanyl sales to US consumers. I'm very flexible so whenever is good to connect, please let me know and can provide whatever data, research or technical support might be useful for understanding the digital market. Happy to help however I can. Thank you!

I' (b) (6) as well.

Best,

Eileen

On Wed, Jul 15, 2020 at 7:02 PM Gretchen Peters (b) (6) > wrote:

> Hi Lauren,
>
> We had our monthly call today with our ACCO experts and I mentioned that I would start connecting folks to your team. I wanted to first connect you to Eileen, who is doing amazing research into drugs on social media, and tracking reality vs. what firms are saying, w a ocus on Instagram.
>
> She used to work in Silicon Valley and has a super interesting insider perspective.
>
> I know you will enjoy connecting,.
>
> Gretchen

--

Gretchen S. Peters | Executive Director
Email (b) (6)
Twitter: @gretchenspeters
Website: www.CINTOC.org
Website: www.counteringcrime.org

--

Document ID: 0.7.2270.6406

(b) (6) **(OLA)**

From: (b) (6) (OLA)
Sent: Friday, July 17, 2020 8:44 AM
To: Motta, Thomas G. (DO) (FBI)
Cc: (b) (6) (OLA); Lloyd, Matt (PAO (b)(6), (b)(7)(C), (b)(7)(E) per FBI (DO) (FBI); (b)(6), (b)(7)(C), (b)(7)(E) per FBI (DO) (OGA) (FBI); Downing, Richard (CR (b) (6) (OLA); Newman, Ryan D. (OAG); Hankey, Mary Blanche (OLA (b)(6), (b)(7)(C), (b)(7)(E) per FBI (OGC) (FBI (b) (6) (DO) (FBI (b) (6) (OLA); OLA Master Calendar; Braese, Molly (CRM); Freeman, Lindsey (OLP); Pollak, Jeffrey (CRM); Williams, Douglas A. Jr. (DO) (FBI); Hale, Brian Patrick (DO) (FBI); Willard, Lauren (OAG); Hodge, Jennifer (CRM); Kjergaard, Alison (OPA (b)(6), (b)(7)(C), (b)(7)(E) per FBI (OGC) (FBI); Raimondi, Marc (OPA (b)(6) per NSD (NSD); Grocki, Steve (CRM); Ciobanu, Ileana (OLP (b) (6) (OLA (b)(6), (b)(7)(C), (b)(7)(E) per FBI (OGC) (FBI (b)(6), (b)(7)(C), (b)(7)(E); (b)(6), (b)(7)(C), (b)(7)(E) per FBI (OGC) (OGA) (FBI (b)(6), (b)(7)(C), (b)(7)(E) per FBI (DO) (FBI (b)(6), (b)(7)(C), (b)(7)(E) per FBI (ITB) (FBI); Gelber, Alexandra (CRM); Wiegmann, Brad (NSD); McNally, Joseph (OLP); Jones, Darrin E. (ITID) (FBI (b)(6), (b)(7)(C), (b)(7)(E) per FBI (WF) (FBI); Cronin, Matthew J. (USAEO); Shults, Anthony M. (OLP (b)(6) per NSD (NSD); Harris, Stacie B. (ODAG); Goldfoot, Josh (CRM); Raman, Sujit (ODAG (b)(6), (b)(7)(C), (b)(7)(E) per FBI (DO) (FBI); Kueter, Dean (OLA); Sabol, Sherry E. (OGC) (FBI); Antell, Kira M. (OLA); McNally, Joseph (USACAC); Smith, David L. (USAEO)
Subject: Re: Lawful Access - House Judiciary Hearing Upcoming

Thank you, Greg:

I believe the hearing you are referencing is below. Witnesses have not yet been announced. As I learn more, I will let you know. It would be helpful t (b) (5) . Could folk (b) (5) ? Thank yo (b) (6) .

Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google

Subcommittee on Antitrust, Commercial, and Administrative Law

Date: Monday, July 27, 2020 - 12:00pm

Location: 2141 RHOB

Tags: *Antitrust, Commercial, and Administrative Law*

On Jul 17, 2020, at 8:00 AM, Motta, Thomas G. (DO) (FBI) (b)(6), (b)(7)(C), (b)(7)(E) per FBI> wrote:

Document ID: 0.7.2270.7526

DO WE HAVE INSIGHT INTO THIS HEARING? ITS HARD TO BELIEVE THAT E2EE OR SECTION 230 WONT COME UP. HAVE W (b) (5) ?

SHOULDN'T WE?

FIRST IN MT: TOP REPUBLICAN TAKES ISSUE WITH ANTITRUST HEARING SETUP — The House Judiciary Committee's proposed framework for its blockbuster hearing with the CEOs of Amazon, Apple, Google and Facebook runs afoul of the chamber's rules, Ranking Member Jim Jordan (R-Ohio) wrote in new a letter to Chair Jerry Nadler (D-N.Y.). It marks the latest sign of friction over the session between Judiciary leaders and Jordan, who has jabbed Democrats for excluding some committee members by holding it at the subcommittee level.

— Timing is everything: According to Jordan, Antitrust Subcommittee Chair David Cicilline (D-R.I.) is planning to "allow more time for Member questions" by granting lawmakers double the usual five minutes and later also recognizing "a single Democrat and Republican Member for a period of extended questioning of up to thirty minutes." The remarks provide a peek into the behind-the-scenes negotiations over the format for the hearing, which hasn't been announced. But Jordan took issue with the plan, saying lawmakers should instead stick to the usual five minutes per member to allow the full committee to partake in the session.

A Judiciary spokesperson declined to comment on the Jordan letter

Thos. Gregory Motta, Esq.
Senior Level Science & Technology Policy Advisor
Operational Technology Division
FEDERAL BUREAU OF INVESTIGATION
(b)(7)(E) per FBI
Quantico, VA 22135
Te (b)(7)(E) per FBI

Document ID: 0.7.2270.7526

Willard, Lauren (OAG)

From: Willard, Lauren (OAG) (b) (6) >
Sent: Friday, July 17, 2020 2:29 PM
To: (b) (6) (OLA)
Cc: Toensing, Brady (OLP); Freeman, Lindsey (OLP)
Subject: FW: Sec. 230 Briefing Paper
Attachments: Section 230 Talking Points Cong Test 07.16.2020.docx

(b) (6)

Attached are edits on the Section 230 materials from OLP. I haven't had a chance to review yet, but wanted to see if OLA had updates on the legislative side. And if you all have thoughts on format and structure. I assume we should also address the separate issues of the tech review and antitrust.

I'm dealing with a crisis for the next hour or so, but hopefully can turn back after and work on this over the weekend as needed to.

Best,
Lauren

From: Toensing, Brady (OLP) (b) (6) >
Sent: Friday, July 17, 2020 12:45 PM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Freeman, Lindsey (OLP) (b) (6) >
Subject: RE: Sec. 230 Briefing Paper

Hey, Lauren. Here you go. I distilled out the points and questions from the other documents you sent me and added in a section on Executive Order 13925. I put in a request for OLA to respond to the legislative questions, per your suggestion. Please let me know if you have any questions or need anything else. If we were not on the silly Eastern Daylight Time, it would be arriving before noon, as promised. Best, bt

* * * * * * * * * * * * * * * * * * *

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: Thursday, July 16, 2020 6:21 PM
To: Toensing, Brady (OLP) (b) (6) >
Cc: Freeman, Lindsey (OLP) (b) (6) >
Subject: Re: Sec. 230 Briefing Paper

That works, thanks!

Document ID: 0.7.2270.6125

On Jul 16, 2020, at 6:03 PM, Toensing, Brady (OLP) (b) (6) > wrote:

Hey, Lauren. Do you mind if I get this to you tomorrow (b-4 noon)?

* * * * * * * * * * * * * * * * * * *

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: Thursday, July 16, 2020 11:29 AM
To: Willard, Lauren (OAG) (b) (6) >
Cc: Freeman, Lindsey (OLP) (b) (6) >
Subject: RE: Sec. 230 Briefing Paper

Thanks, Lauren.

* * * * * * * * * * * * * * * * * * *

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: Thursday, July 16, 2020 10:51 AM
To: Toensing, Brady (OLP) (b) (6) >
Cc: Freeman, Lindsey (OLP) (b) (6) >
Subject: RE: Sec. 230 Briefing Paper

Duplicative Information - See Document ID 0.7.2270.6258

Section 230 Talking Points

Section 230 and pubic rollout of DOJ Key Takeaways.

- Section 230 of the Communications Decency Act was enacted almost 25 years ago, when online platforms were in their infancy. Section 230 sought to ensure that websites acting in "good faith" to take down content harmful to children would not be considered "publishers" for *all* other third-party content on their services.
- Over time, however, online platforms evolved significantly from simple bulletin boards to actively curated forums. Several have transformed into the nation's largest and most powerful companies, serving as primary conduits for how we receive and share information.
- Responding to widespread and bipartisan concerns about Section 230, the Department took a close look at the statute over the past year. This review has involved other federal agencies and every component within the Department. It also included a large public workshop and numerous listening sessions with experts and industry, and victims' rights advocates.
- The Department of Justice recently issued a set of recommendations to update the outdated Section 230 immunity. We have identified a set of concrete reforms to provide stronger incentives for online platforms to address illicit material on their services while continuing to foster innovation and free speech
- We recommend reshaping incentives for online platforms under Section 230 in two important respects.
    - First**,** we need platforms to be better about addressing egregious criminal content on their platforms (such as child sex abuse, terrorism, and drug trafficking).
    - Second, platforms should be more transparent and accountable when taking down *lawful* speech.

Document ID: 0.7.2270.6125-000001

- These are consistent objectives. The Constitution treats criminal content and lawful speech differently, so too should platforms.

- When it comes to issues of public safety and consumer protection, the government must act on behalf of society at large. Law enforcement cannot delegate its obligations to protect the safety of its citizens to the judgment of profit-seeking private firms. We must shape incentives for companies to create a safer environment, which is what Section 230 was originally intended to do.

***

- The courts' expansive interpretation of Section 230 immunity became unmoored from the statutory language from the start and has been stretched well beyond the statute's original purpose, which was to protect and encourage "Good Samaritan" behavior.

- Technological change has exacerbated the problems that came with the judiciary's misinterpretation of the law. This combination of misinterpretation and technological change has left online platforms both immune for a wide array of harms caused by third-party content and free to moderate lawful speech with little transparency or accountability.

- To return Section 230 immunity to its original purpose – to encourage and reward the "Good Samaritan"– the Department identified several scenarios in which platforms are not "Good Samaritans" and therefore should not be entitled to invoke the immunity

    - For example, Section 230's "Good Samaritan" immunity should *not* extend to platforms that purposefully solicit, promote, or facilitate criminal activity on their services or that fail to take down federal criminal content once they become aware of it.

    - Nor should Section 230's "Good Samaritan" immunity extend to the removal of lawful speech by platforms acting in bad faith or inconsistent with their own terms of service.

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- We also identified types of claims that are clearly outside the core objective of Section 230 to protect against defamation and speech torts. These proposed carve-outs include civil claims for child sex abuse, terrorism, cyberstalking, and antitrust.

- The need for reform is important now more than ever as citizens rely on the internet for daily activities. At the same time, criminals and wrongdoers are increasingly turning to the internet to engage in illicit schemes. It is therefore imperative that we maintain the internet as both an open and safe space for our society, especially our children who are more reliant than ever on the internet for social interactions and education.

Executive Order 13925, Preventing Online Censorship, May 28, 2020

- The purpose of the EO is to foster free and open debate on the internet by, among other things, clarifying the scope of immunity under 47 U.S.C. § 230 to make it consistent with the original purpose of the law.

- The Department was given five tasks under the EO. The Department was to –
    - First, consult with the National Telecommunications and Information Administration (NTIA), during the NTIA's preparation of a petition for rulemaking to be filed within 60 days with the Federal Communications Commission. Sec. 2(b).
    - Second, as with all other federal agencies, review its federal spending on advertising and marketing paid to online platforms and report its findings to OMB within 30 days. Sec. 3(a).
    - Third, review any viewpoint-based speech restrictions imposed by any of the platforms used by federal agencies for advertising and assess whether any of those platforms "are problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices." Sec. 3(c).
    - Fourth, form a working group to examine the potential enforcement of state statutes that prohibit platforms from engaging in unfair or deceptive acts or practices and develop model legislation for consideration by states that do not have adequate protection against such acts or practices. Sec. 5.

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- Fifth, develop a federal legislative proposal aimed at promoting the policy objectives of the EO. Sec. 6.

- **EO Tasking Status:**

  - **FCC petition.** The NTIA worked in consultation with the Department and filed its petition for regulations to the FCC on _____. That petition advocates for regulations consistent with the EO, which seeks to clarify ambiguities within the law that have been misinterpreted by the courts. Sec. 2(b). The petition seeks –
    - regulations to clarify when providers that restrict access to content for reasons outside of those set forth in subparagraph (c)(2)(A) lose the immunity protections provided under (c)(1).
    - clarification for when decisions to take down material are done in bad faith and outside the protections of subparagraph (c)(2)(A) – for example if restrictions are done deceptively, pretextually, or inconsistent with a provider's terms of service.
  - **Review of federal spending.** The Department reviewed its federal spending on advertising and marketing paid to online platforms and reported its findings to OMB on _____. Sec. 3(a).
  - **Review of speech restrictions.** The Department is in the process of assessing whether any of the platforms used by federal agencies for advertising "are problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices." Sec. 3(c). [WHO IS DOING THIS? THE WORKING GROUP?]
  - **Working group on state law.** The Department has formed a working group to examine the potential enforcement of state statutes that prohibit platforms from engaging in unfair or deceptive acts or practices. The working group is also developing model legislation for states that do not have adequate protection against such acts or practices. Sec. 5.

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- **Federal legislative proposal.** The Department has developed a federal legislative proposal aimed at promoting the policy objectives of the EO and has submitted that legislation for interagency review, which it expects to be completed by _____. Sec. 6.

Legislative Proposals

- [We defer to OLA on updating the background sections to reference the recent Hill activity on Section 230 – Schatz/Thune, EARN IT (including Leahy Amendment), etc. Also welcome OLA's thoughts on what the AG can say publicly on any of the proposals if asked
(b) (5) [redacted]

Section 230 Q&A

- **Q** (b) (5) [redacted]
  - (b) (5) [redacted]
  - (b) (5) [redacted]
- **Q** (b) (5) [redacted]

Document ID: 0.7.2270.6125-000001

- (b) (5) [redacted]
- (b) (5) [redacted]
- (b) (5) [redacted]

- **Q** (b) (5) [redacted]
  - (b) (5) [redacted]
  - (b) (5) [redacted]

- **Q** (b) (5) [redacted]
  - (b) (5) [redacted]
  - (b) (5) [redacted]

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- (b) (5)

- **Q** (b) (5)

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Document ID: 0.7.2270.6125-000001

(b) (5)
[redacted]

- **Q** (b) (5)
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  - (b) (5)
[redacted]
  - (b) (5)
[redacted]

Document ID: 0.7.2270.6125-000001

Moran, John (OAG)

From:	Moran, John (OAG)
Sent:	Friday, July 17, 2020 3:44 PM
To:	Staff Secretary
Cc:	Levi, William (OAG); Lyons, Derek S. EOP/WHO
Subject:	RE: Close Hold Review: Draft Press Statement re Online Censorship Task Force
Attachments:	Task Force Press Release 2020.07.17 203 pm - DOJ Edits.docx

Staff Sec:

Will asked that I pass along the attached edits on this draft statement.

Also, if there is any additional information you are able to share about the planned composition of the Task Force and the thinking behind adding it as an additional step beyond the EO and Working Group, that would be helpful. We want to make sure we execute this as smoothly as possible with all of the existing work in this area.

John

Begin forwarded message:

> **From:** Staff Secretary (b) (6) >
> **Date:** July 17, 2020 at 2:08:01 PM EDT
> **To:** "Levi, William (OAG)" (b) (6) >
> **Cc:** "Lyons, Derek S. EOP/WHO" (b) (6) >
> **Subject: Close Hold Review: Draft Press Statement re Online Censorship Task Force**
>
> Will,
>
> Attached for your review is a **close-hold** draft press statement announcing POTUS's formation of an Online Censorship Task Force.
>
> Derek and the Chief of Staff have been working on this and would like to put a press release out today.
>
> Let us know if you have any thoughts or concerns.
>
> Thank you,
>
> **Alison M. Cheperdak**
> Assistant Staff Secretary
> Office of the Staff Secretary
> (b) (6)

Document ID: 0.7.2270.5122

Statement from the Press Secretary Regarding the President's Online Censorship Task Force

(b) (5) [redacted]

(b) (5) [redacted]

(b) (5) [redacted]

(b) (5) [redacted]

(b) (5)

Document ID: 0.7.2270.5122-000001

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Monday, July 20, 2020 10:05 AM
To:	Newman, Ryan D. (OAG); Raman, Sujit (ODAG)
Subject:	FW: Leahy Amendment TPs for AG
Attachments:	2020.07 EARN IT Act - Amendment Background and Talkers FINAL.docx

FYI, the document that OLA sent Cotton staff has clear references to DOJ. For example, on page 5 we reference the "Department of Justice is greatly concerned." Wanted to flag in case either of you think worth raising to OLA. But hopefully Meg will keep close hold.

From (b) (6) (OLA) (b) (6) >
Sent: Monday, July 20, 2020 9:58 AM
To: Willard, Lauren (OAG) (b) (6) >; Antell, Kira M. (OLA) (b) (6) >; Shults, Anthony M. (OLP) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Freeman, Lindsey (OLP) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) (b) (6) (OLA) (b) (6) >
Cc: Boyd, Stephen E. (OLA) (b) (6) >; Newman, Ryan D. (OAG) (b) (6) >
Subject: RE: Leahy Amendment TPs for AG

Yes, the TPs have been sent to Cotton's staff (attached).

From: Willard, Lauren (OAG) (b) (6) >
Sent: Monday, July 20, 2020 9:31 AM
To: Antell, Kira M. (OLA) (b) (6) (b) (6) (OLA) (b) (6) >; Shults, Anthony M. (OLP) (b) (6) >; Toensing, Brady (OLP) (b) (6) >; Freeman, Lindsey (OLP) (b) (6) >; Raman, Sujit (ODAG) (b) (6) >; Hankey, Mary Blanche (OLA) (b) (6) (b) (6) (OLA) (b) (6) >
Cc: Boyd, Stephen E. (OLA) (b) (6) >; Newman, Ryan D. (OAG) (b) (6) >
Subject: Leahy Amendment TPs for AG

Deliberative

Hi folks,

The AG may have an opportunity to speak with Senator Graham tomorrow on other matters, and Ryan Newman and I thought it would be useful to put together a short one pager on the EARN IT/Leahy Act amendment issues in case the AG wanted to raise directly to the Senator.

OLP – Can we rework our existing TPs into a high-level one-pager for the AG? (Can be pretty simple)

OLA – Welcome thoughts on how best to pitch to Graham as well.

Kira/Ryan U. - have we sent the Leahy background/TPs to Cotton staff yet? If not, can we circulate what you all would propose to send and try to get that over today now that Senate is back in session?

Many thanks!

Document ID: 0.7.2270.6725

Lauren

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

Document ID: 0.7.2270.6725

Background & Talking Points on the Leahy Amendment to the EARN IT Act

The EARN IT Act Generally

1. The Original Purpose of the EARN IT Act

A bipartisan pair of senators—Senators Graham and Blumenthal—introduced the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act (the EARN IT Act) on March 5, 2020. The bill was cosponsored by Senators Feinstein, Hawley, Cramer, Jones, Ernst, Casey, Whitehouse, Kennedy, Cruz, Grassley, and Durbin.

The EARN IT Act as originally conceived was motivated by the rampant online circulation of child sexual abuse material (CSAM) and the increasing inability or unwillingness of providers to monitor their platforms for such material. The bill's press release specifically highlighted a series of articles in the New York Times "describing the rapid increase of child sexual abuse material on prominent online platforms," which "has not received a consistent and forceful response from the tech industry."[1] The release also noted that "[r]eports of suspected child sexual abuse material to the [National Center for Missing & Exploited Children (NCMEC)] CyberTipline have exploded since its inception. For example, over the past five years, reports increased from 1.1 million in 2014 to 16.9 million covering 69.1 million photos, videos, and files in 2019."[2]

The EARN IT Act is primarily focused on Section 230 of the Communications Decency Act, 47 U.S.C. § 230, which provides that internet and technology platforms—including social media companies—are immune from any civil action and from state criminal action for any activity related to third-party content on their platforms or services. The original EARN IT Act recognized that Section 230 provides immunity in such a blanket manner as to allow the tech industry to effectively escape liability for ignoring child safety, despite the fact that online platforms allow the transmission of images and videos—including by children themselves—on a near limitless scale.

The press release for the Act stressed specifically that because of Section 230's "significant immunity from civil liability, as well as state criminal liability for third party content," "many companies do not aggressively go after online child sexual exploitation."[3] As originally conceived, the EARN IT Act would have "encourage[d] the tech industry to take online child sexual exploitation seriously" by "creat[ing] incentives for companies to 'earn' liability protection for violations of laws related to online child sexual abuse material (CSAM)."[4] As described below, however, amendments to the bill ultimately removed the obligations on providers for "earning" liability protection under Section 230.

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1 Press Release, "Graham, Blumenthal, Hawley, Feinstein Introduce EARN IT Act to Encourage Tech Industry to Take Online Child Sexual Exploitation Seriously," U.S. SENATE COMM. ON THE JUDICIARY (Mar. 5, 2020) [SJC Press Release], available at: https://www.judiciary.senate.gov/press/rep/releases/graham-blumenthal-hawley-feinstein-introduce-earn-it-act-to-encourage-tech-industry-to-take-online-child-sexual-exploitation-seriously.

2 *Id.*

3 *Id.*

4 *Id.*

Document ID: 0.7.2270.6725-000001

The EARN IT Act's cosponsors issued strong statements on the need for tech companies to do better in addressing CSAM on their platforms:

- Chairman Graham: "[T]his bill [will] ensure tech companies are using best business practices to prevent child exploitation online. . . . Our goal is to do this in a balanced way that doesn't overly inhibit innovation, but forcibly deals with child exploitation."
- Sen. Blumenthal: "The internet is infested with stomach-churning images of children who have been brutally assaulted and exploited . . . . Simply put, tech companies need to do better. Tech companies have an extraordinary special safeguard against legal liability, but that unique protection comes with a responsibility. Companies that fail to comport with basic standards that protect children from exploitation have betrayed the public trust granted them by this special exemption. Online platforms' near complete immunity from legal responsibility is a privilege – they have to earn it – and that's what our bipartisan bill requires."
- Sen. Hawley: "First Big Tech said it needed special immunity from human trafficking laws. Now it says it needs immunity from laws against child pornography. Enough. It's time to stop putting the financial interests of Big Tech above protecting kids from predators."
- Sen. Feinstein: "Companies must do more to combat this growing problem on their online platforms. Our bill would allow individuals to sue tech companies that don't take proper steps to prevent online child exploitation, and it's an important step to protect the most vulnerable among us."[5]

2. Key Provisions of the EARN IT Act

Under its current structure, the EARN IT Act would establish a National Commission on Online Child Sexual Exploitation Prevention to recommend "best practices" for providers related to identifying and reporting online child sexual exploitation. The Commission would consist of the heads of the Department of Justice, the Department of Homeland Security, and the Federal Trade Commission, along with 16 other members appointed equally by Congressional leadership, including representatives from law enforcement, survivors and victims' services organizations, constitutional law experts, technical experts, and industry.[6]

The Manager's Amendment uncoupled the Commission's best practices from Section 230 immunity. As revised, the EARN IT Act simply removes all civil and state criminal immunity for conduct related to the advertising, distribution, receipt, and possession of CSAM.[7] Thus, while the Commission

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5 *Id.*

6 As initially drafted, the EARN IT Act would have: required review and approval of the Commission-developed best practices by the Attorney General, the Secretary of Homeland Security, the Chairman of the Federal Trade Commission, and Congress; created safe harbors for liability from CSAM laws for companies that certify compliance with the best practices or that establish they have other reasonable practices in place to prevent child sexual exploitation on their platform; and bolstered enforcement of CSAM statutes and allowed child abuse survivors civil recourse if companies choose not to comply with the best practices or establish similar reasonable practices.

7 While the Department supports legislation that removes all immunity protections for conduct related to CSAM, we note that the language of the currently bill refers only to 18 U.S.C. §§ 2252 and 2252A, which addresses the "advertisement, promotion, presentation, distribution, or solicitation" of CSAM. This omits production or

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structure remains in place, no explicit penalty (or benefit) attaches to compliance with the Commission's recommended best practices; following the best practices would be completely within the discretion of regulated companies.[8]

3. The Impetus for the Manager's Amendment

Initial drafts of the EARN IT Act were criticized by the tech community because of a perceived threat to companies that utilize end-to-end or "warrant-proof" forms of encryption on their platforms, services, or devices. For example, the Electronic Frontier Foundation claimed that, "[a]lthough the bill doesn't use the word 'encryption' in its text, it gives government officials like Attorney General William Barr the power to compel online service providers to break encryption or be exposed to potentially crushing legal liability."[9] Similarly, the Associate Director of Surveillance and Cybersecurity at the Stanford Center for Internet and Society labeled the bill as a "sneaky way" to ban encryption. [10]

The central premise of this criticism was that the "best practices" recommended by the Commission could include banning encryption. Under this view, companies would have to choose to abandon encryption in order to preserve their immunity under Section 230, or to maintain encryption and be subject to potential civil and state criminal actions.

This concern was addressed, however, by the Manager's Amendment, which, as described above, uncouples the Commission's best practices from Section 230 immunity. Thus, while the EARN IT Act never directly addressed encryption at any stage, the Act as revised by the Manager's Amendment does not even raise the possibility that prohibiting end-to-end encryption will be a requirement for earning immunity from liability under Section 230.

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livestreaming, which is the most serious form of CSAM conduct. We provided technical edits to Congress to address this.

8 The best practices, which require approval by a 14-vote super-majority of the Commissioners, no longer require review and approval by DOJ, DHS, FTC, or Congress. Instead, the Commission-recommended best practices would be submitted to the Attorney General, who is then given the ministerial task of publishing the practices in the federal register, at which point companies "may choose" to follow them or not.

9 The Electronic Frontier Foundation, The EARN IT Act Violates the Constitution, Mar. 31, 2020, available at: https://www.eff.org/deeplinks/2020/03/earn-it-act-violates-constitution.

10 Stanford Law School Center for Internet and Society, The EARN IT Act: How to Ban End-to-End Encryption Without Actually Banning It, Jan. 30, 2020, available at: https://cyberlaw.stanford.edu/blog/2020/01/earn-it-act-how-ban-end-end-encryption-without-actually-banning-it.

Document ID: 0.7.2270.6725-000001

The Leahy Amendment Generally

1. **Background**: On July 2, 2020, the Senate Judiciary Committee advanced the EARN IT Act out of committee by a vote of 22-0 following the adoption of an amendment from Senator Leahy (the Leahy Amendment) by voice vote.

2. **Purpose of the Leahy Amendment**: "To exclude encryption from the increased liability for providers of interactive computer services."

3. **Text of Leahy Amendment**: "On page 16, line 3, strike the quotation marks and the second period and insert the following:

   '(7) CYBERSECURITY PROTECTIONS DO NOT GIVE RISE TO LIABILITY.—Notwithstanding paragraph (6), a provider of an interactive computer service shall not be deemed to be in violation of section 2252 or 2252A of title 18, United States Code, for the purposes of subparagraph (A) of such paragraph (6), and shall not otherwise be subject to any charge in a criminal prosecution under State law under subparagraph (B) of such paragraph (6), or any claim in a civil action under State law under subparagraph (C) of such paragraph (6), because the provider—

   (A) utilizes full end-to-end encrypted messaging services, device encryption, or other encryption services;

   (B) does not possess the information necessary to decrypt a communication; or

   (C) fails to take an action that would otherwise undermine the ability of the provider to offer full end-to-end encrypted messaging services, device encryption, or other encryption services."[11]

4. **Background on Timing and Inclusion of the Leahy Amendment**

The Leahy Amendment was introduced the morning of the EARN IT Act markup on July 2. The Department was not asked for views or technical assistance on the Amendment and had no notice of its introduction prior to the markup hearing. In introducing the Amendment, Senator Leahy stated that he "strongly believe[s] that if the committee wanted to change the rules on encryption, we should do that in a separate bill and we should do it explicitly. My amendment simply preserves this distinction."[12] Subsequent comments by Chairman Graham and other members of the committee express support for this distinction: the EARN IT Act is intended to address Section 230 immunity with respect to CSAM and is not intended as a vehicle to address encryption. Senator Blumenthal, an original cosponsor of the EARN IT Act, expressed his view that cybersecurity protections like end-to-end encryption are fully compatible with efforts to eliminate child sexual abuse online, and made reference to WhatsApp's supposed removal of 250,000 accounts per month for transmitting child sexual exploitation-related content. The Leahy Amendment was adopted by voice vote.

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11 https://www.judiciary.senate.gov/imo/media/doc/Leahy%20Amendment%20to%20S.%203398%20-%20OLL20683.pdf

12 Executive Business Meeting, U.S. SENATE COMM. ON THE JUDICIARY (July 2, 2020), https://www.judiciary.senate.gov/meetings/07/02/2020/executive-business-meeting.

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5. Impact of the Leahy Amendment

The Department of Justice is greatly concerned that the Leahy Amendment may place CSAM victims in a worse position than they would be in if no legislation were passed. Under current law, the Department can prosecute an internet or tech platform for any violation of federal law, whether or not the use of encryption technology is involved. Given ambiguities in the Amendment's language, and the history of courts giving a substantially broad interpretation to Section 230 immunity generally, the Leahy Amendment may be interpreted to constrain the ability of the Department to prosecute platforms for CSAM offenses if those platforms utilize encryption. The Leahy Amendment thus could leave the Department with *fewer* tools to address online CSAM activity, which is contrary to everything the legislation is meant to accomplish.[13]

Beyond that, whatever the intent of the Leahy Amendment, the Department has grave concerns that it will incentivize companies to adopt end-to-end encryption on their platforms, which will make it easier for child sex offenders to exploit children online and more difficult for providers to screen for CSAM and for law enforcement to identify, investigate, and prosecute this abhorrent conduct. The Leahy Amendment is subject to the interpretation that encryption could be a "get out of jail" card that protects providers from any type of liability for CSAM conduct, whether in federal or state court or in a criminal or civil action. Again, this is completely contrary to the entire purpose of the legislation, which is to provide greater tools and incentives to stop online child sexual exploitation.

13 The Leahy Amendment states that "a provider of an interactive computer service shall not be deemed to be in violation of section 2252 or 2252A of title 18, United States Code, for the purposes of subparagraph (A) of such paragraph (6) [of the EARN IT Act]." Under the EARN IT Act, paragraph (6)(A) permits civil suits under 18 U.S.C. § 2255 against providers for CSAM activity prohibited by 18 U.S.C. §§ 2252 and 2252A. Thus, the cross-reference in the Leahy Amendment to paragraph (6)(A) may be intended only to bar federal *civil* suits if the provider uses encryption. However, the oblique language, and the specific phrasing "shall not be deemed to be in violation of Section 2252 or 2252A of title 18," could support an interpretation that the statute prohibits federal *criminal* cases against providers that utilize encryption.

Document ID: 0.7.2270.6725-000001

Talking Points – The Leahy Amendment Language Must Be Removed from the Bill

1. **The Leahy Amendment will incentivize tech companies to close their eyes when it comes to child exploitation on their platforms and services, transforming a bill intended to protect children into legislation that leaves them more vulnerable to abuse.**

   - The Department has consistently warned of the devastating impact that "warrant-proof" encryption has on the ability of providers and law enforcement to identify and address CSAM, often by specifically referencing the example of Facebook's plans to adopt end-to-end encryption.
     - In 2018, Facebook made 16.8 million reports of suspected abuse to the CyberTipline operated by the National Center for Missing and Exploited Children (NCMEC). This accounted for more than 90% of the 18.4 million total reports that year.
     - NCMEC estimates, however, that if Facebook goes forward with its plan to implement end-to-end encryption across its platforms, including in Facebook Messenger, Facebook's reporting would decrease by at least 70%. That translates to almost 12 *million* lost reports concerning online child sexual exploitation.
   - We also have a general understanding of how much actionable information related to CSAM is already lost due to end-to-end encryption. In the same year that Facebook sent in almost 17 million CyberTips, Apple, which already employs encryption on its platforms, sent a grand total of 205 tips to NCMEC. Amazon sent in eight.
   - The Leahy Amendment has a two-fold impact. First, under the Amendment, only providers who *do not* offer encrypted products or services could be subject to liability for child exploitation offenses. Second, providers that eschew encryption and maintain their ability to detect CSAM would be potentially subject to liability for child exploitation offenses and therefore would be at a competitive disadvantage.
   - The Leahy Amendment would make the problem of online child exploitation substantially *worse* by strongly incentivizing providers to adopt end-to-end encryption technology or offer encrypted products that would effectively blind them to child abuse on their platforms. Their reward for such self-blinding would be ensured immunity. This means that more children will be exploited online, with little hope of being identified or rescued.

2. **Rather than calibrate Section 230 immunity based on bipartisan concerns about the (lack of) incentives for online providers to address illicit material on their services, the Leahy Amendment would extend immunity beyond Section 230 and could create an incoherence in federal criminal law enforcement.**

   - The EARN IT Act was motivated by the recognition that providers are not doing enough to address the rampant abuse of children on their online platforms. The bill tries to address this by ensuring that providers can be held accountable by survivors of child abuse and by state criminal justice systems. Such exposure would cause providers to consider in a meaningful way the risks their products pose to children, and whether they are deploying adequate measures to address those dangers.

Document ID: 0.7.2270.6725-000001

- The Leahy Amendment undercuts this goal by allowing companies to avoid liability by deploying the one tool—warrant-proof encryption—that clearly facilitates the online circulation of CSAM and that hinders law enforcement in its effort to stop these crimes.

- Because of its imprecise language (i.e., "a provider of an interactive computer service shall not be deemed to be in violation of section 2252 or 2252A of title 18, United States Code" for "utiliz[ing] full end-to-end encrypted messaging services, device encryption, or other encryption services"), the Amendment also potentially protects companies that utilize end-to-end encryption from federal *criminal* liability concerning the sexual exploitation of minors under 18 U.S.C. §§ 2252 and 2252A.

- While the Amendment's drafters may not have intended to implicate federal prosecutions, ambiguities in the language may create a perverse set of affairs whereby tech providers could be held liable under federal criminal law for using encryption in a manner that promotes terrorism, narcotics distribution, money laundering, cybercrime, or numerous other federal crimes, but not child exploitation.

- Paradoxically, a bill intended to "encourage the tech industry to take online child sexual exploitation seriously" could place victims of child sexual exploitation in a *worse* position than all other victims of federal crime.

3. The Leahy Amendment represents a complete concession to the interests of "Big Tech," without due regard for the interests of the American people and our children.

- The Leahy Amendment represents the culmination of sustained political pressure by the tech industry, which has continuously opposed any efforts to alter Section 230's blanket liability protections—despite the proliferation of illicit content like CSAM on online platforms.

- The Amendment would transform the EARN IT Act into something that potentially gives platforms *more* immunity with respect to child exploitation, reduces incentives for companies to act as "Good Samaritans" by enabling them to turn a blind eye to the problem, and makes it harder for law enforcement to find and help victims of online child exploitation and abuse.

- This result is flatly inconsistent with a bill intended by its cosponsors to:
    - "encourage the tech industry to take online child sexual exploitation seriously";
    - "ensure tech companies are using best business practices to prevent child exploitation online" (Sen. Graham);
    - recognize that "[c]ompanies that fail to comport with basic standards that protect children from exploitation have betrayed the public trust" (Sen. Blumenthal);
    - "stop putting the financial interests of Big Tech above protecting kids from predators" (Sen. Hawley); and
    - guarantee that companies do more "to protect the most vulnerable among us" by "allow[ing] individuals to sue tech companies that don't take proper steps to prevent online child exploitation" (Sen. Feinstein).

Document ID: 0.7.2270.6725-000001

4. The Leahy Amendment is not necessary to safeguard the use of encryption technology in a responsible manner.

- Under initial drafts of the EARN IT Act, companies would have been required to follow the "best practices" recommended by the Commission created by the bill in order to retain Section 230 immunity from civil and state criminal liability. Opponents of the EARN IT Act suggested that bill represented a threat to encryption because the Commission could recommend a ban on encryption technology as a "best practice" related to identifying and reporting online child sexual exploitation.

- These criticisms were addressed by changes to the bill made by a Manager's Amendment. Under the bill as introduced, companies "may choose" to follow the Commission's best practices, and the bill merely carves out Section 230 immunity for child sexual abuse claims without referencing "encryption" or "willful blindness."

- Thus, to the extent that the Leahy Amendment was meant to account for the complaints from the tech industry, it is not necessary, as the manager's amendment had already resolved the matter. Yet the Leahy Amendment remains in the bill, undercutting the legislation's very purpose.

- In comparison, 47 U.S.C. § 230(e)(5) permits civil actions and state criminal actions against online providers that facilitate sex trafficking. The language of Section 230(e)(5) is substantially similar to the provisions of the EARN IT Act that permit civil actions and state criminal actions against providers for their facilitation of CSAM offenses. When Section 230(e)(5) was introduced, no one worried that it was a "sneaky way" to ban encryption, and the statute does not have a special carveout to protect providers from liability if they use or offer encryption. Congress should follow this precedent, and drop the Leahy Amendment. Doing so would ensure that sex trafficking survivors and CSAM survivors have the same legal tools available to them to seek justice.

5. The important debate over end-to-end encryption and lawful access should be addressed separately in the context of specific lawful access legislation like the Lawful Access to Encrypted Data Act (S. 4051).

- As introduced, the EARN IT Act was silent on encryption. It was technology-neutral, and was focused solely on protecting children. Indeed, despite Senator Leahy's statement "that if the committee wanted to change the rules on encryption, we should do that in a separate bill and we should do it explicitly," his Amendment in fact upends the distinction between the EARN IT Act and encryption-focused bills and explicitly brings encryption into the EARN IT Act context in a manner that puts the thumb on the scale in favor of tech companies.

- We should not permit the debate over lawful access to coopt the distinct and important EARN IT Act, which is focused specifically on Section 230 liability—not encryption. Indeed, by shoehorning broad immunity for providers who implement end-to-end encryption, regardless of the consequences to society, into the EARN IT Act, the tech community is doing precisely what they have accused Senator Graham and the bill's supporters of doing: using the bill as a "sneaky way" to address end-to-end encryption.

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- A bill to address encryption and lawful access has been proposed by Senator Graham, and it is not the EARN IT Act. It is the Lawful Access to Encrypted Data Act.

6. <u>At the very least, the Leahy Amendment language that was incorporated into the bill must be revised to protect federal prosecutions.</u>

- The language from the Leahy Amendment is unclear, and creates a risk that the provision will be interpreted to limit federal prosecutions for CSAM activity against providers that utilize encryption on their platforms. If language from this amendment is not removed, it should at least be modified to avoid any negative impact on federal CSAM prosecutions.

Document ID: 0.7.2270.6725-000001

Document ID: 0.7.2270.6725-000001

(b) (6) (OLA)

From:	(b) (6) (OLA)
Sent:	Monday, July 20, 2020 1:29 PM
To:	Willard, Lauren (OAG); Boyd, Stephen E. (OLA)
Cc:	Levi, William (OAG); Newman, Ryan D. (OAG (b) (6) (OLA); Barnett, Gary (OAG)
Subject:	RE: Tech Policy Hearing Materials
Attachments:	TECH - Big Tech - Dominant Tech Platforms.docx; TECH - CDA 230 and tech industry rights and responsibilities.docx; TECH - CHILD EXPLOITATION- DARKNET AND CHILD PORNOGRAPHY SITES.docx; TECH - EXECUTIVE ORDER 13925 - Preventing Online Censorship.docx; TECH - Lawful Access.docx; TECH - Tech Investigations.docx; ATR - Criminal Antitrust Enforcement.docx; ATR - General Antitrust Enforcement.docx; 05 ATR - Political Influence.docx; 11 - COVID - Antitrust COVID-19 Efforts.docx

As requested, attached are the Tech and Antitrust papers that are in the AG's binders. FYSA, the Section 230 paper and the Executive Order paper were updated and sent to us yesterday. They have not yet been updated in the binders.

Thanks,
(b) (6)

From: Willard, Lauren (OAG) (b) (6) >
Sent: Monday, July 20, 2020 1:06 PM
To: Boyd, Stephen E. (OLA) (b) (6) >
Cc: Levi, William (OAG) (b) (6) >; Newman, Ryan D. (OAG) (b) (6) (b) (6) (OLA) (b) (6) (b) (6) (OLA) (b) (6) >; Barnett, Gary (OAG) (b) (6) >
Subject: RE: Tech Policy Hearing Materials

Thanks Stephen!

If possible, it would helpful to schedule the Section 230/tech review/antitrust briefings towards the end of the week (Thursday afternoon or Friday) and together. As you may know, there are fast-moving developments on Section 230 this week, so our TPs will likely change over the next few days.

Also, happy to go back to the teams for friendly questions on the topics below and report back t (b) (6) an (b) (6) . In terms of readout from the 7/27 hearing, is there someone from OLA that can listen and help with a readout? I will unfortunately be tied up at a speaking event, but agree that it would be helpful to have someone able to report back anything that may spill over to the AG's hearing.

Best,
Lauren

From: Boyd, Stephen E. (OLA) (b) (6) >
Sent: Monday, July 20, 2020 12:55 PM

Document ID: 0.7.2270.5176

To: Willard, Lauren (OAG) (b) (6) >
Cc: Levi, William (OAG) (b) (6) >; Newman, Ryan D. (OAG) (b) (6) (b) (6) (OLA) (b) (6) (b) (6) (OLA) (b) (6) >
Subject: RE: Tech Policy Hearing Materials

Lauren:

W/r/t the tech & lawful access briefer (b) (6) and/ (b) (6) (copied here) can send you the cleared versions that are currently in the book. If OAG would like to make further edits, we can easily replace the current version with an amended version. Not a problem.

Our focus w/ the AG has been on hot topics thus far, though we have some time set aside for more substantive issues this week. I'm going to propose a schedule today, so we should have a game plan on that shortly.

Two things that would be very helpful:

1. A half-dozen friendly open ended questions on tech, anti-trust, lawful access, and 230 (b) (6) an (b) (6) are compiling a list and those issue are ideal for good questions.
2. A basic read out from our perspective of the tech hearing you referenced below just so we know if there are any major developments.

Thank you!

SB
AAG/OLA
(b) (6)

From: Willard, Lauren (OAG) (b) (6) >
Sent: Friday, July 17, 2020 5:51 PM
To: Boyd, Stephen E. (OLA) (b) (6) >
Cc: Levi, William (OAG) (b) (6) >; Newman, Ryan D. (OAG) (b) (6) >
Subject: Tech Policy Hearing Materials

Hi Stephen,

I know OLA is busy with all the 7/28 hearing prep, but wanted to quickly touch base about process per Will's request. (b) (6) has helpfully been coordinating with me on the Section 230 briefer, but just learned today there were separate talkers on the tech investigations and lawful access. Will anyone in OAG need to review those before they are put in the AG's binder? Ryan and I can take a look at lawful access, and I can help on the ATR and tech review issues.

Do you also happen to know when the AG will likely be mooted on the tech-related issues? I assume they will be a lower priority, but I wouldn't be surprised if he gets some questions especially as the House antitrust hearing with the CEOs from Apple, Twitter, Facebook, and Google will be the day before.

Have a great weekend!

Best,
Lauren

CHILD SEXUAL EXPLOITATION

(b) (5) [redacted]

BACKGROUND

- Child exploitation involves the production, distribution, advertising, receipt, possession and access of child sexual abuse material, the online enticement of children to engage in illegal sexual activity, child sex trafficking, travel and transportation offenses involving illegal sexual activity with children, and child sex offenses on federal lands.
    - Note: Federal law uses the term "child pornography". However, there is a growing international consensus that the phrase "child pornography" inaccurately captures the sexual assault, abuse, and exploitation inherent in this imagery. (b) (5) [redacted].
- The Department's flagship effort to address child exploitation is Project Safe Childhood (PSC). Under this program, due to increases every year from FY 2008 to FY 2019, prosecutions for the production of child pornography have almost tripled.
- The Department administers the Internet Crimes Against Children (ICAC) Task Force Program, which is a national network of 61 coordinated task forces representing over 4,500 federal, state, and local law enforcement and prosecutorial agencies.
- In recent years, child exploitation offenses have increased in scale, complexity, and dangerousness. In the Fall of 2019, the New York Times ran a four-part series of articles describing the current landscape of the trade of child sexual abuse material online. Those articles describe an internet that is overrun with child sexual abuse material.
- Reports to the CyberTipline operated by the National Center for Missing & Exploited Children (NCMEC) increased from 1 million in 2014 to 18.4 million in 2018. In 2019, there were 16.9 million CyberTips.
    - The number of CyberTips that have been referred to the ICAC task forces has increased by more than 640% from 2010 to 2019.
    - (b) (5) [redacted]
- An extraordinary number of child exploitation offenders are now taking advantage of anonymous networks and hidden services, known as the Dark Web, to commit their crimes. In recent years, child exploitation hidden services have registered millions of offenders who

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are operating openly and notoriously on the Tor anonymity network (a key network within the Dark Web).

- Section 230 of the Communications Decency Act of 1996 provides immunity to interactive computer services for third-party content on their platforms. Courts have interpreted the scope of Section 230 broadly, leaving a wide array of online activity immune from lawsuits. The immunities granted by Section 230 have contributed to the distribution of child sexual abuse material.

- There are a number of bills pending in the Senate that directly or indirectly impact online child sexual exploitation. These include S. 3398, known as the EARN IT Act, which would eliminate provider immunity for conduct related to child sexual abuse material. This bill also replaces the phrase "child pornography" as it appears in federal law with "child sexual abuse material". There is also the Lawful Access to Encrypted Data Act, which would require service providers and device manufacturers to provide assistance to law enforcement when access to encrypted devices or data is necessary – ***but only after*** a court issues a warrant, based on probable cause that a crime has occurred, authorizing law enforcement to search and seize the data. One Senate bill makes some revisions to Section 230.

EXPECTED QUESTIONS

- (b) (5) [redacted]

- (b) (5) [redacted]

RECOMMENDED RESPONSES

- (b) (5) [redacted]
  - (b) (5) [redacted]
  - (b) (5) [redacted]

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

- (b) (5)

Document ID: 0.7.2270.5176-000003

Willard, Lauren (OAG)

From:	Willard, Lauren (OAG)
Sent:	Monday, July 20, 2020 11:31 PM
To:	Grieco, Christopher (ODAG)
Subject:	Fwd: draft
Attachments:	v3 Fully Merged Petition Edits.docx; ATT00001.htm

Finally made it through the draft... They didn't quite take our suggestion t (b) (5) . We are going to have to think strategically about how extensively we want to edit.

Begin forwarded message:

From: "Candeub, Adam" (b) (6) >
Date: July 20, 2020 at 4:58:16 PM EDT
To: "Willard, Lauren (OAG)" (b) (6) >, "Grieco, Christopher (ODAG)" (b) (6) >
Subject: draft

Lauren, This is the draft we have. It is largely there, but we will have to continue working on it tomorrow, i.e., TOA and further cite checking. But, we are eager for your comments so that we can incorporate them in the distribution COB tomorrow. Happy to chat if you have any questions or concerns! Thanks! Adam

Adam Candeub
Deputy Assistant Secretary
National Telecommunications and Information Administration

Document ID: 0.7.2270.6353

CDA 230 AND TECH INDUSTRY RIGHTS / RESPONSIBILITIES

SAFE HARBOR: The Department recognizes Section 230 as an important part of today's digital landscape, but tailored reform is necessary to incentivize platforms to be better about addressing criminal content on their services, while also being more transparent and accountable when taking down lawful speech.

BACKGROUND

- Passed in 1996, Section 230 of the Communications Decency Act limits certain civil liabilities for interactive computer service providers for third-party content on their platforms. It was enacted primarily for two purposes:
    - To encourage the growth of online forums by immunizing platforms against liability for third-party speech.
    - To encourage platforms to self-regulate by granting immunity for blocking or filtering material harmful to children.
- However, the combination of 25 years of drastic technological changes and an expansive statutory interpretation has left online platforms unaccountable for a variety of harms flowing from content on their platforms and with virtually unfettered discretion to censor third-party content with little transparency or accountability.
- Responding to widespread and bipartisan concerns about Section 230, the Department took a close look at the statute over the past year. The Department held a large public workshop and expert roundtable in February 2020, as well as dozens of listening sessions with industry, thought leaders, and policy makers, to gain a better understanding of the benefits and concerns of Section 230.
- In June 2020, the Department of Justice issued a set of recommendations to update the outdated Section 230 immunity, as well as a summary of its February Public Workshop and Expert Roundtable.
- To return Section 230 immunity to its original purpose – to encourage and reward the "Good Samaritan"– the Department identified several scenarios in which platforms are not "Good Samaritans" and therefore should not be entitled to invoke the immunity.
    - For example, Section 230's "Good Samaritan" immunity should *not* extend to platforms that purposefully solicit, promote, or facilitate criminal activity or that fail to take down federal criminal content once they become aware of it.

Document ID: 0.7.2270.19492

  - Nor should Section 230's "Good Samaritan" immunity extend to the removal of lawful speech by platforms acting in bad faith or inconsistent with their own terms of service.

- DOJ is currently working through the OMB process on the draft legislative text, and is close to getting clearance on a package (current draft attached).

QUESTION

- (b) (5) [redacted]

- (b) (5) [redacted]

RECOMMENDED RESPONSE

- (b) (5) [redacted]

- (b) (5) [redacted]
  - (b) (5) [redacted]
  - (b) (5) [redacted]
  - (b) (5) [redacted]

- (b) (5) [redacted]

- (b) (5) [redacted]

- (b) (5) [redacted]

Document ID: 0.7.2270.19492

(b) (5) [redacted]

- (b) (5) [redacted]

QUESTION

- (b) (5) [redacted]

RECOMMENDED RESPONSE

- (b) (5) [redacted]

- (b) (5) [redacted]

Document ID: 0.7.2270.19492

EXECUTIVE ORDER 13925 (May 28, 2020) – PREVENTING ONLINE CENSORSHIP,

- The purpose of the EO is to foster free and open debate on the internet by, among other things, clarifying the scope of immunity under 47 U.S.C. § 230 to make it consistent with the original purpose of the law.

- The Department was given five tasks under the EO –

    - (1) **consult with the National Telecommunications and Information Administration (NTIA)**, during the NTIA's preparation of a petition for rulemaking to be filed within 60 days with the Federal Communications Commission;
        - (b) (5) [redacted]
    - (2) along with other federal agencies, **review its federal spending on advertising and marketing paid to online platforms** and report its findings to OMB within 30 days;
    - (3) **review any viewpoint-based speech restrictions imposed by any of the platforms** used by federal agencies for advertising and assess whether those platforms "are problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices;"
    - (4) **form a working group** to examine the potential enforcement of state statutes that prohibit platforms from engaging in unfair or deceptive acts or practices and develop model legislation for consideration by states that do not have adequate protection against such acts or practices.
    - (5) **develop a federal legislative proposal** to promote the policy objectives of the EO. DOJ is working through OMB process on draft Section 230 legislation.

QUESTION:

- (b) (5) [redacted]

RECOMMENDED RESPONSE:

- (b) (5) [redacted]

- (b) (5) [redacted]

Document ID: 0.7.2270.19501

BIG TECH / DOMINANT TECH PLATFORMS

SAFE HARBOR: (b) (5) [redacted]

BACKGROUND

- In July 2019, the Department issued a press release stating that it was reviewing the practices of market-leading online platforms.

- (b) (5) [redacted]

- (b) (5) [redacted]

- Press has reported that the Department may be close to making a decision about whether to bring an antitrust complaint against Google.

- (b) (5) [redacted]

- In June 2019, the House Judiciary Committee announced a bipartisan investigation into competition in the digital economy focusing on:

    - Documenting competition problems in digital markets;
    - Examining whether dominant firms are engaging in anti-competitive conduct; and
    - Assessing whether existing antitrust laws, competition policies, and current enforcement levels are adequate to address these issues.

- On July 27, 2020 (day before AG hearing), the CEOs of Amazon, Apple, Facebook, and Google will testify before the HJC as part of the antitrust investigation.

- Citing widely held concerns about the dominance of Facebook and Google in online advertising, Rep. Cicilline introduced (on March 7, 2018) the "Journalism Competition and Preservation Act of 2018" that give newspapers an antitrust exemption to bargain collectively with online platforms about the distribution of their news content.

- Amazon's business practices have been singled out by Lina Khan (staffer for Cicilline) and others for squeezing out competition through low prices and other allegedly predatory practices.

Document ID: 0.7.2270.19471

QUESTIONS

- (b) (5) [redacted]

RECOMMENDED RESPONSE

- (b) (5) [redacted]
- (b) (5) [redacted]
- (b) (5) [redacted]

QUESTION

- (b) (5) [redacted]

RECOMMENDED RESPONSE

- (b) (5) [redacted]
    - (b) (5) [redacted]
- (b) (5) [redacted]

Document ID: 0.7.2270.19471

QUESTION

- (b) (5) [redacted]

RECOMMENDED RESPONSE

- (b) (5) [redacted]
- (b) (5) [redacted]
- (b) (5) [redacted]

QUESTION

- (b) (5) [redacted]

RECOMMENDED REPONSE

- (b) (5) [redacted]
- (b) (5) [redacted]
- (b) (5) [redacted]
- (b) (5) [redacted]

Document ID: 0.7.2270.19471

Draft // Pre-decisional

FOR IMMEDIATE RELEASE
Monday, July 27, 2020

News Media Contact:
Office of Public Affairs, 202-482-4883

Commerce Department Files Petition to Clarify Liability Protections for Online Platforms and Protect Against Censorship

Today, the National Telecommunications and Information Administration (NTIA) filed a petition for rulemaking with the Federal Communications Commission (FCC) on behalf of U.S. Secretary of Commerce Wilbur Ross seeking to clarify regulations related to section 230 of the Communications Decency Act.

The petition was filed in response to the May 2020 Executive Order on Preventing Online Censorship. It calls on the FCC to make clear when online platforms can claim section 230 protections if they restrict access to content in a manner not specifically outlined under the Act.

(b) (5)

Commented [YSF1]: Draft, will be edited by the Secretary's Office

The petition also seeks further clarity from the FCC on:

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

Commented [WL(2)]: (b) (5)

(b) (5)

Commented [WL(3)]: (b) (5)

Document ID: 0.7.2270.19461

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR DEMOCRACY & TECHNOLOGY,
1401 K Street NW
Suite 200
Washington, DC 20005

Plaintiff,

v.

DONALD J. TRUMP, in his official capacity as President of the United States of America,

Serve: Donald J. Trump
President of the United States
1600 Pennsylvania Avenue NW
Washington, DC 20500

Defendant.

Case No. 20-1456

COMPLAINT

INTRODUCTION

1. President Trump's May 28, 2020 "Executive Order on Preventing Online Censorship" ("Executive Order")[1] violates the First Amendment in two fundamental respects: First, the Order is plainly retaliatory: it attacks a private company, Twitter, for exercising its First Amendment right to comment on the President's statements. Second, and more fundamentally, the Order seeks to curtail and chill the constitutionally protected speech of all online platforms and individuals—by demonstrating the willingness to use government authority to retaliate against those who criticize the government.

[1] Executive Order on Preventing Online Censorship (May 28, 2020), https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/.

Document ID: 0.7.2270.18894-000002

2. Plaintiff—an organization that promotes and protects free expression on the Internet—brings this lawsuit to invalidate that unconstitutional act and prevent the chilling of Americans' essential free speech rights.

3. The First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

4. Commentary about the statements and actions of public officials lies at the very core of the speech protected by the First Amendment. Indeed, the Supreme Court has explained that the First Amendment's protection extends even to "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan*, 376 U.S. at 270.

5. The Sedition Act of 1798 made it a crime to "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress. . . , or the President. . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." James Madison—speaking against the Act—said that in our constitutional system, "the censorial power is in the people over the Government, and not in the Government over the people (4 Annals of Congress at 934 (1794))"; "[t]he right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government." *Sullivan*, 376 U.S. at 274-75. In both Congress and the Supreme Court, there was a "broad consensus that the Act, because of the restraint it

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imposed upon criticism of government and public officials, was inconsistent with the First Amendment." *Id*. at 276.

6. The First Amendment prohibits government officials from using government power to retaliate against an individual or entity for engaging in protected speech. As the Supreme Court has explained, "[o]fficial reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right,' and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (internal citations omitted).

7. The First Amendment also prohibits the use of government power to *chill* individuals or entities from engaging in protected speech. "Generally speaking, government action which chills constitutionally protected speech or expression contravenes the First Amendment." *Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996) (citing *Riley v. Nat'l Fed'n of the Blind of North Carolina*, 487 U.S. 781, 794 (1988)).

8. Finally, the First Amendment bars the government from trying to censor lawful speech—such as the online speech of ordinary Americans—through the threat of liability or reprisals directed at intermediaries, the companies that provide the platform for Americans' online speech. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) ("[T]he threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" constitutes "informal censorship" that violates the First Amendment).

9. The Executive Order violates all of these well-established First Amendment principles.

10. Twitter appended the President's tweets on California's plans for voting by mail with a tag stating that viewers could "get the facts" about California's mail-in ballot plans by clicking

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on the addendum. In immediate retaliation, the President issued the Executive Order. In addition, President Trump—by publicly attacking Twitter and issuing the Order—sought to chill future online speech by other speakers.

11. The processes prescribed by the Order would circumvent the role of Congress and of the courts in enacting and interpreting 47 U.S.C. § 230 ("Section 230")—a critical protection for online speech—and purport to empower multiple government agencies to pass judgment on companies' content moderation practices. The Order clouds the legal landscape in which the hosts of third-party content operate and puts them all on notice that content moderation decisions with which the government disagrees could produce penalties and retributive actions, including stripping them of Section 230's protections. It invokes government authority to set in motion processes to limit legal protections applicable to private actors and to coordinate legal actions by State Attorneys General against online service providers, and threatens withdrawal of government advertising funds. The effect of the Order will be to reduce Americans' ability to speak freely online and access the wide range of information and views that are available today.

12. President Trump's retaliatory motivation and his goal of chilling future protected speech that is inconsistent with his views render the Executive Order violative of the First Amendment.

13. This Court should therefore declare that the Executive Order violates the First Amendment and is therefore invalid, and issue an order prohibiting government officials from engaging in the acts specified in the Order.

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JURISDICTION AND VENUE

14. Pursuant to 28 U.S.C. § 1331, this Court has subject matter jurisdiction over Plaintiff's claim, which raises questions under the First Amendment to the United States Constitution. The Court has additional remedial authority under 28. U.S.C. §§ 2201-02.

15. Venue is proper under 28 U.S.C. § 1391(e) because (i) this is a civil action in which Defendant is the President of the United States, (ii) a substantial part of the events or omissions giving rise to the claim occurred in the District of Columbia, and (iii) Defendant resides in this district at the White House.

PARTIES

16. Plaintiff Center for Democracy & Technology ("CDT") is a federally tax-exempt, nonprofit organization headquartered in Washington, District of Columbia, whose mission is to strengthen individual rights and freedoms by defining, promoting, and influencing technology policy and the architecture of the Internet that impacts people's daily lives. For more than 25 years, CDT has put democracy and individual rights at the center of the digital revolution, and ensured that the constitutional and democratic values of free expression and privacy are protected in the digital age. CDT consistently urges courts to defend Americans' rights to express themselves online.

17. Defendant Donald J. Trump is the President of the United States. He is sued in his official capacity. In that capacity, he issued the Executive Order challenged in this lawsuit.

FACTUAL ALLEGATIONS

Threats Aimed at Internet Intermediaries Jeopardize Individuals' Free Speech Online

18. The Internet enables billions of people around the world to access and contribute to the enormous wealth of information and ideas it sustains. It is transforming every aspect of our

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societies, large and small, from how our economies function and our elected officials govern, to how we acquire information about deeply sensitive issues and express our most intimate thoughts.

19. Internet users depend on the interconnected network of technical intermediaries, including backbone network operators, Internet service providers (ISPs) and telecommunications carriers, content delivery networks, and remote hosting providers to exchange and store data. They also rely on the millions of websites, social media services, and applications that run on this infrastructure to access forums for searching for and sharing information and ideas, and for connecting with other Internet users around the world. These intermediaries facilitate access to content predominantly created by others.

20. Individuals' ability to engage freely in online communication is vulnerable to censorship through threats directed at Internet intermediaries, Internet intermediaries face pressure to control or police user content and activity in a wide range of circumstances, including in response to claims of defamation, obscenity, intellectual property infringement, invasion of privacy, or because content is critical of the government.[2] Due to the sheer scale of user-generated content that intermediaries host or transmit, and intermediaries' concerns about their own reputational risk, Internet intermediaries may lack the resources and/or incentives to defend the free speech interests of the users or to defend particular posts.

21. Recognizing the threat to free expression posed by a system treating intermediaries as gatekeepers, Congress in 1996 enacted an amendment to the Communications Act of 1934. That amendment, Section 230, shields intermediaries from liability for third-party content and enables interactive service providers, such as social media companies, to moderate the content they host

[2] *See* Seth Kreimer, Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link, 155 U. Penn. L. Rev. 11, 31-32 (2006).

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without fear of liability. Section 230 expressly exempts an interactive computer service from publisher liability for the exercise of its editorial and self-regulatory functions. This provision ensures that "[i]nteractive computer services like Facebook, YouTube, and Twitter can, for example, 'perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn't edit or delete.'"[3]

22. This shield from the threat of litigation enables social media companies to combat misinformation and disinformation, and remove or flag content that violates their policies without fear of reprisal.[4] Section 230 has been described as "the most important law protecting internet speech" and "perhaps the most influential law to protect the kind of innovation that has allowed the Internet to thrive."[5]

President Trump's Retaliation Against Internet Content Providers

23. In August 2019, the White House announced it was working on a potential Executive Order that would reduce liability protections for online platforms. It also announced that it was investigating potential anticonservative bias on social media platforms.[6]

[3] *Am. Freedom Def. Initiative v. Lynch*, 217 F. Supp. 3d 100, 105 (D.D.C. 2016) (citing *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008)).

[4] Press Release, CDT, Reported Executive Order Again Threatens First Amendment and Empowers Government Censorship (May 28, 2020), https://cdt.org/press/reported-executive-order-again-threatens-first-amendment-and-empowers-government-censorship/

[5] *See* Electronic Frontier Foundation, *Section 230 of the Communications Decency Act*, https://www.eff.org/issues/cda230.

[6] *See* Margaret Harding McGill and Daniel Lippman, *White House Drafting Executive Order to Tackle Silicon Valley's Alleged Anti-Conservative Bias*, Politico, Aug. 7, 2019, https://www.politico.com/story/2019/08/07/white-house-tech-censorship-1639051.

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24. After significant negative public response, the White House in August 2019 shelved its draft Executive Order to restrain the free speech of online platforms.[7] Opposition to the potential Executive Order included groups from across the political spectrum.[8]

25. On May 11, 2020, Twitter announced that it would begin applying labels and warning messages to disputed or misleading tweets about the COVID-19 coronavirus pandemic, with links to further context and factual information. That announcement did not mention tweets about

[7] *Id.*

[8] *See, e.g.*, CDT (Press Release, CDT, CDT Condemns Reported Executive Order to Empower Government Censorship (Aug. 9, 2019), https://cdt.org/press/cdt-condemns-reported-executive-order-to-empower-government-censorship/); Public Knowledge (Harold Feld, Could the FCC Regulate Social Media Under Section 230? No, Aug. 14, 2019, https://www.publicknowledge.org/blog/could-the-fcc-regulate-social-media-under-section-230-no); NetChoice (Carl Szabo, Trump Seeks Powers to Rein In Alleged Social Media Bias, Aug. 9, 2019, https://netchoice.org/media-press/trump-seeks-powers-to-rein-in-alleged-social-media-bias/); CCIA (Heather Greenfield, Administration Should Not Embrace Censorship Nor Hamstring Efforts To Fight Online Extremism, Says CCIA, Aug. 9, 2019, https://www.ccianet.org/2019/08/administration-should-not-embrace-censorship-nor-hamstring-efforts-to-fight-online-extremism-says-ccia/); TechFreedom (TechFreedom, *Draft Social Media Bias Executive Order Would Create Real Internet Speech Police*, Aug. 9, 2019, https://techfreedom.org/draft-social-media-bias-executive-order-would-create-real-internet-speech-police/); Gab (Andrew Torba, *Don't Get Excited About The White House's Social Media Censorship Executive Order*, Gab News, May 28, 2019, https://news.gab.com/2019/05/28/dont-get-excited-about-the-white-houses-social-media-censorship-executive-order); FreedomWorks (@FreedomWorks, Twitter (Aug. 12, 2019, 10:02 AM), https://twitter.com/FreedomWorks/status/1160959638671679489; Senator Ron Wyden (Brian Fung, *White House Proposal Would Have FCC and FTC Police Alleged Social Media Censorship*, CNN Business, Aug. 10, 2019, https://www.cnn.com/2019/08/09/tech/white-house-social-media-executive-order-fcc-ftc/index.html); Fight for the Future (*URGENT: Leaked Documents Show White House Is Planning Executive Order to Censor the Internet* (last visited June 1, 2020), https://actionnetwork.org/petitions/censor-the-internet/); Jared Schroeder (Jared Schroeder, *Efforts to Compel Social Media 'Fairness' Go Afoul On Freedom Of Expression*, The Hill, Aug. 13, 2019, https://thehill.com/opinion/civil-rights/457297-efforts-to-compel-social-media-fairness-go-afoul-on-freedom-of); and Congressman Ro Khanna (Ro Khanna (@RoKhanna), Twitter, https://twitter.com/RoKhanna/status/1162519156970754049 (Aug. 16, 2019, 5:19 PM).

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elections, but it stated, "We will continue to introduce new labels to provide context around different types of unverified claims and rumors as needed."[9]

26. Since April 2019 it has been against Twitter's policy—and its terms of use—to employ the platform to interfere with elections:

> "You may not use Twitter's services for the purpose of manipulating or interfering in elections. This includes but is not limited to: Misleading information about how to vote or register to vote (for example, that you can vote by Tweet, text message, email, or phone call)"[10]

27. The COVID-19 pandemic has raised significant concerns about the safety of in-person voting. In the April 7, 2020, Wisconsin primary, 67 people tested positive for COVID-19 after visiting the polls, and their exposure may have resulted from the lack of any broadly available mail voting alternative.[11]

28. Michigan Secretary of State Jocelyn Benson has stated that, because of the threat of COVID-19 spreading through in-person voting, Michigan voters this year will receive absentee ballot applications allowing them to vote from home. Nearly 7.7 million registered voters in the state will have the option to mail in their ballots for August and November elections.[12]

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[9] *See* Yoel Roth and Nick Pickles, *Updating Our Approach to Misleading Information*, Twitter (May 11, 2020), https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information.html.

[10] *See* Twitter Safety, *Strengthening Our Approach to Deliberate Attempts to Mislead Voters,* Twitter (Apr. 24, 2019) https://blog.twitter.com/en_us/topics/company/2019/strengthening-our-approach-to-deliberate-attempts-to-mislead-vot.html.

[11] *See* David Wahlberg, *67 Got COVID-19 After Visiting Polls In State's April 7 Election But Tie To Voting Unclear*, Wisconsin State Journal, May 8, 2020, https://madison.com/wsj/news/local/health-med-fit/67-got-covid-19-after-visiting-polls-in-states-april-7-election-but-tie-to/article_49a42a7e-45d8-50cc-bd76-3a583842de39.html.

[12] *See* Governor Gretchen Whitmer, Executive Order 2020-27 (COVID-19), *Conducting Elections on May 5, 2020 Using Absent Voter Ballots*, Mar. 27, 2020, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-523400--,00.html; *see also* Public Interest, *Michigan Polls Quiet As Absentee Voting Booms to Record Levels Amid*

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29. In response to these health and safety concerns, a number of other states have taken steps to modify their voting protocols, including expanded mail-in voting options.[13]

30. President Trump has repeatedly expressed concern about mail-in voting. For example, during a Fox & Friends appearance on March 30, 2020, he opposed funding for mail-in voting, saying "they have things, levels of voting, that if you ever agreed to it, you'd never have a Republican elected in this country again."[14]

31. Similarly, on April 8, 2020, the President tweeted: "Republicans should fight very hard when it comes to state wide mail-in voting. Democrats are clamoring for it. Tremendous potential for voter fraud, and for whatever reason, doesn't work out well for Republicans."[15]

32. On May 26, 2020, the President tweeted: "There is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent. Mail boxes will be robbed, ballots will be forged & even illegally printed out & fraudulently signed."[16]

33. He continued in a second tweet: "The Governor of California is sending Ballots to millions of people, anyone . . . living in the state, no matter who they are or how they got there, will get one. That will be followed up with professionals telling all of these people, many of whom

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Coronavirus Outbreak, May 5, 2020, https://www.mlive.com/public-interest/2020/05/michigan-polls-quiet-as-absentee-voting-booms-to-record-levels-amid-coronavirus-outbreak.html.

[13] *See* Nat'l Conference of State Legislatures, *COVID-19 And Elections* (May 21, 2020), https://www.ncsl.org/research/elections-and-campaigns/state-action-on-covid-19-and-elections.aspx.

[14] *See* Aaron Rupar (@atrupar), Twitter (Apr. 8, 2020, 5:40 AM), https://twitter.com/atrupar/status/1247866822252277760.

[15] Donald J. Trump (@realDonaldTrump), Twitter (Apr. 8, 2020, 5:20 AM), https://twitter.com/realDonaldTrump/status/1247861952736526336.

[16] Donald J. Trump (@realDonaldTrump), Twitter (May 26, 2020, 5:17 AM), https://twitter.com/realDonaldTrump/status/1265255835124539392.

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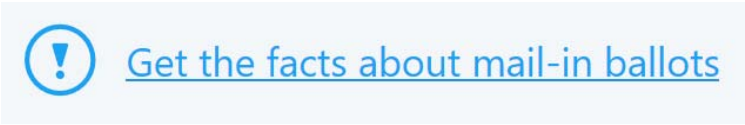
have never even thought of voting before, how, and for whom, to vote. This will be a Rigged Election. No way!"[17]

34. Later that same day, May 26, 2020, Twitter appended the following addendum to the President's tweets, stating that viewers could "Get the facts" about California's mail-in ballot plans and providing a link if they chose to do so:[18]



The link leads to a series of news articles regarding President Trump's claim that mail-in ballots will lead to voter fraud and "a [r]igged [e]lection."

35. Twitter did not remove the President's tweets about mail-in voting. Those tweets remain available to the public. Instead, Twitter provided more information regarding the subject matter of the President's tweet.

36. In response, on May 26, 2020, the President tweeted "@Twitter is now interfering in the 2020 Presidential Election. They are saying my statement on Mail-In Ballots, which will lead to massive corruption and fraud, is incorrect, based on fact-checking by Fake News CNN and the

[17] Twitter, Politics, *Trump Makes Unsubstantiated Claim That Mail-In Ballots Will Lead to Voter Fraud* (May 26, 2020), https://twitter.com/i/events/1265330601034256384; Donald J. Trump (@realDonaldTrump), Twitter (May 26, 2020, 5:17 AM), https://twitter.com/realDonaldTrump/status/1265255845358645254;

[18] *See* Twitter, Politics, *Trump Makes Unsubstantiated Claim That Mail-In Ballots Will Lead to Voter Fraud* (May 26, 2020), https://twitter.com/i/events/1265330601034256384.

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Amazon Washington Post . . . ."[19] "Twitter is completely stifling FREE SPEECH, and I, as President, will not allow it to happen!"[20]

37. Twitter posted the following explanation for its label.

38. On May 27, 2020, the President tweeted at 7:11 a.m., "Republicans feel that Social Media Platforms totally silence conservatives voices. We will strongly regulate, or close them down, before we can ever allow this to happen. We saw what they attempted to do, and failed, in 2016. We can't let a more sophisticated version of that . . . happen again."[21] "Just like we can't let large scale Mail-In Ballots take root in our Country. It would be a free for all on cheating,

[19] Donald J. Trump (@realDonaldTrump), Twitter (May 26, 2020, 4:40 PM), https://twitter.com/realDonaldTrump/status/1265427538140188676.

[20] Donald J. Trump (@realDonaldTrump), Twitter (May 26, 2020, 4:40 PM), https://twitter.com/realDonaldTrump/status/1265427539008380928.

[21] Donald J. Trump (@realDonaldTrump), Twitter (May 27, 2020, 4:11 AM), https://twitter.com/realDonaldTrump/status/1265601611310739456.

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forgery and the theft of Ballots. Whoever cheated the most would win. Likewise, Social Media. Clean up your act, NOW!!!!"[22]

39. The President continued his targeted attacks by tweeting at 10:22 a.m., "Twitter has now shown that everything we have been saying about them (and their other compatriots) is correct. Big action to follow!"[23] At 9:36 p.m., he followed up by tweeting, "Big Tech is doing everything in their very considerable power to CENSOR in advance of the 2020 Election. If that happens, we no longer have our freedom. I will never let it happen! They tried hard in 2016, and lost. Now they are going absolutely CRAZY. Stay Tuned!!!"[24]

40. On May 27, 2020, White House adviser Kellyanne Conway, appearing on "Fox & Friends," spelled out the Twitter handle for Twitter's head of Site Integrity (a "handle" is the means of identifying a specific individual via Twitter) and said, "somebody in San Francisco will wake him up and tell him he's about to get more followers. This guy is constantly attacking Trump voters, Trump, Mitch McConnell, you name it."[25] The handle for Twitter's head of Site Integrity is "@[y*****]."

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[22] Donald J. Trump (@realDonaldTrump), Twitter (May 27, 2020, 4:11 AM), https://twitter.com/realDonaldTrump/status/1265601615261827072.

[23] Donald J. Trump (@realDonaldTrump), Twitter (May 27, 2020, 10:22 AM), https://twitter.com/realDonaldTrump/status/1265649545410744321.

[24] Donald J. Trump (@realDonaldTrump), Twitter (May 27, 2020, 9:36 PM), https://twitter.com/realDonaldTrump/status/1265819308699070464.

[25] *See* Justine Coleman, *Kellyanne Conway: Trump's Twitter Fact Checks Done By 'People Who Attack Him All Day Long*, The Hill, May 27, 2020, https://thehill.com/homenews/administration/499730-conway-trumps-twitter-fact-checks-done-by-people-who-attack-him-all.

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41. At 10:47 p.m. on May 27, 2020, Twitter's CEO Jack Dorsey stated on Twitter that he personally took responsibility for the decision to add a label to Trump's tweets, adding, "Please leave our employees out of this."[26]

42. On May 28, 2020, the President retweeted Rep. Elise Stefanik's tweet: "Thanks for the clarification @jack[.] This makes YOU accountable for allowing the Chinese Communist Party to abuse this site with mis-information & propaganda spread across the globe - all while the CCP bans and suppresses their own people from using Twitter!"[27]

43. Later that morning, at 8:37 a.m., President Trump tweeted, "This will be a Big Day for Social Media and FAIRNESS!"[28] At 12:44 p.m. he continued, "So ridiculous to see Twitter trying to make the case that Mail-In Ballots are not subject to FRAUD. How stupid, there are examples, & cases, all over the place. Our election process will become badly tainted & a laughingstock all over the World. Tell that to your hater "@[y*****]."[29]

The "Executive Order on Preventing Online Censorship"

44. The President swiftly took retaliatory action. At 4:28 p.m. on May 28, 2020, the White House Twitter account released a video of the President issuing an "Executive Order on Preventing Online Censorship" ("Executive Order") pertaining to "online platforms," which the order defines as "any website or application that allows users to create and share content or engage in social

[26] Jack Dorsey (@jack), Twitter (May 27, 2020, 10:47 PM), https://twitter.com/jack/status/1265837138114830336?s=20.

[27] Elise Stefanik (@EliseStefanik), Twitter, May 27, 2020, 11:18 PM), https://twitter.com/EliseStefanik/status/1265844947653197824.

[28] Donald J. Trump (@realDonaldTrump), Twitter (May 28 2020, 8:37 AM), https://twitter.com/realDonaldTrump/status/1265985660898459655.

[29] Donald J. Trump (@realDonaldTrump), Twitter (May 28, 2020, 12:44 PM), https://twitter.com/realDonaldTrump/status/1266047584038256640.

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networking, or any general search engine."[30] The Order attempts to inhibit the exercise of free speech rights by online content hosts; directs the government to review media advertising spent on those platforms; directs the Department of Justice to evaluate the editorial practices of those platforms; and orders the Federal Trade Commission, Federal Communications Commission, and Department of Justice to investigate or regulate the platforms.[31]

45. The Order will interfere significantly with the freedom of speech of all Americans. Intermediaries that host content online will be forced to shape and apply their content moderation policies according to government officials' desires, depriving Americans of access to online forums free from government interference with their constitutionally protected speech. And those intermediaries will be chilled in exercising their own First Amendment right to comment upon and to moderate the online content that they host.

46. First, the Order's text confirms that it was issued to retaliate against constitutionally protected speech. The Order expressly discusses Twitter's speech responding to President Trump's May 26, 2020, tweet and states President Trump's view that his tweets are being selectively targeted:

> Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias. As has been reported, Twitter seems never to have placed such a label on another politician's tweet. As recently as last week, Representative Adam Schiff was continuing to mislead his followers by peddling the long-disproved Russian Collusion Hoax, and Twitter did not flag those tweets. Unsurprisingly, its officer in charge of so-called 'Site Integrity' has flaunted his political bias in his own tweets.

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[30] *See* @WhiteHouse Twitter (May 28, 2020, 1:28 p.m.), https://twitter.com/WhiteHouse/status/1266104188112601089; *see also* Exec. Order (May 28, 2020), https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/.

[31] *See* Exec. Order (May 28, 2020), https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/.

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The Order explicitly mentions Twitter by name six times and contains numerous implicit references to Twitter's free speech actions. President Trump also references other constitutionally protected speech by online content platforms who are "flagging content as inappropriate."

47. Second, the Order seeks to circumvent the roles of Congress and the courts by dictating a new interpretation of a federal statute that is contrary to established law. Under longstanding precedent, Section 230 protects online content providers from liability for making decisions about what content may be published on their platforms. The Order nevertheless directs the "Secretary of Commerce in consultation with the Attorney General, acting through the National Telecommunications and Information Administration (NTIA)" to file with the Federal Communications Commission a rulemaking petition urging the FCC to issue a rule that would restrict significantly Section 230's liability protection by imposing new limitations on that protection. The Order further directs "all executive departments and agencies" to "ensure that their application of [S]ection 230(c) properly reflects the narrow purpose of the section and take all appropriate actions in this regard."

48. Third, the Order encourages officials in the Executive Branch to allocate taxpayer funds to online platforms based on those officials' assessment of the free speech practices of those platforms. It directs "each executive department and agency" to review its "spending on advertising and marketing paid to online platforms" and their statutory authority to "restrict [those online platforms] receipt of advertising dollars" and provide a report to the Office of Management and Budget. And the Order directs the Department of Justice to "review the viewpoint-based speech restrictions imposed by each online platform identified in [those reports] and assess whether any online platforms are problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices."

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49. Fourth, the Order provides that the White House "will submit" reports of purported "online censorship" received through its "Tech Bias Reporting Tool" to the Department of Justice, and the FTC so it can "consider taking action" under applicable law, including under 15 U.S.C § 45, which makes unfair methods of competition unlawful.

50. Fifth, the Order directs the Attorney General to establish a working group "regarding the potential enforcement of State statutes that prohibit online platforms from engaging in unfair or deceptive acts or practices" and to "develop model legislation," if needed, for states to address online platforms' actions of moderating and posting content on their own platforms as "unfair and deceptive acts and practices." It further orders the Attorney General to "develop a proposal for Federal legislation."

51. The effect of the actions directed by the Executive Order will be to dramatically limit and chill free speech on the Internet. The Order calls into question essential liability protection that makes it possible for companies to host third-party content at scale, and creates several punitive mechanisms if those intermediaries step out of line, including withdrawal of federal advertising funds, prosecution by state attorneys general, and adverse action by the FTC. It will burden the freedom of speech of all Americans by requiring intermediaries to moderate according to the government's preferences. It will require intermediaries to refrain from taking actions, including addressing hateful speech or inaccurate information about voting, that would displease the government—chilling social media services themselves from exercising their protected First Amendment rights through fact-checking, labeling, or other editorial activity.

52. In addition, this Order will increase the chance that social media services decide not to address hateful or harassing speech, combat disinformation, or correct inaccurate information about where and how to vote, which in turn will have a chilling effect on the ability for vulnerable

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groups to participate on these services and potentially to exercise their right to vote. Finally, the Order will discourage social media companies from engaging in fact-checking partnerships with third parties and groups that combat voter suppression, directly burdening the speech of those organizations.

Announcement of the Executive Order Confirms President Trump's Retaliatory Motive

53. During an Oval Office press conference on May 28, 2020, announcing the Executive Order, President Trump further revealed his retaliatory motive against online platforms, stating they have "points of view" and are "taking over the airwaves." He then expressly targeted Twitter's May 26, 2020, exercise of free speech on its own platform, labeling it "inappropriate" and calling out by name the company's "Head of Site Integrity":

> The choices that Twitter makes when it chooses to suppress, edit, blacklist, shadow, ban are editorial decisions, pure and simple. They're editorial decisions. In those moments, Twitter ceases to be a neutral public platform, and they become an editor with a viewpoint. And I think we can say that about others also, whether you're looking at Google, whether you're looking at Facebook and perhaps others.
>
> One egregious example is when they try to silence views that they disagree with by selectively applying a "fact check" — a fact check — F-A-C-T. Fact check. What they choose to fact check and what they choose to ignore or even promote is nothing more than a political activism group or political activism. And it's inappropriate.
>
> . . .
>
> This is our — this is the arbiter. This guy is the arbiter of what's supposed to go on Twitter. He's the one. He thought that — he thought — and he used CNN as a guide — CNN, which is fake news. He uses CNN as a guide. His name is [Y***] [R***].
>
> . . .
>
> So here's your — here's your man, and that's on Twitter.
>
> . . .
>
> If Twitter were not honorable — if you're going to have a guy like this be your judge and jury, I think just shut it down, as far as I'm concerned, but I'd have to go

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> through a legal process to do that. . . . [I]f it were able to be legally shut down, I would do it.

Commenting further on online platforms' free speech actions, President Trump stated "[W]e're fed up with it, and it's unfair, and it's been very unfair. And we'll see what happens."[32]

54. In the same press conference, the President threatened to eliminate or restrict government funding to online platforms, which provides free educational content to the world, by directing his administration to "develop policies and procedures to ensure taxpayer dollars are not going into any social media company" that engages in protected speech like that of Twitter. In regard to such funding, Trump said: "So we're going to be doing none of it or a very little of it."

55. FCC Commissioner Brendan Carr confirmed President Trump's retaliatory motivation. In an appearance on Fox News, he declared that "Twitter made the decision to take on the president of the United States" and accused Twitter of "punishing speakers based on whether it approves or disapproves of their politics."[33] Commissioner Carr's statement differs from views he expressed last year, when he criticized a social media company's request for government assistance in moderating content and declared that "[o]utsourcing censorship to the government is not just a bad idea, it would violate the First Amendment."[34]

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[32] Remarks by President Trump Announcing an Executive Order on Preventing Online Censorship (May 28, 2020, 3:47 p.m.), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-announcing-executive-order-preventing-online-censorship/

[33] Press Release, FCC, FCC Commissioner Carr Welcomes Executive Order on Online Censorship (May 28, 2020), https://docs.fcc.gov/public/attachments/DOC-364629A1.pdf; @BrendanCarr, Twitter (May 29, 2020, 1:14 p.m.), https://twitter.com/BrendanCarrFCC/status/1266462927936278529?s=20

[34] Brendan Carr (@BrendanCarrFCC), Twitter (Mar. 30, 2019, 5:31 PM) https://twitter.com/brendancarrfcc/status/1112150281066819584?lang=en

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President Trump Further Confirms His Retaliatory Motivation Through A Series of Tweets

56. Following the death of George Floyd on May 25, 2020, demonstrations took place protesting the actions of the Minneapolis police. Some of those demonstrations led to violence.

57. Just after midnight on May 29, 2020, the President tweeted: "These THUGS are dishonoring the memory of George Floyd, and I won't let that happen. Just spoke to Governor Tim Walz and told him that the Military is with him all the way. Any difficulty and we will assume control but, when the looting starts, the shooting starts. Thank you!"

58. Twitter appended a label to the President's tweet: "This Tweet violated the Twitter Rules about glorifying violence. However, Twitter has determined that it may be in the public's interest for the Tweet to remain accessible."[35] The tweet remains accessible to the public.

59. At 7:10 a.m. on May 29, 2020, the President claimed, "Twitter is doing nothing about all of the lies & propaganda being put out by China or the Radical Left Democrat Party. They have targeted Republicans, Conservatives & the President of the United States. Section 230 should be revoked by Congress. Until then, it will be regulated!"[36] At 8:44 a.m. on May 29, 2020, the President tweeted: "'Regulate Twitter if they are going to start regulating free speech.' @JudgeJeanine @foxandfriends Well, as they have just proven conclusively, that's what they are doing. Repeal Section 230!!!"[37]

60. On the morning of May 29, 2020, White House deputy chief of staff Dan Scavino tweeted: "Twitter is targeting the President of the United States 24/7, while turning their heads to

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[35] Donald J. Trump (@realDonaldTrump), Twitter (May 28, 2020, 9:53 PM), https://twitter.com/realDonaldTrump/status/1266231100780744704.

[36] Donald J. Trump (@realDonaldTrump), Twitter (May 29, 2020, 7:10 AM), https://twitter.com/realDonaldTrump/status/1266326065833824257.

[37] Donald J. Trump (@realDonaldTrump), Twitter (May 29, 2020, 8:44 AM), https://twitter.com/realDonaldTrump/status/1266349790507515905.

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protest organizers who are planning, plotting, and communicating their next moves daily on this very platform. Twitter is full of shit - more and more people are beginning to get it."[38]

President Trump's Demonstrated Capacity to Influence Private Actors

61. Targeting by President Trump often causes companies to reverse course on policy and corporate conduct. For example, air conditioning manufacturer Carrier reversed its plans to move some jobs abroad after being targeted by the President.[39] On January 3, 2017, President-elect Trump tweeted: "General Motors is sending Mexican made model of Chevy Cruze to U.S. car dealers-tax free across border. Make in U.S.A. or pay big border tax!"[40] Two weeks later, GM said it would invest at least $1 billion in US factories, and committed to creating or retaining about 7,000 jobs in coming years.[41]

62. The President's tweets about a company can have immediate impact. "In almost every case, when the president unleashes his Twitter fury, the share price of the affected company drops—in some cases fairly significantly. Lockheed Martin's stock, for example, plunged by more

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[38] Dan Scavino Jr. (@scavino45), Twitter, (May 29, 2020, 5:18 AM), https://twitter.com/Scavino45/status/1266343153466060803; *see also* Adam Shaw, *White House hits back after Twitter cracks down on Trump's Minneapolis tweet, reposts censored message*, Fox News, https://www.foxnews.com/politics/white-house-twitter-trump-minneapolis-tweet (last visited June 1, 2020).

[39] *See* Ylan Q. Mui, Matea Gold & Max Ehrenfreund, *Trump threatens 'consequences' for U.S. firms that relocate offshore*, Wash. Post, Dec. 1, 2016, https://www.washingtonpost.com/politics/trump-threatens-consequences-for-us-firms-that-relocate-offshore/2016/12/01/a2429330-b7e4-11e6-959c-172c82123976_story.html

[40] Donald J. Trump (@realDonaldTrump), Twitter (Jan 3, 2017, 4:30 AM), https://twitter.com/realDonaldTrump/status/816260343391514624?ref_src=twsrc%5Etfw.

[41] *See* David Shepardson, *General Motors says to invest additional $1 billion in U.S.*, Reuters (Jan. 16, 2017, 9:58 PM), https://www.reuters.com/article/us-gm-jobs-trump/general-motors-says-to-invest-additional-1-billion-in-u-s-idUSKBN15107B.

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than 5% in December, after Trump criticized the company by saying the cost of its F-35 jet aircraft contract was 'out of control.'"[42]

63. As a result of this long record of President Trump's direct and forceful attacks on individuals and companies who have taken actions with which he disagrees, organizations may be reluctant to challenge President Trump's right to issue the Executive Order given the possibility that his ire and the power of the White House may be directed against them.[43]

64. In light of President Trump's history of retaliatory action, which often causes companies to reverse course on policy and corporate conduct, operators of online content platforms, social networks, or search engines will almost certainly be deterred or hindered in protecting their own free speech rights through a lawsuit. *See Camacho v. Brandon*, 317 F.3d 153, 160 (2d Cir. 2003) (noting "the possibility that instituting litigation on [one's] own behalf may only incur further retribution"). That is particularly true for those operators who benefit from the constant publicity of the President using their services or who receive government funding.

The First Amendment Prohibits the President from Retaliating Based on Speech

65. "[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in protected speech. *Hartman v. Moore*, 547 U.S. 250, 256 (2006). "[A]ny governmental action that . . . results in a chilling effect upon an individual's right of free speech may violate the First Amendment. *McBride v. Vill. of Michiana*, 30 F.3d 133 (6th

[42] *See* Mathew Ingram, *Here's What a Trump Tweet Does to a Company's Share Price*, Fortune (Feb. 24, 2017, 11:26 AM), https://fortune.com/2017/02/24/trump-tweet-stocks/.

[43] *See* Jamie L. Lareau, *President Trump's shots at GM have left company insiders deeply troubled*, Detroit Free Press (Apr. 1, 2020, 5:01 PM), https://www.freep.com/story/money/cars/general-motors/2020/04/01/coronavirus-covid-19-donald-trump-mary-barra-tweets-gm/5088449002/; *see also* Ben White & Lorraine Woellert, *Trump's tweet shaming startles corporate America*, Politico (Dec. 6, 2016, 5:42 PM), https://www.politico.com/story/2016/12/trumps-tweet-shaming-corporate-america-232274.

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Cir. 1994) (table) (*citing Laird v. Tatum*, 408 U.S. 1, 11 (1972)); *Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996) ("Generally speaking, government action which chills constitutionally protected speech or expression contravenes the First Amendment." (citing *Riley v. Nat'l Fed'n of the Blind of N. Carolina*, 487 U.S. 781, 794 (1988))).

66. Courts have recognized that retaliatory conduct chills a person or entity from exercising their First Amendment rights in the future. Even informal measures such as an investigation, coercion, persuasion, and intimidation can chill First Amendment activities. *Am. Commc'ns Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 402 (1950) ("[I]ndirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes."); *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) ("[T]he threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" constitutes "informal censorship" that violates the First Amendment).

67. A court will "strike down executive and administrative action on the basis of what it determines to be improper motives or purposes." L. Tribe, American Constitutional Law § 12-5, at 816. In so doing, courts "look through forms to the substance" of government conduct. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

The Executive Order's Impact on Plaintiff

68. CDT is a nonprofit advocacy organization that works to ensure that the human rights people enjoy in the physical world, like freedom of speech, are realized online and that technology continues to serve as an empowering force for people worldwide. Integral to this work is CDT's representation of the public interest in the creation of an open, innovative, and decentralized

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Internet that promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

69. Critical to CDT's mission is advocating in favor of First Amendment protection for speech on the Internet. To that end, among other things, CDT has participated in a number of cases addressing First Amendment rights and the Internet, including as litigants in *CDT v. Pappert*, 337 F. Supp. 2d 606, 646, 649-63 (E.D. Pa. 2004) (striking down as unconstitutional a statute that imposed criminal liability on Internet service providers who failed to comply with requests issued by the Pennsylvania Attorney General to block access to websites containing child pornography); challenging, as part of a broad coalition, key portions of the Communications Decency Act (CDA) in *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down portions of the CDA prohibiting transmission of obscene or indecent communications to persons under Age 18 as a content-based blanket restrictions on speech and facially overbroad in violation of the First Amendment); and as amicus curiae in First Amendment challenges including *Backpage.com, L.L.C., v. Dart*, 807 F.3d 229 (7th Cir. 2016) (holding campaign by sheriff's office to pressure pressuring financial intermediaries to cease payment processing for online classified advertising website to be an unconstitutional prior restraint) (*See* ECF Nos. 29, 34, 35, and 37, No. 15-3047 (7th Cir.)).

70. CDT has been deeply engaged in law and policy advocacy regarding intermediary liability frameworks, free speech, and content moderation since the organization was founded in 1994.

71. The organization devotes significant resources to advocating in favor of individuals' online free expression rights and the legal frameworks that support them, [44] including evaluating

[44] *See, e.g.*, Emma Llansó, *Clearing Up Misinformation About Section 230*, CDT (July 11, 2019), https://cdt.org/insights/clearing-up-misinformation-about-section-230/.

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proposals to amend the proposed laws on free speech online and challenging legislation that burdens individuals' fundamental rights, holding public events, and communicating with policy makers in the Executive and Legislative Branches.

72. The Executive Order injures Plaintiff CDT by infringing on its interests, including its interests in enhancing freedom of expression, preserving the unique nature of the Internet, and limiting government surveillance, and by causing Plaintiff CDT to divert resources to safeguarding the principles underlying the First Amendment, 47 U.S.C. § 230, and the free speech rights of online content platforms and individuals that the Executive Order places under attack.

73. As a result of the Executive Order, CDT will be required to devote substantial resources to (a) participating in the planned FCC rulemaking proceeding; (b) monitoring federal agencies' reports regarding and any action by the Department of Justice; (c) tracking any FTC action with respect to online speech, and participating in any proceedings that the Commission institutes; (d) engaging with federal and state policymakers with respect to the development of proposed legislation—as well as informing the public about all of these activities and the potential consequences for protection of free speech online. These activities will be time-consuming and resource-intensive, and will require CDT to reallocate resources that it planned to use for other activities furthering its mission.

CLAIM FOR RELIEF

FIRST CAUSE OF ACTION
Ultra Vires Action in Violation of the First Amendment

74. The foregoing allegations are repeated and incorporated as though fully set forth herein.

75. Plaintiff has a cause of action in equity and under the All Writs Act, 28 U.S.C. § 1651, to declare unlawful and to enjoin a Presidential Executive Order or other Presidential action that is *ultra vires*. *See generally Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015)

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("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.").

76. A Presidential Executive Order issued in violation of the U.S. Constitution is *ultra vires* and therefore void ab initio.

77. President Trump's May 28, 2020, "Executive Order on Preventing Online Censorship" constitutes retaliatory action by a government official, in violation of the U.S. Constitution's First Amendment's protection of free speech. *See generally Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . .").

78. A private company engaged in constitutionally protected speech on its own online platform by including a label on President Trump's tweets on May 26, 2020, and linking to information regarding the subject matter of President Trump's tweet, thereby expressing its viewpoint and adding to the discourse on its platform regarding the subject matter of the President's tweets.

79. Two days later and after a series of public attacks directly focused on the company's exercise of free speech, President Trump retaliated on May 28, 2020, by issuing the "Executive Order on Preventing Online Censorship," expressly mentioning the company by name six times. The company's constitutionally protected speech was the proximate or "but for" cause of President Trump issuance of the Executive Order. President Trump also issued the Executive Order to pressure the company into removing its constitutionally protected speech from its online platform and to coerce other Internet intermediaries into refraining from similar constitutionally protected speech on their own platforms, and into prohibiting such speech by their users, in the future.

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80. President Trump's retaliatory acts would deter a person of ordinary firmness from engaging in First Amendment speech and activity.

81. The Executive Order was intended to have, and is having or is likely to have, the effect of chilling the constitutionally protected speech of online content platforms, including Twitter, Facebook, Instagram, and YouTube that were explicitly named in the Executive Order. *See generally Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right' . . . ." (alteration in original) (quoting *Crawford–El v. Britton*, 523 U.S. 574, 588, n. 10 (1998)). The Executive Order seeks to curtail and chill the constitutionally protected speech of all online platforms and individuals—by demonstrating the willingness to use government authority to retaliate against those who criticize the government.

82. As noted, the Executive Order injures Plaintiff CDT's First Amendment interest and causes it to divert resources to safeguarding the First Amendment rights of individuals and Internet intermediaries that the Executive Order places under attack.

83. Plaintiff has been and will be irreparably injured by President Trump's *ultra vires* Executive Order issued in violation of the First Amendment, and have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

A. A declaration pursuant to 28 U.S.C. § 2201 that the Executive Order is unlawful and invalid.

B. A preliminary and permanent injunction enjoining Defendant, his officials, agents, employees, assigns, and all persons acting in concert or participating with them from implementing or enforcing any part of the Executive Order;

C. An order awarding Plaintiff cost of suit, and reasonable attorneys' fees and expenses

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pursuant to any applicable law; and

D. Such other relief as this Court deems equitable, just, and proper.

Dated: June 2, 2020

Respectfully Submitted,

MAYER BROWN LLP

By: /s/ Andrew J. Pincus

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CIVIL COVER SHEET

JS-44 (Rev. 6/17 DC)

I. (a) PLAINTIFFS
Center for Democracy and Technology

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF 11001
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS
Donald J. Trump

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT 11001
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
Please see attached.

ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION
(PLACE AN x IN ONE BOX ONLY)

- ○ 1 U.S. Government Plaintiff
- ○ 3 Federal Question (U.S. Government Not a Party)
- ◉ 2 U.S. Government Defendant
- ○ 4 Diversity (Indicate Citizenship of Parties in item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) **FOR DIVERSITY CASES ONLY!**

	PTF	DFT		PTF	DFT
Citizen of this State	○ 1	○ 1	Incorporated or Principal Place of Business in This State	○ 4	○ 4
Citizen of Another State	○ 2	○ 2	Incorporated and Principal Place of Business in Another State	○ 5	○ 5
Citizen or Subject of a Foreign Country	○ 3	○ 3	Foreign Nation	○ 6	○ 6

IV. CASE ASSIGNMENT AND NATURE OF SUIT
(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

○ **A. *Antitrust***
- ☐ 410 Antitrust

○ **B. *Personal Injury/ Malpractice***
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Medical Malpractice
- ☐ 365 Product Liability
- ☐ 367 Health Care/Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Product Liability

○ **C. *Administrative Agency Review***
- ☐ 151 Medicare Act

Social Security
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

Other Statutes
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 890 Other Statutory Actions (If Administrative Agency is Involved)

○ **D. *Temporary Restraining Order/Preliminary Injunction***

Any nature of suit from any category may be selected for this category of case assignment.

(If Antitrust, then A governs)

○ **E. *General Civil (Other)*** OR ○ **F. *Pro Se General Civil***

Real Property
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent, Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

Personal Property
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

Bankruptcy
- ☐ 422 Appeal 27 USC 158
- ☐ 423 Withdrawal 28 USC 157

Prisoner Petitions
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Conditions
- ☐ 560 Civil Detainee – Conditions of Confinement

Property Rights
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent – Abbreviated New Drug Application
- ☐ 840 Trademark

Federal Tax Suits
- ☐ 870 Taxes (US plaintiff or defendant)
- ☐ 871 IRS-Third Party 26 USC 7609

Forfeiture/Penalty
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

Other Statutes
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 430 Banks & Banking
- ☐ 450 Commerce/ICC Rates/etc.
- ☐ 460 Deportation
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions
- ☐ 470 Racketeer Influenced & Corrupt Organization
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Satellite TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions (if not administrative agency review or Privacy Act)

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G. *Habeas Corpus/ 2255*	H. *Employment Discrimination*	I. *FOIA/Privacy Act*	J. *Student Loan*
☐ 530 Habeas Corpus – General ☐ 510 Motion/Vacate Sentence ☐ 463 Habeas Corpus – Alien Detainee	☐ 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	☐ 895 Freedom of Information Act ☐ 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	☐ 152 Recovery of Defaulted Student Loan (excluding veterans)

K. *Labor/ERISA (non-employment)*	L. *Other Civil Rights (non-employment)*	M. *Contract*	N. *Three-Judge Court*
☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 740 Labor Railway Act ☐ 751 Family and Medical Leave Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	☐ 441 Voting (if not Voting Rights Act) ☐ 443 Housing/Accommodations ☒ 440 Other Civil Rights ☐ 445 Americans w/Disabilities – Employment ☐ 446 Americans w/Disabilities – Other ☐ 448 Education	☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholder's Suits ☐ 190 Other Contracts ☐ 195 Contract Product Liability ☐ 196 Franchise	☐ 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN

◉ 1 Original Proceeding ○ 2 Removed from State Court ○ 3 Remanded from Appellate Court ○ 4 Reinstated or Reopened ○ 5 Transferred from another district (specify) ○ 6 Multi-district Litigation ○ 7 Appeal to District Judge from Mag. Judge ○ 8 Multi-district Litigation – Direct File

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)

Ultra vires challenge to constitutionality of May 28, 2020, Executive Order on Preventing Online Censorship

VII. REQUESTED IN COMPLAINT CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND $** **JURY DEMAND:** Check YES only if demanded in complaint YES ☐ NO ☐

VIII. RELATED CASE(S) IF ANY (See instruction) YES ☐ NO ☒ If yes, please complete related case form

DATE: 6/2/2020 **SIGNATURE OF ATTORNEY OF RECORD** /s/ Andrew J. Pincus

INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.

III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.

IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.

VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.

VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

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ADDENDUM TO CIVIL COVER SHEET
LIST OF PLAINTIFFS' COUNSEL

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AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Center for Democracy & Technology,

Plaintiff(s)

v.

Donald J. Trump

Civil Action No. 20-1456

Defendant(s

SUMMONS IN A CIVIL ACTION

To: *Defendant's name and address)* Donald J. Trump, in his official capacity as President of the United States
1600 Pennsylvania Avenue, NW
Washington, DC 20500

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 a)(2) or 3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Andrew J. Pincus (D.C. Bar No. 370762)
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
APincus@mayerbrown.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 20-1456

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *name of individual and title, if any)* _____

was received by me on *date)* _____ .

❒ I personally served the summons on the individual at *place)* _____

_____ on *date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *name)* _____

_____ , a person of suitable age and discretion who resides there,

on *date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *name of individual)* _____ , who is

designated by law to accept service of process on behalf of *name of organization)* _____

_____ on *date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify :*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____ _____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

Document ID: 0.7.2270.18894-000002

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Center for Democracy & Technology

Plaintiff(s)

v.

Donald J. Trump

Defendant(s

Civil Action No. 20-1456

SUMMONS IN A CIVIL ACTION

To: *Defendant's name and address)* William P. Barr, in his official capacity as
Attorney General of the United States
950 Pennsylvania Avenue, NW
Washington, DC 20530

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 a)(2) or 3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Andrew J. Pincus (D.C. Bar No. 370762)
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
APincus@mayerbrown.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 20-1456

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *name of individual and title, if any)* _____

was received by me on *date)* _____ .

❒ I personally served the summons on the individual at *place)* _____

_____ on *date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *name)* _____

_____ , a person of suitable age and discretion who resides there,

on *date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *name of individual)* _____ , who is

designated by law to accept service of process on behalf of *name of organization)* _____

_____ on *date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify :*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____ _____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

Document ID: 0.7.2270.18894-000002

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Center for Democracy & Technology

Plaintiff(s)

v.

Donald J. Trump

Defendant(s

Civil Action No. 20-1456

SUMMONS IN A CIVIL ACTION

To: *Defendant's name and address)* Michael R. Sherwin
Acting U.S. Attorney for the District of Columbia
Judiciary Center Building
555 Fourth Street, NW
Washington, DC 20001

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 a)(2) or 3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Andrew J. Pincus (D.C. Bar No. 370762)
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
APincus@mayerbrown.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 20-1456

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *name of individual and title, if any)* _____
was received by me on *date)* _____ .

❒ I personally served the summons on the individual at *place)* _____
_____ on *date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *name)* _____
_____ , a person of suitable age and discretion who resides there,
on *date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *name of individual)* _____ , who is
designated by law to accept service of process on behalf of *name of organization)* _____
_____ on *date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify :*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

Document ID: 0.7.2270.18894-000002

Federal Register
Vol. 85, No. 106
Tuesday, June 2, 2020

Presidential Documents

Title 3—

The President

Executive Order 13925 of May 28, 2020

Preventing Online Censorship

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy*. Free speech is the bedrock of American democracy. Our Founding Fathers protected this sacred right with the First Amendment to the Constitution. The freedom to express and debate ideas is the foundation for all of our rights as a free people.

In a country that has long cherished the freedom of expression, we cannot allow a limited number of online platforms to hand pick the speech that Americans may access and convey on the internet. This practice is fundamentally un-American and anti-democratic. When large, powerful social media companies censor opinions with which they disagree, they exercise a dangerous power. They cease functioning as passive bulletin boards, and ought to be viewed and treated as content creators.

The growth of online platforms in recent years raises important questions about applying the ideals of the First Amendment to modern communications technology. Today, many Americans follow the news, stay in touch with friends and family, and share their views on current events through social media and other online platforms. As a result, these platforms function in many ways as a 21st century equivalent of the public square.

Twitter, Facebook, Instagram, and YouTube wield immense, if not unprecedented, power to shape the interpretation of public events; to censor, delete, or disappear information; and to control what people see or do not see.

As President, I have made clear my commitment to free and open debate on the internet. Such debate is just as important online as it is in our universities, our town halls, and our homes. It is essential to sustaining our democracy.

Online platforms are engaging in selective censorship that is harming our national discourse. Tens of thousands of Americans have reported, among other troubling behaviors, online platforms ''flagging'' content as inappropriate, even though it does not violate any stated terms of service; making unannounced and unexplained changes to company policies that have the effect of disfavoring certain viewpoints; and deleting content and entire accounts with no warning, no rationale, and no recourse.

Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias. As has been reported, Twitter seems never to have placed such a label on another politician's tweet. As recently as last week, Representative Adam Schiff was continuing to mislead his followers by peddling the long-disproved Russian Collusion Hoax, and Twitter did not flag those tweets. Unsurprisingly, its officer in charge of so-called ''Site Integrity'' has flaunted his political bias in his own tweets.

At the same time online platforms are invoking inconsistent, irrational, and groundless justifications to censor or otherwise restrict Americans' speech here at home, several online platforms are profiting from and promoting the aggression and disinformation spread by foreign governments like China. One United States company, for example, created a search engine for the Chinese Communist Party that would have blacklisted searches for ''human rights,'' hid data unfavorable to the Chinese Communist Party,

Document ID: 0.7.2270.18894-000003

and tracked users determined appropriate for surveillance. It also established research partnerships in China that provide direct benefits to the Chinese military. Other companies have accepted advertisements paid for by the Chinese government that spread false information about China's mass imprisonment of religious minorities, thereby enabling these abuses of human rights. They have also amplified China's propaganda abroad, including by allowing Chinese government officials to use their platforms to spread misinformation regarding the origins of the COVID–19 pandemic, and to undermine pro-democracy protests in Hong Kong.

As a Nation, we must foster and protect diverse viewpoints in today's digital communications environment where all Americans can and should have a voice. We must seek transparency and accountability from online platforms, and encourage standards and tools to protect and preserve the integrity and openness of American discourse and freedom of expression.

Sec. 2. *Protections Against Online Censorship.* (a) It is the policy of the United States to foster clear ground rules promoting free and open debate on the internet. Prominent among the ground rules governing that debate is the immunity from liability created by section 230(c) of the Communications Decency Act (section 230(c)). 47 U.S.C. 230(c). It is the policy of the United States that the scope of that immunity should be clarified: the immunity should not extend beyond its text and purpose to provide protection for those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints.

Section 230(c) was designed to address early court decisions holding that, if an online platform restricted access to some content posted by others, it would thereby become a ''publisher'' of all the content posted on its site for purposes of torts such as defamation. As the title of section 230(c) makes clear, the provision provides limited liability ''protection'' to a provider of an interactive computer service (such as an online platform) that engages in '' 'Good Samaritan' blocking'' of harmful content. In particular, the Congress sought to provide protections for online platforms that attempted to protect minors from harmful content and intended to ensure that such providers would not be discouraged from taking down harmful material. The provision was also intended to further the express vision of the Congress that the internet is a ''forum for a true diversity of political discourse.'' 47 U.S.C. 230(a)(3). The limited protections provided by the statute should be construed with these purposes in mind.

In particular, subparagraph (c)(2) expressly addresses protections from ''civil liability'' and specifies that an interactive computer service provider may not be made liable ''on account of'' its decision in ''good faith'' to restrict access to content that it considers to be ''obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable.'' It is the policy of the United States to ensure that, to the maximum extent permissible under the law, this provision is not distorted to provide liability protection for online platforms that—far from acting in ''good faith'' to remove objectionable content—instead engage in deceptive or pretextual actions (often contrary to their stated terms of service) to stifle viewpoints with which they disagree. Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike. When an interactive computer service provider removes or restricts access to content and its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial conduct. It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider.

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(b) To advance the policy described in subsection (a) of this section, all executive departments and agencies should ensure that their application of section 230(c) properly reflects the narrow purpose of the section and take all appropriate actions in this regard. In addition, within 60 days of the date of this order, the Secretary of Commerce (Secretary), in consultation with the Attorney General, and acting through the National Telecommunications and Information Administration (NTIA), shall file a petition for rulemaking with the Federal Communications Commission (FCC) requesting that the FCC expeditiously propose regulations to clarify:

(i) the interaction between subparagraphs (c)(1) and (c)(2) of section 230, in particular to clarify and determine the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c)(2)(A) may also not be able to claim protection under subparagraph (c)(1), which merely states that a provider shall not be treated as a publisher or speaker for making third-party content available and does not address the provider's responsibility for its own editorial decisions;

(ii) the conditions under which an action restricting access to or availability of material is not ''taken in good faith'' within the meaning of subparagraph (c)(2)(A) of section 230, particularly whether actions can be ''taken in good faith'' if they are:

(A) deceptive, pretextual, or inconsistent with a provider's terms of service; or

(B) taken after failing to provide adequate notice, reasoned explanation, or a meaningful opportunity to be heard; and

(iii) any other proposed regulations that the NTIA concludes may be appropriate to advance the policy described in subsection (a) of this section.

Sec. 3. *Protecting Federal Taxpayer Dollars from Financing Online Platforms That Restrict Free Speech.* (a) The head of each executive department and agency (agency) shall review its agency's Federal spending on advertising and marketing paid to online platforms. Such review shall include the amount of money spent, the online platforms that receive Federal dollars, and the statutory authorities available to restrict their receipt of advertising dollars.

(b) Within 30 days of the date of this order, the head of each agency shall report its findings to the Director of the Office of Management and Budget.

(c) The Department of Justice shall review the viewpoint-based speech restrictions imposed by each online platform identified in the report described in subsection (b) of this section and assess whether any online platforms are problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices.

Sec. 4. *Federal Review of Unfair or Deceptive Acts or Practices.* (a) It is the policy of the United States that large online platforms, such as Twitter and Facebook, as the critical means of promoting the free flow of speech and ideas today, should not restrict protected speech. The Supreme Court has noted that social media sites, as the modern public square, ''can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.'' *Packingham* v. *North Carolina,* 137 S. Ct. 1730, 1737 (2017). Communication through these channels has become important for meaningful participation in American democracy, including to petition elected leaders. These sites are providing an important forum to the public for others to engage in free expression and debate. *Cf. PruneYard Shopping Center* v. *Robins,* 447 U.S. 74, 85–89 (1980).

(b) In May of 2019, the White House launched a Tech Bias Reporting tool to allow Americans to report incidents of online censorship. In just weeks, the White House received over 16,000 complaints of online platforms censoring or otherwise taking action against users based on their political

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viewpoints. The White House will submit such complaints received to the Department of Justice and the Federal Trade Commission (FTC).

(c) The FTC shall consider taking action, as appropriate and consistent with applicable law, to prohibit unfair or deceptive acts or practices in or affecting commerce, pursuant to section 45 of title 15, United States Code. Such unfair or deceptive acts or practice may include practices by entities covered by section 230 that restrict speech in ways that do not align with those entities' public representations about those practices.

(d) For large online platforms that are vast arenas for public debate, including the social media platform Twitter, the FTC shall also, consistent with its legal authority, consider whether complaints allege violations of law that implicate the policies set forth in section 4(a) of this order. The FTC shall consider developing a report describing such complaints and making the report publicly available, consistent with applicable law.

Sec. 5. *State Review of Unfair or Deceptive Acts or Practices and Anti-Discrimination Laws.* (a) The Attorney General shall establish a working group regarding the potential enforcement of State statutes that prohibit online platforms from engaging in unfair or deceptive acts or practices. The working group shall also develop model legislation for consideration by legislatures in States where existing statutes do not protect Americans from such unfair and deceptive acts and practices. The working group shall invite State Attorneys General for discussion and consultation, as appropriate and consistent with applicable law.

(b) Complaints described in section 4(b) of this order will be shared with the working group, consistent with applicable law. The working group shall also collect publicly available information regarding the following:

(i) increased scrutiny of users based on the other users they choose to follow, or their interactions with other users;

(ii) algorithms to suppress content or users based on indications of political alignment or viewpoint;

(iii) differential policies allowing for otherwise impermissible behavior, when committed by accounts associated with the Chinese Communist Party or other anti-democratic associations or governments;

(iv) reliance on third-party entities, including contractors, media organizations, and individuals, with indicia of bias to review content; and

(v) acts that limit the ability of users with particular viewpoints to earn money on the platform compared with other users similarly situated.

Sec. 6. *Legislation.* The Attorney General shall develop a proposal for Federal legislation that would be useful to promote the policy objectives of this order.

Sec. 7. *Definition.* For purposes of this order, the term ''online platform'' means any website or application that allows users to create and share content or engage in social networking, or any general search engine.

Sec. 8. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

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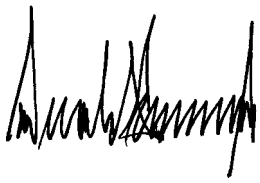
(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
May 28, 2020.

[FR Doc. 2020–12030
Filed 6–1–20; 11:15 am]
Billing code 3295–F0–P

Document ID: 0.7.2270.18894-000003

From: Willard, Lauren (OAG)
Subject: RE: QUICK REVIEW: Statement from the Press Secretary Regarding the Implementation of Censorship EO
To: Harris, Shane M. EOP/WHO
Cc: Moran, John (OAG); Staff Secretary; Levi, William (OAG); Bissex, Rachel (OAG)
Sent: July 29, 2020 8:59 AM (UTC-04:00)
Attached: Statement from the Press Secretary Regarding the Implementation of Censorship EO_v.2 smd_DOJ.docx

Looking at May's comment (which didn't come up on my phone), I do agree that further clarification could be helpful. I added her recommendation "for those actions" in the attached in case this hasn't gone out already. (And if it hasn't we should change "Yesterday" to "Monday").

But if it already went out, that's fine too.

Best,
Lauren

From: Willard, Lauren (OAG)
Sent: Wednesday, July 29, 2020 8:35 AM
To: Harris, Shane M. EOP/WHO <(b) (6)>
Cc: Moran, John (OAG) <(b) (6)>; Staff Secretary <(b) (6)>; Levi, William (OAG) <(b) (6)>; Bissex, Rachel (OAG) <(b) (6)>
Subject: Re: QUICK REVIEW: Statement from the Press Secretary Regarding the Implementation of Censorship EO

I'm so sorry all, just seeing this now. Crashed early last night and missed your call. Fine by be, hopefully John already approved!

Sent from my iPhone

On Jul 28, 2020, at 10:30 PM, Harris, Shane M. EOP/WHO <(b) (6)> wrote:

> John/Lauren – just tried to reach you. We are planning to move this forward for release. Thanks,
>
> Shane Harris
> (b) (6)
>
> ---
>
> **From:** Harris, Shane M. EOP/WHO
> **Sent:** Tuesday, July 28, 2020 9:51 PM
> **To:** 'Moran, John (OAG)' <(b) (6)>
> **Cc:** Levi, William (OAG) <(b) (6)>; Bissex, Rachel (OAG) <(b) (6)>; Willard, Lauren (OAG) <(b) (6)>
> **Subject:** RE: QUICK REVIEW: Statement from the Press Secretary Regarding the Implementation of Censorship EO
>
> Thanks John. Lauren/DOJ – Please see attached for one comment from WHCO. I believe the "civil liability" May is referring to was a phrase added in by Derek Lyons. Please let me know if you all have any objections regarding her comment.
>
> ---
>
> **From:** Moran, John (OAG) <(b) (6)>
> **Sent:** Tuesday, July 28, 2020 9:36 PM
> **To:** Staff Secretary <(b) (6)>
> **Cc:** Levi, William (OAG) <(b) (6)>; Bissex, Rachel (OAG) <(b) (6)>; Willard, Lauren (OAG) <(b) (6)>
> **Subject:** Re: QUICK REVIEW: Statement from the Press Secretary Regarding the Implementation of Censorship EO

Staff Sec:

Thanks for sending the new turn. It looks like our comments have been addresses but I am adding Lauren just to confirm.

Thanks,

John S. Moran
Deputy Chief of Staff & Counselor to the Attorney General
U.S. Department of Justice
(b) (6) (W)
(b) (6) (C)
(b) (6)

On Jul 28, 2020, at 8:41 PM, Staff Secretary <(b) (6) > wrote:

All,

Attached is an updated version of this statement. Please send all edits to Staff Sec by **9:30 pm tonight, July 28.**

From: Staff Secretary <(b) (6) >
Sent: Tuesday, July 28, 2020 3:44 PM
To: Philbin, Patrick F. EOP/WHO <(b) (6) >; Cipollone, Pat A. EOP/WHO <(b) (6) >; Eisenberg, John A. EOP/WHO <(b) (6) >; Gilmartin, Kayleigh M. EOP/WHO <(b) (6) >; Farah, Alyssa A. EOP/WHO <(b) (6) >; Hicks, Hope C. EOP/WHO <(b) (6) >; Moran, John (OAG <(b) (6) >; Levi, William (OAG <(b) (6) >; Miller, Stephen EOP/WHO <(b) (6) >; Short, Marc T. EOP/OVP <(b) (6) >; Rollins, Brooke L. EOP/WHO <(b) (6) >; Butterfield, Nicholas W. EOP/WHO <(b) (6) >; Williamson, Benjamin D. EOP/WHO <(b) (6) >; Meadows, Mark R. EOP/WHO <(b) (6) >; Droegemeier, Kelvin K. EOP/OSTP <(b) (6) >; Vought, Russell T. EOP/OMB <(b) (6) >; Liddell, Christopher P. EOP/WHO <(b) (6) >; Walsh, Michael (Federal) <(b) (6) >; Pottinger, Matthew F. EOP/WHO <(b) (6) >; O'Brien, Robert C. EOP/WHO <(b) (6) >
Cc: Staff Secretary <(b) (6) >
Subject: QUICK REVIEW: Statement from the Press Secretary Regarding the Implementation of Censorship EO

All,

Attached for your review is a draft statement from the Press Secretary on implementation of an Executive Order signed in May of this year on ending online censorship.

Affirmative clearance is requested from WHCO and DOJ. Please send all other edits to Staff Sec by **4:15 pm today, July 28.**

Document ID: 0.7.2270.19098

Thank you,

STAFF SEC.
<Statement from the Press Secretary Regarding the Implementation of Censorship EO_v.2.docx>

Statement from the Press Secretary Regarding the Implementation of President Trump's Executive Order on Preventing Online Censorship

(b) (5) [redacted]

(b) (5)

Document ID: 0.7.2270.19098-000001

Big Tech TPs – August 2020

Section 230:

- The Department recognizes Section 230 as an important part of today's digital landscape, but tailored reform is necessary to incentivize platforms to be better about addressing criminal content on their services, while also being more transparent and accountable when taking down lawful speech.

  - Passed in 1996, Section 230 of the Communications Decency Act limits civil liabilities for online platforms for third party content they host and for removing certain categories of content.

  - Congress enacted Section 230 to nurture a nascent industry and promote free speech online, while also encouraging platforms to remove obscene and harmful material for children.

  - A lot has changed since 1996. Online platforms have evolved significantly from simple 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.

  - The combination of 25 years of drastic technological changes and an expansive statutory interpretation has left online platforms unaccountable for a variety of harms flowing from content on their platforms and with virtually unfettered discretion to censor third-party content with little transparency or accountability.

  - The Department's review of Section 230 started a year ago in the content of our review of market-leading online platforms. (b) (5) [redacted]

  - Responding to widespread and bipartisan concerns about Section 230, we formed a Department-wide Working Group, hosting a large public workshop and expert roundtable in February, had dozens of listening sessions with industry, thought leaders, and policy makers, and issued a summary of our findings and proposals for reform in June.

  - The need for reform is important now more than ever as citizens rely on the internet for daily activities. At the same time, criminals and wrongdoers are increasingly turning to the internet to engage in illicit schemes. It is therefore imperative that we maintain the internet as both an open and safe space for our society, especially our

Document ID: 0.7.2270.19487

children who are more reliant than ever on the internet for social interactions and education.

- The DOJ proposals address two categories of reforms: (1) reforms to incentivize platforms to better address *illicit* content on their platforms (e.g. child sexual abuse materials, illicit drug trafficking, terrorism, etc.) and (2) reforms to make platform more transparent and accountable when taking down *lawful* speech.

- Both are important to

- To return Section 230 immunity to its original purpose – to encourage and reward the "Good Samaritan"– the Department identified several scenarios in which platforms are not "Good Samaritans" and therefore should not be entitled to invoke the immunity.

    - For example, Section 230's "Good Samaritan" immunity should *not* extend to (b) (5) [redacted]

    - Nor should Section 230's "Good Samaritan" immunity extend to (b) (5) [redacted]

- DOJ is currently working through the OMB process on the draft legislative text, and is close to getting clearance on a package (current draft attached).

- The Department further believes that (b) (5) [redacted]

- The Department also supports (b) (5) [redacted]

QUESTION

Document ID: 0.7.2270.19487

- (b) (5) [redacted]

RECOMMENDED RESPONSE

- (b) (5) [redacted]

- (b) (5) [redacted]

Document ID: 0.7.2270.19487

From: Bronack, Candice M. EOP/OMB
Subject: FW: Willful Blindness: JUSTICE Draft Bill on Modernize and Clarify the Immunities under the Communications Decency Act
To: Willard, Lauren (OAG); Raman, Sujit (ODAG); Newman, Ryan D. (OAG)
Sent: August 10, 2020 12:32 PM (UTC-04:00)
Attached: Section 230 Redline (DELIBERATIVE) passback_DOJ response_8.6 v3.docx, Further Explanation re DOJ's Position on Willful Blindness and Terrorism Provisions NTIA _ DOJ response.FINAL.docx

-----Original Appointment-----
From: Bronack, Candice M. EOP/OMB <(b) (6) >
Sent: Monday, August 10, 2020 12:26 PM
To: Bronack, Candice M. EOP/OMB; (b) (6) (OLA); 'Parisi, Elizabeth (Federal)'; Davis, May M. EOP/WHO; Clark, Sharri R. EOP/NSC; Sherk, James B. EOP/WHO; Colwell, Robin C. EOP/WHO; Wiggins, Jeremy G. EOP/WHO; Champagne, Joshua D. EOP/NSC; Kahangama, Iranga A. EOP/NSC; Collie, Jacqueline L. EOP/OSTP; Ventura, Alexandra EOP/OMB; Herman, Barry C. EOP/OSTP; Kratsios, Michael J. EOP/OSTP
Subject: Willful Blindness: JUSTICE Draft Bill on Modernize and Clarify the Immunities under the Communications Decency Act
When: Wednesday, August 12, 2020 9:30 AM-10:00 AM (UTC-05:00) Eastern Time (US & Canada).
Where: Call-in (b) (6)

Call to discuss the willful blindness section of the DOJ draft bill to Modernize and Clarify the Immunities under the Communications Decency Act. Relevant documents attached.

Call in (b) (6)
Code: (b) (6)

Federal Civil Enforcement Provision of PACT Act

Section 7(a) of the PACT Act would amend Section 230 of the Communications Decency Act to provide that the immunity Section 230 confers on online platforms does not limit federal civil enforcement actions by the U.S. government.

I. A Carve-out for Federal Civil Enforcement Appropriately Balances the Public Interest in the Enforcement of Federal Law with Platforms' Interest in Limiting Liability for Hosting and Moderating Third-Party Content.

A. Section 230 immunity was enacted in 1996 to protect incipient online platforms from being overrun by private damages lawsuits related to third-party speech on their services. Since then, however, changes in technology have led to a wide array of illegal activity unrelated to the intent of Section 230 and unimagined by its drafters. Meanwhile, expansive judicial interpretations of Section 230 have left online platforms increasingly immune from liability for this ever-expanding illicit activity.

B. Reform is necessary to clarify that Section 230 immunity does not extend to civil enforcement cases brought by the federal government acting on behalf of the American people.

C. Federal civil enforcement is an important complement to federal criminal prosecutions.

D. Federal civil enforcement is often a faster, more efficient means than criminal enforcement to prevent or stop conduct that is harming individuals and the broader public. Indeed, DOJ has used civil enforcement to great effect during the COVID pandemic to remove fraudulent treatments from the market.

E. Limiting the carve-out to federal civil enforcement will ensure platforms do not face meritless suits, and will limit the overall number of suits.

F. Section 230's bar to federal civil enforcement currently threatens enforcement of federal laws that protect public health and safety, consumer protection, civil rights, and competition.

G. Cases in which companies have invoked Section 230 as a shield for conduct that would otherwise violate federal law demonstrate that this concern is not theoretical.

II. (b) (5) [redacted]

A. (b) (5) [redacted]

1. (b) (5) [redacted]

Document ID: 0.7.2270.19495

(b) (5)

a. (b) (5)

b. (b) (5)

B. (b) (5)

1. (b) (5)

2. (b) (5)

C. (b) (5)

1. (b) (5)

Document ID: 0.7.2270.19495

(b) (5)

2. (b) (5)

D. (b) (5)

1. (b) (5)

a. (b) (5)

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E. (b) (5)

1. (b) (5)

a. (b) (5)

Document ID: 0.7.2270.19495

(b) (5) [redacted]

b. (b) (5) [redacted]

2. (b) (5) [redacted]

a. (b) (5) [redacted]

b. (b) (5) [redacted]

c. (b) (5) [redacted]

3. (b) (5) [redacted]

a. (b) (5) [redacted]

Document ID: 0.7.2270.19495

(b) (5) [redacted]

b. (b) (5) [redacted]

c. (b) (5) [redacted]

F. (b) (5) [redacted]

1. (b) (5) [redacted]

2. (b) (5) [redacted]

Document ID: 0.7.2270.19495

(b) (5) [redacted]

Document ID: 0.7.2270.19495

From: Willard, Lauren (OAG)
Subject: RE: roughly what we discussed
To: Levi, William (OAG)
Cc: Kupec, Kerri (OPA); Herlihy, Brianna (PAO)
Sent: August 17, 2020 4:24 PM (UTC-04:00)

Thanks!!

From: Levi, William (OAG) <(b) (6) >
Sent: Monday, August 17, 2020 4:23 PM
To: Willard, Lauren (OAG) <(b) (6) >
Cc: Kupec, Kerri (OPA) <(b) (6) >; Herlihy, Brianna (PAO) <(b) (6) >
Subject: Re: roughly what we discussed

Ok

On Aug 17, 2020, at 4:14 PM, Willard, Lauren (OAG) <(b) (6) > wrote:

Further edits in red to be responsive to Will's suggestions. Any final edits? Otherwise, can send back to WSJ to go.

Attributable to a senior DOJ official:

(b) (5)

Clean:

- Harm to innovation and nascent competition in fast-moving technology markets can happen quickly. The Department of Justice has a duty to act quickly to determine if antitrust violations have been committed and, if so, to address them.
- This investigation, which has been open for over a year, is premised on traditional antitrust principles and the long-standing consumer welfare standard. There are a lot of additional concerns that have been raised about the major tech platforms, including political censorship, online crime, and broad immunity under Section 230, which the Department is exploring separately as part of its broader tech review.

Document ID: 0.7.2270.19089

WSJ to say bi-partisan point on its own.

From: Willard, Lauren (OAG)
Sent: Monday, August 17, 2020 3:43 PM
To: Kupec, Kerri (OPA) <(b) (6) >; Levi, William (OAG) <(b) (6) >; Herlihy, Brianna (PAO) <(b) (6) >
Subject: RE: roughly what we discussed

Based on further discussion with Will, proposing a few additional edits in red.

From: Kupec, Kerri (OPA) <(b) (6) >
Sent: Monday, August 17, 2020 3:32 PM
To: Willard, Lauren (OAG) <(b) (6) >; Levi, William (OAG) <(b) (6) >; Herlihy, Brianna (PAO) <(b) (6) >
Subject: RE: roughly what we discussed

Attributable to a senior DOJ official (which means a senior DOJ official actually has to say them)

(b) (5)

From: Willard, Lauren (OAG) <(b) (6) >
Sent: Monday, August 17, 2020 3:12 PM
To: Levi, William (OAG) <(b) (6) >; Herlihy, Brianna (PAO) <(b) (6) >; Kupec, Kerri (OPA) <(b) (6) >
Subject: Fwd: roughly what we discussed

Can we say the below? Ryan and I workshopped together. This is consistent with AG's prior speeches and the meeting DAG, Ryan and I had with the AG last month.

WSJ is going live soon, and we should get counter message in there.

Best,
Lauren

Begin forwarded message:

From: "Shores, Ryan (ODAG)" <(b) (6)>
Date: August 17, 2020 at 3:09:22 PM EDT
To: "Herlihy, Brianna (PAO)" <(b) (6)>
Cc: "Willard, Lauren (OAG)" <(b) (6)>
Subject: RE: roughly what we discussed

(b) (5)

[redacted]

From: Herlihy, Brianna (PAO) <(b) (6)>
Sent: Monday, August 17, 2020 1:53 PM
To: Shores, Ryan (ODAG) <(b) (6)>
Subject: Fwd: roughly what we discussed

Here's what he wants - talked to Kerri, going to have attribution be "sr DOJ official" instead

Begin forwarded message:

> **From:** "Kendall, Brent" <(b) (6)>
> **Date:** August 17, 2020 at 12:38:10 PM EDT
> **To:** "Herlihy, Brianna (PAO)" <(b) (6)>
> **Subject: roughly what we discussed**
>
> A person familiar with the thinking of the Justice Department's leadership said the department is being pressured externally by both Republican and Democratic lawmakers to take action against Google, and there's a belief that the department's credibility is at stake if it sits on the sidelines.
>
> There's a broad perception that antitrust enforcement in the tech space has been lacking, and relying on the old playbook hasn't worked, this person said, adding that the department has a duty to act quickly if it believes antitrust violations have been committed.

From: Lee, Steffanie G. \(ODAG\)
Subject: ODAG Weekly Report
To: Rosen, Jeffrey A. \(ODAG\); Atwell, Tonya \(ODAG\); Bacon, Antoinette T. \(ODAG\); Braverman, Adam L. \(ODAG\); Brinkley, Winnie \(ODAG\); Brown, Angela M. \(ODAG\); Cardwell, Christine \(ODAG\); Gamble, Nathaniel \(ODAG\); Goldsmith, Andrew \(ODAG\); Harris, Stacie B. \(ODAG\); Hovakimian, Patrick \(ODAG\); Hughes, William C. \(ODAG\); Hunt, Ted \(ODAG\); Lan, Iris \(ODAG\); Liskamm, Amanda N. \(ODAG\); Masling, Mark \(ODAG\); Metcalf, David \(ODAG\); Powell, SeLena Y \(ODAG\); Raman, Sujit \(ODAG\); Simms, Donna Y. \(ODAG\); Suero, Maya A. \(ODAG\); Weinsheimer, Bradley \(ODAG\); Wetmore, David H. \(ODAG\); Grieco, Christopher \(ODAG\); Sherwin, Michael R. \(ODAG\); Shores, Ryan \(ODAG\); Higgins, John E. \(ODAG\); Plack, Laura \(ODAG\); Blue, Matthew \(ODAG\); Hodes, Jarad \(ODAG\); Anderson, John \(ODAG\); Mascott, Jenn \(ODAG\); Creegan, Erin \(ODAG\); Donoghue, Richard \(ODAG\); Canterbury, Kenneth \(ODAG\); Moran, John \(OAG\)
Sent: August 21, 2020 9:06 PM (UTC-04:00)
Attached: 2020.08.24 ODAG Weekly Report.pdf

Good evening, ODAG,

Attached is the weekly report for the week of August 24-28.

Have a good weekend,

Steffanie Lee
Paralegal Specialist
Office of the Deputy Attorney General
U.S. Department of Justice
Office: (b) (6)
Cell: (b) (6)

Document ID: 0.7.2270.19669

For ODAG Internal Use Only

WEEKLY REPORT
FOR
THE DEPUTY ATTORNEY GENERAL

WEEK OF

24 AUGUST 2020

Document ID: 0.7.2270.19669-000001

OLP Office of Legal Policy	ODAG POC: Laura Plack ((b) (6)) Component POC: Chief of Staff Lindsey Freeman ((b) (6))		
	Date	*OAG/ODAG action required?*	*Recommend notifying PAO?*

Removed per scoping agreement

Internet Bias/Section 230 Rewrite: The Section 230 Working Group sent OMB its latest response to comments arising from the OMB interagency review of the Department's Section 230 legislative proposal. In particular, the Working Group has been addressing specific concerns from DPC. The Working Group hopes to come to a resolution with DPC and obtain OMB clearance to publish the legislative proposal.		None	No

Removed per scoping agreement

Document ID: 0.7.2270.19669-000001

From: Lee, Steffanie G. \(ODAG\)
Subject: ODAG Weekly Report & September Deliverables
To: Rosen, Jeffrey A. \(ODAG\); Atwell, Tonya \(ODAG\); Bacon, Antoinette T. \(ODAG\); Braverman, Adam L. \(ODAG\); Brinkley, Winnie \(ODAG\); Brown, Angela M. \(ODAG\); Cardwell, Christine \(ODAG\); Gamble, Nathaniel \(ODAG\); Goldsmith, Andrew \(ODAG\); Harris, Stacie B. \(ODAG\); Hovakimian, Patrick \(ODAG\); Hughes, William C. \(ODAG\); Hunt, Ted \(ODAG\); Lan, Iris \(ODAG\); Liskamm, Amanda N. \(ODAG\); Masling, Mark \(ODAG\); Metcalf, David \(ODAG\); Powell, SeLena Y \(ODAG\); Raman, Sujit \(ODAG\); Simms, Donna Y. \(ODAG\); Suero, Maya A. \(ODAG\); Weinsheimer, Bradley \(ODAG\); Wetmore, David H. \(ODAG\); Grieco, Christopher \(ODAG\); Sherwin, Michael R. \(ODAG\); Shores, Ryan \(ODAG\); Higgins, John E. \(ODAG\); Plack, Laura \(ODAG\); Blue, Matthew \(ODAG\); Hodes, Jarad \(ODAG\); Anderson, John \(ODAG\); Mascott, Jenn \(ODAG\); Creegan, Erin \(ODAG\); Donoghue, Richard \(ODAG\); Canterbury, Kenneth \(ODAG\); Moran, John \(OAG\)
Sent: August 28, 2020 8:04 PM (UTC-04:00)
Attached: 2020.08.31 ODAG Weekly Report.pdf, 9. September Deliverables_ODAG_20200828.docx

Good evening, ODAG,

Attached is the weekly report for the week of August 31 – September 4 and a draft of the September Deliverables.

Have a good weekend,

Steffanie Lee
Paralegal Specialist
Office of the Deputy Attorney General
U.S. Department of Justice
Office: (b) (6)
Cell: (b) (6)

Document ID: 0.7.2270.19524

For ODAG Internal Use Only

WEEKLY REPORT
FOR
THE DEPUTY ATTORNEY GENERAL

WEEK OF

31 AUGUST 2020

Document ID: 0.7.2270.19524-000001

OLP Office of Legal Policy	ODAG POC: Laura Plack ((b) (6)) Component POC: Chief of Staff Lindsey Freeman ((b) (6))		
	Date	*OAG/ODAG action required?*	*Recommend notifying PAO?*
Removed per scoping agreement			
Internet Bias/Section 230 Rewrite: • The Department's Section 230 Working Group has been addressing DPC's concerns regarding the Department's Section 230 legislative proposal. The Working Group expects a principals meeting to be called with the Attorney General, WH representatives, and possibly FBI Director Wray to address the remaining issues. • OLP is working with OAG, OASG, and ODAG to address tasks assigned to the Department within Executive Order 13925 ("Preventing Online Censorship"), including performing research and developing model legislation for the states. In furtherance of those efforts, the Department is coordinating with the WH to meet with state attorneys general on September 10.		None	No
Removed per scoping agreement			

Document ID: 0.7.2270.19524-000001