Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 230 of the Communications Act of 1934	)	RM-11862
	)	

Statement of DigitalFrontiers Advocacy
in Support of the Petition for Rulemaking

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Summary

Something needs to change.

In 1996, Congress added section 230 to the Communications Act to encourage internet platforms to proactively curb harmful, illicit, and unwelcome conduct by their users. Congress sought to do so by limiting platforms' liability for engaging in content moderation. Twenty-five years later, however, bipartisan consensus is growing that section 230—at least as construed by the courts—instead contributes to a toxic online environment by shielding platforms even when they negligently, recklessly, or knowingly fail to curb abuse of their services.

The platforms need not be perfect. But if the idea is to encourage platforms to be Good Samaritans, then section 230 should be applied in a way that immunizes them only when they proactively take reasonable steps to prevent illicit use of their services. This would better accomplish Congress' dual goals of promoting content moderation and fostering growth of the internet as a forum for expression and commerce. And it would do so in a way that better protects the public, as well as ameliorates concerns about platforms' market power.

What this approach would not do, despite the claims of opponents, is stifle innovation or hinder smaller service providers. It requires no regulation, and the reasonableness standard is a flexible one that accounts for the resources available to a platform. Nor would this approach stifle free expression. It would focus on illicit content, not protected speech. It does not create a government entity that could restrict platforms' editorial discretion, avoiding censorship concerns. The safe harbor for content moderation would remain, allowing platforms to continue carrying and moderating user-generated content free from liability so long as they take reasonable steps to curb illicit conduct. And even if a platform failed to take such steps, it would not automatically be subject to liability. It simply could no longer hide behind section 230. Any lawsuit would still need

to prove some cause of action and a court would still be bound to consider the free speech implications before rendering judgement.

The best course would be for Congress to amend section 230 to require reasonable efforts by platforms to curb illicit activity as a condition of receiving the section's protection. Unless and until Congress does so, however, the FCC can and should adopt rules clarifying that section 230 does not preclude holding platforms liable for failing to meet the generally applicable duty of care, which ordinarily requires businesses to take reasonable steps to prevent third parties from using their services to harm others. The Supreme Court has ruled that section 201(b) of the Communications Act authorizes the FCC to implement provisions found in chapter five of the Act, where section 230 resides. The Court has also ruled that in construing ambiguous provisions of the Act, the FCC is not bound by prior court interpretations, so long as the Commission's constructions are reasonable. Nothing in the ambiguous language of section 230 requires the courts' interpretations that have had the effect of precluding application to platforms of the ordinary duty of care. Consequently, the FCC may adopt a different interpretation.

Because unwelcome but lawful speech is constitutionally protected, concerns over expression—including allegations of hate speech, bias, and fake news—are best addressed through enforcement of platforms' terms of service and application of the "good faith" language in section 230. If platforms are found to be treating lawful content inconsistently, under pretext, without due diligence, or in violation of their own policies, they could be found to have lost section 230 protection and be potentially held liable for breach of contract or unfair and deceptive practices.

At bottom, the FCC has authority to construe section 230 in a way that better meets Congress' goals. A rulemaking proceeding would help the FCC determine the best way to do so.

I. Congress Intended Section 230 to Encourage Platforms to Proactively Curb Harmful, Illicit, and Unwelcome Behavior by Users of Their Services

In 1996, Congress added section 230 to the Communications Act with two goals in mind: 1) to further foster internet platforms as venues for communication and commerce;[1] and 2) to combat the increasing spate of harmful behavior online.[2] Determined not to chill internet growth or expression in the process, Congress sought to advance these goals without regulation.[3]

Instead, Congress chose to rely on voluntary efforts by platforms to proactively protect consumers, which it would encourage by limiting platforms' liability when they moderated content. Thus, section 230(c)(2), sometimes referred to as the content moderation safe harbor, provides that:

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[1] *See* 47 U.S.C. § 230(a)(1), (a)(3), (a)(5) (finding that internet platforms "represent an extraordinary advance in the availability of educational and informational resources," "offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," and increasingly provide access to "a variety of political, educational, cultural, and entertainment services" upon which Americans rely); *id.*, § 230(b)(1) (making it U.S. policy to "promote the continued development of the Internet and other interactive computer services and other interactive media.").

[2] *See id.*, § 230(a)(2) (finding that internet platforms "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"); *id.* § 230(b)(3)-(5)(making it U.S. policy 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," 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 to "ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.").

[3] *See id.*, § 230(a)(4) (finding that platforms "have flourished, to the benefit of all Americans, with a minimum of government regulation"); *id.*, § 230(b)(2) (making it U.S. policy 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."). *See also* 141 Cong. Rec. H8468, H8469-70 (daily ed. Aug. 4, 1995) (comments of then-House members Chris Cox and Ron Wyden, along with others, about amendment language that would eventually become section 230, stating that the language was intended to promote content moderation while preserving discourse on the internet, without regulating), https://www.congress.gov/104/crec/1995/08/04/CREC-1995-08-04-pt1-PgH8460.pdf.

> "[n]o 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."[4]

Section 230 was precipitated in particular by the 1995 decision in *Stratton Oakmont v. Prodigy*.[5] An anonymous poster on Prodigy's "Money Talk" bulletin board had leveled securities fraud accusations against Stratton Oakmont—the brokerage firm later depicted in the film *Wolf of Wall Street*. Stratton Oakmont sued Prodigy for libel. A New York trial court ruled that Prodigy's use of content moderators as well as automated methods to both prevent and remove inappropriate content on the board rendered it a "publisher."

Under traditional libel law, publishers—those with editorial discretion over another's content, such as producers of books, newspapers, and magazines—can be held culpable for defamatory statements in that content, regardless whether they are aware of the statements or their falsity, subject to certain First Amendment protections.[6] As a result, Prodigy's content moderation efforts meant it could be held culpable if the anonymous post was found unlawfully defamatory,[7]

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[4]47 U.S.C. § 230(c)(2), (c)(2)(A).

[5]*See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), https://h2o.law.harvard.edu/text_blocks/5715.

[6]W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 113, at 803, 810 (5th ed. 1984).

[7]Even as a "publisher," Prodigy might have escaped liability if Stratton Oakmont had been unable to prove one of the elements of libel or if Prodigy had a defense, such as that the statement was true. Prodigy might well have had such a defense, based on what we now know about Stratton Oakmont. *See* Edward Wyatt, *Stratton Oakmont Executives Admit Stock Manipulation*, N.Y. TIMES, Sept. 24, 1999, at C3, https://www.nytimes.com/1999/09/24/business/stratton-oakmont-executives-admit-stock-manipulation.html. In the end, the parties appear to have settled after Prodigy provided Stratton Oakmont with a public apology. *See* Peter H. Lewis, *After Apology From Prodigy, Firm Drops Suit*, N.Y. TIMES, Oct. 25, 1995, at D1, https://www.nytimes.com/1995/10/25/business/after-apology-from-prodigy-firm-drops-suit.html. In light of the settlement, Prodigy asked the court to vacate the decision, but the court refused, arguing the precedent should remain. *See* Stratton Oakmont v. Prodigy, 1995 WL 805178 (N.Y. Sup. Ct. Dec. 11, 1995), https://cyber.harvard.edu/metaschool/fisher/ISP/ISPc4.html; Peter H. Lewis, *Judge Stands By*

even though Prodigy had not been aware of the post. By contrast, "distributors"—those that do not have editorial discretion over content but that are responsible for its delivery, such as libraries, bookstores, and newsvendors—cannot be held culpable for libel unless they knew, or should have known, about the defamatory statements in the content they delivered.[8]

The *Stratton* decision agitated Congress. It wanted platforms to moderate content so children would not be exposed to sexually explicit material or predatory behavior online, and so adults would not be exposed to harassment or content they wished to avoid. Prodigy had engaged in the desired content moderation, marketing itself as a family friendly service, but was being "punished" for doing so. Concerned that platforms would stop moderating to avoid potential liability under *Stratton*, Congress inserted section 230 into the Communications Act[9] to prevent use of a platform's moderation efforts as the basis for civil liability.

Ruling on Prodigy's Liability, N.Y. Times, Dec. 14, 1995, at D2, https://www.nytimes.com/1995/12/14/business/judge-stands-by-ruling-on-prodigy-s-liability.html.

[8]*See* KEETON, *supra* note 6, § 113 at 810-11; 1 ROBERT D. SACK, SACK ON DEFAMATION, § 7:3.1[A], at 7-11 (5th ed. rel. no. 3 April 2020). For further discussion of "publishers," "distributors," the elements of a libel cause of action, and the formative section 230 cases, *see* Neil Fried, *Dodging the Communications Decency Act when Analyzing Libel Liability of On-line Services: Lunney v. Prodigy Treats Service Provider like Common Carrier Rather than Address Retroactivity Issue*, 1 Colum. Sci. & Tech. L. Rev. 1 (1999), https://journals.library.columbia.edu/index.php/stlr/article/view/3507/1389.

[9]Congress added section 230 to the Communications Act with section 509 of the Telecommunications Act of 1996. *See* Pub. L. No. 104–104, sec. 509, 110 Stat. 56, 137-39. Section 509 and all the other provisions in 1996 Telecommunications Act title V—which sought to address indecent, obscene, and violent transmissions by phone, on television, and over the internet—are collectively referred to as the Communications Decency Act. *Id.*, secs. 501, 502-561, 110 Stat. at 133-43. Provisions created by section 502 of the CDA that sought to criminalize certain indecent online communications were held unconstitutional in Reno v. ACLU, 521 U.S. 844 (1997), and Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996), *aff'd*, 521 U.S. 1113 (1997). In United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000), the Supreme Court also found unconstitutional certain provisions created by CDA section 505 that required scrambling of adult cable channels. Provisions in CDA section 551 governed creation of the television rating code and mandated that certain televisions include technology, commonly

Congress was quite clear that "[o]ne 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*."[10] The idea was to inoculate platforms from liability when they take proactive steps to curb harmful behavior, in the hope of encouraging them to do so. In other words, to bestow upon internet platforms a content liability shield so that they would wield a content moderation sword. Because of the analogy to liability protections for people who help others in distress, Congress designated section 230(c) the "Good Samaritan" provision.[11]

II. As Construed by the Courts, Section 230 Does Not Encourage Platforms to Proactively Curb Harmful, Illicit, and Unwelcome Behavior, but Instead Endangers the Public by Immunizing Platforms When They Negligently, Recklessly, or Knowingly Fail to Curb Such Behavior

Congress has accomplished one of its goals in passing section 230—promoting the growth of internet platforms—as internet platforms are now among the largest and most influential companies on the planet. Congress' other goal—protecting consumers from harmful behavior online—remains elusive, however. Indeed, the internet is increasingly rife with illicit activity, such as fraud,[12] animal and antiquities trafficking,[13] sale of unsafe products,[14] identity theft and theft of

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known as the "v-chip," that would allow viewers to block programming based on rating. *See* 110 Stat. 140-42, sec. 551.

[10] TELECOMMUNICATIONS ACT OF 1996, S. Rep. 104-230, at 194 (1996) (Conf Rep.) (emphasis added).

[11] *See* 47 U.S.C. § 230(c).

[12] *See, e.g.,* U.S. Securities and Exchange Commission, *Internet and Social Media Fraud*, INVESTOR.COM (last visited Sept. 2, 2020); Sabri Ben-Achour, *The most common scams in the U.S. involve online purchases*, MARKETPLACE, Oct. 28, 2019.

[13] *See, e.g.*, Kurt Wagner, *A black market in wildlife trafficking thrives on Facebook and Instagram*, L.A. TIMES, July 12, 2019; Karen Zraick, *Now for Sale on Facebook: Looted Middle Eastern Antiquities*, N.Y. TIMES, May 9, 2019.

[14] *See, e.g.*, Andrew Martins, *Online Searches Often Lead Customers to Counterfeit Goods*, BUS. NEWS DAILY, Oct. 21, 2019.

personal information,[15] spread of malware,[16] housing discrimination,[17] harassment,[18] unlawful drug sales,[19] cyber attacks,[20] terrorist activity,[21] espionage,[22] revenge porn,[23] and the proliferation of child sexual abuse materials.[24]

Part of the problem is that, despite claims that section 230 encourages content moderation, as construed by the courts, it actually does the opposite. Although the subsection (c)(2) content moderation safe harbor does mitigate the disincentive to moderate content by removing the potential liability that would otherwise stem from *Stratton*, eliminating a disincentive is not the same as creating an incentive. Moreover, subsection (c)(1) states 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."[25] Courts have ruled that this language "creates a federal immunity to *any cause of action* that would make service providers liable for information

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[15] *See, e.g.*, Zoya Gervis, *More than 60% of Americans say they've been a victim of an online scam*, N.Y. POST, Dec. 6, 2019.

[16] *See, e.g.*, Charlie Osborne, *The hacker's paradise: Social networks net criminals $3bn a year in illicit profits*, ZDNET, Feb. 26, 2019.

[17] *See, e.g.*, John D. McKinnon and Jeff Horwitz, *HUD Action Against Facebook Signals Trouble for Other Platforms*, WSJ, Mar. 28, 2019; Aaron Rieke and Corrine Yu, *Discrimination's Digital Frontier*, THE ATLANTIC, Apr. 15, 2019.

[18] *See, e.g.*, Maeve Duggan, *Online Harassment*, PEW RESEARCH CENTER, July 11, 2017; Angela Chen, *The legal crusader fighting cyberstallkers, trolls, and revenge porn*, MIT TECH. REV., Aug. 26, 2019.

[19] *See, e.g.,* Nitasha Tiku, *Facebook has not warned investors about illegal activity, says whistleblower*, INDEPENDENT ONLINE, May 28, 2020.

[20] *See, e.g.*, Danny Palmer, *CEOs are deleting their social media accounts to protect against hackers*, ZDNET, Jan. 28, 2020.

[21] *See, e.g.*, Desmond Butler and Barbara Ortutay, *Facebook auto-generates videos celebrating extremist images*, AP, May 9, 2019.

[22] *See, e.g.*, Catalin Cimpanu, *FBI warning: Foreign spies using social media to target government contractors*, ZDNet, June 18, 2019.

[23] *See, e.g.*, Cara Bayles, *With Online Revenge Porn, The Law Is Still Catching Up*, LAW360, Mar. 1, 2020.

[24] *See, e.g.*, Michael H. Keller and Gabriel J.X. Dance, *Child Abusers Run Rampant as Tech Companies Look the Other Way*, N.Y. TIMES, Nov. 9, 2019.

[25] *See* 47 U.S.C. § 230(c)(1).

originating with a third-party user of the service."[26] Not only does this remove the publisher liability at issue in the *Prodigy* case, but also the distributor liability that was not.[27]

This interpretation has the effect of eliminating for platforms the legal duty of care that ordinarily requires businesses to take reasonable steps to prevent third parties from using the businesses' services to harm others.[28] As a result, platforms cannot be held accountable for what a user does over their services—including in cases, for example, involving housing discrimination,[29] harassment,[30] sexual disparagement,[31] revenge porn,[32] marketing of child sexual abuse materials,[33] and terrorism[34]—regardless of the harm caused, regardless whether the platforms knew or should have known about the illicit activity, regardless whether they collected advertising fees, subscription revenue, or valuable data in connection with the illicit use of their services, and regardless whether they engaged in adequate (or any) content moderation.

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[26]*See* Zeran v. AOL, 129 F.3d 327 (4th Cir. 1997). Platforms do not receive the protection of section 230, however, if their own, affirmative actions facilitating the illicit, third-party conduct are themselves unlawful. *See* Fair Housing Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157 (9th Cir. 2008) (*en banc*).

[27]*See supra* text accompanying notes 6-8.

[28]*See* DAN B. DOBBS ET AL., HORNBOOK ON TORTS § 9.2, at 191, § 20.1, at 459-60, § 20.6, at 465-66, § 25.1, at 615-16, § 25.4, at 620-21, §§ 26.1-26.5, at 633-44, §§ 26.9-26.10, at 651-55 (2d ed. 2015) (stating that a business has an affirmative duty to take reasonable steps to prevent one person from using its auspices to harm another if the business has a relationship with either party, such as by welcoming one or the other to engage with it, and that failure to meet that duty can lead to liability).

[29]*See, e.g.,* Chicago Lawyers' Committee for Civil Rights Under Law v. Craigslist, 519 f.3d 666 (7th cir. 2008).

[30]*See, e.g.,* Herrick v. Grindr LLC, 18-396 (2d Cir. Mar. 27, 2019), https://www.cagoldberglaw.com/wp-content/uploads/2018/09/Second-Circuit-Decision.pdf; Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003).

[31]*See*, *e.g.,* Jones v. Dirty World Enter. Recordings LLC, 755 F.3d 398 (6th Cir. 2014).

[32]*See, e.g.,* Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009).

[33]*See, e.g.,* Doe v. AOL, Inc., 783 So.2d 1010 (2001).

[34]*See, e.g.,* Force v. Facebook, 934 F.3d 53 (2d Cir. 2019).

In other words, platforms reap the benefits of the section 230 shield even when they drop the section 230 sword.[35] In fact, a recent Internet Association study suggests that, of the cases dismissed under section 230, 91 percent are dismissed under subsection (c)(1), rather than under the subsection (c)(2) safe harbor for content moderation.[36] If 91 percent of section 230 dismissals occur regardless whether platforms moderate content, section 230 protection is rarely contingent on the behavior Congress was trying to encourage.

Consequently, as construed by the courts, section 230 does not just protect platforms when they behave like good Samaritans. Because platforms need not take any action to receive the liability limitations of 230(c)(1), it protects them even when they behave like *bad Samaritans*—negligently, recklessly, or knowingly turning a blind eye while they facilitate (and collect advertising or other revenue around) the unlawful behavior of their users. So rather than create an incentive to moderate content, section 230 as applied today creates a *misincentive* that allows platforms to profitably sit on their hands without legal consequence.[37] Even worse, it gives them an economic incentive to spend as little on content moderation as possible, knowing that unlike their non-internet-based competitors, they cannot be held accountable.

Those directly engaged in illicit behavior should of course be held primarily accountable for their actions. But the decentralized, often anonymous, and global nature of the internet makes

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[35] *See, e.g.,* Ben Popken, *Senate intel committee grapples with social media's threat to democracy*, NBC NEWS.COM, Aug. 1, 2018 (quoting Sen. Wyden as stating that "the whole point of 230 was to have a shield and a sword, and the sword hasn't been used and these pipes are not neutral."), https://www.nbcnews.com/tech/tech-news/senate-intel-committee-grapples-social-media-s-threat-democracy-n896741.

[36] *See* Neil Fried, *IA Study Shows Sec 230 Reform Would Have Impact Only Where Needed*, DIGITALFRONTIERS ADVOCACY: BLOGS & OP EDS (Aug. 3, 2020), https://digitalfrontiersadvocacy.com/blogs-%26-op-eds-1/f/ia-study-shows-sec-230-reform-would-have-impact-only-where-needed.

[37] *See* https://en.wiktionary.org/wiki/misincentive (defining "misincentive" as "[s]omething that is meant to be an incentive but has no (or the opposite) effect").

finding those culprits—let alone stopping them before harm has occurred—far more difficult without platform involvement. By limiting platform liability for negligent, reckless, and knowing disregard of illegal activity on their services, section 230 puts internet users in harms way and often leaves victims without a remedy.

III. Requiring Platforms to Take Reasonable Steps to Curb Illicit Activity as a Condition of Receiving Section 230 Protection Would Better Fulfill Congress' Goals

A. Requiring Platforms to Take Reasonable Steps to Curb Illicit Activity Would Better Protect the Public

One way to preserve the benefits of subsection (c)(2)'s content moderation safe harbor, while fixing subsection (c)(1)'s harmful misincentive, would be to restore a duty of care. This could be achieved by requiring platforms to take reasonable steps to proactively curb illicit activity over their services as a condition of receiving section 230's liability protection.[38] That would mean platforms do not enjoy protection from liability when they negligently, recklessly, or knowingly facilitate illicit activity by their users. Doing so would better realize Congress' goal of *encouraging* platforms to moderate content, so that we get the best out of the internet and mitigate the worst.

Since one of Congress' goals with section 230 was to protect the public from harmful behavior by creating a liability shield for platforms that *did* take proactive measures, it seems odd to construe section 230 as granting a liability shield to platforms even when they *do not* take such measures, thereby removing the duty of care that ordinarily requires businesses to take reasonable

[38] *See Disinformation Online and a Country in Crisis: Hearing before H. Subcomm. on Commc'ns. & Tech, and H. Subcomm. on Consumer Prot. and Commerce, H. Comm. on Energy and Commerce*, 116th Cong. (2020) (statement of Neil Fried, Principal, DigitalFrontiers Advocacy), https://digitalfrontiersadvocacy.com/6-24-20-sec-230-testimony; *Fostering a Healthier Internet to Protect Consumers: Hearing before H. Subcomm. on Commc'ns. & Tech, and H. Subcomm. on Consumer Prot. and Commerce, H. Comm. on Energy and Commerce*, 116th Cong. (2019) (statement of Prof. Danielle K. Citron, Boston University School of Law), https://energycommerce.house.gov/committee-activity/hearings/hearing-on-fostering-a-healthier-internet-to-protect-consumers.

steps to prevent third parties from using the platforms' services to harm others.[39] Indeed, suppose the *Stratton* case had been about someone who posted to an internet dating platform fake solicitations for sex that appeared to come from a former girlfriend or boyfriend for purposes of harassing her or him.[40] And suppose further that the platform had been held culpable for refusing to prevent or remove the postings—or even for just failing to do so after being informed about this type of problem. Congress probably would not have been motivated to pass section 230.[41]

Another way to illustrate the problem is to observe that Good Samaritan statutes usually protect individuals *who have no existing relationship to the person in jeopardy and thus no duty of care*,[42] not businesses that have an ongoing relationship with an imperiled customer. Take, for example, the situation where a stranger is passing a pond and sees someone drowning. Because the stranger has no relationship to the person, the stranger has no duty at common law to provide aid. Once the stranger begins to help, however, he or she does have a duty not to cause harm. This means that if in the course of the rescue the stranger causes injury, he or she can be held culpable. That possibility can discourage the stranger from lending assistance in the first place.

To remove the disincentive, Good Samaritan statutes limit the liability of "strangers" who provide assistance, thereby increasing the likelihood that someone with no duty to help will do so—a net societal benefit. By contrast, section 230(c)(1) as construed by the courts *takes away* the duty of care businesses would otherwise have to act, reducing the likelihood of assistance—a net

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[39] *See supra* note 28 and accompanying text.

[40] *See* Herrick v. Grindr LLC, 18-396 (2d Cir. Mar. 27, 2019), https://www.cagoldberglaw.com/wp-content/uploads/2018/09/Second-Circuit-Decision.pdf.

[41] *See* Neil Fried, *Revisiting Prodigy: A Section 230 Thought Experiment*, DIGITALFRONTIERS ADVOCACY: BLOGS & OP EDS (July 7, 2020), https://digitalfrontiersadvocacy.com/blogs-%26-op-eds-1/f/revisiting-prodigy-a-section-230-thought-experiment.

[42] *See* KEETON, *supra* note 6, § 56, at 373-78.

societal loss. Conditioning section 230 protection on reasonable efforts to curb illicit activity fixes that problem with (c)(1) as currently applied, while leaving the benefits of (c)(2).

B. Requiring Platforms to Take Reasonable Steps to Curb Illicit Activity Would Ameliorate Concerns Over Platforms' Market Power

Altering section 230 this way would also ameliorate competition concerns arising from the fact that while many of the platforms' non-internet-based rivals appropriately have a duty of care regarding third-party conduct, the platforms themselves do not. By shielding platforms from potential liability that other companies face if they unreasonably fail to prevent illicit action by their customers, section 230 provides platforms an unearned ability to avoid the ordinary business costs of mitigating harm. In that sense, section 230 subsidizes platforms, enabling them to grow in scale and scope more recklessly and giving them an unfair advantage in the marketplace.

First, that subsidized scale and scope has enabled the platforms to amass large consumer and business audiences, which gives them a retail edge over their competitors—whether in the sale of advertising, the sale of products, and the sale of services, or in the collection of valuable data about those consumers and businesses.

Second, it provides the platforms with extraordinary market power to set aggressive terms in their favor when entering into business-to-business relationships with companies that wish access to those consumers and businesses for purposes of entering into commercial transactions.

Third, the platforms can take advantage of that business-to-business relationship in dealing with those companies as the platforms increasingly also enter into retail competition with them for access to those same consumers and businesses.

Fourth, section 230 shields the platforms as they collect advertising fees, subscription revenue, or valuable data around the illicit activity of users, creating an inappropriate and unmatched source of funding to fuel their businesses.

Restoring a duty of care for platforms would create a more technologically neutral playing field by eliminating these unearned and unfair advantages.

C. Requiring Platforms to Take Reasonable Steps to Curb Illicit Activity Would Not Harm Innovation, Hinder Smaller Platforms, or Chill Speech

Requiring platforms to take reasonable steps to curb illicit activity won't harm innovation or hinder smaller platforms,[43] despite claims by opponents.

First, holding platforms accountable for failing to meet the ordinary duty of care is not regulation. Regulation involves advance restrictions on the permissible business models of multiple, similarly situated entities. Under this proposal, however, platforms would still have discretion over their business models on the front end. Individual platforms just would appropriately be held accountable on the back end if they used that discretion unreasonably in a particular circumstance, the same standard that applies to most businesses. That potential back-end accountability would prompt more responsibly from the start. In essence, it would encourage more "responsibility by design."

Platforms' historical assertion that (their) innovation should always be "permissionless" is already controversial. To say innovation should be "permissionless" *and* "unaccountable" takes this to yet another level. Ordinarily it is one or the other. Regulated entities—such as common carriers—are sometimes immunized from liability on the back end to the extent that they are in compliance with agency rules, on the grounds that their discretion has been constrained on the front end. Indeed, not only are their business models restricted, but they are ordinarily prohibited from denying anyone service or exercising editorial discretion over the content they carry.

[43] *See* Neil Fried, *Instead of cry wolf, platforms should focus on predators within*, DIGITALFRONTIERS ADVOCACY: BLOGS & OP EDS (Aug. 12, 2020), https://digitalfrontiersadvocacy.com/blogs-%26-op-eds-1/f/instead-of-cry-wolf-platforms-should-focus-on-predators-within.

Unregulated entities, by contrast, ordinarily are not immunized on the back end, since they retain control over their business models, can refuse service, and are allowed editorial discretion. Platforms should not be allowed to have it both ways: lack of regulation and accountability.

In any event, back-end accountability will actually promote innovation in the way companies create their services to avoid facilitating harm. Addressing potential problems in the earlier stages of a service's creation will also be a lot easier than trying to fix problems later, when those problems are already entrenched in a platform's business model and architecture.

Second, the reasonableness standard is inherently flexible. It would account for the resources available to a platform and the benefits and risks posed by use of its services. The effort needed to meet the reasonableness standard will be proportional to platform size, ensuring smaller platforms are not unreasonably burdened as they try to grow and that firms are asked only to expend resources that make sense in light of the severity of a potential harm and the costs to combat it. Furthermore, smaller platforms—as well as platforms that focus less on user-generated content—will have fewer users and uses to moderate.

Nor will this approach jeopardize online expression.[44] First, it focusses on illicit activity, not expression. Second, it preserves the (c)(2) content moderation safe harbor the platforms say they need to be willing to carrying user-generated content, so they can continue to be a forum for free expression. Third, it does not rely on the creation of proscriptive content requirements by Congress or an agency, avoiding First Amendment claims.

So long as platforms take reasonable steps to curb use of their services and facilities for illicit activity—as other companies must—the platforms could continue to innovate *and* moderate content without fear of liability. Congress would *not* need to define illicit conduct. Those bringing

[44] *See id.*

a claim would have the burden of demonstrating that someone engaged in unlawful activity using the facilities or services of the platform, and that the platform's failure to take reasonable steps to prevent that activity caused them harm. There is an abundance of precedent regarding such claims, and courts have ample experience with this area of law.

Moreover, even if an internet platform failed to take steps to prevent illicit activity, it would not automatically be subject to liability. It simply could no longer hide behind section 230. Any lawsuit would still need to prove some cause of action. And a court would still be bound to consider the free speech implications before assessing liability, because loss of section 230's special protections does not eliminate the First Amendment's protections.

Thus, requiring platforms to take reasonable steps to curb illicit activity as a condition of receiving section 230's protections would better accomplish Congress' goal of encouraging internet platforms to moderate content while fostering them as a means of free expression.

IV. Unless and Until Congress Acts, the FCC Can and Should Clarify that Section 230 Does Not Preclude Holding Platforms Accountable for Negligently, Recklessly, or Knowingly Failing to Prevent Illicit Use of Their Services

Ideally, Congress will amend section 230 to explicitly require platforms to take reasonable steps to curb illicit activity as a condition of receiving the section's protections. Unless and until it does so, however, section 230(c)(1) as currently applied will continue to aggravate the spread of illicit activity online by shielding platforms when they negligently, recklessly, or knowingly fail to prevent such activity by their users. The FCC can and should ameliorate this problem by clarifying that section 230 does not preclude holding platforms accountable when they fail to take reasonable steps to curb illicit activity by their users.

A. Section 201(b) Authorizes the FCC to Implement Section 230

Because Congress placed section 230 in chapter 5 of the Communications Act[45]–the same chapter where section 201(b) resides[46]–section 201(b) of the Communications Act authorizes the FCC to implement section 230. That remains true even though Congress adopted section 230 in separate legislation, and even though section 230 nowhere directs the FCC to implement it.

Section 201(b) states that the FCC "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."[47] As the Supreme Court held in *AT&T v. Iowa Utilities Board*, section 201(b) serves as a general grant of rulemaking authority to the FCC, and applies to provisions that Congress subsequently adds to the Communications Act.[48] In *Iowa Utilities*, the Supreme Court ruled that, because Congress chose with the Telecommunications Act of 1996 to place local phone competition provisions in sections 251 and 252 of the Communications Act, the FCC has authority under section 201(b) to implement those provisions—even though local phone service is ordinarily the province of state regulators, and even though the provisions did not direct the FCC to adopt rules.[49] As with sections 251 and 252, Congress adopted section 230 in the Telecommunications Act of 1996, and chose to place it in the same chapter as section 201. It matters not whether liability protection for internet platforms is something typically governed by the FCC, or that section 230 does not itself authorize the FCC to adopt rules. Just like section 201(b) authorizes the FCC to adopt rules implementing the local competition provisions, it also authorizes the FCC to adopt rules implementing section 230.

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[45]*See* Pub. L. No. 104–104, sec. 509, 110 Stat. 56, 137-39.

[46]*See* 47 U.S.C. ch. 5, "Wire or Radio Communication" (including both section 201 and section 230 in part I of subchapter II), https://www.govinfo.gov/content/pkg/USCODE-2009-title47/html/USCODE-2009-title47-chap5.htm.

[47]47 U.S.C. § 201(b).

[48]*See* 525 U.S. 366, 377-80 & n.5 (1999).

[49]*See id.*, at 371-75, 377-85.

B. In Implementing Section 230, the FCC is not Bound by Prior Court Interpretations

Because the language of section 230(c) is ambiguous regarding the treatment of platforms that *have not* taken action, the FCC may adopt rules clarifying that section 230 does not preclude holding platforms liable when they negligently, recklessly, or knowingly fail to prevent their users from engaging in illicit activity—even though federal courts have previously ruled otherwise.

The Supreme Court has held that agencies are free to interpret ambiguous statutes that are within their jurisdiction; that courts must defer to such agency interpretations if the interpretations are reasonable, regardless whether the courts believe better interpretations exist; and that in developing such reasonable interpretations, agencies need not follow previous court constructions of the language.[50] Thus, in *NCTA v. Brand X*, the Supreme Court concluded that the FCC could rule that cable broadband service is an information service, even though a federal court had previously ruled that it was a telecommunications service, because the statutory language was ambiguous and the FCC's interpretation was reasonable.

Section 230(c) is also ambiguous. Although subsection (c)(2) is quite clear that "[n]o provider or user of an interactive computer service *shall be held liable* [for] *action voluntarily taken to restrict access*,"[51] it says nothing about action *not* taken. And although subsection (c)(1) says "[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,"[52] it does not mention the word "liability." Nor does it say anything about a platform's action or inaction. Although subsection (c)(1) language certainly *can* be—and has been—interpreted as precluding

[50]NCTA v. Brand X, 545 U.S. 967, 980-83 (2005) (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837 (1984)).

[51]47 U.S.C § 230(c)(2), (c)(2)(A) (emphasis added).

[52]47 U.S.C. § 230(c)(1).

liability for both action and inaction regarding third party conduct over a platform, nothing *requires* it to be interpreted that way.

Other reasonable interpretations exist. For example, the FCC could reasonably construe the "publisher or speaker" language in subsection (c)(1) narrowly, to mean only that platforms in libel cases shall not be subject to the implied knowledge standard of publisher liability. After all, the "publisher or speaker" language comes from libel law and the *Prodigy* case that prompted Congress to pass section 230 was a libel case. Congress may well have meant only to prevent the act of content moderation, absent some actual knowledge or recklessness regarding defamation on the platform, from exposing platforms to libel liability, as that, alone, could deter moderation.

Under such an interpretation, subsection (c)(1) would not preclude subjecting platforms in libel cases to the "known or should have known" standard of distributor liability.[53] Nor would it preclude application of the general duty of care to platforms that fail to curb illicit activity on their services. In fact, it would be reasonable for the FCC to conclude that interpretation is a *better* one than courts' current interpretation, on the grounds that: 1) section 230 was meant to protect the public by shielding platforms when they take action, not when they don't; and 2) Congress would have spoken more explicitly if it intended to broadly eliminate for platforms the general duty of care to prevent harm caused by third party use of their services. That interpretation is buttressed by the fact that Congress used the word "liability" in subsection (c)(2), but not in subsection (c)(1).

Thus, because the FCC has authority to implement the ambiguous language of section 230, and is not bound by prior court interpretations of the section's language, the FCC can adopt the reasonable position that holding platforms culpable for negligently, recklessly, or knowingly failing to stop unlawful activity by their users is not treating the platforms like a publisher or

[53] *See supra* text accompanying notes 6-8.

speaker of their users' information. Rather, it is assessing liability for a failure to meet the general legal duty of care that ordinarily applies.

V. In light of the First Amendment, Issues over Expression—Including Allegations of Hate Speech, Bias, and Fake News—Are Likely Best Addressed Through Enforcement of Platforms' Terms of Service and Application of the "Good Faith" Language in Section 230(c)(2)

The FCC has substantial discretion to conclude that section 230 allows platforms to be held culpable for negligently, recklessly, or knowingly failing to curb *illicit conduct*. It has less discretion, however, when it comes to lawful speech—even if troubling or unwelcome—because the First Amendment protects the editorial decisions of platforms. Perhaps the best way, then, to address issues related to lawful expression—such as concerns over hate-speech, bias, and fake news—is through enforcement of platforms' terms of service and application of the "good faith" language in section 230(c)(2).

This is not to say that hate speech and "fake news" cannot potentially rise to actionable violations of law, such as perhaps fraud or harassment. In such cases, we would no longer be dealing with lawful speech, in which case platforms might be held culpable for failing to curb such illicit activity, as outlined in the previous section. Absent such circumstances, reliance on terms of service and the "good faith" language may provide a way forward.

For example, a user concerned that a platform failed to take down particular expression, despite applicable language in its terms of service saying it would, could seek to bring a breach of contract claim in court or an unfair or deceptive acts or practices complaint before the FTC. In such circumstances, a platform would likely argue that the claim, at its core, was seeking to hold the platform culpable for something posted by a third party, and that violates section 230(c)(1)'s prohibition on treating the platform as the publisher or speaker of third-party content. Although the user may have a good argument that holding a platform culpable for deviating from its terms

of service is not the same as treating the platform as the publisher or speaker of third party content,[54] it might be wise for the FCC to adopt a rule clarifying that section 230(c)(1) is not a bar to contract or FTC claims for such deviations. To do so, the FCC would again invoke its authority under section 201(b).[55]

A user concerned that a platform *did* take down content, but in a way that did not comply with the policies and procedures in the platform's terms of service, might similarly bring a contract or FTC claim. In this situation, a platform would likely argue that the claim violates section 230(c)(2)'s prohibition on holding the platform liable for voluntarily restricting access to third party material. Here, the user would need to argue that the platform lost its subsection (c)(2) defense because it had failed to act in good faith.

For example, if there was evidence that a platform was motivated by something other than protecting users or the public (such as bias), the user could argue that the platform was acting under pretext, and thus not in good faith. Other evidence of a lack of good faith might include a platforms' failure to act consistently, or its failure to comply with its own policies and procedures regarding the flagging of content, appeals of content violation claims, removal of content, and termination of a user. A platform's lack of due diligence regarding claims that someone has posted inappropriate content might also indicate the absence of good faith. A court could look for any of these factors today under the "good faith" language of subsection (c)(2) but, again, it may make sense for the FCC to invoke section 201(b) to adopt rules clarifying this interpretation.

[54]*See, e.g.,* Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009) (reasoning that section 230 might not bar a claim for breach of contract on the grounds that a platform has failed to honor a commitment to remove content, or that such a commitment might constitute a waiver of the section 230 defense).

[55]*See, supra,* Part IV.A.

Keep in mind that, as discussed above in connection with the discussion of illicit activity, the inability of platforms to continue hiding behind section 230 when they act inappropriately in regard to lawful expression would not mean that expression on the internet would suffer. Courts would still be required to apply the First Amendment when addressing any claim against platforms, and would thus need to factor in the impact that assessing liability on a platform in a particular case would have on internet speech.

An additional complication that needs addressing is the fact that platforms control their terms of service. If those terms are silent or vague on particular issues, provide that the platforms reserve the right to take unilateral action, or say that the platforms reserve the right to follow certain procedures and take certain actions but do not commit to always do so, it may be difficult to demonstrate a violation of the terms of service or bad faith. If necessary, the FCC could adopt transparency requirements or require terms of service to include particular procedural provisions.

To adopt such transparency requirements, the FCC could rely on section 257 of the Communications Act regarding elimination of market barriers,[56] as it did in creating transparency requirements in its *Restoring Internet Freedom* proceeding.[57] Indeed, information about platforms' content moderation practices is relevant to a consumer's decision about what platforms to use, as well as whether to switch providers. In a similar vein, new entrants and existing providers might use such information to compete based on content moderation practices. The FCC could also rely

[56]47 U.S.C. § 257.

[57]*See In re* Restoring Internet Freedom, WC Docket No. 17-108, *Declaratory Ruling,* FCC 17-166, at ¶ 232(rel. Jan. 4, 2018). *See also* Mozilla Corp. v. FCC, No. 18-1051, slip. op. at 69-71 (D.C. Cir. Oct. 1, 2019) (upholding the FCC's authority under section 257 to adopt transparency rules for internet service providers, which, like internet platforms, are information service providers).

on section 4(i),[58] on the grounds that requiring information about platforms' content moderation policies and practices is reasonably ancillary to its ability to implement the section 230 "good faith" language pursuant to section 201(b), as discussed above.

To be clear, transparency requirements alone would not be enough. Fostering competition among platforms over content moderation may help, but won't do enough to curb the growth of illicit activity. Any transparency requirements should also be used to ensure platforms are held accountable when they fail to meet their duty of care, once properly restored as outlined in the prior section.

Conclusion

To fully realize the internet we all aspire to, Congress should require platforms to take reasonable steps to curb illicit activity as a condition of receiving section 230's protections. Until then, the public will continue to suffer injury from the spread of illicit activity online and the internet will grow increasingly toxic, making the public more reluctant to use it for creativity, communication, and commerce. The FCC can help address these problems by adopting rules clarifying that section 230 does not preclude holding platforms accountable for negligently, recklessly, or knowingly failing to curb illicit activity over their services. Opening a rulemaking proceeding would enable the FCC to build a record on the best way of accomplishing that goal.

The platforms argue that such legal accountability is not necessary because they have market incentives to combat illicit activity, since they will lose users if they don't. But the reality is that a few, dominant platforms have become so critical to so much of today's social and economic fabric that many consumers and commercial users cannot realistically forgo patronage.

[58] *See* 47 U.S.C. § 154(i) (providing that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.").

The platforms also argue they have reputational and ethical incentives to prevent illicit activity. Although that's true, those incentives do not appear to be sufficiently stemming the tide. Those incentives also tend to manifest themselves cyclically. So while they may help—at least for a time—when tragedies reach the public consciousness, they do not help the victims of the unnoticed tragedies that occur every day.

At bottom, the platforms say they *are* taking reasonable steps to curb illicit activity. In some circumstances that may be true. But why must we take their word for it? Why should their judgment be beyond objective, judicial scrutiny? Where they are acting reasonably, they will be vindicated. But certainly some platforms, in some cases, are taking inadequate or even no steps to mitigate unlawful behavior. Few other sectors, if any, get a pass in such circumstances, especially when they have an outsized and growing influence on social and commercial discourse—and are increasingly used to perpetrate illicit acts. So long as platforms and online intermediaries can facilitate illicit activity with impunity, we will continue to be fighting a losing battle. For the past 25 years, we have run an internet experiment based on the courts' current interpretation of section 230. Based on the results, it's time to make a change.

Respectfully submitted,

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