

## U.S. Department of Justice

## Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

## October 27, 2020

The Honorable Roger Wicker Chairman Senate Committee on Commerce, Science & Transportation 512 Dirksen Senate Office Building Washington, D.C. 20510

The Honorable Frank Pallone, Jr. Chairman House Committee on Energy & Commerce 2125 Rayburn House Office Building Washington, D.C. 20515 The Honorable Lindsey Graham Chairman Senate Committee on the Judiciary 224 Dirksen Senate Office Building Washington, D.C. 20510

The Honorable Jerold Nadler Chairman House Committee on the Judiciary 2138 Rayburn House Office Building Washington, D.C. 20515

Dear Chairmen Wicker, Graham, Pallone, and Nadler:

The Department of Justice (Department) is encouraged by the emerging consensus in each branch of government and many parts of the private sector that the time has come to reform Section 230 of the Communications Decency Act of 1996. We note the bipartisan interest on this matter in the House and Senate Committees on the Judiciary and, in particular, the important upcoming hearing of the Senate Committee on Commerce, Science, and Transportation titled, "Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior?" scheduled for Wednesday, October 28. The Department hopes that the committees will continue to thoroughly explore these important issues and move swiftly to enact much needed reform to Section 230.

The events of recent days have made reform even more urgent. Today's large online platforms hold tremendous power over the information and views available to the American people. It is therefore critical that they be honest and transparent with users about how they use that power. And when they are not, it is critical that they can be held accountable. For example, the decision by two social media companies to restrict access to news content of significant public interest from the *New York Post*, a widely distributed journalism publication, is quite concerning.

Under the current text of Section 230, an online platform that removes content in bad faith or that demotes the speech of others based on political viewpoint should not be entitled to immunity. That text provides immunity only for content removed "in good faith" because it is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable"—

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not merely because the platform operators themselves dislike or disagree with it. In the event that a victim were to file meritorious claims against an online platform in such instances, the Department would be willing to file a statement of interest to clarify that, under a proper reading of the statute, Section 230 does not immunize such conduct.

Relatedly, the Department notes Justice Thomas' recent call for the Supreme Court, in an appropriate case, to review lower court decisions that have construed Section 230 to confer sweeping immunity on online platforms. As Justice Thomas noted, those decisions have "emphasized nontextual arguments" in the service of expanding immunity "beyond the natural reading of the [statutory] text." Similarly, the recent announcement by Chairman Pai that the Federal Communications Commissions will undertake rulemaking to clarify the meaning of Section 230 in response to the petition of the National Telecommunications and Information Administration is a positive step.

The most certain way to ensure an open and safe internet, however, is legislative reform. The Department accordingly reiterates its legislative proposal—submitted on September 23, 2020, after a long-standing review—to modernize Section 230. While the Department's proposal amends the current statutory text, the time also may be ripe for Congress to start from a blank slate to account for the dramatic changes in this industry.

We are enclosing the Department's legislative package for your convenience and further consideration. The Department's proposal focuses on the two big areas of concern that were highlighted by victims, businesses, experts, and other stakeholders in the conversations led by the Department over the past year.

First, the Department's proposal addresses unclear and inconsistent moderation practices that limit speech and go beyond the text of the existing statute. Some courts have interpreted the scope of Section 230 immunity too broadly, diverging far from its text and original purpose of encouraging platform operators to act as Good Samaritans in response to harmful content. This broad interpretation of immunity has left online platforms free to moderate lawful content without transparency or accountability. Unfortunately, these concerns are not merely hypothetical, as demonstrated by the actions of certain platforms over the past several weeks.

Second, the Department's proposal also addresses the proliferation of harmful illicit online content that could leave some meritorious victims without any civil recourse. Criminals are increasingly turning to online platforms to engage in a host of unlawful activities, including child sexual exploitation, sales of illicit drugs, cyberstalking, human trafficking, and terrorism. Changes to the law that complement the Department's ongoing criminal enforcement and enable some victims to seek civil recourse would help stop online platforms from knowingly facilitating clearly illegal activity on their own services.

The Department rejects the view, suggested by some commentators, that Section 230 must be left alone for fear that any change to the law will cripple the tech industry. While Section 230 has helped build today's internet by enabling innovation and new business models, the internet

<sup>&</sup>lt;sup>1</sup> See Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, No. 19-1284, slip op. at 3 (U.S. Oct. 13, 2020) (statement of Thomas, J., respecting denial of certiorari).

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itself has drastically changed since 1996. Online platforms are no longer nascent companies but have become titans of industry. Platforms have also changed how they operate, functioning not as simple forums for posting third-party content but rather employing sophisticated algorithms to suggest and promote content and connect users. Whether by amending the existing text of Section 230 or starting from scratch, legislative proposals should consider these realities. Congress may also wish to consider that legislative changes to the existing text should clearly overrule erroneous precedent that has built up around Section 230 over the last 25 years—something which striking all of Section 230 and starting on fresh canvas would not have to contend with.

Citizens are relying on the internet more than ever for commerce, entertainment, education, employment, and public discourse, and children are spending more time online, at times unsupervised, just as more and more criminal activity is moving online. All of these factors make it imperative that we maintain the internet as an open and safe forum, and that we begin this work together now. We believe there is a path forward that preserves innovation while improving transparency, safety, and the free exchange of ideas. The Department looks forward to working with Congress to address these challenges.

Very truly yours,

Stephen E. Boyd

Assistant Attorney General

The Honorable Maria Cantwell Ranking Member Senate Committee on Commerce, Science & Transportation

The Honorable Dianne Feinstein Ranking Member Senate Committee on the Judiciary

The Honorable Greg Walden Ranking Member House Committee on Energy and Commerce

The Honorable Jim Jordan Ranking Member House Committee on the Judiciary