



The Subcommittee on Communications and Technology and the Subcommittee on Consumer Protection and Commerce of the Committee on Energy and Commerce

**Joint Hearing:
“Fostering a Healthier Internet to Protect Consumers”**

**Statement of Corynne McSherry, Ph.D.
Legal Director
Electronic Frontier Foundation**

October 16, 2019



As Legal Director for the Electronic Frontier Foundation, I thank Chairman Pallone, Ranking Member Walden and Members of the Subcommittee on Communications and Technology and the Subcommittee on Consumer Protection and Commerce for the opportunity to share EFF's views on how to create a healthier Internet and protect all of its users.

EFF is a donor-funded nonprofit, with contributions from more than 30,000 dues-paying members from around the world forming the backbone of our financial support. The majority of EFF's funding comes from ordinary individuals, and over 80% of that funding consists of donations under \$10,000. We receive less than six and a half percent of our funding from corporate sponsors.¹

For nearly 30 years, EFF has represented the interests of technology users both in court cases and in broader policy debates to help ensure that law and technology support our civil liberties. From that vantage point, we are well aware that online speech is not always pretty—sometimes it's extremely ugly and causes real-world harm. The effects of this kind of speech are often disproportionately felt by communities for whom the Internet has also provided invaluable tools to organize, educate, and connect. Systemic discrimination does not disappear and can even be amplified online. Given the paucity and inadequacy of tools for users themselves to push back, it's no surprise that many would look to Internet intermediaries to do more to limit such speech.

We all want an Internet where we are free to meet, create, organize, share, associate, debate, and learn. We want to make our voices heard in the way that technology now makes possible and to feel safe. We want to exercise control over our online environments and to feel empowered by the tools we use. We want our elections free from manipulation and for the speech of women and marginalized communities not to be silenced by harassment.

Chipping away at the legal foundations of the Internet is not the way to accomplish those goals. Instead, it is likely to backfire, to the detriment of all users but particularly to those who are most vulnerable to other forms of silencing. As a civil liberties organization, the Electronic Frontier Foundation's primary reason for defending Section 230 is the role that the law has played in providing a megaphone to those who previously lacked one, and removing much of the gatekeeping that stifled social change, perpetuated power imbalances, and rendered marginalized voices susceptible to censorship. Section 230 enables the existence of intermediaries that allow marginalized voices to get their messages out to the whole world, without having to own a printing press or a broadcast license, and without knowing how to code. It allows people to connect with people from around the world, to find community, organize, and advocate.

But Section 230 does far more. If you have ever forwarded an email—whether a news article, a party invitation, or a birth announcement—you have done so with the protection of Section 230. If you have ever maintained an online forum for a neighborhood group, you have done so with the

¹ *2018 Annual Report*, Electronic Frontier Found. <https://www.eff.org/files/annual-report/2018>.



protection of Section 230. If you are a library that provides a forum for reader reviews, or a local newspaper that allows readers to comment online regarding the news of the day, or a job board that allows former employees to share comments about a prospective company, you do so with the protection of Section 230. If you've used Wikipedia to figure out the birthplace of George Washington or the airspeed velocity of an unladen swallow, you have benefited (indirectly) from Section 230. When you watch online videos documenting events in real time in northern Syria, you are benefiting from Section 230.

To be clear, the free and open Internet has never been fully free or open. And it can amplify the worst of us as well as the best. But at root, the Internet still represents and embodies an extraordinary idea: that anyone with a computing device can connect with the world, anonymously or not, to tell their story, organize, educate, and learn. Section 230 helps make that idea a reality. And it is still worth protecting.

A. What Section 230 Does

Commonly referred to as Section 230, 47 U.S.C. § 230 originated in H.R. 1978—the “Internet Freedom and Family Empowerment Act”—introduced in 1995 by Reps. Chris Cox (R-CA) and Ron Wyden (D-OR)—but was ultimately incorporated into the Telecommunications Act of 1996.

Section 230 provides broad—but not absolute—immunity for Internet intermediaries from legal liability for user-generated content. 47 U.S.C. § 230(c)(1) 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.”

This means Internet intermediaries that host third-party content are protected against a range of laws that might otherwise be used to hold them legally responsible for what their users say and do. Specifically, Section 230 provides immunity to platforms against liability under state law—whether criminal or civil—and against liability under federal civil law, but not under federal criminal law or copyright law.

At the same time, Section 230 protects companies when they choose to moderate their platforms. Indeed, part of the genesis of the law was a pair of defamation disputes where one company was held liable for content on its service, and the other was not, because the first company chose to moderate generally but failed to catch the defamatory statement. Section 230 remedied that disparity, providing a safe harbor for moderation.²

In essence, Section 230 ensures that while Internet platforms—ISPs, web hosting companies, webmail providers, blogging platforms, social media and review sites, online marketplaces, photo

² *CDA 230: Legislative History*, Electronic Frontier Found. <https://www.eff.org/issues/cda230/legislative-history>.



and video sharing platforms, and cloud storage providers—have limited liability for the speech on their platforms, they are also free to remove or restrict users or speech that have violated their standards or terms of service.

B. What Section 230 Does Not Do

It's also important to understand what Section 230 does *not* do. Section 230 has important exceptions: it doesn't provide immunity against prosecutions under federal criminal law, liability based on intellectual property law, electronic communications privacy law, or certain sex trafficking laws. For example, a federal judge in the Silk Road case correctly ruled that Section 230 did not provide immunity against federal prosecution to the operator of a website that hosted other people's ads for illegal drugs.³

Courts have also held that Section 230 does not provide immunity against civil or state criminal liability where the company had a direct role in creating the content at issue or where liability is otherwise based on the company's own actions, rather than on user-generated content. For example:

- In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, the Ninth Circuit held that Roommates.com could not claim immunity under Section 230 where it required users to choose among set answers to questions that violated anti-discrimination laws.⁴
- In *Anthony v. Yahoo!, Inc.*, a district court held that Section 230 did not apply to claims against Yahoo! based on the company's own creation of false dating profiles and its tactic of sending users now-defunct profiles in order to entice them to re-subscribe.⁵ Similarly, the Fourth Circuit explained in *Nemet Chevrolet, LTD. v. Consumeraffairs.com, Inc.* that Section 230 would not apply to claims that a platform had fabricated reviews of a plaintiff's business.⁶
- In *Barnes v. Yahoo!, Inc.*, the Ninth Circuit held that Section 230 did not bar a claim against Yahoo! based on the company's failure to take down a false profile of the plaintiff *after* a company employee assured her that it would be removed. The reason is that claim was based on Yahoo!'s failure to honor its promise to the plaintiff, not the user-generated content itself.⁷

³ Cyrus Farivar, *Judge denies Silk Road's demands to dismiss criminal prosecution*, Ars Technica (July 9, 2014), <https://arstechnica.com/tech-policy/2014/07/judge-denies-silk-roads-demands-to-dismiss-criminal-prosecution>.

⁴ *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

⁵ *Anthony v. Yahoo! Inc.*, 421 F.Supp.2d 1257 (N.D. Cal. 2006).

⁶ *Nemet Chevrolet, LTD. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009).

⁷ *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009).



- In *Doe v. Internet Brands, Inc.*, the Ninth Circuit held that Section 230 did not immunize a networking website from a “failure to warn” claim brought by one of its users who posted content to its site, because the plaintiff’s claims did not derive from her content, but rather Internet Brands’ own actions.⁸

Thus, Section 230’s safe harbor, while substantial, is significantly narrower than is often supposed.

Another common misconception is that Section 230 provides special legal protection only to “tech companies.”⁹ For example, legacy news media companies often complain that Section 230 gives online social media platforms extra legal protections and thus an unfair advantage. In fact, Section 230 makes no distinction between news entities and social media platforms. When a news media entity operates online, it gets the exact same Section 230 immunity from liability based on someone else’s content as a social media platform does. So, for example, news media entities have Section 230 immunity from any liability that arises from online comments that readers post to articles, or wire service stories or advertisements run online.¹⁰ Conversely, a big tech company is *not* protected by Section 230 when it publishes someone else’s content in print. That means, for example, that Airbnb can’t use Section 230 to avoid liability based on user reviews or letters to the editor that it might publish in its new print magazine.¹¹

Nor is Section 230’s protection limited to businesses. Instead, it provides immunity to any “provider *or* user of an interactive computer service” when that “provider or user” republishes content created by someone or something else. “User,” in particular, has been interpreted broadly to apply “simply to anyone using an interactive computer service.”¹²

Finally, it bears repeating that Section 230 does not prevent Internet companies from removing unlawful or objectionable content.¹³ To the contrary, as noted above, it encourages them to do so by protecting them from liability for actions “taken in good faith to restrict access or availability” of material they deem objectionable. To be clear, however, they do not have to do so in a “neutral”

⁸ *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016).

⁹ David Greene, *Section 230 Is Not A Special “Tech Company” Immunity*, Electronic Frontier Found. (May 1, 2019), <https://www.eff.org/deeplinks/2019/04/section-230-not-special-tech-company-immunity>.

¹⁰ Eric Goldman, *Yet Another Case Says Section 230 Immunizes Newspapers from User Comments-Hadley v. GateHouse Media*, Technology & Marketing Law Blog (July 15, 2012), https://blog.ericgoldman.org/archives/2012/07/yet_another_cas.htm.

¹¹ *See the world through a local lens*, Airbnb magazine, <https://www.airbnb.com/magazine>.

¹² *Barrett v. Rosenthal*, 40 Cal. 4th 33 (2006).

¹³ Mike Masnick, *Wired’s Big Cover Story On Facebook Gets Key Legal Point Totally Backwards, Demonstrating Why CDA 230 Is Actually Important*, TechDirt (Feb. 20, 2012), <https://www.techdirt.com/articles/20180216/16165239254/wireds-big-cover-story-facebook-gets-key-legal-point-totally-backwards-demonstrating-why-cda-230-is-actually-important.shtml>.



manner;¹⁴ any such requirement would violate the First Amendment, which gives online platforms the choice about what speech they will and will not host.

C. Section 230 Helps Ensure the Internet’s Growth as a Platform for Speech and Innovation

Section 230 has ushered in a new era of community and connection on the Internet. People can find friends old and new over the Internet, learn, share ideas, organize, and speak out. Those connections can happen organically, often with no involvement on the part of the platforms where they take place. Consider that some of the most vital modern activist movements—#MeToo, #WomensMarch, #BlackLivesMatter—are universally identified by hashtags.

The ways in which the Internet has grown as a platform for everyone to speak out go far beyond what lawmakers had imagined when they wrote Section 230. The freedom that Section 230 afforded to Internet startups to choose their own moderation strategies has led to a multiplicity of options for users—some more restrictive and sanitized, some more *laissez-faire*. That mix of moderation philosophies contributes to a healthy environment for free expression and association online.¹⁵

Indeed, and perhaps ironically, Section 230 has also played a key role in the development of Internet filtering technologies and practices. While the technologies platforms use to find offensive speech remain deeply flawed, they’ve been allowed to evolve under the legal protections of Section 230.¹⁶ Without those protections, the extremely high risk associated with letting a piece of unlawful content slip by would have discouraged platforms from improving them, and the filters on the market today would look much like notoriously flawed “parental control” tools of the 1990s.¹⁷

Section 230 also plays an important role in preventing or limiting efforts to use legal threats to silence critics. Defamation law in particular is already frequently abused to silence and intimidate critics, including using legal process to unmask anonymous speakers solely for purposes of retaliation.¹⁸ Without Section 230, bad-faith actors could wield these tactics equally effectively against not only the original author of the criticism but also anyone who forwards it, quotes it, or

¹⁴ Elliot Harmon, *No, Section 230 Does Not Require Platforms to Be “Neutral”*, Electronic Frontier Found. (Apr. 12, 2018), <https://www.eff.org/deeplinks/2018/04/no-section-230-does-not-require-platforms-be-neutral>.

¹⁵ Brief of Amicus Curiae Electronic Frontier Foundation in Support of Defendants-Appellees and Affirmation, *Prager University v. Google*, No. 18-15712 (9th Cir. Nov. 7, 2018), <https://www.eff.org/document/prager-university-v-google-eff-amicus-brief>.

¹⁶ Carl Szabo, *Section 230 Is the Internet Law That Stops the Spread of Extremist and Hate Speech*, Morning Consult (Aug. 27, 2019), <https://morningconsult.com/opinions/section-230-is-the-internet-law-that-stops-the-spread-of-extremist-and-hate-speech>.

¹⁷ Jonathan Weinberg, *Rating the Net*, 19 Hastings Comm. & Ent. L.J. 453 (1996), https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol19/iss2/5

¹⁸ cyberSLAPP.org, <http://www.cyberslapp.org>.



otherwise shares it online. For example, Section 230 unambiguously provides Rose McGowan immunity from defamation liability for sharing, via Twitter, stories that other women sent her about abuse by Harvey Weinstein.

But Section 230's beneficial effect is even more pervasive. A host of ordinary activities depend on Section 230's protections. Users can forward an email without worrying whether its contents might be deemed defamatory under some state's law. A library can host an online catalog that allows for reader reviews. A university can provide forums for students to share their work. A job search service can allow employees to share their views on a given employer. Wikipedia can offer a free online encyclopedia used by everyone from schoolchildren to judges.¹⁹ And so on.

Section 230 was crafted before many of these services and activities existed, and it's easy to forget that it gives them legal shelter. In fact, for people who rely on online communities and services to share ideas, knowledge, and culture, Section 230 is more crucial today than ever before.

D. Proceed with Caution: The Risks of Undermining Section 230

1. Weakened Liability Protections Will Undermine Valuable Online Speech

a) Increased Liability Risk Will Lead to Over-censorship

Without Section 230—or with a weakened Section 230—online platforms would have to exercise extreme caution in their moderation decisions in order to limit their own liability. A platform with a large number of users can't remove all unlawful speech while keeping everything else intact. Therefore, undermining Section 230 effectively forces platforms to put their thumbs on the scale—that is, to remove far more speech than only what is actually unlawful, censoring innocent people and often important speech in the process.

The effects of 2018's Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) offer an object lesson. FOSTA amended Section 230 to create new civil and criminal liability for platforms that host content about sex work at both the state and federal levels. It also broadly and ambiguously expanded federal criminal law to target online platforms where users discuss sex work and related topics.

FOSTA's impact on Internet speech was apparent almost immediately after the law passed. Internet companies became significantly more restrictive toward speech discussing sex.²⁰ The law threw harm reduction activities in the sex work community into a legal gray area, giving the organizations providing support to sex workers the unpleasant choice of taking on a great deal of

¹⁹ Leighanna Mixer, *Three Principles in CDA 230 That Make Wikipedia Possible*, Wikimedia Found. (Nov. 9, 2017) <https://blog.wikimedia.org/2017/11/09/cda-230-principles-wikipedia>.

²⁰ Elliot Harmon, *Facebook's Sexual Solicitation Policy is a Honeytrap for Trolls* (Dec. 7, 2018), <https://www.eff.org/deeplinks/2018/12/facebooks-sexual-solicitation-policy-honeytrap-trolls>.



legal risk or ceasing operations.²¹ Unfortunately, many of them chose the latter. Websites that sex workers relied on for sharing information about dangerous clients have gone offline, putting sex workers' lives at risk.²²

At the same time, platforms presented with new liability risks immediately moved to over-censor. For example, Craigslist completely removed its message boards dedicated to both personal ads and therapeutic services. The company could not individually review every post on those boards—and even if it could, it would not be able to reliably recognize every unlawful post—so it removed the boards altogether, punishing legitimate, lawful businesses in the process.²³ Similarly, Tumblr—a community which many LGBTQ users have said was vital to them as youth²⁴—chose to ban all sexual content. Some smaller, niche personals sites either removed certain features or closed entirely.²⁵

Our founders knew that it is impossible to craft laws that only target bad actors, which is why the First Amendment protects most speech, even distasteful or “indecent” speech. Private enforcers face the same problem, and it will only worsen if a failure to enforce perfectly could lead to legal liability.

b) The Content Moderation System is Already Broken

For decades, EFF has followed the role of social media companies in providing platforms for users to speak and exchange ideas, including the recent surge in “voluntary” platform censorship.

That surge drew public attention in 2017 when a company called Cloudflare made headlines for its decision to take down a neo-Nazi website called *The Daily Stormer*.²⁶ But that was far from the only instance. Two years ago, for example, YouTube came under fire for restricting LGBTQ content.²⁷ Companies—under pressure from lawmakers, shareholders, and the public alike—

²¹ Karen Gullo and David Greene, *With FOSTA Already Leading Censorship, Plaintiffs Are Seeking Reinstatement Of Their Lawsuit Challenging the Law's Constitutionality* (March 1, 2019),

<https://www.eff.org/deeplinks/2019/02/fosta-already-leading-censorship-we-are-seeking-reinstatement-our-lawsuit>
²² Emily McCombs, *'This Bill Is Killing Us': 9 Sex Workers On Their Lives In The Wake Of FOSTA* (May 11, 2018), https://www.huffpost.com/entry/sex-workers-sesta-fosta_n_5ad0d7d0e4b0edca2cb964d9

²³ Karen Gullo and David Greene, *With FOSTA Already Leading Censorship, Plaintiffs Are Seeking Reinstatement Of Their Lawsuit Challenging the Law's Constitutionality* (March 1, 2019),

<https://www.eff.org/deeplinks/2019/02/fosta-already-leading-censorship-we-are-seeking-reinstatement-our-lawsuit>

²⁴ Proditia Sabarini, *Why Tumblr's ban on adult content is bad for LGBTQ youth*, *The Conversation* (Dec. 6, 2018), <https://theconversation.com/why-tumblrs-ban-on-adult-content-is-bad-for-lgbtq-youth-108215>

²⁵ *Documenting Tech Actions*, *Survivors Against SESTA*, <https://survivorsagainstsesta.org/documentation/>

²⁶ Jeremy Malcolm, Cindy Cohn & Danny O'Brien, *Fighting Neo-Nazis and the Future of Free Expression*, Electronic Frontier Found. (Aug. 17, 2017), <https://www.eff.org/deeplinks/2017/08/fighting-neo-nazis-future-free-expression>

²⁷ Catherine Shu, *YouTube updates its policies after LGBTQ videos were blocked in Restricted Mode*, *TechCrunch* (Jun. 19, 2017), <https://techcrunch.com/2017/06/19/youtube-updates-its-policies-after-lgbtq-videos-were-blocked-in-restricted-mode>.

ramped up restrictions on speech, adding new rules,²⁸ adjusting their still-hidden algorithms, and hiring more staff to moderate content.²⁹ They have banned ads³⁰ from certain sources and removed “offensive” but legal content.³¹

All of these efforts have, predictably, led to the silencing of all kinds of lawful speech. For example, social media platforms have been hard-pressed to remove violent extremism while keeping videos and other content *documenting* violent extremism intact.³² We’ve seen prohibitions on hate speech employed to silence individuals engaging in anti-racist speech³³ and rules against harassment used to suspend the account of an activist calling out their harasser.³⁴

These mistakes are the result, in part, of an intractable problem: threats to free expression in real life and on the Internet don’t always come in obvious packages, announcing their presence. They instead may come in the form of speech—describing hateful violence, aggression and despicable acts—that fair-minded people find appalling. The desire to remove this speech (and hopefully, the underlying prejudice) from public discourse is understandable, but fulfilling that desire is likely to lead to a host of unintended consequences for all online speech. Those on the left face calls³⁵ to characterize the Black Lives Matter movement as a hate group. In the Civil Rights Era cases that formed the basis of today’s protections for freedom of speech, the NAACP’s voice was the one attacked.³⁶

²⁸ Sarah Perez, *Twitter posts a new version of its rules with updated sections on abuse, spam, violence, and more*, TechCrunch (Nov. 3, 2017), <https://techcrunch.com/2017/11/03/twitter-posts-a-new-version-of-its-rules-with-updated-sections-on-abuse-spam-violence-and-more>.

²⁹ Colin Lecher, *Facebook will add 3,000 moderators after video killings*, The Verge (May 3, 2017), <https://www.theverge.com/2017/5/3/15529864/facebook-mark-zuckerberg-violence-moderation-reviewers>.

³⁰ Natasha Bertrand, *Twitter is banning all ads from Russian news agencies RT and Sputnik effective immediately*, Bus. Insider (Oct. 26, 2017), <http://www.businessinsider.com/twitter-is-banning-all-ads-from-russian-news-agencies-rt-and-sputnik-2017-10>.

³¹ Jason Kelley & Jillian York, *Seven Times Journalists Were Censored: 2017 in Review*, Electronic Frontier Found. (Dec. 30, 2017), <https://www.eff.org/deeplinks/2017/12/seven-times-2017-journalists-were-censored>.

³² Abdul Rahman Al Jaloud, Hadi Al Khatib, Jeff Deutch, Dia Kayyali, and Jillian C. York, *Caught in the Net: The Impact of “Extremist” Speech Regulations on Human Rights Content*, Electronic Frontier Found. (May 30, 2019), <https://www.eff.org/wp/caught-net-impact-extremist-speech-regulations-human-rights-content>.

³³ Natalie Wiener, *Talib Kweli Calls Out Instagram for Deleting His Anti-Racism Post*, Billboard (July 1, 2015), <https://www.billboard.com/articles/columns/the-juice/6613208/talib-kweli-instagram-deleted-post-anti-racism-censorship>.

³⁴ Kaitlyn Tiffany, *Twitter criticized for suspending popular LGBTQ academic @meakoopa*, The Verge, (Jun 13, 2017), <https://www.theverge.com/2017/6/13/15794296/twitter-suspended-meakoopa-anthony-oliveira-controversy>.

³⁵ Richard Cohen, *Black Lives Matter is Not a Hate Group*, Southern Poverty Law Center, July 16, 2016, <https://www.splcenter.org/news/2016/07/19/black-lives-matter-not-hate-group>.

³⁶ David Greene and Shahid Buttar, *The Inextricable Link Between Modern Free Speech Law and the Civil Rights Movement*, Electronic Frontier Found. (March 8, 2019), <https://www.eff.org/deeplinks/2019/03/inextricable-link-between-modern-free-speech-law-and-civil-rights-movement>.

c) *Moderation Decisions Often Privilege the Powerful*

In addition, moderation choices often reflect and reinforce bias against marginalized communities. Indeed, for every high-profile case of despicable content being taken down, there are many more stories of people in marginalized communities and journalists finding their voices silenced online. Here are just a few examples:

- Instagram often deletes photos of transgender people and people of color while keeping nearly identical photos of white, cisgender people online.³⁷ *Salty*, a lifestyle magazine for women, transgender, and nonbinary readers, attempted to advertise on Instagram but had its advertisements rejected, apparently due to a misapplication of a rule banning advertisements for escort services.³⁸
- Under rules against online harassment, platforms frequently mistakenly punish the targets of harassment who are attempting to engage in counter-speech, rather than the perpetrators.³⁹
- Flickr removed photos of Egypt's state security force from a user's account claiming the takedown was because the user did not create the images himself.⁴⁰
- Facebook allows white supremacists to spread violent threats while censoring Black Lives Matter posts and activists of color.⁴¹
- Twitter regularly removes ads related to sexual health and condoms but allows Playboy to promote its account freely.⁴²
- Egyptian journalist Wael Abbas has been censored by Facebook, Yahoo!, Twitter, and YouTube in connection with his work documenting police brutality.⁴³

³⁷ EJ Dickson, *Why Did Instagram Confuse These Ads Featuring LGBTQ People for Escort Ads?*, Rolling Stone (July 11, 2019), <https://www.rollingstone.com/culture/culture-features/instagram-transgender-sex-workers-857667>.

³⁸ Mary Emily O'Hara, *Queer and Feminist Brands Say They are Being Blocked from Running Ads on Instagram and Facebook*, MTV News (July 19, 2019), <http://www.mtv.com/news/3131929/queer-and-feminist-brands-say-they-are-being-blocked-from-running-ads-on-instagram-and-facebook>.

³⁹ Katie Notopoulos, *How Trolls Locked My Twitter Account for 10 Days, and Welp*, BuzzFeed News (Dec. 2, 2017), <https://www.buzzfeednews.com/article/katienotopoulos/how-trolls-locked-my-twitter-account-for-10-days-and-welp>; Elliot Harmon, *In debate over internet speech law, pay attention to whose voices are ignored*, The Hill (Aug. 21, 2019), <https://thehill.com/opinion/technology/458227-in-debate-over-internet-speech-law-pay-attention-to-whose-voices-are>.

⁴⁰ Jennifer Preston, *Ethical Quandary for Social Sites*, New York Times (Mar. 27, 2011), <https://www.nytimes.com/2011/03/28/business/media/28social.html>.

⁴¹ Sam Levin, *Civil rights groups urge Facebook to fix 'racially biased' moderation system*, The Guardian (Jan. 18, 2017), <https://www.theguardian.com/technology/2017/jan/18/facebook-moderation-racial-bias-black-lives-matter>; Sam Levin, *Facebook temporarily blocks Black Lives Matter activist after he posts racist email*, The Guardian (Sept. 12, 2016), <https://www.theguardian.com/technology/2016/sep/12/facebook-blocks-shaun-king-black-lives-matter>.

⁴² Amber Madison, *When Social-Media Companies Censor Sex Education*, The Atlantic (Mar. 4, 2015), <https://www.theatlantic.com/health/archive/2015/03/when-social-media-censors-sex-education/385576>.

⁴³ Jillian C. York, *Companies Must Be Accountable to All Users: The Story of Egyptian Activist Wael Abbas* (Feb. 13, 2018), <https://www.eff.org/deeplinks/2018/02/insert-better-title-here>.

- YouTube removed reports about the Syrian war because of rules against depictions of violence.⁴⁴
- Facebook removed posts about the military campaign against the Rohingya in Myanmar.⁴⁵
- Facebook also removed links on a small news weekly’s page to an opinion column criticizing men for their complacency in light of several high-profile sexual assault and harassment scandals.⁴⁶

Problematically, companies’ moderation policies also often feature exceptions for public figures: that’s why the president of the United States can post false information but an ordinary user can’t. While there’s some sense to such policies—people should know what their elected representatives are saying—they necessarily privilege the powerful.⁴⁷

Given this background, we worry that the users most likely to be harmed by a weakened Section 230 are the people who most rely on online communities to safely gather and share information: racial and religious minorities, members of the LGBTQ community, and other marginalized groups. For some of those groups, online platforms provide safety and resources that aren’t available anywhere else. As a group of South Dakota activists wrote in a letter to Senator John Thune:

[Section 230’s] protections are uniquely important to South Dakotans: we rely on online communities to share our thoughts and ideas with friends across the country and around the world. For rural Americans, online communities often serve as our most important connection to likeminded friends. For people of color, members of the LGBTQ community, and other marginalized South Dakotans, online communities are our lifelines.⁴⁸

Online platforms can give power to the most vulnerable members of society. As EFF Chief Program Officer Rainey Reitman put it, “Online communities let women make decisions from the safety of our homes about whom we can trust. When we’re forced to make those decisions on the

⁴⁴ Malachy Browne, *YouTube Removes Videos Showing Atrocities in Syria*, New York Times (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/world/middleeast/syria-youtube-videos-isis.html>.

⁴⁵ *Facebook Bans Rohingya group’s Posts as Minority Faces ‘Ethnic Cleansing,’* The Guardian (Sept. 20, 2017), <https://www.theguardian.com/technology/2017/sep/20/facebook-rohingya-muslims-myanmar>.

⁴⁶ Jillian C. York, *Blunt Measures on Speech Serve No One: The Story of the San Diego City Beat* (Mar. 5, 2018), <https://www.eff.org/deeplinks/2018/03/blunt-measures-speech-serve-no-one-story-san-diego-city-beat>.

⁴⁷ Kit Walsh and Jillian C. York, *Facebook Shouldn’t Give Politicians More Power Than Ordinary Users*, Electronic Frontier Found. (October 6, 2019), <https://www.eff.org/deeplinks/2019/10/facebook-shouldnt-give-politicians-more-power-ordinary-users>.

⁴⁸ Elliot Harmon, *South Dakota Civil Liberties Groups Urge Senator Thune to Put the Brakes on SESTA*, Electronic Frontier Found. (Oct. 17, 2017), <https://www.eff.org/deeplinks/2017/10/south-dakota-civil-liberties-groups-urge-senator-thune-put-brakes-sesta>.

street, we're usually doing it from the wrong side of a power imbalance."⁴⁹ A weakened Section 230 means an Internet where some members of society aren't afforded that safety.

d) *The Robots Won't Fix It*

The situation worsens when we look to automation and algorithms to help enforce already confused policies. Machine learning algorithms are meant to grow and evolve on their own without human input, and they inevitably end up removing legal and often important speech.

For example, when Google launched its PerspectiveAPI tool, designed to measure the "toxicity" in online discussions based on feedback from users, users quickly noticed troubling results in how it would treat different user demographics, flagging statements like "I am a gay woman" and "I am a black man" as highly toxic.⁵⁰ And when blogging platform Tumblr turned to automated tools last year to enforce its ban on "adult" content, its filters flagged a wide variety of non-adult content, including images Tumblr itself has identified as acceptable and even ordinary drawings from patent applications.⁵¹

Automation failures can have significant consequences for human rights. In Syria, human rights defenders have found the openness of the YouTube platform to be a major benefit to their efforts to document the conflict. Syrian activists have relied on both YouTube and Facebook to generate more hours of content than the length of the conflict itself, some of which has been collected for use in war crimes tribunals. But YouTube's automated filters have taken down thousands of Syrian channels that depicted human rights violations. Our joint investigation with Syrian Archive and Witness estimates that at least 206,077 videos, including 381 videos documenting airstrikes targeting hospitals and medical facilities, have been removed from the platform between 2011 and 2019.⁵²

Political criticism also suffers. For example, a video by Kurdish activist was flagged simply because it contained imagery that depicted Turkey's President Erdogan as a member of ISIS.⁵³

⁴⁹ Rainey Reitman, *Commentary: Bill Aimed at Sex Trafficking Actually Puts Women in More Danger*, Mercury News (Dec. 11, 2017), <https://www.mercurynews.com/2017/12/11/commentary-bill-aimed-at-sex-trafficking-actually-puts-women-in-more-danger>.

⁵⁰ Elliot Harmon and Jeremy Gillula, *Whose Voices Will SESTA Silence?*, Electronic Frontier Found. (Sept. 13, 2017), <https://www.eff.org/deeplinks/2017/09/stop-sesta-whose-voices-will-sesta-silence>.

⁵¹ *What Tumblr's Ban on 'Adult Content' Actually Did*, Electronic Frontier Found. (Dec. 2018), <https://www.eff.org/tossedout/tumblr-ban-adult-content>.

⁵² Abdul Rahman Al Jaloud, Hadi Al Khatib, Jeff Deutch, Dia Kayyali, and Jillian C. York, *Caught in the Net: The Impact of "Extremist" Speech Regulations on Human Rights Content*, Electronic Frontier Found. (May 30, 2019), <https://www.eff.org/wp/caught-net-impact-extremist-speech-regulations-human-rights-content>.

⁵³ Sara Spary, *Facebook Is Embroiled In A Row With Activists Over "Censorship"*, BuzzFeed, (April 8, 2016) <https://www.buzzfeed.com/sarasparry/facebook-in-dispute-with-pro-kurdish-activists-over-deleted>.



And state actors have systematically abused Facebook’s flagging process to censor political enemies.⁵⁴

Further examples abound; EFF has documented a few of the most egregious ones in our “TOSsed Out” archive.⁵⁵

Building a more complicated filter—say, by using advanced machine learning or AI techniques—won’t solve the problem either. That’s because all complex machine learning systems are susceptible to what are known as “adversarial inputs”—examples of data that look normal to a human, but which completely fool AI-based classification systems. For example, an AI-based filtering system that recognizes sex trafficking posts might look at such a post and classify it correctly—unless the sex trafficker adds some random-looking-yet-carefully-chosen characters to the post (maybe even a block of carefully constructed incomprehensible text at the end), in which case the filtering system will classify the post as having nothing to do with sex trafficking.⁵⁶

Based on the track record of filters for copyright infringement, these problems were unfortunately predictable. YouTube’s expensive and sophisticated Content ID system has a woeful track record at flagging noninfringing videos as copyright infringement,⁵⁷ including infamously flagging a video of nothing but static five times.⁵⁸ It is telling that even one of the most powerful Internet companies in the world, with powerful incentives, nonetheless still cannot filter reliably.

Finally, automated speech “decisions,” unlike those of courts, are often shrouded in mystery because the technology is hidden behind a veil of trade secrets and other assertions of proprietary information. When platforms like Facebook and YouTube create large databases of what they believe to represent “terrorist” content, the algorithm begins to define what it considers “terrorist” content to be, but few people in the human rights community, if any, have knowledge about how they’re programmed.⁵⁹ Fionnuala Ní Aoláin, a law professor and special rapporteur for the United Nations Human Rights Council, has been quoted as saying that Facebook’s definition of terrorism “bears no relationship to the global definition agreed by states,” a development which she sees as “a very dangerous precedent.”⁶⁰

⁵⁴ Russell Brandon, *Facebook’s Report Abuse Button has Become a Tool of Global Oppression*, The Verge (Sept 4, 2014), <https://www.theverge.com/2014/9/2/6083647/facebook-s-report-abuse-button-has-become-a-tool-of-global-oppression>.

⁵⁵ *TOSsed Out*, Electronic Frontier Found. <https://www.eff.org/tossedout>

⁵⁶ *Attacking Machine Learning with Adversarial Examples*, OpenAI (February 27, 2017) <https://openai.com/blog/adversarial-example-research>.

⁵⁷ Elliot Harmon, *Don’t Put Robots in Charge of the Internet*, Electronic Frontier Found. (Jan. 18, 2019), <https://www.eff.org/deeplinks/2019/01/dont-put-robots-charge-internet>.

⁵⁸ *Ten Hours of Static Gets Five Copyright Notices*, Electronic Frontier Found. (Jan. 4, 2018), <https://www.eff.org/takedowns/ten-hours-static-gets-five-copyright-notices>.

⁵⁹ Bernhard Warner, *Tech Companies Are Deleting Evidence of War Crimes*, The Atlantic (May 8, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/facebook-algorithms-are-making-it-harder/588931>.

⁶⁰ *Id.*



Given the value we place on free speech and access to information in the United States, we should be wary of giving control over both to a network of robot Star Chambers.

2. Raising the Cost of Hosting 3rd Party Speech May Help Also Cement the Dominance of Big Tech

As noted, Section 230 has played a key role in the development of the today’s Internet industry. Without Section 230, Google, Facebook, and Twitter would not exist in their current form. It’s understandable that some people who are concerned about the outsized power of the tech giants are drawn toward proposals to modify Section 230.

Unfortunately, any such attempt is likely to backfire. If Section 230 does nothing else, it helps pave the way for competition. As Professor Eric Goldman of Santa Clara University School of Law puts it, “Even as Section 230 privileges the Internet giants, it also plants the seeds of their future destruction.”⁶¹

Simply put, Section 230 dramatically reduces the legal cost of hosting third-party speech. This allows Internet platforms both big and small, commercial and nonprofit, to operate at a global scale. Whether it’s Wikipedia, the world’s largest (and continuously growing) repository of information, staffed by a mere 350 people worldwide (approximately one third of the size of just Google’s legal department); or the Internet Archive’s 150 staff members that maintain an archive of the entire Internet on a budget of just \$18 million a year; these types of massive global efforts would not exist without a strong Section 230.

Eviscerating Section 230, or imposing new burdens in exchange for immunity, would make those operations untenable (much less the smaller operations of many startups, websites, and community forums). The tech giants, by contrast, would have resources to shoulder those burdens. They also have the legal resources to fight off the lawsuits a weakened Section 230 would invite.⁶² More generally, changing the formula after the fact only favors established companies that have used the law to establish a foothold while their would-be usurpers are forced to tread less certain legal waters. And if competing products don’t exist, users cannot simply switch services as a means to discipline a company’s conduct.

To see how this works now, we need only look to the example of the Grindr dating website, which was hardly a giant but was nonetheless financially successful. A subscriber misused the service as part of a harassment campaign targeting a former boyfriend, with terrible consequences for that

⁶¹ Eric Goldman, *Want to Kill Facebook and Google? Preserving Section 230 Is Your Best Hope*, Balkinization, New Controversies in Intermediary Liability Law (June 3, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3398631.

⁶² Elliot Harmon, *Google Will Survive SESTA. Your Startup Might Not*, Electronic Frontier Found. (Sept. 22, 2017), <https://www.eff.org/deeplinks/2017/09/google-will-survive-sesta-your-startup-might-not>



person. The victim sued Grindr, alleging it failed to do enough to help stop the harassment, and the lawsuit garnered intense press coverage. Even though Grindr was not found liable under Section 230, users looking for a safer experience turned to alternative dating applications committed to tougher vetting and safety processes.⁶³ Those competitors were just as dependent on 230's protections as they experimented with moderation techniques as Grindr itself was.

We do not have to guess as to whether the potential impacts on profits would be sufficiently motivating for corporations to censor speech. We are witnessing it in real time today as corporations with financial entanglements in China willfully stifle expression on behalf of the Chinese government in order to preserve their access to lucrative markets.⁶⁴ There is little difference between preserving opportunities to increase profits in more censorship-oriented markets and eliminating their exposure to liability to a weakened Section 230 in order to protect profits.

Finally, competitive effects are another reason Congress should avoid pushing platforms toward more reliance on automated filtering. The cost of building and using automated systems for removing content makes these tools inaccessible for startups. For example, YouTube's Content ID system cost the company approximately \$100 million.⁶⁵ For comparison, the Wikimedia Foundation (the organization that maintains Wikipedia and several other information-sharing tools) has an annual budget of \$80 million.⁶⁶

E. (Further) Lessons from FOSTA

EFF is a part of the legal team representing the plaintiffs who are seeking to have FOSTA declared unconstitutional.⁶⁷ They include two human rights organizations, a digital library, a sex work activist, and a certified massage therapist.

⁶³ Jon Shadel, *Grindr was the First Big Dating App for Gay Men. Now It's Falling Out of Favor*, Washington Post (Dec. 6, 2018), <https://www.washingtonpost.com/lifestyle/2018/12/06/grindr-was-first-big-dating-app-gay-men-now-its-falling-out-favor>.

⁶⁴ Matt Kim, *Hearthstone Pro Banned by Blizzard After Calling for Hong Kong Liberation During Stream*, IGN News (Oct. 7, 2019), <https://www.ign.com/articles/2019/10/08/hearthstone-pro-calls-for-hong-kong-liberation-during-live-blizzard-interview>; Laura Wagner, *Internal Memo: ESPN Forbids Discussion of Chinese Politics When Discussing Daryl Morey's Tweet About Chinese Politics*, Deadspin (Oct. 8, 2019), <https://deadspin.com/internal-memo-espn-forbids-discussion-of-chinese-polit-1838881032>.

⁶⁵ Paul Sawers, *YouTube: We've invested \$100 million in Content ID and paid over \$3 billion to rightsholders*, VentureBeat (Nov. 7, 2018), <https://venturebeat.com/2018/11/07/youtube-weve-invested-100-million-in-content-id-and-paid-over-3-billion-to-rightsholders>.

⁶⁶ Wikimedia Foundation, Inc., *Financial Statements June 30, 2018 and 2017 (With Independent Auditors' Report Thereon)*, KPMG, (Sept. 26, 2018), https://upload.wikimedia.org/wikipedia/foundation/6/60/FY17-18_-_Independent_Auditors%27_Report.pdf.

⁶⁷ Karen Gullo and David Greene, *With FOSTA Already Leading to Censorship, Plaintiffs Are Seeking Reinstatement of Their Lawsuit Challenging the Law's Constitutionality*, Electronic Frontier Found., (Mar 1, 2019) <https://www.eff.org/deeplinks/2019/02/fosta-already-leading-censorship-we-are-seeking-reinstatement-our-lawsuit>.



All of those plaintiffs have one thing in common: thanks to FOSTA, their lawful speech and activities are now compromised. Woodhull Freedom Foundation and Human Rights Watch both advocate for decriminalization of sex work. While their advocacy is completely legal, FOSTA put them at risk. Alex Andrews works with several organizations to provide harm reduction resources to sex workers. Like Woodhull and Human Rights Watch, Ms. Andrews' work is legal, but thanks to FOSTA's broad prohibition on using the Internet to "support" sex work, has now been thrown into a legal gray area. Massage therapist Eric Koszyk advertised his services on Craigslist's therapeutic services section and has now lost a key income source.

But the plaintiffs have another thing in common: they represent the types of voices that were sadly missing from the congressional debate over FOSTA. Groups like Freedom Network USA and the Sex Workers Outreach Project—both national networks of frontline organizations working to reduce trafficking—expressed grave concerns that FOSTA would put trafficking victims in more danger.⁶⁸ But those groups weren't invited to speak to Congress, and neither were Mr. Koszyk or other business owners whose work would be threatened by the law.

FOSTA teaches that Congress should carefully consider the unintended consequences of this type of legislation, recognizing that any law that puts the onus on online platforms to discern and remove illegal posts will result in over-censorship. Most importantly, it should listen to the voices most likely to be taken offline.

FOSTA also teaches that removing distasteful speech online may not have the hoped-for impact. At this committee's hearing on November 30, 2017, Tennessee Bureau of Investigation special agent Russ Winkler explained that online platforms were the most important tool in his arsenal for catching sex traffickers.⁶⁹ One year later, there is anecdotal evidence that FOSTA has made it harder for law enforcement to find traffickers.⁷⁰ Indeed, several law enforcement agencies report that without these platforms, their work finding and arresting traffickers has hit a wall.⁷¹

This is not a new lesson. For example, while many have worried that playing violent video games lead to real-world violence, researchers have been unable to establish any causal link.⁷² Similarly,

⁶⁸ Elliot Harmon, *Sex Trafficking Experts Say SESTA Is the Wrong Solution*, Electronic Frontier Found. Oct. 3, 2017), <https://www.eff.org/deeplinks/2017/10/sex-trafficking-experts-say-sesta-wrong-solution>.

⁶⁹ Elliot Harmon, *Internet Censorship Bills Wouldn't Help Catch Sex Traffickers*, Electronic Frontier Found. (Dec. 5, 2017), <https://www.eff.org/deeplinks/2017/12/internet-censorship-bills-wouldnt-help-catch-sex-traffickers>

⁷⁰ Mike Masnick, *More Police Admitting That FOSTA/SESTA Has Made It Much More Difficult To Catch Pimps And Traffickers* (July 9, 2018), <https://www.techdirt.com/articles/20180705/01033440176/more-police-admitting-that-fosta-sesta-has-made-it-much-more-difficult-to-catch-pimps-traffickers.shtml>.

⁷¹ Alexandra Stassinopoulos, *Anti-trafficking law has unexpected consequences on sex work in Bay Area*, The Daily Californian (May 3, 2019), <https://www.dailycal.org/2019/05/03/anti-trafficking-law-has-unexpected-consequences-on-sex-work-in-bay-area>.

⁷² Ollie Barder, *New Study Shows That There Is No Link Between Violent Video Games And Aggression In Teenagers*, Forbes (Feb. 15, 2019), <https://www.forbes.com/sites/olliebarder/2019/02/15/new-study-shows-that-there-is-no-link-between-violent-video-games-and-aggression-in-teenagers/#468f2e26328e>.



before Congress takes steps to undermine Section 230 in the hopes that policing hateful speech will help reduce dangerous hateful activities, it should take care to examine the causal links, if any, so that it can legislate with a scalpel, not a hacksaw.

F. Remedies Exist Under Current Law That Do Not Conflict with 230

Critics of Section 230 often forget that the law already affords rights and remedies to victims of harmful speech when it causes injury. Arguments that the tools that disseminate speech such as Internet platforms, broadband providers, and applications must be held liable for the conduct of users wrongly discount this fundamental fact. A speaker who harms another is not free from the consequences of their actions.

In the infamous *Grindr* case mentioned above, for instance, the abuser was arrested two years ago under criminal charges of stalking, criminal impersonation, making a false police report, and disobeying a court order.⁷³ Backpage.com, a controversial website that was frequently cited in debates over FOSTA, was shut down by the FBI in April 2018—without any help from or need for FOSTA.⁷⁴

States have also crafted a whole range of laws that hold individuals personally responsible for their harmful conduct that make it clear there are consequences. There are state criminal penalties for both stalking and harassment and a whole panoply of civil and criminal statutes for conduct that causes physical harm to an individual. The courts can draft restraining orders that carry with them penalties for their violation. Many of these criminal laws also carry civil enforcement equivalents as well.

In addition to criminal charges, victims can use defamation, false light, intentional infliction of emotional distress, common law privacy, interference with economic advantage, fraud, anti-discrimination laws, and other civil causes of action to seek redress. They can also sue the platforms if the platform owner is itself creating the illegal content. But just as we do not hold telephone companies liable for crimes committed over the telecommunications system, Section 230 stands for the consistent proposition that building a tool that allows the dissemination of information should not result in liability for what other parties do with that tool.

To the extent Congress believes any currently existing remedies individuals may invoke are insufficient, we encourage the Committee to explore why they are insufficient and to carefully

⁷³ Tyler KingKade and Davey Alba, *A Man Sent 1,000 Men Expecting Sex And Drugs To His Ex-Boyfriend Using Grindr, A Lawsuit Says*, BuzzFeed News (Jan. 10, 2019), <https://www.buzzfeednews.com/article/tylerkingkade/grindr-herrick-lawsuit-230-online-stalking>.

⁷⁴ Tom Porter and Reuters, *Backpage Website Shut Down, Founder Charged with 93 Counts by FBI in Sealed Document*, (Apr. 7, 2018) <https://www.newsweek.com/sex-ads-website-backpagecom-co-founder-charged-after-fbi-raid-876333>.



consider the collateral impacts any new remedies would yield. But I caution this committee to understand that there will be no law that will do a perfect job preemptively at all times.

G. Conclusion

Unfortunately, regulation of much of our online expression, thought, and association has already been ceded to unaccountable executives and enforced by minimally-trained, overworked staff and hidden algorithms. Nonetheless, many, especially in policy circles, continue to push for companies to perfectly differentiate—magically and at scale—between speech that should be protected and speech that should be erased. If our experience has taught us anything, it is that we have no reason to trust the powerful—inside governments, corporations, or other institutions—to draw those lines, and every reason to expect that the line-drawing processes will be abused.

Fighting censorship—by governments, large private corporations, or anyone else—has been core to EFF’s mission for more than 25 years, not because we enjoy defending reprehensible content, but because we know that tools for censorship are more often *used by the powerful, against the powerless*.⁷⁵ And we are worried about proposals to force platforms to filter the content on their services not because there’s a slippery slope from judicious moderation to active censorship—but because *we are already far down that slope*. Congress should not take us any further.

⁷⁵ Cindy Cohn, *10+ Years of Activists Silenced: Internet Intermediaries’ Long History of Censorship*, Electronic Frontier Found. (Aug. 23, 2017), <https://www.eff.org/deeplinks/2017/08/10-years-activists-silenced-internet-intermediaries-long-history-censorship>.