

**STATEMENT OF**  
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**BEFORE THE**  
**SUBCOMMITTEE ON PRIVACY, TECHNOLOGY, AND THE LAW**  
**OF THE COMMITTEE ON THE JUDICIARY**  
**UNITED STATES SENATE**  
  
**AT A HEARING ENTITLED**  
**“PLATFORM ACCOUNTABILITY: GONZALEZ AND REFORM”**  
  
**PRESENTED MARCH 8, 2023**

Good afternoon, Chair Blumenthal, Ranking Member Hawley, and distinguished members of this Subcommittee. Thank you for the opportunity to appear before you today to discuss platform accountability.

Founded in 1992, the Internet Society is a U.S. non-profit organization headquartered in Reston, Virginia, and Geneva, Switzerland, with a core mission of promoting and defending the Internet. The Internet Society’s staff comprises technical experts in internetworking, cybersecurity, and network operations, among other fields, as well as policy experts in a broad range of Internet-related areas.

A key characteristic of the Internet—one that sets it apart from every other communications media—is that it was meant to be open for everyone. Individuals can speak, debate, create, invent, and engage with others, whether they are across town or around the world. The broad protections that Section 230 affords are essential for—in the words of that statute—this “interactivity” on the Internet. Simply stated, without the basic protections that Section 230 provides, we would not have the robust engagement of hundreds of millions of Americans in the online conversation, nor would we have the astounding innovation in online services that we have witnessed over the past 25 years.

It is certainly true that as more of our society’s discourse has moved online, so have a number of serious societal problems. We appreciate that Congress is looking to address some of those problems. Americans are, quite reasonably, concerned that speech and behavior that would not be tolerated in other settings are seemingly not only protected, but even exploited for profit,

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<sup>1</sup> I wish to express thanks to my colleagues at the Internet Society, and especially to John Morris, in the preparation of this testimony.

in some online platforms. At the same time, the power of those very platforms appears only to grow, such that they have outsized influence and power in the social and political life of the nation and other nations around the world. Yet it is important not to lose sight of the value of the Internet. For every appalling example of childhood sexual abuse material, there is an example of a young person who was in crisis and found online a community of others like themselves. Examples of nasty online speech abound, but so do examples of people reaching out and giving one another support in times of need. Some consumers of content on platforms appear to see only polarizing influences; but plenty of others seem to use the same platforms for education, and thereby to better themselves. The Internet can be a conduit for social problems, yes, but it is also an enormous resource for social good. Any changes to the rules about its operation must be undertaken with enormous care.

Our core message to this Subcommittee is that—because of its critical role in ensuring the very ability of individuals to speak online—Section 230 is not the appropriate vehicle through which to try to address social problems. Amendments to Section 230 risk the viability of what makes the Internet unique—the ability of individuals to participate in the global marketplace of ideas.

To appreciate these risks, we must all remember why Congress took the bold steps to create Section 230 in the first place. It was a very early stage of development of the public Internet—and the legal landscape that applied to it—that Congress confronted when it enacted what became Section 230. But in its wisdom, Congress created the broad scope of protections that Section 230 affords far beyond the major online platforms that have since emerged. As a result, there are serious risks that would flow from removing those protections. We address each of these points below, as well as discussing the Gonzalez case, referenced in the title of this hearing.

#### **A. THE ORIGINS AND GOALS OF SECTION 230**

The Internet was developed in the 1970s (by a number of the founders of the Internet Society, among others) within the U.S. academic community through a federal government project.<sup>2</sup> Even at this early stage, the potential for interactivity—individual participation—unique to the Internet was plain. In the 1970s and 1980s, it was used primarily for collaboration between academic, government, and commercial researchers, with non-research commercial traffic effectively prohibited. The broad ban on commercial activity—including commercial services offered to individuals—lasted until the Internet was transitioned to the private sector, in April 1995, about nine months before Section 230 was enacted.<sup>3</sup>

The Internet's design is somewhat peculiar in that it is not a single system, but rather a system built up from other systems. This nature is immediately apparent from its name—the Inter-net. The designers recognized that the best way to deploy a very large, distributed network

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<sup>2</sup> Vint Cerf, *A Brief History of the Internet and Related Networks*, Internet Society, <https://www.internetsociety.org/internet/history-internet/brief-history-internet-related-networks/>.

<sup>3</sup> See *A Brief History of NSF and the Internet*, National Science Foundation (Aug. 13, 2003), [https://www.nsf.gov/news/news\\_summ.jsp?cntn\\_id=103050](https://www.nsf.gov/news/news_summ.jsp?cntn_id=103050).

was to take advantage of various other, existing networks, and link them together with some basic common technology. This fundamental design of the Internet is what has allowed it to grow so large. As new needs, areas of operation, or inventions come along, new networks can join the Internet without adjusting the rest of the system. This feature of the design is especially relevant for any consideration of changes to Section 230, because it creates many different actors whose actions might be implicated in any liability question.

Over the 1970s and 1980s, privately-operated networks were also created, ranging from commercial-focused communications networks to “bulletin board” services for individuals or small groups to communicate. As early as 1992, the Hartford Courant reported that “computers [are] growing as [a] forum for ideas”—the newspaper reported on a political debate through a bulletin board involving individuals in Wethersfield, CT, St. Louis, MO, and Glendale, AZ.<sup>4</sup> One of the earliest successful private networks—CompuServe—was founded in 1969 as a “dial up” network aimed at businesses, before later offering its services to individuals, who were then able to engage, share content, and collaborate with people far beyond their local communities. As restrictions on commercial traffic on the Internet eased, these other networks also had the opportunity to join the Internet, bringing even more people into one global online community even as they continued to receive service from their preferred service provider.

As with all forms of communication since the emergence of the common law, there arose the question of how liability for harmful or illegal content would be assigned in the online context. With “first-party” speech—where the speaker and the platform for speech are the same entity—liability was always clear: the first-party speaker would be liable. What was unclear was responsibility for “third-party” speech—speech by speakers that was carried or conveyed by others. Throughout the history of this country, the rules for responsibility for third-party speech under the common law have appropriately varied by the medium of the speech:

- **Broadsheets, pamphlets, and speech on the village green:** Generally, there was no third-party speech involved, and thus only first-party liability applied.
- **Newspapers:** Most speech is first-party speech, but the newspapers can be liable for third-party speech (such as letters to the editor).
- **Telephones:** Under the common carriage regime, telephone companies were not liable for speech made over their networks.
- **Radio and broadcast television:** Similar to newspapers, with potential liability for the broadcaster if they carry third-party speech.
- **Cable television:** Through private negotiations between the cable channels and cable systems, liability was allocated to the cable channels.

But the Internet is fundamentally different than any of those media, with literally orders of magnitude more people and entities involved in the liability questions. In the 1990s, two

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<sup>4</sup> Hartford Courant, Computers Growing as Forum for Ideas, Aug. 17, 1992 (available at <https://www.courant.com/1992/08/17/computers-growing-as-forum-for-ideas/>). The article identified one Connecticut political observer who saw “the beginning of a vast change in how people learn about and discuss politics,” quoting him as saying: “There are 65 million computer users in the United States, and they’re just starting to use their modems.”

seminal cases began to answer the question of whether online service providers would be liable for content posted by individual users. *Cubby, Inc.* held that an online service provider would not be held liable for speech made by a participant in an online forum, but *only* because the provider had not moderated any content. *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991). Then *Stratton Oakmont, Inc.* held an online service provider liable for participants' speech because the provider engaged in some content monitoring and regulation. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). These cases created significant uncertainty and potentially crippling liability for the developing industry of online service providers, including companies that facilitated access to the Internet and third-party speech.

It is against this backdrop that Congress considered and enacted the “Internet Freedom and Family Empowerment Act,” which became 47 U.S.C. Section 230.<sup>5</sup> One of Congress’s explicit goals for Section 230 was “to promote the continued development of the Internet and other interactive computer services and other interactive media.” 47 U.S.C. 230(b)(1). Congress recognized that interactive computer services in general, and the Internet in particular—even at its early stage when Section 230 was enacted—offered what was at the time a profoundly unique platform for interactive communication. Congress observed in the statute that the “Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” *Id.* 230 (a)(3). In Congress’s judgment in 1995, these interactive communications, which foster public discourse, should be encouraged. The Internet, unlike prior “published” forms of mass communication, transforms the individual from a passive recipient of mainly corporate-created products into an active participant in shaping communication and content. Congress recognized that this individual-driven “interactivity” was an essential attribute of the emerging Internet that warranted protection.

The results of the Congressional foresight to enable citizen speech and innovation are undeniable. A vast amount of communication (artistic, political, intellectual, pedestrian, and otherwise) now flows through the Internet—whether through blogs, message boards, social media both large and small, videos or music uploaded to the Internet, or other means. Already by 1997, the U.S. Supreme Court noted in its *Reno* decision the “dramatic expansion of this new marketplace of ideas,” and the Court held that speech on the Internet warrants the highest level

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<sup>5</sup> The “Internet Freedom and Family Empowerment Act” passed by the U.S. House of Representatives in part as an alternative to the “Communications Decency Act” (CDA), which was proposed and passed by the United States Senate. A joint Senate-House conference committee decided to include both the CDA and House-passed Section 230 in the Telecommunications Act of 1996. CDA’s rules on “indecent” and “patently offensive” content were quickly challenged and subsequently struck down on First Amendment grounds by the United State Supreme Court in *Reno v. ACLU*, 521 U.S. 844 (1997), but Section 230 had not been challenged and was not at issue in the *Reno* decision. See Ashley Johnson & Daniel Castro, *Overview of Section 230: What It Is, Why It Was Created, and What It Has Achieved*, ITIF (Feb. 22, 2021), <https://itif.org/publications/2021/02/22/overview-section-230-what-it-why-it-was-created-and-what-it-has-achieved>.

of Constitutional protection under the First Amendment.<sup>6</sup> The lower court in that case had observed the beneficial “democratizing” effects of Internet interactivity, and noted “that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen.”<sup>7</sup>

## B. THE BROAD SCOPE OF SECTION 230 PROTECTIONS

As this Subcommittee considers “platform accountability,” it is vital that it understand that Section 230 protects providers and individuals far, far beyond the major online content platforms. Section 230 is applicable—and needed—at almost every level and in every corner of the Internet ecosystem.

Foremost—and often overlooked in discussions of Section 230—is that it directly and critically protects hundreds of millions of Internet users in America. In addition to companies and organizations that offer Internet and online services, Section 230 also specifically protects “users” of those services. Thus, every time that an American re-tweets a humorous or outrageous tweet, they are protected by Section 230 in the event that the original tweet is found to be defamatory or otherwise harmful. Similarly, every time an American on social media forwards an interesting newspaper article or a hard-hitting online restaurant review, they are protected by Section 230 from liability for the underlying content.

Beyond this type of common user engagement that is protected by Section 230, individual Americans—as well as many community groups, political organizations, and local governmental agencies—are protected by Section 230 when they host discussion forums online that allow other people to discuss a topic. Here are just a few examples of the thousands—if not hundreds of thousands—online discussion fora:

- The “Bethel, CT Forum” is a “forum of local political discussion with bipartisan views,” with more than 8,000 members, at <https://www.facebook.com/groups/615946511795955>;
- a subreddit hosts discussions focused on New Haven, CT, at <https://www.reddit.com/r/newhaven/>;
- a Missouri-based blogger hosts comments and discussion at <https://blogodidact.blogspot.com>;
- “Lathrop Missouri Discussion” is a discussion group focused on any “concerns, problems, ideas, ... Lathrop business or events,” at <https://www.facebook.com/groups/1690547144552949/about>;
- the Missouri Department of Health and Senior Services hosts a private discussion group, limited to public health nurses, named the “Missouri Public Health Nursing Discussion Group,” at <https://health.mo.gov/living/lpha/phnursing/pdf/discussion-group.pdf>;
- “Southeast Missouri political discussions” is a private discussion group with 701 members, at <https://www.facebook.com/groups/2731558740434487/>.

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<sup>6</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844, 885 (1997).

<sup>7</sup> *Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996).

As may be obvious, there is a huge diversity of online discussion groups in every state across the country, most of which are hosted by individuals, small organizations, government agencies, and others. And of course there is a vast array of national discussion fora, ranging from <https://liberalforum.net> to <https://conservativepoliticalforum.com>, and from <https://www.reddit.com/r/Cooking/> to <https://www.gardenstew.com/>, and from <https://racing-forums.com/forums/nascar-chat.8/> to <https://www.reddit.com/r/rugbyunion/>. Every person and organization hosting or moderating those discussion groups is directly protected by Section 230 for liability for content posted in their fora by other people.

Beyond the non-commercial sites identified above, many commercial entities also host comments from customers, users of their products, and people interested in their work. Some small online retailers allow customers to post reviews of their products, some newspapers (such as the <https://www.emissourian.com/>) allow readers to post comments, and there are numerous software and service providers aimed at enabling small businesses to build interactive online communities of their customers. Any of these small businesses that allow customers, users, or the public to post comments are directly protected by Section 230.

In addition to the participation of individuals and small organizations on the Internet, of great concern to our organization is that Section 230 also protects many different types of service and infrastructure providers in the Internet ecosystem. Those providers include (but are not limited to):

- Internet Service Providers (“ISPs”), who make it possible for individuals to access the Internet. Whether through cable, digital subscriber lines, fiber, wireless, or satellite connections, ISPs enable Internet access. Section 230 ensures that ISPs are not responsible for regulation and monitoring of third-party content transmitted over these services. And according to BroadbandNow, in the United States there are “more than 2,846 Internet service providers, with most covering very small areas.” This includes, for example, 82 ISPs in Connecticut, and 278 in Missouri.<sup>8</sup>
- Content Delivery Networks (CDNs), which are specialized network providers, also depend on Section 230 immunity. CDNs are geographically distributed networks of proxy servers and data centers, and they are crucial to delivering large amounts of data (such as delivering high-definition streaming video) quickly to many viewers simultaneously.
- Web hosting companies, many of which, around the country, specialize in helping local small businesses get online. Section 230 is critical to their existence.

Each of these types of infrastructure providers—and others—depends on Section 230 to enable them to efficiently convey traffic to the final destination without risk of liability or obligation to screen content passing through their networks. That includes operators of systems—such as ISPs or voice-over-IP providers—that have no involvement at all with the content that passes through their systems. Like the individuals discussed earlier, their ability to fully participate in the online ecosystem is heavily dependent on the continued protections under Section 230.

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<sup>8</sup> See <https://broadbandnow.com/Missouri> and <https://broadbandnow.com/Connecticut>.

### **C. SERIOUS RISKS FROM REDUCING SECTION 230 PROTECTIONS**

A complete repeal of Section 230 would be immediately catastrophic to the Internet, the hundreds of millions of Americans who use and engage online over the Internet, and the tens- or hundreds-of-thousands of businesses in this country that directly offer Internet-based services. The thousands of very small Internet Service Providers—which provide Internet access to many thousands of small, rural, and underserved communities across this country—would immediately be at grave risk of being sued for harmful content transmitted over their networks. And even if they might ultimately prevail in such lawsuits, the costs of litigating can be crushing and could easily put them out of business. Many more thousands of other businesses would similarly face grave risk for providing online services. And over time, as the understanding of the risks became clearer, many businesses would simply choose to shut down. Only the very largest players in the various markets—ISPs, web hosting providers, online platforms—could safely be predicted to survive.

But an even graver risk is that Congress will consider and enact a more limited “reform” of Section 230 that—as a practical matter for individuals and small businesses—would have the same basic effect of a total repeal. Amendments that carve out new exceptions or add new limitations to Section 230 could easily create too much risk of liability for individuals and small businesses. Although this hearing is about “platform accountability,” the vast majority of the individuals and entities protected by Section 230 do not even remotely have access to the resources—or lawyers—that are available to the major online platforms. Many if not most businesses in America would be severely threatened by facing even a single serious lawsuit (especially one that cannot be quickly dismissed as Section 230 permits), and an increase in litigation risk for online speech would drive some companies out of businesses, and would certainly discourage other potential start-ups from entering the field at all.

These risks of liability would profoundly damage the ability of users to speak and receive information online. Providers facing the risk of crippling liability would rationally decide not to carry user or other third-party speech at all, or to carry only a very limited amount that it could be confident would not subject it to liability (e.g., because it was entirely non-controversial or came from an “authoritative” source). In other words, repealing or substantially limiting Section 230 would reduce the opportunity for users of all stripes to engage in speech online.

The reason for this danger goes back to the very nature of the Internet itself. Because it is a distributed network of other networks, there is no central point of control, and a huge abundance of parties involved in its operation. Many of the proposals one hears to address the societal problems the United States faces are, really, efforts to address the behaviors of small handfuls of organizations involved in the operation of the Internet, or even merely services that depend on the Internet. But any changes to Section 230 risk involving all of those other organizations that make the Internet such a resource for all humanity. That is why it is so important to recognize why Section 230 covers so much: it must, because the diversity of people involved in making the Internet is so large.

Because Section 230 protects the entire Internet ecosystem—and the very ability of individuals to participate online—it is a very poor vehicle through which to seek to address problems caused by a small subset of bad actors, actors who may or may not be covered by Section 230. This is not to say that Congress is powerless to address important social problems. Approaches that give rights to all Americans—such as baseline privacy legislation—would be an important start to address some of the current lack of protections in the online sphere. More direct regulation of certain categories of online services could also be appropriate in some cases.<sup>9</sup> And, although we have not seen any examples proposed to date, we do not reject the logical possibility that a focused amendment to Section 230 might achieve socially desirable goals without gravely undercutting the Internet. The Internet Society certainly stands willing to consult and provide feedback on any proposals to address social problems online.

#### **D. GONZALEZ V. GOOGLE LLC**

As we argued in our amicus brief in support of affirmance,<sup>10</sup> we believe that the lower courts in that case reached the correct result under both the statutory text and the Congressional intent of Section 230. It is clear that the *Gonzalez* case—although tragic—is covered by Section 230, and the intermediary involved should not be liable for the content of the videos at issue.

In *Gonzalez*, the plaintiffs/petitioners raised two particular arguments that warrant discussion. First, they asserted that the protections of Section 230 should be deemed to be limited to “traditional editorial functions”—a term or concept not found in the statutory language of Section 230. As our brief describes in detail, far from seeking to enshrine some notion of “traditional” editorial functions, Congress was expressly seeking to protect content management tools and techniques that were—as Congress put it—“rapidly developing.” 47 U.S.C. 230(a)(1). In seeking to protect innovation, Congress expressly anticipated that many “editorial functions”—including “filter[ing], screen[ing], allow[ing], ... disallow[ing,] ... choos[ing] ... organiz[ing], reorgan[izing] or translat[ing] content”—would be performed by computer software, not by humans. See 47 U.S.C. 230(c)(2)(B), (f)(4). There is no support in the statutory language that Section 230 only protects “traditional editorial functions.”

Second, the plaintiffs/petitioners asserted that the fact that the video platform used a general purpose “algorithm” to offer to users new videos to watch based on prior videos the user had watched somehow took the case outside of Section 230. Yet, as suggested by the statutory language quoted immediately above, Congress specifically understood that humans could not possibly moderate or organize all of the content coming online, and thus Congress afforded protection for modern non-human techniques to organize and present content. Moreover, any

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<sup>9</sup> It is also true that *any* new U.S. law responding to categories of speech online—whether altering Section 230 or not—will face significant constitutional hurdles. The vast majority of speech online—even some harmful or unwanted speech—is lawful under the First Amendment. Private companies that offer Internet-based services themselves have First Amendment rights to carry—or not carry—any lawful speech.

<sup>10</sup> Available at <https://www.internetsociety.org/wp-content/uploads/2023/01/Internet-Society-Gonzalez-v-Google-Amicus-Brief.pdf>.

organization of content—even alphabetical order<sup>11</sup>—utilizes one or more algorithms. There is no support for the contention that the use of an algorithm somehow takes the actions of an intermediary outside of the coverage of Section 230.

## CONCLUSION

Online content can raise difficult concerns—concerns appropriate for Congress to consider addressing. But any action by Congress should not come at the cost of the enormous positive benefits that have flowed, and continue to flow, from the fact that hundreds of millions of Americans are able to go online and express their opinions, share their creative works, pursue innovative and sometimes lucrative new ideas, and generally engage in the global online conversation.

We appreciate the opportunity to testify to this Subcommittee, and we welcome any questions you may have.

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<sup>11</sup> See, e.g., *Let's Learn Algorithms: Sorting a list of strings in alphabetical order with bubble sort*, undated, available at <https://www.calhoun.io/lets-learn-algorithms-sorting-a-list-of-strings-in-alphabetical-order-with-bubble-sort/>; *Sorting Algorithms*, undated, available at <https://brilliant.org/wiki/sorting-algorithms/>.