Protecting Free Speech and Defending Kids

A Proposal to Amend Section 230

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AMERICAN PRINCIPLES PROJECT

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Summary

Section 230, a provision of the Communications Decency Act (CDA), was sold to the American people as a necessary legal protection to remove pornography and obscenity from the Internet while also giving free speech the opportunity to flourish. Unfortunately, almost 25 years later, it's clear that the opposite has occurred: Big Tech platforms are removing free speech from the Internet, while pornography and obscenity are flourishing like never before.

We believe Section 230 still has value, but requires amendment in order to achieve what should be its dual mandate: 1.) protecting children from pornography and obscenity, and 2.) creating a digital public square where the value of free speech is cherished and where, as envisioned in the Findings of the original bill, "a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" are promoted.

In short, we propose to amend Section 230 by:

- Eliminating protection from civil liability for market-dominant Big Tech platforms that fail to make content moderation decisions pursuant to policies and practices reasonably consistent with the First Amendment standard under clearly established Supreme Court Law applicable to state actors;
- Establishing a private right of action and broad compensatory damages for users who have had their expression treated adversely by a market-dominant Big Tech platform, if that speech would otherwise be protected against government state actor censorship under the First Amendment;
- Creating a certification process through the Federal Trade Commission (FTC) and Department of Justice (DOJ). These certifications, while potentially admissible in civil actions against platforms, would not be determinative. The FTC would be tasked with reviewing whether a platform is "market-dominant" such that the requirements of this amendment would apply. It would also evaluate whether the content moderation policies and practices of such a platform "reasonably" track the First Amendment rulings of the Supreme Court, while taking into consideration the complexity of current technology. DOJ would review and certify this process;
- Eliminating protection from civil liability for providers or users who actively participate in or materially contribute to illegal online conduct;
- Eliminating protection from civil liability for providers or users who facilitate or knowingly permit an adult having illicit digital contact with a child;
- Eliminating protection from civil liability for providers or users who facilitate or knowingly permit the distribution of content that is indecent, obscene, or harmful to children by failing to implement a system designed to effectively screen users under the age of 18 from accessing such content.

The Problem

- Online speech monopoly
- Viewpoint suppression
- Harmful content to children

A handful of Big Tech platforms possess a chokehold monopoly over online speech, opinion, and information.

Many have likened the development of the printing press in the 1500s to the Internet information revolution in the 21st century. But here is one devastating difference: a mere 50 years after the printing of the Gutenberg Bible, there were more than 1,000 similar printing presses operating across Europe, publishing more than 500,000 books. By contrast today there are only a handful of giant Big Tech platforms controlling the vast majority of online user-generated content.

This "chokehold" monopoly power has permitted Big Tech companies to regularly commit viewpoint suppression against user posts and opinions they don't like. Big Tech has become intransigent and has refused to change its behaviors, despite multiple congressional hearings and public outcry, and despite the fact that such behaviors would seem to violate the original intent behind the provision in the Communications Decency Act now known as Section 230. This became frighteningly apparent during the COVID-19 crisis when government officials colluded with Big Tech to remove "dangerous" content that either contradicted the state-approved narrative or encouraged citizens to exercise their constitutional right to assemble in protest.

The free flow of information and opinion is essential to our Constitutional Republic, not only for an informed electorate, but for the future of citizen discourse and debate on important social, religious, and political issues, particularly because citizens now get a bulk of their news from online sources.

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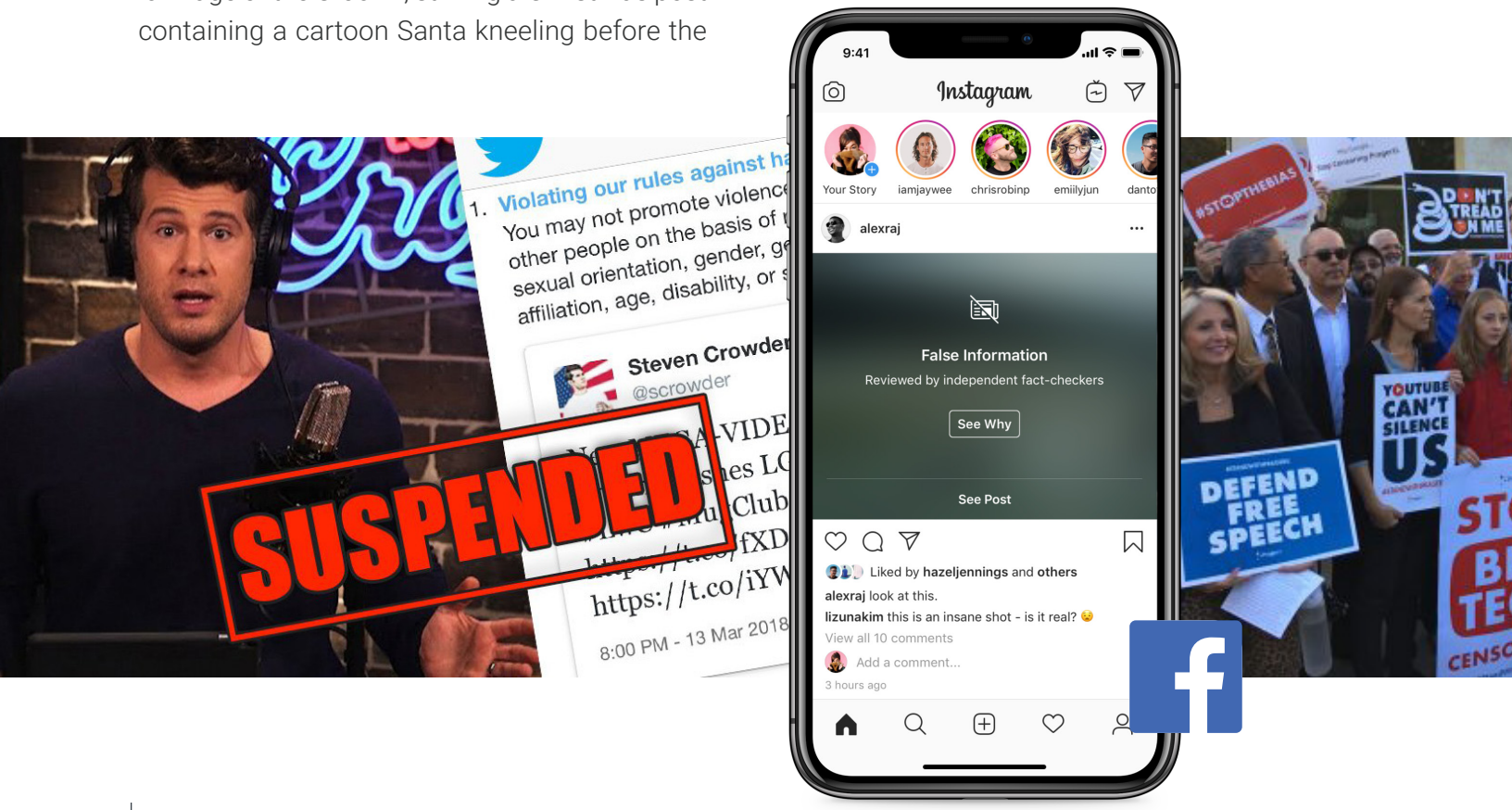
A small handful of Silicon Valley behemoths operate the portal for almost all of America's online information: four of a handful of the world's largest social media services are owned by Facebook, a platform that reaches nearly 2.5 billion people. PC magazine, former Facebook co-founder Chris Hughes, and members of Congress have all publicly recognized Facebook as a "monopoly;" Google controls more than 90 percent of online searches on the planet; Amazon controls nearly half of all book sales in the U.S. and dominates all online retail sales generally; Apple's iTunes app store determines the commercial success or failure of every app so extensively that, as the Supreme Court recently noted in *Apple Inc. v. Pepper*, its signature "app" concept has become "part of the 21st-century lexicon;" and Twitter is reportedly the single digital source relied-on by 83 percent of all journalists who, in turn, deliver America's news.

Big Tech platforms are consistently committing viewpoint suppression without consequences.

Big Tech platforms have: blatantly censored Senate Majority Leader Mitch McConnell and Republican Senator Marsha Blackburn; labeled a user's call for Prayer for President Trump "hate speech;" blocked online ads from one of the largest TV cable programs because of its conservative views; blocked former Governor Mike Huckabee's Facebook page; voiced opposition to President Trump's next election bid; employed anti-conservatives as so-called "fact checkers" whose judgments are used to justify content and viewpoint bans; and have relied on the notoriously flawed "hate group" list of leftist Southern Poverty Law Center (SPLC) to deny donor benefits to conservative non-profit groups.

Big Tech platforms have also censored conservative Christian content by: blocking an ad by a Catholic college because it contained the iconic image of the Crucifix; striking a Christmas post containing a cartoon Santa kneeling before the manger of Jesus; banning online sale of a book written by a Christian who describes why she left the lesbian lifestyle; refusing an ad by a Lutheran synod for vacation Bible school because it advanced a "religious affiliation;" and removing posts by a New Testament scholar for using politically incorrect references to gender identity.

Big Tech platforms have also launched an ever-expanding chokehold on information and suppression of ideas that contradict the private values of Silicon Valley companies by: banning COVID-19 information or views (including posts by doctors) that are deemed politically incorrect or out of line with the views of the UN's World Health Organization; imposing so-called "fact checks" and content warning labels on President Trump's posts; blocking conservative political ads; banning ads under the manipulative label of "false information," and limiting the ability for pro-life groups to communicate, such as LifeNews, which posted that Planned Parenthood is in the



"abortion business" and then was punished by having its online reach restricted due to publishing what the platform outrageously called "partly false" statements.

And, of course, there are no consequences. Due to the "sweetheart deal" granted by Congress to online platforms almost 25 years ago in the Communications Decency Act (CDA), lawsuits challenging Big Tech bans against specific viewpoints have failed, making Big Tech virtually immune to civil litigation regarding their content moderation decisions.

Platforms of all sizes are providing children with access to harmful and often horrific content.

The original intent of the Communications Decency Act (CDA) was to criminalize the transmission of obscene and indecent content to children under the age of 18, while providing interactive computer services with the ability to remove that content. The implication was a sort of quid pro quo — the idea that if platforms clean up the Internet and create a healthy digital public square, they could enjoy a special immunity from civil litigation that no other industry enjoys.

Unfortunately, when the Supreme Court overturned much of the CDA in *Reno v. ACLU*, only one part of that deal remained — the special immunity. Now, platforms of all sizes allow children to access indecent and exploitative content that is harmful and often horrific without facing the consequences of successful civil litigation against them.

We believe that platforms should shoulder the duty of shielding families from indecent and exploitative content that is readily accessible to children — recognizing that their failure to do this actively endangers these families and children. The jurisprudence from *Reno v. ACLU*, while deeply flawed, still suggests that there is a state interest in protecting children from harmful content, but that an across-the-board restriction on content could pose an "undue burden" to adults' access to speech.

However, platforms are well within their rights to impose their own restrictions on access to harmful content. The vast majority choose not to because there is currently little incentive for them to do so. A change to Section 230 that conditions their immunity from civil litigation would likely incentivize many of these platforms to change their behavior.

The Solution

- Amend Section 230
- Restore original intent
- Incentivize free speech and free expression
- Require age-restricted screening of age-inappropriate content

Section 230 of the Communications Decency Act (CDA), intended to both promote free speech and restrict access to harmful content by children under the age of 18, has failed to achieve either objective.

Congress intended Section 230 of the CDA to create a digital public square where the value of free speech is cherished and where "a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" are promoted.

Congress also intended Section 230 of the CDA to incentivize online platforms to remove indecent and exploitative content harmful to, and accessible by, children under the age of 18.

Both of these laudable goals have been frustrated and neither has been achieved by Section 230 as currently written and interpreted.

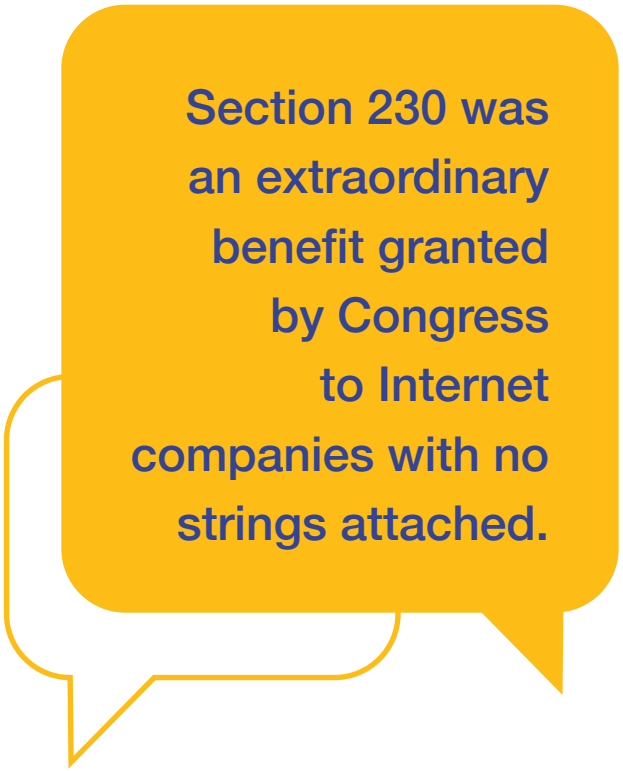
This amendment will restore online free expression and protect children and families, while also avoiding big government intrusion.

Regarding free expression: this amendment seeks to restore the original stated intent of Section 230 by using a small-government approach; the special benefits of Section 230's protection from civil lawsuits would become ***conditional***. It would open the gate to private lawsuits against Big Tech companies unless and until they choose to adopt viewpoint-neutral, First Amendment-type principles that will guide their decisions to ban or take other adverse actions against the content or viewpoints of users.

Regarding content harmful to children: this amendment would require any online platform desiring Section 230 protections to implement an effective age-restricted screening of age-inappropriate content to avoid making indecent, harmful, or exploitative content accessible to children.

This legislative solution is constitutional.

Typically, the First Amendment only applies to "state actors;" i.e. government agencies and officials, not private Internet platforms. However, Section 230 was an extraordinary benefit granted by Congress to Internet companies with no strings attached. It has provided some of the largest companies in the world with powerful protection against civil lawsuits. In light of the abuses by Big Tech companies, Congress is within its authority to now attach reasonable and constitutional preconditions to that benefit.



The Supreme Court has declared that even media companies … can be restrained.

Big Tech companies have a much weaker First Amendment defense against this proposal than traditional media companies, because, unlike newspapers and broadcasters, they are not primarily content providers, but are just conduits for content provided by others; i.e. ***citizen content and citizen viewpoints***.

Nevertheless, the Supreme Court has declared that even media companies that use their monopoly-type power to choke off avenues of information can be restrained, because in that case they wield powers of censorship just as harmful as if the government were the one doing it. If such chokehold monopoly power can be remedied by requiring media companies and broadcasters to adjust their abusive and suppressive conduct, then the same must hold true for non-media Internet Big Tech platforms that control the content, information, and viewpoints of American citizens.

The Supreme Court has upheld federal restrictions on media companies and broadcasters, requiring them to protect minors from harmful, indecent or exploitative content. Therefore, the same should also certainly hold true for online companies that are primarily mere ***conduits*** for the content of their users – and are not media content creators. Those online companies should not be able to use the First Amendment as a ***shield*** against this amendment to Section 230, while also using it as a ***sword*** to harm children and families.

About American Principles Project

When our Founders put this country together, they clearly articulated the essence of human dignity: that all are created equal, endowed by our Creator with certain unalienable rights, among them the rights to life, liberty, and the pursuit of happiness.

At APP, we believe these principles are central to what makes the American experiment so unique. We also believe that human dignity has often been overlooked in present-day policy debates. Therefore, we strongly affirm that emphasizing human dignity in our politics is fundamental to the flourishing of this country.

APP strives to put these values into action through our work in impacting key elections, promoting strategic legislation, and conducting groundbreaking research. We stand with all those Americans who believe, as we do, in re-establishing human dignity as the basis for American society.

To find out more information about APP, including how to further support our work, please visit our website at www.AmericanPrinciplesProject.org.

Public policy

with

human dignity at its heart

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