

Section 230 Is Essential to the Internet's Future

Electronic Frontier Foundation

Sophia Cope, Senior Staff Attorney
Ernesto Omar Falcon, Senior Legislative Counsel
Elliot Harmon, Senior Activist
India McKinney, Director of Federal Affairs
Corynne McSherry, Legal Director
Joe Mullin, Policy Analyst

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Summary

Section 230 is not a gift to Big Tech and eliminating it will not solve the problems that Big Tech is causing. Those problems stem from a severe lack of competition. Repealing Section 230 will exacerbate those problems.

Section 230 is critical to the proper functioning of the Internet. To rein in Big Tech, the law should be supported, not weakened or repealed. The Trump Administration's executive order on Section 230 should be repealed. Further, action to limit the power of large tech companies should be taken on three fronts: antitrust, privacy, and interoperability.

Challenge and Opportunity

Weakening Section 230 Would Not Address Big Tech's Flaws

Section 230 stands for the simple principle that the party responsible for unlawful speech online is the person who said it, not a website that they posted to, or an app they used, or any other Internet intermediary. This liability structure established by Section 230 comports with the expectations of a broad swath of the American public, as well as common sense.¹

Internet users rely on multiple online services to connect, engage, and express themselves online. That means the general public itself benefits from 47 U.S.C. § 230 ("Section 230"), which provides partial legal protection to intermediaries from liability for hosting their users' speech. It additionally provides immunity from liability that might arise from a platform or service's removal of users' speech or other moderation decisions.

Originally introduced in Congress as the Internet Freedom and Family Empowerment Act, Section 230 is an essential legal pillar for online speech. As the Electronic Frontier Foundation (EFF) told Congress in 2019,² Section 230 ushered in a new era of community and connection on the Internet. It is in large part thanks to Section 230 that people can use the Internet to find friends old and new, learn, share ideas, organize, and speak out.

Today's Internet would not exist without a chain of intermediaries including ISPs, web hosting companies, domain name registrars, email providers, and social media platforms. Weakening Section 230—or, as President Trump demanded in the last days of his presidency,³ repealing it

¹ Most Americans (66%) support the principles behind Section 230. Knight Foundation, *The Future of Tech Policy: American Views* (June 16, 2020), https://knightfoundation.org/reports/the-future-of-tech-policy-american-views/.

² Corynne McSherry, Testimony to House Committee on Energy and Commerce on Section 230, EFF (Oct. 16, 2019), https://www.eff.org/document/testimony-house-energy-and-commerce-committee-section-230.

³ Kate Cox, Trump Vetoes \$740B Defense Bill, Citing "Failure to Terminate" Section 230, Ars Technica (Dec. 23, 2020), https://arstechnica.com/tech-policy/2020/12/trump-vetoes-bill-to-fund-us-military-demands-section-230-repeal/.



altogether—would make the Internet a more restrictive place overnight. If potentially on the legal hook for what their users and say and do, those intermediaries would have no choice but to remove more speech than ever before or to prevent speech from being posted in the first place, silencing innumerable voices.

Section 230's most vocal critics often contradict each other's narratives about what Section 230 does or what the Internet would be like without it.⁴ Many conservatives complain that Section 230 permits Internet platforms to exercise political bias in the way they curate users' speech or add fact-checks to certain posts. Sen. Josh Hawley (R-MO) and other Republicans have proposed bills to strip "biased" platforms of their Section 230 protections.⁵ Some conservatives incorrectly claim that Section 230 *already* forbids platforms from showing bias.⁶ President Trump was so incensed at social media platforms fact-checking him during the 2020 campaign that he issued Executive Order 13925 on "Preventing Online Censorship." Some liberals, on the other hand, claim that Section 230 lets platforms host hate speech and disinformation.

Politicians and commentators on both sides of the aisle imagine that weakening or repealing Section 230 would address the flaws in large Internet platforms' practices. Both sides misunderstand that it is the First Amendment—not Section 230—that permits online platforms to curate, moderate, and contextualize users' speech.⁸ And the vast majority of user content, even if objectionable, is protected by the First Amendment.⁹ Furthermore, Internet users ought to be able to choose what platforms they engage with based on the platforms' content policies and styles of moderation, and not be subject to a single approach mandated by the government.

There is a common misconception that without Section 230's protections, social media platforms would become more permissive in their moderation policies. All evidence points to the contrary. Without Section 230 (or under a weakened Section 230), platforms would become far more restrictive in their handling of users' speech. Before allowing a user to post online, a platform would need to gauge the level of legal risk that she and her speech represent. Some users,

⁴ Elliot Harmon and Joe Mullin, *Congress Fails to Ask Tech CEOs the Hard Questions*, EFF Deeplinks Blog (Oct. 29, 2020), https://www.eff.org/deeplinks/2020/10/congress-fails-ask-tech-ceos-hard-questions.

⁵ Elliot Harmon and Joe Mullin, *Sen. Hawley's "Bias" Bill Would Let the Government Decide Who Speaks*, EFF Deeplinks Blog (June 20, 2019), https://www.eff.org/deeplinks/2019/06/sen-hawleys-bias-bill-would-let-government-decide-who-speaks.

⁶ Elliot Harmon, No, Section 230 Does Not Require Platforms to Be "Neutral," EFF Deeplinks Blog (April 12, 2018), https://www.eff.org/deeplinks/2018/04/no-section-230-does-not-require-platforms-be-neutral.

⁷ U.S. President Donald J. Trump, *Preventing Online Censorship*, E.O. 13925 of May 28, 2020, Federal Register (June 6, 2020), https://www.federalregister.gov/documents/2020/06/02/2020-12030/preventing-online-censorship.

⁸ See, e.g., Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."), https://supreme.justia.com/cases/federal/us/418/241/#tab-opinion-1950903.

⁹ See United States v. Stevens, 559 U.S. 460, 468-69 (2010) ("From 1791 to the present ... the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations."), https://supreme.justia.com/cases/federal/us/559/460/#tab-opinion-1963156.



particularly those from the most historically marginalized communities, may effectively be excluded from online discussions altogether.¹⁰

We have already seen one example of a law that weakens Section 230 in the form of Stop Enabling Sex Traffickers Act (SESTA) / Fight Online Sex Trafficking Act (FOSTA). It has led to sections of websites, or entire websites, shutting down, thereby harming legitimate speech.¹¹ And it has been counterproductive in achieving its intended goal: it has hampered, not helped, law enforcement efforts in the area of sex trafficking and harmed those it sought to help.¹²

Plan of Action

The first thing the Biden-Harris Administration should do is repeal President Trump's Executive Order 13925 on "Preventing Online Censorship." As we have explained elsewhere, the E.O. poses significant threats to free speech online. He Biden-Harris Administration should also take actions related to three additional areas: antitrust, privacy, and interoperability.

Curb Big Tech's Abuses Through Smarter Antitrust Efforts

It is a problem that just a few tech companies wield immense control over what speakers and messages are allowed online. Those companies frequently fail to enforce their own policies consistently or to offer users meaningful opportunities to appeal bad moderation decisions. There is little hope of competitors with fairer speech moderation practices gaining market share given the big players' practice of acquiring would-be competitors before they can ever threaten the status quo.

Furthermore, liability exposure plays a direct role in stifling small business creation for the Internet because it is directly connected to startup costs. The higher the startup costs, the higher the barrier to entry, as only well-resourced players can enter the business. Conversely, the lower a company's liability exposure, the more money gets invested in trying to launch more ideas and the more people try to start businesses. Taking away the rules that allowed the creation of Big Tech networks will prevent their replacements from being created. If a new entrant in a non-Section 230 world must contend with liability risks that grow exponentially if they become

¹⁰ Elliot Harmon, It's Not Section 230 President Trump Hates, It's the First Amendment, EFF Deeplinks Blog (Dec. 9, 2020), https://www.eff.org/deeplinks/2020/12/its-not-section-230-president-trump-hates-its-first-amendment.

¹¹ Jason Kelley and Aaron Mackey, *Don't Repeat FOSTA's Mistakes*, EFF Deeplinks Blog (March 29, 2019), https://www.eff.org/deeplinks/2019/03/dont-repeat-fostas-mistakes.

¹² Elliot Harmon, Internet Censorship Bills Wouldn't Help Catch Sex Traffickers, EFF Deeplinks Blog (Dec. 5, 2017), https://www.eff.org/deeplinks/2017/12/internet-censorship-bills-wouldnt-help-catch-sex-traffickers.

¹³ U.S. President Donald J. Trump, *Preventing Online Censorship, E.O. 13925 of May 28, 2020*, Federal Register (June 6, 2020), https://www.federalregister.gov/documents/2020/06/02/2020-12030/preventing-online-censorship.

¹⁴ David Greene and Corynne McSherry, *The Dangers of Trump's Executive Order Explained*, EFF Deeplinks Blog (May 31, 2020), https://www.eff.org/deeplinks/2020/05/dangers-trumps-executive-order-explained.



successful and expand rapidly, they may collapse before they can establish themselves because of their liability obligations.

Put simply, the better outcome is to have more competitive choices in the online social networking market rather than fewer. In such an environment, the speech moderation decisions Facebook or Twitter make would not have the outsized influence they have today. The Biden-Harris Administration should tackle this problem by updating antitrust enforcement to bring meaningful competition to Internet businesses.¹⁵

Actions to take:

- Direct the Department of Justice (DOJ) and the Federal Trade Commission (FTC) to intervene aggressively in mergers and acquisitions.
- Follow the recommendations of the House of Representatives' recent report on antitrust (with the exception of the proposed exemption for news media).¹⁶
- Pursue and enforce cases that reflect how consumers can be harmed even in markets
 where services are "free" to the consumer. Courts currently struggle to use a
 pricing-based consumer welfare standard in applying the Sherman and Clayton Acts.
 Rulings in antitrust cases are increasingly determined by esoteric economic theories
 rather than direct evidence of harm to the competitive process.
- Acknowledge and support FTC and state antitrust cases against Facebook.¹⁷

Curb Big Tech's Abuses Through Stronger Privacy Rules

Congress can't improve Big Tech's practices without addressing its surveillance-based business models. Large tech companies have endorsed changes to Section 230, but they will probably never endorse real, comprehensive privacy legislation.

Stronger online privacy will require legislation, but there are building blocks already in place. Actions to take:

 Publicly support existing state-level laws that protect user privacy, including the California Consumer Privacy Act (CCPA) and Illinois Biometric Privacy Act (BIPA), and commit to ensuring that any federal action will not undermine those laws.

¹⁵ Elliot Harmon, *Don't Blame Section 230 for Big Tech's Failures. Blame Big Tech*, EFF Deeplinks Blog (Nov. 16, 2020), https://www.eff.org/deeplinks/2020/11/dont-blame-section-230-big-techs-failures-blame-big-tech.

¹⁶ U.S. House Judiciary Committee, Subcommittee on Antitrust, Commercial and Administrative Law, *Investigation of Competition In Digital Markets, Majority Staff Report and Recommendations* (2020), https://judiciary.house.gov/uploadedfiles/competition in digital markets.pdf.

¹⁷ For more details about EFF support of this case, see Mitch Stoltz and Karen Gullo, Federal and State Antitrust Suits Challenging Facebook's Acquisitions are a Welcome Sight, EFF Deeplinks Blog (Dec. 20, 2020), https://www.eff.org/deeplinks/2020/12/federal-and-state-antitrust-suits-challenging-facebooks-acquisitions-are-welcome.



 Work with leaders in the commerce and judiciary committees in Congress to move forward federal privacy legislation. Federal law should embrace the principles of nondiscrimination, no federal preemption of state laws, and a private right of action. Users should have an affirmative "right to know" what personal data is being gathered about them, and online service operators should be required to obtain opt-in consent to collect, use, or share personal data.¹⁸

The private right of action is critical: if a company breaks the law and infringes on individuals' privacy rights, it is not enough to put a government agency in charge of enforcing the law. Users should have the right to sue the companies directly—because government agencies only have so many resources—and it should be impossible to sign away those rights in a terms-of-service agreement. The law must also forbid companies from selling privacy as a service: all users must enjoy the same privacy rights regardless of what they are paying—or being paid—for the service. In short, poor people should not have fewer privacy protections.

The recent fights over the California Consumer Privacy Act (CCPA) serve as a useful example of how tech companies can give lip service to the idea of privacy-protecting legislation while actually insulating themselves from it.¹⁹ After the CCPA passed in 2018, the Internet Association—a trade group representing Big Tech powerhouses like Facebook, Twitter, and Google—spent over \$475,000 lobbying the California legislature to weaken it.²⁰ That the Internet Association and its members have fought tooth and nail to stop privacy protective legislation while lobbying *for* bills undermining Section 230 says all we need to know about which type of regulation they see as the greater threat to their bottom line.²¹

Curb Big Tech's Abuses Through Interoperability²²

Real competition and choice come about when new market entrants—both commercial and nonprofit—can connect their products and services to existing ones, especially currently dominant ones. Better review of proposed mergers will help, as will unwinding existing problematic mergers from the recent past. But interoperability is needed for a truly procompetitive Internet.

¹⁸ Gennie Gebhart, *EFF's Recommendations for Consumer Data Privacy Laws*, EFF Deeplinks Blog (June 17, 2019), https://www.eff.org/deeplinks/2019/06/effs-recommendations-consumer-data-privacy-laws.

¹⁹ Hayley Tsukayama, *Thanks for Helping Us Defend the California Consumer Privacy Act*, EFF Deeplinks Blog (Sept. 18, 2019), https://www.eff.org/deeplinks/2019/09/thanks-helping-us-defend-california-consumer-privacy-act.

²⁰ Tony Romm, "There's going to be a fight here to weaken it": Inside the lobbying war over California's landmark privacy law, Washington Post (Feb. 8, 2019), https://www.washingtonpost.com/technology/2019/02/08/theres-going-be-fight-here-weaken-it-inside-lobbying-war-over-californias-landmark-privacy-law/; Tony Romm, California adopted the country's first major consumer privacy law. Now, Silicon Valley is trying to rewrite it, Washington Post (Sept. 3, 2019), https://www.washingtonpost.com/technology/2019/09/02/california-adopted-countrys-first-major-consumer-privacy-law-now-silicon-valley-is-trying-rewrite-it/.

²¹ Elliot Harmon, *Internet Association Endorses Internet Censorship Bill*, EFF Deeplinks Blog (Nov. 3, 2017), https://www.eff.org/deeplinks/2017/11/internet-association-endorses-internet-censorship-bill.

²² For extensive discussion of EFF's views on privacy and interoperability, see Bennett Cyphers and Cory Doctorow, *Privacy Without Monopoly: Data Protection and Interoperability*, EFF (Feb. 12, 2021), https://www.eff.org/wp/interoperability-and-privacy.



First, users should be allowed to do what they want with their data. They should be able to download it and move it to a platform that suits them. Both the European General Data Protection Regulation (GDPR) and the California Consumer Privacy Act (CCPA) include some data portability mandates. Big Tech companies have acknowledged that data portability mandates are legitimate and necessary. Google, Microsoft, Facebook, and Twitter are among the founding partners of the Data Transfer Project,²³ an attempt to develop secure standards for sending user data from one service to another. Last year, Facebook signaled support for the portability mandate proposed in the ACCESS Act, and requested that regulators tell companies exactly what they need to export.²⁴

Second, a back-end interoperability mandate would require dominant firms to grant competitors access to their APIs (subject to oversight to safeguard user privacy). This would allow competitors' users to interact with the users of the dominant firms even though data is hosted on different platforms. For instance, users who do not like Facebook could join a separate social network—but users of that smaller social network would still be able to read, comment on, and react to comments on Facebook such that Facebook users could see the interactions. This type of requirement may be more burdensome to companies, and it may be wise to only apply it to dominant platforms, at least at first.

Third, a delegability mandate would allow users of any platform to build tools on top of a platform to better control their experience. For example, users of Facebook could build a tool that filters their friends' posts according to certain criteria.²⁵

Finally, EFF supports a legal regime of "competitive compatibility" (ComCom) that removes legal restrictions on competitive innovation. Small competitors should be able to interoperate with an incumbent company's products or services without the incumbent's permission to do so. Users and companies must be allowed to build around, and on top of, existing tools and services. This is how telecommunications technology has historically evolved: the first cable TV services, for instance, grew out of hobbyist efforts to bring TV networks to small towns. Unfortunately, companies today often employ legal tools to undermine small competitors, including the Digital Millennium Copyright Act (DMCA), the Computer Fraud and Abuse Act (CFAA), as well as terms of service and user agreements.

The Biden-Harris Administration should urge Congress to pass long-pending legislation to rebalance the CFAA and Section 1201 of the DMCA and bring them nearer to their intended purpose. Failing that, some of these rules could be imposed through settlement agreements (via litigation brought by FTC or DOJ) and consent decrees. Companies that wish to do business

²⁴ Nandita Bose, Facebook pushes for data portability legislation ahead of FTC hearing, Reuters (Aug. 20, 2020), https://www.reuters.com/article/us-facebook-antitrust/facebook-pushes-for-data-portability-legislation-ahead-of-ftc-hearing-idUKKBN25H0BG.

²³ Data Transfer Project, About Us, https://datatransferproject.dev/.

²⁵ Bennett Cyphers and Cory Doctorow, A Legislative Path to an Interoperable Internet, EFF Deeplinks Blog (July 28, 2020), https://www.eff.org/deeplinks/2020/07/legislative-path-interoperable-internet.



with the government could be compelled to follow these rules through revisions to federal procurement guidelines.

Actions to take:

- Foster interoperability through data portability, back-end interoperability, and delegability.
- Take away legal tools that block interoperability by preventing abuse of the Computer Fraud and Abuse Act and Section 1201 of the DMCA.
- Provide legal backstops for interoperability changes through the strong privacy laws suggested above.
- Use FTC or DOJ consent decrees or require companies to agree to similar terms as a condition of government procurement in the absence of legislative action.

Conclusion

Section 230's importance to the Internet cannot be overstated. Section 230 has permitted the Internet platforms that we all rely on every day to grow and flourish. In doing so, it has allowed the Internet to become a central place for the gathering and sharing of ideas, particularly for those who do not have the resources or influence to publish their messages via traditional media. Many of today's most vital activist movements would not exist without Section 230.

Section 230 has become a lightning rod for politicians and commentators across the political spectrum, with critics of all stripes blaming the law for what they perceive as failures of social media's moderation practices. Both sides misunderstand that it is the First Amendment, not Section 230, that protects Internet companies' right to moderate and curate users' speech.

Critics of Big Tech are right to question the immense power that a few companies wield over online speech. Rather than undermine Section 230, the Biden-Harris Administration should work to advance antitrust enforcement, privacy-protecting laws, and platform interoperability in order to bring real competition and choice to the social media marketplace.



About the Authors



Sophia Cope is a Senior Staff Attorney on the Electronic Frontier Foundation's civil liberties team, working on a variety of free speech and privacy issues. She has been a civil liberties attorney for over 15 years and has experience in both litigation and policy advocacy. Prior to joining EFF, Sophia spent eight years in Washington, DC, working at the Newspaper Association of America (now News Media Alliance) and the Center for Democracy & Technology.



Ernesto Falcon is Senior Legislative Counsel at Electronic Frontier Foundation with a primary focus on intellectual property, open Internet issues, broadband access, and competition policy. He represents EFF's advocacy, on behalf of its members and all consumers, for a free and open Internet before state legislatures and Congress. Ernesto's work includes pushing the state of California to pass the strongest net neutrality law in the country in response to federal repeal efforts, as well as leading EFF's research and advocacy to promote universally available, affordable, and competitive fiber broadband networks.



Elliot Harmon is a Senior Activist at Electronic Frontier Foundation. He advocates for free speech and the right to innovate online, with particular emphases on patents, copyright, open access, and Section 230. Before coming to EFF, Elliot served as director of communications at Creative Commons, an organization that helps creators share their works with the public via open copyright licenses.





Corynne McSherry is the Legal Director at Electronic Frontier Foundation, specializing in copyright, intermediary liability, open access, and free speech issues. As a litigator, she has represented the Woodhull Freedom Foundation, Professor Lawrence Lessig, Public.Resource.Org, the Yes Men, and a dancing baby, among others. Her policy work includes leading EFF's efforts to fix copyright, promote competition, and promote best practices for online expression. In 2019 she testified before Congress regarding Section 230; in 2014, she testified before Congress about problems with the Digital Millennium Copyright Act. Prior to joining EFF, Corynne was a civil litigator at the law firm of Bingham McCutchen, LLP.



India McKinney is Director of Federal Affairs for Electronic Frontier Foundation. Prior to joining EFF, India spent 10 years in Washington as a staffer for three members of Congress from California. Her passion has always been good public policy, and she is excited to be using her skills in advocating for privacy rights for consumers.



Joe Mullin is a Policy Analyst on Electronic Frontier Foundation's intellectual property team, where he works on patent reform, copyright issues, and free speech online. Before joining EFF, Joe worked as a reporter covering legal affairs for the technology website Ars Technica, and American Lawyer's magazine group. Earlier in his journalism career, Joe wrote for The Associated Press and The Seattle Times.



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