

July 27, 2020

The Honorable John Thune, Chairman
The Honorable Brian Schatz, Ranking Member
U.S. Senate Committee on Commerce, Science, and Transportation
Subcommittee on Communications, Technology, Innovation, and the Internet
512 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Thune and Ranking Member Schatz:

We write to you in advance of the hearing on “The PACT Act and Section 230: The Impact of the Law that Helped Create the Internet and an Examination of Proposed Reforms for Today’s Online World.”¹ EPIC supports efforts to reform Section 230 of the Communications Decency Act² and commends you for taking steps towards reform. In passing the Communications Decency Act, Congress never intended to protect corporate irresponsibility.

The Electronic Privacy Information Center (“EPIC”) is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age.³ EPIC supports efforts to reform Section 230 and has written about the types of abuse that can occur when platforms are not held accountable.⁴ EPIC’s Members are leading thinkers on issues at the intersection of privacy, technology, and policy, and include experts on Section 230.⁵

Congress Should Reform Section 230 to Encourage Reasonable Content Moderation

Nothing in the text, findings, or history of § 230 indicates that Congress intended to enable widespread abuse and harassment of individuals through social media and other online platforms. Congress made clear that it is the “policy of the United States” to “encourage the development of technologies which *maximize user control* over what information is received by individuals, families, and schools who use the Internet and other interactive computer services,”⁶ and to “ensure

¹ *The PACT Act and Section 230: The Impact of the Law that Helped Create the Internet and an Examination of Proposed Reforms for Today’s Online World: Hearing Before the S. Comm. on the Commerce, Sci. and Trans., Subcomm. on Communications, Tech., Innovation, and the Internet* 116th Cong. (July 28, 2020), <https://www.commerce.senate.gov/2020/7/the-pact-act-and-section-230-the-impact-of-the-law-that-helped-create-the-internet-and-an-examination-of-proposed-reforms-for-today-s-online-world>.

² 47 U.S.C. § 230.

³ See *About EPIC*, EPIC.org, <https://epic.org/epic/about.html>.

⁴ EPIC, *Herrick v. Grindr* (2020), <https://epic.org/amicus/230/grindr/>.

⁵ See, e.g., Danielle K. Citron, Prof. of Law, Boston U. School of Law <https://www.bu.edu/law/profile/danielle-citron/>; Kate Klonick, Asst. Prof. of Law, St. John’s Univ. Law School, <https://kateklonick.com/>.

⁶ 47 U.S.C. § 230(b)(3) (emphasis added).

vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and *harassment* by means of computer.”⁷

Congress created the Section 230 safe harbor to encourage internet service providers to improve their content moderation systems.⁸ Experts have noted that the core purpose of the law was to protect users, not to put them at risk:

Development of technologies that “maximize user control over what information is received” by Internet users, as well as the “vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, talking and harassment by means of computer.” In other words, the law [wa]s intended to promote and protect the values of privacy, security and liberty alongside the values of open discourse.⁹

As Professor Danielle Citron has explained, “Section 230 has helped secure opportunities to work, speak, and engage online. But it has not been a clear win for civil rights and civil liberties. Its overbroad interpretation in the courts has undermined the statute’s purpose and exacted significant costs to free speech and equal opportunity.”¹⁰ In recent years, platforms have been shielded from liability even where they solicit illegal activities, deliberately leave up unambiguously illegal content that causes harm, and sell dangerous products. The costs to free expression and equality have been considerable, especially for women, nonwhites, and LGBTQ individuals.”¹¹ Professor Citron has recommended revisions to Section 230 that would “condition the legal shield on reasonable content moderation practices in the face of clear illegality that causes demonstrable harm.”¹² EPIC supports Professor Citron’s proposal and encourages this committee to review her prior testimony and her articles when considering this Section 230 reform proposal.

The Committee Should Strengthen the PACT Act’s Provisions on Injunctive Relief

The PACT Act requires online platforms to give notice of their content moderation policies and to make a complaint system available, and sets deadlines by which platforms must process complaints. The Act would also require online platforms to take down content if ordered by a court to do so—which, appallingly, is often not happening now. However, the bill limits this relief to cases involving violations of federal criminal and civil law or state *defamation law*. The injunction provision should be expanded.

⁷ *Id.* § 230(b)(5) (emphasis added).

⁸ H.R. Rep. No. 104-223, at 3, 14 (1995); *see also* Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401, 404 (2017).

⁹ Mary Anne Franks, *The Lawless Internet? Myths and Misconceptions About CDA Section 230*, Huffington Post (Feb. 17, 2014); *20 see also* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598, 1605–09 (2018).

¹⁰ *Fostering a Healthier Internet to Protect Consumers: Hearing Before the H. Comm. on Energy & Commerce*, 116th Cong. 3 (2019) (statement of Danielle K. Citron, Prof. of Law, Boston University School of Law), <https://docs.house.gov/meetings/IF/IF16/20191016/110075/HHRG-116-IF16-Wstate-CitronD-20191016.pdf>.

¹¹ *Id.*

¹² *Id.*

There is simply no reason to limit this type of relief to defamation claims. When a court finds that content has been posted illegally or in violation of an individual’s rights, there should be a legal mechanism to order online platforms to remove that content. The bill should be amended to make clear that platforms must comply with court orders to remove content deemed unlawful *regardless of the type of legal claim involved*.

Section 230 has limited the ability of victims of invasions of sexual privacy to prevent ongoing abuse caused by reposting of their images or information. Even when victims prevail in lawsuits against perpetrators and obtain court orders directing the removal of illegal content, they cannot force platforms to comply. Forty-six states plus the District of Columbia now have revenge porn laws on the books,¹³ but under Section 230, none of these laws can provide injunctive relief against Internet platforms, which can simply refuse to take down the illegal content.

The refusal by platforms to take down illegal sexual images means that victims must continue living with invasions of their privacy even after a court order – ruining careers and causing emotional distress. While injunctive relief cannot undo damage, it can stop the future harms of illegal content living on the web.

As Professor Citron has explained:

The Internet extends the life of destructive posts. Harassing letters are eventually thrown away, and memories fade in time. The web, however, can make it impossible to forget about malicious posts. Search engines index content on the web and produce it instantaneously. Indexed posts have no built-in expiration date; neither does the suffering they cause. Search engines produce results with links to destructive posts created years earlier.¹⁴

This Committee has an opportunity to right these wrongs. The PACT Act should be amended to strike all references to “state defamation law” and replace it with “state criminal and civil law.”

We ask that this statement be entered in the hearing record. EPIC looks forward to working with the Committee on these issues of vital importance to the American public.

Sincerely,

/s/ Alan Butler
Alan Butler
EPIC Interim Executive Director
and General Counsel

/s/ Caitriona Fitzgerald
Caitriona Fitzgerald
EPIC Interim Associate Director and
Policy Director

¹³ *46 States + DC + One Territory Now Have Revenge Porn Laws*, Cyber Civil Rights Initiative, <https://www.cybercivilrights.org/revenge-porn-laws/>; *State Revenge Porn Policy*, EPIC, <https://epic.org/state-policy/revenge-porn/>.

¹⁴ Danielle Keats Citron, *Hate Crimes in Cyberspace* 4 (2014).