

REFORM TO PROMOTE COMPETITION

A concern that many have raised in the context of Section 230 and more broadly is the increased size and power of a small handful of online platforms. This is relevant in the Section 230 discussion for those citizens who want safer online spaces, for those whose speech has been banned or restricted by these platforms, and for upstart businesses trying to compete against these platforms. Over time, the avenues for sharing information and engaging in discourse with a large number of individuals have concentrated in the hands of a few key players. Further, the big tech platforms of today often monetize through targeted advertising and related businesses, rather than charging users. Thus, their financial incentives in content distribution may not always align with what is best for an individual user.

Antitrust law prohibits dominant firms from engaging in anticompetitive conduct that harms competition. In some cases, online platforms have argued that Section 230 creates an immunity from antitrust claims. *See, e.g., Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1050 (9th Cir. 2019) (rejecting Malwarebytes’s contention that it was immune from liability under Section 230 “regardless of any anticompetitive motives”) (cert pending).

Immunity against antitrust claims, however, was not part of the core objective of Section 230. In an antitrust case, the key question is whether a defendant is engaging in conduct that harms competition. Such claims are not based on third-party speech, nor do they focus on whether the platform is a publisher or speaker.

Given this, and the existing market dynamics, it is important to ensure that Section 230 is not used as a tool to block antitrust claims aimed at promoting and preserving competition. Interpreting Section 230 based on its text and original purpose does not appear to preclude federal antitrust claims. However, the Department believes it would be useful to create an explicit legislative carve-out from Section 230 for claims under the federal antitrust laws. Until then, there is a risk that defendants will continue to try to use Section 230 creatively to block antitrust actions.