

REFORMS THAT PROMOTE OPEN DISCOURSE AND GREATER TRANSPARENCY

1. Replace Vague Language to Address Moderation Beyond Section 230

Currently, Section 230(c)(2) immunizes platforms from liability related to restricting access to, or the availability of, material that the platforms consider “obscene, lewd, lascivious, filthy, excessively violent, harassing, or *otherwise objectionable*.” 47 U.S.C. § 230(c)(2)(A) (emphasis added). Courts have disagreed over how much discretion platforms have to decide what is “otherwise objectionable.” Some construe the phrase to confer virtually unlimited discretion on platforms to remove any content they object to, for whatever reason. *See, e.g., PC Drivers Headquarters, LP v. Malwarebytes Inc.*, 371 F. Supp. 3d 652, 662 (N.D. Cal. 2019); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631 (D. Del. 2007). Others counter that such unconstrained discretion would be inconsistent with the policy goals Congress set forth in Section 230. *See, e.g., Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1049-51 (9th Cir. 2019). Those goals include “preserv[ing] the vibrant and competitive free market that presently exists for the Internet,” 47 U.S.C. § 230(b)(2), and maintaining the Internet as “a forum for a true diversity of political discourse,” *id.* § 230(a)(3).

Unconstrained discretion is particularly concerning in the hands of the biggest platforms, which today effectively own and operate digital public squares. This is even more salient today where social distancing requirements have driven more speech and interaction online. The vagueness of the term “otherwise objectionable” risks giving every platform a free pass for removing any and all speech that it dislikes, without any potential for recourse by the user. Therefore, to bring the immunity conferred by (c)(2) more in line with the interests Congress identified in the original CDA, the Department proposes deleting the vague phrase “otherwise objectionable,” while adding a new immunity for moderation of material the platform believes, in good faith, violates federal law or promotes violence or terrorism. By both narrowing and expanding 230(c)(2) in these ways, the proposals strike a more appropriate balance between promoting an open, vibrant Internet and preserving platforms’ discretion to restrict obscene and unlawful content.

To be clear, the Department’s proposal would not leave platforms unable to moderate content on their services. Nor does removal of blanket immunity itself impose liability for content moderation decisions. Online platforms are often protected by their terms of service when removing content that violates the platform’s rules, whether or not that content falls into the categories of (c)(2). Therefore, removing Section 230 immunity from certain content moderation decisions means that platforms must rely on—and abide by—their terms of service. In our view, incentivizing platforms to be more transparent and clear in their terms of services, including with respect to content removal decisions, will ultimately benefit users.