



Wednesday, December 2, 2020

The Honorable Lindsey Graham  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Dianne Feinstein  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Chairman Graham and Ranking Member Feinstein:

Consumer Reports<sup>1</sup>, an independent, non-profit member organization, **writes to urge the Judiciary Committee to oppose S. 4632 - The Online Content Policy Modernization Act**, based on the nature of its proposed changes to Section 230 of the Telecommunications Act (Section 230). While certain updates to Section 230 may be warranted to advance consumer safety and well-being, we nevertheless urge that you oppose S. 4632, because the bill would severely disincentivize both internet computer services and their users from contextualizing, removing, or slowing the spread of harmful content—ranging from spam and COVID-19 misinformation to dangerously faulty products sold in online marketplaces.

In a moment when American consumers are relying on internet computer services more than ever before—for work, school, commerce, and everything in between—passing S. 4632 would jeopardize consumer safety and online security. Indeed, the bill could even expose consumers themselves to liability for the roles they play—often voluntarily—in curating safer, more accurate online experiences for their peers. If anything, Congress must *better* incentivize responsible, competitive online marketplaces, accurate information ecosystems, and safer communities—not compel platforms to reverse what little progress has been made on these fronts.

Although Section 230 offers no positive incentives for undertaking content moderation, it

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<sup>1</sup> Consumer Reports (CR) is a nonprofit membership organization that works side by side with consumers to create a fairer, safer, and healthier world. For 80 years, CR has provided evidence-based product testing and ratings, rigorous research, hard-hitting investigative journalism, public education, and steadfast policy action on behalf of consumers' interests, including promoting strong antitrust laws and sound and effective antitrust enforcement. Unconstrained by advertising or other commercial influences, CR has exposed landmark public health and safety issues and strives to be a catalyst for pro-consumer changes in the marketplace. From championing responsible auto safety standards, to winning food and water protections, to enhancing healthcare quality, to fighting back against predatory lenders in the financial markets, Consumer Reports has always been on the front lines, raising the voices of consumers.

critically *removed* costly *disincentives* to moderating content by allowing internet computer services to moderate their platforms in order to keep consumers safe without risking expensive litigation.<sup>2</sup> Section 230, as written, enables platforms to remove spam, take down false or misleading advertisements, slow the spread of health misinformation, and take action against abusive users—all crucial to keeping consumers safe online—without fear of frivolous lawsuits. It similarly enables consumers themselves to moderate, curate, and care for their own communities without fear of legal fees: from volunteer editors contributing to Wikipedia to moderators of forums, Reddit threads, Facebook Groups, and other online communities that have only become more crucial in the midst of the pandemic. S. 4632 upsets that balance and would severely restrict the scope of immunities for both platform and user moderators.

Specifically, the Online Content Policy Modernization Act crucially changes the two key provisions of Section 230: Subsection (c)(1)<sup>3</sup> and Subsection (c)(2).<sup>4</sup>

First, the bill would bar Subsection (c)(1) immunities from applying to content moderation, explicitly limiting moderation protections to Subsection (c)(2). It then alters the criteria that Subsection (c)(2) immunities are conditioned upon, reducing platform and user discretion to moderate their communities by: (1) requiring a stricter threshold to moderate content (from content that platforms or users “consider to be” a violation, to content that platforms or users “have an objectively reasonable belief is” a violation) and (2) most critically, striking the catch-all “otherwise objectionable,” and replacing it with just three more specific reasons that platforms can moderate—if content is “promoting self-harm, promoting terrorism, or unlawful.”

In short, users or internet computer services that moderate content for reasons that aren’t explicitly defined in Subsection (c)(2) would be risk lawsuits with a range of standard moderation choices: mitigating spam emails, banning hate speech, keeping a Reddit thread on-topic, or removing dangerous product listings on online marketplaces, as just a few examples. While civil actions might ultimately fail under the First Amendment, the cost of litigation would be deterrent enough for users and many services. Faced with that risk, users and services alike would be dissuaded from undertaking a breadth of content moderation that consumers nationwide already rely on to offer safe, useful online exchanges of information and commerce. An online ecosystem with less moderation means an online ecosystem with fewer niche

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<sup>2</sup> John Bergmayer, “What Section 230 Is and Does — Yet Another Explanation of One of the Internet’s Most Important Laws” Public Knowledge (May 14, 2019), <https://www.publicknowledge.org/blog/what-section-230-is-and-does-yet-another-explanation-of-one-of-the-internet-most-important-laws/>.

<sup>3</sup> 47 U.S. Code § 230 (c)(1). Subsection (c)(1) shields, with some exceptions, “internet computer services and users” from being “treated as the publisher or speaker of information provided by another information content provider.”

<sup>4</sup> 47 U.S. Code § 230 (c)(2). Subsection (c)(2) shields internet computer services and users from civil liability if they: (A) choose to moderate, in good faith, content that they “**consider to be** obscene, lewd, lascivious, filthy, excessively violent, harassing, or **otherwise objectionable**, whether or not such material is constitutionally protected” or (B) provide technical means for others to restrict access to or otherwise moderate content.

communities, more spam, more dangerous COVID-19 misinformation, more consumers driven to extremism, more online harassment, more dangerous products sold to unsuspecting consumers, more scams, and simply, more harm. Imposing the burden of liability for so many yet-unknown types of content moderation would also make for an online ecosystem where only the most profitable platforms could afford to shoulder the financial risk of offering consumers more moderated experiences, likely further entrenching already dominant platforms and reducing consumer choice online.

Finally, it could discourage useful fact-checking—and indeed, perhaps all commentary on controversial work by defining “responsibility” such that any instance where a person or entity “editorializes or affirmatively and substantively modifies the content of another person or entity” makes that person or entity responsible in whole or in part for the creation or development of information: the definition provided for an information content provider. It is unclear whether the statute is merely reaffirming what is already true—that entities that editorialize are responsible for the content of their commentary—or whether it seeks to further hold them responsible even for the content they choose to editorialize, which could chill a broad swath of consumer speech.

CR advocates for safety, truth, and fairness in the marketplace. Our work makes clear the challenge that confronts policymakers and the public when it comes to figuring out how best to ensure powerful online platforms do not promote or give voice to patently false claims, conspiracy theories, and potentially dangerous “cures” in the midst of a worldwide pandemic. What is certain, however, is that as online platforms attempt to respond to the widespread nature of these threats to consumer safety, that actively opening internet computer services and their users up to liability for taking actions that reduce the spread of such harm cannot be in consumers’ or the public’s best interest.

We look forward to working with the Committee, colleague organizations, and industry to strike the appropriate balance on this complicated, crucial issue.

Sincerely,

A handwritten signature in black ink, appearing to read 'L. Lehman', with a stylized flourish at the end.

Laurel Lehman  
Policy Analyst

cc. Members of the Senate Judiciary Committee