

## Dear President Biden: You should save, not revoke, Section 230

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### ABSTRACT

Politicians from both major US parties want to reform a more than 20-year-old law that gives internet companies broad protection from liability over third-party content. The left sees Section 230 reform as key to reducing the harm of online disinformation and other ills; the right sees reform as way to prevent censorship. In a “memo” to the president-elect, law professor Eric Goldman asks Joe Biden to work to understand Section 230 and ensure future reforms don’t diminish the society-wide benefits the law has had.

### KEYWORDS

Disinformation; free speech; censorship; content moderation; Section 230; First Amendment; Joe Biden; Donald Trump

In 1996, Congress enacted an extraordinary law, 47 U.S.C. § 230 (Section 230). Section 230 says that websites usually aren’t legally liable for third-party content (subject to some statutory exclusions).

This simple proposition has had profound implications. Section 230 has facilitated the emergence of Web 2.0 – a universe of internet services that help us communicate and engage with each other in powerful and novel ways. Many of the top Internet services depend on Section 230, and we rely on Section 230-enabled services hourly.

Section 230 played a crucial role during the COVID-19 related shutdowns. Major institutions, including businesses, schools, and governments, continued to serve their communities by immediately switching over to Section 230-protected internet technologies. Because of Section 230, videoconferencing software like Zoom don’t need to police every conversation, and online marketplaces like Amazon Marketplace can help consumers shop at home from a wide diversity of retailers without facing exposure for every retailer’s mistakes. Had our country not pivoted online as quickly as it did, the death toll and economic damage from COVID-19 would have been dramatically worse. Section 230 literally helped save lives – and our country.

Despite its vital benefits to our country, Section 230 has emerged as a top target of the broader techlash movement. Many Republicans think Section 230 lets internet services treat conservative content in a biased matter, while many Democrats believe that Section 230 lets internet services foster harmful speech such as disinformation, foreign election interference, and hate speech. In that vein, in January 2020, you said: “Section 230 should be revoked, immediately should be revoked, number one.”

Congress will try to honor your request. Even during the pandemic and the associated economic distress,

Congress made time to introduce a tsunami of Section 230 reform bills. Despite those extensive congressional efforts, the clear partisan divide over Section 230’s problems might lead to gridlock and paralysis, or it could make strange bedfellows and awful backroom deals.

As president, your leadership can transcend the partisanship of Section 230 reform. These four principles can serve as your guide.

**#1: Set the right factual baseline.** People are terrible to each other, both online and off. The internet sometimes makes this bad behavior easier to observe, but often that just mirrors broader systemic problems. Because of this, it’s unfair and unrealistic to expect internet services to eliminate all anti-social behavior online. Instead, we should compare their success against the levels of anti-social behavior offline.

If the internet accelerates anti-social behavior compared to offline activity, we might consider whether regulatory interventions could redress that acceleration. However, internet services are constantly rolling out new and effective deceleration techniques, such as how the local social network Nextdoor has improved online civility by forcing users to be more thoughtful about their posts. Eventually, internet services should figure out how to reduce anti-social online activities below the offline baseline. Section 230 provides the essential legal safety net that lets internet services experiment with and iterate these pro-social interventions.

**#2: Set the right legal baseline.** Even if Section 230 were repealed, the First Amendment would still protect internet services from liability for third-party content in some cases. In those circumstances, revisions to Section 230 might not change how internet services moderate content – meaning that those Section 230 reforms won’t accomplish Congress’s goals. Worse, those reforms

would hurt the internet by stripping away Section 230's valuable procedural benefits, such as how it ends meritless cases quickly and cheaply. In other words, where Section 230 and the First Amendment dictate the same substantive outcome, reducing Section 230 raises everyone's costs without any corresponding gains. To avoid that outcome, any Section 230 reform must be carefully evaluated against the First Amendment legal baseline.

**#3: Ensure evidence-based policy-making.** Section 230 reform should be supported by credible evidence demonstrating the reform's likely efficacy. Without that evidence, Section 230 reform could lead to avoidably bad outcomes.

For example, in 2018, Congress passed the Fight Online Sex Trafficking Act, which created several new Section 230 exceptions for promotions for sex trafficking and commercial sex. The new law sought to reduce online channels for marketing sex trafficking victims – a laudable goal. Unfortunately, the law's outcomes have been anything but laudable. It has counterproductively reduced law enforcement efforts to rescue sex trafficking victims, wreaked havoc on commercial sex workers who have resorted to riskier methods of finding business, and eliminated some valuable speech on the internet. The law appears to have hurt many communities without countervailing benefits.

Frustratingly, many experts warned legislators exactly how the sex-trafficking bill would fail. Congress disregarded the extensive evidence presented to it.

The stakes for Section 230 reform are too high to make a similar error. Another Section 230 reform mistake could have drastic consequences for our economy, our key institutions, and our society. You should require Congress to gather credible evidence showing how Section 230 reform would actually solve a specific problem – and take seriously the evidence indicating potential adverse consequences.

**#4: Restore the United States as the world's free speech leader.** For decades, the United States was a global

leader on free speech issues. That leadership took a substantial hit during Trump's administration – with one crucial exception. In 2020, President Donald Trump signed the United States Mexico Canada Act (USMCA), the updated North American free trade law. The law requires Canada and Mexico to adopt Section 230-like protections, which represented an unprecedented effort to export Section 230's free speech norms. Your administration should continue to proliferate Section 230 throughout the globe.

Of course, it would be disingenuous for the United States to tout its global free speech leadership if we are simultaneously reducing Section 230's protections. The world is watching our moves on speech regulation, especially in light of how our moral leadership on the topic eroded in the Trump era. Our moves should promote free speech online, not seek to circumscribe it.

Your presidency is a time to rebuild our country. It would be a tragic misstep if your presidency instead tore down one of Congress' most significant technology policy accomplishments. The internet is one of our most cherished institutions, and I hope you will fight to preserve what makes it great.

### Disclosure statement

No potential conflict of interest was reported by the author.

### Notes on contributor

*Eric Goldman* is a law professor at Santa Clara University School of Law, where he also co-directs the school's High Tech Law Institute. He has taught Internet Law for a quarter century, and he blogs on Section 230 and related topics at <http://blog.ericgoldman.org>.

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