

May 27, 2021

President Joseph R. Biden
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear President Biden,

We write to ask you to stop the recent U.S. government practice of embedding in trade agreements protections for tech companies to evade domestic liability for race and gender-based discrimination, as well as illicit activity. Specifically, the Trump administration inserted language mirroring Section 230 of the Communications Decency Act of 1996, which provides intermediate liability protections for tech platforms, into Article 19.17 of the United States–Mexico–Canada Agreement included at the end of this letter.

This reference reflects a broad effort by the big tech platforms to use “trade negotiations” to limit the domestic policy options available to Congress, U.S. regulators, and courts to address questions of public governance involving privacy concerns, civil rights, monopoly, cybercrime, and other questions related to the platforms.

With the respect to Section 230’s immunity shield, among other problems, it may give large technology firms like Google and Facebook the right to violate civil rights laws without incurring legal liability. The law says that a website or “interactive computer service” will not be considered the “publisher or speaker” of information provided by its users. Since Section 230’s passage in 1996, courts have expanded the law’s protections to encompass a wide range of online activity and immunize corporations from responsibility for the harmful conduct of its users. Today, Section 230 enables a wide range of harmful and discriminatory behavior that would otherwise be illegal.

A few examples help illustrate some ways large tech corporations have allegedly discriminated against protected classes of people while hiding behind Section 230 protections. In 2016, a ProPublica investigation found that Facebook allowed advertisers to discriminate and exclude people based on protected classes, including ancestry, gender, and age. And in December 2019, another ProPublica report found that – despite announced changes to their employment, housing, and credit advertising policies after settling a lawsuit brought by civil rights group – advertisers could “still tilt toward demographic groups such as men or younger workers.” Writing about Facebook’s discriminatory advertising tools, one American Civil Liberties Union attorney said, “Make no mistake, this is not simply an advertising problem – this is a civil rights problem made all the more dangerous by social media’s technological advances.” Facebook has argued in the relevant cases that Section 230 means that civil rights laws do not apply to it. While the civil rights legal community does not believe that section 230 exempts Facebook from complying with civil rights law, the courts have yet to decide. Congress must have the flexibility to fix that loophole should the courts agree with Facebook and should not be barred from doing so by foreign trade agreements.

Under former President Trump and previous U.S. Trade Representative Robert Lighthizer, the United States inserted Section 230-like language into the U.S.-Mexico-Canada Agreement (USMCA) in 2018 as well as in a bilateral executive agreement with Japan that includes the same terms. The Trump administration also pushed for inclusion of such terms in a global “Digital Trade” agreement now under negotiation in Geneva, the text of which leaked in February 2021. The tech firms seek to lock in the immunities provided in U.S. law by creating international legal obligations for the United States that would conflict with domestic reform to Section 230. Enshrining Section 230-like protections for tech

firms into additional trade agreements would only serve to further chill efforts by U.S. policymakers to update and revise the 1996 law.

Large corporations have already claimed that Mexican proposals to check tech monopolies violate USMCA obligations. Just this past February, Mexico's majority party suggested a law that would require social media corporations to "request authorization" to operate from the Mexican telecommunications agency. The Latin American Internet Association, a social media trade group that includes Facebook and Twitter, denounced the legislation. The association argued that the proposed law was an unjustified trade barrier and violates USMCA. Allowing corporations to hijack trade agreements to constrain important domestic public policy discussions over race and discrimination is unacceptable.

If the U.S. Trade Representative continues to advocate for agreements that would entrench Section 230 in domestic law, U.S. trade agreements could actually undermine the Biden administration's commitment to racial justice and, and thus such agreements may thwart civil rights violation victims' claims against Big Tech platforms. Online intermediaries like Facebook and Google have enormous power to control what people see and who they reach, inadequately checked by public market structuring. As Olivier Sylvain writes, "Unpoliced, putatively neutral online application and service designs can entrench longstanding racial and gender disparities."

Lawmakers from both parties in Congress have spoken out against attempts to short-circuit domestic policy debate by including non-trade policies in trade agreements. House Speaker Nancy Pelosi opposed the inclusion of Section 230-like language into USMCA while other prominent House lawmakers of both parties, including Democrats Jan Schakowsky, David Cicilline, and Frank Pallone and Republican Greg Walden, have also said that they oppose efforts to put Section 230 language into trade agreements. And this past December, a bipartisan group of senators sent a letter to U.S. Trade Representative Lighthizer opposing inclusion of Section 230-like language into any potential trade agreement between the United States and the United Kingdom.

While this letter is not meant to take a position on any bill, Members of Congress have recently put forth proposals to refine Section 230 in legislation. Senators Mark Warner, Mazie Hirono, and Amy Klobuchar have recently introduced the SAFE TECH Act which would, among other measures, clarify that Section 230 does not apply to ads or paid content and does not protect sites for civil rights violations. Rep. Yvette Clarke's Civil Rights Modernization Act of 2021 makes plain Section 230 does not protect platforms from complaints about civil rights violations on their sites and businesses that engage in targeted advertising. And Senators Schatz and Thune have put forward the PACT ACT which would require platforms to explain the content moderation policies as well as implementing reporting requirements. Trade agreements freezing Section 230 would prevent Congress from enacting any changes if they are needed.

Policymakers in the United States and globally will continue to study and question how best to check the power of corporations that dictate global commerce and discourse. U.S. trade policy should reflect, not cut short, democratic debate over how to fairly structure our commerce.

Sincerely,

Access Now
Accountable Tech
American Economic Liberties Project
Artist Rights Alliance
Center for Countering Digital Hate

Center for Digital Democracy
Color Of Change
Electronic Privacy Information Center (EPIC)
Free Speech For People
Joint Center for Political and Economic Studies
Lawyers' Committee for Civil Rights Under Law
Public Citizen
Revolving Door Project
SumOfUs
Tech Workers Action

Article 19.17: Interactive Computer Services

1. The Parties recognize the importance of the promotion of interactive computer services, including for small and medium-sized enterprises, as vital to the growth of digital trade.
2. To that end, other than as provided in paragraph 4, no Party shall adopt or maintain measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created, or developed the information.⁷
3. No Party shall impose liability on a supplier or user of an interactive computer service on account of:
 - (a) any action voluntarily taken in good faith by the supplier or user to restrict access to or availability of material that is accessible or available through its supply or use of the interactive computer services and that the supplier or user considers to be harmful or objectionable; or
 - (b) any action taken to enable or make available the technical means that enable an information content provider or other persons to restrict access to material that it considers to be harmful or objectionable.
4. Nothing in this Article shall:
 - (a) apply to any measure of a Party pertaining to intellectual property, including measures addressing liability for intellectual property infringement; or
 - (b) be construed to enlarge or diminish a Party's ability to protect or enforce an intellectual property right; or
 - (c) be construed to prevent:
 - (i) a Party from enforcing any criminal law, or
 - 6 This disclosure shall not be construed to negatively affect the software source code's status as a trade secret, if such status is claimed by the trade secret owner.
 - 7 For greater certainty, a Party may comply with this Article through its laws, regulations, or application of existing legal doctrines as applied through judicial decisions.
 - (ii) a supplier or user of an interactive computer service from complying with a specific, lawful order of a law enforcement authority.⁸
5. This Article is subject to Annex 19-A.