Written Testimony of
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Regarding
"Liability or Deniability? Platform Power as Section 230 Turns 30"

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Chairman Cruz, Ranking Member Cantwell, and distinguished members of this Committee, thank you for the opportunity to testify today. My name is Nadine Farid Johnson, and I am the Policy Director at the Knight First Amendment Institute. The questions before this Committee today are immensely important ones: How can we protect and strengthen free speech rights even as technology evolves? How in this context can we protect *other* individual rights and democratic interests that are also fundamental? All of us here agree that the digital public sphere is not working for Americans or for our democracy. The question is what to do about it.

As I will explain, Section 230's protection is vital to free speech online, even if there are difficult questions about how far its protection should extend—questions that the courts are working through right now. While Section 230 should not be treated as sacrosanct, repealing it would do little to address the problems that all of us are most concerned about, and in some ways it would make these problems worse. What I will explain today is that the better approach would be to pass structural regulation that would protect users' privacy, allow users to engage with platforms on their own terms or leave them more easily, and make the platforms more transparent and accountable to the public. If Congress is going to amend Section 230, what it should do is make Section 230's protection conditional on platforms' compliance with transparency, privacy, and interoperability requirements.

Let me begin with the role that Section 230 plays in protecting free speech online. In the 1990s, when the internet was in its infancy, two court decisions addressed whether efforts by platforms—in those days, bulletin board services—to curate their users' posts would subject the platforms to liability for any unlawful speech that they failed to take

down. The decisions, *Cubby v. CompuServe* and *Stratton Oakmont v. Prodigy*, each assessed the potential liability online services might face for distributing user content. Taken together, those cases indicated that the more service providers curated the content posted on their platforms, the more likely they would be to face liability for that content. Had that regime of liability been allowed to go into full effect, it is easy to predict how the early platforms would have responded, because they would have had only two realistic options for avoiding crushing liability for the posts on their sites. They would have had to either allow everything to be published without moderation or aggressively take down any post that could conceivably provide a basis for liability. The first path would have turned the early internet platforms into cesspools of pornography, hate, and spam; the latter would have turned them into sterile channels of play-speech, devoid of any allegations of wrongdoing—including truthful ones—by those with the means to sue.

Section 230 effectively gave platforms the ability to moderate user content without having to fear that doing so would give rise to liability. The first part of the provision, codified in Section 230(c)(1), limited the liability of online service providers for content posted on their sites by third parties. The second, codified in section (c)(2), shielded online service providers for good faith efforts in content moderation. With the protection provided by Section 230, platforms now moderate content in many different ways, including in ways that are important to their users and to the public more broadly. The most popular social media platforms filter or suppress spam, pornography, and (to varying degrees) hateful speech directed at racial, religious, and other minorities. While there is inevitably disagreement about what speech platforms should moderate, and how they should moderate it, it is indisputable that the platforms would be unusable if they did not engage in moderation in ways that Section 230 was meant to protect.

Although the very large online platforms dominate much of the conversation around Section 230, Section 230's protections reach the online experience far beyond social media. We often use "platforms" and "social media" interchangeably, but Section 230 applies to everything from news and entertainment aggregators, to community-driven encyclopedias and comment sites, to forums for artistic and cultural exchange. Section 230 protections have enabled features of our online lives that many of us take for granted, such as web search results.

None of this is to deny that some of the speech on the platforms is seriously harmful. Some of these harms result from the publication of users' speech—the third-party content that platforms host—and some of these harms result from platform design. Some of the content that the platforms publish denigrates minorities; some of it is dangerous misinformation about public health; some of it is defamatory. Platforms' recommendation algorithms sometimes amplify this content; and sometimes they amplify other forms of polarizing content that are intended to generate engagement and outrage.

It is important to recognize that the platforms would be protected for publishing most of this speech even in the absence of Section 230, because the First Amendment would most likely be understood to protect it. Even without Section 230, the platforms would not be liable for publishing the speech of their users that falls outside of the few, narrow exceptions to the First Amendment. Without Section 230, the platforms could perhaps be held liable for hosting defamation, or true threats, or incitement to imminent violence (at least so long as they had knowledge of the posts in question). But the Supreme Court has interpreted the First Amendment to deny to the government the ability to punish hateful and dehumanizing speech, or speech that promotes outrage. Even without Section 230 immunity, then, the platforms could rely directly on the First Amendment in responding to lawsuits over this kind of "lawful, but awful" speech.

It is also important to recognize that Section 230 does not preclude platforms from being held liable for design decisions that are harmful—at least if those design decisions are not themselves expressive. The First Amendment has properly been understood to protect platforms' content-moderation decisions. Courts have, rightfully, upheld the platforms' First Amendment right to exercise traditional editorial functions—such as when they choose to feature or demote certain content, when they specify and enforce "community standards" that restrict what categories of content users can post, or when they attach warning labels to user content. That protection stems from a line of Supreme Court cases starting with *Miami Herald Publishing Company v. Tornillo*, which involved a statute concerning newspapers' editorial functions. Just two years ago, the Supreme Court made clear that this long line of cases applies to social media platforms when they "decide which third-party content th[eir] feeds will display, or how the display will be ordered and organized." *Moody v. NetChoice*, LLC, 603 U.S. 707, 740 (2024).

Neither Section 230 nor the First Amendment would protect platforms from liability, however, for design decisions that are not expressive and that cause harm. For example, in *Lemmon v. Snap, Inc*., bereaved parents sued the company behind the social media platform Snapchat for its allegedly negligent design of a "Speed Filter" that encouraged users to drive at excessive speeds. In reversing the district court's dismissal of the parents' complaint, the appellate court noted that a platform could still face liability for its provision of "content-neutral tools" where the liability stemmed from the platform's own acts—such as designing and making available to users the "Speed Filter" and corresponding reward system—and not the content posted by its users.

There are of course hard questions around whether any particular design decision is expressive and for that reason implicates the First Amendment. Courts are addressing these questions in the product liability lawsuits recently filed against the social media platforms. Similar questions are also being adjudicated in the realm of generative artificial intelligence, specifically with respect to large language model-driven chatbots and minors' use of and engagement with those chatbots. As these and other relevant

cases move forward, they may provide further insights into how Section 230 and the First Amendment apply in these contexts.

If Congress eliminated Section 230, however, the main result would be to incentivize the platforms to take down speech that is socially valuable. As discussed above, because the First Amendment protects harmful, outrageous, and sensational speech, the platforms would not be required to remove it, even without Section 230. But they would be motivated to take down speech that might plausibly give rise to liability. That category would include, most significantly, potentially defamatory speech, such as speech that alleges wrongdoing by a specific individual. The First Amendment does not protect defamation. Truth is of course a defense to defamation liability, but the platforms do not have the ability to determine—definitively and at the scale that they operate—whether any particular allegation is true or not. This means that, absent Section 230, the platforms could face liability for leaving up such factual allegations about real people, and so they would almost certainly remove them, including allegations that turn out to be true. Needless to say, true allegations of wrongdoing—particularly by government officials and powerful private actors—are socially valuable and important for public discourse.

For all of these reasons, eliminating or substantially narrowing Section 230 has little demonstrated upside and dramatic potential downsides. Doing so would not address the harms that result from the platforms' publication of user speech, and it would create a significant incentive for the platforms to take down socially valuable speech. And even with Section 230 in place, the platforms are already potentially liable for harms that result from their own design decisions, at least to the extent that those design decisions are not protected by the First Amendment.

If Congress is going to amend Section 230, what it should do is make Section 230's protection conditional on platforms' compliance with transparency, privacy, and interoperability requirements. These are challenging issues, but there is an opportunity now for Congress to act. Few believe that our system of free expression is working in a manner that best serves our democracy. Members of this Committee who want to address concerns about online harms should put forward legislation that is both aligned with First Amendment rights and would foster a better online environment for people who use social media platforms.

Sunsetting Section 230 will not achieve that. The better course would be for Congress to enact structural changes that would better align the incentives of the large platforms with the interests of their users. Doing so holds the promise of simultaneously minimizing the harms of social media while liberating users from the monopoly control over—and suppression of—their online speech. Specifically, Congress should enact new mandates in transparency, privacy, data portability, and interoperability.

First, lawmakers should establish legal protections for journalists and researchers who study the platforms in the public interest. Understanding the online experience of users—how algorithms target content, and how these decisions shape public discourse and, ultimately, our democracy—is a necessary step toward informing the public about how the platforms operate. These efforts are integral to holding the platforms accountable, and to ensuring that consumers have the information necessary to make informed choices about the social media networks they join. But today, researchers and journalists are stymied in their study of online platforms. The companies' terms of service generally ban the use of the tools necessary to study the platforms at scale, subjecting researchers to the threat of civil and potentially even criminal liability for public-interest investigations. Congress can and should address this problem by establishing a legal safe harbor for those who study the platforms in ethical and privacy-preserving ways to improve public understanding of how the platforms are shaping society. One model for doing so is the Knight Institute's safe-harbor proposal, a modified version of which was incorporated into the Platform Accountability and Transparency Act.

Second, legislators can address several data privacy-related issues that affect users' experience online. Platforms are successful in maintaining user engagement because they use the extensive information they gather about a user—their viewing habits, interests, friends, likes, dislikes, beliefs—to recommend content accordingly. To facilitate transparency efforts, legislators could require platforms to clearly let users know what data the platforms collect about them, how the platforms use that data, and with whom they share that data. To protect users' privacy online, legislators can limit what information platforms collect. Prohibiting the collection of certain personal or behavioral data or circumscribing the uses of that data would limit the amount of information that is gathered by platforms and fed back into their algorithms, thereby lessening some of the algorithms' targeting ability. This would be a monumental step forward to protect all Americans but especially minors who engage online. And to further shield social media users from the misuse of their data, Congress can also pass legislation that prevents platforms from selling user information to data brokers, whose $270 billion-dollar business model involves the sale of Americans' sensitive data to businesses and governments.

Third, Congress can and should attack the platforms' monopoly control over public discourse—directly. The platforms have been extremely successful at holding off their competitors and maintaining control over the social-media industry. They have been able to do so in large part because of the "network effect"—the phenomenon by which the value of a product or service increases as more people use it. People want to be on the platforms their friends and families use, but once there, it becomes very difficult for users to leave, because the platforms do not allow them to take their social networks with them or to communicate with their old contacts from competitor services. This lock-in is anti-competitive, it denies users meaningful choice over the platforms they use, and it makes it nearly impossible for new platforms to compete with the incumbents. There are multiple ways to address this problem, but perhaps the most direct would be to

establish a requirement of "interoperability," which would enable users to take their data and social networks with them when they leave a platform. Competitors could be immunized for interoperating with other social media platforms, and large platforms could be required to facilitate this interoperation through Application Programming Interfaces (APIs). To be sure, any interoperability mandate would need to be carefully designed to avoid creating privacy risks, but this can and should be done.

The Knight Institute notes that these mandates would benefit more Americans if enacted directly, so that they apply more broadly and even in situations and to actors not covered by or relying on Section 230. But we also recognize that there is logic in requiring actors that benefit from Section 230—especially platforms whose scale is made possible by its expansive immunity—to comply with a broader and stronger range of mandates meant to ensure that the platforms do not exploit that scale in ways that harm their users or public discourse. Conditioning Section 230 protections on things like researcher access, data privacy, and user controls can be done in a way that not only respects the limitations of the First Amendment, but actually promotes the values that underlie it. Whether these mandates are enacted directly or as a condition of Section 230 immunity, the opportunity exists to improve upon the current information landscape to protect the free flow of information while improving the user experience online.

Mr. Chairman, Madam Ranking Member, and members of the Committee, I thank you again for the opportunity to testify this morning, and I look forward to your questions.