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DEPLATFORMED: SOCIAL NETWORK CENSORSHIP, THE FIRST AMENDMENT, AND THE ARGUMENT TO AMEND SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

John A. LoNigro[*]

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable gov-

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> ernment; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[1]

I. INTRODUCTION

On March 15, 1783 General George Washington in an address to the Officers of the Army stated:

> For if Men are to be precluded from offering their sentiments on a matter, which may involve the most serious and alarming consequences, that can invite the consideration of Mankind; reason is of no use to us; the freedom of Speech may be taken away, and, dumb and silent we may be led, like sheep, to the Slaughter.[2]

Washington, and the framers who had advocated for the creation of the Bill of Rights, could not have possibly foreseen a future where the world would be connected by a device that could fit into the palm of one's hand. However, it cannot be disputed that no matter the medium of communication, the First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[3] The more challenging issue tends to be what is the precise scope of the First Amendment? Or stated otherwise, to what extent can speech be regulated or restricted?

Since the creation of the Internet, a vast number of technological advancements have occurred, allowing for the rapid development of various mediums of communication, and business and enterprise.

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[1] Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).
[2] *From George Washington to Officers of the Army, 15 March 1783*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/99-01-02-10840 (last visited Apr. 11, 2019).
[3] U.S. CONST. amend. I.

Specifically, social media has begun to play a vital and pervasive role in American society. According to the Pew Research Center,[4] "around seven-in-ten Americans use social media to connect with one another, engage with news content, share information and entertain themselves."[5] In terms of population, about seventy-two percent of Americans now use social media of some form.[6] The United States has an approximate population of 331,449,281 million people.[7] This means an astounding 238,643,482 million Americans are present on social media.

With over two-thirds of the entire United States population, and nearly three billion users on social media worldwide,[8] social media has begun to play a vital role in our society by providing a forum for business, news, communication, and politics—including electioneering. With the growing significance of online use by Americans, one must wonder as to how the Internet can remain open and free for all users. By and large the First Amendment does a great deal to protect against online censorship by the United States government. However, in recent years there has been a developing concern as to the role social networking sites are playing in censoring American citizens.[9] A Pew Research Center survey found that "72 percent of

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[4] "Pew Research Center is a nonpartisan fact tank that informs the public about the issues, attitudes and trends shaping the world. We conduct public opinion polling, demographic research, content analysis and other data-driven social science research. We do not take policy positions." *About Pew Research Center*, PEW RESEARCH CENTER, https://www.pewresearch.org/about/ (last visited Sept. 15, 2020).

[5] *Social Media Fact Sheet*, PEW RESEARCH CENTER, https://www.pewinternet.org/fact-sheet/social-media/ (last visited Sept. 12, 2019).

[6] *Id.*

[7] *See 2020 Census Apportionment Results Delivered to the President*, U.S. CENSUS BUREAU (Apr. 26, 2021) https://www.census.gov/newsroom/press-releases/2021/2020-census-apportionment-results.html *U.S. Population and World Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/ (last visited Apr. 26, 2021).

[8] Simon Kemp, *Number of social media users passes 3 billion with no signs of slowing*, THENEXTWEB.COM (Aug. 7, 2017), https://thenextweb.com/contributors/2017/08/07/number-social-media-users-passes-3-billion-no-signs-slowing/.

[9] *Public Attitudes Toward Technology Companies*, PEW RESEARCH CENTER (June 28, 2018), https://www.pewinternet.org/2018/06/28/public-attitudes-toward-technology-companies/ ("In the midst of an ongoing debate over the power of digital technology companies and the way they do business, sizable shares of Americans believe these companies privilege the views of certain groups over others.").

the public thinks it is likely that social media platforms actively censor political views that those companies find objectionable."[10] Although many social networking sites provide "community guidelines" or "terms of service" to inform its users what is unacceptable or objectionable content,[11] the guidelines are often vague.

Recently, the issue of social network censorship has emerged in a realm that is all too vital to the spirit of democracy, the United States' presidential election. United States Representative and 2020 presidential candidate Tulsi Gabbard's campaign was the victim of suspension by Google.[12] Gabbard's campaign page on Google Ads was suspended after her appearance in the Democratic presidential debate, where her performance awarded her with a spot as "one of Google's most-searched candidates."[13] What happens to be extremely troubling here is that a presidential candidate who was attempting to get her message out to possible voters—specifically when potential voters were seeking information about the candidate—was stifled by what seems to be an arbitrary decision by Google. A spokesperson for Google stated that "Google's automated systems 'triggered a suspension' of Ms. Gabbard's account but did not provide a specific reason for the suspension or exclude the possibility that human agency was involved."[14] Such a vague response should not be an adequate justification when the results of the censor's actions jeopardize the integrity of the United States' presidential election. Since this occurrence, Gabbard has filed suit against Google and has asserted, among other things, that Google's suspension of her campaign's Google Ad account has violated her First Amendment right under the United States Constitution.[15] While Ms. Gabbard's case may gain the atten-

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[10] *Id.*

[11] *See, e.g.*, *Community Standards*, FACEBOOK, https://www.facebook.com/communitystandards/introduction; *Twitter Rules and Policies*, TWITTER, https://help.twitter.com/en/rules-and-policies#general-policies; *YouTube's Community Guidelines*, YOUTUBE, https://support.google.com/youtube/answer/9288567?hl=en&ref_topic=6151248.

[12] Fred Campbell, *Representative Tulsi Gabbard Lawsuit Against Google Makes Case for Regulating Online Political Ads*, FORBES (Aug. 2, 2019), https://www.forbes.com/sites/fredcampbell/2019/08/02/representative-tulsi-gabbard-lawsuit-against-google-makes-case-for-regulating-online-political-ads/#67b802fa2e8a.

[13] *Id.*

[14] *Id.*

[15] Complaint at 21-24, Tulsi Now, Inc. v. Google, LLC, No. 2:19-CV-06444 (C.D. Cal. 2019).

tion of the press, at least to a certain degree, thousands of individuals are censored or banned by social network conglomerates and have no method of recourse against such vague and arbitrary decisions.

The most significant issue with vague terms of service often arises when someone is censored, or banned from the social network site altogether, and is unaware as to the reason why. This is partly due to the fact that the reason why a user can be censored or banned is complex. For example, on Facebook "these guidelines are nowhere to be found on the site's front page, and that if someone happens to navigate to the Community Standards, these rules are divided into twenty-two separate pages housed within six subsections."[16] What recourse does one have against a social networking site that has censored or banned a user? Arguably none. The internal appeals process of Facebook essentially allows a reviewer to determine if a post should have been taken down, but it does not provide for safeguards against bias. Moreover, it is virtually impossible to sue a social network site because in 1996 Congress passed into law, Section 230 of the Communications Decency Act (CDA).[17]

Section 230(c) of the CDA was created in part to regulate the Internet in a much different manner than more traditional forms of telecommunications.[18] Traditionally, newspapers, and television and radio stations could be held personally liable for publishing other individuals' obscene or defamatory speech.[19] Congress passed this provision into law with a goal of preventing or at least limiting the liability of Internet service providers and interactive computer services.[20] Section 230(c) of the CDA grants immunity for civil liability to interactive computer services for taking "good faith" action to censor any material or person the provider deems to be objectionable, whether or not the material is constitutionally protected.[21] Congress granted such broad immunity for predominately two reasons: first Congress wanted minimal regulations to interfere with the growth of free speech and e-commerce on the Internet; and second, Congress

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[16] Bryan Menegus, *Here's Everything That's Banned on Facebook, All on One Page*, GIZMODO (Apr. 24, 2019), https://gizmodo.com/here-s-everything-that-s-banned-on-facebook-all-on-one-1825495383.
[17] 47 U.S.C. § 230 (2018).
[18] Gonzalez v. Google, Inc., 282 F. Supp. 3d 1150, 1162 (N.D. Cal. 2017).
[19] *Id.*
[20] *Id.*
[21] 47 U.S.C. § 230(c)(2)(A).

wanted to protect children from obscene material on the Internet.[22] However, Section 230(c)'s broad civil immunity provision may actually be stifling the growth of free speech on the Internet due to arbitrary censorship of social media users. This has resulted in recent calls by many lawmakers to amend Section 230.[23] While the precise solution on how to curtail social media censorship is not clear, some proposed solutions have provided clearer paths forward. Specifically, the Department of Justice's proposed legislative amendments to Section 230 provide a reasonable and practical solution to the biased and arbitrary content moderation decisions made by interactive computer services, i.e., social network companies.

This Note will discuss social network sites' use of censorship against constitutionally protected speech that may be resulting in the violation of U.S. citizens' constitutional rights. Cases of arbitrary and capricious censorship by social network providers are becoming a growing concern as social network sites increasingly become a public forum for communication and interaction. Section II of this Note will discuss situations in which social network censorship has been prevalent. Section III of this Note will analyze First Amendment jurisprudence, and whether the First Amendment should be implicated when a social media user is censored or banned. Section IV of this Note will engage in a statutory analysis of the CDA to determine what was Congress's intent when it passed this legislation and discuss proposed amendments or legislation that considers removing social network sites' civil immunity in situations when constitutionally protected speech is censored. Section V of this Note will discuss whether the application of existing First Amendment jurisprudence can be used to regulate social network sites or whether the state action doctrine bars the use of the First Amendment as a tool to regulate social network sites. Finally, Section V will also discuss the need to amend or pass similar but new legislation to ensure a fair and free Internet, in order to continue to promote and protect the Marketplace of Ideas. Particularly, this Note analyze whether the Department of Jus-

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[22] Gonzalez, 282 F. Supp. 3d at 1162.

[23] *See infra* Section V; *see also* Matt Laslo, *The Fight Over Section 230—and the Internet as We Know It*, WIRED.COM (Aug. 13, 2019), https://www.wired.com/story/fight-over-section-230-internet-as-we-know-it/; *see, e.g.*, H.R. 492, 116th Cong. (2019); S. 1914, 116th Cong. (2019); H.R. 4027, 116th Cong. (2019); H.R. 4232, 116th Cong. (2019).

tice's proposed legislative amendments to Section 230 is a viable solution to online censorship.

II. THE "DEPLATFORMING" OF U.S. CITIZENS FOR DISSIDENT SPEECH: A CONCERTED EFFORT OR A COINCIDENCE?

As briefly discussed above, social network censorship has reached a level where it may very well be interfering with U.S. presidential campaigns. There is no question that in recent years high-profile censorship has occurred on political lines. Such problems have been widespread. This Note is not concerned with a particular viewpoint being suppressed; but the fact that such political suppression is occurring is setting a dangerous precedent. If online content moderation practices by social network providers continues to go unchecked, it may have severe adverse effects on our democracy. Take for example, the case of House Representative Tulsi Gabbard, who has been openly critical of the tech industry. "She rolled out her candidacy, in part, by warning against 'big tech companies who take away our civil liberties and freedoms in the name of national security and corporate greed.'"[24] While Google's suspension of Ms. Gabbard's campaign Google Ad account may seem coincidental, it came at a very odd time, specifically when Ms. Gabbard was "among the top search topics on Google during and after the debate."[25] The temporary suspension came exactly at the time potential voters where seeking out information on Ms. Gabbard. Google's responded by claiming that it was not an arbitrary decision, rather it was a suspension "for violations of billing practices" and "advertising practices."[26]

However, Gabbard's campaign confirmed that there was "no change of banks or financial issue with the campaign's account. And when asked by the campaign about the validity of the suspension, [Google] then told the campaign there was 'a violation of the terms of service.'"[27] A Google spokesperson commented on the issue and

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[24] Carla Marinucci & Daniel Strauss, *Tulsi Gabbard Sues Google Over Post-Debate Ad Suspension*, POLITICO (July 25, 2019), https://www.politico.com/story/2019/07/25/tulsi-gabbard-sues-google-account-suspension-1435405.
[25] *Id.*
[26] *Id.*
[27] *Id.*

claimed that the suspension was due to the automated system response and that the Google Ad account was "reinstated shortly thereafter."[28] Furthermore, the Google spokesperson stated "we are proud to offer ad products that help campaigns connect directly with voters, and we do so without bias toward any party or political ideology."[29] However, there is evidence showing Google and other interactive computer service providers are taking a "sides" even when holding themselves out as a neutral public forum.

YouTube, owned by Google, LLC, has displayed bias by frequently "demonetizing" conservatives over other left-leaning channels on its website.[30] Prager University, a not-for-profit conservative organization, was a victim of YouTube's vague terms of service, resulting in videos titled "'Why America Must Lead,' 'The Ten Commandments: Do Not Murder,' and 'Why Did America Fight the Korean War' demonetized (i.e., barred from accepting advertisements)."[31] While the content of these videos was for educational or thought provoking purposes, some controversial videos posted by left-leaning channels remained monetized. The issue with these potentially arbitrary decisions by YouTube is that it advertises itself as an open public platform for those who wish to express themselves or as means to educate and deliver information. YouTube's mission statement page states, "our mission is to give everyone a voice and to show them the world."[32] Furthermore, YouTube states that its values are based on "four essential freedoms," the "freedom of expression," "freedom of information," "freedom of opportunity," and "freedom to belong."[33]

YouTube believes that the "freedom of opportunity" is that "everyone should have a chance to be discovered, build a business and succeed on *their own terms*, and that people—*not gatekeepers*—decide what's popular."[34] However, YouTube's own definition of

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[28] *Id.*
[29] *Id.*
[30] Ben Shapiro, *Viewpoint Discrimination with Algorithms*, NATION REVIEW (Mar. 7, 2018), https://www.nationalreview.com/2018/03/social-media-companies-discriminate-against-conservatives/.
[31] *Id.*
[32] *About YouTube*, YOUTUBE.COM, https://www.youtube.com/intl/en-GB/about/ (last visited Nov. 9, 2019).
[33] *Id.* (most notably, of these "four essential freedoms," the freedom of speech is not listed).
[34] *Id.* (emphasis added).

"freedom of opportunity" tends to conflict with its policy and procedures of arbitrarily censoring and suppressing the speech of those that they do not agree with. The term "gatekeeper" is defined as "a person who controls access."[35] When YouTube makes the decision to review and select which of its users' content is permissible for viewers it effectively becomes the very gatekeeper that it claims it is trying to bypass. YouTube is not the only entity that has displayed a bias when regulating the content on its websites. Facebook has also displayed a similar bias when self-regulating.

Facebook has played, arguably, an even stronger role in arbitrary censorship of its users than has Google. Former Facebook employees blew the whistle on its former employer and revealed "Facebook workers routinely suppressed news stories of interest to conservative readers from the social network's influential 'trending' news section."[36] These former "news curators" revealed that they were "instructed to artificially 'inject' selected stories into the trending news module, even if they weren't popular enough to warrant inclusion—or in some cases weren't trending at all."[37] This is particularly concerning because the "trending" section of Facebook "helps dictate what news Facebook's users . . . are reading at any given moment."[38] Additionally, the choice to censor some new sources, typically those that are politically conservative or right leaning, over other sources, was the personal and arbitrary decision of the news curator that was operating the "trending" section at the particular time.[39] Moreover, "[s]tories covered by conservative outlets (like Breitbart, Washington Examiner, and Newsmax) that were trending enough to be picked up by Facebook's algorithm were excluded unless mainstream sites like the New York Times, the BBC, and CNN covered the same stories."[40] This conduct by Facebook has the potential to chill constitutionally protected speech and disturb the flow of information that U.S. citizens need to make informed decision—such as voting. Facebook's arbitrary control over what its users can

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[35] *Gatekeeper*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/gatekeeper#other-words (last visited Mar. 31, 2021).
[36] Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, GIZMODO (May 9, 2019), https://gizmodo.com/former-facebook-workers-we-routinely-suppressed-conser-1775461006.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*

say or see seriously disrupts the Marketplace of Ideas. The years leading up to 2020 showed the growth of censorship online. An example of this growth was the banning of Alex Jones and other controversial figures in 2018.[41] While many may agree, or even disagree, with the choice to ban these individuals, this censorship pushed the United States down the proverbial slippery slope. So why the public outcry if Big Tech is only banning conspiracy theorists or extremist? Simply put, that is the misconception. The censorship goes beyond conspiracy theories and has begun to stifle public debate and discourse, damaging the Marketplace of Ideas.

In 2020 the situation worsened, corporate censorship expanded, and the damaging effects of such censorship seemed to be a feature of the 2020 Presidential Election and the COVID-19 pandemic. Take only one example, the treatment of the New York Post's exposé on Hunter Biden by Facebook and Twitter.[42] The New York Post's article was based on an issue of public importance—the potentially improper conduct abroad by the son of the Democratic presidential candidate. The article was allegedly based on the contents of Hunter Biden's laptop, dropped off at a computer repair shop in Delaware.[43]

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[41] *See* Barbara Ortutay, *Twitter Permanently Bans Alex Jones, Infowars, Citing Abuse*, ASSOCIATED PRESS (Sept. 6, 2018), https://apnews.com/article/2521ccbe3b5a43d68d66c21c030a7f2d; Matthew S. Schwartz, *Facebook Bans Alex Jones, Louis Farrakhan and Other 'Dangerous' Individuals*, NPR (May 3, 2019, 8:12 AM), https://www.npr.org/2019/05/03/719897599/facebook-bans-alex-jones-louis-farrakhan-and-other-dangerous-individuals. Many Americans know of the name Alex Jones either because they have heard his radio show or viewed his internet content, while others may know him because of his frequent mentions in the media. Dubbed a right-wing conspiracy theorist for quite some time, Alex Jones was banned across nearly all mainstream social network sites. *See also* Jane Coaston, *YouTube, Facebook, and Apple's Ban on Alex Jones, Explained*, VOX (Aug. 6, 2018, 3:05 PM), https://www.vox.com/2018/8/6/17655658/alex-jones-facebook-youtube-conspiracy-theories.

[42] *See* Noah Manskar, *Twitter, Facebook Censor Post Over Hunter Biden Exposé*, N.Y. POST (Oct. 14, 2020, 4:14 PM), https://nypost.com/2020/10/14/facebook-twitter-block-the-post-from-posting/ ("The Post's primary Twitter account was locked as of 2:20 p.m. Wednesday because its articles about the messages obtained from Biden's laptop broke the social network's rules against 'distribution of hacked material,' according to an email The Post received from Twitter.").

[43] *See* Emma-Jo Morris & Gabrielle Fonrouge, *Smoking-gun Email Reveals How Hunter Biden Introduced Ukrainian Businessman to VP Dad*, N.Y. POST (Oct. 14, 2020, 5:00 AM), https://nypost.com/2020/10/14/email-reveals-how-hunter-biden-introduced-ukrainian-biz-man-to-dad/.

Facebook and Twitter widely censored the story, with Twitter going as far as locking the New York Post's account from posting any further, while members of the media sought to discredit contents of the laptop as *Russian disinformation*.[44] Twitter made a claim that it was enforcing its policy of restricting the dissemination of content obtained without authorization of the owner, implying the material was hacked.[45] However, this was proven to be false when the Director of National Intelligence confirmed the laptop was not "Russian disinformation."[46] Moreover, the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) confirmed the authenticity of the emails in question on the laptop and that the FBI was in possession of the laptop that was dropped off at the Delaware computer store.[47] Finally, just two weeks after Twitter and Facebook censored the story, the FBI confirmed that Hunter Biden and his associates

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[44] *See* Natasha Bertrand, *Hunter Biden Story is Russian Disinfo, Dozens of Former Intel Officials Say*, POLITICO (Oct. 19, 2020, 10:30 AM), https://www.politico.com/news/2020/10/19/hunter-biden-story-russian-disinfo-430276 (reporting that 50 former intelligence officials, including former Obama CIA Director John Brennan, said that the Hunter Biden laptop story "has all the classic earmarks of a Russian information operation"—though the letter they signed admitted that "we do not have evidence of Russian involvement."). *See* The Situation Room (@CNNSitRoom), TWITTER (Oct. 16, 2020, 7:24 PM), https://twitter.com/CNNSitRoom/status/1317245084639891457 (CNN's Wolf Blitzer interviewing House Intelligence Committee Chairman Adam Schiff who stated "we know that this whole smear on Joe Biden comes from the Kremlin.").

[45] Twitter Safety (@TwitterSafety), TWITTER (Oct. 14, 2020, 7:44 PM), https://twitter.com/TwitterSafety/status/1316525307441147907 ("The policy, established in 2018, prohibits the use of our service to distribute content obtained without authorization. We don't want to incentivize hacking by allowing Twitter to be used as distribution for possibly illegally obtained materials.").

[46] Ryan Saavedra, *Director of National Intelligence Confirms Hunter Biden Laptop 'Not Part of Some Russian Disinformation Campaign'*, DAILY WIRE (Oct. 19, 2020), https://www.dailywire.com/news/breaking-director-of-national-intelligence-confirms-hunter-biden-laptop-not-part-of-some-russian-disinformation-campaign.

[47] Ryan Saavedra, *DOJ, FBI Confirm Hunter Biden Laptop is Not Part of 'Russian Disinformation Campaign,' Reports Say*, DAILY WIRE (Oct. 20, 2020), https://www.dailywire.com/news/breaking-doj-fbi-confirm-hunter-biden-laptop-is-not-part-of-russian-disinformation-campaign; Jake Gibson & Brooke Singman, *FBI in Possession of Hunter Biden's Purported Laptop, Sources Say*, FOX NEWS (Oct. 20, 2020), https://www.foxnews.com/politics/fbi-purported-hunter-biden-laptop-sources; Joseph Simonson, *FBI and DOJ Do Not Believe Hunter Biden Laptop Part of Russian Disinformation Campaign*, WASH. EXAMINER (Oct. 20, 2020, 6:33 PM), https://www.washingtonexaminer.com/news/fbi-and-doj-do-not-believe-hunter-biden-laptop-part-of-russian-disinformation-campaign.

were involved in an ongoing federal investigation for money laundering that began in 2018.[48]

As the country inched closer to the November 2020 election, this matter should have been open to the public for debate. Instead, Twitter and Facebook, chilled the speech of many American citizens and members of the press. What is equally troubling is that many left-leaning media outlets did not report on the fact that the investigation into Hunter Biden was ongoing until after the 2020 Presidential Election.[49] Even if one were to argue that this story should have been prevented from being spread based on, e.g., uncorroborated reporting, or as Twitter claimed when suspending the New York Post's account—removing unauthorized or hack material, the bias from Big Tech companies becomes even more apparent. On the other hand, leading up to the 2020 election, then President Trump's infamously undisclosed tax returns reemerged in public discussion when the New York Times published an article discussing the long-sought details on

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[48] Sinclair Broadcast Group, *DOJ Official Confirms FBI 2019 Criminal Investigation into Hunter Biden, Still Active*, ABC NEWS (Oct. 29, 2020), https://abc3340.com/news/nation-world/tony-bobulinksi-i-have-now-put-myself-in-huge-risk-for-the-sake-of-the-american-people; Zachary Evans, *FBI Investigating Hunter Biden for Money Laundering: Report*, NATIONAL REVIEW (Oct. 29, 2020, 6:23 PM), https://www.nationalreview.com/news/fbi-investigating-hunter-biden-for-money-laundering-report/; Brooke Singman & Jake Gibson, *Laptop Connected to Hunter Biden Linked to FBI Money Laundering Probe*, FOX NEWS (Oct. 21, 2020), https://www.foxnews.com/politics/laptop-hunter-biden-linked-fbi-money-laundering-probe.

[49] Ben Schreckinger, *Justice Department's Interest in Hunter Biden Covered More Than Taxes*, POLITICO (Dec 9, 2020, 11:21 PM), https://www.politico.com/news/2020/12/09/justice-department-interest-hunter-biden-taxes-444139; Brooke Singman, *Hunter Biden 'Tax Affairs' Under Federal Investigation; Links to China Funds Emerge, Sources Say*, FOX NEWS (Dec. 9, 2020), https://www.foxnews.com/politics/hunter-biden-tax-affairs-under-federal-investigation; Mark Moore, *DOJ Probe into Hunter Biden Reportedly Extends Beyond Burisma*, N.Y. POST (Dec. 13, 2020, 1:27 PM), https://nypost.com/2020/12/13/doj-probe-into-hunter-biden-extends-beyond-burisma-report/; Rowan Scarborough, *How Silicon Valley Scions Launched 'Unprecedented Cover-up' in Hunter Biden Case*, WASH. TIMES (Dec. 27, 2020), https://www.washingtontimes.com/news/2020/dec/27/how-silicon-valley-scions-launched-unprecedented-c/. *See generally* Shawn Cooke, *Distrust in News Media Ticks Up, Concern About Misinformation Is Strong*, CIVIC SCI. (Apr. 7, 2021), https://civicscience.com/distrust-in-news-media-ticks-up-concern-about-misinformation-is-strong/ (showing a growing distrust with the media amongst most Americans).

President Trump's tax returns.[50] However, Twitter did not suppress this information despite its unauthorized release.[51]

What appears to be the boldest and most brazen censorship decision made by Big Tech companies occurred on January 6, 2021. The banning of the United States' then current sitting president, Donald J. Trump, from nearly all online social media platforms, such as Facebook, Instagram, Twitter, and YouTube. The decision by social media companies came following an election integrity protest by thousands of Trump voters. President Trump chose to speak at the end of a rally held on the White House Ellipse, and afterwards the thousands of supporters marched through D.C. to the Capitol, where the protest was to resume while Congress was in session counting the electoral college votes, certifying Joe Biden as the official president-elect of the United States. Before, the large caravan of people arrived at the Capitol, some members of the fringed far-right had begun to riot at the Capitol. Chaos ensued. Ultimately, reports had developed on news media that President Trump had incited the violence with his speech at the White House Ellipse, and that his message sent out over Twitter and other social media accounts calling for the riots to stop were inadequate, or even, allegedly, further fanning of the flames of violence. President Trump has been convicted for the Capitol Riots of January 6th, in at least one sense, and his punishment was exile from the digital public square. Shortly after sending his message on social media for peace on the streets and for the protesters at the Capitol to return home, President Trump was temporarily banned from, among others, Facebook, Instagram, Snapchat, Twitter, and YouTube. Initially, the ban was temporary, but ultimately, these companies affirmed their decisions to ban President Trump for the remainder of his term.[52] Sitting in some room, an unnamed employee with the press of a few buttons, without Due Process of the law, without any notice, silenced the leader of the free world. The Presi-

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[50] Russ Buettner, Susanne Craig & Mike McIntire, *The President's Taxes: Long-Concealed Records Show Trump's Chronic Losses and Years of Tax Avoidance*, N.Y. TIMES (Sept. 27, 2020), https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html.

[51] *See e.g.*, The New York Times (@nytimes), TWITTER (Sept. 27, 2020, 5:53 PM), https://twitter.com/nytimes/status/1310336685574680578.

[52] Annie Palmer, *Facebook Will Block Trump from Posting At Least For the Remainder of His Term*, CNBC (Jan. 7, 2021, 7:53 AM), https://www.cnbc.com/2021/01/07/facebook-will-block-trump-from-posting-for-the-remainder-of-his-term.html.

dent of the United States was digitally gagged by billion-dollar corporate tech conglomerates.

There was a time in the United States where principled men and women believed in the individualized liberty of freedom of speech. The United States has allowed itself to be reduced to the point that many Americans cheered the idea that Big Tech companies finally stopped the words and thoughts of the United States President. What should be eye-opening to the United States, is the international response by world leaders when President Trump was banned. From Mexico to Germany, these world leaders condemned the tech companies' actions.[53]

What followed from the banning of President Trump was a trip further down the slippery slope. With the chaos of January 6, 2021 freshly imprinted into the minds of millions of Americans, tech companies seized the opportunity to ramp-up their terms of service enforcement in an arbitrary and biased manner. Parler, marketed as a free speech social media alternative to Twitter, which is hosted on websites and mobile phone applications, was removed from, first, the Google Play Store,[54] then from Apple's App Store,[55] and finally,

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[53] Dave Graham, *Mexico President Slams Social Media 'Censorship' After Chaos in U.S. Capitol*, REUTERS (Jan. 7, 2021, 8:36 AM), https://www.reuters.com/article/us-usa-election-mexico-idUSKBN29C1QY; Birgit Jennen & Ania Nussbaum, *Germany and France Oppose Trump's Twitter Exile*, BLOOMBERG (Jan. 11, 2021, 7:17 AM), https://www.bloomberg.com/news/articles/2021-01-11/merkel-sees-closing-trump-s-social-media-accounts-problematic ("'The chancellor sees the complete closing down of the account of an elected president as problematic,'" Steffen Seibert, her chief spokesman, said at a regular news conference in Berlin. Rights like the freedom of speech "'can be interfered with, but by law and within the framework defined by the legislature—not according to a corporate decision.'"); Thierry Breton, *Thierry Breton: Capitol Hill — the 9/11 Moment of Social Media*, POLITICO (Jan. 10, 2021, 4:50 PM), https://www.politico.eu/article/thierry-breton-social-media-capitol-hill-riot/ (the European commissioner for the internal market stated, "[t]he fact that a CEO can pull the plug on POTUS's loudspeaker without any checks and balances is perplexing. It is not only confirmation of the power of these platforms, but it also displays deep weaknesses in the way our society is organized in the digital space."); Natasha Lomas, *Europe seizes on social media's purging of Trump to bang the drum for regulation*, TECHCRUNCH (Jan. 11, 2021, 7:45 AM), https://techcrunch.com/2021/01/11/europe-seizes-on-social-medias-purging-of-trump-to-bang-the-drum-for-regulation/?guccounter=1.

[54] Tyler Sonnemaker, *Google has Banned Parler from Its App Store for Failing to Remove Violent Content*, Business Insider (Jan. 8, 2021, 7:58PM), https://www.businessinsider.com/google-bans-parler-from-play-store-over-violent-content-2021-1.

Parler's website was taken offline by Amazon, which owns the cloud hosting service used by Parler.[56] All three companies denied acting in an anti-competitive manner, but instead insisted Parler had been in violation of all three companies' terms of service failing to police violent content or content that would incite violence. However, Parler claimed this was nothing more than a pretext to stonewall the Big Tech competitor. Parler explained that it had reported to the FBI numerous threats of violence on its website and app in the month leading up to the January 6th riots.[57] Parler's removal from the Internet occurred despite Facebook playing a larger role in facilitating the Capitol riots.[58] The rush to paint Parler as the sole culprit has only further revealed the bias displayed by Big Tech companies. But one need not look further than the donative track-record for these Big Tech companies to conclude that there is some inherent bias against conservative politics. "Facebook and Twitter (employees and PACs) combined contributed more than 12 times more money to Democrats (more than $5.5 million) than Republicans (less than $435,000) in 2020."[59]

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[55] Jay Peters and Kim Lyons, *Apple Removes Parler from the App Store*, VERGE (Jan. 9, 2021, 7:47 PM), https://www.theverge.com/2021/1/9/22221730/apple-removes-suspends-bans-parler-app-store.

[56] John Paczkowski & Ryan Mac, *Amazon Will Suspend Hosting for Pro-Trump Social Network Parler*, BUZZFEED NEWS (Jan. 9, 2021, 10:08 PM), https://www.buzzfeednews.com/article/johnpaczkowski/amazon-parler-aws.

[57] Mark Zapotosky, *Parler Says It Warned FBI of 'Specific Threats of Violence' Before Capitol Riot*, WASH. POST (Mar. 25, 2021), https://www.washingtonpost.com/national-security/parler-fbi-capitol-riot/2021/03/25/addba25a-8dae-11eb-a6bd-0eb91c03305a_story.html.

[58] Thomas Brewster, *Sheryl Sandberg Downplayed Facebook's Role in The Capitol Hill Siege—Justice Department Files Tell A Very Different Story*, FORBES (Feb. 7, 2021), https://www.forbes.com/sites/thomasbrewster/2021/02/07/sheryl-sandberg-downplayed-facebooks-role-in-the-capitol-hill-siege-justice-department-files-tell-a-very-different-story/?sh=7e161dba10b3 ("In total, the charging documents refer to 223 individuals in the Capitol Hill riot investigation. Of those documents, 73 reference Facebook. That's far more references than other social networks. YouTube was the second most-referenced on 24. Instagram, a Facebook-owned company, was next on 20. Parler, the app that pledged protection for free speech rights and garnered a large far-right userbase, was mentioned in just eight.").

[59] *IAP Analysis: Facebook, Twitter Donations 12-1 Favor Dems Over GOP*, IAP (Apr. 1, 2021), https://theiap.org/media/press/iap-analysis-facebook-twitter-donations-12-1-favor-dems-over-gop/.

III. IS THE FIRST AMENDMENT IMPLICATED WHEN A SOCIAL NETWORK SITE CENSORS OR BANS ONE OF ITS USERS?

This Section will examine whether a provider of a social media service can be subject to First Amendment constraints when regulating its users' speech. Section III.A will discuss the First Amendment and the public forum doctrine. Section III.B will discuss the state action doctrine, and whether a provider of a social media service, a private entity, can be considered a state actor, such that the First Amendment would be implicated when it engages in arbitrary or capricious censorship of its users. Section III.C explores the United States Supreme Court cases that have dealt specifically with the Internet and the idea of the Internet as a public forum. Section III.D reviews other telecommunication cases where the Supreme Court has struck down government restrictions on telecommunication providers. Finally, Section III.E discusses what the future may hold for free speech rights on the Internet.

A. The First Amendment and the Public Forum Doctrine

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[60] The First Amendment has also been incorporated to the states through the Due Process Clause of the Fourteenth Amendment.[61] In order to evaluate whether one's First Amendment right to freedom of speech is violated, a court must determine if the forum is public. In *Perry Education Association v. Perry Local Educators' Association*,[62] the Supreme Court explained the three different categories of property under which the right to expression may be limited "depending on the character of the property at issue."[63] The first category is the Traditional Public Forum. The Court held, "[i]n places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed."[64] The Court gave the

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[60] U.S. CONST. amend. I.
[61] *See* Gitlow v. New York, 268 U.S. 652 (1925).
[62] 460 U.S. 37 (1983).
[63] Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 44 (1983).
[64] *Id.* at 45.

example of streets and parks, "which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"[65] Moreover, the Court explained, in these "quintessential public forums" the content-based restriction on speech must serve a compelling state interest and must be narrowly tailored to achieve this purpose.[66] Finally, in regard to Traditional Public Forums the Court explained, "[t]he state may also enforce regulations of the time, place, and manner of expression which are *content-neutral*, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[67]

The second category is the Limited or Designated Public Forum. This type of public forum is created or opened up by the state for "use by the public as a place for expressive activity."[68] The Court stated that "[t]he Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place."[69] The Court explained that as long as the state keeps the forum's characteristics open "it is bound by the same standards as applied in a traditional public forum. . . . [C]ontent-based prohibition must be narrowly drawn to effectuate a compelling state interest."[70]

Finally, the third category is the nonpublic forum. Here, the Supreme Court reasoned that "[p]ublic property which is not by tradition or designation a forum for public communication is governed by different standards."[71] The Court held that "[i]n addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regu-

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[65] *Id.* (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).
[66] *Perry Educ. Ass'n*, 460 U.S. at 45 (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).
[67] *Perry Educ. Ass'n*, 460 U.S. at 45 (emphasis added) (citing U.S. Postal Serv. v. Council of Greenburgh, 453 U.S. 114, 132 (1981); Consolidated Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 535–536 (1980); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. New Jersey, 308 U.S. 147 (1939)).
[68] *Perry Educ. Ass'n*, 460 U.S. at 45.
[69] *Id.* (citing Widmar v. Vincent, 454 U.S. 263 (1981); City of Madison Joint Sch. Dist. v. Wis. Pub. Emp. Rels. Comm'n, 429 U.S. 167 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)).
[70] *Perry Educ. Ass'n*, 460 U.S. at 46.
[71] *Id.*

lation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[72] Thus, the government need only a rational basis—a standard easily and often met—for regulating speech in a nonpublic forum, as compared to showing a compelling interest—requiring the state to overcome the highest burden—when dealing with a traditional or designated public forum.

B. The First Amendment and the State Action Doctrine

Normally, private persons or entities are free to control and restrict the speech of others on private property as they see fit.[73] However, private actors may be subject to the constraints of the First Amendment when they are found to be a state actor.[74] This exception to the state action doctrine provides that a private actor will be designated as a state actor, and thus, subject to the constraints of the First Amendment when "(i) the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity."[75]

Despite these exceptions to the state action doctrine, the U.S. Supreme Court has only found a limited number of situations when the doctrine will apply, such as in the case of elections and company towns.[76] Specifically, in *Manhattan Community Access Corp. v. Halleck*,[77] the Supreme Court, in determining "whether private operators of public access cable channels are state actors subject to the First

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[72] *Id.* (citing U.S. Postal Serv. v. Council of Greenburgh, 453 U.S. 114, 131 n.7 (1981)).

[73] *See, e.g.*, Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 737 (1996) (plurality opinion); Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 566 (1995); Hudgens v. NLRB, 424 U.S. 507, 513 (1976).

[74] *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946).

[75] Manhattan Cmty Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019) (citing Jackson v. Metro. Edison Co., 419 U.S. 345, 352-54 (1974); Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922, 941–42 (1982)).

[76] *See, e.g.*, *Marsh*, 326 U.S. at 505-09 (1946) (company town); Terry v. Adams, 345 U.S. 461, 468–70 (1953) (elections).

[77] 139 S. Ct. 1921 (2019).

Amendment,"[78] explained that "a variety of functions do not fall into [the state action] category, including, for example: running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity."[79] In *Manhattan Community Access Corp.*, two public access program producers sought to compel the Manhattan Neighborhood Network (MNN) to air the producers' documentary criticizing MNN's "alleged neglect of the East Harlem community" after the documentary was removed from the public access channels due to complaints and a dispute between the producers and MNN's staff.[80] The producers argued that MNN had violated the producers' First Amendment rights because MNN was a state actor due to a state law, requiring Time Warner to set aside "some channels on its cable system for public access,"[81] and due to the fact that New York City had hired MNN to operate the public access channels in Manhattan.[82]

The Court explained that because a state has not traditionally and historically performed the function of providing public access channels, MNN could not be consider a state actor.[83] The Court reasoned that "when public access channels became a regular feature on cable systems, a variety of private and public actors have operated public access channels, including: private cable operators; private nonprofit organizations; municipalities; and other public and private community organizations such as churches, schools, and libraries."[84] Additionally, the Court addressed the producers' second claim that New York was providing a public forum and that the public forum's operation and management by a private entity in turn creates state action.[85]

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[78] *Manhattan Cmty Access Corp.*, 139 S. Ct. at 1927.

[79] *Id.* at 1929 (citing American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 55–57 (1999) (insurance payments); National Collegiate Athletic Assn. v. Tarkanian, 488 U.S. 179, 197, n.18 (1988) (college sports); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 544–45 (1987) (amateur sports); *Blum*, 457 U.S. at 1011–12 (nursing home); Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (special education); Polk County v. Dodson, 454 U.S. 312, 318–19 (1981) (public defender); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157–63 (1978) (private dispute resolution); *Jackson*, 419 U.S. at 352–54 (electric service)).

[80] *Manhattan Cmty Access Corp.*, 139 S. Ct. at 1926-27.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 1929.

[84] *Id.* at 1929-30.

[85] *Id.* at 1930-31.

The Court held that "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."[86] Moreover, the Court explained that any ruling to the contrary would run afoul of the principles enunciated in the Constitution, such that "[t]he Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property."[87]

The producers also argued that because New York placed heavy regulations on MNN's operation of public access channels, MNN is thus a state actor.[88] However, the Court explained the producers' reasoning is flawed, to the extent that "New York State's extensive regulation of MNN's operation of the public access channels does not make MNN a state actor."[89] The Court held that "being regulated by the State does not make one a state actor,"[90] and "[i]f those facts sufficed to transform a private entity into a state actor, a large swath of private entities in America would suddenly be turned into state actors and be subject to a variety of constitutional constraints on their activities."[91]

Manhattan Community Access Corp. is the U.S. Supreme Court's most recent opinion discussing the exceptions to the state action doctrine, and it also serves as the chief case prohibiting the possibility that a social media provider can be deemed a state actor. Surely, the unequivocal statement from the majority repudiates the idea that a private company that hosts the speech of others can be, without more, treated as a state actor subject to the constraints imposed by the First Amendment. While the court did not entirely foreclose the possibility of a private entity that hosts the speech of others from becoming a state actor, the justification for such a scenario seems very unlikely. The U.S. Supreme Court's mention of a private person's, or private entity's, right to exercise editorial discretion over the speech of others on his or her property is telling. Since interactive computer services are private companies, they may choose to ex-

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[86] *Id.* at 1930.
[87] *Id.* at 1931.
[88] *Id.*
[89] *Id.*
[90] *Id.* at 1932 (citing *Sullivan*, 526 U.S. at 52; *Blum*, 457 U.S. at 1004; *Rendell-Baker*, 457 U.S. at 841–42; *Jackson*, 419 U.S. at 350; Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176–77 (1972)).
[91] *Manhattan Cmty Access Corp.*, 139 S. Ct. at 1932.

ercise editorial discretion over the content of their users without transforming themselves into state actors subject to the constraints of the First Amendment. This reading of the state action doctrine is troubling for those seeking to reign in Big Tech through the use of the First Amendment. Without something more, and whatever that something may be, a social network company cannot be considered a state actor for simply hosting its users' speech—even when a specific interactive computer service secures a contract with the government to provide the public with a product or service.

C. The First Amendment and the Internet

While the Supreme Court has dealt with various cases regarding the Public Forum Doctrine in the physical world, its jurisprudence is fairly scarce in regard to cyberspace. In two very important decisions, the Supreme Court struck down, first a federal statute in *Reno v. American Civil Liberties Union*,[92] and then a state statute in *Packingham v. North Carolina*.[93] In both cases, the statutes in question had, in effect, chilled the speech of U.S. citizens on the Internet.

In *Reno*, the Supreme Court was faced with the issue of "the constitutionality of two statutory provisions enacted to protect minors from 'indecent' and 'patently offensive' communications on the Internet."[94] The statute in question was Section 233 of the Communications Decency Act.[95] It criminalized the sending of "indecent" and "patently offensive" material to anyone under the age of eighteen.[96] Due to the nature of the terms "indecent" and "patently offensive" material, the Court found that the "[t]he vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."[97] The Court reasoned that "the burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."[98]

The Court recognized that Congress did in fact have a compelling interest in passing the regulation, protecting children from

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[92] 521 U.S. 844 (1997).
[93] 137 S. Ct. 1730 (2017).
[94] Reno v. American Civil Liberties Union, 521 U.S. 844, 849 (1997).
[95] 47 U.S.C § 223 (2018).
[96] *Reno*, 521 U.S. at 858-60.
[97] *Id.* at 871-72.
[98] *Id.* at 874.

harmful material; however, it was not so narrowly tailored as to be constitutionally permissible.[99] The government failed to show how its interest could be accomplished in the least restrictive manner. Furthermore, the government asserted that "in addition to its interest in protecting children—its "[e]qually significant" interest in fostering the growth of the Internet provides an independent basis for upholding the constitutionality of the CDA."[100] The Court rejected the government's contention that indecent material was driving individuals away from the Internet. The Court held that "governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."[101]

In *Packingham*, the Supreme Court was tasked with determining whether a North Carolina law prohibiting sex offenders from accessing "commercial social networking" websites, where the sex offender knew that the website permitted minors to "create or maintain personal Web pages,"[102] was "permissible under the First Amendment's Free Speech Clause, applicable to the States under the Due Process Clause of the Fourteenth Amendment."[103] The North Carolina statute made it a felony for any sex offender in violation of this law.[104] Packingham was indicted for violating a statute when the state discovered that Packingham maintained a Facebook account.[105] The trial court convicted Packingham after a motion to dismiss the indictment on the ground that the statute violated First Amendment was denied.[106] Packingham appealed to the North Carolina Court of Appeals, which struck down the statute on the ground that it was not "narrowly tailored to serve the State's legitimate interest in protecting minors from sexual abuse."[107] The North Carolina Supreme Court reversed, explaining that the law was "carefully tailored . . . to prohibit registered sex offenders from accessing only those websites that

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[99] *Id.* at 875.
[100] *Id.* at 885.
[101] *Id.*
[102] N.C. GEN. STAT. §§ 14-202.5(a), (c) (2015).
[103] Packingham v. North Carolina, 137 S. Ct. 1730, 1733 (2017).
[104] *Id.*
[105] *Id.* at 1734.
[106] *Id.*
[107] *Id.* at 1734-35.

allow them the opportunity to gather information about minors."[108] The U.S. Supreme Court reversed the decision of the North Carolina Supreme Court, holding that "the [g]overnment 'may not suppress lawful speech as the means to suppress unlawful speech.'"[109]

The Court reasoned that the statute was overly broad, and that such a broad sweeping statute was not necessary to serve the legitimate purpose of protecting vulnerable children from sex offenders.[110] The Court explained that because the North Carolina statute imposed a definition of what a commercial social networking website was, it could presumably prevent access to websites such as Amazon.com, Washingtonpost.com, and Webmd.com.[111] The Court analogized this case to *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*,[112] and reasoned that "if a law prohibiting 'all protected expression' at a single airport is not constitutional, it follows with even greater force that the State may not enact this complete bar to the exercise of First Amendment rights *on websites integral to the fabric of our modern society and culture*."[113]

In *Packingham*, the Supreme Court made it a point to readdress certain principles and ideas that were stated in *Reno*. The Court stated that "[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and *social media in particular*."[114] Moreover, the Court reiterated, "social media users employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'"[115] The Court cautioned against the use of such a wide sweeping statute because it barred, in this case, a sex offender, from accessing information and means to communication to the extent that:

> North Carolina with one broad stroke bars access to what for many are the principal sources for knowing

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[108] *Id.* at 1735.
[109] *Id.* at 1738.
[110] *Id.* at 1737.
[111] *Id.* at 1736-37.
[112] Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987).
[113] *Packingham*, 137 S. Ct. at 1738 (emphasis added).
[114] *Id.* at 1735 (emphasis added) (quoting Reno v. American Civil Liberties Union, 521 U.S. 844, 868 (1997)).
[115] *Packingham*, 137 S. Ct. at 1735-36 (quoting *Reno*, 521 U.S. at 870).

> current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox."[116]

The Court concluded, "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights."[117]

Ashcroft v. American Civil Liberties Union was another case that determined the constitutionality of a statute affecting speech online.[118] *Ashcroft* did not discuss the Internet in terms of public forum, but it did invalidate a law regulating speech on the Internet due to Congress's failure to narrowly tailor the law.[119] In *Ashcroft*, the Court was tasked with determining whether the Child Online Protection Act (COPA)—which criminalized an individual's conduct of knowingly posting, for commercial purposes, content that was "harmful to minors"—was constitutional.[120] The Court held that "[a] statute that 'effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.'"[121] Since the regulation that was being challenged was a content-based restriction on speech, the government had the burden of showing that a less restrictive alternative would not be effective as the regulation in question.[122] The Court reasoned that the purpose of the test is to prevent the restriction of speech no more than is necessary, and thus avoid any collateral effect on legitimate speech, so it is "not chilled or punished."[123] The proposed alternative to Congress's

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[116] *Packingham*, 137 S. Ct. at 1737 (quoting *Reno*, 521 U.S. at 870).
[117] *Packingham*, 137 S. Ct. at 1737.
[118] 542 U.S. 656 (2004).
[119] Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 673 (2004).
[120] *Id.* at 660-61.
[121] *Id.* at 665 (quoting *Reno*, 521 U.S. at 874).
[122] *Ashcroft*, 542 U.S. at 665.
[123] *Id.* at 666.

regulation was filtering software to prevent children from viewing pornographic material that was deemed harmful, and the Court agreed that filtering software was less restrictive and would not be ineffective in achieving Congress's goal.[124] The Court explained that the government's burden is not to show that the less restrictive alternative needs to be perfect, but instead the government must show that the alternative is less effective.[125]

D. The First Amendment and Other Telecommunication Cases

The Internet is a unique form of telecommunication in regard to how it is regulated. Unlike other forms of telecommunications, such as a telephone, television, and radio broadcasts, the Internet (as well as cable television, satellite television, and radio) lacks the type of speech regulations that are enforced on the former platforms.[126] The Federal Communications Commission (FCC) has stated that "[t]he First Amendment, as well as Section 326 of the Communications Act, prohibits the Commission from censoring broadcast material and from interfering with freedom of expression in broadcasting. . . . However, the right to broadcast material is not absolute."[127] The restrictions that the FCC is permitted to maintain are not nearly as arbitrary and capricious as of those that are self-enforced by social networking sites. The FCC's permissible restrictions are typically confined to material that is obscene, indecent, or expressions of views that involve a "clear and present danger of serious, substantive evil."[128] This section briefly discusses United States Supreme Court precedent that has determined the scope of regulation on speech the government, or the FCC, may apply to telecommunication providers.

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[124] *Id.* at 666-67 ("Filters are less restrictive than COPA. . . . Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished.").

[125] *Id.* at 669.

[126] *Obscene, Indecent, and Profane Broadcasts*, FCC.GOV, https://www.fcc.gov/consumers/guides/obscene-indecent-and-profane-broadcasts (last visited Oct. 13, 2019).

[127] *The Public and Broadcasting*, FCC.GOV, https://www.fcc.gov/media/radio/public-and-broadcasting#SPEECH (last visited Oct. 13, 2019).

[128] *The FCC and Freedom of Speech*, FCC.GOV, https://www.fcc.gov/consumers/guides/fcc-and-freedom-speech (last visited Oct. 13, 2019).

i. Telephone Communications

In *Sable Communications of California, Inc. v. FCC*,[129] the U.S. Supreme Court was asked to determine the constitutional validity of Section 223(b) of the Communications Act of 1934.[130] This section of the Communications Act of 1934 provided for a complete ban on all obscene and indecent "interstate commercial telephone messages."[131] The appellant, Sable Communications, Inc., was a provider of prerecorded sexual telephone messages or also known as "dial-a-porn," which customers would purchase for a fee.[132] The Court quickly disposed of Sable's challenge to the statute's provision barring obscenity from being transmitted over a telephone for commercial purposes, and held that "[i]n contrast to the prohibition on indecent communications, there is no constitutional barrier to the ban on obscene dial-a-porn recordings."[133] Furthermore, the Court agreed with the district court's conclusion that although the government has a legitimate interest in restricting indecent speech under certain circumstances, Section 223(b) was not narrowly tailored and violated the First Amendment.[134]

The Court held that "[s]exual expression which is indecent but not obscene is protected by the First Amendment . . . The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."[135] The Court reasoned that an outright ban is not narrowly tailored in the context of "dial-a-porn" communications because it required consumers to take affirmative actions to receive the messages, as distinguished from public radio broadcasts where there is a "captive audience" and an indecent message could be broadcasted without any warning.[136]

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[129] 492 U.S. 115 (1989).
[130] Sable Commc'ns of Cal. Inc., v. FCC, 492 U.S. 115, 117 (1989).
[131] *Id.*
[132] *Id.* at 118.
[133] *Id.* at 124.
[134] *Id.* at 126.
[135] *Id.* (citing Ginsberg v. New York, 390 U.S. 629, 639-40 (1968)).
[136] *Sable Commc'ns of Cal. Inc.*, 492 U.S. at 127-29 (citing FCC v. Pacifica Foundation, 438 U.S. 726 (1978)) (In *Pacifica*, the Court upheld a federal regulation on indecent radio broadcasts because it was not an outright ban of the indecent speech. Rather, the federal regulation "sought to channel [indecent speech] to times of day

ii. Cable Television

In *United States v. Playboy Entertainment Group, Inc.*,[137] the U.S. Supreme Court considered the issue of whether Section 505 of the Telecommunication Act of 1996 was unconstitutional content-based restriction that violated the First Amendment.[138] Section 505 of the Telecommunication Act of 1996 required "cable television operators who provided channels 'primarily dedicated to sexually-oriented programming' to 'fully scramble or to otherwise fully block' those channels or limit their transmission to hours when children are unlikely to be viewing . . . ."[139] The purpose of Section 505 was to prevent the exposure of children to these explicit programs through what was known as "signal bleed."[140] Signal bleed occurs when a cable provider scrambles a channel in the regular course of business, but "either or both audio and visual portions of the scrambled programs might be heard or seen."[141]

The effect of the statute caused most cable providers to select the time limiting option, and thus, "for two-thirds of the day no household in those service areas could receive the programming, whether or not the household or the viewer wanted to do so."[142] These restrictions implemented by Section 505 that were carried into effect by cable operators significantly hurt the revenue of Playboy.[143] The Court held that Section 505 of the Telecommunication Act was an unconstitutional violation of the First Amendment because Section 505, while serving a compelling governmental interest, was not the least restrictive means necessary to achieve the interest of protecting children from exposure to sexually explicit content due to signal bleeds.[144] The Court made clear that if an individual's speech was to be silenced or even regulated, the government's conduct must adhere to a standard of strict scrutiny.[145] Moreover, the court distinguished

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when children most likely would not be exposed to it." Pacifica Foundation, 438 U.S. at 733).

[137] 529 U.S. 803 (2000).

[138] United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 806-07 (2000).

[139] *Id.* at 806.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 806-07.

[143] *Id.* at 809.

[144] *Id.* at 827.

[145] *Id.* at 814.

cable television from broadcast media, such as radio in that "[c]able systems have the capacity to block unwanted channels on a household-by-household basis."[146]

The Court explained that the government could not survive strict scrutiny because there was a less restrictive alternative to the speech regulation, namely, "targeted blocking is less restrictive than banning, and the government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests."[147] Since the government could not prove that the proposed alternative, household-by-household blocking of sexually explicit channels, would be ineffective in achieving its goals the content-based speech restriction was presumptively held unconstitutional.[148]

E. Looking Forward: Social Media, Free Speech, and One Supreme Court Justice

As the previous sections have shown, the United States Supreme Court has consistently struck down the government's content-based restrictions on speech when the restrictions go too far in chilling an individual's speech. When regulations by the government are not of the least restrictive means, it is very likely the regulations will fail, and thus, any regulation placed on Internet service providers that infringes on the First Amendment will have to survive the courts' scrutiny. Therefore, if Congress decides to impose new regulations to protect free speech, or even amend Section 230 to ensure fair content moderation policies, it will have to tread lightly in order to avoid a constitutional violation.

What seems to be less apparent is how the Court will decide on how the Internet may be regulated so that it can remain a neutral public forum as the Court has enunciated in *Reno* and *Packingham.* The United States Court of Appeals for the Second Circuit was one of the first appellate courts to decide a case regarding the First Amendment's public forum doctrine and social media. In *Knight First Amendment Institute at Columbia University v. Trump*,[149] the Second Circuit affirmed the district court's holding that the president's blocking of social media users violated the users' First Amendment

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[146] *Id.* at 815.
[147] *Id.*
[148] *Id.* at 816.
[149] 928 F.3d 226 (2d 2019).

rights.[150] The logic behind the Second Circuit's decision is clear. When using his personal Twitter account, President Trump was also acting in his official governmental capacity and arbitrarily blocked certain user's from seeing or interacting with his tweets. Thus, President Trump's conduct was sufficient to establish state action and trigger the protections of the First Amendment that would normally be applicable when the government restricts speech in any public forum.[151] However, President Trump appealed the Second Circuit's decision, and on April 4, 2021, a few months after President Trump's term had expired and President Joe Biden took office, the Supreme Court granted certiorari, vacated the judgment of the Second Circuit, and remanded it with the instructions to dismiss the case as moot because President Trump was no longer in office.[152] By dismissing the case as moot, the Supreme Court had passed up the opportunity to address a question of large public concern, are social media providers public forums in the constitutional sense? And to what degree is the Court willing to modify First Amendment and state action jurisprudence to address issues with online censorship. While the Court would only have to address the issue in question: whether President Trump's personal Twitter Account was a public forum, the Court could have used the opportunity to reevaluate the state action doctrine, as well as develop First Amendment jurisprudence surrounding the Internet. Despite the Court's unwillingness or reluctance to hear the case, one associate justice appears to be blazing the trail in the fight against online arbitrary censorship. Justice Clarence Thomas, concurring in the Court's decision to dismiss the case as moot, appears to have outlined a potential legal path forward in dealing with Internet service providers and interactive computer service providers.[153] However, without a majority of the Court's endorsement, Justice Thomas's concurring opinion can only serve as a roadmap for future advocates. What remains unclear is at what point does the self-regulation by interactive computer services, and more specifically social networking sites threaten an individual's freedom of speech and expression in the digital public square?

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[150] Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 230 (2d Cir.2019).
[151] *Id.* at 237.
[152] Biden v. Knight First Amend. Inst. At Columbia Univ., 141 S. Ct. 1220 (2021).
[153] *See id.* at 1221 (Thomas, J., concurring); *see also infra* Section V (discussing Justice Thomas's concurring opinion in *Biden v. Knight First Amendment Institute at Columbia University*).

IV. DOES SECTION 230(C) OF THE COMMUNICATION DECENCY ACT GIVE INTERNET SERVICE PROVIDERS AND INTERACTIVE COMPUTER SERVICE PROVIDERS A CARTE BLANCHE TO CENSOR OR BAN ITS USERS?

A. Ascertaining Congress's Intent

Section 230 of the Communications Decency Act has been increasingly scrutinized on both sides of the political aisle. However, there tends to be a disagreement as to what exactly is the solution to Big Tech censorship.[154] Despite what each party in Congress may think is the appropriate solution, it is crucial to examine what exactly Congress's intent was in passing Section 230 into law in 1996. Section 230(c) of the Communications Decency act states:

> (c) Protection for "Good Samaritan" blocking and screening of offensive material
> (1) Treatment of publisher or speaker
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
> (2) Civil liability
> No provider or user of an interactive computer service shall be held liable on account of—
> (A) any action voluntarily taken in *good faith* to *restrict access* to or *availability* of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[155]

[154] Matt Laslo, *supra* note 23.
[155] 47 U.S.C § 230(c) (2018) (emphasis added).

Furthermore, to understand the niceties of Section 230, it is essential to read the "Definitions" listed under Section 230(f). Particularly, Section 230(f)(2) provides that "[t]he term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . ."[156] Additionally, Section 230(f)(3) provides that "[t]he term 'information content provider' means any person or entity that is responsible, *in whole or in part*, for the creation or development of information provided through the Internet or any other interactive computer service."[157]

What tends to be the most controversial aspect of Section 230 is that it provides social networking sites—interactive computer services—the ability to censor or even ban a user for any material posted that the social networking site deems in "good faith" to be "objectionable" regardless if the speech is constitutionally protected.[158] Congress's primary goal appears to be fairly clear: the law was intended to protect minors from exposure to obscene or indecent material that was widely circulated on the Internet in the late 1990s.[159] In *Blumenthal v. Drudge*,[160] the District Court for the District of Columbia explained, "Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others."[161]

It is quite apparent that Congress wanted to deviate from the common law scheme of publisher liability in regard to the Internet. Under the common law scheme, liability for defamation or similar torts depends on "the degree of editorial control that the entity exercises over the material at issue."[162] As one commentator stated, "[a]

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[156] 47 U.S.C. § 230(f)(2).
[157] 47 U.S.C. § 230(f)(3) (emphasis added).
[158] 47 U.S.C § 230(c)(2)(A).
[159] Batzel v. Smith, 333 F.3d 1018, 1026 (9th Cir. 2003) (citing H.R. REP. NO. 104-458, at 81-91 (1996) (Conf. Rep.); S. REP. NO. 104–230, at 187–93 (1996) (Conf. Rep.)).
[160] 992 F. Supp. 44 (D.D.C 1998).
[161] Blumenthal v. Drudge, 992 F. Supp. 44, 46 (D.D.C 1998).
[162] Patricia Spiccia, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VAL. U. L. REV. 369, 377 (2013).

common carrier passively provides a forum for third-party speech without editorial control; therefore, it is not liable for information it transmits. In contrast, a publisher exercises editorial control over the third-party information and thus is subject to liability for the content of the speech."[163] Under the common law scheme, it appears that an interactive computer service provider, such as Facebook or Twitter, that takes the initiative to censor its users, may by nature, appear to be acting in the shoes of a publisher, rather than a common carrier. And as social media and social network companies begin to police their websites, they have increasingly exercised more and more discretion that resembles the functions of a publisher.[164]

Congress's intent is further laid out within the statute itself. Section 230(a) "Findings" states,

> (a) Findings
> The Congress finds the following:
> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
> (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
> (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

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[163] *Id.* at 378.

[164] *See*, *e.g.*, Yoel Roth & Nick Pickles, *Updating Our Approach to Misleading Information*, TWITTER BLOG (May 11, 2020), https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information.html; Elizabeth Dwoskin, *Twitter Labels Trump's Tweets With a Fact Check for the First Time*, WASH. POST (May 26, 2020), https://www.washingtonpost.com/technology/2020/05/26/trump-twitter-label-fact-check/; Elizabeth Dwoskin, *Twitter's Decision to Label Trump's Tweets Was Two Years in the Making*, WASH. POST (May 29, 2020), https://www.washingtonpost.com/technology/2020/05/29/inside-twitter-trump-label/.

> (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
> (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.[165]

This "Finding" section of the statute makes clear that Congress had recognized key fundamental reasons for the writing and passing of this statute. First, Congress recognized that the Internet was rapidly developing, and it would ultimately provide an efficient means for broadcasting "educational and informational resources" that the "*users*" would be able to control.[166] Second, Congress purposely included in its findings that the Internet and those who provided interactive computer services would "offer a forum for true diversity of political discourse . . . and . . . intellectual activity."[167] Finally, Congress recognized that the Internet would continue to flourish without government regulation, like most enterprise in the United States, and that Americans would increasingly rely on Internet based media for political and educational services.[168] Congress's findings help illustrate that Congress was focused on two major points: (1) the Internet would be the forum in which Americans would receive their information, of any variety, and (2) the *User*, not government regulators, not corporate bureaucrats, should control the flow of information.

Furthermore, Congress explicitly included its main policy goals for passing this legislation in Section 230(b). The policy section of the statute provides,

> (b) Policy
> It is the policy of the United States—
> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

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[165] 47 U.S.C. § 230(a).
[166] 47 U.S.C. § 230(a)(1), (2).
[167] 47 U.S.C. § 230(a)(3).
[168] 47 U.S.C. § 230(a)(4), (5).

> (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
> (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
> (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.[169]

This policy section of the statute also makes clear that Congress sought an ever-expanding Internet that was based on the principles of free market enterprise (minimal state or federal regulations).[170] Again, Congress was clear in its intent to protect children from obscenities and other harmful content by encouraging the development of methods to maintain *user* control over the content parents could permit their children to view, i.e., "blocking and filtering technologies."[171] And in order to execute these policy goals Congress determined that the inclusion of Section 230(c)—the "Good Samaritan" provision—would enable interactive computer service providers to police themselves in a manner that would promote the free market Internet enterprise, foster free speech, all while providing interactive computer services with publisher liability protections when restricting "objectionable online content."[172] While it may

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[169] 47 U.S.C. § 230(b).
[170] 47 U.S.C. § 230(b)(1), (2).
[171] 47 U.S.C. § 230(b)(3), (4).
[172] H.R. REP. NO. 104-458, at 81-91 (1996) (Conf. Rep.); S. REP. NO. 104–230, at 187–93 (1996) (Conf. Rep.) (stating that "[o]ne of the specific purposes of this section is to overrule Stratton-Oakmont v. Prodigy and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material."). In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), Prodigy, an Internet service provider similar to AOL, was found liable for a third-party's defamatory statements made on Prodigy's computer bulletin boards. *Id.* at *4. The New York Supreme Court explained that because Prodigy utilized screening software and was actively monitoring the content on its computer bulletin board, Prodigy was considered to be making editorial decisions, and therefore was a publisher. *Id.* ("By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of of-

seem clear, to some ascertainable degree, what Congress's intent was for passing Section 230, much of the confusion and debate surrounding Section 230 of the CDA—since its inception—has developed due to the courts' overly broad interpretations of the statute.

B. The Courts' Overly Broad Interpretation of Section 230

In Congress's effort to protect children from online obscenities and other harmful threats, the protections it has afforded to interactive computer service providers, via Section 230 of the CDA, have virtually given Big Tech companies a liability shield that can be used as a sword. What makes this statute all the more troublesome is the fact that courts have broadly interpreted the language of Section 230.[173] The statutory interpretation by federal and state courts has been so broad that it has caught the eye of at least one justice on the U.S. Supreme Court. On October 13, 2020, Associate Justice Clarence Thomas wrote a statement respecting the denial of certiorari in *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*.[174] In this statement, Justice Thomas acknowledged that in the twenty-four years that Section 230 has been enacted into law the Supreme Court has yet to rule on its interpretation.[175] Justice Thomas recognized that "most of today's major Internet platforms did not exist" when Congress had enacted the law in 1996.[176] What appears to be most significant about Justice Thomas's statement is that he expressly recognized that federal district and circuit courts "relied heavily on the 'policy' and 'purpose' of § 230 to conclude that immunity is unavailable when a plaintiff alleges anticompetitive conduct."[177] Justice Thomas emphasized that this was one of the few instances when the courts relied on "policy and purpose to *deny* immunity under § 230."

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fensiveness and 'bad taste,' for example, Prodigy is clearly making decisions as to content, and such decisions constitute editorial control.").

[173] *See* Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009); Sikhs for Justice, Inc. v. Facebook, Inc., 144 F. Supp. 3d 1088 (N.D. Cal. 2015).

[174] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13 (2020) (mem.) (statement of Justice Thomas respecting the denial of certiorari).

[175] *Id.* at 13.

[176] *Id.*

[177] *Id.*

It appears that the courts have taken up a practice of using policy and purpose to read "extra immunity" into Section 230.[178]

When taken on its face, Justice Thomas asserts, "the statute suggests that if a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A)."[179] The federal district and circuit courts' overly broad interpretation of Section 230 appears to have written an unintended immunity into the statute, specifically, immunity from "distributor" liability[180] as compared to the intended immunity from "publisher" liability.[181]

The Fourth Circuit in *Zeran v. American Online, Inc.*,[182] was the first federal appellate court to determine whether the liability protections of Section 230 would be extended to cases where a plaintiff sued an interactive computer service based on a theory of distributor liability. The Fourth Circuit—relying on the purposes and policy of the statute—explained, "Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. . . . Section 230 was enacted, in part, to maintain

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[178] *Id.* at 15.

[179] *Id.* at 14-15.

[180] Distributor liability is a subset of defamation law that holds a distributor or transmitter of a third-party's defamatory statements liable, but the distributor must know of the statement's defamatory character. RESTATEMENT (SECOND) OF TORTS § 581 (AM. L. INST. 1977). *See* Stratton Oakmont v. Prodigy, 1995 WL 323710, at *3 (citing Cubby Inc. v. CompuServe Inc., 776 F. Supp. 135, 139 (S.D.N.Y. 1991)) (explaining that "distributors such as book stores and libraries may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue."). In *Cubby Inc. v. CompuServe Inc.*—a case decided prior to the passing of Section 230 of the CDA—the Southern District of New York determined that a computer database library needed to have knowledge in order to be held liable for any third-party statements published within the database. *Cubby Inc.*, 776 F. Supp. at 140. The district court acknowledged that once an item was published into the database it would be unfeasible for CompuServe to review each and every publication for any statement that may rise to the level of defamation. *Id.* "First Amendment guarantees have long been recognized as protecting distributors of publications. . . . Obviously, the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment." Lerman v. Flynt Distributing Co., 745 F.2d 123, 139 (2d Cir.1984), *cert. denied*, 471 U.S. 1054 (1985).

[181] *Malwarebytes, Inc.*, 141 S. Ct. at 14-15 (Justice Thomas explaining how the text of Section 230 refers specifically to publisher liability and not distributor liability).

[182] Zeran v. American Online, Inc., 129 F.3d 327 (4th Cir. 1997).

the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."[183] However, in relying on what the court believed to be Congress's intent, the Fourth Circuit rejected Zeran's claim that AOL could be found liable under the theory that AOL acted not as a publisher, but as a distributor.[184] The *Zeran* court was concerned that if it imposed distributor liability upon interactive computer services, it would ultimately undermine Congress's goal of promoting free speech and self-regulation within the budding Internet industry.[185] The Fourth Circuit was able to reach this conclusion based on an interpretation of defamation law that distributor liability is a mere subset of publisher liability and, thus, Congress must have impliedly intended to encompass distributor liability protections into Section 230.[186]

The *Zeran* court set a precedent that was subsequently adopted by many other courts in varying contexts. For example, The Ninth Circuit in *Carafano v. Metrosplash.com, Inc.*[187] emphasized the policy decisions of Congress in enacting Section 230, namely, Congress's intent to promote the "free exchange of information and ideas," as well as "encourag[ing] voluntary monitoring for offensive or obscene material."[188] The Ninth Circuit, in essence, adopted the *Zeran* court's holding that there was no intended distinction between publisher liability and distributor liability, and any such distinction would in fact chill speech because the possibility of tort liability upon an interactive computer service would encourage censorship to protect against liability.[189] The First Circuit deferred to the *Zeran* court's interpretation of Section 230 immunity as well, recognizing broad liability protections against tort liability as a means to protect free speech on the Internet, and deferred to a broad reading of im-

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[183] *Id.* at 330.
[184] *Id.* at 331-34.
[185] *Id.* at 333 ("Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact.").
[186] *Id.* at 331-33.
[187] Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003).
[188] *Id.* at 1122 (citing Batzel v. Smith, 333 F.3d 1018, 1026-30 (9th Cir. 2003)).
[189] *Carafano*, 339 F.3d at 1122; *see also Batzel*, 333 F.3d at 1026-30 (discussing the background behind Section 230(c) and recognizing that "courts construing § 230 have recognized as critical in applying the statute the concern that lawsuits could threaten the 'freedom of speech in the new and burgeoning Internet medium.'" (citing *Zeran*, 129 F.3d at 332-33)).

munity into Section 230.[190] The broad interpretation of Section 230's immunity provision has also been upheld by some states' highest courts.[191]

The use of "policy and purpose" by the federal courts to discern the intent of Congress has resulted in contradictory effects in how the statute is now applied versus how the law may have been intended to work. Despite Congress's choice to only use the word "publisher," the *Zeran* court ultimately rejected the idea that the term "publisher" did not include protections for interactive computer services from distributor liability, thus, concluding it to be a mere subset of publisher liability. In fact, Justice Thomas makes a compelling point, Congress may have shared the opposite view of the *Zeran* court to the extent that Congress recognized distributor liability, not as a mere subset of publisher liability, but as its own distinct concept. Notably, "Congress expressly imposed distributor liability in the very same Act that included § 230. Section 502 of the Communications Decency Act makes it a crime to 'knowingly . . . display' obscene material to children, even if a third party created that content."[192] Thus, when drafting Section 230, in light of, and in response to, the *Stratton Oakmont* decision, Congress was likely aware of this distinction between the two forms of liability. Appropriate weight should have been given to this consideration.

Justice Thomas further noted that if Congress wanted to eliminate distributor liability, rather than using the word publisher—without any further indication that it would encompass distributor liability—Congress could have simply stated that no interactive computer service is liable for the content posted by a third party.[193] Ra-

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[190] Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007) (citing *Zeran*, 129 F.3d at 332-33) ("It is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech." *Universal Commc'n Sys., Inc.*, 478 F.3d at 420).

[191] *See, e.g.*, Shiamili v. Real Estate Grp. of New York, Inc., 952 N.E.2d 1011, 1016 (N.Y. 2011) ("Both state and federal courts around the country have 'generally interpreted Section 230 immunity broadly, so as to effectuate Congress's 'policy choice . . . not to deter harmful online speech through the . . . route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.'" (quoting *Zeran*, 129 F.3d at 330-31)); Barrett v. Rosenthal, 146 P.3d 510, 517-19 (Cal. 2006) (concluding "the *Zeran* court's construction of the term "publisher" is sound.").

[192] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 15 (2020) (mem.).

[193] *Id.* at 16.

ther, Congress decided to use the specific language as it relates to publisher liability in section 230(c)(1), while using the broader immunity language in section 230(c)(2), which governs content removal by an interactive computer service.[194] Generally, when interpreting a statute, the U.S. Supreme Court has held that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[195] Therefore, while we cannot be certain about whether Congress actually intended the term "publisher" to include the concept of distributor liability, it is plausible that the appropriate reading of Section 230 is to make the distinction between both forms of liability.

There is no denying that Congress intended, at a minimum, that interactive computer service providers receive legal immunity against publisher liability for the material posted on their computer services by information content providers (their users). This aspect of Section 230 is somewhat less controversial. Generally speaking, an interactive computer service provider will not be treated as the publisher of any material posted by another information content provider. But what happens if an interactive computer service publishes its own statement, or "speaks" on its own? Or, when, if ever, does the interactive computer service become an information content provider, who is not protected from civil liability under Section 230? The courts may have muddied the waters here as well by "depart[ing] from the most natural reading of the text by giving Internet companies immunity for their own content."[196]

It could hardly be the case that Congress intended to provide civil immunity to interactive computer services in every case—including in situations where material is created and published by the provider. However, the Fourth Circuit in *Zeran* held that Section 230 bars lawsuits against an interactive computer service provider when seeking to hold the "provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or *alter content*."[197] By holding that Section 230

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[194] *Id.*
[195] Russello v. United States, 464 U.S. 16, 23 (1983).
[196] *Malwarebytes, Inc.*, 141 S. Ct. at 16.
[197] Zeran v. American Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (emphasis added).

allowed interactive computer services to engage in editorial functions of a publisher and alter content, *Zeran* broadened the scope of civil immunity to cases where the provider could edit a third-party's content and republish it.[198] However, "[t]his grant of immunity applies only if the interactive computer service provider is not also an 'information content provider,' which is defined as someone who is 'responsible, in whole or in part, for the creation or development of' the offending content."[199] This presents another crucial issue under Section 230. Courts have been quite reluctant to broadly interpret the language defining what constitutes an information content provider, and instead have chosen, in most cases, to narrowly construe when an interactive computer service is treated as an information content provider, thus, allowing for the circumstances in which an interactive computer service could alter content and remain protected under the law.

After *Zeran*, courts typically afforded Section 230 immunity to interactive computer services that were only exercising, what appeared to be, editorial functions, which Congress sought to allow. In *Blumenthal v. Drudge*, the U.S. District Court for the District of Columbia held that AOL was not an information content provider as defined under Section 230(f)(3), when it entered into a contract with the Drudge Report. The Drudge Report was an online gossip news publication that was available through its website and was sent to its subscribers through an AOL email listserv. AOL's contract with Drudge provided that AOL would make the Drudge Report available to all of AOL's members.[200] Additionally, AOL "affirmatively promoted Drudge as a new source of unverified instant gossip on AOL," and under the terms of the contract with Drudge, AOL had the right to "remove content that AOL reasonably determine[s] to violate AOL's then standard terms of service."[201] In *Ben Ezra, Weinstein, & Co., Inc. v. American Online Inc.*, the Tenth Circuit also held that AOL was not an information content provider when it edited or removed stock market information that was provided to AOL by third-parties.[202] In light of these prior cases, the Ninth Circuit then held in

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[198] *Id.* at 332.
[199] Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008) (citing 47 U.S.C. § 230(f)(3)).
[200] Blumenthal v. Drudge, 992 F. Supp. 44, 47-53 (D.D.C. 1998).
[201] *Id.*
[202] Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc., 206 F.3d 980, 985-86 (10th Cir. 2000). *See also* Schneider v. Amazon.com, Inc., 31 P.3d 37, 39-43

Batzel v. Smith[203] that "[t]he 'development of information' therefore means something more substantial than merely editing portions of an e-mail and selecting material for publication."[204] While stating something more substantial was required, and without elaborating further, the courts' reading of Section 230(f)(3) seems to ignore the fact that the statute also addresses situations where the interactive computer service is responsible "in part" for the "creation or development of information." Thus, by reading the word "substantial" into Section 230(f)(3), the courts gradually increased the situations where an interactive computer service would still receive immunity.

In order for an interactive computer service to become an information content provider, and thus, subject to civil liability, most courts will apply the material contribution test, as it was established by the Ninth Circuit.[205] *In Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, the Ninth Circuit held, when discussing what it means to "develop" material as stated in Section 230(f)(3), that "a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct."[206] The courts have, more or less, consistently applied the material contribution test whenever tasked with determining whether an interactive computer service is also an information content provider, and therefore, not entitled to civil liability immunity under Section 230. In *Jones v. Dirty World Entertainment Recordings LLC*,[207] the Sixth Circuit held that Dirty World—a "website [that] enables users to anonymously upload comments, photographs, and video, which [an employee] then selects and publishes along with his own distinct, editorial comments"[208]—was not an information content provider—and was protected under

(Wash. Ct. App. 2001) (rejecting plaintiff's claim that Amazon, an interactive computer service, can be considered an information content provider simply by having the right to edit its users' defamatory comments).

[203] Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003).

[204] *Id.* at 1031.

[204] *Id.* at 1031 & n.18.

[205] Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008).

[206] *Id.* at 1168.

[207] Jones v. Dirty World Entertainment Recordings LLC, 755 F.3d 398 (6th Cir. 2014).

[208] *Id.* at 401.

Section 230.[209] The Sixth Circuit applied the holding in *Roommates.Com, LLC* to Dirty World's conduct and stated:

> A website operator who edits user-created content—such as by correcting spelling, removing obscenity or trimming for length—retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality. However, a website operator who edits in a manner that contributes to the alleged illegality—such as by removing the word "not" from a user's message reading "[Name] did not steal the artwork" in order to transform an innocent message into a libelous one—is directly involved in the alleged illegality and thus not immune.[210]

Justice Thomas noted that the decision of the Sixth Circuit in *Jones* to treat the defendant website as an interactive computer service and not an information content provider that created or developed information, at least in part, was "dubious."[211] The statute has been so broadly interpreted that the Ninth Circuit has held that Section 230(c)(1) provides a liability to shield for interactive computer services that are being sued for their decision as publishers when modifying or removing their users' content, despite Section 230(c)(2) providing for the circumstances an interactive computer service can *restrict or remove content in good faith*.[212] By reading the statute in such a manner that runs the risk of Section 230(c)(1) swallowing the rule provided in Section 230(c)(2), the courts have enabled situations

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[209] *Id.* at 416-17.

[210] *Id.* at 411 (quoting *Roommates.Com, LLC*, 521 F.3d at 1169).

[211] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 16 (2020) (mem.) (discussing under the prevailing interpretation of Section 230(f)(3) "a company can solicit thousands of potentially defamatory statements, 'selec[t] and edi[t] ... for publication' several of those statements, add commentary, and then feature the final product prominently over other submissions—all while enjoying immunity.") (citing *Jones*, 755 F.3d at 416).

[212] *See* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1105 (9th Cir. 2009); *cf.* e-ventures Worldwide, LLC v. Google, Inc., No. 214CV646FTMPAMCM, 2017 WL 2210029, at *3 (M.D. Fla. Feb. 8, 2017) ("interpreting the CDA [as the *Barnes* court did] results in the general immunity in (c)(1) swallowing the more specific immunity in (c)(2). Subsection (c)(2) immunizes only an interactive computer service's 'actions taken in good faith.' If the publisher's motives are irrelevant and always immunized by (c)(1), then (c)(2) is unnecessary. The Court is unwilling to read the statute in a way that renders the good-faith requirement superfluous.").

where Section 230 protects companies that may be violating civil rights laws, i.e., racial or religious discrimination when providing their services or moderating their users content.[213] This is due to the fact that the courts have determined that "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230."[214] What this holding explicitly ignores is the fact that no good faith showing was made as to why, in *Sikhs for Justice, Inc.*'s case, Facebook blocked access to the Sikhs for Justice Facebook page in India. Rather, the Ninth Circuit permitted Facebook's arbitrary decision-making, which could have been a result of racial or religious animus, or even by Facebook at the direction of a government that sought to repress the speech of a racial or religious minority group.

The legislative material prior to passing Section 230 into law and the case law thereafter tend to show that Congress's purpose and policy of facilitating free speech and free market enterprise have had contradictory effects in application. This has become particularly evident in the area of protecting children from obscenities and other harmful content.[215] Courts have broadened the protective scope of

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[213] *Malwarebytes, Inc.*, 141 S. Ct. at 16 (citing Sikhs for Justice, Inc. v. Facebook, Inc., 697 Fed. App'x 526 (9th Cir. 2017), *aff'g* 144 F. Supp. 3d 1088, 1094 (N.D. Cal. 2015)). In *Sikhs for Justice, Inc.*, the plaintiff sued Facebook when it blocked access to its page in India. *Sikhs for Justice, Inc.*, 144 F. Supp. 3d at 1090. The plaintiff's Facebook page was used to "organize[] a number of political and human rights advocacy campaigns, including promoting the right to self-determination for the Sikh people in Punjab and opposing the forced conversions of religious minorities to Hinduism that have allegedly taken place in India . . . ." *Id.* Plaintiff accused Facebook of discrimination, or even colluding with the India's government to suppress the plaintiff's efforts of activism in violation of Title II of the Civil Rights Act of 1964. *Id.* However, these issues were never litigated as plaintiff's lawsuit did not survive a motion to dismiss due to Section 230 of the CDA.

[214] *Sikhs for Justice, Inc.*, 144 F. Supp. 3d at 1094 (quoting *Roommates.Com, LLC*, 521 F.3d at 1170-71).

[215] In *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), the Ninth Circuit, when dissecting the history of Section 230, explained "[t]he second reason for enacting § 230(c) was to encourage interactive computer services and users of such services to self-police the Internet for obscenity and other offensive material, so as to aid parents in limiting their children's access to such material." *Id.* at 1028. This policy goal has largely been a failure in terms of Section 230 being an effective tool against distribution of heinous and even criminal obscenities, such as child pornography. *See* Michael H. Keller & Gabriel J.X. Dance, *The Internet is Overrun with Images of Child Sexual Abuse. What Went Wrong?*, N.Y. TIMES (Sept. 29, 2019), https://www.nytimes.com/interactive/2019/09/28/us/child-sex-abuse.html ("While the material, commonly known as child pornography, predates the digital era,

Section 230 beyond what is plausible, or even practical. Why is the law impractical in its current state? One can answer that question by looking to the behavior of interactive computer services, and particularly social media providers. Take Twitter for example. Twitter is one of the social media providers that has banned President Trump from its platform. However, Twitter knowingly refused to remove child sexual abuse material (CSAM) when the child victim explicitly identified the material's prevalence on Twitter and pleaded for its removal.[216] Oddly, Twitter declined to remove this egregious content, even though the complainant was confirmed to be the underage victim who appeared in the content.[217] Twitter did not remove the content until the child sought help from the federal authorities.[218] Twitter's response to the victim's lawsuit was to file a motion to dismiss, asserting immunity under Section 230.[219] This case paints a clear picture on why Section 230 and its current interpretation has

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smartphone cameras, social media and cloud storage have allowed the images to multiply at an alarming rate. Both recirculated and new images occupy all corners of the internet, including a range of platforms as diverse as Facebook Messenger, Microsoft's Bing search engine and the storage service Dropbox."). This is a tragedy that is much more widespread than meets the eye. For example, YouTube's curation algorithms provided pedophiles with videos of children playing in their backyard pools:

> YouTube had curated the videos from across its archives, at times plucking out the otherwise innocuous home movies of unwitting families, the researchers say. In many cases, its algorithm referred users to the videos after they watched sexually themed content. The result was a catalog of videos that experts say sexualizes children.

Max Fisher & Amanda Taub, *On YouTube's Digital Playground, an Open Gate for Pedophiles*, N.Y. TIMES (June 3, 2019), https://www.nytimes.com/2019/06/03/world/americas/youtube-pedophiles.html. *See also* K.G Orphanides, *On YouTube, a Network of Paedophiles is Hiding in Plain Sight*, WIRED (Feb. 20, 2019), https://www.wired.co.uk/article/youtube-pedophile-videos-advertising ("YouTube has a long history of content regulation problems, particularly when it comes to children.").

[216] Gabrielle Fonrouge, *Twitter Refused to Remove Child Porn Because It Didn't 'Violate Policies': Lawsuit*, N.Y. Post (Jan. 21, 202, 10:35 AM), https://nypost.com/2021/01/21/twitter-sued-for-allegedly-refusing-to-remove-child-porn/. *See also* Complaint, Doe v. Twitter, Inc., No. 21-cv-00485-JCS, 2021 WL 226066 (N.D. Cal. Jan. 20, 2021).

[217] Gabrielle Fonrouge, *supra* note 216.

[218] *Id.*

[219] *See* Defendant's Motion to Dismiss Plaintiff's Complaint, Doe v. Twitter, Inc., No. 21-cv-00485-JCS (N.D. Cal. Mar. 10, 2021).

failed; interactive computer services should not be secure in their decisions to disregard the dissemination of CSAM that was brought directly to their attention, while allowing censorship of political speech surrounding, i.e., election integrity. This behavior is antithetical to Congress's intent.

V. FINDING A SOLUTION TO BIG TECH CENSORSHIP

This section will explore whether there is a First Amendment based solution to Internet service provider and interactive computer service provider censorship of its users. This section will also address solutions that can be achieved by congressional action with the goal of facilitating the exchange of information and ideas and preserving free market enterprise on the Internet. Section V.A will discuss the unlikelihood that the First Amendment will be applicable to private companies on the Internet without a new adaption of First Amendment jurisprudence by the Court. Section V.A.i will consider the enactment of an Internet civil rights statute that would provide specific protections for consumers against invidious discrimination that have stifled speech and competition on the Internet. Section V.A.ii will briefly discuss Justice Thomas's roadmap for the future of speech on the Internet. Section V.B will analyze whether there is a need to repeal Section 230 or amend the statute to clarify its scope. Section V.B.i will explore whether it is practical to repeal Section 230 in its entirety. Section V.B.ii will propose the amendment of Section 230. Specifically, it will recommend the adoption of the Department of Justice's proposed legislative amendments to Section 230 and will demonstrate how enacting these proposals promotes free speech on the Internet. Section V.C will briefly analyze current congressional proposals to amend Section 230. Section V.C.i will discuss why many congressional proposals inadequately address the content moderation issues under Section 230. Finally, Section V.C.ii will discuss some notable legislative proposals and recommendations that can add to the DOJ's legislative proposal.

A. The First Amendment and State Action: An Insurmountable Hurdle?

While Big Tech censorship has managed to stifle speech in various ways,[220] many commentators do not disagree that the ability to control a private corporation's actions, generally speaking, do not fall within the purview of the First Amendment. The U.S. Supreme Court has consistently held that in order for the First Amendment to be implicated the alleged infringement must come from the government, whether it be a federal or state actor. This principle is consistent with all liberties afforded by the U.S. Constitution.[221] However, over time the courts have developed a seemingly finite number of exceptions that could result in a private entity's action being treated as state action, thus implicating an aggrieved party's constitutional rights. The *Manhattan Community Access Corp*. opinion has signaled the Court's apprehensiveness to expand upon the current exceptions to the state action doctrine. What is more troublesome for free speech on the Internet is that a private actor is typically able to prohibit certain speakers from their property in their editorial discretion. In this case, the private actor is permitted to determine what is "published" on their property.

This principle of law—in conjunction with the liability protections afforded interactive computer services through Section 230—has facilitated the abuse of power by many large interactive computer service providers. Without having to carefully curate content like a traditional publisher, interactive computer services—particularly social network and social media providers—have acted with impunity and have arbitrarily censored, blocked, suspended, deleted, and banned users from their services. Some argue that private companies have the right to deny whomever they like from using their services—aside from reasons that would violate state or federal civil rights laws.

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[220] *Supra* Section II.

[221] *Cf.* The 13th Amendment does prohibit private persons (or companies) from owning slaves or requiring involuntary servitude of others. In theory the First Amendment could be amended to include certain aspects of the Internet—but this seems very unlikely. A journey down this path would be beyond the scope of this Note.

i. Internet Rights are Civil Rights

It would be difficult for those who were born in the 1990s to imagine a world without the Internet. It has seemingly always existed and only improved. As technology continues to advance, a discussion must ensue regarding whether the People are to be afforded certain rights and protections to use the Internet. As the courts have stressed, the purpose of passing Section 230 into law, in large part, was to facilitate the growth of the Internet, while promoting principles of free speech through the sharing of information and ideas. Congress also recognized the need for minimal government interference and allowed Internet service providers and interactive computer services to self-regulate, again, to facilitate the growth of the Internet. As a matter of fact, the Internet has grown tremendously and through information sharing it has empowered—not just millions of Americans—but billions of people worldwide. The Internet has been a megaphone for democracy in many regards.

While the traditional forums for public discourse, such as streets and public parks, are still used for various forms of discourse and protest, the dominant medium to reach people, is no doubt, the Internet. More specifically, social media and social network providers have become the modern public square. One does not simply grab a soap box and head off to the town square to shout to his or her fellow citizens;[222] now people log into Facebook, or Twitter, or perhaps they make a podcast and upload it to YouTube. Through these mediums an individual can engage in political discourse, conduct business, and simply conversate with friends and family. So why should a natural person have any more rights to speak online than the companies who have created the platforms that they wish to speak on? The answer is clear, the same reason why civil right statutes exist that regulate the private conduct of businesses for public accommodations.

ii. Justice Thomas's Roadmap

As briefly mentioned in Section III, Justice Thomas has recently expressed his thoughts on the issues surrounding digital platforms and speech in his concurring opinion in *Biden v. Knight First*

[222] *See* Reno v. American Civil Liberties Union, 520 U.S. 844, 870 (1997).

Amendment Institute at Columbia University.[223] He explained that the way forward, the way in which online censorship and bias can be curtailed, may not be expressly within First Amendment jurisprudence, but with other legal doctrines that "limit a company's right to exclude" without violating the First Amendment.[224] Justice Thomas's roadmap consisted of two paths that Congress could hypothetically take to ensure that Internet based platforms are not discriminating against its users. The first path used was "common carrier" regulations, and the second path employed "public accommodation" laws.[225] A common carrier is a certain business that law generally requires "to serve all comers."[226] Although the laws apply in some cases where common carriers "possess market power," this requirement is not always needed.[227] Moreover, Justice Thomas explained that marketplace domination is not required where "the company holds itself out as open to the public."[228] Many digital platforms, e.g., Facebook, Twitter, or YouTube, resemble common carriers, as they carry and transmit information of others, and the argument is even more convincing once one realizes the market share held by a few Big Tech companies.[229] By holding such a strong concentration of control over speech these few companies have become gatekeepers that can easily control the flow of information, e.g., "[Google] can suppress content by deindexing or downlisting a search result or by steering users away from certain content by manually altering auto-

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[223] Biden v. Knight First Amend. Inst. At Columbia Univ., 141 S. Ct. 1220 (2021) (Thomas, J., concurring).
[224] *Id.* at 1222 (Thomas, J., concurring).
[225] *Id.* at 1222-24.
[226] *Id.* at 1222.
[227] *Id.*
[228] *Id.* at 1223 (quoting German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914)) ("this Court long ago suggested that regulations like those placed on common carriers may be justified, even for industries not historically recognized as common carriers, when 'a business, by circumstances and its nature, . . . rise[s] from private to be of public concern.'").
[229] *Knight First Amend. Inst. At Columbia Univ.*, 141 S. Ct. at 1224 (Thomas, J., concurring) ("The Facebook suite of apps is valuable largely because 3 billion people use it. Google search—at 90% of the market share—is valuable relative to other search engines because more people use it, creating data that Google's algorithm uses to refine and improve search results. These network effects entrench these companies. Ordinarily, the astronomical profit margins of these platforms—last year, Google brought in $182.5 billion total, $40.3 billion in net income—would induce new entrants into the market. That these companies have no comparable competitors highlights that the industries may have substantial barriers to entry.").

complete results."[230] Justice Thomas further explained that if perhaps a digital platform could not be recognized as a common carrier, it may still be subject to public accommodations laws because of the services it provides to the general public at large, and therefore, should be subject to anti-discrimination laws, such that digital platforms deal with consumers equally.[231]

Despite Justice Thomas's willingness to solve the speech issues involving digital platforms, it will likely come down to Congress's legislative authority. While it would be preferred that Congress regulate the digital platforms in a manner that requires these companies to deal equally with all of their users, the immunities granted to digital platforms via Section 230(c) must be addressed in order to avoid a conflict within the law. It would be difficult to treat digital platforms as common carriers while simultaneously permitting arbitrary content moderation through Section 230.

B. To Repeal, or Not to Repeal, that is the Question

i. The Practicality of Repealing Section 230

It is undeniable that a small number of Big Tech companies now dominate majority of the market, in terms of products and services that exist on the Internet. For example, Google dominates the search engine market, with an astounding ninety percent of the market share.[232] While Section 230 was passed, in part, to facilitate the growth of the Internet, no serious argument can be raised that would indicate Congress had any intention of allowing the voice of hundreds of millions of Americans to be regulated by a handful of tech corporations. Section 230 has been used as a shield and sword by interactive computer services, such as Google, YouTube, Apple, Microsoft, Facebook, and Twitter (to name a few). Although this issue is arguably riper than it has ever been, it is unlikely that the Supreme Court will hear the appropriate case any time soon to resolve how Section 230 is to be interpreted, or even less likely, striking it down as unconstitutional. Thus, it is up to Congress to exercise its Article I power under the U.S. Constitution to rectify the law. Twenty-five

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[230] *Id.*
[231] *Id.* at 1225.
[232] *See supra* note 229 and accompanying text.

years have passed since Section 230 was enacted and there needs to be proactive reform.

While bipartisan support exists for reworking this 1996 law, the reform debate centers around whether Section 230 should be repealed entirely. Arguments for repealing the law exist amongst both parties in Congress. The two parties diverge in terms of why they want the law repealed. For instance, Democratic members of Congress and President Joseph R. Biden have raised support for the revocation of Section 230 because they believe interactive computer services have not done enough to remove misinformation and offensive speech. For their colleagues across the aisle, Republican members of Congress and former President Donald J. Trump believe Section 230 should be repealed because interactive computer services have acted in bad faith by self-regulating unevenly, resulting in viewpoint discrimination that has stifled and chilled conservative users' speech.

Like most controversial political and legal issues in the United States, the solutions proposed tend to be just as polarizing as the issues themselves. However, this issue should be unequivocally unifying. A time-honored principle in the United States—the Freedom of Speech—has been the bedrock at the foundation of our constitutional republic; however, as many legal scholars and commentators have correctly stated, there are no First Amendment protections on private property. And this principle has, for the most part, worked—except in application to the Internet, and specifically social media and social network platforms. What does an open Internet look like? Depending on who you ask, some believe it looks like digital anarchy, while others support zealous regulation in order to police against offensive content. The truth is, it is somewhere in the middle where viewpoint discrimination is restricted, illegal content is removed, and harassment is curtailed.

The repeal of Section 230, in theory, could help solve some issues regarding speech and online content. If Section 230 was repealed, the immunities afforded to interactive computer services would no longer afford them protections against the editorial discretion these companies make when hosting and curating content for their users. Thus, the repeal of Section 230 would, in essence, serve as a penalty against tech companies that proceed to operate as more than "a passive conduit."[233] Since the Internet has billions of users, it

[233] Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995).

would be nearly impossible for an interactive computer services to avoid traditional tort liability, i.e., defamation, in the event an interactive computer service exercises enough editorial discretion to be considered a publisher. Such a sharp reform in the law would likely have some clear benefits. First, in terms of combatting terrorism and providing remedies for those who have fallen victim to acts of terrorism, the revocation of Section 230 would require interactive computer services to ramp up their moderation efforts in order to remove users' accounts that promote terrorism and distribute propaganda created by terrorist organizations.[234] Other malicious forms of content will also need to be moderated at a heightened level. For example, there are many cases when an individual was unable to sue interactive computer services for hosting revenge pornography in violation of the law. Similarly, interactive computer services would be held accountable for the hosting of illegal content on their platforms, such as child pornography, especially when they have notice of the illegal content on their sites.

Although eliminating the online presence of terrorist groups, child pornography, obscenities, and online harassment are strong arguments alone to draw back the liability shield given to interactive computer services, these objectives could still be achieved through reformation of Section 230, rather than revocation. The latter would be comparable to applying a bandage to a gunshot wound—its temporary, and you will still need surgery that requires carefully placed sutures. Both U.S. Senator Ron Wyden of Oregon and former U.S. Representative Chris Cox of California, the authors of the 1996 U.S. House of Representatives bill that amended the CDA to include Section 230, forewarned that a rush to repeal Section 230 in its entirety would likely "return us to the legal no-man's land that necessitated Section 230 in the first place."[235] This forewarning was prompted by

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[234] *See* Force v. Facebook, Inc., 934 F.3d 53 (2d Cir. 2019) (holding that Section 230(c) protects Facebook and other interactive computer services from claims of liability for information published by third parties, even when the third party is a terrorist organization). *See also* Desmond Butler & Barbara Ortutay, *Facebook Still Auto-Generating Islamic State, al-Qaida Pages*, ASSOCIATED PRESS (Sept. 18, 2019), https://apnews.com/article/3479209d927946f7a284a71d66e431c7; Moustafa Ayad, *Islamic State Terrorist Propaganda is Going Viral on Facebook*, WIRED (July 8, 2020), https://www.wired.co.uk/article/islamic-state-terrorism-facebook.

[235] Ron Wyden & Chris Cox, *Don't Let Donald Trump Crush Internet Free Speech*, USA TODAY (Dec. 18, 2020, 4:00 AM),

President Donald J. Trump's attempt to veto the National Defense Authorization Act because it did not provide for a full repeal of Section 230 in either the House or Senate version of the bill.[236] While some bills containing the outright repeal of Section 230 have been introduced into the House and Senate, such a forced repeal of Section 230 is likely to cause more harm than help. The negative repercussions to an outright repeal of Section 230 would undoubtedly send the modern Internet into a state of anarchy—or perhaps worse, it would cause Internet service providers and interactive computer services to censor any content that could conceivably result in some sort of legal liability.

The repeal of Section 230, without any immediate replacement, would return the Internet to its pre-1996 form, thus, interactive computer services (approximately 200 million websites) would be treated as publishers and would be required to overzealously police the content uploaded to their respective websites, lest they face traditional tort liability. This approach has two flaws. First, without considering a company's financial resources, the repeal of Section 230 would cause most interactive computer services to restrict users from posting anything controversial. The risk of lability to websites alone would surely chill speech; this is then counterintuitive if the reason for repealing Section 230 is to promote diversity of thought and free speech. Second, if an interactive computer service chooses to police third-party (user) content in order to avoid liability, this method would not come without great cost. For larger websites, such as Facebook, this would require twenty-four-seven review of user content by hundreds, if not thousands, of employees. This is simply not feasible for any start-up or smaller tech business that aims to compete with a company like Facebook. A full repeal of Section 230, without any sort of replacement, would ultimately conflict with another one of Congress's policy goals when it first passed Section 230—the development of free market enterprise on the Internet. A repeal of Section 230, alone, would be a gun to the head of smaller businesses seeking to compete in the social network or social media industry, where its users can post and share information around the clock. The

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https://www.usatoday.com/story/opinion/2020/12/18/section-230-and-complications-free-speech-internet-column/3928033001/.

[236] Amanda Macias, *Trump Doubles Down on $740 Billion Defense Bill Veto Threat Over Section 230 Tech Fight*, CNBC (Dec. 3, 2020, 2:39 PM), https://www.cnbc.com/2020/12/03/trump-defense-bill-section-230.html.

solution to this predicament requires a much more surgical approach. Rather than repealing Section 230 in its entirety, Congress should amend Section 230.

ii. Amending Section 230 – the Department of Justice's Proposal

The amendment to Section 230 must be balanced to achieve consistency amongst Congress's multifaceted policy goals, which have, to some degree, changed over the past twenty-five years. The 1996 law is inarguably outdated. Indeed, the regulation of interactive computer services—and particularly social media—have become one of these societal problems that has garnered enough support for government action. Nearly two-thirds of Americans believe that social media companies are very likely or likely to censor political viewpoints.[237] Former president Donald J. Trump enacted an executive order on May 28, 2020 ordering, among other things, the Department of Justice (DOJ) to develop proposed amendments to Section 230 that would promote the policy goals outlined within the executive order.[238]

The DOJ's review focused on "two areas of reform, both of which are, at minimum, necessary to recalibrate the outdated immunity of Section 230."[239] The DOJ's legislative recommendations are, in essence, a narrowing of the statute's interpretation from the broad construction state and federal courts have applied, and revisions to the actual text to promote the dual aims of preserving free speech and protecting free market enterprise on the Internet. While the DOJ's legislative proposal, overall, would serve as a comprehensive modification to the current statutory scheme, some specific changes ought to be highlighted.[240] First, the DOJ's proposed

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[237] Emily A. Vogels, Andrew Perrin & Monica Anderson, *Most Americans Think Social Media Sites Censor Political Viewpoints*, PEW RSCH. CTR. (Aug. 19, 2020), https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/ ("Roughly three-quarters of Americans (73%) think it is very or somewhat likely that social media sites intentionally censor political viewpoints they find objectionable . . . .").

[238] Exec. Order No. 13925.

[239] *The Justice Department Unveils Proposed Section 230 Legislation*, DOJ (Sept. 23, 2020), https://www.justice.gov/opa/pr/justice-department-unveils-proposed-section-230-legislation.

[240] It should be noted that the DOJ's review of Section 230 was not strictly influenced by members of the DOJ. Rather, the DOJ's review included the hosting of a

amendment to Section 230(c)(1) explicitly addresses and eliminates the "Moderator's Dilemma" that was created by the infamous *Stratton Oakmont, Inc. v. Prodigy Services Co.* case.[241] This is accomplished by distinguishing the situations in which an interactive computer service would be treated as "*the*" publisher as compared to "*a*" publisher. This distinction is crucial as it has led to the overly broad application of the rule by state and federal courts. As the textualist argument goes, by using the word "*the*," a definite article,[242] before

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"Public Workshop," a private "Expert Roundtable" discussion, and an "Industry Listening Session" where "the Department met individually with a diverse group of businesses that had attended the public event or otherwise expressed interest in Section 230. [These] [m]eetings were private and confidential to foster frank discussions about their use of Section 230 and thoughts on potential reform." *Department of Justice's Review of Section 230 of The Communications Decency Act of 1996*, DOJ, https://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996 (last visited Feb. 6, 2021) [https://web.archive.org/web/20210126123904/https://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996#].
For the DOJ's key takeaways from its engagement and research, see U.S. DEP'T OF JUST., SECTION 230 — NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY? KEY TAKEAWAYS AND RECOMMENDATIONS (2020), https://www.justice.gov/file/1286331/download. For a recording of the public workshop held by the DOJ on February 19, 2020, see *Section 230 Workshop – Nurturing Innovation or Fostering Unaccountability?*, DOJ (Feb. 19, 2020), https://www.justice.gov/opa/video/section-230-workshop-nurturing-innovation-or-fostering-unaccountability; *see also* U.S. DEP'T OF JUST., SECTION 230 — NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY? AGENDA (2020), https://www.justice.gov/file/1286216/download. For a summary of the DOJ's public workshop and the private roundtable events, see U.S. DEP'T OF JUST., SECTION 230 — NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY? SUMMARY OF PUBLIC WORKSHOP & PRIVATE ROUNDTABLE (2020), https://www.justice.gov/file/1286201/download; *see also* U.S. DEP'T OF JUST., SECTION 230 — NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY? AFTERNOON ROUNDTABLE BIOS (2020), https://www.justice.gov/file/1286211/download. For writing submissions by workshop and roundtable participants, see U.S. DEP'T OF JUST., SECTION 230 — NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY? WORKSHOP PARTICIPANT WRITTEN SUBMISSIONS (2020), https://www.justice.gov/file/1286206/download.

[241] Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995).

[242] "English has two articles: *the* and *a/an*. *The* is used to refer to specific or particular nouns; *a/an* is used to modify non-specific or non-particular nouns. We call *the* the definite article and *a/an* the indefinite article." *Using Articles*, PURDUE OWL, https://owl.purdue.edu/owl/general_writing/grammar/using_articles.html (last visit-

the noun "publisher" the authors of Section 230 chose to only immunize an interactive computer service from being liable from the defamatory postings of its users (third parties). For example, if a traditional publisher such as a newspaper company were to publish the defamatory speech of another, the newspaper company could be held liable for publishing the defamatory speech in the same manner that the original publisher or speaker would face liability. This reading of the statute would have greatly limited the situations where an interactive computer service could claim the protection of Section(c)(1) to instances of where users are posting defamatory content. This section, presumably, would not provide immunity to an interactive computer service when it acts as "*a*" publisher—or to use the statute's language, Section(c)(1) would not provide immunity when an interactive computer service also acts as an information content provider.[243]

The DOJ accomplishes this by moving the original language of section 230(c)(1) into a subparagraph (A),[244] while creating a new subparagraph (B) that provides that content moderation, i.e., censoring or removing content, by an interactive computer service is governed solely by Section 230(c)(2).[245] By adding this subparagraph (B), the DOJ sought to eliminate any ambiguity by making clear that when an interactive computer service moderates content, it will be subject to the standards under (c)(2) alone. Finally, the proposed subparagraph (C) does away with the Moderator's Dilemma by establishing that an interactive computer service will not be treated as a publisher or a speaker when good faith action is taken by the interac-

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ed Feb. 6, 2021); *see also* BRYAN A. GARNER, THE REDBOOK: A MANUEL ON LEGAL STYLE 206 (3d ed. 2013).

[243] *See* Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008).

[244] U.S. Dept. of Just., Ramseyer Draft Legislative Reforms to Section 230 of the Communications Decency Act, (Sept. 23, 2020), https://www.justice.gov/file/1319331/download (the proposed Section 230(c)(1)(A) provides, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." This language is the identical language provided in the current version of Section 230(c)(1)).

[245] *Id.* (the proposed Section 230(c)(1)(B) provides, "Subparagraph (A) shall not apply to any decision, agreement, or action by a provider or user of an interactive computer service to restrict access to or availability of material provided by another information content provider. Any applicable immunity for such conduct shall be provided solely by Paragraph (2) of this subsection.").

tive computer service to remove user content if the interactive computer service has an objective reasonable belief that the user content violates its terms of services.[246] This proposed subparagraph (C) avoids the issue created by the *Stratton Oakmont, Inc. v. Prodigy Services Co.* case because it explicitly allows an interactive computer service to police content on its website, with respect to any violation of its terms of service, without having to face liability for making available other content from its users that are not in violation of the website's terms of service but, for example, may be defamatory.

Second, the DOJ's proposed changes to Section 230(c)(2)(A) address the overly broad and vague language that has enabled arbitrary and capricious content moderation by interactive service providers. The currently enacted Section 230(c)(2)(A) of the Communications Decency Act states:

> No provider or user of an interactive computer servicer shall be held liable on account of—
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user *considers to be* obscene, lewd, lascivious, filthy, excessively violent, harassing, or *otherwise objectionable*, whether or not such material is constitutionally protected.[247]

The DOJ's proposed change is as follow:

> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user *has an objectively reasonable belief is* obscene, lewd, lascivious, filthy, excessively violent, *promoting terrorism or violent extremism*, harassing, *promoting self-harm*, or *unlawful*, whether or not such material is constitutionally protected.[248]

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[246] *Id.* (the proposed Section 230(c)(1)(C) provides, "For purposes of Subparagraph (A), no provider or user of an interactive computer service shall be deemed a publisher or speaker for all other information on its service provided by another information content provider solely on account of actions voluntarily taken in good faith to restrict access to or availability of specific material that the provider or user has an objective reasonable belief violates its terms of service or use.").

[247] 47 U.S.C. § 230(c)(2)(A) (emphasis added).

[248] U.S. Dept. of Just., Ramseyer Draft Legislative Reforms to Section 230 of the Communications Decency Act, (Sept. 23, 2020), https://www.justice.gov/file/1319331/download (emphasis added).

The two most important changes within the DOJ's proposed Section 230(c)(2)(A) were the removal of the terms "otherwise objectionable" and the inclusion of an objective reasonableness standard to govern how content moderation choices can be made. By removing the "otherwise objectionable" language, the statute's scope becomes much less vague. Under the original language a provider of an interactive computer service could remove a user's content if the interactive computer service provider simply considered the content to be objectionable. Such a standard has proved too subjective.

One must look to the practicality of how this language would be employed in the real world. It is likely, and is often the case, that some individual who is hired by a company that provides an interactive computer service, such as Twitter, will be responsible for reviewing its users' content for "objectionable" material. The flaw here, in theory, is that an employee of the interactive computer service should be guided by its terms of service when making content moderation decisions. However, in reality, the statute has permitted the use of overly broad discretion by these employees, leaving the online conversation to be regulated by any individual's particular belief of what constitutes objectionable content. Some would argue that the "good faith" language present in the original statute serves as a mechanism to prevent arbitrary content moderation by an interactive computer service or its employees. Contrarily, the fact that good faith language was included in the statute has not prevented bad faith decisions from being made. Moreover, courts have rarely held that an interactive computer service has acted in bad faith when making content moderation decisions. This is largely due to the subjective-based language that was drafted into the original statute as well as the fact that Congress did not provide a definition of "good faith." By leaving the meaning of good faith—an amorphous concept—undefined under Section 230, courts have applied one of the various legal contexts of "good faith" without guidance.

The DOJ's proposed changes seek to eliminate the statute's subjectiveness by explicitly requiring that the provider or user have an "objectively reasonable belief" for moderating content that is alleged to be "obscene, lewd, lascivious, filthy, excessively violent, promoting terrorism or violent extremism, harassing, promoting self-

harm, or unlawful."[249] By making this clarification, the proposed statute prevents interactive computer services, or their employees, from injecting their subjective beliefs into the online platform's content moderation procedures. This method provides for there to be an objective reason why an interactive computer service removed, for example, one of its users' posts for being obscene. And in order to voluntarily take action to remove obscene content, based on an objectively reasonable belief, the interactive computer service must have been acting in *good faith*. While the DOJ continues to include the good faith language in their rendition of Section 230(c)(2)(A), there is also an answer provided to clarify the ambiguity issues that the good faith language has caused. The definition section of the DOJ's proposed Section 230 includes a statutorily defined meaning for good faith, stating:

> (5) Good Faith
> To restrict access to or availability of specific material "in good faith," an interactive computer service provider must—
> (A) have publicly available terms of service or use that state plainly and with particularity the criteria the service provider employs in its content- moderation practices;
> (B) restrict access to or availability of material consistent with those terms of service or use and with any official representations or disclosures regarding the service provider's content-moderation practices;
> (C) not restrict access to or availability of material on deceptive or pretextual grounds, or apply its terms of service or use to restrict access to or availability of material that is similarly situated to material that the provider intentionally declines to restrict; and
> (D) supply the provider of the material with timely notice describing with particularity the provider's reasonable factual basis for the restriction of access and a meaningful opportunity to respond, un-

[249] U.S. Dept. of Just., Ramseyer Draft Legislative Reforms to Section 230 of the Communications Decency Act, (Sept. 23, 2020), https://www.justice.gov/file/1319331/download.

> less a law enforcement agency has asked that such notice not be made, or a provider reasonably believes that the material relates to terrorism or other criminal activity, or that such notice would risk imminent harm to others.[250]

This prescribed definition of good faith provides a reasonable mechanism to reduce viewpoint discrimination by ensuring that interactive computer service providers act in an objective and neutral manner when moderating their users' content. To act in good faith, the provider must meet four requirements. First, subparagraph (A) addresses the issue of when an interactive computer service provider's terms of service are vague or overly complex. Thus, to act in good faith, an interactive computer service provider's terms of service must—as a threshold requirement—be stated in plain language and address with particularity the rules regarding the interactive computer service provider's content moderation policies.

Second, subparagraph (B) requires that interactive computer service providers must deal evenhandedly with all of their users when making content moderation choices. This requires an element of neutrality and essentially creates a similar viewpoint neutral requirement as the one that governs non-public forums under the First Amendment. While it is not a true viewpoint neutral requirement, as an interactive computer service provider may choose to wholly restrict some viewpoints on their platforms, the requirement of having to apply its terms of services impartially will greatly reduce the amount of subjective censorship that occurs on platforms that hold themselves out to be a neutral forum for dialogue—a digital public square. Third, subparagraph (C) provides that the interactive computer service provider cannot make content moderation choices based on a pretextual reason. This component of the definition prevents, very literally, bad faith decision-making. When an interactive computer service provider seeks to restrict content that would normally be considered acceptable under the terms of service, and this content would be something they would intentionally decline to restrict, then the provider simply cannot restrict the content. This prevents, for example, Facebook from removing a user's content displaying her opinion for the need for less gun control, while simultaneously declining to

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[250] U.S. Dept. of Just., Ramseyer Draft Legislative Reforms to Section 230 of the Communications Decency Act, (Sept. 23, 2020), https://www.justice.gov/file/1319331/download.

remove other users' posts regarding their desire for more gun control. Facebook may argue that the content was removed for inciting violence; however, if a showing can be made that Facebook was acting on a pretext because it disfavors the idea of fewer gun laws, then Facebook may be subject to liability for acting in bad faith.

Finally, subparagraph (D) provides a notice requirement that has been long sought by those who have been subject to a sentence in "Facebook jail,"[251] without any adequate notice as to the reason why the interactive computer service provider censored them. This provision would require that an interactive computer service provider, who has taken action to moderate user content, send the targeted user notice explaining the reasonable facts as to why the user's content, or user's account, is being restricted—and this must be stated with *particularity*. Moreover, the proposed statute also would require that in order for the interactive computer service to act in good faith, the interactive computer service must provide a user—whose account or content has been restricted—with a "meaningful opportunity" to respond to the restrictions imposed. While the term "meaningful opportunity" was not defined, it is plausible that, at the very least, a user would be able to dispute the restrictions imposed on his or her content (or account), by providing a statement that rebuts the factual basis provided by the interactive computer service provider. Of course, this would require some sort of appellate procedure judged by an objectively neutral decisionmaker, otherwise, it is speculative at best as to whether a notice requirement is of any benefit other than explaining to a user the reason upon which he or she was silenced. For there to be "meaningful opportunity" to respond, the response must carry some weight, and the user's response should be judged against the facts established in the interactive computer service's original notice of restriction. If the user's flagged content and statement, taken together, clarify or otherwise rebut the factual basis used to restrict the content, so that there is no longer a reasonable factual basis to regard the user's content as a violation of the terms of service, then the user's content must be restored. It is worth considering the inclusion of

[251] Facebook jail is a term sometimes used to describe when an individual's Facebook account has been restricted or suspended for certain period of days, usually between seven and twenty-one days, due to a violation of Facebook's community guidelines. *See* Drew Melendy, *What is Facebook Jail & Why is It Happening?*, COMMENT SOLD (Dec. 11, 2019, 11:32 AM), https://insights.commentsold.com/what-is-facebook-jail-why-is-it-happening.

a provision that would require an interactive computer service to maintain a certain number of employees on its content moderation teams, in some proportion to the company's users.

C. Current Congressional Proposals to Amend Section 230

There is no current shortage of proposed legislative amendments to Section 230 of the Communications Decency Act.[252] These

[252] At the time of this writing, there have been thirty-four legislative proposals introduced between both branches of Congress. *See* Platform Accountability and Consumer Transparency Act, S. 797, 117th Cong. (2021); Protecting Local Authority and Neighborhoods Act, H.R. 1107, 117th Cong. (2021); Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act, S. 299, 117th Cong. (2021); Abandoning Online Censorship Act, H.R. 874, 117th Cong. (2021) (repealing Section 230 of the Communications Decency Act); See Something, Say Something Online Act of 2021, S. 27, 117th Cong. (2021); Limiting Section 230 Immunity to Good Samaritans Act, H.R. 277, 117th Cong. (2021); Curbing Abuse and Saving Expression in Technology Act, H.R. 285, 117th Cong. (2021); Protecting Constitutional Rights from Online Platform Censorship Act, H.R. 83, 117th Cong. (2021); S. 5085, 116th Cong. § 2 (2020) (repealing Section 230 of the Communications Decency Act); S. 5020, 116th Cong. § 2 (2020) (repealing Section 230 of the Communications Decency Act); Holding Sexual Predators and Online Enablers Accountable Act of 2020, S. 5012, 116th Cong. (2020) (providing "for criminal and civil liability for an interactive computer service that willfully or recklessly promotes or facilitates child exploitation . . ."); Break Up Big Tech Act of 2020, H.R. 8922, 116th Cong. (2020); Abandoning Online Censorship Act, H.R. 8896, 116th Cong. (2020) (repealing Section 230 of the Communications Decency Act); Curbing Abuse and Saving Expression in Technology Act, H.R. 8719, 116th Cong. (2020); Stop Suppressing Speech Act of 2020, S. 4828,116th Cong. (2020); Protecting Americans from Dangerous Algorithms Act, H.R. 8636, 116th Cong. (2020); Limiting Section 230 Immunity to Good Samaritans Act, H.R. 8596, 116th Cong. (2020); Don't Push My Buttons Act, H.R. 8515, 116th Cong. (2020); Protect Speech Act, H.R. 8517, 116th Cong. (2020); Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020, H.R. 8454, 116th Cong. (2020); Don't Push My Buttons Act, S. 4756, 116th Cong. (2020); See Something, Say Something Online Act of 2020, S. 4758, 116th Cong. (2020); Online Content Policy Modernization Act, S. 4632, 116th Cong. (2020) (similar to DOJ proposal in some respects); Online Freedom and Viewpoint Diversity Act, S. 4534, 116th Cong. (2020) (similar to DOJ proposal in some respects); Stop the Censorship Act of 2020, H.R. 7808, 116th Cong. (2020); Behavioral Advertising Decisions Are Downgrading Services Act, S. 4337, 116th Cong. (2020); Stopping Big Tech's Censorship Act, S. 4062, 116th Cong. (2020); Platform Accountability and Consumer Transparency Act, S. 4066, 116th Cong. (2020); Limiting Section 230 Immunity to Good Samaritans Act S. 3983, 116th Cong. (2020); Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020, S. 3398, 116th

legislative proposals can generally be broken down into four categories. The first category contains legislative proposals that were introduced for purposes of repealing Section 230 outright—the "Repeal Proposals."[253] The second category contains legislative proposals to amend Section 230 in order to draw back liability protections against interactive computer services who use discriminatory or biased content moderation policies or practices resulting in online censorship—the "Anti-Censorship Proposals."[254] The third category contains legislative proposals for amending Section 230 as to prevent interactive computer services from claiming immunity to liability for the presence of child exploitation or child sexual abuse material on their websites—the "Preventing Child Exploitation and Abuse Proposals."[255] Finally, the fourth category contains proposals that are specific to certain issues that have arisen under Section 230, other

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Cong. (2020); Protecting Local Authority and Neighborhoods Act, H.R. 4232, 116th Cong. (2019); Stop the Censorship Act, H.R. 4027, 116th Cong. (2019); Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019); Biased Algorithm Deterrence Act of 2019, H.R. 492, 116th Cong. (2019).

[253] *See* Abandoning Online Censorship Act, H.R. 874, 117th Cong. (2021) (repealing Section 230 of the Communications Decency Act); S. 5085, 116th Cong. § 2 (2020) (repealing Section 230 of the Communications Decency Act); S. 5020, 116th Cong. § 2 (2020) (repealing Section 230 of the Communications Decency Act); Abandoning Online Censorship Act, H.R. 8896, 116th Cong. (2020) (repealing Section 230 of the Communications Decency Act).

[254] *See* Limiting Section 230 Immunity to Good Samaritans Act, H.R. 277, 117th Cong. (2021); Curbing Abuse and Saving Expression in Technology Act, H.R. 285, 117th Cong. (2021); Protecting Constitutional Rights from Online Platform Censorship Act, H.R. 83, 117th Cong. (2021); Curbing Abuse and Saving Expression in Technology Act, H.R. 8719, 116th Cong. (2020); Protecting Americans from Dangerous Algorithms Act, H.R. 8636, 116th Cong. (2020); Limiting Section 230 Immunity to Good Samaritans Act, H.R. 8596, 116th Cong. (2020); Don't Push My Buttons Act, H.R. 8515, 116th Cong. (2020); Protect Speech Act, H.R. 8517, 116th Cong. (2020); Don't Push My Buttons Act, S. 4756, 116th Cong. (2020); Stopping Big Tech's Censorship Act, S. 4062, 116th Cong. (2020); Platform Accountability and Consumer Transparency Act, S. 4066, 116th Cong. (2020); Limiting Section 230 Immunity to Good Samaritans Act S. 3983, 116th Cong. (2020); Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019).

[255] *See* Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020, S. 3398, 116th Cong. (2020); Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020, H.R. 8454, 116th Cong. (2020); Curbing Abuse and Saving Expression in Technology Act, H.R. 8719, 116th Cong. (2020) (amending Section 230 to combat the spread of CSAM on the Internet and to promote viewpoint neutral content moderation); Holding Sexual Predators and Online Enablers Accountable Act of 2020, S. 5012, 116th Cong. (2020); Curbing Abuse and Saving Expression in Technology Act, H.R. 285, 117th Cong. (2021).

than those related to online censorship and child exploitation, i.e., "amend[ing] federal law to make clear that [Section 230] does not shield Internet-based platforms that facilitate bookings of illegal short-term [real property] rentals."[256] It also contains proposals of laws related to more general crime prevention on the Internet—these are the "Other Proposals."[257]

i. Why Congress's Current Proposals Fall Short

The legislative proposals introduced into Congress, in large part, focus on the content moderation issues in response to politically motivated censorship by interactive computer service providers. Of the nearly three-dozen proposed amendments to Section 230, many have fallen short of what is required in order to resolve the censorship issues that have arisen. This is partly due to about one-third of the legislative proposals being a combination of total repeals of Section 230(c),[258] or legislative proposals that would—in effect—function as

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[256] *Case Introduces Measure to Allow Full Enforcement of State and Local Laws Targeting Illegal Short-Term Rentals*, CASE.HOUSE.GOV (Sept. 9, 2019), https://case.house.gov/news/documentsingle.aspx?DocumentID=92.

[257] *See e.g.,* Protecting Local Authority and Neighborhoods Act, H.R. 1107, 117th Cong. (2021); Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act, S. 299, 117th Cong. (2021); See Something, Say Something Online Act of 2021, S. 27, 117th Cong. (2021); See Something, Say Something Online Act of 2020, S. 4758, 116th Cong. (2020); Protecting Local Authority and Neighborhoods Act, H.R. 4232, 116th Cong. (2019). This Note will not discuss the Other Proposals, as they do not provide a comprehensive legislative solution to content moderation issues presented under Section 230, and therefore, do not warrant any further discussion here.

[258] This Note dispenses with the Repeal Proposals at the outset. Any such proposal that requires the repeal of Section 230 without any legislative replacement is an inadequate solution to the complex issues associated with online content moderation by interactive computer service providers. *See* discussion *supra* Section IV.B.i. Moreover, this Note will not discuss the current congressional legislative proposals as they solely relate to content moderation of child sexual abuse material (CSAM). While the author has acknowledged that interactive computer services still host—knowingly or not—large amounts of CSAM, and that the existence of such CSAM on interactive computer services is de facto proof that Section 230 is in need of reform, a discussion of the precise solution to the elimination of CSAM on the Internet is beyond the scope of this Note. However, interactive computer services that host CSAM should be stripped of any civil or criminal liability protection that Section 230 currently affords it, unless they take more exhaustive efforts to remove it and preserve the evidence for law enforcement. These interactive computer services should not be exempt from criminal prosecution and civil liability when they

a repeal of Section 230(c) immunities for interactive computer services. For example, legislative amendments to Section 230 that have been proposed by Congress and have the effect of operating like a complete repeal tend to only amend the language of Section 230(c)(2)(A). As discussed above, Section 230(c)(2)(A) contains the controversial language that allows interactive computer services to remove content that they believe to be "otherwise objectionable, whether or not such material is constitutionally protected."[259]

As an attempt to limit the situations in which an interactive computer service could remove its users' content in a politically motivated manner, some congressional proposals sought to remove the "otherwise objectionable" language.[260] However, by only striking the "otherwise objectionable" language and replacing it with a more definite category of content that can be removed,[261] the proposed amendment forces interactive computer services to allow virtually all forms of content or speech on their services, without providing interactive computer services a mechanism to reasonably regulate the content on their services. These proposals, if passed into law, would likely cause interactive computer services to over censor if they

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have expended time and effort making arbitrary and bias content moderation decisions, i.e., banning the President of the United States across various social media platforms, while these same platforms host child pornography and revenge porn. The DOJ's comprehensive legislative proposal to amend Section 230 also addresses issues as they relate to preventing the spread of CSAM across the Internet. *See* U.S. Dept. of Just., Ramseyer Draft Legislative Reforms to Section 230 of the Communications Decency Act, (Sept. 23, 2020), https://www.justice.gov/file/1319331/download (amending Section 230 to include a "'Bad Samaritan' Carve-out" that prevents an interactive computer service from asserting immunity for conduct that the interactive computer service purposefully engaged in and knew would violate federal law. Additionally, the proposed amendment also includes a "carve-out" from the interactive computer service's ability to assert immunity when the interactive computer service is aware of material that violates federal law but fails to take expeditious action to remove it).

[259] 47 U.S.C. § 230(c)(2)(A).

[260] *See, e.g.*, Stop the Censorship Act, H.R. 4027, 116th Cong. (2019); Stop the Censorship Act of 2020, H.R. 7808, 116th Cong. (2020); Stop Suppressing Speech Act of 2020, S. 4828, 116th Cong. (2020); Online Content Policy Modernization Act, S. 4632, 116th Cong. (2020); Online Freedom and Viewpoint Diversity Act, S. 4534, 116th Cong. (2020).

[261] For example, content that is "obscene, lewd, lascivious, filthy, excessively violent, harassing," 47 U.S.C. § 230(c)(2)(A), or "that the provider or user determines to be unlawful, or that promotes violence or terrorism." Stop Suppressing Speech Act of 2020, S. 4828, 116th Cong. (2020).

wanted to make even the most reasonable restrictions on certain content and speech, i.e., restricting the use of racial slurs and other invidious forms of profanity. Since any type of restriction on a user's content outside those outlined in the statute will trigger publisher liability, the interactive computer service will have to choose between loosely regulating its service, allowing nearly all content, despite its possible relevance on a particular service, or the interactive computer service will have to exercise strict editorial control over nearly all content posted onto its service, in order to make even reasonable regulations that fall outside of the statute's text. If the interactive computer service wishes to exercise editorial control outside of the language of the statute, then the interactive computer service will be exposed to publisher liability, and ultimately, will have to over censor content on its service to avoid being sued over defamatory statements, at a minimum. Therefore, any amendment to Section 230(c) that seeks to only remove the "otherwise objectionable" language from Section 230(c)(2)(A) will function as a repeal of the liability protections and will reintroduce the Moderator's Dilemma, created by the *Stratton Oakmont* decision, that Congress sought to expressly override with the passing of Section 230 in the first place.

Some other legislative proposals that were introduced into Congress and also function as a repeal of the liability protections under Section 230(c) are premised around the interactive computer service's behavior—or the behavior of its algorithms—when curating user content on its service, as well as its advertising practices.[262] These particular proposals are in effect a repeal of Section 230 because they are specifically targeted at the practices of social media companies. For example, the Break Up Big Tech Act of 2020 essentially created requirements for interactive computer services to be able to assert immunity from liability under the statute. This proposed amendment sought to preclude an interactive computer service from asserting the liability protections of Section 230(c), paragraphs (1) and (2) when the interactive computer service sell advertisement space in which the advertisement is then displayed to a user of the service based on, i.e., the "personal traits of the user" or "the previous

[262] *See, e.g.*, Break Up Big Tech Act of 2020, H.R. 8922, 116th Cong. (2020); Behavioral Advertising Decisions Are Downgrading Services Act, S. 4337, 116th Cong. (2020); Biased Algorithm Deterrence Act of 2019, H.R. 492, 116th Cong. (2019).

online or offline behavior of the user."[263] Moreover, these proposals also seek to limit the ability of an interactive computer service to claim immunity if it provides the content on its service to its users in any manner other than chronological order. Therefore, if the social media company chooses to display content posted to its service in a way that each particular user will see the content that has been curated for them based on their prior use of the service, and thus, not in chronological order, the social media company could not assert Section 230 as a defense if sued over the content that was not posted in chronological order.[264] This would occur regardless of how the content was selected—by computer algorithms or not. These proposals are geared directly at removing a social media company's immunity under Section 230 and fall short because they would also reduce these online platforms to either under regulated bulletin boards (largely how "social media" looked in the 1990's), or it will result in over regulation. Again, in terms of over regulation the "Moderator's Dilemma" would cause some social media companies to act more like traditional publishers and exercise exacting editorial discretion over all content that is posted to avoid liability, and thus creating a chilling effect on all speech. Finally, all of the proposals that seek to rein in the immunity provided to interactive computer services but do so by targeting the use of (and possibly the incentives to create) technology that aid in advancement of the Internet through the use of algorithms, go directly against one of Congress's express policy goals in passing Section 230.

Aside from the proposed repeals and functional repeals, the legislative proposals to curtail arbitrary discrimination and political bias in interactive computer services' content moderation decisions also have fallen short. Some of these proposals stray far from Congress's goal to maintain a free market on the Internet. These proposals sought to provide comprehensive legislative reform but would require the Federal Trade Commission to take a heavy hand in regulating interactive computer services. Establishing licensing regimes in which some interactive computer services would need to register and comply with FTC regulations to receive immunity under Section

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[263] Break Up Big Tech Act of 2020, H.R. 8922, 116th Cong. (2020); *see also* Behavioral Advertising Decisions Are Downgrading Services Act, S. 4337, 116th Cong. (2020).

[264] Break Up Big Tech Act of 2020, H.R. 8922, 116th Cong. (2020); *see also* Biased Algorithm Deterrence Act of 2019, H.R. 492, 116th Cong. (2019).

230 is not desirable.[265] Congress should require interactive computer services to provide clear and non-biased terms of service to their users to enable the users to seek legal and equitable remedies when these terms of services are selectively enforced in bad faith.

The use of licenses to designate which interactive computer services receive Section 230's protections would vastly expand the regulatory requirements needed to determine which interactive computer services are to be afforded the statute's protections against publisher liability. For example, in one proposal the FTC would be required to set up a commission that would evaluate certain interactive computer services to determine if they have acted in a politically biased manner; and if so, then that interactive computer service would be denied immunity under Section 230.[266] In theory this seems like it would be a promising method to curtail bias. But more likely than not, in application this type of administrative regulation and oversight will result in unnecessary bureaucratic red tape. Moreover, the commission's evaluation of whether an interactive computer service has acted with political bias may not be clear cut and could require numerous hours and resources for the investigation to determine if a company was truly acting in a biased manner. To the contrary, the system could also be abused by officials—or members of the public when the public is permitted to comment or testify—to create a finding of bias, and thus, denying certain interactive computer services immunity when they otherwise would be deserving of the law's protection.

Finally, some proposed legislative amendments introduced into Congress attempt to use a First Amendment-like standard to determine whether certain content moderation decisions are permissible and will receive protection under Section 230. The danger with adopting a standard that mimics First Amendment protections afforded to individuals against government infringement is that the proposed law will likely be abrogated as unconstitutional. Notwithstanding the protections Section 230 affords interactive computer services, any individual or entity has the First Amendment right to exercise ed-

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[265] *See, e.g.*, Platform Accountability and Consumer Transparency Act, S. 797, 117th Cong. (2021); Curbing Abuse and Saving Expression in Technology Act, H.R. 285, 117th Cong. (2021); Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019).

[266] Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019).

itorial discretion over the third-party speech on its private property.[267] However, an entity, such as a new organization, can use this editorial discretion to choose the speech it will publish, but it will also be responsible for any harm the speech causes, e.g., defamation. Therefore, any proposal that seeks to leverage Section 230 immunity by forcing interactive computer services to moderate the content on their services in a manner that is consistent with the First Amendment, would likely amount to a content-based restriction and would have to survive a strict scrutiny analysis by the courts. Since interactive computer services are being "gifted" immunity against publisher liability for its users' speech, a healthy balance would be amending Section 230 so that it is, in one sense, the least restrictive alternative, while also allowing for reasonable regulations of the content moderation decisions of Internet service providers. It must be conceded that a pure First Amendment standard—under the current state action and First Amendment jurisprudence—could not survive constitutional scrutiny, as it would require private entities to virtually surrender all content moderation decisions on their private property, unless the speech to be removed is one of the few categories of unprotected speech. However, requiring interactive computer services to clearly define their terms of service and enforce them in a neutral manner, so that interactive computer services—particularly those akin to public squares—take a viewpoint neutral approach to content moderation, are reasonable mechanisms to promote free speech on the Internet.

ii. Notable Mentions and Recommendations

Some proposals from Congress can be worked into the DOJ recommendations, further improving on the ways in which to deter censorship. However, none of these proposals would be sufficient on their own to solve the content moderation issues presented by Section 230. For example, the Protecting Constitutional Rights from Online

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[267] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019) ("when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion over the speech and speakers in the forum."); *see also* Prager Univ. v. Google LLC, 951 F.3d 991, 997 (9th Cir. 2020) ("private property does not 'lose its private character merely because the public is generally invited to use it for designated purposes.'") (quoting Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 569 (1972)).

Platform Censorship Act,[268] proposed on January 4, 2021, seeks to prohibit interactive computer services from "restricting access to or availability of protected material of the user."[269] The statute defines protected material as virtually any material that would be protected under the Constitution or federal, state, or local laws. If an interactive computer service restricts a user's protected material, the statute would create a private right of action for the aggrieved party to sue. If the aggrieved party is successful, the statutory remedy would be monetary relief of no less than $10,000 and no more than $50,000.[270] By establishing protected materials as the equivalent of whatever is constitutionally permissible speech, the proposed law operates as a fine. Nearly all speech is protected under the First Amendment, and thus, virtually all content that is removed by an interactive computer service will have to be that of a small and finite category of unprotected speech. Therefore, an interactive computer service provider would be fined for each violation, a mechanism that would further act as a deterrent to arbitrary censorship. Such a prophylactic approach to online censorship would be a viable inclusion into any comprehensive legislative reform. Fines work as an incentive for interactive computer services to use more objectivity when making content moderation decisions. When a service censors one of its users, it must risk the possibility that it will now be fined. In turn, the interactive computer service would have to only limit its content moderation efforts to unprotected speech, which would allow for a more expansive effort in removing more heinous and obscene material, such as CSAM. Although the use of a First Amendment standard within the statute may be grounds for an interactive computer services to challenge the law as unconstitutional, the use of the civil penalties as a mechanism to discourage arbitrary content moderation can be incorporated into the DOJ's revised Section 230 and provide a private right of action for an individual or entity whose speech or content is improperly censored.

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[268] Protecting Constitutional Rights from Online Platform Censorship Act, H.R. 83, 117th Cong. (2021).
[269] *Id.*
[270] *Id.*

VI. CONCLUSION

As technology continues to rapidly develop while in the hands of a few private entities—free from any meaningful governmental regulation—the digital public square will continue to erode by biased content moderation decisions of a few Big Tech corporations. The framers of the Constitution could not have imagined the complexity of our world, nor could they have imagined that entities, such as Amazon, Facebook, or Google, would seemingly control the speech of American citizens. Undoubtedly the First Amendment, as it is written, is only applicable to the government—and the apparently finite exceptions to the state action doctrine. Thus, without an express amendment to the U.S. Constitution, the U.S. Supreme Court would have to adopt new First Amendment jurisprudence that would require privately-owned digital platforms to conform to some form of constitutional scrutiny; or the Court would have to expand upon the current exceptions to the state action doctrine, so that the First Amendment would be applicable to digital platforms that conduct arbitrary or biased content moderation practices. However, both solutions are unlikely to occur, as the Court has already signaled its unwillingness to expand upon the state action exceptions, especially when it would require treating a private entity as state actor for hosting speech. Despite Justice Thomas's foresight on the issue, acknowledging that "[w]e will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms,"[271] "soon" will likely not be soon enough.

The solution, then, to arbitrary and biased online censorship lies with limiting the immunities interactive computer services are afforded when removing their users' content under Section 230 of the CDA. These immunities have become a sword for online censorship and have been abused beyond the scope in which Congress had intended. As previously discussed, comprehensive legislative reform is needed to peel back the immunity Congress has given interactive computer service providers to promote the growth of free speech, political diversity, and the free market. In order to deter censorship on digital platforms, Congress must restore the ability for individuals to

[271] Biden v. Knight First Amend. Inst. At Columbia Univ., 141 S. Ct. 1220, 1221 (2021).

sue an interactive computer service for their bad faith content moderation practices.

The clearest path forward for providing a remedy for those who are harmed by arbitrary online censorship is the adoption of the DOJ's proposed legislative amendments to Section 230 of the Communications Decency Act.[272] The DOJ's proposed amendments strike a balance by maintaining some of the liability protections afforded to interactive computer services for the content posted by their users, and restricting arbitrary content moderation by requiring that interactive computer services have clear terms of service policies available to all their users; that all content moderation decisions be made based on an objective good faith standard; and all content moderation must be applied even handedly, with notice to the effected user.

By reducing the liability protections currently afforded interactive computer services, Congress will effectively be serving the American people by protecting the principles of the First Amendment. This action by Congress may also send a signal to the Court that the public is now largely in agreement with placing constitutional constraints upon larger corporate entities that host the speech of nearly three billion users worldwide. And short of an unfathomable catastrophe, the world will not be returning to its pre-online days. In fact, the Internet of Things continues to grow,[273] and as the COVID-19 pandemic wages on, Big Tech companies are becoming increasingly injected into the functions of government,[274] while their reve-

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[272] U.S. Dept. of Just., Ramseyer Draft Legislative Reforms to Section 230 of the Communications Decency Act, (Sept. 23, 2020), https://www.justice.gov/file/1319331/download.

[273] *What is IoT?*, ORACLE, https://www.oracle.com/internet-of-things/what-is-iot/#link0 (last visited Apr. 26, 2021) ("The Internet of Things (IoT) describes the network of physical objects—"things"—that are embedded with sensors, software, and other technologies for the purpose of connecting and exchanging data with other devices and systems over the internet. These devices range from ordinary household objects to sophisticated industrial tools. With more than 7 billion connected IoT devices today, experts are expecting this number to grow to 10 billion by 2020 and 22 billion by 2025.").

[274] Franklin Foer, *What Big Tech Wants Out of the Pandemic*, ATLANTIC MAG. (July-Aug. 2020), https://www.theatlantic.com/magazine/archive/2020/07/big-tech-pandemic-power-grab/612238/

nues begin to outsize the economies of other nations.[275] In order to secure the blessings of liberty, Americans must continue to promote and protect the Freedom of Speech that our ancestors fought so hard to obtain. Without the ability to have healthy political debate amongst the citizenry, there can be no concept of a democracy. Political censorship is a poison that requires an immediate antidote. The People's antidote can only be administered by Congress, and it starts with reversing our course and amending Section 230 of the Communications Decency Act and enacting the DOJ's proposed legislative amendments.

[275] Jasper Jolly, *Is Big Tech Now Just too Big to Stomach?*, GUARDIAN (Feb. 6, 2021), https://www.theguardian.com/business/2021/feb/06/is-big-tech-now-just-too-big-to-stomach.