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Free Speech in the Internet Era: Reviewing Policies Seeking to Modify Section 230 of the Communications Decency Act of 1996

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1. Abstract

Section 230 of the Communications Decency Act (CDA), has for over two decades[1] provided "interactive computer services" a legal liability shield for defamatory or otherwise actionable user-generated content posted on their platforms and, for lawsuits stemming over unequal enforcement of their content policies provided enforcement efforts are taken in "good faith."[2]

This law, passed in the early days of the Internet, incubated the Internet and social media, giving it the regulatory freedom it needed to grow into a platform where hundreds of millions of Americans can exchange ideas and engage in political and social discourse.[3]

Yet, for all the good Section 230 did, the negative implications of the expanding role social media platforms in American political life have spurred calls for change. Concerned parties often cite alleged bias by social media companies in enforcing community standards and moderating content,[4] as well as the role of social media platforms in political radicalization and the spread of misinformation.[5] Proposals for change differ greatly, but at their heart, they involve the balancing of three incredibly important interests: the interest of the government to limit the spread of dangerous content, the interest of the people to engage in "free speech," and the freedom of companies to regulate their products as they see fit.[6]

This article first examines the current state of the law, and then analyses the ultimate extent to which potentially objectionable, user-generated online content may be regulated within the context of constitutional protections for free speech. Next, it analyzes the potential implications—legal, economic, and social—of popular policies seeking to amend Section 230 and more broadly regulate "interactive computer services," and their effects on constitutional protections of free speech and of a free press. Finally, based on these analyses, it recommends changes for Congress to pursue.

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[1] Lewis, Peter H. 1996. "Protest, Cyberspace-Style, for New Law." *The New York Times*. https://www.nytimes.com/1996/02/08/us/protest-cyberspace-style-for-new-law.html (April 29, 2021).
[2] Communications Decency Act of 1996. 47 U.S. Code § 230.
[3] Wakabayashi, Daisuke. 2019. "Legal Shield for Websites Rattles Under Onslaught of Hate Speech." *The New York Times*. https://www.nytimes.com/2019/08/06/technology/section-230-hate-speech.html (April 29, 2021).
[4] Ibid.
[5] Ibid.
[6] Ibid.

2. Table of Contents

3. Introduction

Within the last several years, bipartisan calls to regulate social media companies have reached a fever pitch.[7] While different interests have divergent views on how to go about regulating social media, the underlying principles and objectives of a large part of good faith actors on both sides of the political spectrum are quite similar: concerns about the political and social implications of granting to an elite group of technology CEOs and board members the authority to regulate what many now see as the modern public square,[8] worries about political bias in selectively enforcing policies,[9] and, of the rapid spreading of misinformation on social media platforms, where a large portion of the American population seek their news.[10]

In 1996, with the modern Internet in its infancy, the United States Congress passed a law that set the stage for the development of modern social media platforms, the Communications Decency Act of 1996.[11] While this law was first made famous for the legal challenge over its anti-indecency provisions in the Supreme Court case *Reno v. ACLU,*[12] it is a lesser-known provision of this law, Section 230, which grants a legal shield to social media companies that has recently

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[7] Reardon, Marguerite. 2020. "Democrats and Republicans Agree That Section 230 Is Flawed." *CNET*. https://www.cnet.com/news/democrats-and-republicans-agree-that-section-230-is-flawed/ (April 29, 2021).
[8] Allott, Daniel. 2021. "Section 230's Unconstitutional Delegation of Power to Big Tech." *TheHill*. https://thehill.com/opinion/technology/535497-section-230s-unconstitutional-delegation-of-power-to-big-tech (April 29, 2021).
[9] Vogels, Emily A., Andrew Perrin, and Monica Anderson. 2020. "Most Americans Think Social Media Sites Censor Political Viewpoints." *Pew Research Center*. https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/ (April 29, 2021).
[10] Stewart, Emily. 2020. "America's Growing Fake News Problem, in One Chart." *Vox*. https://www.vox.com/policy-and-politics/2020/12/22/22195488/fake-news-social-media-2020 (April 29, 2021).
[11] Selyukh, Alina. 2018. "Section 230: A Key Legal Shield For Facebook, Google Is About To Change." *NPR.org*. https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change (April 29, 2021).
[12] Magee, Alexander F. 2020. "Back Against the Wall: Are Section 230's Days Numbered?" *Wake Forest Law Review*. http://wakeforestlawreview.com/2020/10/back-against-the-wall-are-section-230s-days-numbered/ (May 4, 2021).

come to the forefront of the political debate in the United States,[13] and, that will be the focus of this analysis.

This paper, an amalgamation of a law review and a policy analysis, offers a review of the current state of the law when it comes to the liability of social media companies for potentially inciteful, hateful, or defamatory things said on their platforms. It also reviews protections of "free speech" on social media and will review relevant academic and public opinion to develop a list of regulatory goals to aspire to, will analyze, focusing on the political and social implications of recent federal proposals to regulate the policing of speech online, in addition to assessing their constitutionality. Finally, I will recommend a policy solution to the goals outlined.

[13] Kopit, Sarah. 2021. "Why Big Tech and Conservatives Are Clashing on Free Speech." *Bloomberg.com*. https://www.bloomberg.com/news/articles/2021-01-12/why-big-tech-u-s-conservatives-battle-over-speech-quicktake (April 29, 2021).

4. The Problem and Goals for its Solution

To begin a policy analysis, one should start by developing a list of goals that an ideal policy should achieve. To determine such relevant goals, it is useful to search across the political spectrum for grievances within the status quo, examining the positions of political parties, individual politicians, activists, legal scholars, interest groups, and any other relevant body.

If one conducts such a search in the realm that is the focus of this analysis, social media reform, it becomes clear that the "problem" with modern social media platforms differs depending on which group is asked.[14] For some, like politicians and interest groups on the political right, the issue is a perceived bias in policy enforcement against individuals with conservative viewpoints.[15] For others, like some Democratic politicians, it is a worrying spread of hate speech and misinformation, especially political misinformation.[16] Interest groups like the Electronic Frontier Foundation object to enforcement biases against all parties that hold views outside of the political mainstream, on both the left and the right.[17] Others, like the American Civil Liberties Union, object to the very proposition that a small group of elite technology CEOs and board members exert such a level of direct control over the discourse of this nation that they may unilaterally ban the social media presence of a sitting American president.[18]

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[14] Kovach, Steve. 2020. "Democrats and Republicans Disagree on How to Curb Big Tech's Power — Here's Where They Differ." *CNBC*. https://www.cnbc.com/2020/10/07/democrats-and-republicans-disagree-on-how-to-regulate-big-tech.html (April 29, 2021).
[15] Ibid.
[16] Lerman, Rachel. 2021. "Social Media Liability Law Is Likely to Be Reviewed under Biden." *Washington Post*. https://www.washingtonpost.com/politics/2021/01/18/biden-section-230/ (April 29, 2021).
[17] Harmon, Elliot. 2018. "No, Section 230 Does Not Require Platforms to Be 'Neutral.'" *Electronic Frontier Foundation*. https://www.eff.org/deeplinks/2018/04/no-section-230-does-not-require-platforms-be-neutral (April 29, 2021).
[18] Colarossi, Natalie. 2021. "ACLU Counsel Warns of 'Unchecked Power' of Twitter, Facebook after Trump Suspension." *Newsweek*. https://www.newsweek.com/aclu-counsel-warns-unchecked-power-twitter-facebook-after-trump-suspension-1560248 (April 29, 2021).

These concerns, from both sides of the political and ideological spectrum, amount to more than mere fearmongering and conjecture: there is evidence of discriminatory application of facially neutral policies by social media companies.[19] For example, some platforms like YouTube have been credibly accused of de-prioritizing "borderline" or politically unpopular content,[20] while others, like Facebook, have been seen to be discriminating against extreme viewpoints on both sides of the aisle, or, favoring one extreme, in the application of their facially neutral terms of service.[21] However, generally—this second concern seems overblown, [22] as various studies have indicated a lack of systemic bias in enforcement.[23]

While many of the specifics of these demands are, in and of themselves, reasonable, some come into conflict with each other; promoting free speech and limiting social media companies' ability to remove politically charged content comes into conflict with aims to increase regulation to repress the spread of political misinformation and potentially hateful content. It is clear, therefore, that an ideal policy must *balance* these two interests, both of which are critically important. The importance of the first of these interests, regulating platforms to reduce viewpoint discrimination, is especially relevant because to many, social media has become a sort of modern-day public square, where hundreds of millions of Americans engage in lively political and social

[19] Gabbatt, Adam. 2021. "Claim of Anti-Conservative Bias by Social Media Firms Is Baseless, Report Finds." *the Guardian*. http://www.theguardian.com/media/2021/feb/01/facebook-youtube-twitter-anti-conservative-claims-baseless-report-finds (April 29, 2021).
[20] Etzioni, Amitai. 2019. "Should We Privatize Censorship?" *Issues in Science and Technology* 36(1): 19–22.
[21] Dwoskin, Elizabeth, Nitasha Tiku, and Heather Kelly. "Facebook to Start Policing Anti-Black Hate Speech More Aggressively than Anti-White Comments, Documents Show." *Washington Post*. https://www.washingtonpost.com/technology/2020/12/03/facebook-hate-speech/ (May 4, 2021).
[22] Scott, Mark. "Despite Cries of Censorship, Conservatives Dominate Social Media." *POLITICO*. https://www.politico.com/news/2020/10/26/censorship-conservatives-social-media-432643 (April 29, 2021).
[23] Barrett, Paul M., and J. Grant Sims. 2021. "False Accusation: The Unfounded Claim That Social Media Companies Censor Conservatives." *NYU Stern Center for Business and Human Rights*. https://static1.squarespace.com/static/5b6df958f8370af3217d4178/t/6011e68dec2c7013d3caf3cb/1611785871154/NYU+False+Accusation+report_FINAL.pdf.

discourse.[24] As such, evidence of viewpoint discrimination is deeply concerning. Yet the second concern, reducing the spread of misinformation, especially harmful political misinformation, given the role of social media in spreading misinformation at the behest of foreign governments seeking to delegitimize the 2016 and 2020 elections and ultimately destabilize the United States' population,[25] is a major reason for this recent drive for change.[26] Additionally, the role of social media platforms in facilitating radicalization and the planning of the January 6th storming of the United States Capitol while the body was meeting to certify the results of the 2020 election[27] raise calls for concern.

These two primary concerns are real, substantive problems that have a profound impact on American political discourse. Before a conversation about policy goals seeking to remedy the impact of these concerns can be engaged in, it is necessary to briefly review the importance of prudence in potential new regulatory schemes passed by Congress. If Congress is needlessly burdensome in their regulations, they risk placing such a financial and legal burden on social media platforms that the very public square that they seek to protect[28] will be completely undone. Simply granting individuals who are the victims of viewpoint-based discrimination at the behest of a social media company the right to sue and receive not just compensatory, but possibly statutory

[24] Foer, Franklin. 2018. "The Death of the Public Square." *The Atlantic*. https://www.theatlantic.com/ideas/archive/2018/07/the-death-of-the-public-square/564506/ (April 29, 2021).
[25] Rodriguez, Stephen, and T. S. Allen. 2020. "To Protect Democracy, Protect the Internet." *Foreign Policy*. https://foreignpolicy.com/2020/07/14/united-states-election-interference-illegal-social-media/ (April 29, 2021).
[26] Kelly, Makena. 2021. "Democrats Take First Stab at Reforming Section 230 after Capitol Riots." *The Verge*. https://www.theverge.com/2021/2/5/22268368/democrats-section-230-moderation-warner-klobuchar-facebook-google (May 4, 2021).
[27] Nardello, Co-Liam Hanlon, Jud Welle, and Scott Nawrocki. 2021. "January 6 and Beyond: Understanding the New Social Media Landscape." *Lexology*. https://www.lexology.com/library/detail.aspx?g=faaa6f9d-017a-4c56-9acd-ba9a5ed2a479 (April 29, 2021).
[28] Foer, Franklin. 2018. "The Death of the Public Square." *The Atlantic*. https://www.theatlantic.com/ideas/archive/2018/07/the-death-of-the-public-square/564506/ (April 29, 2021).

damages,[29] as well as permitting individuals slandered on such platforms the ability to sue and hold accountable to platform as a *publisher*[30] will result in unsustainable implementation and legal costs for social media companies, forcing them to fundamentally change their platforms in ways that would undermine the goals Congress attempted to achieve in such a circumstance. Since publishers of newspapers and other printed forms of media can be held liable for defamatory content written in their publication,[31] and since it is not feasible to have individual review and screening of every post and every comment written on a social media website,[32] policy proposals will necessarily have to grant some degree of immunity to social media companies that make good faith efforts to fairly regulate their content, or, Congress will have to acknowledge that the libel law of the 20th century and print media are not compatible with mass quantities of user-generated content.

Any policy that Congress passes should ensure that social media companies are not engaging in viewpoint-based discrimination in the enforcement of their terms of service, while also making sure that social media companies are able to bar other types of speech protected by the First Amendment,[33] like hate speech, cyberbullying, etc.[34] as long as enforcement efforts are not biased against a group with a specific political or social viewpoint. Any passed policy ought to retain these companies' ability to remove such content, and should also require them to remove

[29] Mackey, Aaron. 2020. "Two Different Proposals to Amend Section 230 Share A Similar Goal: Damage Online Users' Speech." *Electronic Frontier Foundation*. https://www.eff.org/deeplinks/2020/06/two-different-proposals-amend-section-230-share-similar-goal-damage-online-users (May 4, 2021).
[30] McCabe, David. 2020. "Justice Dept. Urges Congress to Limit Tech's Legal Shield." *The New York Times*. https://www.nytimes.com/2020/09/23/technology/social-media-internet-speech-section-230.html (May 4, 2021).
[31] Proffatt, John. 1880. "The Law of Newspaper Libel." *The North American Review* 131(285): 109–27; Lee, Jae Hong. 2004. "Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third-Party Content on the Internet." *Berkeley Technology Law Journal* 19(1): 469–93.
[32] Ibid.
[33] U.S. Const. amend I.
[34] Juhan, S. Cagle. 2012. "Free Speech, Hate Speech, and the Hostile Speech Environment." *Virginia Law Review* 98(7): 1578.

unlawful content, or, ordered to be removed by an injunction of a criminal court. However, in establishing such an affirmative duty for social media companies and other interactive service providers, Congress must take care that companies that take "good faith" efforts to remove such content from their platforms remain immune from civil causes of action and criminal statutes.

Finally, any good policy proposal should require social media companies to ramp up their efforts to stop the spread of potentially damaging political misinformation, specifically, that which is generated and propagated by robotic computer networks at the behest of foreign governments.[35] A potential way to do this might be by removing waivers of liability for content that violates generally applicable criminal laws. In doing so, however, Congress must ensure that enacting such policies does not cause interactive service providers to punish *individual users* that simply engage in false, or partially false forms of what would be considered protected "political speech" by Courts if social media companies were a state actor. It is with these three goals, and these caveats, that the policies introduced later in this analysis will be reviewed.

[35] Abrams, Abigail. 2019. "Here's What We Know So Far About Russia's 2016 Meddling." *Time*. https://time.com/5565991/russia-influence-2016-election/ (May 4, 2021).

5. Review of Current Law

Having reviewed the legislative problem that the proposals reviewed later in this analysis ought to solve, it is now relevant to review the current state of the law as it relates to this specific area.

Section 230: *A Small Statute with Mammoth Implications*

Section 230 of the Communications Decency Act is a relatively short section. Operationally, it has just 490 words,[36] —an incredibly small amount for a statute with such widespread implications[37]—implications that will be discussed at length later. The section has two major subsections, both of which will be discussed at length: first, the waiver of "publisher" or "speaker" status for social media companies and other interactive service providers like forums, blogs, or any other website where users submit their own content when it comes to the posts produced by users of their platform,[38] and second, a "Good Samaritan" provision that provides a legal shield to companies acting in good faith to moderate their platform.[39] Both of these sections are critically important to the functioning and impact of the law—but, both operate in different ways and are separate from each other in their specific impact, and therefore warrant being analyzed separately.

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[36] Communications Decency Act of 1996. 47 U.S. Code § 230.
[37] Engelberg, Stephen. "Twenty-Six Words Created the Internet. What Will It Take to Save It?" *ProPublica*. https://www.propublica.org/article/nsu-section-230?token=LxlGpDTGeNkRVdBY_bX0b8KqR5dJhsIu (April 29, 2021).
[38] Communications Decency Act of 1996. 47 U.S. Code § 230, C, 1.
[39] Communications Decency Act of 1996. 47 U.S. Code § 230, C, 2. A.

Operative Section 1: Publisher Responsibility Waiver

Text of the Subsection

As outlined in the "goals" section, one area of import when it comes to social media regulation is the waiver of responsibility for the social media company of potentially libelous or inciteful user-generated content shared on their platform. The current law provides this type of liability waiver through the first operational section of the statute, a "publisher responsibility waiver," granting social media companies an affirmative defense to these types of claims.[40] The statute specifically provides that for the purposes of libel law and other civil causes of action:

> …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…[41]

The law then defines "interactive computer service" as:

> …any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.[42]

The law also defines "information content provider" as:

> …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… [43]

This subsection has been understood to mean that for any online platform like say, for example, Facebook, they are not treated like a newspaper, or a television station would be treated, as responsible for the content in question.[44] This particular subsection is the cause of one of the major implications of the statute—that there is no liability for social media companies when it comes to potentially defamatory or inciteful content posted on their platforms *by users.*[45]

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[40] Communications Decency Act of 1996. 47 U.S. Code § 230, C, 1.
[41] Ibid.
[42] Communications Decency Act of 1996. 47 U.S. Code § 230, F, 2.
[43] Communications Decency Act of 1996. 47 U.S. Code § 230, F, 3.
[44] Lee, Jae Hong. 2004. "Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third-Party Content on the Internet." *Berkeley Technology Law Journal* 19(1): 469–93.
[45] Ehrlich, Paul. 2002. "Communications Decency Act § 230." *Berkeley Technology Law Journal* 17(1): 401–19.

This section, along with these definitions, makes clear that the law provides social media platforms with a blanket waiver from being considered by a court or other entity, as the publisher of the information on their platform.[46] The impact of this may not be immediately apparent, however, upon an examination of precedent-related to defamation law, the importance of the waiver becomes widely apparent. This waiver essentially frees social media companies from the common law principle that says that, for the purposes of determining liability for defamation, a publisher bears the same liability as the initial speaker of the defamatory statement[47] (and prior to the enactment of the CDA, some courts held online platforms liable for damages, as a publisher, in defamation cases, like in the 1995 New York case *Stratton Oakmont v. Prodigy.*[48]) The impact of this section will be discussed more in the "policy review" sections when analyzing laws that seek to remove this waiver of liability.

[46] Ibid.
[47] Cramer, Benjamin W. 2020. "From Liability to Accountability: The Ethics of Citing Section 230 to Avoid the Obligations of Running a Social Media Platform." *Journal of Information Policy* 10: 124-125.
[48] *Stratton Oakmont, Inc. v. Prodigy Services Co.,* 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995)

Operative Section 2: Civil Liability waiver for Enforcement Actions

Text of the Subsection

As noted in the "goals" section, a second important purpose of any statute seeking to regulate in this area is to provide mechanisms by which platforms can moderate potentially offensive, violent, or other types of undesirable content. The second operative section of the law grants a "civil liability waiver" to "interactive computer services," including social media companies that undertake voluntary actions:

> ….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 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…[49]

This subsection has been understood to mean that social media companies that attempt in "good faith" to remove content from their platform that they deem offensive, lewd, violent, harassing, or "otherwise objectionable," according to some generally applicable standard, are waived from any potential civil cause of action arising from their activities.[50]

This waiver allows social media companies and other online web-service providers to remove content without fear of lawsuits over inequitable or unequal enforcement of their policies,[51] freeing such companies from potentially time-consuming lawsuits and other actions that would make running a platform unsustainably expensive.[52] It should be noted that this waiver of liability is *narrower* than that in the other section of the law, since it only provides a

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[49] Communications Decency Act of 1996. 47 U.S. Code § 230, C, 2. A.
[50] Ziniti, Cecilia. 2008. "The Optimal Liability System for Online Service Providers: How *Zeran v. America Online* Got It Right and Web 2.0 Proves It." *Berkeley Technology Law Journal* 23(1): 584, 597.
[51] "Section 230 Protections." 2011. *Electronic Frontier Foundation*. https://www.eff.org/issues/bloggers/legal/liability/230 (May 4, 2021).
[52] Ibid.

waiver if actions are taken in "good faith," whereas the first waiver of publisher responsibility is *absolute.*[53]

This statute and its language raises a number of questions as to the definitions of its terms that are not outlined in the statute, and thus left to the Courts to define precisely what the terms, for example, "good faith," and "otherwise objectionable" meant precisely.[54] One must look to relevant case law to see the accepted definitions of these terms so as to examine potential specific changes that may be made to these understood definitions via congressional action.

[53] Brannon, Valerie C. 2019. "Liability for Content Hosts: An Overview of the Communication Decency Act's Section 230." *Congressional Research Service*: 3.
[54] Communications Decency Act of 1996. 47 U.S. Code § 230, C, 1.

Applying the Text – Case Law

Operative Section 1 Cases: *Extent of Liability Waiver, Applicability of State Laws, Etc.*

After passing the CDA, it was up to the Courts to interpret what the specific provisions of the law meant in practice. While no case involving Section 230 of the Communications Decency Act has been reviewed by the United States Supreme Court,[55] a number of decisions have been made at lower-level federal courts, constituting binding precedent for courts inferior to them, and setting standards and examples for other unrelated courts to follow.[56]

A question needing to be answered by the courts about the first section of Section 230 was whether or not generally applicable state laws establishing duties of care for traditional publishers ought to apply to online platforms if they act in bad faith. In 1997, in *Zeran v. America Online, Inc.,* the United States Court of Appeals for the Fourth Circuit answered this question, stating that the plain text of the law barred social media companies from being held liable for failing to exercise the "traditional editorial functions" of a publisher, such as "deciding whether to publish, withdraw, postpone or alter content (3)."[57] The Court noted the legitimacy of the damages by plaintiffs in these types of cases and referenced the fact that the law does not bar the plaintiff from pursuing a defamation claim against the original poster of the defamatory content.[58]

Another question the courts needed to answer was precisely what the term "information" referred to,[59] and whether it only meant actual written text and images, things that would

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[55] Rouan, Rick. 2021. "Fact Check: Justice Clarence Thomas Didn't Say Section 230 Is Unconstitutional." *USA TODAY*. https://www.usatoday.com/story/news/factcheck/2021/04/08/fact-check-post-misrepresents-justice-thomas-section-230/7122886002/ (May 4, 2021).
[56] "CDA 230: Key Legal Cases." 2017. *Electronic Frontier Foundation*. https://www.eff.org/issues/cda230/legal (May 4, 2021).
[57] *Zeran v. America Online, Inc*., 129 F.3d 327 (4th Cir. 1997).
[58] Ibid.
[59] Communications Decency Act of 1996. 47 U.S. Code § 230, F.

traditionally be published, or, all types of data like computer programs.[60] A second question was whether or not the inclusion of mechanisms by which companies remove content from their platforms in violation of their policies created an affirmative duty for such a company to remove said violative content, and, if they breached such duty, whether Section 230 still applied.[61] In 2003, the U.S. District Court for the District of New Jersey answered these questions, in both instances, ruling for the defendant in a broad interpretation of Section 230's terms.[62]

On the first question of the waiver of the liability waiver based on the language in the terms of service agreement, the Court ruled that including within the terms of service agreement a statement that a company "does not assume any responsibility or liability" is enough to retain the waiver of publisher liability, even if the platform takes other types of actions that a "publisher" would take like removing content or otherwise moderating their platform.[63] The court stated—unequivocally, that Congress intended to establish a rule that social media companies, and other interactive computer service providers, cannot be held liable for failing to take "actions quintessentially related to a publisher's role."[64] This was an important precedent, as it was cited repeatedly by other Courts as to the functional absoluteness of the waiver under Section 230.[65] On the second question, the Court ruled that because of factors surrounding interpretations of Congressional intent, it is clear that Congress intended the word "information" to include any content, including computer programs, under the liability waiver.[66] This too is an important piece of precedent, as it established a legal argument that *everything*, not just textual

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[60] *Green v. America Online*, 318 F.3d 465 (3d. Cir. 2003).
[61] Ibid.
[62] Ibid.
[63] Case
[64] "Green v. America Online, 318 F.3d 465 (3d. Cir. 2003)." 2012. *Electronic Frontier Foundation*. https://www.eff.org/issues/cda230/cases/green-v-america-online (May 6, 2021).
[65] Ibid.
[66] *Green v. America Online*, 318 F.3d 465 (3d. Cir. 2003).

communications, and other specifically defamatory communications were included under the Section 230 liability waiver.[67]

Another important question that the courts needed to answer was whether generally applicable *civil* torts may apply to these types of companies covered under Section 230.[68] This question was answered in 2009, when the United States Court for the Ninth Circuit ruled that an Oregon law barring online harassment and cyberstalking did not apply to social media platforms. The Court ruled that they could neither provide compensatory or even injunctive relief for the plaintiff, stating that while the platform's behavior did indisputably violate the affirmative duty the Oregon law provided, the company was immune from liability because the action they would need to have taken to prevent the damage was related to censoring and removing specific types of content from their website, something that would have required the Court to "…treat the service provider as 'publisher' of the content," which is "…barred by Sec. 230."[69]

[67] "Green v. America Online, 318 F.3d 465 (3d. Cir. 2003)." 2012. *Electronic Frontier Foundation*. https://www.eff.org/issues/cda230/cases/green-v-america-online (May 6, 2021).
[68] *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009).
[69] Ibid, 7423.

Operative Section 2 Cases: *Defining Good Faith and Types of Regulatable Content*

The second section of Section 230 also contains various terms that were left undefined by Congress, leaving it up to the courts to determine the exact breadth of the statute.

One such question was what the term "good faith" means specifically when referring to "good faith" actions taken by platforms to remove objectionable content from their platforms.[70] This question was answered by the United States District Court for the Middle District of Florida, who ruled that what matters is the context involved in companies making decisions "based on editorial judgment or compliance with stated guidelines."[71] The law, the Court opined, grants wide immunity to companies attempting to enforce their policies, but does not grant absolute immunity; companies that are neither making editorial judgments nor following their own internal policies are *not* protected under this subsection of Section 230, as failing to act in this manner is acting in "bad faith."[72] Specifically, the court ruled that companies are covered if they are taking actions that are traditionally those that would be taken by publishers, acting in a fashion that the law explicitly waives them from being held responsible for doing[73]

This case still remains important for setting what is often cited as the definition for "good faith" under this subsection of the law.[74] This is a relatively recent case—and one of just a few that has attempted to define "good faith" under the law.[75] While there have been a few others citing it as precedent,[76] it is not well-established enough to go unchallenged by the ideas of other courts.

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[70] *e-ventures Worldwide, LLC v. Google, Inc.*. 188 F. Supp. 3d 1265 (M.D. Fla. 2016).
[71] Ibid, 8.
[72] Ibid, 7.
[73] Ibid.
[74] Communications Decency Act of 1996. 47 U.S. Code § 230, C, 2. A.
[75] "CDA 230: Key Legal Cases." 2017. *Electronic Frontier Foundation*. https://www.eff.org/issues/cda230/legal (May 4, 2021).
[76] Ibid.

Finally, the courts needed to determine what types of material platforms may remove under the term "otherwise objectionable" in the second operative section of the statute, and to determine if any types of content could not be removed without the risk of liability on the part of the removing platform.[77] In a recent 2019 decision, the United States Courts of Appeals for the Ninth Circuit ruled that "otherwise objectionable" was "a subjective standard whereby internet users and software providers decide what online material is objectionable," where essentially the term acted as a mechanism of giving absolute discretion to the internet service provider when it comes to which type of content is "objectionable."[78]

However, in this case, which involved an accusation that Malwarebytes was using their virus detection software in a way to engage anti-competitive behavior by falsely identifying the plaintiff's software as malware, the court limited the discretion of companies to deem content "otherwise objectionable," ruling that "otherwise objectionable" does not include software that the provider finds objectionable for anticompetitive reasons," and putting—for the first time—real limits on the discretion of companies to deem materials objectionable.[79]

[77] *Malwarebytes Inc v. Enigma Software Group USA, LLC,* 938 F.3d 1026 (9th Cir. 2019).
[78] Ibid.
[79] Ibid.

6. Constitutional Law and Federalism Question

Having analyzed the current state of the law when it comes to the regulation of social media companies' efforts to moderate their platforms, the next logical step is to review potential avenues for change. Before we begin this process, it is useful to answer some important overarching questions: are state governments barred by the dormant commerce clause from developing their own regulations seeking to moderate speech online, and what is the extent of federal power under the Interstate Commerce Clause,[80] tempered by the First Amendment and other legal precedents to force private actors (social media companies) to comply with specific regulatory mandates? Finally, do social media platforms rise to the standard of a "public forum" under American law, granting the users full protection of the First Amendment?

The Federalism Question and the Dormant Commerce Clause:

Regulating speech on social media has, as noted repeatedly earlier in this analysis, become a priority for federal legislators.[81] It has, however, also become an area of interest of various state legislators, leading some, like members of the Texas State Senate to introduce for consideration bills that seek to require social media platforms that operate within their borders to be politically neutral in enforcing their policies regarding potentially inciteful political rhetoric, and grant banned users mechanisms to be reinstated onto platforms.[82] A state attempting to regulate social media companies that also have users out-of-state and that engage in transferring information across state lines raises an interesting question about the constitutionality of *any* state level proposals regarding concerns of federalism and federal preemption.

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[80] U.S. Const. art. I §8, cl. III.
[81] Reardon, Marguerite. 2020. "Democrats and Republicans Agree That Section 230 Is Flawed." *CNET*. https://www.cnet.com/news/democrats-and-republicans-agree-that-section-230-is-flawed/ (April 29, 2021).
[82] Agnew, Duncan, and Bryan Mena. 2021. "Republicans and Democrats Both Want to Repeal Part of a Digital Content Law, but Experts Say That Will Be Extremely Tough." *The Texas Tribune*. https://www.texastribune.org/2021/01/21/section-230-internet-social-media/ (May 1, 2021).

State and Federal Authority to Regulate Under the Interstate Commerce Clause:

First, to answer this question of whether state or federal regulations are appropriate, one must examine the authority to regulate the Internet under both State and Federal authority. The idea that the Federal government has wide authority to regulate the Internet under the Interstate Commerce Clause is black letter law in the United States.[83] To analyze whether state governments may also engage in regulations seeking to *augment* federal regulations under the concept of cooperative federalism, or if states are explicitly banned from doing so as a result of the Dormant Commerce Clause,[84] one must review the proposal in light of jurisprudence relating to the issue of federal preemption.

Preemption Analysis and Dormant Commerce Clause Discussion:

To determine whether a law attempting to regulate "decency" on the internet in relation to a state's citizens, or if any other regulatory area is federally pre-empted, the proper legal standard is derived from *Pennsylvania v. Nelson,* which outlines the following three prong legal test, stating that:

1. The federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."
2. The national interest is so dominant that the federal system must "be assumed to preclude enforcement of state laws on the same subject."
3. "There is a danger of conflict between state and federal enforcement efforts."[85]

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[83] Luster, Valeria. 2015. "Let's Reinvent the Wheel: The Internet as a Means of Interstate Commerce in *United States v. Kieffer*." *Oklahoma Law Review* 67(3). https://digitalcommons.law.ou.edu/olr/vol67/iss3/5; McGimsey, Diane. 2002. "The Commerce Clause and Federalism after Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole." *California Law Review* 90(5): 1675–1737.

[84] Burk, Dan L. 1996. "How State Regulation of The Internet Violates the Commerce Clause." *CATO JOURNAL*: 1-15; Goldsmith, Jack L., and Alan O. Sykes. 2001. "The Internet and the Dormant Commerce Clause." *The Yale Law Journal* 110(5): 785–828.

[85] *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

Using this standard, reaffirmed and strengthened in cases like *Arizona v. United States* (2012),[86] let us examine proposed **state** regulations that seek to regulate social media companies relating to content created by third parties.

First, under the first prong of the test, it is clear, based on the text of Section 230, which explicitly states "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section,"[87] that Congress clearly intended Section 230 to bar laws that attempt to conflict with the statute, further evidenced by the laws' grant to states permission to "enforce[e]…State law[s] that…[are]…consistent with…[the]…section."[88] It is obvious, therefore, examining legal precedent and the statute itself, that Section 230 was meant to pre-empt state laws that seek to modify the explicit terms of the statute.[89]

The passage of the second prong of the test—that an area of preemption must be one where the federal government has a "dominant interest"—is easily determined. It is black letter law in the United States that the Internet constitutes interstate commerce;[90] data is crossing state lines, and goods and services are sold across state lines using it.[91] It is further black letter law that the federal government has the authority to regulate the internet, as a forum of interstate commerce, [92] under the enumerated power to regulate interstate commerce under the Constitution's Interstate Commerce Clause,[93] and this, if tested, would almost certainly be

[86] *Arizona v. United States*, 567 U.S. 387 (2012).
[87] Communications Decency Act of 1996. 47 U.S. Code § 230, E, 3.
[88] Ibid.
[89] Glynn, Cary. 2017. "Section 230's Applicability to 'Inconsistent' State Laws (Guest Blog Post)." *Technology & Marketing Law Blog*. https://blog.ericgoldman.org/archives/2017/10/section-230s-applicability-to-inconsistent-state-laws-guest-blog-post.htm (May 1, 2021).
[90] Luster, Valeria. 2015. "Let's Reinvent the Wheel: The Internet as a Means of Interstate Commerce in *United States v. Kieffer*." *Oklahoma Law Review* 67(3). https://digitalcommons.law.ou.edu/olr/vol67/iss3/5.
[91] Ibid.
[92] Ibid.
[93] U.S. Const. art. I §8, cl. III.

considered an area of "dominant federal interest" therefore, this prong of the *Pennsylvania v. Nelson* preemption test is met.

Finally, regulations seeking to moderate the manner in which social media companies deal with content on their platforms conflict *directly* with the federal law, and would therefore not *augment,* but seek to replace and change federal law, clearly violating the *Nelson* standard. This type of law, therefore, having met the three prongs of the *Pennsylvania v. Nelson* test, is clearly preempted by Section 230 and is therefore a violation of the federal constitution, which renders it unenforceable.[94] Whether regulations that seek to only regulate internet usage and communications that are *entirely* within the same state are permitted as an exercise of the reserved Tenth Amendment power to regulate Int**ra**state Commerce is an unanswered question.[95] As such, the feasibility of regulating a platform in this way, which would be requiring barring communications on regulated platforms that cross state lines is so unrealistic and pointless that it borders on absurdity.

[94] U.S. Const. art VI, cl. II.
[95] Luster, Valeria. 2015. "Let's Reinvent the Wheel: The Internet as a Means of Interstate Commerce in *United States v. Kieffer*." *Oklahoma Law Review* 67(3), 595. https://digitalcommons.law.ou.edu/olr/vol67/iss3/5.

Extent of Federal Authority to Regulate, and limitations under the First Amendment:

Federal authority to regulate the Internet as a "channel of interstate commerce" under the Interstate Commerce Clause, as referenced above, is well-established law in the United States.[96] As a number of Supreme Court cases have noted, including *United States v. Lopez,* that Congress may regulate the "use of channels of interstate commerce."[97] While the Supreme Court has never explicitly ruled that the Internet is a "channel of interstate commerce,"[98] it is abundantly obvious that since money is exchanged for goods over it, and that the money, and the goods cross state lines (and even international lines),[99] Congress has similar authority to regulate it as any other area regulated under the Interstate Commerce Clause. However, while Congress has this authority, it, like other areas regulated under the Commerce Clause, is *not* unlimited.[100]

First, any regulation seeking to set conditions under which private businesses may regulate the content on their own platform's risks running afoul of the First Amendment. The question of whether or not the federal government can *require* private companies to regulate their content turns, in many instances, like in *Ashcroft v. Free Speech Coalition,*[101] and, in *United States v. X-Citement Video, Inc*. on the *nature* of the speech.[102] This includes whether the speech is *exploitative of minors,* whether the speech in question is *political in nature,* whether it is *commercial speech,* or, a number of other categories.[103] Having read all of these cases, upon reflection, it seems that the Court engages in a balancing test to determine whether the interest

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[96] Ibid, 594-596.
[97] *United States v. Alfonso D. Lopez, Jr*., 514 U.S. 549 (1995).
[98] Bomboy, Scott. 2018. "Supreme Court Set to Tackle Internet Sales Tax Question - National Constitution Center." *National Constitution Center*. https://constitutioncenter.org/blog/supreme-court-set-to-tackle-internet-sales-tax-question (May 4, 2021).
[99] Ibid.
[100] Armond, Michelle. 2002. "State Internet Regulation and the Dormant Commerce Clause." *Berkeley Technology Law Journal* 17(1): 379–400.
[101] *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002).
[102] *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994).
[103] Middleton, Kent R. 1991. "Advocacy Advertising, the First Amendment, and Competitive Advantage: A Comment on Cutler & Muehling." *Journal of Advertising* 20(2): 78–81.

purportedly advanced by the Government is a.) truly advanced, in the least-restrictive way possible, by the mechanism of the statute and b.) whether such an interest outweighs the protection granted by to speakers by the First Amendment.

In passing regulations, Congress must not be overly broad,[104] and, must ensure that their regulations, if they burden speech substantially, are supported by significant government interests and legislative factfinding.[105] Congress, for example, could not establish a provision defining and barring "hate speech," or bullying, racism, sexism, anti-Semitism, or any other number of socially unacceptable, offensive types of speech, including anything else permitted as protected speech under *Miller v. California's* three-prong obscenity test.[106] Companies, of course, may go further in barring speech than Congress may—the First Amendment protects a speaker only from government, not corporate censorship.[107] Yet it must be noted that private, non-commercial speech, in particular, *political speech,* such as espousing racist or sexist policies, may not be barred by Congress, or any other state actor, except in specific, unrelated circumstances.[108] This doubtless dampers, as will be discussed in the "policy" section below, the likelihood that some proposals attempting to regulate the Internet to remove misinformation or politically radicalizing content be held constitutional, for political speech leading to the adoption of views deemed society, and by extension, by the government to be radical, while potentially undesirable, is precisely what the First Amendment was, in my view, adopted to protect.

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[104] "The First Amendment Overbreadth Doctrine." 1970. *Harvard Law Review* 83(4): 844–927.
[105] Benjamin, Stuart Minor. 2000. "Proactive Legislation and the First Amendment." *Michigan Law Review* 99(2): 300, 306, 317.
[106] *Miller v. California*, 413 U.S. 15 (1973)
[107] MacLaren, Selina. 2021. "Is There a First Amendment Right to Tweet?" *JSTOR Daily*. https://daily.jstor.org/is-there-a-first-amendment-right-to-tweet/ (May 5, 2021).
[108] BeVier, Lillian R. 1978. "The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle." *Stanford Law Review* 30(2): 307, 333, 337-339.

Next, Congressional regulations of internet companies must comply with other standards that other generally applicable laws must comply with: particularly, both the vagueness doctrine *and* the overbreadth doctrine. First, when it comes to the vagueness doctrine, Congress must ensure that laws attempting to regulate particular content are specific enough in their language that companies reading the law will be "…inform[ed]…to…what conduct on their part will render them liable to its penalties," per the seminal case on the vagueness doctrine, *Connally v. General Construction Co.*[109] Second, when it comes to the overbreadth doctrine, Congress must ensure that they are not too specific in their barring of particular types of speech, else they risk an "overly broad law deterring constitutionally protected speech," as was the case when it came to laws barring the depiction of specific acts glorifying and engaging in animal cruelty, deemed unconstitutional by *United States v. Stevens.*[110]

Outside of these concerns: conflicts with the First Amendment rights of private companies, and, of their customers, the vagueness doctrine, and the overbreadth doctrine, Congress has generally wide and unrestricted authority to regulate Internet Service Providers, including social media companies, as cited and evidenced above, an authority that the policies proposed to revamp Section 230, which this analysis will later review, seeks to exercise.

[109] *Connally v. General Construction Co*., 269 U.S. 385 (1926).
[110] *United States v. Stevens*, 559 U.S. 460 (2010).

Are social media platforms a "public forum" under which First Amendment protections should apply?

Some note a recent argument that social media companies have, through providing free, open access to their platform to all users, created a "public forum," and therefore, all of the protections of the First Amendment should apply.[111] While the implications of such a determination would be broad[112]—and they will not be discussed here, since they are essentially *identical* to the implications of what would occur if the government opted to regulate social media platforms as a "public utility." A policy proposal which will be reviewed later—whether or not a public forum has been *already* been created, under American jurisprudence is an interesting and relevant discussion.

The answer to the first question is relatively simple, but not conclusive: at first, examining older precedent like *Marsh v. Alabama,* a 1946 case that ruled the First Amendment still applies on the sidewalks, public squares, and other confines of a privately owned company town,[113] makes it seem that a ruling making the First Amendment apply is not absurd. Yet in 2019 a 5-4 Supreme Court decision in *Manhattan Community Access Corp v. Halleck,* an unrelated case relating to whether public access television systems, not specifically intended by the Congress to be a public forum, have become them,[114] the Court ruled that "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."[115] The Court further opined that "providing some kind of forum for speech is not an activity that only governmental entities have

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[111] Nunziato, Dawn. 2018. "From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital." *GW Law Faculty Publications & Other Works,* 1-4, 75-76. https://scholarship.law.gwu.edu/faculty_publications/1368
[112] Ibid, 69-78.
[113] *Marsh v. Alabama*, 326 U.S. 501 (1946).
[114] Manhattan Community Access Corp. v. Halleck, No. 17-1702, 587 U.S. ___ (2019).
[115] Ibid.

traditionally performed."[116] Therefore, a private entity that provides a forum for speech is "not transformed by that fact alone into a state actor."[117] This appears to answer, rather definitively, that although social media companies have created a sort of "forum for speech" it does not mean that that forum is "transformed" into a public one where the First Amendment applies. It should be noted, however, that the Court decided this case narrowly, and did not explicitly mention social media companies, or, whether the governments *regulation* through Section 230 goes further than the regulation of public access companies, constituting a Congressional effort to create a "public forum," and being enough to transform the company into a state actor.[118] This question, is, as of now, undecided.[119] However, there is no reason why the logic in this case would not apply to the issue of social media companies with the possible exception of the caveat outlined in the last sentence. The Court has, since this point, lost a dissenting justice in Justice Ginsburg and added another conservative Justice in Justice Barrett that would likely join the majority.[120] Congress could—of course, change the law to explicitly make clear their legislative intent to develop social media as a public forum or utility,[121] something that is the basis of one of the proposals that will be reviewed later.

Furthermore, under the standard established in *Hazelwood School District v. Kuhlmeier* and grown in *Walker v. Texas Division, Sons of Confederate Veterans,* Congress must make at

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[116] Ibid, 9.
[117] Ibid, 2.
[118] Lecher, Colin. 2019. "First Amendment Constraints Don't Apply to Private Platforms, Supreme Court Affirms." *The Verge*. https://www.theverge.com/2019/6/17/18682099/supreme-court-ruling-first-amendment-social-media-public-forum (May 5, 2021).
[119] Ibid.
[120] Greenhouse, Linda. 2020. "Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87." *The New York Times*. https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html (May 5, 2021); Fausset, Richard. 2020. "Amy Coney Barrett Sworn In as Supreme Court Justice, Cementing Conservative Majority." *The New York Times*. https://www.nytimes.com/live/2020/10/26/us/trump-biden-election (May 5, 2021).
[121] Weiss, Debra C. "Can Congress Stop Twitter from Blocking Users? Thomas Considers Idea as Supreme Court Vacates Trump Decision." *ABA Journal*. https://www.abajournal.com/news/article/can-congress-stop-twitter-from-blocking-users-thomas-considers-the-idea-as-scotus-vacates-trump-decision (May 5, 2021).

least some explicit, direct effort to establish a public forum[122]—Section 230 does not include a reference to a "public forum," nor does it include any conversation relating to protecting speech protected by the First Amendment—only restricting speech. Therefore, it cannot be reasonably argued that Congress intended, in 1996, to force "interactive service providers" to become state actors running public forums, according to both the text of the law, and a review of legislative discussions[123] that make clear the implications of such a declaration would have been anathema to the intent of the law.

[122] *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. 200 (2015).
[123] Lee, Edward. 2021. "Moderating Content Moderation: A Framework for Nonpartisanship in Online Governance." *American University Law Review* 70(3): 943.

7. Analysis of Policies

Having completed a review of the current state of the law when it comes to the protection of "free speech" and the regulation of user-generated content on social media and other platforms, it is now relevant to move to the secondary focus of this analysis, a review of policies proposed to achieve the aims, and other similar priorities outlined in the "goals" section of this analysis.

This analysis will review a total of 7 policies from across the political spectrum, and from impacted parties, like those proposed by Facebook, and social media companies *themselves.*[124] I will review several different types of policies, including bills that seek to repeal the entirety of Section 230, and bills that seek to limit the scope of Section 230 by limiting the activities and circumstances that of the statute's liability applicability, while also making the waivers unenforceable under certain conditions. I will also examine bills that seek to impose new obligations on internet service providers, like various duties of care, among other proposals. In reviewing these proposals, I will examine, in the context of the goals and priorities outlined earlier in this paper, and, understanding the limits of congressional power to regulate internet service providers, the purported aims of particular proposals, their mechanisms of action, and their legal, political, social, and economic impacts.

Due to the fact that most bills seek to modify multiple parts of Section 230 and therefore would be categorized under multiple categories, I will sort proposals within a specific policy category by the party affiliation of the proposer, and then review policies supported by bipartisan coalitions and other interested parties.

[124] "Internet Regulations." 2021. *About Facebook*. https://about.fb.com/regulations/ (May 5, 2021).

Republican Proposals:
Grouped Proposals Seeking to:
Restrict Section 230 Applicability to companies that meet certain guidelines

Ending Support for Internet Censorship Act – S. 1914[125]
Sponsor: Josh Hawley, R-Missouri
Co-Sponsors: None

Summary:
Modification of general waiver of liability, reinstates in specific circumstances, Modification of Good Samaritan waiver

Aims:

This bill seeks to meet the legislative goal, outlined in the "goals" section of this paper, of addressing reports of political bias in the enforcement of facially neutral community standards. The legislation does not seek to address any of the other goals identified in the "goals" section of this analysis.

Changes to Operative Sections:

This legislation would amend both operative sections of Section 230 in ways that would fundamentally change the impact of the law. First, the legislation adds language that modifies section 1 (the publisher responsibility waiver) and section 2 (the good faith waiver for enforcement actions), stating that only companies that have newly created, 2-year renewable "immunity certifications" from the Federal Trade Commission are covered under the law.[126] However, the bill would only change Section 230 for American companies that had more than 30,000,000 active monthly users in the United States. The bill further defines the requirements to receive these certificates as any company that:

> …proves to the Commission by clear and convincing evidence that the provider does not (and, during the 2-year period preceding the date on which the provider

[125] Ending Support for Internet Censorship Act of 2019, S. 1914, 116th Cong. (2019).
[126] Ibid, 2.

> submits the application for certification, did not) moderate information provided by other information content providers in a politically biased manner.[127]

The bill further describes the term "politically biased moderation," as used in the proposed subsection above, as when the:

> …provider moderates information provided by other information content providers in a manner that—(aa) is designed to negatively affect a political party, political candidate, or political viewpoint; or (bb) disproportionately restricts or promotes access to, or the availability of, information from a political party, political candidate, or political viewpoint…"[128]

The bill attempts to make some sort of "business necessity" waiver, which attempts to retain some degree of protection against unprotected speech that permits companies to engage in politically disproportionate viewpoint discrimination if the:

> …information involved is not speech that would be protected under the First Amendment of the United States Constitution, there is no available alternative that has a less disproportionate effect, and the provider does not act with the intent to discriminate based on political affiliation, political party, or political viewpoint.[129]

[127] Ibid, 3.
[128] Ibid.
[129] Ibid, 4.

Curbing Abuse and Saving Expression in Technology (CASE-IT) Act – H.R. 285[130]
Sponsor: Gregory Steube, R-Florida
Co-Sponsors: Madison Cawthorn (R-North Carolina), Kevin Hern (R-Oklahoma), Ashley Hinson (R-Iowa), Jefferson Van Drew (R-New Jersey)[131]

Summary:

Requires companies that are "dominant" in the market to enact content moderation policies consistent with First Amendment protections, creates a civil cause of action for plaintiffs to sue "dominant" companies whose moderation policies are inconsistent with the First Amendment.

Summary of Aims and Relevant Operative Sections:

This legislation seeks to establish First Amendment protections for speech on platforms provided by "interactive service providers" by waiving liability waivers, in specific circumstances, for "dominant companies," as determined by the FTC and defined broadly by the bill as "provider[s]…[that]…ha[ve] gained substantial, sustained market power over any competitors."[132] Specifically, the bill states that both the publisher responsibility waiver (paragraph 1) and the first half of the liability waiver (the operative portion) for "dominant" (as described above) companies that "make content moderation decisions pursuant to policies or practices that are not "reasonably consistent" with the First Amendment to the Constitution,"[133] moderation decisions which the proposed statute defines as:

> …conform[ing] such policies and practices to established law under the First Amendment to the Constitution applicable to state actors, regardless of whether or not such provider is a state actor, to the extent feasible taking into consideration the developing capabilities and complexities of technology and the unique characteristics of online communication platforms.[134]

The proposed law also creates a private civil cause of action for actions taken by "dominant" interactive computer service providers that:

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[130] Curbing Abuse and Saving Expression In Technology Act of 2019, H.R. 285, 116th Cong. (2019).
[131] Jeevanjee, Kiran et al. 2021. "All the Ways Congress Wants to Change the Internet's Most Fundamental Law." *Slate Magazine*. https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html (April 18, 2021).
[132] Curbing Abuse and Saving Expression In Technology Act of 2019, H.R. 285, 116th Cong. (2019), 9.
[133] Ibid.
[134] Ibid.

> …bans, blocks, down-ranks, demonetizes in its advertising, or otherwise subjects (the proposed plaintiff) to similar adverse treatment the content of any information content provider that uses an interactive computer service of such dominant provider by reason of the failure of such dominant provider to make content moderation decisions pursuant to policies or practices that are reasonably consistent with the First Amendment to the Constitution.[135]

In addition to providing this civil cause of action, the proposed statute further permits plaintiffs to seek either compensatory *or* statutory damages of $500,000 per *"incident"* in violation of the subsection quoted directly above.[136] It furthermore states that if a defendant is found liable for violating the above-mentioned section, and such a violation is determined to be willful or as a result of a "knowing failure" to "make content moderation decisions pursuant to policies or practices that are reasonably consistent with the First Amendment to the Constitution," the damages are to be tripled.[137]

The bill provides a process for companies deemed "dominant" to "earn" their Section 230 immunity back by undergoing changes in their policies to make them "reasonably consistent with the First Amendment,"[138] and, upon receiving approval from the FTC and the Attorney General's office, may receive a new waiver.[139] The law also includes a 120-day implementation period, during which the old liability waiver still applies, during which companies may modify their policies to be consistent with new, yet to be written FTC regulations.[140] The bill makes no attempt to limit the spread of misinformation, hateful content, or meet any other legislative goal outlined earlier in this paper, aside from attempting to force platforms to regulate obscene content viewable to minors more strictly, lest they risk losing their immunity.[141]

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[135] Ibid, 5.
[136] Ibid, 6.
[137] Ibid, 7.
[138] Ibid, 8.
[139] Ibid.
[140] Ibid, 7.
[141] Ibid, 3.

Legal, Social and Political Implications of this Category of Proposals:

While these pieces of legislation are somewhat different in their specific applicability, their operative sections are so similar that the impact of both, if passed, may be reviewed together in order to save time and space. Beyond simply modifying the law in the ways outlined above, these pieces of legislation would create an upheaval in defamation law and other civil causes of action for individuals suffering harm as the result of defamatory or other types of unlawfully damaging content posted on social media by third-party users., While it was not previously possible to collect any significant damages as a result of defamation from a random Twitter user, if Twitter itself can be held responsible for their comments, the calculus when it comes to filing a likely lawsuit changes entirely. This would require an increase in the capacity of both the state and federal court system, as any claims against companies not covered by immunity passports would almost certainly need to be individually dealt with through either jury, bench trials, or via settlement. This would further burden an already overburdened legal system; for example, the U.S. Financial Education Foundation estimated that in any given year, approximately 40 million lawsuits are filed at various court levels in the United States.[142] Imagine, for example, a platform like Twitter, which has been the ire of many claiming it has politically biased enforcement efforts,[143] were made ineligible for an immunity certification. Such a scenario may be likely if the Presidency and Senate, and therefore the FTC were in Republican control. If Twitter saw lawsuits from just 0.1% of its 67 million American daily active users[144] relating to unequal enforcement actions, or, for facilitating defamation, this would

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[142] "Frivolous Lawsuits." *U.S. Financial Education Foundation*. http://ogdenpage.com/frivolous_lawsuits.htm (May 6, 2021).
[143] Gabbatt, Adam. 2021. "Claim of Anti-Conservative Bias by Social Media Firms Is Baseless, Report Finds." *the Guardian*. http://www.theguardian.com/media/2021/feb/01/facebook-youtube-twitter-anti-conservative-claims-baseless-report-finds (April 29, 2021).
[144] Twitter Inc. 2020. "Q2 2020 Letter to Shareholders." *twitter.com*. https://s22.q4cdn.com/826641620/files/doc_financials/2020/q2/Q2-2020-Shareholder-Letter.pdf (May 6, 2021).

increase the number of filed lawsuits in the United States by 67,000. This would place additional strain on the American civil legal system, a system already decried by many as being needlessly slow and inefficient.[145] Furthermore, the program of reviewing, in detail, potentially tens of millions of submissions of "evidence" from individuals impacted by allegedly politically biased enforcement actions would greatly burden the FTC and leave them less time to focus on other important priorities.

There is a different, potentially more problematic impact of the second piece of legislation reviewed in this section, the CASE-IT Act. This law would have another major legal impact that the first outlined did not have: the creation of a direct civil cause of action with *statutory damages.*[146] These statutory damages will certainly make it easier for plaintiffs to receive compensation for being, under the law, wronged by defendants. It will also create an incentive for lawsuits, since actual damages are much more difficult to prove in defamation cases,[147] and since third parties would be more likely to take cases on contingencies and fund lawsuits for individual plaintiffs in return for a portion of the guaranteed large damages if a breach is found under the law.

The CASE-IT Act's new definition of "dominant," which, as the law specifically states, does not apply for the purposes of federal antitrust law,[148] is deeply interesting, and, if adopted in other areas of the law, could cause a marked change in federal antitrust and other areas of corporate law.

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[145] Thornton, Tiffany, and Subrata Saha. 2008. "The Need for Tort Reform." *Journal of Long-Term Effects of Medical Implants* 18(4): 321.
[146] Curbing Abuse and Saving Expression In Technology Act of 2019, H.R. 285, 116th Cong. (2019), 6.
[147] Arkin, Stanley S., and Luther A. Granquist. 1968. "The Presumption of General Damages in the Law of Constitutional Libel." *Columbia Law Review* 68(8): 1482–95.
[148] Curbing Abuse and Saving Expression In Technology Act of 2019, H.R. 285, 116th Cong. (2019), 9.

While neither of these pieces of legislation would extend "first amendment" protections onto the Internet to protect *all* types of speech covered by the First Amendment, it would protect *all* types of political speech, including, presumably, speech that is, at least to some degree, political in nature, regardless of whether the speech is also other groups of protected speech under the First Amendment. Consider, for example, hate speech, which the Supreme Court of the United States has repeatedly ruled, in cases like *Matal v. Tam*, is constitutionally protected. As the Court ruled:

> Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate."[149]

The drafters of these laws are not only attempting to protect *this* type of speech,[150] but, in granting a carte-blanche to *political speech*, they also—inadvertently—grant protections for these types of hate speech, since many types of hate speech are *also* likely to be ruled by a court as political speech.[151] Consider, say, an online commentator pushing for the government to round up and execute individuals that engage in homosexual activity, or, those who date individuals of a different race. This is most assuredly "hate speech" under this definition, but it is also *political speech*, as it is calling for specific political, governmental action. This, and many other similar hateful statements would be protected under this law. This would have a massively negative impact on individuals who, for one reason or another, are not deemed acceptable by the majority of society, leading to potential increases in rates of depression, social isolation, and eventually, for some, suicide.

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[149] *Matal v. Tam*, 582 U.S. ___ (2017), 25.
[150] "Steube Introduces Bill Limiting Section 230 Immunity for Big Tech Companies." 2020. *Office of Representative W. Steube*. https://steube.house.gov/media/press-releases/steube-introduces-bill-limiting-section-230-immunity-big-tech-companies (May 6, 2021).
[151] Brown, Alexander. 2017. "What Is Hate Speech? Part 1: The Myth of Hate." *Law and Philosophy* 36(4): 443.

A major concern of this legislation is the power which it grants to the commissioners of the Federal Trade Commission to essentially determine whether a company can continue to exist as waiving the company's liability waiver under Section 230 would force them to defend so many incredibly costly lawsuits that operating their platforms would become unprofitable. A major political concern that stems from this is the fact that the Federal Trade Commission's board consists of Senate-confirmed political appointees.[152] While the requirement that these commissioners be Senate-confirmed will likely tamp down on political bias in their decision making, the grant to an inherently political body the authority to arbitrarily, and with no oversight, strip from certain companies their profitability is a concerning amount of power to give anybody. This raises concerns of political bias in the review and provision of these immunity certificates, a potentially major political concern.

The economic impact of these pieces of legislation would be wide-ranging. These policies would require each company to engage in an expensive and extremely difficult process to receive immunity certifications. Those companies that did not receive such certifications would be susceptible to mass numbers of potentially extremely costly lawsuits. While most companies would probably, given the protection of the First Amendment in this country, win most of these suits, just paying legal fees to defend against well-funded plaintiffs seeking to destroy specific, smaller "interactive service providers," disregarding any potential judgment, could be devastating. This could look similar to what happened to *Gawker* in *Bollea v. Gawker,* a case whose' plaintiff was funded by a rich conservative billionaire, Peter Thiel, and whose judgment bankrupted *Gawker.*[153] These laws would open non-certified companies up to these

[152] "Commissioners - Confirmation Process." 2013. *Federal Trade Commission*. https://www.ftc.gov/about-ftc/commissioners (May 6, 2021).
[153] Ember, Sydney. 2016. "Gawker, Filing for Bankruptcy After Hulk Hogan Suit, Is for Sale." *The New York Times*. https://www.nytimes.com/2016/06/11/business/media/gawker-bankruptcy-sale.html (May 6, 2021).

types of lawsuits, and could result in their destruction and the destruction of their contribution to the economy, potentially putting many thousands of jobs at risk.[154]

[154] "Facebook: Number of Employees." 2021. *Statista*. https://www.statista.com/statistics/273563/number-of-facebook-employees/ (May 6, 2021).

Grouped Proposals *Seeking to:*
Completely Repeal Section 230

Abandoning Online Censorship (AOC) Act – H.R. 874[155]
Sponsor: Louie Gohmert (R-Texas)
Co-Sponsors: None

Summary:
Completely repeals the entirety of Section 230.

Summary of Aims and Relevant Operative Sections:

The aim of this bill is quite clear simply from reading the title: to achieve the goal, as outlined earlier in this paper, to eliminate perceived political bias in enforcement efforts of social media companies and other interactive service providers. This proposed statute—which is so brief that the section naming the legislation is longer than the actual operative section itself—has but one operative section: that "Section 230 of the Communications Act of 1934 (47 U.S.C. 230(c)) is repealed."[156]

The law makes no attempt to deal with the consequences of repealing Section 230 and does not differentiate between companies that do and do not make good-faith efforts to regulate speech on their platforms in ways that are consistent with the First Amendment.[157] Further, it does not even attempt to assert that social media companies *must* comply with the First Amendment,[158] a failure that will be discussed monetarily.

Legal, Social and Political Implications of this Category of Proposals:

Repealing Section 230 entirely, which this legislation proposes, would have a series of incredibly meaningful impacts on the legal system in the United States. To understand this, all one must know is something that has repeatedly been analyzed: the terms of Section 230, and,

[155] Abandoning Online Censorship Act of 2021, H.R. 874, 117th Cong. (2021).
[156] Ibid, 1.
[157] Ibid.
[158] Ibid.

through case law, what it means for those who seek to sue "interactive service providers" like social media companies. The aim of those seeking to fully repeal Section 230 is to make it so that users who are the victims of viewpoint discrimination, in violation of the terms of service of a company, are able to sue them in court for monetary damages.[159] On its face, this is not an absurd proposition; if companies can be sued for viewpoint discrimination, they will be more likely to enforce their own policies in a way that is equitable, achieving the goals of the drafters of this statute. Yet this statute has a fatal flaw; it does not simply tweak the "good faith" requirement to include an affirmative obligation on the part of social media companies to equitably enforce their policies. Instead, it repeals the entirety of the second operative section of Section 230 providing social media companies a waiver for "good faith" actions seeking to moderate their platform,[160] and *also* repeals the first operative section of the law.[161]

While repealing—or more appropriately—modifying the waiver of responsibility for good faith actions taken to moderate a social media company's platform is not unreasonable, repealing the entirety of the first section of Section 230 in the process is unreasonable, and for a reason that will be explained in a moment, completely antithetical to the aims that the drafters of this legislation purport to be serving.

Repealing the first operative section of Section 230 would mean that social media companies and other interactive service providers may be held liable for the posts put on their platform by their users,[162] the same type of "publisher responsibility" that newspapers and other

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[159] "Gohmert Introduces Bill That Removes Liability Protections for Social Media Companies That Use Algorithms to Hide, Promote, or Filter User Content." 2018. *Office of Representative Louie Gohmert*. https://gohmert.house.gov/news/documentsingle.aspx?DocumentID=398676 (May 6, 2021).
[160] Abandoning Online Censorship Act of 2021, H.R. 874, 117th Cong. (2021), 1.
[161] Ibid.
[162] Kelley, Jason. 2020. "Section 230 Is Good, Actually." *Electronic Frontier Foundation*. https://www.eff.org/deeplinks/2020/12/section-230-good-actually (May 6, 2021).

publishers that pay for content currently face.[163] This means that if something defamatory, inciteful, or any other statement that could lead to a civil cause of action against the speaker were to be made on social media, the platform in question could be held liable in addition to the third-party user. The only possible response that companies would have to this is to hire human monitors to read and preapprove content being posted, which would, presumably take, at best, several minutes for every single comment and posting, since Americans post around a billion comments and posts in social media every day.[164] This would handicap smaller companies that lack the funds to hire thousands of employees to do such reviews, further worsening the consolidation of power and authority into a small number of companies. Further, companies would almost certainly err on the side of caution, removing content that *seems* to be inciteful, or defamatory, or, violative of civil rights laws, resulting in *more* censorship, the opposite of the aims cited by the drafters of this legislation.[165]

Consider, as an example, the incident last spring when President Trump accused MSNBC host Joe Scarborough of committing a murder and covering it up on Twitter.[166] This is clearly a defamatory statement—yet it was allowed to remain on Twitter, as it was not deemed a violation of their guidelines. Yet if Twitter could be held responsible for the defamation to Mr. Scarborough's reputation that this statement caused, they would be *far* more likely to remove it from their platform. This example shows the issue with repealing Section 230 carte blanche to

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[163] Proffatt, John. 1880. "The Law of Newspaper Libel." *The North American Review* 131(285): 109–27
[164] Auxier, Brooke, and Monica Anderson. 2021. "Social Media Use in 2021." *Pew Research Center: Internet, Science & Tech*. https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/ (May 6, 2021).
[165] "Gohmert Introduces Bill That Removes Liability Protections for Social Media Companies That Use Algorithms to Hide, Promote, or Filter User Content." 2018. *Office of Representative Louie Gohmert*. https://gohmert.house.gov/news/documentsingle.aspx?DocumentID=398676 (May 6, 2021).
[166] Grynbaum, Michael M., Marc Tracy, and Emily Cochrane. 2020. "'Ugly Even for Him': Trump's Usual Allies Recoil at His Smear of MSNBC Host." *The New York Times*. https://www.nytimes.com/2020/05/27/business/media/trump-joe-scarborough-conservative-media.html (May 5, 2021).

“decrease censorship;” while repealing—or modifying—the second operative section to do so is reasonable and may work, repealing the first would only make censorship a far, far bigger problem.

Democratic Proposals:

Make Social Media a Public Utility:

Some on the left have proposed making social media platforms into "public utilities," arguing that because social media platforms have become like a sort of modern-day "public square," they ought to be treated as such by the Government.[167] This proposal would involve the Federal Government declaring, as it did in 1934 to various older forms of communication under the Communications Act,[168] that social media is, similarly, a "public utility." The Federal government would then likely establish an agency to regulate it (or more likely expand the role of the Federal Communications Commission). This would likely include promulgating specific regulations and rules overseeing the day-to-day operations of social media platforms, including the guidelines by which platforms regulate the speech and content created by third parties, and how moderation policies should apply and operate.

Legal, Social and Political Implications of this Proposal:

This proposal may seem, at a glance, to be enticing; after all, social media platforms *have* become much like a modern-day public square,[169] so treating them as such makes sense. But there are some ways social media platforms are *not* like public squares: for example, most social media platforms bar—as Democrats would likely approve, given the legislative aims of most of their policies[170]—cyberbullying, targeted harassment, hate speech, and other types of incendiary speech, like indirect calls to violence.[171] In this way, at least from the perspective of an average

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[167] Muldoon, James. 2020. "Don't Break Up Facebook — Make It a Public Utility." *Jacobin Magazine*. https://jacobinmag.com/2020/12/facebook-big-tech-antitrust-social-network-data (May 6, 2021).
[168] Communications Act of 1934, Pub. L. No, 73-146, 48 Stat. 1064 (1934).
[169] Foer, Franklin. 2018. "The Death of the Public Square." *The Atlantic*. https://www.theatlantic.com/ideas/archive/2018/07/the-death-of-the-public-square/564506/ (April 29, 2021).
[170] "Warner, Hirono, Klobuchar Announce the SAFE TECH Act to Reform Section 230." 2021. *Office of Senator Mark R. Warner*. https://www.warner.senate.gov/public/index.cfm/2021/2/warner-hirono-klobuchar-announce-the-safe-tech-act-to-reform-section-230 (May 6, 2021).
[171] Laub, Zachary. "Hate Speech on Social Media: Global Comparisons." *Council on Foreign Relations*. https://www.cfr.org/backgrounder/hate-speech-social-media-global-comparisons (May 6, 2021).

Democrat, speech on social media is actually *better* than speech off of the Internet, since all of those forms of speech listed in the previous sentence have been ruled, by the United States Supreme Court, to be protected by the First Amendment.[172] Companies, as is common knowledge to most that have a basic understanding of constitutional law, are not required to comply with the First Amendment.[173] They, therefore, may ban these types of speech, provided they comply with federal statutes regulating the Internet like the broader Communications Decency Act.[174] The government—however—may *not* bar these types of speech.[175] If the Government declared social media platforms to be a public utility, like they have done with communications infrastructure, then they would be forced to ensure the *full protection* of the First Amendment online through the regulations that the FCC and other relevant agencies require companies to strictly adhere to.[176] This would mean protecting speech like hate speech, as per *Matal v. Tam*,[177] or even incitement of violence as deemed protected in *Elonis v. United States.*[178] For Democrats seeking to limit the prevalence of content that contributes to cyber-bullying, targeted harassment, and political polarization, *requiring* companies to discontinue all policies that currently regulate and limit these types of speech seems shortsighted and counterproductive.

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[172] Downing, John D.H. 1999. "'Hate Speech' and 'First Amendment Absolutism' Discourses in the US." *Discourse & Society* 10(2): 175–89.
[173] MacLaren, Selina. 2021. "Is There a First Amendment Right to Tweet?" *JSTOR Daily*. https://daily.jstor.org/is-there-a-first-amendment-right-to-tweet/ (May 5, 2021).
[174] Communications Decency Act of 1996. 47 U.S.C. §5.
[175] Downing, John D.H. 1999. "'Hate Speech' and 'First Amendment Absolutism' Discourses in the US." *Discourse & Society* 10(2): 175–89.
[176] Crews, Clyde W. 2021. "The Case against Social Media Content Regulation." *Competitive Enterprise Institute*, 15-16, https://cei.org/studies/the-case-against-social-media-content-regulation/ (May 6, 2021).
[177] *Matal v. Tam*, 582 U.S. ___ (2017).
[178] *Elonis v. United States*, 575 U.S. ___ (2015).

Safeguarding Against Fraud, Exploitation, Threats, Extremism and Consumer Harms Act (SAFE TECH ACT) – S. 299[179]

Sponsors: Mark Warner (D-Virginia), Mazie Hirono (D-Hawaii), Amy Klobuchar (D-Minnesota)[180]

Summary:

This proposal would limit section 230 to "speech" instead of "information," requires that companies prove to a court, on a case-by-case basis that the data in question is actually from a third party, creates a civil cause of action for wrongful death, makes it possible for courts to issue injunctions regardless of section 230, and makes clear that the law does not waive legal duties for companies in relation to civil rights laws.

Aims:

This legislation aims to "reform Section 230 and allow social media companies to be held accountable for enabling cyber-stalking, targeted harassment, and discrimination on their platforms."[181] In an attempt to achieve this legislative goal, which notably lacks the common Democratic theme of attempting to tamp down on political polarization and the spread of potentially radicalizing and/or dangerous misinformation,[182] the proposed statute calls for a number of potential changes to Section 230.

Changes to Operative Sections:

The proposed statute would attempt to decrease "targeted harassment" by making it clear that Section 230's waiver of liability does not apply to paid advertisements or other paid, targeted content. It would attempt to insert the following caveat into the first section of the statute: that the waiver applies "unless the provider or user has accepted payment to make the

[179] Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act of 2021, 117th Cong. (2021).
[180] Jeevanjee, Kiran et al. 2021. "All the Ways Congress Wants to Change the Internet's Most Fundamental Law." *Slate Magazine*. https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html (April 18, 2021).
[181] "Warner, Hirono, Klobuchar Announce the SAFE TECH Act to Reform Section 230." 2021. *Office of Senator Mark R. Warner*. https://www.warner.senate.gov/public/index.cfm/2021/2/warner-hirono-klobuchar-announce-the-safe-tech-act-to-reform-section-230 (May 6, 2021).
[182] Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act of 2021, 117th Cong. (2021).

speech available or, in whole or in part, created or funded the creation of the speech."[183] It should be noted that per *Elonis v. United States,* the Government may only restrict "threatening speech" if a reasonable person would perceive the speech to be threatening, as they must prove "subjective intent to threaten," making it difficult for Congress to broadly regulate with a wide brush this type of speech.[184] The legislation further requires that interactive service providers prove that content is created by a third party, who is not paying to publish the content to other users, specifically outlining that:

> …the defendant shall have the burden of persuasion, by a preponderance of the evidence, that the defendant is a provider or user of an interactive computer service and is being treated as the publisher or speaker of speech provided by another information content provider."[185]

The legislation attempts to tamp down on "cyber-stalking" by granting the ability to potential plaintiffs to bring civil causes of action against any platform that fails to uphold federal or state law through granting an exception to the waiver of liability in those specific circumstances.[186] It similarly does the same thing for civil rights laws, and, for causes of action related to wrongful death.[187] In this way, the legislation puts a large hole in Section 230's publisher responsibility waiver while leaving untouched the waiver for "good faith" actions taken to regulate speech on a specific platform. Further, the legislation allows Courts to issue injunctive relief in some specific Section 230 civil lawsuits.[188]

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[183] Ibid, 2.
[184] *Elonis v. United States*, 575 U.S. ___ (2015), 8.
[185] Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act of 2021, 117th Cong. (2021), 2.
[186] Ibid, 4.
[187] Ibid, 5.
[188] Ibid, 3.

Legal, Social and Political Implications of this Proposal:

The legal implications of this legislation, if passed, are fairly widespread and fairly self-evident. Unlike the Republican proposals reviewed above, the passage of this bill would not result in the ability of the Government to essentially pick and choose which companies can exist and cannot afford to exist. This bill would massively change the legal framework surrounding social media and other interactive service providers, for a number of reasons.

First, in permitting civil causes of action for cases related to civil rights violations, wrongful death cases, and circumstances of "stalking, harassment, or intimidation" as described by state and federal anti-discrimination statutes,[189] the passage of this legislation would cause a massive increase in the number of lawsuits filed against these types of companies. While this does not initially seem to be a problem: after all, this legislation is seeking to force companies to improve their platforms when it comes to these referenced implicated areas, the actual impact of the legislation would go much further.

If companies can be held responsible for harassment, bullying, or other types of incendiary and socially undesirable speech created on their platforms by third parties, they will need to create mechanisms to ensure that such speech is not only *uncommon*, but *nonexistent.* Companies today, without regulation, seek, under the waiver of "good faith" enforcement actions present in the second operative section of Section 230, to do this through the use of filters, user-run reporting mechanisms, and, in some cases, monitoring of specific hashtags tied to discriminatory language or movements.[190] These programs are extremely expensive, and, in

[189] Ibid, 4-5.
[190] Popkin, Helen A. S. 2013. "Instagram Still Censors Your Filthy Hashtags ... except When It Doesn't." *NBC News.* http://www.nbcnews.com/technolog/instagram-still-censors-your-filthy-hashtags-except-when-it-doesnt-8C11497733 (May 6, 2021).

many cases, effective, *but cases slip through the cracks.*[191] Under this legislation, these cases that slip through the cracks could be fodder for lawsuits—not only against the individual who created the content, but, against the forum in which the speech was heard.

To understand the absurdity of this proposal, let me provide an example: imagine, every month during the summer a child and their family visit an amusement park in the downtown of a small American city. In this park, another individual who frequents the area repeatedly yells targeted insults at this child based on some protected, immutable personal characteristic. Imagine, then, that the parents of the child file suit under a state statute barring harassment in public areas based on the child's protected characteristic, against not the individual who was harassing them and breaking the law, but, *against the amusement park.* This law effectively, if tied in with state and federal anti-discrimination laws, creates an affirmative duty for interactive service providers to *ensure* that their platforms are free from these types of speech, and if they fail in their duty, even if they are acting in good faith and catching a vast majority of incidents of these types of speech, they may be sued and found liable of damages.

In a world with technology capable of reviewing every single post on social media before it goes live with 100% efficiency, such a piece of legislation might be reasonable. But the only way that such a complex determination can be made between *political speech* that is tinged with potentially distressing or "harassing" language and speech that is violative of this statute is to hire a team of well-trained, *human* experts. This would be so expensive that it would essentially bankrupt any company that tried to do it, and would also be so time-consuming that it would take—at a minimum—minutes to hours for *each and every social media post, website comment,*

[191] Sullivan, Mark. 2020. "Facebook Says It's Deleting 95% of Hate Speech before Anyone Sees It." *Fast Company*. https://www.fastcompany.com/90577901/facebook-says-its-deleting-95-of-hate-speech-before-anyone-sees-it (May 6, 2021).

or any other similar piece of third-party generated content to be preapproved before it goes live. This is similar to the problem that Google had when it launched its content-ID copyright matching service on YouTube. There, Google and the copyright holders suing them learned an important lesson: it is impossible for each and every third-party-generated post to be reviewed by a human being.[192]

Passing this legislation would achieve the legislative end that the drafters seek: harassment, cyber-bullying, scamming, and other forms of speech that the drafters desired to suppress[193] would doubtless decrease in their prevalence online. However, what would be left is not a "safe space" where people could instantly share their ideas, the fruit of their creative abilities, vacation photos, or the like. Rather, we would see a slow, bloated, and likely pay-to-use version of social media.

Socially and politically, the loss of social media as a forum where complex issues of the day can be debated would be devastating. It is not conjecture to state that this legislation would have this unintended impact: if a company thinks there is a *possibility* that they can be beset with massive statutory and punitive damages, and negative PR for allowing political speech that targets, say, LGBT people, or undocumented immigrants, or any other group, they are likely to err on the side of caution and remove it. For these reasons, this proposal is unworkable and should not be enacted.

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[192] Harmon, Elliot. 2016. "Content ID and the Rise of the Machines." *Electronic Frontier Foundation*. https://www.eff.org/deeplinks/2016/02/content-id-and-rise-machines (May 6, 2021).

[193] "Warner, Hirono, Klobuchar Announce the SAFE TECH Act to Reform Section 230." 2021. *Office of Senator Mark R. Warner*. https://www.warner.senate.gov/public/index.cfm/2021/2/warner-hirono-klobuchar-announce-the-safe-tech-act-to-reform-section-230 (May 6, 2021).

Bipartisan and Stakeholder Proposals:

Beyond purely partisan proposals from the two major political parties, there is also a single bipartisan proposal that seeks to amend Section 230 in a way that is relevant to this analysis, and several vague proposals from companies like Facebook that acknowledge the need for Congressional action. Both of these policy proposals will be reviewed here, in lengths that are proportional to their specificity and breadth of their express terms relative to those policies already reviewed.

Platform Accountability and Consumer Transparency (PACT) Act – S. 4066[194]
Sponsors: Brian Schatz (D-Hawaii), John Thune (R-South Dakota)[195]

Summary:

While this legislation has many provisions, relevant to this discussion are those requiring platforms to be more transparent with their users when it comes to their content moderation policies, give users the ability to appeal moderation decisions to a specific body within companies if they disagree with their decisions, give users a more transparent and effective process to report violative content, and permit federal and state bodies to take legal action against interactive service providers

Aims:

This legislation seeks to be a compromise between Democrats and Republicans, who both seek to reform Section 230, but in different ways and for completely different reasons. The terms of the proposal have been hailed by many who believe it to be "one of the few serious proposals" to revise Section 230.[196]

Changes to Operative Sections:

This legislation has a number of provisions,[197] some of which are outside of the scope of the legislative aims that this paper seeks to analyze. However, relevant to these aims, the proposed statute makes many changes to Section 230, which are analyzed below.

First, the legislation requires that companies meet certain standards with their acceptable use policies; these policies must not be vague,[198] as many are now.[199] They must explicitly

[194] Platform Accountability and Consumer Transparency Act of 2020, S. 4066, 116th Cong. (2020).
[195] Jeevanjee, Kiran et al. 2021. "All the Ways Congress Wants to Change the Internet's Most Fundamental Law." *Slate Magazine*. https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html (April 18, 2021).
[196] Mackey, Aaron. 2021. "Even with Changes, the Revised PACT Act Will Lead to More Online Censorship." *Electronic Frontier Foundation*. https://www.eff.org/deeplinks/2021/03/even-changes-revised-pact-act-will-lead-more-online-censorship (May 6, 2021).
[197] Platform Accountability and Consumer Transparency Act of 2020, S. 4066, 116th Cong. (2020).
[198] Ibid, 6-7.
[199] Patel, Faiza, and Laura Hecht-Felella. 2021. "Facebook's Content Moderation Rules Are a Mess." *Brennan Center*. https://www.brennancenter.org/our-work/analysis-opinion/facebooks-content-moderation-rules-are-mess (May 5, 2021).

inform users about "the type of content that is allow[ed] on the interactive computer service,"[200] as well as explain, in detail, the steps the platforms use to ensure that content is complying with their policies.[201] The legislation also requires acceptable use policies to provide clear instructions about how a user may notify the provider of content that violates their policies or is otherwise unlawful.[202] To that end, the proposed statute proposes requiring social media platforms to create live telephone hotlines for users to call to address this type of content, operating at least 8 hours per day, 5 days per week. Also suggested is the creation of an email address to handle such complaints, and the production of an interactive, online system that may be used to submit complaints.[203]

The policy further states that once the platform receives the complaint, they must act to remove it within 14 days, or, if they receive a court order or other notice that some content violates criminal statutes, within 24 hours.[204] Further, the policy provides a process by which all decisions may be appealed by users to somebody within the company where that user is allowed a real hearing in which they may present their arguments to a human being.[205]

The legislation also requires companies to make public quarterly reports about the aggregate statistics relating to the removal of content of their platform, such as why certain types of content were removed, the type of violation, etc.[206] The proposed law also empowers the Federal Trade Commission to ensure that companies comply with the provisions of the statute, and review, in aggregate, enforcement actions made by companies to ensure that they are not

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[200] Platform Accountability and Consumer Transparency Act of 2020, S. 4066, 116th Cong. (2020), 6.
[201] Ibid.
[202] Ibid, 6-7.
[203] Ibid.
[204] Ibid, 8, 11.
[205] Ibid, 9-10.
[206] Ibid, 7.

unfair or deceptive under existing FTC regulations, and if they are, empowers them to fine or use other currently existing authority to bring companies into compliance.[207]

The legislation also empowers the federal Department of Justice and states attorneys general to file suit against interactive service providers if they violate an otherwise generally applicable *civil* statute.[208]

Finally, the legislation removes Section 230 liability waivers for companies that knowingly contribute to illegal activity, and do not act within 24 hours, after having such knowledge, to remove said activity.[209] The legislation does not waive Section 230 for any other companies under any other circumstance, and exempts providers that have fewer than 1,000,000 monthly users or accrued less than $25,000,000 within the last two years.[210]

Legal, Social and Political Implications of this Proposal:

Legally, the implications of this legislation—if passed—are not, compared to the other reviewed proposals, overly broad. Unlike the other legislation, since this act does not waive Section 230's liability waivers, except in specific circumstances where, one could argue, they should be waived, [211] the legal system will not see an explosion in the number of lawsuits it faces. There would, if this legislation were passed, almost certainly be an increase in actions undertaken by states against social media companies—including conservative states alleging bias in enforcement against conservatives. However, plaintiffs will be required to *prove* such cases, in the public forum, and also to a judge, where facts and evidence matter more than rhetoric and slogans.

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[207] Ibid, 1, 14-16.
[208] Ibid, 24
[209] Ibid, 18-19.
[210] Ibid, 22-23.
[211] Ibid.

Socially and politically, this legislation would do good: requiring more transparency would make social media companies less likely to shut down voices they don't agree with, and, would make users more confident in social media platforms moderation schemes. Overall, this is a good piece of legislation, and the only real serious attempt at changing Section 230 in a way that is bipartisan and attempts to achieve goals that both political parties want. However, it does not go far enough to address the concerns of either party; companies can simply ignore *generally* small FTC fines, though large fines have been issued to social media companies in recent years.[212] However, companies would not have the thing that matters to them most, their liability waivers at risk, unless they continue to keep up illegal content.[213]

Perhaps the biggest potential issue with this proposal is its requirement that "illegal content" be removed within 24 hours, or else a company loses its liability waiver. Specifically, there is a risk for potential abuse by copyright holders under the terms of the Digital Millennium Copyright Act. Under copyright law, if copywritten material is illegally uploaded to the platform, with this change, social media companies may be sued by the copyright holders if it is not removed within 24 hours of notice of its existence.[214] This will require the hiring of large amounts of people to look through reports for this content rapidly to remove it in a timely fashion. It will also likely mean that a large number of extremely costly lawsuits will commence between social media platforms and copyright holders. This is almost certainly an unintended effect of this bill and could be remedied by adding language noting that the waiver does not apply to copyright law. In all, this is the best proposal reviewed thus far, but it does not go far

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[212] "FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook." 2019. *Federal Trade Commission*. https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions (May 6, 2021).
[213] Platform Accountability and Consumer Transparency Act of 2020, S. 4066, 116th Cong. (2020), 18-19.
[214] Keller, Daphne. 2020. "CDA 230 Reform Grows Up: The PACT Act Has Problems, But It's Talking About the Right Things." *The Center for Internet and Society*. http://cyberlaw.stanford.edu/blog/2020/07/cda-230-reform-grows-pact-act-has-problems-it%E2%80%99s-talking-about-right-things (May 6, 2021).

enough to meet the legislative ends of those supporting it and creates an unintended consequence that ought to be remedied before considering its passage.

Facebook Proposal:[215]

Facebook, on their website,[216] and through an advertising campaign they have recently engaged in,[217] is calling for vague "changes" to internet regulations. They are calling for many things that are outside the scope of this analysis, and some direct changes that are to Section 230 itself. Unfortunately, all that Facebook says on its website in relation to Sec. 230 specifically is:

> We support thoughtful updates to internet laws, including Section 230, to make content moderation systems more transparent and to ensure that tech companies are held accountable for combatting child exploitation, opioid abuse, and other types of illegal activity.[218]

These changes seem to be related to the types of changes that Democratic politicians are proposing, so, specifically reviewing them here, when their explicit terms and the differences that they would have between those proposals are unavailable is not a useful way to spend time. It is interesting, however, that Facebook, a company that has benefited from and grown as a result of Section 230[219] proposes changing it.

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[215] "Internet Regulations." 2021. *About Facebook*. https://about.fb.com/regulations/ (May 5, 2021).
[216] Ibid.
[217] Cohen, David. 2021. "Newest Spot in Facebook's 'It's Time' Campaign Continues Push for Updated Internet Regulation." *AdWeek*. https://www.adweek.com/media/newest-spot-in-facebooks-its-time-campaign-continues-push-for-updated-internet-regulation/ (May 5, 2021).
[218] "Internet Regulations." 2021. *About Facebook*. https://about.fb.com/regulations/ (May 5, 2021).
[219] Ortutay, Barbara. 2020. "AP Explains: The Rule That Made the Modern Internet." *AP NEWS*. https://apnews.com/article/what-is-section-230-tech-giants-77bce70089964c1e6fc87228ccdb0618 (May 5, 2021).

8. Conclusion

The policy proposals that we reviewed that seek to amend Section 230 are put forth by individuals acting in good faith. These proposals seek to tackle real legislative problems that are worthy of addressing. Yet all of these proposals, as currently written, are either fatally flawed, or, in the case of proposals like the PACT Act or by Facebook, do not go far enough to meaningfully "change the game" in such a way that substantively addresses the aims put forth by legislators at the behest of their constituent's legitimate concerns.

These proposals are flawed for different reasons. Republican proposals, for example, are, on the whole, overly broad, and, in ending the waiver of platforms' publisher responsibility liability for defamatory or otherwise actionable statements made by third parties[220] would actually make it more likely that a given politically-charged statement be removed, since a platform could be held liable if say—as President Trump did, a user defamed someone by falsely accusing them of committing a murder.[221] Ironically, for Republicans that seek to make social media a freer place where Americans can say whatever they want without fear of having their posts removed or their accounts suspended,[222] the passage of their policies would likely cause social media companies to get even stricter on speech, since removing the liability waiver would make civil causes of action relating to defamation or harassment possible, but would do nothing to force a *private* company to comply with a First Amendment that only applies to the

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[220] Abandoning Online Censorship Act of 2021, H.R. 874, 117th Cong. (2021).
[221] Grynbaum, Michael M., Marc Tracy, and Emily Cochrane. 2020. "'Ugly Even for Him': Trump's Usual Allies Recoil at His Smear of MSNBC Host." *The New York Times*. https://www.nytimes.com/2020/05/27/business/media/trump-joe-scarborough-conservative-media.html (May 5, 2021).
[222] Kopit, Sarah. 2021. "Why Big Tech and Conservatives Are Clashing on Free Speech." *Bloomberg.com*. https://www.bloomberg.com/news/articles/2021-01-12/why-big-tech-u-s-conservatives-battle-over-speech-quicktake (April 29, 2021).

government and state actors.[223] While all of the Republican proposals would have this unintended consequence, the popular call of fully repealing Section 230 would, for this reason, be even more extreme in this area.

On the other side of the political spectrum, Democratic proposals, which seek differing legislative goals, as reviewed above, are equally ineffective in achieving their purported ends—at least at a cost that is bearable. As noted in detail in reviewing the policy seeking to make social media a "public utility," the actual impact of this policy would be precisely *the opposite* of what Democrats seek: the extension of First Amendment protection to *everything* that could be posted on social media. This would make it impossible for platforms to remove hate speech, and even some forms of political misinformation.

While the Warner-Hirono-Klobuchar proposal *would* have the impact that it seeks, its carte-blanche removal of the liability waiver for several areas of civil law would result in a social media and wider internet that is a shell of its former self, a caricature of the most bad-faith arguments from conservatives about "safe spaces." The outcome of this legislation, while meeting its legislative ends, would so completely destroy the Internet as we know it that it is unworkable, and should not be passed.

It is bipartisan proposals, like the Schatz-Thune Platform Accountability and Consumer Transparency Act that should be used as a starting point for bipartisan legislation to revamp Section 230 in a way that addresses concerns of Democrats, Republicans, and third-party groups. An ideal proposal should have many of the provisions of the PACT Act; the acceptable use policy requirements,[224] the transparency reports,[225] and other provisions are sensible, and, would

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[223] MacLaren, Selina. 2021. "Is There a First Amendment Right to Tweet?" *JSTOR Daily*. https://daily.jstor.org/is-there-a-first-amendment-right-to-tweet/ (May 5, 2021).
[224] Platform Accountability and Consumer Transparency Act of 2020, S. 4066, 116th Cong. (2020), 6-7.
[225] Ibid, 7.

make a real difference. However, the only way to really "change the game" is by modifying the text of Section 230 itself.

To that end, Congress should modify the "good faith" requirement of the second operative section of Section 230 that waives liability for enforcement actions taken on platforms, provided they are in "good faith."[226] Right now, companies merely must prove that they are following their own policies[227] **or** making the types of "editorial decisions" that publishers make.[228] This is far too broad of a waiver. Specifically, Congress should define the term "good faith" to make companies *prove* that they are following their own policies, by a preponderance of the evidence, using aggregate data like that which would be publicly available if the PACT act were to be passed.[229] Congress should further include language to ensure that Courts do not simply waive any action that appears to be related to "editorial decisions" as they do now, narrowing the scope of the "good faith" waiver. This, in conjunction with the injunctive relief requirement from the Warner-Hirono-Klobuchar proposal,[230] if passed, would reach the legislative ends sought by both Republicans and Democrats, without destroying the Internet as we know it. If Congress takes these actions, they can update Section 230 in a way that substantially improves the quality of debate online, while also tamping down on the dangerous spread of misinformation and radicalization.

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[226] Communications Decency Act of 1996. 47 U.S. Code § 230, C, 2. A.
[227] *e-ventures Worldwide, LLC v. Google, Inc.*. 188 F. Supp. 3d 1265 (M.D. Fla. 2016).
[228] *Zeran v. America Online, Inc*., 129 F.3d 327 (4th Cir. 1997).
[229] Platform Accountability and Consumer Transparency Act of 2020, S. 4066, 116th Cong. (2020), 7.
[230] Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act of 2021, 117th Cong. (2021), 3.