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Something for Nothing: Untangling a Knot of Section 230 Solutions

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SOMETHING FOR NOTHING: UNTANGLING A KNOT OF SECTION 230 SOLUTIONS

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INTRODUCTION

On May 26, 2020, then-President Trump tweeted out concerns about mail-in voting and the potential, as he saw it, that "[m]ail boxes will be robbed, ballots will be forged & even illegally printed out & fraudulently signed."[1] As part of its new policy on misleading content, Twitter applied a label to the tweet directing users to "[g]et the facts about mail-in ballots."[2] When users clicked the link, they were directed to a tweet from the account @TwitterSafety that advised users of the platform's "civic integrity policy."[3] Twitter's response to the President's tweet stated that it "could confuse voters about what they need to do to receive a ballot and participate in the election process."[4]

On May 28, 2020, President Trump issued an Executive Order titled "Preventing Online Censorship," motivated by "troubling behaviors" by social media platforms "engaging in selective censorship that is harming our national discourse."[5] These troubling behaviors include "'flagging' content as inappropriate, even though it does not violate any stated terms

1 Donald J. Trump (@realDonaldTrump), TRUMP TWITTER ARCHIVE V2 (May 26, 2020, 8:17 AM), https://www.thetrumparchive.com/?searchbox=%22illegally+printed+out+%22 [https://perma.cc/G4LS-6425]. Trump was permanently banned from Twitter on January 8, 2021 for tweets relating to the January 6, 2021 attack at the United States Capitol, and all his tweets were deleted from the platform. *See* Twitter Inc. (@Twitter), *Permanent Suspension of @realDonaldTrump*, TWITTER BLOG (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension [https://perma.cc/D2Q7-A4A8].

2 Trump, *supra* note 1; Dan Mangan & Kevin Breuninger, *Twitter Fact-Checks Trump, Slaps Warning Labels on His Tweets About Mail-In Ballots*, CNBC (May 26, 2020, 6:12 PM), https://www.cnbc.com/2020/05/26/twitter-fact-checks-trump-slaps-warning-labels-on-his-tweets-about-mail-in-ballots.html [https://perma.cc/5BD5-FPM3]. *See also* Twitter Safety (@TwitterSafety), TWITTER (May 27, 2020, 10:54 PM), https://twitter.com/TwitterSafety/status/1265838823663075341?s=20 [https://perma.cc/FNC3-G5GD]; Yoel Roth & Nick Pickles, *Updating Our Approach to Misleading Information*, TWITTER BLOG (May 11, 2020), https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information [https://perma.cc/FWB7-CPLF].

3 Twitter Safety, *supra* note 2; Mangan & Breuninger, *supra* note 2.

4 Twitter Safety, *supra* note 2.

5 Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

of service" and "deleting content and entire accounts with no warning, no rationale, and no recourse."[6] Specifically, the Order accuses Twitter of "selectively decid[ing] to place a warning label on certain tweets in a manner that clearly reflects political bias."[7]

The Order directed the National Telecommunications and Information Administration (NTIA) to file a rulemaking petition with the Federal Communications Commission (FCC) to seek clarification of a particularly contentious provision of the Communications Decency Act: Section 230.[8] That Section provides "Good Samaritan" immunity for online hosts of third-party content that make a "good faith" effort to "restrict access" to indecent, illegal, or "otherwise objectionable" content.[9]

In his Order, the President alleged that the Good Samaritan provision is often "distorted to provide liability protection for online platforms that . . . engage in deceptive or pretextual actions . . . to stifle viewpoints with which they disagree."[10] The Order sought to prevent this abuse by clarifying the meaning of "good faith" and whether actions not in good faith will disqualify a platform from immunity.[11]

The President's Order joined a chorus of political voices, mostly Republican, raising cries of politically biased content moderation on social media platforms.[12] On the other side, Democrats have also complained that Section 230 does little to curb the spread of child exploitation content or political disinformation.[13] Taken together, these arguments illustrate that Section 230 is critically flawed because social media platforms can abuse their immunity to moderate content in a biased or unfair manner, while not following through with the underlying purposes of Section 230: preserving free speech and making the Internet safer.[14]

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6 *Id.*

7 *Id.*

8 *Id.* at 34,081.

9 47 U.S.C. § 230(c)(2).

10 Exec. Order No. 13,925, *supra* note 5, at 34,080.

11 *Id.* at 34,081.

12 Edward Lee, *Moderating Content Moderation: A Framework for Nonpartisanship in Online Governance*, 70 AM. U. L. REV. 913, 941 (2021) (pointing out that the majority of legislative proposals dealing with biased content moderation were put forward by Republicans).

13 Marguerite Reardon, *Democrats and Republicans Agree that Section 230 Is Flawed*, CNET (June 21, 2020, 5:00 AM), https://www.cnet.com/news/democrats-and-republicans-agree-that-section-230-is-flawed [https://perma.cc/T7RM-TKVG].

14 "It is the policy of the United States . . . (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation; . . . (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to

The 116th Congress saw a flurry of activity to amend—or eliminate—Section 230. Eighteen bills were put forward between the House and Senate,[15] though not one saw any action in committee.[16] While the bills vary in their specific policy goals, they share similar approaches, including conditioning immunity on fair enforcement of terms of use and narrowing the category of "otherwise objectionable" content subject to protected Good Samaritan removal.[17] Some proposals offer more robust statutory schemes, while others change as little as a few words of Section 230.[18]

Despite the vast menu of options for fixing Section 230, Congress has taken no action toward resolving the issue.[19] This Note will build a comprehensive solution out of the variety of legislative proposals, with the goal of accomplishing the dual purposes of Section 230. Part I will summarize the history of Section 230 and illustrate through judicial decisions the legal dilemma that has arisen in applying the statutory immunity. Part II will survey notable legislative, executive, and academic solutions that have been put forward so far and identify those that will best promote free speech online while incentivizing platforms to combat illegal content. Part III will lay out some legal guidelines for structuring a proposal, while Part IV will weave all the strands together to create a proposal for a legislative solution that will more effectively promote

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objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." 47 U.S.C. § 230(b). *See also* Reardon, *supra* note 13.

15 *See* Limiting Section 230 Immunity to Good Samaritans Act, H.R. 8596, 116th Cong. (2020); Don't Push My Buttons Act, H.R. 8515, 116th Cong. (2020); AOC Act, H.R. 8896, 116th Cong. (2020); Protecting Americans from Dangerous Algorithms Act, H.R. 8636, 116th Cong. (2020); Stop the Censorship Act, H.R. 4027, 116th Cong. (2019); CASE-IT Act, H.R. 8719, 116th Cong. (2020); Stop the Censorship Act of 2020, H.R. 7808, 116th Cong. (2020); Protect Speech Act, H.R. 8517, 116th Cong. (2020); S. 5020, 116th Cong. (2020); S. 5085, 116th Cong. (2020); Limiting Section 230 Immunity to Good Samaritans Act, S. 3983, 116th Cong. (2020); Stop Suppressing Speech Act of 2020, S. 4828, 116th Cong. (2020); Don't Push My Buttons Act, S. 4756, 116th Cong. (2020); Online Freedom and Viewpoint Diversity Act, S. 4534, 116th Cong. (2020); Holding Sexual Predators and Online Enablers Accountable Act of 2020, S. 5012, 116th Cong. (2020); Stopping Big Tech's Censorship Act, S. 4062, 116th Cong. (2020); Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019); Platform Accountability and Consumer Transparency (PACT) Act, S. 4066, 116th Cong. (2020).

16 Congress.gov, LIBR. OF CONG., https://congress.gov (search for "Section 230," limit search by "Legislation," select "116 (2019–2020)" Congress, and use "tracker" function under each bill to observe that none of the bills has been through any committee hearings) (last visited Nov. 22, 2021).

17 *See, e.g.*, S. 3983, 116th Cong. (2020); S. 4062, 116th Cong. (2020); H.R. 8517, 116th Cong. (2020); S. 4534, 116th Cong. (2020); S. 4828, 116th Cong. (2020); H.R. 4027, 116th Cong. (2019).

18 For examples of bills that present new statutory schemes, see S. 4066, 116th Cong. (2020); S. 4062, 116th Cong. (2020). For proposals that modify only a few words, see, for example, S. 4828, 116th Cong. (2020), and H.R. 4027, 116th Cong. (2019).

19 *See Congress.gov*, *supra* note 16.

Section 230's purposes: to protect free speech and make the Internet safer.[20]

I. BACKGROUND: ABOUT SECTION 230

A. *The Communications Decency Act*

The Communications Decency Act (CDA) was first passed in 1996 with the goal of protecting children from obscene and indecent content online by imposing criminal penalties on those who knowingly transmitted this content "over any telecommunications device, including the Internet."[21] Shortly before the bill was passed, it was amended to include immunity for online platforms that hosted third-party content.[22] This provision was geared at resolving a critical First Amendment issue that arose with the advent of the Internet: whether an online platform could be liable for the defamatory or illegal content of third parties.[23]

Before the advent of Internet publishing, First Amendment doctrine assigned liability for the publication of defamatory content based on a distinction between publishers, distributors, and platforms.[24] Publishers, like newspapers, exercise a degree of editorial control over their content and are liable for publishing defamatory content created by a third party only upon a showing of actual malice.[25] Distributors, like bookstores and newsstands, are not expected to have reviewed every item they sell but can be liable if they are given notice of defamatory content and refuse to remove it.[26] A platform, such as a telephone service provider, is categorically immune from liability for third-party defamatory content.[27]

As Internet-based forums made it possible for nearly anyone to post their opinion online, the legal distinctions regarding defamation—especially between a publisher and a distributor—became more difficult

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20 47 U.S.C. § 230(b).

21 *Communications Decency Act Section 230 Immunity*, LEXISNEXIS (Oct. 18, 2021) [hereinafter *Section 230 Immunity*], https://plus.lexis.com/api/permalink/22d96624-25eb-44df-b87d-642cd7b3ae29/?context=1530671.

22 *See id.*

23 *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995).

24 Eugene Volokh, *47 U.S.C. § 230 and the Publisher/Distributor/Platform Distinction*, REASON (May 28, 2020, 11:44 AM), https://reason.com/volokh/2020/05/28/47-u-s-c-%C2%A7-230-and-the-publisher-distributor-platform-distinction [https://perma.cc/LA6V-TUPD].

25 *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964) (stating that actual malice in a publishing context is "knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not").

26 *See* Janklow v. Viking Press, 378 N.W.2d 875 (S.D. 1985).

27 *See* Anderson v. N.Y. Tel. Co., 35 N.Y.2d 746, 750–51 (1974).

to apply with consistency.[28] A dilemma arose, illustrated by two cases from the early 1990s.[29] In *Cubby, Inc. v. Compuserve, Inc.*, the Southern District of New York held that an Internet content host could totally avoid liability for defamatory third-party content by declining to moderate any content on its website (thereby acting as a distributor).[30] In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, a New York state trial court found that an Internet content host acted as a publisher because it attempted to control the content of its forums, thereby exposing itself to liability for third-party content.[31] Within this framework, Internet content hosts were disincentivized from taking action against objectionable or illegal content, since any effort to moderate third-party content that did not remove all illegal content could expose a platform to the full extent of liability.[32] By contrast, Section 230's Good Samaritan immunity supersedes the common law publisher/distributor distinction and incentivizes active content moderation by shielding Internet content hosts who choose to moderate from liability resulting from illegal content that may slip through the cracks.[33]

Shortly after being passed, Section 230's indecency provisions were gutted by the Supreme Court in *Reno v. ACLU*.[34] The Court found that the imposition of criminal sanctions for the transmission of obscene or indecent material was overly broad and violated the First Amendment

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28 *See Section 230 Immunity*, *supra* note 21.

29 *See id.*

30 *See* Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135, 141 (S.D.N.Y. 1991). In *Cubby*, a database operator brought a libel suit against one of its competitors for hosting allegedly libelous content about the plaintiffs. *Id.* at 138. The court granted the defendants' motion for summary judgment, finding that the database acted only as a distributor, not a publisher. *Id.* at 141.

31 *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995). The defendant, an online content host, ran a finance-focused "Money Talk" forum, on which an anonymous user posted defamatory statements about the plaintiff, an investment banking firm. *Id.* at *1–2. The defendant used software to screen each post for offensive content and enforced a code of conduct for users of the platform. *Id.* at *10. The court held that the defendant had acted as a publisher by exercising editorial control of the forum, and was therefore liable for defamatory content published there by third parties. *Id.* at *10–14.

32 *See* Volokh, *supra* note 24 ("But whether or not those two decisions were sound under existing legal principles, they gave service providers strong incentive not to restrict speech in their chat rooms and other public-facing portions of their service. If they were to try to block or remove vulgarity, pornography, or even material that they were persuaded was libelous or threatening, they would lose their protection as distributors, and would become potentially strictly liable for material their users posted.").

33 *See* Force v. Facebook, Inc., 934 F.3d 53, 63–64 (2d Cir. 2019).

34 521 U.S. 844, 874–75 (1997). The ACLU sought a declaratory judgment that the CDA violated the First and Fifth Amendments and an injunction barring enforcement of the statute. Affirming the injunction, the Supreme Court found that the CDA violated the First Amendment because its provisions had a chilling effect on free speech and criminalized protected speech. *Id.* at 876–79. The Court did not reach the question of whether the CDA violated the Fifth Amendment. *Id.* at 864.

since it would include content that was constitutionally protected.[35] After Congress amended the statute, all that remained was Good Samaritan immunity.[36]

B. *Section 230 in Action*

Section 230 establishes two forms of immunity. The first declares that users or providers of online platforms will not "be treated as the publisher or speaker of any information provided by another information content provider."[37] This immunity is directed specifically at the First Amendment dilemma that arose from *Cubby* and *Stratton Oakmont*.[38] The second immunity is intended to promote the statute's Internet safety goals. It protects "any action voluntarily taken in good faith to restrict access to . . . 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."[39] Together, the provisions create a statutory scheme in which an online platform is not liable to those it censors, nor is it liable for any failure to remove illegal or indecent content.[40]

Two opinions from the Seventh Circuit Court of Appeals applying Section 230 demonstrate both its wide reach and the potential dilemmas that arise from such a broad immunity. First, in *Doe v. GTE Corp.*, the Seventh Circuit Court of Appeals upheld Section 230 immunity for an Internet service provider that hosted a website selling secretly filmed nude videos of college athletes.[41] Since the objectionable content was provided by a third party, subsection (c)(1) applied and shielded GTE from liability "under any state-law theory to the persons harmed by [the third party's] material."[42]

Although (c)(2) immunity was not implicated—since GTE made no effort to remove content—the court explored in dicta the notion that

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35 *Id.* at 874–75.

36 *See Section 230 Immunity*, *supra* note 21.

37 47 U.S.C. § 230(c)(1).

38 *See* FTC v. LeadClick Media, LLC, 838 F.3d 158, 173 (2d Cir. 2016) ("The amendment [to Section 230] was intended to overrule *Stratton* . . . .").

39 47 U.S.C. § 230(c)(2)(A).

40 *See* Doe v. GTE Corp., 347 F.3d 655, 659 (7th Cir. 2003) ("Section 230(c)(2) tackles this problem not with a sword but with a safety net. A web host that *does* filter out offensive material is not liable to the censored customer. . . . The district court held that subsection (c)(1), though phrased as a definition rather than as an immunity, also blocks civil liability when web hosts and other Internet service providers (ISPs) *refrain* from filtering or censoring the information on their sites.").

41 *Id.* at 656.

42 *Id.* at 659.

Section 230 immunity might actually disincentivize "Good Samaritan" content moderation.[43] The court reasoned that, since platforms are protected even when they do not act, there is no incentive to undertake the costs of content moderation.[44] The effect is that platforms do little to remove indecent content while still enjoying editorial immunity—an outcome that the court found to be inappropriate for a section of the CDA.[45]

The court explored various constructions of Section 230(c) that might bring the statute's effect back in line with its purpose.[46] One such reading involved treating subsection (c)(1) as a definitional clause, rather than a general immunity.[47] This interpretation would treat "provider or user" as a status (in contrast to "speaker or publisher") that would entitle the party to immunity under subsection (c)(2).[48] However, under this interpretation, (c)(2) immunity would effectively swallow (c)(1) immunity and leave platforms exposed to state law liability.[49] An alternate construction, the court suggested briefly, would limit the scope of (c)(1) immunity to "liability that depends on deeming the ISP a 'publisher,'" like defamation.[50]

Ultimately, the court had no reason to conclude which interpretation of Section 230(c) was better because the plaintiffs' claims under the Electronic Communications Privacy Act—that GTE had aided illegal

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43 *Id.* at 660.

44 *Id.*

45 *Id.* ("[Section] 230(c) as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law. As precautions are costly, . . . ISPs may be expected to take the do-nothing option and enjoy immunity under § 230(c)(1). Yet § 230(c)–which is, recall, part of the 'Communications Decency Act'–bears the title 'Protection for "Good Samaritan" blocking and screening of offensive material,' hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services.").

46 *Id.*

47 *Id.*

48 *Id.*

49 The conclusion that Section 230, so construed, would not preempt state law claims relies on the premise that subsection (c)(2) does not impose a duty to moderate indecent content, but only shields those platforms who choose to do so. *Id.*

50 *Id.*; *see* Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009), *as amended* (Sept. 28, 2009). By way of contrast, courts have found that contract claims like promissory estoppel do not implicate Section 230 immunity because they do not require a determination of whether the defendant acted as a publisher. *See Barnes*, 570 F.3d 1096. "[O]ne notices that subsection (c)(1), which after all is captioned 'Treatment of publisher or speaker,' precludes liability only by means of a definition. . . . Subsection 230(e)(3) makes explicit the relevance of this definition, for it cautions that '[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.' Bringing these two subsections together, it appears that subsection (c)(1) only protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider." *Id.* at 1100–01.

activity by "intercepting" the objectionable content[51]—did not require a determination of whether GTE acted as a publisher.[52] Plaintiffs also could not show that GTE had a duty, statutory or otherwise, that would implicate Section 230 protections.[53] In a way, the court evaded the Section 230 dilemma it identified by avoiding the question entirely.

The Seventh Circuit adopted a similarly narrow reading of "publisher" in *Chicago Lawyer's Committee for Civil Rights Under the Law v. Craigslist, Inc.*, in which the court upheld (c)(1) immunity for Craigslist when it was sued over discriminatory rental housing advertisements posted by third parties in violation of the Fair Housing Act.[54] While the court acknowledged that the advertisements were actionable under the Fair Housing Act,[55] Craigslist was nonetheless immunized by Section 230(c)(1) because the content was provided by third parties and it was acting in the capacity of a publisher.[56]

The court was careful to note that Section 230(c)(1) is not a "general prohibition" of liability for platforms and seemed to adopt the narrow interpretation that (c)(1) immunity is limited only to causes of action that require a finding that the defendant acted as a publisher.[57] It concluded that the Fair Housing Act imposed liability only if Craigslist had acted as publisher or speaker of the illegal advertisements.[58] Given the protection of Section 230(c)(1), Craigslist could not be treated as the speaker or publisher of third-party content, so the court found no liability under the Fair Housing Act.[59]

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51 *GTE*, 347 F.3d at 658.

52 *Id.* at 660 ("[T]he difference matters only when some rule of state law *does* require ISPs to protect third parties who may be injured by material posted on their services. Plaintiffs do not contend that GTE 'published' the tapes and pictures for purposes of defamation and related theories of liability. . . . Instead, they say, GTE is liable for 'negligent entrustment of a chattel' . . . .").

53 *Id.* at 660–61.

54 Chi. Laws.' Comm. for C.R. Under L., Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008), *as amended* (May 2, 2008).

55 *Id.* at 668.

56 *Id.* at 671.

57 *Id.* at 669–71 (quoting *GTE*, 347 F.3d at 659–60). *See also* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1105 (9th Cir. 2009), *as amended* (Sept. 28, 2009) ("Subsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties. Subsection (c)(2), for its part, provides an additional shield from liability, but only for 'any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene . . . or otherwise objectionable." (quoting 47 U.S.C. § 230(c)(2)(A))).

58 *Craigslist*, 519 F.3d at 669–71.

59 *Id.* at 671.

C. *Applying Section 230 to Discrimination Claims*

Courts have used both subsections of Section 230(c) in tandem to find immunity for platforms being sued for removing content rather than hosting it. For example, in *Domen v. Vimeo, Inc.*, a religious nonprofit sued Vimeo when the video hosting site removed content that violated its user agreement.[60] The nonprofit posted videos advocating for Sexual Orientation Change Efforts, which were specifically prohibited by the terms of use, and Vimeo removed the content.[61] The nonprofit sued, alleging, inter alia, religious discrimination and free speech violations under state and federal law.[62]

Applying subsection (c)(1), the district court used a three-part test for immunity that examined whether "the defendant (1) is a provider or user of an interactive computer service, (2) the claim is based on information provided by another information content provider, and (3) the claim would treat the defendant as the publisher or speaker of that information."[63] Although the plaintiffs insisted they did not seek to hold Vimeo liable for distributing their videos, the court concluded that Vimeo

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60 Domen v. Vimeo, Inc., 433 F. Supp. 3d 592, 596 (S.D.N.Y. 2020), *aff'd by* 991 F.3d 66 (2d Cir. 2021), *withdrawn*, No. 20-616-cv, 2021 WL 4399692 (2d Cir. Sept. 23, 2021). This case has a particularly convoluted procedural history that may raise some questions regarding its precedential value. Plaintiffs commenced the action in the Central District of California, and defendants succeeded in transferring to the Southern District of New York. *See* Domen v. Vimeo, Inc, No. 19-cv-01278-SVW-AFM, 2019 U.S. Dist. LEXIS 177650 (C.D. Cal. Sept. 4, 2019). Once in New York, defendants moved to dismiss and a magistrate judge granted the motion. *Vimeo*, 433 F. Supp. 3d at 607–08. While Federal Rule of Civil Procedure 72 requires that a district court review *de novo* any objections to the magistrate judge's ruling, there is no record of any such objection in the Southern District. Instead, Plaintiffs appealed the decision to the Second Circuit Court of Appeals, which affirmed the magistrate judge's finding of immunity for Vimeo. *Vimeo*, 991 F.3d at 73. A few months later, in July 2021, the Second Circuit vacated the ruling without explanation and granted the plaintiff's petition for rehearing. Domen v. Vimeo, Inc., 2 F.4th 1002 (2d Cir. 2021) (mem.). Just six days after that, the Second Circuit issued a new opinion that reached the same conclusion, but excluded any analysis of subsection (c)(1) (publisher immunity) and relied only on subsection (c)(2) ("Good Samaritan" immunity). Domen v. Vimeo, Inc., 6 F.4th 245 (2d Cir. 2021). Finally, after vacating their order once more, the Second Circuit issued a new opinion that avoided any analysis of Section 230 and dismissed plaintiff's claims solely for failure to state a claim under New York's discrimination law. Domen v. Vimeo, Inc., No. 20-616-cv, 2021 U.S. App. LEXIS 29214 (2d Cir. Sept. 23, 2021) (vacating previous opinion); Domen v. Vimeo, Inc., No. 20-616-cv, 2021 U.S. App. LEXIS 28995 (2d Cir. Sept. 24, 2021) (summary order). Although the Second Circuit never offered any rationale for vacating its Section 230 analyses, the *Vimeo* saga is a salient example of judicial uncertainty as to which type of immunity to apply and when. See Section III.D, *infra*, for further discussion of overlapping immunity.

61 *Id.* at 599.

62 *Id.* at 596.

63 *Id.* at 601–02 (internal quotations omitted) (quoting FTC v. LeadClick Media, LLC, 838 F.3d 158, 173 (2d Cir. 2016)). The *LeadClick* court borrowed this test from *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016) (quoting Universal Commc'ns Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007)).

acted as a publisher because removing content falls in the realm of traditional editorial functions.[64] The court also found that subsection (c)(2) applied directly to Vimeo policing content that violated its terms of use.[65] Although the plaintiffs alleged that Vimeo had not acted in good faith, they failed to plead evidence sufficient to support that claim and the court declined to address the question.[66]

Many courts are hesitant to address the meaning of "good faith" when applying Section 230, fearing that an inquiry into the permissibility of a platform's motive would lead to problematic outcomes.[67] Excessive inquiry into a platform's motive or procedure in removing content (or not) could expose platforms to a flood of claims that would contradict the very purpose of Section 230.[68] Furthermore, the exposure of a platform's content moderation decision-making process to judicial review would likely disincentivize taking any action at all, rendering Section 230 immunity meaningless.[69] When faced with this choice, courts prefer to construe subsection (c)(2) broadly, in favor of immunity.[70]

II. EXAMINING THE OPTIONS

A. *Legislative Proposals*

Legislative proposals seeking to address problems with Section 230 were abundant during the 116th Congress.[71] The following subsection reviews two of the most common approaches to fixing Section 230, as well as one notable proposal that goes beyond amending the text of the statute to create an entirely new framework. My analysis of these legislative solutions will inform the proposal I set forth below in Part IV.

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64 *Vimeo*, 433 F. Supp. 3d at 602 (quoting *LeadClick*, 838 F.3d at 174).

65 *Id.* at 603.

66 *Id.* at 604.

67 *See, e.g.*, Prager Univ. v. Google LLC, No. 19-CV-340667, 2019 Cal. Super. LEXIS 2034, at *27–28 (Cal. Super. Ct. Nov. 19, 2019). The concurring opinion in *Milo v. Martin* defined "good faith" simply as "an absence of malice." 311 S.W.3d 210, 221 (Tex. App. 2010) (Gaultney, J., concurring).

68 Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1174 (9th Cir. 2008) ("Such close cases, we believe, must be resolved in favor of immunity, lest we cut out the heart of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged . . . the illegality of third parties.").

69 Levitt v. Yelp! Inc., No. C-10-1321 EMC, 2011 U.S. Dist. LEXIS 124082, at *27–28 (N.D. Cal. Oct. 26, 2011).

70 *Prager Univ.*, 2019 Cal. Super. LEXIS 2034, at *28 (citing *Roommates.com*, 521 F.3d at 1174).

71 *See* sources cited *supra* note 15.

1. Conditional (c)(1) Immunity

Making (c)(1) immunity conditional is one of the most common approaches to resolving the perverse incentive that platforms can benefit from Section 230's immunity without having to take any action to further the statute's goal of Internet safety.[72] One Senate bill, the Stopping Big Tech's Censorship Act (S. 4062), makes (c)(1) immunity conditional upon taking "reasonable steps" to prevent unlawful use of the platform.[73] The bill defines "unlawful use" to include "cyberstalking, sex trafficking, trafficking in illegal products or activities, [and] child sexual exploitation."[74] Another, the Limiting Section 230 Immunity to Good Samaritans Act (S. 3983), conditions immunity on the platform's maintenance of written terms of service.[75]

Whereas S. 3983's conditional immunity is directed at ensuring platforms' evenhanded enforcement of their terms of use, S. 4062 attacks the types of illegal content that Section 230 was initially intended to address.[76] By adding a requirement of active content moderation to (c)(1) immunity, S. 4062 creates a connection between the two subsections where before there was none—at least not explicitly.[77] Both bills deal generally with the perverse enforcement incentive by imposing a condition on (c)(1), but they diverge in terms of policy goals. S. 4062 seeks to incentivize platforms' pursuit of Internet safety, while S. 3893 seeks to enforce a policy of transparent terms of use and evenhanded enforcement.[78]

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72 *See* discussion *infra* Section III.C.

73 Stopping Big Tech's Censorship Act, S. 4062, 116th Cong. (2020).

74 *Id.* § 2(1)(A)(iii).

75 Limiting Section 230 Immunity to Good Samaritans Act, S. 3983, 116th Cong. § 2(1)(A)(ii) (2020).

76 *See* Protection for Private Blocking and Screening of Offensive Material, 47 U.S.C. § 230(b); *supra* Section I.A.

77 S. 4062 § 2(1)(B)(iii). The courts in both *Prager University* and *Vimeo* at least acknowledged that subsections (c)(1) and (c)(2) are independent sources of immunity that are applied separately. *See* Prager Univ. v. Google LLC, No. 19-CV-340667, 2019 Cal. Super. LEXIS 2034, at *19–22 (Cal. Super. Ct. Nov. 19, 2019); Domen v. Vimeo, 433 F. Supp. 3d 592, 601–04 (S.D.N.Y 2020), *aff'd by* 6 F.4th 245 (2d Cir. 2021), *withdrawn*, No. 20-616-cv, 2021 WL 4399692 (2d Cir. 2021). Both courts nevertheless applied the subsections in tandem. By treating content moderation as a traditional editorial function, the *Prager University* and *Vimeo* courts were able to find "double immunity" for the platforms. *See Prager Univ.*, 2019 Cal. Super. LEXIS 2034, at *19–27; *Vimeo*, 433 F. Supp. 3d at 601–04. While there is no added benefit to the platform for immunity under both (c)(1) and (c)(2), this overlapping application creates confusion as to whether (c)(1) was truly intended to be an independent immunity. *See* discussion of the *GTE* court's alternative readings of Section 230 *supra* Section I.B.

78 See text and accompanying footnotes *supra* Section I.B for discussion of the perverse incentive against moderation created by the common law publisher/distributor distinction.

Irrespective of its policy goals, this approach faces criticism on the grounds that it would be an unconstitutional condition imposed by the government on a protected right.[79] At least one academic proposal suggests treating content moderation as a form of editorial discretion over a private forum, which is protected from government interference by the First Amendment.[80] A condition on Section 230 immunity would require platforms to give up their protected right to moderate the content of a private forum or lose a benefit—immunity—that is necessary for their survival.[81] One scholar supports such a solution on the grounds that the government's interest is not compelling enough to justify inducing platforms to give up their right to editorial discretion, and that "[s]uch proposals should not become law."[82]

While it is certain that a platform's right to make editorial decisions free from government interference is central to freedom of the press, the prevailing scholarly assumption is that the First Amendment does not require Section 230 immunity.[83] This weakens the case for an unconstitutional condition because it lessens the importance and necessity of the benefit at issue—here, Section 230 immunity.[84] If the content moderation decisions that a platform is making would have been protected under traditional editorial discretion doctrine, then immunity is not necessary to protect that right and a condition on immunity would not be unconstitutional.[85]

2. Narrowing the Scope of (c)(2)

In an effort to limit platforms' wide editorial latitude, some lawmakers have sought to define "good faith" in subsection (c)(2) and to narrow the scope of "objectionable" content that a platform can remove or restrict with immunity.[86] Currently, under subsection (c)(2), a platform is protected if it acts in "good faith" to remove or restrict content that the

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79 *See* Edwin Lee, Note, *Conditioning Section 230 Immunity on Unbiased Content Moderation Practices as an Unconstitutional Condition*, 2020 U. ILL. J.L. TECH. & POL'Y 457, 467–69 (2020).

80 *See id.* at 467–68.

81 *Id.* at 467.

82 *Id.* at 475.

83 *See* Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2031 (2018).

84 The constitutionality of such a condition hinges on whether the benefit at issue (here, Section 230 immunity) is important and necessary to the beneficiary's exercise of a protected right. The more necessary the benefit is to the exercise of such a right, the more protected the benefit will be. See Lee, *supra* note 79, at 467–69, and Section III.C, *infra*, for further discussion of unconstitutional conditions.

85 *See* Lee, *supra* note 79, at 467–69.

86 *See, e.g.*, Limiting Section 230 Immunity to Good Samaritans Act, S. 3983, 116th Cong. (2020); Protect Speech Act, H.R. 8517, 116th Cong. (2020); Stop the Censorship Act, H.R. 4027, 116th Cong. (2019).

platform believes is obscene, illegal, or "otherwise objectionable."[87] This standard gives platforms nearly unlimited discretion to remove with impunity whatever content it finds "objectionable," as long as it does so in "good faith."[88]

One proposed amendment, the Protect Speech Act (H.R. 8517), limits Good Samaritan protection to the removal of content that the platform has an "objectively reasonable belief" is obscene, violent, or illegal.[89] This change is significant because it redirects the focus of the analysis from the platform's motivation in restricting the content to the platform's belief that the content was obscene and whether that belief was reasonable. The bill also redefines "good faith" to include publicly available terms of service "that state plainly and with particularity" the platform's content moderation policies and practices.[90] It also requires that platforms apply their terms of service evenhandedly and give users notice describing "the reasonable factual basis" for restricting or removing the content.[91] In doing so, H.R. 8517 seeks to create more transparency and accountability regarding content moderation.[92]

By requiring consistent application of the platform's terms of service or community guidelines, H.R. 8517 creates a First Amendment dilemma where there already are too many.[93] A consistency requirement would force platforms to remove all the content—and only the content—that violates terms of service or community standards, acting as a restraint on the content a platform may moderate.[94] However, these sorts of editorial decisions are likely protected by First Amendment doctrine that prohibits the government from requiring newspapers to maintain politically neutral spaces.[95]

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87 47 U.S.C. § 230(c)(2)(A).

88 *See* PC Drivers Headquarters, LP v. Malwarebytes Inc., 371 F. Supp. 3d 652, 662 (N.D. Cal. 2019); Langdon v. Google, Inc., 474 F. Supp. 2d 622, 630 (D. Del. 2007).

89 Protect Speech Act, H.R. 8517, 116th Cong. § 2(1)(C), (2)(A) (2020).

90 *Id.* § 2(4)(A)–(B).

91 *Id.* § 2(4)(C)–(D).

92 The long form of the bill's title reads: "To amend [S]ection 230 of the Communications Act of 1934 to ensure that the immunity under such section incentivizes online platforms to responsibly address illegal content while not immunizing the disparate treatment of ideological viewpoints and continuing to encourage a vibrant, open, and competitive internet, and for other purposes."*Id. See also id.* § 2(1)(C), (2)(A), (4).

93 *See* Mark MacCarthy, *Some Reservations About a Consistency Requirement for Social Media Content Moderation Decisions.*, FORBES (July 29, 2020, 8:22 AM), https://www.forbes.com/sites/washingtonbytes/2020/07/29/some-reservations-about-a-consistency-requirement-for-social-media-content-moderation-decisions/?sh=6b25cbda76d7 (last visited Nov. 25, 2021). See also Section III.A, *infra*, for discussion of existing First Amendment dilemmas.

94 *See* MacCarthy, *supra* note 93.

95 See discussion *infra* Section III.A on editorial decisions as protected speech.

An additional pitfall of a consistency requirement is that it would require a government agency to make determinations of whether a platform acted appropriately in restricting content.[96] That notion is problematic because the monitoring agency, likely the Federal Trade Commission, is probably not an expert in social media content moderation.[97] Additionally, it would be tremendously costly for a government agency to review even a fraction of the content moderation decisions that a social media platform makes.[98]

3. A New Framework

Another groundbreaking proposal is the bipartisan Platform Accountability and Consumer Transparency Act (PACT), which sidesteps Section 230 in favor of a new framework.[99] First, PACT requires platforms to adopt and publish an "acceptable use policy" that "reasonably inform[s] users about the types of content" permitted and prohibited.[100] The platform must also establish a complaint process by which users can report objectionable content or protest the platform's decision to remove content.[101] The bill requires platforms to submit quarterly reports on their content moderation practices and makes violation of these terms punishable under the Federal Trade Commission Act.[102] Additionally, PACT creates an exception to Section 230 for platforms that have knowledge of illegal content or activity but do not make an effort to stop the illegal use within twenty-four hours of receiving notice.[103] This requirement is not as far-reaching as it appears, however, since proper notice of illegal content requires a court order specifying that the content in question violates state or federal law.[104]

The PACT avoids many of the pitfalls that other legislative proposals encounter, like unconstitutional conditions or limits on platforms' editorial decision-making, by imposing regulations on process instead of content.[105] This is also the bill's weakness, as process requirements like a quarterly transparency report will require a

96 *See* MacCarthy, *supra* note 93.

97 *Id.*

98 *See infra* notes 168–171 and accompanying text.

99 Platform Accountability and Consumer Transparency Act, S. 4066, 116th Cong. § 5(a)(1)–(2)(A) (2020).

100 *Id.*

101 *Id.* § 5(a)(2)(C), (b).

102 *Id.* § 5(a)(2)(D), (d), (g)(2)(A).

103 *Id.* § 6(a).

104 *Id.*

105 *See* MacCarthy, *supra* note 93.

substantial amount of agency oversight to administer.[106] Scholars have also criticized the court-ordered takedown requirement as being susceptible to abuse by frivolous claimants.[107] However, the approach of creating narrow exceptions in Section 230 immunity—such as for content the platform knew was illegal—is an effective step towards requiring platforms to moderate content more actively while avoiding First Amendment conflicts.[108]

B. *Executive Proposals*

As discussed in the Introduction, President Trump issued an Executive Order in May 2020 requesting administrative rulemaking to clarify the meaning of "good faith" in subsection (c)(2).[109] The Order also suggested criteria for defining good faith, including whether the actions are "deceptive, pretextual, or inconsistent with a provider's terms of service" and whether the platform provided clear notice to the user whose content was removed.[110] Shortly after the Order was issued, the Center for Democracy and Technology (CDT) filed a lawsuit in federal court challenging the Order as retaliatory and in violation of the First Amendment.[111] The court dismissed on the grounds that CDT failed to demonstrate an imminent injury resulting from the Order.[112] Furthermore, the court found that CDT's First Amendment claim was unripe for adjudication because the Order did not prescribe law but, instead, directed federal agencies to take actions that might eventually lead to the law CDT claimed was unconstitutional.[113]

In September 2020, following President Trump's Executive Order, the Department of Justice (DOJ) submitted a legislative proposal based on its own study of Section 230.[114] Its conclusions, summarized in a letter

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106 *See infra* Section III.B (discussing the risks of excessive government oversight of content moderation).

107 *See* Daphne Keller, *CDA 230 Reform Grows Up: The PACT Act Has Problems, But It's Talking About the Right Things*, STAN. L. SCH. CTR. FOR INTERNET & SOC'Y (July 16, 2020, 6:02 PM), https://cyberlaw.stanford.edu/blog/2020/07/cda-230-reform-grows-pact-act-has-problems-it%E2%80%99s-talking-about-right-things [https://perma.cc/UP2Q-VCD3]; *see also* MacCarthy, *supra* note 93.

108 *See infra* Section III.C (discussing carve-outs as a less problematic alternative to conditional immunity).

109 *See supra* Introduction; Exec. Order No. 13,925, *supra* note 5.

110 Exec. Order No. 13,925, *supra* note 5, at 34,081.

111 Ctr. for Democracy & Tech. v. Trump, 507 F. Supp. 3d 213 (D.D.C. 2020).

112 *Id.* at 227–28.

113 *Id.*

114 Letter from William P. Barr, U.S. Att'y Gen., to Michael R. Pence, Vice President of the U.S. (Sept. 23, 2020) [hereinafter DOJ Letter], https://www.justice.gov/file/1319346/download [https://perma.cc/2CSD-YSGB].

sent to Congress, identify many of the same changes proposed by the bills discussed above, including defining "good faith"[115] and narrowing the content that can be removed with immunity under subsection (c)(2).[116] It also conditions subsection (c)(1) immunity on "act[ing] in good faith and abid[ing] by [a platform's] own terms of service and public representations."[117]

However, the DOJ's recommendations expand on the congressional proposals in several key respects. First, the letter seeks to "clarif[y] the interplay" between subsection (c)(1) and subsection (c)(2) immunity and finds "that platforms cannot use [Section] 230(c)(1) as a shield against moderation decisions that fall outside the explicit limitations of [Section] 230(c)(2)."[118] This change is directed specifically at cases like *Vimeo*, where courts use subsection (c)(1) to immunize a platform that removes content by construing "publisher" to include editorial decisions.[119] Implicit in this recommendation is the notion that subsection (c)(1) is intended to apply when a platform does not remove content and subsection (c)(2) applies when a platform does.[120]

The DOJ deepened the divide between subsections (c)(1) and (c)(2) by also recommending an amendment to subsection (c)(1) to clarify that a content moderation decision, made in good faith and consistent with a platform's terms of service, does not automatically make that platform a publisher.[121] This amendment serves to reinforce the belief that subsection (c)(1) and subsection (c)(2) immunity should not overlap—that a platform should not be protected under subsection (c)(1) for restricting or removing content that would not otherwise be subject to subsection (c)(2) immunity.[122] In effect, application of subsection (c)(1) immunity would be limited to liability that required a determination of whether the platform published—or merely distributed—the offending third-party content.[123]

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115 Interestingly, both the DOJ and H.R. 8517 propose identical statutory definitions of "good faith." *Compare id.* at 2, *with* H.R. 8517, 116th Cong. § 2(4)(A)–(D) (2020) (proposing a statutory definition that would require "publicly available terms of service or use that state plainly and with particularity the criteria the interactive computer service employs in content-moderation practices," as well as timely notice to the creators of content that has been restricted providing a "factual basis for the restriction" and an opportunity to respond).

116 DOJ Letter, *supra* note 114, at 2–3.

117 *Id.* at 3.

118 *Id.* at 2.

119 *See* Domen v. Vimeo, Inc., 433 F. Supp. 3d 592, 601–02 (S.D.N.Y. 2020), *aff'd by* 6 F.4th 245 (2d Cir. 2021), *withdrawn*, No. 20-616-cv, 2021 WL 4399692 (2d Cir. 2021).

120 *See* Doe v. GTE Corp., 347 F.3d 655, 659 (7th Cir. 2003).

121 DOJ Letter, *supra* note 114, at 3.

122 *Id.*

123 See notes 54–59 and accompanying text for discussion of a case, Chi. Laws.' Comm. for C.R. Under L., Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008), *as amended* (May 2, 2008), in which the plaintiff's claims required a finding that the defendant platform acted as publisher.

Lastly, the DOJ proposal also includes three new exceptions to (c)(2) immunity for "platforms that (1) purposefully promote, facilitate, or solicit third-party content that would violate federal criminal law; (2) have actual knowledge that specific content it is hosting violates federal law; and (3) fail to remove unlawful content after receiving notice by way of a final court judgment."[124] These exceptions are intended to further Section 230's original purpose of promoting Internet safety by creating "carve-outs" in (c)(2) immunity for platforms that fail to take appropriate action.[125]

III. STRUCTURING A PROPOSAL

Before proceeding to a proposal, it is necessary to lay out some legal and practical guard rails in order to structure a proposal that achieves the purposes of the CDA—free speech and a safer Internet—while steering clear of constitutional pitfalls.[126] This Part lays out five factors that are key to formulating the proposal that follows in Part IV. These factors are distilled from court decisions,[127] legislative and executive proposals,[128] and scholarship,[129] and represent obstacles that have arisen in seeking to amend Section 230: the First Amendment, the mode of implementation, conditions on immunity, "overlapping" immunity, and defining "good faith." These considerations will serve both as limits and as objectives for a proposal that seeks to promote the original purposes of Section 230 while navigating the litany of pitfalls that accompany government regulation of online content moderation.[130]

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124 DOJ Letter, *supra* note 114, at 3.

125 *Id.* at 3–4.

126 47 U.S.C. § 230(b).

127 See *supra* Sections I.B–C for discussion of courts' varying approaches to applying Section 230 and their conflicting interpretations of immunity under subsections (c)(1) and (c)(2).

128 See *supra* Part II for discussion of various governmental approaches to amending Section 230 and the common themes and obstacles they encounter.

129 See *supra* Section II.A.1 and *infra* Section III.A for scholarly discussion of constitutional issues that arise from government regulation of content moderation. See *infra* Sections III.B–C for discussion of competing scholarly approaches to regulation.

130 The primary purposes of Section 230, codified in 47 U.S.C. § 230(b) and referenced throughout this Note, are to promote a free marketplace of ideas and to minimize illegal or unsafe content online. The constitutional question—to what extent the government may require platforms to promote those ends—is discussed briefly at *supra* Section II.A.1, and in greater detail at *infra* Section III.A.

A. *Preliminary First Amendment Considerations*

Any attempt at regulating platforms' content moderation practices risks First Amendment challenges on the grounds that the platforms' acts of content moderation—often carried out by algorithms—are themselves a form of protected speech.[131] Professor Kyle Langvardt suggests that social media platforms would frame content moderation as an editorial decision akin to the editorial discretion often exercised by a newspaper.[132] Social media platforms likely "occupy the high ground" with this argument, Langvardt asserts, since the First Amendment as applied to newspapers has protected editorial decisions from government interference.[133] This even prohibits requirements that newspapers maintain a politically balanced op-ed space.[134] In short, the government likely could not require social media platforms to moderate content in a politically neutral manner.

This challenge is compounded by the premise that online platforms are private companies and not state actors or common carriers, so they are not bound by traditional First Amendment requirements, like viewpoint neutrality.[135] Although private entities, state actors are agents of the government and, consequently, are bound by the same First Amendment limits as the government itself.[136] To be considered a state actor, an entity must either "perform[] a traditional, exclusive public function," or act in conjunction with, or under the compulsion of, the state.[137] Few, if any, social media platforms would meet these criteria.[138]

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131 *See* Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1364–65 (2018).

132 *See id.* at 1365.

133 *Id.* at 1364.

134 *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257–58 (1974).

135 *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928–30 (2019) ("[T]he [First Amendment] prohibits only *governmental* abridgment of speech. . . . [A] private entity who provides a forum for speech is not transformed by that fact alone into a state actor.").

136 *See id.*

137 *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345, 357–59 (1974); *Halleck*, 139 S. Ct. at 1928.

138 *See Halleck*, 139 S. Ct. 1921 at 1928 ("[A] private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity." (internal citations omitted)). Of the many roles that social media plays in our world, it appears that none exercises a power "traditionally exclusively reserved to the State," the most common of which is elections. *Id.* at 1928–29 (quoting *Jackson*, 419 U.S. at 352). Even functions that are apparently for the "public good," including supplying energy or running a nursing home, do not qualify as government functions for the purposes of determining whether a private entity is a state actor. *Id.* Recently, the Ninth Circuit concluded that the hosting of speech on a private platform does not qualify as a traditional and

A related argument is that social media constitutes a public forum, the access to which is protected by the First Amendment.[139] However, public forum doctrine is more relevant to situations when government officials block users from their own social media profiles, since the doctrine applies only to situations in which the government limits access to the forum.[140]

Taking these constitutional considerations together, it becomes clear that any government regulation of online content moderation practices will operate within narrow boundaries. Langvardt reminds that these constraints are not permanent, but subject to change based on the doctrinal inclinations of the Supreme Court.[141] Nevertheless, the current situation makes clear that online platforms should be—and must be—regulated with a subtle hand to avoid running into constitutional challenges.

In February 2021, Florida Governor Ron DeSantis proposed more aggressive legislation that would impose a fine of $100,000 on social media platforms that ban the accounts of political candidates.[142] Although the bill was approved by the Florida legislature, a federal court issued an injunction blocking the law from taking effect on the grounds that the First Amendment protects social media platforms against being forced to host political content.[143] In *Miami Herald Publishing Co. v. Tornillo*, a newspaper challenged a regulation requiring it to give politicians a "right of reply" when criticized in editorials.[144] The Supreme Court held that mandating the publication of a reply article interfered with the

exclusive government function. *See* Prager Univ. v. Google, LLC, 951 F.3d 991, 997–98 (9th Cir. 2020).

139 *See* Samantha Briggs, Note, *The Freedom of Tweets: The Intersection of Government Use of Social Media and Public Forum Doctrine*, 52 COLUM. J.L. & SOC. PROBS. 1, 5–7 (2018).

140 *See id.* at 5–6, 14–16.

141 Langvardt, *supra* note 131, at 1366 ("Those trends, of course, can change. Certain broad doctrinal contours that appear timeless today in fact developed relatively recently and are surprisingly contingent on the [Supreme] Court's partisan fault line.").

142 *Florida Gov. DeSantis Proposing Laws Against 'Censorship' by Social Media Companies*, NBC MIAMI (Feb. 2, 2021, 3:42 PM), https://www.nbcmiami.com/news/local/florida-gov-desantis-holding-news-conference-in-tallahassee/2372711 [https://perma.cc/MS5N-AD8Q].

143 Sara Morrison, *Florida's Social Media Free Speech Law Has Been Blocked for Likely Violating Free Speech Laws*, VOX (July 1, 2021, 2:50 PM), https://www.vox.com/recode/2021/7/1/22558980/florida-social-media-law-injunction-desantis [https://perma.cc/QD7W-7WXS]; *see also* NetChoice, LLC v. Moody, No. 21cv220-RH-MAF, 2021 WL 2690876 (N.D. Fla. June 30, 2021) (granting preliminary injunction blocking the Florida law); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974); Judd Legum, *DeSantis, Big Tech, and the Future of Trumpism*, POPULAR INFO. (Feb. 4, 2021), https://popular.info/p/desantis-big-tech-and-the-future?r=a5hc&utm_campaign=post&utm_medium=web&utm_source=copy [https://perma.cc/8FVN-MAUD].

144 *See Miami Herald*, 418 U.S. 241.

newspaper's protected right to choose the content it publishes.[145] With respect to the 2021 Florida law, the district court held that requiring social media platforms to host political candidates' content is the twenty-first century equivalent of requiring a politically neutral op-ed page.[146]

B. *Why the Only Solution Is a Government Solution*

Given the narrow First Amendment limits, it might appear that legislation is not the best approach to resolving the Section 230 dilemma. Surveying three alternate legal approaches—common law, federal administrative regulation, and state-level regulation—Langvardt concludes not only that federal legislation is appropriate, but that Congress is the only branch of government with the authority to restrict content moderation by private entities.[147] He first argues that a common law solution is untenable because it would require courts to loosen the state action doctrine when applied to private speech in order to hold platforms accountable to First Amendment requirements.[148] Langvardt also dismisses administrative rulemaking that might reclassify social media platforms as common carriers—and therefore subject to content regulation—on the grounds that they cannot be analogized easily to services like the telephone or broadband Internet.[149] Finally, any state-level attempts to "punish overzealous content moderation" would likely face federal preemption and challenges under the dormant commerce clause of the Constitution.[150]

Langvardt maintains that government intervention is especially desirable because there are few alternative platforms available for users trying to escape overly restrictive moderation.[151] Although modern technology gives the appearance of a nearly infinite realm of possibility, the reality in social media is that the vast majority of speech happens on

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145 *See id.* at 258 ("A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and the content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.").

146 *See NetChoice*, 2021 WL 2690876 (granting preliminary injunction).

147 *See* Langvardt, *supra* note 131, at 1366–67.

148 *Id.* at 1366 ("Such a transformation in the law is not completely unthinkable, but it is nearly so . . . .").

149 *Id.* at 1368–69. In an act of political clairvoyance, Langvardt anticipated that a president might try to bypass Congress by resorting to executive agencies. This is more or less what President Trump did with his May 2020 Executive Order. *See* Exec. Order No. 13,925, *supra* note 5, at 34,080.

150 Langvardt, *supra* note 131, at 1370.

151 *Id.* at 1371.

a small group of social networks, owned by an even smaller group of tech conglomerates.[152] Out of approximately 3.5 billion social media users worldwide, Facebook commands more than 2.3 billion monthly active users (MAU).[153] In second place is YouTube, owned by Google, with nearly 2 billion MAU.[154] Instagram, also owned by Facebook, has about 1 billion MAU.[155] In short, more than two-thirds of all social media users in the world use a single platform, Facebook, which also owns the third-most popular platform.[156] Twitter, not owned by Facebook or Google, pales in comparison with a measly 330 million MAU.[157]

To further illustrate the lack of meaningful competition in social media, consider the rash of social media bans against President Trump following his supporters' riot at the U.S. Capitol on January 6, 2021.[158] Twitter permanently banned Trump on January 8, claiming that Trump had violated the platform's policy against threatening or glorifying violence.[159] Facebook, Instagram, YouTube, Snapchat, and others also banned Trump for various lengths of time.[160] Additionally, Google, Amazon, and Apple banned Twitter alternative Parler from their app stores on the grounds that the platform was used extensively to promote

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152 *See* Mozilla, *Social Media Giants Facebook, Tencent, Google Reign*, INTERNET HEALTH REP. (Apr. 2018), https://internethealthreport.org/2018/social-media-giants-facebook-tencent-google-reign [https://perma.cc/ZA8T-EV98].

153 Esteban Ortiz-Ospina, *The Rise of Social Media*, OUR WORLD IN DATA (Sept. 18, 2019), https://ourworldindata.org/rise-of-social-media [https://perma.cc/THX4-2QWE].

154 *Id.*

155 *Id.*

156 *See* Mozilla, *supra* note 152.

157 Ortiz-Ospina, *supra* note 153.

158 Dan Barry, Mike McIntire & Matthew Rosenberg, '*Our President Wants Us Here': The Mob That Stormed the Capitol*, N.Y. TIMES (Nov. 10, 2021), https://www.nytimes.com/2021/01/09/us/capitol-rioters.html [https://perma.cc/2EN6-8L3L].

159 The offending tweet read: "The 75,000,000 great American Patriots who voted for me, AMERICA FIRST, and MAKE AMERICA GREAT AGAIN, will have a GIANT VOICE long into the future. They will not be disrespected or treated unfairly in any way, shape or form!!!" Twitter, Inc., *Permanent Suspension of @realDonaldTrump*, TWITTER BLOG (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.html [https://perma.cc/QL6S-WE7L]; *see also Glorification of Violence Policy*, TWITTER (Mar. 2019), https://help.twitter.com/en/rules-and-policies/glorification-of-violence [https://perma.cc/5PWT-UZTJ] (prohibiting users from "glorifying, praising, condoning, or celebrating . . . attacks carried out by terrorist organizations or violent extremist groups").

160 *See* Sara Fischer & Ashley Gold, *All the Platforms That Have Banned or Restricted Trump so Far*, AXIOS (Jan. 11, 2021), https://www.axios.com/platforms-social-media-ban-restrict-trump-d9e44f3c-8366-4ba9-a8a1-7f3114f920f1.html [https://perma.cc/4P93-N8AY]; Hannah Denham, *These Are the Platforms That Have Banned Trump and His Allies*, WASH. POST (Jan. 14, 2021, 6:11 PM), https://www.washingtonpost.com/technology/2021/01/11/trump-banned-social-media [https://perma.cc/ELR4-A9HM].

the Capitol riots and other violence.[161] Parler is a particular favorite amongst Trump supporters and other right-wing social media users because its content moderation policies are held out as being more permissive than mainstream platforms' policies.[162]

The case of Trump's mass de-platforming demonstrates that widespread collective action against a common persona non grata can result in the exclusion of that person (or groups) from the market for social media.[163] Additionally, by banning Parler, Google, Amazon, and Apple also removed the primary alternative to "Big Social Media," narrowing the market and raising barriers to entry for those alternatives that might try to compete.[164] This illustration of the lack of alternatives to Big Social Media serves to identify the risk that voluntary measures may be ineffective due to the lack of meaningful competition amongst social media platforms and to underscore the necessity of a legislative solution.

By way of comparison, Professor Edward Lee recently put forward a proposal that advocates for a voluntary, uniform code of nonpartisan content moderation.[165] Finding that most platforms' policies already embrace varying degrees of nonpartisanship, Lee suggests expanding the existing framework to include a standardized protocol for reviewing and appealing platforms' editorial decisions.[166] This system would also utilize trained moderators to review content, transparency reports that include data about the platform's moderation activity, and independent audits to provide expert feedback.[167]

Langvardt and Lee agree that a major downside to an extensive government regulatory scheme is that it would require substantial—

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161 *See* Fischer, *supra* note 160; Bryan Sullivan, *Amazon and Twitter "Deplatforming" Parler and Trump; Is It Legal?*, FORBES (Jan. 28, 2021, 6:28 PM), https://www.forbes.com/sites/legalentertainment/2021/01/28/amazon-and-twitter-deplatforming-parler-and-trump-is-it-legal/?sh=21958acf7d25 [https://perma.cc/B5W5-CNY7].

162 *See* Tunku Varadarajan, *The 'Common-Carrier' Solution to Social-Media Censorship*, WALL ST. J. (Jan. 15, 2021, 12:39 PM), https://www.wsj.com/articles/the-common-carrier-solution-to-social-media-censorship-11610732343 [https://perma.cc/HC2F-RFTZ]; Mike Masnick, *Parler Speedruns the Content Moderation Learning Curve; Goes From 'We Allow Everything' to 'We're the Good Censors' in Days*, TECHDIRT (July 1, 2020, 10:43 AM), https://www.techdirt.com/articles/20200630/23525844821/parler-speedruns-content-moderation-learning-curve-goes-we-allow-everything-to-were-good-censors-days.shtml [https://perma.cc/Y7H4-7SLF].

163 *See supra* notes 151–162 and accompanying text.

164 *See* Varadarajan, *supra* note 162. In an interview with the Wall Street Journal, Professor Richard Epstein of New York University School of Law argued that iPhones make up 40% of the market for smartphones, so removing Parler's access to the Apple App Store effectively removes 40% of Parler's potential users. *Id.* Professor Epstein noted that Gab, another social media alternative, is in the process of performing an end-run around Apple's restrictions by developing its own independent server network and becoming completely "self-sufficient." *Id.*

165 Lee, *supra* note 12, at 925–26.

166 *Id.* at 1039–44.

167 *Id.* at 1044–50.

almost excessive—agency interference in platforms' day-to-day operations.[168] One example of such a proposal is Senator Josh Hawley's Ending Support for Internet Censorship Act, which requires the Federal Trade Commission to establish a process by which it certifies that platforms do not engage in politically biased content moderation, thereby entitling them to Section 230 immunity.[169] Not only would it require substantial resources for the Federal Trade Commission to review the content moderation activity of every online platform seeking immunity,[170] but it would also create an "immensely important quasi-constitutional institution" with broad-reaching, undefined powers.[171]

A strength of Lee's proposal is that it avoids the issue of government overreach or intrusion that might result from too aggressive a regulatory scheme.[172] The flipside of such a voluntary code is that it relies on the goodwill of quasi-monopolies to undertake the costs of adopting and implementing the code, including the three-level, double-blind review process Lee proposes.[173]

C. *"Something for Nothing"*

Platforms' ability to immunize themselves entirely from liability without having to make any effort to advance the purposes of Section 230 has created a "something for nothing" dilemma, in which platforms enjoy the benefits of immunity without having to screen for illegal content.[174] In a way, the dilemma encompasses both parties' gripes with Section 230. On one hand, platforms may moderate content however they see fit, leading to claims of viewpoint discrimination and anti-conservative bias on the right.[175] On the other, platforms are protected by Section 230

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168 *Compare* Langvardt, *supra* note 131, at 1363 ("[T]his model would require a degree of administrative hassle and governmental intrusion that lacks precedent in the law of free speech."), *with* Lee, *supra* note 12, at 1036 ("Some of the proposed Section 230 bills would entangle the [Federal Trade Commission] or courts in thorny determinations of whether an internet platform engaged in content moderation in a 'politically biased manner,' beyond 'unlawful material,' not 'in a viewpoint-neutral manner,' or not justified by 'a compelling reason for restricting that access or availability.'").

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

170 *See* Lee, *supra* note 12, at 1055–56.

171 Langvardt, *supra* note 131, at 1378.

172 *See* Lee, *supra* note 12, at 1036.

173 *Id.* at 1046–50.

174 *See supra* Section I.B.

175 It is worth recognizing here that multiple recent studies tend to disprove the right's claim that social media is biased against them. In October 2020, *Politico* found that conservatives dominated online conversations on hot topics leading up to the election. *See* Mark Scott, *Despite Cries of Censorship, Conservatives Dominate Social Media*, POLITICO (Oct. 27, 2020, 1:38 PM),

regardless of whether they undertake to remove indecent or illegal content—one of the left's major complaints.[176]

The most common solution put forward to deal with the "something for nothing" dilemma is to impose a condition on (c)(1) immunity: either to moderate content in a nonpartisan manner or to engage in proactive moderation of indecent and illegal content.[177] Although such conditions are admittedly a direct route to holding platforms accountable for Section 230's various policy objectives, they are also vulnerable to constitutional challenges on the grounds that they impermissibly restrict platforms' free exercise of their First Amendment right to monitor content on a private forum.[178]

A solution that avoids the constitutional issue while still addressing the dilemma might be to create carve-outs to immunity based on certain behaviors that both sides agree are harmful.[179] Some examples of such carveouts are the Fight Online Sex Trafficking Act (FOSTA) and the Stop Enabling Sex Traffickers Act (SESTA), a pair of anti-sex trafficking bills passed in tandem in 2018 that remove Section 230 immunity if third parties use a platform to advertise or solicit sex work.[180] Detractors of FOSTA-SESTA argue that it imposes a costly burden of moderation on platforms and punishes them based on the unpredictable behavior of their users.[181] Other classes of carve-outs might include exceptions to immunity for platforms that host content created by certain specified terrorist organizations or platforms that do not limit foreign propaganda.[182]

A final consideration when implementing the carve-out solution to the "something for nothing" dilemma is that it is better directed at the

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https://www.politico.com/news/2020/10/26/censorship-conservatives-social-media-432643 [https://perma.cc/V6R9-KKKX]. The New York University Center for Business and Human Rights also released a study in February 2021 that further disproves claims of bias using publicly available social media engagement data. *See generally* PAUL M. BARRETT & J. GRANT SIMS, FALSE ACCUSATION: THE UNFOUNDED CLAIM THAT SOCIAL MEDIA COMPANIES CENSOR CONSERVATIVES 14–17 (2021), https://static1.squarespace.com/static/5b6df958f8370af3217d4178/t/60187b5f45762e708708c8e9/1612217185240/NYU+False+Accusation_2.pdf [https://perma.cc/GR2E-U52A].

176 *See supra* Section I.B.

177 *Compare* Limiting Section 230 Immunity to Good Samaritans Act, S. 3983, 116th Cong. (2020) (conditioning immunity on nonpartisan moderation), *with* Stopping Big Tech's Censorship Act, S. 4062, 116th Cong. (2020) (conditioning immunity on affirmative moderation of illegal content).

178 *See supra* Section II.A.1.

179 *See* Lee, *supra* note 79, at 477–78.

180 *See* Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX (July 2, 2018, 1:08 PM), https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom [https://perma.cc/C549-G8NN].

181 *See id.*

182 *See* Lee, *supra* note 79, at 477–78.

goal of preventing illegal uses of platforms than of preventing politically-biased moderation.[183] Government regulation of speech based on its content (as compared to regulations regarding its "time, place, and manner") must survive a stricter degree of judicial review that looks to whether the regulation is "narrowly tailored to serve a compelling government interest."[184] In fact, Section 230 itself is the sole remnant of an encounter with strict scrutiny: the rest of the CDA was ruled an overly vague content-based regulation.[185] Since it is well-settled that the government cannot require the publication of politically neutral content, any carve-out that would limit a platform's editorial discretion—particularly with respect to political content—already has the weight of authority against it and would not likely pass constitutional muster.[186] By contrast, Section 230 already contains several carve-outs for the enforcement of state and federal laws, including intellectual property, communications privacy, and sex trafficking laws.[187]

D. *Separating the Overlapping Immunities*

As illustrated by some of the leading opinions dealing with Section 230 immunity, there is an apparent overlap in the way that courts apply subsections (c)(1) and (c)(2), especially to claims of discriminatory content moderation.[188] Although (c)(1) is commonly recognized as the subsection to protect platforms against speaker or publisher liability for third-party content, courts frequently read "publisher" in (c)(1) to include any actions the platform took that would constitute editorial decisions.[189]

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183 Restrictions on speech for the purpose of preventing illegal conduct generally stand up better to judicial scrutiny than do regulations dealing with the content of speech. *Accord* Reno v. ACLU, 521 U.S. 844, 871–72 (1997) (invalidating as overbroad most of the CDA provisions banning "indecent" material while preserving those relating to illegal uses of the Internet); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (holding that a local law requiring a newspaper to maintain a politically neutral op-ed page was an unconstitutional restriction on the content of protected speech).

184 *See* Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009).

185 *See Reno*, 521 U.S. at 871–74.

186 *See Miami Herald*, 418 U.S. 241; *supra* Section III.A (discussing the *Miami Herald* decision).

187 *See* 47 U.S.C. § 230(e)(1)–(5).

188 *See, e.g.*, Prager Univ. v. Google LLC, No. 19-CV-340667, 2019 Cal. Super. LEXIS 2034 (Cal. Super. Ct. Nov. 19, 2019); Domen v. Vimeo, Inc., 433 F. Supp. 3d 592 (S.D.N.Y. 2020), *aff'd by* 6 F.4th 245 (2d Cir. 2021), *withdrawn*, No. 20-616-cv, 2021 WL 4399692 (2d Cir. 2021). See also Sections I.B–C, *supra*, for discussion of the dilemmas that arise from the interaction of (c)(1) and (c)(2) immunity, especially when courts find immunity under both subsections (as in *Prager University* and *Vimeo, Inc.*).

189 *See, e.g.*, *Vimeo*, 433 F. Supp. 3d at 602; FTC v. LeadClick Media, LLC, 838 F.3d 158, 174 (2d Cir. 2016); *In re* Zoom Video Commc'ns Priv. Litig., 525 F. Supp. 3d 1017, 1032 (N.D. Cal. 2021).

By including content moderation as a form of editorial decision, platforms could theoretically be immunized under (c)(1) even if their action was not in "good faith" or not directed at a type of objectionable content specified in (c)(2).[190]

Overlapping immunity strays from one of the original intentions of Section 230, which was to resolve the "moderator's dilemma" that arose from the *Cubby* and *Stratton Oakmont* decisions.[191] A prevailing judicial interpretation of Section 230 is that subsection (c)(2) protects the platform when it chooses to remove content—addressing *Stratton Oakmont*—and (c)(1) protects the platform when it refrains from moderating, as in *Cubby*.[192] Allowing (c)(1) immunity for acts of content moderation destroys the difference between the two subsections and grants immunity with an overly broad stroke.[193] The DOJ recommendations deal with this overlap most directly, decoupling the two subsections with a term specifying that the removal of content pursuant to subsection (c)(2) does not necessarily make the platform a publisher of all other third-party content.[194] This term would consolidate immunity for content removal under (c)(2) by excluding moderation decisions from the scope of (c)(1) immunity.[195]

To effectively separate the two immunities, however, a proposal must also narrow the scope of "otherwise objectionable" content in (c)(2).[196] Courts have read this phrase broadly, granting essentially unlimited discretion to platforms to remove content as they see fit.[197] This change can be accomplished simply, by removing "otherwise

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190 See *supra* Section III.B, *infra* Section III.D, for discussion of content moderation as an editorial function protected by the First Amendment.

191 *See supra* Section I.A.

192 *See, e.g.*, Doe v. GTE Corp., 347 F.3d 655, 659 (7th Cir. 2003); Zeran v. Am. Online, Inc., 129 F.3d 327, 330–31 (4th Cir. 1997). *Compare* Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991) (holding that a platform could avoid liability by refusing to moderate content, thereby acting as a distributor), *with* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995) (holding that a platform that exercises any editorial control acts as a publisher and is liable for third-party content).

193 See discussion of the *GTE* court's alternative readings of Section 230, *supra* Section I.B.

194 U.S. DEPARTMENT OF JUSTICE, SECTION 230—NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY? KEY TAKEAWAYS AND RECOMMENDATIONS 4, 21–22 (2020) [hereinafter DOJ RECOMMENDATIONS], available for download at https://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996 [https://perma.cc/B3RW-SBKA].

195 *Id.* at 22 ("A takedown decision pursuant to (c)(2)(A) is immune from civil liability under Section 230. A platform's removal or restriction of content outside of (c)(2)(A) is not entitled to Section 230 immunity—under either (c)(1) or (c)(2)—even if consistent with the platform's terms of service.").

196 47 U.S.C. § 230(c)(2)(A).

197 *See, e.g.*, PC Drivers Headquarters, LP v. Malwarebytes Inc., 371 F. Supp. 3d 652, 662 (N.D. Cal. 2019); Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169 (9th Cir. 2009); *Zeran*, 129 F.3d 327.

objectionable" and replacing it with more specific qualifications of the content a platform can remove with immunity.[198] The question of how tightly to narrow the scope of (c)(2) is a policy decision, but the essence of the revision is that the determination of "objectionable" should not be left to the platform's discretion.[199]

E. *Defining "Good Faith"*

The issue of defining "good faith" has been a perennial issue both for courts applying Section 230 and for lawmakers trying to amend the statute.[200] A primary concern is that the good faith standard is often ignored, and that platforms censor those who express politically unpopular viewpoints.[201] Many proposals seek to define "good faith" in terms of a platform's evenhanded, transparent, and politically neutral enforcement of its terms of service.[202] As a favorable example, the DOJ recommendations provide a detailed, four-point framework for assessing whether a platform has acted in good faith.[203] A strength of this framework is that it avoids constitutional issues by only regulating the manner of enforcement, not what kind of content the platform may remove.[204]

One area of concern, however, is the recommendation that a good faith content removal requires an objectively reasonable belief that the content falls within one of the categories specified by (c)(2)(A).[205] This recommendation introduces a reasonable person standard into the good

198 Legislative proposals that approximate this approach include: S. 3983, 116th Cong. (2020); S. 4828, 116th Cong. (2020); S. 4534, 116th Cong. (2020); and H.R. 4027, 116th Cong. (2019).

199 DOJ RECOMMENDATIONS, *supra* note 194, at 21 ("Unconstrained discretion is particularly concerning in the hands of the biggest platforms, which today effectively own and operate digital public squares. . . . The vagueness of the term 'otherwise objectionable' risks giving every platform a free pass for removing any and all speech that it dislikes, without any potential for recourse by the user.").

200 See discussion of courts avoiding the question of "good faith," *supra* Section I.C.

201 *See* DOJ RECOMMENDATIONS, *supra* note 194, at 22; *see also* Reardon, *supra* note 13.

202 *See, e.g.*, DOJ RECOMMENDATIONS, *supra* note 194, at 22; S. 3983, 116th Cong. (2020); S. 4828, 116th Cong. (2020).

203 DOJ RECOMMENDATIONS, *supra* note 194, at 22 ("To restrict access to particular content in 'good faith,' a platform should be required to meet four criteria. First, it must have publicly available terms of service or use that state plainly and with particularity the criteria the platform will employ in its content-moderation practices. Second, any restrictions of access must be consistent with those terms of service or use and with any official representations regarding the platform's content-moderation policies. Third, any restrictions of access must be based on an objectively reasonable belief that the content falls within one of the categories set forth in subsection (c)(2)(A). And fourth, the platform must supply the provider of the content with a timely notice explaining with particularity the factual basis for the restriction of access . . . .").

204 See *supra* Section III.A for a discussion of First Amendment limitations.

205 *See* DOJ RECOMMENDATIONS, *supra* note 194, at 22.

faith analysis in order to promote greater neutrality and transparency in moderation decisions.[206] However, the language proposed by the DOJ seems to focus more on the platform's belief—and whether it was objectively reasonable—than whether the content removed could reasonably be understood to violate the terms of use. Furthermore, courts fear that excessive inquiry into a platform's motive or belief while removing content may lead to problematic or unconstitutional outcomes.[207] Perhaps a simple solution to this concern is to remove this requirement entirely, since it appears redundant of several of the DOJ's recommended good faith factors.[208]

As a supplement to its definition of good faith, the DOJ also recommends creating a carve-out in (c)(2) immunity for "Bad Samaritans" who promote or facilitate illegal content while still enjoying Section 230 immunity.[209] Given the constitutional concerns addressed above, the creation of carve-outs in the blanket immunity is a favorable approach because it allows for narrow exceptions that do not tread on platforms' editorial discretion.[210]

IV. PROPOSAL: "PACT PLUS"

Of all the government solutions set forth in Part II, the bill that fits best within the guiderails is PACT. Its primary strength is that it avoids First Amendment concerns about infringing on platforms' editorial decisions by regulating process, rather than content.[211] Additionally, it uses narrow carve-outs to remove Section 230 immunity from platforms that do not police illegal content—an effective means of sidestepping concerns about unconstitutional conditions.[212] As the need for new exceptions to immunity arises, legislators can add narrow carve-outs to address the need while being careful to avoid constitutional issues.[213] That said, PACT has its weaknesses, including a need for excessive agency oversight and the potential for abuse by frivolous claimants.[214] There are also serious questions about whether the transparency reports

206 *Id.*

207 *See, e.g.*, Prager Univ. v. Google LLC, No. 19-CV-340667, 2019 Cal. Super. LEXIS 2034 (Cal. Super. Ct. Nov. 19, 2019); Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1174 (9th Cir. 2008).

208 *See* DOJ RECOMMENDATIONS, *supra* note 194, at 22.

209 *Id.* at 14.

210 *See supra* Section III.D.

211 *See supra* Section II.A.3; MacCarthy, *supra* note 93.

212 *See supra* Section III.C.

213 *See* Lee, *supra* note 79, at 477–78.

214 *See* Keller, *supra* note 107.

required by the bill will be useful in monitoring platforms' content moderation practices.[215]

While agency oversight presents practical and constitutional pitfalls, it is a necessary evil that can be limited through specific constraints on the agency's power to review platforms' content moderation decisions.[216] Ideally, the agency's review would not ask whether the content at issue indeed violated the platform's community standards, but whether the platform acted in accordance with its published terms of use. Although this opens the door for platforms to adopt and publish a rule of essentially unlimited power to remove content, users could discover this through transparency reports (or by simply reading the platform's terms of use) and choose to use an alternative platform.[217]

PACT maintains Section 230 immunity in parallel with its new framework, so it is necessary to include changes to that immunity in order to achieve fully the legislation's goals.[218] A "PACT Plus" proposal should—and does—include carve-outs to limit (c)(1) immunity.[219] These carve-outs are essential to ensure that restrictions on content moderation are not so broad as to be unconstitutional.[220] An effective proposal must also separate the "overlap" of subsections (c)(1) and (c)(2) so that content moderation decisions are not immunized under both.[221] This can be accomplished first by specifying that content removals pursuant to (c)(2) do not, on their own, render a platform a publisher under (c)(1).[222] Then, a proposal should narrow the scope of (c)(2) protection by removing the "otherwise objectionable" language that gives platforms nearly unlimited discretion to remove content.[223]

Finally, a proposal must define "good faith" with a set of clear criteria to aid courts in assessing the nature of platforms' actions in

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215 *Id.*

216 *See* MacCarthy, *supra* note 93 ("Agency oversight still seems necessary for the effective operation of any due process requirement for platform content moderation. It is needed to put teeth in even the basic requirement that social media companies publish the content rules that govern their content moderation decisions.").

217 *See id.* ("Abandoning a consistency requirement and limiting agency enforcement creates its own difficulties. . . . [I]t seems a company could just put out whatever rules it wants and then act in accordance with them or not as it sees fit in specific cases. It could even say in its rules that it reserves the right to take down any content for any reason whatsoever, thereby allowing itself to engage in essentially arbitrary, unreasoned content moderation decision making. The transparency reports would let the public know about these abuses but would not themselves force any changes in platform conduct."); see also *supra* Section III.B for a counterpoint about the limited and shrinking market for social media.

218 *See supra* Section II.A.3.

219 *See supra* Section III.C.

220 *See supra* Section III.A.

221 *See supra* Sections III.C–III.D.

222 *See* DOJ RECOMMENDATIONS, *supra* note 194.

223 *See supra* Section II.A.2.

removing content.[224] The DOJ recommendations also set forth a particularly useful four-part test for good faith that seems to avoid constitutional issues by looking primarily at the platform's application of its terms of use.[225] By tying the definition of good faith to the way a platform enforces and adheres to its terms of use, the DOJ's test helps reinforce the PACT transparency framework.[226] In effect, platforms' immunity to remove content will be tied to their adherence with their own terms of use.

CONCLUSION

In the leadup to his inauguration in January 2021, President Joe Biden resumed calls for lawmakers to repeal Section 230 entirely, citing overreach and propagation of false information by Facebook and other social media platforms.[227] Although President Biden's approach is contrary to those put forward by lawmakers and Trump's administration, it shares a common motivation: to restrict platforms' unlimited immunity to remove content on a whim.[228] The 116th Congress produced a wealth of options for reforming Section 230 that fall short of repealing the statute entirely, and the Biden Administration would do well to take them under consideration.[229] One standout option, PACT, leaves Section 230 immunity in place, albeit with an exception for failure to comply with a court order, and builds a new framework dedicated to content moderation transparency.[230] PACT nimbly avoids constitutional issues by requiring due process in content moderation instead of regulating what platforms can and cannot moderate.[231] However, the bill should be amended to include certain key changes to the text of Section 230 that will make a considerable impact in reining in the nearly unlimited immunity to moderate content that platforms currently enjoy.[232] Between these two strategies—process requirements and more limited immunity—the Congress can restrict platforms' wide reach while still accomplishing the

224 *See supra* Section III.E.

225 *See* DOJ RECOMMENDATIONS, *supra* note 194, at 22.

226 *See id.*; *supra* Section II.A.3.

227 *See* Makena Kelly, *Joe Biden Wants to Revoke Section 230*, VERGE (Jan. 17, 2020, 10:29 AM), https://www.theverge.com/2020/1/17/21070403/joe-biden-president-election-section-230-communications-decency-act-revoke [https://perma.cc/VJB6-YT6Y].

228 *See supra* Introduction.

229 *See supra* Introduction.

230 *See supra* Section II.A.3.

231 *See supra* Part IV.

232 *See supra* Part IV.

original goals of Section 230: preserving free speech and creating a safer Internet.[233]

With the threat of increased regulation looming on the horizon, stakeholders are starting to feel the pressure and act on their own. On January 7, 2021, Facebook's Oversight Board reviewed Facebook's decision to restrict then-President Trump's access to his account indefinitely.[234] The Board found that a temporary suspension was appropriate but that an indefinite ban was excessively harsh, and remanded to Facebook to render a proper penalty.[235] Founded in 2019, the Board is comprised of twenty academics, former politicians, and activists who have the power to rule against Facebook's moderation actions.[236] The Board will soon add twenty more members, and is being touted as a vehicle for reforming the social media platform.[237]

Taking a different tack, former President Trump launched an "alternative" social media platform in July 2021.[238] The new app is called "GETTR"—an amalgamation of "getting together"—and advertises itself as "a non-bias social network for people all over the world."[239] Its mission is to fight "cancel culture" and promote free speech.[240] Ultimately, the platform has not enjoyed as much success as the former President anticipated: shortly after its launch, the app was attacked by hackers and more than 85,000 email addresses were stolen.[241] Time will tell if others try to start their own free speech-focused platforms.

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233 *See* 47 U.S.C. § 230(b).

234 *Oversight Board Upholds Former President Trump's Suspension, Finds Facebook Failed to Impose Proper Penalty*, FACEBOOK OVERSIGHT BD. (May 2021), https://oversightboard.com/news/226612455899839-oversight-board-upholds-former-president-trump-s-suspension-finds-facebook-failed-to-impose-proper-penalty [https://perma.cc/7PXD-N98V].

235 *Id.*

236 *Meet the Board*, FACEBOOK OVERSIGHT BD., https://oversightboard.com/meet-the-board [https://perma.cc/HU3J-3EDG].

237 *See* Parmy Olson, *Facebook Is Too Secretive. Its Oversight Board Should Change That*, BLOOMBERG OP. (Sept. 15, 2021, 12:55 PM), https://www.bloomberg.com/opinion/articles/2021-09-15/facebook-s-oversight-board-should-step-up-and-reform-the-social-media-giant [https://perma.cc/Q668-CGDN].

238 Meridith McGraw, Tina Nguyen & Cristiano Lima, *Team Trump Quietly Launches New Social Media Platform*, POLITICO (July 1, 2021, 4:19 PM) (internal quotation marks omitted), https://www.politico.com/news/2021/07/01/gettr-trump-social-media-platform-497606 [https://perma.cc/J5CT-65S3].

239 *Id.*

240 *Id.*

241 Taylor Hatmaker, *Gettr, the Latest Pro-Trump Social Network, Is Already a Mess*, TECHCRUNCH (July 6, 2021, 5:26 PM), https://techcrunch.com/2021/07/06/gettr-trump-social-network-hack-defaced [https://perma.cc/5M7U-2NHS].