

Private Solutions to a Public Problem: Next Steps for Section 230

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I. INTRODUCTION

Humans do many small things every day that add up to grand numbers. For example, the average human spends about twenty-six years of her life asleep; around thirteen years at work; and four years and six months eating.¹ There are also plenty of small things that, arguably, humans do not do enough. The typical human will only spend three years, one month, and three weeks of their life on vacation; one year and four months exercising; and one year and thirty days doing anything romantic.²

Among these time-consuming activities is social media usage. On average, the global internet user spends two hours and twenty-two minutes daily on social media.³ Although this large amount of time could constitute mindless scrolling, reviewing headlines, or watching dog videos, social media has also acted as a platform for multiple social movements.⁴ Additionally, social media sites such as Facebook and Instagram have allowed loved ones to stay in touch throughout months of quarantining during the 2020 coronavirus pandemic.⁵

The Internet and the companies it hosts would not be what they are today without the protections of Section 230. Known as the “twenty-six words that

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1. Gemma Curtis, *Your Life in Numbers*, DREAMS (Apr. 28, 2021), <https://www.dreams.co.uk/sleep-matters-club/your-life-in-numbers-infographic/> [https://perma.cc/S4PW-WUM7]. These statistics are based on a life span of seventy-nine years.

2. *Id.*

3. Katharina Buchholz, *Where Do People Spend the Most Time on Social Media?*, STATISTA (Nov. 17, 2020), <https://www.statista.com/chart/18983/time-spent-on-social-media/> [https://perma.cc/Q8JP-J3XE].

4. *See infra* Part III.

5. Natalie Bazarova, *Staying Connected via Social Media in the Age of COVID-19*, PSYCH. TODAY (Mar. 20, 2020), <https://www.psychologytoday.com/us/blog/social-media-stories/202003/staying-connected-social-media-in-the-age-covid-19> [https://perma.cc/KLX3-B7PF].

created the Internet,” Section 230 is a federal statute that shields online companies from liability for user-generated content.⁶ This liability shield has allowed online companies to innovate and for the Internet to flourish.⁷

While Section 230 has always sparked controversy, the law’s broad protections are currently being reconsidered given the ever-growing presence of social media in society. Throughout 2020, social media played a large part in some of the year’s most significant events. For example, when citizens took to the streets to protest the murder of George Floyd,⁸ President Donald Trump sent a tweet causing Twitter to censor him for “glorifying violence.”⁹ As the 2020 presidential election came to a close, social media platforms carefully monitored tweets to fight against misinformation, and even went as far as permanently suspending President Trump’s Twitter “due to the risk of further incitement of violence.”¹⁰ After a historic year, politicians on both sides of the aisle and big tech leaders are asking whether the Internet’s liability shield should be reconsidered.

This Comment argues that Section 230’s vast protections to internet companies should remain because the law promotes innovation in the marketplace of ideas, lowers the barrier to entry for future startups, and prevents greater governmental influence over the Internet. Part II explores the legislative history and subsequent development of Section 230. It first breaks down the language of the law, and then explains the various ideas of reform from both politicians and key leaders in the technology field. It also discusses additional critiques of Section 230 such as the lack of moderation of hate speech, defamatory speech, and misinformation. Part III argues that the current protections of the law should remain and private action, rather than public, should be utilized to remedy current issues with the Internet. It does

6. 47 U.S.C. § 230; JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* 2 (2019). If not for this language and the liability shield it provides, online service providers likely would not have built the variety of applications and services that people use today. *See* KOSSEFF, *supra*, at 9.

7. KOSSEFF, *supra* note 6, at 2–3.

8. Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [https://perma.cc/RTP6-5LCN].

9. Grace Panetta, *Trump Claims His ‘When the Looting Starts, the Shooting Starts’ Remarks Weren’t a Call to Violence but Instead a ‘Fact,’* BUS. INSIDER (May 29, 2020), <https://www.businessinsider.com/trump-defends-his-when-the-looting-starts-the-shooting-starts-tweet-2020-5> [https://perma.cc/T322-JJRN].

10. Brian Fung, *Twitter Bans President Trump Permanently*, CNN BUS. (Jan. 9, 2021), <https://www.cnn.com/2021/01/08/tech/trump-twitter-ban/index.html> [https://perma.cc/R2PS-VRB5]. Read more about the insurrection at the Capitol here: Lauren Leatherby et al., *How a Presidential Rally Turned into a Capitol Rampage*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/interactive/2021/01/12/us/capitol-mob-timeline.html> [https://perma.cc/6MAQ-NQVY].

this by analyzing social media's impact on the proliferation of the marketplace of ideas, previous harmful attempts to moderate media, and examples of other government methods of moderating content. Finally, Part IV concludes.

II. UNDERSTANDING THE CURRENT IMPACT OF SECTION 230 AND THE DEBATE BETWEEN PRIVATE AND PUBLIC ACTION

The current scope of Section 230 supports the flourishing of online services and user-generated content. Involving three key parties—the “provider or user,” the “interactive computer service,” and other “information content provider[s]”¹¹—Section 230's carefully crafted language allows for all of these players to coexist and mutually benefit from one another. A basic understanding of the language and the case law that shaped the law's current interpretation is fundamental to appreciating Section 230's benefits. As politicians and key tech figures propose modifications to the law, it is important to keep in mind which party will bear liability for infringing content.

A. *The Evolving History of Section 230*

In order to analyze the future of Section 230, it is critical to understand its language, legislative history, and the seminal case, *Zeran v. AOL*, that helped define its current application.

1. Breaking Down the Language of Section 230

Section 230, also known as the “twenty-six words that created the internet,”¹² provides that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹³

Put simply, Section 230 protects online services from liability for third-party content.¹⁴ The language of this statute involves three distinct

11. 47 U.S.C. § 230(c)(1)–(2).

12. KOSSEFF, *supra* note 6, at 2.

13. § 230(c)(1).

14. Eric Goldman, *Online User Account Termination and 47 U.S.C. § 230(c)(2)*, 2 U.C. IRVINE L. REV. 659, 660 (2012). This protection is limited by five statutory exclusions: federal criminal law, intellectual property law, state law that is consistent with the section, violations of the Electronic Communications Privacy Act or similar state law, and sex trafficking law. § 230(e)(1)–(5).

terms: the “provider or user,” the “interactive computer service,” and “another information content provider.”¹⁵ While not explicitly defined in the statute, a “provider or user” is an online intermediary, like Facebook or Twitter, that hosts speech.¹⁶

An “interactive computer service” means any “service . . . that provides or enables computer access by multiple users to a computer server.”¹⁷ The term encompasses internet service providers and “any online service that publishes third-party content.”¹⁸ Under this definition, most sites on the Internet, including nine of the of the top ten sites in the United States, would qualify for Section 230 protection.¹⁹ This protection is not limited to the big tech giants that reign in Silicon Valley. It also applies to the majority of services on the Internet: from websites that host advertisements, publishers of wire service stories, and even the comment section under a blog.²⁰

Lastly, “another information content provider” means “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”²¹ This term refers to the original author of a work that is either posted directly or shared onto an interactive computer service.²²

It should be noted that Section 230 does not create a blanket protection for authors or any speech posted online. A person spreading harassment or hate speech on Twitter is not protected by Section 230 solely because the speech

15. § 230(c)(1)–(2).

16. *Section 230 of the Communications Decency Act*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230> [<https://perma.cc/PFE7-9BRJ>].

17. § 230(f)(2).

18. *Section 230 of the Communications Decency Act*, *supra* note 16.

19. *Top Sites in United States*, ALEXA, <https://www.alexa.com/topsites/countries/US> [<https://perma.cc/R8UD-7P7R>]. As of October 2020, the current top ten sites from one to ten are: Google, YouTube, Amazon, Facebook, Zoom, Yahoo, Reddit, Wikipedia, Shopify, and eBay. *Id.* All these sites, except for Zoom, the video conferencing site, are protected under Section 230 due to their role as an online service that shares third-party content. *Section 230 of the Communications Decency Act*, *supra* note 16. However, Zoom has argued that Section 230 should apply to protect the company from several complaints regarding Zoombombing, a term used to describe when a hijacker breaches Zoom’s security, enters a private Zoom conference, and then bombs participants with inappropriate images. *Zoom Says Obscene ‘Zoombombings’ Aren’t Its Problem, Legally*, L.A. TIMES (Sept. 15, 2020, 3:14 PM), <https://www.latimes.com/business/technology/story/2020-09-15/zoom-says-obscene-zoombombings-arent-its-problem-legally> [<https://perma.cc/5WKT-SRXZ>].

20. See Goldman, *supra* note 14, at 661; *Section 230 of the Communications Decency Act*, *supra* note 16; Patrick O’Keefe, *How Online Communities Can Disappear if Section 230 Gets Repealed*, CMTY. SIGNAL, at 16:28 (May 20, 2019), <https://www.communitysignal.com/how-online-communities-can-disappear-if-section-230-gets-repealed/> [<https://perma.cc/88KJ-6K4J>].

21. § 230(f)(3).

22. See *Section 230 of the Communications Decency Act*, *supra* note 16.

is published on an interactive computer service.²³ Rather, if a victim of hate speech wants to take legal action, she should sue the author directly; Section 230 merely protects the interactive computer service, or Twitter, in this case.²⁴ This is because, under Section 230, Twitter is not the speaker of the hypothetical hate speech, but just the platform on which the speech was posted.²⁵

In addition to shielding services from liability for third-party content, the law contains another immunity. Section 230 also provides that an interactive computer service shall not be liable to the author for the “good faith” removal or restriction of content “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.”²⁶ This portion of the law encourages internet companies to make editorial decisions to remove offensive content.²⁷

2. The Drafting of Section 230 and Its Journey Through the Courts

Senator Ron Wyden and Representative Chris Cox drafted Section 230 in 1996, when Facebook was just a twinkle in young Mark Zuckerberg’s eye.²⁸ Part of the Communications Decency Act, Section 230 was created with the hopes of incentivizing online services “to moderate pornography, filthy jokes, violent stories, and other words and images that could harm children.”²⁹ It was also crafted in response to a lawsuit involving Prodigy Services Company (Prodigy), the largest online service in the United States at the time.³⁰

Prodigy hosted a number of online “bulletin boards” on which the service’s two million subscribers could communicate with one another.³¹ On the service’s “Money Talk” board, a user posted statements about Stratton Oakmont, Inc. (Stratton), calling the securities investment banking firm a “cult of brokers who either lie for a living or get fired.”³² Because Prodigy

23. Jamie Williams, *Victory! Second Circuit Affirms Dismissal of Latest Threat to Section 230*, ELEC. FRONTIER FOUND. (Apr. 8, 2019), <https://www EFF.ORG/deeplinks/2019/04/victory-second-circuit-affirms-dismissal-latest-threat-section-230> [<https://perma.cc/K5S9-PQ5G>].

24. *Id.*

25. *Id.*

26. § 230(c)(2)(A).

27. *See* Goldman, *supra* note 14, at 662.

28. KOSSEFF, *supra* note 6 at 2.

29. *Id.*

30. *Id.*

31. Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995).

32. *Id.*

previously monitored content and screened for offensive language, the court found Prodigy exercised editorial control and therefore opened itself up to greater liability than other providers who did not moderate.³³ Concerned by this disincentive, Senator Wyden and Representative Cox planned to protect internet companies from lawsuits involving user-generated content to incentivize the creation of rules of service and moderation of harmful content.³⁴

Additionally, Cox and Wyden hoped immunity would allow the Internet to evolve into a whole new industry.³⁵ By safeguarding online companies from content-related suits, they wanted to encourage accessible platforms for user content and foster innovation.³⁶ Congress' stated policy "to promote the continued development of the Internet" and "preserve the vibrant and competitive free market that presently exists for the Internet" evidences this intention.³⁷

Since Section 230's passage in 1996, courts have interpreted its language and scope frequently.³⁸ One of the earliest cases, *Zeran v. AOL*, established just how expansive Section 230's scope would be. In *Zeran*, an anonymous user posted a message to an AOL bulletin board advertising "Naughty Oklahoma T-Shirts" related to the 1995 Oklahoma City bombing with the plaintiff's phone number in the posting.³⁹ As a result, the plaintiff received numerous harassing phone calls and asked AOL to remove the posting.⁴⁰ The plaintiff argued that because he provided AOL with notice of the offensive content, AOL should be liable for its failure to remove the post.⁴¹ The Fourth Circuit held that Section 230 protected AOL.⁴² Not only did this case set a broad scope for Section 230's immunity, but the court also established a precedent for protecting websites' publishing decisions—even finding that notice of defamatory content does not increase liability.⁴³ This ruling

33. *Id.* at *5.

34. KOSSEFF, *supra* note 6 at 2.

35. *Id.*

36. *Id.* at 3.

37. 47 U.S.C. § 230(b)(1)–(2).

38. See Eric Goldman, *The Ten Most Important Section 230 Rulings*, 20 TUL. J. TECH. & INTELL. PROP. 1, 2 (2017); *CDA 230: Key Legal Cases*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230/legal> [<https://perma.cc/3C3F-CJ4Q>].

39. *Zeran v. AOL*, 129 F.3d 327, 329 (4th Cir. 1997).

40. *Id.*

41. *Id.* at 331.

42. *Id.* at 332.

43. *Id.* ("Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information.").

continues to play a part in modern Section 230 cases and is fundamental to understanding the scope of the law.

As the current language of Section 230 stands, internet companies may host a wide variety of material and make editorial decisions when necessary. While this law allows the Internet to host successful startups,⁴⁴ provide a global platform for social media activism,⁴⁵ and facilitate open discourse for current events,⁴⁶ critics of Section 230 believe it desperately needs reform.

B. Suggested Reforms of Section 230 from Political Figures and Tech Leaders

As Section 230 enters its twenty-sixth year of existence, both political and technology leaders question its current scope. In a rare instance of bipartisanship, both Republicans and Democrats seek reform, albeit for different reasons. Focused on protecting the type of speech that can exist online, Republicans shape their proposals around regulating social media's moderation of political speech—specifically conservative speech.⁴⁷ On the other side, Democrats are concerned by the use of social media to spread disinformation.⁴⁸ Conflicted over whether a private or public solution is best, key technology executives are torn between reforming Section 230 or taking private action through their own companies.⁴⁹ Given this varying range of proposals, the future of Section 230 is hotly contested and remains as hazy as ever.

44. Among the list of successful internet startups are Yelp and Airbnb. Both companies assert that without the protections of Section 230, content moderation and user reviews would not survive on their services. *CDA § 230 Success Case: Yelp*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230/successes/yelp> [https://perma.cc/27BM-AC76]; *Communications Decency Act Section 230 and How the PLAN Act Could Change It*, AIRBNB (Oct. 23, 2019), <https://news.airbnb.com/cda-230-plan-act/> [https://perma.cc/W99S-SC9J].

45. See Sebastián Valenzuela, *Unpacking the Use of Social Media for Protest Behavior: The Roles of Information, Opinion Expression, and Activism*, 57 AM. BEHAV. SCIENTIST 920, 935 (2013); Danielle Abril, *Eliminating Social Media's Legal Protection Would End Facebook and Twitter 'As We Know It,' Legal Experts Say*, FORTUNE (June 12, 2020, 11:42 AM), <https://fortune.com/2020/06/12/social-media-executive-order-section-230-facebook-twitter-legal-experts/> [https://perma.cc/3DKL-SS8P].

46. Valenzuela, *supra* note 45, at 934.

47. See *infra* Part II.B.1.

48. See *infra* Part II.B.1.

49. See *infra* Part II.B.2.

1. Congressional Proposals

Despite the divisive nature of modern politics,⁵⁰ both sides of the aisle have sought Section 230 reform—but for completely different reasons. Most Republican criticism of the law focuses on alleged incidences of discrimination against conservative speech. This perceived discrimination has embroiled congressional Republicans, even causing Texas Senator Ted Cruz to angrily ask then-Twitter CEO Jack Dorsey “who the hell elected you and put you in charge of what the media are allowed to report and what the American people are allowed to hear” at a Senate committee hearing.⁵¹

Other Republican senators have crafted bills in the hopes of limiting Section 230’s protections to internet companies that filter material in good faith. For example, Senator Josh Hawley introduced the Limiting Section 230 Immunity to Good Samaritans Act (Good Samaritans Act) in June 2020 in an effort to provide accountability for platforms who abuse the Good Samaritan protections provided under Section 230.⁵² The Good Samaritans Act presents a tiered liability system that would require interactive computer services with at least 30 million users in the United States or 300 million users worldwide to pay damages upwards of \$5,000 per affected user for not operating their service in good faith.⁵³ The Good Samaritans Act focuses on discrimination against conservatives by providing that an interactive computer service fails to act in good faith when it intentionally and selectively enforces its terms of service, or selectively restricts access to material using an algorithm.⁵⁴ With co-sponsors Senators Marco Rubio, Mike Braun, Kelly Loeffler, and Tom Cotton supporting the bill, this type of narrowing likely reflects the

50. Katherine M. Gehl & Michael E. Porter, *Fixing U.S. Politics*, HARV. BUS. R. (July 2020), <https://hbr.org/2020/07/fixing-u-s-politics> [<https://perma.cc/HDW4-Z97J>]; Lee Drutman, *How Hatred Came To Dominate American Politics*, FIVETHIRTYEIGHT (Oct. 5, 2020, 6:00 AM), <https://fivethirtyeight.com/features/how-hatred-negative-partisanship-came-to-dominate-american-politics/> [<https://perma.cc/9JB2-3QNJ>].

51. Kaya Yurieff & Brian Fung, *CEOs of Google, Twitter and Facebook Grilled in Senate Hearing*, CNN BUS. (Oct. 28, 2020, 4:03 PM), <https://www.cnn.com/2020/10/28/tech/section-230-senate-hearing-wednesday/index.html> [<https://perma.cc/F59B-EWRU>]. Senator Cruz’s statement also included a question of why CEO Dorsey persists “in behaving as a Democratic super PAC silencing views to the contrary of your political beliefs?” *Id.*

52. Limiting Section 230 Immunity to Good Samaritans Act, S. 3983, 116th Cong. (2020).

53. *Id.* The Good Samaritans Act was not the first time Senator Hawley proposed bills to monitor big tech. See Makena Kelly, *Internet Giants Must Stay Unbiased To Keep Their Biggest Legal Shield, Senator Proposes*, VERGE (June 19, 2019, 12:01 AM), <https://www.theverge.com/2019/6/19/18684219/josh-hawley-section-230-facebook-youtube-twitter-content-moderation> [<https://perma.cc/7KFN-5DNY>].

54. S. 3983; Russell Brandom, *Senate Republicans Want To Make It Easier To Sue Tech Companies for Bias*, VERGE (June 17, 2020, 9:46 AM), <https://www.theverge.com/2020/6/17/21294032/section-230-hawley-rubio-conservative-bias-lawsuit-good-faith> [<https://perma.cc/BXV2-LXR6>].

Republican caucus' view.⁵⁵ Although several studies have found that social media does not show bias to either political affiliation, and sometimes even leans more republican depending on the site, Republicans still focus their reform on curing conservative bias.⁵⁶

On the other side, Democrats base their desire for Section 230 reform on concerns over the use of social media to propagate hate speech and spread misinformation. Both Senators Bernie Sanders and Elizabeth Warren have condemned big tech companies for profiting off hatred and violence on their platforms.⁵⁷ Senator Warren specifically called out Facebook for “operating as a disinformation-for-profit machine.”⁵⁸ Notably, President Joe Biden said Section 230 should be completely revoked, commenting that internet companies are “propagating falsehoods they know to be false.”⁵⁹

Following a riot at the United States Capitol on January 6, 2021,⁶⁰ Senators Mark Warner, Amy Klobuchar, and Mazie Hirono proposed the SAFE TECH Act.⁶¹ In an effort to hold platforms accountable for content that causes actual violence, the SAFE TECH Act would create avenues for users to sue platforms for personally threatening content.⁶² Under the Act, Section 230's liability shield would no longer apply to speech that the provider or user has “accepted payment to make”—advertisements or other paid content—to

55. See sources cited *supra* note 54.

56. *Facebook Offers a Distorted View of American News*, *ECONOMIST* (Sept. 10, 2020), <https://www.economist.com/graphic-detail/2020/09/10/facebook-offers-a-distorted-view-of-american-news> [<https://perma.cc/NYU7-KR4J>].

57. Rani Molla & Emily Stewart, *Should Social Media Companies Be Legally Responsible for Misinformation and Hate Speech? 2020 Democrats Weigh In.*, *VOX* (Dec. 5, 2019, 4:10 PM), <https://www.vox.com/policy-and-politics/2019/12/3/20965459/tech-2020-candidate-policies-section230-facebook-misinformation-hate-speech> [<https://perma.cc/6WBM-R9JA>].

58. *Id.*

59. Casey Newton, *Everything You Need To Know About Section 230*, *VERGE* (Dec. 29, 2020, 4:50 PM), <https://www.theverge.com/21273768/section-230-explained-internet-speech-law-definition-guide-free-moderation> [<https://perma.cc/84KM-FFPQ>].

60. Marie Fazio, *Notable Arrests After the Riot at the Capitol*, *N.Y. TIMES* (July 23, 2021), <https://www.nytimes.com/2021/01/10/us/politics/capitol-arrests.html> [<https://perma.cc/ZXG5-U8A2>]. Social media sites such as Gab and Parlor have been alleged to have played an integral role in planning and fueling the riot. See Rebecca Heilweil & Shirin Ghaffary, *How Trump's Internet Built and Broadcast the Capitol Insurrection*, *VOX: RECODE* (Jan. 8, 2021, 5:00 PM), <https://www.vox.com/recode/22221285/trump-online-capitol-riot-far-right-parler-twitter-facebook> [<https://perma.cc/4WLE-L9X9>]; see also Andrew Marantz, *How Social Media Made the Trump Insurrection a Reality*, *NEW YORKER* (Jan. 7, 2021), <https://www.newyorker.com/news/daily-comment/how-social-media-made-the-trump-insurrection-a-reality> [<https://perma.cc/3U5C-8ZXR>].

61. SAFE TECH Act, S. 299, 117th Cong. (2021).

62. *Id.*; Makena Kelly, *Democrats Take First Stab at Reforming Section 230 After Capitol Riots*, *VERGE* (Feb. 5, 2021, 11:53 AM), <https://www.theverge.com/2021/2/5/22268368/democrats-section-230-moderation-warner-klobuchar-facebook-google> [<https://perma.cc/JLB6-68GE>].

ensure platforms cannot profit on speech targeted at vulnerable consumers.⁶³ The Act also makes clear that Section 230 does not bar injunctive relief, allowing victims to “seek court orders where misuse of a provider’s services is likely to cause irreparable harm.”⁶⁴ As of March 2021, this is Democrats’ first content moderation bill following the Capitol riots.⁶⁵ Although the reasoning behind the reform is different, both Republicans and Democrats continue to agree Section 230 needs reform.

2. Tech Leaders’ Proposals

Outside of Congress, big technology players are conflicted over whether Section 230 should be reformed, or if social media companies can innovate and avoid government enforcement. Viewed as one of the biggest benefactors of the law’s sweeping protections, Facebook founder and CEO Mark Zuckerberg⁶⁶ believes the government should regulate internet companies somewhere between the regulation framework of a zero-liability telco-type model and the much stricter framework of newspapers.⁶⁷ Emphasizing the need for a standardized approach, Zuckerberg has called on the government to “set baselines for what’s prohibited and require companies to build systems for keeping harmful content to a bare minimum.”⁶⁸ One such baseline would

63. S. 299; MARK R. WARNER, THE SAFE TECH ACT (SAFEGUARDING AGAINST FRAUD, EXPLOITATION, THREATS, EXTREMISM AND CONSUMER HARMS ACT), https://www.warner.senate.gov/public/_cache/files/9/4/946ef55b-5d08-4f72-9ca0-f4394303d5f2/CA92EA4F424BCFD48E816A4153A89380.the-safe-tech-three-pager.pdf [https://perma.cc/S4JU-PEE4].

64. WARNER, *supra* note 63.

65. Kelly, *supra* note 62.

66. In October 2021, Facebook rebranded to Meta Platforms, Inc. (Meta). As of February 2022, Zuckerberg remains CEO of Meta, the parent company of Facebook. Alex Heath, *Mark Zuckerberg on Why Facebook Is Rebranding to Meta*, VERGE (Oct. 28, 2021), <https://www.theverge.com/22749919/mark-zuckerberg-facebook-meta-company-rebrand> [https://perma.cc/L8DH-QFE3].

67. *Treat Us Like Something Between a Telco and a Newspaper, Says Facebook’s Zuckerberg*, REUTERS (Feb. 15, 2020, 8:55 AM), <https://www.reuters.com/article/us-germany-security-facebook/treat-us-like-something-between-a-telco-and-a-newspaper-says-facebooks-zuckerberg-idUSKBN2090MA> [https://perma.cc/D4S9-NZV5]. In a telco-type model, a telephone communications company would not be held liable for what a person said over a telephone. *See id.*

68. Mark Zuckerberg, *Opinion, Mark Zuckerberg: The Internet Needs New Rules. Let’s Start in These Four Areas*, WASH. POST (Mar. 30, 2019), https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html [https://perma.cc/NW2E-9A2B].

involve defining what constitutes terrorist propaganda and hate speech.⁶⁹ Furthermore, Zuckerberg recommends that the government require companies to meet specific performance targets by decreasing the frequency of content in violation of a site's hate speech policies or maintaining a median time-to-report policy.⁷⁰ Facebook also recommends that governments institute "procedural accountability regulations" that require internet companies to be more transparent about their content standards.⁷¹

In an October 2020 hearing with the Senate Committee on Commerce, Science, and Transportation, Zuckerberg plainly stated that Congress needs to "update the law to make sure it's working as intended."⁷² Zuckerberg's call for a standardized approach to internet regulation most closely matches the Platform Accountability and Consumer Transparency Act (PACT).⁷³ The PACT Act, an Act proposed by Democratic Senator Brian Schatz in June 2020, would require internet companies to publish an "acceptable use policy" that informs users about the types of content allowed on the site, provides a system for users to track complaints or appeals of content removal, and requires platforms to explain their moderation decisions on specific content within fourteen days.⁷⁴ Although Facebook has not explicitly expressed approval of the PACT Act, in March 2021 at a hearing with the House Committee on Energy and Commerce, Zuckerberg reiterated his belief that platforms' intermediary liability protection should be "conditional on companies' ability to meet best practices to combat the spread of this

69. MONIKA BICKERT, FACEBOOK, CHARTING A WAY FORWARD: ONLINE CONTENT REGULATION 16–18 (2020).

70. *Id.* at 9. This report also notes that "[r]egulations of this sort should take into account a company's size and reach, as content regulation should not serve as a barrier to entry for new competitors in the market." *Id.* at 10.

71. *Id.* at 10. In a self-written opinion in the Washington Post, Zuckerberg touts his company's publication of "transparency reports" and encourages other internet services to do the same. Zuckerberg, *supra* note 68.

72. *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior?: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 116th Cong. 2 (2020) (statement of Mark Zuckerberg, CEO, Facebook, Inc.).

73. Platform Accountability and Consumer Transparency Act, S. 4066, 116th Cong. (2020). As of March 2021, this bill is still in the introduction phase. *Id.*

74. *Id.*

content.”⁷⁵ The company also has a history of supporting government initiatives to narrow Section 230.⁷⁶

Compared to other tech leaders, Zuckerberg most openly supports Section 230 reform. Twitter CEO Jack Dorsey⁷⁷ has a different opinion. In the same October 2020 Senate Committee hearing, Dorsey advocated for an increase in transparency on moderation rules that would “advanc[e] procedural fairness” for appeals of moderation decisions, “empower[] algorithmic choice,” and protect privacy.⁷⁸ Dorsey and Zuckerberg share a desire for more transparency in moderation and ease in appealing moderation decisions; however, Dorsey’s solutions focus more on private action rather than enforcing penalties through Section 230. For example, Twitter’s most recent search for a private solution has taken the form of Birdwatch, a program that allows users to write notes that identify tweets as misleading or misinformed.⁷⁹ With the program only in its pilot stage, its full impact is not currently known, but it has already been criticized as ineffective.⁸⁰

A notable difference between Facebook’s and Twitter’s approach to Section 230 is the emphasis on algorithmic choice. Social media sites use algorithms to determine what content to deliver to users based on prior personal engagement, relevancy of the content to the individual, and each

75. *Disinformation Nation: Social Media’s Role in Promoting Extremism and Misinformation: Hearing Before the Subcomms. on Consumer Prot. & Com. and Commc’ns & Tech. of the H. Comm. on Energy & Com.*, 117th Cong. 7 (2021) (statement of Mark Zuckerberg, CEO, Facebook, Inc.).

76. In 2018, the company supported a bill that removed protections for content that violated anti-prostitution laws. *Allow States and Victims To Fight Online Sex Trafficking Act of 2017*, H.R. 1865, 115th Cong. (2017). While the bill had little effect on Facebook due to its extensive moderation staff, the new legislation deeply impacted smaller sites like Craigslist. Adi Robertson, *Mark Zuckerberg Just Told Congress To Upend the Internet*, VERGE (Oct. 29, 2020, 10:29 AM), <https://www.theverge.com/2020/10/29/21537040/facebook-mark-zuckerberg-section-230-hearing-reform-pact-act-big-tech> [<https://perma.cc/YC79-VBUB>].

77. In November 2021, Jack Dorsey announced his resignation as Twitter CEO in a tweet. Elizabeth Dwoskin & Will Oremus, *In a Surprise Tweet, Twitter CEO Jack Dorsey Said He’s Stepping Down*, WASH. POST (Nov. 29, 2021, 7:38 P.M.), <https://www.washingtonpost.com/technology/2021/11/29/dorsey-steps-down-twitter/> [<https://perma.cc/7F39-XVET>].

78. *Does Section 230’s Sweeping Immunity Enable Big Tech Bad Behavior?: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 116th Cong. (2020) (statement of Jack Dorsey, CEO, Twitter, Inc.).

79. Kim Lyons, *Twitter Launches Birdwatch, a Fact-Checking Program Intended To Fight Misinformation*, VERGE (Jan. 25, 2021, 2:00 PM), <https://www.theverge.com/2021/1/25/22248903/twitter-birdwatch-fact-checking-misinformation> [<https://perma.cc/ZEP7-JD6F>].

80. Scott Galloway, *The Capitalist Case for Overhauling Twitter: We Know It’s Terrible for Society. But It’s Also a Terribly Run Company*, N.Y. MAG.: INTELLIGENCER (Feb. 1, 2021), <https://nymag.com/intelligencer/2021/02/capitalist-case-for-overhauling-twitter.html> [<https://perma.cc/A8NF-DJGB>].

post's overall performance and engagement level.⁸¹ In December 2018, Twitter implemented an option for users to switch between algorithms that either provide tweets based on relevance or simply in reverse chronological order.⁸² With this focus on algorithmic choice, Dorsey hopes to give users more control over their content and increase transparency in the way social media companies determine what users see.⁸³ Zuckerberg, on the other hand, does not mention the need for algorithmic choice in his calls for reform.

Additionally, with recent antitrust concerns looming over Google and Facebook,⁸⁴ Twitter made a plea for regulators to consider how sweeping regulations would “further entrench companies that have large market shares and can easily afford to scale up additional resources to comply” with a stricter standard.⁸⁵ Twitter emphasized the role Section 230 plays in enabling “new companies—small ones seeded with an idea—to build and compete with established companies globally,” and claimed the erosion of its foundation could cause online communication to only exist on a “small number of giant and well-funded technology companies.”⁸⁶

Thus, while Zuckerberg supports a narrower Section 230 that sets baselines for what types of content can be hosted and how much time sites have to respond to violative content, Dorsey hopes to keep content moderation in Twitter's hands (or wings) and improve upon the current system through methods such as algorithmic choice or user-led moderation. Based on these competing views, it is unclear whether Section 230 would benefit more from public or private action.

C. *Hate Speech, Defamation, and Misinformation—Oh My!*

Beyond the pressure from politicians and tech leaders to narrow Section 230, multiple other issues call for a closer look at narrowing the law. This Section provides those reasons, with a focus on reform that would provide

81. AJ Agrawal, *What Do Social Media Algorithms Mean for You?*, FORBES (Apr. 20, 2016, 6:22 PM), <https://www.forbes.com/sites/ajagrawal/2016/04/20/what-do-social-media-algorithms-mean-for-you/?sh=996902da5152> [<https://perma.cc/9294-RBF4>].

82. *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior?: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 116th Cong. 3 (2020) (statement of Jack Dorsey, CEO, Twitter, Inc.).

83. *Id.*

84. Heather Kelly, *The Biggest Takeaways from the Big-Tech Antitrust Hearing*, WASH. POST (July 29, 2020), <https://www.washingtonpost.com/technology/2020/07/29/big-tech-antitrust-hearing-takeaways/> [<https://perma.cc/5ZA8-E5DK>].

85. *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior?: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 116th Cong. 4 (2020) (statement of Jack Dorsey, CEO, Twitter, Inc.).

86. *Id.* at 1.

accountability for hate speech, defamation and stalking, and the spread of disinformation.

1. Accountability for Hate Speech

With the simple click of a button, users can post just about anything online. Although the typical social media platform provides terms of service that prohibit “hateful conduct,” “targeted harassment,” and the “promot[ion] [of] violence,”⁸⁷ the Anti-Defamation League in 2018 reported that 53% of Americans experienced hateful speech and harassment online. This was a significant increase compared to the 18% of Americans who reported harassment in 2017.⁸⁸

Notwithstanding social media companies’ attempts to curb hate speech, critics argue that social media’s moderation leads to arbitrary and contradictory results.⁸⁹ For example, Facebook has been criticized for only deleting content that targets “‘protected categories’—based on race, sex, gender, identity, religious affiliation, national origin, ethnicity, sexual orientation, and serious disability/disease”—while speech directed at “‘subsets’ of protected categories” remains online.⁹⁰ This means that hate speech directed at “female drivers” or “black children”—subsets, according to the Facebook algorithm—is not censored, while hate speech against “white men”—a protected category—is removed.⁹¹

This arbitrary moderation is best seen when a public figure posts violent speech that clearly violates the social platform’s terms of service, but the algorithm fails to censor the content due to the speech falling into a subset category. For example, when United States Representative Clay Higgins “called for the slaughter of ‘radicalized Muslims’” in a Facebook post, repeatedly saying “kill them all,” the post remained online.⁹² Although this

87. *Twitter User Agreement*, TWITTER, https://cdn.cms-twigitalassets.com/content/dam/legal-twitter/site-assets/privacy-policy-new/Privacy-Policy-Terms-of-Service_EN.pdf [https://perma.cc/6AWP-9DEX].

88. Jessica Guynn, *If You’ve Been Harassed Online, You’re Not Alone. More than Half of Americans Say They’ve Experienced Hate*, USA TODAY (Feb. 13, 2019), <https://www.usatoday.com/story/news/2019/02/13/study-most-americans-have-been-targeted-hateful-speech-online/2846987002/> [https://perma.cc/RZY8-K6VP].

89. See Emily Lagg, Note, *Stormy Waters for the Internet’s Safe Harbor: The Future of Section 230*, 71 RUTGERS U.L. REV. 763, 790 (2019).

90. *Id.*; Julia Angwin & Hannes Grassegger, *Facebook’s Secret Censorship Rules Protect White Men From Hate Speech But Not Black Children*, PROPUBLICA (June 28, 2017), <https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms> [https://perma.cc/AK97-BXAL].

91. Angwin & Grassegger, *supra* note 90.

92. *Id.*

speech was directly hateful to Muslims and promoted violence, Representative Higgins' post went unnoticed by Facebook.⁹³

Furthermore, due to social media's ability to allow users to interact with specific groups of friends, critics of Section 230 fear social media will serve as an echo chamber that eventually turns online hate speech into real-world violence.⁹⁴ For example, when Robert Bowers opened fire on a synagogue, investigations later found his Gab page⁹⁵ was riddled with anti-Semitism.⁹⁶ This creation of an echo chamber fosters confirmation bias within users that reinforces hateful prejudices and viewpoints.⁹⁷

Another concern emerges when hate speech comes from an elected official—most notably, the President of the United States. After the murder of George Floyd,⁹⁸ President Donald Trump took to Twitter to voice his thoughts on the protests sparking around the country. After tweeting “when the looting starts, the shooting starts,”⁹⁹ Twitter covered the text with a gray banner reading “[t]his Tweet violated the Twitter Rules about glorifying violence.”¹⁰⁰ Users were given the option to click “view” and remove the banner to read the tweet.¹⁰¹ As President Trump pointed out in his executive order promptly signed after Twitter's action, no other United States politician had ever had such a label placed over a tweet.¹⁰² President Trump has since been banned from Twitter after the insurrection at the Capitol in January 2021 “due to the risk of further incitement of violence.”¹⁰³

In order to address the harms caused by hate speech, critics argue that Section 230's broad scope should be narrowed to provide that a service's “action or inaction falling within the realm of *facilitation*, *gross negligence*, *willful ignorance*, or *recklessness* should not be protected,” regardless of the

93. *Id.*

94. Lauren E. Beausoleil, *Free, Hateful, and Posted: Rethinking First Amendment Protection of Hate Speech in a Social Media World*, 60 B.C. L. REV. 2101, 2107–08 (2019).

95. Gab is a social media service similar to Twitter with a heavy alt-right influence. Amanda Hess, *The Far Right Has a New Digital Safe Space*, N.Y. TIMES (Nov. 30, 2016), <https://www.nytimes.com/2016/11/30/arts/the-far-right-has-a-new-digital-safe-space.html> [<https://perma.cc/G5RS-LUZN>].

96. Beausoleil, *supra* note 94, at 2101.

97. *Id.* at 2108.

98. Hill et al., *supra* note 8.

99. Panetta, *supra* note 9.

100. *Twitter Hides Trump Tweet for 'Glorifying Violence'*, BBC NEWS (May 29, 2020), <https://www.bbc.com/news/technology-52846679> [<https://perma.cc/DZR5-2UVK>].

101. *Id.*

102. Exec. Order No. 13925, Preventing Online Censorship, 85 Fed. Reg. 34079 (May 28, 2020).

103. Fung, *supra* note 10; *Permanent Suspension of @realDonaldTrump*, TWITTER (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension [<https://perma.cc/86S6-MGUC>]. Read more about the insurrection at the Capitol here: Leatherby et al., *supra* note 10.

fact that the content comes from a third-party.¹⁰⁴ Supporters of narrowing the law believes this enforcement could be accomplished by creating a reasonable standard of care for social media companies through a notice-based takedown procedure that provides users self-defense against hurtful speech.¹⁰⁵ Certainly hate speech is an issue on these platforms, but the question remains whether narrowing Section 230 is the correct way to handle the problem.

2. Justice for Defamation and Stalking

While the Internet's accessibility to all is one of its greatest triumphs, the ability for anyone to post about anything has obvious setbacks. The law provides victims opportunities for justice through defamation and libel suits; however, some believe Section 230 acts as a roadblock to fully holding wrongdoers responsible.

A story about a victim of stalking, whose pleas for relief to a powerful dating app remained unanswered for months, illustrates this concern. As Matthew Herrick sat on his stoop in New York City, he was surprised when a stranger started walking towards his home.¹⁰⁶ When Matthew asked the stranger if they knew each other, the stranger held out his phone, showing a picture of Matthew on a profile from Grindr, a gay dating app, but the profile was not his.¹⁰⁷ Matthew tried to explain to the stranger that someone else made the profile, but the stranger argued that Matthew had invited him for sex.¹⁰⁸ After finally getting the stranger to leave, Matthew returned to his apartment, only to hear his buzzer ring, with another stranger calling to him, asking to be let in.¹⁰⁹

Matthew knew who created this fake profile: his ex.¹¹⁰ Soon after realizing this, Matthew asked Grindr to take down the profile.¹¹¹ Several other small dating applications quickly removed the fake profile, but Grindr took no action.¹¹² By the end of the ten-month long ordeal, over 1,400 men had shown

104. Benjamin Volpe, Comment, *From Innovation to Abuse: Does the Internet Still Need Section 230 Immunity?*, 68 CATH. U.L. REV. 597, 621 (2019).

105. *Id.*

106. Carrie Goldberg, *Herrick v. Grindr: Why Section 230 of the Communications Decency Act Must Be Fixed*, LAWFARE (Aug. 14, 2019), <https://www.lawfareblog.com/herrick-v-grindr-why-section-230-communications-decency-act-must-be-fixed> [<https://perma.cc/Y4KH-TGFA>].

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

up at Matthew's home and work.¹¹³ Although Grindr's terms of service say it may delete a user's account "at any time for any reason, or no reason whatsoever," Matthew was forced to go to court.¹¹⁴

Instead of bringing a standard defamation case, Matthew's lawyer brought a products liability claim, hoping to prevent Grindr from invoking Section 230's shield to liability for user content.¹¹⁵ But this strategy was to no avail, as the Second Circuit found that Grindr was an "interactive computer service," and because the issue at suit revolved around the actions of Matthew's former boyfriend, it held that Section 230 barred Matthew's claims.¹¹⁶

When consumers are left with nowhere to turn, critics argue that internet companies will not protect them unless threatened with legal liability.¹¹⁷ Instead of barring liability simply because the company is an interactive service, supporters of narrowing Section 230 argue that courts should treat these cases as fact-intensive inquiries in order to give damaged plaintiffs an opportunity to be heard.¹¹⁸ As Matthew's story demonstrates, stalking through internet platforms causes tangible harms in a person's life. Narrowing Section 230 and enforcing liability for such incidents could incentivize web platforms to remove this content, giving victims a clear path to justice.

3. Halting the Spread of Disinformation

As more people turn to social media to get their news, critics of Section 230 believe the law should be narrowed to halt the spread of disinformation. Throughout the COVID-19 pandemic and the highly anticipated 2020 election season, internet users were glued to social media, waiting to catch the latest updates. Under the leadership of President Trump, who frequently used social media in lieu of traditional media outlets to communicate with the public, it is not surprising that the lines between news and user-generated content have blurred.

In what has been called a "pandemic of misinformation," disinformation has spurred the rampant rise of COVID-19.¹¹⁹ Whether it is the former

113. *Id.*

114. *Grindr Terms and Conditions of Service*, GRINDR, <https://www.grindr.com/terms-of-service/> [<https://perma.cc/Q9UD-MN88>].

115. Goldberg, *supra* note 106.

116. *Herrick v. Grindr LLC*, 765 F. App'x 586, 590–91 (2d Cir. 2019).

117. Goldberg, *supra* note 106.

118. *Id.*

119. See Christina Pazzanese, *Battling the 'Pandemic of Misinformation'*, HARV. GAZETTE (May 8, 2020), <https://news.harvard.edu/gazette/story/2020/05/social-media-used-to-spread-create-covid-19-falsehoods/> [<https://perma.cc/DN7G-6H5L>].

President's tweets comparing COVID-19 to the previous administration's "full scale disaster" response to the Swine Flu,¹²⁰ or the spread of disinformation regarding the efficacy of masks, social media allows users to spread and gain information in an instant, regardless of its truth.¹²¹

In addition to concern over misinformation about COVID-19, the 2020 election led to questions regarding social media's role in monitoring misinformation. As votes began to pour in, President Trump tweeted "[t]hey are trying to STEAL the Election," prompting social media sites like Facebook and Twitter to act.¹²² Facebook added a label to the post advising that not all the votes had been counted and that "no winner of the election had been projected."¹²³ Twitter took it one step further by labeling the tweet "disputed" and disabling users' ability to like and share it in order to prevent the rule-breaking tweet from reaching more people.¹²⁴ Several tweets and posts from the former President questioning the results of the election have begged the question of whether social media is doing enough to quell misinformation—especially when misinformation as poignant as accusations of election fraud prompted a full blown riot at the Capitol in January 2021.¹²⁵

The concern over misinformation online is heightened due to social media acting as a platform for fringe groups like QAnon.¹²⁶ Described as an "umbrella term for a [sprawling] set of internet conspiracy theories," QAnon has flooded social media with conspiracy theories ranging from celebrities'

120. Christian Paz, *All the President's Lies About the Coronavirus*, ATLANTIC (Nov. 2, 2020), <https://www.theatlantic.com/politics/archive/2020/11/trumps-lies-about-coronavirus/608647/> [<https://perma.cc/86GR-H895>].

121. *Id.*

122. Kate Conger et al., *Social Media Companies Survived Election Day. More Tests Loom.*, N.Y. TIMES (Nov. 5, 2020), <https://www.nytimes.com/2020/11/04/technology/social-media-companies-election-misinformation.html> [<https://perma.cc/4D9G-M8FF>].

123. *Id.*

124. *Id.*

125. Marantz, *supra* note 60; *see also* Fazio, *supra* note 60.

126. In an internal Facebook report created March 2021, Facebook identified several groups that published "harmful non-violating narratives" that may have led to "substantial negative impacts including contributing materially to the capital riot." For more information about this report, and the links between Facebook and the Capitol riot, see "*Harmful Non-Violating Narratives*" *Is a Problem Archetype in Need of Novel Solution*, DOCUMENT CLOUD <https://www.documentcloud.org/documents/21090921-consumer-harmful-non-violating-narratives-is-a-problem-archetype-in-need-of-novel-solutions-march-2021#document/p2/a2061302> [<https://perma.cc/724V-EKCU>]; Alexandra S. Levine, *Inside Facebook's Struggle To Contain Insurrectionists' Posts*, POLITICO (Oct. 25, 2021, 7:01 A.M.), <https://www.politico.com/news/2021/10/25/facebook-jan-6-election-claims-516997> [<https://perma.cc/5Z8E-ECTG>].

involvement in satanic practices to complex sex-trafficking schemes.¹²⁷ Although several providers have removed and banned QAnon's disinformation, many criticize big tech leaders for being too late to the punch.¹²⁸ QAnon came to the Internet in October 2017, and attempts to eradicate the conspiracy group have been ineffective due to the group's ability to move to smaller sites because of its large reach.¹²⁹

As disinformation continues to linger online, critics point to social media's slow response time as the largest culprit. Social media sites hire large amounts of moderators but still struggle to meet the numbers necessary to effectively moderate content.¹³⁰ This causes criticism of the companies as a whole and leads people to see misinformation as a "feature, not a bug, of social media platforms—and their business models."¹³¹ Facebook already places tags on posts potentially spreading misinformation and even includes articles fact-checking the post.¹³² However, these types of initiatives may not be doing enough.¹³³ Instead, narrowing Section 230 and holding social media sites liable for violative content could incentivize them to remove misinformation faster.

III. WHY SECTION 230'S SCOPE AND LANGUAGE SHOULD REMAIN AS-IS

Although critics of Section 230's broad scope have legitimate reasons for rethinking its application, a limited scope will have harmful impacts on both

127. Kevin Roose, *What Is QAnon, the Viral Pro-Trump Conspiracy Theory?*, N.Y. TIMES (Sept. 3, 2021), <https://www.nytimes.com/article/what-is-qanon.html> [<https://perma.cc/X8D7-JFR7>].

128. See Kim Lyons, *Facebook Bans One of the Largest QAnon Groups for Violating Harassment, Hate Speech Policies*, VERGE (Aug. 8, 2020, 9:15 AM), <https://www.theverge.com/2020/8/8/21359723/facebook-bans-qanon-twitter-roku-tiktok-reddit> [<https://perma.cc/2RVM-2Z73>]; Craig Timberg & Isaac Stanley-Becker, *QAnon Learns To Survive—and Even Thrive—After Silicon Valley's Crackdown*, WASH. POST (Oct. 28, 2020), <https://www.washingtonpost.com/technology/2020/10/28/qanon-crackdown-election/> [<https://perma.cc/E568-5H7X>].

129. Timberg & Stanley-Becker, *supra* note 128.

130. See Seth Fiegerman, *Tech's Biggest Companies Are Spreading Conspiracy Theories. Again.*, CNN: BUS. (Feb. 22, 2018, 10:48 PM), <https://money.cnn.com/2018/02/21/technology/facebook-youtube-parkland-conspiracy-theories/index.html> [<https://perma.cc/4XPJ-6EGG>].

131. *Id.*

132. See *How Facebook's Third-Party Fact-Checking Program Works*, META: META JOURNALISM PROJECT (JUNE 1, 2021), <https://www.facebook.com/journalismproject/programs/third-party-fact-checking/how-it-works> [<https://perma.cc/NXP8-4QTP>].

133. See Priyanjana Bengani & Ian Karbal, *Five Days of Facebook Fact-Checking*, COLUM. JOURNALISM REV. (Oct. 30, 2020), <https://www.cjr.org/analysis/five-days-of-facebook-fact-checking.php> [<https://perma.cc/X2C2-PC4Q>].

social media companies and the Internet as a whole. The current language of Section 230 should remain due to the harm that narrowing would cause to the marketplace of ideas, the heightened barrier to entry, and the slippery slope to government censorship. Instead of taking government action by narrowing the law, issues such as those discussed above are better resolved with private action.

A. *Limiting the Marketplace of Ideas*

As the Internet currently exists, when a user posts content that violates a site's terms of service, the content is either removed using an algorithm, or the website will receive a complaint, review the content, and decide whether or not to remove it.¹³⁴ This ability to moderate content shapes much of what is on the Internet today, and ultimately gives users a platform to voice their opinions and even create livelihoods for themselves.¹³⁵ However, if the Internet did not have Section 230, it could devolve into an "Internet where armies of volunteers could not crowd edit Wikipedia entries, where Americans could not share their views about politics on Facebook, where unhappy consumers could not leave one-star reviews on Amazon."¹³⁶

This freedom and growth of the Internet has occurred largely due to Section 230, which has incentivized sites to provide platforms capable of hosting user-generated content.¹³⁷ If an online platform faced potential liability for every single bit of content on its site, it would be severely deterred from hosting user-generated content.¹³⁸ This could mean the end of user-generated content, leading to the emergence of "professionally produced content made available behind paywalls," entirely under the control of the platform.¹³⁹

Although this format would not completely destroy social media companies, it would drive many beneficial sites from the Internet. Platforms such as Wikipedia provide a completely free wealth of information accessible

134. See, e.g., *Facebook Community Standards*, META: TRANSPARENCY CTR., <https://www.facebook.com/communitystandards/> [<https://perma.cc/QJE3-JV8M>].

135. See Peter Suci, *Is Being a Social Media Influencer a Real Career?*, FORBES (Feb. 14, 2020, 7:00 AM), <https://www.forbes.com/sites/petersuci/2020/02/14/is-being-a-social-media-influencer-a-real-career/?sh=2b6df40a195d> [<https://perma.cc/RW5J-UTAP>].

136. KOSSEFF, *supra* note 6, at 4.

137. *Id.* at 9.

138. *Section 230 of the Communications Decency Act*, *supra* note 16.

139. Eric Goldman, *An Interview on Why Section 230 Is on the "Endangered Watch List"*, TECH. & MKTG. L. BLOG (Sept. 15, 2020), <https://blog.ericgoldman.org/archives/2020/09/an-interview-on-why-section-230-is-on-the-endangered-watch-list.htm> [<https://perma.cc/P7YV-99XW>]. This switch to professionally produced content has been described as Web 3.0. *Id.*

to anyone with an internet connection.¹⁴⁰ Unless the site was willing to bear all of the risk and liability associated with its user-generated content, without Section 230, Wikipedia would never have become what it is today—one of the “largest repositor[ies] of free knowledge in the world.”¹⁴¹

Additionally, social media has served as a platform for social change by hosting the opinions and calls to action of its users. For example, in 2017, women took to social media and flooded users’ feeds with two simple words: “me too.”¹⁴² The movement was credited for leading to the sexual assault convictions of several high-profile men, including Bill Cosby, Larry Nassar, and Harvey Weinstein.¹⁴³ Most recently, social media has bolstered the Black Lives Matter movement, allowing users to post photos online, share “protest guides,” and efficiently spread email and phone templates to help users contact their representatives.¹⁴⁴ If Section 230 were narrowed, these movements involving sensitive and controversial topics might have never happened.

The role social media plays in providing a forum for change has even impacted niche groups like true-crime sleuths. With the recent capture of Joseph James DeAngelo, the serial killer known as the “Golden State Killer,” online “armchair sleuths” have been credited with breathing life into the decades old cold case.¹⁴⁵ As the late author Michelle McNamara writes in her book detailing her personal hunt for the killer, she frequently worked with members of online boards that hosted “member-made maps detailing everything from crime scene locations to witness sightings,” and skilled

140. WIKIPEDIA, <https://en.wikipedia.org/wiki/Wikipedia> [<https://perma.cc/4Z7T-ZS5Q>].

141. *CDA § 230 Success Case: Wikipedia*, ELEC. FRONTIER FOUND., <https://www EFF.org/issues/cda230/successes/wikipedia> [<https://perma.cc/9KUS-KYPF>].

142. See Anna Codrea-Rado, *#MeToo Floods Social Media with Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html> [<https://perma.cc/98KG-ZM4C>]. “Me too” was posted by thousands of women, from celebrities to friends and family, to show the prevalence of sexual assault and harassment. *Id.*

143. See Constance Grady, *Some Say the Me Too Movement Has Gone Too Far. The Harvey Weinstein Verdict Proves That’s False.*, VOX (Feb. 24, 2020, 5:07 PM), <https://www.vox.com/culture/2020/2/24/21150966/harvey-weinstein-rape-conviction-sexual-predatory-assault-me-too-too-far> [<https://perma.cc/A3RN-YWFB>]. Although Nassar and Cosby were both charged with crimes before the Me Too movement, Weinstein’s case was “accused, investigated, charged, and tried all within the world created by the Me Too movement,” galvanizing the movement and proving its power. *Id.*

144. See Jane Hu, *The Second Act of Social-Media Activism*, NEW YORKER (Aug. 3, 2020), <https://www.newyorker.com/culture/cultural-comment/the-second-act-of-social-media-activism> [<https://perma.cc/9M8Y-TEQS>].

145. Amanda Whiting, *What It’s Like To Spend a Decade Hunting a Serial Killer on the Internet*, BUSTLE (July 27, 2020), <https://www.bustle.com/entertainment/ill-be-gone-in-the-dark-hbo-golden-state-killer-true-crime-sleuths> [<https://perma.cc/PX5T-GQ5X>].

sleuths focused on the smallest of the details.¹⁴⁶ This use of forums and crowdsourcing has led to specific calls for citizen sleuths to utilize social media to solve ongoing and cold cases.¹⁴⁷

Under a narrowed scope of Section 230, social media sites would risk liability for hosting controversial content and would be incentivized to remove “anything that might offend anyone.”¹⁴⁸ Certainly, the prospect of penalty would prompt social media companies to remove hate speech, defamatory content, and other offensive speech from their platforms. A completely hate-speech-free Internet, however, is idealistic and would lead to removal of content purely due to it being controversial. If platforms refused to host *any* controversial content out of fear of liability, the previously mentioned social movements likely would not have been as impactful.¹⁴⁹ While tiered liability, similar to that proposed by Senator Hawley in the Good Samaritans Act,¹⁵⁰ could aid in removing hurtful content from some of the largest offenders, the same problem arises where sites are dissuaded to host controversial content, regardless of its benefit to society. Under Section 230’s current scope, the marketplace of ideas is able to thrive and provide optimal benefit to society.

Issues such as hate speech, defamation, and disinformation that arise in the marketplace of ideas are better addressed through private means. A simple way of handling harmful types of speech would be to increase transparency to allow users to be fully informed of platforms’ moderation policies. Additionally, improvements in algorithms that require users to see all types of viewpoints would avoid the creation of echo chambers that foster hate speech.

Beyond technical changes, a recent increase in users on Snapchat and Pinterest, two companies covered by Section 230’s liability shield, demonstrates the economic and social benefits of allowing platforms to self-moderate. Throughout the COVID-19 pandemic, both Snapchat and Pinterest added millions of new users.¹⁵¹ Scott Galloway, a marketing professor at the New York University Stern School of Business, suggests this is due to the

146. *Id.*; MICHELLE MCNAMARA, I’LL BE GONE IN THE DARK 170–71 (2018).

147. Andrea Marks, *How To Be a Social Media Sleuth*, ROLLING STONE (Oct. 29, 2019, 3:21 PM), <https://www.rollingstone.com/culture/culture-features/billy-jensen-facebook-detective-how-to-solve-crimes-905256/> [<https://perma.cc/2MMP-H39Z>].

148. Abril, *supra* note 45.

149. *Id.*

150. *See supra* text accompanying notes 52–55.

151. Allison Prang, *Snap, Pinterest Log Strong User Growth*, WALL ST. J. (Feb. 4, 2021, 4:13 PM), <https://www.wsj.com/articles/snap-pinterest-log-strong-user-growth-11612473181> [<https://perma.cc/SGD7-R275>].

companies' vigilant approaches to monitoring toxic content.¹⁵² Calling it a "citizen accreditive effect," Galloway believes these increased valuations show "you can do well, by doing good."¹⁵³ For example, Twitter emerged out of a short-term dip in its stock price to hit a new record share-price after removing former President Donald Trump from the platform.¹⁵⁴ Galloway states this is because "Twitter is realizing that being a handmaid to sedition is not a good business strategy."¹⁵⁵ These increased profits go to show that when companies operate independently and follow the guidance of their users, economic benefits arise. Rather than using government action to combat issues with online content, companies should follow the lead of Snapchat and Pinterest, and recognize that minimizing offensive content means more shareholder value and more profits.

B. High Barriers to Entry

Beyond the marketplace of ideas, narrowing Section 230 could also harm innovation by erecting high barriers to entry for startup companies. Stricter enforcement would create an increased need for resources to deal with inevitable future litigation and a larger workforce to meet the new moderation standard. Currently, Facebook employs 35,000 staff members to moderate content and carry out security measures, and it suspends more than one million fake accounts daily.¹⁵⁶ Algorithms can assist in moderation, but this demand to closely moderate the Internet would put a huge expense on a new startup. If the cost becomes too high, social media startups may disappear and be replaced with a "desiccated, sanitized, corporate Internet—less like an electronic frontier than a well-patrolled office park."¹⁵⁷

152. *Pivot, Struggles at Dispo, Trump's Own Social Media Network, and the 411 on NFTs* (Mar. 23, 2021) (downloaded using iTunes).

153. *Id.*

154. Jeran Wittenstein, *Twitter Kicked Trump Out and Its Stock Surged to a Record*, BLOOMBERG (Feb. 21, 2021, 9:00 AM), <https://www.bloomberg.com/news/articles/2021-02-21/twitter-kicked-donald-trump-out-and-its-stock-surged-to-a-record> [<https://perma.cc/52SN-ZEAW>].

155. *Pivot, supra* note 152. It should be noted that Scott Galloway is largely in favor of reforming Section 230 and imposing liability upon social media companies. Most recently, he suggested Section 230's protections should be removed "the moment an algorithm identifies content and decides to elevate it." @intelligencer, TWITTER (Oct. 19, 2021, 11:01 AM), <https://twitter.com/intelligencer/status/1450522582021726215/photo/1> [<https://perma.cc/QS2S-H4JN>].

156. *Treat Us Like Something Between a Telco and a Newspaper, Says Facebook's Zuckerberg, supra* note 67.

157. Anna Wiener, *Trump, Twitter, Facebook, and the Future of Online Speech*, NEW YORKER (July 6, 2020), <https://www.newyorker.com/news/letter-from-silicon-valley/trump-twitter-facebook-and-the-future-of-online-speech> [<https://perma.cc/3F3P-W4SN>].

The loss of smaller startup sites harkens back to when the federal government began regulating broadcasting in the 1920s.¹⁵⁸ After establishing the Federal Communications Commission (FCC), the government tasked the commission with regulating and issuing licenses to broadcasters in order to use the broadcasting spectrum.¹⁵⁹ The FCC's control over the spectrum restricted the amount of competing stations, resulting in inflated license costs.¹⁶⁰ This led to "insurmountable barriers to entry" for smaller firms who wanted to compete with incumbent firms and essentially "created monopoly power for the regulated."¹⁶¹

Similar to the early regulation of broadcasting, the only firms that could operate under a narrow reading of Section 230 will be those that already have the capital and resources to meet a stricter standard—entrenched incumbent firms like Facebook and Twitter. These providers do bring plenty of service to users; however, sites like Yelp that specialize in specific content would not be where they are today without the protections of Section 230. Without Section 230, "Yelp would be pressured to avoid liability by removing legitimate, negative reviews, and they would deprive consumers of information about the experiences of others."¹⁶² If liability is imposed, the barrier to entry will be too high for new sites to gain a firm position in the market. This is because resources that were once used to grow and implement improvements to an online platform—improvements that ultimately attract users and earn the site popularity—will have to shift to increased moderation to meet the new standard.

Tiered liability could potentially help maintain an acceptable barrier of entry; however, it does not address the issue of sites being disincentivized to host user-generated content. If a platform were to enter the market and choose to host user-generated content, the platform would only be able to avoid liability for a short amount of time. Where online platforms typically enter the market with the (sensible) intention to grow and earn money, once a platform grew to a certain size, it would no longer be able to enjoy the typical protections of Section 230. Instead, the platform would have to choose whether it would bear the costs of heightening moderation or go through the challenging task of completely changing its business model to professionally curated content. Rather than endure the challenging process of reforming

158. John Samples, *Why the Government Should Not Regulate Content Moderation of Social Media*, CATO INST. (Apr. 9, 2019), <https://www.cato.org/publications/policy-analysis/why-government-should-not-regulate-content-moderation-social-media> [https://perma.cc/5AQV-YVJ8].

159. *Id.*

160. *Id.*

161. *Id.*

162. *CDA § 230 Success Case: Yelp*, *supra* note 44.

their business models, platforms will likely only host professional content because user-generated content is so costly.

Private solutions prevent this high burden of content moderation from being borne by newer startups. As new platforms grow their user base, instead of being weighed down by an expensive government standard, the platform can adapt its moderation standards as it gains more capital. This will allow new players to enter the market and also address the previously discussed issues that necessitate content moderation.

C. *A Slippery Slope to Government Censorship*

Freedom of expression played a heavy role in the crafting of Section 230.¹⁶³ This intention has played out in the previously described social movements the Internet has helped support,¹⁶⁴ and its importance is striking when compared to content moderation in other countries. For instance, China employs the Golden Shield Project, also known as the Great Firewall, to filter keywords and block access to select sites.¹⁶⁵ This has led to China temporarily “blacking out” several popular sites in the United States, like Wikipedia, Facebook, and Twitter, during the country’s controversial periods.¹⁶⁶ Outside of the government, the country’s social media sites employ high degrees of moderation as well. In early 2020, the creators of TikTok, the Chinese social media and video-sharing platform, were found to have “instructed moderators to suppress posts created by users deemed too ugly, poor, or disabled” on the platform, and to censor political speech and ban “those who harmed ‘national honor’ or broadcast streams about ‘state organs such as police.’”¹⁶⁷

While China is an extreme example of censorship, it has demonstrated the harms caused by the government’s over-moderation of speech. The majority of sites blocked by the government are ones that allow people to easily publish their own content and vocalize their opinions.¹⁶⁸ The United States is

163. KOSSEFF, *supra* note 6, at 9.

164. *See supra* Part III.A.

165. Beina Xu & Eleanor Albert, *Media Censorship in China*, COUNCIL ON FOREIGN RELS. (Feb. 17, 2017, 7:00 AM), <https://www.cfr.org/background/under/media-censorship-china> [<https://perma.cc/7HRT-6GWG>].

166. *Id.*

167. Sam Biddle, Paulo Victor Ribeiro & Tatiana Dias, *Invisible Censorship*, INTERCEPT (Mar. 15, 2020, 9:02 PM), <https://theintercept.com/2020/03/16/tiktok-app-moderators-users-discrimination/> [<https://perma.cc/S8WU-C9VS>].

168. Among the many United States websites blocked in China are social media sites like Facebook, Instagram, Reddit, and Tumblr. Darcy French, *Which Websites and Online Services Are Banned in China?*, TECHRADAR (Nov. 26, 2021), <https://www.techradar.com/vpn/which-websites-and-online-services-are-banned-in-china> [<https://perma.cc/3U2D-Y2ZF>]. These sites predominantly host user-generated content in which users frequently express their opinions.

unlikely to reach this degree of censorship; however, the website limitations in China do suggest that a certain amount of censorship will have curtailing effects on citizens' abilities to express their opinions. As previously discussed, where social media has acted as a platform for controversial movements, limiting users' ability to voice their opinions due to government censorship through a narrowed Section 230 could have harmful effects on social rights movements.

Moreover, while a narrowed Section 230 could help curb the spread of disinformation, examples of foreign governments censoring postings related to COVID-19 tell a different story. When Turkey detained nineteen suspects for posting "unfounded and provocative" information about the coronavirus pandemic, the country defended its decision by saying that the posts spread panic and suggested officials had taken inadequate action to combat the virus.¹⁶⁹ However, a *New York Times* article published about a month after the incident suggests Turkey's coronavirus figures were higher than it reported.¹⁷⁰ Incorrect figures from events such as this are detrimental in fully assessing the global impact of COVID-19 and burden attempts to manage and control the virus.¹⁷¹

Under a tiered liability model, this same issue would continue to persist, and would be counterintuitive to support. This structure would still allow government control over the biggest and most used platforms. Although this type of control could cause some users to seek out smaller platforms for information, as more people transition, a site once protected by Section 230 could quickly meet the threshold and be held liable for infringing content. All it would take is enough people switching to cause a site to meet the user threshold and push it into the realm of government control. Platforms' liability would excessively ebb and flow as users floated around different sites, making this structure unpredictable and unsustainable.

Although it is hard to imagine United States citizens being imprisoned for correcting misinformation perpetrated by the government, giving the government the ability to oversee moderation of the Internet could lead to harmful consequences. Political figures could be tempted to censor certain

169. *Turkey Detains 19 People over "Provocative" Coronavirus Posts*, REUTERS (Mar. 17, 2020, 12:08 AM), <https://www.reuters.com/article/us-health-coronavirus-turkey/turkey-detains-19-people-over-provocative-coronavirus-posts-idUSKBN2140T9> [https://perma.cc/QJ6B-7NK9].

170. *Coronavirus Death Toll Soars in Turkey; W.H.O. Warns of Vaccine Roadblock*, N.Y. TIMES (Apr. 23, 2020), <https://www.nytimes.com/2020/04/20/world/coronavirus-cases-news.html> [https://perma.cc/37GR-76DV].

171. Sezer Kisa & Adnan Kisa, *Under-Reporting of COVID-19 Cases in Turkey*, 35 INT'L J. HEALTH PLAN. & MGMT. 1009, 1012 (2020), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/hpm.3031> [https://perma.cc/H2EU-B2QZ].

content under the guise of removing misinformation in order to improve the country's image to the rest of the world. Furthermore, if the government narrows Section 230 and governs moderation, service providers may be less likely to fact check misinformation published by public officials due to fear of liability. Finally, a narrowed Section 230 would likely worsen the content echo chambers that social media is prone to creating. As seen in China, a high degree of government moderation of content would essentially create a government-sponsored echo chamber in which only specific types of content could exist. Due to the threat that government censorship poses, private solutions are more sensible than carving away at Section 230's protections.

IV. CONCLUSION

In conclusion, the current protections afforded under Section 230 should remain. Maintaining the current scope of Section 230 will eliminate companies' concerns about liability for user-generated content, allowing the marketplace of ideas to continue to flourish and social media sites to host controversial, albeit necessary, content. Also, it will help keep competition high and the barrier to entry low for emerging startups. Finally, it will allow for social media to remain unfettered by governmental influence.

However, the broad scope of Section 230 does not solve the ongoing issue of hate speech, defamation, and misinformation. Rather than carving away at Section 230's liability shield, tech companies should take advantage of private solutions to combat these issues. Private solutions not only prove to be economically beneficial to both current and future players, but also mitigate any potential risks of future government censorship. While a perfect solution for the issues of hate speech, defamation, and misinformation may take time to develop, requiring strict enforcement with heavy penalties is not worth the cost of losing the benefits of innovation and user-generated content fostered by Section 230.