CONTROLLING THE NARRATIVE: HOW SOCIAL MEDIA COMPANIES EXPLOIT SECTION 230 IMMUNITY TO CENSOR ONLINE SPEECH

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INTRODUCTION

> Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as publick Liberty, without Freedom of Speech; which is the Right of every Man. . . . Whoever would overthrow the Liberty of a Nation, must begin by subduing the Freeness of Speech….[1]

Freedom of Speech was the single most important right that our nation's founders sought to protect. However, in today's increasingly online world, the federal government has created a censorship system to prevent information that it deems to be incorrect or false from being spread. Under the current state of immunity in place via Section 230 of the Communications Decency Act of 1996, agencies have joined forces with social media platforms to create a censorship scheme that removes disfavored, though protected, speech from these platforms to advance the administration's political agenda. Therefore, we must legislatively amend or judicially clarify Section 230 civil immunity, which provides for the broad protection of platforms censoring a user conducting discourse through their platform. This broad protection disguises ex-post censorship as ex-ante editorial discretion.

In today's increasingly online world, one would think that the "marketplace of ideas" and the exercise of free speech have never been more open and accessible. However, recent revelations in the information-sharing space show that since 2020, there have been efforts by the Executive Branch of the federal government to censor online speech from those they claim to be spreading dis-, mis-, and mal-information. Evidence uncovered by the House Judiciary Committee's Select Subcommittee on the Weaponization of the Federal Government and through discovery in *Missouri v. Biden*, has shown that the Biden Administration used coercion and vague threats of retaliation to persuade social media companies, namely Meta, Google, and Twitter, to remove posts discussing opposing

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[1] Benjamin Franklin, *Silence Dogood, No. 8*, THE NEW-ENGLAND COURANT (July 9, 1722), https://founders.archives.gov/documents/Franklin/01-01-02-0015 [https://perma.cc/9BZQ-QMT4].

viewpoints from their platforms, regardless of whether or not these posts violated platform policies.[2]

Discussions revolving around social media as a public utility have been ongoing for quite some time. However, since 2020, these discussions and issues have been increasing both in frequency and significance, resulting in "quasi-state agents"[3] engaging in censorship of speech with which the current powers disagree. Vivek Ramaswamy penned an op-ed in the Wall Street Journal on this topic in January 2021 entitled "Save the Constitution from Big Tech."[4] Mr. Ramaswamy suggested in this piece that the view that "technology companies are free to regulate content because they are private, and the First Amendment protects only against government censorship"[5] was wrong. He asserts that "Google, Facebook, and Twitter should be treated as state actors under existing legal doctrines."[6] He further suggested that the government "has co-opted Silicon Valley to do through the back door what government cannot directly accomplish under the Constitution."[7] Further, he discussed *Norwood v. Harrison*, in which the Supreme Court held that the government "may not induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish."[8] He alleged that *Norwood* motivated Congress to enact Section 230 of the Communications Decency Act of 1996.[9]

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[2] *See generally* H. COMM. ON THE JUDICIARY & SELECT SUBCOMM. ON THE WEAPONIZATION OF THE FED. GOV'T, 118TH CONG., THE CENSORSHIP-INDUSTRIAL COMPLEX: HOW TOP BIDEN WHITE HOUSE OFFICIALS COERCED BIG TECH TO CENSOR AMERICANS, TRUE INFORMATION, AND CRITICS OF THE BIDEN ADMINISTRATION (Comm. May 1, 2024); *see also* 680 F. Supp. 3d 630 (W.D. La. 2023). [hereinafter THE CENSORSHIP-INDUSTRIAL COMPLEX].

[3] *See* Erin Miller, *The Private Abridgment of Free Speech*, 32 Wm. & Mary Bill Rights J. 615, 618 (2024) (defining "quasi-state agents" as "a limited set of private agents with extraordinary, *state-like* power over speakers or the primary channels of speech amplification").

[4] Vivek Ramaswamy & Jed Rubenfeld, *Save the Constitution from Big Tech*, WALL ST. J. (Jan. 12, 2021, 12:45 PM), https://www.wsj.com/articles/save-the-constitution-from-big-tech-11610387105 [https://perma.cc/8GU5-2WSL].

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *See generally* 413 U.S. 455, 465 (1973) (quoting Lee v. Macon Cnty. Bd. Of Educ., 267 F. Supp. 458, 475-76 (M.D. Ala. 1967)).

[9] *See* Ramaswamy & Rubenfeld, *supra* note 4; 47 U.S.C. § 230.

In addition, *Missouri v. Biden* has the potential to be one of the most fundamental Supreme Court cases not only in our lifetime but also in the history of our country. On July 4, 2023, Chief Judge Terry Doughty ruled for a preliminary injunction and, in his opinion, determined that "[t]he Plaintiffs are likely to succeed on the merits in establishing that the Government has used its power to silence the opposition."[10] Further, he stated, "the evidence produced thus far depicts an almost dystopian scenario" and "the United States Government seems to have assumed a role similar to an Orwellian 'Ministry of Truth.'"[11] This case has the ability to profoundly reshape the balance between government regulation and free speech, which could leave a lasting impact on our nation's ability to engage in the marketplace of ideas on social media.

Part I of this article discusses the origins of the First Amendment, the history of free speech, and what free speech means today. Part II discusses the state action doctrine, its history, and how this intricate doctrine applies to the issue of digital censorship. Part III briefly summarizes the complex history of Section 230 of the Communications Decency Act. Part IV details how Section 230 acts as somewhat of an enabling statute for this censorship scheme to continue by giving immunity to companies that agree to the federal government's censorship demands.

Finally, Part V outlines proposed solutions to end this unconstitutional censorship scheme. Congress could amend Section 230 to limit immunity from those engaging in unconstitutional censorship, while the Supreme Court could use *Missouri v. Biden* to affirm First Amendment protections to all mediums, even social media. This solution also discusses the distinction between ex-post censorship and ex-ante editorial discretion.

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[10] Missouri v. Biden, 680 F. Supp. 3d 630, 728 (W.D. La. 2023).

[11] *Id.* at 729.

I. FREEDOM OF SPEECH

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech".[12] As evidenced by various Congressional hearings and *Missouri*, there has been significant conspiracy between the Executive Branch and private social media companies to censor Americans' free speech online.[13] Private companies should be subject to the state action doctrine, making this scheme a violation of the First Amendment protections of American citizens on these platforms.

The First Amendment's Free Speech clause lays the foundation for the most basic freedom sought to be protected by the Founding Fathers; it is the most essential freedom in a free society.[14] In *Ashcroft v. Free Speech Coal.*, Justice Anthony Kennedy stated, "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[15] The First Amendment was adopted to ensure no one party monopolizes the truth.[16] The Supreme Court has long held that the First Amendment is not absolute and that only certain types of speech are protected.[17] These categories include political, ideological, and commercial speech.[18] The Court has also held certain types of speech unprotected, including obscenity, defamation, fraud, incitement, fighting words, true threats, and speech integral to criminal conduct.[19]

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[12] U.S. CONST. amend. I.

[13] Missouri v. Biden, 680 F. Supp. 3d 630, 728 (W.D. La. 2023).

[14] *See* Benjamin Franklin, *On Freedom of Speech and the Press*, THE PA. GAZETTE (Nov. 1737) ("Freedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins.").

[15] 535 U.S. 234, 253 (2002).

[16] *See* David Schultz, *Marketplace of Ideas*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV. (Jan. 1, 2009), https://firstamendment.mtsu.edu/article/marketplace-of-ideas/ [https://perma.cc/F7AA-K25C].

[17] *See* Victoria L. Killion, *The First Amendment: Categories of Speech*, CONG. RES. SERV., 1 (2019), https://crsreports.congress.gov/product/pdf/IF/IF11072 [https://perma.cc/7H4X-356Q].

[18] *Id.*

[19] *Id.*

Misinformation and disinformation are notably missing from the list of speech categories that the First Amendment does not protect. This is because misinformation and disinformation are not clearly defined and have evolved to include political speech disfavored by the government.[20] The idea of disinformation "is now – and has always been – nothing more than a political ruse most frequently targeted at communities and individuals holding views contrary to the prevailing narratives."[21]

Much of the misinformation the government and social media companies assert they are protecting users from is not misinformation but rather conflicting viewpoints on controversial topics.[22] Conflicting viewpoints, or viewpoint discrimination, is a cornerstone of the First Amendment's Free Speech Clause.[23]

Truth is arbitrarily determined, especially in the context of political speech, and because of this, misinformation and disinformation are still protected by the First Amendment. This means that the federal government may not censor political speech as "misinformation," but "disinformation researchers . . . [are] not strictly bound by these constitutional guardrails."[24] This is where the state action doctrine comes into play.

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[20] *See generally* H. COMM. ON THE JUDICIARY & SELECT SUBCOMM. ON THE WEAPONIZATION OF THE FED. GOV'T, 118TH CONG., THE WEAPONIZATION OF "DISINFORMATION" PSEUDO-EXPERTS AND BUREAUCRATS: HOW THE FEDERAL GOVERNMENT PARTNERED WITH UNIVERSITIES TO CENSOR AMERICANS' POLITICAL SPEECH (Comm. Nov. 6, 2023) [hereinafter THE WEAPONIZATION OF 'DISINFORMATION'].

[21] *Id.* at 2.

[22] *Id.* at 66.

[23] *Amdt1.7.4.3 Viewpoint Discrimination in Facially Neutral Laws*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/amendment-1/viewpoint-discrimination-in-facially-neutral-laws [https://perma.cc/PMN6-GHGB] (last visited Jan. 31, 2024).

[24] THE WEAPONIZATION OF 'DISINFORMATION', *supra* note 20, at 1.

II. THE STATE ACTION DOCTRINE AND SOCIAL MEDIA PLATFORMS

The State Action Doctrine requires "that in order for a plaintiff to have standing to sue over a law being violated, the plaintiff must demonstrate that the government (local, state, or federal), was responsible for the violation, rather than a private actor."[25] This is because the Constitution's protections only extend to protect citizens from the government.[26] However, the state action doctrine allows plaintiffs to sue private actors for constitutional violations where the private actor was "encouraged . . . or [w]as impermissibly aided it."[27] In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, the Supreme Court held that "'[c]oercion' and 'encouragement' are like 'entwinement' in referring to kinds of facts that can justify characterizing an ostensibly private action as public instead."[28] The test from *Brentwood* will be applied later in this section to determine the relationship between the federal government and its social media partners.

The Supreme Court first articulated the state action doctrine in the 1942 case *Parker v. Brown*, where it held that when a state exercises its authority and enacts a regulation with anti-competitive effects, the state and private parties acting at its direction are not liable for antitrust violations.[29]

In *Norwood v. Harrison*, the Supreme Court held that "a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."[30] This decision effectively meant the government may not use third parties to bypass constitutional protections. In his article "Save the Constitution from Big Tech," Vivek Ramaswamy establishes that "Google, Facebook, and Twitter should be treated as state actors

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[25] *State Action Requirement*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/state_action_requirement [https://perma.cc/93P8-BTMU] (last visited Jan. 31, 2024).

[26] *Id.*

[27] *Amdt14.2 State Action Doctrine*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/amendment-14/state-action-doctrine [https://perma.cc/L2TB-EGE6] (last visited Jan. 31, 2024).

[28] 531 U.S. 288, 303 (2001).

[29] *See* 317 U.S. 341 (1942).

[30] 413 U.S. 455, 465 (1972) (quoting Lee v. Macon Cnty. Bd. Educ., 267 F. Supp. 458, 465 (M.D. Ala. 1967)).

under existing legal doctrines."[31] Further, Ramaswamy compares the doctrine established in *Norwood v. Harrison* to the cases of censorship at hand. "That's what Congress did by enacting Section 230 of the 1996 Communications Decency Act, which not only permits tech companies to censor constitutionally protected speech but immunizes them from liability if they do so."[32]

As stated above, the Supreme Court developed a multi-factor test in *Brentwood* to determine the applicability of state action to private actors. The Court held that private activity is state action (1) when it results from the State's exercise of "coercive power," or when the State provides "significant encouragement, either overt or covert,"; (2) when a private actor operates as a "willful participant in joint activity with the State or its agents,"; (3) when the private entity is controlled by an "agency of the State,"; (4) when it has been delegated a public function by the State, and (5) when it is "entwined with governmental policies" or when government is "entwined in [its] management or control."[33]

The State Action requirement can be met by showing that governmental pressure coerced the private actor to take the alleged actions at issue. That was the case in *Missouri v. Biden,* where the plaintiffs allege that government officials in the Biden administration coerced or forced social media companies to remove posts or ban users that the administration disagreed with politically.[34] The plaintiffs in *Missouri* sought injunctive relief from the government, but Section 230 prevented them from seeking relief from the private actors themselves.[35] Social media companies should be recognized as state actors and be held in violation of the First Amendment to reach a definite resolution to the underlying

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[31] Ramaswamy & Rubenfeld, *supra* note 4.

[32] *Id.*

[33] Tewksbury v. Dowling, 169 F. Supp. 2d 103, 108 (E.D.N.Y. 2001) (quoting Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001).

[34] 680 F. Supp. 3d 630, 641 (W.D. La. 2023).

[35] *Id.* (internal citation omitted) ("With the Supreme Court recently making clear that Section 230 shields social-media platforms from legal responsibility for what their users post, Section 230 is even more valuable to these social-media platforms. These actions could reasonably be interpreted as an implied threat by the Defendants, amounting to coercion.").

issue. Platforms currently receive protection from liability due to editorial discretion.[36]

However, the Supreme Court does not recognize "'editorial discretion' as a special category of First Amendment-protected expression."[37] A platform seeking editorial discretion "accepts reputational and legal responsibility for the content it edits."[38] Editorial discretion must also be exercised before the platform hosts, publishes, or disseminates the content at issue.[39] The platforms do not exercise editorial discretion over the content in *Missouri v. Biden* or *NetChoice v. Paxton*. The platforms "engage in viewpoint-based censorship with respect to a tiny fraction of the expression they have already disseminated."[40] They engage in this censorship seemingly *only* at the request of federal agencies.[41]

The primary government agency conducting this censorship scheme is the Cybersecurity and Infrastructure Security Agency ("CISA"). The CISA was initially tasked with protecting the government and critical infrastructure from cybersecurity attacks.[42] However, the CISA has since played an increasingly central role in censorship and surveillance of private citizens. In 2020, CISA began to report social media posts containing "disinformation" to social media platforms.[43] Shortly after this scheme of surveilling and reporting "disinformation," CISA created a formal "Mis-, Dis-, and "Mal-information" (MDM) team.[44] As these censorship activities were uncovered, CISA attempted to hide its

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[36] *See* Danielle Draper, *Section 230- Are Online Platforms Publishers, Distributors, or Neither?*, BIPARTISAN POL'Y CTR. (Mar. 13, 2023), https://bipartisanpolicy.org/blog/section-230-online-platforms/ [https://perma.cc/NW2P-2AZL].

[37] NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 463 (2022).

[38] *Id.* at 464.

[39] *Id.*

[40] *Id.* at 465.

[41] *See* Missouri v. Biden, 680 F.Supp.3d 630, 695-698 (W.D. La. 2023); *see also* H. COMM. ON THE JUDICIARY & SELECT SUBCOMM. ON THE WEAPONIZATION OF THE FED. GOV'T, 118TH CONG., THE WEAPONIZATION OF CISA: HOW A "CYBERSECURITY" AGENCY COLLUDED WITH BIG TECH AND "DISINFORMATION" PARTNERS TO CENSOR AMERICANS 1 (Comm. June 26, 2023) [hereinafter DISINFORMATION REPORT]; *see also* THE WEAPONIZATION OF 'DISINFORMATION', *supra* note 20, at 66-80.

[42] 6 U.S.C. § 652(c).

[43] DISINFORMATION REPORT, *supra* note 41 at 1 **(**quoting Scully Dep. 16:16–17:8, Missouri v. Biden, 680 F. Supp. 3d 630 (W.D. La. 2023), ECF No. 209).

[44] *Id.*

role in the censorship scheme by claiming its role to be informational only.[45]

CISA claimed to "'work with federal partners to mature a whole-of-government approach' to curbing alleged misinformation and disinformation."[46] CISA also allegedly considered creating a disinformation "rapid response team" that could physically deploy agents across the United States.[47] Moreover, once its censorship operation began to be uncovered, CISA moved the operation to a self-funded non-profit, which is an implied admission that its actions were unconstitutional.[48] The goal of this self-funded non-profit was to "avoid the appearance of government propaganda."[49]

Journalist Michael Shellenberger has dubbed the federal government's scheme to co-opt social media for censoring Americans the "Censorship Industrial Complex", arguing documents obtained by the House Judiciary Committee and its Select Subcommittee on the Weaponization of the Federal Government reveal that CISA has shifted its focus to surveilling Americans' speech on social media and policing the truth.[50] By conspiring with Big Tech and government-funded organizations, CISA, and other agencies attempted to create a proxy for which they could hide their unconstitutional activities from the public.[51] Based on claims of Russian interference in the 2016 general election, CISA created the "'Countering Foreign Influence Task Force' (CFITF) . . . 'to focus on election infrastructure disinformation,'" including "foreign malign influence operations."[52]

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[45] *Id.*

[46] *Id.* at 2.

[47] *Id.* at 14.

[48] *Id.*

[49] *Id.*

[50] *The Censorship Industrial Complex: Hearing Before the Select Subcomm. on the Weaponization of the Fed. Gov't of the H. Comm. on the Judiciary*, 118th Cong. 6 (Mar. 9, 2023) (testimony of Michael Shellenberger).

[51] *See* DISINFORMATION REPORT, *supra* note 41.

[52] *Id.* at 9 (quoting DISINFORMATION REPORT, *supra* note 41, at 5); *see* Gregory Eady et al., *Exposure to the Russian Internet Research Agency Foreign Influence Campaign on Twitter in the 2016 US Election and its Relationship to Attitudes and Voting Behavior*, 14:62 NATURE COMMC'N 1, at 8-9 (2023).

In January 2021, CISA transitioned into a domestic surveillance agency "'focus[ed] on general MDM,' or so-called 'Mis-, Dis-, and Mal-information.'"[53] This sounds shocking in theory but is even more frightening in practice because, as Google employees explained, "what constitutes 'misinformation' or 'disinformation' is determined by government actors, whose evaluations of truth and falsity are necessarily subjective, and 'inherently political.'"[54]

Mal-information is a subject worth special consideration because, according to CISA's own definition, it is "based on fact, but used out of context to mislead, harm, or manipulate."[55] This context is, of course, determined by the government. That is the danger of having a government agency like CISA – the government determines what is and is not the truth. Instead, we should allow people to determine for themselves what they believe and what they do not believe.

CISA is not alone in its policing of disfavored speech online. In an attempt to absolve itself of constitutional violations, the government sought to funnel its operation through several universities, which then passed requests on to the platforms.[56] Stanford's "Election Integrity Partnership" uses a "tickets" system to recommend specific posts that it believes violate the platform's policies.[57] For example, ticket "EIP-421" stated, "[w]e recommend that posts like these be labeled if they are alleging fraud, and that further action may be appropriate if this post actually documents fraud."[58] Other EIP tickets suggested that platforms take actions such as: "this tweet, as well as the tweets with the original video should be removed or labeled as misleading"[59] and "[g]iven the large audiences and Pennsylvania's swing state status, we'd recommend this content be actioned."[60] Based on the EIP ticket system, it is

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[53] DISINFORMATION REPORT, *supra* note 41, at 10.

[54] *Id.* at 2.

[55] *Mis-, Dis-, and Malinformation Planning and Incident Response Guide for Election Officials,* CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY 1 (2023), https://www.cisa.gov/sites/default/files/publications/mdm-incident-response-guide_508.pdf [https://perma.cc/V5CA-4KX3].

[56] THE WEAPONIZATION OF 'DISINFORMATION,' *supra* note 20, at 54.

[57] *Id.* at 84.

[58] *Id.* at 85.

[59] *Id.*

[60] *Id.*

evident that Stanford recommended specific posts be removed from the platform for sharing what it believed was misleading or false information. Stanford and its EIP partners flagged posts for removal, regardless of these posts violating the platform's content rules.[61]

Stanford's Election Integrity Project also briefed the FBI and the NSA.[62] Elvis Chan, a Special Agent with the FBI's San Francisco field office, "was involved in the suppression of news about information damaging to the Biden family found on a laptop belonging to Hunter Biden . . . ."[63] The Hunter Biden laptop story is a key example of so-called misinformation that was de-platformed but known to be truthful information.[64] Prior to the 2020 election, the FBI routinely advised social media platforms to "look for a 'hack and dump' operation by the Russians[.]"[65] Further, the Section Chief of the FBI's Foreign Influence Task Force (FITF) testified in a transcribed interview before the House Judiciary Committee that:

> FBI agents who knew the laptop was real were some of the same FBI agents who repeatedly warned social media companies about a potential "hack-and-leak" likely to occur in October 2020; and (2) despite direct requests from Twitter and Facebook for information on the day the *New York Post* story was published, the FBI decided to deliberately withhold critical information from the social media companies.[66]

A poll by Tipp Insights in August 2022 found that 8 in 10 respondents thought that the "Biden Laptop Cover-Up" changed the results of the election.[67] Furthermore, "47 percent said that knowing before the election that the laptop contents were real and

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[61] *Id.*

[62] *Id.* at 64.

[63] *Id.*

[64] Letter from Rep. James Jordan, Chairman, House Comm. on the Judiciary, to the Hon. Christopher Wray, Dir., Fed. Bureau of Investigation 4 (July 20, 2023).

[65] Brief for Representative Jim Jordan and 44 Other Members of Congress as Amici Curiae in Support of Respondents, Murthy v. Missouri, 603 U.S. 43 (2024) (No. 23-411), 2024 WL 695116 at *16.

[66] *Id.* at 17.

[67] Paul Sperry, *Shock Poll: 8 in 10 Think Biden Laptop Cover-Up Changed* Election, TIPP INSIGHTS (Aug. 23, 2022), https://tippinsights.com/shock-poll-8-in-10-think-biden-laptop-cover-up-changed-election/ [https://perma.cc/CN7L-VKMS].

not 'disinformation' would have changed their voting decision—including more than two-thirds (71 percent) of Democrats."[68] This is why it is essential for online public speech to be protected from government censorship, especially such profound revelations within weeks of a Presidential election.

Self-governance is a cornerstone of our republic's foundation. Without the ability to learn and decide our beliefs, we fail to carry the torch of what our country's founders sought to establish. The ability to live without government oversight of thought is paramount to the establishment of freedom. Moreover, this freedom should not end when our society evolves to adopt a new medium or forum for which we are to converse and exchange thoughts. Just because the internet is a dangerous place does not mean the government should control the information we receive, nor should it ban us from joining fellow Americans in this forum because we disagree about an idea. The freedom to disagree is what our republic was founded on, and it continues to be the single most important freedom that we believe we should hold. CISA should have been shut down the second it crossed, from protecting Americans from foreign threats to surveilling and attacking Americans for free discourse of what it determined to be MDM.

The evidence above clearly shows "'[c]oercion' and 'encouragement' are like 'entwinement' in referring to kinds of facts that can justify characterizing an ostensibly private action as public instead."[69] However, because of Section 230, it is unclear whether social media platforms can be held liable for this coercion and encouragement in violation of the First Amendment.

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[68] *Id.*

[69] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001).

III. A (BRIEF) HISTORY OF SECTION 230

In February 1995, the Communications Decency Act ("CDA") was introduced in the United States Senate to "regulate obscenity and indecency online."[70] The CDA served as a "sweeping . . . update" to the "sixty-year-old" to the Telecommunications Act of 1934. Upon reaching the House of Representatives, "an amendment to the Communications Decency Act" was added.[71] This amendment "would end up becoming Section 230."[72]

The amendment provided civil immunity to ensure that "'providers of an interactive computer service' would not be treated as publishers of third-party content."[73] In her opinion for the Ninth Circuit, Judge Berzon discussed the legislative history and intent of Section 230.[74] She stated that Congress chose to treat internet providers differently than traditional providers because of "two primary reasons."[75] These reasons were to "encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce."[76]

Many have credited this legislation with creating the Internet as we know it today.[77] This clause gave interactive computer services and providers the authority to self-regulate all third-party content posted on its platforms and services and immunity from any litigation arising out of this third-party content. Although the original intent of Congress was to protect "Good Samaritans," "Bad Samaritans" have also benefitted from the immunity provided in Section 230.[78]

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[70] *Section 230: Legislative History*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/cda230/legislative-history [https://perma.cc/YQ95-FPWM](last visited Feb. 2, 2024).

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *See* Batzel v. Smith, 333 F.3d 1018, 1026-27 (9th Cir. 2003).

[75] *Id.* at 1027.

[76] *Id.*

[77] *See* Danielle Draper, *Section 230- Are Online Platforms Publishers, Distributors, or Neither?*, BIPARTISAN POL'Y CTR. (Mar. 13, 2023), https://bipartisanpolicy.org/blog/section-230-online-platforms/ [https://perma.cc/NW2P-2AZL]. Draper, *supra* note 36.

[78] 47 U.S.C. § 230(c)(1).

Section 230 was created based on Congress' reaction to two somewhat contradictory New York state court decisions from the early 1990s.[79] In *Cubby, Inc. v. CompuServe Inc.*, the court held that the internet service provider could not be held liable for content on its platform because it did not exercise any editorial control over the content; it simply played the role of host.[80] In *Stratton Oakmont, Inc., v. Prodigy Services Co.*, the court held that Prodigy could be held liable for content posted on its site because "one who repeats or otherwise republishes" tortious material is "subject to liability as if he had originally published it."[81] These decisions scared lawmakers and made it clear that the rules of the Internet required both regulation and clarification if this new medium was to survive.[82] As the Court stated in *Lemmon v. Snap, Inc.*, "in 1996, when the internet was young and few of us understood how it would transform American society, Congress passed the CDA. That act 'provide[d] internet companies with immunity from certain claims . . . ."[83]

The CDA prevents websites, blogs, forums, and other sources of online information from being held liable for their users' speech. This law has created a unique legal safe haven for internet companies that seek to provide controversial or offensive speech. Platforms continue to argue that the protections afforded to the CDA for the last two and a half decades promote the exercise of free speech.[84] Still, this privilege has been widely misconstrued and abused from its original intent. The protections afforded to social media companies through the distorted use of a law enacted before the birth of many of these companies' users have since created both

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[79] Sara L. Zeigler, *Communications Decency Act and Section 230 (1996)*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV. (May 23, 2023), https://firstamendment.mtsu.edu/article/communications-decency-act-and-section-230-1996/#:~:text=The%20origin%20of%20Section%20230,would%20be%20safe%20for%20children [https://perma.cc/598V-QXL5].

[80] *See* 776 F. Supp. 135 (S.D.N.Y. 1991).

[81] No. 31063/94, 1995 WL 323710 , at *3 (N.Y. Sup. Ct. May 24, 1995) (rev'd on other grounds).

[82] *See Section 230: Legislative History, supra* note 70.

[83] *Id.*

[84] Aaron Terr, *Why Repealing or Weakening Section 230 Is a Very Bad Idea*, THE FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION (Feb. 20, 2023), https://www.thefire.org/news/why-repealing-or-weakening-section-230-very-bad-idea [https://perma.cc/CWE9-XXEN].

virtual and real-world harm to common men and women who seek to have their voices heard. The Communications Decency Act of 1996, as such, has become colloquially known as "the twenty-six words that created the internet."[85] Congress enacted Section 230 at its inception to promote the development of the Internet. Congress created the "Good Samaritan" clause of the CDA as a way to do so.[86]

Section 230 has been coined "the twenty-six words that created the internet."[87] Every aspect of the internet we know today (whether loved or hated) came to be because of Section 230. Section 230 has created a legal safe haven unique to internet service providers. These companies assert that without Section 230, they would be subject to a flood of litigation.[88] Maybe that is a good thing. As evidenced in *Missouri v. Biden*, social media companies caved to the government's threats out of fear that it would amend or repeal Section 230.[89]

Section 230 has been used as both a carrot and a stick.[90] Members of Congress "have repeatedly made explicit threats to social-media giants if they failed to censor speech those lawmakers disfavored."[91] During his candidacy for President, Joe Biden made vague threats to social media companies that "failed to shut down or suppress stories or advertisements casting him or his policies in a negative light."[92] In January 2020, Biden again threatened social media companies to censor an advertisement he disapproved of. However, he was more direct this time, saying, "Section 230 should be revoked, immediately should be revoked, number one. For Zuckerberg and other platforms. . . ."[93] Louisiana Rep. Cedric Richmond warned Facebook and Google in April 2019 that they

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[85] *See* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019).

[86] *Id*.

[87] *Id*.

[88] *See* Alan Z. Rozenshtein, *Interpreting the ambiguities of Section 230*, BROOKINGS (Oct. 26, 2023) https://www.brookings.edu/articles/interpreting-the-ambiguities-of-section-230/ [https://perma.cc/8XF9-DHMA].

[89] *See* 680 F. Supp. 3d 630, 697–98 (W.D. La. 2023).

[90] *See* Ramaswamy & Rubenfeld, *supra* note 4.

[91] *Id.*

[92] Brief Amicus Curiae for America's Future et al. at 16, Gonzalez v. Google LLC, 598 U.S. 617 (2023) (No. 21-1333) (Supporting Petitioners).

[93] *Id.*

"better" censor what Richmond and his colleagues deemed misinformation.[94]

The Canons of Construction is a system of practical rules used to interpret legal instruments such as statutes.[95] One of the most commonly used canons is the doctrine of *contra proferentem*. This doctrine states that "in the interpretation of documents, ambiguities are to be construed unfavorably to the drafter."[96] In applying this doctrine, the ambiguous term of "publisher" would be construed in a manner unfavorable to the government and its partner platforms, excluding them from this classification and therefore defeating their claim for immunity under Section 230.

Based on recent developments of the internet, questions arise about the immunity provisions contained in Section 230's Civil Immunity Clause.[97] Section 230(c)(1)-(2) states that:

> (1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> (2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of—
>
> > (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
> >
> > (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[98]

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[94] *Id.* at 19.
[95] *Canon*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[96] *Contra Proferentem*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[97] 47 U.S.C. §230(c)(2)(A).
[98] 47 U.S.C. § 230(c)(1)-(2).

This statutory immunity should be, at minimum, tailored for a variety of reasons. This statutory immunity has been abused and exploited and has outlived its public policy interest. Section 230 was created when the internet was on the brink of collapsing, but now the internet is involved in our everyday lives; as such, social media platforms are the new public square and should, in turn, be treated as such. Therefore, the marketplace of ideas should extend to protect the views and speech of users seeking to express their opinions online. Various Supreme Court doctrines cloud the unconstitutionality of censorship.[99] Due to the unclear interpretation of these constitutional doctrines, Section 230 has remained in effect. It has allowed a scheme of censorship to violate the First Amendment and the freedoms it protects from government intervention.[100] The first of these doctrines is the Commerce Clause.

The Commerce Clause is the title given to Article 1, Section 8, Clause 3 of the Constitution.[101] This clause gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[102] Over time, Congress has exercised its Commerce Clause powers to regulate the activities of the states and their citizens.[103] Commerce is not defined by the Clause, which has created much debate over what power the Commerce Clause creates.[104] A broad interpretation of "commerce" has been used for Congress to regulate broad social intercourse between citizens of different states.[105] This broad interpretation began with the Supreme Court's decision in *NLRB*

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[99] Philip Hamburger, *How the Government Justifies Its Social-Media Censorship*, WALL ST. J. (June 9, 2023, 6:49 PM), https://www.wsj.com/articles/how-the-government-justifies-its-social-media-censorship-free-speech-supreme-court-doctrine-precedent-biden-laptop-twitter-fbi-facebook-af57b191 [https://perma.cc/MVW9-5J52] (citing *U.S. v. Lopez* (1995) and *Blum v. Yaretsky* (1982)).

[100] *Id.*

[101] *Commerce Clause*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/commerce_clause [https://perma.cc/5AJ9-PHCF] (last visited Jan. 27, 2024).

[102] *Clause 3 Commerce*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/article-1/section-8/clause-3 [https://perma.cc/78EX-B8R2] (last visited Jan. 27, 2024).

[103] Hamburger, *supra* note 99.

[104] *See id.*

[105] *Id.*

v. Jones & Laughlin Steel Corp., where the Court recognized a right of Congress to regulate activities that had a "close and substantial relation to interstate commerce" [106] such that the control of such activity is essential to "protect that commerce from burdens and obstructions".[107] Both scholars and jurists have long reasoned that common carrier laws "limit discrimination in the transmission of . . . messages."[108] However, addressing social media platforms as common carriers is a nuanced argument.[109] Section 230, in its current form, prevents a solution to this problem because it prevents social media platforms from being fairly regulated regardless of their status as common carriers or private entities.[110]

Current understanding of the Commerce Clause has allowed the government to establish a censorship scheme through private parties using Section 230's "editorial discretion" provision to prevent disfavored speech on the internet. The Constitution gives Congress "the power to regulate commerce among the states, including the channels and instrumentalities of commerce, which increasingly are electronic."[111] This power, in practice, gives Congress the power to regulate the industry of speech, but not the speech itself, even when "traveling through commercial channels and instrumentalities."[112]

The National Institute of Standards and Technology defines a common carrier as "a telecommunications company that holds itself out to the public for hire to provide communications transmission services."[113] These companies are, therefore, subject to federal regulation. Congress is effectively allowed to regulate free speech by regulating common carriers, which it delegated to the Federal Communication Commission (FCC) in the Communications Act of 1934.[114]

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[106] N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

[107] *Id.*

[108] NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 469–79 (5th Cir. 2022).

[109] *Id.* at 505.

[110] Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2413 (2024) ("Moreover, 'there is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers' given their many similarities.").

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *See* 47 U.S.C. § 151; *see also* Red Lion Broad. Co. v. F.C.C., 395 U.S. 367 (1969).

Not all of Section 230 is bad, and if not for Section 230, the Internet likely would not have survived. Therefore, completely striking down this code section is both unreasonable and impractical. Section 230 must be tailored to match the needs of today's internet rather than continuing to treat internet companies as they were 25 years ago. The internet then is not the same as the internet today. Congress should seek to understand the motivations behind enacting the civil liability provision to understand how to amend Section 230.

IV. HOW SECTION 230 ALLOWS CENSORSHIP TO BE PROTECTED

Although the original intent of Congress was to protect "Good Samaritans," "Bad Samaritans" have also benefitted from the immunity provided in Section 230. These "Bad Samaritans" are social media companies that have monopolized the market of speech and will comply with government demands to violate the Free Speech rights of Americans. This clause gave interactive computer services and providers the authority to self-regulate all third-party content posted on its platforms and services and immunity from any litigation arising out of this third-party content. Today, some courts have allowed these "Bad Samaritans" who are complicit in the promotion of illegal behavior to be afforded immunity under Section 230. "Through Section 230 . . . the federal government subsidized, fostered, encouraged, and empowered the creation of a small number of massive social media companies with disproportionate ability to censor and suppress speech on the basis of speaker, content, and viewpoint."[115] Section 230's broad immunity is a "type of 'tangible financial aid,'" worth billions of dollars per year.[116] The most important aspect of the immunity provided in Section 230 is that the immunity "has significant tendency to facilitate, reinforce, and support private" censorship.[117]

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[115] Missouri v. Biden, 680 F.Supp.3d 630, 677 (W.D. La. 2023) (quoting Compl. at ¶ 4).

[116] Norwood v. Harrison, 413 U.S. 455, 466 (1973).

[117] *Id.*

Significant evidence has been provided by the House Judiciary Committee, among others, into how the government conspired with and employed social media platforms to conduct its censorship activities.[118] Today, the federal government uses threats of Section 230 reform to coerce social media companies to censor speech that the federal government finds objectionable.[119] In its inception, Section 230 was enacted to protect internet service providers from the fear of liability for simply hosting content created by a user.[120] This is why Section 230 should not apply to platforms exercising ex-post censorship rather than ex-ante editorial discretion, the very nature of what drives social media engagement– user-generated content. Today's platforms serve the same role as network television and newspapers did in the 20th century, although in a different manner.[121] The media of the 20th Century provided people with information, but this information came from the media itself. Today, the information received by users comes from other users.[122] Ideally, this would be a positive outcome for both parties involved: users get information. They can easily communicate with millions of other people while the platforms get free content that users must come to their platform to receive.[123] Section 230 was created to absolve the worries about hosting this content, and it allowed these platforms to become the massive parts of our lives that they are today.[124] Social media platforms hide behind this broad immunity and claim that they are simply exercising editorial discretion. However, they have gone much further than that. By exercising ex-

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[118] *See* DISINFORMATION REPORT, *supra* note 41, at 10.

[119] *Id.*

[120] KOSSEFF, *supra* note 85 ("Without Section 230, companies could be sued for their users' blog posts, social media ramblings, or homemade online videos. . . . The internet would be little more than an electronic version of a traditional newspaper or TV station, with all the words, pictures, and videos provided by a company and little interaction among users.").

[121] Derek E. Bambauer, *How Section 230 Reform Endangers Internet Free Speech*, BROOKINGS (July 1, 2020), https://www.brookings.edu/articles/how-section-230-reform-endangers-internet-free-speech/ [https://perma.cc/E42G-WAAN].

[122] *Id.*

[123] *Id.*

[124] Jonah Berger et al., *The Impact of Social Media: Is It Irreplaceable?*, KNOWLEDGE AT WHARTON (July 26, 2019), https://knowledge.wharton.upenn.edu/article/impact-of-social-media/ [https://perma.cc/96TV-KSZ3] ("Social media has become really fundamental to the way that billions of people get information about the world and connect with each other, which raises the stakes enormously.").

post censorship, social media platforms are violating the First Amendment.

As evidenced above, Section 230 immunizes those guilty of censoring otherwise protected speech through a broad interpretation of the commerce clause. This is a flawed interpretation of constitutional law, however, because the ability of Congress to regulate internet service providers does not include the power to regulate the speech contained on those providers' platforms.[125] By regulating communications as commerce, providing immunity worth billions of dollars to the companies it regulates through Section 230, and threatening to reconsider Section 230's immunity provision, the government maintains a strong upper hand in coercing social media platforms into censoring otherwise protected speech.

Many supporters still maintain that Section 230 is a good law that protects internet speech. This is because removing immunity from legal action for removing content would open the platforms to legal action related to content moderation.[126] This was true when Section 230 was signed into law, but today, Section 230 has become a tool used by the federal government to coerce platforms into complying with their desires for censorship.[127] The federal government uses vague threats of Section 230 reform or repeal to convince platforms to censor users so as to avoid upsetting the federal government and having their immunity shield weakened or removed.[128] Service providers that censor disfavored or "politically objectionable" speech at the government's bidding are not acting as Good Samaritans and exceed the scope of Section 230's immunity.[129] Accordingly, Section 230 is in dire need of clarification

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[125] John Bach McMaster & Frederick D. Stone, *James Wilson, State House Speech*, THE UNIV. OF CHICAGO PRESS, https://press-pubs.uchicago.edu/founders/documents/v1ch14s23.html [https://perma.cc/L94Q-2K3U] (last visited Oct. 30, 2024) (discussing James Wilson's 1787 "State House Speech." Wilson states "a power similar to that which has been granted for the regulation of commerce" did not grant the government authority to regulate "literary publications.").

[126] *See* Kosseff, *supra* note 85.

[127] Rebecca Kern, *White House Renews Call to 'Remove' Section 230 Liability Shield,* POLITICO (Sept. 8, 2022), https://www.politico.com/news/2022/09/08/white-house-renews-call-to-remove-section-230-liability-shield-00055771 [https://perma.cc/3BX3-B68U].

[128] *Id.*

[129] *See* Brief Amicus Curiae for America's Future et al., *supra* note 92 at 4.

or amendment to "discourage government efforts to control the editorial decisions of providers… to apply only to those who meet each of the statutory qualifications."[130]

V. PROPOSED SOLUTIONS

Based on the developments seen in *Missouri v. Biden*, one could reasonably conclude that the federal government sought to employ private actors because of the immunity established in Section 230.[131] The broad immunity established by the Court using Section 230(c) has been widely misconstrued from Congress' original intent. Section 230, part of the Communications Decency Act of 1996, was initially enacted to protect online service providers from civil liability actions based on third-party content.[132] Congress's original intent in Section 230 was to protect internet service providers from the actions of users on their platforms.[133] Section 230 does not define "publisher". However, the ordinary meaning of its root (publish) is "to disseminate to the public."[134] As in *Dyroff*, an internet database service is only entitled to immunity under Section 230 when it solely publishes "information created or developed by third parties."[135] The *contra proferentem* rule interprets ambiguities against the drafter. Thus, "publisher" could be construed against the government, undermining their Section 230 immunity claim.

In *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, the petitioner, sought a writ of certiorari from the Supreme Court.[136] In its defense of the suit brought against it, Malwarebytes sought immunity under Section 230(c)(2), which states that "provider[s] cannot be held liable for providing tools 'to restrict access to material' that it 'considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.'"[137] In his

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[130] *Id*. at 33.

[131] *See generally* 680 F. Supp. 3d 630 (W.D. La. 2023).

[132] *See supra* text accompanying notes 68-74 (discussing the legislative history of Section 230).

[133] *Id.*

[134] *Publish*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/publish [https://perma.cc/RS36-3XBV] (last visited Oct. 8, 2024).

[135] Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1097-98 (9th Cir. 2019).

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

[137] *Id.* (quoting 47 U.S.C. § 230(c)(2))

concurrence to the Supreme Court's denial of certiorari, Justice Thomas stated that he agreed with the Court's denial but that ". . . in an appropriate case, we should consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms."[138] Justice Thomas also stated:

> [p]aring back the sweeping immunity courts have read into §230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place. Plaintiffs still must prove the merits of their cases, and some claims will undoubtedly fail. Moreover, States and the Federal Government are free to update their liability laws to make them more appropriate for an Internet-driven society.[139]

Finally, Justice Thomas affirmed his desire for the Court to take up this issue in the appropriate case, writing, ". . . we need not decide today the correct interpretation of Section 230. But in an appropriate case, it behooves us to do so."[140]

Today, our society is undoubtedly internet driven. When Congress granted immunity to Internet providers in 1996, it allowed the Internet to evolve and flourish. However, just because Congress took the correct actions in 1996, does not mean that the same law is correct in today's society. Just as the Internet has evolved, so should the laws that govern our interactions on the Internet. In today's increasingly online society, there is a dire need for the courts to define the protections of Section 230. In 1996, those who sought protection from liability through Congressional action were a small community in a newly formed industry. This industry has become one of the largest and most powerful in the world.

Since its inception, there have been a multitude of efforts to define or restructure Section 230. To date, these efforts have all failed. Based on the behemoth Section 230 has been allowed to evolve into, it must evolve to meet today's digital age. As it stands, the immunity enacted through Section 230 prevents any civil lawsuit against the providers from advancing in Court, even those

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[138] *Id.* at 14.
[139] *Id.* at 18.
[140] *Id.*

alleging civil rights violations – that is how sweeping this immunity is. This is a bipartisan problem which requires a bipartisan solution. Suppose these platforms are to continue seeking endorsement, funding, and protection from the federal government. In that case, it is imperative that they comply with the basic constitutional principles that the federal government itself is held to.

A. Congressional Action on Section 230

Since the passage of Section 230, dozens of proposed amendments have sought to curtail the sweeping immunity granted to internet service providers.[141] However, only five exceptions made it through both chambers of Congress and across the President's desk.[142] The one exception to this sweeping immunity based on content is Section 230(e)(5), which bars immunity for interactive computer services that knowingly participate in or further acts of sexual exploitation of children or sex trafficking.[143] Congress should seek to amend Section 230 similarly to clarify that ex-post censorship is not ex-ante editorial discretion[144] and enact a federal law that amends the applicable code subsections under 230.

During the 116th Congress, Sen. Josh Hawley introduced the "Limiting Section 230 Immunity to Good Samaritans Act," which sought to limit Section 230 immunity for platforms acting in bad faith.[145] This bill sought to "amend the Communications Act of 1934 to provide accountability for bad actors who abuse the Good Samaritan protections provided under that Act."[146] Sen. Hawley alleged that social media platforms, or "edge providers"[147] as named in the bill, use "Good Samaritan" protections of Section 230 to

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[141] VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RES. SERV., R46751, SECTION 230: AN OVERVIEW 32 (2024), https://crsreports.congress.gov/product/pdf/R/R46751 [https://perma.cc/ZS4X-L75D].

[142] *Id.* at 26.

[143] 47 U.S.C. § 230(e)(5); *see also* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (2018).

[144] *See infra* Part V.

[145] *See* Limiting Section 230 Immunity to Good Samaritans Act, S.3983, 116th Cong. (2020).

[146] *Id.*

[147] *Id.*

"silence political speech from conservatives without any recourse for users[.]"[148] "Edge providers" are interactive services that (1) provide a website, online application, or mobile application through which information provided by another information content provider is distributed; (2) saw more than 30,000,000 users in the United States or 300,000,000 users worldwide access the service in any month of the past year; and (3) generated $1.5 billion in gross revenue in the past tax year.[149] These requirements mean the bill is targeted at curbing censorship on the large social media platforms that use the marketplace of ideas to generate content but also exploit Section 230 to conduct censorship ex-ante. This bill seeks to require edge providers to exercise enforcement of their terms of service in a good faith manner, without selective enforcement of these terms.[150]

Key provisions of this bill, specifically sections (3)(B)(iii) and (iv), exemplify bad faith actions by describing conduct such as "the intentional failure to honor a public or private promise made by, or on behalf of, the provider; or any other intentional action taken by the provider without an honest belief and purpose, without observing fair dealing standards, or with fraudulent intent."[151] This provision seems to target the censorship scheme where platforms have taken recommendations from censorship partners, such as the Election Integrity Project, about specific posts that should be removed or censored.[152] These actions are counter to a fundamental principle of our Nation's founding: *"Those who own the country ought to govern it."*[153] Sen. Hawley's bill directly addresses this principle. Resolving the unconstitutional violations of the censorship industrial complex can be achieved at the state or federal level. However, a federal statute is preferred because

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[148] Press Release, Sen. Josh Hawley, Rubio, Hawley Announce Bill Empowering Americans to Hold Big Tech Companies Accountable for Acting in Bad Faith (Jun. 17, 2020) (available at https://www.hawley.senate.gov/senator-hawley-announces-bill-empowering-americans-sue-big-tech-companies-acting-bad-faith/ [https://perma.cc/5ERF-W6ZW]).

[149] *See* Limiting Section 230 Immunity to Good Samaritans Act, S.3983, 116th Cong. (2020).

[150] *Id.*

[151] *Id.*

[152] *See* THE WEAPONIZATION OF 'DISINFORMATION', *supra* note 20 at 97-102.

[153] *John Jay,* LEGACY CLUB OF BOS., https://legacyclub.boston/john-jay [https://perma.cc/A5K5-R99X] (last visited Jan. 18, 2024).

a federal law would make the solution clear and binding on all states.[154]

An alternative to amending Section 230 is sunsetting the entire provision. In May 2024, the House Energy and Commerce Subcommittee on Communications and Technology held a hearing on "Legislative Proposal to Sunset Section 230 of the Communications Decency Act."[155] In this hearing, the committee discussed a proposed bill from Rep. Rodgers (R-WA) and Rep. Pallone (D-NJ) to sunset Section 230 at the end of 2025.[156] In a Wall Street Journal editorial on their sunset bill, Rep. Rodgers and Rep. Pallone describe the issue perfectly.[157] They state that "Section 230 was written before many of these companies even existed or the full effect of the internet's capabilities were known. Courts have expanded what Congress originally intended, interpreting Section 230 in a way that gives Big Tech companies nearly unlimited immunity from legal consequences."[158] They further state that the intent of this bill is a result of "Big Tech's refusal to engage in a meaningful way."[159] Therefore, sunsetting Section 230 would "restore the internet's intended purpose – to be a force for free expression, prosperity and innovation."[160] Although the proposed bill has not been formally introduced in Congress, it shows the increased attention these proposals have received in recent years.

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[154] *ArtVI.C2.1 Overview of the Supremacy Clause*, CONGRESS.GOV, https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE_00013395/ [HTTPS://PERMA.CC/NFN7-GAL5] (last visited Oct. 8, 2024).

[155] *See generally Legislative Proposal to Sunset Section 230 of the Communications Decency Act: Hearing on Communications Decency Act Section 230 Before the H. Energy and Com. Subcomm. On Commc'ns and Tech.*, 118th Cong. (2024). https://energycommerce.house.gov/events/communications-and-technology-subcommittee-hearing-legislative-proposal-to-sunset-section-230-of-the-communications-decency-act [https://perma.cc/SZL6-UBSR].

[156] *Id.*

[157] Cathy McMorris Rodgers & Frank Pallone Jr., Opinion, *Sunset of Section 230 Would Force Big Tech's Hand*, WALL ST. J., May 12, 2024, at A17, https://www.wsj.com/articles/sunset-of-section-230-would-force-big-techs-hand-208f75f1 [https://perma.cc/9KMY-V3EG].

[158] *Id.*

[159] *Id.*

[160] *Id.*

B. State Regulation

In response to allegations of flagrant censorship and misuse of content moderation policies, Florida and Texas passed similar bills that sought to prevent the deplatforming of users.[161] Florida's SB 7072 was introduced in April 2021 and signed into law by Governor Ron DeSantis that May.[162] SB 7072 established "a violation for social media deplatforming of a political candidate or journalistic enterprise and requires a social media platform to meet certain requirements when it restricts speech by users."[163] Apart from financial penalties and antitrust actions that could be brought against violators by the State of Florida, SB 7072 provides for a right to bring "private cause of action against a social media platform for failing to apply consistently certain standards and for censoring or de-platforming without proper notice."[164] This private right is essential because there are questions of whether this conflicts with the civil immunity provided by federal law under Section 230.

The Texas legislature enacted House Bill 20 to promote free speech in social media applications.[165] The Texas statute generally prohibits social media platforms from censoring speech based on the speaker's viewpoint.[166] On appeal to the Fifth Circuit, the Court reasoned that the First Amendment "protects every person's right to 'the freedom of speech.' But the platforms argue that buried somewhere in the person's enumerated right to free speech lies a corporation's *unenumerated* right to *muzzle* speech."[167] The implications of this unenumerated right are shocking. If this right were to be recognized, it would allow social media companies to censor anyone they do not agree with for any reason they deem

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[161] *See* Amy Howe, *Justices Take Major Florida and Texas Social Media Cases*, SCOTUSBLOG (Sep. 29, 2023, 9:48 AM), https://www.scotusblog.com/2023/09/justices-take-major-florida-and-texas-social-media-cases/ [https://perma.cc/29FT-UNC7].

[162] *S.B. 7072*, THE FLA. SENATE, https://www.flsenate.gov/Session/Bill/2021/7072/ [https://perma.cc/U7V6-D7UE] (last visited Oct. 30, 2024).

[163] *S.B. 7072 – Social Media Platforms*, THE FLA. SENATE, https://www.flsenate.gov/Committees/billsummaries/2021/html/2345 [https://perma.cc/9P56-NCL3] (last visited Oct. 18, 2024) (last visited Oct. 30, 2024).

[164] *Id.*

[165] *See generally* NetChoice, LLC, v. Paxton, 49 F.4th 439 (5th Cir. 2022).

[166] *Id.* at 444.

[167] *Id.* at 445.

reasonable. The Fifth Circuit recognized this unlimited freedom of censorship and noted that if this right were to be recognized, "email providers, mobile phone companies, and banks could cancel the accounts of anyone who sends an email, makes a phone call, or spends money in support of a disfavored political party, candidate, or business."[168] Further, a business can acquire a dominant market share by "holding itself out as open to everyone—as Twitter did in championing itself as 'the free speech wing of the free speech party.'"[169] The platform could then exercise the final say on speech conducted on its platform because it has monopolized the modern public square. The law should evolve to recognize that social media platforms are not acting in the interest of their users' free speech. The idea that corporations have the right to determine what can and cannot be said in this modern public square defeats the First Amendment's and antitrust law's objectives.

The Texas legislature has recognized that social media platforms "function as common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States."[170] Further, it opined that "social media platforms with the largest number of users are common carriers by virtue of their market dominance."[171]

Sections 2 and 7 of Texas H.B. 20 were relevant to the issue in this case and are, in turn, relevant to the issues proposed here. Section 2 requires platforms to disclose their content moderation activities by publishing a "biannual transparency report."[172] These reports will contain statistics related to content moderation activities, such as the number of instances in which the platform engaged in content moderation, how the platform was alerted of content that violated its policies, how often it removed violative content, and other metrics related to censorship.[173] Finally, under Section 2, platforms must provide users with a written explanation of why their content was deemed violative of the platform policies

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168 *Id.*
169 *Id.*
170 *Id.*
171 *See generally* NetChoice, LLC, v. Paxton, 49 F.4th at 445.
172 *Id.*
173 *Id.* at 446.

and allow the user to appeal the removal.[174] Under this section, the platform must also respond to the appeal within 14 business days.[175] Notably, only the Texas Attorney General may enforce this policy, and the Attorney General may only seek injunctive relief against the platform rather than damages.[176] Section 7 of the statute provides guidelines for viewpoint-based censorship. It states:

> [a] social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression or another person's expression; or (3) a user's geographic location in this state or any part of this state.[177]

Section 7 effectively prohibits all viewpoint-based censorship unless the speech is objectionable under a series of exceptions tailored to follow current First Amendment case law.[178] Texas' HB 20 is a rough attempt at solving the issue because upholding a law like this would challenge Section 230, organizations like NetChoice seek to stop this law, and others like it, from being enforced.

In July, the Supreme Court vacated the rulings of the Eleventh and Fifth Circuits in both *NetChoice* cases.[179] The Court directed the lower courts to perform a full First Amendment analysis as NetChoice had not provided enough evidence to meet the threshold of facial unconstitutionality.[180] In his opinion concurring in judgment, Justice Alito stated that an interactive computer service "must use the compilation of speech to express 'some sort of collective point'–even if only at a fairly abstract level."[181] This further emphasizes the difference between ex-post editorial discretion and ex-ante censorship. Justice Alito further compared the Florida and Texas laws to previous cases involving common

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[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] NetChoice, L.L.C. v. Paxton, 49 F.4th at 445-46.
[178] *Id.* at 462.
[179] Moody v. NetChoice, LLC, No. 22–277, slip op. at 3 (U.S. July 1, 2024).
[180] *Id.* at 2.
[181] *Id.* at 36 (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 558 (1995)).

carriers.[182] Previously, the Court has held that a prevailing party must "show that the challenged regulation of its curation practices violates the applicable level of First Amendment scrutiny."[183]

C. Protecting Free Speech Online

In May 2022, the Attorneys General of Missouri and Louisiana filed suit against President Biden and a number of Biden administration officials.[184] Missouri Attorney General Andrew Bailey called the case "the most important free speech lawsuit in a generation, as we highlight more than 1,400 facts showing the Biden Administration's blatant coercion and collusion with Big Tech social media companies to suppress speech it disagrees with."[185] To solve the issues with Section 230 and its exploitation by government agencies and their private partners, the Supreme Court could use this case to explicitly state that social media platforms may not use Section 230 to censor individuals and that the First Amendment takes precedent over the civil immunity afforded to these platforms for conducting editorial discretion. The *Missouri* case has the potential to be one of the most important free speech cases in the history of our country, especially if the marketplace of ideas is to follow into the digital age. It is imperative that we not allow the reigning majority political party to determine what is or is not permitted in the digital marketplace of ideas.

The distinction between content-based and content-neutral regulations is fundamental to the freedom of speech. Content-based regulations restrict what is being said. These regulations are highly disfavored and subject to strict scrutiny review.[186] Under strict scrutiny, the government must prove the action is narrowly tailored

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[182] *Id.* at 37.

[183] *Id.*

[184] Missouri v. Biden, 680 F. Supp. 3d 630 (W.D. La. 2023).

[185] Andrew Bailey, *Missouri Attorney General Andrew Bailey Asks Court to Block Biden from Violating Americans' 1st Amendment Rights, Citing 1,400 Facts*, MO. ATT'Y GEN, https://ago.mo.gov/missouri-attorney-general-andrew-bailey-asks-court-to-block-biden-from-violating-americans-1st-amendment-rights-citing-1400-facts/ [https://perma.cc/6626-36F6] (last visited Jan. 4, 2024).

[186] David L. Hudson Jr., *Strict Scrutiny*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV. (Aug. 16, 2021), https://firstamendment.mtsu.edu/article/strict-scrutiny/ [https://perma.cc/M9T7-PQ5R] (emphasis added).

and necessary to serve a compelling government interest.[187] To survive strict scrutiny, the government must exercise the least restrictive means possible to achieve its compelling interest.[188]

The First Amendment was enacted to protect the idea that no single person or institution, namely the government, could monopolize truth.[189] The "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[190] Even if so-called "misinformation" is not true, it is still protected under the First Amendment. The First Amendment has no explicit exception for "misinformation," nor has the Supreme Court interpreted free speech to be limited to speech the government arbitrarily determines to be true.[191] In dissenting to the Court's ruling in *Alvarez*, Justice Alito said, "Even when there is a wide scholarly consensus concerning a particular matter, the truth is served by allowing that consensus to be challenged without fear of reprisal."[192]

The First Amendment prohibits the government from outright engaging in censorship and as discussed earlier, prohibits the government from enlisting private, third parties to carry out its censorship requests.[193] As established earlier, through the state action doctrine, social media platforms engaging in content-based censorship should be held to have violated users' First Amendment rights. *R.A.V. v. City of St. Paul* established that "The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid."[194]

In *New York Times v. Sullivan*, the Court held that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity

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[187] *Id.*

[188] *Id.*

[189] *See* Wood v. Georgia, 370 U.S. 375 (1962).

[190] Ashcroft v. ACLU, 535 U.S. 564, 573 (2002).

[191] United States. v. Alvarez, 567 U.S. 709, 718 (2012).

[192] *Id.* at 752.

[193] *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); *see also* Norwood v. Harrison, 413 U.S. 455 (1973).

[194] R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377, 382 (1992) (citations omitted).

essential to the security of the Republic, is a fundamental principle of our constitutional system."[195] Further, the Court reasoned that "'[i]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions,' and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.'"[196]

In *Sullivan*, the Court looked to a prior holding, *Whitney v. California*, in which Justice Brandeis formulated the classic principle of political discussion as protected speech:

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.[197]

Speech on the internet is like the issue in *Guffey v. Mauskopf*. There, the Court held that government restrictions on employees' political activities and speech violated the First Amendment.[198] Applying strict scrutiny, the Court held that employees' strong interest in political expression strongly outweighed the government's desire to avoid disruption.[199] A similar issue is at play with the censorship complex discussed here. Individuals' right to political expression should be recognized as strongly outweighing the government's desire to control political narratives about a particular candidate or political party.

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[195] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

[196] *Id.* (citation omitted) (quoting Bridges v. California, 314 U.S. 252, 270 (1941); NAACP v. Button, 371 U.S. 415, 429 (1963).

[197] *Id.* (quoting Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)).

[198] Guffey v. Mauskopf, 45 F.4th 442, 445 (D.C. Cir. 2022).

[199] *Id.*

Regarding free speech involving social media, the government has yet to provide a compelling interest in censoring citizens other than advancing their political agenda. Even if the government could produce a compelling reason, broad censorship of disfavored speech is by far the most restrictive means to achieving that interest. Thus, it is imperative to the foundations of our Constitution that we recognize that speech in the form of 140 characters or a meme is still protected by the First Amendment. The Supreme Court has the opportunity to definitively answer this question in *Missouri*.

One of the primary functions of the First Amendment is to protect the free discussion of government, which includes elections, institutions, and candidates. The censorship of individuals seeking to use social media platforms to exercise their right to free speech is reminiscent of the Sedition Act. The Sedition Act of 1798, as quoted in *N.Y. Times Co. v. Sullivan*, "crystallized a national awareness of the central meaning of the First Amendment."[200] The Act brought criminal punishment against anyone who "write[s], print[s], utter[s] or publish[es] any false, scandalous and malicious writing or writings against the government of the United States . . . to bring them . . . into contempt or disrepute."[201] Jefferson and Madison condemned the act as unconstitutional, but President Adams used it to prosecute his political opponents.[202] Although never directly ruling that the act was unconstitutional, the Supreme Court recognized this fact in its ruling in *Sullivan*.[203]

Similar to the Sedition Act, the issue here is that social media companies will continue to censor speech because of the protections that the government has given them via Section 230. This unconstitutional censorship will continue until the scheme is recognized as unconstitutional. That is why the Supreme Court must answer this question, or Congress must adopt legislation to remove immunity for platforms that violate the First Amendment. In his dissenting opinion in *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, Justice Thomas stated that although denial of

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[200] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273 (1964).

[201] Sedition Act, ch. 74, 1 Stat. 596 (1798).

[202] *See* JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 159 (1956).

[203] *N.Y. Times Co.*, 376 U.S. at 276.

certiorari in that case was proper, Section 230 had been interpreted too broadly, and it was necessary for the Court to narrow or eliminate the civil immunity provision under Section 230 at some point in the future.[204] There is no better time than now to address Justice Thomas' concerns.

While also addressing the issue of protected speech extending to social media platforms, the Court could also solve this issue through the state action's public function exception.[205] The Supreme Court has held that "'a private entity can qualify as a state actor in a few limited circumstances,' such as '[1] when the private entity performs a traditional, exclusive public function; [2] when the government compels the private entity to take a particular action; or [3] when the government acts jointly with the private entity.'"[206] In applying this test to the issues alleged in the *Missouri* case, for example, it is unclear whether Section 230 provides immunity for these actions. The Court must once and for all state that the First Amendment trumps Section 230.[207]

Based on the state action doctrine, the systemic relationship that has been established between the social media platforms likens the platforms to government-owned property.[208] Therefore, it is necessary to explore forum-based regulations. When speech occurs in a government-controlled forum, a forum analysis must be conducted. This analysis builds upon the distinction between content-based or content-neutral regulation but adds considerations based on the type of property in which the speech occurs. There are three types of forums: traditional public forums, limited public forums, and nonpublic forums.[209] Traditional public forums are places that have traditionally been used for public speech, such as streets, sidewalks, and public parks.[210] Generally,

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[204] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 18 (2020).

[205] *Amdt1.7.2.4 State Action Doctrine and Free Speech*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/amendment-1/state-action-doctrine-and-free-speech [https://perma.cc/L3W4-EQ9E] (last visited Jan. 31, 2024) (*quoting* Manhattan Cmty. Access Corp. v. Halleck, No. 17-702, slip op. at 6 (U.S. June 17, 2019)).

[206] *Id.*

[207] Bambauer, *supra* note 121.

[208] David L. Hudson Jr., *Public Forum Doctrine*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV. (Aug. 10, 2023), https://firstamendment.mtsu.edu/article/public-forum-doctrine/ [https://perma.cc/ZP78-H6LU].

[209] *Id.*

[210] *Id.*

the government may not selectively restrict or prohibit access to traditionally public forums, and regulations of speech in these forums are subject to normal rules of free speech.[211] The public forum doctrine protects speech on social media from state action. The Supreme Court has described a "'public function' test, under which the First Amendment will apply if a private entity exercises 'powers traditionally reserved to the State.'"[212]

Limited public forums, also known as designated public forums, are nontraditional forums that have been designated by the government as public forums for specific or limited purposes, such as public schools.[213] The government is in no way obligated to create limited public forums, but once it does so, the forum is subject to the normal rules of free speech. Unlike traditional forums, however, the government may restrict or completely prohibit access to limited public forums by allowing the limited forum to be used only for its intended purposes.[214] However, these restrictions must be viewpoint-neutral, and the government may not restrict access or discriminate based on the speakers' viewpoints.[215] Avenues for expression need not be physical either; freedom of speech under limited public forum analysis can include newspapers or other written mediums.[216] Therefore, social media platforms fall under this distinction. Under the time place and manner test, the regulation must be content-neutral, narrowly tailored to serve a significant government interest, and it must leave ample alternative channels open for communicating the speaker's message.[217] Based on the idea of limited public forums, social media platforms should be treated as such. By using the public function test, we can see that editorial discretion should not apply to the

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[211] *Id.*

[212] VALERIE C. BRANNON, CONG. RES. SERV., R45650, FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT (2019).

[213] *Id.*

[214] *Id.*

[215] *Id.*

[216] *First Amendment*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/first_amendment [https://perma.cc/FRF2-QZ37] (last visited Jan. 31, 2024).

[217] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (*quoting* Bridges v. California, 314 U.S. 252, 270 (1941); NAACP v. Button, 371 U.S. 415, 429 (1963)).

social media platforms that cooperate with government agencies to censor politically disfavored speech.

CONCLUSION

As evidenced in *Missouri v. Biden*, the government will stop at nothing to restrict access to the marketplace of ideas if it believes these ideas are against its then-current political ideologies. We must stand up to this tyranny and fix the broken immunity afforded to companies who seek to conspire with the government to breach users' constitutional freedoms. This can be accomplished in a variety of ways, only a few of which have been explored here. An amendment to Section 230 to remove the civil liability for social media companies acting in concert with the federal government would likely put an immediate end to this continuing violation.

Regardless of the final disposition in *Missouri v. Biden*, and the two *NetChoice* cases, the root cause of this issue–Section 230–is likely to remain unaddressed. Therefore, it is necessary for legislators and judges to explore this issue further and firmly cement the First Amendment as a cornerstone of the new digital age. This issue remains at the forefront of discussion in today's legal and political spheres, especially with Elon Musk's acquisition of Twitter and with comments made by Mark Zuckerberg regarding the efforts of the Biden administration to censor information that would have harmed public perception of the government's actions. Notably, on January 20th, 2025, one of President Trump's first actions on returning to the White House was to issue an Executive Order "Ending Censorship of Protected Speech."[218] Both litigation and government investigations signal that this issue will remain at the forefront of public discourse. Therefore, it is essential to consider all relevant factors to solving the issues surrounding Big Tech and censorship.

Section 230 is a broad and complex tool used by both private parties and government agencies alike to censor speech that, expressed in a traditional public forum, should be an open and closed case of First Amendment protection. Therefore, advocates of

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[218] *Restoring Freedom of Speech and Ending Federal Censorship*, THE WHITE HOUSE (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/restoring-freedom-of-speech-and-ending-federal-censorship/ [https://perma.cc/C7HR-92EX].

a free society, regardless of partisanship, should all work together to solve this issue. Protecting the marketplace of ideas should transcend partisan politics and is an issue that should deeply concern all Americans. When a social media company takes action to disrupt the free expression of thoughts and opinions by harming the individual, the company should not be afforded immunity under the same laws that seek to promote and protect civil discourse amongst all citizens of the United States.