

THE FATE OF SECTION 230

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*For years Section 230 has operated as the Internet Giants’ shield from liability for user content posted on their platforms, regardless of the extent of harm to the public. The Supreme Court’s decisions in *Gonzalez v. Google* and *Twitter v. Taamneh* inform that the law’s broad protections may stay for now, but the Court suggested to Congress that such protections may need to change or disappear altogether. Although proponents of maintaining Section 230 “as is” fear that any change to the law may lead to Internet companies possibly overhauling their platforms or restricting speech on their platforms in an effort to avoid a windfall of lawsuits, critics of Section 230 see the law as a broad shield for these companies to avoid legal accountability. This Note argues that Congress should overhaul Section 230 and replace it with a federal regulatory mechanism, modeled after the European Union’s Digital Services Act, that regulates Internet companies, improves transparency among their moderation policies, and demands accountability when such policies cause harm to users.*

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INTRODUCTION

Section 230 of the Communications Decency Act (“CDA”)¹ has been hailed as the “Magna Carta of cyberspace”² for shaping the modern Internet:³ “No provider or user of interactive computer services shall be treated as the publisher or speaker of any information provided by any other information content provider.”⁴ The brevity of this twenty-six-word provision belies its power: the law provides “federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a third party.”⁵ Even though Section 230(c) does not contain the word “immunity,” courts have broadly interpreted the provision as a shield immunizing Internet Computer Providers (“ICPs”),⁶ including Internet Services Providers (“ISPs”), search engines, and websites, from liability for practically any user-generated content on their platforms.⁷ Any state laws or private causes of action attempting to impose liability on these companies

1. 47 U.S.C. § 230.

2. Kallen Dimitroff, *Mark Zuckerberg, Joe Manchin, and ISIS: What Facebook’s International Terrorism Lawsuits Can Teach Us About the Future of Section 230 Reform*, 100 TEX. L. REV. 153, 157 (2021).

3. JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* 3 (2019).

4. 47 U.S.C. § 230(c)(1).

5. *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online, Inc.*, 206 F.3d 980, 984–85 (10th Cir. 2000); 47 U.S.C. § 230(e)(3) (“No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”); John Spisak, *A Strange-Love or: How I Learned to Stop Worrying and Love Section 230*, 61 WASHBURN L.J. 395, 397 (2022).

6. 47 U.S.C. § 230(f)(3) (defining an information content provider as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service”).

7. *See, e.g.*, PAUL M. STERNBERG, *SECTION 230: FREE SPEECH AND THE INTERNET, THE LAW THAT MAKES IT ALL POSSIBLE* (2023); Dimitroff, *supra* note 2, at 157; *see, e.g.*, DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 25 (2014); Nicholas Bradley, *Something for Nothing: Untangling a Knot of Section 230 Solutions*, 43 CARDOZO L. REV. DE NOVO 58, 62 (2022); Ashley Johnson & Daniel Castro, *Fact-Checking the Critiques of Section 230: What Are the Real Problems?*, INFO. TECH. & INNOVATION FOUND. (Feb. 22, 2021), <https://itif.org/publications/2021/02/22/fact-checking-critiques-section-230-what-are-real-problems/> [https://perma.cc/52WJ-2FE8]; Chase J. Edwards, *Location-Based Marketing, Regulation of Home-Share Platforms, and Other Developments in Section 230 Immunity*, 75 BUS. LAW. 1667, 1667 (2019).

were effectively preempted.⁸ “Courts, in interpreting Section 230, presumed that, without the protection, providers would be chilled into censoring unpopular or unsavory online user conduct far more than necessary to avoid even the possibility of liability.”⁹

The courts reached this interpretation based on the vision shared, sometimes explicitly, by at least some of the drafters of the bill, including Senator Ron Wyden (D-Or.) and then-Representative Chris Cox (R-Cal.), who viewed the Internet as “a unique and wholly new medium of worldwide human communication,”¹⁰ entitled to certain protections from the imposition of traditional government regulations, and capable of “encourag[ing] content diversity and the free flow of information.”¹¹ This vision came under threat when court rulings suggested that Internet companies were subject to secondary liability laws and penalties, even those who made “good-faith, but imperfect, efforts to moderate content” on their platforms.¹² Motivated in part to protect the so-called “little guy,” fledgling Internet companies that populated the Internet at the time, lawmakers moved to pass Section 230 as part of the CDA before these rulings could become “the law of the land.”¹³

Whether the courts correctly reasoned that Congress *intended* such broad protections when it enacted Section 230 in 1996 remains a contested issue. However, the effect of such sweeping immunity on the landscape of the Internet is incontrovertible. Internet users were free to have their voices heard online without fear of censorship, ranging from posting negative reviews on Yelp about a disappointing restaurant experience, for instance, or publishing a Facebook post criticizing their local politician.¹⁴ Moreover, a significant portion of the tech industry gained unprecedented

8. 47 U.S.C. § 230(e)(3) (“No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section”); Spisak, *supra* note 5, at 397.

9. Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 203, 219 (2018).

10. *Reno v. ACLU*, 521 U.S. 844, 850 (1997); *see* KOSSEFF, *supra* note 3.

11. Sylvain, *supra* note 9, at 219.

12. *See, e.g., Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995) (warning that if a provider moderated some content on its site, it took on liability for posts that it did not remove); *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991); Tyler Dillon, *Leash the Big Dogs, Let the Small Dogs Roam Free: Preserve Section 230 for Smaller Platforms*, 74 FED. COMM. L.J. 171, 174 (Feb. 1, 2022).

13. Ellen L. Weintraub & Thomas H. Moore, *Section 230*, 4 GEO. L. TECH. REV. 625, 626 (2020); KOSSEFF, *supra* note 3, at 165; *see* Ellison Snider, *Evolving Online Terrain in an Inert Legal Landscape: How Algorithms and AI Necessitate an Amendment of Section 230 of the Communications Decency Act*, 107 MINN. L. REV. 1829, 1832 (2023); *see also* Sylvain, *supra* note 9, at 219.

14. *See* Edwards, *supra* note 7, at 1669.

protection from taking legal responsibility for “the words, images, videos, or other [third-party] content.”¹⁵ They were also given the power to decide what content to remove or leave untouched on their platforms, “free from government oversight.”¹⁶ This recipe led to the emergence of social media companies.¹⁷ Either denomination includes, but is not limited to, Meta¹⁸ (or its platforms, Facebook or Instagram), X (formerly known as Twitter),¹⁹ and TikTok.²⁰

In the first decade following Section 230’s enactment, these social media titans replaced newspapers as the “principal sources for knowing current events” for many Americans²¹ and were praised as “an online public square available to any private citizen desiring ‘to make his or her voice heard.’”²² Today, with billions of users flooding their platforms, Big Tech has become an influential communications conduit, providing “open forums for user-generated discourse, cultural development, and intellectual activity” in a way that the early proponents of immunity and nongovernmental interference perhaps believed unfathomable.²³ Big Tech actively shapes “every aspect of the user experience.”²⁴

15. KOSSEFF, *supra* note 3, at 65; see John Villasenor, *The Supreme Court and Social Media Platform Liability*, BROOKINGS INST. (Oct. 10, 2022), <https://www.brookings.edu/blog/techtank/2022/10/10/the-supreme-court-and-social-media-platform-liability/> [https://perma.cc/2N2W-4AZ4].

16. David McCabe, *Supreme Court Poised to Reconsider Key Tenets of Online Speech*, N.Y. TIMES (Jan. 19, 2023), <https://www.nytimes.com/2023/01/19/technology/supreme-court-online-free-speech-social-media.html> [https://perma.cc/W9KS-Q3PU].

17. This Note will alternate between “social media companies” and “Big Tech.”

18. Jennifer Elias, *Tech Companies Like Google and Meta Made Cuts to DEI Programs in 2023 After Big Promises in Prior Years*, CNBC (Dec. 22, 2023, 9:00 AM), <https://www.cnbc.com/2023/12/22/google-meta-other-tech-giants-cut-dei-programs-in-2023.html> [https://perma.cc/7GCR-9M9Y].

19. Don Muir, *Meta vs. X: The Race to Be the Next Big Fintech*, FORBES (July 6, 2023, 6:39 PM), <https://www.forbes.com/sites/donmuir/2023/07/06/twitter-sets-out-to-disrupt-financial-services-alongside-big-tech-rivals/?sh=7364167070ef> [https://perma.cc/AJ44-VRWS].

20. Makenzie Holland, *U.S. Senators Renew Efforts to Rein in Big Tech, Ban TikTok*, TECHTARGET (Mar. 9, 2023), <https://www.techtarget.com/searchcio/news/365532279/US-senators-renew-efforts-to-rein-in-big-tech-ban-TikTok> [https://perma.cc/DA6S-85FT].

21. *Packingham v. North Carolina*, 137 S.Ct. 1730, 1732 (2017) (noting how Section 230 enabled diverse platforms to take a variety of approaches to hosting the speech of others and has made the Internet a critically important forum for ordinary people to speak and access information freely); Derek E. Bambauer, *How Section 230 Reform Endangers Internet Free Speech*, BROOKINGS INST. (July 1, 2020), <https://www.brookings.edu/techstream/how-section-230-reform-endangers-internet-free-speech/> [https://perma.cc/U7X4-84LL].

22. *Packingham*, 137 S.Ct. at 1737.

23. 47 U.S.C. § 230(a)(3); Sylvain, *supra* note 9, at 218.

24. See Sylvain, *supra* note 9, at 218 (“Today, online services do so much more than relay or store user-generated content in the way that the early proponents of immunity

The new Internet landscape, brought about by Section 230, has seen public trust toward the Internet and Big Tech dwindle over the years, in part due to scathing reports²⁵ connecting libelous speech, extremist content, and real-world harm to Internet use. Revelations of bad Big Tech behavior have raised questions over how these companies “might have unduly affected mental health, elections, genocides, wars, and political debates” through their non-government regulated moderation policies.²⁶ They have also raised the question of whether these powerful platforms can be held legally responsible.²⁷

Presidents²⁸ and lawmakers²⁹ on both sides of the aisle have been receptive to public calls for reform or the complete overhaul of the law.³⁰ Further, a growing number of courts have begun to scrutinize the scope of the law’s liability protections, culminating in the Supreme Court reviewing the law for the first time in *Gonzalez v. Google*³¹ and *Twitter v. Taamneh*³² in its Spring 2023 term.³³ The Court was expected to take one of two routes: Either limit Section 230’s liability protections “for tech companies and free speech” or solidify the shield for social media companies from third-party

and nongovernmental interference presumed. They actively shape every aspect of the user experience. Many of the most successful internet companies . . . design their applications to collect, analyze, sort, reconfigure, and repurpose user data for their own commercial reasons . . . These developments belie any suggestion that online intermediaries are merely conduits of user information anymore.”)

25. See, e.g., *Section 230 – Nurturing Innovation or Fostering Unaccountability?*, U.S. DEPT OF JUST. (June 2020), [https://www.justice.gov/ag/file/1072971/d1?inline=;Comm'n Info. Disorder, Final Report](https://www.justice.gov/ag/file/1072971/d1?inline=;Comm'n%20Info.%20Disorder,%20Final%20Report), ASPEN INST. (Nov. 2021), https://www.aspeninstitute.org/wp-content/uploads/2021/11/Aspen-Institute_Commission-on-Information-Disorder_Final-Report.pdf [<https://perma.cc/F9JC-NMA2>].

26. McCabe, *supra* note 16.

27. *Id.*

28. See Casey Newton, *Everything You Need to Know About Section 230*, VERGE (Dec. 29, 2020, 2:50 PM), <https://www.theverge.com/21273768/section-230-explained-internet-speech-law-definition-guide-free-moderation> [<https://perma.cc/WAG5-UZGF>].

29. See Makena Kelly, *The PACT Act Would Force Platforms to Disclose Shadow-bans and Demonetizations*, VERGE (June 24, 2020, 1:36 PM), <https://www.theverge.com/2020/6/24/21302170/facebook-google-brian-schatz-john-thune-section-230-content-moderation> [<https://perma.cc/998H-9Z55>]; see Eric Goldman, *The “EARN IT” Act Is Another Terrible Proposal to “Reform” Section 230*, TECH. & MKTG. L. BLOG (Feb. 18, 2020), <https://blog.ericgoldman.org/archives/2020/02/the-earn-it-act-is-another-terrible-proposal-to-reform-section-230.htm> [<https://bipartisanpolicy.org/blog/gonzalez-v-google/>].

30. Kelly, *supra* note 29; Goldman, *supra* note 29; see Enrique Armijo, *Reasonableness as Censorship: Section 230 Reform, Content Moderation, and the First Amendment*, 73 FLA. L. REV. 1, 9 (2021).

31. *Gonzalez v. Google LLC*, 598 U.S. 617, 622 (2023).

32. *Twitter, Inc. v. Taamneh*, No. 21-1496, slip op. at 31 (U.S. May 18, 2023).

33. Sabine Neschke et al., *Gonzalez v. Google: Implications for the Internet’s Future*, BIPARTISAN POL’Y CTR. (Nov. 29, 2022), <https://bipartisanpolicy.org/blog/gonzalez-v-google/> [<https://perma.cc/4JAM-W3AY>].

content, regardless of how harmful.³⁴ The Court declined to take either path.³⁵ Its inaction caused widespread disappointment among reformists and relief among proponents of preserving the law as interpreted by lower courts, but it also sparked debate on what to do with Section 230 now that the Court has punted the issue to Congress. Both sides fail to see the significance of the Court's move. "By skirting Section 230," the Court effectively opened the door for elected officials to reform Section 230's protections.³⁶ The fate of Section 230 rests in lawmakers' hands.³⁷

Part I of this Note describes the context behind Section 230's inception and how courts' decisions to expand the law's protective scope in the years following its passage have crafted an impenetrable liability shield for technology companies that have fueled the meteoric rise of Big Tech. Part II explores the effects of Section 230 and examines arguments weighing the harms resulting from Section 230 immunity against the harms of repealing or reforming the immunity doctrine. Part III calls on Congress to take up the Court's call and act on Section 230 with these harms in consideration. Specifically, it argues that Congress should overturn Section 230 and pass uniform federal regulations that are modeled after the European Union's Digital Services Act (DSA),³⁸ and that demand transparency and accountability from Big Tech, impose civil liability on Big Tech for failing to monitor content on their platforms, and protect and empower online users.

34. Bina Venkataraman, *The Supreme Court Is Right About Google and Twitter. Now Congress Must Act*, WASH. POST (May 19, 2023, 9:21 AM), <https://www.washingtonpost.com/opinions/2023/05/19/section-230-supreme-court-congress-internet-google-twitter/> [<https://perma.cc/2569-WXNM>].

35. *Gonzalez*, 598 U.S. at 622; *Twitter*, slip op. at 31.

36. Venkataraman, *supra* note 34.

37. See Amy Howe, *Court Agrees to Hear Nine New Cases, Including Challenge to Tech Companies' Immunity Under Section 230*, SCOTUSBLOG (Oct. 3, 2022, 7:56 PM), <https://www.scotusblog.com/2022/10/court-agrees-to-hear-nine-new-cases-including-challenge-to-tech-companies-immunity-under-section-230/> [<https://perma.cc/P279-RQQX>]; see Michael Hiltzik, *The Supreme Court Holds the Internet's Fate in Its Hands, and You Should Be Terrified*, L.A. TIMES (Oct. 13, 2022, 5:00 AM), <https://www.latimes.com/business/story/2022-10-13/a-scary-thought-the-supreme-court-holds-the-internets-fate-in-its-hands> [<https://perma.cc/P9CD-2RHD>].

38. Regulation 2022/2065 of the European Parliament and of the Council of 19 Oct. 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

I. INTERNET EXCEPTIONALISM TO TECHLASH TO *GONZALEZ* AND *TAAMNEH*: SECTION 230'S JOURNEY IN THE COURTS

A. *Internet Exceptionalism and the Enactment of Section 230*

In 1996, the year that Section 230 became law, the Internet had yet to hit the mainstream.³⁹ That changed by 1998, when an increasing number of Americans used the Internet regularly, in large part to gather information from “all-news cable television outlets, network news magazine shows, and other information sources.”⁴⁰ The Internet was perceived as unique compared to all other forms of media because it empowered users “to choose the kind of information they want to receive, and often, to respond actively to it,”⁴¹ rather than be passive observers.⁴² To followers of the philosophy of “Internet Exceptionalism,” this uniqueness merited freedom from government oversight and legal accountability.⁴³ Perhaps surprisingly, some members of Congress agreed.⁴⁴

To these lawmakers, the ICPs operating within the Internet were also unique. Contrary to other information providers, ICPs faced “an impossible task”⁴⁵ of regulating the volume of information

39. PEW RSCH. CTR., ONLINE NEWCOMERS MORE MIDDLE-BROW, LESS WORK ORIENTED: THE INTERNET NEWS AUDIENCE GOES ORDINARY 1 (1999) (A Pew Research study conducted in the 1990s found that a mere 23 percent of Americans, most of whom were well-educated, affluent men, used the Internet in 1996, but that number skyrocketed by 1999 to 41 percent, with women, adults without college degrees, and those living in low-income households flocking to the Internet's ranks.).

40. *Id.* at 23.

41. Amy Harmon, *Sad, Lonely World Discovered in Cyberspace*, N.Y. TIMES (Aug. 30, 1998), <https://www.nytimes.com/1998/08/30/us/sad-lonely-world-discovered-in-cyberspace.html> [<https://perma.cc/WPP9-V5LA>]; see Tim Wu, *Is Internet Exceptionalism Dead?*, in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 179, 182 (Berin Szoka & Adam Marcus eds., 2010); see also H. Brian Holland, *Section 230 of the CDA: Internet Exceptionalism as a Statutory Construct*, in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 189, 193 (Berin Szoka & Adam Marcus eds., 2010).

42. Harmon, *supra* note 41; Spisak, *supra* note 5, at 400.

43. See Alan K. Chen, *Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 FORDHAM L. REV. 379, 391 (2017); see Mark Tushnet, *Internet Exceptionalism: An Overview from General Constitutional Law*, 56 WM. & MARY L. REV. 1637, 1638 (2015); see generally John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), <https://www.eff.org/cyberspace-independence> [<https://perma.cc/S823-DY9D>].

44. KOSSEFF, *supra* note 3, at 78 (Statement by Rep. Cox on the need “to nurture the amazing potential of this burgeoning technology.”); see Steve Randy Waldman, *The 1996 Law That Ruined the Internet: Why I Changed My Mind About Section 230*, THE ATLANTIC (Jan. 3, 2021), <https://www.theatlantic.com/ideas/archive/2021/01/trump-fighting-section-230-wrong-reason/617497/> [<https://perma.cc/7C4L-VA4D>].

45. Villasenor, *supra* note 15.

content on their platforms against the lightning speed with which information spreads online.⁴⁶ Internet enthusiasts in Congress believed that placing burdensome moderation obligations on ICPs would amount to a death sentence, stifling their growth through fear of costly lawsuits and threatening the Internet industry's potential as a haven for free speech along with it.⁴⁷ They insisted that Congress should provide safeguards for ICPs, not create restrictions hampering their growth, a message Representative Bob Goodlatte shared with Congress in 2017:

The Internet is a tremendous opportunity. . . . Its true potential, however, lies in the future, when students and teachers can access a wealth of high quality information through the click of a computer mouse, and businesses can bring the benefits of electronic commerce to consumers. Before this can happen, creators must feel secure that when they use this new medium, they are protected by laws that are as effective in cyberspace as they are on main street.⁴⁸

Lawmakers like Representative Goodlatte who saw the “potential” of a self-regulated Internet may have grown in Congress, but not in the courts. The decisions in *Cubby, Inc. v. CompuServe Inc.*⁴⁹ and *Stratton Oakmont, Inc. v. Prodigy Services Co.*⁵⁰ show different jurisdictions formulating a liability standard to be imposed on ICPs for user-generated content hosted on their platforms. The legal standards centered around how the ICP approached its content moderation. In *CompuServe*, the court found that the ICP's contract with a third party to manage users' communications on its servers made it a mere distributor, not a publisher, of the material that it hosted, and, therefore, not liable for its content.⁵¹ Whereas in *Stratton Oakmont*, the ICP employed its own moderator team to check and approve content,⁵² which constituted taking steps to moderate user forums, and was, therefore, liable.⁵³

46. CITRON, *supra* note 7.

47. KOSSEFF, *supra* note 3, at 60.

48. *Introduction of the No Electronic Theft (Net) Act of 1997*, 105th Cong. E1529 (1997) (statement of Rep. Bob Goodlatte).

49. 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991).

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

51. Layla G. Maurer, *Cyber-Silencing the Community: YouTube, Divino Group, and Reimaging Section 230*, 17 WASH. J.L. TECH. & ARTS 172, 189 (2022).

52. *Stratton Oakmont*, 1995 WL 323710, at *4.

53. *Id.*

A group of lawmakers dismayed by what they perceived as an unfair standard (i.e., an ICP can be liable if “it trie[s] to do the right thing,”⁵⁴ but is immune if it does not) hastened to quash *Stratton Oakmont* and *CompuServe*’s punitive effects.⁵⁵ They proposed a new, protective law stipulating that “providers of Internet forums would not be liable for user-posted speech, even if they selectively censored some material.”⁵⁶ The statute was also explicit about its vision of unfettered innovation on the Internet.⁵⁷ To the bill’s drafters, this law would function as a tool to “effectuate many of the goals, ideals, and realities of the Internet exceptionalist” movement.⁵⁸ To the wider legislature, the proposed bill was an answer to the growing concern, especially following the *Stratton Oakmont* and *CompuServe* decisions, that disincentivizing technology companies from moderating their platforms would create “the specter of liability” and deter service providers from blocking and screening offensive material, to the detriment of Internet users.⁵⁹

Thus, without any significant opposition or fanfare, Section 230 passed through Congress as part of the Communications Decency Act (“CDA”) in 1996.⁶⁰ The purpose of the CDA was aimed at “protect[ing] minors from ‘indecent’ and ‘patently offensive’ communications on the Internet” by prohibiting “the knowing transmission of obscene or indecent messages.”⁶¹ Section 230 was celebrated as a step towards protecting online speech by giving “many more people access to the content that others create than they would ever have otherwise.”⁶² Whether it would survive judicial scrutiny was another question.

B. Early Treatment in the Courts

In the decade that followed, Section 230 and the idea that the Internet was exceptional, would survive, but the rest of the CDA

54. Waldman, *supra* note 44.

55. KOSSEFF, *supra* note 3, at 60.

56. Waldman, *supra* note 44.

57. Snider, *supra* note 13, at 1833.

58. Holland, *supra* note 41.

59. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

60. KOSSEFF, *supra* note 3, at 137.

61. Ronald Kahn, *Reno v. American Civil Liberties Union (1997)*, FREE SPEECH CTR. (Aug. 6, 2023), <https://firstamendment.mtsu.edu/article/reno-v-american-civil-liberties-union/> [https://perma.cc/2KEZ-X3WD].

62. Jason Kelley, *Section 230 Is Good, Actually*, ELEC. FRONTIER FOUND. (Dec. 3, 2020), <https://www.eff.org/deeplinks/2020/12/section-230-good-actually> [https://perma.cc/BZ8W-MYJB].

would not.⁶³ In *Reno v. American Civil Liberties Union*, a unanimous Supreme Court struck down certain provisions of the CDA, determining that they functioned as a content-based restriction of First Amendment free speech rights in violation of the United States Constitution.⁶⁴ The majority opinion, authored by “Justice Stevens, primarily focused on the ways in which the Internet and the radio are different⁶⁵: the latter falls into the category of broadcast media that experienced a history of extensive government regulation and is characteristically “invasive”; the former allows “tens of millions of people to communicate with one another and to access vast amounts of information from around the world”⁶⁶ and is far from invasive.⁶⁷

With the remainder of the CDA struck down and little instruction on how to proceed with Section 230 from the Court, lower courts were at a crossroad when deciding how to interpret who qualified for Section 230 immunity. One year after the enactment of Section 230, the Fourth Circuit’s interpretation of the law in *Zeran v. America Online* led to courts’ adoption of a broad interpretation of Section 230 as prohibiting liability claims for third-party content against online platforms, regardless of the classification of these online platforms as “publishers” or “distributors.”⁶⁸

In *Zeran*, malicious anonymous posts on AOL’s online “bulletin board” advertised t-shirts bearing “offensive and tasteless slogans” related to the Oklahoma City Bombing.⁶⁹ These posts encouraged interested parties to call Ken Zeran, unsuspecting and innocent, to make their purchase. After being assailed with irate calls and threats, Mr. Zeran reported the hoax posts to AOL and repeatedly requested removal of the posts, blocking of the anonymous poster, and posting of a retraction.⁷⁰ When AOL failed to carry out his requests, Mr. Zeran sued for negligence and defamation in district court, and AOL responded by invoking Section 230 as its affirmative defense.⁷¹ The district court granted AOL’s motion and the Fourth Circuit affirmed. The court held that AOL was a

63. Andy Jung, *What Is Section 230 and How Is It Different Than the First Amendment?*, FOUND. ECON. EDU. (May 27, 2022), <https://fee.org/articles/what-is-section-230-and-how-is-it-different-than-the-first-amendment/> [https://perma.cc/X349-MP2D].

64. *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

65. Kahn, *supra* note 61.

66. *Reno*, 521 U.S. at 850.

67. *Id.* at 868.

68. *Id.*

69. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 329 (4th Cir.1997).

70. *Id.*

71. *Id.*

publisher, not a distributor, and was, therefore, not liable for the offensive, anonymous posts on its platform.⁷² The court explained that the plain language of Section 230 immunizes online platforms from *virtually all suits arising from third-party content*,⁷³ “regardless of what causes of action the plaintiff actually alleges,”⁷⁴ and clarified that distributor liability is a subset of publisher liability.⁷⁵

The court’s reasoning was influenced by what it perceived as Congress’ desire to promote unfettered online speech⁷⁶ and “to encourage the development of technologies, procedures, and techniques”⁷⁷ that moderate offensive content by incentivizing companies to self-regulate their platforms.⁷⁸ Imposing distributor liability would not only contradict this purpose but would also incentivize ICPs “to be willfully ignorant” of defamatory messages on their platforms and “to cease policing their space.”⁷⁹

The Fourth Circuit’s broad interpretation in *Zeran* would spread to courtrooms throughout the country and “set the tone”⁸⁰ for the judicial interpretation of Section 230 for the next two decades.⁸¹ Courts consistently upheld and occasionally expanded Section 230 liability protections to nearly any kind of activity involving third-party content,⁸² including “in cases involving

72. *Id.* at 332.

73. *Id.* at 330–31.

74. Eric Goldman, *How Section 230 Enhances the First Amendment*, AM. CONST. SOC’Y (July 2020), https://www.acslaw.org/issue_brief/briefs-landing/how-section-230-enhances-the-first-amendment/ [<https://perma.cc/U9NM-WGWY>].

75. *Zeran*, 129 F.3d at 332.

76. *Id.* at 334.

77. Mary Anne Franks, *Moral Hazard on Stilts: ‘Zeran’s’ Legacy*, in ZERAN V. AMERICA ONLINE 39, 39 (Eric Goldman & Jeff Kosseff eds.) (ebook).

78. *Zeran*, 129 F.3d at 331; Sylvain, *supra* note 9, at 219.

79. Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J.L. & PUB. POL’Y 553, 574 (2018).

80. Michael Beder, *Understanding Cybershield Law*, STUDENT PRESS L. CTR. (Sept. 1, 2009), <https://splc.org/2009/09/understanding-cybershield-law-8621/> [<https://perma.cc/825N-XTE9>].

81. *See* KOSSEFF, *supra* note 3, at 92.

82. *See, e.g.*, *Batzel v. Smith*, 333 F.3d 1018, 1034 (9th Cir. 2003) (holding that “a service provider or user is immune from liability under § 230(c)(1) when a third person or entity that created or developed the information in question furnished it to the provider or user under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other ‘interactive computer service.’”); *Barrett v. Rosenthal*, 146 P.3d 510, 529 (Cal. 2006) (finding that Section 230 shielded Rosenthal from liability for reposting Bolen’s statements, and that Section 230’s protections apply to forwarded emails); *Blumenthal v. Drudge*, 992 F.Supp. 44, 47 (D.D.C. 1998); *Force v. Facebook, Inc.*, 934 F.3d 53, 77 (2d Cir. 2019) (Katzmann, C.J., concurring in part) (stretching the

negligence; deceptive trade practices, unfair competition, and false advertising; common-law privacy torts; tortious interference with contract or business relations; intentional infliction of emotional distress; and dozens of other legal doctrines.”⁸³ These decisions culminated into “a mighty fortress protecting platforms from accountability for unlawful activity on their systems,”⁸⁴ and elevated Section 230 into “the vehicle for Internet [E]xceptionalism.”⁸⁵

The courts occasionally played an active role in precluding claims that would place a computer service provider in a publisher role. *Ben Ezra, Weinstein, & Co. v. America Online, Inc.*⁸⁶ was one such case. Ben Ezra, Weinstein, and Company (“Ben Ezra”) brought a defamation action against AOL, alleging that on three occasions AOL published incorrect information concerning Ben Ezra’s stock quotation.⁸⁷ Ben Ezra attempted to convince the Tenth Circuit that its claim was not preempted by Section 230 immunity because AOL had acted as both an ICS and an ICP in contributing to the creation and development of Ben Ezra’s stock quotation information.⁸⁸ The court was unpersuaded and held that AOL was shielded from liability. It reasoned that “Congress *clearly* enacted Section 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.”⁸⁹ After this ruling, lawsuits seeking to hold an ISP liable for its exercise of a publisher’s traditional editorial functions were tossed out as being preempted by Section 230.⁹⁰

The U.S. District Court for the District of Columbia, in *Blumenthal v. Drudge*, also adhered to the Fourth Circuit’s broad interpretation of Section 230.⁹¹ In *Blumenthal*, a reporter for the Drudge Report, a gossip column, transmitted a defamatory report

definition of publishing to include the activity of “developing new social networks”); *Parker v. Google, Inc.*, 422 F.Supp.2d 492, 500 (2006) (finding that the ISP was eligible for immunity under Section 230 because it merely archived, cached, or provided access to content that was created by third parties); *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 985 n.3 (10th Cir. 2000).

83. Goldman, *supra* note 74, at 3.

84. Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 406–07 (2017); Snider, *supra* note 13, at 1849.

85. See Citron & Wittes, *supra* note 84, at 410; KOSSEFF, *supra* note 3, at 78.

86. *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 980 (10th Cir. 2000).

87. *Id.* at 983.

88. *Am. Online, Inc.*, 206 F.3d at 984.

89. *Id.* at 986 (emphasis added).

90. *Stoner v. eBay, Inc.*, No. 305666, 2000 WL 1705637, at *1 (Cal. Super. Ct. Nov. 1, 2000).

91. *Blumenthal*, 992 F.Supp. at 50.

he wrote about the Blumenthals to AOL, which in turn disseminated the story to its subscribers. The Drudge Report received compensation from AOL for its report. The Blumenthals sued both AOL and the Drudge Report for defamation, arguing that Section 230 was not a bar to their claim, because it did not immunize AOL from publishing a defamatory story by a paid contractor.⁹² As in *Ben Ezra* and *Zeran*, the court rejected the plaintiffs' claim and found that Section 230 immunity applied.

More than a decade after *Zeran*, courts occasionally expanded the scope of Section 230's reach by expanding the definition of "publisher." For instance, in *Doe v. MySpace*, the Fifth Circuit extended Section 230's liability protections to social media companies by holding that Myspace, a social media platform, was a publisher.⁹³ As with *Blumenthal* and *Ben Ezra*, the *Doe* court sent a message that no matter how sympathetic the victim,⁹⁴ if a claim rested on blaming an internet company for "failing to protect or police its user[s]" activity, then it would likely be tossed out by the court.⁹⁵

C. Dawn of the Techlash: Cracks Emerge in the Colossal Liability Shield

Outside the courtroom, the enthusiasm over the Internet that had defined Section 230's first decade experienced a "slow but steady erosion"⁹⁶ in its second. Despite the Internet's widespread adoption and the unprecedented number of Americans using social media, the period of 2008 to 2018, referred to as the "techlash," was dominated by "the widely-held view that the [I]nternet ha[d] gone wrong"⁹⁷ and that Big Tech and its nearly-impenetrable legal shield were to blame. The increasing animus and distrust toward Big Tech partly stemmed from its role in allowing "harassment, hate speech, disinformation, violent content, child sexual abuse material,

92. *Id.* at 51.

93. *Doe v. MySpace, Inc.*, 528 F.3d 413, 422 (5th Cir. 2008).

94. *See id.*

95. Anna Volftsun, *Doe v. Myspace, Inc.: Fifth Circuit Holds No Safety Exception to Communications Decency Act ISP Immunity*, JOLT DIGEST (May 30, 2008), <https://jolt.law.harvard.edu/digest/doe-v-myspace-inc#:~:text=Telecommunications-.Doe,MySpace%2C%20Inc.&text=On%20May%2016%2C%202008%2C%20the,working%20site%2C%20MySpace.com> [<https://perma.cc/UJ3M-TM28>].

96. KOSSEFF, *supra* note 3, at 166.

97. Hiltzik, *supra* note 37; *see generally*, Brian Deagon, *Congress May Tear Apart a Law That Launched the Internet*, INVESTOR'S BUS. DAILY (Dec. 24, 2020, 7:11 AM), <https://www.investors.com/news/technology/section-230-law-launched-internet-in-danger-fb-google-twtr/> [<https://perma.cc/GRA2-JVZU>].

nonconsensual pornography, and alleged political bias”⁹⁸ to proliferate on their platforms through flawed moderation policies and algorithms.⁹⁹ These algorithms consist of “a set of mathematical instructions that direct users’ everyday experiences down to the posts that they see,”¹⁰⁰ all without facing any liability or accountability for having directly or indirectly caused these harms.¹⁰¹ Section 230 was, therefore, viewed as “the root cause of many problems with the Internet.”¹⁰²

Around this time, a minority of courts began applying limits to Section 230’s applicability, marking a divergence from *Zeran*’s vision of the law as a shield that should be applied broadly. Two important cases decided by the Ninth Circuit started the erosion process: *Fair Housing Council of San Fernando Valley v. Roommates.com*¹⁰³ in 2008 and *Barnes v. Yahoo!, Inc.*¹⁰⁴ in 2009.

The Ninth Circuit in *Roommates.com* was the first to crack the colossal liability shield by ruling that because Roommates.com had acted as a developer, it waived its right to immunity under Section 230.¹⁰⁵ The three judges on the bench issued separate opinions discussing the appropriate application of Section 230.¹⁰⁶ Judge Ikuta called for continuing the Ninth Circuit’s status quo of granting “broad immunity for websites for claims arising from third-party content.”¹⁰⁷ Conversely, Judge Reinhardt’s opinion described the necessity of imposing liability on Internet companies that “have virtually any connection to the users’ decision to post illegal content.”¹⁰⁸ Judge Kozinski’s controlling opinion, viewed as a compromise between Judge Ikuta’s and Judge Reinhardt’s opinions, identified a limit to Section 230’s liability protections. His opinion held that Roommate.com could not invoke Section 230

98. Johnson & Castro, *supra* note 7; Robert D. Atkinson et al., *A Policymaker’s Guide to the “Techlash”—What It Is and Why It’s a Threat to Growth and Progress*, INFO. TECH. & INNOVATION FOUND. (Oct. 28, 2019), <https://itif.org/publications/2019/10/28/policymakers-guide-techlash/> [<https://perma.cc/D8R5-BXTS>].

99. AM. PSYCH. ASS’N, HEALTH ADVISORY ON SOCIAL MEDIA USE IN ADOLESCENCE 3 (May 2023), <https://www.apa.org/topics/social-media-internet/health-advisory-adolescent-social-media-use> [<https://perma.cc/86CE-VG3M>].

100. *Id.*

101. See Atkinson et al., *supra* note 98; Johnson & Castro, *supra* note 7.

102. Johnson & Castro, *supra* note 7.

103. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

104. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), as amended (Sept. 28, 2009).

105. *Roommates.com*, 521 F.3d at 1166; KOSSEFF, *supra* note 3, at 176.

106. *Roommates.com*, 521 F.3d at 1157.

107. KOSSEFF, *supra* note 3, at 174.

108. *Id.*

immunity because the website had “contribute[d] materially to the alleged illegality of the conduct.”¹⁰⁹ Roommates.com subjected itself to liability the moment it uploaded its online form with discriminatory questions, “requiring subscribers to answer those questions to use its services, and displaying the answers to those questions.”¹¹⁰

In *Barnes*,¹¹¹ the Ninth Circuit appeared to recognize a new limitation to Section 230’s liability shield for Big Tech¹¹² in that a plaintiff’s claim may successfully circumvent Section 230(c) immunity if the claim “does not arise from the defendant’s publishing or content moderation decisions.”¹¹³ The court held that Yahoo! was not immune from liability for the nude photographs of the plaintiff, Ms. Barnes, posted on their platform without her consent. Yahoo! had promised to remove the harmful posts “with the constructive intent that it be enforceable,” but the photographs remained up on its platform.¹¹⁴ The ISP did not get its way, and Ms. Barnes was able to proceed with her suit against Yahoo!¹¹⁵

Also in 2009, the Tenth Circuit interpreted yet another exception to Section 230 immunity: an ICS may not invoke the Section 230 immunity defense, for example, if the ICS aided in development of illegal content on its platform.¹¹⁶ Beyond chipping away at the law by unearthing exceptions, a shift was growing among the courts about the “fairness” of the law, especially as the fledgling Internet companies the law originally protected evolved into powerful entities, and as more legitimate claims barred by Section 230 were brought forth by sympathetic plaintiffs. Some courts began to ponder: “Why should a law designed to eliminate ISPs’ liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?”¹¹⁷

The Court’s decision to take up *Gonzalez v. Google* and *Twitter v. Taamneh*, both involving Section 230 immunity, sparked debate between Section 230 proponents and opponents, leaving both sides

109. *Roommates.com*, 521 F.3d at 1168.

110. KOSSEFF, *supra* note 3, at 175.

111. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009).

112. *See id.* at 1096; KOSSEFF, *supra* note 3, at 194 (noting that the Ninth Circuit’s opinion spurred “an immunity that until recently had appeared to be impenetrable” for Big Tech under Section 230).

113. *Johnson & Castro*, *supra* note 7.

114. *Barnes*, 570 F.3d at 1108–09 (adding that Yahoo! also violated the “baseline rule” of Subsection 230(c)(1) which provides that liability is not extended to Internet companies merely for publishing or speaking the content of other information service providers).

115. *Id.* at 1109.

116. *See FTC v. Accusearch, Inc.*, 570 F.3d 1187 (10th Cir. 2009).

117. *See e.g., Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003).

wondering what the Court would do to the immunity provision. After all, this was the first instance in the law's twenty-seven-year history that the Court had taken any cases that directly addressed its scope.

With the "fate of the Internet" in the Court's hands, questions emerged regarding what would happen to Section 230, Big Tech, and the modern Internet.¹¹⁸

D. Gonzalez and Taamneh Bring Section 230 to the Supreme Court

Just three years prior, the Court declined its first opportunity to address Section 230 in *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*,¹¹⁹ to the disgruntlement of Justice Clarence Thomas, who penned a statement railing against Big Tech and calling for "[p]aring back the sweeping immunity courts have read into Section 230" that would enable plaintiffs to raise their claims against these companies.¹²⁰ His statement in *Malwarebytes, Inc.* added fuel to the debate on whether the Court would conduct a "broad review of social media companies' immunity from lawsuits over moderation practices and content posted by users"¹²¹ and decide whether the law should be preserved, narrowed, or repealed.¹²²

In *Gonzalez*, Google faced claims that it allowed ISIS to post and circulate recruitment videos via YouTube and enabled its

118. *Fate of Internet May Hang with Supreme Court Case*, DISRUPTIVE COMPETITION PROJECT (Feb. 7, 2023), <https://www.project-disco.org/competition/020723-fate-of-internet-may-hang-with-supreme-court-case/> [<https://perma.cc/WFE5-ZCAC>].

119. *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S.Ct. 13, 13 (2020).

120. *Id.* at 18.

121. Ashley Gold, *Supreme Court's Liability Case Could Scramble the Online World*, AXIOS (Oct. 6, 2022), <https://www.axios.com/2022/10/06/supreme-courts-liability-case-could-scramble-the-online-world> [<https://perma.cc/FF54-EU6U>].

122. See, e.g., Tate Ryan-Mosley, *The Supreme Court May Overhaul How You Live Online*, MIT TECH. REV. (Feb. 13, 2023), <https://www.technologyreview.com/2023/02/13/1068311/supreme-court-section-230-gonzalez-google-content-recommendation-algorithm/> [<https://perma.cc/SP2S-6DGZ>]; David Morar, *Change Is Coming to Internet Platforms. The Supreme Court May Lead the Charge*, BARRON'S (Oct. 15, 2022, 8:00 AM), <https://www.barrons.com/articles/supreme-court-230-tech-companies-internet-twitter-51665779309> [<https://perma.cc/NN4C-GC7A>]; Brian Fung, *Supreme Court Shields Twitter from Liability for Terror-Related Content and Leaves Section 230 Untouched*, CNN (May 18, 2023, 1:56 PM), <https://www.cnn.com/2023/05/18/politics/supreme-court-twitter-google-social-media/index.html> [<https://perma.cc/FD5L-NT8D>]; Villasenor, *supra* note 15; see Ben Wodecki, *The US Supreme Court, Google and the Future of Free Speech*, AI BUS. (Feb. 22, 2023), <https://aibusiness.com/google/the-us-supreme-court-google-and-the-future-of-free-speech> [<https://perma.cc/LSC8-XJQ7>].

algorithms to recommend the videos to other users.¹²³ The plaintiffs alleged that this led to the ISIS attacks in Paris in 2015, an act of terrorism that resulted in the death of the plaintiffs' daughter. The issue at the heart of *Gonzalez* was "whether section 230(c)(1) immunizes an interactive computer service when it makes targeted recommendations of information provided by . . . another party."¹²⁴ The plaintiffs argued that it did not and warned the Court that "[a]pplication of [S]ection 230 to such recommendations removes all civil liability incentives for interactive computer services to eschew recommending such harmful materials."¹²⁵

The issue in *Twitter, Inc. vs. Taamneh* was whether online platforms, including Twitter and other Big Tech companies, are liable for violating anti-terrorism laws "if they have policies against pro-terrorist content but fail to remove all such messages."¹²⁶ In other words, *Taamneh* asked whether "recommendations of content [are] the same as display of content, the latter of which is widely accepted as being covered by Section 230?"¹²⁷

Oral arguments revealed a Supreme Court reluctant to address Section 230's complexities and unwilling to play a role in its reform.¹²⁸ In a reversal from his *Malwarebytes* statement, Justice Thomas now questioned why YouTube should be punished for its algorithms.¹²⁹ The Supreme Court decided not to repeal Section 230 or make any dent in the impenetrable liability status provided by the statute. The Justices decided the case on narrow

123. Kelsey Reichmann, *The Case That Could Change the Internet*, COURTHOUSE NEWS SERV. (Feb. 17, 2023), <https://www.courthousenews.com/the-case-that-could-change-the-internet/> [<https://perma.cc/889K-TVG8>].

124. Petition for a Writ of Certiorari at i, *Gonzalez v. Google LLC*, 598 U.S. 617 (No. 21-1333), http://www.supremecourt.gov/DocketPDF/21/21-1333/220254/20220404211548101_GonzalezPetPDF.pdf [<https://perma.cc/R9AA-JHMD>].

125. *Id.* at 7.

126. Ashley Gold, *Tech Firms Send Supreme Court a Warning*, AXIOS (Dec. 1, 2022), <https://www.axios.com/2022/12/01/supreme-court-warning-tech-section-230-terrorism> [<https://perma.cc/8QTT-C3ZN>].

127. Ryan-Mosley, *supra* note 122.

128. See Transcript of Oral Argument, *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-1496_32q3.pdf [<https://perma.cc/96UG-7H94>]; see Oral Argument, *Google v. Gonzalez* (Feb. 21, 2023) <https://www.c-span.org/video/?525323-1/gonzalez-v-google-oral-argument> [<https://perma.cc/Z22Z-AHX5>]; see Scott R. Anderson et al., *The Supreme Court Punts on Section 230*, LAWFARE MEDIA (May 19, 2023, 12:00 PM), <https://www.lawfare-media.org/article/the-supreme-court-punts-on-section-230> [<https://perma.cc/MK2L-TDNZ>]; see Robert Barnes & Cat Zakrzewski, *Supreme Court Rules for Google, Twitter on Terror-Related Content*, WASH. POST (May 18, 2023, 5:51 PM), <https://www.washingtonpost.com/politics/2023/05/18/gonzalez-v-google-twitter-section-230-supreme-court/> [<https://perma.cc/8ARD-R2FS>].

129. *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 471 (2023).

grounds and issued a statement: Congress, not the courts, decides what changes, if any, happen to Section 230. As put succinctly by Justice Elena Kagan, “We really don’t know about these things...[y]ou know, these are not like the nine greatest experts on the [I]nternet.”¹³⁰

The consensus among opponents and proponents of the law is that any alteration to Section 230 would signify the end of the hands-off legal approach to Section 230 that Big Tech has enjoyed. Some go further, claiming that it would upend their businesses altogether¹³¹ by “potentially opening the door to a flood of litigation.”¹³² Those disappointed with the Court’s decision not to address Section 230 feared that “social media companies [would] continue to benefit from broad protections against liability for content posted on their sites,”¹³³ without feeling any legal pressure from the courts to change their moderation policies or any moral pressure to face plaintiffs like the Gonzalezes.

For now, Section 230 remains intact. But the harms of an unregulated Internet threaten its hold.

II. THE DEBATE OVER PROBLEMS WITH SECTION 230’S IMMUNITY FOR BIG TECH

In 2019, actor and satirical comedian Sacha Baron Cohen lambasted Section 230 in his keynote address at the Anti-Defamation League’s annual Never Is Now Summit on Anti-Semitism and Hate.¹³⁴ Cohen followed his speech with an opinion editorial in *The Washington Post* explaining his views, writing that “freedom of speech is not freedom of reach” and arguing that online

130. Oral Argument of Justice Kagan at 43:05, *Google v. Gonzalez* 598 U.S. 617 (2023) (No. 21-1333), https://www.supremecourt.gov/oral_arguments/audio/2022/21-1333 [<https://perma.cc/7JPR-X27N>].

131. McCabe, *supra* note 16; Barbara Ortutay, *Why the Supreme Court Tiptoeing Past a Key Social Media Shield Helps Big Tech*, AP NEWS (May 18, 2023, 1:21 PM), <https://apnews.com/article/google-twitter-facebook-section-230-supreme-court-10883c85f517afe3659efdf4c3d20e36> [<https://perma.cc/93KG-GPZV>].

132. Rosie Moss, *The Future of Section 230: What Does It Mean for Consumers*, NAT’L ASSOC. ATTY’S GEN. (July 21, 2023), <https://www.naag.org/attorney-general-journal/the-future-of-section-230-what-does-it-mean-for-consumers/> [<https://perma.cc/NLX8-PSXD>].

133. *Id.*

134. *Remarks by Sacha Baron Cohen, Recipient of ADL’s International Leadership Award*, ADL (Nov. 21, 2019), <https://www.adl.org/resources/news/sacha-baron-cohen-keynote-address-adls-2019-never-now-summit-anti-semitism-and-hate> [<https://perma.cc/2RWH-SYAT>].

platforms do not deserve protection when they amplify harmful views to millions of users.¹³⁵

Cohen has a point.¹³⁶ Following the principles of Internet Exceptionalism, the drafters of Section 230 designed the law to protect nascent Internet companies from being crushed by legal fees and government oversight, both of which they viewed as obstacles in these companies' path to create potentially game-changing technologies. Today, these once fledgling companies have grown into empires of the Internet, with the power to promulgate free speech and the exchange of ideas,¹³⁷ to censor online speech,¹³⁸ and to promote certain ideas over others.¹³⁹ No longer mere hosts or distributors of user-generated content, these companies now "solicit, sort, deliver, and amplify content that holds consumer attention for advertisers,"¹⁴⁰ even if that means amplifying the reach of harmful third-party content.¹⁴¹ For many who oppose Section 230's widespread immunity provision, such tremendous influence shows that certain companies (i.e., Big Tech) have outgrown the classification of "distributors," and pushes them out of the realm of Section 230 immunity for harmful user content.¹⁴² To them, the *Gonzalez* and *Taamneh* decisions were missed opportunities to reign in Big Tech.

There are those who cheered the outcome of *Gonzalez* as a win for free speech.¹⁴³ These same proponents fear a world without Section 230 immunity, where "social media platforms would be

135. *Id.*; Sacha Baron Cohen, *The 'Silicon Six' Spread Propaganda: It's Time to Regulate Social Media Sites*, WASH. POST (Nov. 25, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/11/25/silicon-six-spread-propaganda-its-time-regulate-social-media-sites/> [https://perma.cc/H34S-YBEA].

136. Newton, *supra* note 28.

137. James D. Long & Victor Menaldo, *Section 230: Friend, Not Foe, of Free Speech*, SEATTLE TIMES (Jan. 22, 2021, 2:29 PM), <https://www.seattletimes.com/opinion/section-230-friend-not-foe-of-free-speech/> [https://perma.cc/69P3-RLBZ].

138. *See* Newton, *supra* note 28.

139. *See* Bill Baer & Caitlin Chin-Rothmann, *Addressing Big Tech's Power over Speech*, BROOKINGS INST. (June 1, 2021), <https://www.brookings.edu/articles/addressing-big-techs-power-over-speech/> [https://perma.cc/9PL6-G9LL].

140. Olivier Sylvain, *Platform Realism, Informational Inequality, and Section 230 Reform*, YALE L.J. 475, 494 (2021), [hereinafter Sylvain, *Platform Realism*].

141. Neil Fried, *Why Section 230 Isn't Really a Good Samaritan Provision*, DIGITALFRONTIERS ADVOC. (Mar. 24, 2021), <https://www.congress.gov/117/meeting/house/111407/documents/HHRG-117-IF16-20210325-SD013.pdf> [https://perma.cc/WE62-RJ6Q].

142. Sylvain, *Platform Realism*, *supra* note 140.

143. Press Release, ACLU N. Calif, ACLU Commends Supreme Court Decisions Allowing Free Speech Online to Flourish (May 18, 2023), <https://www.aclu.org/press-releases/aclu-commends-supreme-court-decisions-allowing-free-speech-online-to-flourish> [https://perma.cc/D6VN-3MYU].

more likely to censor user-posted content”¹⁴⁴ and where “the spontaneous joy of the [I]nternet”¹⁴⁵ would fade. Many proponents argue for preservation of Section 230. These dedicated believers warn that “[l]imiting or removing Section 230 protections would be harmful to innovation, free speech, and competition,”¹⁴⁶ and that even the slightest reform would “lead to a flood of lawsuits, forcing companies to curb controversial topics.”¹⁴⁷

Although these arguments are not without merit, some critics of the law say that they ignore that “some users do post content that has caused real harm in the form of disinformation campaigns, harassment, hate speech, cyberbullying, and other forms of online abuse.”¹⁴⁸ Many technology experts have voiced “the collective harm of the [I]nternet.”¹⁴⁹ Numerous studies link social media use to poor mental health, particularly among young adults and teens.¹⁵⁰ In addition, some tech experts predict the Internet “will hurt democracy, if it hasn’t already, basing this prediction on the speed and scope of reality distortion occurring online, the impact of surveillance capitalism, and the decline of journalism in the digital age.”¹⁵¹

To Mr. Cohen and others, the era of coddling technology companies with legal protections must end. To Big Tech and supporters of preserving the law, the Internet could break if liability was in any way changed.

A. *Online Free Speech*

Twitter, in *Taamneh*, described the challenge of its business operations, which it described as “open to all comers.”¹⁵² Holding Big Tech liable for third-party content, Twitter asserted, would have a domino effect that would ultimately lead to censorship (i.e.,

144. Moss, *supra* note 132.

145. Deagon, *supra* note 97.

146. Johnson & Castro, *supra* note 7.

147. Brian Mann, *Social Media Platforms Face Pressure to Stop Online Drug Dealers Who Target Kids*, NPR (Jan. 26, 2023, 5:01 AM), <https://www.npr.org/2023/01/26/1151474285/social-media-platforms-face-pressure-to-stop-online-drug-dealers-who-target-kids> [<https://perma.cc/H2CF-FVHU>].

148. Johnson & Castro, *supra* note 7.

149. Snider, *supra* note 13, at 1844.

150. *Id.*

151. *Id.* at 1844–45; see Janna Anderson & Lee Rainie, *Many Tech Experts Say Digital Disruption Will Hurt Democracy*, PEW RSCH. CTR. (Feb. 21, 2020), <https://elondn.blob.core.windows.net/eu3/sites/964/2020/02/Elon-Pew-Future-of-Democracy-2-21-20.pdf> [<https://perma.cc/9UXU-85HH>].

152. Transcript of Oral Argument at 88, *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023) (No. 21-1496) https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-1496_32q3.pdf [<https://perma.cc/6AG6-8X3P>].

these companies, fearing liability, would ferret out extensive information about their users, leading to increased removal of online speech) and limit its collective ability to target harmful content and protect their users from such content.¹⁵³

Twitter’s warning to the courts is not new. Courts have historically been willing to heed this warning by extending Section 230 protections to defendant Internet companies even at times when they have republished content knowing such an act was potentially unlawful, “encouraged users to post illegal content, changed their design and policies for the purpose of enabling illegal activity, or sold dangerous products.”¹⁵⁴ The courts, in rarely denying or restricting the defense,¹⁵⁵ have tossed out even the most legitimate plaintiffs’ claims, thus barring those from having their voices heard before a judge.¹⁵⁶

A result of an unregulated Internet is the flourishing of online harm, such as harmful, misleading, or extreme harassment and physical threats.¹⁵⁷ Big Tech is, to critics of the law, less inclined to monitor the content of their platforms, with one reason being fear that doing so would remove Section 230’s liability protections.¹⁵⁸ Moreover, even the most malicious content may remain on a website without making the website liable. Many critics believe the overbroad reading of the statute has “given online platforms a free pass to ignore illegal activities, to deliberately repost illegal material, and to solicit unlawful activities while ensuring that abusers cannot be identified.”¹⁵⁹

Section 230 has enabled moderation policies that silence online free speech.¹⁶⁰ Destructive harassment encouraged or tolerated by ICSs have silenced voices.¹⁶¹ “Individuals have difficulty expressing themselves in the face of online assaults.”¹⁶² In some instances, these individuals “shut down their blogs, sites, and social network profiles not because they tire of them but because continuing them provokes their attackers.”¹⁶³

153. *Id.* at 122; *Does Section 230’s Sweeping Immunity Enable Big Tech Bad Behavior? Hearing Before the S. Comm. on Com., Sci., and Transp.*, 116th Cong. 1 (2020) (statement of Jack Dorsey, CEO, Twitter) [hereinafter *Twitter Hearing*].

154. Citron & Wittes, *supra* note 84.

155. Vincent Dumas, *Enigma Machines: Deep Learning Algorithms as Information Content Providers Under Section 230 of the Communications Decency Act*, 2022 WIS. L. REV. 1581, 1590 (2022).

156. *See id.* at 1598.

157. Erin Simpson & Adam Conner, *How to Regulate Tech: A Technology Policy Framework for Online Services*, AM. PROGRESS (Nov. 16, 2021), <https://www.american-progress.org/article/how-to-regulate-tech-a-technology-policy-framework-for-online-services/> [https://perma.cc/6Z2R-A83W].

158. *See id.*

159. Citron & Wittes, *supra* note 84, at 413.

160. *Id.* at 420.

161. *Id.* at 410.

162. *Id.* at 420.

163. *Id.*

B. Accountability

Snapshots of polished Big Tech executives walking grim-faced into the Capitol are becoming a common sight in the media, as has the reason for their presence. The CEOs of Facebook, Twitter, and Google are examples of industry figures who have recently visited Capitol Hill to answer for research findings revealing widespread harms from using their respective platforms.¹⁶⁴ At the hearings, lawmakers lean into their microphones, staring intently at these executives, and ask what has become an all-too common question: Whether Section 230 immunity is worth keeping around. The executives' answers typically caution Congress that modifying or repealing the law or implementing federal regulations affecting its liability under Section 230, would serve to benefit Big Tech and hurt smaller competitors in the industry, or the "little guy" as they are occasionally referred.¹⁶⁵ The "little guy" lacks the same resources as Big Tech and depends on long-established legal protections to survive costly litigation and attorney's fees for liability suits.¹⁶⁶

Take the recent Congressional Hearing with Jack Dorsey, the former CEO of Twitter, who gave the dire warning that Section 230 reform "could collapse how we communicate on the [I]nternet, leaving only a small number of giant and well-funded technology companies."¹⁶⁷ Survival of the little guys, which is the vast majority of industry players, depends on the preservation of Section 230 according to Big Tech and other Section 230 proponents. Even if some members of Congress do not share this belief or believe his sincerity, Dorsey and other Big Tech executives are not outliers in this view.

Supporters of preserving Section 230 praise the law for shielding a variety of companies across the Internet industry, including "individuals, companies, and organizations that provide a platform for others to share speech and content over the Internet."¹⁶⁸ This also includes any social networks, video

164. *Big Tech CEOs Face Lawmakers in House Hearing on Social Media's Role in Extremism, Misinformation*, WASH. POST (Apr. 9, 2021, 3:20 PM), <https://www.washingtonpost.com/technology/2021/03/25/facebook-google-twitter-house-hearing-live-updates/> [<https://perma.cc/3PX7-5JBZ>].

165. David Dayen, *Zoe Lofgren: The Democratic Holdout on Big Tech Legislation*, PROSPECT (July 1, 2021), <https://prospect.org/power/zoe-lofgren-democratic-holdout-big-tech-legislation/> [<https://perma.cc/2RC8-5B3Y>].

166. *See id.*

167. *Twitter Hearing*, *supra* note 153, at 1; Deagon, *supra* note 97.

168. Jason Kelley, *Section 230 Is Good, Actually*, ELEC. FRONTIER FOUND. (Dec. 3, 2020), <https://www.eff.org/deeplinks/2020/12/section-230-good-actually> [<https://perma.cc/P5KH-L6V2>].

platforms, news websites, blogs, and other websites that allow comments,¹⁶⁹ as well as “educational and cultural platforms.”¹⁷⁰ The law shields *all* of these companies, no matter their market power, from “complex litigation” and saves them from the fate of “divert[ing] substantial managerial and organizational attention and mindshare from maintaining or enhancing the service.”¹⁷¹ The defendant service provider has the ability to dispose of the case with a motion to dismiss, which protects small and low-revenue Internet services from having to pay for costly discovery and, “in turn[,] enhances the richness and diversity of the Internet ecosystem.”¹⁷² There are also procedural benefits through early dismissals: both parties are saved from “wasting valuable resources on doomed litigation,” and the court’s time is saved from “handl[ing] other cases more carefully or quickly.”¹⁷³ Proponents see these early dismissals as valuable to defendant Internet companies.¹⁷⁴

At the same time, these proponents foresee that repealing Section 230 would lead to disaster, with some describing how Social Media platforms would need to overhaul their entire business models.¹⁷⁵ Facebook is among those in Big Tech claiming that the immediate and future consequences of regulations would be felt most by small businesses that rely on the Internet to run their operations, not Big Tech itself.¹⁷⁶ For the smaller Internet services currently operating their platforms, “defending a single protracted lawsuit may be financially ruinous” without Section 230 protection.¹⁷⁷ As for future entrepreneurs in the industry, they may abandon any idea of creating a new service that allows user-generated speech, out of fear that such a business venture would be

169. *Id.*

170. *Id.*

171. Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 41 (2019).

172. *Id.*

173. *Id.*

174. *Id.* at 40.

175. Ryan-Mosley, *supra* note 122; see Emily Stewart, *How Big Business Exploits Small Business*, VOX (June 30, 2021, 8:00 AM), <https://www.vox.com/the-goods/22550608/how-big-business-exploits-small-business> [<https://perma.cc/6ZTX-W482>].

176. Aaron Mackey, *Facebook’s Pitch to Congress: Section 230 for Me, But Not for Thee*, ELEC. FRONTIER FOUND. (Mar. 24, 2021), <https://www.eff.org/deeplinks/2021/03/facebook-pitch-congress-section-230-me-not-thee> [<https://perma.cc/BP7Y-AZYK>].

177. Goldman, *supra* note 171, at 41; see, e.g., Eliot Van Buskirk, *Veoh Files for Bankruptcy After Fending Off Infringement Charges*, WIRED (Feb. 12, 2010), <https://www.wired.com/2010/02/veoh-files-for-bankruptcy-after-fending-off-infringement-charges/> [<https://perma.cc/H4B2-UTM3>] (noting that Veoh, a YouTube competitor, ran out of money while defending copyright claims before the courts confirmed it qualified for the online copyright safe harbor).

cost-prohibitive.¹⁷⁸ Unable to bear the financial weight of liability, small businesses across the United States would shut down, leading the Internet “to collapse on itself.”¹⁷⁹

The nightmare hypothetical scenario would be if Ms. Barnes had brought her suit against an unknown start-up tech company rather than Yahoo! (one of the most financially successful Internet-based companies in the world), and a court found that this start-up was liable for the offensive photographs. Ms. Barnes would be given her day in court and awarded damages. For the start-up, however, the total of damages and litigation fees could destroy its business for good. The plaintiff benefits, but Big Tech, such as Yahoo!, are the actual winners of the lawsuit. The elimination of its market competitor has allowed Big Tech to become “bigger.”¹⁸⁰

Even for those companies that can financially handle a flood of lawsuits, proponents argue that setting new legal requirements to moderate all content on their platform would create an impossible hurdle even for Big Tech to overcome. Echoing Congressman Goodlatte’s statement to Congress in 1997, present-day Section 230 proponents argue that online platforms are *different* from traditional media, because online platforms that rely on user-generated content are constantly inundated with content.¹⁸¹ Based on this unique challenge, they argue that it would be “unreasonable to expect these platforms to take down every potentially objectionable post in a timely manner without making some mistakes.”¹⁸² Google most recently presented this argument to the Supreme Court in *Gonzalez* when it defended its inability to remove all the terrorist posts that exist on its platforms: To expect otherwise would be unrealistic, particularly “inherent in a system that [] services hundreds of millions of customers.”¹⁸³

On the other side of the debate, critics of Section 230, and Big Tech in particular, have seen this argument repeated over the past decade and dismiss it as a tired excuse to avoid accountability.¹⁸⁴ As one Internet scholar put it, “if tech companies can profit from the content they host, they can moderate it—that is their responsibility, and if moderation proves difficult, that is their

178. Goldman, *supra* note 171.

179. Eric J. Savitz, *Why Repealing Section 230 Could Ruin the Internet*, BARRON’S (Jan. 15, 2021, 7:23 PM), <https://www.barrons.com/articles/section-230-repeal-could-destroy-the-internet-51610756633> [<https://perma.cc/FN6F-TFQF>].

180. Goldman, *supra* note 171, at 41–42.

181. See Johnson & Castro, *supra* note 7.

182. *Id.*

183. Transcript of Oral Argument, *Twitter v. Taamneh*, *supra* note 128, at 85.

184. Johnson & Castro, *supra* note 7.

problem”¹⁸⁵; yet Big Tech deny it being “their problem” under Section 230 to moderate harmful content on their platforms.¹⁸⁶ When these Internet companies do admit some responsibility for publicized catastrophes, there appears to be limited evidence showing how these companies have lived up their promises of altering their moderation policies to better target these virtual harms on their platforms.

Since Section 230’s passage in 1996, online platforms have been immunized against lawsuits from victims who were harmed and who sued online platforms to demand accountability for those harms.¹⁸⁷ Those with legitimate claims against Big Tech are blocked from having their voices heard in court by the impenetrable wall of Section 230. With each dismissal comes a clear message from the courts: “[I]f a tech company’s product was turned to malicious purposes by a user, no matter how foreseeable the malicious use, that tech company was beyond the reach of the law and tort system.”¹⁸⁸

The case of Franco Caraccioli highlights the difficulties of overcoming Section 230(c)’s liability shield.¹⁸⁹ When Mr. Caraccioli, a law student, learned that a fake Facebook account posted sexually explicit pictures of him, he contacted the company to remove the account, but Facebook refused. Upon review, Facebook was skeptical that the account was fake. Eventually, Facebook terminated the fake account, but the damage had already been done to Mr. Caraccioli, who had been barraged with humiliating calls and messages since the anonymous account emerged.¹⁹⁰ He sued Facebook for defamation and negligent infliction of emotional distress in district court, alleging that Facebook knew that the anonymous account featured “facially objectionable” content and could have removed it but chose not to.¹⁹¹ Mr. Caraccioli’s complaints, however, were futile. The district court held that Section 230 barred his claim and dismissed his Complaint, a decision it grounded in the furtherance of perpetuating online “free speech.”¹⁹²

185. *Id.*

186. *Id.*

187. KOSSEFF, *supra* note 3, at 9.

188. Carrie Goldberg, Herrick v. Grindr: *Why Section 230 of the Communications Decency Act Must Be Fixed*, LAWFARE (Aug. 14, 2019, 8:00 AM), <https://www.lawfaremedia.org/article/herrick-v-grindr-why-section-230-communications-decency-act-must-be-fixed> [<https://perma.cc/2TUT-59M4>].

189. *See* Caraccioli v. Facebook, Inc., 167 F. Supp. 3d 1056, 1066 (N.D. Cal. 2016).

190. *Id.* at 1061.

191. *Id.* at 1062, 1067.

192. *Id.* at 1067.

The court's reasoning was particularly jarring: "Plaintiff did not cite to authority establishing that the recklessness or maliciousness of a provider's behavior is part of the inquiry under Section 230(c)."¹⁹³ Plaintiffs like Mr. Caraccioli can experience troubling damage to their reputations, relationships, and even physical and mental health because of online content that a platform is aware of but does *nothing* about. Yet, this does not entitle them to any recourse against that platform.

Proponents of Section 230 point to comments by the law's authors affirming that the courts' interpretation of Section 230 does not go against their original intentions, as its immunity provision was designed to apply broadly.¹⁹⁴ It is hard to imagine that the Section 230 draft makers imagined or ever intended an outcome where victims are repeatedly, almost automatically, denied having their voices heard in court or that immunity was merited in nearly every outcome. It is true that Section 230 does not prevent people like Mr. Caraccioli from suing the person who committed the harm. However, if that person cannot be found, then there is nowhere else to seek redress for injury. The doors to justice are closed to these victims.

C. *Mental Health*

Proponents maintain that limiting or removing Section 230 would also have a detrimental effect on free speech, with some suggesting that "[i]f websites and online platforms start censoring potentially objectionable content in order to avoid liability, controversial speech [would] likely be the first to go."¹⁹⁵ At the same time, if platforms are not shielded from liability, they will do less to moderate online abuse and hate speech.¹⁹⁶ Thus, repealing Section 230, they argue, would lead to less free speech online, not more.¹⁹⁷

In 1998, Carnegie Mellon University released its findings of "HomeNet," the first concentrated study on the social and psychological effects of Internet use at home, showing a decline in interaction with family members and a reduction in their circles of friends that directly corresponded to the amount of time they spent

193. *Id.*

194. Brief of Sen. Ron Wyden and Former Rep. Christopher Cox as Amici Curiae Supporting Respondent-Appellant at 10–13, *Gonzalez et al. v. Google LLC* (No. 21-1333) (Jan. 19, 2023).

195. Johnson & Castro, *supra* note 7.

196. *Id.*

197. *Id.*

online.¹⁹⁸ These results raised the question over whether the Internet was actually ever “exceptional,” or just as socially unhealthy to its users as other mass media. Studies conducted subsequently would go on to repeat similar findings, showing that time spent on social media correlated to mental health challenges such as anxiety and depression.¹⁹⁹ Alarmed by these findings, some organizations have attempted to educate the public about the consequences of Internet use, particularly on adolescents. The American Psychological Association, for example, issued a set of recommendations for parents to follow in protecting their children online and warned:

To reduce the risks of psychological harm, adolescents’ exposure to content on social media that depicts illegal or psychologically maladaptive behavior, including content that instructs or encourages youth to engage in health-risk behaviors, such as self-harm (e.g., cutting, suicide), harm to others, or those that encourage eating-disordered behavior (e.g., restrictive eating, purging, excessive exercise) should be minimized, reported, and removed; moreover, technology should not drive users to this content.²⁰⁰

Despite these efforts and the dreary results of these studies, Internet use has only increased,²⁰¹ including among many teenage girls, who risk exposure to bullying, picking up eating disorders, and developing low self-esteem every time they log onto the Internet.²⁰² In particular, teenage girls face tremendous risk to their mental health online and even to their bodies, with one 2023 research study revealing that “[s]exual attacks and other traumatic experiences” from logging onto the Internet have at least in part contributed to “an unprecedented level of hopelessness and suicidal thoughts among teenage girls” across the country.²⁰³

198. Robert Kraut et al., *Internet Paradox: A Social Technology That Reduces Social Involvement and Psychological Well-Being?*, 53 AM. PSYCH. 1017, 1025 (1998).

199. See AM. PSYCH. ASS’N, *supra* note 99.

200. *Id.*

201. *Digital Around the World*, DATAREPORTAL, <https://datareportal.com/global-digital-overview> [<https://perma.cc/DS6L-QNRX>] (last visited Apr. 28, 2024).

202. See Emily Vogels et al., *Teens, Social Media and Technology 2022*, PEW RSCH. CTR. (Aug. 10, 2022), <https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022/> [<https://perma.cc/P36Z-356N>]; Jose H. Marco & M. Pilar Tormo-Irun, *Cyber Victimization Is Associated with Eating Disorder Psychopathology in Adolescents*, 9 FRONTIERS PSYCH. 1, 5–6 (2018).

203. Press Release, Ctrs. for Disease Control & Prevention, U.S. Teen Girls Experiencing Increased Sadness and Violence (Feb. 13, 2023), <https://www.cdc.gov/media/releases/2023/p0213-yrbs.html> [<https://perma.cc/3824-YKGM>]; Erika Edwards, *CDC Says*

Sexual harassment is one online harm that proliferates the Internet and predominantly targets marginalized communities. Over 33 percent of young women has experienced online sexual harassment, compared to eleven percent of young men. An overwhelming number of Internet users identifying as LGBTQIA+ has been targeted by online harassment. Fifty-four percent of Black users and 47 percent of Hispanic users believed the harassment was race-based.²⁰⁴

Another harm is the lack of moderation of cyberbullying, despite over 36 percent of high-school students reporting that they had been cyberbullied during their lifetime.²⁰⁵ Similar or even more disturbing statistics have been collected world-wide over the past ten years.²⁰⁶ Often, the victims of online abuse are from the most vulnerable parts of society: ethnic minorities, the LGBTQ community, or people with disabilities, for example. Exposure to toxic and hateful comments online can lead to psychological trauma, radicalization, and even self-harm and suicide.²⁰⁷

Big Tech and its algorithms have promoted dangerous content such as addiction, eating disorders, self-harm, suicide, bullying, and radicalization, to the most vulnerable.²⁰⁸ The pervasive harms across the Internet have not optimized online speech but have silenced it significantly. Online harassment has caused more than a quarter of Americans to refrain from posting materials.²⁰⁹ In some instances, users have completely abandoned online platforms or were forced to alter their usernames to avoid “relentless” harassment.

Some states have blamed the moderation policies of Big Tech for causing these societal harms in the United States, and have specifically pointed out how their algorithms are deployed against

Teen Girls Are Caught in an Extreme Wave of Sadness and Violence, NBC NEWS (Feb. 13, 2023, 10:00 AM), <https://www.nbcnews.com/health/health-news/teen-mental-health-cdc-girls-sadness-violence-rena69964> [<https://perma.cc/6NUC-38DY>] [hereinafter Edwards, *CDC Says Teen Girls are Caught in an Extreme Wave*].

204. Emily A. Vogels, *The State of Online Harassment*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment/> [<https://perma.cc/3Q2N-V32F>].

205. *Id.*; Sam Cook, *Cyberbullying Data, Facts and Statistics for 2018 – 2024*, COMPARITECH (Jan. 10, 2024), <https://www.comparitech.com/internet-providers/cyberbullying-statistics/> [<https://perma.cc/28A5-FVME>].

206. *Id.*

207. Svetlana Kiritchenko et al., *Confronting Abusive Language Online: A Survey from the Ethical and Human Rights Perspective*, 71 J. A.I. RSCH. 431–78 (2021).

208. Alix Fraser et al., *Dangerous by Design*, ISSUE ONE (Dec. 18, 2023), <https://issueone.org/articles/dangerous-by-design/> [<https://perma.cc/6ZAW-RZGV>].

209. Maeve Duggan, *Online Harassment 2017*, PEW RSCH. CTR. (July 11, 2017), <https://www.pewresearch.org/internet/2017/07/11/online-harassment-2017/> [<https://perma.cc/27CN-GDT7>].

children and teenagers.²¹⁰ Additionally, the Federal Trade Commission has placed the blame on Big Tech as it expressed this much in its damning report to Congress.²¹¹ But these harms and the threat to online speech will likely persist as long as Section 230 continues to shield the platforms hosting these harms from any accountability.

D. Terrorism and Radicalization

During oral arguments for *Taamneh*, Twitter refuted the claim that it was complicit in terrorism by “knowingly” letting groups recruit on its platform.²¹² Twitter asserted that even if it should have known terrorists were plotting on its platform, it did not *know* that *terrorists* were actually plotting on its platform, because the company did not engage in face-to-face encounters to suspect them or their conduct.²¹³ Only if the online service directly engages in illegal activity—such as knowingly aiding and abetting terrorists—can federal law enforcement move against the service. Because the transactions between Twitter and its users are not “face-to-face,” the company could not be held to have knowingly aided the terrorist group.

Justice Kavanaugh questioned whether the type of transaction between Twitter and its users (i.e., ISIS in this case) negated the fact that Twitter had at least *some* knowledge terrorists were plotting on its platform: “[Twitter] knows that ISIS, a group of individuals, is using this service to help recruit to kill people.”²¹⁴ With this statement, Justice Kavanaugh pointed out a key issue raised by critics of Section 230: whether Big Tech is truly a passive intermediary under Section 230 or whether it plays a more active role in how it designs its algorithms and moderates its platforms. According to a 2017 research paper by the National Consortium for the Study of Terrorism, social media has played some role in the radicalization of a claimed ninety percent of extremists.²¹⁵ Online

210. Bobby Allyn, *States Sue Meta, Claiming Instagram, Facebook Fueled Youth Mental Health Crisis*, NPR (Oct. 24, 2023, 4:28 PM), <https://www.npr.org/2023/10/24/1208219216/states-sue-meta-claiming-instagram-facebook-fueled-youth-mental-health-crisis> [https://perma.cc/75SU-FE6C].

211. FED. TRADE COMM., Statement of Comm’r Rebecca Kelly Slaughter Regarding the Commission’s Report to Congress: *Combatting Online Harms Through Innovation* (June 16, 2022).

212. Transcript of Oral Argument, *Twitter v. Taamneh*, *supra* note 128, at 5–6.

213. *Id.* at 13.

214. *Id.* at 99.

215. Tom Muha, *Section 230 and the Death of the For You Page*, MICH. DAILY (Nov. 13, 2022), <https://www.michigandaily.com/opinion/section-230-and-the-death-of-the-for-you-page/> [https://perma.cc/9T8B-VXH9].

intermediaries have a history of allowing criminals and terrorists to recruit on their platforms, online messaging services have been known to provide criminals and terrorists a digital space to communicate, and websites have enabled criminals and terrorists to post illegal content.²¹⁶ Social media has shown itself to be “an incubator, providing community and training that fuels racist hate.”²¹⁷ “The resulting potential impact is far reaching, including physical violence offline, as well as threats to well-being.”²¹⁸

The January 6 insurrection demonstrated the consequences of Big Tech’s decision not to carefully moderate content on their platforms. In documents disclosed by Frances Haugen, the whistleblower and former Facebook engineer who testified before Congress in October of 2022, “what emerges . . . is that Facebook isn’t a passive tool but a catalyst.”²¹⁹ The documents showed how “Facebook made people’s efforts at coordinating a domestic terrorist attack highly visible on a global scale.”²²⁰ They further revealed that Facebook “not only helped them recruit participants, but offered people a sense of strength in numbers, proving to be ‘the perfect hype machine for the coup-inclined.’”²²¹

Rather than take responsibility for the active, not merely passive, role the platform played on January 6, Facebook reacted by rejecting the validity of these disclosed documents and silenced its own employees from telling the truth about the company’s moderation practices. Facebook employees tried to warn of “the dangers posed by the platform—how Facebook amplifies extremism and misinformation, how it incites violence, how it encourages radicalization and political polarization,” but their pleas were repeatedly ignored by the higher-ups at Facebook.²²²

Yet, despite these findings, individual users are held accountable for their online criminal activity, not the online platforms that proclaim to operate as mere passive intermediaries.

216. Michael Steinbach, *ISIL Online: Countering Terrorist Radicalization and Recruitment on the Internet and Social Media*, FBI (July 6, 2016), <https://www.fbi.gov/news/testimony/isil-online-countering-terrorist-radicalization-and-recruitment-on-the-internet-and-social-media-> [https://perma.cc/ZK5F-PDVK].

217. AM. PSYCH. ASS’N, *supra* note 99, at 3.

218. *Id.*

219. Adrienne LaFrance, *History Will Not Judge Us Kindly*, THE ATLANTIC (Oct. 25, 2021), <https://www.theatlantic.com/ideas/archive/2021/10/facebook-papers-democracy-election-zuckerberg/620478> [https://perma.cc/5YQ9-6V7H].

220. *Id.*

221. *Id.*

222. *Id.*

III. CONGRESS CAN, AND MUST, DECIDE THE FUTURE OF SECTION 230

Section 230 must be replaced. Beginning with *Zeran*'s broad construction of the immunity provision, courts have granted liability that is "far more sweeping than anything the law's words, context, and history support."²²³ The unintended, indirect results have disincentivized online platforms to handle the tremendous harms proliferating across the Internet and the limited recourse for victims in the courts. Arguments insisting on the continuance of the law "as is" and of no government oversight overlook the realities of the new Internet landscape brought about by Section 230 and the escalating risks that legally invincible Big Tech poses to everyone. Indeed, one of the most compelling reasons to repeal these immunity protections is to force platforms, especially Big Tech, to take reasonable steps to mitigate present and future harms caused by their platforms and to better protect and empower their users.²²⁴

"Congress is the only branch of government with the authority to restrict content moderation by private entities."²²⁵ The past few years have seen some lawmakers attempt to repeal or reform Section 230 through carve-outs of the law with some, albeit debatable, success.²²⁶ They have put CEOs of Big Tech, like Mr. Dorsey, in the public spotlight in hearings before Congress and peppered them with heated questions over reports that these online platforms have let harm plague their platforms. Yet, lawmakers have not accomplished any significant change to Section 230 immunity, which is the source of Internet companies' unwillingness to attack online harms through sound moderation policies or to even provide transparency on their methods of attack.

Congress should repeal Section 230 and enact a federal statute in its place with two central aims. First, the law should make online

223. Citron & Wittes, *supra* note 84, at 408.

224. Johnson & Castro, *supra* note 7.

225. Bradley, *supra* note 7, at 78.

226. See, e.g., Mark MacCarthy, *Back to the Future for Section 230 Reform* (Mar. 17, 2021), <https://www.congress.gov/118/meeting/house/115561/documents/HHRG-118-IF16-20230328-SD026.pdf> [<https://perma.cc/W4YV-NYFV>]; Press Release, Mark R. Warner, Sen., Legislation to Reform Section 230 Reintroduced in the Senate, House (Feb. 28, 2023), <https://www.warner.senate.gov/public/index.cfm/2023/2/legislation-to-reform-section-230-reintroduced-in-the-senate-house> [<https://perma.cc/S2EF-Y82H>]; Chris Riley & David Morar, *Legislative Efforts and Policy Frameworks Within the Section 230 Debate*, Brookings Inst. (Sept. 21, 2021), <https://www.brookings.edu/articles/legislative-efforts-and-policy-frameworks-within-the-section-230-debate/> [<https://perma.cc/QTDA-LVF6>]; Press Release, Mark R. Warner, Sen., Warner, Hirono, Klobuchar Announce the SAFE TECH Act to Reform Section 230 (Feb. 5, 2021), <https://www.warner.senate.gov/public/index.cfm/2021/2/warner-hirono-klobuchar-announce-the-safe-tech-act-to-reform-section-230> [<https://perma.cc/9YJE-HXAT>].

companies, including Big Tech, subject to potential civil liability if they fail to remove harmful content from their platforms after twenty-four hours. Without being able to rely on Section 230 immunity, these companies would have the financial incentive to act before such content reaches their users. Second, a new federal law should strive to limit civil liability to platforms with a certain number of users that reap high annual revenues (for companies subject to liability under the DSA, this threshold is 50 million users and over \$500 million dollars generated annually in revenue).²²⁷

Congress can look across the Atlantic to the EU's DSA as a guide to implementing its own co-regulatory mechanisms, where government involvement would exist to regulate the Internet industry, but in a limited fashion.²²⁸ The DSA relies heavily on its co-regulatory mechanisms, along with intense oversight, to achieve its goal of "countering the power" of Big Tech.²²⁹ U.S. policymakers can adopt similar co-regulatory mechanisms without running into the constitutional challenge that they impermissibly restrict platforms' free exercise of their First Amendment right to monitor content on a private forum.²³⁰

A. *The Digital Services Act*

The EU has played an influential role on digital legislation around the world for decades.²³¹ Since 1995, the EU has passed landmark legislation on data protection, including its e-Commerce Directive, whose "horizontal legal framework . . . has been the cornerstone for regulating digital services in the European single market"²³² that focused on the effective protection of users' fundamental rights online.²³³ The e-Commerce Directive was impeded, however, by the "differences in the way that each Member

227. *EU Identifies 19 Companies Subject to Digital Services Act*, PYMNTS (Apr. 25, 2023), <https://www.pymnts.com/news/regulation/2023/eu-identifies-19-companies-subject-to-digital-services-act/> [<https://perma.cc/23EY-5PWJ>].

228. See Bradley, *supra* note 7, at 69.

229. David Morar, *The Digital Services Act's Lesson for U.S. Policymakers: Co-regulatory Mechanisms*, BROOKINGS INST. (Aug. 23, 2022), <https://www.brookings.edu/articles/the-digital-services-acts-lesson-for-u-s-policymakers-co-regulatory-mechanisms/> [<https://perma.cc/V7DR-PU54>] [hereinafter Morar, *The Digital Services Act's Lesson*].

230. *Id.*

231. Anu Bradford, *Europe's Digital Constitution*, 64 VA. J. INT'L L. 6 (2023).

232. *Questions and Answers: Digital Services Act*, EUR. COMM'N 1, 2 (Feb. 23, 2024), https://ec.europa.eu/commission/presscorner/api/files/document/print/en/qanda_20_2348/QANDA_20_2348_EN.pdf [<https://perma.cc/7WD9-2HRV>] [hereinafter *DSA Q&A*].

233. *The Impact of the Digital Services Act on Platforms*, EUR. COMM'N (Nov. 3, 2023), <https://digital-strategy.ec.europa.eu/en/policies/dsa-impact-platforms> [<https://perma.cc/3CXM-5AF7>].

State implement[ed] the law,” leading to “inconsistencies, which create[d] complexity, legal uncertainty and administrative costs.”²³⁴ Members of the EU Parliament feared that the public would lose trust and confidence in the EU’s economy, with market competitiveness suffering as a result. They scrutinized their legislation and recognized, as a growing number of U.S. politicians are appreciating Section 230, that the current legislation was outdated.

The predominant attitude among these parliament members was that the Internet has changed over the past twenty years, as have the companies that proliferate it. Like U.S. lawmakers, members of the European Parliament recognized that online platforms have become “quasi-public spaces for information sharing and online trade” that endanger “users’ rights, information flows and public participation” by “disseminating illegal content, or selling illegal goods or services online.”²³⁵ The legislation then in place was clearly in need of reform. The question was what kind of law would force compliance by Big Tech in their moderation policies. The time had come for the rules of the Internet to be upgraded, and after a matter of years, the European Parliament passed the DSA in July 2022.²³⁶

When the DSA passed, the European Democracy Action Plan announced that the Act, together with the updated Code of Practice on Disinformation and the new Commission Guidance, would “foster a co-regulatory framework”²³⁷ that “balances free speech and free commerce, with responsibility for creating a robust online ecosphere shared by producers, platforms, and regulators.”²³⁸ Geared toward user safety and more secure online environments,²³⁹ the Act sets out comprehensive standards for handling online content, in order to stop disseminating illegal or

234. *Questions and Answers – Data Protection Reform*, EUR. COMM’N (Dec. 21, 2015), https://ec.europa.eu/commission/presscorner/api/files/document/print/et/memo_15_6385/MEMO_15_6385_EN.pdf [<https://perma.cc/9Z6D-AUFF>].

235. See *DSA Q&A*, *supra* note 232, at 2.

236. *The Digital Services Act Package*, EUR. COMM’N (Jan. 17, 2024), <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package> [<https://perma.cc/7EAH-VBDH>].

237. *DSA Q&A*, *supra* note 232, at 4.

238. Anne Bagamery, *Ahead of the Curve? In the EU, Issues Raised at the US Supreme Court over Regulation of Online Platforms Are Already Being Addressed*, LAW.COM (Feb. 24, 2023, 9:15 AM), <https://www.law.com/international-edition/2023/02/24/ahead-of-the-curve-in-the-eu-issues-raised-at-the-us-supreme-court-over-regulation-of-online-platforms-are-already-being-addressed/> [<https://perma.cc/RB78-D5L6>].

239. *DSA Q&A*, *supra* note 232, at 4.

harmful content that violates platforms' terms of service²⁴⁰ and to protect the rights of European Internet users, including their fundamental rights of privacy and free speech.²⁴¹

The rules imposed by the DSA, built upon the foundations of the e-Commerce Directive, “govern everything from the removal of illegal or harmful content to the retention of personal user data.”²⁴² They focus primarily on how platforms moderate content, advertising, algorithmic processes, and risk mitigation.²⁴³ The Act requires online platforms to implement moderation methods that “prevent and remove posts containing illegal goods, services, or content while simultaneously giving users the means to report this type of content.”²⁴⁴ Moreover, the DSA prohibits online platforms from “targeted advertising based on a person’s sexual orientation, religion, ethnicity,” or political beliefs and imposes restrictions on targeting ads to minors.²⁴⁵ Online platforms are also required under the Act to provide lawmakers with greater transparency on their algorithms.²⁴⁶

The primary target of these rules is Big Tech.²⁴⁷ Disturbed by revelations on Big Tech’s role in spreading disinformation and manipulation of electoral processes across the Internet,²⁴⁸ the Act’s drafters aimed to ensure that the largest platforms are held accountable and “assume their responsibility for the actions they take and the systemic risks they pose.”²⁴⁹ The DSA thus created a tiered responsibility framework imposing varying levels of responsibilities for different types and sizes of services. The largest

240. Kelvin Chan, *EU Investigates X Over Potential Violations of Social Media Law*, PBS (Dec. 18, 2023, 12:33 PM), <https://www.pbs.org/newshour/world/eu-investigates-x-over-potential-violations-of-social-media-law> [<https://perma.cc/NA9U-MYUT>] (providing “the promotion of genocide or anorexia” as examples of terms of service violations).

241. *Digital Services Act*, EUR. COMM’N, [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en#:~:text=Digital%20Services%20Act%20\(DSA\)%20over-view&text=Its%20main%20goal%20is%20to,and%20open%20online%20platform%20environment](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en#:~:text=Digital%20Services%20Act%20(DSA)%20over-view&text=Its%20main%20goal%20is%20to,and%20open%20online%20platform%20environment) [<https://perma.cc/JP5T-ZZHD>] (last visited Feb. 28, 2024).

242. *DSA Q&A*, *supra* note 232, at 2.

243. *Id.* at 5.

244. Emma Roth, *The EU’s Digital Services Act Goes into Effect Today: Here’s What That Means*, VERGE (Aug. 25, 2023, 10:50 AM), <https://www.theverge.com/23845672/eu-digital-services-act-explained> [<https://perma.cc/3LMM-448G>].

245. *Id.*

246. *Id.*

247. Cassandre Coyer, *EU’s Digital Services Act Targets Big Tech, but Its Impact Could Ripple Far and Wide*, LAW.COM, (May 18, 2023, 10:35 AM), <https://www.law.com/corpocounsel/2023/05/18/eus-digital-services-act-targets-big-tech-but-its-impact-could-ripple-far-and-wide/?slreturn=20240022022950> [<https://perma.cc/7BVK-B4EP>].

248. *DSA Q&A*, *supra* note 232, at 5.

249. *Id.*

platforms in this framework are classified as *very large online platforms* (“VLOPs”), which face additional requirements such as conducting an annual systemic-risk review,²⁵⁰ providing “users the right to opt out of recommendation systems and profiling, sharing key data with researchers and authorities, cooperat[ing] with crisis response requirements, and perform[ing] external and independent auditing.”²⁵¹

To qualify as a VLOP, a company must have at least 45 million average monthly users in the EU.²⁵² The EU has designed nineteen platforms and search engines as VLOPs, including eight social media platforms (i.e., Facebook, TikTok, X, YouTube, Instagram, LinkedIn, Pinterest, and Snapchat),²⁵³ five online marketplaces (i.e., Amazon, Booking.com, China’s Alibaba AliExpress, and Germany’s Zalando), mobile app stores Google Play and Apple’s App Store, Google’s Search and Microsoft’s Bing search engines, Google Maps, and Wikipedia.²⁵⁴

The DSA requires that VLOPs perform their own annual risk assessments and, based on the results of these assessments, establish more effective mitigation measures.²⁵⁵ The risk assessments focus on how the platforms’ choices of recommendation, moderation, terms and conditions, ads, and data practices exacerbate systemic risks.²⁵⁶ The drafters’ intentions behind these rather “loosely structured”²⁵⁷ risk assessments were twofold: “to uncover risks posed by illegal content, and its effects on fundamental rights, civic discourse, public security, electoral processes, gender-based violence, and public health”²⁵⁸; and to

250. *Id.*

251. Roth, *supra* note 244.

252. Kelvin Chan, *Is Twitter Ready for Europe’s New Big Tech Rules? EU Official Says It Has Work To Do*, AP NEWS (June 22, 2023, 10:27 PM), <https://apnews.com/article/twitter-musk-europe-digital-services-act-824e107cf9b28595a7264d4565304bf9> [https://perma.cc/D8SR-Z9TM].

253. *EU Digital Services Act: Tech Companies Face a Reckoning in Europe as New Rules Come into Force*, EURONEWS (Aug. 22, 2023, 6:27 PM), <https://www.euronews.com/next/2023/08/22/eu-digital-services-act-tech-companies-face-a-reckoning-in-europe-as-new-rules-come-into-f> [https://perma.cc/NST6-YQDK].

254. *Id.*

255. Aliya Bhatia & Asha Allen, *Auditing in the Dark: Guidance Is Needed to Ensure Maximum Impact of DSA Algorithmic Audits*, CTR. FOR DEMOCRACY & TECH. (Nov. 20, 2023), <https://cdt.org/insights/auditing-in-the-dark-guidance-is-needed-to-ensure-maximum-impact-of-dsa-algorithmic-audits/> [https://perma.cc/WWM9-GWCW].

256. Paddy Leerssen, *Counting the Days: What to Expect from Risk Assessments and Audits Under the DSA – and When?*, DSA OBSERVATORY (Jan. 30, 2023), <https://dsa-observatory.eu/2023/01/30/counting-the-days-what-to-expect-from-risk-assessments-and-audits-under-the-dsa-and-when/> [https://perma.cc/GDS9-RPD4].

257. Morar, *The Digital Services Act’s Lesson*, *supra* note 229.

258. *Id.*

ensure that these online platforms are actively focusing on mitigating these issues.²⁵⁹ Under the DSA, VLOPs are also required to undergo an annual independent audit of their compliance with the obligations set out in the codes of conduct. Although the DSA does not design or carry out these audits, instead encouraging the development of “voluntary—presumably industry-based—standards,” the EU still plays a role in oversight of the audit process.²⁶⁰

VLOPs face a tough enforcement mechanism, which the Act designed to be similar when applied in antitrust proceedings.²⁶¹ They are subject to harsh fines for non-compliance, reaching as high as six percent of their annual worldwide turnover.²⁶² The Act imposes a one percent penalty of their annual worldwide turnover if VLOPs are found to have provided “incorrect, incomplete, or misleading” information.²⁶³

With the passage of the DSA, online platforms went from “effectively no regulation to heavy regulation.”²⁶⁴ Before the DSA, Google could get away with saying the company was offering more “visibility” into content moderation decisions and different ways for users to contact the company, without offering specifics.²⁶⁵ Under the DSA, Google and other platforms became legally obligated to provide more information behind why posts are removed, among other heavy regulations.²⁶⁶ To Big Tech, adapting to the DSA’s new

259. *Id.*

260. *Id.*

261. *DSA Q&A*, *supra* note 232, at 2.

262. Eur. Comm’n, *The Enforcement Framework Under the Digital Services Act*, EUR. COMM’N (Dec. 22, 2023), <https://digital-strategy.ec.europa.eu/en/policies/dsa-enforcement#:~:text=those%20preliminary%20findings.,Non-compliance%20decision,deadline%20set%20by%20the%20Commission> [<https://perma.cc/UZX8-GDR8>].

263. Paul Johnson et al., *How New Regulations Are Shaping Europe’s Digital Landscape*, GCR (Dec. 8, 2023), <https://globalcompetitionreview.com/guide/digital-markets-guide/third-edition/article/how-new-regulations-are-shaping-europes-digital-landscape> [<https://perma.cc/B9PK-D9SM>].

264. Mathew Ingram, *In Europe, a Regulatory Vise Tightens Around Big Tech*, COLUM. JOURNALISM REV. (Aug. 31, 2023), https://www.cjr.org/the_media_today/eu_dsa_dma_regulations_big_tech.php [<https://perma.cc/V56Q-PA4W>].

265. Kelvin Chan, *Europe’s Sweeping Rules for Tech Giants Have Kicked In. Here’s How They Work*, AP NEWS (Aug. 25, 2023, 2:17 AM), <https://apnews.com/article/digital-services-act-social-media-regulation-europe-26d76cc4785df1153669258766cc6387> [<https://perma.cc/2QXB-KHX8>].

266. *The Impact of the Digital Services Act on Platforms*, *supra* note 233 (“With the DSA, providers of intermediary services, including online platforms, must communicate to their users why they have removed their content, or why access to an account has been restricted.”).

rules meant survival, at least in the European market.²⁶⁷ These titans of the Internet industry rushed to meet their compliance obligations with the EU by rolling out “new ways for European users to flag illegal online content and dodgy products” and “quickly and objectively” removing this flagged content from their platforms.²⁶⁸

The results have seen Big Tech taking steps to protect its users. Following the DSA’s directive to end the practice of targeting vulnerable categories of people, including minors, with ads, some platforms, such as Snapchat and TikTok, have vowed to stop targeting teenage users.²⁶⁹ For example, they will no longer base their advertising strategies on the online viewing habits of teenagers. Google has expressed its plans to provide more information about targeted ads shown to people in the EU and give researchers more access to data on how its products work.²⁷⁰

The effects of Europe’s new digital regulations have also resulted in users being handed more control over harmful content to which they are exposed on the Internet. TikTok offered users the option of flagging harmful content, such as videos loaded with hate speech and harassment, and coordinated a team of experts to review these flagged videos.²⁷¹ Amazon created a new channel for users to report “suspect goods.”²⁷² TikTok announced that it would enable its EU users to turn off the service’s recommendation algorithm, in order to comply with the DSA’s mandate that “EU users have the right to refuse any feature that relies on personal data-tracking.”²⁷³ Meta announced that it would make it easier to report harmful content on its Facebook and Instagram platforms.²⁷⁴ Meta also promised that Facebook and Instagram would provide EU users an option to opt-out of their algorithmic news feeds.²⁷⁵ “Facebook, Instagram, TikTok[,] and Snapchat also

267. Martin Coulter, *Big Tech Braces for EU Digital Services Act Regulations*, REUTERS (Aug. 24, 2023, 3:15 PM), <https://www.reuters.com/technology/big-tech-braces-roll-out-eus-digital-services-act-2023-08-24/> [<https://perma.cc/EA8S-ZC2A>].

268. Chan, *supra* note 265.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. Ingram, *supra* note 264.

274. Nick Clegg, *New Features and Additional Transparency Measures as the Digital Services Act Comes into Effect*, META (Aug. 22, 2023), <https://about.fb.com/news/2023/08/new-features-and-additional-transparency-measures-as-the-digital-services-act-comes-into-effect/> [<https://perma.cc/BUS5-C4CF>].

275. Natasha Lomas, *Meta Confirms AI ‘Off-Switch’ Incoming to Facebook, Instagram in Europe*, TECHCRUNCH (Aug. 22, 2023, 6:29 AM),

are giving people the option to turn off automated systems that recommend videos and posts based on their profiles, [which] have been blamed for leading social media users to increasingly extreme posts.”²⁷⁶

The Act also grants Internet users in the EU new rights to pursue lawsuits against the most powerful online platforms.²⁷⁷ Users can now file a complaint against a platform, seek out-of-court settlements, complain to their national authority, and seek compensation for breaches.²⁷⁸ Representative organizations will also be able to defend the rights of users in court for widespread breaches of the DSA.²⁷⁹

The new digital rules and oversight structure of the DSA were hailed as “groundbreaking,”²⁸⁰ and described as “the world’s most comprehensive rules for artificial intelligence” for forcing powerful technology companies “to crack down on hate speech, disinformation, and other harmful and illegal material” proliferating their platforms.²⁸¹ The Act passed despite opposition from Big Tech and business executives who argued that the new regulations would weaken the competitiveness of European companies against rivals overseas and shackle the development of innovative technology.²⁸²

As one tech analyst put it, the DSA was Europe’s “Glass-Steagall moment for big tech,” referring to the Depression-era law that brought anti-competitive behavior by banks under control.²⁸³ In the U.S., the moment for massive change has arrived to follow in Europe’s footsteps and craft its own law establishing liability for Big Tech firms that host hateful, extremist, and false ideas.

<https://techerunch.com/2023/08/22/meta-confirms-ai-off-switch-incoming-to-facebook-instagram-in-europe/> [<https://perma.cc/45XD-F6QY>].

276. Chan, *supra* note 265.

277. DSA Q&A, *supra* note 232, at 4–5.

278. *Id.* at 2.

279. *Id.*

280. Chris Riley, *EU Advances Groundbreaking Law for Online Platforms – U.S. Lawmakers Should Pay Attention*, RSTREET (Dec. 14, 2020), <https://www.rstreet.org/commentary/eu-advances-groundbreaking-law-for-online-platforms-u-s-lawmakers-should-pay-attention> [<https://perma.cc/8889-569P>].

281. Chan, *supra* note 252.

282. Courtney Bonnell, *Company Executives Urge Europe to Rethink Its World-Leading AI Rules*, AP NEWS (June 30, 2023, 6:16 AM), <https://apnews.com/article/artificial-intelligence-europe-regulations-chatgpt-c2f08ee87d82cea63cfcba166709d52> [<https://perma.cc/2MQP-ATHX>].

283. Kim Mackrael & Sam Schener, *America’s Tech Giants Rush to Comply with New Curbs in Europe*, WALL ST. J. (Aug. 20, 2023, 2:55 PM), <https://www.wsj.com/tech/americas-tech-giants-rush-to-comply-with-new-curbs-in-europe-2076ade9> [<https://perma.cc/55DD-823H>].

B. A Federal Regulatory Replacement

U.S. lawmakers can take away several lessons from the DSA. The DSA has shown that a law focused on user safety and online platform accountability in the Internet industry can create a safer online environment and that Section 230 is not, despite what Big Tech and the law's proponents argue, necessary for the Internet to operate and to operate safely.²⁸⁴ The successful implementation and user-friendly results of the DSA preempts arguments that regulation and oversight of the Internet is elusive or potentially destructive. The Act also reveals that replacing Section 230 with a new federal law “without undermining free expression and innovation” is not an impossible feat.²⁸⁵

An important lesson from the DSA is that a bipartisan federal bill is necessary for the law to be effective. Members of the European Parliament worked together to create the DSA over their shared concerns that Big Tech had limitless control over the Internet. There is a perception that Congress is too paralyzed by political polarization to come together to pass anything close to a DSA-like model in the U.S. that tackles the same issues related to user safety and moderation of offensive online content.²⁸⁶ There are even some who believe that Europe is more motivated to make moves against Big Tech than the U.S., whose inaction towards regulating these powerful entities shows the country is still shackled to its Internet Exceptionalism ideals.²⁸⁷

These perceptions are understandable given the political divide over many issues in Congress. How to address Section 230 reform is one of these issues. Republicans and Democrats have generally agreed that reform should be a legislative priority, but “[w]here Republicans have attacked Section 230 for allegedly giving tech platforms a free pass to remove conservative content, Democrats have said the problem with the law is that it immunizes platforms despite their failure to remove misinformation and hate speech.”²⁸⁸

284. See Ellen Smith Yost, *Social Support for Terrorists: Facebook's 'Friend Suggestion' Algorithm, Section 230 Immunity, Material Support for Terrorists, and the First Amendment*, 37 SANTA CLARA HIGH TECH. L.J. 301 (2021).

285. Danielle Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 456 (2018).

286. Bradford, *supra* note 231, at 62.

287. *Id.* at 44.

288. Brian Fung, *Senators Warn Big Tech on Section 230: 'Reform Is Coming'*, CNN (Mar. 8, 2023, 3:13 PM), <https://www.cnn.com/2023/03/08/tech/senators-section-230-reform/index.html#:~:text=US%20senators%20said%20Wednesday%20that,at%20large%20social%20media%20platforms> [https://perma.cc/XKF9-VDQF].

Reform efforts, as a result, have been very slow.²⁸⁹ “The current divided Congress, with Republicans in the House and Democrats in the Senate, complicates compromise” on federal tech policy.²⁹⁰ “Diverse industry interests hinder consensus on addressing privacy, content moderation, and other vital matters.”²⁹¹ Despite the introduction of about ten thousand bills in the last few Congressional sessions, only a limited number of those that became law have affected tech policy in any meaningful way.²⁹² With so little being done on the Hill, it appeared as though members of Congress were failing to heed the warning of former Facebook employee and whistleblower Frances Haugen, given during her appearance before Congress:

Facebook wants you to get caught up in a long, drawn out debate over the minutiae of different legislative approaches. Please don't fall into that trap. Time is of the essence. There is a lot at stake here. You have a once-in-a generation opportunity to create new rules for our online world.²⁹³

A growing number of lawmakers do appear to have listened to Ms. Haugen. Bipartisanship is attainable, given the growing public outcry against Big Tech and calls to change Section 230, as well as lawmakers' own discontent with Big Tech and its services.²⁹⁴ As one senator put it: “Social media companies continue to allow malicious users to go unchecked, harm other users, and violate laws. This cannot go on and it is clear federal reform is necessary.”²⁹⁵

Even before the Court issued its decisions on *Gonzalez* and *Taamneh*, both Republican and Democratic senators voiced that “however the Court rules, it is up to Congress to rewrite the law so that members of the public can take platforms to court and hold

289. *Id.*

290. Hillary Brill, *Forget Washington – US States Drive Tech Policy*, CTR. EUR. POL'Y ANALYSIS (Aug. 17, 2023), <https://cepa.org/article/forget-washington-us-states-drive-tech-policy/> [https://perma.cc/FQ4R-GVPC].

291. *Id.*

292. *Id.*

293. Ashley Gold, *Lawmakers Bring Back Facebook Whistleblower for Encore*, AXIOS (Dec. 1, 2021), <https://www.axios.com/2021/12/01/haugen-congress-testify-230-content-moderation> [https://perma.cc/M868-4BLU].

294. Goldberg, *supra* note 188.

295. Press Release, Mark R. Warner, Sen., Legislation to Reform Section 230 Reintroduced in the Senate, House (Feb. 28, 2023), <https://www.warner.senate.gov/public/index.cfm/2023/2/legislation-to-reform-section-230-reintroduced-in-the-senate-house#:~:text=%E2%80%9CSocial%20media%20companies%20continue%20to,Levin> [https://perma.cc/6EKW-2Y78].

them accountable.”²⁹⁶ The Court’s move to punt Section 230 to Congress has appeared to reignite Congress’s momentum for drastic change. In a statement to Congress, House Energy and Commerce Committee Chair Cathy McMorris Rodgers emphasized the magnitude of the moment:

Today’s Supreme Court decision underscores the urgency for Congress to enact needed reforms to Section 230. This law hasn’t been meaningfully updated since the Communications Decency Act was enacted, nearly three decades ago. The online ecosystem has changed drastically since then, which is why we must update the law intended to hold these companies accountable.²⁹⁷

With the fate of the Internet in its hands, Congress must ride this wave of momentum and move swiftly to create a bipartisan law that demands shared responsibility, where all actors, including online platforms, share the responsibility of the detection and the removal of illegal content.²⁹⁸ This is not a novel idea. Some scholars have already asked Congress to adopt a law made in the DSA’s image.²⁹⁹

A new federal law would require bipartisanship, but, as the DSA shows in its second big takeaway, lawmakers in the U.S. do not have to rely on one another to implement it effectively, which can also make its implementation more attainable. They can follow the DSA’s example of working with a team of specialized experts in identifying and measuring systemic risks on the Internet,³⁰⁰ and assemble a working group of experts to develop a set of best practices for implementing the duty to remove offending content. Industry experts and practitioners could contribute to designing an effective regulator model that imitates the DSA, recommend best practices for industry compliance in the U.S., and put forth other

296. Alexandre de Streel et al., *Liability Of Online Hosting Platforms: Should Exceptionalism End?*, CTR. ON REGUL. IN EUR. (Sept. 13, 2018), <https://cerre.eu/publications/liability-online-hosting-platforms-should-exceptionalism-end/> [https://perma.cc/A3RA-89LC].

297. Press Release, Cathy McMorris Rodgers, Rep., Chair Rodgers’ Statement on the Supreme Court’s Ruling Regarding Section 230 Immunity (May 18, 2023), <https://energycommerce.house.gov/posts/chair-rodgers-statement-on-the-supreme-court-s-ruling-regarding-section-230-immunity> [https://perma.cc/5T27-2LAY].

298. *DSA Q&A*, *supra* note 232, at 3.

299. Statement of Daphne Keller, *U.S. Senate Committee Hearing on Platform Transparency: Understanding the Impact of Social Media* (May 5, 2022), <https://www.judiciary.senate.gov/imo/media/doc/Keller%20Testimony1.pdf> [https://perma.cc/UZ8L-KRAQ].

300. *Id.*

ideas to legally reign in Big Tech without compromising small businesses or online free speech.

The reason why it is important to have experts assist with the new federal law's development relates to avoiding the mistakes of the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 ("FOSTA"),³⁰¹ the government's initial attempt at reforming Section 230 without thorough research into its potential effects. FOSTA repealed some of Section 230's protections for third-party commercial sex advertising, including prohibiting advertisements promoting sex trafficking.³⁰² Rather than being an effective tool against reducing online sex trafficking, however, critics of the law say that it "missed the mark."³⁰³ It is difficult to argue with that critique. The law has led to adverse consequences to the very communities it was meant to protect. For example, "[b]ecause it became harder to conduct online investigations, law enforcement departments reduced their efforts to rescue sex trafficking victims, meaning that FOSTA counter-productively increased the likely harm suffered by those victims."³⁰⁴

Some Internet scholars suggested that FOSTA policymakers were not expecting this outcome, because they had failed to have consulted "with all communities likely to be impacted by the policy—in this case, by overlooking talking with sex workers."³⁰⁵ Experts in the Internet industry can assist lawmakers to create a "clear, nuanced policy" that avoids making vague regulations and, instead, makes a framework focused on targeted problems that need solving.³⁰⁶ They can put their expertise, knowledge, and what they have garnered through consultation with the players "who would be impacted" by reform into crafting an effective new regulatory regime in the U.S.³⁰⁷

The final lesson from the DSA is the success of its tiered responsibility hierarchy structure. U.S. lawmakers should adopt a similar structure in crafting its own federal law in place of Section 230's responsibility-free structure for online platforms. A U.S. model inspired by the DSA would subject the largest online platforms to the strictest obligations and steepest penalties for

301. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, 115 P.L. 164, 132 Stat. 1253, 2018 Enacted H.R. 1865, 115 Enacted H.R. 1865.

302. *Id.*

303. Goldman, *supra* note 74, at 11.

304. *Id.*

305. Julie Pattison-Gordon, *Can Section 230 Reform Advocates Learn from Past Mistakes?*, GOV'T TECH. (Mar. 15, 2022), <https://www.govtech.com/network/can-section-230-reform-advocates-learn-from-past-mistakes> [<https://perma.cc/XUB4-B2BE>].

306. *Id.*

307. *Id.*

noncompliance. In this way, smaller-sized online platforms and other Internet companies, whose size and reach are no comparison to Big Tech's, would not have to face any "legal strain," thus preempting concerns that "the little guy" risked financial ruin without Section 230 protections.

Unlike in 1996, when Section 230 was first passed, the Internet has revealed to lawmakers its harms, not just its awesome capabilities. Like in 1996, Congress understands it can *and should* change the path of the Internet. Congress has the tools it needs to repeal Section 230 and finally reign in Big Tech with a new, comprehensive federal enforcement mechanism. The longer lawmakers wait to strip Big Tech of legal immunity, however, the longer these companies will continue to [t]ake advantage of policymakers' inaction [and] . . . impose their own will on the digital marketplace."³⁰⁸ In the words of Ms. Haugen, "[t]ime is of the essence."³⁰⁹ Congress must steer control out of the hands of Big Tech and towards a regulatory future.

CONCLUSION

Internet Exceptionalism has led to the creation and broad interpretation of Section 230. Unfortunately, this interpretation has also freed Big Tech from accountability for any third-party user content on its platforms, no matter how abusive or dangerous. The Court acted cautiously in leaving Section 230 untouched in *Taamneh* and *Gonzalez* and in punting the issue of reform to Congress. While Section 230 continues to protect Big Tech in the U.S., Europe has tightened its regulations in the Internet industry to protect EU based users. A similar law that replaces Section 230 can be accomplished in the U.S., but Congress must join in a united bipartisan effort to do so, all the while sustaining the inevitable pushback. A federal statute, with a co-regulatory framework, would finally provide the oversight needed to demand accountability from Big Tech and ensure that these Internet companies are acting responsibly in their online content moderation policies. Imposing such a broad regulation, in addition to civil liability, will prompt Internet companies, especially Big Tech, to proactively safeguard their users from harmful content.

308. Tom Wheeler, *A Focused Federal Agency Is Necessary to Oversee Big Tech*, BROOKINGS INST. (Feb. 10, 2021), <https://www.brookings.edu/articles/a-focused-federal-agency-is-necessary-to-oversee-big-tech/> [<https://perma.cc/G3M3-Y7ZH>].

309. *Facebook Whistleblower Haugen Urges Lawmakers to Avert Impasse on Social Media Laws*, NBC NEWS (Dec. 1, 2021, 11:34 AM), <https://www.nbcnews.com/politics/congress/lawmakers-mull-curbs-social-media-facebook-whistleblower-haugen-weighing-n1285140> [<https://perma.cc/7YQ4-RFWY>].

Section 230 has created the modern Internet. It has also spurred the harms that dominate the Internet landscape, including disinformation, hate speech, cyberbullying, and other countless online harms that have led to immeasurable damage, both to individuals' perceptions of truth and justice, and to their physical and mental health. The only antidote to this toxic law is to remove it.