

Fall 2022

Section 230 of the Communications Decency Act of 1996: The Antiquated Law in Need of Reform

Katherine Mediavilla

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Katherine Mediavilla, *Section 230 of the Communications Decency Act of 1996: The Antiquated Law in Need of Reform*, 87 MO. L. REV. (2023)

Available at: <https://scholarship.law.missouri.edu/mlr/vol87/iss4/10>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

NOTE

Section 230 of the Communications Decency Act of 1996: The Antiquated Law in Need of Reform

*Katherine Mediavilla**

I. INTRODUCTION

Imagine a world without the information sharing-giants of Facebook, YouTube, Instagram, TikTok, Twitter, or Reddit.¹ It is nearly impossible to go a day without some type of exposure to content created, published, and shared on such platforms.² A world without these platforms would bear a striking resemblance to the world in 1996, when Congress passed the Communications Decency Act (“CDA”).³ The CDA, often referred to as “the 26 words that made the internet,” states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁴ In short, the CDA is a federal law that prevents websites,

*B.S., Kansas State University, 2020. J.D. Candidate, University of Missouri School of Law, 2023; Associate Managing Editor, *Missouri Law Review*, 2022–2023; Associate Member, *Missouri Law Review*, 2021–2022. I am incredibly grateful to Professor Christina Wells for her guidance, insight, and mentorship during the writing of this Note, as well as throughout my entire law school experience. I would also like to thank the members of the *Missouri Law Review* for their help during the editing process.

¹ Dave Chaffey, *Global Social Media Statistics Research Summary 2022*, SMART INSIGHTS (Mar. 29, 2022), <https://www.smartinsights.com/social-media-marketing/social-media-strategy/new-global-social-media-research/#:~:text=57.6%25%20of%20the%20world's%20population,10%20digital%20marketing%20statistic%20sources> [https://perma.cc/35UB-DT8L].

² *Id.*

³ *The History of Social Media*, FUTURE MARKETING, <https://www.future-marketing.co.uk/the-history-of-social-media/> [https://perma.cc/8RYU-B978] (last visited Apr. 14, 2022).

⁴ Communications Decency Act, 47 U.S.C. § 230 (1996).

blogs, forums, and other sources of online information from being held liable for their users' speech.⁵ The legal protections established in § 230 of the CDA are unique to the United States—European nations, Canada, Japan, and the vast majority of other countries do not provide such safeguards to internet companies.⁶ Despite the high levels of internet access in these countries, the largest and most prominent online services are located in the United States.⁷ Section 230 makes the United States desirable as a safe haven for internet providers who wish to provide controversial or politicized speech with a legal platform and environment which is favorable to free expression.⁸

While proponents argue that § 230 fosters free speech, its privilege comes with many consequences and gives internet platforms the power to manifest social devastation.⁹ Since its inception, § 230's protections have provided an outlet for hate speech, election interference, "fake news," and even content that is otherwise illegal in the United States—namely terrorism and sex crimes.¹⁰

The vast prevalence of the internet in everyday life has forced lawmakers to confront previously unfathomable questions regarding accountability on internet platforms.¹¹ Social media channels have become avenues for users to share and receive daily news.¹² In today's age, in the midst of a pandemic and warfare, the spread of misinformation from ill-informed sources may endanger lives, incite hate, and perpetuate violence.¹³ As individuals increasingly obtain news from online sources with unknown or nonexistent credibility, the heightened risk of public

⁵ *CDA 230: The Most Important Law Protecting Internet Speech*, The Electronic Frontier Foundation, <https://www.eff.org/issues/cda230> [<https://perma.cc/3NQN-DD33>] (last visited Apr. 14, 2022).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Michael D. Smith & Marshall Van Alstyne, *It's Time to Update Section 230*, HARV. BUS. REV. (Aug. 12, 2021), <https://hbr.org/2021/08/its-time-to-update-section-230> [<https://perma.cc/BN5D-C6BS>].

¹⁰ Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 454 (2018).

¹¹ Smith & Van Alstyne, *supra* note 9.

¹² Chaffey, *supra* note 1.

¹³ Dylan Walsh, *Study: An Abundance of Media Fuels Polarization*, YALE INSIGHTS (Mar. 9, 2022), <https://insights.som.yale.edu/insights/study-an-abundance-of-media-fuels-polarization> [<https://perma.cc/WDX8-E2FT>].

disinformation becomes extremely problematic, especially when individuals filter their social media feeds based on their prior beliefs.¹⁴

At what point should internet platforms that are protected by an antiquated law be held to a higher standard? Should Facebook be held accountable to any extent for the Capitol riots, for which much of the planning occurred on its platform?¹⁵ To what extent should Twitter face liability for enabling the recruitment of terrorists?¹⁶ Should adult sites such as Pornhub be held responsible for facilitating the sexual exploitation of children?¹⁷ Questions like these, which were completely unanticipated at the time of § 230's adoption, now seem to be the focus of many major internet-related discussions among lawmakers. Part II of this Note addresses the legal background and origins of the CDA. Part III highlights recent developments involving the CDA, including the law's legal protections, proponents of the law, as well as proposed methods of CDA reform. Finally, Part IV discusses the potential avenues for change.

II. LEGAL BACKGROUND

In 1996, as part of the Telecommunications Act, Congress enacted the CDA to address whether internet service providers should be treated as publishers or distributors of the content created by their users.¹⁸ Congress's goal in enacting the Communications Decency Act was to regulate the accessibility to obscenity and indecency online, specifically toward children.¹⁹ The CDA made it illegal to “knowingly send to or show minors obscene or indecent content online.”²⁰ Following concerns about free speech and the availability of online platforms, Congress amended the CDA to add § 230.²¹

Since its addition, there have been two amendments to § 230: (1) to require that interactive computer services notify customers about parental control protections, and (2) to except its application in certain criminal and

¹⁴ *Id.*

¹⁵ Smith & Van Alystne, *supra* note 9.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Valerie C. Brannon & Eric N. Holmes, *Section 230: An Overview*, CONGRESSIONAL RESEARCH SERVICE at 2 (Apr. 7, 2021), <https://crsreports.congress.gov/product/pdf/R/R46751> [<https://perma.cc/Y2ZB-95DV>].

¹⁹ *Id.*

²⁰ *Id.* at 515.

²¹ *Id.*

civil cases related to sex trafficking or prostitution.²² In its current form, § 230 provides that interactive computer service providers cannot be held liable for any action taken which the provider considers to be “obscene, lewd, . . . [] violent, . . . or otherwise objectionable.”²³ Section 230 encourages providers to self-regulate the dissemination of offensive material over their services and allows providers to establish standards of decency without risking liability.²⁴

Under § 230, Congress found:

- (1) The rapidly developing array of Internet . . . represent[s] an extraordinary advance in the availability of educational and informational resources to our citizens;
- (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops;
- (3) The Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity;
- (4) The Internet . . . [has] flourished, to the benefit of all Americans, with a minimum of government regulation;
- (5) . . . Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.²⁵

Federal courts have interpreted § 230 to create expansive immunity against claims based on third-party online content.²⁶ As a result, internet platforms and their users frequently turn to § 230 and its protections to avoid liability in both federal and state litigation.²⁷ However, commentators and jurists have recently expressed concern that the broad immunity is beyond the intended scope of the law.²⁸ At the heart of § 230

²² Brannon & Homes, *supra* note 18, at 2.

²³ NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1089 (N.D. Fla. 2021), *aff'd in part, vacated in part, remanded by* NetChoice, LLC v. Attorney General, Florida, 34 F.4th 1196 (11th Cir. 2022).

²⁴ *Id.*

²⁵ 47 U.S.C. § 230(a)(1)–(5).

²⁶ Brannon & Homes, *supra* note 18, at 4.

²⁷ *Id.*

²⁸ *Id.*

is subsection (c), also known as the “Good Samaritan” provision, which established the elements for immunity under the CDA.²⁹ This section’s language indicates that Congress did not intend to restrict § 230’s immunity privileges only to defamation claims, but rather to extend immunity to civil claims of all kinds.³⁰ Subsection (c), which addresses the protections for “Good Samaritan” blocking and screening of offensive material, states:

(1) TREATMENT OF PUBLISHER OR SPEAKER.—No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) CIVIL LIABILITY.—No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in [subparagraph (A)].³¹

In *Barnes v. Yahoo!, Inc.*, the Ninth Circuit created a three-prong test to determine § 230 immunity.³² Under this test, “[i]mmunity from liability exists for ‘(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information

²⁹ Samuel Estreicher & Samantha Zipper, *Another Strike Against § 230 of the Communications Decency Act: Courts Allowing § 230 to Trump Federal and State Public Accommodations Protections*, VERDICT (Dec. 29, 2020), [https://verdict.justia.com/2020/12/29/another-strike-against-%C2%A7-230-of-the-communications-decency-act#:~:text=Section%20230\(c\)%20of%20the,by%20another%20information%20content%20provider](https://verdict.justia.com/2020/12/29/another-strike-against-%C2%A7-230-of-the-communications-decency-act#:~:text=Section%20230(c)%20of%20the,by%20another%20information%20content%20provider) [<https://perma.cc/3JMF-BX5Z>].

³⁰ *Doe II v. MySpace Inc.*, 96 Cal. Rptr. 3d 148, 153 (Cal. App. 2d Dist. 2009).

³¹ 47 U.S.C. § 230(c)(1)–(2)(B).

³² *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009), *as amended* (Sept. 28, 2009).

content provider.”³³ Thus, a plaintiff must allege sufficient facts to show that the defendant was in fact the publisher or speaker of the content to get around the immunity clause.³⁴

Many courts grant broad immunity when a plaintiff seeks to hold an online entity liable for content posted by a third party.³⁵ Subsection (b) of § 230 claims that it is the United States’ policy to: (1) promote the continued development of the Internet, (2) preserve the Internet’s competitive free market, (3) encourage the development of technologies to maximize user control, (4) support parents to restrict their children’s access to inappropriate material, and (5) ensure vigorous enforcement of federal criminal laws.³⁶

III. RECENT DEVELOPMENTS

Online platforms are treated differently than traditional modes of media because of the immense quantity of content they produce.³⁷ A popular social media platform, such as Twitter or Facebook, may produce thousands of posts per second.³⁸ And many online platforms allow users to create individual pages, company pages, government pages, clubs, support groups, and many other pages.³⁹ The opportunities and limits are essentially endless.⁴⁰ In contrast, the Letters to the Editor page of *The New York Times* may have only five or ten letters on a page per day.⁴¹ Section 230 attempts to account for the exceptional nature of the internet and seeks to encourage a marketplace of ideas.⁴² Now a quarter-century since § 230’s adoption, the “marketplace of ideas” has seen both important

³³ See *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019) (discussing *Barnes* test) (quoting *Barnes*, 570 F.3d at 1100–01).

³⁴ *Id.*

³⁵ See generally *Claudia G. Catalano, Annotation, Validity, Construction, and Application of Immunity Provisions of Communications Decency Act*, 47 U.S.C.A. § 230, 52 A.L.R. Fed. 2d 37 (2011).

³⁶ 47 U.S.C. § 230(b)(1)–(5).

³⁷ Scott Pelley, *Why victims of internet lies want Section 230 repealed*, CBS NEWS (Jan. 3, 2021, 7:45 PM), <https://www.cbsnews.com/news/section-230-internet-60-minutes-2021-01-03/> [<https://perma.cc/6CMN-ZP9W>].

³⁸ *Id.*

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ *Id.*

⁴² Pelley, *supra* note 37.

advancements *and* dangerous threats to the public.⁴³ The impressive, yet daunting, evolution and vast growth of the internet is at the core of the current debate over § 230.⁴⁴

Since its enactment, § 230 has welcomed all types of companies to harbor content that is otherwise illegal in the United States.⁴⁵ For example, organizations deemed to be terrorist groups by the United States have created and maintained accounts on internet platforms owned by American companies, despite federal laws that prohibit providing material support to terrorist groups.⁴⁶ The immunity provisions found within § 230 continue to halt efforts to hold these internet sites, specifically social media companies, liable under the civil provisions of the federal material support statute.⁴⁷

Due to the broad interpretation of § 230, many egregious activities and operations have been immunized from liability. For example, § 230 has protected: (1) a revenge porn operator who posted nude images without the consent of those appearing in the images; (2) operators of a social network who willfully ignored users' illegal activity; (3) the biggest purveyor of sex trade advertisements whose operations were specifically designed to prevent the detection of sex trafficking; (4) an auction site established to promote the exchange of harmful and dangerous goods; (5) users of an online service who disseminated defamatory emails; and (6) a hook up platform that received and ignored over fifty reports that a user was falsely impersonating a man and suggesting his interest in rape fantasies, which resulted in hundreds of strangers confronting him for sex at work and home.⁴⁸

A. Recent Examples of § 230's Immunity Protections

Recent cases have galvanized § 230's protection of internet platforms and called into question the law's applicability to today's social media

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Citron & Wittes, *supra* note 10, at 455.

⁴⁶ See 18 U.S.C. § 2339B for statute on providing material support or resources to designated foreign terrorist organizations; Citron & Wittes, *supra* note 10, at 454 (“Yet numerous designated terrorist groups, including Hamas, Hezbollah, the PKK, and Lakshar-e-Taiba, openly maintained an online presence on well-known social media services, including Facebook and Twitter; several of those accounts were suspended after publication of the corresponding article.”).

⁴⁷ Citron & Wittes, *supra* note 10, at 454.

⁴⁸ *Id.* at 466.

reality.⁴⁹ In February 2022, an anti-terrorism organization lost its case against Google after it alleged that Google failed to enforce its own app developer guidelines and policies.⁵⁰ Specifically, the plaintiff alleged that an app on the Google Play Store violated California law because it was used to transmit racist speech and incite violence against Jewish persons and people of color.⁵¹ The plaintiff claimed that the app “currently serves as the preferred Neo-Nazi/white nationalist communications channel, fanning anti-Semitic and antiblack incitement during the current wave of protests across America.”⁵² Google successfully moved the court to dismiss the suit under § 230’s immunity provision.⁵³ Using the three-prong *Barnes* test, the court determined that all three prongs were satisfied and held that Google itself did not help to “develop [the app] or create any of the online content giving rise to the lawsuit.”⁵⁴

In another instance, a group of minor females unsuccessfully brought various claims against MySpace in 2009, alleging that they were sexually assaulted by men they met while using the site.⁵⁵ The minors claimed that MySpace failed to “implement reasonable, basic safety precautions with regard to protecting young children from sexual predators. . . [and was] aware that its Web site pose[d] a danger to children, facilitating an astounding number of attempted and actual sexual assaults.”⁵⁶ Specifically, the plaintiffs asserted that the host site helped perpetrators commit sex crimes through a negligent failure to detect and report inappropriate content.⁵⁷ The court ultimately held that MySpace was not an “information content provider” and thus was immune from liability under the CDA.⁵⁸

⁴⁹ See *Ginsberg v. Google Inc.*, No. 21-CV-00570-BLF, 2022 WL 504166, *5 (N.D. Cal. Feb. 18, 2022); *Doe II v. MySpace Inc.*, 96 Cal. Rptr. 3d 148, 158–59 (Cal. App. 2d Dist. 2009).

⁵⁰ *Ginsberg*, 2022 WL 504166, at *2.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at *8.

⁵⁴ Christina Tabacco, *Google Prevails with Section 230 Defense in App-Related Hate Speech Suit*, LAW STREET MEDIA (Feb. 23, 2022), <https://lawstreetmedia.com/news/tech/google-prevails-with-section-230-defense-in-app-related-hate-speech-suit/> [<https://perma.cc/4NWD-FKS4>].

⁵⁵ *Doe II*, 96 Cal. Rptr. 3d at 158–59.

⁵⁶ *Id.* at 151.

⁵⁷ *Id.*

⁵⁸ *Id.* at 158–59.

In October of 2022, the United States Supreme Court agreed to hear two cases pertaining to § 230, *Gonzalez v. Google LLC* and *Twitter, Inc. v. Taamneh*, which will respectively be heard on February 21 and 22 of 2023.⁵⁹ The Court's interest in hearing these cases shocked many experts on law and technology, as there is no real circuit split suggesting a divide in underlying legal issues.⁶⁰ As a result, many speculate that the Court's grant of certiorari in the cases indicates a desire to reign in § 230.⁶¹

B. Proponents of the Law

Despite disturbing examples of its application, not everyone is a proponent of § 230 reform.⁶² Many defenders of § 230 argue that its structure fosters and enables innovation.⁶³ This is, in part, because startups and other small businesses might not otherwise have the adequate resources to protect their websites with the same level of care as a technology goliath such as Google.⁶⁴ Without the protections of § 230, companies would be forced to spend valuable resources to respond to bad faith attacks and pushed by market forces to react to public outcry surrounding such complaints.⁶⁵

Congress enacted the CDA to carve out a sphere of immunity for providers of interactive computer services and preserve a “vibrant and competitive free market” of ideas on the internet.⁶⁶ Proponents of § 230 reform argue that a new duty-of-care standard would address Congress's initial concerns—it would create a flexible range of “reasonable” protection that varies from billion-dollar corporations to small startup

⁵⁹ James Romoser, *Elon Musk, internet freedom, and how the Supreme Court might force big tech into a catch-22*, (Nov. 6, 2022), <https://www.scotusblog.com/2022/11/elon-musk-internet-freedom-and-how-the-supreme-court-might-force-big-tech-into-a-catch-22/>. *Gonzalez v. Google LLC*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/gonzalez-v-google-llc/> [https://perma.cc/L7SM-H6AN] (last visited Jan. 16, 2023); *Twitter, Inc. v. Taamneh*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/twitter-inc-v-taamneh/> [https://perma.cc/TKD3-H7HB] (last visited Jan. 16, 2023).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Smith & Van Alstyne, *supra* note 9.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Derek E. Bambauer, *How Section 230 reform endangers internet free speech*, BROOKINGS (July 1, 2020), <https://www.brookings.edu/techstream/how-section-230-reform-endangers-internet-free-speech/> [https://perma.cc/9N95-C72J].

⁶⁶ Smith & Van Alstyne, *supra* note 9.

companies.⁶⁷ Critics of reform include a range of individuals, from security experts and civil liberties advocates to lawmakers.⁶⁸ These individuals believe that altering the CDA would be another attempt by the government to impede both free speech and security protections online.⁶⁹ Moreover, they argue that the protections and immunities of § 230 “promote[], and [are] in the best traditions of, American respect for the value of free information exchange.”⁷⁰

C. Political Proposals of § 230 Reform

Following the enactment of the Fight Online Sex Trafficking Act (“FOSTA”) in 2018, congressional momentum to reform § 230 gained traction.⁷¹ In fact, legislators introduced twenty-six proposed amendments between 2019 and 2021.⁷² During that time, there were also a number of reform proposals from outside commentators and the executive branch.⁷³ For example, in late May 2020, President Trump issued the “Executive Order on Preventing Online Censorship.”⁷⁴ This executive order outlined the position of the executive branch on § 230, weighed in on several specific interpretive disputes, and directed various government agencies to take certain actions to implement the executive’s understandings.⁷⁵ It

⁶⁷ *Id.*

⁶⁸ Marguerite Reardon, *Democrats and Republicans agree that Section 230 is flawed*, CNET (June 21, 2020), <https://www.cnet.com/news/politics/democrats-and-republicans-agree-that-section-230-is-flawed/> [https://perma.cc/38PC-PP5D] (quotations omitted).

⁶⁹ *Id.*

⁷⁰ Derek E. Bambauer, *How Section 230 reform endangers internet free speech*, BROOKINGS (July 1, 2020), <https://www.brookings.edu/techstream/how-section-230-reform-endangers-internet-free-speech/> [https://perma.cc/4ZJP-UZ6E].

⁷¹ VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW at 5 n.13 (2021) (“FOSTA . . . created criminal and civil liability for owning, managing, or operating an interactive computer service “with the intent to promote or facilitate the prostitution of another person”).

⁷² *See id.* at 30 n.302; *see also* JASON A. GALLO & CLARE Y. CHO, CONG. RSCH. SERV., R46662, SOCIAL MEDIA: MISINFORMATION AND CONTENT MODERATION ISSUES FOR CONGRESS app. B. at 27 (2021). *See, e.g.*, H.R. 874, 117th Cong. (2021) (example of Section 230 reform bill in 117th Congress); SAFE TECH Act, S. 299, 117th Cong. (2021).

⁷³ BRANNON & HOLMES, *supra* note 71, at 30.

⁷⁴ *Id.*

⁷⁵ Valerie C. Brannon & Eric N. Holmes, *Section 230: An Overview*, CONGRESSIONAL RESEARCH SERVICE at 30 (Apr. 7, 2021).

addressed President Trump’s condemnation of “flagging” content, warning labels, and selective censorship which “harms. . . national discourse.”⁷⁶ In this order, President Trump claimed that internet platforms were invoking “inconsistent, irrational, and groundless justifications to censor. . . Americans’ speech.”⁷⁷

In July 2020, the National Telecommunications and Information Administration (“NTIA”) responded to President Trump’s executive order and filed a petition for rulemaking with the Federal Communications Commission (“FCC”)—the agency responsible for the administration of the Communications Act of 1934.⁷⁸ In this petition, NTIA asked the FCC “to clarify ambiguities in § 230.”⁷⁹ In October 2020, the FCC announced its “inten[t] to move forward with a rulemaking,” but ultimately failed to act on the petition following a chairman change in January 2021.⁸⁰ The Department of Justice also made its views over § 230 known when it sent its own proposed amendments to Congress in September 2020.⁸¹ In this proposal, the Department of Justice focused on four ripe areas for reform: (1) incentivizing online platforms to address illicit content; (2) clarifying federal government enforcement capabilities to address unlawful content; (3) promoting competition; and (4) fostering open discourse and greater transparency.⁸²

Some members of Congress have proposed an entire repeal of § 230, while others propose more gradual rollbacks or the removal of immunity for only certain types of claims or providers.⁸³ For example, several proposals would have created new exceptions to § 230 with specific categorical claim carveouts, similar to that of FOSTA.⁸⁴ A few other bills focused on exceptions that would allow claims to go forward where illegal conduct related to distributing child sexual abuse material is involved.⁸⁵ Other bills opted to expand existing exemptions for federal criminal

⁷⁶ Exec. Order No. 13925, 85 Fed. Reg. 34,079.

⁷⁷ *Id.*

⁷⁸ BRANNON & HOLMES, *supra* note 71, at 30.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Department of Justice’s Review of Section 230 of the Communications Decency Act of 1996*, U.S. DEP’T OF JUST., <https://www.justice.gov/archives/ag/departments-justice-s-review-section-230-communications-decency-act-1996> [<https://perma.cc/2GFY-VQVU>] (last visited Oct. 8, 2022).

⁸³ BRANNON & HOLMES, *supra* note 71, at 30.

⁸⁴ *Id.* at 30.

⁸⁵ *Id.* at 30–31.

prosecutions to include the enforcement of federal civil laws.⁸⁶ And other proposals focused on creating exemptions for certain claims and lawsuits brought under state law, such as breach of contract claims or claims relating to property rentals.⁸⁷ The overwhelming calls for change from both sides of the political spectrum signal that something is wrong and in dire need of fixing, especially in light of the American public's growing reliance on social media.

IV. DISCUSSION

By 2023, prominent social media platforms have firmly replaced network television and newspapers as the primary sources of information for much of the American public.⁸⁸ In fact, research shows that around seventy-one percent of Americans now get “at least some of their news input from social media platforms.”⁸⁹ The primary difference between these social media sites and older sources of traditional media is that the popularity of the platforms stems from the content that *users* create, rather than from the sites themselves.⁹⁰

Section 230 was likely written with the intent that social media companies would police themselves in some manner.⁹¹ So far, however, social media platforms have failed to do so. To address the many issues that come with unfettered discretion, either social media companies need to better police themselves or the government needs to figure out some mechanism to hold them liable.⁹² While both President Biden and former President Trump have advocated for the revocation of § 230, each have

⁸⁶ *Id.* at 31.

⁸⁷ *Id.*

⁸⁸ Derek E. Bambauer, *How Section 230 reform endangers internet free speech*, BROOKINGS (July 1, 2020), <https://www.brookings.edu/techstream/how-section-230-reform-endangers-internet-free-speech/> [<https://perma.cc/4ZQ7-9EAE>].

⁸⁹ Andrew Hutchinson, *New Research Shows that 71% of Americans Now Get News Content via Social Platforms*, SOCIALMEDIATODAY (Jan. 12, 2021), <https://www.socialmediatoday.com/news/new-research-shows-that-71-of-americans-now-get-news-content-via-social-pl/593255/> [<https://perma.cc/ZK62-5RAK>] (“According to the latest data from Pew Research, which incorporates responses from more than 9,200 Americans, around 71% of people now get at least some of their news input from social media platforms.”).

⁹⁰ Baumbauer, *supra* note 88.

⁹¹ Brit McCandless Farmer, *What you need to know about Section 230*, CBS NEWS (Jan. 3, 2021), <https://www.cbsnews.com/news/section-230-60-minutes-2021-01-03/> [<https://perma.cc/3BFZ-AVAK>].

⁹² *Id.*

done so for differing reasons.⁹³ Republicans have focused their criticisms of § 230 on alleged censorship, while Democrats seek to establish accountability for misinformation and other harmful content spread through internet companies.⁹⁴ On one hand, President Biden has consistently criticized § 230 for protecting social media companies that allow for the spread of misinformation.⁹⁵ In fact, Biden called for the revocation of § 230 protections for “big tech”—particularly Facebook.⁹⁶ Biden has stated that Facebook is not simply an internet company—it is responsible for propagating falsehoods that Facebook knows to be false.⁹⁷ He also urged that the United States must implement standards in the same way that the European Union's General Data Protection Regulation (“GDPR”) set standards for online privacy.⁹⁸

On the other hand, former President Trump, as well as other prominent Republicans, believe that § 230 leads to the censorship and suppression of conservative voices.⁹⁹ Trump’s May 2020 executive order came after Twitter fact-checked and labeled a pair of his tweets as potentially misleading.¹⁰⁰ Following Trump’s permanent Twitter ban, he and fellow de-platformed individuals sued and demanded that § 230 be declared unconstitutional.¹⁰¹ Trump even went so far as to state that the

⁹³ Betsy Klein, *White House reviewing Section 230 amid efforts to push social media giants to crack down on misinformation*, CNN (updated July 20, 2021, 10:31 AM ET), <https://www.cnn.com/2021/07/20/politics/white-house-section-230-facebook/index.html> [https://perma.cc/933W-Y7XQ].

⁹⁴ Shannon Bond, *Donald Trump Sues Facebook, YouTube And Twitter For Alleged Censorship*, NPR (updated July 7, 2021, 2:37 PM ET), <https://www.npr.org/2021/07/07/1013760153/donald-trump-says-he-is-suing-facebook-google-and-twitter-for-alleged-censorship> [https://perma.cc/8KUP-SVDF].

⁹⁵ Klein, *supra* note 93.

⁹⁶ Makena Kelly, *Joe Biden wants to revoke Section 230*, THE VERGE (Jan. 17, 2020), <https://www.theverge.com/2020/1/17/21070403/joe-biden-president-election-section-230-communications-decency-act-revoke> [https://perma.cc/35AE-JMZY].

⁹⁷ *Id.*

⁹⁸ Elizabeth Culliford, *Where do Trump and Biden stand on tech policy issues?*, REUTERS (Oct. 28, 2020, 12:11 PM) <https://www.reuters.com/article/usa-election-tech-factbox-idINKBN27D2LP> [https://perma.cc/2BFM-HPWB].

⁹⁹ Klein, *supra* note 93.

¹⁰⁰ Marguerite Reardon, *Democrats and Republicans agree that Section 230 is flawed*, CNET (June 21, 2020), <https://www.cnet.com/news/politics/democrats-and-republicans-agree-that-section-230-is-flawed/> [https://perma.cc/DGG3-AV2S].

¹⁰¹ Maria Dinzeo, *Trump’s First Amendment lawsuit against Twitter on thin ice*, COURTHOUSE NEWS SERVICE (Feb. 24, 2020), <https://www.courthousenews.com/trumps-first-amendment-lawsuit-against-twitter-on-thin-ice/> [https://perma.cc/S3FY-AH5S] (“Other named plaintiffs include the American Conservative Union, which

law is “a blank check issued to private companies holding unprecedented power over the content of public discourse to censor constitutionally protected speech with impunity, resulting in a grave threat to the freedom of expression and to democracy itself.”¹⁰² During his presidency, Trump attempted to enact an executive order that would revoke the immunity granted to tech platforms for their site’s content.¹⁰³

With the recent takeover of Twitter by Elon Musk, many speculate how the current state of § 230 will impact his desire to reduce regulation of the platform’s content.¹⁰⁴ With the topic of § 230 on the Supreme Court’s horizon, there is a chance that Musk may be unable to reduce the platform’s moderation if the Court opts to shrink the statute’s protection—especially because “everything Twitter does is built around content recommendations produced by complex algorithms, which in turn respond to the unpredictable behavior of human users.”¹⁰⁵ With the looming threat of litigation for Twitter—as well as all other major social media platforms that use similar algorithms—companies would likely opt to remove far more content before the chance for litigation arises.¹⁰⁶

Supporters of the provision, meanwhile, argue that the law protects free speech.¹⁰⁷ Trump’s attempts to use the executive branch to change § 230’s application were called unconstitutional by legal experts, lawmakers, and FCC officials.¹⁰⁸ Members of both the political right and left have sought bipartisan approaches to reform § 230, which include proposals to limit its application or even require companies to earn its

claims Twitter “purged” thousands of followers from its @CPAC Twitter account without explanation, and Austen Fletcher, who claims to have had multiple YouTube videos removed for violations of YouTube’s medical misinformation policy. One of the removed videos discussed the ‘demonization of hydroxychloroquine,’ a drug Trump promoted as a Covid-19 cure despite clinical evidence to the contrary.”)

¹⁰² *Id.*

¹⁰³ Tony Romm & Josh Dawsey, *Trump expected to sign executive order that could threaten punishment against Facebook, Google and Twitter over allegations of political bias*, THE WASH. POST (May 28, 2020), <https://www.washingtonpost.com/technology/2020/05/27/trump-twitter-executive-order/> [<https://perma.cc/7H2N-T2W9>].

¹⁰⁴ Romoser, *supra* note 59.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Reardon, *supra* note 100.

¹⁰⁸ *Id.* See also Todd Spangler, *Trump Signs Executive Order Targeting Twitter, Facebook That Legal Experts Say is Likely Unconstitutional*, VARIETY (May 28, 2020, 1:51 PM), <https://variety.com/2020/digital/news/trump-executive-order-targets-twitter-facebook-1234619250/> [<https://perma.cc/4JVK-S7KR>].

protections by certifying they have complied with practices for detecting and reporting child exploitation materials to law enforcement.¹⁰⁹

Supporters of § 230 also claim that reform will hinder free speech, but that remains to be seen.¹¹⁰ All of the duty-of-care proposals on the table today address content that is not protected by the First Amendment.¹¹¹ There are no First Amendment protections for speech that induces harm (e.g., falsely yelling “fire” in a crowded theater), encourages illegal activity (e.g., advocating for the violent overthrow of the government), or propagates certain types of obscenity (e.g., child sexual-abuse material).¹¹²

The ever-changing environment of the internet makes any effort to reform § 230 risky.¹¹³ Just as lawmakers did not know about the exponential growth of the internet when they created the CDA, there is no telling what unforeseen advancements the internet will undergo in the next several years.¹¹⁴ Many proposed solutions welcome potentially harmful consequences—such as diminished freedom of expression—and should be approached with caution.¹¹⁵

Among such proposals include the mandate of content moderation, the imposition of common carrier obligations, or the outright repeal of § 230.¹¹⁶ Another method is to limit civil immunity of interactive computer services by requiring action upon notification of tortious activity.¹¹⁷ Under the “notification” reform, a website operator:

¹⁰⁹ Reardon, *supra* note 100 (“Democrat[ic] Sens. [Richard] Blumenthal and Dianne Feinstein (California) joined Republican Sen[s]. Lindsey Graham (South Carolina) and [Josh] Hawley in March to introduce the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act, known as EARN IT. This legislation would establish a new government commission composed of administration officials and outside experts, who would set ‘best practices’ for removing child sexual exploitation and abuse material online.”).

¹¹⁰ Smith & Van Alstyne, *supra* note 9.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Cameron F. Kerry, *Section 230 reform deserves careful and focused consideration*, BROOKINGS (May 14, 2021), <https://www.brookings.edu/blog/techtank/2021/05/14/section-230-reform-deserves-careful-and-focused-consideration/> [https://perma.cc/5WBS-NY8E].

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Amanda L. Cecil, *Taking Back the Internet: Imposing Civil Liability on Interactive Computer Services in an Attempt to Provide an Adequate Remedy to Victims of Nonconsensual Pornography*, 71 WASH. & LEE L. REV. 2513, 2548 (2014)

retains immunity if it follows the procedures set forth in the amendment, but it may lose immunity for failing to promptly address the issue. The legislature may set forth a period of time, such as fifteen days, to allow the service to respond. If a service refuses to respond within the time period and loses its § 230 immunity, the victim may sue the service for the civil claim as though it were the original poster. Though this causes the victim to endure a lengthy and expensive trial, it provides an opportunity for victims to pursue their legal claims against an identifiable defendant who cannot hide behind the shield of § 230 immunity.¹¹⁸

It is hard to fathom that § 230 protects internet platforms from liability due to their lack of physical, “brick-and-mortar” presence. A business or group may be held liable if its physical, brick-and-mortar premises are used for sex trafficking, similar to how a publishing company may be held liable for malicious gossip or privacy-invading content.¹¹⁹ Additionally, a company that knowingly allows foreign terrorist organizations to use its physical amenities would be subject to lawsuits from those impacted by resulting terrorist attacks.¹²⁰ Internet companies, however, are insulated from liability merely because they do not operate out of physical premises.

When immunity from legal recourse rests on the categorical placement of a business’s online or physical presence, the internet becomes much more attractive for those wishing to evade liability.¹²¹ The catch-all immunity created under § 230 encourages irresponsible behavior, such as establishing sites that cause others severe embarrassment, mental anguish, and emotional distress.¹²² It grants providers a license to “solicit illegal activity, including sex-trafficking, child sexual exploitation, or nonconsensual pornography.”¹²³ Site operators have no incentive to remove blatantly defamatory or invasive content or criminal or tortious user behavior.¹²⁴ Additionally, victims have no leverage to urge site operators to remove harmful posts when they are in a system structurally established to fail.¹²⁵

(This article specifically addresses redress to victims of revenge pornography, however, the amendment can pertain to other civil suits).

¹¹⁸ *Id.* at 2551.

¹¹⁹ Citron & Wittes, *supra* note 10, at 455.

¹²⁰ *Id.*

¹²¹ *Id.* at 464.

¹²² *Id.* at 467.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

Over the past two years, discussions over § 230 reform have skyrocketed for many obvious reasons. The outpour of concern over this law may be due in part to the sharing of content related to COVID-19. The spread of misinformation has the power to incite hate (e.g., “China virus”), instill a distrust in science and medicine, and result in unnecessary death.¹²⁶ During the time spent in quarantine throughout the pandemic, a reliance and addiction to cell phones and the internet have provided individuals with an endless supply of news and content. With the unfettered access to any and all content, however, comes the dark realities of the internet. For these reasons, reform is needed.

V. CONCLUSION

The CDA is well over twenty-five years old, but lawmakers on both sides of the political spectrum actively aspire to change the law to remedy all of the existing problems with platforms and moderation.¹²⁷ There is simply no way Congress could have intended for § 230 to create a lawless space where internet platforms are no longer responsible for protecting users’ civil rights online and where accountability for content is practically nonexistent.¹²⁸

While there can be no doubt that § 230 allows the internet to prosper, innovate, and expand “beyond the imagination of the operators of early bulletin boards and computer service providers the provision was designed to protect,” amending § 230 is critical to protecting vulnerable and powerless victims.¹²⁹ As American society moves increasingly online, there is a need for § 230 to be read in more narrow terms, with goals of safeguarding individual civil rights in an already prolific internet sector.¹³⁰ Each passing day welcomes billions of Facebook posts, millions of Tweets and Instagram posts, and thousands of hours of YouTube content.¹³¹ The internet has exponentially increased in size and capability since the conception of the CDA, and it will only continue to grow with each

¹²⁶ Katie Rogers, Lara Jakes and Ana Swanson, *Trump Defends Using ‘Chinese Virus’ Label, Ignoring Growing Criticism*, (Mar. 18, 2021), <https://www.nytimes.com/2020/03/18/us/politics/china-virus.html>.

¹²⁷ Kelly, *supra* note 96.

¹²⁸ Estreicher & Zipper, *supra* note 29.

¹²⁹ Citron & Wittes, *supra* note 10, at 456.

¹³⁰ Estreicher & Zipper, *supra* note 29.

¹³¹ Walsh, *supra* note 14 (“Every day there are billions of posts on Facebook, 500 million tweets on Twitter, and 200 million new Instagram pictures. There are also 500 hours of video uploaded to YouTube . . . every minute.”).

passing day.¹³² Over five billion people globally have cellular devices, the majority of which are smartphones with the capabilities to post or access a plethora of unmonitored internet content.¹³³ So long as § 230 remains law, social media companies are left with complete freedom to ignore lies, hoaxes, and slander with the potential to ruin the lives of innocent people.¹³⁴

¹³² Kerry, *supra* note 113.

¹³³ Laura Silver, *Smartphone Ownership Is Growing Rapidly Around the World, but Not Always Equally*, PEW RESEARCH CENTER (Feb. 5, 2019), <https://www.pewresearch.org/global/2019/02/05/smartphone-ownership-is-growing-rapidly-around-the-world-but-not-always-equally/> [<https://perma.cc/N868-2FRJ>].

¹³⁴ Pelley, *supra* note 38.