

CONDITIONING SECTION 230 IMMUNITY ON UNBIASED CONTENT MODERATION PRACTICES AS AN UNCONSTITUTIONAL CONDITION

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I. INTRODUCTION

As protests erupted throughout the United States in the wake of the police killing of George Floyd in late May 2020, President Donald Trump’s attention was focused elsewhere. On May 26, he tweeted: “There is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent. Mail boxes will be robbed, ballots will be forged & even illegally printed out &

* University of Illinois College of Law Class of 2021. This paper was finished during a weird time in all of our lives. I thank all of my friends for their love and support through this period of uncertainty.

fraudulently signed.”¹ Twitter then labelled the tweet with a disclaimer urging readers to “[g]et the facts about mail-in ballots,” linking to a Twitter-curated list of sources disputing the veracity of Trump’s claim.² The disclaimer was part of Twitter’s new process of labelling misleading tweets, originally adopted to flag misinformation related to COVID-19.³ In response, Trump issued an executive order on May 28 targeting a law known as Section 230, a small section of the 1996 Communications Decency Act largely responsible for enabling websites like Twitter to moderate user content however it wants.⁴ The statute reads:

(c) Protection for “Good Samaritan” blocking and screening of offensive material

(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[.]⁵

Under subparagraph (c)(1), an “interactive computer service” like a website cannot be treated as the publisher or speaker of content generated by a user or any other “information content provider,” meaning that Twitter generally cannot face legal liability for any of its users’ tweets.⁶ If Twitter were to be sued for publishing a defamatory user tweet, it could simply invoke Section 230(c)(1) and be granted a motion to dismiss, while the user who posted the tweet could still be personally liable for defamation.⁷ U.S.-based social media platforms are the relatively open forums they are today because this statutory immunity to liability allows them to host large amounts of unvetted user posts, profiles, comments, media, and other content without fear of being liable for the consequences of that content.⁸ Under subparagraph (c)(2), websites generally cannot be held civilly liable for good-faith moderation of content they find

1. Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2020, 8:17 AM), <https://twitter.com/realDonaldTrump/status/1265255835124539392>.

2. *Id.*

3. Yoel Roth and Nick Pickles, *Updating our Approach to Misleading Information*, TWITTER: PROD. BLOG (May 11, 2020), https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information.html.

4. Sam Dean, *The Facts About Section 230, the Internet Speech Law Trump Wants to Change*, L.A. TIMES (May 28, 2020, 4:39 PM), <https://www.latimes.com/business/technology/story/2020-05-28/the-facts-about-section-230-the-internet-speech-law-trump-wants-to-change>.

5. 47 U.S.C § 230(c) (2018).

6. Dean, *supra* note 4.

7. KATHLEEN ANN RUANE, CONG. RESEARCH SERV., HOW BROAD A SHIELD? A BRIEF OVERVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT 2 (2018).

8. Dean, *supra* note 4.

objectionable for any reason—a breach of contract claim against Twitter for its suspension of user accounts would be dismissed.⁹ This liability shield has enabled social media platforms to maintain robust control over the kinds of user content they allow.¹⁰

Under an unprecedented reading of Section 230,¹¹ Trump’s executive order directed the Secretary of Commerce to petition the Federal Communications Commission to adopt regulations that would condition subsection (c)(1)’s liability shield on whether a website is moderating under (c)(2)’s “good faith” requirement and define “good faith” as, among other things, refraining from suppressing political viewpoints the website disagrees by suspending users who express those views.¹² The order, in effect, expressed the policy that Section 230 immunity should be taken away if a website moderates content in a politically biased manner.¹³ Through the National Telecommunications and Information Administration, the Commerce Secretary made the petition for rulemaking to the FCC on July 27.¹⁴ Though the petition’s proposed rules were heavily criticized during the NTIA’s public comment period,¹⁵ FCC Chairman Ajit Pai announced on October 15 that the FCC would proceed with formal rulemaking.¹⁶

Trump made clear in the executive order that he perceives social media platforms to be engaging in illegitimate viewpoint discrimination and that the purpose of the order is to discourage such discrimination by threatening to take away Section 230 immunity.¹⁷ The order states:

Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias. As has been reported, Twitter seems never to have placed such a label on another politician’s tweet. As recently as last week, Representative Adam Schiff was continuing to mislead his followers by peddling the long-disproved Russian Collusion Hoax, and Twitter did not flag those tweets. Unsurprisingly, its officer in charge of so-called “Site Integrity” has flaunted his political bias in his own tweets.¹⁸

Trump’s actions did not occur in a vacuum. They are rooted in grievances aired by conservative politicians in recent years that Section 230 immunity allows social media platforms to censor conservative viewpoints with impunity

9. *See, e.g.,* Brittain v. Twitter, Inc., No. 19-cv-00114-YGR, 2019 U.S. Dist. LEXIS 97132 (N.D. Cal. June 10, 2019) (granting Twitter’s Section 230 motion to dismiss plaintiff’s eight claims arising from his account suspensions).

10. Dean, *supra* note 4.

11. *Id.*

12. Exec. Order No. 13925, 85 Fed. Reg. 34079, 34079–81 (May 28, 2020) [hereinafter Censorship Executive Order].

13. *See id.* at 34079 (“Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias.”).

14. *Petition for Rulemaking of the National Telecommunications and Information Administration*, FED. COMM’NS. COMM’N. (July 27, 2020).

15. *NTIA Reply Comments in the Matter of Section 230 of the Communications Act of 1934*, FED. COMM’NS. COMM’N. (Sep. 17, 2020).

16. *Statement of Chairman Pai on Section 230*, FED. COMM’NS. COMM’N. (October 15, 2020).

17. Censorship Executive Order, *supra* note 12, at 34079.

18. *Id.*

under the guise of content moderation.¹⁹ One lawmaker has proposed, as Trump's executive order did, conditioning Section 230 immunity on unbiased content moderation practices to compel social media platforms to stop censoring conservative users.²⁰ Part II of this Note will review the historical context leading up to these proposals. Part III of this note will argue that such conditional immunity is unconstitutional under the unconstitutional conditions doctrine. Finally, Part IV will recommend that lawmakers focus on creating narrow exceptions to Section 230 immunity instead of seeking to impose conditions on it.

II. BACKGROUND

A. Section 230 Immunity: A Brief History

Section 230 was intended to encourage websites to actively moderate third party content.²¹ Its origins can be traced to two cases that were decided in the internet's infancy: *Cubby, Inc. v. CompuServe, Inc.* in the Southern District of New York,²² and *Stratton Oakmont, Inc. v. Prodigy Services Co.* in New York state court.²³ In 1991, the *Cubby* court held that CompuServe could not be liable for defamatory user content found on its online forums because it did not actively moderate them, which made them more like a distributor of the content and not a publisher.²⁴ In its reasoning the *Cubby* court turned to *Smith v. California*, in which the Supreme Court struck down a Los Angeles city ordinance imposing criminal liability on bookstore owners who sold obscene material, holding that distributors like bookstores could be held liable only if they knew or should have known of the illegality of the content they were distributing.²⁵ In 1995, however, the *Stratton* court found that Prodigy was liable for all defamatory user posts made on its website because it was selectively deleting them and therefore engaging in content moderation.²⁶

These early decisions indicated that a website could be exposed to an unpredictable amount of liability if it moderated third party content, so its safest bet would be to refrain from moderating altogether to avoid any potential

19. John D. McKinnon, *Senate Republicans Push Bill to Weaken Liability Shield for Online Platforms*, WALL ST. J. (Sept. 8, 2020), <https://www.wsj.com/articles/senate-republicans-push-bill-to-weaken-liability-shield-for-online-platforms-11599603303>.

20. Lauren Feiner, *Republican Bill Seeks to Limit Social Media Liability Protections Without Getting Rid of Them*, CNBC (Sept. 10, 2020, 10:07 AM), <https://www.cnbc.com/2020/09/10/republican-bill-seeks-to-limit-section-230-protection-for-tech-platforms.html>.

21. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1604 (2017).

22. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

23. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *6 (N.Y. Sup. Ct. May 24, 1995).

24. *Id.*

25. *Cubby*, 776 F. Supp. at 139–40; Adi Robertson, *Why the Internet's Most Important Law Exists and How People are Still Getting it Wrong*, THE VERGE (June 21, 2019), <https://www.theverge.com/2019/6/21/18700605/section-230-internet-law-twenty-six-words-that-created-the-internet-jeff-kosseff-interview>.

26. *Id.*

liability.²⁷ Recognizing this perverse incentive, Representatives Chris Cox and Ron Wyden authored an amendment to the Communications Decency Act, a law proposed by Senator James Exon criminalizing sending minors indecent content online.²⁸ The CDA was passed by Congress in 1996, but the Supreme Court's 1997 decision in *Reno v. ACLU* struck down most of the anti-indecency provisions of the CDA on First Amendment grounds.²⁹ What survived was Section 230, the amendment authored by Cox and Wyden.³⁰

A few months after *Reno*, *Zeran v. America Online Inc.*³¹ became the first case decided under Section 230.³² Zeran sought to hold AOL liable for the mental anguish he suffered due to AOL's failure to promptly remove a fake advertisement on its message boards directing readers to call Zeran's phone number to order t-shirts celebrating the 1995 Oklahoma City bombing.³³ AOL raised Section 230 as a defense, and in a seminal ruling the Fourth Circuit held that it indeed barred Zeran's claim, discerning a Congressional intent in Section 230 to protect freedom of speech in the nascent internet by not requiring websites to moderate third-party content at all.³⁴ The ruling set the precedent for judges nationwide to broadly interpret Section 230's protections in favor of shielding websites from liability for third-party content, regardless of how or if they moderate it.³⁵

Section 230 immunity has not always been absolute. A website can be liable for the content it produces itself as an "information content provider."³⁶ Subsection (e) also lists specific exceptions to subsection (c)'s liability shields, four of which have always been part of the law: the enforcement of intellectual property law; federal criminal law; the Electronic Communications Privacy Act and similar state laws; and state laws that are otherwise "consistent with" Section 230.³⁷ The latter does not create a general exception for state criminal law—a state law that imposes criminal liability on a website for hosting certain types of third-party content by treating it as the publisher of that content would be inconsistent with and preempted by subsection (c)(1).³⁸

The overall broad immunity granted to websites by Section 230 emboldened bad actors to host users engaged in illicit activity.³⁹ In particular,

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

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

32. Klonick, *supra* note 19; Robertson, *supra* note 23.

33. Michael Fitzgerald, *The Court Case that Enabled Today's Toxic Internet*, WIRED (July 08, 2018), <https://www.wired.com/story/the-court-case-that-enabled-todays-toxic-internet/>.

34. *Id.*

35. Klonick, *supra* note 19.

36. *See, e.g.*, *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (holding that the defendant website acted as the information content provider of the questionnaire it provided to users, and therefore Section 230(c)(1) immunity did not apply to the contents of the questionnaire).

37. 47 U.S.C. § 230(e) (2018).

38. Eric Goldman, *The Implications of Excluding State Crimes from 47 U.S.C. § 230's Immunity*, SANTA CLARA SCH. L. LEGAL STUD. RSCH. PAPERS SERIES, PAPER NO. 23-12 (2013), https://papers.ssm.com/so13/papers.cfm?abstract_id=2287622.

39. Danielle Citron, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 413–14 (2017).

websites that allowed advertising by sex traffickers drew public outrage as they continually escaped liability in civil suits brought to hold them accountable for their promotion of sex trafficking.⁴⁰ After more than a decade of mounting public pressure, Congress passed the Stop Enabling Sex Traffickers Act and the Allow States and Victims to Fight Online Sex Trafficking Act in 2018, or FOSTA-SESTA, which created subsection (e)'s fifth exception.⁴¹ Websites effectively lost immunity from state criminal and federal civil liability for facilitating sex trafficking: first, the legislation added “knowingly assisting, facilitating, or supporting sex trafficking” to the definition of sex trafficking under federal law criminal law so that websites allowing sex traffickers to post ads would be brought within its ambit, and then limited Section 230 from preempting a federal law that allows sex trafficking victims to use a sex trafficking violation under federal criminal law as the basis for a civil suit against the sex trafficker in federal court; and second, it limited Section 230 from preempting state laws criminalizing activity that would constitute sex trafficking under federal criminal law, allowing state prosecution for such activity.⁴²

B. Background Leading up to Recent Proposals of Conditional Section 230 Immunity

The passage of FOSTA-SESTA was momentous not only for being the first and only successful carveout to Section 230 immunity, but also for signaling that the law was not immutable and that bad actors need not be entitled to its immunity.⁴³ Lawmakers began to propose additional changes to Section 230 in FOSTA-SESTA's wake, this time taking aim at a new bad actor: large social media platforms like Twitter and Facebook.⁴⁴ The proposals can largely be seen as backlash against the way these sites moderated user content in response to foreign election interference in 2016 and a spate of ideologically motivated mass shootings beginning in late 2018.⁴⁵

In the year leading up to the 2016 presidential election in the United States, teenagers in the small Macedonian city of Veles were busy plagiarizing pro-Donald Trump articles from far-right political websites in the U.S. and posting them on over 100 pro-Trump news websites they had created.⁴⁶ They would then share the articles on right-wing Facebook groups to direct traffic to their news sites and earn ad revenue.⁴⁷ The Facebook posts and the articles they linked to featured various false or misleading stories, like claims that the Pope

40. Christine Biederman, *Inside Backpage.com's Vicious Battle With the Feds*, WIRED (June 6, 2019), <https://www.wired.com/story/inside-backpage-vicious-battle-feds/>.

41. *Id.*

42. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253-55.

43. *Id.*; Stop Enabling Sex Traffickers Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253-55.

44. *Id.*

45. *Id.*

46. Craig Silverman et al., *How Teens in The Balkans Are Duping Trump Supporters with Fake News*, BUZZFEED NEWS (Nov. 3, 2016), <https://www.buzzfeednews.com/article/craigsilverman/how-macedonia-became-a-global-hub-for-pro-trump-misinfo#fu2okXaeKo>.

47. *Id.*

had endorsed Trump and that Hillary Clinton believed honest people like Trump should run for office.⁴⁸ The latter headline generated nearly 480,000 interactions in a week.⁴⁹ And while Macedonian teenagers were directing social media traffic to pro-Trump fake news stories for income, Russian government operatives were spreading fake news on social media to specifically help Trump win the election.⁵⁰ Special Counsel Robert Mueller's report on Russian interference in the 2016 election found an extensive propaganda campaign conducted on U.S. social media by Russia's Internet Research Agency (IRA).⁵¹ Twitter identified over 3,800 IRA operated accounts tweeting pro-Trump and right-wing messages that received significant engagement during the election period.⁵² These and other Russian linked Twitter accounts deliberately amplified fake news stories based on various right-wing conspiracy theories, including claims that Hillary Clinton engaged in satanism and ritual sex abuse and that the Democratic National Committee's emails were hacked not by Russian intelligence agencies but by a deceased former DNC data analyst.⁵³

Two years after the election, Robert Bowers, an avid user of a social media platform popular with far-right extremists called Gab, posted the following about the Hebrew Immigrant Aid Society (HIAS) in October 2018: "HIAS likes to bring invaders in that kill our people. I can't sit by and watch my people get slaughtered. Screw your optics, I'm going in."⁵⁴ He then shot and killed 11 people in a Pittsburgh synagogue.⁵⁵ In 2019, John T. Earnest opened fire on a synagogue in Poway, California in April,⁵⁶ and Patrick Crusius shot and killed 22 people at a Walmart in El Paso in August.⁵⁷ Before shooting, they respectively posted an anti-Semitic and anti-Latino manifesto on 8chan, a message board website known to host far-right, white nationalist, and anti-Semitic content.⁵⁸ 8chan is strongly associated with far-right radicalization, with a case study by investigative journalism website Bellingcat showing ten of

48. *Id.*

49. *Id.*

50. Craig Timberg, *Russian propaganda effort helped spread 'fake news' during election, experts say*, WASH. POST (Nov. 24, 2016), https://www.washingtonpost.com/business/economy/russian-propaganda-effort-helped-spread-fake-news-during-election-experts-say/2016/11/24/793903b6-8a40-4ca9-b712-716af66098fe_story.html.

51. Robert Mueller III, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election*, DEP'T. OF JUST. (2019), <https://www.justice.gov/storage/report.pdf>.

52. @policy, *Update on Twitter's review of the 2016 US election*, TWITTER (Jan. 19, 2018), https://blog.twitter.com/official/en_us/topics/company/2018/2016-election-update.html.

53. Matthew Hindman et. al., *Disinformation, and Influence Campaigns on Twitter*, KNIGHT FOUND. 38, 41 (2018), https://kf-site-production.s3.amazonaws.com/media_elements/files/000/000/238/original/KF-DisinformationReport-final2.pdf.

54. Caroline Linton, *Gab gets new domain host, expects to be back online Sunday*, CBS NEWS (Nov. 3, 2018), <https://www.cbsnews.com/news/gab-new-domain-host-epik-robert-bowers-pittsburgh-shooting/>.

55. *Id.*

56. City News Service, *Suspected Poway synagogue shooter charged with murder, hate crimes*, FOX 5 SAN DIEGO (Oct. 3, 2019), <https://fox5sandiego.com/2019/10/03/watch-live-suspected-poway-synagogue-shooter-back-in-court/>.

57. Christina Maxouris et al., *El Paso vigils bring together a city in mourning after mass shooting*, CNN (Aug. 5, 2019), <https://www.cnn.com/2019/08/05/us/el-paso-shooting-monday/index.html>.

58. Julia Carrie Wong, *8chan: The Far-Right Website Linked to the Rise in Hate Crimes*, THE GUARDIAN (Aug. 4, 2019, 10:36 PM), <https://www.theguardian.com/technology/2019/aug/04/mass-shootings-el-paso-texas-dayton-ohio-8chan-far-right-website>.

seventy five prominent far-right activists specifically crediting 8chan with their “red-pilling,” or conversion to fascist, racist, or anti-Semitic beliefs.⁵⁹ In the same study, six specifically credited their conversion to Infowars, the internet talk show hosted by notorious far-right conspiracy theorist Alex Jones,⁶⁰ which at one point had over 2.4 million followers on YouTube,⁶¹ over 1.4 million combined with Jones’s personal account on Twitter,⁶² and over 2.5 million combined with his personal account on Facebook.⁶³ Jones has claimed that Barack Obama is possessed by demons, the “Jewish mafia” controls Uber and the healthcare system, the Sandy Hook Elementary School shooting was a hoax perpetrated by the anti-gun lobby,⁶⁴ and Muslim refugees employed by the Chobani yogurt company commit rape.⁶⁵

Social media platforms found themselves under intense public scrutiny during this period for their perceived roles in both the election interference and the mass shootings—through their lax content moderation practices, they were seen as enabling the proliferation of fake news corrupting the democratic process⁶⁶ and hosting rhetoric fueling online communities of hate that incubate domestic terrorists.⁶⁷ In response to the public pressure, in 2018 and 2019 they banned several high-profile users known to spread misinformation or repeatedly violate their hate speech policies: Twitter permanently banned Alex Jones,⁶⁸

59. Robert Evans, *From Memes to Infowars: How 75 Fascist Activists Were “Red-Pilled,”* BELLINGCAT (Oct. 11, 2018), <https://www.bellingcat.com/news/americas/2018/10/11/memes-infowars-75-fascist-activists-red-pilled/>.

60. *Id.*

61. *Id.*

62. Associated Press, *Twitter Removes Accounts Linked to Alex Jones, Infowars*, NBC NEWS (Oct. 23, 2018, 2:04 AM), <https://www.nbcnews.com/tech/social-media/twitter-removes-accounts-linked-alex-jones-infowars-n923151>.

63. Kalhan Rosenblatt, *Facebook, YouTube and Apple Remove Alex Jones and Infowars From Their Platforms*, NBC NEWS (Aug. 6, 2018, 6:56 AM), <https://www.nbcnews.com/tech/tech-news/facebook-removes-four-pages-belonging-infowars-alex-jones-n897861>.

64. Jane Coaston, *YouTube, Facebook, and Apple’s Ban on Alex Jones, Explained*, VOX (Aug. 6, 2018, 3:05 PM), <https://www.vox.com/2018/8/6/17655658/alex-jones-facebook-youtube-conspiracy-theories>.

65. Jackie Wattles, *InfoWars’ Alex Jones Apologizes for Saying Chobani Supports ‘Migrant Rapists’*, CNN BUS. (May 17, 2017, 5:16 PM), <https://money.cnn.com/2017/05/17/media/alex-jones-chiobani/index.html>.

66. See Ali Breland, *Zuckerberg Apologizes to Congress over Spread of ‘Fake News,’ Hate Speech*, THE HILL (Apr. 10, 2018, 3:47 PM), <https://thehill.com/policy/technology/382523-zuckerberg-apologizes-to-congress-over-spread-of-fake-news-hate-speech> (“‘It’s clear now that [Facebook] didn’t do enough to prevent these tools from being used for harm,’ Zuckerberg said at a joint hearing of the Senate Judiciary and Commerce committees. ‘That goes for fake news, foreign interference in elections, and hate speech, as well as developers and data privacy. We didn’t take a broad enough view of our responsibility, and that was a big mistake,’ he continued.”).

67. David Goldman, *Big Tech Made the Social Media Mess. It Has to Fix It*, CNN: BUS. (Oct. 29, 2018, 3:17 PM), <https://www.cnn.com/2018/10/29/tech/social-media-hate-speech/index.html>.

68. Charlie Warzel & Ryan Mac, *After Multiple Provocations, Twitter Has Banned Alex Jones And Infowars*, BUZZFEED NEWS (Sept. 6, 2018, 4:44 PM), <https://www.buzzfeednews.com/article/charliwarzel/twitter-bans-alex-jones-infowars?bfsource=relatedmanual>.

Laura Loomer,⁶⁹ and Jacob Wohl⁷⁰ while Facebook banned Alex Jones, Laura Loomer, Milo Yiannopoulos, and Paul Joseph Watson.⁷¹

The banned users also happened to be influential figures on the far right, which to conservatives validated their long-held suspicion that platforms had been shadowbanning, or covertly limiting access to, content from right-wing accounts.⁷² Conservative politicians began to accuse social media sites of abusing their Section 230 immunity by censoring conservative voices without fear of any repercussions for their discriminatory content moderation practices.⁷³ Trump's executive order was the first manifestation of this sentiment in the executive branch—Republican Senator Josh Hawley's Ending Support for Internet Censorship Act in June 2019 was the first in the legislature.⁷⁴ For a website with more than 30 million monthly users in the U.S., 300 million monthly users worldwide, or more than \$500 million in global revenue per year,⁷⁵ Senator Hawley's bill would condition Section 230's liability shields on proving to the Federal Trade Commission that it does not moderate third-party content in a manner that is biased against a political party, political candidate, or political viewpoint.⁷⁶

In June 2020, Hawley also introduced the Limiting Section 230 Immunity to Good Samaritans Act.⁷⁷ For a website with more than 30 million monthly users in the U.S., 300 million monthly users worldwide, or more than \$1.5 billion in global revenue per year, the bill would condition subsection (c)(1)'s liability shield on including a promise in its terms of service that it will design and operate the provided service in “good faith,” in the same sense that the term is used in subsection (c)(2), and would allow a user to sue for damages up to \$5,000 upon breach of that promise.⁷⁸ For both subsection (c)(1) and (c)(2)'s liability shields, a covered website would not be moderating content in “good faith” if it engages in the intentionally selective enforcement of its terms of service,

69. Jane Lytvynenko, *Laura Loomer Was Banned From Twitter After Spreading Anti-Muslim Falsehoods About Ilhan Omar*, BUZZFEED NEWS, <https://www.buzzfeednews.com/article/janelytvynenko/laura-loomer-banned-twitter?bfsource=relatedmanual> (last updated Nov. 22, 2018, 1:05 PM).

70. Salvador Hernandez & Ryan Mac, *Twitter Has Suspended Pro-Trump Conspiracy Theorist Jacob Wohl For Operating Fake Accounts*, BUZZFEED NEWS, <https://www.buzzfeednews.com/article/salvadorhernandez/twitter-suspends-jacob-wohl> (last updated Feb. 26, 2019, 7:53 PM).

71. Jane Coaston, *The Facebook Free Speech Battle, Explained*, VOX (last updated May 14, 2019, 12:38 PM), <https://www.vox.com/technology/2019/5/6/18528250/facebook-speech-conservatives-trump-platform-publisher>.

72. *Id.*

73. *Id.*

74. Dean, *supra* note 4; Ending Support for Internet Censorship Act, S. 1914, 116th Cong. § 2(a)(1) (2019).

75. Mary Catherine Wellons, *GOP Senator Introduces a Bill that Would Blow Up Business Models for Facebook, YouTube and Other Tech Giants*, CNBC (last updated June 19, 2019, 8:47 AM), <https://www.cnbc.com/2019/06/18/sen-hawley-bill-would-revoke-cda-section-230-for-large-tech-companies.html>.

76. *Id.*

77. Russell Brandom, *Senate Republicans Want to Make It Easier to Sue Tech Companies for Bias*, THE VERGE (June 17, 2020, 9:46 AM), <https://www.theverge.com/2020/6/17/21294032/section-230-hawley-rubio-conservative-bias-lawsuit-good-faith>.

78. S. 3983, 116th Cong. § 2(1) (2020).

including its user suspension and content restriction policies, or if it recklessly disregards the selective enforcement of its terms of service by an algorithm.⁷⁹

The NTIA's July 2020 petition for rulemaking mandated by President Trump's executive order asked the FCC to promulgate regulations placing similar limitations on what counts as good faith moderation in subsection (c)(2), but for all websites regardless of the size of its userbase.⁸⁰ The petition also asked the FCC to preclude "otherwise objectionable" in subsection (c)(2) from meaning "objectionable for any other reason," and to instead interpret it to mean "similar to" the six named types of content websites are allowed to moderate in good faith without civil liability: obscene, lewd, lascivious, filthy, excessively violent, and harassing.⁸¹ The petition retains the executive order's request that subsection (c)(1)'s liability shield be conditioned on meeting the standard of "good faith" moderation in subsection (c)(2).⁸²

All three proposals above seek to condition Section 230 immunity in some form. Hawley's 2019 bill rather explicitly conditions Section 230's liability shields on unbiased, politically neutral content moderation.⁸³ His 2020 bill and the NTIA's rulemaking request can be read as achieving the same condition—a social media platform would have to enforce its content restriction and user suspension policies the same way on all points of the political spectrum to keep Section 230 immunity.⁸⁴ Under the NTIA's request, if a platform wanted to qualify for the liability shields, it could only restrict content or suspend a user on the basis of one of the six named categories in subsection (c)(2)—a platform could not restrict content or suspend users simply because they espouse ideologies it finds objectionable.⁸⁵

The three proposals all essentially seek to condition Section 230 immunity on social media platforms abstaining from biased content moderation practices.⁸⁶ The next Part will argue that such a scheme would violate the unconstitutional conditions doctrine, which prohibits the conditioning of a government benefit on the relinquishment of a constitutional right⁸⁷—in this case, social media sites' statutory grant of general civil and criminal immunity for hosting third-party content cannot be conditioned upon the relinquishment of their constitutional right to choose how to moderate their platforms.

79. *Id.*

80. *See generally* FED. COMM'N. COMM'N., PETITION FOR RULEMAKING OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, (2020) [hereinafter NTIA Petition] (asking the FCC to promulgate regulations placing similar limitations on what counts as good faith moderation in Section 230(c)(2)).

81. *Id.* at 38.

82. *Id.* at 30–31.

83. *See* S. 1914 (conditioning liability shields on unbiased, politically neutral content moderation).

84. NTIA Petition, *supra* note 78.

85. *Id.* at 43.

86. S. 1914; S. 3983. *See* NTIA Petition, *supra* note 78 (outlining Section 230 immunity on social media platforms abstaining from biased content moderation).

87. Thomas McCoy, *Unconstitutional Conditions Doctrine*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV., <https://www.mtsu.edu/first-amendment/article/1026/unconstitutional-conditions-doctrine> (last visited Oct. 21, 2020).

III. ANALYSIS

At the heart of the doctrine of unconstitutional conditions is the notion that the government should not be allowed to coerce individuals into waiving their constitutional rights by threatening to deprive them of a crucial benefit—such coercion can be as suspect as directly depriving a person of a right without offering a conditional benefit.⁸⁸ Successful unconstitutional conditions challenges have consisted of a variety of pairings of government benefits and protected constitutional rights: a tax break and the First Amendment right to free exercise of religion,⁸⁹ funding and the First Amendment right to free speech,⁹⁰ pre-trial release from jail and the Fourth Amendment right against unreasonable search and seizure,⁹¹ medical care and the Fourteenth Amendment right to equal protection,⁹² and employment and the Fifth Amendment right against self-incrimination.⁹³ The analysis here will treat Section 230 immunity as the government benefit. The coercive potential of the benefit is high, as the modern internet is wholly dependent on the twenty five years of relatively unrestricted user speech resulting from Section 230's general immunization against liability for hosting that speech.⁹⁴ Taking away Section 230 immunity would upend the business models of large social media platforms by forcing them to vet all user content for illegal or defamatory material before it gets posted.⁹⁵ They might simply go out of business from the sudden costs of defending against legal liability.⁹⁶ Any condition placed on Section 230 immunity is essentially a condition on their existence as they know it, and thus should be carefully scrutinized.⁹⁷

The constitutional right that social media platforms must relinquish to gain Section 230 immunity is based on the First Amendment and can be

88. See Louis W. Fisher, *Contracting Around the Constitution: An Anticommodificationist Perspective on Unconstitutional Conditions*, 21 U. PA. J. CONST. L. 1167, 1171–72 (2019) (“Unconstitutional conditions plays an essential role in constitutional doctrine, but scholars have long struggled to ‘explain why conditions on government benefits that ‘indirectly’ pressure preferred liberties should be as suspect as ‘direct’ burdens on those same rights, such as the threat of criminal punishment.’ One persuasive, but incomplete, answer derives from concerns about the distributive impacts of government offers that condition benefits on the waiver of individual constitutional rights.”).

89. *E.g.*, *Speiser v. Randall*, 357 U.S. 513 (1958).

90. *E.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

91. *E.g.*, *U.S. v. Scott*, 450 F.3d 863 (9th Cir. 2005).

92. *E.g.*, *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974).

93. *E.g.*, *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977).

94. See Christopher Zara, *The Most Important Law in Tech has a Problem*, WIRED (Jan. 3, 2017), <https://www.wired.com/2017/01/the-most-important-law-in-tech-has-a-problem> (“With those 26 words, the federal government established the regulatory certainty that has allowed today’s biggest internet companies to flourish. Without Section 230—the popular theory goes—there could be no Facebook, Amazon, or Twitter. Yelp’s one-star reviews would have rendered it helpless against litigation from angry business owners, and Reddit’s anonymous trolls would have long ago invited a barrage of devastating libel lawsuits.”).

95. Mary Wellons, *GOP Senator Introduces a Bill That Would Blow up Business Models for Facebook, YouTube and Other Tech Giants*, CNBC (June 19, 2019), <https://www.cnbc.com/2019/06/18/sen-hawley-bill-would-revoke-cda-section-230-for-large-tech-companies.html>.

96. See, e.g., Christine Biederman, *Inside Backpage.com’s Vicious Battle With the Feds*, WIRED (June 18, 2019), <https://www.wired.com/story/inside-backpage-vicious-battle-feds> (explaining how classifieds website Backpage, at one point the largest online marketplace for advertising and buying sex services, was shut down after FOSTA-SESTA took away its Section 230 immunity).

97. *Id.*

conceptualized as the right to editorial discretion.⁹⁸ At the most basic level, it is derived from the negative right of private entities to not be bound by the First Amendment’s prohibitions against abridging speech—the First Amendment only applies to government actors, not private ones.⁹⁹ When private entities create forums for speech, they have control over the kind of speech and speakers allowed in the forum.¹⁰⁰ Restated as a positive right, private entities have the freedom of editorial discretion over their forums.¹⁰¹ Editorial discretion is not only the right to exclude speech and speakers, but also a corollary to the First Amendment¹⁰² right against compelled speech.¹⁰³ Private entities cannot be compelled by the government to host certain speech and speakers.¹⁰⁴ Applied to the present context, social media platforms, as private entities, exercise their right to editorial discretion over their forums when they moderate content by allowing or restricting speech and users as they see fit. Senator Hawley’s and the NTIA’s proposals seek to induce platforms to cede this right in exchange for the Section 230 immunity they need to remain viable.¹⁰⁵

With the government benefit and the right at stake clearly defined, analysis of the proposals follows.

A. *Senator Hawley’s and the NTIA’s Proposals Should be Subject to and Would be Unable to Survive Strict Scrutiny*

The Supreme Court has previously dealt with limitations on editorial discretion as a condition for a government benefit that essentially amounts to a mass media entity’s ability to exist.¹⁰⁶ In *Red Lion Broadcasting Co. v. FCC*, the Court upheld the FCC’s “fairness doctrine,” its practice until 1987¹⁰⁷ of requiring broadcasters to cover issues of importance to the public in a manner that is fair and accurately reflects opposing views, as a condition of obtaining an operating license from the FCC.¹⁰⁸ Specifically, the Court upheld FCC

98. See generally Ben Sperry, *The First Amendment & Section 230: Protecting Free Speech on the Internet*, INT’L CTR. FOR L. & ECON. (Aug. 2020) (discussing the rights of online platforms when determining what content is acceptable).

99. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

100. *Id.* at 1930.

101. *Id.*

102. See *Miami Herald Pub. Co., Div. of Knight Newspapers v. Tornillo*, 418 U.S. 241, 258 (1974) (“The choice of material to go into a new paper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public official—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”).

103. See *id.* at 256 (“Compelling editors or publishers to publish that which ‘reason tells them should not be published’ is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.”).

104. *Id.*

105. Ending Support for Internet Censorship Act, S. 1914, 116th Cong. § 2(a)(1) (2019); Limiting Section 230 Immunity to Good Samaritans Act S. 3983, 116th Cong. § 2(1) (2020); PETITION FOR RULEMAKING OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION 37, FCC (July 27, 2020).

106. *Tornillo*, 418 U.S. at 247–48.

107. Brooks Boliek, *FCC finally kills off fairness doctrine*, POLITICO (Aug. 22, 2011), <https://www.politico.com/story/2011/08/fcc-finally-kills-off-fairness-doctrine-061851>.

108. 395 U.S. 367, 375, 377 (1969).

regulations implementing the doctrine that required broadcasters to allow a person or group disparaged on a broadcaster's station a timely opportunity for rebuttal on the same station.¹⁰⁹ The validity of the doctrine as a condition for licensure was premised on the notion that the broadcast spectrum is a medium of scarcity.¹¹⁰ Before the FCC began to allocate broadcasting frequencies through a licensing scheme, any broadcaster could occupy any frequency at any power level, rendering the technology nearly useless in the hands of the private sector.¹¹¹ "It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the [g]overnment."¹¹² In a scarce medium, broadcasters have "obligations to present those views and voices which are representative of [their] community and which would otherwise, by necessity, be barred from the airwaves."¹¹³ In other words, since licensed broadcasters have the privilege of disseminating speech in a medium where only a finite number of licenses can be granted, they must present viewpoints that may not receive that same privilege. The right to editorial discretion is limited, and so, "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on [a] unique medium."¹¹⁴

Next, in *FCC v. League of Women Voters* the Supreme Court dealt with a portion of the Public Broadcasting Act conditioning both government and privately owned¹¹⁵ public broadcasting stations' receipt of funding from the Corporation for Public Broadcasting on complete refrain from "engag[ing] in editorializing."¹¹⁶ "Editorializing" included not only exercising editorial discretion in such a way that could lead to biased programming, but also explicitly stating the station's own views.¹¹⁷ Characterizing the *Red Lion* decision upholding the fairness doctrine as an intermediate scrutiny analysis permitting the government to advance "the substantial governmental interest in ensuring balanced presentations of views in [a] limited medium"¹¹⁸ through narrowly tailored means,¹¹⁹ the Court also applied intermediate scrutiny to the Act and found that the complete prohibition on any activity that could be considered editorializing was an overbroad solution to the same substantial government concerns raised in *Red Lion*.¹²⁰

The Court mentioned, however, that if the same prohibition in the Act were applied to a newspaper, it would be subject to strict scrutiny and struck down for

109. *Id.* at 373–75.

110. *Id.* at 396–97.

111. *Id.* at 375–76, 388–89.

112. *Id.* at 376.

113. *Id.* at 389.

114. *Id.* at 390.

115. 468 U.S. 364, 393–94 (1984).

116. *Id.* at 368.

117. *See id.* at 384–85 ("the Government urges that the statute was aimed . . . to keep these stations from becoming convenient targets for capture by private interest groups wishing to express their own partisan viewpoints.").

118. *Id.* at 378.

119. *Id.* at 380.

120. *Id.* at 398.

lack of serving a compelling government interest—¹²¹scarcity, the fundamental characteristic of the broadcast spectrum that justifies the application of relaxed First Amendment standards for broadcast regulation,¹²² is absent from the medium of print. A print publication need not be compelled to present all sides of an issue because anybody can start their own publication and disseminate those other viewpoints themselves, without needing a license from the FCC.¹²³ The classic First Amendment paradigm of more speech being the solution to bad speech is achieved in print.¹²⁴

As the *Red Lion* court explained, “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”¹²⁵ Thus, the defining characteristics of the medium social media platforms operate in must be examined to determine what standards should be applied to reviewing the constitutionality of Senator Hawley’s bills and the NTIA’s proposed rules. The internet, in short, resembles print more than broadcast in that it also has no scarcity issue: someone who is dissatisfied with the way a website is run is always free to start their own. All that is needed is a domain name and host—no license from the FCC is required.¹²⁶ Barriers to market entry are as low as or even lower than in print media since the only technical process involved is website design, which a single amateur can learn,¹²⁷ whereas entrants in print must almost always outsource or hire personnel to handle the costly physical processes of printing and distribution.¹²⁸ Discontent with a website for any reason can be readily remedied by becoming its competitor.

Since the internet is as or even less scarce of a medium than print, any conditional benefit seeking to limit a website’s editorial discretion by imposing an editorial neutrality requirement should be reviewed under strict scrutiny, as if imposed directly on a print publication. Applying strict scrutiny to a conditional benefit implicating the First Amendment is not unprecedented. In *Speiser v. Randall*, the Supreme Court struck down a law conditioning a veterans’ tax benefit on swearing an oath not to advocate for overthrowing the U.S. government, for lack of a compelling government interest.¹²⁹ In *Sherbert v. Verner*, the Court struck down a state law conditioning eligibility for employment benefits on being willing to work on Saturdays, the Sabbath day of the Seventh Day Adventist Church, again for lack of a compelling government interest.¹³⁰

121. *Id.* at 376.

122. *Id.* at 377.

123. *See generally id.* at 376–77 (explaining that such government oversight as seen in this case would not be applicable to print media).

124. *Id.*

125. *Id.* at 386.

126. Lars Lofgren, *How to Create a Website (Step by Step Guide)*, QUICKSPROUT (Sept. 14, 2020), <https://www.quicksprout.com/how-to-create-a-website/>.

127. *Id.*

128. *How to Start Your Own Magazine*, WIKIHOW (last updated March 16, 2020), <https://www.wikihow.com/Start-Your-Own-Magazine>.

129. *Speiser v. Randall*, 357 U.S. 513, 529 (1958).

130. *Sherbert v. Verner*, 374 U.S. 398, 406–09 (1963).

President Trump's executive order discusses the government interest animating its mandate to the NTIA for an FCC rulemaking petition:

Section 1. Policy. . . . In a country that has long cherished the freedom of expression, we cannot allow a limited number of online platforms to hand pick the speech that Americans may access and convey on the internet. This practice is fundamentally un-American and anti-democratic. When large, powerful social media companies censor opinions with which they disagree, they exercise a dangerous power. . . . **Sec. 2. Protections Against Online Censorship.** . . . It is the policy of the United States that the scope of [Section 230] immunity should be clarified: the immunity should not extend beyond its text and purpose to provide protection for those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints.¹³¹

The government here characterizes its interest in limiting the editorial discretion of websites like Twitter and Facebook as important and valid in a medium where they hold a quasi-monopoly on social media platforms.¹³² Though it is true that only a handful of platforms hold an outsize share of the social media market,¹³³ the internet is still not a scarce medium. Anyone who thinks those platforms engage in biased content moderation by being more inclined to censor conservative speech and suspend conservative users is free to start their own platform and moderate content however they please. In fact, several newer social media platforms were expressly created as unbiased or conservative-leaning alternatives to the larger platforms.¹³⁴ Sites like Parler, CloutHub, Brighteon, and Gab, where the Pittsburgh synagogue shooter posted his manifesto, have attracted substantial user bases by vowing not to censor conservative voices the way Facebook, Twitter, and YouTube do.¹³⁵ Objectionable viewpoints and users that are supposedly suppressed on large platforms can also find expression through online outlets that are not social media sites in a strict sense, such as messaging platform Discord¹³⁶ and discussion forum site Reddit.¹³⁷ The government's interest in limiting the editorial discretion of social media platforms is not compelling in the non-scarce

131. Exec. Order No. 13,925, 85 Fed. Reg. 34,079, 34,080 (May 28, 2020).

132. *Id.*

133. See generally Eve Smith, *The Techlash Against Amazon, Facebook and Google—and What They Can Do*, *ECONOMIST* (Jan. 20, 2018), <https://www.economist.com/briefing/2018/01/20/the-techlash-against-amazon-facebook-and-google-and-what-they-can-do> (outlining how big tech companies should handle negative public sentiment based on the perception that they're too big, anti-competitive, and damaging to democracy).

134. Anna Merlan, *How Shadowbanning Went from a Conspiracy Theory to a Selling Point*, *VICE* (Aug. 24, 2020), https://www.vice.com/en_us/article/v7gq4x/how-shadowbanning-went-from-a-conspiracy-theory-to-a-selling-point-v27n3?utm_content=1598887810&utm_medium=social&utm_source=VICE_facebook&fbclid=IwAR3DGTpfTINjiJAIRLBOJH0y6nAL5egIR1xaosnwkx9zrcRh79skBUSGVNo.

135. *Id.*

136. April Glaser, *Where 8channers Went After 8chan*, *SLATE* (Nov. 11, 2019), <https://slate.com/technology/2019/11/8chan-8kun-white-supremacists-telegram-discord-facebook.html>.

137. @u/marisam7, *List of Hate Subreddits*, *REDDIT* (Apr. 29, 2017, 9:43 PM), https://www.reddit.com/t/AgainstHateSubreddits/comments/68damg/list_of_hate_subreddits.

medium of the internet, and thus its conditioning of Section 230 immunity on unbiased content moderation practices would fail to survive strict scrutiny.

B. Senator Hawley's and the NTIA's Proposals May not even Survive Lower Levels of Scrutiny

The constitutionality of Senator Hawley's and the NTIA's recent proposals would be questionable even at lower levels of judicial scrutiny. As a preliminary matter, it is possible that there is not even a rational basis for them. The alleged anti-conservative moderation practices of large social media platforms serving as the impetus for these proposals might not be an actual phenomenon at all, as Facebook's own analytics show that the content receiving the most engagement on the platform comes from right-wing accounts.¹³⁸ Intermediate scrutiny could also prove fatal to Senator Hawley's and the NTIA's proposals because of the overbroad effects they could have on social media platforms' ability to express their own viewpoints.¹³⁹

When social media platforms publish their hateful content moderation policies, they may provide specific bases for content restriction or user suspension. Twitter, for example, states that it may restrict content from or suspend users who "promote violence against or directly attack or threaten other people on the basis of race, ethnicity, national origin, caste, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease."¹⁴⁰ A platform can also elucidate the rationale behind its policy. Twitter further provides:

We recognize that if people experience abuse on Twitter, it can jeopardize their ability to express themselves. Research has shown that some groups of people are disproportionately targeted with abuse online. This includes; women, people of color, lesbian, gay, bisexual, transgender, queer, intersex, asexual individuals, marginalized and historically underrepresented communities. For those who identify with multiple underrepresented groups, abuse may be more common, more severe in nature and have a higher impact on those targeted.¹⁴¹

A policy rationale like the one above can be used as vehicles for expressing the company values of a social media platform.¹⁴² In the above case, Twitter unequivocally expresses a liberal viewpoint when it states its belief that discrimination against LGBTQIA people is particularly harmful and that they

138. David Gilbert, *Zuckerberg Says Conservatives Don't Rule Facebook. Data Says He's Wrong*, VICE (Sept. 9, 2020), https://www.vice.com/en_us/article/z3e7dx/zuckerberg-says-conservatives-dont-rule-facebook-data-says-hes-wrong?utm_content=1599663622&utm_medium=social&utm_source=VICE_facebook&fbclid=IwAR0me08rOqJm9vVIBLIQAOR_LLVxSgt7tz7KNQ_Ji2I4KC3PgU2m9hU8FZY.

139. Sam Dean, *The Facts About Section 230, the Internet Speech Law Trump Wants to Change*, L.A. TIMES (May 28, 2020), <https://www.latimes.com/business/technology/story/2020-05-28/the-facts-about-section-230-the-internet-speech-law-trump-wants-to-change>.

140. Lauren Feiner, *Beto O'Rourke Goes After Key Immunity for Social Media Companies if They Allow Users to Incite Violence*, CNBC (Aug. 16, 2019), <https://www.cnbc.com/2019/08/16/beto-orourke-goes-after-immunity-for-big-tech-after-el-paso-shooting.html>; *Hateful Conduct Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> (last visited Oct. 21, 2020).

141. Gilbert, *supra* note 135.

142. *Id.*

deserve special protection—similar language is found in the Democratic Party Platform,¹⁴³ while the Republican Party Platform characterizes the inclusion of sexual orientation as a basis of sex discrimination as incorrect and the “impos[ition] [of] a social and cultural revolution upon the American people.”¹⁴⁴ Senator Hawley’s bills and the rules proposed in the NTIA’s petition could have a substantial chilling effect on this kind of speech, as such rationale statements could be seen as evidence of liberal or anti-conservative bias in the enforcement of a platform’s content moderation policies.¹⁴⁵ Platforms may very well err on the side of caution and forego making their beliefs public. Thus, having them enforce their content moderation policies in an unbiased manner may functionally be closer to the complete ban on editorializing struck down in *League of Women Voters* than to the fairness doctrine upheld in *Red Lion*, which merely asked broadcasters to present multiple viewpoints in their programming.

C. *Senator Hawley’s and the NTIA’s Proposals May Unacceptably Distort the Normal Functioning of the Internet as a Medium*

As a final consideration in analyzing the inherent qualities of the internet to determine how to scrutinize Senator Hawley’s and the NTIA’s proposals, the Supreme Court has indicated a disinclination to drastically disrupting the traditional functioning of a medium through conditional benefits. In *Legal Servs. Corp. v. Velazquez*, the Supreme Court stated that when “[g]overnment seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning[.]” the medium’s accepted usage should inform whether a particular restriction on speech is necessary.¹⁴⁶ The *Velazquez* Court struck down a law funding nonprofit legal aid organizations on the condition that their attorneys and clients do not challenge existing welfare laws in court,¹⁴⁷ holding that the government could not design a conditional subsidy imposing such a serious restriction on the fundamental functions of the medium of the judiciary.¹⁴⁸ It observed the operation of the same anti-medium distortion principle in *FCC v. League of Women Voters* as well. There, the Court had been “instructed by its understanding of the dynamics of the broadcast industry in holding that prohibitions against editorializing by public radio networks were an impermissible restriction, even though the Government enacted the restriction

143. Democratic National Committee, 2020 Democratic Party Platform 28 (2020), <https://www.demconvention.com/wp-content/uploads/2020/07/2020-07-21-DRAFT-Democratic-Party-Platform.pdf> [hereinafter 2020 Democratic Party Platform].

144. Republican National Committee, 2020 Republican Party Platform 35 (2020), https://prod-cdn-static.gop.com/docs/Resolution_Platform_2020.pdf?_ga=2.165306300.2055661719.1598124638-455285808.1584478680 [hereinafter 2020 Republican Party Platform].

145. Compare 2020 Democratic Party Platform, *supra* note 140 (establishing a commitment to protecting LGBT people from hate speech), with 2020 Republican Party Platform, *supra* note 141 (establishing a commitment to overturning gay marriage rulings and promoting free speech for conservative speakers).

146. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543–44 (2001).

147. *Id.* at 549.

148. *Id.* at 544.

to control the use of public funds.”¹⁴⁹ The *Velazquez* Court discerned a deference to the traditional editorial discretion afforded to mass media entities in their respective mediums, necessary in order preserve the normal functioning of the mediums.¹⁵⁰ Attempting to curtail that discretion and distort the normal functioning of the medium by conditional government benefit may be an unacceptable outcome to the Supreme Court outside of a strict First Amendment analysis.¹⁵¹ Manipulating Section 230 in the way that Senator Hawley and the NTIA have proposed would impose what is essentially a fairness doctrine onto a medium that has never been subject to it and would distort the medium beyond recognition.

IV. RECOMMENDATION

Senator Hawley’s bills and the NTIA’s rulemaking petition mandated by Trump’s executive order were conservatives’ response to large social media platforms banning right-wing public figures who repeatedly spread misinformation or hateful content. It was a self-regulatory attempt to remedy what the public perceived to be their culpability for foreign election interference and hate-fueled domestic terrorism. Liberal lawmakers, on the other hand, do not think that the platforms went far enough. Representative Beto O’Rourke, who represents the district where the Walmart shooting occurred in August 2019, announced during his 2020 presidential campaign a plan to condition Section 230 immunity for all websites on their ability to demonstrate proactive removal of hate speech and content inciting violence.¹⁵² In February 2020, Representative David Cicilline was in the process of drafting a bill that would condition Section 230 immunity for social media platforms on refraining from knowingly publishing demonstrably false political ads.¹⁵³

It is as if platforms can do no right: to liberals, platforms need to be held accountable for under-moderating content that has harmful effects on democratic society;¹⁵⁴ to conservatives, large social media platforms need to be held accountable for over-moderating content in response to those effects, which itself is threatening to democratic ideals of free speech.¹⁵⁵ The desire to hold social media platforms accountable for their perceived ills can be understood as part of a larger backlash to big tech companies in general.¹⁵⁶ Dubbed the “techlash,” it is rooted in the reality that a handful of tech companies occupy an outsize share of their respective markets, such that they seem imbued with

149. *Id.* at 543.

150. *Id.* at 545.

151. *Id.* at 543.

152. Lauren Feiner, *Beto O’Rourke Goes After Key Immunity for Social Media Companies if They Allow Users to Incite Violence*, CNBC (Aug. 16, 2019), <https://www.cnbc.com/2019/08/16/beto-orourke-goes-after-immunity-for-big-tech-after-el-paso-shooting.html>.

153. Rebecca Kern, *Cicilline Drafting Bill to Tackle False Ads on Online Platforms*, BLOOMBERG LAW (Feb. 24, 2020), https://www.bloomberglaw.com/document/X825MNPO000000?bna_news_filter=tech-and-telecom-law&jcsearch=BNA%252000000170795fd9aa7fd7f5fcab50000#jcite.

154. *Id.*

155. *Id.*

156. *Id.*

impunity.¹⁵⁷ While an e-commerce company like Amazon's chief ill can be seen as a monopolistic business model that is bad for the American economy, social media giants like Twitter and Facebook are viewed as being unaccountable for pushing a product that is bad for American democratic society.¹⁵⁸ The content that they host resonates with domestic terrorists and enables the electoral process to be corrupted by foreign misinformation campaigns, but their attempts to moderate that content also leads to unacceptable viewpoint discrimination.¹⁵⁹ Limiting Section 230 immunity is appealing to lawmakers on either side of the paradox as a powerful way to finally hold platforms accountable.. The largest platform, at least, appears willing to embrace some change: during a Senate hearing in October 2020 dedicated to Section 230 reform, Facebook CEO Mark Zuckerberg acknowledged that “[t]he debate about Section 230 shows that people of all political persuasions are unhappy with the status quo,” and indicated that he believes “Congress should update the law to make sure it’s working as intended.”¹⁶⁰

Acknowledging a general desire to hold platforms accountable for their harmful effects on democratic society as the driving force behind recently proposed conditions to Section 230 immunity, this Note makes the following policy recommendations:

A. *Section 230 Immunity Should not be Made Conditional*

As Part III of this note demonstrated, Senator Hawley’s 2019 and 2020 bills and the proposed rules in the NTIA’s rulemaking petition are likely unconstitutional as written—since the internet is not a scarce medium and viewpoints suppressed on one website can be expressed on any other, the government has no compelling interest in inducing social media platforms to relinquish their First Amendment right to editorial discretion by conditioning Section 230 immunity on unbiased content moderation practices. Such proposals should not become law.

As a policy matter, it is also vital that platforms are fully empowered to exercise editorial discretion in an era where eroded democratic norms have led to an incumbent president openly questioning the legitimacy of any electoral process or result that he does not believe will lead to his reelection.¹⁶¹ President Trump has repeatedly made false claims that the widespread usage of mail-in ballots in the 2020 presidential election due to the COVID-19 pandemic will

157. See generally Smith, *supra* note 133, at 1 (discussing perceived impunity of tech giants).

158. See *id.* (“You are an industry that embraces acronyms, so let me explain the situation with a new one: “BAADD.” You are thought to be too big, anti-competitive, addictive and destructive to democracy.”).

159. See, e.g., Emily Stewart, *Facebook’s Political Ads Policy is Predictably Turning Out to be a Disaster*, VOX: RECODE (Oct. 30, 2019), <https://www.vox.com/recode/2019/10/30/20939830/facebook-false-ads-california-adriel-hampton-elizabeth-warren-aoc> (“Facebook and other social media companies are already dogged by unfounded accusations by Republicans that their algorithms contain anti-conservative bias.”).

160. Adi Robertson, *Mark Zuckerberg just told Congress to upend the internet*, THE VERGE (Oct. 29, 2020), <https://www.theverge.com/2020/10/29/21537040/facebook-mark-zuckerberg-section-230-hearing-reform-pact-act-big-tech>.

161. Mike Isaac & Sheera Frenkel, *Facebook Braces Itself for Trump to Cast Doubt on Election Results*, N.Y. TIMES (last updated Aug. 24, 2020), <https://www.nytimes.com/2020/08/21/technology/facebook-trump-election.html>.

result in election fraud, either on the part of voters or in the counting of the votes themselves.¹⁶² He also has yet to definitively say he would voluntarily leave office if he were to lose the election.¹⁶³ Facebook, Twitter, and YouTube have braced for Trump baselessly disputing election results on their platforms if he appears to be losing or to have lost.¹⁶⁴ Indeed, in the same way Twitter added a disclaimer to Trump's May 2020 tweet claiming mail-in ballots lead to voter fraud, both Facebook and Twitter added fact-checking disclaimers to various posts from Trump's accounts made after the election prematurely declaring victory and insinuating fraudulent vote counting in states with tight races.¹⁶⁵ Social media platforms should never be hindered from combating misinformation to preserve the democratic process for fear of appearing politically biased and losing Section 230's protections.

This Note will not analyze the constitutionality of other proposals floated by Representatives O'Rourke and Cicilline at length. Briefly, the government interest behind O'Rourke's proposal of conditioning Section 230 immunity on platforms proactively moderating hate speech and language inciting violence would have to clear the high level of protection the Supreme Court has afforded to hate speech¹⁶⁶ and the high bar it has set for incitement.¹⁶⁷ Cicilline's proposal of conditioning immunity on platforms refraining from publishing demonstrably false political ads presents issues of vagueness—¹⁶⁸in the First Amendment context, the vagueness doctrine prohibits the government from passing a law that possibly limits speech but is so vague that ordinary people could not figure out what kind of speech it regulated.¹⁶⁹ Though there is no written bill yet, it is eminently unclear what the scope of "demonstrably false" should or would be in a field like politics where debatable facts and half-truths are constantly manipulated.

Above all, however, O'Rourke's, Cicilline's, and anyone else's attempts to place conditions on Section 230 immunity should be rejected for the dangerous precedent it could set. The doctrine of unconstitutional conditions exists to prevent the government from exploiting the dependence of beneficiaries on their benefits such that they are induced to forfeit rights they could not directly be

162. *Id.*

163. *Id.*

164. *Id.*

165. *E.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Nov 7, 2020, 10:36 AM), <https://twitter.com/realDonaldTrump/status/1325099845045071873>; Donald J. Trump (@realDonaldTrump), TWITTER (Nov 7, 2020, 8:20 AM), <https://twitter.com/realDonaldTrump/status/1325065540390559745>; Donald J. Trump, FACEBOOK (Nov 6, 2020, 10:10 AM), <https://www.facebook.com/DonaldTrump/posts/10165770858585725>; Donald J. Trump, FACEBOOK (Nov 6, 2020, 12:42 PM), <https://www.facebook.com/DonaldTrump/posts/10165771747840725>.

166. *See, e.g.*, *Matal v. Tam*, 137 S.Ct. 1744 (2017) (striking down prohibition on trademarks that could disparage persons, institutions, beliefs, or national symbols).

167. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that inflammatory speech could not be criminalized unless "directed to inciting or producing imminent lawless action [and] likely to incite or produce such action.>").

168. Phillip Dynia, *Vagueness*, FREE SPEECH CTR. AT MIDDLE TENN. ST. UNIV., <https://mtsu.edu/first-amendment/article/1027/vagueness> (last visited Oct. 21, 2020).

169. *Id.*

deprived of;¹⁷⁰ if the dependence is great enough, the beneficiary really has no choice but to forfeit, rendering any nominal consent to the forfeiture irrelevant and giving the government a workaround to passing constitutional muster. Thus, any condition that is successfully placed on Section 230 immunity for social media platforms would signal to other lawmakers that the American internet's lifeline can be used as an expedient weapon to prescribe their preferred behavior for platforms. For the 72% of Americans who use social media,¹⁷¹ their ability to express themselves in the modern public square¹⁷² would be subject to the whim of any member of Congress, and possibly even the special interest groups they are beholden to.

B. Lawmakers Should Focus on Creating Carveouts, not Conditions, to Section 230 Immunity

If conditional Section 230 immunity is unconstitutional and opens the door to arbitrary condition-making, what could be done to satisfy lawmakers' desire to hold social media platforms accountable for the ways they harm democratic society? While he was still a candidate, president-elect Joe Biden suggested completely repealing Section 230.¹⁷³ But a complete repeal would be so disruptive as to cause an estimated \$440 billion reduction in GDP and lead to 4.25 million jobs lost over 10 years.¹⁷⁴ Complete repeal is out of the question for the foreseeable future.

A better route would be creating further carveouts akin to FOSTA-SESTA that limit the preemptive effect of Section 230 to allow other laws to remain in effect or limit civil immunity in specific instances. Instead of attempting to elicit desired behavior through the coercive effect of threatening to take away Section 230 immunity entirely, carveouts would focus on creating limited exceptions to blanket immunity for the enforcement of existing laws barring behavior that both liberals and conservatives agree is harmful, or introducing a specter of civil liability for specific behavior. Carveouts for the harm of domestic terrorism could take the form of exceptions for state anti-terrorism laws, or as another commenter has suggested, adding an interpretive provision to Section 230 that a website can be treated as the speaker or publisher of user content in instances where the website knew or should have known the content came from certain

170. See Fisher, *supra* note 86, at 1187 (“In fact, legal scholars have long recognized distributive inequality as one of the primary normative concerns underlying the unconstitutional conditions doctrine. From this perspective, constitutional rights not only protect individual rightsholders but also, crucially, such rights help secure a particular distribution of power between the government and rightsholders and between different classes of rightsholders. The argument, in its simplest form, is that poor rightsholders will “sell” more rights to the government, altering the initial distribution of power set by fundamental constitutional rights.”).

171. *Social Media Fact Sheet*, PEW RES. CTR. (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/social-media/#social-media-use-over-time>.

172. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

173. *Interview by Editorial Board of the New York Times with Joe Biden*, N. Y. TIMES (Dec. 16, 2019), <https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html>.

174. *Section 230: The Most Important Law in Tech*, COMPUT. & COMM’N INDUS. ASS’N., <https://www.cciainet.org/section230> (last visited Oct. 21, 2020).

designated terrorist organizations.¹⁷⁵ For the harm of foreign election interference, civil fines could be created for social media companies that do not take reasonable steps to limit foreign propaganda on their platforms, accompanied by a corresponding exception in subsection (e).

This Note does not comment on the prudence or feasibility of these possibilities. They are merely offered to demonstrate the potential of carveouts as the appropriate mechanism for finally holding social media platforms accountable for the harms to democratic society they are believed to cause. As mentioned above, introducing any form of accountability is the overarching goal of lawmakers in the techlash era.¹⁷⁶ Any successful carveout would not only address harms, but also serve to appease lawmakers who are vexed by big tech's seeming impunity and curb their appetite for arbitrary and imprudent conditions on Section 230 immunity.

V. CONCLUSION

In response to the public's perception of their culpability for disseminating fake news that facilitated foreign interference in the 2016 election and hosting hateful content that fueled online communities of hate that incubated the perpetrators of several ideologically motivated mass shootings beginning in late 2018, social media sites banned several high-profile right wing figures who spread misinformation and hateful rhetoric on their platforms. Conservative politicians viewed this as evidence of anti-conservative content moderation practices. They believed platforms were emboldened to moderate content any way they wanted because of Section 230, the law that grants websites general immunity for hosting and moderating user content and that the business models of social media platforms depend on. To compel these sites to stop discriminating against conservative viewpoints, conservative politicians made several proposals for conditioning Section 230 immunity on unbiased content moderation practices, which would constitute the relinquishment of platforms' First Amendment right as private media entities to exercise editorial discretion over the forums of expression they create. In past Supreme Court cases, such conditioning was upheld against broadcasters because broadcast technology limited the number of broadcasters that could operate in the medium, giving broadcasters an obligation to present multiple viewpoints and remain unbiased. Social media platforms, however, have no similar obligation because viewpoints suppressed on one platform have countless other outlets for expression on the internet. Thus, the proposals are likely unconstitutional. Further, conditional Section 230 immunity is an imprudent method of holding social media platforms accountable for the harms to democratic society they're perceived to cause because it could set a dangerous precedent for arbitrary condition-making. A better approach to accountability for platforms would be carving out limited exceptions to Section 230 immunity for specific harmful behaviors. Such

175. Steven Beale, *Online Terrorist Speech, Direct Government Regulation, and the Communications Decency Act*, 16 DUKE L. & TECH. REV. 333, 345 (2018).

176. *Smith*, *supra* note 130, at 1.

carveouts would also serve to appease lawmakers and make them less inclined to impose arbitrary conditions on Section 230 immunity.