Leash the Big Dogs, Let the Small Dogs Roam Free: Preserve Section 230 for Smaller Platforms

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* I dedicate this Note to my partner, Natalie, whose love and support is my foundation. I would also like to thank the student editors and members of the Federal Communications Law Journal for their valuable advice and proofreading; their combined hundreds of hours of unpaid labor keep legal academia running.

I. INTRODUCTION

Section 230 helped create the modern Internet economy by protecting online platforms from legal liability if they were not able to perfectly moderate the actions of and content posted by their users.[1] Passed as part of the Communications Decency Act of 1996, section 230 provided incumbent and new "computer service[s]" the immunity necessary to create innovative new products in the growing Internet economy without the threat of prohibitive legal costs for the actions of their users.[2] Without identical adequate laws in other countries allowing small entrepreneurs such freedom to compete and experiment without uncertain legal costs looming over their heads, section 230 protections helped give rise to U.S. dominance in online services.[3] However, as social media platforms have garnered more power over public discourse, a movement has grown to limit the immunity that these platforms enjoy.[4] While the details of section 230 reform proposals vary and reform proponents span the political spectrum, their premises rely on curbing the power of social media platforms.[5]

Ironically, the broad application of section 230 reforms to all online platforms would likely consolidate even more influence over public discourse into the hands of a select few social media platforms by stifling competition through increased costs on small firms and new entrants.[6] Behemoths like Facebook with billions of dollars in revenue can withstand increased legal and compliance fees; their smaller competitors, however, likely would not be able to and will die, reduce services, or pivot away from social media.[7] Untargeted regulation will therefore help secure the power of large social media platforms by inhibiting their competitors.[8]

This Note argues that by targeting section 230 reforms only to certain companies, policy makers can still achieve their goals without destroying one of the legal foundations of the technology sector that has allowed the American digital economy to flourish. To accomplish these goals, any reforms to section 230 that increase liability for computer services should apply only to content published on (1) social media platforms with (2) more than 50 million monthly active users that (3) generate more than $500 million

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1. *See* CHRISTIAN M. DIPPON, ECONOMIC VALUE OF INTERNET INTERMEDIARIES AND THE ROLE OF LIABILITY PROTECTIONS 1-3 (June 5, 2017), https://internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf [https://perma.cc/8NE3-ECU3].
2. 47 U.S.C. § 230.
3. *See* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 148-50 (2019).
4. *See generally* Kiran Jeevanjee et al., *All the Ways Congress Wants to Change Section 230*, SLATE (Mar. 23, 2021), https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html [https://perma.cc/GP2W-7L9K]. .
5. *See infra* Part II, Section C.
6. *See infra* Part III, Section B, Part 3.
7. *See infra* Part III, Section B, Part 3.
8. Jeevanjee, *supra* note 4.

in revenue. By requiring all three criteria to be met, changes to liability law that could cost companies millions of dollars would be restricted to companies most able to withstand new legal expenses while still holding accountable platforms that are most responsible for the problems that legislators wish to solve.

Part II, Section A discusses the history of section 230 and how Congress sought to adapt liability law to the Internet Age. Section B discusses how to define social media platforms and measure their performance. Section C analyzes the costs and benefits of section 230 immunity, including how its protections helped shape the modern Internet economy, and proposals to address critiques. Part III, Section A argues that the overarching purpose of reform proposals is to limit the power that social media companies have on public discourse. Section B then discusses the benefits of exemptions to any changes to section 230 immunity and how limiting such restrictions to companies with more than $500 million in revenue that operate social media platforms with more than 50 million monthly active users can fulfill the purported purposes of legislation while reducing the negative consequences of regulation on small and new firms, as well as reducing unintended consequences.

II. BACKGROUND

A. *The History and Scope of Section 230*

Section 230 is the common name for provisions in the 1996 Communications Decency Act that immunize online service providers from civil or criminal liability for both moderating content and for unlawful content created by third parties.[9] As more people began to have home Internet connection and new companies have started experimenting with new ways for humans to connect with one another, Congress sought to remove legal disincentives for online platforms to moderate content.[10] In doing so, they created legal protections for these new companies that helped create the modern Internet.[11]

1. The Substance of Section 230

Section 230 provides legal protections for companies through two provisions that have come under fire from elected officials and commentators: 47 USC § 230(c)(1), which decrees 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," and § 230(c)(2), which immunizes interactive computer service providers from liability for moderating content or giving users or content creators the ability

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9. 47 U.S.C. § 230.
10. *See* 141 CONG. REC. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox.).
11. *See* KOSSEFF *supra* note 3.

to moderate content.[12] Interactive computer services include Internet Service Providers (ISPs), websites, apps, social media platforms, online marketplaces, wikis (websites that permit users to make changes to the site itself)[13] news publications, music or podcast hosting services, and any other website where users can post content.[14]

The prohibition against categorizing online service providers as publishers of third-party content effectively immunized companies with websites that allowed third parties to create and post content from lawsuits arising from that content, regardless of whether the companies knew or should have known about specific unlawful content.[15] As long as those companies did not create the content (or induce its creation), they could not be held criminally or civilly liable for user behavior even if they had actual notice of the content and its potential harm.[16] In the twenty-five years since its introduction, defendants have successfully invoked section 230 to bar claims of defamation, invasion of privacy, and negligence.[17]

2. Why Congress Passed Section 230

Congress passed section 230 after court decisions showed that secondary liability laws could penalize companies who made good-faith, but imperfect, efforts to moderate content, even when companies sought to create family-friendly environments online for moderating content.[18] When deciding whether to hold a party responsible for content hosted on its digital platform but created by others, courts distinguished between two categories: publishers of information who have "editorial control" over the information they publish, and distributors who merely transmit information without such control.[19] Publishers are liable for all unlawful content they furnish, but

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12. 47 U.S.C. § 230 ("No provider or user of an interactive computer service shall be held liable on account of (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)."); *see also* Jessica Guynn, *Trump vs. Big Tech: Everything You Need to Know About Section 230 and Why Everyone Hates It*, USA TODAY (Oct. 16, 2020, 5:43 PM), https://www.usatoday.com/story/tech/2020/10/15/trump-section-230-facebook-twitter-google-conservative-bias/3670858001/ [https://perma.cc/WU3K-QKDV].

13. *Definition of Wiki*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/wiki (last visited Oct. 19, 2021) [https://perma.cc/5R2M-8YX6].

14. Jeff Kosseff, *The Gradual Erosion of the Law that Shaped the Internet: Section 230's Evolution Over Two Decades*, COLUM. SCI. & TECH. L. REV., Fall 2016, at 8-9.

15. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 328, 330, 333 (4th Cir. 1997).

16. *Id.*

17. *See generally* Vanessa S. Browne-Barbour, *Losing Their License to Libel: Revisiting § 230 Immunity*, 30 BERKELEY TECH. L.J. 1505 (2016).

18. *See* 141 CONG. REC. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox.); *see also* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 139-40 (S.D.N.Y. 1991).

19. *See Cubby*, 776 F. Supp. at 140-41.

distributors are only liable if they subjectively or constructively have knowledge of unlawful content.[20]

As the Internet proliferated, Congress found that *how* courts applied these categories produced perverse incentives for interactive computer services to not moderate any content and thus encouraged online platforms to purposely ignore horrific or unlawful content.[21] This approach grew out of judicial attempts to apply print media case law to companies operating online.[22] The distinction first arose in *Smith v. California*, where the Supreme Court ruled that the First Amendment prohibited Los Angeles from holding bookstore operators strictly liable for obscene content contained in books offered for sale because the lack of a scienter requirement indirectly limited the distribution of lawful content.[23] The concern of the Court was practical: if bookstores were responsible for the content of every book they sold, they would only sell those books they could verify were lawful, and such verification would add so much time to store operations that many lawful books would not be sold.[24] After *Smith*, courts continued to hold that publishers who republished a libel can be liable for illegal content and applied this rule to newspapers, magazines, and book publishers.[25] Thus, relatively clear rules formed: vendors such as bookstores and newsstands were only liable for unlawful content if they had constructive knowledge, while publishers that exercised editorial control such as book editors, publishing companies, and newspapers were open to liability for all content published.

The development of online platforms where users could not only easily create millions of pieces of content, but could interact with each other as well, created risks for Internet companies attempting to moderate or curate content without sufficient resources to monitor every post. Two cases, *Cubby v. CompuServe* and *Stratton Oakmont v. Prodigy Services*, demonstrate how the archaic categories of publisher and distributor disincentivized online platforms from moderating any of their content by immunizing companies that permitted all users to post unlawful content, but imposed liability on companies that attempted to moderate content if they were not 100% successful.[26]

In *Cubby*, the Southern District of New York held that CompuServe was not liable for defamatory statements created by a third-party user in a "special interest forum" which CompuServe hosted and to which it offered

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20. *See id.*

21. 141 CONG. REC. H8468 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

22. *See generally Cubby*, 776 F. Supp. at 140; Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

23. *See* Smith v. California, 361 U.S. 147, 150-51, 154-55 (1959).

24. *See id.* at 154-55.

25. *See generally* Bindrim v. Mitchell, 92 Cal. App. 3d 61 (Ct. App. 1979); Dixson v. Newsweek, Inc., 562 F.2d 626 (10th Cir. 1977); Pittsburgh Courier Pub. Co. v. Lubore, 200 F.2d 355 (D.C. Cir. 1952); Hoover v. Peerless Publications, Inc., 461 F. Supp. 1206 (E.D. Pa. 1978).

26. *See generally Cubby*, 776 F. Supp. at 140; *Stratton Oakmont*, 1995 WL 323710, at 3.

subscriptions.[27] The court ruled that CompuServe was a distributor, not publisher, of the alleged defamatory statements, which included lies about one company stealing information about another and being a "start-up scam," because CompuServe did not review the contents or have notice of any complaints.[28]

Stratton Oakmont showed the dangers of applying these categories to Internet companies when the court ruled that Prodigy Services, which advertised itself as a "family oriented computer network" that monitored and censored content on its online bulletin boards, was a publisher due to this editorial control.[29] An anonymous user posted content on one of Prodigy's online bulletin boards claiming that financial brokerage Stratton Oakmont was a "major criminal fraud" and a "cult of brokers who either lie for a living or get fired."[30] The court found that Prodigy was a publisher (even though the company did not manually review all 60,000 messages posted on the bulletin boards each day) because Prodigy had an "automatic software screening program" and policy guidelines through which employees were empowered to enforce the removal of user-generated content.[31]

In distinguishing Prodigy's system from that found in *Cubby,* the court found that Prodigy had:

> virtually created an editorial staff of Board Leaders who have the ability to continually monitor incoming transmissions and in fact do spend time censoring notes. Indeed, it could be said that PRODIGY's current system of automatic scanning, Guidelines and Board Leaders may have a chilling effect on freedom of communication in Cyberspace, and it appears that this chilling effect is exactly what PRODIGY wants, but for the legal liability that attaches to such censorship.[32]

Thus, the U.S. legal system punished Prodigy for attempting to create a family-friendly environment by forcing them to spend time and money defending lawsuits regarding its hosting of allegedly unlawful content. At the same time, courts rewarded those who refused to moderate the character of third-party content by immunizing them from liability.

Federal lawmakers recognized the dangerous incentives of punishing companies that made good-faith efforts to moderate content while excusing those that purposefully turned a blind eye, and sought to change U.S. law in response to *Stratton Oakmont*.[33] One of the co-authors of section 230, then-Representative Christopher Cox (R-CA), stated that the purposes of his and his co-author's (then-Representative Ron Wyden (D-OR)), amendment was

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27. *See Cubby*, 776 F. Supp. at 137.
28. *Id.* at 138.
29. *See Stratton Oakmont*, 1995 WL 323710, at *2, *5.
30. *Id.* at *1
31. *Id.* at *2-3, *5.
32. *Id.* at *5.
33. 141 CONG. REC. H8468 (daily ed. Aug. 4, 1995) (statement of Rep. Cox.).

to "protect computer Good Samaritans [and] online service providers . . . who . . . screen indecency and offensive material" while keeping "an army of bureaucrats" away from "regulating the Internet."[34]

The statute itself enumerates five purposes for its passage, the first two of which advance growth of the Internet economy, and the final three of which encourage content moderation:

> It is the policy of the United States—(1) to promote the *continued development of the Internet* and other interactive computer services and other interactive media; (2) to *preserve the vibrant and competitive free market* that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation; (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; (4) to *remove disincentives for the development and utilization of blocking and filtering technologies* that empower parents to restrict their children's access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.[35]

The Fourth Circuit affirmed the broad immunity section 230 confers in *Zeran v. AOL*, when it categorized distributor liability as a type of publisher liability.[36] Consequently, since section 230 prevented courts from holding online service providers liable as publishers of third-party content, such providers were immune from distributor liability even when the platform had subjective or constructive knowledge of unlawful content.[37] The court found that "[t]he imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech."[38] Other circuits have affirmed this immunity from liability for user-created content.[39]

3. Limits to Section 230 Immunity

There are significant statutory and court-defined limits to section 230 protections. The clearest limit is that section 230 does not protect the actual creators of unlawful content; plaintiffs and prosecutors are free to pursue

34. *Id.*
35. 47 U.S.C. § 230(b) (emphasis added).
36. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 332-33 (4th Cir. 1997).
37. *See id.*
38. *Id.* at 330.
39. *See generally* Chicago Lawyers' Comm. for C.R. Under L., Inc. v. Craigslist, Inc., 519 F.3d 666, 669 (7th Cir. 2008); *see also* Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980 (10th Cir. 2000).

those parties.[40] Neither does section 230 protect a company when its agents created unlawful content posted online.[41] At least one court has recognized that when defendants know of unlawful content, approve of the unlawful content, and can edit the unlawful content, section 230 immunity does not apply because defendants are operating as publishers or speakers of their own content.[42]

Congress also has statutorily exempted violations of certain laws from immunity, including violations of patent and copyright law, the Electronic Communications Privacy Act, and federal criminal law.[43] Though section 230 does not broadly exempt violations of state criminal law, Congress has exempted specific state crimes.[44] Most recently, Congress also limited immunity by passing the "Allow States and Victims to Fight Online Sex Trafficking Act of 2017" (FOSTA), which amends section 230 to remove protections from website operations with constructive knowledge of user content used for prostitution or human trafficking.[45]

Section 230 immunity also does not apply when an interactive computer service "materially contributes" to the content at issue.[46] The Ninth Circuit used the material contributions test in *Fair Housing Council of San Fernando Valley v. Roommates.com*, where the court ruled that online service providers may be liable for unlawful housing discrimination when the provider induces users to create illegal content.[47] There, the court held Roommates.com liable because it materially contributed to the creation of unlawful content when it prompted users to violate housing antidiscrimination laws by requiring them to select from a list of answers to certain questions in illegal ways.[48] However, when declining to apply section 230 immunity to Roommates.com, the court also stated that "close cases . . . must be resolved in favor of immunity," and clarified there is no liability for providers when providers do not provide such options or solicit the specific discriminatory

40. *See Zeran*, 129 F.3d at 330-31.

41. *See* Kosseff, *supra* note 14, at 25-27 (discussing cases that survived the motion to dismiss stage based on pleadings that alleged defendants controlled or were the persons responsible for the relevant content).

42. *See* FTC v. LeadClick Media, LLC, 838 F.3d 158, 176-77 (2d Cir. 2016) (finding a defendant not entitled to immunity when it paid affiliates to advertise products and advised affiliates on the content of those products).

43. 47 U.S.C. § 230(e).

44. *See* Letter from Nat'l Ass'n of Att'ys Gen. to Various Cong. Leaders (May 23, 2019), https://1li23g1as25g1r8so11ozniw-wpengine.netdna-ssl.com/wp-content/uploads/pdfs/sign-ons/CDA-Amendment-NAAG-Letter.pdf [https://perma.cc/QE5P-6C3W].

45. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (2018) (codified at 47 U.S.C. § 230(e)(5)).

46. *See* Matthew Feuerman, *Court-Side Seats? The Communications Decency Act and the Potential Threat to StubHub and Peer-to-Peer Marketplaces*, 57 B.C. L. REV. 227, 237-38 (2016).

47. *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1169-72 (9th Cir. 2008) (describing how Roommates.com designed its search system to allow users to hide listings based on sex, sexual orientation, and presence of children).

48. *See id.*

information.[49] Across circuits, courts have developed different standards to test when interactive computer services lose immunity for inducing illegal content.[50]

Since *Roommates.com*, courts have found other scenarios where section 230 does not provide immunity, though not all limiting doctrines are applied consistently across jurisdictions.[51] A survey in 2016 of court opinions found four categories of cases where courts have found that section 230 immunity may not apply when: (1) claims do not arise from third-party content,[52] (2) online providers may have developed the content,[53] (3) providers repeated unlawful statements of others,[54] or (4) providers "failed to act in good faith" when suppressing competitors' content.[55]

B. *Defining Social Media Platforms and Measuring the Size of Their User Base*

Section 230 is relevant for all interactive computer services but is particularly important for social media platforms. This Note defines social media platforms as those that: (1) are Internet-based programs that are interactive between users and the platform; (2) rely heavily on public or semi-public user-generated content, as opposed to platform-generated content, as the foundation of the service; (3) where users have individualized "profiles"; and (4) facilitate social networks by connecting user profiles to facilitate content sharing.[56] "Public or semi-public" is any sharing of content where the original post or message is viewable by users not within the sharing user's network. Since social media platforms rely on the creation and sharing of user-generated content, section 230 immunity, or the lack thereof, is particularly important. Companies that fall under this definition include not only those similar to Facebook, Clubhouse, or Twitter, but also potentially

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49. *See id.* at 1173-74 (declining to find Roommates.com liable for comments provided by users in the "Additional Comments" section where Roommates.com did not provide options users must select).

50. *See* Feuerman, *supra* note 46 (identifying two general standards used by appellate courts, the encouragement test and the requirement test, that operate under the umbrella of the *Roommates.com* material contributions test).

51. *See* Kosseff, *supra* note 14, at 31 (categorizing case opinions reflecting limits on section 230 immunity).

52. *See id.* at 23; *see also* Doe v. Internet Brands, Inc., 824 F.3d 846, 851 (9th Cir. 2016).

53. *See* Kosseff, *supra* note 14, at 25-27; *see also* AMCOL Sys., Inc. v. Lemberg L., LLC, No. CV 3:15-3422-CMC, 2016 WL 613896 *9 (D.S.C. Feb. 16, 2016); Congoo, LLC v. Revcontent LLC, No. CV16401MASTJB, 2016 WL 1547171, at *3 (D.N.J. Apr. 15, 2016).

54. *See* Kosseff, *supra* note 14, at 27-28; *see also* Diamond Ranch Acad., Inc. v. Filer, No. 2:14-CV-751-TC, 2016 WL 633351, at *20-22 (D. Utah Feb. 17, 2016).

55. *See* Kosseff, *supra* note 14, at 31-33; *see also* e-ventures Worldwide, LLC v. Google, Inc., 188 F. Supp. 3d 1265, 1269 (M.D. Fla. 2016).

56. *See generally* Jonathan A. Obar & Steve Wildman, *Social Media Definition and the Governance Challenge: An Introduction to the Special Issue*, 39 TELECOMMS. POL'Y 745-750 (2015), https://www.sciencedirect.com/science/article/abs/pii/S0308596115001172?via%3Dihub [https://perma.cc/4V25-CVTV] (describing common traits of social media platforms).

online marketplaces where users create unique profiles, post about the products or services they are selling, and can network with other users.[57]

The size of social media platforms is commonly measured by the number of their monthly active users (MAU). MAUs are the industry standard used by platforms, financial analysts, and the press because it is a baseline measurement that people can use to compare websites that provide different services.[58] The advantages of using MAUs as a metric are that they are easily measurable—most online platforms measure the metric as part of their business operations—and the metric captures not only how many users have ever used a website or created a profile, but how many actively engage. While there is debate on the efficacy of using MAUs because companies use different criteria to determine active users, it is worth noting that a significant number of these criticisms come from industry leaders whose perceived company performances would benefit from changing the criteria[59] Even one of those critics admitted that there is a minimum baseline able to be measured that is sufficient for legislative purposes; as Twitter co-founder acknowledged, a MAU is "[s]omething you did [that] caused some data in their servers to be recorded for the month."[60] Defining the "something" users did as creating or consuming any type of content on the platform at issue, including viewing video, listening to audio, or viewing or writing reviews and comments, ensures that all users who actually interact with the website are counted. This standard solves the issue of counting users who use login credentials of one source website (often Facebook or Google) to sign into other websites, but do not actually engage with the source website itself.[61]

C. The Debate on Section 230

The story of section 230 is a complex and nuanced history that implicates different societal values. Proponents often point to the economic benefits that section 230 immunity provides to new and smaller firms in the Internet space.[62] Critics can be generally categorized into two camps: those that believe section 230 permits online platforms to escape societal responsibilities to moderate certain content, and those that believe section 230 permits online platforms to moderate *too much* content. Both critical camps

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57. *See infra* Part III, Section A.

58. *See* Kurt Wagner, *The 'Monthly Active User' Metric Should Be Retired. But What Takes Its Place?*, VOX: RECODE (Feb. 9, 2015, 12:26 PM), https://www.vox.com/2015/2/9/11558810/the-monthly-active-user-metric-should-be-retired-but-what-takes-its [https://perma.cc/DQ93-HXXF].

59. *See* Ben Munson, *Deeper Dive—Xumo, Tubi, Pluto TV and the Monthly Active User Debate*, FIERCEVIDEO (Oct. 9, 2020, 10:51AM), https://www.fiercevideo.com/video/deeper-dive-xumo-tubi-pluto-tv-and-monthly-active-user-debate [https://perma.cc/8B3T-8CVC] (founder of video-streaming service claims "There's no standard for MAUs" even though a user who never logged into the website during the month at issue would definitely not be considered an MAU); *see also* Wagner, *supra* note 58 (Twitter CEO critiques the MAU metric based on different web services after Instagram announces more MAUs than Twitter).

60. *See* Wagner, *supra* note 58.

61. *See id.*

62. *See* KOSSEFF, *supra* note 3, at 149-50.

argue that this immunity has permitted companies with substantial power over public discourse to ignore values such as tolerance and presentation of different viewpoints in pursuit of profit.[63] This section discusses how section 230 immunity encourages competition by protecting smaller and new firms and analyzes how both critical camps seek to curb the influence of social media companies.

1. How Section 230 Immunity Is Vital for the Modern Internet Economy by Promoting Competition Through Protecting Small Firms

Section 230 helped create the modern Internet by removing a significant threat to burgeoning companies: existentially-threatening litigation costs for user-created content that was nearly impossible to perfectly monitor.[64] Damages for common claims precluded by section 230, including defamation, can be unpredictable and cost millions of dollars.[65] Additionally, section 230 can end claims relatively early in the litigation process, thereby preventing expensive legal costs.[66] One survey of in-house attorneys estimates that even in a case where an online services provider would be found not liable, legal costs could run over $500,000 just to get through the discovery phase before reaching the trial stage.[67] As one section 230 scholar put it, "[w]ithout [s]ection 230, each user who posted a comment, photo, or video on a website would represent another small but real risk that the website could be sued out of existence."[68] In contrast, successful section 230 defenses can end a case at the motion to dismiss or summary judgment stages, which can cost much less—80,000 or $150,000, respectively.[69] Though some commentators have argued that First Amendment protections would serve the same role as section 230 immunity,[70] there is uncertainty that First Amendment protections are as broad and can be defended as inexpensively as section 230 immunity.[71]

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63. *See infra* Part II, Section C, Part 2.

64. *See* KOSSEFF, *supra* note 3, at 177-78.

65. *See* Kate Taylor, *ABC Settled 'Pink Slime' Lawsuit for $177 Million, Leaving the Beef Company Feeling 'Vindicated'*, BUS. INSIDER (Aug. 9, 2017, 9:13 AM), https://www.businessinsider.com/pink-slime-case-177-million-settlement-2017-8 [https://perma.cc/7YVU-JVNE].

66. *See* ENGINE, SECTION 230: COST REPORT 1-2 https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5c8168cae5e5f04b9a30e84e/1551984843007/Engine_Primer_230cost2019.pdf [https://perma.cc/TY56-H48T].

67. *Id.*

68. KOSSEFF, *supra* note 3, at 149-50.

69. ENGINE, *supra* note 66.

70. *See generally* Note, *Section 230 As First Amendment Rule*, 131 HARV. L. REV. 2027, 2028 (2018).

71. *See* Elliot Harmon, *It's Not Section 230 President Trump Hates, It's the First Amendment*, ELEC. FRONTIER FOUND. (Dec. 9, 2020), https://www.eff.org/deeplinks/2020/12/its-not-section-230-president-trump-hates-its-first-amendment [https://perma.cc/FQA5-9FL3].

These protections were vital to create a favorable legal and economic environment for the modern Internet. While today, the Internet may be seen as largely shaped by corporations founded in the United States—such as Amazon, Google, and Facebook—American dominance was not predetermined.[72] As the Internet began to enter the public consciousness and commercial opportunities arose, start-up firms experimented with new ways to connect human beings with one another by creating interactive services where users created and shared their own content.[73] These services necessarily required users to create unprecedented amounts of content—almost impossible for new firms with limited financial resources to effectively monitor and moderate—and section 230 immunity allowed companies to experiment without prohibitively expensive legal or compliance costs.[74]

European and Asian countries, which also grappled with regulating this new Internet economy, declined to extend protections as extensive as those in section 230 to interactive computer services.[75] In part because of this difference, thirteen of the twenty-one largest technology companies are located in the U.S.[76] While differences in privacy and intellectual property laws also added to this disparity, section 230 significantly contributed (and still contributes) to the ability of online companies to invest in their products and services instead of legal fees.[77]

Lower costs and consequently fewer barriers to entry for new firms means that competition and innovation thrived, and continues to thrive, in the United States Internet economy. While market power in certain areas indicates that portions of the Internet economy can be heavily concentrated (84% of advertising investment is spent on Facebook and Google, and Amazon controls almost half of ecommerce)[78] these firms and other large technology firms act in many ways as if they operate in a competitive environment.[79] The relative ease in which consumers and businesses can switch services, competitors can adopt business models of rivals, and new entrants can offer rival services has maintained competitive pressures in the technology and online markets.[80] The consequences: increased spending on research and development, a steady share of revenue for labor (as opposed to

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72. *See generally* DIPPON, *supra* note 1.

73. *See* KOSSEFF, *supra* note 3, at 175-78.

74. *See* Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L. J. 639, 670 (2014).

75. KOSSEFF, *supra* note 3, at 179.

76. DIPPON, *supra* note 1, at 5.

77. *See* Chander, *supra* note 74.

78. INTERNET SOCIETY, CONSOLIDATION IN THE INTERNET ECONOMY 19 (2019), https://future.internetsociety.org/2019/wp-content/uploads/sites/2/2019/04/InternetSociety-GlobalInternetReport-ConsolidationintheInternetEconomy.pdf [https://perma.cc/68NP-UMLY].

79. *See* MICHAEL MANDEL, COMPETITION AND CONCENTRATION: HOW THE TECH/TELECOM/ECOMMERCE SECTOR IS OUTPERFORMING THE REST OF THE PRIVATE SECTOR 23 (2018), https://www.progressivepolicy.org/wp-content/uploads/2018/11/PPI_Competition-Concentration-2018.pdf [https://perma.cc/DW46-UACX].

80. *See id.* at 2-4.

other sectors where works have received declining proportions of revenue), massive increases in productivity, and declining prices for consumers.[81]

Section 230 protections particularly help the startup businesses that increase competition, productivity, and innovation across the broader economy, but inherently have less capital and stable funding to pay legal costs.[82] In contrast to other industries and even the popular conception of the technology sector, the number of new technology firms has significantly increased.[83] From 2007 to 2016, the number of technology-based startups has grown by 47%.[84] Technology startups are particularly important to the United States economy, as they have higher pay and longer-lasting jobs compared to new firms in other industries.[85]

Increased competition reduces the power of market-dominant corporations.[86] While major Internet companies have a powerful influence on our lives, the threat of new firms and rivals provides a check on undue influences of that power; if the quality of available products falter or a new entrant provides innovative value for consumers, incumbent firms will lose market share and profits.[87] Without section 230, the companies that benefited from its immunity when they were new entrants with small revenue, but are now valued at hundreds of billions or even over a trillion dollars, would be even more secure in their market dominance as increased costs would lead to fewer competitor startups, and even the surviving startups would have fewer resources to invest.[88] As one academic put it: "[i]f you really want to stick it to Google and Facebook, you should fight to preserve [s]ection 230's competition-enhancing benefits. Otherwise, you are implicitly rooting to squelch the future competitive threats they should face, which only strengthens the Internet giants' marketplace dominance."[89]

Economic analyses show that further reducing section 230 protections would also significantly harm the general economy. One study projects the United States economy would lose $44 billion a year and 425,000 jobs due to lost investment in online companies generally, and especially in new startup firms.[90] These projections likely underestimate the economic harm, as they

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81. *Id.*; *see also* Matthew Lane, *How Competitive is the Tech Industry?*, DISRUPTIVE COMPETITION PROJECT (July 29, 2019), https://www.project-disco.org/competition/072919-how-competitive-is-the-tech-industry [https://perma.cc/58SH-LPGN].

82. J. JOHN WU & ROBERT D. ATKINSON, HOW TECHNOLOGY-BASED START-UPS SUPPORT U.S. ECONOMIC GROWTH 7 (2017), http://www2.itif.org/2017-technology-based-start-ups.pdf [https://perma.cc/VKY4-2PPP].

83. *See id.* at 6.

84. *Id.*

85. *See id.* at 8-9.

86. *See* Eric Goldman, *Want to Kill Facebook and Google? Preserving Section 230 Is Your Best Hope*, BALKIN (June 3, 2019), https://balkin.blogspot.com/2019/06/want-to-kill-facebook-and-google.html [https://perma.cc/HU3K-ZV7W].

87. *See id.*

88. *The 100 Largest Companies in the World by Market Capitalization in 2021*, STATISTA (Sept. 10, 2021), https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/ [https://perma.cc/4ZWH-QNN3].

89. *See* Goldman, *supra* note 86.

90. *See* DIPPON, *supra* note 1, at 2.

do not even include the value of social media companies often targeted by section 230 reform proposals.[91] Even *uncertainty* of the extent of section 230 immunity can inhibit growth of small and innovative companies.[92]

2. Criticism of Section 230 Immunity

Substantive criticisms of section 230 immunity generally fall into two categories: (1) content moderation of disfavored speech, especially hateful, violent, or illegal content, is insufficient; and (2) content moderation disproportionately censors certain political perspectives. Some proposed legislation targets not only the blatant removal or non-removal of content, but also how social media platforms display such content through algorithms that determine the type and frequency of content seen by users.[93]

a. Inadequate Censorship of Hateful or Violent Speech

Critics charge that section 230 protections not only permit web companies to ignore illegal, harmful, or reprehensible content, but also allows companies to design their services to profit from such content.[94] Commentators and lawmakers have attacked online services for profiting from hosting solicitations for illegal acts, such as prostitution, human trafficking, nonconsensual photos and videos, and, in some jurisdictions, "revenge porn."[95] They have also criticized social media companies for refusing to moderate or inadequately moderating repugnant racist or misogynistic speech, or providing forums for extremist groups to organize violent events or even terrorist attacks.[96] The January 6th U.S. Capitol storming, where extremists allegedly used private Facebook groups to

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91. *See id.*

92. *See* DIPPON, *supra* note 1, at 4, 19.

93. Protecting Americans from Dangerous Algorithms Act, H.R. 2154, 117th Cong. (2021).

94. *See* Nicole Phe, *Social Media Terror: Reevaluating Intermediary Liability Under the Communications Decency Act*, 51 SUFFOLK U. L. REV. 99, 129-130 (2018).

95. *See* 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, 2520 (2014); *see also* NAT'L CTR. ON SEXUAL EXPLOITATION, https://endsexualexploitation.org/ [https://perma.cc/YL27-DHHB].

96. *See* Phe, *supra* note 94, at 99-102; *see also* Felix Gillette & Laurence Arnold, *Why Section 230 is Nub of Fights Over Online Speech*, BLOOMBERG (Feb. 2, 2021), https://www.bloomberg.com/news/articles/2021-02-02/why-section-230-is-nub-of-fights-over-online-speech-quicktake [https://perma.cc/7V9N-K8FA].

organize a rally that led to a riotous invasion of the U.S. Capitol, fueled further calls to remove section 230 immunity from social media companies.[97]

These reform proposals would remove immunity for platforms that fail to adequately censor certain speech that falls into certain categories. The Platform Accountability and Consumer Transparency (PACT) Act requires platforms to remove certain content within specific timeframes after receiving knowledge of the content or of court judgments.[98] Another proposal, the Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (SAFE TECH) Act, would remove section 230 immunity for speech violating civil rights or cyberstalking laws, as well as any type of paid speech – including advertising.[99] Some lawmakers have also suggested to remove immunity for platforms that do not remove or flag fake videos.[100]

Critics have also alleged that not only do social media platforms fail to moderate certain content, but the algorithms these companies use *proactively* encourage disfavored speech by promoting such content by showing or recommending it to more users than other content. A prominent critic in this category, Congresswoman Anna G. Eshoo, has claimed that Internet platforms use "opaque algorithms" that increase engagement on platforms, and that these algorithms, created for increased profits, can create "offline harms."[101] These platforms do not necessarily purposefully promote disfavored speech, but because their algorithms often amplify content already receiving heightened engagement, and because hateful or violent speech often has high engagement, such content can be promoted even though the algorithm mechanics are facially neutral regarding the type of content.[102] By promoting such speech, the criticism goes, social media companies change what is seen as socially acceptable and effectively make it "okay" to have those views. The Protecting Americans from Dangerous Algorithms Act (PADAA) proposes to remove immunity if platforms amplify certain content

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97. *See* Kevin Collier, *Some Pro-Trump Extremists Used Facebook to Plan Capitol Attack, Report Finds*, NBC NEWS (Jan. 19, 2021), https://www.nbcnews.com/tech/tech-news/some-pro-trump-extremsists-used-facebook-plan-capitol-attack-report-n1254794 [https://perma.cc/49EA-2C32]; *see also* Sara Morrison, *How the Capitol Riot Revived Calls to Reform Section 230*, RECODE (Jan. 11, 2021), https://www.vox.com/recode/22221135/capitol-riot-section-230-twitter-hawley-democrats [https://perma.cc/V9PT-HRZ4].

98. Platform Accountability and Consumer Transparency Act, S. 797, 117th Cong. (2021); *see also* Protecting Americans from Dangerous Algorithms Act, H.R. 2154, 117th Cong. (2021).

99. *See* SAFE TECH Act, S. 299, 117th Cong. (2021).

100. *See* MARK R. WARNER, POTENTIAL POLICY PROPOSALS FOR REGULATION OF SOCIAL MEDIA AND TECHNOLOGY FIRMS 8-10, https://graphics.axios.com/pdf/PlatformPolicyPaper.pdf [https://perma.cc/4V25-CVTV].

101. Press Release, Office of United States Representative Anna Eshoo, Reps. Eshoo and Malinowski Introduce Bill to Hold Tech Platforms Liable for Algorithmic Promotion of Extremism (Oct. 20, 2020), https://eshoo.house.gov/media/press-releases/reps-eshoo-and-malinowski-introduce-bill-hold-tech-platforms-liable-algorithmic#:~:text=The%20bill%20narrowly%20amends%20Section,with%20civil%20rights%20(42%20U.S.C [https://perma.cc/S3US-TTMW].

102. *See* Mark Zuckerberg, *A Blueprint for Content Governance and Enforcement*, FACEBOOK (Mar. 13, 2021), https://www.facebook.com/notes/mark-zuckerberg/a-blueprint-for-content-governance-and-enforcement/10156443129621634/ (last accessed Oct. 11, 2021).

related to violating civil rights and international terrorism,[103] and the 21st Century FREE Speech Act would remove section 230 immunity for *all* content that social media platforms promote through algorithms.[104]

b. Politically Biased Censorship

Other critics lament that when online platforms do moderate user content, they disproportionately moderate certain voices depending on the political views espoused. Conservative elected officials and organizations have received particular attention for their claims of perceived censorship; however, elected officials on the left side of the aisle have expressed similar concerns when social media companies have removed or restricted their content.[105]

Credible evidence of systemic bias remains undiscovered, though there are anecdotes that suggest social media companies struggle with maintaining consistent enforcement of moderation policies.[106] Conservatives have criticized how social media companies treated President Trump while in office, including the widespread de-platforming of the President after the Capitol attack and instances of platforms placing various warnings on his social media posts.[107] Many conservatives have also strongly condemned the shunning of social media site Parler after the Capitol riots.[108] After user posts supporting and organizing the rioters became publicly known, Amazon abruptly banned the website from its web-hosting services for breaking its

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103. Protecting Americans from Dangerous Algorithms Act, H.R. 2154, 117th Cong. (2021).

104. 21st Century FREE Speech Act, S. 1384, 117th Cong. (2021).

105. *See* Prager Univ. v. Google LLC, No. 17-CV-06064-LHK, 2018 WL 1471939, at *1 (N.D. Cal. 2018); *see also* Sara Morrison, *supra* note 97; Mahita Gajanan, *Facebook Removed Elizabeth Warren's Ads Calling for the Breakup of Facebook*, TIME MAG. (Mar. 11, 2019), https://time.com/5549467/elizabeth-warren-facebook-breakup-ads [https://perma.cc/L9RN-Z4XK].

106. *See* Casey Newton, *The Real Bias on Social Networks Isn't Against Conservatives*, VERGE (Apr. 11, 2019, 6:00 AM), https://www.theverge.com/interface/2019/4/11/18305407/social-network-conservative-bias-twitter-facebook-ted-cruz [https://perma.cc/GEE5-XGBY]; *see also* Jessica Bursztynsky, *Twitter CEO Jack Dorsey Says Blocking New York Post Story Was 'Wrong'*, CNBC (Oct. 16, 2020, 9:25 AM), https://www.cnbc.com/2020/10/16/twitter-ceo-jack-dorsey-says-blocking-post-story-was-wrong.html [https://perma.cc/46G9-3JNX]; Shannon Bond, *Facebook, YouTube Warn of More Mistakes as Machines Replace Moderators*, NAT'L PUB. RADIO (Mar. 31, 2020), https://www.npr.org/2020/03/31/820174744/facebook-youtube-warn-of-more-mistakes-as-machines-replace-moderators [https://perma.cc/X58C-MCS7].

107. *See* Cristiano Lima, *Twitter Boots Trump*, POLITICO (Jan. 8, 2021), https://www.politico.com/news/2021/01/08/twitter-suspends-trump-account-456730 [https://perma.cc/9KPJ-7DGF]; *see also* Shannon Bond, *Trump Threatens to Shut Down Social Media After Twitter Adds Warning to His Tweets*, NAT'L PUB. RADIO (May 27, 2020), https://www.npr.org/2020/05/27/863011399/trump-threatens-to-shut-down-social-media-after-twitter-adds-warning-on-his-twee [https://perma.cc/D5CJ-MTZV].

108. *See* John Paczkowski & Ryan Mac, *Amazon Will Suspend Hosting for Pro-Trump Social Network Parler*, BUZZFEED NEWS (Jan. 9, 2021), https://www.buzzfeednews.com/article/johnpaczkowski/amazon-parler-aws [https://perma.cc/S7NK-D9WT].

terms of service.[109] These claims are not limited to conservatives as progressives have also criticized social media platforms for allegedly unfair treatment; Democratic Senator and then-Presidential candidate Elizabeth Warren accused Facebook of blocking her campaign ads after she called for the government to take antitrust action against the company.[110]

How the removal of section 230 immunity is specifically operationalized depends on the proposed legislation. One proposal would replace the phrase "otherwise objectionable" with the more specific, and presumably smaller scope, "promoting self-harm, promoting terrorism, or unlawful" in section 230 (c)(2)(A), and seeks to limit when section 230 protects online platforms from liability for content moderation decisions.[111] Another proposed bill defines the good faith requirement to prohibit platforms from "intentionally selective enforcement of the terms of service,"[112] and yet another would require online platforms to receive certification from the Federal Trade Commission that its moderation decisions are not biased based on politics.[113] A separate bill would categorize "major internet communications platforms" as common carriers and impose non-discrimination requirements based on political sentiments on such platforms.[114] On the state level, Florida recently passed legislation that purports to prohibit social media platforms from de-platforming statewide candidates, though its survivability in the courts is in question partly because of section 230.[115]

III. ANALYSIS

A. *Overarching Purpose of Section 230 Reforms Is to Limit the Power of Large Social Media Companies on Public Discourse*

Almost all proposals to reform section 230 center on the goal of limiting the power that large social media companies have on public discourse. Proponents of removing immunity based on biased content moderation policies cite the power social media companies have over public discourse. Senator Ted Cruz called these companies and the immunity they receive under section 230 "the 'single greatest threat to our free speech and democracy.'"[116] After Twitter banned then-President Trump, Senator Lindsey Graham declared "I'm more determined than ever to strip [s]ection

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109. *See id.*

110. *See* Gajanan, *supra* note 105.

111. Online Freedom and Viewpoint Diversity Act, S. 4534, 116th Cong. (2020).

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

113. Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019).

114. 21st Century FREE Speech Act, S. 1384, 117th Cong. (2021).

115. FLA. STAT. ANN. 106.072 (West 2021); *see also* NetChoice, LLC v. Moody, No. 4:21CV220-RH-MAF, 2021 WL 2690876, at *1 (N.D. Fla. June 30, 2021) (preliminary injunction).

116. *See* Morrison, *supra* note 97.

230 protections from Big Tech that let them be immune from lawsuits."[117] These statements reflect concerns that certain companies have such power over public discourse that they can influence society and politics by removing certain categories of speech or banning certain users, such as the president of the United States, from engaging on their social media platforms.

Proponents of increased content moderation have lambasted the inability or unwillingness of large social media companies to censor certain speech that, when spread, can harm society. Senator Richard Blumenthal argued that the tech platforms' acts after the January 6th, 2021, rally and attack of the U.S. Capitol were too late: "[t]he question isn't why Facebook and Twitter acted, it's what took so long and why haven't others?"[118] Then-presidential candidate Representative Beto O'Rourke, who proposed to remove section 230 immunity if platforms do not censor certain speech, attacked how much power they have "to undermine our democracy and affect the outcomes of our elections."[119] During his campaign, President Biden argued for the absolute revocation of section 230 for Facebook and other large platforms because, he alleged, they are "propagating falsehoods they know to be false."[120] The statements are concerns not only about the initial publication of such information, but primarily about the spread of such information through the general public and the consequences.

Congressional findings in proposed section 230 legislation also indicate that legislators from both parties are primarily concerned with limiting the power of social media companies on public discourse. The Democrat-sponsored Algorithmic Justice and Online Platform Transparency Act notes that "[o]nline platforms have become integral to individuals' full participation in economic, democratic, and societal processes."[121] The Republican-sponsored 21st Century FREE Speech Act states that the internet "offer[s] a forum for a true diversity of political discourse and viewpoints, unique opportunities for cultural development, and myriad avenues for intellectual activity . . . Americans rely on [I]nternet platforms and websites for a variety of political, education, cultural, and entertainment services and for communication with one another."[122] These findings align with the above-

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117. Cristiano Lima, *Fuming Republicans Find Themselves Powerless Over Tech Clampdown*, POLITICO (Jan. 11, 2021), https://www.politico.com/news/2021/01/11/gop-tech-retaliation-457945 [https://perma.cc/9BKD-Q63D].

118. *See* Morrison, *supra* note 97.

119. Sarah Salinas, *2020 Hopeful Beto O'Rourke Says He'd Rather See Big Tech Regulated Than Broken Up*, CNBC (Mar. 21, 2019), https://www.cnbc.com/2019/03/21/beto-orourke-says-big-tech-needs-regulation-not-a-breakup.html [https://perma.cc/J8S2-88J3]; *see also* Lauren Feiner, *Beto O'Rourke Goes After Key Immunity for Social Media Companies if They Allow Users to Incite Violence*, CNBC (Aug. 16, 2019, 4:24 PM), https://www.cnbc.com/2019/08/16/beto-orourke-goes-after-immunity-for-big-tech-after-el-paso-shooting.html [https://perma.cc/JT8M-ZZK8].

120. *See* Makena Kelly, *Joe Biden Wants to Revoke Section 230*, 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/8MV4-H8KK].

121. Algorithmic Justice and Online Platform Transparency Act, H.R. 3611, 117th Cong. § 2(1) (2021).

122. 21st Century FREE Speech Act, S. 1384, 117th Cong. § 2 (2021).

mentioned public statements of section 230 reform proponents by centering on the influence of social media platforms in society.

The shared viewpoint across reform proponents is that large social media companies have too much power over society to have such a broad grant of immunity. Critics of censorship worry about companies deciding what speech hundreds of millions of Americans see and how that power is exercised. Critics of inadequate content moderation worry about how large companies profit from dangerous and radical speech that can change the public discourse of mainstream society. Both groups offer solutions to problems based on the premise that making social media platforms more accountable for removing or moderating certain speech can influence the public.

B. Section 230 Reforms Should be Limited to Content Posted on Social Media Platforms with Over 50 Million Monthly Active Users That Generate Over $500 Million in Annual Revenue

In light of the positive benefits of section 230 immunity on the United States economy and competition, any changes further restricting the immunity should be small, careful, and apply to as few firms as possible. Businesses that would become liable under section 230 reforms should be only those that are responsible for the problems Congress seeks to solve—social media platforms with a sufficient number of users to affect public discourse and opinion. Reforms should also only apply to firms able to survive and profit from their social media platforms even after increased compliance, moderation, and legal costs in order to preserve the competitive market and protect new, innovative companies.

1. Limiting Changes to Section 230 Immunity Will Limit Unpredictable Negative Consequences

When seeking to reform established legislation—especially legislation with such powerful positive benefits such as helping create the modern Internet and economic flourishing of the U.S. tech industry—lawmakers should hesitate before enacting sweeping changes. Humility is especially important when reforms may come at the expense of one of the primary purposes of section 230: competition in the online economy.[123] At the same time, the Internet economy has drastically changed since Congress enacted section 230, and there may be legitimate policy reasons to hold powerful and wealthy companies with online platforms accountable for permitting unlawful content to flourish.

By broadly removing section 230 immunity, lawmakers would effectively impose new regulatory costs on small platforms that can challenge the large incumbents. Regulations can harm competition by increasing costs and barriers to entry, making it more difficult for new and innovative

123. *Id.*

competitors to challenge incumbent firms.[124] Large businesses also gain even more competitive advantages over smaller ones because they often have the financial resources to comply with rules without significantly losing profits or investment in other areas.[125] Carefully targeted changes to section 230 immunity removes these advantages that large social media companies would otherwise have over their competition and reduces the opportunities for increased consolidation in the technology industry.

Section 230 proponents oppose any attempts to reform section 230 partly because restricting section 230 immunity will limit competition and stifle innovation by increasing costs on new and smaller online platforms.[126] One of the original authors of section 230, now-Senator Ron Wyden, argued that "[i]f you unravel 230, then you harm the opportunity for diverse voices, diverse platforms, and, particularly, the little guy to have a chance to get off the ground."[127] Widespread criticism of reforms has arisen from various companies that operate online websites and cybersecurity services as well, including Etsy, Nextdoor, Tripadvisor, Cloudflare, GoDaddy, and the Wikimedia Foundation.[128] These organizations point out that even targeted reforms like FOSTA can have devastating unintended consequences that lead to market consolidation and harms those the law purportedly did not intend to victimize.[129] They also point out that the users themselves remain vulnerable to liability, as section 230 does not immunize the creators or repeaters of the content.[130]

How social media platforms reacted to the passage of FOSTA, which removed section 230 immunity for platforms found to "support" two specific crimes (prostitution and human trafficking), shows how even a targeted law can consolidate more power into large companies while forcing small ones out of the market.[131] By removing section 230 immunity for those "supporting" certain unlawful conduct, Congress actually imposed severe

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124. *See* HOWARD BEALES ET AL., GOVERNMENT REGULATION: THE GOOD, THE BAD, & THE UGLY 4 (2017), https://regproject.org/wp-content/uploads/RTP-Regulatory-Process-Working-Group-Paper.pdf [https://perma.cc/HQ5U-99MF].

125. *See id.* at 8.

126. *See* Emily Stewart, *Ron Wyden Wrote the Law That Built the Internet. He Still Stands by It - and Everything It's Brought with It*, RECODE (Mar. 16, 2019, 9:50 AM), https://www.vox.com/recode/2019/5/16/18626779/ron-wyden-section-230-facebook-regulations-neutrality [https://perma.cc/KML7-E8YA].

127. *Id.*

128. *See* THE INTERNET WORKS COALITION, https://www.theinternet.works/issue/ (last accessed Oct. 27, 2021) [https://perma.cc/UF8X-CNQQ]. While some of the largest online platforms have supported section 230 reforms, critics are skeptical that support from large internet companies, which began and grew under section 230 immunity but now have the financial resources to survive liability lawsuits and moderate content that smaller competitors do not, to change section 230 are pure or altruistic.

129. *See* Elliot Harmon, *In Debate Over Internet Speech Law, Pay Attention to Whose Voices Are Ignored*, HILL, (Aug. 21, 2019), https://thehill.com/opinion/technology/458227-in-debate-over-internet-speech-law-pay-attention-to-whose-voices-are [https://perma.cc/9QGM-VH2Z].

130. *See* Kosseff, *supra* note 14, at 25-27.

131. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (2018) (codified at 47 U.S.C. § 230(e)(5)).

moderation requirements that smaller companies or those with less-profitable social media platforms could not meet.[132] In response to the bill's passage, Craigslist shut down its "Personals" section due to concerns that maintaining the service would be "jeopardizing all [of their] other services."[133] Reddit closed several forums that *might* have included unlawful content, but which certainly included lawful content as well.[134] At least one legal niche dating service shut down due to financial liability concerns.[135] Yet even as smaller websites shut down services, Facebook used its vast resources to launch its own dating service just a few weeks after Congress passed FOSTA.[136] If a narrowly tailored law such as FOSTA can cause smaller or less-profitable companies to close lawful services out of fear of legal and compliance costs, more sweeping and fundamental changes to section 230 could cause even more businesses to close or lawful services to discontinue.

2. Reform Proposals Seek to Solve Problems Caused by Social Media Platforms

Restrictions to section 230 immunity should apply only to social media platforms, not to every website where users can provide any type of content. Targeting only social media platforms would limit new liability exposure to those companies with the most influence on public discourse and those that have the greatest power to amplify or censor content.

Limiting immunity to social media platforms holds the most influential companies accountable for unlawful content shared on their platforms while not imposing unnecessary costs on companies with business models not built on sharing content and therefore have less impact on public discourse. The shared primary purposes of section 230 reforms are functional—to prevent the amplification or censorship of certain content.[137] The primary purposes are not the first expression itself of the content (such as original Facebook posts or Twitter tweets), which would be almost impossible for the government or private companies to effectively police, but the widespread sharing or censorship of unlawful or political speech.[138] Social media

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132. *See* Merrit Kennedy, *Craigslist Shuts Down Personals Section After Congress Passes Bill On Trafficking*, NAT'L PUB. RADIO (Mar. 23, 2018), https://www.npr.org/sections/thetwo-way/2018/03/23/596460672/craigslist-shuts-down-personals-section-after-congress-passes-bill-on-traffickin [https://perma.cc/2XB8-3UTE]; *see also* Elizabeth Nolan Brown, *Hours After FOSTA Passes, Reddit Bans 'Escorts' and 'SugarDaddy' Communities*, REASON (Mar. 22, 2018), https://reason.com/2018/03/22/reddit-bans-escort-subreddits [https://perma.cc/9AGD-489G].

133. *See* CRAIGSLIST, https://www.craigslist.org/about/FOSTA, (wishing "every happiness" to "the millions of spouses, partners, and couples who met through craigslist") [https://perma.cc/7RST-D47H].

134. *See* Brown, *supra* note 132.

135. *See* Samantha Cole, *Furry Dating Site Shuts Down Because of FOSTA*, VICE (Apr. 2, 2018, 10:00 AM), https://www.vice.com/en/article/8xk8m4/furry-dating-site-pounced-is-down-fosta-sesta [https://perma.cc/8KZY-LFXT].

136. *See* Harmon, *supra* note 129.

137. *See supra*, Part IV.

138. *See id.*

companies definitionally are those platforms that most facilitate such sharing of speech because they are the online services where users can share content with friends or strangers, react to others' content, and create identifying user profiles.[139] To hold companies who do not facilitate content sharing liable for third-party content would apply the reforms outside of those necessary to accomplish the goals of reformers and to amplify the costs or unintended consequences.

The social media criteria capture not only to traditionally perceived social media platforms like Facebook and Twitter, but also to certain online marketplaces where users, including individuals or businesses, can sell products or services to other users. Platforms like Airbnb, eBay, Etsy, or Amazon third-party selling require users to create profiles and facilitate social networking in a manner similar to "traditional" social media companies such as Facebook or Twitter.[140] They also provide users areas for reviews or comments, which open the possibility that they host unlawful defamatory statements.[141] However, other criteria such as a minimum number of content-producing users, may preclude application to smaller online marketplaces.

Websites excluded by the social media platform criteria include those where the user has no interaction or only one-way interaction with other users or content creators. These include blogs or news publications with comment sections that lack social networking services or user profiles; companies that operate websites to sell their own products with consumer reviews; and services, such as audio or video streaming, where users consume content but do not create their own. Importantly, the social media criterion would exclude many wikis, even though some require users to create individualized pages that could constitute "profiles," because they effectively funnel volunteers to create a non-interactive end product.[142] Wikis generally do not facilitate networking among users except to discuss the end product, certain users can be banned for inactivity, and the end product is non-interactive with website visitors except for those who sign up to edit the wiki.[143] Websites such as the New York Times or New York Post, Wikipedia, and streaming services that do not allow casual users to post content (such as Netflix, Hulu, or Pandora) would also still have section 230 immunity.

Limiting section 230 immunity restrictions to platforms that share public or semi-public content preserves immunity for private messaging platforms as well. To not exempt these platforms would not only encourage,

139. *See supra*, Part II.

140. *See, e.g.*, *Why we require a profile*, AIRBNB, https://www.airbnb.com/help/article/67/why-we-require-a-profile (last visited Nov. 9, 2021) [https://perma.cc/Q8ZS-EG8Z].

141. *See id.*

142. *See Wikipedia: What Wikipedia Is Not*, WIKIPEDIA, https://en.wikipedia.org/wiki/Wikipedia:What_Wikipedia_is_not#Wikipedia_is_not_a_blog,_web_hosting_service,_social_networking_service,_or_memorial_site [https://perma.cc/CE3P-DUGN].

143. *See Wikipedia:Wikipedia Is a Volunteer Service*, WIKIPEDIA, https://en.wikipedia.org/wiki/Wikipedia:Wikipedia_is_a_volunteer_service [https://perma.cc/C4X5-QF3P].

but could actually require, companies to actively monitor and store users' private communications. The costs of this mandatory invasion of user privacy likely do not outweigh the benefits, especially considering that private messages have less influence on public discourse and less ability to broadcast the type of content about which policymakers have expressed concern, such as hate speech or violent speech.[144] This requirement would preserve protections for services like WhatsApp and Signal.

3. Applying Section 230 Restrictions to Smaller Companies Will Unnecessarily Penalize Businesses with Few Active Users and Relatively Little Revenue by Decreasing Competition

Section 230 reforms should only apply to platforms with 50 million MAUs and generate over $500 million in annual revenue. These threshold criteria help avoid both penalizing companies that do not have the user base to influence public discourse and empowering large online platforms even more so by reducing competition by increasing costs on competitive small businesses. The relevant factors to consider are not only the number of users on an online platform, which reflects the influence that a particular social media platform has on public discourse, but also the revenue that the platform generates. A platform with a high number of users but little revenue cannot survive increased legal liability, while a platform with high revenue but with fewer users has insufficient social influence to justify such liability costs. Thus, both standards should be met before new section 230 limits apply.

a. Limiting Reforms to Platforms with Over 50 Million Monthly Active Users Holds Influential Platforms Accountable While Protecting New Services and Competition

By limiting the applicability of section 230 reforms to large online platforms, defined as those with more than 50 million MAUs, the integrity of reformers' purposes will remain as the law applies to the most influential websites while new platforms will still have the ability to establish and generate revenue without crumbling due to legal liability. This section will examine why Congress should use 50 million MAUs as the standard and how small platforms would benefit from an exemption.

Small platforms are less likely to have the type of influence on public society or create offline harms than larger platforms, and to impose increased legal costs on them would throttle competition. Though smaller platforms like

144. Reforms to section 230 do not seek to solve the problem of unpopular or hateful posts, but instead the amplification of those messages.

Parler, which once claimed twelve million MAUs,[145] can serve as hosts for illegal speech, larger platforms are essential for amplification and translation of such speech into movements that involve hundreds or thousands of people.[146] Experts have cited Twitter as important for radical views to reach political and journalism influencers whose amplification can (even unintentionally) spread misinformation or violent speech, and Facebook is used by conspiracy theorists to expose a mainstream audience to their false information and collect adherents.[147]

The roles that Parler and Facebook played in the January 6, 2021, rally and attack of the U.S. Capitol show the essentialness of large platforms in disseminating speech into mainstream public discourse. Though Parler contributed to the January 6th attack by giving users with similar views a place to initially meet and discuss, its twelve million total users is minuscule compared to the immense size of Facebook (200 million American users, including 70% of American adults), [148] the use of which allowed coordinators to organize at the necessary scale.[149] Over 100,000 Facebook users posted content affiliated with causes that prompted the Capitol rally,[150] along with at least seventy Facebook groups dedicated to similar causes such as "Stop the Steal."[151] As one leader of a tech watchdog group noted shortly after the attack, "[i]f you took Parler out of the equation, you would still almost certainly have what happened at the Capitol . . . If you took Facebook out of the equation before that, you would not."[152] In an extensive report analyzing Facebook users and posts, a collaboration of tech-focused organizations concluded not only that Facebook bears "significant responsibility" for January 6th events, but also found that "Facebook, with its vast reach, remains

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145. Elizabeth Culliford & Jeffrey Dastin, *Parler CEO Says Social Media App, Favored by Trump Supporters, May Not Return*, REUTERS (Jan. 13, 2021), https://www.reuters.com/technology/exclusive-parler-ceo-says-social-media-app-favored-by-trump-supporters-may-not-2021-01-13/ [https://perma.cc/8C48-LQ4Y].

146. *See* Gilad Edelman, *Twitter Cracks Down on QAnon. Your Move, Facebook*, WIRED (July 22, 2020), https://www.wired.com/story/twitter-cracks-down-qanon-policy/ [https://perma.cc/7SSK-QXYJ].

147. *Id.*

148. *Countries with The Most Facebook Users 2021*, STATISTA (Sept. 10, 2021), https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/ [https://perma.cc/QC6M-YJMR]; *see also* Josh Gramlich, *10 Facts About Americans and Facebook*, PEW RSCH. CTR. (June 1, 2021), https://www.pewresearch.org/fact-tank/2021/06/01/facts-about-americans-and-facebook/ [https://perma.cc/HU32-ZCK5].

149. *See* Igor Derysh, *Despite Parler Backlash, Facebook Played Huge Role in Fueling Capitol Riot, Watchdogs Say*, SALON (Jan. 16, 2021), https://www.salon.com/2021/01/16/despite-parler-backlash-facebook-played-huge-role-in-fueling-capitol-riot-watchdogs-say/ [https://perma.cc/LZ4Q-ZHC6].

150. Elizabeth Dwoskin, *Facebook's Sandberg Deflected Blame for Capitol Riot, but New Evidence Shows How Platform Played Role*, WASH. POST (Jan. 13, 2021), https://www.washingtonpost.com/technology/2021/01/13/facebook-role-in-capitol-protest/ [https://perma.cc/576E-JR4J].

151. Kayla Gogarty, *"Stop the Steal" Organizers Used Facebook and Instagram to Promote Events*, MEDIA MATTERS (Jan. 12, 2021), https://www.mediamatters.org/january-6-insurrection/stop-steal-organizers-used-facebook-and-instagram-promote-events-including [https://perma.cc/2H4B-CBM7].

152. Derysh, s*upra* note 149.

an unparalleled organizing tool for right-wing groups, despite recent moves by many Trump supporters to embrace ideological fringe sites like Parler…"[153] That users of smaller platforms need to operate on larger ones in order to effectively organize should cause policy makers to hesitate before regulating those smaller platforms. If policy makers can prevent societal-wide harm such as the public discourse that led to the January 6th attack by selectively removing section 230 immunity only larger platforms, as opposed to almost all social media services, then for the competitive and economic reasons discussed above they should do so.[154]

The 50 million MAU criteria would allow new firms to grow without worrying about being run out of business due to legal costs, thereby helping to maintain the competitive environment section 230 seeks to promote. Multiple legislative proposals include a minimum threshold number of MAUs, and at least one specifically uses 50 million MAUs as the metric.[155] The 50 million threshold ensures the most-used platforms currently would be within the scope of any enacted reforms; not only are Facebook, Twitter, and Reddit included, but so are lesser-known platforms such as Discord and Quora.[156]

b. Limiting Reforms to Platforms with Over 50 Million Monthly Active Users Protects Competition

Exempting smaller platforms with less than $500 million in annual revenue also supports the original purpose of section 230 to "preserve the vibrant and competitive free market" by protecting new entrants from existentially-threatening legal costs.[157] More businesses in an industry leads to greater competition, and lower entry costs, such as legal fees, leads to more businesses.[158] In turn, greater competition leads to more innovation, productivity, and a growing economy.[159] Five hundred million dollars may seem to be a high bar, but online companies are often global enterprises, and

153. TECH TRANSPARENCY PROJECT, JANUARY 6TH: AN INSURRECTION FUELED BY FACEBOOK 65 (Feb. 2, 2021), https://accountabletech.org/wp-content/uploads/January-6th-An-Insurrection-Fueled-by-Facebook.pdf [https://perma.cc/YLH3-JAQM].

154. *See supra* Part III, Section A.

155. Reps. Eshoo and Malinowski Introduce Bill to Hold Tech Platforms Liable for Algorithmic Promotion of Extremism, *supra* note 101; Online Freedom and Viewpoint Diversity Act, S. 4534, 116th Cong. (2020); Limiting Section 230 Immunity to Good Samaritans Act, S. 3983, 116th Cong. (2020).

156. Werner Geyser, *Discord Statistics: Revenue, Users & More*, INFLUENCER MARKETING HUB (Sept. 1, 2021), https://influencermarketinghub.com/discord-stats/ [https://perma.cc/4M6Y-EZDP]; *see also* Theodore Schleifer, *Yes, Quora Still Exists, and It's Now Worth $2 Billion*, RECODE (May 16, 2019), https://www.vox.com/recode/2019/5/16/18627157/quora-value-billion-question-answer [https://perma.cc/5BPY-3N38].

157. 47 U.S.C. § 230(b)(2); *see also* KOSSEFF, *supra* note 3, at 175-78.

158. *See* WU & ATKINSON, *supra* note 82, at 6, 29, 53.

159. *Id.* at 6.

this standard captures at least the largest ninety-four online businesses.[160] Firms with fewer financial resources have less ability to absorb compliance costs, along with unpredictable settlements or damages arising from lawsuits. In contrast, the largest social media companies employ tens of thousands of people to monitor and moderate content.[161] Facebook alone pays for 15,000 workers to monitor its social media posts, and critics argue the company needs to double that in order to be effective.[162] Smaller companies may not be able to meet heightened monitoring and moderation obligations in an environment without section 230 immunity. Even when scaled down to adjust for smaller user bases, the cost of extra employees can be significant or even fatal for smaller or new online platforms.

As discussed above, reactions by companies to the passage of FOSTA shows how increasing legal liability can lead to less competition and consolidate the marketplace in favor of larger incumbent firms. After Congress passed FOSTA, smaller companies shut down dating-related services or even went out of business.[163] On the other hand, Facebook, which has over $85 billion in annual revenue and had lobbied for FOSTA's passage, launched its own dating service just a few weeks later while its competitors in the online dating space began to fold.[164] Though Facebook does not release the number of users who participate in the dating service, the timing suggests that Facebook decisionmakers understood FOSTA could force competitors to leave the online-romance market and could therefore open a profitable avenue for the wealthy company that could withstand liability costs.[165]

The potential for section 230 reforms to limit competition and consolidate the market highlights the danger that not exempting smaller companies can give "Big Tech" even more power over public discourse and its users. Such market consolidation of the social media sector would only serve to prevent competitors, perhaps those with innovative platforms or services, improved algorithms, effective moderation tools, or meaningful content-guidelines policies that reduce perceived political bias, from displacing or reducing the influence of companies that run large social media platforms.

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160. *List of Largest Internet Companies*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_largest_Internet_companies [https://perma.cc/7D9K-LE9H].

161. *See* Elizabeth Dwoskin, Jeanne Whalen, & Regine Cabato, *Content Moderators at YouTube, Facebook and Twitter See the Worst of the Web - and Suffer Silently*, WASH. POST (July 25, 2019), https://www.washingtonpost.com/technology/2019/07/25/social-media-companies-are-outsourcing-their-dirty-work-philippines-generation-workers-is-paying-price [https://perma.cc/PW5J-7CBA].

162. Charlotte Jee, *Facebook Needs 30,000 of Its Own Content Moderators, Says a New Report*, MIT TECHNOLOGY REV. (June 8, 2020), https://www.technologyreview.com/2020/06/08/1002894/facebook-needs-30000-of-its-own-content-moderators-says-a-new-report/ [https://perma.cc/NJR2-ZFCW].

163. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (2018) (codified at 47 U.S.C. § 230(e)(5)).

164. Harmon, *supra* note 129; *see also Facebook Company Profile*, FORTUNE (Aug. 2, 2021), https://fortune.com/company/facebook/fortune500/.

165. *See* Harmon, *supra* note 136.

Providing regulatory relief for smaller businesses is common in the United States, as lower-revenue businesses are disproportionately impacted by fixed costs of regulation, the consequences of non-adherence to regulations can be smaller, and policy makers often support entrepreneurship.[166] When Congress passed the Small Business Regulatory Enforcement Fairness Act, it recognized that "small businesses bear a disproportionate share of regulatory costs and burdens."[167] Federal agencies can reduce or waive civil penalties for small businesses that violate statutory or regulatory requirements.[168] Agencies must also review regulations to ensure they do not "unduly inhibit the ability of small entities to compete."[169] Minimum wage laws and health insurance requirements for employers are just some of the other ways the law holds smaller firms to more lenient regulatory standards.[170] Only applying section 230 reforms to larger companies would follow this tradition of permitting new firms to grow and flourish before complying with regulations designed to curb actions of large-scale actors.

IV. CONCLUSION

The central concern of many section 230 reformers is to reign in the power that large social media companies with massive number of users and annual revenue exercise over society. In attempting to curb these perceived abuses, Congress should *encourage*, not inhibit the ability of, new and small firms to compete against the larger companies and platforms. Congress can promote such competition by only removing section 230 immunity for the larger companies and platforms most responsible for the perceived harms. While the modern Internet economy has drastically changed since Congress passed section 230, the importance of the free and open Internet to drive competition and innovation has not changed. By narrowing any removal of section 230 immunity to large companies that operate social media platforms with large user bases, Congress can ensure the primary aims of the reforms are met while not overburdening smaller and newer firms that can compete against the largest online companies.

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166. *See* SUSAN M. GATES & KRISTIN J. LEUSCHNER, IS SPECIAL REGULATORY TREATMENT FOR SMALL BUSINESSES WORKING AS INTENDED? (2007), https://www.rand.org/pubs/research_briefs/RB9298.html#:~:text=Small%20businesses%20are%20a%20critical,percent%20of%20net%20new%20jobs [https://perma.cc/KS6W-LSF8]; *see also* WU & ATKINSON, *supra* note 82.

167. Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, § 202, 1996 U.S.C.C.A.N. (110 Stat.) 847 (codified at 5 U.S.C. § 601).

168. *See id.* § 223(a).

169. Letter from Sanford S. Williams, Federal Communications Commission to Government Attic 7 (March 7, 2017), https://www.governmentattic.org/26docs/FCC-MRF2016-SECGM2009.pdf [https://perma.cc/856B-4HL4].

170. *See* Jeanne Sahadi, *Many Low-wage Workers Not Protected by Minimum Wage*, CNN (Apr. 23, 2014), https://money.cnn.com/2014/04/23/smallbusiness/minimum-wage-exemptions/index.html [https://perma.cc/Q2CF-C5ZL]; *see also* GATES & LEUSCHNER, *supra* note 166.