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INTRODUCTION

There are endless proposals in Congress aimed at fixing the problems with "Big Tech." Introduced over the last four years, each one hopes to solve problems such as the spread of misinformation online, the spread of unlawful content online, or even the removal of constitutionally protected speech from internet platforms.[1]

Unfortunately, these various pieces of legislation that hope to regulate social media regularly fail to grapple with all kinds of problems, such as First Amendment barriers to action. Further, they fail to recognize that social media is *not* the cause of many of the problems that legislators seek to solve. This Essay will outline a handful of the biggest issues that elude lawmakers proposing changes to § 230 of the Communications Decency Act of 1996[2] and content moderation policy.

Most importantly, these legislative proposals often raise First Amendment concerns and confuse what the First Amendment does compared with what § 230 does. In many cases, policymakers seem to think that removing § 230's liability shield for platforms will halt offending behavior or that platforms will be forced to act on offending behavior. However, much of the targeted content is constitutionally protected. That means that the government cannot compel platforms to treat this speech differently, and, if brought before a court, neither the speaker nor the platform would be punished. In short, removing the

1. *See generally* Health Misinformation Act of 2021, S. 2448, 117th Cong. (2021); Preserving Political Speech Online Act, S. 2338, 117th Cong. § 4 (2021); Promoting Rights and Online Speech Protections to Ensure Every Consumer Heard (PRO-SPEECH) Act, S. 2448, 117th Cong. § 2 (2021); Don't Push My Buttons Act, H.R. 8515, 117th Cong. § 2 (2021).

2. Communications Decency Act of 1996, 47 U.S.C. §§ 230, 560–61.

liability shield from § 230 would waste court time and increase legal fees unnecessarily.

Furthermore, many regulations aim to curb misinformation but fail to account for the government's own proclivities for spreading the exact same kind of misinformation. Giving the government power to prevent constitutionally protected—if undesirable—speech while the government itself is also producing some of this speech seems counterproductive, if not ridiculous.

Other proposals would expose platforms that do not remove certain kinds of unlawful speech to liability, even though the actual speakers who produce unlawful speech already receive due process if and when they are sued. Judges and courts determine the legality of such speech. Platforms are ill-equipped to handle the task even at a small scale, let alone thousands of times daily and often without the necessary legal expertise and context. Forcing moderators to be constant and quick "judges and juries" is impossible and leaves platforms liable for all the illegal content they miss—even if it is just several pieces out of the millions that they do catch.

Finally, regulators need to grapple with the fact that many changes to § 230 are functionally repeals of § 230. The purpose of § 230 is in no small part to prevent platforms from continuously being dragged into court to defend user speech that they had no hand in creating. Reopening the legal floodgates in small or large ways recreates the original problem that § 230 was designed to solve. The previous legal environment punished platforms that attempted to keep users safe or maintain family-friendly environments, while ultimately rewarding platforms that took a fully hands-off approach to moderation.

I. YOUR PROBLEM IS NOT WITH § 230—IT IS WITH THE FIRST AMENDMENT

All too often regulators fail to recognize which problems are caused by § 230 and which are caused by the free speech protected by the First Amendment. When a law targets speech protected by the First Amendment, it not only misdiagnoses the problem, but also faces a high bar for constitutional scrutiny. This is the case whether a law targets undesirable but legal speech, algorithms and the users who benefit from them, or content moderation standards.

In the online world, the First Amendment allows for content moderation regardless of whether a platform keeps up undesirable content or removes content a user enjoys. It is also the law that enables Twitter to append fact checks to former President Donald J. Trump's tweets and that allows people to be mean to one another online. Section 230 also allows for biased moderation—since "unbiased moderation" does not exist—and allows platforms to moderate as they see fit. All moderators have normal human biases, and humans that use artificial intelligence for moderation

put their own biases into that artificial intelligence—whether or not they are aware that they are doing so.

Even without § 230, platforms could continue this content moderation policy. What differentiates § 230 from the First Amendment in its infamous (c)(1) provision is the stipulation that "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."[3] Section 230(c)(2) further provides that:

> 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 . . . .[4]

Simply put, § 230 prevents platforms and users from being treated as speakers of content that they did not author. If I tweet, I am liable for the tweet and Twitter is not liable. If Twitter, the company itself, posts a comment on your mother's blog, Twitter remains liable and your mother cannot be sued for such content. If Facebook appends a fact check to a user's post on its website, it is only liable for the appended fact check and not for the original Facebook post. If someone retweets a piece of content, they are not liable for sharing that piece of content; only the person who created the tweet is liable. Additionally, platforms are shielded from liability when moderating as they see fit. There is plenty of legal but undesirable content that platforms may want to remove, reduce access to, or otherwise restrict—and they have a right to do so.

With this information in mind, one can understand why various laws attempting to alter § 230 falter when they target speech protected by the First Amendment.

Consider the Health Misinformation Act of 2021,[5] which requires the Secretary of Health and Human Services to work with the leaders of "other relevant Federal agencies and outside experts" to determine what constitutes health misinformation.[6] The proposal would amend § 230 by having platforms treated as speakers of user-created content that contains such "health misinformation" if an algorithm of an online platform promotes the misinformation.[7] Algorithms are exempt from this law if their promotion "occurs through a neutral mechanism, such as through the

3. 47 U.S.C. § 230(c)(1).
4. *Id.* § 230(c)(2).
5. Health Misinformation Act of 2021, S. 2448, 117th Cong. (2021).
6. *Id.* § 3(b).
7. *See id.* § 3(a)(1)(B).

use of chronological functionality."[8] The law also only applies to "covered periods," defined as a "period during which a public health emergency declared by the Secretary of Health and Human Services under section 319 of the Public Health Service Act" is in effect.[9]

The First Amendment problems with such a law are manifest. "Health misinformation" is no less First Amendment protected speech than any other lie or incorrect speech. Furthermore, "neutral mechanisms" is a vaguely defined standard by which to judge algorithms. It is unclear whether an algorithm that promotes similar content to the type of content people already enjoy would be considered "neutral," or if an algorithm that promotes content to users based on location would be considered neutral, because the legislation does not clearly define the term. Furthermore, as Mike Masnick of Techdirt explains, "'the algorithm' is simply a set of recommendations, and recommendations are opinions and opinions are . . . *protected expression under the 1st Amendment*."[10] While the law would not directly prevent platforms from recommending health misinformation—whatever that term ends up meaning—the practical effects of applying cost and risk to such speech activity are nevertheless sure to alter how platforms moderate.

As a study from Daphne Keller at the Cyber Policy Center at Stanford University notes, "[w]hen required to interpret more nuanced legal rules under threat of liability, platforms' performance is also poor. They tend, predictably, to protect themselves by erring on the side of over-enforcement."[11] To explain succinctly why incentives to over-enforce can bring with them First Amendment violations, the study points to an excerpt from a ruling by the Eighth Circuit, *Midwest Video v. FCC*,[12] in which a Federal Communications Commission regulation required "cable operators to restrict unlawful content from programmers."[13] The court explained that

> [i]n so mandating, the Commission appears to have created a corps of involuntary government surrogates, but without providing the procedural safeguards respecting "prior restraint" required of the

8. *Id.*

9. *Id.* § 3(a)(2).

10. Mike Masnick, *House Democrats Decide to Hand Facebook the Internet by Unconstitutionally Taking § 230 Away from Algorithms*, TECHDIRT (Oct. 14, 2021, 10:57 AM), https://www.techdirt.com/articles/20211014/10420547749/house-democrats-decide-to-hand-facebook-internet-unconstitutionally-taking-section-230-away-algorithms.shtml [https://perma.cc/3E8A-NN2X].

11. Daphne Keller, *Amplification and Its Discontents*, KNIGHT FIRST AMEND. INST. (June 8, 2021), https://knightcolumbia.org/content/amplification-and-its-discontents [https://perma.cc/GA4P-AX8C].

12. Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

13. *See* Keller, *supra* note 11.

> government. . . . Thus the Commission made the cable operator both judge and jury, and subjected the cable user's First Amendment rights to decision by an unqualified private citizen, whose personal interest in satisfying the Commission enlists him on the "safe" side—the side of suppression.[14]

The concern regarding making an operator "both judge and jury" will also be relevant later in this Essay, because determining what content is and is not illegal is an extraordinarily difficult task for platforms and an important reason why § 230 exists in the first place. It is unreasonable to suggest "judge and jury" tasks can be adequately adjudicated by moderators who often lack legal training or context to even make such determinations, let alone without error.

The Health Misinformation Act of 2021 is far from the only federal proposal that attempts to regulate algorithms but fails to overcome the high hurdle of First Amendment protection. Although algorithms are also pieces of expression protected by our freedom of expression, there is another consideration: First Amendment rights of users.

While the Health Misinformation Act regulates the amplification of content, "[a] law telling platforms to demote or promote particular kinds of content, or holding them liable for failure to do so, would be a law regulating platform users' speech," as the study explains.[15] Keller points to *United States v. Playboy*[16] as one of many examples of the Supreme Court making this fact clear. The case was centered around a law mandating that cable providers restrict access to pornographic content provided by certain channels.[17] The majority opinion of the case explained that "[t]he distinction between laws burdening and laws banning speech is but a matter of degree. The government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."[18]

The principle applied by the Court in *Playboy* assists with conceptualizing the problem with regulating algorithms. At first glance, the idea of altering an algorithm might not seem to burden First Amendment rights of users. Some user content will be shown instead of other content. Nonetheless, user content will still be shown. However, when considering that the government is the one altering which user content will be shown—burdening some content or unburdening other content according to its desire—the reason such restrictions have to pass First Amendment scrutiny is more obvious. Even if that restriction is on illegal content—rather than undesirable or otherwise bad content such as

14. *Midwest Video Corp.*, 571 F.2d at 1056–57.
15. *See* Keller, *supra* note 11.
16. United States v. Playboy Ent. Grp., Inc., 529 U.S. 803 (2000).
17. *Id.* at 837–39.
18. *Id.* at 812.

health misinformation—the content that the government seeks to restrict access to cannot be restricted by whim, but only by due process for users, which they have not received.

Furthermore, as Keller explains, the law was challenged by the programmers, not by cable companies, due to infringement of programmers' rights, in the same way regulations of algorithms may burden the rights of users rather than platforms.[19] This is not to say that cable companies or platforms do not have free speech rights—they do—but it is possible that the stronger cases do not deal with the intermediaries.[20]

Content moderation is similarly protected speech. Proposals such as the Preserving Political Speech Online Act would violate the First Amendment by amending § 230 to require political neutrality in content moderation by some platforms if they are to maintain their § 230 protection from lawsuits for content that they did not author.[21] But one must remember that § 230 is not the provision that enables content moderation, even if it does ease the process by removing unnecessary and ineffective liability. The law that enables moderation is the First Amendment.

Multiple courts have found that content moderation is a form of speech and as such it is protected by the First Amendment.[22] Content moderation is an act of expression and, like other acts of expression, protected by our freedom of speech.[23]

Legislation proposing to reform § 230 and other legislation like it would discriminate against content moderation on a basis not allowed by the First Amendment in order to expose platforms to liability for user content. Such legislation misunderstands § 230 as the law protecting treatment of content moderation, rather than understanding that the First Amendment is that law.

II. THE GOVERNMENT CAN GET THINGS WRONG

Aside from the First Amendment problems with the Health Misinformation Act of 2021, one must note that the Act touches on content coming from the highest levels of government itself.[24] Indeed, a

19. *See* Keller, *supra* note 11.

20. *See id.*

21. *See* Preserving Political Speech Online Act, S. 2338, 117th Cong. § 4 (2021).

22. *See* Berin Szóka & Ari Cohn, *The Wall Street Journal Misreads § 230 and the First Amendment*, LAWFARE (Feb. 3, 2021, 3:43 PM), https://www.lawfareblog.com/wall-street-journal-misreads-section-230-and-first-amendment [https://perma.cc/2R44-VMA3].

23. *See* John Samples, *Why the Government Should Not Regulate Content Moderation of Social Media*, CATO INST. (Apr. 9, 2019), https://www.cato.org/policy-analysis/why-government-should-not-regulate-content-moderation-social-media [https://perma.cc/K4ZB-8TUN].

24. *See* Health Misinformation Act of 2021, S. 2448, 117th Cong. § 3 (2021).

study from Cornell University found that President Donald J. Trump was the single largest driver of misinformation regarding COVID-19.[25] Even the bill's sponsor, Senator Amy Klobuchar, has been a frequent critic of President Trump's COVID-19 response and has suggested she did not think he was taking the pandemic seriously enough.[26] This legislation fails to grapple with the real source of the misinformation and hands the power to combat what it defines as misinformation to the source spreading so much of it. President Trump does not currently hold the office of the presidency. But he may again one day, as may another president who expresses similar views that Senator Klobuchar considered to be spreading health misinformation. If enacted and somehow held constitutional, legislation like the Health Misinformation Act would give that future officeholder the power to coerce social media sites to suppress valid health information.

Another problem is that health information is constantly evolving. Even Dr. Anthony Fauci, the director of the National Institute of Allergy and Infectious Diseases, and also a member of the White House Coronavirus Task Force, initially recommended against people wearing masks in order to protect themselves from COVID-19.[27] Fauci's rationale for doing so included concern that healthcare workers would face a shortage of protective equipment if people were encouraged to wear masks and also a lack of awareness of the high amount of asymptomatic cases of COVID-19.[28] In any case, under this legislation, the Health and Human Services Secretary could have decided that directing people to wear masks in order to protect themselves was "health misinformation" and then the law would have required penalizing platforms whose algorithms promoted this information.

In the same way that Fauci's decision regarding masks changed, the government regularly changes its decisions on health information. Possibly most notoriously, the U.S. Department of Agriculture has issued factually incorrect "food pyramids" for years.[29] Skim milk, for example,

25. Tommy Beer, *Trump Is 'Single Largest Driver' of Covid-19 Misinformation, Cornell Study Finds*, FORBES (Oct. 1, 2020, 3:23 PM), https://www.forbes.com/sites/tommybeer/2020/10/01/trump-is-single-largest-driver-of-covid-19-misinformation-cornell-study-finds/ [https://perma.cc/A82U-EELK].

26. *See* Amy Klobuchar (@AmyKlobuchar), TWITTER (Aug. 12, 2020, 8:58 AM), https://twitter.com/amyklobuchar/status/1293713398803439622 [https://perma.cc/B5PH-4G9T]; Amy Klobuchar (@AmyKlobuchar), TWITTER (Sept. 13, 2020, 9:45 PM), https://twitter.com/amyklobuchar/status/1305321676251561984 [https://perma.cc/5D37-RQHE].

27. *See Did Fauci Say Not to Wear Masks?*, CNN: FACTS FIRST, https://www.cnn.com/factsfirst/politics/factcheck_e58c20c6-8735-4022-a1f5-1580bc732c45 [https://perma.cc/FQ7A-NJPQ].

28. *Id.*

29. *See* Meir J. Stampfer & Walter C. Willett, *Rebuilding the Food Pyramid*, SCI. AM. (Dec. 1, 2006), https://www.scientificamerican.com/article/rebuilding-the-food-pyramid

has had a sordid history during which researchers were unsure if it was better than whole milk, although that did not seem to pause the government's certainty.[30] These examples are not far-fetched or based in some hypothetical—they come from recent history. Concerns regarding misinformation are very real when lawmakers and executive officials are regularly promoting misinformation—including during congressional hearings about misinformation—and when the government itself is wrong about health information.[31]

III. "LAWFUL" CONTENT IS NOT CLEAR-CUT

Another common kind of proposal demands that social media companies must not take down any content that is not illegal. Aside from First Amendment problems that have already been explored, there is also the problem that platforms are in no position to determine the legality or lack thereof of even a few pieces of content, let alone millions. Cases of libel regularly go through our court systems and before judges and juries. These cases are intensive, require abundant evidence, and require rulings of law that social media platforms are in no position to provide millions of times annually, if not monthly.

Take for example the PRO-SPEECH Act, which, among other provisions, forbids platforms from taking any action that "[b]locks or otherwise prevents a user or entity from accessing any lawful content, application, service, or device that does not interfere with the internet platform's functionality or pose a data privacy or data security risk to a user."[32] The law only applies to the very largest social media platforms but provides that the Federal Trade Commission may apply the law to smaller platforms as it sees fit.[33]

Open a transparency report published by any online platform, and one will see explanations of why categories of millions of pieces of content have been removed from the platform. In the second quarter of 2021, Facebook reported removing more than twenty-five million pieces of identified child exploitation material.[34] Surely within those millions, at

[https://perma.cc/M6ME-T7K9].

30. *See* Emma Green, *The Controversial Life of Skim Milk*, ATL. (Nov. 20, 2013), https://www.theatlantic.com/health/archive/2013/11/the-controversial-life-of-skim-milk/281655 [https://perma.cc/B2E8-BJGJ].

31. *See* Shoshana Weissmann & Canyon Brimhall, *The Misinformation Congress Peddled at a Hearing to Combat Misinformation with Technology CEOs*, R ST. (Apr. 12, 2021), https://www.rstreet.org/2021/04/12/the-misinformation-congress-peddled-at-a-hearing-to-combat-misinformation-with-technology-ceos/ [https://perma.cc/BH53-E2LH].

32. Promoting Rights and Online Speech Protections to Ensure Every Consumer Heard (PRO-SPEECH) Act, S. 2448, 117th Cong. § 2 (2021).

33. *See id.*

34. *Child Endangerment: Nudity and Physical Abuse and Sexual Exploitation*, META TRANSPARENCY CTR., https://transparency.fb.com/data/community-standards-

least one or two pieces were removed accidentally or erroneously and contained innocent images. Facebook would be penalized under the PRO-SPEECH Act in those few cases. Also consider Facebook's removal of tens of millions of pieces of pro-terrorism content each year.[35] Its net is broad. "We do not allow organizations or individuals that proclaim a violent mission, or are engaging in violence, to have a presence on Facebook and Instagram," reads Facebook's policy, adding, "[w]e do not allow content that praises, supports or represents individuals or groups engaging in terrorist activity or organized hate."[36] Much of this speech is completely legal and protected by the First Amendment.[37] Indeed, the *Brandenburg v. Ohio*[38] standard requires that, to be in violation of the law, the speech in question must be "directed to inciting or producing imminent, lawless action and . . . likely to incite or produce such action."[39] And much hate speech does not rise to the standard. "Hate speech" is not a legal term and includes "any form of expression through which speakers intend to vilify, humiliate, or incite hatred against a group or a class of persons on the basis of race, religion, skin color[,] sexual identity, gender identity, ethnicity, disability, or national origin."[40] Much of that which is described will not, in practice, rise to the *Brandenburg* standard. Yes, posts that promote terrorism are awful and at the very least undesirable, but they are also often legal. And that means under the PRO-SPEECH Act, Facebook could be punished for restricting access to content posted in support of terrorist organizations.

As Keller's study explains, evidence demonstrates that platforms are not well equipped to determine what content violates the law and they tend to err on the side of overenforcement.[41] In a situation where the PRO-SPEECH Act is law, however, they would be penalized for such errors.

We are even thinking far too far ahead when considering that speech by terrorists is often protected by the First Amendment. Keller points to a Human Rights Watch report explaining how "[a]lgorithms designed to find terrorist material, for example, can't tell the difference between ISIS

enforcement/child-nudity-and-sexual-exploitation/facebook [https://perma.cc/F6UZ-XHQ6].

35. *See Dangerous Organizations: Terrorism and Organized Hate*, META TRANSPARENCY CTR., https://transparency.fb.com/data/community-standards-enforcement/dangerous-organizations/facebook [https://perma.cc/X44C-4JT].

36. *Id.*

37. Jaclyn K. Haughom, *Combatting Terrorism in a Digital Age: First Amendment Implications*, FREEDOM F. INST., (Nov. 16, 2016), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/internet-first-amendment/combatting-terrorism-in-a-digital-age-first-amendment-implications [https://perma.cc/C3KY-X434].

38. Brandenburg v. Ohio, 395 U.S. 444 (1969).

39. *Id.* at 447.

40. *See Hate Speech and Hate Crime*, ALA AM. LIBR. ASS'N, https://www.ala.org/advocacy/intfreedom/hate [https://perma.cc/QUV4-5X56].

41. *See* Keller, *supra* note 11.

propaganda and news reporting. Algorithmic failures have been blamed for serious mistakes, including YouTube's deletion of videos documenting war crimes in Syria."[42]

Furthermore, that algorithms—which are necessary in order to handle large platforms' content moderation policies—are quite so inept at these tasks necessitates allowing room for error if we are to keep platforms useful by any stretch of the imagination for users. Politicians advocating for proposals like PRO-SPEECH must grapple with the very real consequences of the policy changes that they are suggesting.

IV. PLATFORMS OF DIFFERENT SIZES AND DIFFERENT PURPOSES NEED THE ABILITY TO MODERATE DIFFERENTLY

When politicians consider proposals that impact social media, they forget that a variety of smaller platforms will also be impacted. For example, AllTrails is a website and app that allows people to explore trails for all kinds of outdoor activities, from hiking to off-roading.[43] It boasts over twenty-five million users and over one million paid users, myself included.[44] On a general trail page, one will find a map, pictures, user reviews, a user-edited trail description, weather outlook report, and more. Some of the content is generated by AllTrails itself, but much is generated by users. The comments and reviews discuss how the trail was for the hiker or cycler, what to expect on the trail, how well it was or was not maintained, what wildlife one may expect to see, and whether one needs tickets in order to enter the trail.

Most proposals to change the way in which social media is regulated do not consider AllTrails or even Etsy, ZocDoc, or other much smaller platforms that would be affected. One such piece of legislation is the Don't Push My Buttons Act,[45] which is yet another piece of legislation that targets algorithms. The bill proposes to deny platforms § 230 protection if they collect data about users and use that data to inform the algorithms that then deliver content to that user that they would like unless the user opts into such a mechanism.[46] In the most basic terms, this means if a platform collects data that shows a user is interested in news about Nicolas Cage, and that data informs algorithms that deliver content to that user about Cage, then the platform loses § 230 protection unless the user has opted into such algorithms. However, automatically showing users

42. *Id.*

43. *See About Us*, ALLTRAILS, https://www.alltrails.com/about [https://perma.cc/Y7PJ-RQP7].

44. AllTrails, *AllTrails Celebrates 1 Million Paid Subscribers*, CISION (Jan. 26, 2021, 8:12 AM), https://www.prnewswire.com/news-releases/alltrails-celebrates-1-million-paid-subscribers-301214556.html [https://perma.cc/24AT-3KWN].

45. Don't Push My Buttons Act, H.R. 8515, 117th Cong. (2020).

46. *Id.* § 2.

content that they are likely to find useful is no more cause for liability for user-generated content than manually showing users such content or not showing users such content. In none of these cases are platforms better able to determine what content is illegal and what content is not.

The real-world consequences here are manifest. AllTrails may use algorithms to show users trails more relevant to hikers or cyclists, long or short trails, trails in cold or warm places, etc. depending on previous preferences. If it does so, it would be liable for every potential piece of illegal content on their platform. If someone posted a scam to sell people fake bus tickets to the Zion National Park shuttle, AllTrails would be liable simply because it opted to show users the most relevant content.

Also consider Tripadvisor. Bloomberg reported that "[a]lmost one in [twenty] user posts offered [on Tripadvisor] in 2018 were rejected for such problems as being irrelevant, biased or fake."[47] Users of Tripadvisor are shown relevant content through algorithms. If someone books a trip to Costa Rica to see sloths, while browsing that person may see more relevant content after the algorithm identifies the vacation goal of seeing sloths in the wild. But under the Don't Push My Buttons Act, showing users more relevant content related to their travel plans would mean that the company could not benefit from § 230's protections due to the legislation's provision that excludes platforms from receiving § 230's protection if they use algorithms to target tailored content without explicit consent from the user. This means that all the reviews on the Tripadvisor pages of hotels, excursions, and more would become useless. This is due to a principle called the "heckler's veto."[48] Simply, any business with a bad review could sue Tripadvisor for libel in order to remove a truthful, but bad, review if Tripadvisor is no longer protected by § 230. Even if the claim would be tossed out, it still goes to court and wastes legal resources from Tripadvisor. Knowing that, the website is likely to remove any negative reviews in order to avoid burdensome lawsuits. With an abundance of such lawsuits on the horizon, the company may remove bad reviews with a simple request. Consequently, consumers may be scammed by companies who sued to remove truthful content they disliked. Tripadvisor said as much with regard to the prospect of an altered § 230: "Review sites such as Tripadvisor could easily become nothing more than only-positive advertising glimpses" because "hosting critical or negative views would create a substantial risk of legal liability,"

47. Todd Shields & Ben Brody, *Facebook Worries Smaller Rivals with Openness on Liability*, BLOOMBERG (Dec. 23, 2020, 2:00 AM), https://www.bloomberg.com/news/articles/2020-12-23/facebook-support-for-liability-reform-has-little-guys-nervous [https://perma.cc/WFX8-YYQ3].

48. A heckler's veto occurs where the government curtails a speaker's right due to the anticipated or actual response the speech elicits from opposing individuals. *See* Patrick Schmidt, *Heckler's Veto*, THE FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/968/heckler-s-veto [https://perma.cc/UCP7-X3XP].

reported Bloomberg, citing a Tripadvisor filing.[49]

Similarly, ZocDoc is a platform for people to locate and book visits with a doctor or medical specialist.[50] Each profile page provides background information about the medical professional, reviews posted by users, and often a simple way to book the doctor. A platform such as this would be forbidden from showing users more relevant information using an algorithm unless it wanted doctors to sue it to take down negative reviews. Many doctors have specialties in specific kinds of diseases. If ZocDoc realizes someone is seeking an endocrinologist with a specialty in, say, Polycystic Ovary Syndrome, ZocDoc would expose itself to massive liability were it to use algorithms that position those specialists higher up in search results.

Generally, opening platforms to greater liability for any reason is going to hit smaller platforms hardest. The largest platforms may have swaths of lawyers and may be better able to handle crushing liability, but companies like ZocDoc and Tripadvisor are markedly smaller than Facebook or Google. For people concerned about issues of competition, saddling smaller platforms with crushing liability that could force them to close or seek to be acquired by a company more apt to handle it is not the wisest decision.

V. REFORMING § 230 IS REPEALING § 230

To understand why conversations about reforming § 230 often functionally attempt to repeal § 230, one must understand the original lawsuit that led to the creation of § 230. The lawsuit consisted of Jordan Belfort—commonly known as the "Wolf of Wall Street"—successfully suing a platform for a user posting libel, even though that user was ultimately vindicated.[51]

The authors of § 230 themselves tell the story of how the law came to be in *USA Today*. Jordan Belfort founded the notorious stock brokerage Stratton Oakmont, which "was eventually exposed as a massive fraud. When the firm was shut down by authorities, he went to prison," remind Senator Ron Wyden and Representative Chris Cox—who crafted § 230.[52] And during the fraud's tenure, whistleblowers tried to alert people through various means, including one whistleblower who posted on an older

49. Shields & Brody, *supra* note 47.

50. *See Picture a Patient*, ZOCDOC, https://www.zocdoc.com/about/ [https://perma.cc/3XNY-7VNK].

51. *See generally* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 805178 (N.Y. Dec. 11, 1995).

52. Ron Wyden & Chris Cox, *Don't Let Donald Trump Crush Internet Free Speech*, USA TODAY (Dec. 18, 2020, 4:00 AM), https://www.usatoday.com/story/opinion/2020/12/18/section-230-and-complications-free-speech-internet-column/3928033001 [https://perma.cc/LJ5U-SRED].

platform called "Prodigy."[53] He called the brokerage a "cult of brokers who either lie for a living or get fired."[54] Belfort and Oakmont sued Prodigy for libel, seeking hundreds of millions in damages.[55]

Prodigy played no role beyond being the forum where the whistleblower posted those words, and therefore argued it should not be responsible.[56] It could not ascertain the validity of the statement posted and never added to the statement posted.[57] Unfortunately, a court held in favor of Belfort essentially because Prodigy moderated and attempted to keep its platform family-friendly, and this single comment on its platform did not meet that standard.[58] Had it not attempted to moderate or protect users, the court would have held otherwise.[59] "The alarming message of this case was clear: in the future, online platforms shouldn't attempt to moderate even the most awful content," Wyden and Cox wrote.[60] "Doing so would make them legally responsible for everything their users post."[61]

This perverse scenario is known as the "moderator's dilemma," in which interactive services either moderate at all and risk liability or moderate nothing and avoid liability for user content.[62] That means allowing scams, spam, swearing (whether or not the platform is best suited for that kind of content), harassment, hate speech, and other undesirable content. It also means allowing people to post the same thing 100 times in a row and inundate inboxes with unwanted messages, racist content, and more. For example, AllTrails would have to keep up completely irrelevant religious or political content.

On the other side of the dilemma, platforms could opt to moderate, keep users safe, and be sued for user content.[63] Twitter could be sued for one piece of libel out of billions on its platform, even if it was fully unaware that the content existed, let alone unable to determine its legality. It is a perfect scenario to recreate the circumstances that let the Wolf of Wall Street sue Prodigy and allow anyone to sue platforms for negative content posted about them. Indeed, platforms could choose to moderate and risk being sued left and right. Smaller platforms would likely not

53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *See id.*
59. *See id.*
60. *Id.*
61. *Id.*
62. *See* Bobby Allyn, *As Trump Targets Twitter's Legal Shield, Experts Have a Warning*, NPR (May 30, 2020, 11:36 AM), https://www.npr.org/2020/05/30/865813960/as-trump-targets-twitters-legal-shield-experts-have-a-warning [https://perma.cc/9QJ8-FMK8] (explaining the "moderator's dilemma" and § 230's impact on the quandary).
63. *See id.*

choose this path as they cannot afford that massive risk. Larger platforms like Facebook may be able to weather it to a degree, due in part to their large teams of lawyers.

Reinstating the conditions of the "moderator's dilemma" would also likely make circumstances harder for smaller platforms without the ability to choose to moderate, and it would entrench larger platforms with more options. A recently introduced piece of legislation would repeal § 230 and reintroduce the dilemma in full.[64]

Many suggest small alterations of § 230 would evade creating this dilemma. But this simply is not true. Altering § 230 is less akin to removing some M&Ms from a large bowl than it is to cutting open an avocado that will proceed to rot. One attorney succinctly explains the reason why reform is often repeal: "if you have to litigate whether § 230 applies to you, you might as well not have it on the books in the first place."[65] If exemptions to § 230 mean a platform must go to court to prove that the law protects them from lawsuits, the law no longer serves its purpose. The heckler vetoes.

Furthermore, the attorney notes that "the crippling expense of having to assert one's First Amendment rights in court, and potentially at an unimaginable scale given all the user-generated content Internet platforms facilitate, means that this First Amendment protection is functionally illusory if there's not a mechanism to get platforms out of litigation early and cheaply."[66]

One example of a small alteration to § 230 that would essentially nullify its effects is exempting § 230 protections for certain kinds of content. First, earmarking specific content for liability would not solve the issue of accurately finding and mitigating that content on huge platforms. Consider the proposal to carve out terrorism content from § 230.[67] As previously explored, social media platforms struggle to identify this content well despite being endlessly involved in removing that content. Between April and June of 2021 alone, YouTube removed 431,355 videos of extremism or terrorist content, but there are likely many more that may have been missed.[68] But it would be liable for what it

64. *See* S. 2972, 117th Cong. § 1 (2021).

65. Cathy Gellis, *Why § 230 'Reform' Effectively Means § 230 Repeal*, TECHDIRT (Oct. 12, 2021, 10:55 AM) (emphasis omitted), https://www.techdirt.com/articles/20211004/11400447697/why-section-230-reform-effectively-means-section-230-repeal.shtml [https://perma.cc/A3Q2-WGGV].

66. *Id.*

67. *See generally* Bill to Amend Section 230 of the Communications Act of 1934, 117th Cong., 1st Sess. (2021) (discussion draft), https://republicans-energycommerce.house.gov/wp-content/uploads/2021/07/19-Palmer-Sec-230-Terrorism-Content.pdf [https://perma.cc/5U7A-NX83].

68. *Featured Policies*, GOOGLE TRANSPARENCY REP., https://transparencyreport.google.com/youtube-policy/featured-policies/violent-extremism

misses. In the case of a recent change known as "FOSTA-SESTA," opponents warned of a host of unintended consequences, and they were ultimately vindicated by a U.S. Government Accountability Office report confirming that those harmful consequences followed.[69]

Carving out paid speech as an area for liability is another approach that runs into the same problems. Paid speech is still speech and platforms are no more able to determine the legality of this speech without error than unpaid speech. The SAFE TECH Act would do just this, among other things. Wyden points out that "creating liability for all commercial relationships would cause web hosts, cloud storage providers and even paid email services to purge their networks of any controversial speech."[70]

Finally, carving out moderation practices or algorithms as an area for liability causes a similar exponential growth of possible litigation and unreasonable cost. One could sue saying the kind of moderation used was not sufficient and missed certain content, or one could sue and say that the moderation was overzealous and not allowed by law. Likewise, banning algorithms for those who want to keep § 230 protections (or many kinds of them) would create a smaller moderator's dilemma for platforms where, if a company uses algorithms to make its platform useful, it risks liability, but if it no longer uses them, the platform becomes less useful.

These brief examples are far from exhaustive and do not begin to approach the First Amendment concerns that intersect with each example.

CONCLUSION

When regulating social media, lawmakers must address real concerns around First Amendment rights, liability, and the broad impact of new policy. The possible consequences are well documented and cannot be brushed aside. This Essay does not posit that social media regulation cannot change, but that policymakers must grapple with First Amendment concerns, assess the limits of the government's own information, acknowledge the limited ability of platforms to reliably find illegal content or determine a piece of content's legality, and understand that reforms to § 230 often amount to a repeal. Informed proposals should be ready to tackle these problems and weigh them honestly against the positive outcomes.

[https://perma.cc/5SSE-KU3Y].

69. Mike Masnick, *As Everyone Rushes to Change § 230, New GAO Report Points Out that FOSTA Hasn't Lived Up to Any of Its Promises*, TECHDIRT (June 23, 2021, 10:49 AM), https://www.techdirt.com/articles/20210622/23305347042/as-everyone-rushes-to-change-section-230-new-gao-report-points-out-that-fosta-hasnt-lived-up-to-any-promises.shtml [https://perma.cc/5CFP-V74M].

70. Taylor Hatmaker, *The SAFE TECH Act Offers § 230 Reform, but the Law's Defenders Warn of Major Side Effects*, TECHCRUNCH (Feb. 5, 2021, 5:15 PM), https://techcrunch.com/2021/02/05/safe-tech-act-section-230-warner [https://perma.cc/462Y-252Q].