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ARTICLES

JAWBONING, INC. – WHEN BIG TECH BECOMES A STATE ACTOR

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Jawboning, Inc. – When Big Tech Becomes a State Actor*

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INTRODUCTION

Are Meta (f/k/a Facebook), X (f/k/a Twitter),³ and Google “State

* This article updates the authors’ 2024 book *Jawboning the Big Tech Juggernauts: When Dominant Social Media Platforms Cave to Government Pressure and Become State Actors in A Section 230 World*, which is based on Dr. Honnen’s unpublished dissertation chapter slated for 2025 publication. This update is motivated by the importance of the national conversation about Big Tech’s ability to curate and censor social media platforms, and the rapidly evolving nature of this topic.

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³ In late July 2023, Twitter’s new owner Elon Musk changed the name of the company to “X”. However, because the company’s activities addressed in this article occurred prior to its name change, we will continue to refer to Mr. Musk’s company as Twitter.

Actors” That Owe First Amendment Protections to Their Users?

Section 230 of the Communications Decency Act (CDA)⁴ is generally considered the most important statutory provision relating to the Internet today.⁵ The CDA’s Section 230 grants interactive online platforms comprehensive and broad statutory civil immunity against liability for the uploaded user-generated content on their platforms, including immunity from defamation.

When Congress enacted the CDA in 1996, it created Section 230 to grant then-fledgling Internet platforms these broad immunities “to promote the continued development of the Internet...”⁶ Section 230 immunities are unprecedented—not even publishers or news-reporting organizations enjoy immunity from defamation liability.⁷ This immunity significantly helped companies like Facebook, Twitter, and Google become powerful social media platform juggernauts capable of influencing public debate and ideas.⁸

Many Section 230 critics and challengers today argue that these large dominant online social media platforms, which have become our modern digital public square, do more than merely influence public debate because of these immunities. These critics and challengers argue that these platforms openly censor user content and de-platform users on behalf of or as proxies for the federal government in violation of Americans’ First Amendment rights to free speech.⁹ A recent U.S. House subcommittee (“Weaponization Committee”) has conducted extensive investigations on a number of events related to the issues of censorship

⁴ Congress enacted the CDA as part of the Telecommunications Act of 1996, amending the 1934 Communications Act. 47 U.S.C. § 230 (2023).

⁵ See Alan Z. Rozenshtein, *Interpreting the Ambiguities of Section 230*, 41 YALE J. REG. BULL. 60 (2024) (observing “[w]hether one champions Section 230 as the ‘Magna Carta’ of the internet” or vilifies it as the “law that ruined the internet,” there is no doubting that it “made Silicon Valley”) citing Noa Yachot, *The “Magna Carta” of Cyberspace Turns 20: An Interview With the ACLU Lawyer Who Helped Save the Internet*, ACLU (June 23, 2017), <https://www.aclu.org/news/free-speech/magna-carda-cyberspace-turns-20-interview-aclu-lawyer-who-helped> <https://perma.cc/LAR9-N73Z>; S. Randy Waldman, *The 1996 Law That Ruined the Internet*, ATLANTIC (Jan. 3, 2021), <https://www.theatlantic.com/ideas/archive/2021/01/trump-fighting-section-230-wrong-reason/617497>, <https://perma.cc/7SZT-6PQQ>; Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 650-57 (2014)

⁶ 47 U.S.C. § 230(b)(1) (2018).

⁷ See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (explaining that if a public figure plaintiff can prove malicious intent, a defendant news organization is liable for defamation).

⁸ See Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377 (2021).

⁹ *Id.*

and weaponization of government against the American people and released a number of detailed reports of its findings.¹⁰

There are legitimate and pressing questions about whether these platforms are victims of regulatory capture by the powerful federal government under coercive threat of public disfavor, oppressive regulation, and punitive enforcement. If so, the federal government may actually be pulling the strings in establishing social media platform content moderation and terms of service modification decisions constituting government censorship violating the first amendment. Such platform user censorship, whether spontaneous or by government proxy, abuses the purpose and spirit of Section 230 in a manner detrimental to the public interest.¹¹

These Section 230 critiques and challenges now drive a spirited national policy debate as to the proper level of regulation and attendant legal responsibility for online social platforms' ("Big Tech's") content and curation.¹² For example, do we need guardrails for social media content moderation and Big Tech terms of service? If so, what might compose these guardrails? Would these guardrails be established at the judicial, legislative, and/or executive level? And who decides? And who decides who decides? As discussed throughout this article, this debate gathers steam from recent Big Tech actions to censor and promote certain user-generated content, followed by some powerful responses.

One such example of a powerful response to this Big Tech censorship, resulting from an almost 2-year congressional probe, is within the recent 17,000-page four-part U.S. House Judiciary Select Subcommittee ("Weaponization Committee") Report on the

¹⁰ A number of congressional investigations have yielded disturbing evidence of Big Tech censorship of users, often in conjunction with or response to intense governmental pressure. *See e.g.*, Rep. Jim Jordan et al., Republican Staff Report, Committee on the Judiciary U.S. House of Representatives, *Reining In Big Tech's Censorship Of Conservatives* (October 6, 2020); U.S. House, *Final Report: The Weaponization of the Federal Government* (Dec. 20, 2024); Homeland Security Committee, *Evidence of DHS, Big Tech Collaborating to Censor Americans*, (Nov. 6 2023), at homeland.house.gov/2023/11/06/chairmen-green-bishop-uncover-new-evidence-of-dhs-big-tech-collaborating-to-censor-americans/; <https://judiciary.house.gov/media/press-releases/final-report-weaponization-federal-government>.

¹¹ *See Messenger v. Pennsylvania R. Co.*, 36 N.J.L. 407, 410-11 (N.J. 1873) (finding that when a beneficiary of a government privilege abuses that privilege, such abuse is detrimental to the public's interest).

¹² For a thorough analysis of the modern marketplace of ideas within the public square as occupied mainly by social media forms today, and the debate about regulating these platforms, soft censorship, and the implications for free speech rights for private parties, *see* Michael J. Glennon, *Symbiotic Security and Free Speech*, 14 HARV NAT'L SEC. J. 102 (2022).

Weaponization of the Federal Government (“Weaponization Report”).¹³ The Weaponization Committee stated in its press release for the Weaponization Report that it “found numerous instances of the federal government being weaponized against the American people,” and provided as one of the numerous examples of its findings that it “[h]ighlighted censorship by Big Tech that led to Mark Zuckerberg admitting Facebook was pressured by the Biden-Harris White House to censor Americans.”¹⁴

Another powerful such example comes from Meta CEO Mark Zuckerberg in both his: (1) August 27, 2024, *mea culpa* letter posted on X/Twitter to U.S. House Judiciary Committee Chairman Jim Jordan recounting his remorse for Facebook’s heavy-handed user censorship decisions and related activities in light of intense and unrelenting federal government and regulatory pressure to do so;¹⁵ and (2) August 25, 2022, Joe Rogan 3-hour podcast interview during which Zuckerberg recounts the federal government’s ongoing pressure campaign to persuade Facebook/Meta to censor user content.¹⁶

One might observe that this ongoing government Big Tech censorship coercive pressure campaign, with its public-private “partnering” phenomenon,¹⁷ at least as far as we know, did not occur in connection with the traditional “mainstream” or “legacy” non-digital media. Accordingly, a legitimate question exists as to whether, in enacting Section 230, Congress and Big Tech entered in some form of Faustian pact—by trading Big Tech’s legislative legal immunity in exchange for Big Tech’s compliancy in response to government requests and demands for user censorship by proxy through Big Tech’s content moderation decisions and terms of service revisions.

Why does this matter? A strong argument exists that government lawmakers and regulators unconstitutionally entangle (e.g., government

¹³ See U.S. House, *Final Report: The Weaponization of the Federal Government* (Dec. 20, 2024), <https://judiciary.house.gov/media/press-releases/final-report-weaponization-federal-government>.

¹⁴ *Id.*

¹⁵ See Appendix 1; see also, <https://x.com/JudiciaryGOP/status/1828201780544504064>.

¹⁶ See Mark Zuckerberg’s 2022 3-hour interview on “The Joe Rogan Experience” podcast episode no. 1863 (Aug. 25, 2022). <https://jrelibrary.com/1863-mark-zuckerberg/>.

¹⁷ See e.g., Hearing Before the United States House of Representatives Committee on Energy and Commerce Subcommittees on Consumer Protection & Commerce and Communications & Technology, Testimony of Mark Zuckerberg, Facebook, Inc., 117th Cong. IF16 (Mar. 25, 2021), <chrome-extension://efaidnbmnnnibpcajpcgleclefindmkaj/https://docs.house.gov/meetings/IF/IF16/20210325/111407/HHRG-117-IF16-Wstate-ZuckerbergM-20210325-U1.pdf>.

“partnering” with social media platforms around content moderation and modifying terms of service) or entwine themselves with Big Tech, using coercion and threats of unfavorable enforcement and regulation to promote speech censorship on social media platforms by proxy. Such user censorship can take the form of deplatforming, outright content bans, demonetization, shadow banning, and/or selective content demotion, among other forms. Arguably, Big Tech then becomes a state actor (and thus subject to the state action doctrine¹⁸) when it complies with or submits to such state coercion; it thus performs the government’s bidding by censoring or blocking such objectionable content.¹⁹

If lawmakers can pass this form of far-reaching legal immunity and then direct the actions of erstwhile private actors to accomplish speech censorship behind the scenes, then lawmakers could as easily end-run nearly any other individual liberty or constitutional right. Accordingly, federal legislative statutory immunity plus coercive regulatory pressure must equal state action for Big Tech’s content moderation policies.

Courts routinely dismiss private lawsuits alleging constitutional free speech violations against Big Tech, primarily because lower federal courts repeatedly find that tech companies are purely private businesses: They are not state actors, and their online social media platforms are not public forums.²⁰ Accordingly, purely private Big Tech is not obligated to

¹⁸ The state action doctrine is a bedrock legal principle that says the obligation to protect individual U.S. Constitutional rights (e.g., under the Bill of Rights and Fourteenth Amendment) applies only to governmental, and not private, entities.).

¹⁹ See 47 U.S.C. § 230(b)(1) (2018).

²⁰ See, e.g., *Prager Univ. v. Google L.L.C.*, 951 F.3d 991 (9th Cir. 2020) (holding that a private social media platform does not become a state actor by virtue of creating a public forum); see also *United States v. Stevenson*, 727 F.3d 826, 829 (8th Cir. 2013) (holding that Google did not become a government agent by virtue of a reporting requirement); see also, *Trump v. Twitter*, No. 21-cv-08378, 602 F. Supp. 3d 1213, 2022 WL 1443233 at *1220 (N.D. Cal. May 6, 2022) (remarking that Twitter did not behave as a state actor when it banned President Trump and others from using its service and closed their Twitter accounts, even though some Democratic members of Congress wanted President Trump banned from Twitter, because “comments (from a handful of elected officials (were a far cry from a ‘rule of decision for which State was responsible’”); see also, *Hall v. Meta, Inc.*, Civil No. 3:22-CV-03063-TLB-MEF, 2022 WL 18109625 (W.D. Ark. Dec. 14, 2022) (holding that Facebook was not acting as a state actor when it applied its own community standards when placing a temporary ban on Hall’s account for posting a humorous and satirical tweet “Republicans vote Nov. 8-Democrats vote Nov. 9th.”, and any alleged government involvement was purely speculative); see Class Action Complaint at 56-59, *Facebook*, No. 1:21-CV-22440; see also, Eric Goldman, *Comments on Trump’s Lawsuits Against YouTube, Facebook, and Twitter*, TECH. & MKTG.. L. BLOG (July 12, 2021), <https://blo>

protect individual constitutional rights nor guarantee users the free speech protections of the First Amendment. In turn, those who post on such platforms have no right to free speech.

Lower courts have repeatedly ruled that Facebook, Google, and other Big Tech private internet platforms are not obligated to protect individual constitutional rights. However, these case holdings have been based primarily on public forums and public-function doctrine grounds discussed below. In other words, courts have found that internet platforms do not become state actors merely by providing a digital public square-like forum for public expression.²¹ But these cases fail to address a different question posed by Section 230: Did Congress transform social media platforms into state actors when it passed a legal immunity statute giving these platforms unfettered incentives to act on behalf of government officials? In doing so, do these private platforms avoid constitutional checks and balances that would otherwise apply to these government-directed actions? And specifically, when exactly does Big Tech become entangled with, responding to, and acting upon the federal government's encouragement, pressure, or threats such that it transforms into a state actor?

As Big Tech companies like Facebook, X (formerly Twitter), and Google continue to dominate social media platform markets, arguably, they are approaching near-monopoly status.²² The Department of Justice ("DOJ") sued Google for civil antitrust in both 2020, for search engine monopoly, and 2023, for monopolizing the online advertising technology ("adtech") market.²³

[g.ericgoldman.org/archives/2021/07/comments-on-trumps-lawsuits-against-youtube-facebook-and-twitter.htm](https://www.ericgoldman.org/archives/2021/07/comments-on-trumps-lawsuits-against-youtube-facebook-and-twitter.htm) ("The complaint alleges that the US government made censorial demands of the internet services, and those exhortations turned the services into state actors who then became compelled to follow the First Amendment.").

²¹ See, e.g., *Prager Univ.*, 951 F.3d at 997-98.

²² See Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952 (2021) (exploring the emerging legal and academic debate about whether large Big Tech companies have become monopolies because they dominate their markets and have created barriers to market entry such that they have become monopolies subject to antitrust regulations).

²³ See *United States v. Google, LLC*, Case Nos. 20-cv-3010 (APM), Case No. 20-cv-3715 (APM), ___ F. Supp. ___; 2024 WL 3647498, 119 Fed. R. Serv.3d 884 (D.D.C. Aug. 5, 2024). In *U.S. v. Google*, the United States and several states brought separate actions against Google, alleging that it unlawfully maintained monopolies through exclusionary practices in various markets in violation of the Sherman Act. The U.S. District Court for the District of Columbia consolidated these actions. In 2023, Google filed motions for summary judgment as to all claims in both cases. See *U.S. v. Google*

In the federal regulators' first major win for taking on Big Tech's market power, in August 2024 the DOJ won its 2020 civil antitrust suit against Google related to its search engine. Judge Amit Mehta ruled that Google was a monopolist that spent billions of dollars to create and maintain an illegal monopoly as the world's default search engine.²⁴ This seismic monopoly ruling augurs a second trial to determine potential remedies, which could include the breaking up of Google parent Alphabet. Google remains in the DOJ's crosshairs in a 2023 civil case related to its alleged illegal activities. The FTC (together with 17 state attorneys general) recently filed civil antitrust cases against Amazon: the FTC for unfair monopolist and consumer practices related to Prime.²⁵

Big Tech's immense market power underscores the importance of

LLC, 687 F. Supp. 3d 48 (D.D.C. 2023). The District Court granted part of Google's motion, holding that: (i) Google's restriction of visibility of search results for companies focused on niche markets and data requirements did not have anticompetitive effect; and (ii) Google's decisions regarding which applications to develop on open-source or proprietary basis did not have an anticompetitive effect. *Id.* at 78. However, the District Court denied Google's motion in part because factual issues remained as to (i) whether Google's proprietary search engine marketing tool had anticompetitive effects; and (ii) whether Google's agreements with browser developers and original equipment manufacturers substantially foreclosed substantial part of markets. *Id.* at 83-7.

On August 5, 2024 and following a bench trial, the District Court held the following: (1) Google had monopoly power in the general search services market; (2) Google did not have monopoly power in the search advertising market; (3) Google had monopoly power over general search text advertisements; (4) The "general search advertising market" as not relevant; (5) Google contracts were exclusive, as an element of the claim that Google maintained monopolies through exclusionary practices; (6) Google's exclusive distribution agreements had an anticompetitive effect; and (7) Foreclosure of the market for general search services caused by exclusive distribution agreements was significant; (8) Exclusive agreements did not have a procompetitive benefit; and (9) no anticompetitive harm resulted from Google's delay in launching its proprietary search engine management tool on a competitor's platform. 2024 WL 3647498 at **2-4. For an excellent summary of the District Court's findings that Google acted like a monopoly, see *Antitrust – Sherman Act, Section 2 – U.S. District Court for the District of Columbia Imposes Liability on Google for Engaging in Anticompetitive Conduct as a Monopolist. – United States v. Google, LLC, No. 20-CV-301, 2024 WL 364498 (D.D.C. Aug. 5, 2024)*, 138 HARV. L. REV. 891 (Jan. 2025).

²⁴ See *U.S. v. Google*, *supra* note 23.

²⁵ See *F.T.C. v. Amazon.com, Inc.*, NO. 2:23-cv-01495-JHC, 2024 WL 4448815, at *1 (W.D. Wash. Sept. 30, 2024) (denying Amazon's motion to dismiss as to the FTC's claims under Section 2 and Section 5(a) of the Sherman Act, granted in part and denied in part Amazon's motion to dismiss as to the FTC's various state-law claims, giving the FTC leave to amend its Complaint. The FTC and 17 states sued Amazon and filed a 175-page complaint for federal and state unfair competition law and consumer protection law violations); see also, *F.T.C. v. Amazon.com, Inc.* 735 F. Supp. 3d 1297 (W.D. Wash. 2024) (denying Amazon's motion to dismiss, and holding that the FTC had sufficiently alleged facts to support its claims that Amazon used manipulative, coercive, or deceptive user-interface designs known as "dark patterns" to trick consumers into enrolling in automatically-renewing Prime subscriptions).

preventing their entanglement with government actors, thereby censoring constitutionally protected free speech. In 1924, then-Commerce Secretary and later U.S. President Herbert Hoover gave a prescient and ominous warning about the dangers of allowing a monopoly unfettered power to censor speech:

It is inconceivable that the American people will allow this newborn communication system to fall exclusively into the power of any individual, group, or combination... We cannot allow any single person or group to place themselves in a position where they can censor the material broadcast to the public.²⁶

As Professor Jeb Rubenfeld of Yale Law School notes, Hoover's warnings have now come to pass in the digital age: A handful of internet mega-platforms, unsurpassed in wealth and power, exercise a degree of control over the content of public discourse that is unprecedented in history. No government actor in this country, high or low, can excise from even a small corner of public discourse opinions deemed too dangerous or offensive. Yet Facebook and Google do that every day for hundreds of millions of people.²⁷

Accordingly, it seems absurd that the government should have free reign to deputize private entities and effectuate its political goals and agendas by proxy via private actors. This backdoor approach to governmental regulation bolsters the government's unfettered interference with highly protected individual liberties. This unfettered governmental interference would occur while also allowing it to turn around and claim that its proxy's resulting private conduct lacks state action—and is thus outside the reach for enforcing such individual constitutional protections and guarantees.

As absurd as it may seem that the government could have such unchecked free reign to collaborate with, coerce, or jawbone Big Tech into interfering with—and in many instances outright censor—what users say on social media, more and more evidence continues to emerge that the government has routinely used this backdoor approach. For example, on November 6, 2023, the House Committee on Homeland Security Chairman Mark E. Green and Subcommittee on Oversight,

²⁶ See 67 Cong. Rec. 5483-84 (1926) (Senator Davis quoting Commerce Secretary Herbert Hoover), <https://www.congress.gov/bound-congressional-record/1926/03/12/67/house-section/article/5471-5509?q=%7B%22search%22%3A%22vol.+67%22%7D&s=5&r=65>.

²⁷ Jed Rubenfeld, *Are Facebook and Google State Actors?*, LAWFARE (Nov. 4, 2019, 8:20 AM), <https://www.lawfareblog.com/are-facebook-and-google-state-actors>.

Investigations, and Accountability announced new evidence that the Department of Homeland Security (“DHS”) engaged in “censorship laundering” with four non-governmental organizations (“NGOs”) to combat “misinformation” in social media.²⁸ The NGOs included the Election Integrity Partnership (“EIP”) and the Virality Project.

The NGOs were supposedly engaged in the harmless research of “mis-, dis- and mal-information” (“MDM”). The obvious concern is: *who* decides what constitutes MDM? The government? The first amendment in large part was intended to protect citizens’ rights to freely challenge and question government narratives—to engage in political and ideological speech.²⁹

However, recently uncovered evidence shows that the NGOs instead worked directly with government employees—using an elaborate ticketing system—and instructed Big Tech to flag, suppress, or take down social media content about the 2020 election, COVID-19, vaccine safety, and vaccine mandates.³⁰ Sometimes, DHS even went so far as to explicitly and outright expect social media platforms to remove objectionable content (i.e., content that did not align with the Biden Administration’s narratives about the 2020 election, COVID-19, and the like). DHS also solicited status updates from social media platforms to

²⁸ Homeland Security Committee, *Evidence of DHS, Big Tech Collaborating to Censor Americans*, (Nov. 6, 2023), homeland.house.gov/2023/11/06/chairmen-green-bishop-uncover-new-evidence-of-dhs-big-tech-collaborating-to-censor-americans/.

Chairman Green said, “It is astounding that an agency tasked with securing the home land chose to spend taxpayer resources policing protected speech. It is even more alarming that an agency tasked with serving all Americans actively engaged in censorship efforts that were overwhelmingly partisan. As this nation faces a historic border crisis and growing threats from our adversaries, Americans need to know that DHS is committed to its crucial mission, not infringing on our First Amendment rights.”

²⁹ See e.g., *The First Amendment: Categories of Speech*, CONGRESSIONAL RESEARCH SERVICE (Mar. 28, 2024) (“The Court has long considered political and ideological speech to be at the core of the First Amendment, including speech concerning “politics, nationalism, religion, or other matters of opinion.”), available at <https://crsreports.congress.gov/product/pdf/IF/IF11072/4>.

³⁰ See e.g., U.S. Rep. Mark Green, *Chairmen Green, Bishop Uncover New Evidence of DHS, Big Tech Collaborating to Censor Americans*, Press Release, (November 6, 2023) (“House Committee on Homeland Security Chairman Mark E. Green, MD (R-TN) and Subcommittee on Oversight, Investigations, and Accountability Chairman Dan Bishop (R-NC) announced new evidence of censorship laundering by the Department of Homeland Security (DHS) through its work with the “Election Integrity Partnership” (EIP), a group of four non-governmental organizations (NGOs) supposedly working to research “mis-, dis-, and mal-information” (MDM). Source documents provided to the Committee by a member of the partnership, the Stanford Internet Observatory (SIO), show this effort ultimately was used by the federal government and Big Tech to silence speech and limit the exercise of First Amendment freedoms.”), <https://markgreen.house.gov/2023/11/chairmen-green-bishop-uncover-new-evidence-of-dhs-big-tech-collaborating-to-censor-americans>.

ensure they managed and removed objectionable content per DHS's direction.³¹

Although DHS has claimed that both the EIP and Virality Project acted independently from the government when they pressured social media platforms to interfere with social media content, emerging contrary evidence shows that government employees routinely used this ticketing system, their government email accounts, switchboards, and other government resources to pressure social media platforms to take down content.³²

Chairman Green characterizes this process as “censorship laundering,” and his committee continues to investigate Secretary of Security Alejandro Mayorkas and staff for government abuse, overreach, and using taxpayer funds to silence speech and limit the exercise of First Amendment freedoms when DHS should instead focus on securing the United States border and keeping Americans safe.³³

In October 2023, the Fifth Circuit Court of Appeals extended the scope of an injunction that limits the Biden Administration's communications with Big Tech to include DHS's Cybersecurity and Infrastructure Security Agency (CISA) within DHS.³⁴ The injunction was part of a lawsuit brought by both the Attorneys General of Missouri and Louisiana against the Biden Administration that claims high-ranking government officials worked with Big Tech “under the guise of combatting misinformation,” that resulted in censoring protected speech about topics such as COVID-19 and its origins, the efficacy and wisdom of face masks, and Hunter Biden's authentic laptop.³⁵

³¹ *Id.*

³² See e.g., Mike Benz, Allum Bokhari & FFO Staff, *2024 Censorship Index: The U.S. Government's Programs for Information Control*, Foundation for Freedom Online (Nov. 27, 2024), <https://foundationforfreedomonline.com/the-censorship-logs-us-government-censorship-empire/>.

³³ *Id.*

³⁴ *Missouri v. Biden*, 80 F.4th 641 (5th Cir. 2023), *rev'd and remanded*, *Murthy v. Missouri*, 603 U.S. 43 (2024) (holding that the state and individual plaintiffs failed to establish Article III standing to seek injunctive relief against the government defendants). We included a detailed description of the *Murthy* decision and Justice Alito's impassioned dissent later in this article.

³⁵ In June 2024 and during Hunter Biden's criminal gun charges trial, the Department of Justice's Special Counsel David Weiss introduced his infamous laptop data, held by the FBI for several years before this, into evidence as authentic. See Lucien Bruggeman, *4 big takeaways from 1st day of testimony in Hunter Biden's gun trial*, ABC NEWS (June 4, 2024), <https://abcnews.go.com/US/4-big-takeaways-1st-day-testimony-hunter-bidens/story?id=110830830>; see generally, Andrew Rice and Olivia Nuzzi, *The Sordid Saga Of Hunter Biden's Laptop: The Most Invasive Data Breach Imaginable Is A Political Scandal Democrats Can't Just Wish Away*, INTELLIGENCER (Sept. 12, 2022), <https://nymag.com/intelligencer/article/hunter-biden-laptop-investigation.html>.

We will discuss this related litigation in more detail later.

In extending the scope of the original injunction, Missouri's Attorney General Andrew Bailey argued that CISA is the "nerve center" of the White House's "vast censorship enterprise" and "the very entity that worked with the FBI to silence the Hunter Biden laptop story." The Fifth Circuit held that CISA was the "primary facilitator" of the FBI's interactions with Big Tech and that both CISA and FBI coordinated in an effort to push these social media platforms to moderate "hack-and-leak" content. The Fifth Circuit further concluded that CISA acted as a "switchboard" for funneling moderation requests to social media sites that were flagged by state and local officials. But CISA didn't stop at just requesting censorship of these offending posts.

The Fifth Circuit explained that "CISA used its frequent interactions with social-media platforms to push them to adopt more restricted policies on censoring election-related speech . . . And CISA officials affirmatively told the platforms whether the content they had switchboarded was true or false." In other words, when the platforms acted to censor CISA-switchboarded content, they did not do so independently. Rather, the platforms' censorship decisions were made pursuant to policies that CISA had pressured them into adopting and were based on CISA's determination of the integrity of the flagged content. Thus, CISA likely significantly encouraged the platforms' content-moderation decisions and violated the First Amendment.

The Biden Administration appealed the Fifth Circuit's decision. On June 26, 2024, in *Murthy v. Missouri*, the Supreme Court dismissed the case, holding that the State of Missouri lacked Article III standing to seek injunctive relief against the defendants.³⁶ The *Murthy* Court articulated a nearly insurmountable standing burden to roadblock claims that social media platforms censored users at the direction of government, holding that "plaintiffs must demonstrate a substantial risk that, in the near future, they will suffer an injury that is traceable to a Government defendant and redressable by the injunction they seek."³⁷

But wait – there's more.

In a 103-page Staff Interim Report ("Judiciary Report"),³⁸ and as

³⁶ 603 U.S. 43 (2024).

³⁷ *Id.* at 49.

³⁸ Interim Staff Report of the Committee on the Judiciary and the Select Subcommittee on the Weaponization of the Federal Government, U.S. House of Representatives, *The Weaponization of "Disinformation" Pseudo-Experts And*

reported by Josh Christenson of the New York Post,³⁹ the House Judiciary Committee has uncovered evidence that, again before the 2020 election, DHS created a Stanford University “disinformation group” to censor social media user speech. Emails and other internal communications between DHS, CISA, and EIP (one of the NGOs that we mentioned a few moments ago) helped coordinate with Big Tech to flag, suppress, and remove protected online speech as early as July 2020.

The pressure was largely directed in a way that benefitted one side of the political aisle: true information, jokes, and political opinions posted by Republicans and conservatives were labeled as “misinformation” while false information posted by Democrats and liberals was largely unreported and untouched by the censors.

In the course of this endeavor, Big Tech slapped “misinformation” labels on public officials such as former President Donald Trump, Senator Thomas Tillis (R-NC), and Representative Thomas Massie, as well as on media outlets such as Newsmax and the Babylon Bee.

As Christenson reported, the Judiciary Report further concluded that CISA’s Countering Foreign Influence Task Force maintained a central focus “to censor Americans engaged in core political speech in the lead-up to the 2020 election.”⁴⁰

The Task Force engaged in “switchboarding” — a tactic that refers to removal requests from government officials to Big Tech and other

Bureaucrats: How the Federal Government Partnered with Universities to Censor American’s Political Speech (Nov. 6, 2023), judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/EIP_Jira_Ticket_Staff_Report_11-6-23_Clean.pdf/.

³⁹ Josh Christenson, *New Emails Show DHS Created Stanford ‘Disinfo’ Group That Censored Speech Before 2020 Election*, NEW YORK POST (Nov. 6, 2023), <https://nypost.com/2023/11/06/news/new-emails-show-dhs-created-stanford-disinfo-group-that-censored-speech-before-2020-election/>.

⁴⁰ On December 19, 2024, non-profit organization America First Legal (“AFL”) released an official federal government internal document detailing CISA’s “FEMA social listening” for COVID-19 narratives to further its censorship activities during the pandemic that AFL obtained through its ongoing litigation with the federal government. *See Covid-19 CFITF Reporting and Analysis*, AM. First Legal (Dec. 19, 2024), <https://media.aflegal.org/wp-content/uploads/2024/12/19115013/COVID-19-CFITF-Reporting-and-Analysis-AFL.pdf>; America First Legal, *America First Legal’s Lawsuit Against CISA Further Exposes Deep State Reliance on the Censorship Industrial Complex to Monitor Social Media Narratives on COVID-19* (Dec. 19, 2024), <https://aflegal.org/america-first-legals-lawsuit-against-cisa-further-exposes-deep-state-reliance-on-the-censorship-industrial-complex-to-monitor-social-media-narratives-on-covid-19/>; Jeffrey Tucker, *The Spies Who Hate Us*, BROWNSTONE INST. (Dec. 25, 2024), <https://brownstone.org/articles/the-spies-who-hate-us/>; Jonathan Turley, *A New Year’s Resolution: Let’s Get the United States Out of the Censorship Business*, *Res ipsa loquitur – The thing itself speaks* (Dec. 31, 2024), <https://jonathanturley.org/2024/12/31/a-new-years-resolution-lets-get-the-united-states-out-of-the-censorship-business/>.

social media platforms. The Judiciary Report also shows that Stanford University students worked at both CISA and EIP at the same time:

Not only were there a number of university students involved with the EIP, at least four of the students were also employed by CISA during the operation of EIP, using their government email accounts to communicate with CISA officials and other “external stakeholders” involved with EIP.

Apparently, EIP was not exactly working independently from the government when it came to pressuring Big Tech to censor conservative speech.

Not surprisingly, Big Tech’s censorship of online content has prompted some elected officials to fight back and protect social media users’ free speech rights. For example, as we discuss in Section III(B) later in this article, Texas and Florida Legislatures have enacted anti-censorship laws, and a social media platform named NetChoice, LLC has challenged both statutes as unconstitutional. However, on July 1, 2024 and by unanimous vote 9-0, the Supreme Court remanded both cases back to the lower courts, stating that neither the Fifth Circuit Court of Appeals nor the Eleventh Circuit Court of Appeals “conducted a proper analysis of the facial First Amendment challenges to the Florida and Texas laws regulating large Internet platforms” such as Meta (formerly known as Facebook) and X (formerly known as Twitter).⁴¹

It has become a bit of a jawbreaker to predict how the judicial or legislative branches of our government will be able to successfully curtail the government’s ability to conspire with Big Tech and to censor the protected speech of social media users through backdoor censorship schemes. Our article explores possible avenues for reigning in this type of censorship and how we can create workable guard rails that can ensure more certainty, predictability, and reliability for social media users, especially now that Big Tech companies are no longer the fledgling start-up darlings of the 1990s.

When exactly, and in what circumstances, does Big Tech act as a deputy on behalf of the government or government officials such that it qualifies as a state actor? If and when Big Tech does become a state actor, should it be subject to the same constitutional strict scrutiny means-ends testing analysis that would otherwise apply to the government? We argue that the government cannot avoid such strict constitutional scrutiny by indirectly proxying digital platforms to act as their erstwhile alter egos or avatars.

⁴¹ *Moody v. NetChoice, LLC*, 603 U.S. 707, 708 (2024).

Commentators suggest that this is precisely what Congress and federal officials have done in Big Tech censorship, ostensibly immunized by the CDA.⁴² When Big Tech uses the powers authorized by Section 230 to restrict public internet access to materials it considers objectionable and to allow and highlight content it wants to promote, is it secretly acting on behalf and at the behest of the state instead? If so, it is arguably a state actor and must thereby provide and be accountable for violating the same constitutional protections and guarantees as the government itself.

This article argues that these transmission and content moderation (i.e., censorship) decisions are no longer purely private. Big Tech has taken the public square online and worked in concert or entanglement with government officials to decide what content to allow, promote, and block. Thus, Big Tech's resulting editorial and censorial actions properly constitute government action subject to the U.S. Constitution.

Another key development impacting federal regulatory policy is the Supreme Court's June 2024 landmark decision in *Loper Bright Enterprises v. Raimondo* ("Loper Bright"),⁴³ striking down its longstanding *Chevron* deference doctrine, which had allowed agencies to interpret ambiguous statutory language broadly if the interpretation was reasonable without explicit statutory authority and thus narrowing the scope of federal agency power. It is impossible to overstate the significance of *Loper Bright* in the social media regulatory context. Any eventual remedy to address the issue of social media moderation and censorship will likely involve federal regulators such as the Federal Communications Commission ("FCC"). Pre-*Loper Bright*, absent clear Congressional statutory authorization to the FCC to regulate social media, even with *Chevron* deference in place it was unclear to what extent the FCC had the power to interpret Section 230 with agency rulemakings.⁴⁴ Any future efforts to regulate social media will likely

⁴² See Catherine Salgado, *Democrat Senators Pressure YouTube to Censor SO-Called 'Ghost Gun' Videos*, NEWSBUSTERS, <https://www.newsbusters.org/blogs/free-speech/catherine-salgado/2022/02/18/democrat-senators-pressure-youtube-censor-so-called> (last visited Dec. 15, 2023) (five Democratic Party senators are pressuring YouTube to remove "ghost gun" videos).

⁴³ 603 U.S.369 (2024).

⁴⁴ Section 230: An Overview, Congressional Research Service (April 7, 2021) <https://crsreports.congress.gov/product/pdf/R/R46751>; see e.g., Alan Z.

Rozenshtein, *Interpreting the Ambiguities of Section 230*, YALE J. REGUL. (April 17,

include (and may go well beyond) interpreting Sections 230. Post-Loper Bright, any such federal regulatory efforts may need to begin with Congress because the FCC may need new express legislative authorization to expand into the official role of social media gatekeeper and regulator.

In Section II, we will first explore how the U.S. Constitution applies to Big Tech by examining the State Action and State Actor Doctrines (The “Who”), the Public Function Doctrine (The “What”), and the Public Forum Doctrine (The “Where”). In Section II, we will analyze the State Actor Entanglement/Entwinement Doctrine (The “How”) when such entanglement/entwinement occurs, and why Big Tech should provide the same constitutional protections and guarantees to its users as the government (The “Why”).

Section III will briefly preview a rapidly emerging alternative approach to reigning in Big Tech censorship: When Big Tech acts as a common carrier and benefits from special government privileges such as Section 230 immunity, it is subject to regulation as a quasi-public entity.

To briefly summarize why we are exploring these issues: As Professor Rubinfeld has noted, public officials using Big Tech as a proxy “back door” to target disfavored but otherwise legal and constitutionally protected speech is problematic.⁴⁵ This is so especially when the government pressure is accompanied by granting these platforms broad Section 230 legal immunity.⁴⁶ As Professor Rubinfeld argues, this stealth proxy censorship qualifies as state action and should be scrutinized and regulated accordingly.⁴⁷

II. WHEN DOES BIG TECH STOP BEING PURELY PRIVATE AND BECOME A STATE ACTOR OBLIGATED TO PROTECT ITS USERS’ CONSTITUTIONAL RIGHTS?

A. The State Action and State Actor Doctrines (The “Who”).

2024), <https://www.yalejreg.com/bulletin/interpreting-the-ambiguities-of-section-230/>; Lawrence Spiwak, *Sauce for the Goose: The FCC Lacks Authority to Interpret Section 230 Post-Loper Bright*, THE FEDERALIST SOCIETY (Nov. 21, 2024), <https://fedsoc.org/commentary/fedsoc-blog/sauce-for-the-goose-the-fcc-lacks-authority-to-interpret-section-230-post-loper-bright>.

⁴⁵ Jed Rubinfeld, *Are Facebook and Google State Actors?*, *supra* note 27.

⁴⁶ *Id.* See also, Rachel Chiu, *Distinguishing Between Big Tech & Overzealous Government*, THE HILL (Feb. 14, 2023), <https://thehill.com/opinion/technology/3857309-distinguishing-between-big-tech-and-overzealous-government/> (summarizing Professor Rubinfeld’s analysis about state action and social media platforms); Vivek Ramaswamy & Jed Rubinfeld, *Saving the Constitution from Big Tech*, WALL ST. J. (Jan. 11, 2011), <https://www.wsj.com/articles/save-the-constitution-from-big-tech-11610387105>.

⁴⁷ Jed Rubinfeld, *supra* note 27.

1. What is state action?

To briefly summarize why we are exploring these issues: As Professor Rubinfeld has noted, public officials using Big Tech as a proxy “back door” to target disfavored but otherwise legal and constitutionally protected speech is problematic.⁴⁸ This is so especially when the government pressure is accompanied by granting these platforms broad Section 230 legal immunity.⁴⁹ As Professor Rubinfeld argues, this stealth The state action doctrine is a bedrock legal principle that the obligation to protect individual U.S. Constitutional rights (e.g., under the Bill of Rights and Fourteenth Amendment) applies only to governmental entities, not private ones.⁵⁰ By its express terms, the First Amendment only prevents Congress from making laws restricting freedom of speech.

Such federal individual constitutional liberty protections are then extended to the states and local governments through the selective incorporation doctrine via the Fourteenth Amendment Due Process Clause. Simply put, the state action doctrine does not prevent private (i.e., non-governmental) parties from infringing on the constitutional rights and liberties of others, such as free speech and due process.

Traditionally, First Amendment restrictions do not extend to private parties (such as Big Tech), which traditionally cannot violate Americans’ constitutional First Amendment free speech rights. Some commentators believe our traditional view of state action (i.e., it exclusively relates to official governmental activity and the Constitution’s restrictions run only against the government) is functionally outdated.⁵¹

They point to the phenomenon of our public functions being increasingly privatized, delegated, contracted out, outsourced, or

⁴⁸ Jed Rubinfeld, *Are Facebook and Google State Actors?*, *supra* note 27.

⁴⁹ *Id.* See also, Rachel Chiu, *Distinguishing Between Big Tech & Overzealous Government*, THE HILL (Feb. 14, 2023), <https://thehill.com/opinion/technology/3857309-distinguishing-between-big-tech-and-overzealous-government/> (summarizing Professor Rubinfeld’s analysis about state action and social media platforms); Vivek Ramaswamy & Jed Rubinfeld, *Saving the Constitution from Big Tech*, WALL STREET JOURNAL (Jan. 11, 2011), <https://www.wsj.com/articles/save-the-constitution-from-big-tech-11610387105>.

⁵⁰ Kevin Duffy & Richard Brown, *Shouting Fire! (Or Worse) on Social Media: The Interplay of the First Amendment and Government Involvement in Efforts to Limit or Remove Social Media Content*, 33 INTELL. PROP. & TECH. L. J. 3 (2021) (summarizing the state action doctrine and efforts to apply it to social media platforms); Daniel Rudofsky, *Modern State Action Doctrine in The Age of Big Data*, 71 N.Y.U. ANN. SURV. AM. L. 741 (2017).

⁵¹ See, e.g., Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 510 (1985) (“Speech can be chilled and lost just as much through private sanctions as through public ones. Private discrimination cause and perpetuates social inequalities at least as pernicious as those caused by government action”).

otherwise transferred from the public to the private sector (e.g., a private prison management corporation hired to run a state's prison system is arguably a state actor under 42 U.S.C. § 1983 for an inmate's claim against a private guard (who is also arguably a state actor for this claim) alleging Fourth, Eighth, and Fourteenth Amendment violations).⁵²

2. Who is a state actor?

In theory, private entities become state actors whenever they take over traditional state functions, as with a company town.⁵³ However, plaintiffs have difficulty proving this functionality and convincing a court to hold private entities accountable as state actors.⁵⁴ Alternatively, state action can occur when a state has facilitated or validated the conduct or become so intertwined with the private entity that there is no perceptible separation between the two.⁵⁵

Should conflicts between private property rights and constitutional rights be resolved in favor of the latter? In certain circumstances, we may regard private entities as government actors under the judicially created State Actor Doctrine. Private entities acting by proxy under the color of public law and engaging in harmful activity that is either governmentally authorized or "otherwise cloaked in"

⁵² See Myriam Gilles, *Private Parties as Defendants in Civil Rights Litigation: Introduction*, 26 CARDOZO L. REV. 1 (2004); but see Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45 (2020).

⁵³ *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1929 (2019) ("Very few functions fall into the category of traditional, exclusive public functions, for which a private actor performing the function is subject to constitutional constraints pursuant to the state action doctrine, including, for example, running elections and operating a company town").

⁵⁴ See, e.g., *Ill. Migrant Council v. Campbell Soup Co.*, 574 F.2d 374 (7th Cir. 1978) (holding that although a soup company provided sewage disposal, garbage collection, and water to local farms, and set speed limits near its facilities, it did not constitute a "company town" because it did not provide other town functions such as a fire department or police department). See also Jordan Goodson, *The State of the State Action Doctrine: A Search for Accountability*, 37 TOURO L.R. 151, 169-70 (2021).

⁵⁵ See, e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, (2001) (holding that regulatory enforcement action by interscholastic athletic association constituted "state action" for purposes of Fourteenth Amendment, despite association's nominally private character, in light of pervasive entwinement of public institutions and public officials in its composition and workings, public schools constituted 84% of its membership, half of council and board meetings were held during official school hours, public schools provided for association's financial support by giving up sources of their own income, state board of education members served as members of association's governing boards, and association's ministerial employees were eligible for membership in state retirement system).

governmental authority, are instead deemed state actors.⁵⁶ State actors are then subject to the State Action Doctrine and thus must comply with and become accountable for corresponding constitutional limitations and guarantees.

Three basic categories fall under the State Actor Doctrine: (1) exclusive public functions (a private party performs a traditional and exclusive government function); (2) public forums (a private party stands in the shoes of government in terms of offering a place, or forum, for public expression); and (3) entanglement or entwinement (when there is a close and responsive relationship between a private party's actions and what government seeks to accomplish, such that a private party has a "symbiotic relationship" with the state).⁵⁷

3. Judicial History of The State Actor Doctrine.

Cases addressing the State Actor Doctrine are invariably complex and fact-specific, leaving ample room for clarification and consistency.⁵⁸ This doctrine has rarely been used in free speech cases and has appeared in very limited situations, such as cases involving the U.S. Constitution's Equal Protection or Establishment Clauses.⁵⁹ Some examples of the complex and disjointed judicial history of the State Actor Doctrine to date are as follows.

Company town that censors religious speech on the street as state action. This case is generally considered the basis for the Public Function Doctrine. An oft-cited case for proponents of finding Big Tech as a state actor is *Marsh v. Alabama*.⁶⁰ In *Marsh*, a divided Supreme Court held that the First Amendment prohibits a law against distributing religious literature in a company-owned town without permission from the town's management because this is essentially state action.⁶¹ The Gulf Shipbuilding Corporation owned the town of Chickasaw, Alabama, as a company town and otherwise resembled any

⁵⁶ See Joshua Lisk, *Is Batman A State Actor? The Dark Knight's Relationship with The Gotham City Policy Department and the Fourth Amendment Implications*, 64 CASE W. RES. L. REV. 1419 (2014) (discussing the state action doctrine).

⁵⁷ *Id.*

⁵⁸ See generally, Christopher Schmidt, *On Doctrinal Confusion: The Case of The State Action Doctrine*, 2016 B.Y.U. L.R. 575, 582-99 (2016) (exploring the complexity and oftentimes confusing body of case law for the state action doctrine).

⁵⁹ U.S. CONST. art. I; U.S. CONST. art. XIV; Brett M. Pinkus, *The Limits of Free Speech in Social Media*, ACCESSIBLE LAW 9 (Spring 2023), <https://www.accessiblelaw.untDallas.edu/post/the-limits-of-free-speech-in-social-media>.

⁶⁰ 326 U.S. 501 (1946).

⁶¹ *Id.* at 508-10.

American town.⁶² Marsh distributed literature supporting her beliefs as a Jehovah's Witness in the town streets without first obtaining permission from the Gulf. Under Alabama's criminal trespass law, she was banned from remaining on the premises of another private party after being told to leave.⁶³

Appealing her conviction, Marsh argued that Alabama's state law violated the First Amendment. The Court majority found that any municipal ordinance prohibiting distributing religious literature in a public street would violate the First Amendment.⁶⁴ A company town does not have the same rights as a purely private property owner in preventing unwelcome religious expression on its property.⁶⁵

While a private company owns the town, it is open for public use and becomes burdened by constitutional protections for the people (i.e., freedoms of speech and religion).⁶⁶ The court stated that merely opening up a business to the public is not state action, but the performance of a function that the state has traditionally and exclusively performed is a public function, and thus is state action.⁶⁷

Court enforcement of restrictive private real property covenant held state action. In *Shelley v. Kraemer*, the Supreme Court observed that if an individual or organization merely enters into a contract or asserts a contractual right outside of court, it is not state action.⁶⁸ But if it instead sues to enforce a contractual right judicially, then it is state action.⁶⁹ This was a seminal case at the time in expanding the scope of conduct that can be considered state action under the Fourteenth Amendment. Many federal, state, and local laws have since banned discrimination in private residential housing.⁷⁰

Shelley v. Kraemer's salient facts are as follows: In 1911, a neighborhood in St. Louis, Missouri, enacted a racially restrictive covenant designed to prevent Blacks and Asians (i.e., "people of the

⁶² *Id.* at 503.

⁶³ *Id.* at 504-05.

⁶⁴ *Id.* at 509-10.

⁶⁵ *Id.* at 506-07.

⁶⁶ *Id.* at 520, 508-09.

⁶⁷ *Id.* at 507.

⁶⁸ *Shelley v. Kraemer*, 334 U.S. 1, 20-22 (1948).

⁶⁹ *Id.*

⁷⁰ See e.g., Fair Housing Act, 42 U.S.C. §§ 3601-19 (1968), https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview, <https://www.justice.gov/crt/fair-housing-act-1>; see generally, James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049 (1989), <https://scholarship.law.vanderbilt.edu/vlr/vol42/iss4/5>.

Negro or Mongolian Race”) from occupying property in the community.⁷¹ Later, in 1945, a Black family named Shelley bought a home and moved into the neighborhood without being informed of the covenant.⁷²

Louis Kraemer, a community resident who lived several blocks away, sued to enforce the covenant to prevent the Shelleys from moving into their house.⁷³ Elsewhere, the Black McGhee family bought a home in a Detroit neighborhood that was similarly subject to a racially restrictive covenant.⁷⁴ The McGhees were not subject to such a covenant, and a community resident named Sipes sued to enforce the covenant.⁷⁵

Their respective state supreme courts enforced both of these racially restrictive covenants on appeal (i.e., Missouri and Michigan).⁷⁶ Both state supreme courts reasoned that these covenants were private agreements and thus did not constitute state action.⁷⁷ As such, these covenants did not violate the Fourteenth Amendment, were valid under property law principles, and were enforceable against subsequent owners and third parties.⁷⁸ On appeal, the Supreme Court consolidated the two cases.

It held that, although racially restrictive real estate covenants were not *per se* void, a court cannot then enforce them as this would indeed constitute state action under the Fourteenth Amendment.⁷⁹ The Court noted that, while individuals are free to privately and voluntarily abide by the terms of a racially restrictive covenant, state action would occur if, instead, a government entity like a court intervened to enforce a policy

⁷¹ *Shelley*, 334 U.S. at 5–6. In 1911, thirty owners of property in an area in the city of St. Louis signed and recorded an agreement providing in part: “. . . the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as [*sic*] not in subsequent conveyances and shall attach to the land as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.”

⁷² *Id.* at 6.

⁷³ *Id.* at 6–7.

⁷⁴ *Sipes v. McGhee*, 25 N.W.2d 638 (Mich. 1947).

⁷⁵ *Id.*

⁷⁶ *See Kraemer v. Shelley*, 198 S.W.2d 679 (Mo. 1947), *rev'd*, 334 U.S. 1 (1948); *see also, Sipes v. McGhee*, 25 N.W.2d 638 (Mich. 1947), *combined with Kraemer*, 198 S.W.2d 679 (Mo. 1947), *overruled sub nom. Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁷⁷ *Id.*

⁷⁸ *Id.* The plaintiffs in both cases petitioned the United States Supreme Court for a writ of certiorari, and the Court granted their petitions, combining their cases. The Court ruled on both appeals in *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁷⁹ *Id.*

devised by private parties judicially.⁸⁰

Private Coffee shop lessee of public parking authority held state actor. In *Burton v. Wilmington Parking Authority*,⁸¹ a sharply divided Supreme Court held that a business located in, and considered part of, a state-owned public facility may not discriminate against protected groups under the Fourteenth Amendment because its discrimination can be classified as state action.

The Court stated that if the government merely enters into a contract with an individual or organization for the goods or services, then the private party's actions are not state action.⁸² But if the government "insinuates itself into a position of interdependence" and a relationship of mutual benefit with a private party, it is a "joint participant," which thus constitutes state action.⁸³

In this case, a new public parking facility, the Delaware Wilmington Parking Authority (the "Authority"), could not finance its construction costs publicly.⁸⁴ So, it arranged long-term leases with private commercial tenants for some parking facility space.⁸⁵ Eagle Coffee Shoppe signed a 20-year lease to use part of this space as a restaurant.⁸⁶ The Authority had not used its state power to expressly require that the restaurant be open to the general public.⁸⁷

Eagle Coffee Shoppe was not required under state law to serve all persons entering the shop because it was a restaurant rather than an inn. When Eagle refused to serve Burton because he was Black, he sued the Authority for declaratory and injunctive relief, arguing that Eagle leased from the Authority, a state agency, and the discrimination could be classified as state action.⁸⁸

The Delaware Supreme Court rejected Burton's claim.⁸⁹ It found that the action could not be attributed to the Authority or classified as state action.⁹⁰ The court reasoned that Eagle was acting in a purely private capacity under its lease because: (1) only 15 percent of the cost of building the facility came from public funds; (2) anticipated parking revenue was only 30.5 percent of total income (the balance of which was

⁸⁰ *Shelley*, 334 U.S. at 19–21.

⁸¹ *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

⁸² *Id.* at 722, 726.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Wilmington Parking Auth. v. Burton*, 157 A.2d 894 (Del. 1960).

⁹⁰ *Id.* at 900–01.

expected to come from leasing); (3) Eagle did not have a public entrance from the parking area; (4) Eagle had spent much of its own money on furnishings; and (5) Eagle had no interactions with the Authority besides paying annual rent.⁹¹

The United States Supreme Court found otherwise and held that the restaurant and the Authority were so physically and economically intertwined that the private entity's conduct could be attributed to the government.⁹²

The Court provided several reasons for its decision: (1) the land and building where Eagle was located were publicly owned; (2) the funds from the city were responsible for buying the real estate as well as building and maintaining the facility; (3) the funding sources were city loans and revenue bonds, as well as the proceeds of rentals and parking services out of which the loans and bonds were payable; (4) it was contradictory that one part of the facility was a public parking service open to the public, while certain groups could not receive service in another part of the facility, the Eagle restaurant; and (5) while the Authority did not expressly include anti-discrimination provisions in the lease with Eagle, its failure to do so is a type of inaction that may be categorized as state action, as it makes the government a party to Eagle's discriminatory refusal of service.⁹³

Big Tech Section 230 cases to date. Courts have thus far interpreted Section 230 to immunize Big Tech and prevent various claims (including lawsuits based on their decisions to both transmit and censor content).⁹⁴ These courts have thus preempted actions that would otherwise have made traditional non-internet providers and users legally liable for such user-generated content.⁹⁵ The lower federal courts have consistently ruled that Big Tech is not a state actor based primarily on

⁹¹ *Id.*

⁹² *Burton*, 365 U.S. at 722.

⁹³ *Id.* at 723–26.

⁹⁴ *See e.g., Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023); *Gonzales v. Google LLC*, 598 U.S. 617 (2023). The Supreme Court decided *Taamneh* and *Gonzales* on the same day – May 18, 2023. These two companion cases further perpetuated the judiciary's refusal to hold Big Social Media Platforms liable to users for content moderation decisions. It seems that courts do not want to touch Section 230 immunity, even when plaintiffs can show that an interactive internet platform moderated and/or censored posted terrorist content. *See generally*, Newton Minow and Martha Minow, *Social Media Companies Should Pursue Serious Self-Supervision –Soon: Response to Professors Doek and Kadri*, 136 HARV. L. R. F. 428 (2023).

⁹⁵ *Id.*

reliance on public forum and public-function doctrines.⁹⁶

Private lawsuits alleging constitutional free speech violations against Big Tech are routinely dismissed, and thus, Big Tech is not subject to upholding user free speech protections under the First Amendment. Thus, users who post on such platforms have no right to free speech. In other words, most courts have found that internet platforms are not state actors merely by providing a forum for public expression.⁹⁷

The current policy debate. Consequently, legislators, presidents, and commentators are hotly debating the proper scope and value of Section 230 immunity. And with it, there are implications of increasing government entanglement in Big Tech's publication and censorship decisions. The prior Trump administration took steps to reform Section 230, which died when the Biden administration took office.⁹⁸

However, with Trump back in the presidency, it is possible there may be major changes in this policy area. In his first day in office, Trump signed a new executive order addressing online censorship.⁹⁹ And with the newly formed Department of Government Efficiency ("DOGE"), Elon Musk and his DOGE Team are tasked with reducing waste and

⁹⁶ See, e.g., *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (relying on public forum grounds to find Trump unconstitutionally blocked users from his personal Twitter account), *aff'd* 928 F.3d 226 (2d Cir. 2019), *reh'g en banc denied*, 953 F.3d 216 (2d Cir. 2020) (Park, J., dissenting), *granting cert. and vacating judgment* 141 S. Ct. 1220 (2021); see also *O'Connor-Ratcliff v. Garnier*, 143 S. Ct. 1779 (2023) (granting petition for writ of certiorari to address the public function test); *Trump v. Twitter Inc.*, 602 F. Supp. 3d 1213 (N.D. Cal. 2022) (dismissing Trump's claims that Twitter acted as a state actor when it censored and de-platformed the plaintiffs), *denying motion for relief from judgment*, Case No. 3:21-cv-08378-JD, 2023 WL 1997921 (N.D. Cal. 2023). On May 5, 2023, Trump filed an appeal with the Ninth Circuit Court of Appeals. See *Trump v. Twitter*, No. 22-15961, 2023 WL 3438120 (9th Cir. 2023). This appeal is still pending as of the date this article has been published.

⁹⁷ See, e.g., *Prager Univ. v. Google LLC*, 951 F.3d 991 (9th Cir. 2020).

⁹⁸ See Appendix #3, Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020); see generally Jennifer Huddleston, *Content Moderation, Section 230, and The First Amendment*, AM. ACTION F. (May 28, 2020), <https://www.americanactionforum.org/insight/content-moderation-section-230-and-the-first-amendment/>. This article discusses the pending 2020 executive order regulating social media companies based on free speech concerns and opines about the issues it raises. "This move came after Twitter placed a fact-checking label on one of Trump's tweets concerning voting by mail. While the digital age has led to an explosion of speech of many different forms and opinions, social media platforms have faced criticisms from both the left and the right for the decisions they make regarding what content to leave up, take down, or otherwise moderate. Nevertheless, those that value freedom of expression or see the benefits technology brings should be concerned about calls for government regulation of private actors in this area." *Id.* (internal citations omitted).

⁹⁹ See Appendix #3, Exec. Order No. 14149, 90 Fed. Reg. 8243 (Jan. 20, 2025).

inefficiency in the federal government which may impact the FTC generally and Section 230 specifically.¹⁰⁰

When Trump was last in office in 2020, his administration had some important Section 230 policy initiatives in progress. For example, as part of former and President-Elect Trump's 2020 Executive Order on Preventing Online Censorship,¹⁰¹ and due to the DOJ's "long-standing review of Section 230," the DOJ put together a legislative package to reform Section 230.¹⁰² The DOJ proposal focused on the two significant "areas of concern highlighted by victims, businesses, and other stakeholders in the DOJ's conversations and meetings to discuss the issue."¹⁰³ These two areas of concern provided a "clear path forward in modernizing Section 230 to encourage a safer and more open internet."¹⁰⁴

The DOJ proposal focused on two areas: (1) it addressed "unclear and inconsistent moderation practices that limit speech and go beyond the text of the existing statute," and (2) "the proliferation of illicit and harmful content online that leaves victims without any civil recourse."¹⁰⁵ The DOJ identified four areas ripe for reform: (1) Incentivizing Online Platforms to Address Illicit Content; (2) clarifying Federal Government Enforcement Capabilities to Address Unlawful Content; (3) Promoting Competition; and (4) Promoting Open Discourse and Greater Transparency.¹⁰⁶

It remains to be seen how President Elect Trump will approach Section 230 and whether he will resume his prior 2020 policy change efforts around Section 230 reform during his second term. It is also possible that recent course corrections in Big Tech may have ameliorated some of the pressing need for Section 230 reforms that were underway back in 2020. There are numerous proposals propounded for reform and

¹⁰⁰ Elon Musk and Vivek Ramaswamy, *Elon Musk and Vivek Ramaswamy: The DOGE Plan to Reform Government*, WALL ST. J. (Nov. 20, 2024), <https://www.wsj.com/opinion/musk-and-ramaswamy-the-doge-plan-to-reform-government-supreme-court-guidance-end-executive-power-grab-fa51c020>.

¹⁰¹ See Exec. Order No. 13,925, 85 Fed. Reg. 34,079.

¹⁰² The Department of Justice, *Department of Justice's Review of Section 230 of the Communications Decency Act of 1996*, U.S. DEP'T JUST. ARCHIVES (Sep. 23, 2020), <https://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

repeal.¹⁰⁷ There are also commentators arguing for alternative modes of addressing the issues outside of Section 230, such as common carrier designation, discussed in a later section of this article, among other ideas.¹⁰⁸ The authors recommend a federal legislative solution in the interest of clarity, stability (i.e., not subject to the vagaries of a long, drawn, and uncertain judicial process), popular legitimacy (i.e., debated and legislated by elected representatives), and national uniformity - since cyberspace knows no geographical boundaries a state-by-state solution appears unworkable.

4. Section 230 Federal Civil Immunity Provision and Judicial Interpretation.

Section 230 provides limited federal civil immunity to providers and users of interactive internet computer services.¹⁰⁹ Section 230 precludes providers and users from legal liability for publishing third-party data by deeming them not to be publishers.¹¹⁰

Two provisions of Section 230 provide the primary legal immunity framework for internet service providers (“ISPs”) and users: (1) in Section 230(c)(1), ISPs and users may not “be treated as the publisher or speaker of any information provided by another information content provider”; and (2) in Section 230(c)(2), ISPs and users may not be held liable for voluntarily acting in good faith to restrict access to “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” content.¹¹¹

Also, Section 230 contains express statutory exceptions. It generally will not apply to actions brought under (1) federal criminal law; (2) intellectual property law; (3) any state law “consistent” with Section 230; (4) specific privacy laws applicable to electronic communications; and (5) certain state and federal laws regarding sex trafficking.¹¹²

A corresponding interpretive Congressional Release states that

¹⁰⁷ See, e.g., Philip Hamburger, *The Constitution Can Crack Section 230: Tech companies think the statute allows them to censor with impunity. The law is seldom so simple.* WALL ST. J. (Jan. 29, 2021), <https://www.wsj.com/articles/the-constitution-can-crack-section-230-11611946851> (arguing Congress violated Commerce Clause in providing federal §230 immunity); but see Berin Szóka & Ari Cohn, *The Wall Street Journal Misreads Section 230 and the First Amendment*, LAWFARE INST. (Feb. 3, 2021), <https://www.lawfaremedia.org/article/wall-street-journal-misreads-section-230-and-first-amendment>.

¹⁰⁸ *Id.*

¹⁰⁹ 47 U.S.C. § 230 (1996).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

Section 230 “generally precludes providers and users from being held... legally responsible... for information provided by a third party but does not prevent them from being held legally responsible for information that they have developed or for activities unrelated to third-party content.”¹¹³ It notes that the courts have interpreted Section 230 broadly “to foreclose a wide variety of lawsuits and to preempt laws that would make providers and users liable for third-party content.”¹¹⁴ However, as written, it should not block Big Tech from liability for data they generate or their activities unrelated to third-party user content.

Do censorship and editorial control constitute “activities unrelated” to third-party content? On the one hand, courts have interpreted Section 230(c)(1) to apply to content distribution and takedown decisions.¹¹⁵ On the other hand, Section 230(c)(2) is more limited: it applies only to *good-faith takedowns* of objectionable content.¹¹⁶

One of the few early cases interpreting the scope of Section 230 is the 1997 case *Zeran v. America Online, Inc.*¹¹⁷ The *Zeran* court stated that Section 230(c)(1) bars “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content.”¹¹⁸ However, it is essential to remember that this case was decided in the pre-Big Tech era during the nascent days of the internet.

More recently, in 2023, the Supreme Court decided two closely watched companion cases that likewise upheld Section 230 service provider immunity, which will be discussed more fully later.¹¹⁹ Commentators have called attention to accelerating public concern as Big Tech has achieved market dominance and monopolized the nation’s online speech, data flow, and commercial transactions.¹²⁰ We should

¹¹³ Valerie Brannon & Eric Holmes, CONG. RES. SERV., R46751, *SECTION 230: AN OVERVIEW* (2021), <https://crsreports.congress.gov/product/pdf/R/R45153>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); see also *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Green v. America Online*, 318 F.3d 465 (3d Cir. 2003); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) (both dismissing libel suits against internet platforms).

¹¹⁸ *Zeran*, 129 F.3d at 330.

¹¹⁹ *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023); *Gonzalez v. Google*, 598 U.S. 617 (2023).

¹²⁰ Gregory M. Dickinson, *Resolving the Section 230 Crisis*, L. & LIBERTY, (Nov. 20,

remember that when Congress enacted Section 230, and the internet was in its infancy, Congress was motivated to ensure it had room to establish its roots free from the looming threat of crushing legal liability for third-party content.

Accordingly, internet medium publishers got this special legislative immunity from liability for third party-generated material posted on their forums. Similarly situated established traditional print, broadcast, and cable media publishers still remained legally liable for such claims and thus operated, and continue to operate, at a considerable competitive disadvantage. One might reasonably question whether government encouragement and pressure upon Big Tech, with the expectation of obedient compliance, was ultimately regulators' price for Section 230 immunity.

We can presumably all agree that, by now, Big Tech (1) has had every conceivable legislative advantage in establishing its now well-established business model,¹²¹ and (2) is no longer in danger of being snuffed out in its infancy by adhering to those same standard media legal burdens as with other similarly situated publishers.¹²²

Modernly, Big Tech has ballooned into a near-global and thriving monopoly, insatiably facilitating all types of human activity both for good and malign purposes. Big Tech has virtually unregulated superpowers to surveil and track user locations and movements, impact elections, influence and direct consumer buying decisions, monitor and curate speech and data flow, and influence and shape political discourse.

Notably, Big Tech's powers are often exercised in conjunction with (either soft or hard) governmental input and influence. We now appear to have solid evidence of the FBI's continued and frequent involvement

2020), <https://lawliberty.org/resolving-the-section-230-crisis/> (The question of § 230's scope has largely been left for independent resolution in 63 jurisdictions (i.e., 13 federal circuit courts of appeals and the high courts of the 50 states) with "judicial lemmings" citing other courts' broad immunity decisions, as if maximal immunity inevitably flows from the words of the statute). See Gregory Dickinson, *Towards Textual Internet Immunity*, 33 STAN. L. & POL'Y REV. ONLINE 1, 10–11 (Mar. 2022) ("Thus far, the story has been one of largely uniform decisions across jurisdictions, all following broadly worded early precedents as if maximal immunity inevitably flows from the words of the statute. It does not...A text-focused renaissance of Section 230 would shift internet immunity doctrine in two directions. First, it would expose tech companies to liability where they act as more than conduits and can be thought of as somehow 'responsible . . . for' the content they host—for example, because they know that a piece of unlawful content is on their platforms but fail to remove it or because they intentionally curate it. Second, it would limit online entities' ability to assert immunity in lawsuits not directly related to publication, such as claims for negligence, product defects, conspiracy, or antitrust violations.") (internal citations omitted).

¹²¹ See Volokh, *supra* note 8, at 460–461.

¹²² *Id.* at 384–387, 402.

with Big Tech in connection with the 2020 election. As mentioned earlier, in an ongoing 2022 lawsuit against the Biden administration, Attorneys General Eric Schmitt of Missouri and Jeff Landry of Louisiana jointly accused top-ranking federal government officials of working with Meta (formerly Facebook), Twitter, and YouTube “Under the... guise of combating... misinformation...” to achieve greater censorship.¹²³

In the context of this lawsuit, Supervisory FBI Special Agent Elvis Chan testified under oath in a November 29, 2022, deposition that the FBI met with Big Tech in Silicon Valley monthly and then weekly in the lead-up to the 2020 election. During the meetings, the FBI warned Big Tech to be on the lookout for particular Russian misinformation and disinformation.¹²⁴

For example, Facebook allows state agencies to operate Facebook pages.¹²⁵ Google has collaborated with the government and state

¹²³ See *Missouri v. Biden*, 680 F.Supp.3d 630 (W.D. La. 2023). On July 4, 2023, the District Court for the Western District of Louisiana granted a preliminary injunction, finding that the States and social media users were “likely to succeed on the merits of their claim” that the Center for Disease Control (CDC) violated First Amendment by engaging in censorship campaign, together with White House and other federal agencies, despite CDC’s contention otherwise. *Id.* at 700. On September 8, 2023, the Fifth Circuit affirmed this preliminary injunction. *State v. Biden*, 80 F.4th 641 (5th Cir. 2023). On September 14, 2023, Justice Alito of the Supreme Court administratively stayed the preliminary injunction until September 22, 2023. *Murthy v. Missouri*, No. 23A243, 2023 WL 5968043 (U.S. Sept. 14, 2023) (mem.). On September 22, 2023, Justice Alito extended the administrative stay until September 27, 2023. *Murthy*, No. 23A243, 2023 WL 6173457 (U.S. Sept. 22, 2023) (mem.); On October 20, 2023, the Supreme Court stayed the injunction and treated the Government’s application for the stay as a petition for a writ of certiorari, which the Supreme Court granted. *Murthy v. Missouri*, 144 S. Ct. 7 (2023) (mem.). Justice Alito, with whom Justice Thomas and Justice Gorsuch, dissented, noting that the Government had not met its burden of showing that a likelihood of irreparable harm will result from the denial of the stay. *Id.* (Alito, J., dissenting, joined by Thomas, and Gorsuch, JJ.). The dissenting Justices expressed alarm that the stay allowed the Government to continue coercing and controlling social media platforms to make content-moderation decisions and to continue to suppress the First Amendment rights of millions of Americans, when the lower courts already found clear evidence that these same government officials had engaged in a coordinated campaign of unprecedented “magnitude orchestrated by federal officials that jeopardized a fundamental aspect of America life.” *Id.* at 8–9 (internal citations omitted). As discussed in more detail in this article, in *Murthy v. Biden*, the Supreme Court dismissed the *Missouri v. Biden* plaintiffs’ claims on the grounds that the plaintiffs lacked standing to seek a future injunction against the government defendants. *Murthy v. Missouri*, 603 U.S. 43, 75 (2024).

¹²⁴ See Chan Dep. 261-262, Nov. 29, 2022, *Missouri v. Biden*, 3:22-cv-01213 TAD-KDM (W.D. La.).

¹²⁵ GOVLOOP, *THE GOVERNMENT’S GUIDE TO USING FACEBOOK* (2015) (Govloop was developed by and for the government community without funding or formal support

universities to create digital libraries.¹²⁶ As Elon Musk's Twitter files dump has confirmed, in October 2020, Twitter agreed to censor information about the Hunter Biden laptop.¹²⁷

Twitter's decision was based on discussions and communications with FBI officials who characterized the news as "Russian disinformation" and asked Twitter not to post it.¹²⁸ When considering FBI agent Elvis Chan's explosive testimony discussed above, federal courts will soon have a more difficult time dismissing lawsuits: (1) claiming that Big Tech does not act at the direction of government officials, or (2) holding that claimants have failed to show that the state actor doctrine applies in specific scenarios.

High-profile Big Tech executives often participate in Congressional hearings where lawmakers have threatened them with coercive and unfavorable regulatory action if Big Tech does not do Congress's bidding.¹²⁹ The FBI has even paid Twitter millions of dollars for user information.¹³⁰ Some commentators would go so far as to claim that the mere enactment of Section 230 and the attendant immunity privileges it grants Big Tech itself demonstrates Big Tech's and the government's inextricable entwinement.¹³¹

from the U.S. Government), <https://www.govloop.com/wp-content/uploads/2015/05/The-Governments-Guide-to-Using-Facebook.pdf>; see also Facebook, *Best Practices for Government Organizations*, <https://www.facebook.com/gpa/best-practices/government-organization> (last visited Mar. 23, 2025).

¹²⁶ See UCNET, *UC Libraries Partner with Google To Digitize Books*, UNIV. CAL. (Aug. 9, 2006), <https://ucnet.universityofcalifornia.edu/employee-news/from-the-archive-uc-libraries-partner-with-google-to-digitize-books/>; see also, Jessie Haines, *Grow with Google Is Heading To Libraries In All 50 States, Starting Today*, GROW WITH GOOGLE BLOG (Jan. 28, 2019), <https://blog.google/outreach-initiatives/grow-with-google/grow-google-heading-libraries-all-50-states-starting-today/>.

¹²⁷ See Chan Dep. 261–262, Nov. 29, 2022, <https://www.documentcloud.org/documents/23379650-elvis-chan-deposition>.

¹²⁸ Steven Nelson, *House GOP Wants FBI's Twitter Censorship, Reimbursement Records*, HOUSE JUDICIARY COMM. (December 23, 2022), <https://judiciary.house.gov/media/in-the-news/house-gop-wants-fbis-twitter-censorship-reimbursement-records>; see also Victor Nava, *FBI treated Twitter as a 'subsidiary,' flagged tweets and accounts for 'misinformation'*, N.Y. POST (Dec. 21, 2022), <https://nypost.com/2022/12/16/fbi-treated-twitter-as-subsidiary-flagged-tweets-for-misinformation/>.

¹²⁹ Zach Weissmueller, *'Fake News' Is Not an Excuse to Regulate the Internet*, REASON (Jan. 17, 2018), <https://reason.com/video/2018/01/17/why-fake-news-is-not-an-excuse-to-regula/>.

¹³⁰ Molly Stellino, *Fact Check: FBI Paid Twitter for Information Requests, Not Censoring Information*, USA TODAY (Jan. 18, 2023), <https://www.usatoday.com/story/news/factcheck/2023/01/18/fact-check-fbi-gave-3-million-twitter-information-requests/11033845002/>.

¹³¹ Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. REV. 121, 152 & n.161 (2014) (citing ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 519–21 (4th ed. 2011)).

We will discuss Big Tech's relationship and interactions with the government in the section on Entwinement. However, it seems that to the extent Big Tech and the government's paths cross or combine, they appear to do so with increasingly coercive frequency and visibility.

This disturbing phenomenon presents a truly nettlesome conundrum. Big Tech, while deemed a purely private actor, in fact, acts as an unaccountable global speech auditor and digital town square. As non-publishers, Big Tech has the freedom to exercise such incredible superpowers behind closed doors. This immunity privilege comes absent any corresponding public constitutional obligations or restrictions. Big Tech remains broadly and selectively immune from legal rules and burdens governing its "analog" publisher counterparts.

What to do? Public actors, private industry, and commentators have loudly called for Section 230's revision or repeal, but it may be too late. Big Tech likely wouldn't be an unaccountable global monopolist superpower absent Section 230. So, without protections for new or relatively small market entrants, revising or repealing it may only *increase* and further entrench its incredible market power over smaller competitors. These newer and smaller market entrants and competitors are unequipped to withstand the crushing political and regulatory compliance burdens and increased legal liability.

B. The §1983 Public Function Doctrine Defined (The "What").

The public function doctrine¹³² is a longstanding yet poorly defined legal principle. It states that a private party's actions constitute state action if the private party performs those functions traditionally and exclusively reserved for the government or state. Under this doctrine, certain functions are regarded as the exclusive province of government in the context of "under color of state law" for purposes of §1983 (i.e., pursuant to the 1866 Civil Rights Act). Here, ostensibly, private parties performing such exclusive governmental functions are instead deemed acting as public parties or state actors. Under this public designation, these parties are subject to comporting with U.S. constitutional protections and guarantees.

The public function test is primarily based on historical practice and judicial precedent, not simply as a normative value judgment. Classic cases are the conduct of public elections and the civic governance of a

¹³² See LIBRARY OF CONGRESS, *Amdt14.2 State Action Doctrine*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-2/ALDE_00000810/ (last visited 03/01/2025).

company town.¹³³ The government apparently cannot just sometimes perform the public function, but the erstwhile private entity must instead engage in a function *exclusively* reserved to the state.¹³⁴

1. The right to regulate competitors.

Regulating competition is the responsibility of the government.¹³⁵ Congress cannot then delegate this federal regulatory power to private parties to regulate those private parties' competitors.

The Parler App. In the aftermath of the January 6, 2020, riot at the U.S. Capitol, Big Tech, seemingly in coordination, shut down the Parler social media app. Parler was a conservative iteration of Twitter and Instagram that presented a serious competitive threat at the time. At one point before the 2020 election, Parler held the top overall position on Apple's app store. Then, Google and Apple blocked Parler's app from their app stores, and Amazon Web Services denied Parler's wholesale and life-sustaining access to its cloud network.¹³⁶ Parler was shut down overnight, akin to a regulatory action putting Parler out of business.¹³⁷ Conservative voices, who had been roundly de-platformed from Big Tech, had completely lost the functional ability to be heard in the digital public square.¹³⁸ Section 230 statutory immunity encouraged Big Tech to blithely step into the shoes of the state in its regulatory functions by

¹³³ *Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22 (1st Cir. 2002) (holding that the public-function doctrine requires that the private actor exercise a power traditionally exclusively reserved to the state) (citing *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 640 (1991)); see also William A. Diamond, *State Action and the Public Function Doctrine: Are There Really Public Functions?*, 13 U. RICH. L. REV. 579 (1979).

¹³⁴ Diamond, *supra* note 131, at 579.

¹³⁵ See, e.g., Jessica Inscore, *The Amazon Argument: An Examination of South Dakota v. Wayfair and a Discussion of its Implications*, 41 CAMPBELL L. REV. 531 (2019) (summarizing the history of Congress's authority and obligation to regulate under the Commerce Clause).

¹³⁶ Tony Romm & Rachel Lerman, *Amazon Suspends Parler, Taking Pro-Trump Site Offline Indefinitely*, WASH. POST (Jan. 11, 2021), <https://www.washingtonpost.com/technology/2021/01/09/amazon-parler-suspension/>; see also Jack Nicas & Davey Alba, *Amazon, Apple and Google Cut Off Parler, an App That Drew Trump Supporters*, N.Y. TIMES (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/technology/apple-google-parler.html>; see generally, Kaya Yurieff, *Conservatives flocked to Parler after the election. But its explosive growth is over*, CNN BUSINESS (Dec. 10, 2020), <https://www.cnn.com/2020/12/10/tech/parler-downloads/index.html>.

¹³⁷ *Id.*

¹³⁸ See, e.g., Shannon Bond, *Kicked Off Facebook and Twitter, Far-Right Groups Lose Online Clout*, NPR (Jan. 6, 2022, 3:41 PM), <https://www.npr.org/2022/01/06/1070763913/kicked-off-facebook-and-twitter-far-right-groups-lose-online-clout>.

regulating and silencing its own social media platform competitors.¹³⁹

Commentators suggest that even decades-old Supreme Court cases involving the tech giants of yesteryear (i.e., coal companies, railroads, and company towns) can provide crucial modern guidance on the limits of Big Tech’s power to regulate the new digital public square.¹⁴⁰

The coal industry. The Supreme Court spoke to this issue 1936 in *Carter v. Carter Coal*.¹⁴¹ Congress had delegated to coal producers and miners the power to impose standards on other producers and miners. *Carter* held that a private entity: [m]ay not be entrusted with the power to regulate the business of another, and especially a competitor. Any statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is arbitrary, and a denial of due process....¹⁴² The Court characterizes such action as “Legislative delegation in its most obnoxious form.”

This holding has gone unchallenged for over eighty (80) years.¹⁴³

The Stationers’ Company in England. Prof. Hamburger¹⁴⁴ cites the example of the seventeenth-century official government English censorship scheme imposed largely through private entities, such as universities and the Stationers’ Company, England’s printers’ trade guild. He notes that, whereas privatized censorship then was often mandatory, the contemporary Big Tech version is voluntary. But Big Tech has been legislatively and judicially protected for dutifully restricting Congress’s list of disfavored content while promoting its favored content.

¹³⁹ See Kalev Leetaru, *The Great Social Silencing*, REAL CLEAR POL. (Jan. 12, 2021), https://www.realclearpolitics.com/articles/2021/01/12/the_great_social_silencing_145014.html; see also Marcy Gordon & Michael Sisak, *US govt, states sue Facebook for ‘predatory’ conduct*, AP NEWS (Dec. 9, 2020), <https://apnews.com/article/us-govt-states-sue-facebook-antitrust-312de23e330a318ff8d339ef38dfbc08>.

¹⁴⁰ See Volokh, *supra* note 8, at 419 (explaining the legal limits placed on Big Tech’s power to regulate the modern public square); see also Evelyn Douek, *Governing Online Speech: From “Posts-as-Trumps” to Proportionality and Probability*, 121 COLUM. L. REV. 759 (2021) (demonstrating how Big Tech views its power and place of systemic importance).

¹⁴¹ *Carter v. Carter Coal*, 298 U.S. 238 (1936). The principles in *Carter* were upheld by the D.C. Circuit as recently as 2013 in *Am. Assn. of Railroads v U.S. Dept. of Transp.*, 821 F.3d 19 (D.C. Cir. 2016), *rev’d on other grounds*, 896 F.3d 539 (D.C. Cir. 2018). This case became quite significant as it was the only case in a long stretch wherein the Supreme Court declared an act of Congress to be unconstitutional using the Commerce Clause. It was not until 1995 (a 59-year span) that the Court would revisit a similar issue of production and commerce distribution and arrive at a similar conclusion when deciding *United States v. Lopez*, 514 U.S. 549 (1995).

¹⁴² *Carter v. Carter Coal*, 298 U.S. 238 (1936).

¹⁴³ See, e.g., Paul J. Larkin, *Revitalizing the Nondelegation Doctrine*, FEDERALIST SOC’Y REV. 238, 254 (2022).

¹⁴⁴ Hamburger, *supra* note 106.

This means that the government is still setting the censorship agenda.

2. Elections.

Private political party pre-primary elections. In *Terry v. Adams*,¹⁴⁵ the Supreme Court held a racially discriminatory private political association as a state actor. State laws did not govern this association's preprimary elections or utilize state elective machinery or funds.¹⁴⁶ The association did not certify its elected candidates as such in the Democratic primary, and the primary candidates filed their names as candidates.¹⁴⁷ However, for over sixty years, the association's county-wide candidates were invariably nominated in the Democratic primaries and then elected to office.¹⁴⁸

It held an annual election to select candidates for county offices to run for nomination in the official Democratic primary.¹⁴⁹ The association consisted of all qualified white voters in the County, and Black voters of a Texas county were racially excluded from voting in the private association elections.¹⁵⁰ For over 60 years, the association's county-wide candidates were invariably nominated in the Democratic primaries and elected to office.¹⁵¹ For these reasons, the Court found that the association was a political organization or part, with its chief object to deny Blacks any voice or part in the election of county officials.¹⁵²

3. Law enforcement.

Southern sheriffs and the KKK. Professor Hamburger also cites the KKK example whereby some Southern sheriffs, long ago, used to assure Klansmen that they would face no repercussions for suppressing the speech of civil rights marchers.¹⁵³ Under the U.S. Constitution, the government cannot immunize powerful private parties in the hope that they will "voluntarily" carry out the state's unconstitutional policy by proxy.¹⁵⁴

¹⁴⁵ *Private political party pre-primary elections.* In *Terry v. Adams*, 345 U.S. 461, 469–70 (1953).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Hamburger, *supra* note 106.

¹⁵⁴ *Id.*

C. The “Public Forum” Doctrine (The Where).

Most scholars trace the lineage of the public forum doctrine to Supreme Court Justice Roberts’s 1939 opinion in *Hague v. Committee for Industrial Organization*.¹⁵⁵ Justice Roberts wrote:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Since ancient times, such use of the streets and public places has been a part of citizens’ privileges, immunities, rights, and liberties.¹⁵⁶

Courts employ this doctrine, an analytical tool used in First Amendment jurisprudence, to decide (1) the constitutionality of speech restrictions on government property and (2) whether groups should have access to engage in otherwise restricted expressive activities thereon.¹⁵⁷

This doctrine is one of the thorniest areas of First Amendment jurisprudence.¹⁵⁸ In numerous opinions dating back to the 1970s, the United States Supreme Court has recognized that public forums, such as streets and town squares, serve an important democratic function.¹⁵⁹ The Court has, therefore, held that if government property is a public forum, regulations that burden the use of that property for speech merit heightened judicial scrutiny.¹⁶⁰

The basic argument for state actor status is that Congress has no constitutional power to empower, encourage, deputize, or authorize private parties to deprive citizens of their constitutional speech rights. By granting Big Tech immunity from civil liability when it censors material it deems objectionable from its platforms, Congress has indirectly encouraged and authorized Big Tech to regulate protected speech.¹⁶¹

¹⁵⁵ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

¹⁵⁶ *Id.* at 516.

¹⁵⁷ David L. Hudson Jr., *Public Forum Doctrine*, FREE SPEECH CTR. (July 2, 2024), <https://firstamendment.mtsu.edu/article/public-forum-doctrine/>.

¹⁵⁸ Martin Flumenbaum & Brad Karp, *Recent Decision Extends the Public Forum Doctrine to Public Access Television*, 259 N.Y. L. J. 59 (Mar. 27, 2018), <https://www.law.com/newyorklawjournal/2018/03/27/recent-decision-extends-the-public-forum-doctrine-to-public-access-television/>.

¹⁵⁹ *Id.*

¹⁶⁰ See *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (summarizing the public forum doctrine and the applicable strict scrutiny test).

¹⁶¹ See Klon Kitchen, *Section 230-Mend It, Don’t End It*, HERITAGE FOUND. CTR. TECH. POL’Y, Issue Brief No. 6020 (Oct. 27, 2020), https://www.heritage.org/sites/default/files/2020-10/IB6020_1.pdf.

When a private party such as Big Tech controls the new public square, it functions as a government forum, and private property rights are insufficient to justify restricting such fundamental liberties.

The First Amendment severely limits state power to regulate political speech, especially the viewpoint of such speech. Accordingly, the government can neither delegate to Big Tech the proxy power to regulate this speech nor grant it legal immunity from liability. If Congress desires to impose speech limitations on the internet, then it must do so openly and directly. Congress must act by open and explicit government regulation that secures, guarantees, and protects the constitutional rights of all citizens.

Three types of public forums. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,¹⁶² the Supreme Court established three public forums: traditional, limited, and nonpublic.¹⁶³ In *Perry*, a union argued that an Indiana school district gave preferential treatment to a rival union by granting it exclusive rights to use the district's mail system. The Court ruled that the government mail system constituted a nonpublic forum, allowing the school administration to have reasonable regulations on speech that did not discriminate based on viewpoint.

In practice, however, courts have had difficulty defining the outer limits of this doctrine. For example, is a state school auditorium a public forum? Are privately owned Big Tech social media platforms public forums? Courts have espoused such a confusing labyrinth of rules that commentators have thus criticized the public forum doctrine variously as "byzantine," like "kudzu," "riven with incoherence," and "virtually impermeable to common sense."¹⁶⁴

¹⁶² *Perry Educ. Ass'n v. Perry Local Educ.'s Ass'n*, 460 U.S. 37 (1983).

¹⁶³ *Id.* In the Court's forum-based approach, the government can impose reasonable time, place, and manner restrictions on speech in all three categories but has limited ability to impose content-based restrictions on traditional or limited public forums. *Id.* at 45. Justice White explained that there were three categories of government property for purposes of access for expressive activities: Traditional/quintessential public forums, limited/designated public forums, and nonpublic forums. *Id.* In traditional public forums, the government may not prohibit all communicative activity, and any content-based restrictions on speech are highly suspect. *Id.* In limited public forums, reasonable time, place, and manner regulations are permissible and any content-based prohibition must be narrowly drawn to effectuate a compelling state interest. *Id.* at 46. For nonpublic forums, in addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, provided any regulation on speech is reasonable and not an effort to suppress a viewpoint of expression. *Id.*

¹⁶⁴ See Flumenbaum & Karp, *supra* note 157; Aaron Caplan *Invasion of the Public*

First CDA Public Forum Case: The Internet as a newspaper. In his 2020 article *Public Forum Doctrine and the Internet: A Neoliberal Approach to Speech Protection, Democratic Communiqué*,¹⁶⁵ Professor Chris Demaske traces and critiques the checkered history of the public forum doctrine as applied to the internet.¹⁶⁶ *Reno v. ACLU* in 1997 was the first Supreme Court case assessing the First Amendment’s application to the internet. The Court decided the issue of whether the CDA’s “indecent” and “patently offensive” provisions were unconstitutional under the First Amendment.¹⁶⁷

To answer the question, the Court first had to characterize the internet as a medium (i.e., whether the internet should be treated more like broadcast or print media).¹⁶⁸ The Court majority found that the internet was more like print because (1) it did not have the qualities of broadcast (i.e., there was no scarcity of frequencies; and (2) the internet was not as invasive as radio and television).¹⁶⁹ The Court struck down both CDA provisions as content-based and overly broad.¹⁷⁰

Social Media as a public forum. In *Packingham v. North Carolina*, the Supreme Court held that a North Carolina criminal statute preventing a convicted sex offender from accessing social media websites was unconstitutional under the First Amendment’s guarantee of freedom of speech.¹⁷¹ Applying the public forum doctrine, the Court noted that social media was “what for many are the principal sources for ... speaking and listening in the modern public square.”¹⁷² It held that “to foreclose access to social media altogether is to prevent the user from engaging in

Forum Doctrine, 46 WILLAMETTE L. REV. 648 (2010) (public forum doctrine is like “kudzu”); Case Comment, *The Supreme Court 2013 Term: Leading Case: Constitutional Law: First Amendment - Freedom of Speech - Content Neutrality - McCullen v. Coakley*, 128 HARV. L. REV. 221, 226 (2014) (“Perhaps no branch of the Supreme Court’s constitutional jurisprudence has been so roundly and routinely criticized as that concerning content neutrality.”); see generally, Anthony D. Lauriello, *Panhandling Regulation After Reed v. Town of Gilbert*, 116 COLUM. L. REV. 1105, 1111 (2016) (“Making the determination of what laws fall into each category has traditionally been murky. Academics routinely have denounced the byzantine and inconsistent manner courts determine whether a regulation discriminates against the content of speech”).

¹⁶⁵ Chris Demaske, *Public Forum Doctrine and the Internet: A Neoliberal Approach to Speech Protection*, DEMOCRATIC COMMUNIQUÉ (Dec. 26, 2020), <https://scholarwork.s.umass.edu/cgi/viewcontent.cgi?article=1001&context=democratic-communique>.

¹⁶⁶ *Id.*

¹⁶⁷ *RENO V. ACLU*, 521 U.S. 844 (1997).

¹⁶⁸ *Id.* at 868.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 868–70, 874, 882.

¹⁷¹ See *Packingham v. North Carolina*, 582 U.S. 98 (2017).

¹⁷² *Id.*

the legitimate exercise of First Amendment rights.”¹⁷³ The Court found that North Carolina could still adequately protect minor children from predatory sex offenders through less restrictive means.¹⁷⁴

Demaske observes that the Court failed to distinguish between the internet and traditional public forums in both *Reno* and *Packingham*.¹⁷⁵ He notes that, especially in light of the modern ubiquity of the internet, the Court has ushered in the neoliberal hands-off solution of trusting the corporate sector to uphold and champion societal norms, this time in the speech arena.¹⁷⁶

Demaske further notes that:

the Court’s lack of any real assessment of the internet as a public forum for First Amendment purposes is bound to lead to confusion among the lower courts.¹⁷⁷ This resulting confusion will then be compounded as we move past the specific law in *Packingham* to a broader application in cases dealing with topics such as fake news, hate speech, and government-sponsored social media sites.¹⁷⁸

Privately-owned public access television station, not a public forum. In a 2019 post-*Packingham* Supreme Court decision in a non-internet case, *Manhattan Community Access Corp. v. Halleck*, the Supreme Court held that private operators of public access stations should not be considered state actors and are thus not liable under the state action doctrine.¹⁷⁹ In *Halleck*, the Court granted certiorari to resolve a split among Circuit Courts of Appeals on whether private operators of public access cable channels are state actors subject to the First Amendment.¹⁸⁰

The Court reversed the controversial and much criticized 2018 Second Circuit decision extending the public forum doctrine to public access television channels.¹⁸¹

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Demaske, *supra* note 163.

¹⁷⁶ *Id.* at 2–3.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 15.

¹⁷⁹ *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 804–05 (2019); see generally, Graham Fisher, *Lights, Camera, State Action: Manhattan Community Access Corp. v. Halleck*, 2020 CARDOZO L. REV. DE NOVO 165, 192 (2020); see generally, B. Szóka & C. Barthold, *Justice Thomas’s Misguided Concurrence on Platform Regulation*, LAWFARE (Apr. 14, 2021) <https://www.lawfaremedia.org/article/justice-thomass-misguided-concurrence-platform-regulation>.

¹⁸⁰ *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. at 804–05 (2019).

¹⁸¹ *Id.*

In the court below, the Second Circuit Court of Appeals had held that privately-owned “public access channels, authorized by Congress to be ‘the video equivalent of the speaker’s soapbox’ and operating under the municipal authority given to it in this case, are public forums.”¹⁸² Therefore, the station and its employees were subject to First Amendment restrictions.¹⁸³

In reversing the Second Circuit, the United States Supreme Court held that the cable company was not a state actor.¹⁸⁴ The Court reasoned that providing some forum for speech is not an activity that only governmental entities have traditionally performed.¹⁸⁵ Therefore, a private entity that provides a forum for speech via public access channels is not transformed by that fact alone into a state actor.¹⁸⁶

Even though New York State heavily regulated the cable company, the Court found this regulation was “analogous to a government license, a government contract, or a government-granted monopoly.”¹⁸⁷ The Court stated that none of these forms of regulation necessarily converts a private entity into a state actor unless the private entity is otherwise performing a traditional, exclusive public function.¹⁸⁸

The post-*Halleck* implications for Big Tech seem straightforward if they occupy a similar space to the private operations of broadcast stations. However, the Court in *Halleck* did not directly address the implications for the Internet.¹⁸⁹ It remains to be seen how *Packingham* and the Supreme Court’s subsequent decision in *Halleck* will be applied to an internet-related case, and it is unclear what this portends for Section 230.

The President’s private Twitter account used for official purposes as a public forum. With the advent of social media, many politicians set up official Facebook, Twitter, and Instagram accounts to communicate with their constituents for official purposes.¹⁹⁰ Many politicians have also kept separate personal accounts for their lives outside of public office.¹⁹¹ President Trump’s use of his previously-

¹⁸² *Halleck v. Manhattan Cmty. Access Corp.*, 882 F.3d 300, 308 (2018).

¹⁸³ *Id.*

¹⁸⁴ *Manhattan Cmty.*, 587 U.S. at 804–05.

¹⁸⁵ *Id.* at 808–813.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 813–817.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ David McGee, *What Constitutes a Public Forum on Social Media?*, AMER. BAR ASSN. HUM. RTS. MAG., Vol. 43 No. 4. (Oct. 20, 2018), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/public-forum-social-media/.

¹⁹¹ *Id.*

private Twitter account as president brought up a new issue: whether a politician's private Twitter account that he used for official business may instead be a public forum. President Trump maintained only one Twitter account for private and official interactions and blocked certain users.¹⁹²

As a public official, Trump blocking an individual user on his private account has constitutional implications.¹⁹³ The challenge to Trump's unprecedented use of Twitter in office came from seven individuals he blocked, plus the Knight First Amendment Institute.¹⁹⁴ The plaintiffs argued that the President's personal account was an extension of his public office.¹⁹⁵ In a case of first impression, the Federal District Court for the Southern District of New York found that Trump engaged in unconstitutional viewpoint discrimination, violating the First Amendment by using Twitter's 'blocking' function to limit certain users' access to his social media account.¹⁹⁶ On appeal, the Second Circuit upheld this decision.¹⁹⁷ The court ruled that President Trump's Twitter feed constitutes a designated public forum, compared to a public park where many voices could congregate to express their views and ideas.¹⁹⁸

The court found that President Trump's Twitter was a public forum because he used his private account for official business.¹⁹⁹ Also, the court differentiated the options a politician can use to interact with citizens who "troll" the official.²⁰⁰ It clarified that an official may simply

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018). The case concerned the @realdonaldtrump account with more than 88 million followers. Trump argued it was his personal property. The Justice Department argued that blocking people from it was akin to elected officials who refuse to allow their opponents' yard signs on their front lawns.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 575–78. The District Court for the Southern District of New York agreed with the Justice Department and noted that blocking precludes the blocked user from seeing or replying to the blocking user's tweets entirely. The elimination of the blocked user's ability to reply directly is more than blocking the user by merely ignoring the blocked user: it is limiting the blocked user's right to speak in a discrete, measurable way. The court further noted that the audience for a reply extends more broadly than the sender of the tweet being replied to, and blocking restricts the ability of a blocked user to speak to that audience. For these reasons, the District Court concluded the President's blocking of the individual plaintiffs as a result of the political views they have expressed is impermissible under the First Amendment. The court stated, "while we must recognize, and are sensitive to, the President's personal First Amendment rights, he cannot exercise those rights in a way that infringes the corresponding First Amendment rights of those who have criticized him." *Id.*

¹⁹⁷ *Knight First Amendment Inst. of Columbia Univ. v. Trump*, 928 F.3d 226 (2nd Cir. 2018), *reh'g en banc denied*, 953 F.3d 218 (2nd Cir. 2019).

¹⁹⁸ *Id.* at 237.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

mute instead of block a constituent's account, likening this to a public official merely ignoring the voice of a constituent (i.e., had President Trump merely muted the plaintiffs, then there would have been no First Amendment violation).²⁰¹

In May 2021, after Trump lost the 2020 election, the Supreme Court granted *certiorari* and vacated the Second Circuit judgment.²⁰² The Court remanded the case back to the Second Circuit with instructions to dismiss the case as moot because Trump was no longer President.²⁰³

The debate over what constitutes a designated public forum on Big Tech forums is far from settled.²⁰⁴ We will no doubt see more cases involving Big Tech that may also be deemed public forums using similar reasoning. The unbridled expansion of internet speech and activity will thus require the courts to revisit traditional speech and constitutional doctrines to reflect how we now digitally and virtually communicate.²⁰⁵

D. State Actor “Entanglement/Entwinement” Doctrine (The “How”).

The prior state actor cases discussed above consistently fail to address a weighty and compelling issue presented by Section 230. That issue is whether state action for Big Tech exists when two conditions are met. First, Congress passes an immunity statute designed to induce private parties (i.e., Big Tech) to act (i.e., censor users) that would trigger strict scrutiny-level constitutional review were it instead directly engaged in by state actors (i.e., it would require the state to provide users with First Amendment protections). Second, Big Tech is entangled with, and acting upon, encouragement, pressure, coercion, threats of regulation, or

²⁰¹ While the constituents could have interacted with President Trump's interactive space on Twitter, President Trump just would not have seen those messages.

²⁰² *Biden v. Knight First Amendment Inst. of Columbia Univ.*, 141 S. Ct. 1220 (2021).

²⁰³ *Id.*

²⁰⁴ *Id.* As discussed later in this article, Justice Clarence Thomas wrote a concurring opinion in *Biden v. Knight First Amendment Inst.* at 1221 (Thomas, J., concurring). Justice Thomas fired a warning shot at social media giants Facebook (now Meta) and Twitter that could signal the possibility of stricter regulation and a potential radical shift in thinking around the First Amendment and the hotly debated topic of Section 230. See Marguerite Reardon, *A Supreme Court Justice Weighs in on Section 230: Here's What It Means*, CNET (Apr. 12, 2021, 9:57 AM), <https://www.cnet.com/news/politics/a-supreme-court-justice-weighs-in-on-section-230-heres-what-it-means/>; see also Mark Sherman, *Supreme Court Dismisses Case Over Trump and Twitter Critics*, ASSOC. PRESS (Apr. 5, 2021, 9:55 AM), <https://apnews.com/article/supreme-court-dismisses-case-trump-twitter-critics-bcdfcc37052e9c737ac5a1318b02a71c>.

²⁰⁵ See Philip Hamburger & Clare Morell, *The First Amendment Doesn't Protect Big Tech's Censorship*, WALL ST. J. (July 31, 2021, 11:31 AM), <https://www.wsj.com/article/s/big-tech-twitter-facebook-google-youtube-sec-230-common-carrier-11627656722>.

worse, from the federal government (also commonly referred to as “jawboning”).

In other words, what about when government actors coax, coerce, or threaten these private actors into taking certain actions to further these erstwhile suggestions and threats? Does this convert the resulting erstwhile private actions into thinly veiled state actions by proxy?

At least not yet. No published Section 230-related court decision appears to have explicitly recognized this issue. Again, the primary argument for state actor status is that: (1) Congress lacks the constitutional power to empower, encourage, or authorize private parties to deprive citizens of their constitutional speech rights; and (2) by granting Big Tech immunity from civil liability for restricting material from the internet that Congress deems objectionable, Congress has indirectly encouraged and authorized Big Tech to regulate constitutionally-protected speech by proxy.

1. Prior Non-Section 230 Court decisions: The Supreme Court has considered this issue in unrelated contexts and found erstwhile private entities to be state actors instead.

Non-profit scholastic athletic association. A closely divided 5-4 Supreme Court, in the seminal 2001 state actor doctrine case *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*,²⁰⁶ held that a non-profit athletic association regulating interscholastic sports in Tennessee public and private high schools was deemed a state actor.²⁰⁷ The Court’s state actor finding was due to the pervasive entwinement of state school officials in the association’s structure. The Court found the association’s nominally private character overborne by

²⁰⁶ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 291, 303 (2001); see also, Michael L. Wells, *Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context*, 26 CARDOZO L. REV. 99, 99 (2004). While Section 1983 suits are generally brought against local governments and officials, an increasing number of plaintiffs target private persons and businesses who have collaborated with the government in one way or another. In such cases, plaintiffs claim that private entities have acted under color of state law in violation of the plaintiffs’ rights. They must establish that the defendants are nonetheless state actors in order to prevail on the constitutional claims they raise. The broad range of cases includes, among others, efforts to obtain relief against creditors who use self-help remedies, litigation directed at persons who have cooperated with state officers to the plaintiffs’ detriment, and suits seeking recovery from persons and firms to whom the State has contracted out some function. Taking the Supreme Court’s recent decision in *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 291, 303 (2001) as a starting point, this article examines the criteria the courts use to determine whether state action is present in a given case.

²⁰⁷ *Brentwood Acad.*, 531 U.S. at 296.

the pervasive entwinement of public institutions and public officials in its composition and workings, thus holding it to constitutional standards.

Justice Souter, writing for the majority, identified the seven factors bearing on the fairness of state actor attribution: (1) when it results from the State's exercise of "coercive power"; (2) when the State provides "significant encouragement, either overt or covert"; (3) when a private actor operates as a "willful participant in joint activity" with the State or its agents; (4) when an agency of the State controls it; (5) when it has been delegated a public function by the State; (6) when it is "entwined with governmental policies"; or (7) when "government is entwined in its management or control."²⁰⁸

State-funded school without day-to-day state oversight.

In *Rendell-Baker v. Kohn*,²⁰⁹ the Supreme Court held that, on the one hand, if the government merely acquiesces in the performance of an act by a private individual or organization, it is not state action.²¹⁰ On the other hand, if the government coerces, influences, or encourages the act's performance, it is state action.²¹¹ A private high school was designed for maladjusted high school students; most of them were referred to the school by the state.

The school operated under significant state regulations, and most of its funding was from public sources. Because of a policy dispute, Kohn, the school director, fired Rendell-Baker, a teacher, and other teachers were later fired for supporting Rendell-Baker.²¹² The fired teachers sued the school under Section 1983, arguing that their due process rights had been violated when they were fired for exercising their First Amendment rights.²¹³ On the question of whether their termination was state action, the lower courts disagreed.²¹⁴

A divided United States Supreme Court held that, even when a private school is substantially funded and regulated by the state, it is not a state actor if it is not exercising state prerogatives. The majority stated that the actions of private contractors like the school cannot be attributed to the state simply because they have contracts with the government. State regulations did not form the basis for firing the teachers, and the school generally handled its personnel matters without intrusion from the state. As the school's public function had not traditionally been within

²⁰⁸ *Id.*

²⁰⁹ *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

the state's exclusive control, its actions were not state action. The dissent argued that the school was so closely linked to the state through its use of public funding and the regulations controlling such funding that its actions can be interpreted as state action. The state essentially delegated its duty to provide education to the school.²¹⁵ The dissent further argued that the school was not a private contractor because it was under a much greater level of oversight from the state and was performing a duty usually performed by the state.²¹⁶

State-provided textbooks to private schools. In *Norwood v. Harrison*, the United States Supreme Court struck down, as state action, a state's providing free textbooks to racially segregated private schools.²¹⁷ These schools were set up to avoid desegregated public schools, although the textbook program predated the establishment of these schools.²¹⁸ The Court notes that any tangible state assistance (outside general services it might provide to private segregated schools along with other schools) is unconstitutional if it has "a significant tendency to facilitate, reinforce, and support private discrimination."²¹⁹ The Court further noted: "Racial discrimination in state-operated schools is barred by the Constitution and 'it is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what is constitutionally forbidden to accomplish.'"²²⁰ Congress arguably accomplished this goal in Section 230 by permitting and encouraging Big Tech to censor constitutionally protected speech while simultaneously immunizing Big Tech from legal liability if and when it does so.

Private railroads. In 1985, a federal agency enacted regulations designed to induce - but which did not compel - private railroads to test their workers for drugs and alcohol as part of accident investigations. Subpart D of the regulations immunized private railroads that voluntarily chose to administer such tests from state law liability in certain circumstances. Thus, Subpart D didn't mandate the tests but merely permitted them and immunized the private actors. In the 1989 Supreme Court case *Skinner v. Railway Labor Executives Ass'n*,²²¹ the Railway Labor Executives Association sought to enjoin the railroads from

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Norwood v. Harrison*, 413 U.S. 455 (1973).

²¹⁸ *Id.*

²¹⁹ *Id.* at 466.

²²⁰ *Id.* at 465 (citing *Lee v. Macon Cty. Bd. of Educ.*, 267 F. Supp. 458, 475-76 (M.D. Ala. 1967)).

²²¹ *Skinner v. Ry. Lab. Execs. Ass'n*, 489 U.S. 602, 602 (1989).

conducting these tests.²²² It claimed that these drug and alcohol tests were unlawful searches that violated the Fourth Amendment.²²³ The federal government argued that it merely authorized but did not compel any tests under Subpart D, and the tests were voluntarily undertaken by private parties and thus not state action.

The lower federal District Court, Ninth Circuit, and a unanimous Supreme Court firmly rejected the government's non-state-action argument.²²⁴ The Court noted that, simply because the government has not *compelled* a private party to perform a search, it does not alone establish that the search is private.²²⁵ Further, the specific features of the regulations combined to convince the Court that the Government did more than adopt a neutral and passive position toward private conduct.²²⁶ Namely, the Court highlighted that: (1) the federal regulations pre-empted state laws and voided any contracts prohibiting the tests, which immunized private employers who administered the tests from any state law liability (including for breach of contract); (2) workers were not "free to decline" the tests, as employees who refused could be removed from service; and (3) the Government not only removed any legal barriers to the testing authorized by Subpart D but also had "made plain...its strong preference for testing."²²⁷ Consequently, the Court found that "the Government's encouragement, endorsement, and participation ... suffice to implicate the Fourth Amendment."²²⁸

Commentators compare the private railroad's drug and alcohol testing program in *Skinner* (which the government encouraged and also provided employer immunity), judicially deemed state action, to government action in Section 230.²²⁹ Specifically, like *Skinner*'s permissive and officially encouraged testing authority, in Section 230 the government likewise encouraged Big Tech censorship (to restrict materials it deemed "objectionable" and promote those it supported).²³⁰ Also, like *Skinner*, the government provided comprehensive legal immunity therefor.²³¹

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 615.

²²⁷ *Id.* at 603–04, 615.

²²⁸ *Id.* at 615–16.

²²⁹ *See, e.g.*, John C. Greiner & Michaela Taylor, *Five Strikes, and You're Out: Courts Find that Twitter Can Restrict More Than Just Your Character Count*, 38 FALL COMM'NS. L. 36 (Fall 2022) (citing *Skinner* when analyzing § 230's analogous applicability to Twitter and other social media platforms).

²³⁰ *Id.*

²³¹ *Id.*

Add the government's broad grant to Big Tech of Section 230 immunity to Big Tech's vast power to restrict published materials.²³² Like *Skinner*, this combination yields an entangled relationship between Big Tech and the state, encouraging Big Tech to actively implement state goals. And voila, we now have a pretty compelling argument for finding state action in connection with Section 230.

Private Booksellers. Another line of cases that provides ammunition for applying state actor liability to Big Tech begins in 1963 with *Bantam Books, Inc. v. Sullivan*.²³³ In *Bantam Books*, the Supreme Court ruled that states must provide adequate procedural safeguards when establishing a mechanism to declare books obscene.²³⁴

In *Bantam Books*, a private bookseller had "voluntarily" stopped selling certain books (i.e., engaged in self-censorship) after receiving a threatening and coercive letter from state commissioners.²³⁵ This letter had listed those books as objectionable, suggesting that the bookseller might be referred to local prosecutors if he continued selling them. In this case, the Court found state action in prior restraint of speech violating the First Amendment.²³⁶

Private Nursing Homes. In *Blum v. Yaretsky*, the Supreme Court appeared to take a more restrictive approach toward what constitutes impermissible government coercion.²³⁷ In *Blum*, Medicare recipients who received government-subsidized care at private nursing homes brought a class action lawsuit against the nursing homes.²³⁸ These Medicare recipients claimed that the nursing homes violated their due process rights because the facilities either discharged or transferred them to nursing homes where they received lesser medical care without first giving them notice or a hearing.²³⁹

These Medicare recipients further claimed that because the nursing homes were motivated to act by federal regulations that encouraged such discharges or transfers whenever medically possible to save tax dollars, the nursing homes did the government's bidding as state actors.²⁴⁰ Although Justice Brennan wrote in his dissent that the class action plaintiffs showed that the government was responsible for these

²³² *Id.*

²³³ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

²³⁴ *Id.* at 59–72.

²³⁵ *Id.*

²³⁶ *Id.* at 67–72.

²³⁷ *Blum v. Yaretsky*, 457 U.S. 991 (1982).

²³⁸ *Id.* at 994–98.

²³⁹ *Id.*

²⁴⁰ *Id.*

nursing home discharges and transfers,²⁴¹ most of the Supreme Court disagreed.²⁴²

The Court held that because the government did not order the nursing homes to discharge or transfer these patients, they did not act as state actors, even though they did what the government encouraged them to do.²⁴³ Writing for the majority, Justice Rehnquist noted, “A state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”²⁴⁴ In other words, government coercion that causes a private actor to arguably deprive others of constitutionally protected rights does not qualify as state action if the private actor retains the ability to decide what to do for each case.²⁴⁵

The problem of jawboning. As Professor Genevieve Laiker of the University of Chicago Law School notes in her article *Informal Government Coercion and The Problem of “Jawboning,”*²⁴⁶ *Bantam* and *Blum* articulate different approaches to what constitutes constitutionally impermissible government coercion of a private actor.²⁴⁷ Under the *Bantam* approach, even implied and empty government threats may qualify as unconstitutional coercion.²⁴⁸ In contrast, *Blum* seems to require government coercion that leaves the private actor with no choice but to comply. Consequently, *Bantam* and *Blum* have engendered a legacy of somewhat inconsistent precedent, and subsequent lower courts have not shown much interest in reconciling them.²⁴⁹

Government pressure on Big Tech to modify and censor social media content has recently renewed jurisprudential interest in the

²⁴¹ *Id.* at 1012–29 (J. Brennan dissenting).

²⁴² *Id.* at 1005–10.

²⁴³ *Id.*

²⁴⁴ *Id.* at 1004.

²⁴⁵ *Id.*

²⁴⁶ See, e.g., Genevieve Laiker, *Informal Government Coercion and The Problem of “Jawboning,”* LAWFARE (July 26, 2021, 3:52 PM), <https://www.lawfaremedia.org/article/informal-government-coercion-and-problem-jawboning/> (exploring the question of where the line falls between permissible government pressure and impermissible government coercion when it comes to efforts to get social media platforms to suppress harmful speech. “Whatever answer courts give to this important question will shape the relationship between government officials and the social media companies that play such a powerful role in contemporary public life... It will help determine, in other words, the balance of power between the old-fashioned governors of the brick-and-mortar public sphere and the ‘new governors’ of the digital public sphere.”).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

jawboning debate.²⁵⁰

Because social media has become the modern public square, protecting the free exchange of ideas may require reexamining the judiciary's excessive deference to state action and government speech doctrines.²⁵¹ Safeguarding speech becomes even more challenging when social media companies "operate in tandem with the government on a range of matters of great consequence."²⁵² Arguably, and in the digital age, government coercion has more pervasive and irreparably restrictive consequences for speakers and listeners alike when content is censored and users are de-platformed or canceled.²⁵³

Private union-employer closed-shop agreements. In *Railway Employees' Department v. Hanson*,²⁵⁴ the Supreme Court declared state action in private union-employer closed-shop agreements, forcing all employees to join the union.²⁵⁵ The Court's state action decision was based on the fact that Congress had passed a statute immunizing such agreements from liability under state law.²⁵⁶

Private telephone company censorship. In *Carlin Commc'ns Inc. v. Mountain States Telephone & Telegraph Co.*,²⁵⁷ the

²⁵⁰ See generally, Gregg Zive, *Prior Restraint and the Press Following the Pentagon Papers Cases- Is the Immunity Dissolving?*, 47 NOTRE DAME L. REV. 927 (1972); see generally, Jeffrey Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV., 439 (1986) (discourse on the judicial history and doctrine of prior restraint); Eugene Volokh, *When Government Urges Private Entities to Restrict Others' Speech*, THE VOLOKH CONSPIRACY BLOG (July 19, 2021, 6:20 PM), <https://reason.com/volokh/2021/07/19/when-government-urges-private-entities-to-restrict-others-speech/>; but see, Peter Suci, *Misinformation: The White House And Jen Psaki Didn't Actually Call For Censorship Of Social Media*, Forbes (July 16, 2021), <https://www.forbes.com/sites/petersuci/2021/07/16/misinformation-the-white-house-and-jen-psaki-didnt-actually-call-for-censorship-of-social-media/?sh=49da5b9f5b39/>.

²⁵¹ For a thought-provoking article that examines the symbiotic relationship between Big Tech and government and recommends the retraction of these two doctrines to better protect the free exchange of ideas in social media, see Michael Glennon, *Symbiotic Security and Free Speech*, 14 HARV. N.S.J. 102 (2022).

²⁵² *Id.* at 102-03.

²⁵³ *Id.* See generally, Gregg Zive, *Prior Restraint and the Press Following the Pentagon Papers Cases-Is the Immunity Dissolving?*, 47 NOTRE DAME L. REV. 927, 930-32 (1972); Jeffrey Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV. 439 (1986) (discourse on the judicial history and doctrine of prior restraint); Eugene Volokh, *When Government Urges Private Entities to Restrict Others' Speech*, THE VOLOKH CONSPIRACY BLOG, Reason.com (July 19, 2021), <https://reason.com/volokh/2021/07/19/when-government-urges-private-entities-to-restrict-others-speech/>.

²⁵⁴ *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Carlin Commc'ns Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291 (9th Cir. 1987).

Ninth Circuit found state action when a government official induced a telephone company to stop carrying offensive content.²⁵⁸ Again, this involved the government's threat of prosecution.²⁵⁹ Carlin supplied salacious telephone messages to the public.²⁶⁰ The county attorney instructed Mountain Bell to terminate Carlin's service and threatened to prosecute Mountain Bell if it did not comply.²⁶¹ The court found that "the county attorney's threat of prosecution provided the requisite 'nexus' between the state and the challenged action".²⁶² According to the court, in using this threat, Arizona 'exercised coercive power' over Mountain Bell and thereby converted Mountain Bell's otherwise private conduct into state action.²⁶³

FCC Voluntary Family Viewing Policy ("FVP"). In 1974, the notable (pre-cable) television networks adopted the FVP that barred content "inappropriate for viewing by a general family audience" during the first hour of prime time and the immediately preceding hour.²⁶⁴ In the case of *Writers Guild of Am., West, Inc. v. FCC*, plaintiffs sued the television networks and the FCC, challenging the FVP on First Amendment grounds.²⁶⁵ Defendants responded that private parties voluntarily adopted the FVP and were thus exempt from federal constitutional burdens.²⁶⁶

In a highly reasoned opinion, the district court rejected this argument, holding that the FVP had been adopted due to FCC pressure, which responded to pressure from Congress and was thus deemed state action.²⁶⁷ While the FCC had not mandated the FVP, its chairman had threatened the networks with regulatory action and "actions that would impose severe economic risks and burdens" on the networks if they failed to move to block excessive "sex and violence" from prime-time programming.²⁶⁸ *Writers Guild* was a district court opinion regarding a different medium in the pre-internet era and was later vacated on jurisdictional grounds.²⁶⁹ Nevertheless, the case reasoning is indeed instructive on the issue, as a triable question of fact, of whether state

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 1293.

²⁶¹ *Id.*

²⁶² *Id.* at 1295.

²⁶³ *Id.*

²⁶⁴ *Writers Guild of Am., West, Inc. v. FCC*, 423 F. Supp. 1064, 1072 (C.D. Cal. 1976).

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 1092-93.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 1142.

²⁶⁹ *Id.*

pressure to influence Big Tech’s viewpoint-based censorship policies is properly viewed as Big Tech engaging in state action.

2. Post-Section 230 Judicial Landscape.

Although censorship challenges against Big Tech have not yet proved successful for most claimants in judicial proceedings, these pre-Section 230 cases prove illustrative and applicable in the age of the digital public square. These cases underscore the importance of making a strong evidentiary case. Specifically, one that strongly evidences that government pressure coerced a private actor to act such that, had the government acted on its own accord, this action would violate the challenger’s constitutional rights.

For example, as the United States Supreme Court noted in *Blum v. Yaretsky*, one way to show state action is when the government has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must, in law, be deemed to be that of the State.²⁷⁰ Similarly, in *Skinner*, the Court emphasized similar jawboning language: state action can happen when a statute or regulation provides “clear indices of the Government’s encouragement, endorsement, and participation.”²⁷¹

In recent cases, individuals challenging Big Tech on censorship grounds must show strong evidence that, somehow, the government coerced the defendant’s social media platforms to do its bidding. For example, Twitter suspended Colleen Huber’s account in the March 2022 case of *Huber v. Biden*.²⁷² Huber had quoted an Israeli news article that Pfizer’s COVID vaccines caused “mortality hundreds of times greater in young people compared to mortality from coronavirus without the #vaccine, and dozens of times more in the elderly.”²⁷³ Twitter advised that her tweet violated Twitter’s COVID-19 policies. Huber sued in federal court, arguing that Twitter’s actions constituted state action because it conspired with the Biden administration to censor negative content about the COVID-19 vaccine.²⁷⁴ The U.S. District Court for the Northern District of California disagreed, holding that because Huber

²⁷⁰ See *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

²⁷¹ 489 U.S. 602, 615-16. See, e.g., Greiner & Taylor, *Five Strikes, And You’re Out: Courts Find That Twitter Can Restrict More Than Just Your Character Count*, *supra* note 227; see also, Lakier, *Informal Government Coercion and The Problem of “Jawboning,” supra* note 244.

²⁷² *Huber v. Biden*, No. 21-CV-06580-EMC, 2022 WL 827248 (N.D. Cal. Mar. 18, 2022), *aff’d*, No. 22-15443, 2022 WL 17818543 (9th Cir. Dec. 20, 2022).

²⁷³ *Id.* at 1.

²⁷⁴ *Id.* at 5.

presented *no evidence* of conspiracy, Twitter did not act as a state actor when it suspended her account.²⁷⁵

A month later, in April 2022, a journalist named Alex Berenson contacted Twitter to express concern about Twitter’s recently adopted “five-strike” policy, whereby a fifth strike could result in a user’s permanent suspension.²⁷⁶ After Berenson spoke with Twitter about his concerns, Twitter suspended his account. In *Berenson v. Twitter, Inc.*, Berenson sued Twitter on grounds similar to *Huber*, namely that the government coerced Twitter to address “COVID misinformation.”²⁷⁷

Berenson alleged that the federal government coerced Twitter to suspend Twitter accounts that did not align with the Biden Administration’s “COVID misinformation” narrative.²⁷⁸ In doing so, Twitter acted as a state actor when it suspended his account, violating his First Amendment rights.²⁷⁹ The District Court for the Northern District of California noted that Section 230 barred his claim, but even if Section 230 did not, Berenson *failed to allege sufficient facts* to show that the government coerced Twitter in any way.²⁸⁰

In May 2022, this same District Court heard another Big Tech state action claim in *Hart v. Facebook Inc.*²⁸¹ Both Facebook and Twitter removed content posted by Justin Hart that criticized government mandates that children wear masks during the COVID pandemic.²⁸² He sued Facebook, Twitter, President Biden, and Surgeon General Vivek Murthy (“Murthy”) for acting as a state actor when it censored his post, violating his First Amendment rights.²⁸³

He argued that the government was entangled with both platforms and coercing them into censoring content that did not align with the Administration’s message, as demonstrated by the fact that: (1) senior staff in the Biden Administration were in “regular touch” with Facebook and Twitter about COVID-19 information; and (2) the Surgeon General’s office was “flagging problematic posts for Facebook that

²⁷⁵ *Id.* at 10.

²⁷⁶ See *Updates to our Work on COVID-19 Vaccine Misinformation*, X BLOG (Mar. 1, 2021), https://blog.twitter.com/en_us/topics/company/2021/updates-to-our-work-on-covid-19-vaccine-misinformation.

²⁷⁷ *Berenson v. Twitter, Inc.*, No. C 21-09818 WHA, 2022 WL 1289049 (N.D. Cal. Apr. 29, 2022).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 3.

²⁸¹ *Hart v. Facebook Inc.*, No. 22-cv-00737-CRB, 2022 WL 1427507 (N.D. Cal. May 5, 2022) (order granting motions to dismiss); *aff’d*, No. 23-15858, 2024 WL 1693355 (9th Cir. Apr. 19, 2024) (not reported in Federal Reporter).

²⁸² *Id.* at 4.

²⁸³ *Id.* at 1.

spread disinformation.”²⁸⁴

The District Court again disagreed and dismissed Hart’s case for lack of sufficient evidence of state action.²⁸⁵ However, the Court did write an opinion and noted that Hart’s account had already been flagged.²⁸⁶ The court stated that a President’s one-time statement about an industry does not convert into state action all later decisions by actors in that industry that are vaguely in line with the President’s preferences.²⁸⁷ On April 19, 2024, the Ninth Circuit Court of Appeals upheld the District Court’s dismissal of Hart’s case, ruling that Hart did not show that the government defendants were *responsible* for Facebook and Twitter’s moderation of his posts, and therefore the Court found no plausible inference of “entwinement.”²⁸⁸

As the pre-Section 230 cases illustrated earlier, coercion goes to the core of showing government entanglement. Concerning state action claims against Big Tech companies, *Huber*, *Berenson*, and *Hart* were on the right collective track: Focusing on governmental coercion.

It’s also clear, however, that courts require substantial evidence that the government has coerced a platform’s actions, including censorship or suspension.²⁸⁹ Importantly, *Huber*, *Berenson*, and *Hart* all pre-date Elon Musk’s Twittergate file dump.

The Twittergate file dump paints a more compelling evidentiary picture of the type of relationship that the FBI and other federal agencies have conducted with Big Tech.²⁹⁰ Moreover, Mark Zuckerberg has publicly acknowledged that the FBI visited members of his team to alert them to expect “some kind of dump” similar to Russian propaganda in the 2016 election.²⁹¹ Whether this evidence would sufficiently convince a court that federal government officials have acted to coerce Big Tech is yet another matter.

3. Why Pre-Section 230 Principles Apply with Equal Force to

²⁸⁴ *Id.* at 3-5.

²⁸⁵ *Id.* at 8-14.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 8.

²⁸⁸ *Hart v. Facebook, Inc.*, No. 23-15858, 2024 WL 1693355 (9th Cir., Apr. 19, 2024) (not reported in Federal Reporter).

²⁸⁹ *Id.*; see also *Huber* at 5-20; see also *Berenson* at 4.

²⁹⁰ See, e.g., Steven Nelson, *House GOP Wants FBI’s Twitter Censorship, Reimbursement Records*, HOUSE JUDICIARY COMMITTEE NEWS (Dec. 23, 2022), <https://judiciary.house.gov/media/in-the-news/house-gop-wants-fbis-twitter-censorship-reimbursement-records>.

²⁹¹ David Malloy, *Zuckerberg Tells Rogan FBI Warning Prompted Biden Laptop Story Censorship*, BBC NEWS (Aug. 26, 2022), <https://www.bbc.com/news/world-us-canada-62688532>.

Big Tech in the Post-Section 230 World in the Age of the Digital Public Square.

As aptly put by Professor Dawn Nunziato, “Congress expressly encouraged powerful Internet platforms to do what Congress could not itself do—that is, to restrict harmful, offensive, and otherwise undesirable speech, where such restriction would violate the First Amendment.”²⁹² She recognizes that Section 230 effectively immunizes and induces private conduct that would be unconstitutional if official government actors did it themselves, and that was its purpose.²⁹³ In tech terminology, it is a feature, not a bug.

In two recent articles, *Are Facebook and Google State Actors* (2019) and *Save the Constitution From Big Tech, Congressional Threats and Inducements Make Twitter and Facebook Censorship a free-speech violation* (2021),²⁹⁴ Jed Rubenfeld and Vivek Ramaswamy (“R & R”) make a compelling state actor case for Big Tech.²⁹⁵ They argue that using a combination of statutory inducements and regulatory threats, Congress has co-opted Silicon Valley to do what the government cannot directly accomplish under the Constitution through the back door by proxy.²⁹⁶

²⁹² See Dawn Carla Nunziato, *Protecting Free Speech and Due Process Values on Dominant Social Media Platforms*, 73 HST. L. J. 1255, 1260 (July 10, 2022); see generally, Adam Lamparello, *Social Media, State Action, and the First Amendment*, APPELLATE ADVOCACY BLOG (Aug. 21, 2021), (quoting Jed Rubenfeld, *Are Facebook and Google State Actors?*, LAWFARE (Nov. 4, 2019, 8:20 AM), <https://www.lawfaremedia.org/article/are-facebook-and-google-state-actors>), https://lawprofessors.typepad.com/appellate_advocacy/2021/08/social-media-state-action-and-the-first-amendment.html.

²⁹³ *Id.* at 1260-61.

²⁹⁴ Ramaswamy & Rubenfeld, *Save the Constitution From Big Tech*, *supra* note 46; Jed Rubenfeld, *Are Facebook and Google State Actors?*, *supra* note 28.

²⁹⁵ *Id.*

²⁹⁶ Ramaswamy & Rubenfeld, *Save the Constitution from Big Tech*, *supra* note 46; see also, William L. Kovacs, Opinion, *Big Tech is a state actor with constitutional obligations*, THE HILL (Mar. 30, 2021), <https://thehill.com/opinion/technology/545617-big-tech-is-a-state-actor-with-constitutional-obligations>; William L. Kovacs, Opinion, *Section 230’s unconstitutional delegation of power to Big Tech*, THE HILL (Jan. 1, 2021), <https://thehill.com/opinion/technology/535497-section-230s-unconstitutional-delegation-of-power-to-big-tech> (The authors argue in a duo of articles that Section 230 was an unconstitutional delegation of federal legislative authority to private parties, thus depriving speakers of constitutional due process guarantees when their objectionable speech is censored by Big Tech. Kovacs laments that Congress spectacularly muddled Section 230 and that the Supreme Court has not yet addressed it. He states that two critical questions must be answered: (1) whether private parties controlling the American public square can deprive citizens of their right to free speech; and (2) whether Congress can empower private parties to regulate

When governmental pressure is *combined* with a statutory immunity provision like Section 230, the result *must* be state action: *immunity plus pressure* has to trigger the Constitution's restraints.

In the words of Professor Rosenfeld: "A handful of internet mega-platforms, unsurpassed in wealth and power, exercise a degree of control over the content of public discourse that is unprecedented in history."²⁹⁷ Either Section 230 or congressional pressure alone might be sufficient to create state action, and the combination surely is.

The salient judicial history of the state actor doctrine in the digital era has been relatively consistent (lower courts have repeatedly ruled that Big Tech is not a state actor in cases largely reasoned on public forum and public-function doctrine grounds).²⁹⁸ Courts have largely concluded that Big Tech does not become a state actor *merely* by providing a forum for public expression.²⁹⁹

But this judicial history fails to address the issue of what happens when the government: (1) uses Big Tech to accomplish public activities it could not accomplish itself; (2) so acts without burdening Big Tech with the accompanying constitutional restrictions; and (3) provides Big Tech with a broad grant of statutory legal immunity to boot.³⁰⁰ Through this powerful grant of federal legal immunity, Congress encouraged private internet actors to do what it could not do.³⁰¹ This backdoor censorship limits the publication of otherwise protected speech that the government deems hateful, harmful, offensive, and/or undesirable.³⁰² In sum, Big Tech is squarely acting for and on behalf of the federal government. As

competitors? Kovacs identifies three possible outcomes: (1) Congress re-writes the statute; (2) the Supreme Court rules on the constitutionality of Section 230; or (3) courts provide due process rights for speakers deprived of free speech by state actors. Kovacs argues that Big Tech's actions are state actions reviewable by courts that can balance the property interests of private parties against speakers' free speech and due process rights. And when fundamental liberties such as free speech are involved, courts must provide hearings before the deprivation of such rights occurs. Thus, while litigants cannot seek monetary damages due to Big Tech's immunity from civil liability, they can seek a hearing for injunctive relief and discovery of why their speech is being censored before being silenced in the virtual public square.

²⁹⁷ Jed Rubenfeld, *Are Facebook and Google State Actors?*, *supra* note 28.

²⁹⁸ See, e.g., *Prager Univ.*, 951 F.3d at 997-98; *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S.802, 818 (2019).

²⁹⁹ *Id.*

³⁰⁰ Philip Hamburger, *supra* note 105; but see, Berin Szóka & Ari Cohn, *The Wall Street Journal Misreads Section 230 and the First Amendment*, LAWFARE (Feb. 3, 2021, 3:43 PM), <https://www.lawfaremedia.org/article/wall-street-journal-misreads-section-230-and-first-amendment>.

³⁰¹ See, e.g., Ramaswamy & Rubenfeld, *Save the Constitution from Big Tech*, *supra* at note 46; See also Nunziato, *supra* note 290, at 1261-69 (examining recent allegations of social media platform bias against conservative viewpoints).

³⁰² *Id.*

such, it should thus be treated as a state actor subject to First Amendment limits on its ability to censor protected speech on its internet platforms.

To illustrate their point, R & R propose a few simple yet sobering hypotheticals. First, assume a state wants to shut down its abortion clinics. Legislators can't just ban those clinics; that would likely be unconstitutional (although following the recent Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*,³⁰³ this area of the law is admittedly in a state of flux). So instead, the legislature passed the Childbirth Decency Act, immunizing against any legal liability individuals who barricade abortion clinics, blocking all access to them.

While one is not statutorily required to trespass or held legally liable in any way. When the barricading begins, would courts find any state action or decline constitutional analysis? Suppose further that Congress explicitly threatened private companies with punitive laws if they failed to act against abortion clinics. If those companies did as Congress demanded, they then were praised by Congress. Several cases indicate that this coercive pressure campaign might sufficiently turn Big Tech into a state actor entirely apart from Section 230.³⁰⁴

Second, assume Congress wants to review the emails of every Fortune 500 CEO. So, it enacts a statute immunizing from all legal liability any hackers who break into the CEOs' email files and transfer them to public databases.

Third, assume Congress wants to confiscate firearms from citizens and authorize and immunize all parties from liability.³⁰⁵ Further, assume this includes any non-governmental organizations hiring private security contractors to bust into people's homes to search for, seize, and destroy any guns they find there. Now, add to these hypotheticals a governmental campaign to coercively pressure private parties into conducting the state-preferred activity.

What about the government not only immunizing from liability private parties who barricade abortion clinics but then threatening private parties with adverse legal consequences if they don't? If these private parties, now immune from liability, do, in fact, barricade (i.e., act as Congress wants), then it is hard to imagine we would assert they are

³⁰³ 597 U.S. 215 (2022).

³⁰⁴ See *Writers Guild*, 609 F.2d at 360; *Huber v. Biden*, No. 21-CV-06580-EMC, 2022 WL 827248 (N.D. Cal. Mar. 18, 2022), *aff'd*, No. 22-15443, 2022 WL 17818543 (9th Cir. Dec. 20, 2022); *Berenson v. Twitter, Inc.*, No. C 21-09818 WHA, 2022 WL 1289049 (N.D. Cal. Apr. 29, 2022); *Hart v. Facebook, Inc.*, No. 22-cv-00737-CRB, 2022 WL 1427507 (N.D. Cal. May 5, 2022).

³⁰⁵ *Id.*

not state actors.

Fourth, assume Congress immunizes employers that break into their employees' homes to search for evidence of immigration law violations, threatening large employers with potential adverse regulatory action if they fail to engage in such searches. An American court could not fail to find state action in these circumstances. Without such a finding, it is abundantly clear that Congress could easily circumvent Americans' constitutional rights.

Under existing law, a strong argument exists that Big Tech is a state actor when it blocks what the government deems objectionable content. If lawmakers pass this form of far-reaching legal immunity, they could easily end-run nearly any constitutional right. Accordingly, statutory immunity plus governmental pressure to act must equal state action for Big Tech's content moderation policies.

4. Big Tech Censorship is Not a Partisan Issue.

Most social media censorship cases have predominantly involved conservative social media users who claim that the platforms target conservative content.³⁰⁶ However, liberal and progressive voices have encountered their own share of censorship during the past fifty years.³⁰⁷

For example, the American Civil Liberties Union championed many First Amendment cases that etched their mark on history during the cultural revolution of the 1960s and 1970s ("ACLU").³⁰⁸ Three landmark United States Supreme Court cases in which the ACLU fought

³⁰⁶ See Nunziato, *supra* note 291, at 1261-69 (examining recent allegations of social media platform bias against conservative viewpoints); See also, *Missouri v. Biden*, No. 3:22-CV-01213, 680 F. Supp. 3d 640, 2023 WL 4335270 (W.D. La. July 4, 2023) (issuing preliminary injunction, holding that States and social media users were likely to succeed on merits of their claim that White House officials violated First Amendment by pressuring and encouraging social media companies to suppress speech despite officials' contention that they were merely trying to stem spread of COVID-19 misinformation and virtually all speech suppressed was "conservative" speech) As discussed in more detail in this article, in *Murthy v. Biden*, the Supreme Court dismissed the *Missouri v. Biden*, plaintiffs' claims on the grounds that the plaintiffs lacked standing to seek a future injunction against the government defendants. 603 U.S. 43 (U.S. 2024). See also *O'Handley v. Weber*, 62 F.4th 1145 (9th Cir. 2023) (holding political commentator failed to plausibly allege California's Office of Election Cybersecurity's platform targeted conservative commentators and did not equally scrutinize liberal critics of the electoral process).

³⁰⁷ See, e.g., Carl Cannon, *Is Censorship a Partisan Issue?*, REAL CLEAR POLITICS (Sept. 22, 2023), https://www.realclearpolitics.com/real_clear_opinion_research/poll_is_censorship_a_partisan_issue_149790.html/.

³⁰⁸ ACLU, *History: The Age of Protest: A Banner Era for the First Amendment* (Sept. 1, 2010), <https://www.aclu.org/documents/aclu-history-age-protest-banner-era-first-amendment>.

against the suppression of liberal and progressive countercultural ideas include the following:

- *Tinker v. Des Moines* (1969) – The Court ruled that suspending public school students for wearing black armbands to protest the Vietnam War was unconstitutional because students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”³⁰⁹
- *Cohen v. California* (1971) – The Court ruled that the conviction of an anti-war protester for disturbing the peace because he wore a jacket with the words, “Fuck the Draft,” was unconstitutional; hence the government cannot prohibit speech just because it is “offensive.”³¹⁰
- *Miller v. California* (1973) – The Court ruled that, while art may be restricted where it violates the “contemporary community standards” for obscenity, “[t]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.”³¹¹

In 1977, and to underscore the importance of protecting speech for everyone – even speech that most persons would find highly offensive – the ACLU defended a Nazi group that wanted to march through the Chicago suburb of Skokie, where many Holocaust survivors lived.³¹²

Although the ACLU claims that this case cost it dearly because “members left in droves,” the ACLU explains that “to many, it was our finest hour, and it has come to represent our unwavering commitment to principle.”³¹³

The ACLU describes why it joined the free speech fight as follows: Not every case reached the Supreme Court, and many issues were fought in the lower courts and the court of public opinion as people began to appreciate the value of a society that respected, rather than repressed, free expression. Even more importantly, Americans began to understand that all our other constitutional rights are challenging to invoke without the First Amendment. How can one be informed about government misdeeds without a free press? How can one protest such misdeeds

³⁰⁹ *Tinker v. De Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 506 (1969).

³¹⁰ *Cohen v. California*, 403 U.S. 15, 18 (1971).

³¹¹ *Miller v. California*, 413 U.S. 15, 33-34 (1973).

³¹² *Nat'l Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977).

³¹³ ACLU, *Some Highlights* (ACLU website visited Sept. 25, 2023), <https://www.aclu.org/about/aclu-history#:~:text=1969%20%2D%20Protecting%20Free%20Speech,a%20major%20First%20Amendment%20victory.>

without the right to assemble freely? And how can one create or enjoy books, art, music, and films when censors have unrestricted authority to shut you down?³¹⁴

Debating the epistemological meaning of censorship in the context of First Amendment protections is beyond the scope of this article. However, the ACLU defines censorship as the suppression of offensive words, images, or ideas, and that censorship happens “whenever some people succeed in imposing their personal political or moral values on others.”³¹⁵

The ACLU explains why speech that offends us the most or is hostile to our beliefs deserves the same protection as other speech because the right to free speech is indivisible: How much we value the right of free speech is put to its severest test when the speaker is someone we disagree with most. Speech that deeply offends our morality or is hostile to our way of life warrants the same constitutional protection as other speech because the right of free speech is indivisible:

When we grant the government the power to suppress controversial ideas, we are all subject to censorship by the state. Since its founding in 1920, the ACLU has fought for the free expression of all ideas, popular or unpopular. Where racist, misogynist, homophobic, and transphobic speech is concerned, the ACLU believes that more speech — not less — is the answer most consistent with our constitutional values.³¹⁶

But, censorship by the government is unconstitutional. When the government suppresses controversial ideas, we are all vulnerable to state censorship, regardless of our ideology. Whether it’s a public school that is preventing students from wearing armbands, police officers arresting a protestor for wearing a jacket that says, “Fuck the Draft,” or the government pressuring Big Tech to modify or remove conservative content from social media platforms—government censorship undermines everyone’s First Amendment rights. As the ACLU has noted, without the First Amendment, all our other constitutional protections become more difficult to invoke.³¹⁷ The ACLU continues to fight for the

³¹⁴ ACLU, *History: The Age of Protest: A Banner Era for the First Amendment* (Sept. 1, 2010), <https://www.aclu.org/documents/aclu-history-age-protest-banner-era-first-amendment>.

³¹⁵ ACLU, *What is Censorship?* (Aug. 30, 2006), <https://www.aclu.org/documents/what-censorship>.

³¹⁶ ACLU, *Speech on Campus* (Dec. 31, 1994), <https://www.aclu.org/documents/speech-campus>.

³¹⁷ ACLU, *supra* note 313.

First Amendment rights of groups, even when it does not support a group's ideologies or beliefs.

The Supreme Court unanimously reinstates a jawboning case in Vullo. The ACLU recently represented the National Rifle Association (NRA) and served as co-counsel in a free speech case just decided by the United States Supreme Court in 2024 called *National Rifle Association v. Vullo*.³¹⁸ This case involves the NRA and Maria Vullo ("Vullo"), the former superintendent of the New York Department of Financial Services (DFS). Vullo recommended to banks and insurers that they should consider the "reputational risks" of working with the NRA in the wake of the 2018 Parkland, Florida, mass shootings.³¹⁹ After that, several banks and insurers either broke ties with the NRA or decided not to do business with the NRA. The NRA alleged that Vullo violated their First Amendment rights by pressuring regulated entities to disassociate from the NRA and other gun-promotion advocacy groups. The NRA claimed that Vullo threatened enforcement actions against those entities that refused to disassociate, thereby stifling the NRA's pro-gun advocacy. The NRA sued Vullo for violating its First Amendment and Equal Protection Rights.

The District Court for the Northern District of New York eventually dismissed all claims except the First Amendment claims, concluding that the NRA plausibly alleged that Vullo's actions could be interpreted as a veiled threat to regulated industries to disassociate with the NRA or risk DFS enforcement actions, and that material facts remained as to whether Vullo was protected by qualified immunity.³²⁰ Vullo appealed.

The Second Circuit Court of Appeals reversed the lower court, holding that Vullo's actions constituted permissible government speech and legitimate law enforcement, and not unconstitutional coercion. It further held that, even if the complaint stated a First Amendment violation, Vullo was nevertheless entitled to qualified immunity as the law was not clearly established. The Second Circuit remanded the case back to the District Court with directions to enter judgment for *Vullo*.³²¹

In 2023, The Supreme Court granted the NRA's petition for certiorari as to the following issue: Does the First Amendment allow a government regulator to threaten regulated entities with adverse

³¹⁸ *Nat'l Rifle Assoc. of Am. v. Vullo*, 602 U.S. 175 (U.S. 2024).

³¹⁹ *Id.* Vullo's boss, Governor Cuomo, also urged businesses to disassociate with the NRA to put the organization "into financial jeopardy" and "shut them down." App. 21 (Aug. 3, 2018, tweet).

³²⁰ *Nat'l Rifle Assoc. of Am. v. Cuomo*, 525 F. Supp. 3d 382 (N.D.N.Y. 2021).

³²¹ *Nat'l Rifle Assoc. of Am. v. Vullo*, 49 F.4th 700, 721 (2d Cir. 2022).

regulatory actions if they do business with a controversial speaker as a consequence of: (a) the government’s hostility to the speaker’s viewpoint; or (b) a perceived “backlash” against the speaker’s advocacy?³²²In *Vullo*, the Justices determined whether a New York government official violated the First Amendment by pressuring banks and insurers to cut ties with the NRA. In 2024, a unanimous Supreme Court vacated the Second Circuit judgment, holding that the NRA plausibly alleged that Vullo violated the First Amendment by coercing DFS-regulated entities to cease their NRA business relationships in order to punish or suppress the NRA’s advocacy. Writing for the unanimous Court, Justice Sotomayor states: “Ultimately, *Bantam Books* stands for the principle that a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf.”³²³ To clarify, later in the opinion she further states: “The takeaway is that the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech, directly or (as alleged here) through private intermediaries.”³²⁴

The ACLU agreed to act as co-counsel for the NRA in *Vullo* because “public officials should not be allowed to abuse the powers of the office to blacklist an organization just because they oppose an organization’s political views.”³²⁵ The authors commend the ACLU for agreeing to represent the NRA in this matter.

In *Murthy v. Missouri*, and in sharp contrast to *Vullo*, the Supreme Court punted on an opportunity to address government jawboning when Big Tech is coerced by government officials to censor content posted by users.³²⁶ The *Murthy* plaintiffs claimed that the Biden Administration and CDC routinely jawboned social media platforms to censor their COVID-19 related posts in violation of their First Amendment rights.³²⁷ The plaintiffs included the states of Louisiana and Missouri, and five (5) individual social media users. The social media

³²² *Nat’l Rifle Assoc. of Am. v. Vullo*, No. 22-842, 2023 WL 7266997 (U.S. Nov. 3, 2023).

³²³ *Id.* at 190.

³²⁴ *Id.* at 198.

³²⁵ *The A.C.L.U. Has A New Client: The National Rifle Association*, N.Y. TIMES (Dec. 9, 2023); [Nytimes.com/2023/12/09/us/aclu-nra-scotus-free-speech.html/](https://www.nytimes.com/2023/12/09/us/aclu-nra-scotus-free-speech.html/).

³²⁶ 603 U.S. 43 (2024). As described earlier in this article, the government defendants in *Missouri v. Biden* petitioned for a *writ of certiorari* to the Supreme Court. On October 20, 2023, the Supreme Court granted the petition. For the litigation history of *Missouri v. Biden* that evolved into the Supreme Court’s *Murthy v. Missouri* decision, see *Missouri v. Biden supra* at note 122.

³²⁷ *Id.*

platforms who allegedly served as “intermediaries” to the Government defendants included Facebook, Twitter, and LinkedIn.

The COVID-19 outbreak in 2020 set the censorship stage for the *Murthy* plaintiffs’ claims. When COVID-19 emerged as a global pandemic, social media platforms announced that they would enforce longstanding content-moderation policies against users who posted “false” or “misleading” content about the pandemic and also about the 2020 election season.³²⁸ Various federal officials – including the White House - regularly spoke with these social media platforms and called on them both publicly and privately to address “vaccine misinformation.”³²⁹ For example, Surgeon General Vivek Murthy issued a public health advisory encouraging platforms to prevent COVID-19 “misinformation” from taking hold.³³⁰ Similarly, the Centers for Disease Control and Prevention (“CDC”) alerted the platforms about COVID-19 “misinformation trends” and even flagged example posts.³³¹ Even the FBI and Cybersecurity and Infrastructure Security Agency communicated directly with the platforms about election-related “misinformation.”³³² The five (5) individual plaintiffs were social media users who claimed that this orchestrated full-court press of government pressure on platforms resulted in the unconstitutional censorship of the plaintiffs’ posts, which were labeled as “misinformation” and suppressed by the platforms.³³³ Three (3) of the individual plaintiffs were doctors. One of the plaintiffs – Jill Hines – worked as a healthcare activist and co-directed “Health Freedom Louisiana,” a group that advocated against COVID-19 mask and vaccine mandates.³³⁴

After extensive discovery, the United States District Court for the Western District of Louisiana issued a preliminary injunction against the government.³³⁵ The Fifth Circuit affirmed in part and reversed in part, holding that the state plaintiffs and the individual plaintiffs had Article III standing to seek injunctive relief.³³⁶ On the merits, the Fifth Circuit held that the Government entities and officials, “by “coerc[ing]” or “significantly encourage[ing]” the platforms’ moderation decisions, the social media platforms became state actors acting on behalf of the

³²⁸ *Id.* at 50-51.

³²⁹ *Id.* at 51-53.

³³⁰ *Id.* at 52.

³³¹ *Id.* at 53.

³³² *Id.* at 53-54.

³³³ *Id.* at 53.

³³⁴ *Id.* at 65.

³³⁵ *Id.* at 54.

³³⁶ *Id.*

Government and censoring the plaintiffs’ speech became a “state action” that violated the plaintiffs’ First Amendment rights.³³⁷ The Fifth Circuit modified the District Court’s original injunction to state that the Government defendants would not coerce or significantly encourage social media companies to suppress protected speech on their platforms.³³⁸

As a side note – and before returning to the Supreme Court’s *Murthy* decision – it’s worth noting (to compare and contrast) that on August 26, 2024, Mark Zuckerberg wrote a letter to the Congressional Judiciary Committee in which he confirmed (among other things) the following:

In 2021, senior officials from the Biden Administration, including the White House, repeatedly pressured our teams for months to censor certain COVID-19 content, including humor and satire, and expressed a lot of frustration with our teams when we didn’t agree. Ultimately, it was our decision whether or not to take content down, and we own our decisions, including COVID-19-related changes we made to our enforcement in the wake of this pressure. I believe the government pressure was wrong, and I regret that we were not more outspoken about it. I also think we made some choices that, with the benefit of hindsight and new information, we wouldn’t make today. Like I said to our teams at the time, I feel strongly that we should not compromise our content standards from any Administration in either direction – and we’re ready to push back if something like this happens again.³³⁹

Unfortunately – and during COVID-19 – Facebook and other social media platforms did not “push back.” However, with hindsight and the benefit of Zuckerberg’s own admission to Congress – it seems like the *Murthy* plaintiffs had a point when they brought their respective claims for injunctive relief against the government defendants – the government pressured social media, the government pressure was wrong, and the government pressure caused them to suffer harm.

Nevertheless, the Supreme Court outright rejected the *Murthy* plaintiffs’ claims, holding that neither the state nor individual plaintiffs established Article III standing to seek an injunction against any of the

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ See Letter from Mark Zuckerberg, Chief Executive Officer of Facebook, to the Congressional Judiciary Committee (Aug. 26, 2024) (attached to this article as Appendix I).

Government defendants for two main reasons.³⁴⁰ First, the plaintiffs could not demonstrate “traceability” for their past injuries and failed to show that “a particular defendant pressured a particular platform to censor a particular topic before the platform suppressed a particular speech on that topic.”³⁴¹ Because it is a “bedrock principle” that a federal court cannot redress “injury that results from the independent action of some third party not before the court” (i.e. the social media platforms), the Court held that although the Government defendants played a role in at least some of the platforms’ moderation choice, the platforms had independent incentives to moderate content and often exercised their judgment.³⁴² In short, as for “direct censorship injuries,” the plaintiffs failed to demonstrate that each platform acted due to Government coercion rather than its own judgment.³⁴³ .³⁴⁴ Second, the plaintiffs failed to link their past social media restrictions to the Government defendants’ communications with the social media platforms.³⁴⁵ Third, because the plaintiffs sought “forward-looking” injunctive relief, they had to show that the third-party platforms would “likely react in predictable ways” to the government’s conduct in the future and show that they would suffer a “real and immediate threat of repeated injury.”³⁴⁶ In other words, to merit standing, the plaintiffs had to show that the platforms would likely censor them again in the future as a result of government “jawboning” or pressure.

Even if past occurrence of harm showed a likelihood of similar future injury,³⁴⁷ the Court noted that because of the “lack of specific causation findings with respect to any discrete instance of content moderation,” the plaintiffs would have to “essentially ... build [their] case from scratch” and demonstrate that government pressure resulted in a platform’s decision to censor their type of speech.³⁴⁸ The Court rejected the Fifth Circuit’s more general standing approach which “attribute[ed] *every* platform decision at least in part” to the government based upon broad views of how the administration and the platforms interacted.³⁴⁹ Because none of the plaintiffs could show that they would likely suffer future harm from government jawboning, the plaintiffs failed to convince

³⁴⁰ *Murthy*, 603 U.S. at 56.

³⁴¹ *Id.* at 44.

³⁴² *Id.*, citing *Simon v. Eastern Ky. Welfare Rights Org.* 426 U.S. 26, 41-42 (1976).

³⁴³ *Id.* at 45.

³⁴⁴ *Id.* at 45.

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 58.

³⁴⁷ *Id.* at 43.

³⁴⁸ *Id.* at 59.

³⁴⁹ *Id.* at 60.

the Court that they had standing to seek injunctive relief. The Court noted that although the Government defendants played a role in at least some of the platforms' moderation choice, the platforms had independent incentives to moderate content and often exercised their own judgement.³⁵⁰ The Court concluded:

The plaintiffs, without any concrete link between their injuries and the defendants' conduct, ask us to conduct a review of the years-long communications between dozens of federal officials, across different agencies, with different social-media platforms, about different topics. This Court's standing doctrine prevents us from "exercise[ing such] general legal oversight" of the other branches of Government.³⁵¹

And with that, the Court reversed the Fifth Circuit decision and remanded the cases for further proceedings.³⁵²

In his lengthy and impassioned *Murthy* dissent, Justice Alito calls out the Majority for punting the First Amendment issues big time.³⁵³ Joined in his dissent by Justices Thomas and Gorsuch, Alito urges that *Murthy* represented "one of the most important free speech cases" to reach the Supreme Court in years. He notes that "[f]reedom of speech serves many valuable purposes, but its most important role is protection of speech that ... advances humanity's store of knowledge, thought, and expressions in fields such as science, medicine, history, the social sciences, philosophy, and the arts."³⁵⁴ He further notes that the plaintiffs' speech about COVID-19 "falls squarely into those categories:"

Our country's response to the COVID-19 pandemic was and remains a matter of enormous medical, social, political, geopolitical, and economic importance, and our dedication to a free marketplace of ideas demands that dissenting view on such matters be allowed. I assume that a fair portion of what social media users had to say about COVID-19 and the pandemic was of little lasting value. Some was undoubtedly untrue or misleading, and some may have been downright dangerous. But we now know that valuable speech was also suppressed. That is what inevitably happens when entry to the

³⁵⁰ *Id.* at 61.

³⁵¹ *Id.* at 76, citing *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423-24 (2021).

³⁵² *Id.*

³⁵³ *Id.* at 77-108 (ALITO, J., dissenting, joined in his dissent by THOMAS, J. and GORSUCH, J.).

³⁵⁴ *Id.* at 77, citing *United States v. Alvarez*, 567 U.S. 709, 751 (2012) (ALITO, J., dissenting).

marketplace of ideas is restricted.³⁵⁵

Alito further reminds us that purely private entities like newspapers are not subject to the First Amendment and may therefore publish or decline to publish whatever they wish. But citing *Vullo*, Alito stresses that government officials may not coerce private entities into suppressing speech.³⁵⁶

Because the “voluminous” record before the Court was “vast” and contained evidence of communications between many different government actors and a variety of internet platforms, and how these interactions impacted the plaintiffs, Alito chose to focus on (a) those federal officials that worked in the White House or the Surgeon General’s Office; (b) on just Facebook as one of the most influential social media platforms; and (c) on plaintiff Jill Hines “because if any of the plaintiffs has standing, we are obligated to reach the merits of the case.”³⁵⁷

Alito points out that for months in 2021 and 2022, a “coterie of officials at the highest levels of the Federal Government continuously harried and implicitly threatened Facebook with potentially crippling consequences if it did not comply with their wishes about the suppression of certain COVID-19-related speech” and not surprisingly, “Facebook repeatedly yielded.”³⁵⁸ As a direct result of the Biden White House’s and CDC’s harried and threatening coercion of Facebook, plaintiff Jill Hines was not only “indisputably injured,” she was “threatened with more of the same.”³⁵⁹ These past and threatened future injuries were caused by and traceable to Facebook’s censorship of Hines’ posts that the Biden White House and CDC coerced, and the injunctive relief that Hines sought was an available and suitable remedy.³⁶⁰ Therefore, Hines had more than sufficient evidence to establish standing to sue, and the Court was obligated to tackle the free speech issue that Hines’s case presented.³⁶¹ “The Court, however, shirks that duty and thus permits the successful campaign of coercion in this case to stand as an attractive model for future officials who want to control what the people say, hear, and think.”³⁶²

Concerning the art of jawboning, Alito notes that what the Biden

³⁵⁵ *Murthy*, 603 U.S. at 77-78.

³⁵⁶ *Id.*, citing *Vullo*, 602 U.S. 175.

³⁵⁷ *Id.* at 78-79, citing *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 52, n.2 (2006).

³⁵⁸ *Id.* at 79.

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 79-80.

³⁶¹ *Id.* at 79.

³⁶² *Id.*

Administration and CDC did to Hines may have been “more subtle than the ham-handed censorship found to be unconstitutional in *Vullo*, but it was no less coercive” and “because of the perpetrators’ high positions, it was even more dangerous.”³⁶³ He blasted the coercion as blatantly unconstitutional, cautioning that “the country may come to regret this Court’s failure to say so.”³⁶⁴ He further cautions that if government officials read the *Murthy* decision together with *Vullo*, they will get the following message: “If a coercive campaign is carried out with enough sophistication, it may get by. . . That is not a message this Court should send.”³⁶⁵

For the next fifteen (15) pages of his dissent (which exceeds the actual length of *Murthy*’s majority opinion), Alito recounts in detail what the Biden White House and CDC actually did when considering the coercive impact of their conduct, and urges that we keep two prominent facts in mind: (1) Social media has become a leading source of news for many Americans, and with the decline of other media, its importance may grow; and (2) internet platforms, although rich and powerful, are at the same time far more vulnerable to Government pressure than other news sources:

If a President dislikes a particular newspaper, he (fortunately) lacks the ability to put the paper out of business. But for Facebook and many other social media platforms, the situation is fundamentally different. They are critically dependent on the protection provided by § 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230, which shields them from civil liability for content they spread. They are vulnerable to antitrust actions; indeed, Facebook CEO Mark Zuckerberg has described a potential antitrust lawsuit as an ‘existential’ threat to his company. And because their substantial overseas operations may be subjected to tough regulation in the European Union and other foreign jurisdictions, they rely on the Federal Government’s diplomatic efforts to protect their interests.

For these and other reasons, internet platforms have a powerful incentive to please important federal officials, and the record in this case shows that high-ranking officials skillfully exploited Facebook’s vulnerability. When Facebook did not heed their requests as quickly or as fully as the officials wanted, the platform was publicly accused of “killing people” and subtly threatened with retaliation.

³⁶³ *Id.* at 79-80.

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 80.

Not surprisingly these efforts bore fruit. Facebook adopted new rules that better conformed to the officials' wishes, and many users who expressed disapproved views about the pandemic or COVID-19 vaccines were "deplatformed" or otherwise injured.³⁶⁶

Alito also addresses why plaintiff Jill Hines had standing because she showed that she (1) was imminently threatened with an injury in fact (2) that was traceable to the defendants and (3) that could be redressed by the Court.³⁶⁷ Alito also addresses the merits of Jill Hines's First Amendment claims. Relying upon the principles recognized in *Bantam Books* and *Vullo* which require a court to distinguish between permissible persuasion and unconstitutional coercion (and characterizing the alleged coercive conduct in *Vullo* as "blunt"), Alito evaluates three (3) leading factors articulated in *Vullo* that help to make this distinction: (1) The authority of the government officials who are alleged to have engaged in coercion; (2) the nature of statements made by those officials; and (3) the reactions of the third party alleged to have been coerced.³⁶⁸ In Jill Hines' case, all three factors point to coercion.³⁶⁹ First, high-ranking White House officials and the Surgeon General have the ability to not only influence the President, but can also "inflict potentially fatal damage to social media platforms like Facebook."³⁷⁰ Consequently, the White House and CDC possessed the authority to exert enormous coercive pressure.³⁷¹ Second, officials' communications with Facebook "possess all the hallmarks of coercion" because many of the White House emails were "phrased virtually as orders," and officials conducted frequent follow-ups to ensure that Facebook understood their messages as such.³⁷² Noting that the officials' demands were coupled with "thinly veiled threats" of legal consequences, the "totality of this record – constant haranguing, dozens of demands for compliance, and references to potential consequences – evidence 'a scheme of state censorship.'"³⁷³ Third, Facebook's responses to the officials' persistent inquiries, criticism and threats show that the platform perceived the Biden White House and CDC officials' statements as something more

³⁶⁶ *Id.* at 80-81.

³⁶⁷ *Id.* at 91-98.

³⁶⁸ *Id.* at 99-100, citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963), and *Vullo*, 602 U.S. at 187-91.

³⁶⁹ *Murthy*, 603 U.S. at 100.

³⁷⁰ *Id.*

³⁷¹ *Id.* at 101.

³⁷² *Id.* at 102 (internal quotations omitted).

³⁷³ *Id.* at 103-04, citing *Bantam*, 372 U.S. at 72.

than recommendations, and internal Facebook emails “paint a clear picture of subservience.”³⁷⁴ Facebook’s “quavering responses to those demands show that it felt a strong need to yield.”³⁷⁵ For these reasons, Alito would hold that Jill Hines would be likely to prevail on the claim that the White House coerced Facebook into censoring her speech.³⁷⁶

In short, Alito admonishes the Majority for blowing an opportunity to take a harder look at the First Amendment ramifications when the government jawbones Big Tech, which Alito characterizes as especially vulnerable to jawboning because they depend on Section 230 immunity protections and face potential antitrust liability. The Majority did acknowledge the complexity of the *Murthy* plaintiffs’ claims and the difficulty plaintiffs likely faced attempting to connect the factual dots to support the necessary causation findings with respect to content moderation due to government jawboning.³⁷⁷ Nevertheless, Alito seems to urge that it is precisely the case’s undeniable complexity which makes the Majority’s decision to punt on the First Amendment issues all the more troublesome: “Officials who read today’s decision together with *Vullo* will get the message. If a coercive campaign is carried out with enough sophistication, it may get by.”³⁷⁸

The Supreme Court decided *Vullo*, *Murthy* and *Moody* during its 2024 term. Thanks to *Vullo*, we now have some clarity from the Court that government officials may not coerce private entities into suppressing speech, and we have at least three (3) leading factors from *Vullo* to help us distinguish between permissible persuasion and unconstitutional coercion: (1) the authority of the government officials who are alleged to have engaged in coercion, (2) the nature of statements made by those officials, and (3) the reactions of the third party alleged to have been coerced.³⁷⁹ However, the *Murthy* Majority chose not to evaluate the coerciveness of the government defendants’ actions. As detailed in page after page of Justice Alito’s *Murthy* dissent, the sheer volume and complexity of a factual record that the *Murthy* claimants are now required to develop to demonstrate Article III standing – coupled with the sheer sophistication of the government defendants’ coercive tactics with social media platforms will make it a virtually insurmountable challenge for claimants like those in *Murthy* to demonstrate

³⁷⁴ *Id.* at 107.

³⁷⁵ *Id.* at 108.

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 60.

³⁷⁸ *Id.* at 80.

³⁷⁹ *Id.* at 99-100, citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963), and *Vullo*, 602 U.S. at 187-91.

unconstitutional coercion – let alone standing. As Justice Alito warns, “[i]f a coercive campaign is carried out with enough sophistication, it may get by.”³⁸⁰

If the Court’s position in *Murthy* “feels” familiar to its later 2024 decision in *Moody* – which we introduced at the beginning of our article – that is because the Court punted the ball again in *Moody* as well. In *Moody*, the Court avoided the opportunity to determine whether censorship on social media platforms merits some type of regulatory oversight, even though both the Florida and Texas social media moderation statutes reference the need for common carrier-type regulations to oversee platforms that have become Big Tech giants. Like *Murthy*, the Court punted and sent the cases back to the lower courts to sort out. As we discuss in more detail later in this article, the *Moody* Court reversed and remanded with instructions that the lower courts (1) determine “the full range of activities” that the Texas and Florida laws cover; and (2) at least in the Fifth Circuit, ensure that NetChoice develop the factual record to support its request for facial injunctive relief against the Texas statute.³⁸¹

Just as *Murthy* makes challenging of “as applied” government censorship on social media more difficult because of onerous standing requirements, *Moody* makes it almost impossible to facially challenge the constitutionality of state statutes that seek to regulate Big Tech censorship. Neither the *Murthy* nor *Moody* opinions discuss whether Big Tech can censor user content at the government’s bequest. In fact, as discussed below, the *Moody* Court seems to assume that Big Tech now operates as a publisher with near-absolute editorial discretion to curate the content of its platform – an assumption which flies in the face of Section 230’s stated purpose for treating social media differently than publishers and granting social media sweeping immunities. Although times may have changed since Section 230’s enactment – at some point the judiciary needs to decide whether Big Tech has now evolved into becoming “publishers” that make their own editorial decisions about content – and therefore no longer merit Section 230’s immunity protections.

Meanwhile, *Murthy* and *Moody* seem to fit into the Supreme Court’s minimalist trend to avoid addressing important constitutional

³⁸⁰ *Id.* at 80.

³⁸¹ *Moody*, 603 U.S. at 708.

questions about Section 230.³⁸² Consequently, although everyone may agree that we should value and protect the freedom of speech, it remains unclear to the average social media user whose right to speak merits protection: Where do we draw the line between Big Tech’s First Amendment rights versus those of its users? Especially when state actors have unabashedly influenced how Big Tech curates its content? The uncertainty about where to draw the line – especially after *Murthy* and *Moody* – perpetuates a user’s tendency to self-censor rather than face the consequences of shadow banning, cancel culture, doxxing, or suspension from a platform. As the Supreme Court itself noted in *Grayned v. City of Rockford*, “[u]ncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone... than if the boundaries of the forbidden areas were clearly marked.’”³⁸³

Let’s face it: when it comes to permissible censorship on Big Tech platforms, the boundaries are far from clearly marked. Uncertainty persists. And users have no recourse for holding the government accountable to the extent that it meddles in how Big Tech manages its content.

Hopefully soon, the judiciary and the legislature will find better ways to clarify the “state actor” concept, especially in terms of when Big Tech acts on behalf of the government in censoring the content of online users.³⁸⁴

5. Examples of government entanglement.

a.) US intelligence community collusion?

The infamous Hunter Biden laptop. A profoundly

³⁸² See Matthew D. Bunker & Emily Erickson, *Toxic Minimalism on the “Yolo” Court: The Supreme Court’s Dangerous Muddle in First Amendment And Speech-Adjacent Law*, 47 UC LAW SF COMM’N & ENT. L.J. 51 (2024) (exploring how minimalism – in both case selection and judicial output – can be particularly harmful in the context of First Amendment and speech-related cases).

³⁸³ 408 U.S. 104, 109 (1972) (citations omitted).

³⁸⁴ See generally, Derek E. Bambauer, *The Jawboning Cases End with a Bang Disguised by a Whimper*, 2024 CATO SUP. CT. REV. 157 (January 01, 2024) (SSRN abstract), University of Florida Levin College of Law Research Paper SSRN: <https://ssrn.com/abstract=5044415> (“Government actors at all levels have increasingly deployed this tactic to pressure Internet platforms to suppress disfavored speech. Internet jawboning debuted at the Supreme Court in two cases (*National Rifle Association of America v. Vullo* and *Murthy v. Missouri*) in 2023. Although the Court disposed of both cases on procedural and standing grounds, rather than offering a new methodology for evaluating jawboning, the opinions offer examples of what a successful jawboning claim looks like and what an unsuccessful claim lacks. Thus, jawboning as a species of First Amendment violation is alive and well.”).

concerning story is the New York Times article (followed by articles from the Washington Post and CNN, and so on), which belatedly confirmed the authenticity of the Hunter Biden laptop content.³⁸⁵ This story was first detailed in a New York Post (“NYP”) story³⁸⁶ breaking two weeks before the 2020 presidential election.³⁸⁷ The NYP is the nation’s oldest continuously published newspaper, founded in 1801 by Alexander Hamilton.

On October 14, 2020, Big Tech collectively blocked the NYP’s blockbuster story about Hunter Biden’s laptop, and Big Tech immediately locked the NYP’s entire Twitter account (leading to the other prominent social media outlets doing likewise).³⁸⁸ Twitter left it locked for two weeks, claimed the NYP story might be hacked materials, stated the story was unsubstantiated, “potentially harmful,” and “unsafe,” and labeled it “disinformation.”³⁸⁹

Glenn Greenwald is an independent and non-partisan reporter, constitutional lawyer, and founder of *The Intercept*.³⁹⁰ According to Greenwald, Big Tech and other media got away with calling the story “misinformation” and “disinformation” long enough to accomplish their ultimate goal.³⁹¹ That was getting Joe Biden elected President.

The New York Post began publishing a series of reports about the business dealings of the Democratic frontrunner, Joe Biden, and his son, Hunter, in countries in which Biden, as Vice President, wielded considerable influence (including Ukraine and China) and would again if elected president. The backlash against this reporting was immediate and intense, leading to suppression of the story by U.S. corporate media outlets and leading Silicon Valley monopolies. The disinformation campaign against this reporting was led by the CIA’s all-but-official

³⁸⁵ Michael S. Schmidt, Katie Benner & Kenneth P. Vogel, *Hunter Biden Paid Tax Bill, but Broad Federal Investigation Continues*, N.Y. TIMES (Mar. 16, 2022), <https://www.nytimes.com/2022/03/16/us/politics/hunter-biden-tax-bill-investigation.html>.

³⁸⁶ Emma-Jo Morris & Gabrielle Fonrouge, *Smoking-Gun Email Reveals How Hunter Biden Introduced Ukrainian Businessman to VP Dad*, N.Y. POST (Oct. 14, 2020, 5:00 A.M.), <https://nypost.com/2020/10/14/email-reveals-how-hunter-biden-introduced-ukrainian-biz-man-to-dad/>.

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *The Intercept* is a non-profit online news organization founded by Glenn Greenwald, Jeremy Scahill, and Laura Poitras, and funded by eBay co-founder Pierre Omidyar. Its editor is Betsy Reed. It also publishes four podcasts: *Intercepted*, *Deconstructed*, *Murderville GA*, and *Somebody*.

³⁹¹ *Id.*

spokesperson Natasha Bertrand (then of *Politico*, now with CNN),³⁹² whose article on October 19 appeared in *Politico* under this headline: “*Hunter Biden story is Russian disinfo, dozens of former intel officials say . . .*”³⁹³ On October 19, 2020, a few weeks before the 2020 election, the notorious open letter penned by 51 former intelligence officials (“51 Letter”) was published by *Politico*, calling into question and essentially discrediting the authenticity of the Hunter Biden Laptop and claiming it “has all the classic earmarks of a Russian information operation.”

In June 2024, the Weaponization Committee released a scathing investigatory report into the 51 Letter, concluding the intelligence officials engaged in a “blatant political operation” and colluded with the Biden campaign to mislead the American voters and potentially change the outcome of a presidential election.³⁹⁴

The Twitter files dump and subsequent admissions by *The New York Times* were then quickly followed by several other mainstream

³⁹² Natasha Bertrand, *Hunter Biden Story Is Russian Disinfo, Dozens of Former Intel Officials Say*, POLITICO (Oct. 19, 2020, 10:30 PM), <https://www.politico.com/news/2020/10/19/hunter-biden-story-russian-disinfo-430276>.

³⁹³ *Id.*; see generally, Glenn Greenwald, *The NYT Now Admits the Biden Laptop – Falsely Called “Russian Disinformation – Is Authentic*, GREENWALD (Mar. 17, 2022), <https://greenwald.substack.com/p/the-nyt-now-admits-the-biden-laptop?s=r>; <https://twitchy.com/dougp-3137/2022/03/19/glenn-greenwald-thread-shreds-medias-journalistic-malpractice-over-the-hunter-biden-laptop-story/>; see also, Glenn Greenwald, *Facebook and Twitter Cross a Line Far More Dangerous Than What They Censor*, THE INTERCEPT (Oct. 15, 2020, 7:52 PM), <https://theintercept.com/2020/10/15/facebook-and-twitter-cross-a-line-far-more-dangerous-than-what-they-censor/>. In June 2024 in Hunter Biden’s criminal gun charges trial, Dept. of Justice Special Counsel David Weiss introduced his infamous laptop data, held by the FBI for several years before this, into evidence as authentic. See Lucien Bruggeman, *4 Big Takeaways from 1st Day of Testimony in Hunter Biden’s Gun Trial*, ABC NEWS (June 4, 2024), <https://abcnews.go.com/US/4-big-takeaways-1st-day-testimony-hunter-bidens/story?id=110830830>; see generally, Andrew Rice & Olivia Nuzzi, *The Sordid Saga Of Hunter Biden’s Laptop: The Most Invasive Data Breach Imaginable Is A Political Scandal Democrats Can’t Just Wish Away*, N.Y. MAG. (Sept. 12, 2022), <https://nymag.com/intelligencer/article/hunter-biden-laptop-investigation.html>.

³⁹⁴ Second Interim Joint Staff Report of the Committee on the Judiciary, Select Subcommittee on the Weaponization of the Federal Government, and Permanent Select Committee on Intelligence, U.S. House of Representatives, *The Intelligence Community 51: How Cia Contractors Colluded With The Biden Campaign To Mislead American Voters* (June 25, 2024), chrome-extension://efaidnbmnnnibpcajpcgglefindmkaj/https://intelligence.house.gov/uploadedfiles/the_intelligence_community_51-how_cia_contractors_colluded_with_the_biden_campaign_to_mislead_a_merican_voters.pdf; see also, U.S. Sen. Lindsey Graham (Nov. 19, 2024) (On November 19, 2024, just over 4 years after the 51 Letter, U.S. Senator Lindsay Graham, Ranking Member of the Senate Judiciary Committee, penned an open letter to the 51 signers of this letter recounting the facts and evidence around the laptop at the time they signed the letter and what we have learned since then), chrome-extension://efaidnbmnnnibpcajpcgglefindmkaj/https://www.judiciary.senate.gov/imo/media/doc/letter_to_51_intelligence_officials.pdf.

media outlets coming forward.³⁹⁵ They all belatedly revealed that Hunter Biden’s laptop hard drive archive and its many emails and documents are in fact real and authentic.³⁹⁶ This was then further confirmed by Special Counsel David Weiss introducing this as evidence in Hunter Biden’s 2024 criminal gun trial.³⁹⁷

This series of events suggests to many that the country’s most established, trusted, and influential media institutions perpetrated a gigantic and deliberate fraud, or at least reckless indifference to the truth, which may have impacted the outcome of a presidential election.³⁹⁸

As discussed earlier, this is not a partisan issue. What matters far more than the interest level of various partisan factions is the core truths revealed by this scandalous spectacle. It has brought into sharp relief the arguably fragile and precarious state of both our representative democracy and the role of the seemingly uncurious press (i.e., the fourth estate) as a crucial check on our government (i.e., the first three estates).³⁹⁹

b.) Executive Branch jawboning, encouragement, and threats to Big Tech.

The Hydroxychloroquine–Ivermectin Dr. Fauci-Big Tech Scandal. In his recent 2021 bestselling blockbuster book *The Real Anthony Fauci: Bill Gates, Big Pharma, and the Global War on Democracy and Public Health*,⁴⁰⁰ Kennedy family scion and former Democratic party stalwart Robert F. Kennedy, Jr. (“RFK”) provided a scathing post-mortem indictment of the American governmental response to the COVID pandemic. RFK painstakingly sourced and exhaustively researched his subject. He includes credible (some Nobel Prize-winning) medical and science professionals attesting to its accuracy and integrity and offers a damning recounting of the American

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ In June 2024 in Hunter Biden’s criminal gun charges trial, Dept. of Justice Special Counsel David Weiss introduced his infamous laptop data, held by the FBI for several years before this, into evidence as authentic. See Lucien Bruggeman, *supra* note 391;; see generally, Andrew Rice and Olivia Nuzzi, *supra* note 391.

³⁹⁸ *Id.*

³⁹⁹ Jim Clapper et al., *Public Statement on the Hunter Biden Emails*, POLITICO (Oct. 19, 2020), <https://www.politico.com/f/?id=00000175-4393-d7aa-af77-579f9b330000> (regarding the letter from 50 intelligence officials that the Hunter Biden laptop bears all the hallmarks of a Russian intelligence operation).

⁴⁰⁰ Robert F. Kennedy, Jr., *THE REAL ANTHONY FAUCI: BILL GATES, BIG PHARMA, AND THE GLOBAL WAR ON DEMOCRACY AND PUBLIC HEALTH* (Skyhorse Children’s Health Defense 2021).

response. In a twist of irony, RFK has now been nominated by Trump to be Secretary of Health and Human Services in Trump's new administration in 2025.

RFK connects the dots to retrace what he finds is a corrupt and greed-driven conspiracy to deep-six a trove of credible and encouraging evidence of safe, cheap, and widely available early-stage COVID treatments, with therapeutics that had long been safely used to treat other medical conditions such as Hydroxychloroquine⁴⁰¹ and Ivermectin.⁴⁰² There has been heated disagreement with reputable experts on all sides, as is common with any such claims and hypotheses subjected to the scientific method, about the effectiveness of previously approved, inexpensive, and widely available therapeutics to treat COVID-19.⁴⁰³ RFK argues this official governmental campaign to debunk, discredit, and ultimately ban these existing treatments for COVID-19 was done to instead promote and profit from giant pharmaceutical firms' ("Big Pharma") newer, expensive, and experimental vaccines and treatments (e.g., Remdesivir).⁴⁰⁴

RFK explains how the executive branch colluded with Big Pharma, Big Tech, Bill Gates, and non-governmental organizations, such as the World Health Organization, to generate hundreds of billions of dollars in

⁴⁰¹ Hydroxychloroquine, sold under the brand name Plaquenil, among others, and is a medication used to prevent and treat malaria in areas where malaria remains sensitive to chloroquine. Other uses include the treatment of rheumatoid arthritis, lupus, and porphyria cutanea tarda. *See also*, NAOMI WOLF, *BODIES OF OTHERS: THE NEW AUTHORITARIANS, COVID-19 AND THE WAR AGAINST THE HUMAN* (All Seasons Press 2022) (Dr. Naomi Wolf, a former Hillary Clinton political advisor, is an important voice in this area. She argues in this book that powerful forces, from Big Tech and Big Pharma to the C.C.P. and our oligarchical elites, seized upon two years of COVID panic to undermine our republic and fundamentally reorient human relations); NAOMI WOLF, *THE PFIZER PAPERS: PFIZER'S CRIMES AGAINST HUMANITY* (Blackstone Publishing, Inc. 2024) (Dr. Wolf presents new reports written by WarRoom/DailyClout research volunteers that are based on the primary source Pfizer clinical trial documents released under court order and on related medical literature. Her new book posits that Pfizer's mRNA COVID-19 vaccine clinical trial was deeply flawed and that the pharmaceutical company knew by November 2020 that its vaccine was neither safe nor effective and details vaccine-induced harms throughout the human body).

⁴⁰² Ivermectin is an antiparasitic drug. After its discovery in 1975, its first uses were in veterinary medicine to prevent and treat heartworm and acariasis. Approved for human use in 1987, today it is used to treat infestations including head lice, scabies, river blindness, strongyloidiasis, trichuriasis, ascariasis and lymphatic filariasis.

⁴⁰³ *See e.g.*, Pierre Kory et al., *Review of the Emerging Evidence Demonstrating the Efficacy of Ivermectin in the Prophylaxis and Treatment of COVID-19*, 28(3) AM. J. THERAPEUTICS (2021), https://journals.lww.com/americantherapeutics/fulltext/2021/06000/review_of_the_emerging_evidence_demonstrating_the.4.aspx, <https://pubmed.ncbi.nlm.nih.gov/articles/PMC8088823/>.

⁴⁰⁴ *Id.* at 11-62.

revenues and profits.⁴⁰⁵ Big Tech was indispensable to ensuring the federal government’s message about these experimental products got out, and that any medical industry or other expert’s dissenting views were blocked and/or discredited.⁴⁰⁶

RFK explains that Big Pharma would have been unable to get an emergency use authorization for its experimental products if any of our preexisting treatments or vaccines would provide relief.⁴⁰⁷ Thus, it became necessary to rule out any alternatives to Big Pharma’s new pricey vaccines and treatments.⁴⁰⁸

To this end, RFK alleges that an elite group of government officials (e.g., Anthony Fauci (“Fauci”) the (now retired) director of the National Institute of Allergy and Infectious Diseases (“NIAID”), Big Pharma, Big Tech, and Bill Gates, among others) formed a corrupt “cabal.”⁴⁰⁹ He further alleges that this conspiracy worked together on multiple levels, including suppressing protected speech to make sure that *only* these new, expensive, experimental options were offered as COVID relief.⁴¹⁰ It should be noted that, following RFK’s explosive claims as recounted above, as far as the authors are aware, he has not yet been sued for defamation by any of his targets alleging these allegations are provably false.

Facebook and the White House on COVID. White House press secretary Jen Psaki (“Psaki”) publicly stated that the Biden administration identified problematic posts for Facebook to censor as they contained misinformation about COVID.⁴¹¹ Psaki disclosed the federal government’s active role in monitoring and policing Big Tech during her daily press briefing following Murthy’s clarion call to Big Tech to censor more pandemic-related content:⁴¹²

We are in regular in touch with the social media platforms, and those engagements typically happen through members of our senior staff, but also members of our COVID-19 team.

⁴⁰⁵ *Id.* at xv, xx, 118-122, 171, 230, 291, 299, 302-307, 349, 364, and 397-402.

⁴⁰⁶ *Id.* at xv, xx, 5-17, and 63-70.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ Steven Nelson, *White House ‘Flagging’ Posts for Facebook to Censor over COVID ‘Misinformation’*, N.Y. POST (July 15, 2021), <https://nypost.com/2021/07/15/white-house-flagging-posts-for-facebook-to-censor-due-to-covid-19-misinformation/>.

⁴¹² See Ian Schwarz, *WH’s Psaki: “We’re Flagging Problematic Posts for Facebook that Spread Disinformation,”* REAL CLEAR POLITICS (July 15, 2021) (has live video of the press briefing), https://www.realclearpolitics.com/video/2021/07/15/psaki_were_flagging_problematic_posts_for_facebook_that_spread_disinformation.html#!.

Given as Dr. Murthy conveyed, this is a big issue of misinformation specifically on the pandemic ... We are flagging problematic posts for Facebook that spread disinformation ... it's important to take faster action against harmful posts ... and Facebook needs to move more quickly to remove harmful violative posts.⁴¹³

According to Politico, Big Tech faced intense pressure from congressional Democrats to forcefully crack down on “misinformation” about the virus origin (especially the Wuhan lab-leak theory) throughout the pandemic.⁴¹⁴ Congress hauled in Big Tech CEOs for a hearing in March 2021.⁴¹⁵ Asked whether Twitter plans to revisit its own rules on COVID-19 origin claims, a company spokesperson said they had no updates to share. Twitter continues to “work in close consultation with global public health authorities” on coronavirus misinformation issues, the spokesperson said in a statement.⁴¹⁶

A recently surfaced email from Mark Zuckerberg to Fauci (obtained via BuzzFeed’s Freedom of Information Act request)⁴¹⁷ provides some context for why Facebook blocked the information: “Tony: I wanted to send a note of thanks for your leadership and everything you’re doing to make our country’s response to this outbreak as effective as possible. I also wanted to share a few ideas of ways we could help you get your message out, but I understand you’re incredibly busy, so don’t

⁴¹³ *Id.*

⁴¹⁴ See Cristiano Lima, *Facebook No Longer Treating ‘Man-Made’ Covid as a Crackpot Idea*, POLITICO, (May 26, 2021), <https://www.politico.com/news/2021/05/26/facebook-ban-covid-man-made-491053>; Select Subcommittee on the Coronavirus Pandemic, U.S. House of Representatives, *After Action Review of the COVID-19 Pandemic: The Lessons Learned and a Path Forward* (Dec 2, 2024) (House Select Subcommittee completed its 2-year investigation and released a 520-page report. Since February 2023, it sent more than 100 investigative letters, conducted more than 30 transcribed interviews and depositions, held 25 hearings and meetings, and reviewed more than one million pages of documents. This report exposed high-level corruption in America’s public health system, confirmed the most likely origin of the pandemic, and held COVID-19 bad actors publicly accountable.), <https://oversight.house.gov/release/final-report-covid-select-concludes-2-year-investigation-issues-500-page-final-report-on-lessons-learned-and-the-path-forward/>.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ See Natalie Bettendorf & Jason Leopold, *Anthony Fauci’s Emails Reveal The Pressure that Fell on One Man*, BUZZFEED NEWS (June 1, 2021), <https://www.buzzfeednews.com/article/nataliebettendorf/fauci-emails-covid-response>; see also, Katie Pavlich, *We Now Know Why Facebook May Have Censored the Lab Leak Theory*, Townhall (June 2, 2021), <https://townhall.com/tipsheet/katiepavlich/2021/06/02/we-now-know-why-facebook-may-have-censored-the-lab-leak-theory-n2590360>; see also, Samuel Chamberlain, *Republican Lawmakers Blast Fauci After Thousands of Emails Released*, N.Y. POST (June 2, 2021), <https://nypost.com/2021/06/02/gop-lawmakers-blast-fauci-after-covid-origin-emails-released/>.

feel a need to reply unless these seem interesting,” Zuckerberg wrote in an email to Fauci on March 15, 2020, adding that he wanted to help get “authoritative” information out to the masses.⁴¹⁸

Fauci responded to Zuckerberg directly and worked with him on several messaging projects for the platform.⁴¹⁹ When Fauci was asked about the lab leak theory in April 2020, he downplayed the idea⁴²⁰ and Facebook then started removing platform content about the lab leak theory: “Could you address these suggestions or concerns that this virus was somehow manmade, possibly from a laboratory in China?”⁴²¹

During an official White House Coronavirus Taskforce briefing, a reporter asked Fauci about the theory.⁴²² Fauci stated: “[T]he mutations that it took to get to the point where it is now is totally consistent with a jump of a species from an animal to a human.”⁴²³ Fauci’s public statement directly contradicted an email Fauci received from an NIH scientist on January 31, 2020, stating the virus was “potentially engineered” in a lab.⁴²⁴

In late February 2023, new intelligence, including the FBI’s and Department of Energy’s (“DOE”) communications and statements, came to light stating that the weight of evidence supports the lab leak theory for the virus’s origins.⁴²⁵ Then, in September 2023, a credible whistleblower, a senior C.I.A. officer, told House committee leaders that his agency offered to pay off six analysts who found SARS-CoV-2 likely originated in a Wuhan lab if they instead changed their positions on COVID-19’s origin away from the lab leak theory and in favor of zoonotic origin.⁴²⁶

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ Jenni Fink, *Timeline of What Dr. Fauci Has Said About the Wuhan Lab and COVID’s Origins*, NEWSWEEK (May 25, 2021), <https://www.newsweek.com/timeline-what-dr-fauci-has-said-about-wuhan-lab-covids-origins-1594698>.

⁴²¹ See Katie Pavlich, *supra* note 415; see also, Steve Robinson, *Fauci Deposition Shows Systemic U.S. Censorship Campaign*, THE MAINE WIRE (Nov. 28, 2022) (citing ProPublica report at <https://www.propublica.org/article/senate-report-covid-19-origin-wuhan-lab>), <https://www.themainewire.com/2022/11/fauci-deposition-shows-systemic-u-s-censorship-campaign/>.

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ See Michael R. Gordon & Warren P. Strobel, *Lab Leak Most Likely Origin of Covid-19 Pandemic, Energy Department Now Says*, WALL ST. J. (Feb. 26, 2023, as updated), <https://www.wsj.com/articles/covid-origin-china-lab-leak-807b7boa>.

⁴²⁶ The idea that the pandemic’s origins lie with a research facility in China was once

Fauci’s reported efforts to squash the lab leak narrative in Big Tech content supports the plaintiffs’ merits in two ongoing lawsuits by the States of Louisiana and Missouri.⁴²⁷ These lawsuits allege that several government officials—including Fauci (deposed in these cases)—inappropriately leaned on Big Tech to censor the lab leak theory, among other things.⁴²⁸

In December 2024, the U.S. House Select Subcommittee on the Coronavirus Pandemic completed its 2-year investigation and released its 520-page report, which exposed high-level corruption in America’s public health system, confirmed the most likely origin of the pandemic, and held COVID-19 bad actors publicly accountable. Since February 2023, it sent more than 100 investigative letters, conducted more than 30 transcribed interviews and depositions, held 25 hearings and meetings, and reviewed more than one million pages of documents.⁴²⁹

State action lawsuit against Twitter.⁴³⁰ A 2022 lawsuit filed on behalf of three Twitter users alleged that the federal government’s sustained pressure on social media platforms to censor and report purported COVID-19 misinformation amounts to state action that violates the First Amendment.⁴³¹ The New Civil Liberties Alliance (“NCLA”), a frequent litigant against COVID-related administrative action, represented theoretical cognitive scientist Mark Changizi, lawyer Michael Senger, and stay-at-home father Daniel Kotzin. Twitter

labeled a debunked and discredited conspiracy theory by federal officials and influential commentators. More recent reporting, however, suggests otherwise. See House Committee on Oversight and Accountability, <https://oversight.house.gov/release/testimony-from-cia-whistleblower-alleges-new-information-on-covid-19-origins/>; see also, Jon Cohen, *CIA Bribed Its Own Covid-19 Origin Team to Reject Lab-Leak Theory, Anonymous Whistleblower Claims*, SCIENCE (Sept. 12, 2023), <https://www.science.org/content/article/cia-bribed-its-own-covid-19-origin-team-reject-lab-leak-theory-anonymous-whistleblower>; Michael R. Gordon & Warren P. Strobel, *Behind Closed Doors: The Spy-World Scientists Who Argued Covid Was a Lab Leak*, WALL ST. J. (Dec. 26, 2024, as updated); <https://www.wsj.com/politics/national-security/fbi-covid-19-pandemic-lab-leak-theory-dfbd8a51>; Josh Christenson & Ryan King, *Spy Bosses ‘Silenced’ Defense Department, FBI Scientists from Briefing Biden on COVID Lab Leak Evidence*, N.Y. POST (Dec. 26, 2024); <https://nypost.com/2024/12/26/us-news/spy-bosses-silenced-defense-department-fbi-scientists-from-briefing-biden-on-covid-lab-leak-evidence/>.

⁴²⁷ See Robinson, *supra* note 418; see generally, Greg Piper, *Feds’ Pressure on Tech Platforms to Censor COVID ‘Misinformation’ Is Unconstitutional, Suit Says*, JUST THE NEWS (Mar. 25, 2022), <https://justthenews.com/government/federal-agencies/feds-pressure-tech-platforms-censor-covid-misinformation/>; *Changizi v. Dept. of HHS*, 602 F. Supp. 3d 1031 (S.D. Ohio 2022), *aff’d*, 824 F.4th 492 (6th Cir. 2023) (dismissing plaintiffs’ claims).

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ Greg Piper, *supra* note 425; *Changizi*, 824 F.4th 492, 494.

⁴³¹ *Changizi*, 824 F.4th 492, 495-96.

suspended Kotzin temporarily and Senger permanently within a week of Murthy's March 3, 2021, request for information ("RFI").⁴³² The RFI sought data on the impact and prevalence of health misinformation in the digital information environment during the COVID-19 pandemic, including how it affects the likelihood of vaccination.⁴³³ According to the lawsuit, the RFI encompassed not only search engines and social media but also e-commerce platforms and instant messaging systems, prompting technology companies to ramp up censorship for fear of adverse action against them, including regulation. The suit further alleged the unconstitutional state action started with statements by the White House in May 2021 and the Department of Health and Human Services in July 2021.⁴³⁴

The suit claimed that Psaki implied President Biden would take antitrust actions against Big Tech if they did not censor vaccine misinformation.⁴³⁵ Meanwhile, Murthy issued an "advisory on building a healthy information environment," whose phrasing resembles that used by Chinese state media.⁴³⁶ It noted that Murthy said: tech platforms will be held "accountable" for people who reject COVID vaccines and masking, use "unproven treatments," and they must increase monitoring of purported misinformation, crack down on "super-spreaders" and "repeat offenders," and "amplify[]" information from "trusted and credible sources" and "subject-matter experts."⁴³⁷ The suit alleged that, despite using the words "asking" and "proposing," Murthy and Psaki made clear at a press conference these were not suggestions.⁴³⁸ Psaki said the White House was already reporting "the latest narratives dangerous to public health" to social media companies, and even "flagg[ing] problematic posts for Facebook that spread disinformation."⁴³⁹ The suit noted that Biden later said platforms were "killing people" by not aggressively censoring misinformation.⁴⁴⁰ The suit further noted that USA Today reported that the administration was considering "whether social media platforms are legally liable for misinformation spread on their platforms."⁴⁴¹

On September 14, 2023, the Sixth Circuit Court of Appeals

⁴³² *Id.* at 496.

⁴³³ *Id.* at 495.

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

affirmed the District Court's dismissal of the claim, holding that the Twitter users failed to state a claim under the First Amendment, Fourth Amendment, and Administrative Procedure Act because they were unable to show that Twitter acted as a state actor for the Biden Administration's HHS, and Twitter's actions were not traceable to the federal government.⁴⁴²

c.) Legislative jawboning, coercion, and threats.

Hate speech. As R & R recounts, Congress has repeatedly threatened Big Tech if they failed to heed its demand to censor specific speech.⁴⁴³ We hear the term hate speech, but what prevents the Big Tech censors from disappearing your content under the hate speech banner when they hate your speech?

R & R provides an example from an April 2019 Congressional hearing.⁴⁴⁴ During this hearing, Democrat "Cedric Richmond [cautioned] Facebook and Google that they had 'better' restrict what he and his colleagues saw as harmful content or face regulation: 'We're going to make it swift, we're going to make it strong, and we're going to hold them very accountable.'" ⁴⁴⁵ Democrat "Jerrod Nadler added[,] 'Let's see what happens by pressuring them.'" ⁴⁴⁶

Perhaps in response to such threats, on September 17, 2019, the day before another such congressional hearing was scheduled, Facebook announced major new bans on hate speech.⁴⁴⁷ R & R note that Big Tech took its most aggressive actions against Trump following the 2020 election (and January 6th), as Democrats were poised to take control of the White House and Congress.⁴⁴⁸ Leading congressional Democrats openly lauded "[B]ig [T]ech's actions, which [Democratic] Sen[ator] Richard Blumenthal expressly attributed to 'a shift in the political winds.'" ⁴⁴⁹

The Capitol Riot. A 2021 congressional hearing recalled the leaders of Big Tech to account for MDM and how Big Tech played a role

⁴⁴² *Id.* at 496-498.

⁴⁴³ Ramaswamy & Rubinfeld, *Save the Constitution from Big Tech*, *supra* note 46.

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

⁴⁴⁷ Meta, *Combating Hate and Extremism*, META (Sept. 17, 2019), <https://about.fb.com/news/2019/09/combating-hate-and-extremism/>.

⁴⁴⁸ Ramaswamy & Rubinfeld, *Save the Constitution from Big Tech*, *supra* note 46.

⁴⁴⁹ *Id.*

in the January 6th, 2020, riot at the U.S. Capitol.⁴⁵⁰ Prior such hearings with Big Tech, federal lawmakers from both sides of the aisle criticized and demanded immediate action from Big Tech, under threat of new onerous regulation.⁴⁵¹

According to a National Public Radio (“NPR”) report, “For some lawmakers, concerns about the spread of ‘misinformation’ led to suggestions that [Big Tech] ... increases the [amount of censored content]. In [the ensuing days, Big Tech] ... ramped up censorship in the name of a ... ‘social good.’”⁴⁵²

Bipartisan relentless entreaties by politicians, in Washington to Big Tech, demanding more censorship included several troubling examples. Democrat Mike Doyle stated, “Your companies need to be held accountable ... [o]urs is the committee of jurisdiction, and we will legislate to stop this. The stakes are simply too high.”⁴⁵³ Doyle demanded that Big Tech take down content and accounts skeptical of the virus vaccine.⁴⁵⁴ Republican Jan Schakowsky agreed and berated Big Tech for airing a Spanish-language ad comparing then-presidential-candidate Joe Biden to socialist Latin American dictator Nicolás Maduro during the 2020 presidential election campaign.⁴⁵⁵ Democrat Frank Pallone stated, “[I]t is now painfully clear that neither the market nor public pressure will force these social media companies to take the aggressive action they need to take to eliminate disinformation and extremism from their platforms ... [T]herefore, it is time for Congress ... to legislate and realign these companies’ incentives.”⁴⁵⁶ These blatant threats of government

⁴⁵⁰ Douglas Blair, *When Government Demands Social Media Censorship, Americans of All Political Beliefs Lose*, THE DAILY SIGNAL (Apr. 8, 2021), <https://www.dailysignal.com/2021/04/08/when-government-demands-social-media-censorship-americans-of-all-political-beliefs-lose/> (“[I]f some congressional [members] were to have their way, tech giants would be forced to remove such content or face government-enforced consequences. Americans should be concerned about the symbiosis of Big Tech and big government that is rapidly approaching. The state, unable to legally curtail the free exchange of ideas it finds loathsome, can now offload the task onto private enterprise.... [A]ctivists in power at these tech companies are more than happy to remove content that they, too, find so upsetting.”).

⁴⁵¹ See, e.g., Miles Parks & Shannon Bond, *5 Takeaways from Big Tech’s Misinformation Hearing*, NPR (MAR. 25, 2021), <https://www.npr.org/2021/03/25/981203566/5-takeaways-from-big-techs-misinformation-hearing>.

⁴⁵² Blair, *supra* note 448.

⁴⁵³ *Disinformation Nation: Social Media’s Role in Promoting Extremism and Misinformation: Virtual Joint Hearing Before the H. Subcomm. on Commc’ns & Tech. and the H. Subcomm. on Consumer Prot. & Tech. of the H. Comm. on Energy & Com.*, 117th Cong. 8 (2021) (statement of Rep. Mike Doyle), <https://www.congress.gov/117/meeting/house/111407/documents/HHRG-117-IF16-Transcript-20210325.pdf>.

⁴⁵⁴ *Id.* at 7-8.

⁴⁵⁵ *Id.* at 12-15.

⁴⁵⁶ *Id.* at 20.

intervention and punishment were then followed by a series of increasingly bold lawmakers' warnings.⁴⁵⁷ Democrat G.K. Butterfield warned that if Big Tech didn't become *more diverse by government standards*, then "Congress [would] have to compel...[them, perhaps] with penalties...to make meaningful changes."⁴⁵⁸

Facebook (now Meta) CEO Zuckerberg testified in 2021 before Congress to address the role of MDM in our country's information ecosystem. Zuckerberg also addressed the work Facebook was doing to address such content on its platform.⁴⁵⁹ His platform hosts and facilitates speeches for billions of global citizens.⁴⁶⁰ He noted that the vast majority of what people see on Facebook is neither political nor hateful.⁴⁶¹

Zuckerberg stated that political posts make up only about six percent of what people in the United States see in their News Feeds and that the prevalence of hateful content people see on their service is less than 0.08 percent.⁴⁶² He further stated that they have expended efforts to prioritize fighting misinformation and provided people with authoritative information for the company.⁴⁶³ He added that they have recalibrated their products and built global partnerships to combat misinformation on a massive scale.

Zuckerberg said he stood ready to be a "productive partner with the federal government" in the discussion about Section 230 reform and that it is *up to Congress and the new administration* to chart the path forward.⁴⁶⁴ This sure sounds like Big Tech is not acting independently in editorial decisions, but instead is partnered with, interdependent upon, and entwined with the government in making such editorial and publishing decisions.

III. SOCIAL MEDIA PLATFORMS AS COMMON LAW COMMON CARRIERS: AN ALTERNATIVE STATE REGULATORY APPROACH FOR "QUASI" STATE ACTORS.

The complexities of state standard law-based common carrier regulations and how these would apply to regulating Big Tech are beyond

⁴⁵⁷ *See id.*

⁴⁵⁸ *Id.* at 88.

⁴⁵⁹ *Big Tech CEOs Face Lawmakers in House Hearing on Social Media's Role in Extremism, Misinformation*, WASH. POST (Apr. 9, 2021), <https://www.washingtonpost.com/technology/2021/03/25/facebook-google-twitter-house-hearing-live-updates/> (emphasis added); *see also*, Blair, *supra* note 448.

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² *Id.*

⁴⁶³ *Id.*

⁴⁶⁴ *Id.*

the scope of this article.⁴⁶⁵ In this final section, we highlight certain aspects of the state common law and statutory common carrier solutions that have started to garner jurisprudential and legislative attention.

As a preliminary matter, Section 230 leaves room for courts and legislatures to adopt the common carrier solution to Big Tech censorship.⁴⁶⁶ As noted earlier, nothing in Section 230 abridges or alters those remedies now existing at common law or by statute, including the use of traditional common carrier (or public utility) regulations.⁴⁶⁷

The state-level common law common carrier concept.

The common carrier legal concept is well-established in over a century of American statutory and common law.⁴⁶⁸ Classic examples of such regulated industries or utilities are the railroads and landline telephone services.⁴⁶⁹ The common carrier doctrine exists at the federal and state levels, mainly in federal and state law and statutory and common law.⁴⁷⁰

This section will focus primarily on the state-level common carrier doctrine. Here, we will preview why state-level common carrier designation and attendant regulatory oversight may provide an alternative framework to the state actor approach for regulating social

⁴⁶⁵ For a thorough, well-researched, and balanced exploration of whether social media platforms should be treated as “common carriers,” we highly recommend Eugene Volokh’s 2021 symposium article, *Treating Social Media Platforms Like Common Carriers?*, *supra* note 8. We also recommend James B. Speta, *Boden Lecture: The Past’s Lessons for Today: Can Common-Carrier Principles Make for a Better Internet?*, 106 MARQ. L. REV. 741 (2023). *See also* Evelyn Douek and Genevieve Lakier, *LOCHNER.COM?*, 138 HARV. L. REV. 100 (2024); Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71 (2021); Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97 (2021); Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191 (2021); Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303 (2021); Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. Free Speech L. 175 (2021); Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299 (2021); and Eugene Volokh, *The Reverse Spider-Man Principle: With Great Responsibility Comes Great Power*, 3 J. FREE SPEECH L. 197 (2023).

⁴⁶⁶ The CDA reflects no congressional intent, express or implied, to preempt all state law causes of action concerning interactive computer services; the CDA rather reflects Congress’ clear and unambiguous intent to retain state law remedies except in the event of conflict between those remedies and the CDA. *See Zeran v. America Online, Inc.*, 958 F. Supp. 1124, 1131 (E.D. Va. 1997), *aff’d*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

⁴⁶⁷ *See id.*

⁴⁶⁸ *See* Volokh, *supra* note 8.

⁴⁶⁹ *See* John Villasenor, *Social Media Companies and Common Carrier Status: A Primer*, BROOKINGS INST. (Oct. 27, 2022), <https://www.brookings.edu/articles/social-media-companies-and-common-carrier-status-a-primer/>.

⁴⁷⁰ *See id.*

media platforms.⁴⁷¹ This is so because the law views common carriers as quasi-public entities.⁴⁷²

This may prove especially applicable to and appropriate for those Big Tech companies that: (1) have benefited the most economically from federal government privileges and immunities; (2) have secured a near monopoly in specific social media sectors for the internet platform services offered; and (3) continue to offer such now-essential internet services that arguably serve as utilities to the general public.

A. The Current Federal State of Play.

In the courts. Since section 230's enactment, "[c]ourts [hearing-related cases] have . . . departed [significantly] from the most natural reading of the text. . . ." ⁴⁷³ The courts have given Internet companies immunity for their generated content and censored user-generated content.⁴⁷⁴ Section 230(c)(1) only protects a company from publisher liability when another information provider provides the subject content.⁴⁷⁵ Thus, it does *not* thereby protect a company that provides its own content.

Additionally, section 230(f)(3) says that a company *can* be liable for content that it helps to develop or create "*in whole or in part*" (emphasis added).⁴⁷⁶ The statute's plain language hardly bestows blanket immunity to internet companies. However, courts have relied strenuously on policy justifications to narrowly construe section 230(f)(3) and hold that it covers only substantial or material edits and additions.⁴⁷⁷

Consequently, section 230 immunity has expanded significantly beyond that explicitly provided within the statute's plain text. Even so, the judiciary continues to resist any meaningful jurisprudential limitations on content moderation or hold Big Tech accountable for

⁴⁷¹ *See id.*

⁴⁷² *See id.*

⁴⁷³ *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC.*, 141 S. Ct. 13, 16 (2020) (Thomas, J., concurring) (denying petition for writ of certiorari); *see also*, *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1165 (9th Cir. 2008) (holding that the party responsible for putting information online may be subject to liability, even if the information originated with a user).

⁴⁷⁴ *Id.*

⁴⁷⁵ 47 U.S.C. § 230(C)(1).

⁴⁷⁶ 47 U.S.C. § 230(F)(3).

⁴⁷⁷ *Malwarebytes*, 141 S. Ct. at 16 ("[A] central purpose of the Act was to protect from liability service providers and users who take some affirmative steps to edit the material posted.") (citing *Batzel v. Smith*, 333 F.3d 1018, 1031, and n. 18 (9th Cir. 2003)).

ensorship.⁴⁷⁸ While the Supreme Court has agreed to step in next term, almost every federal court presented content moderation as a censorship issue and dismissed the case on section 230 immunity grounds.⁴⁷⁹

This thereby emboldens Big Tech’s virtually unfettered discretion to edit, remove, or block user-generated content however it chooses.⁴⁸⁰ This has transpired without providing explicit or transparent procedures to users about how much content moderation complies with its guidelines, procedures, and user agreements.⁴⁸¹

Recent United States Supreme Court Cases. Most recently, on May 18, 2023, the Supreme Court heard two closely watched companion cases, *Twitter, Inc. v. Taamneh*⁴⁸² (“*Taamneh*”) and *Gonzalez v. Google*⁴⁸³ (“*Gonzalez*”). Both cases addressed the liability of social media platforms for allowing the terrorist group ISIS to post videos, communicate its messages, and radicalize recruits.⁴⁸⁴ Both cases came to the Court on appeal from the Ninth Circuit, which had declined to narrow the Section 230 immunity shield for third-party content posted on the Internet and social media platforms.⁴⁸⁵

Before *Taamneh* and *Gonzales*, the Supreme Court had refused to

⁴⁷⁸ See Adam Liptak, *Supreme Court Won’t Hold Tech Companies Liable for User Posts*, N.Y. Times (MAY 18, 2023), <https://www.nytimes.com/2023/05/18/us/politics/supreme-court-google-twitter-230.html>.

⁴⁷⁹ See, e.g., *Prager Univ. v. Google LLC*, 951 F.3d 991, 998 (9th Cir. 2020); see also, *Mezey v. Twitter, Inc.*, No. 1:18-cv-21069-KMM, 2018 WL 5306769 (S.D. Fla. July 19, 2018) (order granting motion to dismiss); *Sikhs for Just., Inc. v. Facebook, Inc.*, 697 Fed. Appx. 526 (9th Cir. 2017); *Dehen v. Does*, No. 17cv198-LAB (WCG), 2018 WL 5279127 (S.D. Cal. Oct. 24, 2018); *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019); *Fed. Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295 (N.D. Cal. 2019); but see, *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802 (2019) (holding that an operator of a public access cable television channel, even though operating under an outsourcing contract with the City of New York, was not a state actor and therefore not subject to First Amendment constraints on its editorial discretion); see, *Liability for User Generated Content Online: Principles for Lawmakers*, SANTA CLARA L. DIGIT. COMMONS (July 11, 2019), <https://digitalcommons.law.scu.edu/historical/1987>; see generally, Eric Goldman, *Content Moderation Remedies* TECH. & MKTG. L. BLOG (March 23, 2021), <https://blog.ericgoldman.org/archives/2021/03/new-article-content-moderation-remedies.htm>.

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

⁴⁸² 598 U.S. 471 (2023). In *Taamneh*, where the plaintiffs sued Twitter, Google, and Facebook, the lower court did not consider § 230 immunity, but instead dismissed plaintiffs’ claims for failure to plausibly allege liability for aiding and abetting terrorists or conspiracy. See *id.* However, the Ninth Circuit held that the family members adequately stated a claim for aiding and abetting terrorists and reversed and remanded the case back to a federal district court for further action.

⁴⁸³ 598 U.S. 617 (2023).

⁴⁸⁴ See *Gonzalez*, 598 U.S. 617; see also *Taamneh*, 598 U.S. 471.

⁴⁸⁵ See *id.*

take up Section 230 cases.⁴⁸⁶ These two decided cases illustrate the judiciary's disinclination to hold Big Tech accountable to users for its content moderation decisions. In short, courts do not want to touch Section 230 immunity. This has been so even if plaintiffs can show that the interactive internet platform is at least partly responsible for moderating and curating content and/or censoring seemingly protected speech.⁴⁸⁷

B. The State Common Law Common Carrier General Approach Explained

Frustrated by the judiciary's refusal to hold social media platforms accountable for censoring speech, in 2021, two states, Florida⁴⁸⁸ and Texas,⁴⁸⁹ implemented a similar, creative yet traditional solution to combat Big Tech censorship.⁴⁹⁰ That was to regulate them under state statutory law as common carriers.⁴⁹¹ We summarize these two state statutes later in this section.

Benefits of the state approach. This state common carrier solution offers both (1) an alternative to imposing federal Title II public utility status on Big Tech⁴⁹² and (2) a possible workaround to Section 230's seemingly blanket federal immunity for Big Tech. Moreover, the state common carrier solution has recently started to gain traction. State legislatures, such as Florida and Texas, the judiciary, and scholars are

⁴⁸⁶ See, e.g., *Dryoff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020); *Force*, 934 F.3d, *cert. denied*, 140 S. Ct. 2761 (2020) (holding that an interactive computer service is entitled to immunity when it affirmatively recommends third party materials).

⁴⁸⁷ See Jeff Kosseff, *The Gradual Erosion of the Law That Shaped the Internet: Section 230's Evolution over Two Decades*, 18 COLUM. SCI. & TECH. L. REV. 1, 36-37 (2016) ("these [recent] opinions, when taken together, reflect a growing reluctance of courts to apply Section 230 in the broad manner of the [early] days ... courts are [now] increasingly reluctant to dismiss cases under Section 230, even when the complaint does not credibly allege that the online intermediaries developed or created the content.").

⁴⁸⁸ Fla. Stat. § 501.2041 (2021).

⁴⁸⁹ Tex. Bus. & Com. Code §§ 120.101-104 (2021).

⁴⁹⁰ *Id.*

⁴⁹¹ See Fla. Stat. § 501.2041 (2021); Tex. Bus. & Com. Code §§ 120.101-104 (2021).

⁴⁹² Title II of the Communications Act of 1934, which lets the FCC declare essential services as a "public utility," saw the FCC set rates and ensure equal access to traditional phone service. There has been an FCC movement likewise to re-regulate Internet broadband under Title II, using the "net neutrality" moniker, which took root in 2015 and was later repealed. It currently remains unclear what will transpire in this area. See Roslyn Layton, *Five Reasons Why Title II Net Neutrality Is No Longer Relevant in Tech Policy*, FORBES, (Nov. 12, 2020, 10:31 AM), <https://www.forbes.com/sites/roslynlayton/2020/11/12/five-reasons-why-title-ii-net-neutrality-is-no-longer-relevant-in-tech-policy/?sh=175b2914230c>.

currently engaging in an increasingly robust discussion about whether and to what extent Big Tech can and should instead be regulated as common carriers.⁴⁹³ On September 29, 2023, the United States Supreme Court granted certiorari in the Florida and Texas landmark cases; the Court limited its grant of certiorari to Questions 1 and 2 presented by the Solicitor General in her brief for the United States as amicus curiae.⁴⁹⁴

This common carrier solution arguably offers a more palatable means for preventing large interactive internet platforms from “abusing their massive control over the channels of speech.”⁴⁹⁵ Common carriers must not discriminate against certain members of the public or make individualized speech decisions regarding users.⁴⁹⁶

Accordingly, both states’ laws require social media platforms to (1) host some speech they might otherwise prefer not to host and (2) disclose how and when their respective internet platforms censor such speech.⁴⁹⁷ When states regulate how social media platforms, as common carriers, offer services to the general public, they regulate the platform services, not the content.

Therefore, such state common carrier regulations do not restrict speech or abridge a platform’s constitutional First Amendment rights. As such, states can use their traditional regulatory authority to prevent this type of abuse without challenging or eroding Big Tech’s Section 230 immunity.

C. The Current Fifth Versus Eleventh Circuit Split: Legal Challenges to Florida & Texas State Statutes Treating Big Tech as Common Carriers – In *Moody v. NetChoice*, the Supreme Court Has Just Punted Again.

As noted above, both Florida⁴⁹⁸ and Texas⁴⁹⁹ adopted 2021 legislation regulating Big Tech companies as common carriers. The Texas

⁴⁹³ See, e.g., Volokh, *supra* note 8; Speta, *supra* note 462.

⁴⁹⁴ See *Moody v. NetChoice, LLC*, 144 S. Ct. 478 (2023) (granting the petition for writ of certiorari in part and limited to Questions 1 and 2 presented by the Solicitor General in her brief for the United States as amicus curiae); *NetChoice, LLC v. Paxton*, 144 S. Ct. 477 (2023) (granting the petition for writ of certiorari in part and limited to Questions 1 and 2 presented by the Solicitor General in her brief for the United States as amicus curiae). The Court plans to address *Moody v. NetChoice* and *NetChoice v. Paxton* at the same time.

⁴⁹⁵ *Id.*

⁴⁹⁶ See *Nat’l Ass’n of Regul. Util. Comm’rs. v. F.C.C.*, 533 F.2d 601, 608-09 (D.C. Cir. 1976).

⁴⁹⁷ See Fla. Stat. § 501.2041 (2021); Tex. Bus. & Com. Code §§ 120.101-104 (2021).

⁴⁹⁸ See Fla. Stat. § 501.2041 (2021).

⁴⁹⁹ See Tex. Bus. & Com. Code §§ 120.101-104 (2021).

legislature expressly states that social media platforms with more than 50 million active users per month “function as common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States.”⁵⁰⁰ It further states that those “social media platforms with the largest number of users are common carriers because of their market dominance.”⁵⁰¹

The NetChoice case and a Fifth Circuit versus Eleventh Circuit court split. A social media platform named NetChoice, LLC (“NetChoice”)⁵⁰² has sued both Florida and Texas to challenge each state’s anti-censorship laws. In May 2022, the Eleventh Circuit Court of Appeals upheld certain parts of the district court’s injunction against enforcement of Florida SB 7072, holding that the state statute violated a social media platform’s First Amendment rights.⁵⁰³

The Eleventh Circuit also held that social media platforms did not qualify as common carriers.⁵⁰⁴ This was because these companies “hold themselves open to all members of the public, they require users, as preconditions of access, to accept their terms of service and abide by their community standards,” “Supreme Court precedent strongly suggests that ... social-media platforms aren’t common carriers,” and “Congress has distinguished internet companies from common carriers.”⁵⁰⁵

In November 2022, the Fifth Circuit Court of Appeals rendered an opposite decision in a case involving similar legal issues.⁵⁰⁶ It reversed the district court’s injunction against Texas HB 20, holding that the state statute did not violate a platform’s First Amendment rights.⁵⁰⁷ The Fifth Circuit also held that social media platforms *could* qualify as common carriers.⁵⁰⁸ First, the Fifth Circuit found that Texas properly deemed social media platforms as common carriers since they are communication firms holding themselves out as serving the public absent any “individualized bargaining” and are “affected with a public

⁵⁰⁰ See Tex. H.B. 20, 87th Leg., Reg. Sess. (2021), <https://perma.cc/9KF3-LEQX>.

⁵⁰¹ *Id.*

⁵⁰² Other parties joined NetChoice’s court challenges in these cases, including the Computer & Communications Industry Association, and several trade groups representing internet platforms covered by these laws. Big Tech’s defensive assertion of its First Amendment rights to censor content is an interesting topic beyond the current scope of this article.

⁵⁰³ NetChoice, LLC v. Att’y Gen., Fla., 34 F.4th 1196, 1231 (11th Cir. 2022).

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.* at 1220.

⁵⁰⁶ NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022).

⁵⁰⁷ *Id.* at 494.

⁵⁰⁸ *Id.* at 473.

interest.”⁵⁰⁹

The Fifth Circuit rejected the claim that social media platforms were not like traditional common carriers: At the bottom, the Platforms ask us to hold that in the long technological march from ferries and bakeries, to barges and gristmills, to steamboats and stagecoaches, to railroads and grain elevators, to water and gas lines, to telegraph and telephone lines, to social media platforms—that social media marks the point where the underlying technology is finally so complicated that the government may no longer regulate it to prevent unfair discrimination. But we may not enter this venerable and centuries-old doctrine just because Twitter’s censorship tools are more sophisticated than Western Union’s. “[B]asic principles of freedom of speech and the press, like the First Amendment’s command, do not vary when a new and different medium for communication appears.”⁵¹⁰

Because the Fifth and Eleventh Circuits had split (i.e., reaching opposite decisions on very similar legal issues arising from very similar statutory language), parties from both cases petitioned the Supreme Court for review with writs of certiorari; on September 29, 2023, the Court granted the long-awaited review for both cases, and consolidated them.⁵¹¹

On July 1, 2024 and by unanimous vote 9-0 in *Moody v. NetChoice*, the Supreme Court remanded both cases back to the lower courts, stating that neither the Fifth Circuit Court of Appeals nor the Eleventh Circuit Court of Appeals “conducted a proper analysis of the facial First Amendment challenges to the Florida and Texas laws regulating large Internet platforms” such as Meta (fka Facebook) and X (fka Twitter).⁵¹² Only Justices Thomas and Alito made any mention about common carriers in their respective concurring opinions (see discussion below).

Justice Kagan wrote the *Moody* opinion and focused primarily on NetChoice’s facial challenge under the First Amendment to the constitutionality of both the Florida and Texas statutes because they curtailed Internet platforms’ capacity to engage in content moderation.⁵¹³ NetChoice also argued on a companion First Amendment issue

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.* at 478-79 (citing *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790 (2011)).

⁵¹¹ *Moody v. NetChoice*, 144 S. Ct. 478 (2023) (granting certiorari in part); *NetChoice LLC v. Paxton*, 144 S.Ct. 477 (2023) (granting certiorari in part). The Supreme Court limited its grant of certiorari in both cases to Questions 1 and 2 presented by the Solicitor General in her brief for the United States as amicus curiae.

⁵¹² *Moody v. NetChoice, LLC*, 603 U.S. 707, 708 (2024).

⁵¹³ *Id.* at 707.

presented, namely, whether the Florida and Texas laws' disclosure requirements unduly burdened NetChoice's expression.⁵¹⁴ Justice Kagan noted that NetChoice's decision to litigate these cases as facial First Amendment challenges "comes at a cost" because the Court has made facial challenges difficult to win.⁵¹⁵ And to prevail, NetChoice would need to show that "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."⁵¹⁶ The lower courts focused mainly on how the statutes applied to the content-moderation practices of the "giant social media platforms" such as Facebook's News Feed and YouTube's News Feed.⁵¹⁷ Even so, the laws appear to apply to social media platform services beyond Facebook's News Feed "and its ilk."⁵¹⁸ The Court held that it was not clear "to what extent, if at all, they affect social-media giants' other services, like direct messaging, or what they have to say about other platforms and functions."⁵¹⁹ Before anything could be done with NetChoice's facial challenges, the lower courts must first determine the scope of the statute and "what [the law] covers."⁵²⁰ Additionally, the lower courts did not address the full range of activities that these statutes covered, and did not measure the constitutional versus unconstitutional applications, the Court vacated and remanded both cases.⁵²¹ For these reasons, the Court

⁵¹⁴ See *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

⁵¹⁵ *Moody*, 603 U.S. at 708. Here, Kagan makes a distinction between facial versus "as-applied" challenges:

Today, we vacate both decisions for reasons separate from the First Amendment merits, because neither Court of Appeals properly considered the facial nature of NetChoice's challenge. The courts mainly addressed what the parties had focused on. And the parties mainly argued these cases as if the laws applied only to the curated feeds offered by the largest and most paradigmatic social-media platforms—as if, say, each case presented an as-applied challenge brought by Facebook protesting its loss of control over the content of its News Feed. But argument in this Court revealed that the laws might apply to, and differently affect, other kinds of websites and apps. In a facial challenge, that could well matter, even when the challenge is brought under the First Amendment. As explained below, the question in such a case is whether a law's unconstitutional applications are substantial compared to its constitutional ones. To make that judgment, a court must determine a law's full set of applications, evaluate which are constitutional and which are not, and compare the one to the other. Neither court performed that necessary inquiry.

Id. at 717-18.

⁵¹⁶ *Id.* at 707 (citing *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 615 (2021)).

⁵¹⁷ *Id.* at 716.

⁵¹⁸ *Id.* at 724.

⁵¹⁹ *Id.* at 708.

⁵²⁰ *Id.* at 725 (citing *U.S. v. Hansen*, 599 U.S. 762, 770 (2023)).

⁵²¹ See *id.* at 708.

remanded both cases with instructions to the lower courts to determine the likelihood of success on the claims that the Florida and Texas statutes were facially invalid under the First Amendment as a factor when deciding to preliminarily enjoin their enforcement.⁵²²

Even though the Court vacated and remanded both cases, the Court did tip its hand—at least informally—about how it views First Amendment rights for social media platforms: “It is necessary to say more about how the First Amendment relates to the laws’ content-moderation provisions, to ensure that the facial analysis proceeds on the right path in the courts below.”⁵²³ First, Justice Kagan pointed out that even though social media platforms “have gone from unheard-of to inescapable” due to a “dizzying transformation” in technology, social media platforms engage in expression similar to conventional journalism.⁵²⁴ “[W]hatever the challenges of applying the Constitution to ever-advancing technology, the basic principles’ of the First Amendment ‘do not vary.’”⁵²⁵ Second, she cited a litany of Supreme Court holdings that protect a party’s First Amendment rights when it provides a forum for someone else’s views and engage in their own “expressive activity.”⁵²⁶ Like editors, cable operators and parade organizers

⁵²² *See id.* at 745.

⁵²³ *Id.* at 709.

⁵²⁴ *Id.* at 716.

⁵²⁵ *Id.* at 733 (citing *Brown*, 564 U.S. 786, at 790 (2011)).

⁵²⁶ *Id.* at 728-31, (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down Florida law that required a newspaper to give a political candidate the right to reply when it published criticism and attacks on his record)); *Pacific Gas & Elec. Co. v. Public Utils. Comm’n of California*, 475 U.S. 1 (1984) (striking down law requiring utilities to include material from a consumer-advocacy group perspectives opposed to the messages offered by the utilities); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994) (holding that the Federal Communications Commission’s so-called “must-carry” rules—requiring cable operators to allocate some of their channels to local broadcast stations—implicated the First Amendment rights of the cable operators) (*Turner I*); *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 622 (1997) (approving FCC rules, but noting that a private party’s collection of third-party content was expressive and protected by the First Amendment from unjustified government intrusion) (*Turner II*); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (holding unconstitutional a Massachusetts civil rights law that required parade organizers wanting to participate in a St. Patrick’s Day parade to admit that they were a gay and lesbian group seeking to convey a “pride” message during the parade). The *Moody* Court distinguished its “forced speech” decision in *PruneYard Shopping Center v. Robins* in which the Court dismissed a shopping mall’s First Amendment challenge to a California law requiring the shopping mall to allow the public to distribute handbills because, unlike *NetChoice* in *Moody*, the shopping mall never claimed it engaged in any expressive activity that would negatively impact the handbills. 447 U.S. 74 (1980). The *Moody* Court also

previously considered by the Court, major social-media platforms “curate their feeds by combining “multifarious voices” to create a distinctive expressive offering.⁵²⁷ Moreover, “[t]heir choices about which messages are appropriate give the feed a particular expressive quality and ‘constitute the exercise’ of protected ‘editorial control.’”⁵²⁸ None of this changes expressive quality, even if a compiler of content excludes “[a] handful of messages it most ‘disfavor[s].’”⁵²⁹ Finally, and even though platforms “unabashedly control the content that will appear to users,”⁵³⁰ the government cannot “get its way just by asserting an interest in ... better balancing the marketplace of ideas.”⁵³¹ Justice Kagan states:

The government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas. Of course, it is critically important to have a well-functioning sphere of expression, in which citizens have access to information from many sources. That is the whole project of the First Amendment. And the government can take varied measures, like enforcing competition laws, to protect that access... But in case after case, the Court has barred the government from forcing a private speaker to present views it wished to spurn in order to rejigger the expressive realm.⁵³²

For these reasons, the Court rejected the policy justifications offered by both Florida and Texas—namely that state legislatures need to regulate social media content to ensure more balanced viewpoints.

Although the Court did not issue a binding ruling on the issues presented when it vacated and remanded both cases, the Court did predict that NetChoice would likely succeed on the merits in the Fifth Circuit.⁵³³ In his concurring opinion, Justice Alito reminded that because the Court did not issue a binding ruling, its opinion is nonbinding dicta.

distinguished its prior decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc* in which it rejected a First Amendment challenge to an Act of Congress that required law schools to allow the military to participate in on-campus recruiting because the law schools had no First Amendment right to exclude the military recruiters when the law schools “are not speaking when they host interviews.” 547 U.S. 47, 64 (2006).

⁵²⁷ *Id.* at 738.

⁵²⁸ *Id.* at 711(citing *Tornillo*, 418 U.S. at 258).

⁵²⁹ *Id.* at 732 (citing *Hurley*, 515 U.S. at 574).

⁵³⁰ *Id.* at 736.

⁵³¹ *Id.* at 732.

⁵³² *Id.* at 733.

⁵³³ *Id.* at 734 (“But in reviewing the District Court’s preliminary injunction, the Fifth Circuit got its likelihood-of-success finding wrong. Texas is not likely to succeed in enforcing its law against the platforms’ application of their content-moderation policies to the feeds that were the focus of the proceedings below.”).

Justice Alito wrote, “[t]he holding in these cases is narrow: NetChoice failed to prove that the Florida and Texas laws they challenged are facially unconstitutional. Everything else in the opinion of the Court is nonbinding dicta.”⁵³⁴ Nevertheless, and even if it’s nonbinding dicta, the *Moody* Court has provided the lower courts important First Amendment guidance on remand: Both the Florida and Texas statutes likely violate a social media platform’s First Amendment rights to the extent that the laws dictate what the platform should or should not post or include on its site. The Court also made it quite clear that the Fifth Circuit was completely wrong when it held that the Texas statute’s restrictions did not interfere with the platform’s right to free expression: “At bottom,” the Texas law “requires the platforms to carry and promote user speech that they would rather discard or downplay” which goes against substantial Supreme Court precedent that holds “ordering a party to provide a forum for someone else’s views implicates the First Amendment.” These expressive activity doctrines extend as well to social media platforms when “presenting a curated compilation of speech originally created by others.”⁵³⁵

Interestingly, and on remand from the Supreme Court, the Fifth Circuit held on November 7, 2024, that because (1) The District Court failed to determine “the full range of activities” that the law covers; and (2) NetChoice has a “serious need of factual development” because the record is underdeveloped, the Fifth Circuit remanded the case to the District Court with instructions that NetChoice has the burden to develop the factual record to support its request for facial injunctive relief against the Texas statute.⁵³⁶

The Eleventh Circuit has not yet rendered a subsequent ruling on remand.

It’s worth pointing out that in her *Moody* opinion, Justice Kagan goes to great lengths emphasizing the importance of the State not interfering with speech to advance its own ideas, opinions or beliefs. For example, she writes:

But a State may not interfere with private actors’ speech to advance its own vision of ideological balance. States (and their citizens) are of course right to want an expressive realm in which the public has access to a wide range of views. That is,

⁵³⁴ *Id.* at 766 (J. Alito concurring, J. Thomas and J. Gorsuch join, concurring in the judgment).

⁵³⁵ *Id.* at 728.

⁵³⁶ *NetChoice, L.L.C. v. Paxton*, 121 F.4th 494, 497-500 (5th Cir. 2024) (citing *Moody*, 516 U.S., at 724).

indeed, a fundamental aim of the First Amendment. But the way the First Amendment achieves that goal is by preventing the government from “tilt[ing] public debate in a preferred direction.”⁵³⁷ It is not by licensing the government to stop private actors from speaking as they wish and preferring some views over others. And that is so even when those actors possess “enviable vehicle[s]” for expression.⁵³⁸ In a better world, there would be fewer inequities in speech opportunities; and the government can take many steps to bring that world closer. But it cannot prohibit speech to improve or better balance the speech market. On the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana. That is why we have said in so many contexts that the government may not “restrict the speech of some elements of our society in order to enhance the relative voice of others.”⁵³⁹ That unadorned interest is “not unrelated to the suppression of free expression” and the government may not pursue it consistent with the First Amendment.⁵⁴⁰

But what if the government “tilts” public debate in a preferred direction by pressuring social media platforms through back channels and backroom conversations? The dangers to infringing on the First Amendment rights of social media platforms are no less harmful, and in fact may be even more insidious because it’s more likely to evade judicial scrutiny in pursuit of achieving “speech nirvana.”

And come to think of it, did the *Moody* Majority miss the mark when it comes to viewing social media platforms as private curators of content on par with publishers who can exercise editorial discretion? Wasn’t the whole legislative purpose behind Section 230 to protect the fledgling startup social media platforms of the mid 1990s because Congress viewed them as conduits that simply provide a virtual “public square” platform so that users could post their own messages? And because social media platforms were not curators of content, Congress created Section 230’s sweeping immunities to protect them from the type of liabilities that catch publishers in the crosshairs? Why didn’t the *Moody* Majority acknowledge Section 230’s characterization of social media platforms as not publishers? Have social media companies

⁵³⁷ *Moody*, 516 U.S. at 722 (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-579 (2011)).

⁵³⁸ *Id.* at 741 (citing *Hurley*, 515 U.S. at 577).

⁵³⁹ *Id.* at 741-42 (citing *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curium)).

⁵⁴⁰ *Id.*

emerged into the Big Tech Juggernauts that we know today such that they have become publishers who no longer need Section 230's immunity protections?

And if Big Tech has become so humongous and pervasive, do they now provide a necessary public service such that they should be regulated as common carriers? The Florida and Texas legislatures thought so when they enacted the social media content moderation statutes to reign in censorship, which resulted in the *Moody* decision. However, and except for Justices Thomas and Alito in their respective concurring opinions, why did the rest of the Court completely ignore the common carrier arguments presented by both Florida and Texas for enacting their respective statutes? Justice Thomas writes that the common-carrier doctrine should continue to guide the lower courts' examination of NetChoice's claims.⁵⁴¹ Justice Thomas notes that both the Fifth and Eleventh Circuit appropriately strove to apply the common-carrier doctrine in assessing the constitutionality of their respective statutes.⁵⁴² Justice Thomas agrees that remand is also appropriate because the same factual barriers that preclude assessing NetChoice's First Amendment claims likewise preclude an application of the common-carrier doctrine.⁵⁴³ However, Justice Thomas instructs that the lower courts should continue to consider the common-carrier doctrine when assessing the constitutionality of regulating specific parties and specific conduct.⁵⁴⁴

We agree.

D. Why Common Carriers Are Quasi-Public Entities and Social Media Platforms Act Like Common Carriers.

1. The Background.

The Florida and Texas statutes offer a creative approach to regulating Big Tech. However, our common law system has indeed regulated private companies as common carriers that provide essential services to the general public, such as railroads, for hundreds of years.⁵⁴⁵

⁵⁴¹ *Id.* at 751-52 (J. Thomas, concurring) (citing Justice Alito's concurring opinion, *Moody*, 526 U.S. at 767 and n. 17, at 793 ("[O]ur legal system and its British predecessor have long subjected certain businesses, known as common carriers, to special regulations, including a general requirement to serve all comers." *Biden v. Knight First Amend. Inst. at Colum. Univ.*, 593 U.S. ---, ---, 141 S. Ct. 1220, 1222 (Thomas, J., concurring in grant of certiorari)).

⁵⁴² *Moody*, 603 U.S. at 751-52.

⁵⁴³ *Id.*

⁵⁴⁴ *Id.*

⁵⁴⁵ James B. Speta, *Boden Lecture: The Past's Lessons for Today: Can Common-Carrier Principles Make for A Better Internet?* 106 MARQ. L. REV. 741 (2023).

Common carrier status means that a private company acts as a quasi-public entity when it undertakes to carry out essential services “for all people indifferently.”⁵⁴⁶

For example, a bus service acts as a common carrier when it offers transportation services to any member of the general public who purchases a ticket. In contrast, a private transportation company does not act as a common carrier when it only offers services to specific clients based on a unique, privately negotiated service contract. In a telecommunications context, a telecommunications company is a “common carrier” because it holds itself out to the public for hire to provide telecommunications service.⁵⁴⁷

The government can regulate a common carrier because: (1) of what the entity *does* (i.e., “by the actual activities he carries on”); (2) of the complex infrastructure and essential services it provides to the public; and (3) it often receives unique benefits and privileges from the government.⁵⁴⁸ For example, in the 1800s, railroads offered a new service and complex rail line infrastructure to the general public, who relied upon their services to physically transport them from one place to another. In the 1900s, landline telephone companies provided the general public with a new service and complex wired network infrastructure. This new service helped customers transport their communications from one place to another almost instantaneously without boarding a train or posting a letter in the mail.

2. The argument for state regulation.

Big Tech social media companies arguably operate as common

⁵⁴⁶ Nat’l Ass’n of Regul. Util. Comm’rs v. F.C.C., 533 F.2d 601, 608-09 (D.C. Cir. 1976) (“An examination of the common law reveals that the primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking ‘to carry for all people indifferently . . .’ This does not mean that the particular services offered must practically be available to the entire public; a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users. Nor is it essential that there be a statutory or other legal commandment to serve indiscriminately; it is the practice of such indifferent service that confers common carrier status. That is to say, a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve.”) (emphasis added) (quoting *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960)).

⁵⁴⁷ See, *United States Telecom Ass’n v. F.C.C.*, 825 F.3d 674, 710 (D.C. Cir. 2016).

⁵⁴⁸ Nat’l Ass’n of Regul. Util. Comm’rs v. F.C.C., 533 F.2d 601, 608-09 (D.C. Cir. 1976).

carriers in the twenty-first century for similar reasons.⁵⁴⁹ First, Big Tech transports user content through a complex digital network infrastructure. A social media platform user can share content and communicate with others with a simple click in the platform’s “app.”⁵⁵⁰ Second, a customer relies on a social media platform’s complex infrastructure for her messaging and content to arrive, be posted, and communicate with other users.⁵⁵¹ That’s the entire point of the platform’s service.

Third, social media platforms hold themselves out as available to anyone and everyone.⁵⁵²

Fourth, like the railroad and telephone industries of yore, social media platforms have benefited immensely from special governmental privileges like Section 230’s near-blanket legal immunity protections.⁵⁵³

Social media platform leaders like Mark Zuckerberg have acknowledged that “Section 230 made it possible for every major internet service to be built.”⁵⁵⁴ Furthermore, “immunity from libel and similar lawsuits has allowed platforms to amass and deploy financial resources on a scale that can be matched by few people and even by few corporations.”⁵⁵⁵ On the other hand, since the 1996 CDA, traditional media such as newspapers and television continue to be deemed publishers without any such legal immunity that the dominant Big Tech social media platforms enjoy.⁵⁵⁶

One of the hallmarks of common carrier regulations is that

⁵⁴⁹ See, e.g., Adam Candeub & Clare Morrell, *How to Apply Non-Discrimination to Digital Platforms via Common Carriage*, NEWSWEEK (May 25, 2021), [HTTPS://WWW.NEWSWEEK.COM/HOW-APPLY-NON-DISCRIMINATION-DIGITAL-PLATFORMS-VIA-COMMON-CARRIAGE-OPINION-1593963](https://www.newsweek.com/how-apply-non-discrimination-digital-platforms-via-common-carriage-opinion-1593963).

⁵⁵⁰ Nashville Film Inst., *What Is Social Media? – Everything You Need To Know*, NASHVILLE FILM INST., <https://www.nfi.edu/what-is-social-media/>.

⁵⁵¹ *Id.*

⁵⁵² See, e.g., Nick Clegg, *Facebook Does Not Benefit from Hate*, META BLOG (July 1, 2020) (Clegg is Meta’s VP of Global Affairs and Communications), <https://about.fb.com/news/2020/07/facebook-does-not-benefit-from-hate/>.

⁵⁵³ Cf. *Dinsmore v. Louisville*, 2 F. 465, 468 (D. Ky. 1880) (“Railroads are quasi-public institutions . . . [T]heir construction has been encouraged by liberal grants of power, and aided by private and public contributions); *Taylor v. Philadelphia & Reading R.R. Co.*, 7 F. 386, 397 (E.D. Pa. 1881) (“[Q]uasi public corporations, such as railroads... are invested with important public and governmental functions . . .”); *McCoy v. Cincinnati, Indianapolis, St. Louis & Chicago R.R. Co.*, 13 F. 3, 7 (S.D. Ohio 1882) (“[R]ailroad corporations are quasi-public corporations dedicated to the public use. It is upon this idea that they have been invested with the power of eminent domain”).

⁵⁵⁴ Prepared testimony by Mark Zuckerberg reviewed prior to 2020 Senate hearing on Section 230. Chris Mills Rodrigo, *Zuckerberg to Express Openness to Section 230 Reform*, THE HILL (OCT. 27, 2020, 5:12 PM), <https://thehill.com/policy/technology/523039-zuckerberg-to-express-openness-to-section-230-reform/>.

⁵⁵⁵ Volokh, *supra* note 7 at 391 (citing 47 U.S.C. § 230(c)(1)).

⁵⁵⁶ See Speta, *supra* note 378.

transportation carriers, utilities, and telephone companies that offer essential services to the general public cannot unfairly discriminate among users.⁵⁵⁷ This goes to the heart of the debate when arguing whether social media platform service providers should instead be regulated as common carriers.⁵⁵⁸

- E. Big Tech Interactive Platforms can be Regulated as Common Carriers because they provide complex communication networking services and hold themselves out as distributors of speech and content to the general public.

Justice Thomas's contribution. United States Supreme Court Justice Clarence Thomas agrees that social media platforms may soon be regulated as common carriers. In his recent concurring opinion in *Biden v. Knight First Amend. Inst. at Columbia Univ.*,⁵⁵⁹ Justice Thomas noted that social media platforms already operate as common carriers, whether or not they are regulated as such.⁵⁶⁰ He observed that digital platforms that hold themselves out for use by the general public resemble traditional telephone companies regulated as common carriers.⁵⁶¹

Though digital and virtual, instead of analog and physical, social media platforms act as communication networks that carry or transmit information from one user to another.⁵⁶² Like a traditional telephone company that once laid complex physical wiring infrastructure to create a publicly available network to connect people, digital platforms create complex digital infrastructures to connect users.⁵⁶³

Telephone companies and social media platforms hold themselves out as transmitting and distributing speech and content to the general public.⁵⁶⁴ In other words, these social media platforms do not make individualized determinations about who can use their services.⁵⁶⁵ For these reasons, governmentally sanctioned immunities, like Section 230(c), protect both traditional telephone companies and social media

⁵⁵⁷ *Id.*; See also Common Carrier Obligation of Railroads, Fed. Reg., <https://www.federalregister.gov/documents/2008/02/27/E8-3712/common-carrier-obligation-of-railroads>.

⁵⁵⁸ See generally, Mark Hall, *Common Carriers Under the Communications Act*, 48 U. CHI. L. REV. 409, 413 (1981).

⁵⁵⁹ *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1224 (2021).

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.*

⁵⁶² *Id.*

⁵⁶³ *Id.*

⁵⁶⁴ *Id.*

⁵⁶⁵ *Id.*

platforms from being treated as publishers or speakers of any information they merely distribute.⁵⁶⁶

Justice Thomas further noted that the analogy between telephone companies as common carriers is even clearer for digital platforms with a dominant market share.⁵⁶⁷ “Similar to utilities, today’s dominant digital platforms derive much of their value from network size.”⁵⁶⁸ Thomas gave an example that, as of 2021, larger platforms such as Google captured 90% of the market share and profited astronomically (Google earned \$40.3 billion in net income alone).⁵⁶⁹ “That these companies have no comparable competitors highlights that the industries may have substantial barriers to entry.”⁵⁷⁰

Because dominant social media platforms have a virtual monopoly over their market share of the network services provided,⁵⁷¹ Justice Thomas notes that:

Much like with a communications utility, this concentration gives some digital platforms enormous control over speech. When a user does not already know exactly where to find something on the internet—and users rarely do—Google is the gatekeeper between that user and the speech of others 90% of the time. It can suppress content by deindexing or downlisting a search result or by steering users away from certain content by manually altering autocomplete results... Facebook and Twitter can greatly narrow a person’s information flow through similar means. And, as the distributor of the clear majority of e-books and about half of all physical books, Amazon can impose cataclysmic consequences on authors by, among other things, blocking a listing.⁵⁷² It changes nothing that these platforms are not the sole means for distributing speech or information. A person always could choose to avoid

⁵⁶⁶ *Id.* at 1224 (citing 110 Stat. 137, 47 U.S.C. § 230(c)). Justice Thomas notes that the Supreme Court has been inconsistent about whether telegraphs qualified as common carriers, and he compares *Primrose Western Tel. Co.*, 154 U.S. 1, 14 (1874) with *Moore v. New York Cotton Exchange*, 270 U.S. 593, 605 (1926). However, the Court has consistently recognized that telegraphs were at least analogous enough to common carriers to be regulated similarly. *Primrose*, 154 U.S. at 14. For example, telegraphs received some legal immunity from defamation claims (they were liable only if they knew or had reason to know that a message they transmitted was defamatory) whereas other transmitting entities lacked such immunity. RESTATEMENT (SECOND) OF TORTS § 581 (1976); *see also*, *O’Brien v. Western Union Tel. Co.*, 113 F.2d 539, 542 (1st Cir. 1940).

⁵⁶⁷ *Supra* note 556, at 1224.

⁵⁶⁸ *Id.*

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.*

⁵⁷¹ *Id.*

⁵⁷² *Id.*

the toll bridge or train and instead swim the Charles River or hike the Oregon Trail. But in assessing whether a company exercises substantial market power, what matters is whether the alternatives are comparable. For many of today's digital platforms, nothing is.⁵⁷³

Given the similarities between landline telephone utilities as common carriers and interactive internet social media platforms, Justice Thomas predicted that these similarities might strengthen legislators' argument for regulating such digital platforms as common carriers.⁵⁷⁴

F. The Policy Implications of Privileges and Economic Advantage: Why Abusing These Governmentally Sanctioned Benefits May Act as a Tipping Point for Regulating Interactive Internet Social Media Platforms as Common Carriers & Quasi-State Actors.

Critical public policies have shaped the evolution of common carrier law and doctrine over the centuries.⁵⁷⁵ Similarly, public policy considerations should apply when society balances Section 230 protections with the growing need to protect users from discriminatory censorship.⁵⁷⁶ This is especially true when a common carrier enjoys special governmentally sanctioned privileges such as Section 230 statutory legal immunities.⁵⁷⁷

Big Tech's social media platforms have enjoyed many privileges since Section 230's inception.⁵⁷⁸ Abusing these privileges could thereby accelerate comprehensive regulation of these Big Tech and these social

⁵⁷³ *Id.* at 1224-25 (internal citations omitted).

⁵⁷⁴ *Id.* at 1226 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 684 (1994) (O'Connor, J., dissenting) ("[I]t stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of digital platforms."). "That is especially true because the space constraints on digital platforms are practically nonexistent (unlike on cable companies), so a regulation restricting a digital platform's right to exclude might not appreciably impede the platform from speaking."; *Biden v. Knight*, 141 S. Ct. at 1226 (citing *Turner*, 512 U.S. at 675, 684 (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (noting restrictions on one-third of a cable company's channels but recognizing that regulation may still be justified).

⁵⁷⁵ For a useful history about how the common carriage doctrine evolved from railroad regulations and into the telecommunications, broadcasting and cable television eras, we recommend Brent Skorup and Joseph Kane, *The FCC and Quasi-Common Carriage: A Case Study of Agency Survival*, 18 MINN. J.L. SCI. & TECH. 631 (2017).

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.*

⁵⁷⁸ *Id.*

media platforms as common carriers.⁵⁷⁹

A bit of recent history is worth recounting here. In the 1990s and during the infancy of the Internet and social media, Congress enacted Section 230 “to promote the continued development of the Internet and other interactive computer services and other interactive media.”⁵⁸⁰ Congress wanted to shelter and promote the nascent internet, allowing its related innovation and entrepreneurship to germinate and take root.⁵⁸¹ It tried to protect the nascent hosted online chat forums like CompuServe and the like from crushing legal liability for defamation and other legal claims for third-party posted content outside their control.⁵⁸²

At the time, these online forums were essentially communication superhighways – passive, un-curated communication pipelines.⁵⁸³ So Congress gave these new interactive internet platforms the special privilege of Section 230 immunity and deemed them not to be publishers.⁵⁸⁴ This deemed non-publisher designation and legal immunity privilege has never been extended to other forms of traditional media such as broadcast radio, newspapers, magazines, broadcast networks, or cable television.⁵⁸⁵

But this governmentally sanctioned legal immunity privilege and de facto monopoly must be exercised judiciously, responsibly, and never abused. By the admission of Michael Beckerman, the former president of the Internet Association, Section 230 is “the one line of federal code that has created more economic value in this country than any other.”⁵⁸⁶ However, in all these examples, railroads, landline telephone companies, and now social media platforms have often “seriously leverages [their] economic power into a means of affecting a community’s political life.”⁵⁸⁷

G. Railroad Abuse of Power: A Cautionary Tale.

In closing, we offer a cautionary tale for Big Tech companies that hope to continue enjoying Section 230 immunities without regulatory or

⁵⁷⁹ *Id.*

⁵⁸⁰ 47 U.S.C. § 230(b)(1).

⁵⁸¹ *Id.*

⁵⁸² *Id.*

⁵⁸³ *Id.*

⁵⁸⁴ *Id.*

⁵⁸⁵ *Id.*

⁵⁸⁶ Alina Selyukh, *Section 230: A Key Legal Shield for Facebook, Google Is About to Change*, NPR (Mar. 21, 2018), <https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change>.

⁵⁸⁷ Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, *supra* note 7.

judicial restraint. Remember what happened to the high-flying railroads when they abused their generous governmentally bestowed privileges? The government responded by implementing sweeping federal legislative and agency reforms and restrictions.

In the 1800s, the government granted eminent domain powers and gifted millions of acres in public lands to private railroads.⁵⁸⁸ This helped the railroads access land essential to completing the transcontinental railroad.⁵⁸⁹ These grants and gifts transformed the railroads from private-sector beneficiaries into industry giants with near-monopoly control over the services.

These grants and gifts also transformed them into common carriers charged with serving the general public. Banking on these special privileges, the railroads began discriminating against customers by charging preferential rates to specific groups.⁵⁹⁰ For example, “long haul-short haul” discrimination is widely considered one of the most abusive railroad practices in the late nineteenth to early twentieth centuries.⁵⁹¹ This railroad practice charged a higher rate for a short-haul included within a longer haul over the same line.⁵⁹²

While Congress outlawed this discriminatory practice in Section 4 of the 1887 Interstate Commerce Act (“ICC”),⁵⁹³ the Supreme Court struck down that ICC section in the 1897 case *ICC v. Alabama Midland Railway Company*⁵⁹⁴ (resting its decision on the commission’s power to grant exemptions if the long and short hauls did not occur “under substantially similar circumstances and conditions.”).⁵⁹⁵ Sufficient differences existed between hauls to justify departures from Section 4’s prohibition).⁵⁹⁶

In 1910, Congress reenacted the ICC long haul-short haul clause

⁵⁸⁸ Richard White, *THE REPUBLIC FOR WHICH IT STANDS* 117–19 (2019) (noting that between 1862-1872, Congress granted 131 million acres to railroads, and states contributed 44 million additional acres. The railroads sold most of these acres to finance constructing 30,000 miles of track).

⁵⁸⁹ *Id.*

⁵⁹⁰ *Id.*

⁵⁹¹ Nicola Giocoli, *When Law and Economics Was a Dangerous Subject*, CATO INST. 32, 34 (Winter 2015–2016), <https://www.cato.org/sites/cato.org/files/serials/files/regulation/2015/12/regulation-v38n4-2.pdf>.

⁵⁹² *Id.*

⁵⁹³ See Interstate Commerce Act, NAT’L ARCHIVES (1887), <https://www.archives.gov/milestone-documents/interstate-commerce-act>; see also, James W. Ely Jr., *The Troubled Beginning of the Interstate Commerce Act*, 95 MARQ. L. REV. 1131 (2012), <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=5126&context=mulr>.

⁵⁹⁴ *ICC v. Ala. Midland Ry. Co.*, 168 U.S. 144 (1897).

⁵⁹⁵ *Id.* at 162.

⁵⁹⁶ *Id.* at 163–67.

absent the offending “similar circumstances” clause.⁵⁹⁷ Carriers were then banned from charging higher rates for shorter (included) hauls regardless of different conditions, although the commission was still authorized to make exceptions.⁵⁹⁸ In 1914, a unanimous Supreme Court sustained this reenactment in *United States v. Atchison, Topeka, & Santa Fe Railway Co.*⁵⁹⁹

The regulatory response. By 1872, Kansas held that common carrier law applied to railroads because of these special governmental privileges and curbed their discriminatory practices.⁶⁰⁰ Similarly, the Florida Supreme Court applied common carrier precedent and held that a railroad could not use preferential pricing but must use reasonable rates for all customers instead.⁶⁰¹

Before Congress enacted the ICC, courts used this railroad special privilege analysis to regulate common carriers when addressing the railroads’ discriminatory pricing.⁶⁰² This line of cases addressed unfair discrimination by the railroads and thus formed the basis for enacting the ICC.⁶⁰³ This reasoning was later expanded by including landline telephone companies regulated by the FCC under the 1934 Communications Act.⁶⁰⁴

These common carrier (and public utility) principles continue to govern and regulate railroads and landline telephone providers today.⁶⁰⁵ As a result of congressional protections, the railroad industry, the telecom industry, and now Big Tech “[have shot] from nothing into the

⁵⁹⁷ Homer B. Vanderblue, *The Long and Short Haul Clause Since 1910*, 36 HARV. L. REV. 426 (1923).

⁵⁹⁸ *Id.*

⁵⁹⁹ *United States v. Atchison, Topeka & Santa Fe Ry. Co.*, 249 U.S. 451 (1919) (dismissing a suit to enjoin enforcement of an order of the Interstate Commerce Commission).

⁶⁰⁰ *Kansas Pac. Ry. Co. v. Nichols, Kennedy & Co.*, 9 Kan. 235, 250 (KS 1872) (“It is believed that no railroad has yet been built in Kansas that has not been aided both by the exercise of . . . eminent domain, and by other public aid, such as lands and county or municipal bonds.”).

⁶⁰¹ *Johnson v. Pensacola & Perdido R.R. Co.*, 16 Fla. 623, 663 (1878) (“It cannot be questioned that the reason why a common carrier is restricted to reasonable rates is the same that causes the limitation at common law upon the rates to be charged by a wharfinger licensed under [the] statute.”).

⁶⁰² *Munn v. Illinois*, 94 U.S. 113 (1876).

⁶⁰³ 49 U.S.C. § 10741.

⁶⁰⁴ *FTC v. Verity Int’l Ltd.*, 443 F.3d 48, 56 (2d Cir. 2006). *See, e.g.*, Alan L. Olmstead & Paul W. Rhode, *The Origins of Economic Regulation in the United States: The Interstate Commerce and Bureau of Animal Industry Acts*, HOOVER INST. REGUL. & RULE L. WORKSHOP STAN. UNIV. (Mar. 10, 2017), https://www.hoover.org/sites/default/files/pages/docs/olmstead_and_rhode_-_origins_of_economic_regulation_in_the_us.pdf.

⁶⁰⁵ *See* 47 U.S.C. § 414.

highest ranks of the nation’s largest and wealthiest enterprises.”⁶⁰⁶ Such special governmentally bestowed privileges and immunities have allowed these industries to revolutionize “America’s communication networks and the country itself.”⁶⁰⁷

Social media platforms must act in good faith to maintain Section 230’s immunity.⁶⁰⁸ The phrase “otherwise objectionable” in Section 230(c)(2)⁶⁰⁹ does not mean Big Tech can freely censor anything or deplatform anyone with whom or what a social media platform employee disagrees.⁶¹⁰ Good faith does not mean “however the political wind blows.”⁶¹¹ If and when our courts find that Big Tech can be regulated as a common carrier, Big Tech will no longer have blanket immunity to freely discriminate against users based on their political, social, racial, medical, religious, or sexual orientations.⁶¹²

It’s also worth repeating that Section 230 leaves room for federal and state courts and legislatures to adopt the common carrier solution to Big Tech censorship. As written, nothing in Section 230 bars, abridges, or otherwise alters the remedies now existing at common law or by statute (i.e., it has no effect on federal criminal law, any intellectual property law, or any state law), including the use of traditional common carrier regulations (i.e., any state laws and federal rulemakings from the FCC).⁶¹³

Justice Thomas predicted that, although applying century’s old common law doctrines to these new digital platforms “is rarely straightforward,” the Court “will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.”⁶¹⁴

⁶⁰⁶ *Moody v. NetChoice, LLC*, No. 22-277, 2022 WL 14813881 at 14, (Brief for Donald J. Trump as Amicus Curiae in Support of Petitioners) (U.S. Oct. 21, 2022).

⁶⁰⁷ *Id.* at 15.

⁶⁰⁸ *See, e.g., Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1052 (9th Cir. 2019); *e-ventures Worldwide, LLC v. Google, Inc.*, No. 2:14-cv-646-FtM-PAM-CM, 2017 WL 2210029, at 2 (M.D. Fla. Feb. 8, 2017).

⁶⁰⁹ *SEE* 47 U.S.C. § 230(c)(2)(A).

⁶¹⁰ *Sherman v. Yahoo! Inc.*, 997 F. Supp. 2d 1129, 1138 (S.D. Cal. 2014).

⁶¹¹ *Id.*

⁶¹² *Id.*

⁶¹³ *See* 47 U.S.C. § 230(e) (“Effect on other laws”); *see* Thomas M. Johnson Jr., *The FCC’s Authority to Interpret Section 230 of the Communications Act*, FCC (2002), (under Supreme Court authority the FCC is empowered to interpret all 1934 Communications Act provisions including Section 230), <https://www.fcc.gov/news-events/blog/2020/10/21/fccs-authority-interpret-section-230-communications-act>; *see generally*, Valerice C. Brannon & Eric N. Holmes, *Section 230: An Overview*, Cong. Rsch. Serv. (2021), <https://crsreports.congress.gov/product/pdf/R/R46751/1>.

⁶¹⁴ *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221 (2021).

CONCLUSION.

A. Where Things Currently Stand and What Lies Ahead.

Big Tech has taken the global public square online as a collective de facto speech gatekeeper. Big Tech has collaborated with government officials to decide which viewpoint-related content (i.e., otherwise protected speech) to allow, promote, or censor. Big Tech “partners” with Congress, the executive branch, and, as we now know, thanks to the Twitter files and certain judicial proceedings, even the intelligence community, in making correct editorial and publishing decisions.

This government mentorship of Big Tech often occurs under the threatened penalty of micromanagement and threatened onerous regulation. Accordingly, Big Tech’s transmission, content moderation, and censorship decisions are no longer purely private. If Congress had done what it has done in almost any other setting with Big Tech online speech, the state action status and resulting unconstitutionality would have been immediately apparent.

While many public actors and commentators have loudly argued for Section 230’s revision or repeal, it may be too late. Perhaps the damage is done. Big Tech likely wouldn’t be an unaccountable monopolist global superpower absent Section 230. So, without special protections for new and relatively small market entrants, revising or repealing Section 230 would likely only increase and entrench Big Tech’s anticompetitive position. Big Tech would continue to lord over smaller entrants and competitors, who remain largely unequipped to withstand the onerous compliance burdens and risks of crushing liability.

Congress cannot deputize private firms to carry out their censorship and editorial wishes without burdening them with corresponding constitutional individual liberty protections. Big Tech is arguably a monopolist global speech gatekeeper and state actor. Therefore, It should be held accountable to the same level of American constitutional protection for speakers on its erstwhile private digital forums as the U.S. government in an official public forum.

It’s worth noting that, until we find better ways to hold Big Tech accountable, social media customers as private individuals will continue to have almost no legal recourse against Big Tech when their user

accounts are suspended, throttled, or have their content censored.⁶¹⁵ When a private individual user is ousted from a social media platform because Big Tech employees and their influential institutional allies decide that the user's acts, ideas, or content are somehow harmful, offensive, or inappropriate, this ouster can cause devastating harm to that user.⁶¹⁶ Censorship and de-platforming fuels cancel culture. The typical cancel culture victim is not an influential person nor a high-visibility celebrity with an arsenal of money, resources, and supporters to fight back.⁶¹⁷ Consequently, cancel culture can destroy a user's reputation and career,⁶¹⁸ subject the user to doxing dangers,⁶¹⁹ and wreak havoc on their mental health.⁶²⁰

Beginning in early 2020, preventing the spread of COVID-19 MDM became Big Tech's justification for censoring and de-platforming thousands of users who questioned the prevailing orthodoxy. For example, opining whether COVID may have originated or leaked from a Wuhan virology laboratory that received U.S. taxpayer funding and

⁶¹⁵ See Valerie C. Brannon, *Free Speech and the Regulation of Social Media Content*, CONG. RSCH. SERV. (Mar. 27, 2019) (Federal law offers little recourse for social media users to challenge a social media provider's decision about whether and how to present a user's content.), <https://crsreports.congress.gov/product/pdf/R/R45650>; but see, Kaya Yurieff, *Facebook's 'Supreme Court' Just Ruled Against Facebook*, CNN BUS. (Jan. 28, 2021); <https://www.cnn.com/2021/01/28/tech/facebook-oversight-board-first-decisions/index.html>; Alix Langone, *Twitter Users Can Now Appeal Account Suspensions, Under New Standards*, CNET (Feb. 1, 2023), <https://www.cnet.com/news/social-media/twitter-users-can-now-appeal-account-suspensions-under-new-standards/>.

⁶¹⁶ Emily A. Vogels et al., *Americans and 'Cancel Culture': Where Some See Calls for Accountability, Others See Censorship, Punishment*, PEW RSCH. CTR. (May 19, 2021), <https://www.pewresearch.org/internet/2021/05/19/americans-and-cancel-culture-where-some-see-calls-for-accountability-others-see-censorship-punishment/>.

⁶¹⁷ See Evan Gerstmann, *Cancel Culture is Only Getting Worse*, FORBES (Sept. 13, 2020), <https://www.forbes.com/sites/evangerstmann/2020/09/13/cancel-culture-is-only-getting-worse/?sh=7f5b763663f4>; Jason Johnson, *The Real Victims of Cancel Culture*, SLATE (Mar. 8, 2021), <https://slate.com/news-and-politics/2021/03/cancel-culture-call-out-a-word-podcast.html> (interviewing Loretta Ross, who noted that “[m]ost people who get canceled are the most vulnerable people because most of the punching in the cancel culture is punching down, not punching up.”).

⁶¹⁸ Aarushi Mandal, *The Internet's Courtroom: Cancel Culture Damages Lives*, THE GREEN HOPE FALCON (May 18, 2022), <https://ghfalcon.com/2918/editorial/the-internets-courtroom-cancel-cultures-effects-on-lives/>.

⁶¹⁹ Asha Perry, *#CancelCultureIsOverParty: Why Twitter's 'Cancel Culture' is Toxic and Unhelpful to Genuine Social Change*, DEBATING COMTYS. & NETWORKS CONF. XII (Apr. 26, 2021), <https://networkconference.netstudies.org/2021/2021/04/26/cancelcultureisoverparty-why-twitters-cancel-culture-is-toxic-and-unhelpful-to-genuine-social-change/> (describing how censorship and cancel culture on social media platforms often results in doxing).

⁶²⁰ Lindsey Toler, *The Mental Health Effects of Cancel Culture*, VERYWELLMIND (Apr. 14, 2022), <https://www.verywellmind.com/the-mental-health-effects-of-cancel-culture-5119201>.

allegedly conducted “gain of function” research.⁶²¹

The media and Big Tech, together with federal officials, immediately characterized many such inquiries as conspiracy theories and MDM. Big Tech censored related content and denigrated and deplatformed its users. This occurred regardless of whether these users were world-renowned epidemiologists, virologists, doctors, professors, and researchers with well-credentialed experience and pedigrees.⁶²²

For example, The Great Barrington Declaration (“GBD”),⁶²³ an open letter coauthored in October 2020 by three well-respected epidemiologists and 941,106 cosignatories, expressed grave reservations around the harmful physical and mental health effects of the prevailing COVID-19 lockdowns, school closures, and related policies, and recommended an alternative natural herd immunity policy approach they called “focused protection.”⁶²⁴

Upon publication of the GBD, federal officials, such as Francis Collins at the National Institutes of Health (“NIH”) and Fauci, immediately teamed up to discredit and “take down” the GBD and its co-authors.⁶²⁵

⁶²¹ Cameron English, *COVID-19 Origins Debate Undermines The Case For Social Media Censorship*, AM. COUNCIL ON SCI. & HEALTH AMER. COUNCIL ON SCIENCE AND HEALTH (June 3, 2021), <https://www.acsh.org/news/2021/06/03/covid-19-origins-debate-undermines-case-social-media-censorship-15580>; Cristiano Lima, *Facebook No Longer Treating ‘Man-Made’ Covid as a Crackpot Idea*, POLITICO (May 26, 2021) <https://www.politico.com/news/2021/05/26/facebook-ban-covid-man-made-491053>; Carl Zimmer & James Gorman, *Fight Over Covid’s Origins Renews Debate on Risks of Lab Work*, N.Y. TIMES (June 20, 2021), <https://www.nytimes.com/2021/06/20/science/covid-lab-leak-wuhan.html>; David Zimmermann, *Fauci Knew NIH Funded Wuhan’s Gain-of-Function Research as Pandemic Began*, Email Reveals, Nat’l Rev. (Sept. 5, 2023), <https://www.nationalreview.com/news/fauci-knew-nih-funded-wuhans-gain-of-function-research-as-pandemic-began-email-reveals/>.

⁶²² Yaffa Shir-Raz et al., *Censorship and Suppression of Covid-19 Heterodoxy: Tactics and Counter-Tactics*, 61 MINERVA 407 (2022), <https://doi.org/10.1007/s11024-022-09479-4>.

⁶²³ See *Great Barrington Declaration*, <https://gbdeclaration.org/>.

⁶²⁴ *Id.* This proposed approach balances the risks and benefits of reaching herd immunity. Those at low risk of death are allowed to live their lives normally to build up immunity to the virus through natural infection, while those who are at highest risk merit greater protection. This approach adopts measures to protect the most vulnerable as the central aim of public health responses to COVID-19, while those less vulnerable are immediately allowed to resume life as normal.

⁶²⁵ See Appendix #2, Dr. Jay Bhattacharya’s remarks to the U.S. House of Representatives Subcommittee on Communications and Technology (March 28, 2023), <https://www.congress.gov/event/118th-congress/house-event/115561?q=%7B%22search%22%3A%22Prepared+Statement+by+Dr.+Jay+Bhattacharya++March+27%2C+2023%22%7D&s=1&t=1>; see also Editorial Board, *How Fauci and Collins Shut Down Covid Debate: They Worked with the Media to Trash the Great Barrington Declaration*, WALL ST. J. (Dec. 21, 2021), <https://www.wsj.com/articles/fauci-collins-emails-great-barrington-declaration-covid-pandemic-lockdown-11640129116>; See also Yaffa Shir-Raz et al., *supra* note 620.

Big Tech, with the government’s complicity and overt pressure, censored and ultimately “cancelled” these scientists, doctors, experts, and others for *even questioning* the officially sanctioned prevailing pandemic narrative.⁶²⁶ In a stroke of irony, one of the three GBD coauthors, Dr. Jay Bhattacharya, has now been nominated by President-elect Trump to head the NIH.

As a result, many of these medical and virology experts suffered irreparable damage to their careers and professional reputations.⁶²⁷ As noted earlier, in late February 2023 – and three years later – the DOE and FBI reported that intelligence supports the lab leak theory.⁶²⁸ Query: Where do these previously censored, de-platformed, and canceled scientists, doctors, and researchers go to get their reputations and livelihoods back?

Section 230 effectively prevents censored, de-platformed, and canceled users from seeking recourse against Big Tech in a court of law for damages suffered. If private users lack meaningful recourse, which branch of government should be charged with reining in Big Tech? As discussed in this article – and as demonstrated in the two most recent Supreme Court cases involving Section 230 – the judiciary seems more interested in expanding Section 230’s immunity than restricting it.

Of course, it remains to be seen how the Supreme Court will rule in the two upcoming *NetChoice* cases now that the Court has granted certiorari.⁶²⁹ As the Supreme Court’s recent decisions in *Murthy* and *Moody* make clear, the judiciary is in no hurry to create a judicial framework for reining in Section 230’s immunity reach.⁶³⁰ As for

⁶²⁶ Rikki Schlott, *The Biden Administration Tried to Censor this Stanford Doctor, but He Won in Court*, N.Y. POST (Sept. 20, 2023), <https://nypost.com/2023/09/20/how-dr-jay-bhattacharya-beat-biden-administration-censorship/>; Dylan Housman, *Scientists Join Lawsuit Against Biden Admin Over Censoring COVID-19 Information On Social Media*, DAILY CALLER (Aug. 5, 2022), <https://dailycaller.com/2022/08/05/jay-bhattacharya-martin-kulldorff-lawsuit-biden-big-tech-censorship-covid-coronavirus/>; Katie Pavlich, *White House Advocates for Big Tech to Censor Health Experts They Disagree With*, TOWNHALL (Feb. 1, 2022), <https://townhall.com/tipsheet/katiepavlich/2022/02/01/among-joe-rogan-controversy-white-house-wants-companies-to-censor-misinformation-n2602681>; Buzz Hollander, *The Problems with Censoring Doctors Over Their COVID-19 Stances*, REAL CLEAR SCIENCE (Oct. 7, 2021), https://www.realclearscience.com/articles/2021/10/07/the_problems_with_censoring_doctors_over_their_covid-19_stances_797819.html#!.

⁶²⁷ *Id.*

⁶²⁸ Marisa Dellatto, *Timeline: How The Covid Lab Leak Origin Story Went From “Conspiracy Theory” To Government Debate*, FORBES (Feb. 26, 2023), <https://www.forbes.com/sites/marisadellatto/2023/02/26/timeline-how-the-covid-lab-leak-origin-story-went-from-conspiracy-theory-to-government-debate/?sh=61da716837b9>.

⁶²⁹ See *NetChoice* cases, *supra* notes 416 and 419.

⁶³⁰ See *Murthy v. Missouri*, 603 U.S. 43 (2024); *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024).

Congress, both Republicans and Democrats agree that Section 230 should be fixed, repealed, or replaced. However, they disagree on whether and how to revisit Section 230 and what changes should be made.

The prevailing wisdom is that Democrats want Big Tech to do more about policing so-called mis/disinformation and hate speech, however that is defined, while Republicans want Big Tech to stop censoring content altogether. Although Congress has in the recent past held several hearings to debate Big Tech's content management and censorship practices, Congress seemingly won't touch Section 230 either.⁶³¹

Perhaps regulators will attempt to promulgate administrative agency rules and regulations under the auspices of existing statutes to reign in Big Tech. With the second Trump Administration poised to retake the executive branch in 2025, it is unclear which policy priorities will emerge in this area. However, even during the last Trump Administration, when the winds of political change allowed regulatory agencies to address Big Tech censorship, the agencies chose not to do so. One example of an attempt at reform is Trump's May 2020 Executive Order to reform Section 230, which appeared too late for agency implementation before President Biden shortly after rescinded it.⁶³²

The FCC, which regulates broadcasting, telecommunications, and other related industries, has similarly regulated broadband service, which is now in doubt, again. To quickly recap the recent relevant history, in 2015, the FCC adopted "net neutrality" regulations for broadband, which gives the FCC broad regulatory power and prevents broadband companies from discriminating against users.⁶³³ The FCC adopted these regulations according to Title II of the 1934 Communications Act 1934, rationalizing that broadband provided a telecommunication service like a telephone utility and provided an essential service that the FCC could regulate as a common carrier (or public utility).⁶³⁴ However, under the

⁶³¹ Daniel Howley, *Why Congress Is Never Going to Fix a Legal Field That Big Tech Loves*, YAHOO! FIN. (Nov. 18, 2020), https://www.yahoo.com/video/why-congress-ill-never-fix-section-230-205718856.html?guccounter=1&guce_referrer=aHRocHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAALhC2spZlI09GKK1AIxwGitLoerFHemor9qO8lBJS9bDR99tRNDWjxmv3xWXzLQHdNBMaEMUoQcQLSwnQWgBo1DQdmR xz7DmExCfG44cc4r3PFoEaNAQeaXQN e_Lahqed_DYee5jLcePxmo8sEiCq8ek4ibOstCBysBHxEbv-o.

⁶³² Valerie C. Brannon, et al., *Update: Section 230 and the Executive Order on Preventing Online Censorship*, CONG. RSCH. SERV. (Oct. 16, 2020).

⁶³³ Chris D. Linebaugh, *Net Neutrality Law: an Overview*, CONG. RSCH. SERV. 2 (Oct. 18, 2022).

⁶³⁴ *Id.*

Trump administration in 2017, the FCC reversed course, reclassified broadband as a Title I information service, and dropped the 2015 net neutrality regulations.

Although some states have adopted their own net neutrality laws for broadband services, federal agencies and Congress continue to debate how they want to treat broadband. Then under Biden, in September 2023, the FCC proposed reclassifying broadband under Title II.⁶³⁵ In April 2024, the FCC announced its official reclassification of broadband under Title II.⁶³⁶ The FCC decision was quickly challenged in federal court. In July 2024, the Sixth Circuit granted industry group plaintiffs a temporary stay blocking the FCC from implementing their broadband reclassification rules as a Title II telecommunications service under net neutrality rules, thereby preventing the FCC from asserting Title II authority over broadband services.⁶³⁷ In August 2024, the Sixth Circuit further extended the stay.⁶³⁸

In October 2024, a three-judge panel in the Sixth Circuit⁶³⁹ heard oral argument as to whether the FCC's broadband reclassification violated the "major questions doctrine" in light of the Supreme Court's 2024 *Loper Bright* decision⁶⁴⁰ striking down the *Chevron* deference doctrine. According to recent reporting, the judges also questioned the relationship between the doctrine and *Chevron* deference, as well as the statutory interpretation of the Communications Act and the FCC's

⁶³⁵ See *FCC Votes To Start Proceeding On Reestablishing Open Internet Protections: Proposes to Reestablish FCC's Authority Over Broadband Providers Under Title II*, FCC (Oct. 19, 2023), <https://docs.fcc.gov/public/attachments/DOC-397827A1.pdf>; See also, *Fact Sheet: FCC Chairwoman Rosenworcel Proposes to Restore Net Neutrality Rules: Proposes to Re-Establish FCC's Authority Over Broadband Providers Under Title II*, FCC (Sept. 26, 2023), <https://docs.fcc.gov/public/attachments/DOC-397235A1.pdf>.

⁶³⁶ *FCC Safeguarding and Securing the Open Internet; Restoring Internet Freedom*, 89 FED. REG. 45404 (May 22, 2024), <https://www.govinfo.gov/content/pkg/FR-2024-05-22/pdf/2024-10674.pdf>; FCC Media Release, *FCC Restores Net Neutrality: Reasserts Broadband Jurisdiction, Reestablishing National Open Internet Standard*, Action by the Commission by Declaratory Ruling, Order, Report and Order, and Order on Reconsideration (FCC 24-52) (Apr. 25, 2024), <https://docs.fcc.gov/public/attachments/DOC-402082A1.pdf>.

⁶³⁷ In re: MCP No. 185 Open Internet Rule (FCC 24-52) (Docket 24-7000) (6th Cir. 2024), <https://www.govinfo.gov/content/pkg/USCOURTS-ca6-24-07000/pdf/USCOURTS-ca6-24-07000-0.pdf>

⁶³⁸ In re: MCP No. 185; Federal Communications Commission, in the Matter of Safeguarding and Securing the Open Internet, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, FCC 24-52, 89 Fed. Reg. (6th Cir. 2024), <https://docs.fcc.gov/public/attachments/DOC-404438A1.pdf>.

⁶³⁹ In re: MCP No. 185, 124 F.4th 993 (6th Cir. 2025),

⁶⁴⁰ *Loper Bright Enterprises, et al., v. Raimondo*, 603 U.S. 369 (2024).

changing positions over time.⁶⁴¹ On January 2, 2025, a three-judge panel of the Sixth Circuit struck down the FCC's net neutrality rules.⁶⁴² The Sixth Circuit stated that the FCC lacked the authority to reinstate rules preventing broadband providers from slowing or blocking access to internet content, and pointed to its recent *Loper Bright* decision overturning its 1984 *Chevron* deference doctrine: "Applying *Loper Bright* means we can end the FCC's vacillations...."⁶⁴³

Following *Loper Bright*,⁶⁴⁴ it remains to be seen whether Supreme Court review will then be sought as to whether and to what extent the FCC is empowered to regulate broadband providers and service. Reading the proverbial tea leaves, President-elect Trump's recent choice of Brendan Carr, a veteran Republican member of the FCC both as a commissioner and general counsel, to lead the FCC in his new term, likely signals a hard pivot from the current FCC policy orientation.⁶⁴⁵ While there are calls for Congress to take decisive action, Congress and the FCC have been in gridlock over this very issue for years.⁶⁴⁶ For these reasons, among others, it seems unlikely that these branches of the federal government will collaboratively come together, gain consensus, and address regulating Big Tech anytime soon. On the other hand, because the Republican party has gained electoral control over both Congress and the presidency, the new Trump administration may surprise us.

While Section 230 appears to have become the proverbial electrified third rail, if Big Tech continues to grow and monopolize the social media platform market, then perhaps Congress and the FCC may be forced to revisit regulating Big Tech as providing an essential service as a common carrier. However, until Congress and the FCC deign to do so, perhaps our traditional common carrier laws will provide state legislatures and/or the judiciary with a provisional remedy. Maybe this

⁶⁴¹ See Lauren Feiner, *FCC And The Broadband Industry Argue Net Neutrality's Future: Does The Supreme Court Still Have The Authority To Call Internet Service Providers Common Carriers?*, THE VERGE (Oct. 31, 2024), <https://www.theverge.com/2024/10/31/24284435/fcc-net-neutrality-isp-sixth-circuit-oral-arguments>.

⁶⁴² See *In re: MCP No. 185*, 124 F.4th 993 (6th Cir. 2025).

⁶⁴³ *Id.* at 1000. See generally, Cecilia Kang, *Net Neutrality Rules Struck Down by Appeals Court*, N. Y. Times (Jan. 2, 2025).

⁶⁴⁴ *Loper Bright*, 603 U.S. 369 (2024), *supra* note 636.

⁶⁴⁵ See e.g., *The Fiscal Year 2025 Federal Communications Commission Agency Budget*, Testimony of Brendan Carr, Commissioner, Federal Communications Commission before the Subcommittee on Communications and Technology of the United States House of Representatives Committee on Energy and Commerce (July 9, 2024), <https://docs.fcc.gov/public/attachments/DOC-404046A1.pdf>.

⁶⁴⁶ Patricia Moloney Figliola, *The Federal Net Neutrality Debate: Access to Broadband Networks*, CONG. RSCH. SERV. (Feb. 24, 2021, as updated), <https://crsreports.congress.gov/product/pdf/R/R40616>.

approach offers a more palatable means – and Section 230 workaround – when a social media platform gets sufficiently massive that it functions as a quasi-public essential service.

B. Future Research Opportunities for Other Scholars.

As jurists and scholars revisit and rethink the best approach to the advent of government encouragement and/or direction of Big Tech censorship, and with the increasingly rapid pace of technological change, perhaps the Supreme Court may soon be ready to wade into this thicket. This invigorates more discussion, research, and debate about several related topics the authors believe are worth further research and exploration by other scholars. Although these topics are beyond the scope of this article, we have already touched briefly on a few and also have some additional ideas:

1. Should there be any regulatory scheme? Who and what branch of government decides this? Do the American people have the appetite to regulate this behavior?
2. Should any social media regulation be exclusively federal in the interest of uniformity? Or in the interest of federalism might a state system of regulation suffice? Do the state *NetChoice* cases provide a roadmap for state regulation?
3. At the executive level, the wisdom and substance of some form of FTC regulatory guardrails for large social media platforms. If so, then what might the guardrails look like?
4. At the legislative level, the advent and impact of machine learning and artificial intelligence (“AI”) in the content moderation process and as a potential censorship tool. One may ask whether an algorithm can be a state actor for first amendment purposes. Further, does Section 230 immunity extend to non-human agents or is it limited to human content moderation and terms of service violation decisions? And where do we then place accountability for non-human entities’ decision-making in this area?
5. At the judicial level, has the Supreme Court sufficiently clarified whether and when jawboning constitutes state action for constitutional claims of interference with individual liberties? On a related note, when exactly does a non-governmental response to jawboning convert an otherwise private party to a state actor? What about jawboning morphing into new directions with algorithms and AI? If the Supreme Court sufficiently clarifies the state actor doctrine boundaries, might we be able to rely on the

common law and existing law to address the erstwhile government proxy censorship issue?

6. The proliferation of taxpayer-funded censorship entities, such as those operating under the banner of combatting mis/disinformation, media literacy, factchecking, information integrity, and computational propaganda, both in the private sector (e.g., businesses, corporations and private industry) and civil society (e.g., NGOs, academia, foundations, and non-profits).
7. The prevalence of governmental entities including those affiliated with the U.S. Department of State or the military. When does public funding and coordination equate to government censorship? These entities directly influence speech on social media by funding and also discrediting or promoting certain viewpoints and content or partnering or otherwise coordinating with non-governmental entities to do so. For example, the United States Agency for International Development (“USAID”), now offline following recent DOGE activity, had a budget over \$50 billion and called itself one of the largest official aid agencies in the world with a comprehensive “disinformation primer” and “digital policy.”⁶⁴⁷

⁶⁴⁷ Carolina Lumetta, *The USAID Takedown, Explained*, WORLD NEWS GRP. (Feb. 7, 2025), <https://wng.org/roundups/the-usaid-takedown-explained-1738965931>.

APPENDIX #1



1 Hacker Way
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August 26, 2024

The Honorable Jim Jordan
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Chairman Jordan:

I appreciate the Committee's interest in content moderation on online platforms. As you are aware, Meta has produced thousands of documents as part of your investigation and made a dozen employees available for transcribed interviews. Further to our cooperation with your investigation, I welcome the opportunity to share what I've taken away from this process.

* * *

There's a lot of talk right now around how the U.S. government interacts with companies like Meta, and I want to be clear about our position. Our platforms are for everyone -- we're about promoting speech and helping people connect in a safe and secure way. As part of this, we regularly hear from governments around the world and others with various concerns around public discourse and public safety.

In 2021, senior officials from the Biden Administration, including the White House, repeatedly pressured our teams for months to censor certain COVID-19 content, including humor and satire, and expressed a lot of frustration with our teams when we didn't agree. Ultimately, it was our decision whether or not to take content down, and we own our decisions, including COVID-19-related changes we made to our enforcement in the wake of this pressure. I believe the government pressure was wrong, and I regret that we were not more outspoken about it. I also think we made some choices that, with the benefit of hindsight and new information, we wouldn't make today. Like I said to our teams at the time, I feel strongly that we should not compromise our content standards due to pressure from any Administration in either direction -- and we're ready to push back if something like this happens again.

In a separate situation, the FBI warned us about a potential Russian disinformation operation about the Biden family and Burisma in the lead up to the 2020 election. That fall, when we saw a *New York Post* story reporting on corruption allegations involving then-Democratic presidential nominee Joe Biden's family, we sent that story to fact-checkers for review and temporarily demoted it while waiting for a reply. It's since been made clear that the reporting was not Russian disinformation, and in retrospect, we shouldn't have demoted the story. We've changed our policies and processes to make sure this doesn't happen again -- for instance, we no longer temporarily demote things in the U.S. while waiting for fact-checkers.

Apart from content moderation, I want to address the contributions I made during the last presidential cycle to support electoral infrastructure. The idea here was to make sure local election jurisdictions across the country had the resources they needed to help people vote safely during a global pandemic. I made these contributions through the Chan Zuckerberg Initiative. They were designed to be non-partisan -- spread across urban, rural, and suburban communities. Still, despite the analyses I've seen showing otherwise, I know that some people believe this work benefited one party over the other. My goal is to be neutral and not play a role one way or another -- or to even appear to be playing a role. So I don't plan on making a similar contribution this cycle.

Respectfully,

/s/ Mark Zuckerberg

Mark Zuckerberg
Founder, Chairman & CEO
Meta Platforms, Inc.

cc: The Honorable Jerrold Nadler, Ranking Member

APPENDIX #2

Prepared Statement by Dr. Jay Bhattacharya March 27, 2023

Thank you for the opportunity to address this committee. I am a Professor of Health Policy at Stanford University School of Medicine and a research associate at the National Bureau of Economic Research. I hold an M.D. and Ph.D. from Stanford University. Because of my views on COVID-19 restrictions, I have been specifically targeted for censorship by federal government officials.

On October 4, 2020, I and two colleagues—Dr. Martin Kulldorff, a professor of medicine at Harvard University, and Dr. Sunetra Gupta, an epidemiologist at the University of Oxford—published the “Great Barrington Declaration.”

The declaration called for an end to economic lockdowns, school shutdowns, and similar restrictive policies on the ground that they disproportionately harm the young and economically disadvantaged while conferring limited benefits.

We know that vulnerability to death from COVID-19 is more than a thousand-fold higher in the old and infirm than the young. The declaration endorsed a “Focused Protection” approach that called for strong measures to protect high-risk populations while allowing lower-risk individuals to return to normal life with reasonable precautions. Tens of thousands of doctors and public health scientists signed on to the declaration.

Because it contradicted the government’s preferred response to COVID-19, the Great Barrington Declaration was immediately targeted for suppression by federal officials. Four days after the declaration’s publication, the then-Director of NIH, Dr. Francis Collins, emailed Dr. Anthony Fauci and Cliff Lane at NIH/NIAID about the Great Barrington Declaration.

This email stated: “Hi Tony and Cliff, See: <https://gbdeclaration.org/>. This proposal from the three fringe epidemiologists who met with the Secretary seems to be getting a lot of attention – and even a co-signature from Nobel Prize winner Mike Leavitt at Stanford. There needs to be a quick and devastating published take down of its premises. I don’t see anything like that online yet – is it underway? Francis.” This email was produced over a year later in response to FOIA requests.

It is possible to surmise from this email that Collins viewed the

Great Barrington Declaration as a threat to the illusion that there was a consensus of scientists who agreed with him about the necessity of lockdown.

In the following days, I was subjected to what I can only describe as a propaganda attack. Though the GBD called public health authorities to think more creatively about how to protect vulnerable elderly people from covid, reporters accused me of wanting to let the virus rip. Another FOIAed email shows Tony Fauci forwarding a Wired Magazine article saying something along those lines to Francis Collins only a couple of days after Collins' call for a devastating takedown.

A key part of the government's propaganda campaign supporting lockdowns and other pandemic strategies has been the censorship of discourse by scientists and regular people on social media. I am party to a case brought by the Missouri and Louisiana Attorney Generals against the Biden Administration. Through this case, lawyers have had the opportunity to depose under oath representatives from many federal agencies involved in the censorship efforts, including representatives of the Biden administration and Tony Fauci himself.

What this case has revealed is that a dozen federal agencies, including the CDC, the Office of the Surgeon General, and the White House pressured social media companies like Google, Facebook, and Twitter to censor and deboost even true speech that contradicted federal pandemic priorities, including especially inconvenient facts about the covid vaccines such as its inefficacy against covid disease transmission.

After the publication of the Great Barrington Declaration, we were repeatedly censored on social media. Immediately after publication, Google deboosted search results, pointing users to media hit pieces critical of it and placing the link to the actual declaration lower on this list of results.¹ A prominent online discussion site, Reddit, removed links to the Declaration from COVID-19 policy discussion fora.² In February 2021, Facebook removed the Great Barrington Declaration page without explanation before restoring it a week later.³

¹ Fraser Myers (2020) "Why Has Google Censored the Great Barrington Declaration?" Spiked Online. October 12, 2020. <https://www.spiked-online.com/2020/10/12/why-has-google-censored-the-great-barrington-declaration/>.

² Ethan Yang (2020) "Reddit's Censorship of The Great Barrington Declaration" American Institute for Economic Policy Research. Oct. 8, 2020. <https://www.aier.org/article/reddits-censorship-of-the-great-barringtondeclaration/>.

³ Daniel Payne (2021) "Facebook removes page of international disease experts critical of COVID lockdowns" Just the News. February 5, 2021. https://justthenews.com/nation/technology/facebook-removes-page-international-disease-experts-who-have-been-critical-covid?utm_source=breakingnewsletter&utm_medium=email&utm_campaign=newsletter.

On March 18, 2021, Dr. Scott Atlas of Stanford University, Dr. Kulldorff, Dr. Gupta, and I participated in a two-hour roundtable discussion with Governor Ron DeSantis of Florida. During the discussion, the participants (including me) questioned the efficacy and appropriateness of requiring children to wear face masks. I pointed out an incontrovertible fact - that no randomized studies demonstrate that masking children slows or stops the spread of covid.

The March 18, 2021 roundtable discussion video was promptly censored on social media.⁴ YouTube removed the video, claiming that it “contradicts the consensus of local and global health authorities regarding the efficacy of masks to prevent the spread of COVID-19.” Notably, the opposite is now true-doubting the efficacy of masks, especially cloth masks, is (if anything) the new consensus.

This suppression of scientific discussion online clearly violates the U.S. first amendment. But perhaps even more importantly, the censorship of scientific discussion permitted a policy environment where clear scientific truths were muddled, and as a result, destructive and ineffective policies persisted much longer than they would have otherwise.

In May 2022, the U.S. Office of the Surgeon General released a public call to identify misinformation about covid. Along with Martin Kulldorff and the Indiana Attorney General, we sent a response in which we identified nine specific areas where the primary source of misinformation was the government itself. The topics included ignoring many facts: that the risk of covid is steeply age-stratified; that recovery from covid provides substantial immunity; that the covid vaccines do not stop disease transmission; that school closures were not warranted; that there was no alternative to lockdowns; or that masks block disease transmission; and several other topics.

Government censorship permitted all these ideas – many of which are not particularly controversial in the scientific community – from gaining traction, and as a result, many people suffered from destructive policies like school closures and vaccine passports.

If we learn anything from the pandemic, it should be that the First Amendment is more important during a pandemic, not less.

⁴ Wall Street Journal Editorial Board. (2021) “YouTube’s Assault on Covid Accountability” Wall Street Journal. April 8, 2021. <https://www.wsj.com/articles/youtubes-assault-on-covid-accountability-11617921149>.

APPENDIX #3: EXECUTIVE ORDERS

Restoring Freedom of Speech and Ending Federal Censorship (2025)

By the authority vested in me as President by the Constitution and the laws of the United States of America, and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *Purpose.* The First Amendment to the United States Constitution, an amendment essential to the success of our Republic, enshrines the right of the American people to speak freely in the public square without Government interference. Over the last 4 years, the previous administration trampled free speech rights by censoring Americans' speech on online platforms, often by exerting substantial coercive pressure on third parties, such as social media companies, to moderate, deplatform, or otherwise suppress speech that the Federal Government did not approve. Under the guise of combatting "misinformation," "disinformation," and "malinformation," the Federal Government infringed on the constitutionally protected speech rights of American citizens across the United States in a manner that advanced the Government's preferred narrative about significant matters of public debate. Government censorship of speech is intolerable in a free society.

Sec. 2. *Policy.* It is the policy of the United States to:

(a) secure the right of the American people to engage in constitutionally protected speech;

(b) ensure that no Federal Government officer, employee, or agent engages in or facilitates any conduct that would unconstitutionally abridge the free speech of any American citizen;

(c) ensure that no taxpayer resources are used to engage in or facilitate any conduct that would unconstitutionally abridge the free speech of any American citizen; and

(d) identify and take appropriate action to correct past misconduct by the Federal Government related to censorship of protected speech.

Sec. 3. *Ending Censorship of Protected Speech.* (a) No Federal department, agency, entity, officer, employee, or agent may act or use any Federal resources in a manner contrary to section 2 of this order.

(b) The Attorney General, in consultation with the heads of executive departments and agencies, shall investigate the activities of the Federal Government over the last 4 years that are inconsistent with the purposes and policies of this order and prepare a report to be submitted to the President, through the Deputy Chief of Staff for Policy, with

recommendations for appropriate remedial actions to be taken based on the findings of the report.

Sec. 4. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

[THE WHITE HOUSE, January 20, 2025. Filed 1-27-25; 8:45 am]

Preventing Online Censorship (2020)

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* Free speech is the bedrock of American democracy. Our Founding Fathers protected this sacred right with the First Amendment to the Constitution. The freedom to express and debate ideas is the foundation for all of our rights as a free people.

In a country that has long cherished the freedom of expression, we cannot allow a limited number of online platforms to hand pick the speech that Americans may access and convey on the internet. This practice is fundamentally un-American and anti-democratic. When large, powerful social media companies censor opinions with which they disagree, they exercise a dangerous power. They cease functioning as passive bulletin boards, and ought to be viewed and treated as content creators.

The growth of online platforms in recent years raises important questions about applying the ideals of the First Amendment to modern communications technology. Today, many Americans follow the news, stay in touch with friends and family, and share their views on current events through social media and other online platforms. As a result, these platforms function in many ways as a 21st century equivalent of the public square.

Twitter, Facebook, Instagram, and YouTube wield immense, if not

unprecedented, power to shape the interpretation of public events; to censor, delete, or disappear information; and to control what people see or do not see.

As President, I have made clear my commitment to free and open debate on the internet. Such debate is just as important online as it is in our universities, our town halls, and our homes. It is essential to sustaining our democracy.

Online platforms are engaging in selective censorship that is harming our national discourse. Tens of thousands of Americans have reported, among other troubling behaviors, online platforms “flagging” content as inappropriate, even though it does not violate any stated terms of service; making unannounced and unexplained changes to company policies that have the effect of disfavoring certain viewpoints; and deleting content and entire accounts with no warning, no rationale, and no recourse.

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

At the same time online platforms are invoking inconsistent, irrational, and groundless justifications to censor or otherwise restrict Americans’ speech here at home, several online platforms are profiting from and promoting the aggression and disinformation spread by foreign governments like China. One United States company, for example, created a search engine for the Chinese Communist Party that would have blacklisted searches for “human rights,” hid data unfavorable to the Chinese Communist Party, and tracked users determined appropriate for surveillance. It also established research partnerships in China that provide direct benefits to the Chinese military. Other companies have accepted advertisements paid for by the Chinese government that spread false information about China’s mass imprisonment of religious minorities, thereby enabling these abuses of human rights. They have also amplified China’s propaganda abroad, including by allowing Chinese government officials to use their platforms to spread misinformation regarding the origins of the COVID-19 pandemic, and to undermine pro-democracy protests in Hong Kong.

As a Nation, we must foster and protect diverse viewpoints in

today's digital communications environment where all Americans can and should have a voice. We must seek transparency and accountability from online platforms, and encourage standards and tools to protect and preserve the integrity and openness of American discourse and freedom of expression.

Sec. 2. Protections Against Online Censorship. (a) It is the policy of the United States to foster clear ground rules promoting free and open debate on the internet. Prominent among the ground rules governing that debate is the immunity from liability created by section 230(c) of the Communications Decency Act (section 230(c)). 47 U.S.C. 230(c). It is the policy of the United States that the scope of that immunity should be clarified: the immunity should not extend beyond its text and purpose to provide protection for those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints.

Section 230(c) was designed to address early court decisions holding that, if an online platform restricted access to some content posted by others, it would thereby become a "publisher" of all the content posted on its site for purposes of torts such as defamation. As the title of section 230(c) makes clear, the provision provides limited liability "protection" to a provider of an interactive computer service (such as an online platform) that engages in " `Good Samaritan' blocking" of harmful content. In particular, the Congress sought to provide protections for online platforms that attempted to protect minors from harmful content and intended to ensure that such providers would not be discouraged from taking down harmful material. The provision was also intended to further the express vision of the Congress that the internet is a "forum for a true diversity of political discourse." 47 U.S.C. 230(a)(3). The limited protections provided by the statute should be construed with these purposes in mind.

In particular, subparagraph (c)(2) expressly addresses protections from "civil liability" and specifies that an interactive computer service provider may not be made liable "on account of" its decision in "good faith" to restrict access to content that it considers to be "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable." It is the policy of the United States to ensure that, to the maximum extent permissible under the law, this provision is not distorted to provide liability protection for online platforms that—far from acting in "good faith" to remove objectionable content—instead engage in deceptive or pretextual actions (often contrary to their stated

terms of service) to stifle viewpoints with which they disagree. Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike. When an interactive computer service provider removes or restricts access to content and its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial conduct. It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider.

(b) To advance the policy described in subsection (a) of this section, all executive departments and agencies should ensure that their application of section 230(c) properly reflects the narrow purpose of the section and take all appropriate actions in this regard. In addition, within 60 days of the date of this order, the Secretary of Commerce (Secretary), in consultation with the Attorney General, and acting through the National Telecommunications and Information Administration (NTIA), shall file a petition for rulemaking with the Federal Communications Commission (FCC) requesting that the FCC expeditiously propose regulations to clarify:

(i) the interaction between subparagraphs (c)(1) and (c)(2) of section 230, in particular to clarify and determine the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c)(2)(A) may also not be able to claim protection under subparagraph (c)(1), which merely states that a provider shall not be treated as a publisher or speaker for making third-party content available and does not address the provider's responsibility for its own editorial decisions;

(ii) the conditions under which an action restricting access to or availability of material is not "taken in good faith" within the meaning of subparagraph (c)(2)(A) of section 230, particularly whether actions can be "taken in good faith" if they are:

(A) deceptive, pretextual, or inconsistent with a provider's terms of service; or

(B) taken after failing to provide adequate notice, reasoned explanation, or a meaningful opportunity to be heard; and

(iii) any other proposed regulations that the NTIA concludes may be appropriate to advance the policy described in subsection (a) of this section.

Sec. 3. Protecting Federal Taxpayer Dollars from Financing Online Platforms That Restrict Free Speech. (a) The head of each executive department and agency (agency) shall review its agency's Federal spending on advertising and marketing paid to online platforms. Such review shall include the amount of money spent, the online platforms that receive Federal dollars, and the statutory authorities available to restrict their receipt of advertising dollars.

(b) Within 30 days of the date of this order, the head of each agency shall report its findings to the Director of the Office of Management and Budget.

(c) The Department of Justice shall review the viewpoint-based speech restrictions imposed by each online platform identified in the report described in subsection (b) of this section and assess whether any online platforms are problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices.

Sec. 4. Federal Review of Unfair or Deceptive Acts or Practices. (a) It is the policy of the United States that large online platforms, such as Twitter and Facebook, as the critical means of promoting the free flow of speech and ideas today, should not restrict protected speech. The Supreme Court has noted that social media sites, as the modern public square, "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Communication through these channels has become important for meaningful participation in American democracy, including to petition elected leaders. These sites are providing an important forum to the public for others to engage in free expression and debate. *Cf. PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-89 (1980).

(b) In May of 2019, the White House launched a Tech Bias Reporting tool to allow Americans to report incidents of online censorship. In just weeks, the White House received over 16,000 complaints of online platforms censoring or otherwise taking action against users based on their political viewpoints. The White House will submit such complaints received to the Department of Justice and the Federal Trade Commission (FTC).

(c) The FTC shall consider taking action, as appropriate and consistent with applicable law, to prohibit unfair or deceptive acts or practices in or affecting commerce, pursuant to section 45 of title 15, United States Code. Such unfair or deceptive acts or practice may include practices by entities covered by section 230 that restrict speech in ways

that do not align with those entities' public representations about those practices.

(d) For large online platforms that are vast arenas for public debate, including the social media platform Twitter, the FTC shall also, consistent with its legal authority, consider whether complaints allege violations of law that implicate the policies set forth in section 4(a) of this order. The FTC shall consider developing a report describing such complaints and making the report publicly available, consistent with applicable law.

Sec. 5. State Review of Unfair or Deceptive Acts or Practices and Anti-Discrimination Laws. (a) The Attorney General shall establish a working group regarding the potential enforcement of State statutes that prohibit online platforms from engaging in unfair or deceptive acts or practices. The working group shall also develop model legislation for consideration by legislatures in States where existing statutes do not protect Americans from such unfair and deceptive acts and practices. The working group shall invite State Attorneys General for discussion and consultation, as appropriate and consistent with applicable law.

(b) Complaints described in section 4(b) of this order will be shared with the working group, consistent with applicable law. The working group shall also collect publicly available information regarding the following:

(i) increased scrutiny of users based on the other users they choose to follow, or their interactions with other users;

(ii) algorithms to suppress content or users based on indications of political alignment or viewpoint;

(iii) differential policies allowing for otherwise impermissible behavior, when committed by accounts associated with the Chinese Communist Party or other anti-democratic associations or governments;

(iv) reliance on third-party entities, including contractors, media organizations, and individuals, with indicia of bias to review content; and

(v) acts that limit the ability of users with particular viewpoints to earn money on the platform compared with other users similarly situated.

Sec. 6. Legislation. The Attorney General shall develop a proposal for Federal legislation that would be useful to promote the policy objectives of this order.

Sec. 7. Definition. For purposes of this order, the term "online platform" means any website or application that allows users to create and share content or engage in social networking, or any general search engine.

Sec. 8. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.