

The End of an Era: The Uncertain Future of Section 230 Immunity for Social Media Platforms

ABSTRACT

Major social media platforms (SMPs), such as Facebook, Instagram, and TikTok, have become the primary means of communication for billions of people worldwide. They are the largest modern news distributors and the primary curators of online public discourse. However, the expanding influence of SMPs has led many to publicly scrutinize the content moderation decisions of such platforms, as SMPs regularly remove, block, censor, and ban user-generated content (UGC), including third-party written messages, photos, and videos, at their discretion. Because SMPs exercise immense power and are largely self-regulated, there has been growing public sentiment that SMP content moderation violates Users' free speech rights. Nevertheless, SMP content moderation decisions are protected by Section 230 of the Communications Decency Act of 1996 and the First Amendment of the United States Constitution.

Congress enacted Section 230 to promote the development of the internet by granting "Good Samaritan" online services the authority to moderate UGC without potential liability. However, "Bad Samaritan" providers have also benefited from this immunity, bringing the law to the forefront of public debate regarding online free speech. Despite repeated congressional efforts to narrowly tailor Section 230's protections, the future of SMP immunity and online speech is in the hands of the United States Supreme Court. How the Court decides this question of statutory interpretation could have widespread, unintended consequences for the modern internet. That being so, because policymakers are tasked with redressing societal ills, this Note proposes that Congress articulate a specific liability standard applicable only to SMPs, drawing on the immunity framework in Section 230(c) and narrowly tailored to the unique issues arising from SMPs. This solution evades constitutional concerns and is consistent with the congressional intent to safeguard the ability of SMPs to regulate content moderation for their platforms, subject to moderately heightened standards for immunity.

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I. INTRODUCTION

In 1991, Tim Berners-Lee introduced the first website.¹ Six years later, Andrew Weinreich launched the first social networking site.² The internet rapidly expanded in the early 2000s, creating an

1. Josie Fischels, *A Look Back At The Very First Website Ever Launched, 30 Years Later*, NPR (Aug. 6, 2021, 6:08 PM), <https://www.npr.org/2021/08/06/1025554426/a-look-back-at-the-very-first-website-ever-launched-30-years-later> [perma.cc/4DDN-R7RX].

2. Chenda Ngak, *Then and Now: A History of Social Networking Sites*, CBS NEWS (July 6, 2011, 4:55 PM), <https://www.cbsnews.com/pictures/then-and-now-a-history-of-social-networking-sites/> [perma.cc/NZE9-9672].

advantageous environment for new market entrants.³ By 2006, Facebook, the pinnacle modern social media platform (SMP), extended its reach beyond the campus of Harvard University, opening itself to the greater public.⁴ Since then, SMPs have become the most pervasive communications medium worldwide.⁵

As “global platform[s] for innovation, speech, collaboration, civic engagement, and economic growth,”⁶ SMPs have “rooted themselves into most aspects” of everyday life in innumerable ways.⁷ SMPs serve contemporary society through “a variety of political, educational, cultural, and entertainment services.”⁸ For example, people depend on SMPs as “the principal sources for knowing current events,” discovering employment opportunities, and “exploring the vast realms of human thought and knowledge.”⁹ Entrepreneurs and small business owners utilize SMPs to expand their operations.¹⁰ As SMPs provide “the most powerful mechanisms available to a private citizen to make his or her voice heard,”¹¹ the platforms have served as the grassroots of many

3. See Saqib Shah, *The History of Social Networking*, DIGIT. TRENDS (May 14, 2016), <https://www.digitaltrends.com/computing/the-history-of-social-networking/> [perma.cc/E83K-C4F3].

4. *Id.*

5. Amanda Lenhart, Mary Madden, Aaron Smith & Alexandra MacGill, *Communications and Social Media*, PEW RSCH. CTR. (Dec. 19, 2007), <https://www.pewresearch.org/internet/2007/12/19/communications-and-social-media/> [perma.cc/2X2U-F6D2]; *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/> [perma.cc/2582-8BRZ] (showing that in 2005, five percent of Americans used at least one form of social media; in 2021, seventy-two percent of Americans did).

6. Mark Lemley, Davis S. Levine & David G. Post, *Don't Break the Internet*, 64 STAN. L. REV. 34, 37 (2011).

7. John C. Greiner & Michaela Taylor, *Five Strikes, and You're Out: Courts Find That Twitter Can Restrict More Than Just Your Character Count*, A.B.A. (Oct. 14, 2022), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2022-fall/five-strikes-and-youre-out-courts-find-twitter-can-restrict-more-just-your-character-count/ [perma.cc/4ANS-LLEB].

8. 47 U.S.C. § 230(a)(5) (2018).

9. *Packingham v. North Carolina*, 582 U.S. 98, 99 (2017).

10. See Ali Donaldson, *How This Family-Owned Retailer Capitalized On Its Viral TikTok Moment*, INC. MAG. (Aug. 9, 2022), <https://www.inc.com/ali-donaldson/alabama-sorority-rush-tiktok-pants-store.html> [perma.cc/M22X-DTXK] (discussing how a third-generation family business that went viral on TikTok increased online sales by more than 600 percent within one week).

11. See *Packingham*, 582 U.S. at 107 (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)); Neil Chilson & Casey Mattox, *[The] Breakup Speech: Can Antitrust Fix the Relationship Between Platforms and Free Speech Values?*, KNIGHT FIRST AMEND. INST. (Mar. 5, 2020), <https://knight-columbia.org/content/the-breakup-speech-can-antitrust-fix-the-relationship-between-platforms-and-free-speech-values> [https://perma.cc/JZ77-4V89] (“The Black Lives Matter movement, #MeToo, and the Parkland kids’ gun control movement all originated online and grew through social media.”).

contemporary political and cultural movements.¹² SMPs have also become a “crucially important channel of political communication.”¹³ For all the positive, however, SMPs have also largely contributed to various public harms, including physical and psychological disorders, suicidal ideation, sexual predation and exploitation, and violence and genocide.¹⁴

Because the technology industry largely developed free from federal regulation, SMPs operate under a system of self-governance and are largely insulated from accountability for their decisions regarding user-generated content (UGC).¹⁵ Although lawmakers in some parts of the world have limited SMP influence over online speech, the United States has yet to see such success.¹⁶ Thus, “a small number of

12. See Chilson & Mattox, *supra* note 11.

13. See Transcript of Oral Argument at 28, *Packingham v. North Carolina*, 582 U.S. 98 (2017) (No. 15-1194) (noting that “[t]he president now uses Twitter . . . everybody uses Twitter . . . [a]ll 50 governors, all 100 senators, every member of the House has a Twitter account.”); Stacy Dixon, *Social Media and Politics in the United States—Statistics & Facts*, STATISTA (June 21, 2022), <https://www.statista.com/topics/3723/social-media-and-politics-in-the-united-states> [<https://perma.cc/H6FE-BZME>] (noting that in 2021, members of the US Congress made 477,586 posts on Twitter and 300,000 posts on Facebook).

14. *E.g.*, Georgia Wells, Jeff Horwitz & Deepa Seetharaman, *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sept. 14, 2021, 7:59 AM), <https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739> [<https://perma.cc/T9RE-UY9R>]; Karen Feldscher, *How Social Media’s Toxic Content Sends Teens into ‘A Dangerous Spiral’*, HARV. T.H. CHAN SCH. PUB. HEALTH (Oct. 8, 2021), <https://www.hsph.harvard.edu/news/features/how-social-medias-toxic-content-sends-teens-into-a-dangerous-spiral/> [<https://perma.cc/Z4ZZ-WHRA>]; Kari Paul, *Over 300 Cases of Child Exploitation Went Unnoticed by Facebook—Study*, GUARDIAN (Mar. 4, 2020, 6:00 AM), <https://www.theguardian.com/technology/2020/mar/04/facebook-child-exploitation-technology> [<https://perma.cc/885K-BDVJ>]; Ysabel Gerrard & Tarleton Gillespie, *When Algorithms Think You Want to Die*, WIRED (Feb. 21, 2019, 12:41 PM), <https://www.wired.com/story/when-algorithms-think-you-want-to-die/> [<https://perma.cc/FYN7-99TD>]; Paul Mozur, *A Genocide Incited on Facebook, With Posts from Myanmar’s Military*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html> [<https://perma.cc/CZA4-PEKY>].

15. See VALERIE C. BRANNON, CONG. RSCH. SERV., LSB10309, REGULATING BIG TECH: LEGAL IMPLICATIONS 1, 1 (2019); Eugene Volokh, *Treating Social Media Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 403 (2021) (“[G]overnmental speech restrictions are implemented in open court, with appellate review. Speakers get to argue why their speech should remain protected. Courts . . . follow precedents, or explain why they are distinguishing . . . the rules are generally created by the people, through their representatives or through [representative-appointed judges]. [SMP] rules lack such transparency, procedural protections, and democratic pedigrees.”); Klon Kitchens, *Section 230—Mend It, Don’t End It*, HERITAGE FOUND. (Oct. 27, 2020), <https://www.heritage.org/technology/report/section-230-mend-it-dont-end-it> [<https://perma.cc/V7SH-RA82>].

16. See David McCabe, *Supreme Court Poised to Reconsider Key Tenets of Online Speech*, N.Y. TIMES (Jan. 19, 2023), <https://www.nytimes.com/2023/01/19/technology/supreme-court-online-free-speech-social-media.html> [<https://perma.cc/W9UX-LQSY>]; Adam Satariano, *E.U. Takes Aim at Social Media’s Harms With Landmark New Law*, N.Y. TIMES (Apr. 22, 2022), <https://www.nytimes.com/2022/04/22/technology/european-union-social-media-law.html>

politically-unaccountable technology oligarchs exercise state-like censorship powers” over online speech “without any similar limitation.”¹⁷

This Note proceeds in three parts. Part II provides an overview of SMP operations, including how their business models lead to perverse economic incentives. As referenced herein, whether an online platform is an SMP depends on the platform’s ability to host and derive value from UGC.¹⁸ Part III examines the current legal framework governing SMP immunity—recognizing the free speech concerns inherent in SMP moderation decisions—and surveys potential paths forward for SMP immunity. Part VI proceeds in three parts: first, it recognizes the shortcomings inherent in allowing the Supreme Court to be the sole decisionmaker for the future of online speech. Second, Part VI suggests a minimal free market option to promote SMP transparency in their content moderation decisions without impeding SMP editorial discretion. Finally, Part VI proposes a modified Section 230(c) that applies exclusively to SMPs and simultaneously protects good faith actors while promoting consumer welfare.

II. THE CONDITIONS OF SMP OPERATIONS

A. Overview of SMP Functions

An SMP may be a small platform that caters to niche interests, or a massive platform with millions of Users worldwide seeking to appeal to general populations.¹⁹ This Note only refers to the latter.

[<https://perma.cc/5DCE-6UDQ>] (“[The European Union’s Digital Services Act] is intended to address social media’s societal harms by requiring companies to more aggressively police their platforms for illicit content or risk billions of dollars in fines.”); Kerry Flynn, *Facebook Bans News in Australia as Fight With Government Escalates*, CNN BUS. (Feb. 19, 2021, 4:25 AM), <https://www.cnn.com/2021/02/17/media/facebook-australia-news-ban/index.html>

[<https://perma.cc/U224-BPYS>] (“Facebook (FB) has barred Australians from finding or sharing news on its service” after the Australian government “proposed legislation that would force tech platforms to pay news publishers for content.”).

17. Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1358 (2018) [hereinafter Langvardt, *Regulating Online Content Moderation*].

18. For purposes of this Note, SMPs do not include service platforms like Uber, Skype, Netflix, or other similar platforms. See Caleb T. Carr & Rebecca A. Hayes, *Social Media: Defining, Developing, and Divining*, 23 ATL. J. COMM. 46, 49 (2015).

19. See e.g., Meta Platforms, *Meta Reports Second Quarter 2022 Results*, META INV. RELS. (July 27, 2022), <https://investor.fb.com/investor-news/press-release-details/2022/Meta-Reports-Second-Quarter-2022-Results/default.aspx> [<https://perma.cc/K7ZY-NANC>] (noting that in 2022, Facebook had 2.93 billion active users worldwide); GMI Blogger, *YouTube User Statistics 2023*, GLOB. MEDIA INSIGHT (Oct. 26, 2023, 4:33 AM), <https://www.globalmediainsight.com/blog/youtube-users-statistics> [<https://perma.cc/8EJV-Y5L6>] (noting that in 2022, YouTube had 2.6 billion users worldwide); Debra Williamson, *TikTok Will Be the Top Social App in Daily Minutes in 2025*,

SMPs are consistently and perpetually populated with massive amounts of UGC.²⁰ For every minute of the day, millions of Users across the globe interact with SMPs like YouTube, Facebook, and the newly rebranded X.²¹ With these interactions, SMPs then use various machine learning algorithms (MLAs) to automate decisions about hosting, sorting, indexing, moderating, and prioritizing the UGC.²² MLAs “continuously adjust themselves based on new data inputs” to present UGC across a platform.²³ Nevertheless, SMP programmers exercise discretion when adjusting MLAs, which affects the UGC presented to Users, to meet evolving goals or values in response to internal incentives and external pressures.²⁴ As relevant to this Note, the most powerful MLAs are used by SMPs for content moderation and personalized content navigation.²⁵

INSIDER INTEL. (Oct. 13, 2023), <https://www.insiderintelligence.com/content/tiktok-will-top-social-app-daily-minutes-2025> [<https://perma.cc/2K3D-ZZFV>] (noting that in 2023, US adults spent a total of 4.43 billion minutes per day on TikTok, which was more than Facebook or Instagram); Sheila Dang, *Exclusive: Twitter is Losing Its Most Active Users, Internal Documents Show*, REUTERS (Oct. 26, 2022, 2:46 PM), <https://www.reuters.com/technology/exclusive-where-did-tweet-ers-go-twitter-is-losing-its-most-active-users-internal-2022-10-25/> [<https://perma.cc/U6T9-64PU>] (noting that in 2022, Twitter had 238 million “monetizable daily active users” worldwide).

20. See *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206, 1216 (2023).

21. *Id.* In July 2023, Elon Musk rebranded Twitter as “X.” See Supantha Mukherjee, Martin Coulter & Sheila Dang, *Twitter Blue Bird Has Flown as Musk Says X Logo is Here*, REUTERS (July 25, 2023, 4:45 PM), <https://www.reuters.com/technology/bird-has-flown-musk-twitter-ceo-yaccarino-say-x-logo-is-here-2023-07-24/> [<https://perma.cc/6RJ6-9E42>]. As relevant here, because X is the same company as Twitter, any reference or citation to “Twitter” information or data equally applies to X. See also Kate Conger, *So What Do We Call Twitter Now Anyway?*, N.Y. TIMES (Aug. 3, 2023), <https://www.nytimes.com/2023/08/03/technology/twitter-x-tweets-elon-musk.html> [<https://perma.cc/CDK8-5TDN>] (“In the same app update that wiped out the bird logo, the company swapped its classic blue ‘tweet’ button for one that says ‘post.’”).

22. See Sofia Grafanaki, *Platforms, the First Amendment and Online Speech: Regulating the Filters*, 39 PACE L. REV. 111, 116, 136 (2018) [hereinafter Grafanaki, *Platforms, the First Amendment and Online Speech*]; Tarleton Gillespie, *The Relevance of Algorithms*, in MEDIA TECHNOLOGIES: ESSAYS ON COMMUNICATION, MATERIALITY, AND SOCIETY 167, 186 (Tarleton Gillespie, Pablo J. Boczkowski & Kristin A. Foot eds., 2014).

23. See Grafanaki, *Platforms, the First Amendment and Online Speech*, *supra* note 22, at 141; Enrique Armijo, *Speech Regulation by Algorithm*, 30 WM. & MARY BILL RIGHTS J., 245, 253–54 (2021) (discussing how SMP Programmers teach MLAs to draw such inferences by using compiled training datasets to instruct the algorithms on how to classify new and existing information).

24. See Leon G. Ho, *Countering Personalized Speech*, 20 NW. J. TECH. & INTELL. PROP. 39, 48 (2022).

25. See Robert Gorwa, Reuben Binns & Christian Katzenbach, *Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance*, 7 BIG DATA & SOC’Y 1, 2 (2020); Grafanaki, *Platforms, the First Amendment and Online Speech*, *supra* note 22, at 118.

1. Content Moderation Algorithms

SMPs use content moderation MLAs to regulate and authorize the UGC they host based on the platforms' moderation policies, subject to the platforms' discretion.²⁶ For example, once a User posts on Facebook, the platform engages in “ex-post proactive moderation” by employing content moderation MLAs “to screen and identify objectionable content.”²⁷ Facebook's content moderation MLAs analyze UGC to identify patterns and similarities in “images, words, and behaviors . . . commonly associated with different types of objectionable content.”²⁸ The algorithms, however, need additional context to “evaluate whether the presence of a certain indicator, such as a specific word, is being used in a violating manner.”²⁹ Thus, the content moderation MLAs “also consider other factors related to the post, such as the identity of the poster, the content of the comments, likes, and shares, as well as what is depicted in the rest of an image or video if the content is visual in nature.”³⁰ If a content moderation algorithm determines that UGC violates a Facebook policy, “it may remove it automatically without relaying it to a human moderator.”³¹

2. Content Navigation Algorithms

SMPs use personalization content navigation MLAs, or “recommendation algorithms,” to promote UGC for User interaction and individually tailor User feeds.³² Recommendation MLAs collect, analyze, and quantify “vast amounts of” User data,³³ ostensibly with the

26. See Grafanaki, *Platforms, the First Amendment and Online Speech*, *supra* note 22, at 117.

27. Spandana Singh, *Everything in Moderation: An Analysis of How Internet Platforms Are Using Artificial Intelligence to Moderate User-Generated Content* 23, NEW AM. (July 15, 2019, 10:21 AM) https://d1y8sb8igg2f8e.cloudfront.net/documents/Everything_in_Moderation_2019-07-15_142127_tq36vr4.pdf [<https://perma.cc/873V-HVLW>].

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. See Sofia Grafanaki, *Drowning in Big Data: Abundance of Choice, Scarcity of Attention, and the Personalization Trap, A Case for Regulation*, 24 RICH. J.L. & TECH. 1, 16, 30 (2017) [hereinafter Grafanaki, *Drowning in Big Data*]; Bumsoo Kim & Yonghwan Kim, *Facebook Versus Instagram: How Perceived Gratifications and Technological Attributes Are Related to the Change in Social Media Usage*, 56 SOC. SCI. J. 156, 158 (2019).

33. See Grafanaki, *Drowning in Big Data*, *supra* note 32, at 4. “User Data” includes as much as possible about an individual, including their characteristics, preferences, habits, personality traits, what type of content they have previously engaged with, and how Users “interact” with specific UGC. See *id.* at 22. A User “interacts” with UGC by liking, viewing, commenting, sharing, and saving the post. See *id.* Notably, “[e]ven if a User is passive and does

individual's consent,³⁴ to determine the selection and sequence of UGC on a User's feed and to predict "future patterns of behavior and preferences."³⁵

TikTok—a mobile application that allows Users to create, share, and watch short videos—likely owes its seemingly overnight success to its well-known SMP recommendation algorithm, the platform's For You Page (FYP) and the algorithm that populates it.³⁶ TikTok's FYP is "one of the defining features of the TikTok platform" because it "reflects preferences unique to each User."³⁷ Every User has an individualized FYP; "[n]o two feeds are exactly the same."³⁸ As a result, when a User opens the TikTok application on their mobile device, the first thing they will see is the FYP: "an endless stream of videos uniquely tailored to each User."³⁹ When a new User—who does not follow any other accounts—opens the TikTok application for the first time, their FYP is immediately populated with a never-ending stream of currently "trending" TikTok videos.⁴⁰ Nevertheless, as the new User scrolls through and interacts with their FYP, the makeup of videos slowly

not engage with a post," the SMPs' algorithms will "record[] the duration of the time [the] User keeps the post on [his or her] screen" and takes the time as "an indication of the User's interest in the content of the post," which contributes to User engagement data. See Sang Ah Kim, *Social Media Algorithms: Why You See What You See*, 2 GEO. L. TECH. REV. 147, 150 (2017); see also Haley Griffin, *Laws in Conversation: What the First Amendment Can Teach Us About Section 230*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 473, 475–76 (2022).

34. Meaningful User consent to data collection is debatable at best for three main reasons. See Katherine J. Strandburg, *Free Fall: The Online Market's Consumer Preference Disconnect*, 2013 U. CHI. LEGAL F. 95, 145 (2013). "First, Users lack information about the types of harms that may arise from data collection, the prevalence of those harms, and their costs." *Id.* (internal citation omitted). "Second, Users lack detailed and useful information about [SMP] data collection [practices]." *Id.* "Third, users lack information about . . . the data about them that is already flowing in the online ecosystem." *Id.*

35. See Jennifer Shkabatur, *The Global Commons of Data*, 22 STAN. TECH. L. REV. 354, 365 (2019).

36. See Alex Hern, *How TikTok's Algorithm Made it a Success: It Pushes the Boundaries*, GUARDIAN (Oct. 24, 2022, 1:00 PM), <https://www.theguardian.com/technology/2022/oct/23/tiktok-rise-algorithm-popularity> [<https://perma.cc/QW2G-Z4B>].

37. *How TikTok Recommends Videos #ForYou*, TIKTOK (June 18, 2020), <https://newsroom.tiktok.com/en-us/how-tiktok-recommends-videos-for-you> [<https://perma.cc/DW8V-SX7R>].

38. Louise Matsakis, *TikTok Finally Explains How the 'For You' Algorithm Works*, WIRED (June 18, 2020, 1:00 PM), <https://www.wired.com/story/tiktok-finally-explains-for-you-algorithm-works/> [<https://perma.cc/XB2D-WZB6>]; see also *How TikTok Recommends Videos #ForYou*, *supra* note 37 ("Part of the magic of TikTok is that there's no one [FYP]—while different people may come upon some of the same standout videos, each person's feed is unique and tailored to that specific individual.").

39. Matsakis, *supra* note 38.

40. *How TikTok Recommends Videos #ForYou*, *supra* note 37 ("[W]e start by offering you a generalized feed of popular videos to get the ball rolling. Your first set of likes, comments, and replays will initiate an early round of recommendations as the system begins to learn more about your content tastes.").

changes until “it becomes almost uncannily good at predicting what videos from around the site are going to pique [the User’s] interest.”⁴¹

The FYP “is powered by a recommendation system that delivers content to each User that is likely to be of interest to that particular User.”⁴² A User’s FYP “recommends content by ranking videos based on a combination of factors,” including User interactions, video information, and device and account settings.⁴³ The FYP MLA processes and weighs the factors “based on their value to a User.”⁴⁴ Whether a video is delivered to a specific User’s FYP is based on the results of the MLA’s assessment of the video in the context of that User.⁴⁵ However, unlike older recommendation algorithms, which waited for a User to indicate that they like the video, TikTok actively tests its predictions by experimenting and showing Users videos that it thinks might be enjoyable and gauging the response by monitoring how a User engages with those new videos it sneaks into the FYP.⁴⁶

B. The Perverse Economic Incentives Inherent in the SMP Business Model

The economic model of SMP revenue does not rely on the creation of User accounts or the platforms’ provision of services in itself.⁴⁷ Rather, SMPs monetize their services by selling algorithmically collected User data to advertisers,⁴⁸ who use the data amassed by SMPs to optimize their advertisements, offering different advertisements to specific User categories.⁴⁹ Therefore, SMPs are economically motivated

41. Hern, *supra* note 36.

42. *How TikTok Recommends Videos #ForYou*, *supra* note 37.

43. *Id.*

44. *Id.* (“A strong indicator of interest, such as whether a User finishes watching a longer video from beginning to end, would receive greater weight than a weak indicator, such as whether the video’s viewer and creator are both in the same country.”).

45. *Id.* (“Ultimately, your [FYP] is powered by your feedback: the system is designed to continuously improve, correct, and learn from your own engagement with the platform to produce personalized recommendations that we hope inspire creativity and bring joy with every refresh of your [FYP].”).

46. *Id.* (“Every new interaction helps the system learn about your interests and suggest content—so the best way to curate your [FYP] is to simply use and enjoy the app. Over time, your [FYP] should increasingly be able to surface recommendations that are relevant to your interests.”); Hern, *supra* note 36.

47. JASON A. GALLO & CLARE Y. CHO, CONG. RSCH. SERV., R46662, SOCIAL MEDIA: MISINFORMATION AND CONTENT MODERATION ISSUES FOR CONGRESS 3 (2021).

48. Jack M. Balkin, *The First Amendment in the Second Gilded Age*, 66 BUFF. L. REV. 979, 986 (2018) [hereinafter Balkin, *The First Amendment*].

49. See, e.g., Michal Lavi, *Targeting Exceptions*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 65, 96–97 (2021); Jack M. Balkin, *Fixing Social Media’s Grand Bargain*, HOOVER WORKING GRP. ON NAT’L SEC., TECH., & L. 2018, at 1 (Aegis Series Paper No. 1814) [hereinafter Balkin, *Fixing*

to collect increasingly personalized User data, making the platforms more appealing to advertisers and allowing them to charge higher fees for User data.⁵⁰ As a result, SMPs have a strong economic incentive to maintain User engagement and collect User data.⁵¹ To do so, SMPs effectuate User engagement by manipulating Users.⁵²

SMPs foster engaging platforms by intentionally exploiting “a vulnerability in human psychology.”⁵³ The platforms are designed to give their Users “a little dopamine hit” that is so brief and addictive that the Users are repeatedly prompted to return to the platform, which helps the SMP “consume as much of [the User’s] time and conscious attention as possible.”⁵⁴ For example, SMPs prey on Users’ social obligation.⁵⁵ SMPs “gamify” the human need for social validation

Social Media’s Grand Bargain] (“Our digital public sphere is premised on a grand bargain: free communications services in exchange for pervasive data collection and analysis.”).

50. See Grafanaki, *Drowning in Big Data*, *supra* note 32, at 30 (SMPs attempt to “collect as much data as possible about an individual and use that data to make inferences that can provide a competitive advantage.”); Grafanaki, *Platforms, the First Amendment and Online Speech*, *supra* note 22, at 125 (“[SMPs] goal is not necessarily welfare enhancing.”).

51. Balkin, *Fixing Social Media’s Grand Bargain*, *supra* note 49, at 3 (“[SMPs] have economic incentives to develop algorithms that will promote content that engages people . . . because companies’ central goal is to gain attention share. This leads them to collect ever more data about their [Users] so that they can tailor content to individual [Users] to maximize their emotional engagement.”).

52. See *id.* at 5 (“[SMPs] leverage the data they collect about end users to offer periodic stimulation that keeps users connected and constantly checking and responding to social media.”); Kyle Langvardt, *Regulating Habit-Forming Technology*, 88 FORDHAM L. REV. 129, 150 (2019) [hereinafter Langvardt, *Regulating Habit-Forming Technology*] (“A user with a budding interest does not need to seek it out—the NewsFeed will ensure that this content finds the user. . . . [T]he user may not realize that they are predisposed to engage with [certain UGC]; the algorithm takes the work of self-discovery off the user’s hands.”).

53. Hilary Andersson, *Social Media Apps Are ‘Deliberately’ Addictive to Users*, BBC NEWS (July 4, 2018), <https://www.bbc.com/news/technology-44640959> [<https://perma.cc/KPT4-YZ2D>]; see Julia Carrie Wong, *Former Facebook Executive: Social Media is Ripping Society Apart*, GUARDIAN (Dec. 12, 2017, 1:58 PM), <https://www.theguardian.com/technology/2017/dec/11/facebook-former-executive-ripping-society-apart> [<https://perma.cc/435X-MPWA>] (“[T]he short-term, dopamine driven feedback loops that [Facebook] created are destroying how society works. No civil discourse, no cooperation, misinformation, mistruth . . . This is a global problem. It is eroding the core foundations of how people behave by and between each other.”).

54. Olivia Solon, *Ex-Facebook President Sean Parker: Site Made to Exploit Human ‘Vulnerability’*, GUARDIAN (Nov. 9, 2017, 3:11 PM), <https://www.theguardian.com/technology/2017/nov/09/facebook-sean-parker-vulnerability-brain-psychology> [<https://perma.cc/4428-XB2D>].

55. See Glenn Fleishman, *How Facebook Devalued the Birthday*, FAST CO. (Apr. 6, 2018), <https://www.fastcompany.com/40550725/how-facebook-devalued-the-birthday> [<https://perma.cc/ENP2-3ESP>]; Taylor Lorenz, *Teens Explain the World of Snapchat’s Addictive Streaks, Where Friendships Live or Die*, INSIDER (Apr. 14, 2017, 12:58 PM), <https://www.insider.com/teens-explain-snapchat-streaks-why-theyre-so-addictive-and-important-to-friendships-2017-4> [<https://perma.cc/XR7U-PKEM>] (“Snapchat rewards longer streaks with special emojis,

through features such as the “Like” and “Share” buttons and use “urgent” push notifications to entice Users, even though “[t]he vast majority of push notifications are just distractions that pull [people] out of the moment.”⁵⁶ Many SMPs artificially delay loading or refreshing the platform to create a sense of anticipation that is ultimately accompanied by the “intermittent variable reward” of an updated feed with colorful animations and notifications.⁵⁷

Nevertheless, “the most reliable engagement drivers are messages that stimulate feelings of outrage and group identification.”⁵⁸ Consequently, SMPs employ recommendation algorithms that favor emotions, especially anger and fear, which can significantly impact a User’s mood.⁵⁹ SMP algorithms can also detect and alter what a User thinks, largely modifying or disabling User agency.⁶⁰ Additionally, by prioritizing UGC likely to sustain User engagement, SMP algorithms

such as the ‘100’ emoji for streaks lasting 100 days, or a mountain emoji for an extremely long streak.”).

56. Julian Morgans, *The Secret Ways Social Media Is Built for Addiction*, VICE (May 17, 2017, 10:09 PM), <https://www.vice.com/en/article/vv5jkb/the-secret-ways-social-media-is-built-for-addiction> [<https://perma.cc/CB56-9CEB>]; see John Herrman, *How Tiny Red Dots Took Over Your Life*, N.Y. TIMES (Feb. 27, 2018), <https://www.nytimes.com/2018/02/27/magazine/red-dots-badge-phones-notification.html> [<https://perma.cc/FQV7-XAWB>]; Louise Matsakis, *Facebook Notification Spam Has Crossed the Line*, WIRED (Feb. 15, 2018, 2:16 PM), <https://www.wired.com/story/facebook-notification-spam-two-factor/> [<https://perma.cc/UFZ5-DLJE>].

57. See Kaveh Waddell, *Why Some Apps Use Fake Progress Bars*, ATLANTIC (Feb. 21, 2017), <https://www.theatlantic.com/technology/archive/2017/02/why-some-apps-use-fakeprogress-bars/517233/> [<https://perma.cc/VRD7-QU3F>]; Mark Wilson, *The UX Secret That Will Ruin Apps for You*, FAST CO. (July 6, 2016), <https://www.fastcompany.com/3061519/theux-secret-that-will-ruin-apps-for-you> [<https://perma.cc/GL98-3X66>].

58. Langvardt, *Regulating Habit-Forming Technology*, *supra* note 52, at 149; see also Balkin, *Fixing Social Media’s Grand Bargain*, *supra* note 49, at 3 (“Often what engages people the most is material that produces strong emotional reactions—even if it is polarizing, false, or demagogic. Companies have economic incentives to expose people to this material.”).

59. See, e.g., Jeff Horwitz & Deepa Seetharaman, *Facebook Executives Shut Down Efforts to Make the Site Less Divisive*, WALL ST. J. (May 26, 2020, 11:38 AM), <https://www.wsj.com/articles/facebook-knows-it-encourages-division-top-executives-nixed-solutions-11590507499> [<https://perma.cc/S4TA-VJ3L>] (“[Facebook’s] algorithms exploit the human brain’s attractiveness to divisiveness.”); Robert Booth, *Facebook Reveals News Feed Experiment to Control Emotions*, GUARDIAN (June 29, 2014, 7:57 PM), <https://www.theguardian.com/technology/2014/jun/29/facebook-users-emotions-news-feeds> [<https://perma.cc/QQS8-LNBN>].

60. See, e.g., Julie E. Cohen, *Tailoring Election Regulation: The Platform is the Frame*, 4 GEO. L. TECH. REV. 641, 658 (2020) (“Manipulation in platform-based information environments is neither occasional nor accidental; it is endemic and results from capabilities that platforms systematically design, continually reoptimize, and deliberately offer up to third parties for exploitation.”); Sam Levin, *Facebook Told Advertisers It Can Identify Teens Feeling ‘Insecure’ and ‘Worthless,’* GUARDIAN (May 1, 2017, 3:01 PM), <https://www.theguardian.com/technology/2017/may/01/facebook-advertising-data-insecure-teens> [<https://perma.cc/VBG6-2MWE>]; ANDREW CHADWICK, *THE HYBRID MEDIA SYSTEM: POLITICS AND POWER* 157 (2013).

do not necessarily consider the content's veracity.⁶¹ Thus, the "[t]oo-good-to-check" stories that "pander to readers' worst impulses" gain more traction than stories may be more comprehensively and correctly reported.⁶²

III. THE FUTURE OF SMP PROTECTIONS: PUBLIC PRESSURES, CONGRESSIONAL EFFORTS, AND NOVEL SUPREME COURT INTERVENTION

A. The Contemporary Framework for SMP Immunity

SMPs operate according to two intertwined precepts: they can moderate UGC on their platform free from government oversight and cannot be held legally responsible for the UGC posted on their platform; therefore, SMPs are shielded from lawsuits over libelous speech, extremist content, and real-world harm linked to their platforms.⁶³ These principles are the necessary result of the First Amendment of the US Constitution and Section 230 of the Communications Decency Act of 1996 as applied to SMPs.⁶⁴

The First Amendment provides the baseline speech protections available against the government.⁶⁵ According to the prevailing Supreme Court interpretations of the Free Speech Clause of the First Amendment, the government may not compel SMPs, as private entities, to host or disseminate any message.⁶⁶ Additionally, Supreme Court precedent suggests that entities that serve as conduits for speech produced by others may receive First Amendment protection if they

61. See Grafanaki, *Drowning in Big Data*, *supra* note 32, at 16.

62. Timothy B. Lee, *Mark Zuckerberg Is in Denial About How Facebook Is Harming Our Politics*, VOX (Nov. 10, 2016, 10:25 PM), <http://www.vox.com/new-money/2016/11/6/13509854/facebook-politics-news-bad> [<https://perma.cc/K3GT-6MLD>]; see Grafanaki, *Drowning in Big Data*, *supra* note 32, at 16; Caitlin Dewey, *6 in 10 of You Will Share This Link Without Reading It, a New, Depressing Study Says*, WASH. POST (June 16, 2016, 10:19 AM), <https://www.washingtonpost.com/news/the-intersect/wp/2016/06/16/six-in-10-of-you-will-share-this-link-without-reading-it-according-to-a-new-and-depressing-study/> [<https://perma.cc/LV77-D8PP>].

63. See McCabe, *supra* note 16.

64. U.S. CONST. amend. I.; 47 U.S.C. § 230 (2018).

65. U.S. CONST. amend. I.; see also *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (noting that under the First Amendment, the government may not "prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Matal v. Tam*, 137 U.S. 1744, 1765 (2017) (citing *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)) ("[T]he proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" (internal citation omitted)).

66. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986).

engage in “editorial discretion” when selecting which speech to transmit.⁶⁷ Such an entity is not protected, however, if it indiscriminately or neutrally transmits “any and all” UGC.⁶⁸

Legislatures can enact supplemental speech-enhancing laws, like Section 230, to protect and facilitate speech above the First Amendment’s baseline guarantees.⁶⁹ In “the dawn of the dot-com era,”⁷⁰ Congress enacted Section 230 to clarify the standard for online intermediary liability,⁷¹ encourage interactive computer service providers (ICSPs)⁷² to self-regulate by removing the legal barriers that would otherwise disincentivize them from moderating UGC,⁷³ and promote the continued development of the internet as a forum for free speech and diversity of opinions.⁷⁴

Section 230(c) provides the statute’s key provisions, which protect “Good Samaritan” blocking and screening of offensive material.⁷⁵ Section 230(c)(1) explicitly prohibits courts from treating

67. *Manhattan Cmty. Access Corp. v. Halleck*, 139 U.S. 1921, 1931 (2019) (“[Private entities can] exercise editorial discretion over the speech and speakers in the forum [as private actors should not] face the unappetizing choice of allowing all comers or closing the platform altogether.”); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 636 (1994) (“Cable programmers and cable operators engage in and transmit speech” even though they authored no part of the underlying content because they “exercis[ed] editorial discretion over which stations or programs to include in its repertoire.”); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.”).

68. See Kyle Langvardt, *Can the First Amendment Scale?*, 1 J. FREE SPEECH L. 273, 275 (2021) [hereinafter Langvardt, *Can the First Amendment Scale?*] (“In communications law, this point translates to an essentially binary distinction in which ‘editorial’ platform management receives full-strength protection and the activities of ‘passive conduits’ receive none at all.”).

69. 47 U.S.C. § 230 (2018); see Brief of Professor Eric Goldman as Amicus Curiae Support of Respondent at 5, *Gonzalez v. Google LLC*, 143 S. Ct. 1191 (2023) (No. 21-1333).

70. *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020) (Thomas, J., concurring).

71. 47 U.S.C. § 230. In doing so, Congress sought to reconcile conflicting lower court opinions on the matter. *Compare* *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139–41 (S.D.N.Y. 1991) (holding that ICSPs are entitled to the protections of distributor liability), *with* *Stratton Oakmont, Inc. v. Prodigy Services, Co.*, No. 31063/94, 1995 WL 323710, at *10 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, 47 U.S.C. § 230 (holding that when an ICSP engaged in content moderation, it opened the provider up to publisher liability).

72. ICSPs are “information services” that provide or enable “access by multiple users to a . . . system that provides access to the Internet.” 47 U.S.C. § 230(f)(2).

73. H.R. REP. No. 104-458, at 194 (1996) (Conf. Rep) (“One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own.”).

74. 47 U.S.C. § 230(a)(3).

75. 47 U.S.C. § 230(c); see also *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009) (“Subsection (c)(1) . . . shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties. Subsection (c)(2) . . . provides

ICSPs as “the publisher or speaker” of UGC,⁷⁶ and Section 230(c)(2) immunizes ICSPs for “any action voluntarily taken in good faith to restrict access to or availability of,” among other things, “objectionable” material.⁷⁷ Section 230(c) offers SMPs procedural protections and legal certainty,⁷⁸ barring most liability claims against SMPs and often making considering the First Amendment’s role in SMP publication decisions unnecessary.⁷⁹

Although Section 230 does not provide absolute immunity,⁸⁰ in the years since its enactment, Section 230’s protections have been judicially expanded beyond the statutory language.⁸¹ The statute is now

an additional shield from liability, but only for ‘any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene . . . or otherwise objectionable.’”).

76. 47 U.S.C. § 230(c)(1). Section 230’s immunity only extends if the service provider is not also functioning as an “information content provider” (ICP). *Fair Hous. Council of San Fernando Valley v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1162 (9th Cir. 2008). An ICP is a provider “responsible, in whole or in part, for the creation or development of information provided.” 47 U.S.C. § 230(f)(3).

77. 47 U.S.C. § 230(c)(2)(A).

78. 47 U.S.C. § 230. When SMPs moderate UGC, they are likely protected by Section 230. *See, e.g., Roommates.com*, 521 F.3d at 1173 (distinguishing between displaying third-party content and actually contributing to content creation); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1360 (D.C. Cir. 2014) (holding Facebook immunized by Section 230); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1248 (N.D. Cal. 2014) (holding LinkedIn not protected by Section 230 regarding its generation of emails); *see also* Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 44 (2019) [hereinafter Goldman, *Why Section 230 is Better*] (noting that Section 230’s procedural protections include: enabling early dismissal, being more predictable for litigants, inhibiting plaintiff plead-arounds, moots state-level conflicts of laws, and facilitates constitutional avoidance).

79. *See* Mailyn Fidler, *The New Editors: Refining First Amendment Protections for Internet Platforms*, 2 NOTRE DAME J. EMERGING TECHS. 241, 243 (2021); *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009) (quoting *Brown v. Gilmore*, 278 F.3d 362, 366 n.2 (4th Cir. 2002)) (“Section 230 immunity . . . is generally accorded effect at the first logical point in the litigation process . . . [and is] ‘an immunity from suit.’ . . .”) (italics omitted).

80. 47 U.S.C. § 230; *see* Daniel Castro & Ashley Johnson, *Overview of Section 230: What It Is, Why It Was Created, and What It Has Achieved*, INFO. TECH. & INNOVATION FOUND. (Feb. 22, 2021), <https://www2.itif.org/2021-230-report-1.pdf> [<https://perma.cc/UQ8F-EA34>] (noting that Section 230 is not a limitless legal shield because ICSPs are still liable for violating federal criminal law, copyright law, and sex-trafficking laws).

81. In *Zeran v. American Online, Inc.*, for example, the court found that any distinction between “publisher” and “distributor” immunity was “inconsistent” with Congressional goals. 129 F.3d 327, 333 (4th Cir. 1997) (noting that if ICSPs were subject to distributor liability, it would reinforce incentives for ICSPs to interfere with online speech and to “abstain from self-regulation,” thereby creating a greater need for government regulation). The Court interpreted the statute to bar all tort-based liability. *See id.* at 330 (immunity applies “to any cause of action” that seeks to impose liability on internet service providers for information originating with users). Since *Zeran*, Section 230’s protections have been judicially expanded by interpreting Section 230(c)(1) in favor of immunity. *See* *Marshall’s Locksmith Serv., Inc. v. Google, LLC*, 925 F.3d 1263, 1267 (D.C. Cir.

considered an “all-purpose legal shield” for SMPs.⁸² For example, under the current interpretations of Section 230, SMPs enjoy civil immunity for, *inter alia*, “knowingly host[ing] illegal child pornography,” racially discriminating in removing content, and a broad array of traditional product-defect claims.⁸³

B. The Free Speech Concerns of SMP Users

Although private companies “cannot compel citizens to use them,”⁸⁴ SMPs “have become so central to individual identity and

2019) (“Congress inten[ded] to confer broad immunity for the re-publication of [UGC].”); *Doe v. Backpage.com, LLC*, 817 F.3d 12, 18 (1st Cir. 2016) (“There has been near-universal agreement that [S]ection 230 should not be construed grudgingly.”); *Jones v. Dirty World Ent. Recs., LLC*, 755 F.3d 398, 408 (6th Cir. 2014) (“[C]lose cases . . . must be resolved in favor of immunity.”); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (“Courts have construed the immunity provisions in [Section] 230 broadly in all cases arising from the publication of [UGC].”); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (“The majority of federal circuits have interpreted [Section 230] to establish broad . . . immunity.”); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (“[Section] 230(c) provides broad immunity for publishing [UGC].” (internal citations omitted)). “[C]ourts have relied on policy and purpose arguments to grant sweeping protection.” *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020). As a result, the broad construction of Section 230(c) immunity that has been “adopted by the courts has produced an immunity from liability that is far more sweeping than anything the law’s words, context, and history support.” Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 FORDHAM L. REV. 401, 408 (2017) (“Platforms have been protected from liability even though they republished content knowing it might violate the law, encouraged users to post illegal content, changed their design and policies for the purpose of enabling illegal activity, or sold dangerous products.”).

82. See Julia Angwin, *It’s Time to Tear Up Big Tech’s Get-Out-of-Jail-Free Card*, N.Y. TIMES (Feb. 20, 2023), <https://www.nytimes.com/2023/02/20/opinion/facebook-section-230-supreme-court.html> [<https://perma.cc/MG2J-DZPQ>] (“[SMPs] wield Section 230 to protect themselves against a wide array of allegations, including facilitating deadly drug sales, sexual harassment, illegal arms sales and human trafficking—behavior that they would have likely been held liable for in an offline context.”); Eric Goldman, *How Section 230 Enhances the First Amendment*, AM. CONST. SOC’Y (July 2020), https://www.acslaw.org/wp-content/uploads/2020/07/How-Section-230-Enhances-the-First-Amendment_July-2020.pdf [hereinafter Goldman, *How Section 230 Enhances the First Amendment*] [<https://perma.cc/2L5U-PPH7>] (“Section 230 has been successfully invoked in cases involving negligence; deceptive trade practices, unfair competition, and false advertising; common-law privacy torts; tortious interference with contract or business relations; intentional infliction of emotional distress; and dozens of other legal doctrines.”).

83. 47 U.S.C. § 230; see *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at *2 (E.D. Tex., Dec. 27, 2006); *Sikhs for Just., Inc. v. Facebook, Inc.*, 697 Fed. App’x 526, 526 (9th Cir. 2017); *Herrick v. Grindr, LLC*, 765 Fed. App’x 586, 591 (2d Cir. 2019) (granting immunity on a design-defect claim concerning a dating application that allegedly lacked basic safety features to prevent harassment and impersonation); *Force v. Facebook, Inc.*, 934 F.3d 53, 66 (2d Cir. 2019) (granting a company full immunity for recommending content made by terrorists because recommending content “is an essential result of publishing”).

84. See Eric Goldman, *Content Moderation Remedies*, 28 MICH. TECH. L. REV. 1, 10 (2021) [hereinafter Goldman, *Content Moderation Remedies*].

participation in society that many now view online speech as a right of citizenship.”⁸⁵ Thus, many allege that SMPs inhibit the free speech of their Users by making biased or impermissible UGC moderation decisions that result in unconstitutional censorship.⁸⁶

Today, a handful of SMPs have become the major channels for disseminating, exchanging, and circulating information to billions of Users worldwide.⁸⁷ Because SMPs control much of what is said and seen online,⁸⁸ SMPs have created an “information environment [that] undermines the notion of individual autonomy in the selection of content and threatens the viability of a functioning marketplace of ideas.”⁸⁹ As private parties, SMPs may, among other things, remove, limit, block, or label any UGC for any reason, subject to the platforms’ discretion.⁹⁰ As a result, SMPs possess the means to manipulate and “effectively govern the flow of information.”⁹¹

As SMPs have grown and become more influential, their power over public discourse and User speech has become increasingly scrutinized.⁹² Within the last few years, SMPs have “restrict[ed] opinions within the American political [and social] mainstream,”⁹³ and in doing so, “unfair[ly] influenc[ed]” and “distort[ed] public debate.”⁹⁴

85. Gregory M. Dickinson, *Big Tech’s Tightening Grip on Internet Speech*, 55 IND. L. REV. 101, 106 (2022).

86. See Balkin, *The First Amendment*, *supra* note 48, at 984; Tarleton Gillespie, *Platforms Are Not Intermediaries*, 2 GEO. L. TECH. REV. 198, 198–99 (2018) (“[SMPs] have profited by selling the promises of the web and participatory culture back to us: open participation, free information, expression for all, a community right for you waiting to be found. But as those promises have begun to sour, . . . the reality of these platforms’ impact on public life has become more obvious . . .”).

87. See GALLO & CHO, *supra* note 47, at 1.

88. *Biden v. Knight First Amend. Inst. Columbia Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring) (“[SMPs have] enormous control over speech. When a user does not already know exactly where to find something on the Internet . . . Google is the gatekeeper between that user and the speech of others 90% of the time. It can suppress content . . . by steering users away from certain content . . .”); Jeffrey Rosen, *The Deciders: Facebook, Google, and the Future of Privacy and Free Speech*, BROOKINGS 10 (May 2, 2011), https://www.brookings.edu/wp-content/uploads/2016/06/0502_free_speech_rosen.pdf [<https://perma.cc/5ALU-42ZK>] (“[T]he person who arguably has more power than any other to determine who may speak and who may be heard around the globe isn’t a king, president or Supreme Court justice. She is Nicole Wong, the deputy general counsel of Google, and her colleagues call her ‘The Decider.’”).

89. Grafanaki, *Platforms, the First Amendment and Online Speech*, *supra* note 22, at 132; *see also* Singh, *supra* note 27, at 22 (“Facebook’s content moderation practices affect a significant amount of user expression across the globe.”).

90. See GALLO & CHO, *supra* note 47, at 9.

91. K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 GEO. L. TECH. REV. 234, 235 (2018).

92. See McCabe, *supra* note 16.

93. See Volokh, *supra* note 15, at 395.

94. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 469 (2010) (Stevens, J., dissenting).

For example, Facebook removed and blocked news stories discussing the—now largely confirmed—“conspiracy” theory about the potential source of COVID-19 for over one year.⁹⁵ In the aftermath of George Floyd’s tragic death, TikTok Users who posted using the hashtags #BlackLivesMatter or #GeorgeFloyd were shown to have zero views when, in reality, they “actually had over 2 billion.”⁹⁶ Moreover, “Black Americans have long expressed frustration that Facebook wrongly flags or removes posts discussing racism or white supremacy.”⁹⁷ In October 2020, a few weeks before the US Presidential Election, Facebook and Twitter took extraordinary steps to suppress a *New York Post* story based on materials from the laptop of then-candidate Joe Biden’s son by removing or restricting links to the story and blocking and suspending Users, including then-White House Press Secretary Kayleigh McEnany, for posting about the story.⁹⁸ In 2021, YouTube removed a video posted by Senator Rand Paul, a qualified medical doctor, opining about the relative inefficacy of cloth masks in combating

95. See, e.g., Michael R. Gordon & Warren P. Strobel, *FBI Director Says Covid Pandemic Likely Caused by Chinese Lab Leak*, WALL ST. J. (Feb. 28, 2023, 6:37 PM), <https://www.wsj.com/articles/fbi-director-says-covid-pandemic-likely-caused-by-chinese-lab-leak-13a5e69b> [<https://perma.cc/Y5DK-RY49>]; 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, 4:29 PM), <https://www.wsj.com/articles/covid-origin-china-lab-leak-807b7b0a> [<https://perma.cc/487Q-S7EZ>]; Post Editorial Board, Opinion, *Facebook’s COVID Coverup*, N.Y. POST. (Jan. 5, 2021, 7:25 PM), <https://nypost.com/2021/01/05/facebooks-covid-coverup/> [<https://perma.cc/C7NA-E8LP>]; Sohrab Ahmari, *Facebook’s Lab Leak Censors Owe The Post, and America, an Apology*, N.Y. POST (May 27, 2021, 8:38 PM), <https://nypost.com/2021/05/27/facebook-and-its-censorious-fact-checkers-have-utterly-discredited-themselves/> [<https://perma.cc/YSE7-VPA4>]; Glen Kessler, *Timeline: How the Wuhan Lab-Leak Theory Suddenly Became Credible*, WASH. POST (May 25, 2021, 3:00 AM), <https://www.washingtonpost.com/politics/2021/05/25/timeline-how-wuhan-lab-leak-theory-suddenly-became-credible/> [<https://perma.cc/4LJF-7WCH>] (“[I]mportant information was available from the start but was generally ignored.”).

96. Sam Shead, *TikTok Apologizes After Being Accused of Censoring #BlackLivesMatter Posts*, CNBC (June 2, 2020, 6:39 AM), <https://www.cnbc.com/2020/06/02/tiktok-blacklivesmatter-censorship.html> [<https://perma.cc/3GBH-PZH9>].

97. Craig Silverman, *Black Lives Matter Activists Say They’re Being Silenced by Facebook*, BUZZFEED NEWS (June 19, 2020, 7:59 AM), <https://www.buzzfeednews.com/article/craigsilverman/facebook-silencing-black-lives-matter-activists> [<https://perma.cc/3DWF-BUX2>].

98. See, e.g., David Molloy, *Zuckerberg Tells Rogan FBI Warning Prompted Biden Laptop Story Censorship*, BBC NEWS (Aug. 26, 2022), <https://www.bbc.com/news/world-us-canada-62688532> [<https://perma.cc/YG3G-ZLAD>]; Todd Spangler, *‘Twitter Files’ Touted by Musk Reveal How Execs Debated Decision to Block NY Post Account Over Hunter Biden Articles*, VARIETY (Dec. 2, 2022, 5:21 PM), <https://variety.com/2022/digital/news/twitter-files-blocked-ny-post-hunter-biden-censor-1235448481/> [<https://perma.cc/B5A3-3SWM>]; Kari Paul, *Facebook and Twitter Restrict Controversial New York Post Story on Joe Biden*, GUARDIAN (Oct. 14, 2020, 10:36 PM), <https://www.theguardian.com/technology/2020/oct/14/facebook-twitter-new-york-post-hunter-biden> [<https://perma.cc/66WD-DA2H>].

the COVID-19 pandemic—a view which is now widely accepted—and banned the Senator from posting any videos on any topic for a week.⁹⁹

SMPs create content moderation policies to detail the allowable UGC “to be posted on their services.”¹⁰⁰ Such policies are binding for SMP Users “as conditions for their use of the [SMP] in question,” but they are not binding for the platforms.¹⁰¹ There is no uniform standard for SMP content moderation policies, resulting in practices varying across SMPs.¹⁰² SMPs use content moderation MLAs to screen and block UGC that violates SMP policies or is inconsistent with the SMP’s culture, regardless of its worth to Users.¹⁰³ Consequently, “much of [an individual’s] practical ability to speak online” is governed by the platform’s largely opaque, constantly updated moderation policies, which has bolstered the growing tension over the idea that “the right to cut off [and curate] speech lies most powerfully in the hands of private,” self-regulating SMPs that essentially operate without the potential for liability.¹⁰⁴

99. See Apoorva Mandavilli, *The C.D.C. Concedes That Cloth Masks Do Not Protect Against the Virus as Effectively as Other Masks*, N.Y. TIMES (Jan. 14, 2022), <https://www.nytimes.com/2022/01/14/health/cloth-masks-covid-cdc.html> [<https://perma.cc/GP9T-KSYC>]; Daniel Victor, *YouTube Suspends Rand Paul for a Week Over a Video Disputing the Effectiveness of Masks*, N.Y. TIMES (Aug. 11, 2021), <https://www.nytimes.com/2021/08/11/business/youtube-rand-paul-covid-masks.html> [<https://perma.cc/J75Z-4SKW>].

100. See Evelyn Douek, *Verified Accountability: Self-Regulation of Content Moderation as an Answer to the Special Problems of Speech Regulation*, LAWFARE (Sept. 18, 2019, 1:47 PM), <https://www.lawfareblog.com/verified-accountability-self-regulation-content-moderation-answer-special-problems-speech-0> [<https://perma.cc/486S-GWYN>].

101. See Grafanaki, *Platforms, the First Amendment and Online Speech*, *supra* note 22, at 117; Armijo, *supra* note 23, at 249, 251.

102. See, e.g., 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, 195 (2021); Matt Perault, *Section 230 Reform: A Typology of Platform Power*, 2 CPI ANTITRUST CHRON. 14, 18 (2021) (“Different approaches to content moderation enable users to make choices based on their moderation preferences.”); Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303, 325–26 (2021) (“The fact that people want platforms to do fundamentally contradictory things is a pretty good reason we shouldn’t mandate any one model of how a platform regulates the content posted there”); Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71, 84 (2021) (“[Y]ou don’t want a monoculture of content moderation”).

103. See Grafanaki, *Platforms, the First Amendment and Online Speech*, *supra* note 22, at 117; Armijo, *supra* note 23, at 251 (“Platforms are motivated to moderate user speech to ensure that . . . the speech they host [is] consistent, or at least not in conflict, with their values and goals.”); GALLO & CHO, *supra* note 47, at 8.

104. See Balkin, *The First Amendment*, *supra* note 48, at 982; Biden v. Knight First Amend. Inst. Colum. Univ., 141 S. Ct. 1220, 1227 (2021) (Thomas, J., concurring); Carrie Goldberg, *Section 230 Should Not Be Big Tech’s Get-Out-of-Court-Free Card*, BLOOMBERG L. (Dec. 7, 2022, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/section-230-should-not-be-big-techs-get-out-of-court-free-card> [<https://perma.cc/5N34-Z995>].

C. Congressional Efforts to Reform SMP Immunity

“Americans have rarely been as polarized as they are today,”¹⁰⁵ and yet, the forty-fifth and forty-sixth presidents, Donald Trump and Joe Biden, men who maintain virtually none of the same policy or political positions,¹⁰⁶ share common ground on one growing issue: revising the regulation of SMPs.¹⁰⁷ They are not alone in this position, as members of the 117th Congress “introduced nearly two dozen bills that would have amended Section 230 in some capacity.”¹⁰⁸ Despite the bipartisan agreement to alter the current state of SMP immunity, Congress faced a formidable obstacle: disparity in reform goals stemming from partisan divide.¹⁰⁹

Many conservatives—who believe that SMPs are biased against their viewpoints—push for SMPs to show more restraint and prudence in their content moderation policies.¹¹⁰ Therefore, legislation proposed by conservatives has tended to focus on repealing Section 230, restricting the statute’s protections for platforms that engage in biased content moderation, narrowing the statute’s “Good Samaritan” provisions, and limiting the ability of platforms to collect and employ User data for profit.¹¹¹ Multiple conservative proposals have focused on

105. Michael Dimrock & Richard Wike, *America Is Exceptional in Its Political Divide*, PEW TRUSTS (Mar. 29, 2021), <https://www.pewtrusts.org/en/trust/archive/winter-2021/america-is-exceptional-in-its-political-divide> [<https://perma.cc/QB87-VZ4H>].

106. See *Donald Trump v. Joe Biden*, DIFFEN (Sept. 15, 2023), <https://www.diffen.com/difference/Donald-Trump-vs-Joe-Biden> [<https://perma.cc/8MBL-FA5H>].

107. See, e.g., Christopher Mims, *Republicans and Democrats Find a Point of Agreement: Big Tech Is Too Powerful*, WALL ST. J. (July 30, 2020, 10:49 AM), <https://www.wsj.com/articles/republicans-and-democrats-find-a-point-of-agreement-big-tech-is-too-powerful-11596118625> [<https://perma.cc/3T9B-TXDR>]; Editorial Board, Opinion, *Joe Biden Says Age Is Just a Number*, N.Y. TIMES (Jan. 17, 2020), <https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-ny-times-interview.html> [<https://perma.cc/BZ9G-CYJW>] (President Biden saying Section 230 should be revoked “immediately”); Elizabeth Nolan Brown, *Section 230 Is the Internet’s First Amendment. Now Both Republicans and Democrats Want To Take It Away*, REASON (July 29, 2019, 8:01 AM), <https://reason.com/2019/07/29/section-230-is-the-internets-first-amendment-now-both-republicans-and-democrats-want-to-take-it-away/> [<https://perma.cc/6CWP-URUQ>].

108. 47 U.S.C. § 230 (2018); see Brief for Bipartisan Policy Center as Amicus Curiae Supporting Respondent at 3, *Gonzalez v. Google LLC*, 143 S. Ct. 1191 (2023) (No. 21-1333).

109. See Ashley Johnson & Daniel Castro, *How to Address Political Speech on Social Media in the United States*, INFO. TECH. & INNOVATION FOUND., 3 (Oct. 11, 2022), <https://www2.itif.org/2022-political-speech-on-social-media.pdf> [<https://perma.cc/N9ZQ-YQAK>].

110. *Id.*

111. 47 U.S.C. § 230; see 21st Century FREE Speech Act, S. 1384, 117th Cong. (2021); H.R. 874, 117th Cong. (2021); H.R. 277, 117th Cong. (2021); H.R. 83, 117th Cong. (2021); S. 5020, 116th Cong. (2020); H.R. 8517, 116th Cong. (2020); S. 4337, 116th Cong. (2020); H.R. 4027, 116th Cong. (2019).

punishing or disincentivizing certain SMP algorithms.¹¹² If such legislation passed, in order to avoid costly lawsuits, SMPs would either have to stop using algorithms entirely or change the way their algorithms work to avoid promoting any content that may be harmful or controversial.¹¹³ The former would eliminate many SMP features that Users find most beneficial.¹¹⁴ The latter could suppress relatively harmless content, including political discourse.¹¹⁵

In contrast, many liberals believe that SMPs insufficiently police misinformation, hate speech, election disinformation, and other dangerous speech and demand that SMPs more zealously moderate UGC and Users.¹¹⁶ Legislation proposed by liberals has sought to compel SMP transparency in their moderation decisions.¹¹⁷ A transparency requirement with regular disclosures might help the public hold SMPs accountable for arbitrary or biased policies.¹¹⁸ However, detailed transparency requirements could reveal proprietary algorithm information to the public and competitors.¹¹⁹

112. See Don't Push My Buttons Act, S. 4756, 116th Cong. (2020); The Biased Algorithm Deterrence Act of 2019, H.R. 492, 116th Cong. (2019). Both would eliminate protections for online services that filter, sort, or curate user-generated content.

113. Ashley Johnson, *Algorithms Are Not the Enemy*, INFO. TECH. & INNOVATION FOUND. (Dec. 8, 2022), <https://itif.org/publications/2022/12/08/algorithms-are-not-the-enemy/> [<https://perma.cc/EX2Y-U7TS>].

114. *Id.*

115. *Id.*

116. See Christopher Bates, *A Review of Proposals to Reform Section 230*, ORRIN G. HATCH FOUND. 2, 7 (May 2021), <https://static1.squarespace.com/static/5e2072f645f53f254017e846/t/6151f9b0f5ebbd32e8c9ed0e/1632762293414/OGHF+Section+230+Report+by+Chris+Bates+2021+FINAL.pdf> [<https://perma.cc/TPE9-9XCT>].

117. See *id.*; *Fighting Digital Disinformation*, WARREN DEMOCRATS (2023), <https://elizabethwarren.com/plans/fighting-digital-disinformation> [<https://perma.cc/EZE5-VHDT>].

118. See Jamie Grierson, 'No Grey Areas': Experts Urge Facebook to Change Moderation Policies, GUARDIAN (May 22, 2017, 10:04 AM), <https://www.theguardian.com/news/2017/may/22/no-grey-areas-experts-urge-facebook-to-change-moderation-policies> [<https://perma.cc/KT8B-X32B>] ("These companies are hugely powerful and influential. They have given people a platform to do amazing and wonderful things but also dangerous and harmful things. Given the impact of the content decisions they make, their standards should be transparent and debated publicly, not decided behind closed doors.").

119. See Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 HASTINGS L.J. 1203, 1212 (2022) [hereinafter Goldman, *Constitutionality*] ("A [SMP] can easily disclose many of its codified written policies though doing so may expose trade secrets or enable malicious users.").

D. Judicial Intervention

Given partisan gridlock,¹²⁰ Congressional action clarifying the scope of SMP immunity anytime soon is unlikely. Therefore, the most efficient avenue for immediate change lies with the Supreme Court of the United States.¹²¹ However, “[i]t is not at all obvious how [the Court’s] existing precedents, which predate the age of the internet, should apply to large [SMPs].”¹²²

1. Section 230 and SMP Recommendations

On February 21, 2023, the Supreme Court heard oral arguments in *Gonzalez v. Google LLC*.¹²³ The case presented the Court with a novel question of statutory interpretation: whether Section 230(c) protects internet platforms when their algorithms recommend UGC to specific Users.¹²⁴

In 2015, the Gonzalez family filed a lawsuit against YouTube, a subsidiary of Google, on behalf of Nohemi Gonzalez, an American college student killed during a coordinated ISIS attack in Paris, France.¹²⁵ The family argued that Google’s algorithmic recommendations of ISIS videos to specific YouTube Users were critical “in the development of ISIS’s image, its success in recruiting members from around the world, and its ability to carry out attacks.”¹²⁶ In response, Google argued that Section 230(c)(1) protects YouTube’s recommendations because “curating and displaying content of interest to users” is a central function of publishers.¹²⁷ This argument has

120. See Robert Corn-Revere, *Section 230 and the Curse of Politics*, REASON (Feb. 16, 2023, 7:00 AM), <https://reason.com/2023/02/16/section-230-and-the-curse-of-politics/> [https://perma.cc/HZE6-7ZU3].

121. See *id.*

122. NetChoice, LLC v. Paxton (“*Paxton III*”), 142 S. Ct. 1715, 1717–18 (2022) (Alito, J., dissenting) (suggesting that the Court’s intervention was premature); see also *Packingham v. North Carolina*, 582 U.S. 98, 118 (2017) (Alito, J., concurring) (“[W]e should be cautious in applying our free speech precedents to the internet. Cyberspace is different from the physical world, and if it is true . . . that “we cannot appreciate yet” the “full dimensions and vast potential” of the “Cyber Age,” we should proceed circumspectly, taking one step at a time.”).

123. See Transcript of Oral Argument, *Gonzalez v. Google*, 143 S. Ct. 1191 (2023) (No. 21-1333) [hereinafter *Transcript of Oral Argument*].

124. See Brief of Petitioner at i, *Gonzalez v. Google, LLC*, 143 S. Ct. 1191 (2023) (No. 21-1333) [hereinafter *Brief of Petitioner*].

125. See *Gonzalez v. Google, LLC*, 143 S. Ct. 1191, 1192 (2023).

126. *Brief of Petitioner*, *supra* note 124, at 11.

127. 47 U.S.C. § 230(c)(1) (2018); Brief of Respondent at 10, *Gonzalez v. Google, LLC*, 143 S. Ct. 1191 (2023) (No. 21-1333).

previously seen success in lower courts.¹²⁸ However, “[i]t strains the English language to say that” when Google collects billions of User data points to create User profiles, make predictions about “relevant” UGC for specific Users, and repeatedly recommend targeted videos, it “is acting as the publisher of . . . information provided by another information content provider.”¹²⁹

Justice Thomas has previously expressed his desire to narrow the protections offered by Section 230.¹³⁰ During the *Gonzalez* oral arguments, however, multiple justices noted their discomfort with answering such a broad question, arguing that this case likely centered on a line-drawing question for Congress.¹³¹ Significantly, Justice Barrett raised the prospect that the Court could avoid answering questions on Section 230’s scope based on their decision in *Twitter v. Taamneh*, a similar case for which the Court heard oral arguments the following day.¹³² *Twitter* was brought by the family of a Jordanian citizen who was killed in a 2017 ISIS attack in Istanbul.¹³³ Unlike *Gonzalez*, the *Twitter* plaintiffs brought their action under the Antiterrorism Act,¹³⁴ alleging that because ISIS has used the defendant’s SMPs to recruit new members and raise funds, the SMPs should be liable for aiding and abetting ISIS.¹³⁵ More specifically, the family argued that the SMPs “designed virtual platforms and knowingly failed to do ‘enough’ to remove ISIS-affiliated users and ISIS-related content” from their platforms.¹³⁶

In May 2023, the Court issued a unanimous opinion in favor of Twitter, finding that the “plaintiffs’ allegations [were] insufficient to establish that [the SMPs] aided and abetted ISIS in carrying out the

128. See *Dryoff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019) (finding that to hold the defendant liable for making such recommendations would “inherently require[] the court to treat the defendant as the ‘publisher or speaker’ of content provided by another”); *Gonzalez v. Google, LLC*, 2 F.4th 871, 896 (9th Cir. 2021); *Force v. Facebook*, 934 F.3d 53, 66 (2d Cir. 2019) (granting full immunity for recommending content made by terrorists because recommending content “is an essential result of publishing”).

129. *Force*, 934 F.3d at 76–77; Griffin, *supra* note 33, at 473.

130. 47 U.S.C. § 230; see *Doe v. Facebook*, 142 S. Ct. 1087, 1089 (2022) (Thomas, J., concurring) (“We should . . . address the proper scope of immunity under [Section] 230 in an appropriate case.”); *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 18 (2020) (“Without the benefit of briefing on the merits, we need not decide today the correct interpretation of [Section] 230. But in an appropriate case, it behooves us to do so.”).

131. See *Transcript of Oral Argument*, *supra* note 123, at 14, 40, 46, 96.

132. See *id.* at 58.

133. See *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206, 1215 (2023); Conditional Petition for Cert. at 7, *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023) (No. 21-1496).

134. See 18 U.S.C. § 2333(a), (d)(2); *Twitter*, 143 S. Ct. at 1215.

135. See *Twitter*, 143 S. Ct. at 1215.

136. *Id.* at 1230–31.

relevant attack.”¹³⁷ The Court reasoned that the family did not sufficiently demonstrate the requisite link between the alleged inaction of the SMPs and the ISIS attack on the Istanbul nightclub to hold the SMPs liable.¹³⁸ The same day, as Justice Barrett foreshadowed, the Court issued another unanimous opinion “declin[ing] to address” the Section 230 question.¹³⁹ Notably, however, in Justice Jackson’s concurring opinion, she emphasized that the Court’s decisions in both *Twitter* and *Gonzalez* “are narrow in important respects,” including that “the Court’s view of the facts—including its characterizations of the [SMPs] and algorithms at issue—properly rests on the particular allegations in those complaints,” noting that “[o]ther cases presenting different allegations and different records may lead to different conclusions.”¹⁴⁰

While the Court was anticipated to address the application of a “pre-algorithm statute in a post-algorithm world” in *Gonzalez*, it may signal the beginning of another substantial debate on states’ authority to regulate SMP content moderation practices.¹⁴¹

2. State Regulation of SMP Moderation Decisions

In May 2021, Florida enacted Senate Bill 7072 (the Florida Bill) requiring SMPs to follow specified content moderation provisions.¹⁴²

137. *Id.* at 1215.

138. *See id.* at 1228 (“Given the lack of any concrete nexus between defendants’ services and the Reina attack, plaintiffs’ claims would necessarily hold defendants liable as having aided and abetted each and every ISIS terrorist act committed anywhere in the world. Under plaintiffs’ theory, any U.S. national victimized by an ISIS attack could bring the same claim based on the same services allegedly provided to ISIS.”).

139. 47 U.S.C. § 230; *see Gonzalez v. Google LLC*, 143 S. Ct. 1191, 1192 (2023); *see also Gonzalez v. Google LLC*, OYEZ, <https://www.oyez.org/cases/2022/21-1333> [<https://perma.cc/5DV6-NAHJ>] (last visited Sept. 17, 2023) (“Citing its decision in *Twitter v. Taamneh*, the Court declined to reach the question presented in this case and vacated the judgment of the Ninth Circuit and remanded for further proceedings consistent with that opinion. Although this disposition technically favors *Gonzalez*, the practical effect on remand is dismissal of *Gonzalez*’s claim.”).

140. *See Amy Howe, Supreme Court Rules Twitter Not Liable for ISIS Content*, SCOTUSBLOG (May 18, 2023, 1:03 PM), <https://www.scotusblog.com/2023/05/supreme-court-rules-twitter-not-liable-for-isis-content/> [<https://perma.cc/4M8Q-UA46>].

141. *Transcript of Oral Argument*, *supra* note 123, at 9.

142. *See Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, RON DESANTIS 46TH GOVERNOR OF FLA. (May 24, 2021), <https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/> [<https://perma.cc/NZT3-PR6P>]. S.B. 7072 defines SPMs as “any information service, system, internet search engine, or access software provider” that: (1) provides or enables computer access by multiple users to a computer server; (2) “operates as a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity”; (3) does business in Florida; and (4) either has annual gross revenues over one hundred million or has at least one hundred million monthly individual platform participants globally. FLA. STAT. § 501.2041(1)(g) (2023). Based on

Under these provisions, SMPs cannot ban or delete a political candidate's profile (i.e., "deplatform" the candidate) for more than fourteen days or use "post-prioritization or shadow banning algorithms for content and material posted by or about a candidate."¹⁴³ Additionally, the Florida Bill prohibits SMPs from censoring, deplatforming, or shadow banning journalistic enterprises.¹⁴⁴ However, before the Florida Bill was enacted, the US District Court for the Northern District of Florida granted a preliminary injunction to trade associations representing SMPs, enjoining Florida from enforcing the aforementioned provisions of the Bill.¹⁴⁵ On appeal, the US Court of Appeals for the Eleventh Circuit affirmed the lower court's decision, finding that the Florida Bill's moderation provisions violated the First Amendment rights of SMPs because "when [an SMP] removes or deprioritizes a user or post, it makes [an editorial] judgment . . . rooted in the [SMP's] own views about the sorts of content and viewpoints that are valuable and appropriate for dissemination on its site."¹⁴⁶

In September 2021, Texas enacted House Bill 20 (the Texas Bill).¹⁴⁷ Like the Florida Bill, the Texas Bill restricts SMPs from "censor[ing] a user, a user's expression, or a user's ability to receive the expression of another person."¹⁴⁸ Once again, before the Texas Bill went into effect, trade associations representing SMPs sought a preliminary injunction.¹⁴⁹ The district court granted the injunction halting the Texas Bill from going into effect, holding that the law violates SMPs' First Amendment rights.¹⁵⁰ On appeal, the US Court of Appeals for the

the language, this definition could also include search engines and internet providers. However, this Note only discuss its application to SMPs.

143. FLA. STAT. §§ 106.072(2) (2021), 501.2041(1)(c), (2)(h). Post-Prioritization Algorithms arrange content "in a more or less prominent position." FLA. STAT. § 501.2041(1)(e). Shadow Banning Algorithms limit or eliminate "the exposure of a user or content or material posted by a user to other users." FLA. STAT. § 501.2041(1)(f).

144. FLA. STAT. § 501.2041(2)(j).

145. See *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1096 (N.D. Fla. 2021).

146. See *NetChoice, LLC v. Att'y Gen., Fla. ("Moody")*, 34 F.4th 1196, 1210, 1213 (11th Cir. 2022). In doing so, the court examined various SMP policies. See, e.g., *Policies and Guidelines*, YOUTUBE, <https://www.youtube.com/creators/how-things-work/policies-guidelines> [<https://perma.cc/2HZA-NPG2>]; *Facebook Community Standards*, META, <https://transparency.fb.com/policies/community-standards> [<https://perma.cc/3TBN-K98L>].

147. See Kailyn Rhone, *Social Media Companies Can't Ban Texans Over Political Viewpoints Under New Law*, TEXAS TRIB. (Sept. 2, 2021, 4:00 PM), <https://www.texastribune.org/2021/09/02/texas-social-media-censorship-legislature/> [<https://perma.cc/QX4X-MRCK>].

148. See *Supreme Court Reinstates Injunction Against Texas Social Media Law*, PERKINS COIE (June 1, 2022), <https://www.perkinscoie.com/en/news-insights/supreme-court-reinstates-injunction-against-texas-social-media-law.html> [<https://perma.cc/CL9M-B2A4>].

149. See *NetChoice, LLC v. Paxton ("Paxton I")*, 573 F. Supp. 3d 1092, 1101 (W.D. Tex. 2021).

150. See *id.* at 1117.

Fifth Circuit allowed the Texas Bill to go into effect.¹⁵¹ However, the Supreme Court vacated the Fifth Circuit's order.¹⁵² Nevertheless, four months later, the Fifth Circuit officially upheld the Texas Bill as Constitutional.¹⁵³ Unlike the Eleventh Circuit, the Fifth Circuit held that SMPs do not make editorial judgments because SMPs use content moderation algorithms to "screen out certain obscene and spam-related content," and all of the other UGC is posted with "zero editorial control or judgment."¹⁵⁴

Because SMPs possess significant and widespread global power, comprehensive federal regulation would be more efficient than state-specific patchwork.¹⁵⁵ However, appeals from both circuit courts are pending before the Supreme Court as of July 2023.¹⁵⁶ In January 2023, the Court invited the US Solicitor General to file a brief expressing the views of the United States, which indicates that some justices are potentially interested in clarifying First Amendment protection of SMP decisions.¹⁵⁷

151. See *NetChoice, LLC v. Paxton* ("*Paxton II*"), 2022 WL 1537249, at *4 (5th Cir. May 11, 2022).

152. See *NetChoice, LLC v. Paxton* ("*Paxton III*"), 142 S. Ct. 1715, 1716 (2022).

153. See *NetChoice, LLC v. Paxton* ("*Paxton IV*"), 49 F.4th 439, 494 (5th Cir. 2022).

154. *Id.* at 459.

155. See Mack DeGeurin, *We Could Soon Open a Pandora's Box of Impossible Speech Laws*, GIZMODO (Feb. 23, 2023), <https://gizmodo.com/texas-and-florida-bills-impossible-speech-laws-coming-1850115791> [<https://perma.cc/5VJ8-JYAL>] (noting that if each state could enact SMP legislation, SMPs "could face an 'unworkable and ridiculous' reality where [they] may be legally compelled to ban content in one state but then potentially face a lawsuit for not removing the exact same piece of content in neighboring states. States could purposely pass conflicting legislation that makes hosting and moderating online speech so ridiculously untenable some platforms may simply choose to bail from certain markets entirely.").

156. See *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196 (11th Cir. 2022), *petition for cert. filed*, 2022 WL 446752 (U.S. Sept. 21, 2022) (No. 22-277); *Paxton IV*, 49 F.4th 439 (5th Cir. 2022), *petition for cert. filed*, 2022 WL 17821208 (U.S. Dec. 15, 2022) (No. 22-555).

157. Elisha Kobre, *Court's FCA Ruling Opens Door for SCOTUS Review*, BLOOMBERG LAW (Oct. 4, 2022), <https://www.bloomberglaw.com/bloomberglawnews/health-law-and-business/X1FVRNB0000000> [<https://perma.cc/27NE-SWMG>] ("Historical studies show" that cases in which the Court asks the "U.S. Solicitor General's office for its views on whether to grant the petition" are "far more likely to be granted certiorari."). On September 29, 2023, the Supreme Court granted the petitions. See *Moody*, 34 F.4th 1196 (11th Cir. 2022), *cert. granted*, 2023 WL 6319654 (U.S. Sept. 29, 2023) (No. 22-277); *Paxton IV*, 49 F.4th 439 (5th Cir. 2022), *cert. granted*, 2023 WL 6319650 (U.S. Sept. 29, 2023) (No. 22-555).

IV. A PROPOSED FUTURE FOR SMP IMMUNITY WITH INCREASED ACCOUNTABILITY AND MINIMIZED UNINTENDED CONSEQUENCES

A. *The Shortcomings of Supreme Court Intervention*

The future of SMP liability is unclear. A Supreme Court decision that curtails Section 230 could require SMPs to remove content to avoid liability.¹⁵⁸ Many online services would have to completely change their operations, as targeted recommendations are ubiquitous across the internet and SMPs, which would likely implicate First Amendment concerns regarding content-based restrictions.¹⁵⁹ SMPs would likely become more risk-averse in what content they allow on their platforms, leading them to over-moderate or not moderate at all.¹⁶⁰ Simultaneously, state laws like those at issue in Florida and Texas could restrict SMPs' ability to remove such content.¹⁶¹ Because "the stakes could not be higher," in the absence of the *Gonzalez* court's highly-anticipated Section 230 interpretation, the Supreme Court should defer all policy considerations to legislative action.¹⁶²

Section 230 protects SMPs' leeway to use and develop new forms of content moderation by ensuring that they are not subject to varying state laws requiring or encouraging them to remove or retain content or display it in specific ways.¹⁶³ The statute preempts any inconsistent state laws.¹⁶⁴ Thus, in considering the Florida and Texas bills, the Court has an opportunity to give significant consideration to the constitutionality of Section 230 in its current form, which no court has done before, making it difficult to predict how these laws might fare.¹⁶⁵

158. 47 U.S.C. § 230 (2018); see James Romoser, *Elon Musk, Internet Freedom, and How the Supreme Court Might Force Big Tech Into a Catch-22*, SCOTUSBLOG (Nov. 6, 2022, 6:00 PM), <https://www.scotusblog.com/2022/11/elon-musk-internet-freedom-and-how-the-supreme-court-might-force-big-tech-into-a-catch-22> [<https://perma.cc/S63U-KKTT>].

159. See Brief of Senator Ron Wyden and Former Representative Christopher Cox as Amici Curiae in Support of Respondent at 12, *Gonzalez v. Google, LLC*, 143 S. Ct. 1191 (2023) (No. 21-1333) [hereinafter Brief of Wyden & Cox].

160. See Melissa De Witte, *Four Questions: Evelyn Douek on What Section 230 Is and Why It Is Misunderstood*, STAN. NEWS (Oct. 7, 2022), <https://news.stanford.edu/2022/10/07/four-questions-evelyn-douek-section-230-misunderstood/> [<https://perma.cc/V4QW-5CJA>]; Goldman, *Why Section 230 is Better*, *supra* note 78, at 42.

161. See Romoser, *supra* note 158.

162. 47 U.S.C. § 230; see Corn-Revere, *supra* note 120.

163. 47 U.S.C. § 230; see Brief of Wyden & Cox, *supra* note 159, at 11.

164. 47 U.S.C. § 230(e)(3).

165. 47 U.S.C. § 230; VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 48–49 (2021).

B. Free Market Resolution for Content Moderation Policies

Although many are concerned that SMPs create “the rules and context in which debate, discussion, development of ideas, contestation, and organiz[ation] happens,” exercising immense and arbitrary power over the dissemination of information and how society “engage[s] and communicate[s] with each other,” doctrinal issues stand in the way of reform.¹⁶⁶

First, when courts or Congress dictate a private party’s exercise of free speech, the First Amendment is generally implicated.¹⁶⁷ The existing First Amendment doctrine seemingly characterizes almost all content-based decisions by intermediaries as “editorial” speech subject to First Amendment protection.¹⁶⁸ Thus, SMPs, as private parties, must maintain the freedom to moderate UGC on their platform.¹⁶⁹ Additionally, by enacting Section 230, Congress “sought to protect platforms from liability for [their] content moderation and curation activities.”¹⁷⁰ Thus, any effort to regulate a platform’s content moderation policies would go against congressional intent.

As a result, this Note proposes that SMPs develop a set of industry-wide “best practices,” which uniformly and explicitly define the SMP industry interpretations of the terms in Section 230(c)(2)(A) and any other relevant terms as has been successfully done in other self-regulating industries to protect consumers.¹⁷¹ This unified SMP approach on essential issues would promote platform transparency and

166. K. Sabeel Rahman & Zephyr Teachout, *From Private Bads to Public Goods: Adapting Public Utility Regulation for Informational Infrastructure*, KNIGHT FIRST AMEND. INST. (Feb. 4, 2020), <https://knightcolumbia.org/content/from-private-bads-to-public-goods-adapting-public-utility-regulation-for-informational-infrastructure> [<https://perma.cc/5BL7-NHVG>]; see also Goldman, *Content Moderation Remedies*, *supra* note 84, at 6.

167. See discussion *supra* notes 84–104.

168. See Langvardt, *Can the First Amendment Scale?*, *supra* note 68, at 286.

169. See Goldman, *Constitutionality*, *supra* note 119, at 1217 (“Mandatory editorial transparency restrictions affect the substance of the published content, similar to the effects of outright speech restrictions. . . . If strict scrutiny applies, mandatory editorial transparency laws will routinely fail any constitutional challenge—especially given that transparency laws routinely do not effectively advance their goals. . . . Mandatory editorial transparency laws also should qualify as ‘compelled speech.’”).

170. 47 U.S.C. § 230; see Brief of Wyden & Cox, *supra* note 159, at 2.

171. 47 U.S.C. § 230; see, e.g., Douglas C. Dow, *Motion Picture Ratings*, FIRST AMEND. ENCYC. (Jan. 1, 2009), <https://www.mtsu.edu/first-amendment/article/1247/motion-picture-ratings> [<https://perma.cc/8Q28-ZTQH>] (For example, the Motion Picture Association of America, a trade association representing major film studios, established its ratings system in 1968 to inform parents on whether a film might be appropriate for children of various ages); *ABA Timeline*, ABA, https://www.americanbar.org/about_the_aba/timeline/ [<https://perma.cc/G7CM-9W76>] (the American Bar Association created standards for law school accreditation in 1921 and has developed standards of ethics in the legal field since 1908).

public trust. However, if all major SMPs work together to eliminate forms of harmful and illegal content, Users may voice censorship concerns. Additionally, because the “best practices” are not legally binding, SMPs could choose not to follow them. Thus, to lend legitimacy to the effort and benefit both SMPs and Users, some third-party involvement would likely need to be involved.

C. Proposed Solution: Modified Section 230(c) Narrowly Tailored to SMPs

SMPs intentionally and opportunistically manipulate their self-characterization between speakers whose platforms represent content worthy of First Amendment protection and “mere conduits” of UGC deserving Section 230 protection, expertly dodging responsibility for the harms caused by their platforms.¹⁷² Although Section 230 “made it possible for every major internet service to be built and ensured important values like free expression and openness were part of how platforms operate,” the statute compels SMPs to be “indifferent to the content of information they host or transmit” and encourages them to “do nothing about the distribution of indecent and offensive materials via their services.”¹⁷³ The statute has “defeat[ed] claims by the victims

172. See, e.g., Eric Goldman, *Of Course the First Amendment Protects Google and Facebook (and It's Not a Close Question)*, KNIGHT FIRST AMEND. INST. (Feb. 26, 2018), <https://knightcolumbia.org/content/course-first-amendment-protects-google-and-facebook-and-its-not-close-question> [<https://perma.cc/N2PY-XM2N>] (“Google and Facebook have publicly disclaimed editorial control over their databases of third-party content. Google and Facebook also routinely say the opposite, and their inconsistent statements reflect the disparate audiences for their messages.”); Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQ. L. 487, 494 (2016) (“[I]n the many forums that have tried to call Google, Facebook, Amazon, and other firms to account, a fundamentally American-exceptionalist legal logic based on the two laws has informed these leading internet intermediaries’ efforts to deflect liability. When intellectual property or defamation claims arise, they emphasize their role as mere conduits, reflecting the preferences and serving the interests of users. But when classic business tort or privacy claims arise, intermediaries argue that they are speakers, their selection and arrangement of information a type of activity best protected as freedom of expression.”); Annalee Newitz, *It's Time to Get Rid of the Facebook "News Feed," Because It's Not News*, ARS TECHNICA (Nov. 18, 2016), <https://arstechnica.com/staff/2016/11/its-time-to-get-rid-of-the-facebook-news-feed-because-its-not-news/> [<https://perma.cc/P44M-U6PN>] (noting that the core problem lies in Facebook’s straddling the line between news provider and neutral platform, operating as both but evading the norms and restraints expected of either); Grafanaki, *Platforms, the First Amendment and Online Speech*, *supra* note 22, at 144; Goldberg, *supra* note 104.

173. 47 U.S.C. § 230; *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior? Hearing Before the S. Comm. on Com., Sci., & Transp.*, 116th Cong. 2 (2020) (statement of Mark Zuckerberg, CEO, Facebook, Inc.); see also *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003).

of tortious or criminal conduct.”¹⁷⁴ No authoritative decision against an SMP for injuries caused by the platforms from which SMPs frequently profit has been issued.¹⁷⁵ SMPs operate without the threat of accountability, making remaining impassive an increasingly infeasible option.¹⁷⁶

To realign with the “original purpose of” Section 230—“to clean up the internet, not to facilitate” bad actors—Congress should modify Section 230 by adding a new subsection that governs only SMPs and imports and reframes Section 230(c).¹⁷⁷

1. Narrowly Define SMPs

First, Congress should expressly define what a “social media platform” is to preclude consideration of other ICSPs within this modified SMP framework. To narrowly tailor this definition, Congress should define a “social media platform” as “an interactive computer service that (1) is a centralized virtual space that connects Users and allows them to interact; (2) monetizes its services through selling User data or third-party advertisements; and (3) hosts, promotes, and facilitates the exchange of user-generated content.”

2. Reframe Section 230(c)

Reframing Section 230(c) with an SMP-specific subsection in a way that mitigates the widespread skepticism and distrust of SMPs while preserving online innovation, incentivizing the moderation of harmful UGC, and protecting competition requires three modifications.¹⁷⁸ First, for clarity and consistency, Congress should

174. *Doe*, 347 F.3d at 660; see Alina Selyukh, *Section 230: A Key Legal Shield For Facebook, Google Is About To Change*, NPR (Mar. 21, 2018, 5:11 AM), <https://www.npr.org/sections/alltech-considered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change> [<https://perma.cc/8EM2-XQD2>].

175. See Goldberg, *supra* note 104 (“Unlike any other industry, they breach human rights with no threat of accountability. In recent years, bad actors have used the largest [SMPs] to influence the progression of many global harms—for example, the genocide in Myanmar, election corruption, eating disorders, and online child sexual exploitation.”).

176. See *id.*

177. 47 U.S.C. § 230; see Selyukh, *supra* note 174.

178. 47 U.S.C. § 230(b)(1)–(4).; see Neslage, *Teclash? America’s Growing Concern with Major Technology Companies*, KNIGHT FOUND. (Mar. 11, 2020), <https://knightfoundation.org/reports/teclash-americas-growing-concern-with-major-technology-companies/> [<https://perma.cc/G78R-7M7M>].

replace all instances of the phrase “an interactive computer service” with “a social media platform.”¹⁷⁹

Next, in the imported Section 230(c)(1), Congress should add a “good faith” requirement, immunizing “a social media platform acting in good faith.”¹⁸⁰ Adding this provision would minimize the risk of bad actors benefitting from Section 230 protections.¹⁸¹ This open-ended language would give the courts sufficient flexibility to interpret what constitutes acting “in good faith,” as aided by the Congressional Record, and allow SMPs to maintain broad liability protections, provided they can prove to a court that their response is reasonable. Narrowing the subsection’s breadth of immunity could encourage SMPs to exercise due diligence in moderating UGC and make SMPs more accountable for their own commitments. For example, YouTube’s content moderation policies affirmatively prohibit material intended to promote terrorist organizations.¹⁸² Although YouTube employs algorithms and manual tools to enforce those terms, ISIS content was nonetheless recommended and displayed by YouTube.¹⁸³ Because YouTube was “well aware that the company’s services were assisting ISIS,” a court may find that YouTube was not acting in good faith, allowing plaintiffs, like the Gonzalez family, to fully plead their case without preclusion by

179. 47 U.S.C. § 230; *see, e.g., Transcript of Oral Argument, supra* note 123, at 9–10 (Kagan, J., speaking) (noting that the current issue is how to apply Section 230 in a post-algorithmic world); Olivier Sylvain, *Platform Realism, Informational Inequality, and Section 230 Reform*, 131 *YALE L.J. F.* 476, 476, 500–01 (2021) (“Today, social-media companies do much more than simply host or distribute user-generated content. They solicit, sort, deliver, and amplify content that holds consumer attention for advertisers . . . under the prevailing Section 230 doctrine, it appears that interactive computer services can never be held liable for any of the harms that they contribute to or cause.”); Michael D. Smith & Marshall Van Alstyne, *It’s Time to Update Section 230*, *HARV. BUS. REV.* (Aug. 12, 2021), <https://hbr.org/2021/08/its-time-to-update-section-230> [<https://perma.cc/VG3A-YHJE>] (“Today there is a growing consensus that we need to update Section 230,” so that platforms can “benefit from clearer guidance from elected officials.”).

180. 47 U.S.C. § 230; *see* Griffin, *supra* note 33, at 498 (“Proponents suggest courts use Section 230(c)’s title . . . [as a tool] available for the resolution of doubt’ about the meaning of the statute” to find Section 230(c) should apply exclusively to those who engage in good faith efforts to filter out illegal content.”); Balkin, *Fixing Social Media’s Grand Bargain, supra* note 49, at 1009 (“The goal, in other words, is to ameliorate or forestall the conflict of interest by requiring companies to act in good faith.”).

181. 47 U.S.C. § 230; *see* Balkin, *The First Amendment, supra* note 48, at 1009; Goldberg, *supra* note 104.

182. *See Violent Extremist or Criminal Organizations Policy*, *YOUTUBE HELP* (2023), https://support.google.com/youtube/answer/9229472?hl=en&ref_topic=9282436 [<https://perma.cc/BR42-W8GN>].

183. *See Gonzalez v. Google, LLC*, 2 F.4th 871, 881 (9th Cir. 2021).

Section 230.¹⁸⁴ Notably, such a standard has been proffered by SMP industry titans.¹⁸⁵

A good faith requirement could make it more difficult for SMPs to defend themselves against nuisance lawsuits, potentially opening them up to more costly litigation, as they would not benefit from a presumption of good faith and would have to prove that they acted in good faith.¹⁸⁶ To aid this administrative burden, Congress should suggest that SMPs maintain annual transparency reports regarding the UGC and Users the platform removed within the year and why those actions were taken—or what moderation policies were violated. In doing so, the SMPs would consistently record their “good faith” actions, easing the administrative load and promoting platform accountability.

Finally, in the imported Section 230(c)(2), Congress should modify the statutory language to additionally immunize SMPs acting in good faith for removing UGC that “promotes violence” and that “promotes self-harm.”¹⁸⁷ Adding this language encourages SMPs to take these increasingly important public issues into greater consideration in crafting their content moderation policies and MLAs.

3. Implement Anti-Addiction Measures

Today, the SMP business model is “built around the needs of marketing agencies instead of lives,” so “as long as [SMPs] have an incentive to make their platforms as engaging as possible, the arms race forcing them to ‘manipulate’ Users will continue.”¹⁸⁸ Therefore, outside of reframing Section 230(c), Congress should also require that SMPs implement anti-addiction measures—of the platform’s choice—in the default design of the platform’s interface.¹⁸⁹ Examples of potential anti-addiction measures include using “cooler” colors for the notifications or updates, intermittently prompting Users to set an internal timer for the User’s self-imposed daily limits, recurrently displaying general

184. 47 U.S.C. § 230 (2018); *Brief of Petitioner, supra* note 124, at 10 (“[D]espite extensive media coverage, complaints, legal warnings, congressional hearings, and other attention for providing online [SMP] and communications services to ISIS, prior to the Paris attacks YouTube continued to provide those resources and services to ISIS and its affiliates.”).

185. *Hearing Before the H. Comm. on Energy & Comm.; Subcomms. on Consumer Prot. & Comm. & Commc’ns & Tech.*, 117th Cong. (2021) (testimony of Mark Zuckerberg).

186. See Goldman, *Why Section 230 is Better, supra* note 78, at 40.

187. 47 U.S.C. § 230; see Goldberg, *supra* note 104; *Facebook Community Standards*, Meta, <https://transparency.fb.com/policies/community-standards> [https://perma.cc/4TFH-97QY] (prohibiting coordination or advocacy of harm on Meta platforms); Wells et al., *supra* note 14.

188. See Morgans, *supra* note 56.

189. 47 U.S.C. § 230(c)(2); see Morgans, *supra* note 56; Solon, *supra* note 54.

messages about risks associated with tech addiction and overuse on the platform's homepage, and eliminating the "infinite scroll."¹⁹⁰ Such a requirement is consistent with the congressional intent of Section 230 because it provides Users with more "control over what information" they are exposed to, as current SMP anti-addiction measures "are almost always turned off by default and buried in settings menus."¹⁹¹

V. CONCLUSION

As private parties, SMPs are protected by the First Amendment when they remove, deprioritize, or amplify a particular User or post, as it makes a judgment rooted in the type of content it values and deems "appropriate" for dissemination on its site.¹⁹² Moreover, Section 230 grants SMPs the flexibility to curate their content freely without legal repercussions or restrictions, thus immunizing the platforms from actions undertaken as a "publisher" and good faith efforts to remove or restrict offensive content.¹⁹³ Consequently, to the extent that private litigants or state governments could hold SMPs liable under existing law for their decisions regarding restricting access to or presenting user content, those suits have primarily been barred under Section 230.¹⁹⁴

Although SMPs have provided undeniable social benefits, they have caused unimaginable social devastation without being held accountable.¹⁹⁵ To mitigate some of the harms furthered by unaccountable SMPs without "deal[ing] a fatal blow to the modern

190. See Hern, *supra* note 36; Langvardt, *Regulating Habit-Forming Technology*, *supra* note 52, at 154, 158–59.

191. 47 U.S.C. § 230; see Alex Hern, *Facebook and Instagram to Let Users Set Time Limits*, *GUARDIAN* (Aug. 1, 2018, 7:18 AM), <https://www.theguardian.com/technology/2018/aug/01/facebook-and-instagram-to-let-users-set-time-limits> [<https://perma.cc/8FLL-LXZJ>]; Richard Nieva, *Facebook, Instagram Add Tools to Limit Time Spent on the Apps*, *CNET* (Aug. 1, 2018, 4:00 AM), <https://www.cnet.com/news/facebook-instagram-add-tools-to-limit-time-spent-on-the-apps/> [<https://perma.cc/PG93-CUHV>]; Langvardt, *Regulating Habit-Forming Technology*, *supra* note 52, at 155.

192. See *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1210 (11th Cir. 2022).

193. 47 U.S.C. § 230; see Allegra D'Virgilio, *The US Government's Role in Regulating Social Media Disinformation*, *NE. UNIV. POL. REV.* (May 19, 2022), <https://www.nupoliticalreview.com/2022/05/19/the-us-governments-role-in-regulating-social-media-disinformation/> [<https://perma.cc/B95B-ZRZN>].

194. 47 U.S.C. § 230; see, e.g., *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358–59 (D.C. Cir. 2014) (discussing scope of immunity provided by Section 230).

195. See Smith & Van Alstyne, *supra* note 179 ("To what degree should Facebook be held accountable for the Capitol riots, much of the planning for which occurred on its platform? To what degree should Twitter be held accountable enabling terrorist recruiting? How much responsibility should Backpage and Pornhub bear for facilitating the sexual exploitation of children? What about other [SMPs] that have profited from the illicit sale of pharmaceuticals, assault weapons, and endangered wildlife?").

internet,” Congress should promulgate a modified application of statutory liability under Section 230 specifically for SMPs that prevents bad actors from taking advantage of the statutory shield, encourages reasonable good-faith moderation, and promotes User autonomy.¹⁹⁶

The problems of free speech in any era are shaped by the communications technology used in that era.¹⁹⁷ Consequently, the pivotal determinants of the future of freedom of speech are destined to unfold not within constitutional law but within the realms of technological design and legislative regulations.¹⁹⁸

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196. 47 U.S.C. § 230; *see, e.g.*, Sylvain, *supra* note 179, at 476 (Section 230 has “helped cultivate bigotry, discrimination, and disinformation about highly consequential social facts.”); Press Release, Amy Klobuchar, *Luján Introduce Legislation to Hold Digital Platforms Accountable for Vaccine and Other Health-Related Misinformation* (July 22, 2021), <https://www.klobuchar.senate.gov/public/index.cfm/2021/7/klobuchar-luj-n-introduce-legislation-to-hold-digital-platforms-accountable-for-vaccine-and-other-health-related-misinformation> [https://perma.cc/U7MN-E37S] (Section 230 “distorts legal incentives for platforms to respond to digital misinformation on critical health issues, like Covid-19, and leaves people who suffer harm with little to no recourse.”); Susannah Luthi, *A Legal Shield for Social Media is Showing Cracks*, POLITICO (July 14, 2022, 4:30 AM), <https://www.politico.com/news/2022/07/14/legal-shield-social-media-facebook-00045226> [https://perma.cc/T28F-TTUF] (recounting efforts by litigants to get around Section 230 immunity in asserting claims against SMPs for allegedly causing “teen suicides, eating disorders, and mental collapses”); Johnson, *supra* note 113.

197. *See* Balkin, *The First Amendment*, *supra* note 48, at 986.

198. *See* Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 427 (2009).

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