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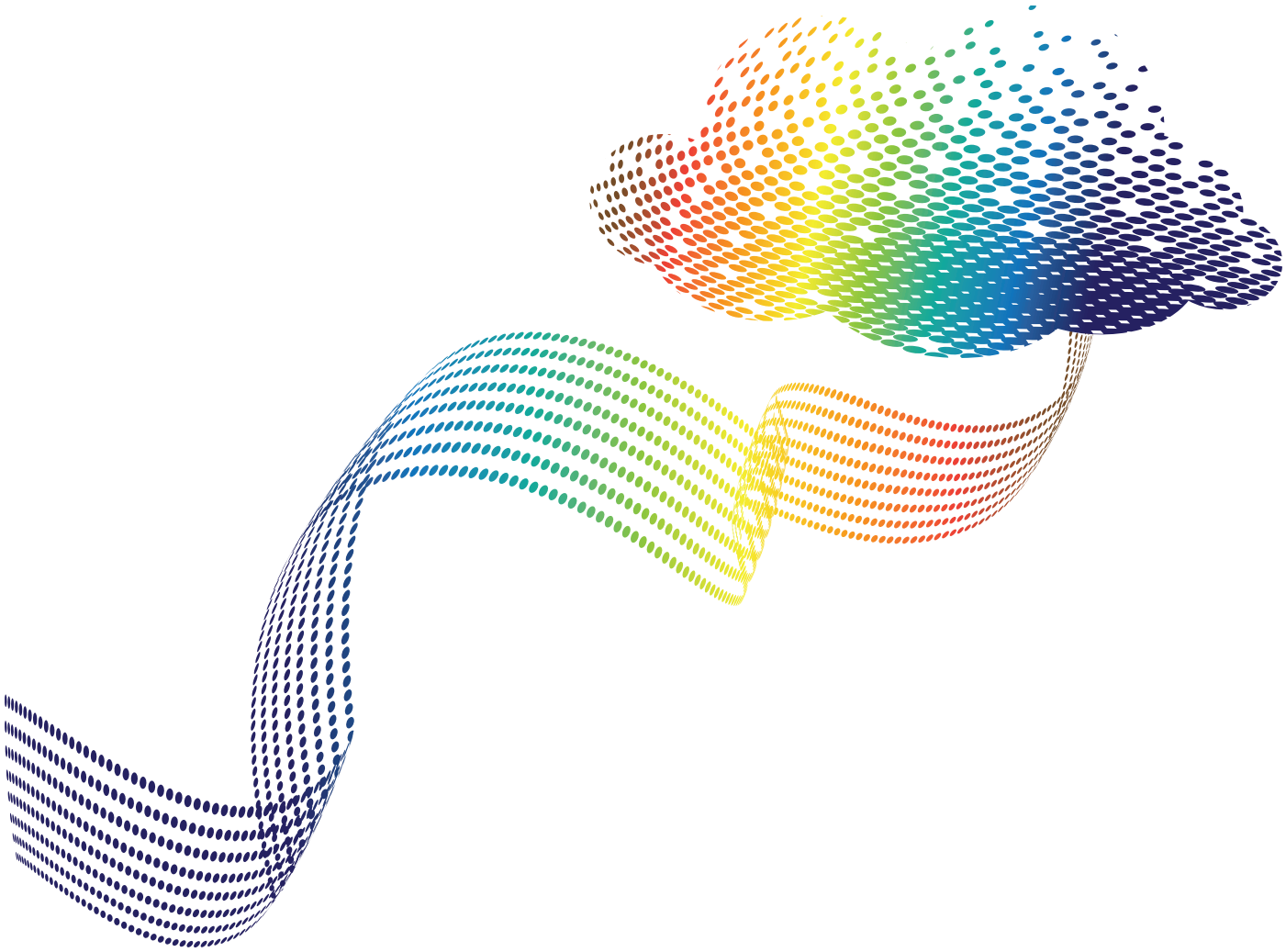

CDA Section 230:

Its Past, Present, and Future

When Congress enacted the Communications Decency Act in 1996—including the once-esoteric provision known as Section 230—the world had yet to tweet or tag, follow or friend, like, or DM. The internet was alive but felt new, mysterious, and still not very social. Sites that allowed users to post and interact with content were just beginning to emerge, raising for the first time questions about how to protect people (especially children) from offensive material on a medium whose lack of regulation was for many part of the draw while also preserving the internet's vibrancy and potential. The provision designed to navigate those crosscurrents is Section 230.

Section 230 protects platforms from liability when they act as hosts for third-party speech. If a user posts defamatory or inflammatory statements, Section 230 shields the website from liability for that user's statements unless certain conditions are met. And if a website considers a user's post objectionable and removes it, Section 230 generally insulates the website from legal risk. Together, these protections encourage internet platforms to foster innovation and free speech while also incentivizing content moderation and removal. In essence, then, Section 230 shields websites from legal liability for both over- and under-filtering user content.

For years, Section 230 was seen as striking the right balance between encouraging free expression and protecting content moderation. More recently, however, the benign view of Section 230 has dissolved and the once-obscure statute has leaped onto the front pages, taking fire from all directions. Calls for reform or repeal have drowned out praise for Section 230. It is therefore timely to take the measure of Section 230 and explore the legal, constitutional, political, and competitive dynamics that have propelled it to the forefront of national consciousness and political controversy.

First, we explore Congress's initial motivations for enacting the statute and how Section 230's protections intersect with the First Amendment. Next, we discuss the Supreme Court's recent denial of the *Malwarebytes* petition for certiorari, which opens the possibility that the Court could grant review in a more "appropriate" Section 230 case, as well as other legal developments. We then address the Department of Justice's report last year on Section 230, which recommended amendments to the statute, but will now fall to a new Attorney General to adopt or reject, before turning to the international landscape for Section 230-like issues. We also review recently proposed legislative reforms and explain how these bills might affect tech companies and their users. We take a closer look at President Trump's "Executive Order on Preventing Online Censorship," which proposed to curtail Section 230's immunities. And, finally, we offer a glimpse into the Biden Administration's potential views of Section 230 and possible changes.

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I. THE ORIGINS OF CDA SECTION 230

Judicial Decisions Conflict on the Liability of Internet Service Providers

In the 1990s, two notable court decisions reached divergent results on internet platforms' liability for user-generated content. First, in *Cubby, Inc. v. CompuServe, Inc.*, a federal judge in the Southern District of New York held that a computer service was a "distributor," and therefore could not be liable for content it distributed online absent proof that the service knew or should have known that the allegedly defamatory statements were false.[1] Four years later, a New York state court reached the opposite conclusion in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, holding that the operator of a computer network could be liable as a "publisher" because it had content guidelines for "bulletin boards" and exercised "editorial control."[2] Concerned that the *Stratton* decision could create a perverse incentive for a platform to evade liability by looking the other way and ***avoiding*** moderating users' online content, Congress enacted the Communications Decency Act ("CDA"), including Section 230.[3]

Congress's overarching goal was to enable internet platforms to host user-posted content and to take down offensive content without fear of liability.[4] In enacting Section 230, Congress aimed to promote the continued development of the internet free from government regulation, to maximize user control over the information an individual views and receives, to remove disincentives for blocking and filtering technologies, and to facilitate enforcement of criminal laws on obscenity, stalking, and harassment.[5]

Free Speech Concerns Animated Congress's Approach to Platform Protection

Recognizing the internet as an important forum for speech, Section 230 states: "[t]he [i]nternet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[6] In passing Section 230, Congress sought to "encourage the unfettered and unregulated development of free speech on the [i]nternet."[7]

Likewise, Congress predicted that giving host sites content moderation abilities would ***encourage*** free speech by reducing surprise encounters with obscene or offensive content, thus providing a more welcoming forum for users to participate. Without adequate tools for content moderation and filtering, the theory went, our online experiences would be replete with obscenity, false information, and otherwise objectionable content from bad actors—which would discourage the free exchange of speech online.[8] And internet service providers would be encouraged to provide

1 776 F.Supp. 135, 140-141 (S.D.N.Y. 1991)

2 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995).

3 Christopher Cox, *The Origins and Original Intent of Section 230 of the Communications Decency Act* (Aug. 27, 2020), https://jolt.ichmond.edu/2020/08/27/the-origins-and-original-intent-of-section-230-of-the-communications-decency-act/#:~:text=%5B1%5D%20Since%201996%2C%20Section,any%20illegal%20content%20they%20create.

4 Valerie C. Brannon, *Liability for Content Hosts: An Overview of the Communication Decency Act's Section 230,* Congressional Research Service (June 6,2019), https://fas.org/sgp/crs/misc/LSB10306.pdf.

5 *See* https://www.eff.org/issues/cda230.

6 47 U.S.C. § 230(a)(3).

7 *Baztel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003).

8 *See* Kyle Langvart, *Regulating Online Content Moderation*, 106 Geo. L.J. 1353, 1358 (2018) (bad actors "rang[e] from trolls to spammers to malicious hackers").

forums for speech if they knew that they would not be forced to either host offensive content or be liable for user-posted content on their sites.

Section 230 Addresses Free Speech Concerns

The private platforms regulated or protected by Section 230 are not government actors and therefore are not subject to First Amendment constraints. But, like the First Amendment, Section 230 operates as a constraint on defamation law.[9]

Section 230 extends traditional protections for distributors to internet service providers—even when those service providers exercise some control over content, such as by removing offensive posts.[10] It states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[11]

Section 230 extends protections beyond the First Amendment in several ways, including by:

- protecting a platform's content moderation "whether or not such material is constitutionally protected,"
- dispensing with First Amendment distinctions between commercial and non-commercial speech and speech about public versus non-public figures, and
- providing immunity whether or not a provider knew of allegedly illegal conduct.

These protections have allowed social media platforms like Twitter to exercise significant controls, such as permanently banning President Trump's account in January 2021 due to risk of incitement of further violence after riots at the U.S. Capitol.[12] At the same time, platforms have been viewed by courts as akin to a "public forum"—at least when considering public officials' blocking of followers. In July 2019, for example, the Second Circuit held that President Trump could not block users from his Twitter account because the "interactive space" on Twitter is a "public forum and that the exclusion from that space was unconstitutional viewpoint discrimination."[13] More specifically, the Second Circuit found that retweets, replies, likes, and mentions on Twitter are the product of the users who generate them and not of the President such that he could silence these disfavored points of view "under the guise of the government speech doctrine."[14]

II. MALWAREBYTES CERTIORARI PETITION

In the near quarter century of the CDA's existence, the Supreme Court has yet to consider the contours of Section 230. Still, when the Court denied a petition for certiorari in a Section 230 case in the October 2020 term, Justice Clarence Thomas wrote separately to explain his view that the Court should consider the reach of Section 230 in an appropriate case.

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9 *See* Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027 (May 10, 2018).

10 Eric Goldman, *How Section 230 Enhances the First Amendment*, Am. Constitution Soc'y (July 2020), https://www.acslaw.org/wp-content/uploads/2020/07/How-Section-230-Enhances-the-First-Amendment_July-2020.pdf.

11 Christopher Zara, *The Most Important Law in Tech Has a Problem, Wired* (Jan. 3, 2017), https://www.wired.com/2017/01/the-most-important-law-in-tech-has-a-problem/.

12 https://www.bloomberg.com/news/articles/2021-01-08/twitter-permanently-suspends-donald-trump-from-social-network

13 *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 239 (2d Cir. 2019).

14 *Id.* at 240-41.

Malwarebytes, Inc. v. Enigma Software Group USA, LLC involved competing tech companies that provide "anti-malware" software programs[15] that identify and block potentially harmful software.[16] Malwarebytes' software also scanned for "potentially unwanted programs" (or "PUPs"), including "obtrusive, misleading, or deceptive advertisements, branding" or "search practices" and gave users an option to block these programs.[17]

Enigma sued Malwarebytes, alleging that Malwarebytes flagged Enigma's competing security programs as PUPs,[18] not due necessarily to any legitimate security concerns, but because of anticompetitive animus.[19] (Notably, Enigma did not bring any antitrust claims.[20]) Enigma's complaint was dismissed; the district court held that Malwarebytes was entitled to immunity under Section 230 as a computer service provider that "filter[ed] or screen[ed] material that the user ***or the provider*** deems objectionable."[21] The court rejected Enigma's argument that Malwarebytes could claim immunity only for decisions made in "good faith," noting that Section 230 has "no good faith language."[22]

The Ninth Circuit reversed,[23] holding that immunizing anticompetitive filtering decisions would be "contrary to the CDA's history and purpose"[24] and Congress's stated intent to "encourage the development of filtration technologies."[25] Malwarebytes petitioned for certiorari,[26] and the petition was denied.[27]

Justice Thomas wrote separately to express concern that courts have relied on non-textual arguments in interpreting Section 230, "leaving questionable precedent in their wake."[28] Justice Thomas expressed his view that "in an appropriate case," the Supreme Court should consider whether the text of the "increasingly important statute" aligns with the immunity enjoyed by internet platforms.[29] He raised several specific criticisms, including that:

- Courts have "discarded the longstanding distinction between 'publisher' liability and 'distributor' liability."[30] Interpretations of Section 230 not only limit publisher liability but "eliminate distributor liability" by conferring "immunity even when a company distributes content that it ***knows*** is illegal";[31]

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15 946 F.3d 1040, 1047 (9th Cir. 2019), cert. denied, 141 S. Ct. 13 (2020).

16 *Id.*

17 *Id.*

18 *Id.* at 1047-48; *see Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, No. 5:17-cv-02915-EJD, 2017 WL 5153698, at *1 n.1 (N.D. Cal. Nov. 7, 2017).

19 *Enigma*, 946 F.3d at 1048.

20 *Enigma*, 2017 WL 5153698, at *1; *see* Compl. ¶¶ 72-97, *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, No. 5:17-cv-02915-EJD (N.D. Cal.), ECF No. 1

21 *Enigma*, 2017 WL 5153698, at *2-3 (quoting *Zango, Inc. v. Kaspersky*, 568 F.3d 1169, 1173 (9th Cir. 2009) (emphasis in original).

22 *Id.* at *3 (quoting Zango, 568 F.3d at 1177).

23 *Enigma*, 946 F.3d at 1054.

24 *Id.* at 1050.

25 *Id.* at 1050-51.

26 Petition For Writ of Certiorari, *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, No. 19-1284 (U.S. May 11, 2020).

27 *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020).

28 *Id.* at 14.

29 *Id.*

30 *Id.* at 15.

31 *Id.*

- Courts give internet companies immunity for their own content;[32] and
- Courts have expanded Section 230 to protect companies from what Justice Thomas characterizes as "product-defect" claims, including facilitating "illegal human trafficking," "recommending content by terrorists," lacking basic safety features to "prevent harassment and impersonation," and encouraging "reckless driving."[33]

Although he agreed with the Court's decision not to hear the case, Justice Thomas urged that the Court take up Section 230's interpretation in an appropriate case to avoid bestowing unwarranted and "sweeping immunity on some of the largest companies in the world."[34]

III. RECENT LOWER COURT DECISIONS

Section 230 also has been actively litigated in the lower courts. A Westlaw search returns over 10,000 cases—with over 200 cases decided in 2020 alone.

Some common themes emerge. Most courts construe Section 230 immunity broadly,[35] holding that website providers act as publishers and are thus entitled to immunity when they remove posts deemed objectionable. Twitter, Facebook, and YouTube have benefitted from that immunity.[36] As a judge in the Eastern District of New York explained recently, removing content "falls squarely within the exercise of a publisher's traditional role and is therefore subject to CDA's broad immunity."[37]

32 *Id.* at 16-17.

33 *Id.* at 17.

34 *Id.* at 13, 18.

35 "[T]he Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity." *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020); *see also Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1267 (D.C. Cir. 2019) ("Congress[] inten[ded] to confer broad immunity for the re-publication of third-party content."); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18 (1st Cir. 2016) ("There has been near-universal agreement that section 230 should not be construed grudgingly."); *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 408 (6th Cir. 2014) ("[C]lose cases … must be resolved in favor of immunity.") (quoting *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc)); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) ("Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content."); *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) ("§ 230(c) provides broad immunity for publishing content provided primarily by third parties."); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.").

36 *See Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 602 (S.D.N.Y. 2020); ("In this case, Vimeo plainly was acting as a 'publisher' when it deleted (or, in other words, withdrew) [the plaintiffs'] content on the Vimeo website."); *Lancaster v. Alphabet Inc.*, No. 15-CV-05299 (HSG), 2016 WL 3648608, at *3 (N.D. Cal. July 8, 2016) (applying Section 230 (c)(1) immunity to the decision by YouTube, LLC, to remove the plaintiff's YouTube videos); *Hare v. Richie*, No. CIV. ELH-11-3488, 2012 WL 3773116, at *15 (D. Md. Aug. 29, 2012) ("[L]awsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred. It is immaterial whether this decision comes in the form of deciding what to publish in the first place or what to remove among the published material.") (internal quotations omitted); *Bennett v. Google, LLC*, 882 F.3d 1163, 1167 (D.C. Cir. 2018) ("[T]he very essence of publishing is making the decision whether to print or retract a given piece of content.") (quotation omitted); *Fair Hous. Council*, 521 F.3d at 1170–71 ("[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230."). *Wilson v. Twitter, Inc.*, No. 3:20-CV-00495, 2020 WL 5985191, at *4 (S.D.W. Va. Sept. 17, 2020), *report and recommendation adopted*, No. CV 3:20-0495, 2020 WL 5983900 (S.D.W. Va. Oct. 8, 2020).

37 *Brikman v. Twitter*, No. 19-cv-5143 (RPK) (CLP), 2020 WL 5594637, at *3 (E.D.N.Y. Sept. 17, 2020) (quotation omitted).

Many courts have applied Section 230 when a company deletes a user's account entirely—as Twitter and other online platforms did to President Trump's accounts in the wake of the January 6, 2021 storming of the nation's Capitol.[38] A court in the District of Maryland held that Section 230 protected Twitter from liability after a user sued Twitter for suspending his account based on offensive tweets.[39] In so doing, it explained that the user "clearly [sought] to hold Twitter liable as a publisher of third-party content," which falls squarely within Section 230's protections.[40] A judge in the Northern District of California reached the same conclusion (based on the same reasoning) in favor of Facebook, finding immunity for Facebook after users sued based on Facebook blocking access to their accounts.[41] Courts also have held that Section 230 protects platforms that ***refuse*** to remove posts that other users have claimed are defamatory or otherwise harmful because such actions are that of a publisher.[42]

Section 230's protection has protected platforms even when the challenged speech was related to terrorism. For example, plaintiffs sued Facebook for allegedly "giving Hamas a forum with which to communicate and for actively bringing Hamas' message to interested parties."[43] The Second Circuit declared that the alleged conduct fell "within the heartland" of what it means to be the "publisher of information under Section 230(c)(1)."[44] In so doing, the Second Circuit became the 11th court to reject claims that social media providers materially contribute to terrorists, undercutting the likelihood of success for similar terrorism-related lawsuits.[45]

IV. THE TRUMP DOJ REPORT

In June 2020, the DOJ published "Key Takeaways and Recommendations" on Section 230. Consistent with this report, then-Attorney General William Barr sent a letter to the President and Congress in September 2020, recommending amendments to Section 230 to "incentivize online platforms to better address criminal content on their services and to be more transparent and accountable when removing lawful speech."[46] The DOJ Report focuses on providing stronger incentives for online platforms to "address illicit material on their services" while fostering "innovation and free speech."[47]

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38 *See, e.g., Mezey v. Twitter*, No. 18-CV-21069 (KMM), 2018 WL 5306769 (S.D. Fla. July 19, 2018) (dismissing lawsuit claiming that Twitter "unlawfully suspended [the plaintiff's] Twitter account" on grounds of Section 230(c)(1) immunity); *Riggs v. MySpace, Inc.*, 444 F. App'x 986, 987 (9th Cir. 2011) (Section 230 immunity applied to claims "arising from MySpace's decisions to delete [the plaintiff's] user profiles on its social networking website yet not delete other profiles …"); *Ebeid v. Facebook, Inc.*, No. 18-CV-07030-PJH, 2019 WL 2059662, at *5 (N.D. Cal. May 9, 2019) (decision to suspend the plaintiff's Facebook account was traditional editorial function and thus protected by § 230); *Enhanced Athlete, Inc. v. Google LLC*, __ F. Supp. 3d __, 2020 WL 4732209 (N.D. Cal. Aug. 14, 2020).

39 *Jones v. Twitter, Inc.*, No. CV RDB-20-1963, 2020 WL 6263412, at *3 (D. Md. Oct. 23, 2020).

40 *Id.*

41 *Zimmerman v. Facebook, Inc.*, No. 19-CV-04591-VC, 2020 WL 5877863, at *1 (N.D. Cal. Oct. 2, 2020).

42 *Brikman*, 2020 WL 5594637, at *1.

43 *Force*, 934 F.3d at 65.

44 *Id.*

45 Eric Goldman, *Second Circuit Issues Powerful Section 230 Win to Facebook in "Material Support for Terrorists" Case - Force v. Facebook*, Tech. & Mktg. Law Blog (July 31, 2019) https://blog.ericgoldman.org/archives/2019/07/second-circuit-issues-powerful-section-230-win-to-facebook-in-material-support-for-terrorists-case-force-v-facebook.htm.

46 Letter from Attorney General William Barr to Hon. Michael Pence, Pres. of U.S. Senate (Sept. 23, 2020) ["DOJ Letter"], https://www.justice.gov/file/1319346/download.

47 U.S. Dep't of Justice, Section 230 - Nurturing Innovation or Fostering Unaccountability? Key Takeaways and Recommendations 1 (2020) ["DOJ Report"], https://www.justice.gov/file/1286331/download.

Attorney General Barr's letter acknowledges the importance of reducing "illicit content" online, but simultaneously suggests limiting platforms' abilities to remove objectionable content. In particular, the DOJ recommends clarifying the scope of immunity to prevent internet platforms from using "the shield of Section 230 to censor lawful speech in bad faith and inconsistent with their own terms of service," and suggests "incentivizing platforms to address the growing amount of illicit content online."[48] The letter does not offer any examples of what "illicit content" means. So, too, the letter notes that Section 230 provides immunity for internet platforms that restrict access to material considered (by the user or the platform) "obscene, lewd, lascivious, filthy, excessively violent, harassing, ***or otherwise objectionable***,"[49] and suggests that the "otherwise objectionable" category provides a potentially "blank check to take down any content [that platforms] want."[50] The letter therefore proposes eliminating the "otherwise objectionable" language in favor of specific enumerated categories: "promoting terrorism or violent extremism," "promoting self-harm," and "unlawful" activities.[51]

The DOJ also recommends requiring platforms to have an "objectively reasonable belief" that speech they remove falls within one of the enumerated categories and incorporating a good-faith requirement for a take-down decision to "discourage deceptive or pretextual takedowns of lawful content."[52] The letter proposes clarifying the definition of "information content provider" to exclude from Section 230 immunity platforms that are "responsible, in whole or in part, for the creation or development of information."[53] Under the DOJ's proposals, a given platform could be found "responsible" for the content it hosts when it "solicits, comments upon, funds, or affirmatively contributes to, modifies, or alters the content of another person or entity," although the DOJ does not provide any examples demonstrating when such activities would rise to the level of conferring "responsibility" on the hosting platform.[54]

The DOJ also targets certain discrete conduct by platforms, such as where a platform (1) "purposefully promotes" content that violates federal criminal law, (2) has actual knowledge that specific hosted content violates federal law, or (3) fails to remove unlawful content following a court order to do so.[55] The DOJ suggests that platforms should not be insulated from, as examples, claims of "child exploitation and sexual abuse," "terrorism," "cyberstalking," and "anticompetitive conduct."[56]

Finally, the DOJ acknowledged an undeniable fact: "the [i]nternet has drastically changed since 1996."[57] The "beneficial role" played by Section 230 in "building today's internet"[58] may no longer be needed, it said. The obvious next question—for the incoming Attorney General, the newly seated Congress, and the courts—is what role Section 230 should play in building the ***future*** internet.

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48 DOJ Letter, supra note 39, at 2-3.

49 *Id.* at 2

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.* at 3.

54 *Id.*

55 *Id.*

56 *Id.* at 4.

57 *Id.* at 1.

58 *Id.*

V. INTERNATIONAL TRADE AGREEMENTS

Regardless of the DOJ's positions, some arms of the executive branch have sought to impede efforts to significantly modify Section 230. In various trade negotiations, for example, the United States Trade Representative has pushed for measures to obligate the parties to the agreement, including the United States, to adopt or uphold provisions similar to Section 230. Article 19.17(2) of the United States-Mexico-Canada Agreement ("USMCA"), for example, provides:

> [N]o Party shall adopt or maintain measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created, or developed the information.[59]

In other words, parties must implement and maintain laws that limit civil liability of online platforms for third-party content. There are exceptions for measures needed to protect intellectual property and to comply with criminal law, similar to Section 230. The United States Trade Representative has pursued similar liability protections in separate negotiations with the United Kingdom[60] and Kenya, but those negotiations have yet to be completed.[61] The international trade obligations in the USMCA, which are binding as a matter of international law, may complicate any efforts by Congress to fundamentally reconfigure Section 230's protections without renegotiating the international trade agreement.

VI. LEGISLATION

Members of the House and Senate have introduced at least 24 bills pending (as of this writing) seeking to amend Section 230. We address selected proposals here.

The Eliminating Abusive and Rampant Neglect of Interactive Technologies Act ("EARN IT Act"), was introduced on March 5, 2020 by a bipartisan group of senators.[62] EARN IT focuses on online child exploitation by requiring companies to "earn" liability protection for violations related to child sexual abuse, including safe harbors for liability, and providing civil recourse to abuse survivors. EARN IT sets forth best practices that companies should utilize to protect products from child exploitation and if these practices are utilized, it can serve as a defense to a civil suit.

In June 2020, Senators Brian Schatz (D-Hawaii) and John Thune (R-South Dakota) introduced another bipartisan bill, the Platform Accountability and Consumer Transparency ("PACT") Act.[63] PACT aims to strengthen online transparency, accountability, and consumer protection by requiring tech companies to (1) have an "acceptable use policy" that informs users about the company's content moderation policy upfront and (2) provide process protections to consumers by having

59 https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19-Digital-Trade.pdf.

60 https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf.

61 https://ustr.gov/sites/default/files/Summary_of_U.S.-Kenya_Negotiating_Objectives.pdf.

62 https://www.judiciary.senate.gov/press/rep/releases/graham-blumenthal-hawley-feinstein-introduce-earn-it-act-to-encourage-tech-industry-to-take-online-child-sexual-exploitation-seriously

63 https://www.schatz.senate.gov/imo/media/doc/OLL20612.pdf.

a complaint system that notifies users of moderation decisions within 14 days and allows them to appeal.[64]

A third bipartisan bill called the See Something, Say Something Online Act, introduced in the Senate in September 2020, seeks to prevent sales of illegal drugs online.[65] The bill would require companies to report suspicious activity to law enforcement; create an office within the DOJ to act as a clearinghouse for these reports; lower the threshold for reporting serious crimes in a way that preserves users' privacy; and require companies to take reasonable steps to prevent or address unlawful activity, resulting in liability for failure to report suspicious activity.[66]

Some Republican lawmakers have also recommended alterations to Section 230. A group of Republican senators introduced the Online Freedom and Viewpoint Diversity Act,[67] which would extend protection from liability only to providers that have an "objectively reasonable belief" that content falls within a specific category before they restrict access to it.[68]

Republicans also introduced the Limiting Section 230 Immunity to Good Samaritans Act.[69] The bill would prevent technology companies from receiving immunity unless they update their terms of service as they relate to any policies relating to restricting access to or availability of material in good faith.[70]

And Democratic members of Congress have proposed various reforms of their own. For example, Representatives Anna Eshoo (D-California) and Tom Malinowski (D-New Jersey) introduced the Protecting Americans from Dangerous Algorithms Act, which seeks to remove immunity for platforms using algorithms that amplify content that leads to civil rights violations and other cases of extremist activity.[71] It would exempt platforms with fewer than 50 million monthly visitors.[72]

Most recently, President Trump sought to tie the issue of repealing Section 230 to the passage of a $740 billion defense spending bill and to the increase in coronavirus stimulus checks to $2,000 from $600.[73] But this effort failed, and Congress did not act on a measure that Senate Majority Leader Mitch McConnell introduced to tie the full repeal of Section 230 with the stimulus payments in late December 2020.[74] So the fate of Section 230 falls to the 117th Congress, now controlled by the Democrats.

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64 https://www.schatz.senate.gov/press-releases/schatz-thune-introduce-new-legislation-to-update-section-230-strengthen-rules-transparency-on-online-content-moderation-hold-internet-companies-accountable-for-moderation-practices.

65 https://www.manchin.senate.gov/imo/media/doc/2020_0928%20See%20Something%20Say%20Something%20Online%20Act.pdf?cb.

66 https://www.manchin.senate.gov/newsroom/press-releases/manchin-cornyn-bill-to-require-companies-report-illicit-online-drug-sales.

67 https://www.commerce.senate.gov/2020/9/wicker-graham-blackburn-introduce-bill-to-modify-section-230-and-empower-consumers-online.

68 https://www.commerce.senate.gov/services/files/94D0F3C6-B927-46D2-A75C-17C78D0D92AA.

69 https://www.hawley.senate.gov/sites/default/files/2020-06/Limiting-Section-230-Immunity-to-Good-Samaritans-Act.pdf.

70 *Id.*

71 https://malinowski.house.gov/sites/malinowski.house.gov/files/MALINJ_103_xml%5B2%5D%5B2%5D%5B2%5D.pdf; https://malinowski.house.gov/media/press-releases/reps-malinowski-and-eshoo-introduce-bill-hold-tech-platforms-liable-algorithmic.

72 https://malinowski.house.gov/sites/malinowski.house.gov/files/MALINJ_103_xml%5B2%5D%5B2%5D%5B2%5D.pdf.

73 https://techcrunch.com/2020/12/23/trump-ndaa-veto-section-230/.

74 https://www.politico.com/f/?id=00000176-b086-d162-a7ff-f18ef09e0000

VII. PRESIDENT TRUMP'S EXECUTIVE ORDER

The Trump Administration also weighed in on Section 230. President Trump issued an "Executive Order on Preventing Online Censorship" ("Executive Order") on May 28, 2020,[75] just two days after Twitter moderators added a fact-checking notice to one of the President's tweets containing misinformation about alleged election fraud.[76] Critics across the political spectrum have branded the Executive Order, and the Trump Administration's efforts to weaken Section 230 protections, as a potential threat to the First Amendment.[77] Broadly stated, the goal of the Executive Order is to limit Section 230's protections for social media companies, such as Twitter. It contains several categories of directives, at least some of which appear unlikely to survive the current administration.

First, the Executive Order announces a policy against purported political "bias" by social media companies in moderating content on their platforms,[78] and directs the Secretary of Commerce, acting through the National Telecommunications and Information Administration ("NTIA"), to file a petition for rulemaking with the Federal Communications Commission ("FCC") requesting that the FCC propose regulations to clarify the scope of immunity provided by Section 230. On July 27, 2020, the NTIA issued its petition for rulemaking, requesting that the FCC clarify the scope of the immunity that Section 230 provides to social media platforms. On October 15, 2020, FCC Chair Ajit Pai issued a press release stating an intention to "move forward with a rulemaking to clarify" Section 230.[79] Pai indicated that he no longer intended to move forward with the rulemaking in early January 2021.[80] (Pai left his post on January 20, 2021.)

In addition, the Executive Order purported to command the head of each executive department and agency to review its agency's federal spending on advertising paid to online platforms so that the DOJ can evaluate whether such platforms are "problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices."[81]

Further, the Executive Order directed the Federal Trade Commission ("FTC") to consider taking action against social media platforms for unfair or deceptive practices. FTC Chair Joe Simons has reportedly expressed skepticism about acting on the Executive Order, telling senators that he considers it outside of the FTC's jurisdiction.[82]

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75 *See* Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

76 *See* Issie Lapowsky, A New Lawsuit Against Trump's Section 230 Executive Order Argues It Chills Speech About Voting, Protocol (Aug. 27, 2020), https://www.protocol.com/lawsuit-trump-section-230.

77 *See, e.g.*, Tory Romm & Elizabeth Dwoskin, Trump signs order that could punish social media companies for how they police content, drawing criticism and doubts of legality (May 28, 2020), Washington Post, https://www.washingtonpost.com/technology/2020/05/28/trump-social-media-executive-order/.

78 *See* Exec. Order, *supra* note 65 ("It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider.").

79 FCC, Statement of Chairman Pai on Section 230 (Oct. 15, 2020), https://docs.fcc.gov/public/attachments/DOC-367567A1.pdf.

80 Emily Birnbaum, *Ajit Pai is distancing himself from President Trump*, Protocol (Jan. 7, 2021), https://www.protocol.com/ajit-pai-distancing-trump; Kelcee Griffis, *Outgoing FCC Chair Says Time's Up For Section 230 Rule*, Law360 (Jan. 11, 2011), https://www.law360.com/articles/1343479/outgoing-fcc-chair-says-time-s-up-for-section-230-rule.

81 Exec. Order, *supra* note 65.

82 Leah Nylen, *et al., Trump Pressures Head of Consumer Agency To Bend On Social Media Crackdown*, Politico (Aug. 21, 2020), https://www.politico.com/news/2020/08/21/trump-ftc-chair-social-media-400104.

Finally, the Executive Order commanded the Attorney General to establish a working group on the potential enforcement of state law prohibiting "unfair or deceptive acts or practices" against social media platforms and to develop a legislative proposal to promote the policy objectives of the Executive Order.

Lawsuits Challenging the Executive Order

Two lawsuits have been brought (and dismissed) against the Executive Order on First Amendment grounds. The Center for Democracy & Technology filed a complaint opposing the Executive Order in June, alleging that it constitutes retaliation against Twitter for exercising its right to comment on the President's statements and seeks to chill the speech of online platforms and individuals.[83] On December 11, 2020, the U.S. District Court for the District of Columbia granted the President's motion to dismiss without prejudice.[84] The Center for Democracy & Technology had until January 11, 2021 to file an amended complaint. After it failed to do so, the court dismissed the case with prejudice on January 12, 2021.[85]

In August, voting rights and watchdog organizations filed a complaint against the Trump Administration over the Executive Order, alleging that it represents a "presumptively invalid speaker-based restriction on speech" and an "unconstitutional attempt to leverage government advertising dollars in order to silence disfavored speech," and that it is "unlawfully retaliatory and coercive."[86] On October 29, 2020, the Northern District of California denied plaintiffs' motion for a preliminary injunction and granted the President's motion to dismiss without prejudice.[87] Plaintiffs did not file an amended complaint, and the court entered judgment dismissing the case on November 25, 2020.[88]

VIII. BIDEN ADMINISTRATION

Last month's change in administration is expected to affect the federal approach to Section 230. On the campaign trail, President-elect Biden rarely spoke about technology policy at length and has not outlined specific policy proposals for Section 230. But the Biden Administration likely will be concerned about Section 230's liability shield and will work towards reforms aimed at increased accountability for tech platforms.

In a December 2019 interview with the *New York Times* editorial board, for example, Biden was asked about the power of tech platforms in the context of Facebook's refusal to fact-check or remove ads containing false and misleading information about him during the campaign. He responded that Section 230 "immediately should be revoked … [f]or Zuckerberg and other platforms."[89] Biden expressed concerns that Section 230 creates an incongruity between news and tech platforms, noting that the *New York Times* could not publish something it knows to be

83 *See* Complaint, *Center for Democracy & Technology v. Trump*, Case No. 20-1456 (D.D.C. June 20, 2020), ECF No. 1.

84 *See* Order, *Center for Democracy & Technology v. Trump*, Case No. 20-1456 (D.D.C. Dec. 11, 2020), ECF No. 23.

85 *See id.* at ECF No. 24.

86 *See* Complaint, *Rock the Vote v. Trump*, Case No. 20-cv-06021-WHO (N.D. Cal. Aug. 27, 2020), ECF No. 1.

87 *Rock the Vote v. Trump*, Case No. 20-cv-06021-WHO, 2020 WL 6342927, *1 (N.D. Cal. Oct. 29, 2020).

88 *Id.*

89 Editorial Board, *Interview with Joe Biden*, N.Y. TIMES (Jan. 17, 2019), https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html.

false and be immune from suit, but Facebook and other tech platforms can.[90]

Biden has also explained that he would either rescind or refuse to follow President Trump's Executive Order on Section 230, noting (through a spokesperson) that he "understands that no President should use Executive Orders as menus to abuse the power of the presidency."[91] In addition, inside the Biden Administration, there likely are "two broad camps jockeying for influence on the question of how to make tech take greater responsibility for curbing misinformation."[92] One side argues for overhauling or scrapping Section 230 altogether, urging that U.S. tech platforms should be treated more like publishers, which are not immune from liability for the material they print. The other side warns that eliminating Section 230 would "only incentivize platforms against moderating at all," and suggests leaving the law intact but proposing alternative means to keep harmful content offline.[93] For example, one such proposal would include new legislation to criminalize certain online speech, since Section 230 does not protect tech platforms if they knowingly let users break federal law.

What some may perceive as President-elect Biden's overall apprehension — or ambivalence — about Section 230 would be consistent with the general stance of many Democratic policymakers. But it remains to be seen how the Biden Administration will be able to implement such efforts given that the White House will likely be working with narrow majorities in each House, especially in the Senate. The immediate future of CDA Section 230 thus may lie in judicial decisions that mark the outer boundaries of the provision's protection—and with the actions of the tech industry itself in how it responds to the pressure on and criticism of the broad immunity shield they have up to now enjoyed.

IX. CONCLUSION

The decision by Twitter and other social media platforms to block President Trump's access for spreading misinformation about the results of the 2020 election has added a new wrinkle to the Section 230 debate. Whereas President Trump sought to limit Section 230's protections for social media companies, social media companies have beat him to the punch, using their immunity under Section 230 to deny him a platform—a move cheered by his political opponents but condemned by free speech advocates. As the scrutiny of high-tech firms continues, traditional critics of Section 230 may find unexpected allies in those who favor more speech, not less. But the future of Section 230 remains in flux, and much remains uncertain about courts' roles in interpreting the statute, the likelihood that any one of the various legislative proposals set forth will be enacted, and whether the early days of the Biden Administration will include executive action in this area.

90 *Id.*

91 Cristiano Lima, *Biden wants to tackle legal protections for tech companies, though it's unclear how he'd do it*, POLITICO (Nov. 7, 2020), https://www.politico.com/news/2020/11/07/joe-biden-policies-technology-433671.

92 Ashley Gold, T*he people trying to get in Biden's head on holding tech accountable*, AXIOS (Oct. 26, 2020), https://www.axios.com/the-people-trying-to-get-in-bidens-head-on-holding-tech-accountable-383b5866-164d-42aa-8531-0c24ff8a8f30.html.

93 *Id.*

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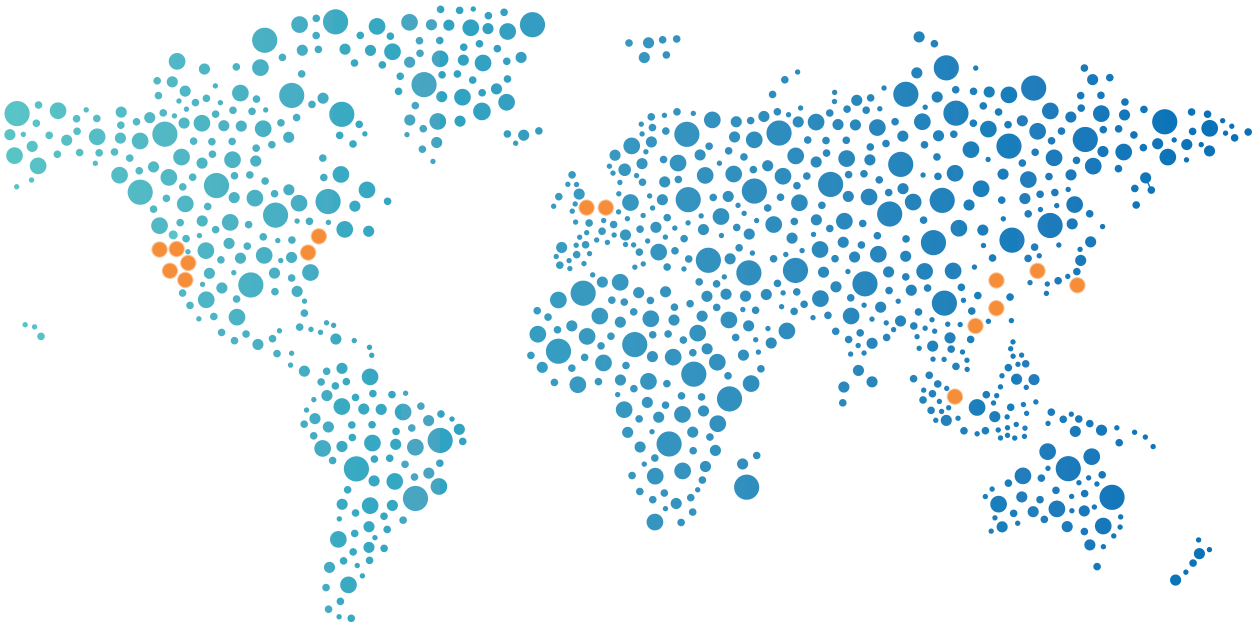

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