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Protecting Free Speech and Due Process Values on Dominant Social Media Platforms

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Abstract

In recent years, dominant social media platforms like Facebook and Twitter have been increasingly perceived as engaging in discrimination against conservative and right-wing viewpoints – especially by conservatives themselves. Such concerns were exacerbated by Twitter and Facebook's deplatforming of then-President Trump in response to the president's tweets and posts leading up to and during the January 6th insurrection. Trump's deplatforming, coupled with the recent actions taken by the platforms in removing Covid- and election-related misinformation, led to cries of censorship by conservative and increased calls for regulation of the platforms. Supreme Court Justice Thomas took up this charge (in an opinion relating to a different controversy involving Trump's Twitter practices) and suggested a regulatory path forward for lawmakers seeking to hold the platforms liable for alleged viewpoint discrimination against and censorship of conservative voices. Justice Thomas's suggested playbook for regulation was adopted by several state and federal lawmakers, who have proposed a host of legislative measures designed to address these concerns.

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In this Article, I examine the desirability and constitutionality of recent federal and state legislative initiatives that seek to provide remedies for these alleged ills—including the proposed federal DISCOURSE Act, the 21st Century FREE Speech Act, the PRO-SPEECH Act, and the PACT Act, as well as state laws like those enacted in Florida and Texas and introduced in every state in the country that seek to rein in the dominant platforms' discretion exercised in content moderation decisions to prohibit them from engaging in viewpoint discrimination (whether human moderated or algorithmically implemented), and to impose notice, transparency and other due process-type obligations on these platforms. This Article analyzes the key elements of such proposed legislation in light of the obligations that the U.S. government historically has imposed on common carriers and broadcasters. This Article then examines the procedural dimensions of our free speech commitments and values and our commitments to due process, including those enshrined in the International Covenant on Civil and Political Rights (which was referenced by the Facebook Oversight Board in its review of Facebook's suspension of Trump from its platform). These due process principles require that speech regulations be clear and precise, that those subject to regulation be provided clear notice of such regulations, that the regulations be enforced in a manner that is non-discriminatory and transparent, and that enforcement be subject to an opportunity to challenge—especially where the consequences of such enforcement are substantial.

This Article concludes with a favorable assessment of the desirability and constitutionality of certain aspects of proposed legislation that would require platforms like Facebook and Twitter to comply with certain principles of nondiscrimination and due process as recognized under the First Amendment, the Due Process Clause, and the International Covenant on Civil and Political Rights, and that would prohibit these platforms from engaging in certain

types of viewpoint discrimination or speaker-based discrimination. This Article contends that, while the platforms should continue to enjoy the discretion to regulate many categories of speech that would otherwise be protected by the First Amendment (such as threats, non-obscene pornography, medical misinformation, etc.) and to moderate content and restrict speakers when in clear violation of their terms of service, the dominant platforms should not engage in blatant viewpoint or speaker-based discrimination and should accord their users certain due process type protections – including the right to receive meaningful advance notice of the platforms' content guidelines and terms of service; clear notice when users' speech is censored or otherwise regulated or when the speaker herself is deplatformed; information about what particular content guideline was allegedly violated; and a meaningful opportunity to challenge content moderation in cases where such moderation severely restricts their exercise of free speech.

Introduction

During the past two and a half decades, the U.S. government essentially adopted a hands-off approach to the Internet—and to the companies that eventually became the dominant social media platforms, notably Facebook and Twitter.[2] Congress ushered into existence this hands-off approach in 1996 with the passage of Section 230 of the Communications Decency Act[3] ("CDA 230"). This law immunized social media platforms from liability for hosting harmful content and expressly authorized and encouraged platforms to engage in content moderation—such as content removal, demotion, promotion, and the deplatforming of speakers—free of government regulation or First Amendment scrutiny.[4] Fast forward to the present, when platforms like

[2] Cameron F. Kerry, *Section 230 Reform Deserves Careful and Focus Consideration*, BROOKINGS (May, 14, 2021), https://www.brookings.edu/blog/techtank/2021/05/14/section-230-reform-deserves-careful-and-focused-consideration/.
[3] Pub. L. No. 104-104, 110 Stat. 133 (codified as amended at 47 U.S.C. § 223 (2000)).
[4] 47 U.S.C. § 230(b)(2), (c).

Facebook and Twitter have become all-powerful gatekeepers and moderators of content online, exercising such power only (loosely) subject to their own ever-changing terms of service and guidelines (which are unenforceable against them in any case). Not surprisingly, this regime has prompted cries of abuse of power, political bias, censorship—and calls for regulation.[5] Of particular interest and concern in this Article are alleged infringements of free speech and due process values, including charges of viewpoint discrimination, speaker-based discrimination, failure to accord due process protections, and exercises of unchecked discretion allegedly engaged in by the dominant social media platforms. In calling for such regulation, advocates have compared today's dominant social media platforms to common carriers like privately-owned telephone and telegraph companies, to places of public accommodation like large shopping malls, and to gatekeepers and forums for expression like broadcasters, on which the government has seen fit at various times over the past century to impose non-discrimination, must-host, must-carry, fairness, and similar obligations.[6]

This Article first briefly discusses the history leading up to today's status quo of non-regulation applicable to the dominant social media platforms, starting with a brief discussion of the passage, implementation, and overall effects of CDA 230. This Article then fast forwards to today's state of affairs, in which various contingents frequently assert claims of discrimination, bias, exercises of standardless discretion, and unfair treatment by the platforms, and otherwise point to harms resulting from the unchecked, opaque, inconsistent, and unprecedented power

[5] *See* Anthony Izaguirre, *Are Social Media Platform* [sic] *Abusing Their Power? GOP Pushes Bills to Allow 'Censorship' Lawsuits*, USA TODAY (Mar. 7, 2021), https://www.usatoday.com/story/tech/news/2021/03/07/gop-pushes-bills-allow-social-media-censorship-lawsuits/4619827001/; Niam Yaraghi, *Regulating Free Speech on Social Media Is Dangerous and Futile*, BROOKINGS (Sept. 21, 2018), https://www.brookings.edu/blog/techtank/2018/09/21/regulating-free-speech-on-social-media-is-dangerous-and-futile/.

[6] *See* Matthew Feeney, *Are Social Media Companies Common Carriers?*, CATO INST. (May 24, 2021), https://www.cato.org/blog/are-social-media-companies-common-carriers.

exercised by the dominant social media platforms over our nation's information ecosystem. This Article focuses in particular on an examination of the extraordinary control over content and speakers exercised by Facebook and Twitter during the course of the pandemic and in the months leading up to the 2020 election, its aftermath, and during and after the insurrection of January 6, which culminated in both Facebook and Twitter banning then-President Trump from their platforms and taking actions against other conservative/right-wing speakers. In connection with allegations of political bias and viewpoint discrimination, this Article examines several high-profile lawsuits brought against the dominant social media platforms seeking redress as a result of such alleged bias and unfair treatment—including lawsuits recently brought by former President Trump against the platforms. This Article examines in detail Facebook's suspension of Trump from its platforms and the in-depth scrutiny of this suspension exercised by the Facebook Oversight Board in Facebook's review of such suspension. This Article then briefly reviews the sorts of claims frequently made by everyday social media users, including allegations that the dominant platforms have moderated their content in ways that are arbitrary, opaque, unchecked, and that otherwise violate our shared commitments to due process values.

This Article then turns to an analysis of recent federal and state legislative initiatives that seek to provide remedies for these alleged ills—including the proposed federal DISCOURSE Act, the 21st Century FREE Speech Act, the PRO-SPEECH Act, and the PACT Act, as well as state laws like those enacted in Florida and introduced in every state in the country—which seek to rein in the dominant platforms' discretion exercised in content moderation decisions, to prohibit them from engaging in viewpoint discrimination (whether human moderated or algorithmically implemented), and to impose notice, transparency and other due process-type

obligations on these platforms (and to correspondingly limit the broad CDA 230 immunity enjoyed by the platforms for the past twenty-five years).

Next, this Article analyzes the key elements of such proposed legislation in light of the obligations that the U.S. government historically has imposed on common carriers of content as well as the regulatory obligations imposed on broadcasters, to ensure that the private entities who wield enormous power over mediums of communication do so in a manner that comports with our shared free speech and due process values. In examining these regulatory regimes, this Article also evaluates the arguments that were asserted by the regulated entities that such regulations violate their First Amendment rights—arguments that are reiterated by today's dominant social media platforms—and that have generally been rejected by the courts. This Article considers common carrier, fairness, and must carry regulations against the backdrop of First Amendment precedent and values that disfavor any form of viewpoint or speaker-based discrimination. This Article then examines the procedural dimensions of our free speech commitments and values and our shared commitments to due process, including those enshrined in the International Covenant on Civil and Political Rights (which was referenced by the Facebook Oversight Board in its review of Facebook's suspension of Trump from its platform), and which are embodied in principles of due process generally. These principles require that speech regulations be clear and precise, that those subject to regulation be provided clear notice of such regulations, that the regulations be enforced in a manner that is non-discriminatory and transparent, and that enforcement be subject to an opportunity to challenge—especially where the consequences of such enforcement are substantial.

This Article concludes with a favorable assessment of the desirability and constitutionality of certain aspects of proposed legislation such as the DISCOURSE Act, the 21st

Century FREE Speech Act, and the PACT Act (and similar provisions of state legislation)—including provisions that would require platforms like Facebook and Twitter to comport with certain principles of nondiscrimination and due process as recognized under the First Amendment, the Due Process Clause, and the International Covenant on Civil and Political Rights, and prohibits these platforms from engaging in certain types of viewpoint discrimination or speaker-based discrimination. This Article contends that, while the platforms should continue to enjoy the discretion to regulate many categories of speech that would otherwise be protected by the First Amendment (such as threats, non-obscene pornography, medical misinformation, etc.) and to moderate content and restrict speakers when in clear violation of their terms of service, they should be prohibited from engaging in viewpoint or speaker-based discrimination and should be required to accord their users certain due process type protections, including the right to receive meaningful advance notice of the platforms' content guidelines and terms of service; clear notice when their speech is censored or otherwise regulated or when the speaker herself is deplatformed; information about what particular content guideline was allegedly violated; and a meaningful opportunity to challenge content moderation by the platforms in cases where such moderation severely restricts their exercise of free speech.

How We Got Here: A Brief Look Back at CDA 230

The genesis of the boundless discretion over content and speakers currently enjoyed by dominant social media platforms like Facebook and Twitter lies in CDA 230,[7] enacted by Congress in 1996. As has been extensively discussed and debated in past years,[8] CDA 230

[7] Pub. L. No. 104-104, 110 Stat. 133 (codified as amended at 47 U.S.C. § 223 (2000)).
[8] *See, e.g.*, Natalie Annette Pagano, Comment, *The Indecency of the Communications Decency Act § 230: Unjust Immunity for Monstrous Social Media Platforms*, 39 PACE L. REV. 511 (2018) (discussing the need to revise CDA 230 immunity to narrow its scope); Ira Steven Nathenson, *The Procedural*

broadly immunizes online platforms from liability for hosting and facilitating access to harmful speech.[9] But equally important for the purposes of this Article, CDA 230 also specifically authorizes social media platforms to engage in acts of content moderation—to censor or otherwise restrict content of their choosing that they deem to be undesirable, including content that is "lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable, whether or not such material is constitutionally protected"—and expressly exempts platforms from most forms of (civil and state criminal) liability for any action the platforms take to censor or otherwise moderate content.[10] Through this latter provision, Congress expressly encouraged powerful Internet platforms to do what Congress could not itself do—that is, to restrict harmful, offensive, and otherwise undesirable speech, where such restriction would violate the First Amendment if it were done by the government.[11] In enacting CDA 230, the government excised itself from the role of protecting (and restricting) free expression on the Internet and passed the mantle of speech regulation over to private entities, enabling and encouraging them to engage in content moderation free of the strictures of the First Amendment.

Since CDA 230 became law, in numerous cases, web sites and other platforms have successfully claimed immunity from a broad range of lawsuits seeking to hold them liable for making available harmful content posted by others.[12] The platforms have also successfully

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Foundations of Intellectual Property Information Regulation, 24 LEWIS & CLARK L. REV. 109, 139 (2020) (discussing CDA 230 immunity as a parallel to Intellectual Property procedural foundations as a tool for information regulation).

[9] *See* 47 U.S.C. § 230(c)(1) ("No provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

[10] *See id.* §§ 230(c)(2), (e)(3).

[11] The Court has held that the government may not restrict speech it finds offensive or hostile to conventional moral standards as these are forms of viewpoint discrimination. *See* Matal v. Tam, 137 S. Ct. 1744, 1751 (2017) (opinion of Alito, J.); *see id.* at 1762-63; *id.* at 1765-66 (opinion of Kennedy, J.); *see also* Iancu v. Brunetti, 139 S. Ct. 2294, 2300 (2019).

[12] *See* Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Sec. 230 Immunity*, 86 FORDHAM L. REV. 401, 409 (2017).

claimed CDA 230 immunity for their acts of content moderation—including content removal, demotion, promotion (whether human moderated or algorithmically imposed) and for acts of blocking or deplatforming individual users—regardless of whether such content moderation is engaged in inconsistently, without notice, or whether such content moderation is viewpoint discriminatory, and regardless of the effect on speakers' freedom of expression.[13]

Recent Allegations of Bias against Conservative Viewpoints

The boundless discretion enjoyed by dominant social media platforms over digital expression has, not surprisingly, prompted charges of abuse of that discretion. Given the concentrated ownership of the dominant social media platforms in the hands of three individuals, it is also not surprising that such unchecked power and control have led to charges of bias against certain viewpoints and certain speakers, as well as to calls for regulation.[14] As Justice Thomas

[13] *See* 42 U.S.C. § 230(c)(2); *see, e.g.*, Domen v. Vimeo, Inc., 433 F. Supp. 3d 592, 603-04 (S.D.N.Y. 2020) (finding that Vimeo's voluntary action to restrict access to materials Vimeo finds objectionable to qualify for CDA 230 immunity).

[14] Such concentrated ownership has also led to calls for antitrust reform as applied to the platforms, see Martha C. White, Momentum Is Building for Antitrust Reform. Here's What That Means for Big Tech, Time (Nov. 12, 2021) https://time.com/6116953/antitrust-reform-big-tech-congress-biden/, [citations] and to other types of regulation. And most recently, the enormous, unchecked control exercised by the platforms has led to increased attention to the harm that the platforms are causing and/or failing to prevent. Facebook and Twitter have been criticized recently for not doing enough to remove content from their platforms that causes real world harm. In October 2021, The Wall Street Journal published the exposé The Facebook Files on Facebook's internal regulatory scheme. The Journal obtained this information from Frances Haugen, a former data scientist at Facebook, who copied thousands of documents purporting to show that Facebook was aware of the societal harm its platform was causing but refused to address the problem because of the effect on its bottom line and because of fears of being called politically biased. Facebook was hesitant to censor inflammatory political content before the January 6 insurrection at the Capitol, for example, because of the content's virality, which led to more ad revenue for the platform. Additionally, the internal documents produced by Haugen showed that 40% of teen users of Instagram (which is owned by Facebook) could trace their feelings of unattractiveness to the app, and 6% of US teen users could trace their suicidal thoughts to the app, with such effects being particularly potent on young girls. *See The Facebook Files*, THE WALL ST. JOURNAL (Oct., 2021), https://www.wsj.com/articles/the-facebook-files-11631713039?mod=article_inline; Bobby Allyn, *Here are 4 key points from the Facebook whistleblower's testimony on Capitol Hill*, N.P.R. (Oct. 5, 2021, 9:30 PM), https://www.npr.org/2021/10/05/1043377310/facebook-whistleblower-frances-haugen-congress The

observed in a recent decision, contemplating and essentially inviting efforts to regulate the platforms and providing a roadmap for such regulation:

> Today's digital platforms provide avenues for historically unprecedented amounts of speech….Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties. We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.[15]

Allegations of viewpoint-based (and speaker-based) discrimination by the platforms and calls for regulation reached an apex in the months leading up to and in the immediate aftermath of the 2020 presidential election and the insurrection at the Capitol, when both Twitter and Facebook deplatformed then-President Trump, disabling his social media access to nearly 90 million people,[16] and taking similar action against certain Trump allies.[17] Indeed, for the past several years, conservatives have alleged that the dominant social media platforms have wielded their unchecked power in such a way as to censor, deprioritize, discriminate against, and ultimately deplatform conservative/right-wing viewpoints, speakers and content.[18] These actions raised the questions of whether such content moderation is even-handed and non-discriminatory or whether it is viewpoint-based or speaker-based, in violation of fundamental shared First Amendment and free speech values. Below this Article briefly reviews the recent history of allegations of bias by

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Haugen revelations have led to increased calls to regulate the dominant social media platforms, which (like calls for antitrust reform as applied to the platforms) are largely outside the scope of this Article.

[15] Biden v. Knight First Amendment Institute at Columbia Univ., 593 U.S. ___ (2021) (mem.) (Thomas, J., concurring).

[16] *See* Michaela Küfner and Terry Martin, *Donald Trump Loses Social Media Megaphone*, DW (Jan. 7, 2021), https://www.dw.com/en/donald-trump-loses-social-media-megaphone/a-56158414.

[17] *See* Venkat Ananth, *The Great Deplatforming: How Trump Lost His Social Media Platforms*, THE ECONOMIC TIMES (Jan. 23, 2021), https://m.economictimes.com/tech/tech-bytes/the-great-deplatforming/articleshow/80425125.cms.

[18] *See* John Herrman & Mike Isaac, *Conservatives Accuse Facebook of Political Bias*, N.Y. TIMES: TECHNOLOGY (May 9, 2016), https://www.nytimes.com/2016/05/10/technology/conservatives-accuse-facebook-of-political-bias.html.

social media platforms and then turns to an analysis of content moderation in the high-stakes contexts of the 2020 presidential election, the January 6 insurrection, and their aftermath.

The origins of concerns of bias can be traced at least to 2016, when a report surfaced that contractors for Facebook were allegedly told to inject stories into the site's "trending section" to displace popular conservative stories.[19] Allegations and perceptions of viewpoint discrimination and bias persist today, with 90% of Republicans surveyed by the Pew Research Center in 2020 believing that it is likely that social media sites censor political viewpoints.[20] Concerns of bias against conservative viewpoints were heightened in May 2019, when Facebook took the then-unprecedented step of deplatforming several right-wing/conservative speakers from its platform, such as Alex Jones and his company/radio show Infowars and Milo Yiannopoulos.[21] Facebook claimed that these figures had violated its policy on "dangerous individuals and organizations," although the timing of the ban was seemingly arbitrary.[22] In May 2019, Twitter suspended actor James Woods for alluding to hanging Robert Mueller, the special counsel who investigated the

[19] *See* David Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, GIZMODO (May 9, 2016, 10:00 AM), https://gizmodo.com/former-facebook-workers-we-routinely-suppressed-conser-1775461006.

[20] *See* Emily A. Vogels, Andrew Perrin & Monica Anderson, *Most Americans Think Social Media Sites Censor Political Viewpoints*, PEW RESEARCH CENTER, https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/. This is despite the fact that a great deal of conservative content is quite prominent in social media, with pundits like Dan Bongino creating some of the most shared content on platforms like Facebook. *See* Mark Scott, *Despite Cries of Censorship, Conservatives Dominate Social Media,* POLITICO (Oct. 26, 2020, 7:55 PM), https://www.politico.com/news/2020/10/26/censorship-conservatives-social-media-432643. One reason for such prominence is that conservative content is emotionally engaging, and when a post is engaging, it is prioritized in the individual's newsfeed and recommended to other users more frequently. *Supra*..

[21] *See* Kari Paul & Jim Waterson, *Facebook Bans Alex Jones, Milo Yiannopoulos and Other Far-Right Figures*, THE GUARDIAN (May 2, 2019, 4:38 PM), https://www.theguardian.com/technology/2019/may/02/facebook-ban-alex-jones-milo-yiannopoulos.

[22] *See id.*

Trump Campaign's ties to Russian intelligence,[23] which prompted a response on Twitter from then President Trump and an ensuing conservative firestorm.[24] These and similar incidents led to congressional hearings on social media bias and censorship in April 2018,[25] followed by similar hearings in September 2018, April 2019, and July 2019, with congressional leaders grilling executives from several prominent social media platforms on their content moderation practices.[26]

Further allegations of bias against conservative viewpoints arose in the period leading up to the 2020 presidential election, such as in the context of Twitter's October 2020 response to a controversial New York Post article that was highly critical of the son of presidential candidate Joe Biden.[27] After Twitter blocked all links to the controversial article shortly after its release—citing company policy against allowing hacked materials on the platform[28]—many conservatives accused Twitter (and other mainstream media platforms) of interfering in the upcoming election and suppressing the story to maximize Biden's chances of winning.[29] In response to such

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[23] *See* Nathan Francis, *Actor James Woods Reportedly Banned From Twitter After Writing 'Hang Them All' In Response To Mueller Report*, INQUISITR (May 3, 2019) https://www.inquisitr.com/5421484/actor-james-woods-reportedly-banned-from-twitter-after-writing-hang-them-all-in-response-to-mueller-report/.
[24] *See* Justin Caruso, *James Woods Banned from Twitter Amid Silicon Valley's Conservative Blacklisting Campaign*, BREITBART (May 3, 2019), https://www.breitbart.com/entertainment/2019/05/03/james-woods-banned-from-twitter-amid-silicon-valleys-conservative-blacklisting-campaign/.
[25] *See* Bloomberg Quicktake: Now, *Diamond and Silk, Others Testify Before Congress*, YOUTUBE (Apr. 26, 2018), https://www.youtube.com/watch?v=yEnMBgSaV-I.
[26] *See* Senator Ted Cruz, *Sen. Cruz Questions Mark Zuckerberg on Alleged Political Bias at Facebook - April 10, 2018*, YOUTUBE (Apr. 10, 2018), https://www.youtube.com/watch?v=-VJeD3zbZZI&t=73s.
[27] *See* Shannon Bond, *Facebook and Twitter Limit Sharing 'New York Post' Story About Joe Biden*, NPR (Oct. 14, 2020), https://www.npr.org/2020/10/14/923766097/facebook-and-twitter-limit-sharing-new-york-post-story-about-joe-biden.
[28] *See* Kate Conger & Mike Isaac, *In Reversal, Twitter Is No Longer Blocking New York Post Article*, N.Y. TIMES (Oct. 16, 2020), https://www.nytimes.com/2020/10/16/technology/twitter-new-york-post.html; TWITTER, *Distribution of hacked materials policy*, https://help.twitter.com/en/rules-and-policies/hacked-materials (last visited Oct. 24, 2021); @vijaya, TWITTER (Oct. 15, 2020, 10:06 PM), https://twitter.com/vijaya/status/1316923549236551680.
[29] *See* Mike Issac & Kate Conger, *Twitter Changes Course After Republicans Claim 'Election Interference'*, N.Y. TIMES (Oct. 15, 2020), https://www.nytimes.com/2020/10/15/technology/facebook-twitter-republicans-backlash.html.

pressure, Twitter reevaluated its actions, reversed course, and reinstated the link on its platform.[30]

The dominant social media platforms' content moderation actions taken in response to the January 6 insurrection at the Capitol led to further allegations of bias against conservative/ right-wing viewpoints.[31] The insurrection indeed led to a substantial restriction by social media platforms of insurrection and election content from the political right.[32] Many figures on the political right had their content removed or were banned by dominant social media platforms, with some claiming that Facebook was "shadow banning" them—that is, blocking or deprioritizing content in a manner that was not transparent to the speaker.[33] The culmination of such content moderation practices occurred on January 8, with Twitter permanently banning then-President Donald Trump from its platform after the January 6 attack at the Capitol [34] and

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[30] *See id.*

[31] *See* Todd Spangler, *No Evidence of Anti-Conservative Bias by Social Media, New Study Asserts*, VARIETY (Feb. 1, 2021), https://variety.com/2021/digital/news/anti-conservative-bias-social-media-nyu-report-1234897746/.

[32] *See* JARED HOLT, AFTER THE INSURRECTION: HOW DOMESTIC EXTREMISTS ADAPTED AND EVOLVED AFTER JANUARY 6 US CAPITOL ATTACK 6 (Andy Carvin et al. eds., 2022), https://www.atlanticcouncil.org/wp-content/uploads/2022/01/After-the-Insurrection.pdf.

[33] For example, in April 2018, pro-Trump online commentators Diamond and Silk received a message from Facebook stating that the content on their page was "dangerous," and they believed that Facebook was shadow banning their content. *See* Joe Perticone, *Facebook VP Apologizes to Pro-Trump Vloggers Diamond & Silk, Despite Their Misrepresentation of the Dispute*, BUSINESS INSIDER (July 17, 2018, 11:12 AM), https://www.businessinsider.com/diamond-and-silk-facebook-apology-trump-congress-testimony-2018-7 However, the message was sent in error, as was confirmed later during congressional testimony. *See Facebook: Transparency and Use of Consumer Data: Hearing Before the H. Comm. on Energy and Com.*, 117th Cong. 27, (2018) (statement by Mark Zuckerburg).
Nothing on the page was removed or banned whatsoever. This did not stop the duo from appearing in conservative media to claim that they were being silenced. *See* Joe Perticone, *Facebook VP Apologizes to Pro-Trump Vloggers Diamond & Silk, Despite Their Misrepresentation of the Dispute*, BUSINESS INSIDER (July 17, 2018, 11:12 AM), https://www.businessinsider.com/diamond-and-silk-facebook-apology-trump-congress-testimony-2018-7. *See* Chris Ciaccia, *Facebook Reconsiders 'Unsafe for Community' Tag on Pro-Trump Diamond and Silk Videos After Fox & Friends Appearance*, FOX NEWS (Apr. 9, 2018), https://www.foxnews.com/tech/facebook-reconsiders-unsafe-for-community-tag-on-pro-trump-diamond-and-silk-videos-after-fox-friends-appearance.

[34] *See Permanent suspension of @realDonaldTrump*, TWITTER BLOG (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.

Facebook following suit soon after.[35] At the time, Trump had eighty-eight million followers on Twitter[36] and routinely used Twitter as a platform to convey, among other things, information regarding his administration's policies.[37] Although several of Trump's prior tweets had also violated Twitter's terms of service, Twitter had previously applied a special, deferential standard to the speech of Trump and other "world leaders."[38] Twitter justified its "world leaders" exception on the grounds that the content of world leaders was often in the "public interest" and would therefore generally be allowed on the platform in order to allow for ". . . public conversation and [allow users to] get informed about the world around them."[39] Pursuant to this policy, tweets from public figures were subject to review by Twitter's "global enforcement team," whose mission was to balance the public harms versus the benefits of keeping such tweets online.[40] If a tweet was deemed to be in the public interest, it would be allowed on the platform—although the global enforcement team had the option of placing a notice next to the tweet to provide proper context.[41] The team applied a presumption in favor of keeping tweets

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[35] *See* Mike Isaac & Kate Conger, *Facebook Bars Trump Through End of His Term*, N.Y. TIMES (Jan. 7, 2018), https://www.nytimes.com/2021/01/07/technology/facebook-trump-ban.html.
[36] *See* Elizabeth Culliford, David Shepardson & Katie Paul, *Twitter Permanently Suspends Trump's Account, Cites 'Incitement of Violence' Risk*, REUTERS (Jan. 8, 2021, 6:32 PM), https://www.reuters.com/article/us-usa-election-trump-twitter/twitter-permanently-suspends-trumps-account-cites-incitement-of-violence-risk-idUSKBN29D355.
[37] See Trump v. Twitter, No. 3:21-cv-08378 (N.D. Cal. transferred and received Oct. 28, 2021).
[38] See Elizabeth Culliford, *Twitter Hears From Record Respondents Over World Leader Rules*, REUTERS (May 4, 2021), https://www.reuters.com/technology/twitter-hears-record-respondents-over-world-leader-rules-2021-05-04/.
[39] *World Leaders on Twitter: principles & approach*, TWITTER BLOG (Oct. 15, 2019), https://blog.twitter.com/en_us/topics/company/2019/worldleaders2019. Facebook has recently been the target of scathing criticism for its failure to take down hateful speech in other countries and other languages, including in India and its various languages. For example, Facebook in India has been repeatedly criticized for granting special exemptions from its hate speech policies for powerful foreign politicians, especially in India. See https://www.washingtonpost.com/technology/2021/10/24/india-facebook-misinformation-hate-speech/
[40] *See About Public-Interest Exceptions on Twitter*, TWITTER HELP CENTER, https://help.twitter.com/en/rules-and-policies/public-interest.
[41] *Id.*

under review online.[42] However, the process applicable to world leaders' tweets did not apply when such a tweet promotes violence, terrorism, doxing,[43] or otherwise constitutes an egregious violation of Twitter's terms of service.[44]

Twitter's global enforcement team was put to the test on January 6, 2021, when it confronted the unprecedented actions and tweets of a sitting president communicating with his base in such a manner as to arguably encourage insurrection.[45] Specifically, during the beginning of the insurrectionists' attack on the Capitol, at 2:24 PM, then-President Trump tweeted:

> Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth![46]

During the attack on The Capitol, President Trump tweeted a video message directed at the rioters at 4:17 PM,[47] in which he said, in relevant part:

> There has never been a time where such a thing [an election] happened where they could take it away from all of us . . . This was a fraudulent election . . . Go home. We love you. You're very special.[48]

And at 6:01 PM, Trump tweeted the following:

> These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who

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[42] *See id.*
[43] Doxing is "the nonconsensual online posting of a person's personal information, such as home address, e-mail address, and place of employment, esp. for purposes of harassment." *See Doxing*, *Black's Law Dictionary* (11th ed. 2019).
[44] *See id.*
[45] *See* Barbara Ortutay & David Klepper, *Twitter, Facebook Muzzle Trump Amid Capitol Violence*, ASSOCIATED PRESS (Jan. 6, 2021), https://apnews.com/article/election-2020-donald-trump-us-news-elections-presidential-elections-f343d50d78b48691b847467da8cb9519.
[46] Donald Trump (@realDonaldTrump), TWITTER (Jan. 6, 2021, 2:24 PM), https://www.thetrumparchive.com/.
[47] Donald Trump (@realDonaldTrump), TWITTER (Jan. 6, 2021, 4:17 PM), https://www.thetrumparchive.com/.
[48] *President Trump Video Statement on Capitol Protesters*, C-SPAN (Jan. 6, 2021), https://www.c-span.org/video/?507774-1/president-trump-claims-election-stolen-tells-protesters-leave-capitol.

> have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever![49]

Twitter concluded that these three tweets violated its civic integrity policies,[50] which barred users from spreading misinformation about the 2020 election,[51] and accordingly suspended Trump's account for twelve hours following the third tweet. On January 8, after Trump's account was temporarily reinstated, Trump tweeted the following at 9:46 AM:

> The 75,000,000 great American Patriots who voted for me, AMERICA FIRST, and MAKE AMERICA GREAT AGAIN, will have a GIANT VOICE long into the future. They will not be disrespected or treated unfairly in any way, shape or form!!![52]

And Trump tweeted the following at 10:44 AM:

> To all of those who have asked, I will not be going to the Inauguration on January 20.[53]

Twitter construed these last two tweets, in the context in which they were communicated, as being in violation of its policy banning the glorification of violence,[54] under which a tweet cannot condone "violent acts committed by civilians that resulted in death or serious physical injury."[55] In its explanation of its decision, Twitter stated that the tweets might not in themselves have glorified violence, but when considered in the context in which they were communicated, the tweets reasonably appeared as if Trump was encouraging his supporters to attempt a similar

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[49] Donald Trump (@realDonaldTrump), TWITTER (Jan. 6, 2021, 6:01 PM), https://www.thetrumparchive.com/.
[50] Twitter Safety (@TwitterSafety), TWITTER (Jan. 6, 2021, 7:02 PM), https://twitter.com/twittersafety/status/1346970431039934464?lang=en.
[51] *Civic integrity policy*, TWITTER HELP CENTER (Aug. 8, 2021, 6:29 PM), https://help.twitter.com/en/rules-and-policies/election-integrity-policy.
[52] Donald Trump (@realDonaldTrump), TWITTER (Jan. 8, 2021, 9;46 AM), https://www.thetrumparchive.com/.
[53] Donald Trump (@realDonaldTrump), TWITTER (Jan. 8, 2021, 10:44 AM), https://www.thetrumparchive.com/.
[54] Permanent suspension of @realDonaldTrump, *supra* note 34.
[55] *Glorification of violence policy*, TWITTER HELP CENTER (Mar., 2019), https://help.twitter.com/en/rules-and-policies/glorification-of-violence.

type of attack in the near future.[56] In an effort to curb any more efforts at real world violence, Twitter made the decision to ban Trump permanently from its platform.[57] Twitter has since made clear that its ban on Trump is permanent, unconditional, and will continue to be enforced even if Trump decides to run for re-election.[58]

Facebook's response to then-President Trump's speech in the context of the January 6 insurrection was similar to that of Twitter.[59] The same video and similar content contained in the tweet that Trump posted on Twitter at 4:17 PM and 6:01 PM on January 6 were posted to Trump's Facebook page.[60] In response, Facebook took immediate action and removed the posts as a violation of its policy on Dangerous Individuals and Organizations.[61] On January 6 at 4:21 pm ET, as the riot at the Capitol was ongoing, Trump posted a video on Facebook and Instagram in which he stated:

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[56] Permanent suspension of @realDonaldTrump, *supra* note 34. Twitter articulated several reasons why these tweets constituted an egregious violation of its terms of service: First, by stating that he would not be attending the Inauguration, Trump promoted the idea that the election was not legitimate and that there would not be an orderly transition of power. Second, since Trump communicated that he would not be attending the Inauguration, he insinuated that his supporters should view the Inauguration as a safe target to attack. Third, Trump's use of the term "American Patriots" in the first tweet could be interpreted as support for the violence that took place on January 6. Fourth, by stating that his supporters have a "giant voice" and "will be heard long into the future," Trump seemed to suggest that he did not plan to facilitate an orderly transition of power. Fifth, these tweets were communicated in the context in which plans to attack The Capitol again, as well as plans to attack state capitols around the country, were surfacing on and off Twitter.

[57] *See* TWITTER (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension

[58] *See Twitter Says Trump Ban is Permanent - Even if He Runs for Office Again*, THE GUARDIAN (Feb. 10, 2021), https://www.theguardian.com/us-news/2021/feb/10/trump-twitter-ban-permament-social-media.

[59] *See* Guy Rosen, *Our Response to the Violence in Washington*, FACEBOOK (Jan. 6, 2021), https://about.fb.com/news/2021/01/responding-to-the-violence-in-washington-dc/ [https://perma.cc/42LZ-YC3J] [hereinafter *Our Response*].

[60] *See Oversight Board Upholds Former President Trump's Suspension, Finds Facebook Failed to Impose Proper Penalty*, OVERSIGHT BOARD (May 2021), https://oversightboard.com/news/226612455899839-oversight-board-upholds-former-president-trump-s-suspension-finds-facebook-failed-to-impose-proper-penalty/.

[61] *See Announcing the Oversight Board's next cases*, OVERSIGHT BOARD (Jan., 2021), https://oversightboard.com/news/175638774325447-announcing-the-oversight-board-s-next-cases/.

> I know your pain. I know you're hurt. We had an election that was stolen from us. It was a landslide election, and everyone knows it, especially the other side, but you have to go home now. We have to have peace. We have to have law and order. We have to respect our great people in law and order. We don't want anybody hurt. It's a very tough period of time. There's never been a time like this where such a thing happened, where they could take it away from all of us, from me, from you, from our country. This was a fraudulent election, but we can't play into the hands of these people. We have to have peace. So go home. We love you. You're very special. You've seen what happens. You see the way others are treated that are so bad and so evil. I know how you feel. But go home and go home in peace.[62]

Shortly after that video was posted, at 5:41 pm, Facebook removed this post for violating its Community Standard on Dangerous Individuals and Organizations.[63]

Then, at 6:07 pm, as police were securing the Capitol, Trump posted the following written statement on Facebook:

> These are the things and events that happen when a sacred landslide election victory is so unceremoniously viciously stripped away from great patriots who have been badly unfairly treated for so long. Go home with love in peace. Remember this day forever![64]

Eight minutes later, at 6:15 pm, Facebook removed this post for violating its Community Standard on Dangerous Individuals and Organizations and temporarily blocked Trump from posting on Facebook or Instagram for 24 hours.[65] Then, on January 7, after further reviewing Trump's posts, as well as his recent communications off Facebook and additional information about the severity of the violence at the Capitol, Facebook extended its block of Trump "indefinitely and for at least the next two weeks until the peaceful transition of power is

[62] *Id.*
[63] *See id.*
[64] *Id.*
[65] *See id.*

complete,"[66] with CEO Mark Zuckerberg personally posting a statement about the decision on his own Facebook page.[67]

These and similar incidents in which Twitter and Facebook and other social media platforms took steps to remove conservative speakers and/or their posts from their platforms have prompted lawsuits challenging actions and to proposed legislation and additional forms of scrutiny of the platforms' actions.[68] Below this Article examines several prominent lawsuits as well as proposed legislation that seeks to rein in the power of the dominant social media platforms to restrict speech and speakers.

Lawsuits Recently Brought by Former President Trump against the Dominant Social Media Platforms

Former President Trump, aggrieved by the decisions of the dominant social media platforms to deplatform him and deprive him of his means of engaging via social media with his more than eighty million followers, has initiated several class action lawsuits to challenge these actions.[69] Trump announced on July 7, 2021, that he was suing Facebook, Twitter, and Google (as well as their CEOs).[70] Trump's lawsuit against Facebook, for example, generally alleged that the company engaged in impermissible viewpoint discrimination and content-based

[66] *Our Response*, *supra* note 59.
[67] Mark Zuckerberg, FACEBOOK (Jan. 7, 2021, 10:47 AM), https://www.facebook.com/zuck/posts/10112681480907401 [https://perma.cc/74L3-3CSL].
[68] *See, e.g.*, Cameron F. Kerry, *Section 230 Reform Deserves Careful and Focus Consideration,* BROOKINGS (May, 14, 2021), https://www.brookings.edu/blog/techtank/2021/05/14/section-230-reform-deserves-careful-and-focused-consideration/; Erik Larson, *Twitter, Facebook Win Appeal in Anticonservative-Bias Suit*, YAHOO! (May 27, 2020) https://finance.yahoo.com/news/twitter-facebook-win-appeal-over-151940896.html.
[69] *See* Jonathan Allan & Teaganne Finn, *Trump Sues Facebook, Twitter, Google Over Platform Bans*, NBC NEWS (July 7, 2021, 10:42 AM), https://www.nbcnews.com/politics/donald-trump/president-trump-announce-suit-against-facebook-twitter-leaders-n1273225.
[70] *See* Trump v. Facebook, Inc., No. 1:21-cv-22440 (S.D. Fla. July 7, 2021); Trump v. Twitter, Inc., No. 1:21-cv-22441 (S.D. Fla. July 7, 2021); Trump v. YouTube, No. 1:21-cv-22445 (S.D. Fla. 2021).

discrimination, in response to threats by Democrats in Congress that they would bring legislative action against the company if it failed to deplatform Trump.[71] The lawsuit contended that Democratic legislators in Congress wielded their power and influence to pressure Facebook into banning Trump and referenced statements from prominent Democrats—such as Vice President Kamala Harris and Mark Warner (D-Va.)—in which they asserted that social media platforms should ban Trump.[72] The complaint alleged that Democrats use such veiled threats and public hearings of social media platforms' CEOs to pressure the platforms into censoring conservative speech.[73] The complaint claimed that Facebook removed Trump and other class members' accounts[74] because of their political viewpoints and without sufficient explanation.[75] Trump also claimed that he and other class members were illegally subject to the company's "non-existent or broad, vague, and ever-shifting standards."[76] The complaint alleged that Facebook is a state actor

[71] See Trump v. Facebook, Inc., No. 1:21-cv-22440, ¶ 11; *see also* Eric Goldman, *Comments on Trump's Lawsuits Against YouTube, Facebook, and Twitter*, TECH AND MARKETING L. BLOG, (July 12, 2021), https://blog.ericgoldman.org/archives/2021/07/comments-on-trumps-lawsuits-against-youtube-facebook-and-twitter.htm ("[T]he complaint alleges that the US government made censorial demands of the Internet services, and those exhortations turned the services into state actors who then became compelled to follow the First Amendment.").

[72] See Trump v. Facebook, Inc., No. 1:21-cv-22440, ¶ 62.

[73] *See id.* ¶¶ 62, 64–65.

[74] The first of the three named class members is Elizabeth Albert, a user who ran the group "WalkAway Campaign," where members would share their stories about leaving the Democratic Party. Albert claims that the page and her personal account was banned arbitrarily. The second and third class members are Kiyan and Bobby Michael, who shared an account under the name "BobbyKiyan." Kiyan and Bobby Michael claim that their posts "experience a delay when they post things to their personal page and … that their page is heavily monitored and 'fact-checked.'" Three of these posts referred to in the complaint regarded COVID-19 disinformation and another regarded support for Donald Trump. The fourth named plaintiff is Jennifer Horton. On April 12, 2021, Horton shared what Facebook deemed to be COVID-19 misinformation. On April 17, Horton's brother went missing, and she started using her Facebook page in the rescue effort. On April 29, her page was suspended for 24 hours because of the April 12 post. The complaint seems to suggest that Facebook is culpable in the brother's disappearance because Horton was too afraid to use Facebook for fear of being banned again. It also alludes to the idea that her brother may have been found alive if Horton had not been suspended.

[75] See Trump v. Facebook, Inc., No. 1:21-cv-22440, ¶¶ 110–11.

[76] *Id.* ¶ 9.

for First Amendment purposes[77] and that it violated the plaintiffs' First Amendment right to free speech because it "impose[d] viewpoint and content-based restrictions on [their] access to information, views, and content otherwise available to the general public."[78] The complaint asked the court to find CDA 230 unconstitutional on the grounds that large social media platforms are state actors who are making content-based restrictions on speech and that such content-based restrictions violate the First Amendment because they are not narrowly tailored to serve compelling government interests.[79] The complaint further alleged that Facebook works with Twitter and other social media platforms to coordinate their censorship efforts.[80] The complaint alleged that Facebook developed a tool that allows the platform to censor speech across a variety of platforms.[81] The complaint further pointed to the fact that Facebook Oversight Board—an independent arbiter that adjudicates certain content-moderation decisions undertaken by the platform—found that Facebook's suspension of Trump was not based on a then-existing Facebook policy.[82]

In addition, in seeking to hold Zuckerberg personally liable for Facebook's content moderation decisions, the complaint further alleged that the company's actions regarding Trump's COVID-related posts violated his free speech rights.[83] Trump alleged that Zuckerberg conspired with the Director of the National Institute of Allergy and Infectious Disease, Anthony Fauci, to suppress speech on the platform and to promote the views of the federal government while suppressing any speech that conflicted with these viewpoints.[84] In particular, Trump

[77] *Id.* ¶ 151.
[78] *Id.* ¶ 153.
[79] *See id.* ¶¶ 168–70.
[80] *See id.* ¶ 34.
[81] *See id.* ¶¶ 36–37.
[82] *See id.* ¶ 44.
[83] See id. ¶¶ 98, 101.
[84] *See id.* ¶ 87.

alleged that Facebook undertook a "concerted, massive, system-wide, and indeed worldwide program of monitoring COVID-related views and content and censor posts deemed false claims by Facebook."[85] Trump claimed that the posts that were being censored were not medical misinformation, but were an opposing political and/or medical viewpoint, such as on the efficacy of hydroxychloroquine on treating COVID,[86] and that censoring such views is unconstitutional and illegal.[87]

Trump has also advanced similar allegations against Twitter.[88] In Trump's complaint against Twitter, he alleged that Twitter sought to censor his and others' COVID-related tweets at the behest of Democrat lawmakers.[89] Such tweets included those espousing the "lab leak" theory, which asserts that the virus was either accidentally released from a lab in Wuhan, China or purposefully released as a biological weapon.[90] Notable Chinese scientists who supported the theory earlier in the pandemic were banned from Twitter for espousing such views, including Li-Meng Yan, a former researcher at the Hong Kong School of Public Health,[91] and Harry Chen, who reported about the virus directly from Wuhan during the beginning of the pandemic. Both

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[85] *See id.* ¶ 93.
[86] *See id.* ¶ 99.
[87] *See id.* ¶ 10. Twitter has recently taken action against Representative Marjorie Taylor Greene's account, suspending it permanently for "'repeated violations' of [Twitter's] COVID misinformation policy." *See* Yacob Reyes, *Marjorie Taylor Greene's Twitter Account Permanently Suspended for COVID Misinformation*, AXIOS (Jan. 2, 2022), https://www.axios.com/twitter-permanently-suspends-marjorie-taylor-greene-98b24ac2-9932-4766-83a7-7d947889228f.html. Twitter suspended Greene's personal account, which she primarily uses, but she will "retain access to her official congressional account." *Id.*
[88] *See* Trump v. Twitter, Inc., No. 1:21-cv-22441.
[89] *Id. ¶ 10.*
[90] *See* Naomi Oreskes, *The Lab-Leak Theory of COVID's Origin Is Not Totally Irrational*, SCI. AM. (Sept. 1, 2021), https://www.scientificamerican.com/article/the-lab-leak-theory-of-covids-origin-is-not-totally-irrational/.
[91] *See* Craig Timberg, *Scientists Said Claims About China Creating the Coronavirus Were Misleading. They Went Viral Anyway.,* WASH. POST (Feb. 12, 2021, 6:48 PM)*, https://www.washingtonpost.com/technology/2021/02/12/china-covid-misinformation-li-meng-yan/;* Didi Rankovic*, Twitter Suspends Harry Chen PhD, Known for Reporting About Coronavirus Direct from Wuhan,* RECLAIM THE NET (Feb. 24, 2020, 6:44 PM)*, https://reclaimthenet.org/twitter-suspends-harry-chen-phd-cornavirus/.*

were banned by Twitter for violating its policies on misinformation.[92] Trump's complaint against Twitter further raises due process type concerns, alleging that Twitter users were not provided meaningful notice of the platform's evolving terms of service.[93] In particular, Trump complains that Twitter's terms of service "span seventy-six (76) pages [and] sixty-five (65) hyperlinks to topics incorporated into the User Agreement,"[94] are subject to unilateral change by the platform, and that users are bound by the agreement and any and all modifications, regardless of whether they receive notice of any such changes.[95]

Finally, Trump's allegations set forth in his complaint against Google/YouTube were similar to those alleged against Facebook and Twitter.[96] In particular, Trump reiterated allegations of censorship and viewpoint discrimination that the platform allegedly exercised over his and other plaintiffs' COVID-related content.[97] In short, the former president's complaints against Facebook, Twitter, and Google/YouTube included allegations of unconstitutional

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[92] *See* Timberg, *supra* note 91; Rankovic, *supra* note 91.
[93] *See* Trump v. Twitter, Inc., No. 1:21 cv-22441, Compl. ¶ 36.
[94] *Id.*
[95] *See id.*
[96] See Trump v. YouTube, LLC, No. 1:21-cv-22445, Compl. ¶¶ 44-68.
[97] One such example of content removed by YouTube is from Pierre Kory, the former medical director for the Trauma and Life Support Center at the University of Wisconsin, and president of the Front Line COVID-19 Critical Care Alliance (FLCCC), a group that seeks to promote the efficacy of Ivermectin (an antiparasitic agent used mostly in livestock) as a treatment for COVID. *See* Trump v. YouTube, No. 1:21-cv-22445, Compl. ¶¶ 83-86. YouTube banned congressional testimony that Pierre Kory gave that promoted the drug. *See id.* Trump's complaint also lists others who have been banned or censored for promoting hydroxychloroquine as a treatment for COVID and/or for espousing the lab leak theory on the platform. *See id.* ¶¶ 87-94. An additional named plaintiff on the complaint against Google/YouTube is Dr. Colleen Victory, a "residency-trained trauma and emergency specialist" with experience working in the context of other health emergencies, such as the SARS epidemic. *See id.* ¶¶ 109-112. In April 2020, Dr. Victory created a viral video in conjunction with a large evangelical church in Texas regarding COVID safety precautions. The complaint alleges that YouTube removed the video for violating its policies on COVID misinformation. *See id.* ¶¶ 114-115. Another named plaintiff is Austen Fletcher, who runs a YouTube channel called Fleccas Talks, and posts conservative-leaning videos. *See id.* ¶¶ 118-119. The complaint alleges that Fletcher noticed that YouTube frequently demonetized his videos and/or shadow banned him, presumably on the grounds that he was in violation of the platform's misinformation policy. *See id.* ¶¶ 120-121.

viewpoint discrimination, content discrimination, and complaints about due process-type violations, including lack of clear standards/guidelines, arbitrary and discriminatory enforcement of such guidelines, and inadequate notice of the applicable, evolving terms of service.[98]

The vast majority of users on social media do not enjoy the status, wealth, or power of Donald Trump, of course, and do not have the means to bring lawsuits or other challenges to the content moderation actions or deplatforming taken against them by dominant social media platforms. Many everyday citizens have nonetheless informally alleged that the platforms have moderated their content in ways that are arbitrary, opaque, unchecked, and that otherwise violate our shared commitments to due process (and freedom of expression). As this Article discusses below,[99] such shared principles of due process prescribe that individuals be provided with clear advance notice of precise content guidelines, explanations when their content is subject to content moderation pursuant to such guidelines, consistent unbiased application of such guidelines, and an opportunity to challenge or appeal such acts of content moderation—particularly when those actions have severe consequences for social media users, like suspending or blocking them from the platform.

While the dominant social media platforms have made some progress in providing notice to their users of their (expansive and ever-changing)[100] community guidelines or terms of service, they have generally been less transparent regarding their actions taken pursuant to such terms (unless the user subject to such actions happens to be the President of the United States). Although claims of such due process-type violations by everyday users frequently are, by their very nature, difficult to document, some reports have surfaced of such actions by the dominant

[98] *See* Trump v. YouTube, LLC, No. 1:21-cv-22445, Compl. ¶; Trump v. Facebook, Inc., No. 1:21-cv-22440; Trump v. Twitter, No. 1:21-cv-22441.
[99] *See* text accompanying notes 338 – 346.
[100] *See* Trump v. Twitter, No. 1:21-cv-22441, ¶ 36.

social media platforms.[101] In general, ordinary social media users tend to claim that, while they may have notice of the platforms' terms of service, they are not meaningfully informed of which terms of service they have violated in any particular instance, nor of when they are blocked, nor are they given meaningful opportunities to appeal.

A glimpse into the scale and scope of such content moderation actions is possible by examining the transparency reports that are made available on a voluntary basis by the platforms. All of the dominant social media platforms produce a type of transparency report that provides an overview of their content moderation practices and actions.[102] Because there is no standardization of such reporting, and because these reports do not provide granular details, it is difficult to assess whether the platforms are consistently applying their terms of service/ community guidelines, and whether they are doing so in a manner that provides affected social media users with notice of and an opportunity to challenge adverse decisions. What is clear,

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[101] *See*, e.g., Kate Klonick, *What I Learned in Twitter Purgatory*, THE ATLANTIC, Sept. 8, 2020 https://www.theatlantic.com/ideas/archive/2020/09/what-i-learned-twitter-purgatory/616144/ (law professor Kate Klonick explaining how her Twitter account was "likely" suspended after one joke tweet including the word "kill" by an "overly literal and aggressive" algorithm, possibly with human review by a "contract worker at call center-type factory outside the United States."); Ryan Moore, *Don't Let Social Media Corporations Deny Free Speech to Conservatives*, DES MOINES REGISTER (Sept. 26, 2019), https://www.desmoinesregister.com/story/opinion/columnists/2019/09/26/one-many-conservatives-banned-social-media/3773954002/ (addressing a rise in account bans of conservative speakers for violating ambiguous terms of service); Jeff Bullas, *My Story of Banishment to Social Media Purgatory: Temporary Suspension from Twitter!* (Oct. 23, 2009), https://www.jeffbullas.com/my-story-of-banishment-to-social-media-purgatory-suspension-from-twitter/.

[102] *See infra* notes 103, 106. Many social media platforms —– including Facebook and Google, but not Twitter — have publicly committed themselves to upholding certain due process and free speech values by joining the Global Network Initiative (GNI), a multi-stakeholder organization whose members formally commit themselves to values such as transparency, accountability, responsible company decision-making, and freedom of expression. See GLOBAL NETWORK INITIATIVE, PRINCIPLES ON FREEDOM OF EXPRESSION AND PRIVACY, available at https://globalnetworkinitiative.org/gni-principles/. *See also* The Santa Clara Principles of Transparency and Accountability in Content Moderation, at https://santaclaraprinciples.org/ (prescribing that companies engaged in content moderation should (1) publish the numbers of posts removed and accounts permanently or temporarily suspended due to violations of their content guidelines; (2) provide notice to each user whose content is taken down or account is suspended about the reason for the removal or suspension; and (3) provide a meaningful opportunity for timely appeal of any content removal or account suspension.)

however, is that allegations of opaque, inconsistent content moderation actions without advance notice or opportunity to respond on the part of affected users appear to be widespread, despite the platforms' progress on transparency reporting, as discussed below.

According to Twitter, from July 1, 2020 through December 31, 2020 (the most recent reporting period), the company had removed 3.8 million tweets for violating their Terms of Service and company rules.[103] Twitter saw an increase by nine percent from the last reporting period in accounts suspended, and an increase of 132 percent for content removal.[104] Twelve million accounts were reported as violating Twitter's Terms of Service, which accounted for a two percent increase from the previous reporting period.[105] Facebook also provides a transparency report of its community standards enforcement.[106] Facebook uses a similar metric whereby it reports the amount of content and accounts actioned upon.[107] Taking action can include content removal, account disabling, or placing a warning over the content.[108] Facebook's transparency report details the amount of content, and fake accounts, it takes action against and the category of community standard it violated.[109] The report also records the number of appeals from content removal Facebook receives for each category and the number of restorations (both with and without appeal) to content removed.[110] If a user is adversely affected by a content

[103] *See Rules Enforcement,* TWITTER (July 14, 2021), https://transparency.twitter.com/en/reports/rules-enforcement.html#2020-jul-dec.
[104] *See id.* This totaled to about 1 million accounts removed and 4.5 million instances of content removal. *See id.*
[105] *See id.*
[106] *See Community Standards Enforcement,* FACEBOOK (Nov. 2021), https://transparency.fb.com/data/community-standards-enforcement/.
[107] *See id.*
[108] *See Content Actioned,* FACEBOOK (July 29, 2021), https://transparency.fb.com/policies/improving/content-actioned-metric/. However, the report does not currently record accounts disabled for violating Facebook rules, accounts disabled only refers to fake accounts. *See id.*
[109] *See Community Standards Enforcement, supra* note 106.
[110] *See id.* The report also provides the same information for content removed from Instagram. *See id.*

decision by Facebook, the user can appeal to the Oversight Board.[111] First, users must request Facebook to reconsider its content decision, and if the user does not agree with that decision, he or she may appeal.[112] The Board will select from those appeals, prioritizing those that meet criteria set out in the Board's bylaws,[113] and a subset of the Board will review and issue a draft decision.[114] The full Board then is empowered to review the draft decision, and a written statement explaining their decision will be published—which may include policy recommendations to Facebook.[115] However, only a small subset of appeals is taken up by the Facebook Oversight Board, and most users must simply abide by the actions undertaken by the company itself.[116]

Social media users' allegations of viewpoint discrimination, lack of transparency, and other free speech and due process-type violations by the dominant social media platforms have not escaped judicial notice—at least, not the notice of Justice Clarence Thomas.[117] In his concurring opinion vacating and dismissing as moot a case involving viewpoint discrimination by then-President Trump with respect to Trump's Twitter account (which became doubly moot after Trump was no longer president *and* was permanently kicked off Twitter), Justice Thomas took the occasion to opine about viewpoint discrimination and other alleged free speech and due

[111] *See Appealing Content Decisions on Facebook or Instagram,* OVERSIGHT BOARD*,* https://oversightboard.com/appeals-process/.
[112] *See id.*
[113] *See id.*
[114] *See id.*
[115] *See id.*
[116] *See id.*; *see also Oversight Board Publishes Transparency Report for Third Quarter*, OVERSIGHT BOARD (December 2021), https://www.oversightboard.com/news/640697330273796-oversight-board-publishes-transparency-report-for-third-quarter-of-2021/.
[117] *See* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring).

process-type violations by the dominant social media platforms like Twitter and Facebook.[118] In his opinion, Justice Thomas signaled that he would be sympathetic toward attempts to regulate dominant social media platforms and suggested that common carriage would be a useful legislative framework for such regulation.[119] Speculating on the desirability of such regulation and the possibility of subjecting such regulations to something less than heightened judicial scrutiny, Justice Thomas recently opined:

> If part of the problem [with dominant social media platforms] is private, concentrated control over online content and platforms available to the public, then part of the solution may be found in doctrines that limit the right of a private company to exclude [viz., the common carriage doctrine and the public accommodations doctrine]….
>
> The long history in this country and in England of restricting the exclusion right of common carriers and places of public accommodation may save similar regulations today from triggering heightened scrutiny…. There is a fair argument that some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated in [the same] manner.
>
> In many ways, digital platforms that hold themselves out to the public resemble traditional common carriers. Though digital instead of physical, they are at bottom communications networks, and they "carry" information from one user to another. A traditional telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way. And unlike newspapers, digital platforms hold themselves out as organizations that focus on distributing the speech of the broader public….

[118] In the Trump Twitter blocking case, the Second Circuit held that Trump violated the First Amendment when he attempted to use his Twitter platform to create a forum only containing speech that was favorable to him. Trump sought to use his Twitter platform for official government announcements but would only allow followers whose comments were favorable to him and his policies to follow him, while blocking those who criticized or disagreed with him. The Second Circuit held that, given Trump's use of his Twitter account for official government purposes, the "interactive space" associated with his tweets constituted a public forum, and that Trump's act of blocking users from speaking in this space amounted to unconstitutional viewpoint discrimination within a public forum. Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019), *vacated and dismissed as moot sub nom.* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021).

[119] *See* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. at 1224.

> If the analogy between common carriers and digital platforms is correct, then an answer may arise for dissatisfied platform users who would appreciate not being blocked: laws that restrict the platform's right to exclude.
>
> Even if digital platforms are not close enough to common carriers, legislatures might still be able to treat digital platforms like places of public accommodation ….
>
> *The similarities between some digital platforms and common carriers or places of public accommodation may give legislators strong arguments for similarly regulating digital platforms. It stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of digital platforms*.[120]

Justice Thomas's suggestion of common carriage (or an analogous framework) as a foundation for regulation to prohibit viewpoint discrimination, unsubstantiated blocking of users, and similar acts of content moderation by the dominant social media platforms did not fall on deaf ears, and legislators at both the federal and state levels have since taken up the mantle of regulating the platforms with something akin to Justice Thomas's suggested roadmap in mind.[121]

Legislative Attempts to Limit Discretion of Dominant Social Media Platforms

In recent months, a host of federal and state legislative measures have been introduced (and some enacted) to address alleged issues of bias, discrimination, opaque decision-making, standardless discretion, and similar alleged violations by dominant social media platforms.[122]

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[120] Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (Thomas, J. concurring) (emphasis added, citations and internal quotations omitted).

[121] For example, shortly after Justice Thomas's opinion was issued, Sen. Roger Wicker (R-MS), the top Republican on the U.S. Senate Committee on Commerce, Science, and Transportation (which enjoys jurisdiction over technology issues), stated that "Justice Thomas's recent opinion suggesting that powerful online platforms should be treated as common carriers offers a sound basis for legislation that would bring accountability to the industry.") *See* Makena Kelly, *Republicans Have a New Tool to Fight Deplatforming: Common Carriage Laws*, THE VERGE (May 18, 2021), https://www.theverge.com/22442359/republican-common-carrier-social-media-facebook-trump-ban-antitrust-section-230.

[122] *See, e.g.*, Disincentivizing Internet Service Censorship of Online Users and Restrictions on Speech and Expression Act, S. 2228, 117th Cong. (2021) [hereinafter DISCOURSE Act]; 21st Century Foundation for the Right to Express and Engage in Speech Act, S.1384, 117th Cong. (2021) [hereinafter 21st Century

Such legislation—including the proposed DISCOURSE Act, the 21st Century FREE Speech Act, and the PACT Act—generally seek to treat dominant social media platforms as akin to common carriers who are subject to nondiscrimination obligations, to treat such platforms as akin to state actors for purposes of the First Amendment (which would prohibit them from discriminating on the basis of viewpoint or speaker identity), to require them to accord due process-type protections to their users, and to limit or circumvent the immunity enjoyed by platforms under CDA 230.[123]

Federal Legislation

First, Senator Marco Rubio (R-FL) has introduced the Disincentivizing Internet Service Censorship of Online Users and Restrictions on Speech and Expression Act (the DISCOURSE Act).[124] This Act is designed (1) to advance certain free speech/First Amendment values by prohibiting the platforms from engaging in (human moderated or algorithmic) viewpoint discrimination and (2) to advance certain due process values by imposing transparency and disclosure requirements on the platforms.[125] The Act would also amend CDA 230 to specify that the CDA's limitation of liability does not apply unless the platforms comply with the Act's terms.[126]

FREE Speech Act]; Platform Accountability and Consumer Transparency Act, S. 797, 117th Cong. § 3(4) (2021) [hereinafter PACT Act]; STOP SOCIAL MEDIA CENSORSHIP, http://www.stopsocialmediacensorship.com/ (last visited Aug. 28, 2021, 4:29 PM).

[123] *See* DISCOURSE Act, S. 2228; 21st Century FREE Speech Act, S. 1284; PACT Act, S. 797.

[124] DISCOURSE Act, S. 2228, 117th Cong. (2021).

[125] Press Release, Marco Rubio, Senator for Fla., Rubio Introduces Sec 230 Legislation to Crack Down on Big Tech Algorithms and Protect Free Speech (June 24, 2021), https://www.rubio.senate.gov/public/index.cfm/2021/6/rubio-introduces-sec-230-legislation-to-crack-down-on-big-tech-algorithms-and-protect-free-speech.

[126] *See id.*

First, the DISCOURSE Act seeks to advance free speech values by limiting viewpoint discrimination, by subjecting dominant social media platforms to liability if they moderate content in a way that advantages certain viewpoints, including if they implement algorithms that do so.[127] In particular, the Act would remove CDA 230's broad limitation of liability from a platform with a "dominant market share" if the platform:

> (i) engages in a content moderation activity that reasonably appears to express, promote, or suppress a discernible viewpoint for a reason that is not protected from liability under subsection (c)(2), including reducing or eliminating the ability of an information content provider to earn revenue, with respect to any information . . . ; or
>
> (ii) engages in a pattern or practice of content moderation activity that reasonably appears to express, promote, or suppress a discernible viewpoint for a reason that is not protected from liability under subsection (c)(2), including reducing or eliminating the ability of an information content provider to earn revenue . . . .[128]

The Act would also remove CDA 230's limitation of liability if the platform engaged in viewpoint discrimination by means of automated processes, if it:

> amplifies information provided by [a user] by using an algorithm or other automated computer process to target the information directly to users without the request of a sending or receiving user . . . ; or
>
> engages in a pattern or practice of amplifying information provided by [a user] by using an algorithm or other automated computer process to target the information directly to users without the request of a sending or receiving user . . . .[129]

Second, the DISCOURSE Act seeks to advance free speech values by limiting discrimination against certain types of content, by limiting the categories of content the platforms can restrict while still enjoying CDA 230's limitation of liability.[130] Specifically, the Act would achieve this goal by amending CDA 230(c)(2). This section currently provides that no platform "shall be held

[127] *See* S. 2228, § (2)(a).
[128] *See id.*
[129] *See id.*
[130] *See id.* § 2(b).

liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, *or otherwise objectionable, whether or not such material is constitutionally protected."*[131] The Act would condition this limitation of liability on an objective reasonableness standard and limit the permissible bases for which a platform can in good faith restrict access to content.[132] Specifically, under the DISCOURSE Act, in order to continue to enjoy CDA 230's limitation on liability, a platform would only be permitted to restrict access to content if it has "an objectively reasonable belief" that the content is "obscene, lewd, lascivious, filthy, excessively violent, harassing, *promot[es] terrorism," is determined to be "unlawful," or promotes "self-harm."*[133]

The DISCOURSE Act also seeks to advance certain due process values by requiring platforms to issue certain disclosures to their users.[134] In particular, the Act would require platforms to issue public disclosures related to content moderation, promotion, and curation, with the goal of enabling consumers to make informed choices regarding such services.[135] The DISCOURSE Act requires that these disclosures be made either through a "publicly available, easily accessible website" or by submitting the information to a commission which will then make it available to the public through the commission's website.[136] These disclosures are intended to "inform and protect consumers" by enabling them to hold platforms accountable and by "level[ing] the playing field" with the removal of "unfair protections . . . ."[137]

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[131] 47 U.S.C. § 230(c)(2)(a).
[132] DISCOURSE Act, *supra* note 124.
[133] *See id.* (emphasis added). This provision includes a religious liberty clause, which states explicitly that (c)(2) does not extend liability protections to decisions that restrict content based on their religious nature.
[134] See id. § 2(d).
[135] *See id.*
[136] *See id.*
[137] Press Release, Marco Rubio, *supra* note 125.

The 21st Century FREE Speech Act, introduced by Senator Bill Hagerty (R-TN) in late April 2021, characterizes dominant social media platforms as common carriers and imposes nondiscrimination, transparency, and due process requirements on—and limits the immunity enjoyed by—such platforms.[138] This Act requires "common carrier technology companies"—interactive computer services that offer services to the public and have more than 100 million worldwide monthly active users, excluding broadband providers—to provide their services without unreasonably discriminating against individuals or groups based on political or religious affiliation, to publish their content management guidelines, to explain their content restriction decisions, and to give content creators facing adverse restriction decisions a meaningful opportunity to respond to such decisions.[139] The Act further abrogates CDA 230 immunity under circumstances where common carrier companies fail to comply with the Act's requirements.[140]

Specifically, the 21st Century FREE Speech Act prohibits dominant platforms from making or giving "any undue or unreasonable preference or advantage to any particular person, class or persons, political or religious groups or affiliation, or locality," and requires that "common carrier" tech companies "disclose . . . accurate material regarding [their] content management, moderation, promotion, account termination and suspension, and curation mechanisms."[141] In cases where these companies either discriminated in violation of the Act's provisions or failed to publish clear guidelines regarding their moderation practices, they would be liable for suit by affected private individuals and by states' attorneys general.[142]

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[138] 21st Century FREE Speech Act, S. 1384, 117th Cong. § 2(a) (2021).
[139] *Id.*
[140] *See id.*
[141] *Id.*
[142] *Id.*

The 21st Century FREE Speech Act also substantially limits the immunity currently afforded to interactive computer service providers by classifying certain "common carrier" providers as publishers when they comment or editorialize on, promote, recommend, increase or decrease visibility of material, restrict access to material, or bar information content providers (users) from their services, whether this is done manually or by an algorithm.[143] The Act also defines, using regulatory and language from applicable Supreme Court precedent, those classes of material listed in CDA 230's "Good Samaritan" blocking and screening of offensive material section.[144]

In addition, the Platform Accountability and Consumer Transparency (PACT) Act, introduced by Senators Thune and Schatz (originally in 2020 and again in 2021), provides a limited reduction in content moderation liability for social media companies.[145] The Act would enforce transparency and some other due process type requirements, but would not create any liability for viewpoint or speaker-based discrimination.[146] While the Act's findings include

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[143] *Id.*

[144] *Id.* "Excessively violent" content is "likely to be deemed violent and for mature audiences" according to FCC television guidelines, or "constitutes or intends to advocate domestic … or international terrorism." "Harassing" material "is provided with the intent to abuse, threaten, or harass any specific person" and lacks "any serious literary, artistic, political, or scientific value," or is spam or "malicious computer code." "Obscene, lewd, lascivious, [or] filthy" content "taken as a whole -- appeals to the prurient interest in sex or portrays sexual conduct in a patently offensive way, and does not have serious literary, artistic, political, or scientific value;" "depicts or describes sexual or excretory organs or activities in terms patently offensive to the average person, applying contemporary community standards;" or "signifies the form of immorality which has relation to sexual impurity, taking into account the standards at common law in prosecutions for obscene libel." *Id.* Like the DISCOURSE Act, *see* discussion *supra* pp. Federal Legislation-30, the 21st Century FREE Speech Act would abrogate immunity for removal of "otherwise objectionable" content, instead protecting removal of content which "promot[es] self-harm" or is "unlawful." *See* 21st Century FREE Speech Act, S. 1384, § 2(a). These terms are not further defined in the act. *See id.*

[145] PACT Act, S. 797, 117th Cong. § (5)(g)(1)(A) (2021).

[146] *See* Eric Goldman, *Comments on the "Platform Accountability and Consumer Transparency Act" (the "PACT Act")*, TECH AND MARKETING L. BLOG (July 27, 2020), https://blog.ericgoldman.org/archives/2020/07/comments-on-the-platform-accountability-and-consumer-transparency-act-the-pact-act.htm (describing what the PACT Act seeks to accomplish).

concerns about the impact social media companies have on the speech interests of their users, [147] the Act would explicitly leave unchanged CDA immunity provision.[148] Liability, which would be defined pursuant to the Federal Trade Commission "unfair or deceptive acts or practices" rulemaking, would attach only where companies (1) failed to timely review user-generated complaints alleging that certain content violates the law or company policies, (2) failed to notify content creators about the reasons for removal of content or failed to follow an appeals process, or (3) failed to publish a bi-annual report detailing removal practices.[149]

Further proposed legislation, Representative Steube's (R-FL) Curbing Abuse and Saving Expression in Technology (CASE-IT) Act, would regulate viewpoint discrimination by the platforms by classifying interactive service providers as information content providers and removing their CDA 230 immunity any time their content moderation "reasonably appears to express, promote, or suppress a discernible viewpoint for a reason that is not protected from liability" under the Good Samaritan clause.[150]

The "Promoting Rights and Online Speech Protections to Ensure Every Consumer is Heard Act" (PRO-SPEECH Act) from Senator Wicker (R-MS) would prohibit large Internet platforms from blocking access to "lawful content, application, service, or device that does not interfere with the internet platform's functionality or pose a data privacy or data security risk to a user."[151] The PRO-SPEECH Act also would prohibit all Internet platforms from discriminating

[147] PACT Act, S. 797, § 3(4).
[148] *Id.* § (5)(g)(1)(A).
[149] *Id.*
[150] Curbing Abuse and Saving Expression In Technology Act, H.R. 285, 117th Cong. (2021).
[151] Promoting Rights and Online Speech Protections to Ensure Every Consumer is Heard Act, S. 2031, 117th Cong., §§ 8, 2, (2021) [hereinafter PRO-SPEECH Act]. "Large internet platforms" are those boasting over 100 global active users or $500 million in annual revenue, including both social media sites and cloud computing services. See S. 2031 § 8(6).

based on "racial, sexual, religious, political affiliation, or ethnic grounds,"[152] and would charge the Federal Trade Commission with regulating "unfair methods of competition," particularly large internet platforms blocking other platforms from using large platforms' services or committing "unreasonable discrimination" against competitors.[153] In order to enforce these rules, the PRO-SPEECH Act would allow platform users to submit complaints of violations to the Federal Trade Commission and require the platforms to respond.[154] The Act would also mandate new disclosures from large Internet platforms regarding, among other things, content curation and modification, access to cloud computing services, platform self-proclamation as "publisher[s]," and data privacy.[155]

Finally, some proposed legislation would almost completely abrogate CDA 230 immunity. Senators Graham (R-SC), Hawley (R-MO), and Blackburn (R-TN) have introduced a bill to entirely repeal CDA 230 and to strike its references from other parts of the U.S. Code.[156] In the House, the Protecting Constitutional Rights From Online Platform Censorship Act introduced by Rep. DesJarlais (R-TN) would strike the Good Samaritan provision from CDA 230 and would make it illegal for interactive service providers to "take an action to restrict access to or the availability of 'protected material' of a user of such platform."[157] At present, the Act does not specify whether algorithmic content moderation would fit the definition of "tak[ing]

[152] Id. § 3.
[153] Id. § 4.
[154] Id. § 6. Responses would take the form of "reparations" for the injuries alleged or written responses to the Federal Trade Commission. See S. 2031 § 6(c)(3-4).
[155] Id. § 5. Small internet platforms would only be obligated to make these disclosures if the Federal Trade Commission determined that the benefits of a small platform's participation outweighed its costs.
[156] S. 2972, 117th Cong. (2021).
[157] Protecting Constitutional Rights From Online Platform Censorship Act, H.R. 83, 117th Cong. § (2)(a)(2), (2021).

an action."[158] "Protected material" is defined as "material that is protected under the Constitution or otherwise protected under Federal, State, or local law."[159] The proposed Act would create a private right of action for users whose protected content was restricted, with allowable relief ranging from $10,000 to $50,000.[160]

State Legislation

In addition to the federal legislation proposed above, legislation to regulate social media platforms has been introduced in all 50 states.[161] Many of these bills are titled the "Stop Social Media Censorship Act (SSMCA)" and are based on a model bill.[162] Florida and Texas have taken the lead in enacting such legislation (and in having such legislation struck down), as discussed below.

Florida's Senate Bill 7072, titled The Stop Social Media Censorship Act, was signed into law by Florida governor Ron DeSantis on May 24, 2021.[163] The Act characterizes dominant social media platforms as constituting the "new public town square,"[164] and provides that they should accordingly be regulated as common carriers. The Florida law would impose various transparency and other due process-type requirements on the platforms and prohibit them from censoring journalists or candidates for office.[165] Specifically, the legislation would require major

[158] Likewise, "platform" is not defined in the proposed legislation, making the term potentially inconsistent with the "interactive service provider" that appears elsewhere in CDA 230.
[159] *Id.* § (2)(a)(2).
[160] *Id.*
[161] *See* STOP SOCIAL MEDIA CENSORSHIP, *supra* note 122.
[162] *See id.*
[163] *See Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, THE OFFICE OF RON DESANTIS (May 24, 2021), https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/.
[164] *See* FLA. STAT. § 501.2041 (1)(4) (2021).
[165] See Eric Goldman, *Florida Hits a New Censorial Low in Internet Regulation (Comments on SB 7072)*, TECH AND MARKETING L. BLOG (June 3, 2021), https://blog.ericgoldman.org/archives/2021/06/florida-hits-a-new-censorial-low-in-internet-regulation-comments-on-sb-7072.htm.

social media platforms:[166] (1) to make public all the criteria they use to make decisions regarding deplatforming and shadow banning;[167] (2) to provide users, upon request, with data on how many people saw their post;[168] (3) to provide users with notice when they or their content are deplatformed or shadow banned (whether via human or algorithmic moderation) and such notice must include a "thorough" rationale explaining why the content was censored and an explanation of how the content was flagged or how the platform otherwise became aware of such content;[169] (4) to make all of the algorithms they use to sort content on users' newsfeeds public; (5) to allow the user the ability to opt out of such algorithms;[170] and (6) to provide annual notices to remind users of the company's deplatforming policies.[171] In addition, the law would prohibit a social media platform from (7) barring from its site any candidate for public office or using post-prioritization algorithms on users who qualify as candidates for public office or elected public officials;[172] and (8) censoring or deplatforming or otherwise acting on the content of a "journalist enterprises"[173] (except if the content the platforms seek to censor is considered obscene).[174] The Act provides that both the state of Florida and private individuals have legal recourse against

[166] Platforms subject to regulation under the law are those that either (1) make over $100 million a year in gross annual revenues or (2) have over 100 million monthly participants globally. *See* § 501.2041(2)(g)(4)(a)–(b).
[167] *See* FLA. STAT. § 501.2041(2)(a)–(b) (2021).
[168] *See* § 501.2041(2)(e)(1)–(2).
[169] § 501.2041(3)(a)–(d).
[170] *See* § 501.2041(2)(f)(2).
[171] *See* § 501.2041(2)(g).
[172] *See* § 501.2041(2)(h).
[173] *See* § 501.2041(2)(i). A "journalistic enterprise" is defined as one that (1) "publish[es] in excess of 100,000 words available online with at least 50,000 paid subscribers or 100,000 monthly active users"; (2) "publishes 100 hours of audio or video available online with at least 100 million viewers annually"; (3) "operate[s] a cable channel that provides more than 40 hours of content per week to more than 100,000 cable television subscribers"; or (4) "operate[s] under a broadcast license issued by the Federal Communications Commission."§ 501.2041(1)(d)(1)–(4).
[174] *See* § 501.2041(2)(j).

platforms if they violate the terms of the law, with remedies of up to $100,000 per violation, along with punitive damages and equitable relief, available.[175]

Immediately after the bill's passage, the law was successfully challenged by NetChoice and the Computer and Communications Industry Association,[176] two powerful industry trade groups that count Twitter, Facebook, and Google as among their members.[177] The federal judge hearing the case enjoined the Florida law because he found that the challengers were likely to succeed on the merits of their First Amendment claim and that the law failed to meet either strict or intermediate scrutiny necessary to survive under the First Amendment.[178] The judge held that "[b]alancing the exchange of ideas among private speakers is not a legitimate governmental interest."[179] The Court also held that NetChoice had demonstrated its likelihood of success on the merits of proving certain provisions of the statute invalid as preempted by CDA 230.[180] Because social media platforms are immune from liability under CDA 230 if they moderate content on their platforms in good faith, the fact that Florida's statute would impose liability in similar situations makes it inconsistent with CDA 230 and thus preempted by federal law.[181]

Texas enacted similar legislation, motivated by similar concerns as those that motivated the Florida legislation. HB 20 is very similar to Florida's law, with the Texas legislature finding that "social media platforms are akin to common carriers."[182] This Texas law makes it a crime

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[175] *See* § 501.2041(6). *See also* Goldman, *supra* note 165 (describing the law's different provisions and the potential legal problems it might face when challenged in court).
[176] *See NetChoice and CCIA Sue the State of Florida Over SB 7072*, NETCHOICE (last visited Aug. 21, 2021).
[177] NETCHOICE, https://netchoice.org/ (last visited Aug. 21, 2021); COMPUT. & COMMC'N INDUS. ASS.'N, https://ccianet.org/about/members/ (last visited Aug. 21, 2021).
[178] NetChoice, LLC v. Moody, ___ F.Supp.3d ___, No. 4:21cv220-RH-MAF, 2021 WL 2690876 (N.D. Fla. June 30, 2021).
[179] *Id.*, 2021 WL 2690876, at *12.
[180] *Id.*, 2021 WL 2690876, at *5-6.
[181] *Id.*, 2021 WL 2690876, at *6.
[182] Tex. S.B. 12, 87th Leg., R.S. (2021).

for social media platforms with 100 million users in a calendar month to "censor" expression based on viewpoint or geographic area.[183] "Censor" is defined as "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to or otherwise discriminate against expression."[184] As with the recently enacted Texas abortion law[185] (and the Florida legislation discussed above),[186] the bill also creates a private right of action for citizens. If the social media platform does not stop censoring after the claim is successfully made, the social media platform can be found in contempt of court and ordered to pay "daily penalties sufficient to secure immediate compliance."[187] The bill provides that the Attorney General may bring an action for declaratory relief and injunction.[188]

In a case challenging Texas House Bill 20, a Texas federal judge enjoined the law from taking effect.[189] In this case, the judge rejected the characterization of social media platforms as common carriers, and instead likened them to newspapers engaging in editorial discretion—even when performing this discretionary content moderation by algorithm.[190] The Court then addressed the Texas law's requirement that social media providers disseminate objectionable content—objectionable to the social media provider—and the law's limitation on social media providers' editorial discretion.[191] The judge held that these requirements violate the First

[183] *See id.*
[184] *Id.*
[185] Tex. S.B. 8, 87th Leg., R.S. (2021).
[186] Fla. S.B. 7072, 2021 Leg., R.S. (2021).
[187] *See id.*
[188] *See id.*
[189] *See* NetChoice, LLC v. Paxton, ___ F.Supp.3d ___, 1:21-CV-840-RP, 2021 WL 5755120 (W.D. Tex Dec. 1, 2021).
[190] *See id.*, 2021 WL 5755120, at *6; see also Eric Goldman, *Texas Enacts Social Media Censorship Law to Benefit Anti-Vaxxers & Spammers*, TECH AND MARKETING L. BLOG (Dec. 2, 2021), https://blog.ericgoldman.org/archives/2021/12/court-enjoins-texas-attempt-to-censor-social-media-and-the-opinion-is-a-major-development-in-internet-law-netchoice-v-paxton.htm.
[191] *See* NetChoice, LLC v. Paxton, 2021 WL 5755120, at *8-11.

Amendment,[192] because the compelled disclosures were "inordinately burdensome."[193] Between the compelled speech,[194] the unduly burdensome nature of the statute's requirements,[195] the chilling effect that the threat of lawsuits under the statute created,[196] and the fact that the statute imposes content-based, viewpoint-based, and speaker-based restrictions,[197] the statute was subject to strict scrutiny under the First Amendment.[198] The court further held that the statute failed to survive strict scrutiny because the government interests at stake are not compelling and the statute is not narrowly tailored.[199] Thus, the court found that the challengers were likely to succeed on the merits, and enjoined the Texas law.[200]

The Constitutionality of Regulations Restricting the Substantive Dimensions of Dominant Social Media Platforms' Content Moderation

Several provisions of the proposed (and enacted) legislation discussed above seek to impose restrictions on the *substantive* dimensions of the dominant social media platforms' content moderation decisions, such as obligations that prevent the platforms from engaging in viewpoint discrimination or prohibit them from censoring or deplatforming candidates for public office or journalistic enterprises.[201] These obligations bear some resemblance to the nondiscrimination obligations that the U.S. has historically imposed on "common carriers"—and such provisions indeed seek to characterize social media platforms as common carriers in laying

[192] *Id.*, 2021 WL 5755120, at *9.
[193] *Id.*, 2021 WL 5755120, at *11.
[194] *Id.*, 2021 WL 5755120, at *9.
[195] *Id.*, 2021 WL 5755120, at *11.
[196] *Id.*, 2021 WL 5755120, at *10.
[197] *Id.*, 2021 WL 5755120, at *13.
[198] *See id.*
[199] *Id.*, 2021 WL 5755120, at *13-14.
[200] *Id.*, 2021 WL 5755120, at *15.
[201] See discussion supra pp. 28-39.

the foundation for such regulation.[202] As Justice Thomas explained in his opinion in the *Knight Foundation* case discussed above,[203] common carriage doctrine has historically imposed obligations on privately-owned speech conduits to facilitate the expression of others and to "ensure open, nondiscriminatory access to the means of communication."[204] Notwithstanding the private ownership of such entities, the common carriage doctrine prohibits these entities from exercising the discretion to determine which communication to facilitate and which to censor, thereby foreclosing arguments that such conduits enjoy predominant First Amendment rights of their own to exercise editorial discretion.[205] Telephone companies, for example, have long been legally obligated to connect all (legal) telephone calls and to otherwise facilitate communications.[206] From the early years of the United States, the government has imposed obligations on private entities engaged in transportation, communications, and other important public service functions to facilitate the free flow of commerce and information free of censorship or discrimination.[207] Through the common carriage doctrine, the government has bridged the gap between public and private entities and imposed duties on entities that provide important communication functions for the benefit of the public.[208] As such:

> [T]he law of common carriage protects ordinary citizens in their right to communicate. [This doctrine] rests on the . . . assumption that, in the absence of regulation, the carrier will have enough monopoly power to deny citizens the right to communicate. The rules against discrimination are designed to ensure access to

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[202] *See id.*
[203] Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring) (emphasis added, citations and internal quotations omitted).
[204] Denver Area Educ. Telecomms. Consortium v. F.C.C., 518 U.S. 727, 798-99 (1996) (Kennedy, J., concurring).
[205] *See id.* at 783.
[206] See Tim Wu, *A Brief History of American Telecommunications Regulation*, 5 Oxford International Encyclopedia of Legal History, 95, 96 2009 (2007).
[207] *See* Primrose v. Western Union Telegraph Co., 154 U.S. 1, 14 (1894); Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV.. 871, 878-879 (2009).
[208] *See infra*, notes 209–227 and accompanying text.

> the means of communication . . . . [T]his element of civil liberty is central to the law of [common carriage].[209]

Individuals who rely on common carriers to facilitate their communications "benefit from the democratic egalitarianism that characterizes the nondiscriminatory access principle associated with common carrier law."[210] As such, the common carriage model is "the paradigm of mandatory access to a communications medium."[211]

From the beginning of the modern communications era in the 1930s, the Federal Communications Commission (F.C.C.) imposed obligations on privately owned providers of interstate communications services like telephone and telegraph companies to facilitate the transmission of all legal content.[212] Congress overhauled the regulation of telecommunications providers in the Communications Act of 1934, which charged the newly-created F.C.C. with regulatory authority over the communications providers of the day (telegraph and telephone companies), regardless of whether they enjoyed monopoly power, and imposed additional common carriage regulations on such providers.[213] Under the 1934 Act, common carriers were charged with the obligation to serve as conduits for all (legal) content originated by others.[214] Unlike newspaper publishers, for example, common carriers are not entitled to engage in editorial discretion to determine which content to transmit and which to censor.[215] As such,

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[209] ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 106 (1983).
[210] Jerome A. Barron, *The Telco, The Common Carrier Model, and The First Amendment – The "Dial-A-Porn" Precedent*, 19 RUTGERS COMPUT. & TECH. L. J. 371, 383(1993).
[211] *Id.* at 383.
[212] *See* 47 U.S.C. § 151 (1934).
[213] *See* Am. Tel. & Tel. Co. v. U.S., 299 U.S. 232 (1936). Under the Communications Act of 1934, common carriage obligations were imposed upon companies that were (1) engaged in interstate communication, (2) by wire, (3) by any entity engaged as a common carrier for hire. The Act's definition of common carrier looked to "whether the carrier holds itself out indiscriminately to a class of persons for service," regardless of whether the entity enjoyed monopoly power.
[214] Sable Communications, Inc. v. F.C.C., 492 U.S. 115 (1989).
[215] *See* Denver Area Educ. Telecommunications Consortium v. F.C.C., 518 U.S. 727, 739 (1996) (plurality opinion).

common carriers are distinct from publishers or other editors who enjoy their own First Amendment rights to exercise editorial discretion in their selection and exclusion of content.[216] Throughout the mid-twentieth century, common carriage/nondiscrimination obligations were applied to traditional conduits of communication like telephone companies.[217] Under telecommunications law, common carriers are prohibited from making "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . . or to make or give any undue or unreasonable preference or advantage to any particular person [or] class of persons . . . or to subject any particular person [or] class of persons . . . to any undue or unreasonable prejudice or disadvantage."[218] Accordingly, under the paradigm common carriage model, conduits for communication like telecommunications providers do not themselves enjoy independent First Amendment rights; rather, they are required to facilitate the free speech interests of others, without discrimination.[219]

In a number of decisions in the 1980s, courts made clear that the common carriage doctrine allows carriers some discretion to refuse to carry certain categories of content.[220] For example, in *Carlin Communications v. Mountain States Telephone & Telegraph*,[221] a provider of sexually-themed messages sought to require the regional telephone company to carry its messages on its 976 network, through which users could pay a special fee in order to access such

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[216] *See, e.g.*, Barron, *supra* note 210, at 377, 389 (explicating the dichotomy between the publisher/broadcaster model and the common carrier model).
[217] Tim Wu*, A Brief History of American Telecommunications Regulation,* 5 Oxford International Encyclopedia of Legal History, 95, 104 2009 (2007).
[218] 47 U.S.C.A. §202(a).
[219] *Id.*
[220] *See* Christopher S. Yoo*, The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy,* 1 J. FREE SPEECH L. 463, 492 (2021).
[221] 827 F.2d.1291 (9th Cir. 1987), cert. denied, 485 U.S. 1029 (1988).

content.[222] Although the district court held that the telephone company, as a common carrier, was required to carry all legal content without discrimination,[223] the Ninth Circuit reversed,[224] holding that the telephone company enjoyed the right to exercise its "business judgment about what messages, even lawful ones, it will carry."[225] In a similar case involving the same content provider, in *Carlin Communication v. Southern Bell Telephone and Telegraph,* the Eleventh Circuit also held that the regional telephone company could exercise its "business judgment" to refuse to carry Carlin's sexually-themed messages via its dial-it medium.[226] These decisions suggest that regulating a communications medium as a common carrier does not mean that the entity is prohibited from excluding certain categories of content (like adult content) in the exercise of their business judgment.

In sum, the common carriage doctrine, which has long been imposed on privately-owned conduits for communication, requires that these conduits carry the communication of others without discrimination. Although the doctrine has historically prohibited common carriers from exercising their own editorial discretion, in certain instances common carriers have been permitted to decline to carry certain categories of content (like adult content) where such carriage would be inconsistent with their "business interests."[227]

The U.S. government has also imposed obligations on other types of powerful conduits for expression in order to facilitate free speech interests and First Amendment values, as I

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[222] Carlin Comm'n v. Mountain States Tel. & Tel., 827 F.2d. 1291 (9th Cir. 1987), *cert. denied,* 485 U.S. 1029 (1988).
[223] 827 F.2d at 1293.
[224] *Id.*
[225] *Id.* at 1294.
[226] 802 F.2d 1352 (11th Cir. 1986). *See also* Network Communications v. Michigan Bell Telephone Co., 703 F. Supp. 1267 (E. D. Mich. 1989) (citing with approval circuit court decisions creating exception to common carriage obligations and holding that telephone companies were permitted to exercise "business discretion and judgment" to decline to carry legal, sexually-themed messages).
[227] *See* Carlin Comm'n, 827 F.2d. at 1293.

discuss below. In the early years of the broadcast mediums, the F.C.C. took the position that "one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day."[228] In order to achieve these goals, the F.C.C. adopted a series of regulations that together came to be known as the "fairness doctrine," which required broadcasters to serve as fiduciaries for the public interest and which granted a conditional right of access to certain members of the public on certain matters of public importance.[229] The fairness doctrine was designed to ensure that broadcasters' coverage of controversial issues of public importance was balanced and fair.[230] Broadcasters, which were conceptualized under the fairness doctrine as public trustees, were required to afford a reasonable opportunity for discussion of competing points of view and controversial issues of public importance, and were prohibited from using their licenses purely to serve their private interest.[231] The fairness doctrine further required that broadcasters actively seek out issues of importance to their local community and to air programming that focused on these issues.[232] The F.C.C. in 1971 established rules requiring broadcasters to report on their efforts to provide programming on issues of concern to their community.[233]

In its central case upholding the fairness doctrine, *Red Lion Broadcasting v. F.C.C.*,[234] the Supreme Court ruled on a challenge to the constitutionality of the fairness doctrine.[235] The

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[228] *See* Editorialization by Broadcast Licensees, Report of the Commission, 13. F.C.C. R. 1246, 1249 par.6 (1949).
[229] *See* Johnathan Mallamud, *The Broadcast Licensee as Fiduciary: Toward the Enforcement of Discretion*, 1973 Duke L.J. 89, 106 (1973).
[230] *See* Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 111 (1973).
[231] *Id.*
[232] *Id.*
[233] 27 F.C.C.2d 650 (1971).
[234] 395 U.S. 367 (1969).
[235] *Id.* at 370.

challenged aspects of the fairness doctrine required broadcast stations to provide notification and a right of access—an opportunity to respond—when "during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity, or like personal qualities of an identified person or group."[236]

Broadcasters challenged the fairness doctrine, contending that the regulations abridged their First Amendment right to free speech and free press.[237] In rejecting this challenge—and, importantly for purposes of this analysis—in prioritizing the free speech interests of members of the public over the free speech interest of the broadcasters, the Supreme Court explained that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[238] Because a limited number of broadcast frequencies exist, the Court held, the state is justified in treating the chosen licensees as proxies or fiduciaries for members of the public at large.[239] In balancing the First Amendment right of the broadcasters to select what speech to facilitate against the rights of the viewers and listeners to be informed on a broad range of public issues, the Court held that the rights of members of the public—the viewers and listeners—were paramount.[240] The Court placed primacy on the role of free expression in facilitating democratic self-government and expressed hostility toward restrictions of free speech by public or private speech conduits:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. Speech concerning public affairs is more than self-expression; it is the essence of self-government. It is the right of the public to receive suitable access

[236] *Id.* at 373.
[237] *Id.* at 386.
[238] *Id.*
[239] *Id.* at 389.
[240] *Id.* at 390.

> to social, political, esthetic, moral, and other ideas and experiences which is crucial here.[241]

With respect to this particular marketplace of ideas, the Court expressed serious doubt about whether an unregulated market would facilitate speech conducive to discussion and debate on matters of public importance, and viewed with skepticism a speech market dominated by the "private interests."[242] The Court emphasized the First Amendment goal of "producing an informed public capable of conducting its own affairs"[243] and was skeptical about whether this goal could be achieved in a market dominated by private interests:

> Freedom of the press . . . does not sanction repression of that freedom by private interests. . . . The right of free speech of a broadcaster . . . does not embrace a right to snuff out the free speech of others. . . .[244]

The *Red Lion* Court gave little credence to the claims of the broadcasters that they themselves enjoyed the First Amendment right to use their frequencies to broadcast the content of their choosing and to deny access to whomever they chose.[245] The Court had no difficulty subordinating the First Amendment rights of the broadcasters to the First Amendment rights of prospective speakers and members of the public, and chose to limit broadcasters' free speech rights in order to advance the preeminent First Amendment goal of "producing an informed public capable of conducting its own affairs."[246]

This trend of U.S. regulators imposing obligations on communications conduits to advance free speech interests of members of the public was extended through "must carry"

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[241] *Id.* at 390.
[242] *Id.* at 392.
[243] *Id.*
[244] *Id.* at 394 (emphasis added).
[245] *See id.* ("It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern.")
[246] *Id.* at 392.

obligations imposed by the F.C.C. on cable systems operators, which were also upheld by the Supreme Court against constitutional attack by the operators.[247] As in its decision upholding the constitutionality of the fairness doctrine, the Court in its decision upholding the constitutionality of must carry obligations balanced the free speech interests of the cable operators against the free speech interests of members of the public, and held that the free speech interests of members of the public were paramount.[248] The 1994 case of *Turner Broadcasting System v. F.C.C.* involved a challenge brought by cable systems operators to the "must carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the Cable Act).[249] This Act required cable systems operators to carry the signals of certain local broadcast television stations, without charge, on a continuous, uninterrupted basis and in the same numerical channel position as when these programs were broadcast over the air.[250] In passing the Cable Act, Congress expressed concern about the concentration of economic power in the cable industry and about how this concentration of power endangered the ability of local broadcast stations to compete for viewing audiences.[251] Congress found that local broadcast television was "an important source of [content] . . . critical to an informed electorate"[252] and that regulation was necessary to ensure that the electorate continue to receive content essential to produce well-informed citizens on matters of public concern.

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[247] *See* Turner Broadcasting Sys. v. F.C.C. 512 U.S. 622 (1994); Turner Broadcasting Sys. v. F.C.C., 520 U.S. 180 (1997).
[248] *See id.* at 663 ("assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order").
[249] *Id.*
[250] *Id.* at 630. Section 4 of the Act imposed must-carry obligations with respect to "local commercial television stations" and required cable systems with more than twelve active channels and more than three hundred available channels to set aside up to one-third of their channels for commercial broadcast stations requesting carriage. Section 5 of the Act imposed must-carry obligations with respect to non-commercial educational television stations.
[251] *See id.* at 623.
[252] *Id.* at 648.

The cable systems operators—like social media platforms of today—argued that these regulations unconstitutionally infringed their free speech rights to make decisions about which content to carry. While ultimately upholding key provisions of the statute, the Court took the occasion to refine and clarify its basis for upholding government intervention in the broadcast market in *Red Lion*.[253] While declining to hold that the economic sources of market dysfunction at issue in *Turner* justified the same reduced scrutiny that the Court applied to the regulations in *Red Lion*, the Court did find that certain features of the cable television market justified state intervention into this market (and less-than-strict scrutiny of such state intervention).[254] The Court also held that in balancing the First Amendment rights of the cable operators against those of members of the public, the First Amendment rights of members of the public were paramount.[255] The Court rejected the analogy that the cable operators sought to draw between their First Amendment rights and those of newspaper publishers.[256] In opposing the statute, cable operators had cited the Court's holding in *Miami Herald v. Tornillo,*[257] in which the Court struck down a right of reply requirement imposed upon newspapers and held that this requirement unconstitutionally intruded upon the editorial prerogative of the newspapers. Cable operators claimed that they enjoyed free speech rights and editorial rights that were analogous to those enjoyed by newspaper publishers, and that the same strict scrutiny the Court applied to the regulations in *Tornillo* were applicable to them.[258] The Court disagreed and held that although both newspapers and cable operators may enjoy economic monopoly status in a given

[253] *See id.* at 638-640.
[254] *See id.* at 640.
[255] *See supra* note 248 and accompanying text.
[256] *See* Turner Broadcasting Sys., 512 U.S. at 655.
[257] 418 U.S. 241 (1974).
[258] *See* Turner Broadcasting Sys., 512 U.S. at 653.

geographical locale, the cable operator enjoys much greater control over access to its medium and much greater power to affect the free speech rights of members of the public:

> The potential for abuse of this private power over a central avenue of communication cannot be overlooked. Each medium of expression … must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems. The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.[259]

The Court expressed concern about cable operators' gatekeeper control over the content they made available to members of the public and viewed such control over a "central avenue of communication" as a sufficient basis for justifying government intervention into this medium of expression.[260] Because of the control that cable operators exercised over this "critical pathway of communication" and the consequences of such control for the "free flow of information and ideas," the Court concluded that intermediate, not strict, scrutiny was the proper level of scrutiny to apply to the regulations in this case.[261] Such scrutiny required the Court to consider whether the speech regulations at issue served an important government interest and that the restriction of First Amendment freedoms of the cable systems operators was no greater than necessary to achieve that interest.[262]

In applying this intermediate scrutiny, the Court identified several important government interests that were advanced by the Act, including promoting the widespread dissemination of information from a multiplicity of sources and promoting fair competition in the market for communications at issue.[263] In particular, the Court recognized the government purpose "of the

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[259] *Id.* at 657.
[260] *Id.*
[261] *Id.* at 662.
[262] *Id.* at 662-63.
[263] *Id.* at 624.

highest order" in ensuring public access to a multiplicity of information sources.[264] On this point, the Court explained that "it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[265] The Court specifically explained that the First Amendment "does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."[266] The majority approved of the state's intervention into this market for speech to protect the free flow of information and ideas and to secure broad public exposure to a multiplicity of information sources—values that were central to the First Amendment.[267] Reviewing the case after remand, the Court, per Justice Kennedy, credited evidence that the potential harms Congress had sought to remedy were real, that the must-carry regulations served the government's important interests directly and effectively, and that the regulations did not burden substantially more of the cable operators' speech than necessary to further these interests.[268]

In his concurring opinion, Justice Breyer addressed the contention that the must carry regulations impermissibly restricted the free speech rights of the cable operators. Breyer acknowledged that the must carry regulation "extracts a serious First Amendment price—amounting to the suppression of speech . . . by . . . interfer[ing] with the protected interests of the cable operators to choose their own programming."[269] Yet, he explained, there were other, weightier First Amendment interests on the other side of the balance, the side of the public—

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[264] *Id.* at 663.
[265] *Id.* at 663-64 (emphasis added).
[266] *Id.* at 657.
[267] *See id.* at 663.
[268] Turner Broadcasting Sys. v. F.C.C., 520 U.S. 180, 209, 213, 215 (1997).
[269] Turner Broadcasting Sys. v. F.C.C., 520 U.S. 180, 226 (1997) (Breyer, J., concurring).

namely, the statute's purpose of advancing the national communications policy of protecting "the widest possible dissemination of information from diverse and antagonistic sources":

> [This national communications] policy, in turn, seeks to *facilitate the public discussion and informed deliberation, which, as Justice Brandeis pointed out many years ago, democratic government presupposes and the First Amendment seeks to achieve*… Indeed, *Turner* [below] rested in part upon the proposition that assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.[270]

Breyer concluded that although there were important First Amendment interests "on both sides of the equation," the regulation struck a reasonable balance between potentially speech-restricting consequences for cable operators and speech-enhancing consequences for members of the public.[271] In short, in upholding the constitutionality of the must carry regulations, the Court approved of regulation of speech intermediaries where the intermediaries exercised significant control over the content accessible by members of the public.[272] In so doing, the Court recognized the importance of facilitating public discussion and informed deliberation, which "democratic government presupposes and the First Amendment seek to achieve."[273]

Treatment of Viewpoint-Based and Speaker-Based Discrimination in First Amendment Jurisprudence

The nondiscrimination, fairness, and must carry obligations that were constitutionally imposed on private communications conduits under the common carriage and fairness doctrines and the must carry regulations provide some support for proposed regulations of today's dominant social media platforms. In addition, as this section argues, the hostility that the

[270] 520 U.S. at 226-27 (Breyer, J., concurring).
[271] *Id.* at 227.
[272] *See id.* at 227-28.
[273] *Id.*

Supreme Court has expressed toward viewpoint discrimination and speaker-based distinctions in speech regulations provides support for provisions of platform regulation that aim to prohibit viewpoint-based and speaker-based discrimination by the platforms.

Under the Supreme Court's First Amendment jurisprudence, viewpoint discrimination in speech regulations is regarded as "the most pernicious of First Amendment sins"[274] and the most egregious type of discrimination[275]—even more egregious than regulations that embody content-based distinctions.[276] In addition, regulations that embody speaker-based discrimination are also viewed by the Court with substantial skepticism.[277] As the Court explained in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*,[278] regulations violate the First Amendment when they "den[y] access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."[279] While content-based distinctions are generally suspect and presumptively unconstitutional, regulations that restrict particular *viewpoints* are even more

[274] *See* DeCrane v. Eckart, 12 F.4th 586, 595 (6th Cir. 2021), (citing Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 515 U.S. 819, 829 (1995)).
[275] *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject" the regulation's violation of Free Speech is blatant and "thus an egregious form of content discrimination."). See also Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) (holding that a public school regulation denying access to school premises to religious organizations solely because the speech the organization sought to express addressed a topic from a religious perspective violated the First Amendment).
[276] A regulation is viewpoint-based or viewpoint-discriminatory when it singles out speech for disfavored treatment because of the point of view or perspective embodied in the speech. See Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Martinez, 561 U.S. 661, 694 (2010). In contrast, a regulation is content-based, but not viewpoint discriminatory, when it restricts speech on a given subject matter and does not seek to regulate only some within it. See, e.g., Kevin Francis O'Neill, *Viewpoint Discrimination*, THE FIRST AMENDMENT ENCYCLOPEDIA (Sept. 2017), https://www.mtsu.edu/first-amendment/article/1028/viewpoint-discrimination.
[277] *See* Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 658 (1994) ("[S]peaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say).").
[278] 473 U.S. 788 (1985).
[279] *Id.* at 806.

blatantly and presumptively unconstitutional.[280] As the Court held in *Rosenberger v. Rector and Visitors of Univ. of Va.*, when a regulation "targets not subject matter, but particular views taken by speakers on a subject," the regulation embodies "an egregious form of content discrimination" and is (even more so) presumptively unconstitutional.[281] In short, for the past half-century, the Court has regarded viewpoint discrimination as constituting one of the most serious and egregious affronts to First Amendment values.[282]

Regulations that embody speaker-based distinctions are also constitutionally suspect under the Court's First Amendment jurisprudence.[283] Although the Court has recognized that some categories of speakers—such as students, government officials or public employees—are accorded reduced First Amendment protections,[284] in general, speaker-based distinctions require

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[280] *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[281] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995). The Court recently reiterated its hostility to regulations embodying viewpoint discrimination in two cases construing the Lanham Act, in which it struck down the Act's "disparagement" clause in Matal v. Tam, 582 U.S. ___, 137 S.Ct. 1744 (2017), and the Act's "immoral or scandalous" clause in Iancu v. Brunetti, 588 U.S. ___, 139 S.Ct. 2294 (2019), which granted the U.S. Patent and Trademark Office the power to deny trademark registrations if the marks disparaged individuals or groups or if they were immoral or scandalous. In striking down the disparagement clause provision, the Court held that the provision embodied impermissible viewpoint discrimination because "[g]iving offense is a viewpoint," 137 S.Ct. at 1763 (Alito, J., plurality opinion), and because the disparagement clause "reflect[ed] the Government's disapproval of a subset of messages it finds offensive, [which] is the essence of viewpoint discrimination." *Id*. at 1766 (Kennedy, J., concurring in part and concurring in the judgment). In striking down the "immoral or scandalous" provision, the Court found that this prohibition was also discriminatory based on viewpoint in the same manner as *Matal*. The Court reasoned that, under the "immoral" and "scandalous" provisions, the Office was authorized to approve marks "that champion society's sense of rectitude and morality," while denying marks that "denigrate those concepts." 139 S.Ct. at 2299. Because the "immoral or scandalous" provision centered on whether the mark would be met by societal approval or cause offense, *id.* at 2300, the provision was viewpoint discriminatory and therefore unconstitutional.

[282] *See, e.g.*, Cornelius, 473 U.S. at 806; Rosenberger, 515 U.S. at 829.

[283] *See* Turner Broadcasting Sys. v. F.C.C. 512 U.S. 622, 658 (1994).

[284] *See* Asaf Wiener, *A Speaker-Based Approach to Speech Moderation and First Amendment Analysis*, 31 STAN. L. & POL'Y REV. 187, 194-96 (2020). *See also* Pickering v. Board of Education, 391 U.S. 563 (1968) (stating that a public teacher's speech can be limited consistent with the First Amendment when such restriction is reasonable after balancing the interest of the teacher as a citizen commenting on matters of public concern and the interests of the State as an employer promoting efficiency of public services through its employees); Nevada Commission on Ethics v. Carrigan, 564 U.S. 117 (2011) (treating public officials as less protected speakers when upholding a law prohibiting official from voting on or

careful scrutiny because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content,"[285] and even when they are not, they are still carefully scrutinized by the Court. *In Turner Broadcasting System, Inc. v. FCC*,[286] for example, the Court held that "speaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)."[287] Further, in *Citizens United*,[288] the Court held that "speaker-based regulation of speech—or discrimination based on the identity of the speaker—violates the First Amendment," regardless of whether the regulation was content-neutral or content-based.[289] More recently, the Court in its decisions in *Sorrell v. IMS Health*[290] and *Reed v. Gilbert*[291] reiterated that heightened scrutiny is required when a regulation imposes speaker-based and content-based restrictions. In particular, the Court has expressed skepticism of speaker-based restrictions because such restrictions risk enabling only speech that is consistent with the State's preferred views.[292]

In short, the Court's First Amendment jurisprudence makes clear that regulations that discriminate based on viewpoint are presumptively unconstitutional, and regulations that embody speaker-based distinctions are subject to heightened scrutiny, in part because they risk being viewpoint-based and/or content-based.[293] Accordingly, legislative efforts to restrict the dominant

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advocating for a measure where the official has a conflict of interest); Morse v. Frederick, 551 U.S. 393 (2007) (allowing the suspension of a public high school student for the student's speech off-campus yet at a school event).

[285] *See* Reed v. Town of Gilbert, 576 U.S. 155, 170 (2015) (quoting Citizens United v. Federal Election Com'n, 558 U.S. 310, 340 (2010)).

[286] 512 U.S. 622, 658 (1994).

[287] Turner Broadcasting Sys., 512 U.S. at 658.

[288] 558 U.S. 310 (2010).

[289] Wiener, *supra* note 284 at 209.

[290] 564 U.S. 552 (2011).

[291] Reed v. Town of Gilbert, 576 U.S. 155 (2015).

[292] *See* 138 S.Ct. at 2378.

[293] 576 U.S. at 168-69.

social media platforms from engaging in viewpoint-based discrimination or speaker-based distinctions may be construed by courts as advancing the compelling government interests of protecting core free speech and First Amendment values.

The Constitutionality of Regulations Restricting the Procedural Dimensions of Dominant Social Media Platforms' Content Moderation

In addition to substantive components of speech regulations that regulators have sought to impose on dominant social media platforms (such as those restricting viewpoint or speaker-based discrimination), several provisions of proposed legislation impose procedural and due process-type requirements on the platforms.[294] As discussed above, such legislative provisions require the platforms to provide notice to their users when their content is removed (including notice regarding the community guideline or term of service that the user allegedly violated); to provide users with an opportunity to appeal adverse moderation decisions; and to issue public disclosures and guidelines related to their content moderation decisions, removal actions, etc.[295] Such provisions should be construed by courts as content-neutral—not content-based—restrictions on the speech of the platforms, and therefore should be subject to less than strict scrutiny, under which these provisions should be upheld if they advance an important or substantial government interest in a narrowly tailored manner that does not substantially burden more speech than necessary. These regulations advancing due process-type interests should be held to satisfy the applicable intermediate scrutiny, as this Article discusses below.

Regulations requiring the disclosure of transparency reports and changes to social media platforms' Terms of Service should be viewed as content-neutral regulations advancing

[294] *See* discussion of proposed legislation *supra* pp. 27-39.
[295] *Id.*

important government interests in protecting due process, fairness, the free flow of information on social media platforms, and the informational interests of social media consumers. To determine whether a regulation is content-based, courts must "consider whether a regulation of speech 'on its face' draws distinctions based on the message the speaker conveys."[296] The Court has also determined that "if a law applies to particular speech because of the topic discussed or the idea or message expressed," then it is also content-based.[297] However, neither of these situations arises in the context of requiring due process and procedural mechanisms within social media platforms' content regulation schemes. These requirements apply irrespective of the message the social media platform seeks to convey.[298] If the proposed legislation's requirements do not depend on a consideration of the topic, idea, or message expressed by a speaker, they should not be considered content-based.[299] Instead, courts should find these requirements to be content-neutral because "[t]he principal inquiry in determining content-neutrality in speech cases generally . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[300]

Content-neutral regulations of speech must be narrowly tailored and serve a substantial or important government interest.[301] These proposed regulations of social media platforms appear to meet the requirements of intermediate scrutiny because the government's important interest here is to protect free speech on the platforms.[302] Courts should also approve the disclosure

[296] Reed v. Town of Gilbert, 576 U.S. 155, 163, 164, 166 (2015).
[297] *Id.*
[298] The DISCOURSE Act, 21st Century Foundation for the Right to Expression and Engage in Speech Act, the PRO-SPEECH Act, and the Platform Accountability and Consumer Transparency Act impose transparency and disclosure requirements. *See* discussion *supra* pp. 28-35.
[299] *See* Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335 (2020).
[300] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
[301] *See* McCullen v. Coakley, 573 U.S. 464, 486 (2014).
[302] *See* discussion of proposed legislations' purposes *supra* pp. 27-39.

requirements imposed by the proposed legislation. The Supreme Court has approved similar disclosure requirements in election contexts.[303] The Court upheld the disclosure requirements of the Bipartisan Campaign Reform Act because while they "may burden the ability to speak," they do not "prevent anyone from speaking."[304] In the proposed legislation under consideration, the important governmental interest is in advancing the due process rights of consumers of social media platforms.[305] For example, the disclosure of changes to a social media platform's terms of service is substantially related to ensuring that consumers are aware of the terms they are violating when their content is moderated by the social media platform.

In addition, to the extent that disclosure requirements compel speech, such regulations merely require factual and uncontroversial information about platforms' terms of service, similar to the disclosures considered and upheld in the foundational case of Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio.[306] In contrast, in National Institute of Family & Life Advocates v. Becerra,[307] the Court held that the disclosure requirement mandated by the state was unconstitutional because it altered the content of the crisis pregnancy center's speech.[308] The Court found in *NIFLA* that *Zauderer* did not apply because the disclosure requirement in *NIFLA* went beyond "purely factual and uncontroversial information about the terms under which … services will be available."[309]

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[303] *See* Buckley v. Valeo, 424 U.S. 1 (1976); McConnell v. Federal Election Com'n, 540 U.S. 93 (2003); Citizens United v. Federal Election Com'n, 558 U.S. 310 (2010).
[304] *Citizens United,* 558 U.S. at 366 (citing *McConnell*, 540 U.S. at 201).
[305] *See* discussion of proposed legislations' purposes *supra* pp. 27-39.
[306] 471 U.S. 626 (1985).
[307] 138 S. Ct. 2361 (2018) [hereinafter *NIFLA*]. In this case, the Court dealt with a California law requiring licensed pregnancy-related clinics to provide patients with notice of publicly-funded services, including abortion, and requiring unlicensed pregnancy-related clinics to disclose that they were not licensed. *Id.* at 2368-70.
[308] *Id.* at 2371. Since crisis pregnancy centers' goals are to dissuade women from choosing abortion, requiring them to also inform women of the availability of state-subsidized abortions directly countered the centers' speech and thus altered the content of their speech. *Id.*
[309] *Id.* at 2372 (citing *Zauderer*, 471 U.S. at 651).

In requiring disclosures of social media platforms, the proposed regulations are limited to purely factual and uncontroversial information.[310] Requiring a social media platform to disclose its own terms of service to its consumers should not be considered as requiring the disclosure of "controversial" information. Further, such disclosure requirements are not unduly burdensome because some social media platforms voluntarily produce transparency reports that contain this information.[311] Thus, courts should hold that the disclosure requirements are not unduly burdensome under relevant First Amendment jurisprudence.[312]

Furthermore, these regulations advance the important government interests of advancing users' due process rights.[313] Shared commitments to due process principles, under the U.S. Constitution and the International Covenant on Civil and Political Rights (ICCPR), require that speech restrictions be imposed—whether by government entities or by powerful private speech regulators—in a manner that is clear, transparent, non-arbitrary, and that provides adequate notice to the affected users. [314] These commitments also require that rules restricting speech be implemented in a manner that is narrowly tailored to achieve the important interests supporting any such speech restrictions.[315] Major social media platforms should be required to adopt and implement procedural guidelines that protect the due process rights that are essential to

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[310] *See* discussion *supra* 28–39.
[311] *See* discussion *supra* pp. 28–39.
[312] *See NIFLA*, 138 S. Ct. at 2377 (describing that *Zauderer* standard requires that disclosure not be unjustified or unduly burdensome, and that they remedy a harm that is potentially real and not purely hypothetical).
[313] *See* discussion *supra* pp. 28–39.
[314] *See* International Covenant on Civil and Political Rights; these due process-type principles have also been made part of the Santa Clara Principles of Transparency and Accountability in Content Moderation, at https://santaclaraprinciples.org/ (prescribing that companies engaged in content moderation should, inter alia, provide notice to each user whose content is taken down or account is suspended about the reason for the removal or suspension and provide a meaningful opportunity for timely appeal of any content removal or account suspension.)
[315] *See* International Covenant on Civil and Political Rights, art. 19, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171.

democratic societies. Protecting due process rights is the first step in protecting and respecting human rights, which transnational corporations—as well as countries—have a duty to protect under the ICCPR.[316] As United Nations' Special Representative of the Secretary-General John Ruggie emphasized in his "Protect, Respect and Remedy" framework, business enterprises as well as nations have a duty to respect human rights.[317] An essential part of respecting human rights is respecting the due process rights of affected individuals.[318] Dominant social media platforms should be required to respect due process principles that are grounded in the free speech and due process jurisprudence of the International Covenant on Civil and Political Rights, and the United States Constitution.

A foundational component of widely shared due process principles is that, in democratic societies, individuals have a right to conduct their lives so as to conform their conduct and their expression to the dictates of governing laws and rules and so as to avoid violations of such laws and regulations.[319] This in turn requires that laws and regulations clearly and precisely indicate what expression is prohibited, so that individuals can steer clear of such expression.[320] Because of the paramount importance of freedom of expression to democratic societies, it is especially important that laws and rules restricting speech do so in a narrow and precise manner, to avoid creating a chilling effect on expression. Under U.S. First Amendment jurisprudence, laws restricting expression must be articulated in a manner that is clear, precise, and specific.[321] The

[316] *See* U.N. ESCOR, 54th Sess., Sub-Comm'n on the Promotion and Protection of Human Rights, Agenda Item 4 at 4, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).
[317] *See* Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. A/HRC/17/31.
[318] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).
[319] Papachristou v. Jacksonville, 405 U. S. 156, 162 (1972).
[320] *See id.*
[321] *See* Smith v. Goguen, 415 U.S. 566, 573 (1974).

U.S. Supreme Court has repeatedly held that laws restricting speech that are vague or overbroad are invalid.[322] The Supreme Court has also rejected as unconstitutional any system of censorship that reposits unbounded discretion in the decision-maker to determine whether or not speech is protected.[323] First, without reference to the substantive categories of which speech can constitutionally be deemed illegal, the U.S. Supreme Court has rejected—both on First Amendment and on Due Process grounds—laws that are framed in vague and imprecise terms because such laws fail to provide clear notice of what speech is prohibited and allow for government officials to exercise standardless discretion.[324] Regulations on speech must be crafted "with sufficient definiteness [so that] ordinary people can understand what is prohibited"[325] and "in a manner that does not encourage arbitrary and discriminatory enforcement."[326] The "requirement of clarity in regulation is essential to the protections provided by the Due Process Clause."[327] A law is unconstitutionally vague if persons "of common intelligence must necessarily guess at its meaning and differ as to its application."[328]

Laws that do not clearly and precisely define the proscribed content are constitutionally infirm because they are fundamentally unfair.[329] Such laws "trap the innocent by not providing fair warning" of what expression is prohibited and because they impermissibly delegate "basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[330] In particular, the U.S.

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[322] *See id.*; see also United States v. Williams, 553 U.S. 285, 292 (2008).
[323] See Shuttlesworth v. Birmingham, 394 U.S. 147, 153 (1969).
[324] *See* Kolender v. Lawson, 461 U.S. 352 (1983).
[325] *Id.* at 357 .
[326] *Id.*
[327] *Williams*, 553 U.S. at 304 .
[328] Connally v. General Construction Co., 269 U.S. 385, 391 (1926).
[329] *See* Grayned v. Rockford, 408 U.S. 104, 108-09 (1972).
[330] *Id.*

Supreme Court has explained that vague laws have a chilling effect on expression, as such laws tend to lead citizens to "steer far wider of the unlawful zone than if the boundaries of the forbidden [were] clearly marked."[331] On these grounds, the Supreme Court has, for example, rejected a law that, in part, prohibited "treat[ing] contemptuously the flag of the United States," because it failed "to draw reasonably clear lines between the kinds of . . . treatment that are criminal and those that are not."[332] Although laws regulating non-expressive conduct may also be struck down on vagueness grounds, vague laws regulating expression are particularly carefully scrutinized because of the danger of chilling constitutionally protected speech.[333] As the Court explained, "[b]ecause First Amendment freedoms need breathing space to survive, the government may regulate in the area only with narrow specificity."[334]

The U.S. Supreme Court has also consistently rejected laws that are overbroad—laws that sweep too broadly so as to encompass both unprotected speech and protected speech.[335] For example, a law that criminally prohibited the use of "opprobrious words or abusive language, tending to cause a breach of the peace" was held to be unconstitutionally overbroad, even though it could constitutionally be applied to prohibit certain types of particularly harmful expression, because it could also be unconstitutionally applied to protected expression.[336] In addition, the Supreme Court has invalidated systems for licensing speech that vest unbridled discretion in the initial decision-maker.[337]

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[331] *Grayned*, 408 U.S. at 109 and n.5.
[332] Smith v. Goguen, 415 U.S. 566, 572-73 (1974).
[333] *See* NAACP v. Button, 371 U.S. 415, 432-33 (1963).
[334] *Id.*
[335] *See* United States v. Williams, 553 U.S. 285, 292 (2008).
[336] *See* Gooding v. Wilson, 405 U.S. 518 (1972); Broadrick v. Oklahoma, 413 U.S. 601 (1973) (to be unconstitutional, overbreadth of statute must not only be real, but substantial as well, in relation to the statute's plainly legitimate sweep).
[337] Such standardless discretion is an independent ground for finding the law unconstitutional, separate and apart from the absence or presence of a provision for judicial review of the initial decision-making

Although dominant social media platforms should continue to enjoy discretion to determine what categories of speech are prohibited on their platforms, they should be required to formulate rules articulating which categories of speech are prohibited in as narrow and precise a manner as language permits. As I discuss below, the International Covenant and the U.S. First Amendment each provide support for this foundational due process principle.

The International Covenant requires that any rules restricting freedom of expression meet three requirements: (1) the rules must be clear and accessible (the principle of legality); (2) the rules must be designed for a legitimate aim (the principle of legitimacy) and (3) the rules must be necessary and proportionate to the risk of harm (the principle of proportionality).[338]

Regarding the first requirement for speech restrictions under the ICCPR, the Facebook Oversight Board, for example, in conducting an extensive analysis of whether Facebook's decision to suspend then-President Trump from its platform, conducted a detailed analysis of whether the decision was in compliance with Facebook's commitment to human rights under the ICCPR, under the principle of legality, which requires that the speech regulation at issue be clear and accessible.[339] The Board found that Facebook's decision to suspend Trump was in compliance with Facebook's articulated policies, specifically, its Dangerous Individuals and

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determination. In Shuttlesworth v. Birmingham, 394 U.S. 147 (1969), for example, the Court evaluated the constitutionality of a parade permitting system that vested the City Commission with the broad discretion to deny parade permits if "in [the Commission's] judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that [the parade permit] be refused." *Id.* at 149-50. Because the permitting scheme conferred "virtually unbridled and absolute power" on the Commission, it failed to comport with the essential requirement that any law subjecting the exercise of First Amendment freedoms to a license must embody "narrow, objective, and definite standards." *Id.* at 150-51.

[338] See International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, T.I.A.S. 92-908, 999 U.N.T.S. 171.

[339] *See* Oversight Board, Case decision 2021-001-FB-FBR, at 25-32, oversightboard.com/sr/decision/2021/001/pdf-english.

Organizations policy. Under its Dangerous Individuals and Organizations policy,[340] Facebook examines, among other things, the "ties to violence" of the entity that posts such content, and, applying this policy, Facebook apparently classified Trump's insurrection posts as a Tier 1 violation, because the posts took place as the attack on the Capitol was ongoing and because Trump referred to the insurrectionists as "patriots" while indicating his support for their actions.[341]

In assessing Facebook's actions in compliance with the first Article 19 criterion—clarity and accessibility—the Board had noted the vagueness of Facebook's Dangerous Individuals and Organizations policy in previous cases, but the Board found that despite such vagueness, Trump's violation fell squarely within the clear letter of the policy, given that Trump praised a group that was responsible for the death of five people.[342] It concluded that potential vagueness in other applications of the policy did not void the policy in its entirety.[343] The Board concluded that Facebook's Dangerous Individuals and Organizations policy was "clear and accessible," at least as applied in this case.[344]

Second, both U.S. and international law per the ICCPR require that speech restrictions be appropriately tailored to advance the interest at stake and that they do so in the least speech-

[340] *Dangerous Individuals and Organizations*, FACEBOOK: CMTY. STANDARDS, https://www.facebook.com/communitystandards/dangerous_individuals_organizations. Facebook's policy regarding Dangerous Individuals and Organizations is divided into tiers, based upon the severity of the violation, and covers leaders and members of organizations, as well as their supporters. (Tier 1 violations are the most serious and "focus on entities that engage in serious offline harms. . .," and events that cause real-world violence, such as terrorism. Tier 2 focuses on actors that engage in violence against the state but do not harm civilians. Tier 3 is focused on those who engage in hate speech and who have not engaged in violence against such groups but may be likely to in the future.)
[341] *See id.*
[342] *See* Oversight Board*, supra* note 339.
[343] *See* id.
[344] *See id.*

restrictive means possible.[345] Under the ICCPR, restrictions on speech must be necessary and proportionate to the risk of harm.[346]

In summary, the International Covenant on Civil and Political Rights and the United States First Amendment each provides strong support for the due process requirement that social media platforms be required to articulate narrow, specific descriptions of what speech is subject to regulation, so as to confine the discretion of the decision-maker and so as to provide fair notice to individuals of what speech is prohibited.

Conclusion

Several aspects of proposed federal and state legislation aimed at regulating dominant social media platforms to restrain abuses of power—specifically to restrict viewpoint discrimination, speaker-based discrimination, and to protect shared due process values—should be upheld by the courts against constitutional challenge.

First, because of the enormous role that dominant social media platforms serve in facilitating expression in today's information ecosystem, courts should prioritize the free speech interests of members of the public over the free speech interests of the platforms. While the platforms may be said to enjoy limited free speech rights of their own—as do broadcasters and cable network operators (and, to a lesser extent, common carriers)—the platforms' free speech interests are outweighed by the free speech interests of the members of the public in having their speech facilitated and moderated free of viewpoint- and speaker-based discrimination and in a manner that is consistent with shared notions of due process. Just as the Supreme Court weighed

[345] See Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015); International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, T.I.A.S. 92-908, 999 U.N.T.S. 171.
[346] *See* International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, T.I.A.S. 92-908, 999 U.N.T.S. 171.

the free speech interests of members of the public over those of common carriers like telephone services, broadcasters, and cable network operators, so too should the courts scrutinizing the constitutionality of proposed platform regulations prioritize the free speech interests of social media users over those of the social media platforms. This is not to say that the platforms should be treated as state actors for First Amendment purposes and prohibited from regulating any types of speech. Rather, the platforms should be prohibited from engaging in core acts of censorship, such as discriminating on the basis of viewpoint or speaker identity. Viewpoint and speaker-based discrimination skews the public discussion and deliberation necessary for democratic self-government and protecting against such discrimination forms the core of our system of free expression.

Second, courts should recognize the due process interests of members of the public with respect to their speech on social media and should uphold regulations that require such platforms to respect and protect the rights of speakers not to have their expression restricted or blocked without adequate notice of applicable and clearly-defined content guidelines and without an explanation of the reasons why their speech was actioned and a meaningful opportunity to challenge such action. And, courts should recognize that these due process considerations take on heightened importance in circumstances where a speaker is suspended or banned from a platform outright. These due process considerations for speakers on social media platforms are supported by widely shared commitments to due process protections, such as the International Covenant on Civil and Political Rights, which applies to actions by private entities, as well as by core First Amendment due process protections.