No. 21-1333

IN THE

Supreme Court of the United States

REYNALDO GONZALEZ, *ET AL.*, *Petitioners*,
v.
GOOGLE LLC, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief *Amicus Curiae* of America's Future, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

America's Future, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). These organizations were established, *inter alia*, to participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

A young American woman, Nohemi Gonzalez, was killed in an ISIS terror attack in Paris in 2015. Her estate, joined by several family members, filed suit alleging that Google (which owns YouTube) had culpability based on its recommendation of ISIS recruiting videos. These "targeted recommendations" were made based on Google's search algorithms to recommend videos to YouTube users based on videos the user has viewed. The suit alleges Google's recommendation of ISIS recruiting videos contributed

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[1] It is hereby certified that counsel for Petitioners and for Respondents have filed blanket consents to the filing of *amicus curiae* briefs; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

to the growth of ISIS, and eventually to the attack that killed Nohemi.

Google's defense was based on Section 230 of the Communications Decency Act, 47 U.S.C. § 230, which provides certain protection from liability to Internet companies.

The U.S. District Court for the Northern District of California granted Google's Motion to Dismiss, believing that Section 230 provided immunity for Google, since all the content in the ISIS videos had been produced by third parties with no input from Google. *Gonzalez v. Google, Inc.*, 335 F. Supp. 3d 1156, 1172-73 (N.D. Cal. 2018).

The Ninth Circuit upheld the district court's dismissal, holding that "'recommendations and notifications—[are] meant to facilitate the communication and content of others,' and 'not content in and of themselves.'" *Gonzalez v. Google LLC*, 2 F.4th 871, 894 (9th Cir. 2021). This Court then granted certiorari.

STATEMENT

This case presents what is arguably the thorniest legal issue associated with the operation of the Internet in resolving the scope of immunity afforded providers of "interactive computer services" ("providers") by 47 U.S.C. § 230. Providers uniformly view Section 230 as a broad an impenetrable legal shield which was singularly responsible for the creation of a robust and unregulated Internet, without

which the current system would degrade if not collapse.[2] On the other hand, many oppose government grants of total immunity for actions by providers which cause injury to others.[3]

If the scope of Section 230 has been the thorniest Internet-related legal issue, then the government's surreptitious control over access to various popular Internet platforms must rank as number two. If decisions are being made behind the scenes by government officials determining who may participate in social media and what positions they may take, then Section 230 serves the government's interest to avoid discovery into such secretive and unconstitutional forms of control of the marketplace of ideas.

Indeed, it is the position of these *amici* that these two issues are not separable, but rather intertwined, for they work together to hide government censorship from public view, while immunizing the private actor carrying out the government's orders. When providers

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[2] G. Fonrouge, "What is Section 230 and why was it created?" *New York Post* (Oct. 28, 2020) ("'Without Section 230, they would be swamped in lawsuits and would either over-moderate or stop moderating at all and the platform would turn into the wild west… with the worst parts of humanity [on display],' Ashkhen Kazaryan, the director of civil liberties with the think tank non-profit TechFreedom told The Post.").

[3] F. Gillette, "Section 230 Was Supposed to Make the Internet a Better Place. It Failed," *Bloomberg* (Aug. 7, 2019) ("Getting rid of it, Big Tech warns, could jeopardize many of the things on the web we take for granted, from reading and writing product reviews to watching amateur how-to videos on YouTube. Take it away, and the whole thing could come crumbling down.").

are sued, they immediately assert Section 230 and the complaint routinely is dismissed without discovery, and the plaintiff is not even allowed to inquire into whether the preconditions of Section 230 apply (*i.e.*, actions "voluntarily taken in good faith to restrict access based on a specified ground") — without government coercion — and thus the plaintiff never learns that a First Amendment claim could be brought based on governmental control over the provider's censorial actions.

This thorny problem of government control over the Internet could be substantially remedied if courts carefully construe Section 230 so that it only immunizes decisions made by providers that meet the statutory preconditions. The provider decision must be made alone (without government influence or coercion) to ban only the specific types of content that the statute allows the provider to ban (which most certainly does not include content viewed as politically objectionable to the provider or the government). If yielding to government pressure would expose the provider to liability for their actions, the providers can be expected to resist that pressure. Moreover, in litigation, if courts inquire into whether the protections of Section 230 actually apply, it would open the provider to discovery about government pressure which would cause the government to cease its abusive behaviors.

SUMMARY OF ARGUMENT

Section 230 of the CDA was enacted in the nascent days of the Internet revolution to prevent liability from

third-party behavior from crippling innovation in Internet technologies. It was primarily designed to protect small startups, including from government intrusion and censorship, while trying to protect children from offensive content.

Section 230 was not, however, designed to insulate governmental actors from transparency and accountability with respect to their efforts to suppress individual speakers or content which is not desired by the ruling party. But members of the executive and legislative branches have pressured providers to ban opposing political messages. Morever, government officials have threatened amendment or repeal of Section 230 in order to coerce tech companies to censor or remove content which those political and governmental entities consider undesirable. When these companies surrender their operations to government control, they are no longer acting voluntarily or in good faith as Section 230 requires, and thus are no longer entitled to the liability shield provided by that section.

ARGUMENT

Section 230 (codified as 47 U.S.C. § 230) does not and was never intended to immunize the actions of interactive computer service providers ("providers") to regulate content of those who work in concert with government to promote the "official government narrative" on a subject, or to suppress disfavored political speech based on their own political agenda.

I. SECTION 230 WAS DESIGNED TO ALLOW THE INTERNET TO DEVELOP WITHOUT COURTS ASCRIBING LIABILITY OR THE FEDERAL GOVERNMENT DICTATING CONTENT.

A. Section 230 — Text.

The prefatory language for Section 230 reveals its purpose was to "offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3). Congress noted that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. § 230(a)(4). Accordingly, Congress stated, "It is the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation...." 47 U.S.C. § 230(b)(2).

In accord with the policy, Congress laid out the statute's operative provisions in Section 230(c):

> (1) Treatment of Publisher or Speaker.
> No provider or user of an interactive computer service shall be **treated as the publisher or speaker** of any information provided by another information content provider.
>
> (2) Civil Liability.

> **No provider** or user of an interactive computer service **shall be held liable** on account of —
> (A) any action **voluntarily taken in good faith to restrict access** to or availability of material that the provider or user considers to be [i] obscene, lewd, lascivious, filthy, [ii] excessively violent, harassing, or [iii] otherwise objectionable, whether or not such material is constitutionally protected; or
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1). [Emphasis added.]

Section (c)(1) allows a provider to provide access to certain information posted by third parties (*e.g.*, search results), without the liability associated with being viewed to be the publisher or speaker of that information. Section (c)(2) allows a provider to exercise its own judgment to block access to certain types of dangerous material. The first grouping is "obscene, lewd, lascivious, filthy," which reflects the primary objective of the bill's original sponsor, as discussed, *infra*. (Other than blocking child pornography, providers appear not to use this power to any significant degree.[4]) The second grouping is "excessively violent, harassing" material. (No doubt, when enacted, the term "harassing" had a more narrow meaning than recent days when some have

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[4] *See* M. Keller & G. Dance, "Child Abusers Run Rampant as Tech Companies Look the Other Way," *New York Times* (Nov. 9, 2019).

come to believe that language **is** violence[5] and where students are taught to feel personally violated by being exposed to speech with which they disagree.[6])

The third category is a catch all: "or otherwise objectionable." This loose language requires a narrowing construction to make sense. At the least, "otherwise objectionable" must be interpreted in the context of coming after the first two groupings.[7] In the context of the adjectives "obscene" and "violent," the best synonyms of "objectionable" might be vulgar and disgusting. However, in practice, "objectionable" has come to mean "politically objectionable" in the view of the provider or the government which is a standard that cannot be drawn from the text.

Even if the censored material falls in one of the three groupings described above, there are two further preconditions to the application of the immunity

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[5] *See* S. Nossel, "No, hateful speech is not the same thing as violence," *Washington Post* (June 22, 2017) ("On the left, theorists have long posited a porous boundary between speech and violence, and the linkage hit the mainstream in Toni Morrison's 1993 acceptance speech for the Nobel Prize in literature: 'Oppressive language does more than represent violence,' she said. 'It is violence.' Taken literally, Morrison's analogy is obviously false.").

[6] *See* W. Bigelow, "'Infantilized' College Students Need 'Safe Spaces' to Avoid Scary Free Speech," *Breitbart* (Mar. 23, 2015).

[7] *See* A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts (Thompson/West: 2012) at 199 ("Where general words follow an enumeration of two or more things, they only apply to persons or things of the same general kind or class specifically mentioned (*ejusdem generis*)").

asserted here. Civil immunity was expressly conditioned on the interactive computer services provider having made a **voluntary** decision to restrict access, and that action had to be taken in **good faith**. Thus, Section 230 was explicitly designed to keep government **out** of the business of regulating Internet speech. The implication is that if government is ordering, coercing, or in any manner compelling a decision by the provider, the decision of that provider is no longer either "voluntary" or made in "good faith" and thus not protected.

B. Section 230 — Legislative History.

The legislative history of Section 230 has been addressed by Petitioners, but there are some aspects of that history which support the principle that when providers make decision to censor material under coercion from the government, there can be no immunity.

In 1996, as the Internet began to explode into everyday use for millions of Americans, Congress enacted Section 230, "in part, to maintain the robust nature of Internet communication and, accordingly, to keep **government interference** in the medium to a **minimum**." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (emphasis added).

Sen. James Exon (D-NE) introduced an amendment to the Communications Decency Act of 1996 ("CDA") in an effort to criminalize distribution of

pornography to children.[8] As originally drafted, CDA authorized the federal government to impose criminal penalties on anyone who knowingly transmitted obscene or indecent images to children, or where they could be accessed by children.

In the House, Reps. Christopher Cox (R-CA) and Ron Wyden (D-OR) proposed Section 230 to the House's version of the Telecommunications Act. *Id*. (Eventually, in conference, both Exon's CDA (codified as 47 U.S.C. § 223) and the Cox-Wyden Amendment, (now 47 U.S.C. § 230) were incorporated into the final Telecommunications Act. The Telecommunications Act passed with wide bipartisan support). Congressman Cox sought to:

> establish as the policy of the United States that **we do not wish to have content regulation by the Federal Government** of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government. In this fashion we can encourage what is right now the most energetic technological revolution that any of us has ever witnessed. [141 Cong. Rec. 129, at H8470 (Aug. 4, 1995) (emphasis added).]

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[8] R. Cannon, "The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway," 49 FED. COMM. L. J. 51, 57 (1996).

"We want to help [the Internet] along this time by saying **Government is going to get out of the way** and let parents and individuals control it rather than Government doing that job for us," Congressman Cox added. *Id*. Congressman Wyden agreed. "[W]e believe that parents and families are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats.... [I]f there is this kind of **Federal Internet censorship** army ... it is going to make the Keystone Cops look like crackerjack crime-fighter." *Id*. Wyden explicitly contrasted Section 230 with Senator Exon's proposal to allow the government to regulate speech for indecency. "Now what [Rep. Cox] … and I have proposed does stand in sharp contrast to the work of the other body [the Senate in Section 223]. They seek there to try to put in place the Government rather than the private sector about this task of trying to define indecent communications and protecting our kids." *Id*.

Congressman Bob Goodlatte (R-VA) concurred:

> The Cox-Wyden amendment [Section 230] empowers parents without Federal regulation. It allows parents to make the important decisions with regard to what their children can access, **not the government**. It doesn't violate **free speech or the right of adults to communicate with each other**. That's the right approach and I urge my colleagues to support this amendment. [*Id*. at H8471.]

Congresswoman Anna Eshoo (D-CA), while supporting the Telecommunications Act as a whole, urged:

> The Internet is **not** a U.S. Government network, and giving **federal officials indiscriminate censorship authority** in this area mocks constitutional protections of free-speech. **I urge expeditious judicial review of this provision to ensure that free-speech protections are not undermined**.[9]

This Court did in fact strike down Section 223 as a Free Speech violation. The case was initially heard in the Eastern District of Pennsylvania. The Court there decisively struck down Section 223 to avoid government censorship.

> [T]he Internet may fairly be regarded as a never-ending worldwide conversation. **The Government may not, through the CDA, interrupt that conversation**. As the **most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion**. True it is that many find some of the speech on the Internet to be **offensive**, and amid the din of cyberspace many hear **discordant voices** that they regard as indecent. The absence of governmental regulation of Internet content has unquestionably produced **a kind of chaos**.... The strength of the Internet is that chaos. Just as the strength of the Internet is chaos, so

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[9] 142 *Cong. Rec.* H1160 (Feb. 1, 1996) (emphasis added).

> **the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects**. [*ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (aff'd. by *Reno v. ACLU*, 521 U.S. 844 (1997) (emphasis added).]

Section 223 was struck down as violative of the First Amendment, but surprisingly the courts have allowed Section 230 to be applied almost without limit. Clearly, Congress did not craft Section 230 to immunize interactive computer service providers who follow government orders to promote some ideas and speakers while censoring others in the online "marketplace of ideas." As co-sponsor Rep. Wyden put it, "the Internet is the shining star of the information age, and Government censors must not be allowed to spoil its promise."[10]

II. WHERE GOVERNMENT COERCES PROVIDERS TO SUPPRESS POLITICAL SPEECH, IT VOIDS THE PROTECTIONS OF SECTION 230.

There can be many motivations for government to seek to control the Internet, and to avoid public blowback, it is likely that most control is exercised quietly, even secretly. Thus, it is surprising that as much knowledge about recent control by the federal government has managed to become public. Control can come in the form of promoting certain views, but

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[10] 141 *Cong. Rec.* at H8470 (Aug. 4, 1995)

more often by some form of censorship, such as: overtly shutting down accounts, requiring that posts be removed to allow continued access, shadow banning, altering drop-down search menus, altering autofill on searches, requiring use of exact terminology to obtain desired search results, restricting the number of results reported from a given search, providing warning labels that certain information is "disinformation" or "hateful," adding Wikipedia entries to posts to imply that the posting is false, and other even more subtle and sophisticated techniques. Use of these techniques by providers at the behest of government are routinely labeled "conspiracy theories." Some of what were once called "conspiracy theories" about government collusion with providers which since have been exposed and confirmed are discussed below.

A. The First Amendment Prevents the Government from Employing Private Entities to Suppress Speech.

Although Google may claim that its editorial decisions about the content it links to are not subject to challenges based on the First Amendment, that is not true if the Federal Government coerced or induced those decisions. "[A]lthough a private entity is not ordinarily constrained by the First Amendment, it is if the government coerces or induces it to take action the government itself would not be permitted to do, such as censor expression of a lawful viewpoint." *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring). *See also Norwood v. Harrison*, 413 U.S. 455, 465 (1973)

("[I]t is ... axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.").

Even without direct coercion, "[w]here comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request, a valid claim can be stated." *Hammerhead Enters. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983). In 2001, Justice Souter explained that "'[c]oercion' and 'encouragement' are like 'entwinement' in referring to kinds of facts that can justify characterizing an ostensibly private action as public instead." *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 303 (2001). As Justice Thomas stated in dissent, "[o]ur goal in every case is to determine whether an action 'can fairly be attributed to the State.'" *Id.* at 306 (Thomas, J., dissenting) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

Additionally, in certain circumstances, the very act of a federal grant of immunity can turn private action into "state action." This Court found that agreements between private companies and labor unions were "state action" because Congress had statutorily immunized the agreements against any contrary state laws. *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956).

B. The Biden Administration and Its Allies Have Threatened Providers with Removing Section 230 Immunity If They Did Not Agree to Censor Opposing Political Views.

Acts of government coercion over social media through threats to remove Section 230 protections are undeniable.

Long before his election as President, Joe Biden had a history of threatening Big Tech companies that failed to shut down or suppress stories or advertisements casting him or his policies in a negative light. On January 17, 2020, then-candidate Biden, angry over an ad on Facebook, called for the immediate revocation of Section 230's liability protections.[11] "Section 230 should be revoked, immediately should be revoked, number one. For Zuckerberg and other platforms," Biden argued. "I've never been a fan of Facebook, as you probably know. I've never been a big Zuckerberg fan. I think he's a real problem." *Id.* "He should be submitted to civil liability and his company to civil liability," Biden said. *Id.* Asked if Zuckerberg should be charged criminally for allowing the ad to run, he replied, "That's possible. That's possible it could happen." *Id.*

Kamala Harris, when still a Democratic presidential hopeful, threatened Facebook, demanding that it remove content posted by President Trump. On

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[11] "Opinion: Joe Biden Says Age Is Just a Number," *New York Times* (Jan. 17, 2020).

May 5, 2019, Harris said in a Detroit speech: "We will hold social media platforms responsible ... because they have a responsibility to help fight against this threat to our democracy. And if you ... don't police your platforms—we are going to hold you accountable as a community," she threatened.[12]

In or around June 2020, the Biden-Harris campaign published an "open letter to Facebook," demanding that Facebook shut down Trump campaign messaging. "Facebook has taken no meaningful action. It continues to allow Donald Trump to say anything," they wrote.[13] "We have offered the following concrete recommendations to fix the problems in Facebook's platform.... There should be a two-week pre-election period during which all political advertisements must be fact-checked before they are permitted to run on Facebook." *Id*.

During President-Elect Biden's transition, CNBC reported that the new administration was considering revoking or dramatically weakening Section 230:

> A law protecting the tech industry from being held liable for their users' posts is on shaky ground as President-elect Joe Biden prepares to come into office. Bruce Reed, a top tech advisor to Biden during his presidential campaign, said at a virtual book launch hosted

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[12] S. Shackford, "Kamala Harris Wants to Be Your Online Censor-in-Chief," *Reason* (May 7, 2019).

[13] J. Biden and K. Harris, "Our open letter to Facebook."

> by Georgetown Law Wednesday that "it's long past time to hold the social media companies accountable for what's published on their platforms."[14]

Reed, who was Biden's chief of staff while Biden was Vice President, has openly called for using legislation to force social media companies to censor disfavored speech. "'If they sell ads that run alongside harmful content, they should be considered complicit in the harm.... In the long run, the only real way to **moderate content** is to moderate the business model," he wrote. *Id.* "Washington would be better off throwing out Section 230 and starting over." *Id.*

Numerous other allies of Biden have also threatened to bring federal power to bear to control speech on social media platforms. As technology news website TechCrunch reports, in 2019, Democrat House Speaker Nancy Pelosi also threatened to punish Big Tech by removing Section 230 protections.

> It is a gift to them and I don't think that they are treating it with the respect that they should, and so I think that that could be a question mark and in jeopardy… I do think that for the privilege of 230, there has to be a bigger sense of responsibility on it. And it is

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[14] L. Feiner, "Biden tech advisor: Hold social media companies accountable for what their users post," *CNBC* (Dec. 2, 2020).

> not out of the question that that could be removed.[15]

TechCrunch points out that "imperiling Section 230 is a fearsome cudgel against even tech's most seemingly untouchable companies." As such, "Pelosi's comments are a reminder that tech's biggest companies and users alike have everything to lose." *Id.*

Also in 2019, "Louisiana Rep. Cedric Richmond warned Facebook and Google that they had 'better' restrict what he and his [Democrat] colleagues saw as harmful content or face regulation: 'We're going to make it swift, we're going to make it strong, and we're going to hold them very accountable,'" Richmond said.[16] "Let's see what happens just by pressuring them," added Rep. Jerry Nadler (D-NY). *Id.*

Once Biden took office, his administration and his party's supporters on Capitol Hill immediately targeted Section 230. Democrat Senators Mazie Hirono (HI), Amy Klobuchar (MN), and Mark Warner (VA) introduced the "SAFETECH Act" to dramatically weaken Section 230's liability protections for Big Tech firms. "Section 230 has provided a 'Get Out of Jail Free' card to the largest platform companies," Warner complained in a joint statement released by the

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[15] T. Hatmaker, "Nancy Pelosi warns tech companies that Section 230 is 'in jeopardy,'" TechCrunch.com (Apr. 12, 2019).

[16] V. Ramaswamy & J. Rubenfeld, "Save the Constitution from Big Tech," *Wall Street Journal* (Jan. 11, 2021).

Democratic Senators.[17] "Internet platforms must either address the serious harms they impose on society or face potential civil liability," Hirono threatened. *Id*.

In February 2021, two House subcommittees held hearings to highlight the committees' claims that Big Tech companies allowed posting of "disinformation" about the 2020 election and COVID-19 vaccination requirements on their sites.[18] They demanded Twitter and Facebook leaders testify before the subcommittees. *Id*. The subcommittees released a statement threatening to "hold[] online platforms accountable for the growing rise of misinformation and disinformation. ... Industry self-regulation has failed. We must begin the work of changing incentives," the statement said. *Id*.

C. Social Media Companies Have Been Cowed into Collusion with the Biden Administration to Suppress Dissident Speech on Key Public Issues.

On issue after issue, the Big Tech firms which did not happily go along with the desires of political leaders have bowed to federal pressure and actively promoted the Biden Administration's positions on

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[17] Statement, "Warner, Hirono, Klobuchar Announce the SAFE TECH Act to Reform Section 230" (Feb. 5, 2021).

[18] Statement, "E&C Committee announces hearing with tech CEOs on the misinformation and disinformation plaguing online platforms," (Feb. 18, 2021).

controversial issues, while actively suppressing opposing positions. As the *Wall Street Journal* has noted:

> It's no accident that big tech took its most aggressive steps against Mr. Trump just as Democrats were poised to take control of the White House and Senate. Prominent Democrats promptly voiced approval of big tech's actions, which [Democratic] Connecticut Sen. Richard Blumenthal expressly attributed to "a shift in the political winds."[19]

1. COVID-19.

On COVID-19, Biden's Surgeon General, Vivek Murthy, issued an "advisory" to social media companies. "[W]e expect more from our technology companies," Murthy told a press briefing. "We're asking them to monitor misinformation more closely. We're asking them to consistently take action against misinformation super-spreaders on their platforms."[20] "[M]uch, much more has to be done. And we can't wait longer for them to take aggressive action," Murthy said. "[W]e are asking technology companies to help lift up the voices of credible health authorities. It's also why **they have to do more to** reduce the

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[19] V. Ramaswamy & J. Rubenfeld, "Save the Constitution from Big Tech," *Wall Street Journal* (Jan. 11, 2021).

[20] "Press Briefing by Press Secretary Jen Psaki and Surgeon General Dr. Vivek H. Murthy," (July 15, 2021).

misinformation that's out there so that the true voices of experts can shine through." *Id*. (emphasis added).

Facebook has responded to the Biden threats by seeking to actively collude with government to determine what information should be promoted and what should be suppressed. "A Facebook spokesperson said the company has partnered with government experts, health authorities and researchers to take 'aggressive action against misinformation about COVID-19 and vaccines to protect public health. So far we've removed more than 18 million pieces of COVID misinformation,'" the spokesperson said.[21]

The day after Murthy's comments, a Facebook executive emailed Murthy, "I know our teams met today to better understand the scope of what the White House expects from us on misinformation going forward."[22] "It's not great to be accused of killing people," the executive wrote soon after. *Id*. He promised to "find a way to deescalate and work together collaboratively." *Id*. On July 23, 2021, the executive wrote to the Department of Health and Human Services, "I wanted to make sure you saw the steps we took just this past week to adjust policies on what we are removing with respect to misinformation." *Id*. According to the *New York Post*, "[o]ther messages

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[21] "White House slams Facebook as conduit for COVID-19 misinformation," *Reuters* (July 15, 2021).

[22] J. Sullum, "Biden's sneaky censors: How officials pressured social media to suppress disfavored speech," *New York Post* (Sept. 12, 2022).

show that Twitter was equally eager to fall in line." *Id*. In fact, by December 2021, Twitter's "COVID-19 misleading information policy" pledged to remove any speech arguing that "face masks ... do not work to reduce transmission or to protect against COVID-19."[23] (After Elon Musk purchased Twitter, on November 23, 2022, the company announced that it is "is no longer enforcing the COVID-19 misleading information policy."[24])

On July 20, 2021, White House spokesperson Kate Bedingfield again threatened to repeal Section 230 if Big Tech companies failed to remove speech the administration deemed objectionable. "We're reviewing that and certainly [social media companies] should be held accountable. And I think you heard the president speak very aggressively about this," she told MSNBC.[25]

The danger of the government's derision and suppression of minority medical opinions is ilustrated by the fact that the government's own recommendations for COVID prevention and treatment have so often been proven wrong. Initially

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[23] Twitter, "COVID-19 misleading information policy," (Dec. 2021) (cited *in* *Missouri v. Biden* Complaint, Case 3:22-cv-01213 (W.D. La., May 5, 2022)) at 26.

[24] *See* https://blog.twitter.com/en_us/topics/company/2020/covid-19.

[25] M. Ginsberg, "WH Communications Director Repeats Threat To Combat 'Irresponsible Content' By Eliminating Section 230," (July 20, 2021).

the government recommended that individuals not wear facemasks. Dr. Anthony Fauci then suggested that double-masking is just "common sense." Initially, the CDC recommended six-foot social distancing, and derided natural immunity possessed by persons recovered from COVID. On August 11, 2022, the CDC issued new "guidance," countermanding and altering many previous recommendations, including abandoning the six-foot rule and acknowledging that natural immunity is in fact highly effective against COVID infection.[26] "The CDC is admitting it was wrong here, although they won't put it in those words," said Dr. Jay Bhattacharya, professor of medicine at Stanford University School of Medicine. *Id.* "Yesterday's misinformation is today's … public health guidance, which is an illustration of the fact that science and censorship are totally incompatible, and that censorship can only halt the progress of science and can halt testing of new hypotheses and new ideas by trying to prematurely foreclose these questions," said Aaron Kheriaty, chief of medical ethics at The Unity Project.[27]

2. Election Challenges.

As the campaign of President Donald Trump criticized mail-in voting and ballot harvesting in 2020,

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[26] Z. Steiber and J. Jekielek, "New CDC COVID-19 Guidance Is Agency 'Admitting It Was Wrong': Stanford Epidemiologist," *Epoch Times* (Aug. 15, 2022).

[27] Z. Steiber, "CDC Gave Facebook Misinformation About COVID-19 Vaccines, Emails Show," *Epoch Times* (Sept. 7, 2022).

the Biden-Harris campaign wrote another letter to the social media companies, demanding a "more aggressive approach" to censoring Trump's posts.[28] In response, Facebook executive Rob Leathern wrote, "We also won't allow ads with content that seeks to delegitimize the outcome of an election ... or us[es] isolated incidents of voter fraud to delegitimize the result of an election."[29] Twitter also cracked down on Trump tweets questioning mail-in voting, in response to the Biden-Harris letter. "[W]e may label and reduce the visibility of Tweets containing false or misleading information about civic processes in order to provide additional context," Twitter stated.[30]

What the Biden administration derides and attempts to ban as "misinformation" is actually serious academic and political debate over voting systems that can introduce fraud. In 2005, former President Jimmy Carter and former Secretary of State James Baker chaired the Carter-Baker Commission, which warned, "Absentee ballots remain the largest source of

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[28] "Letter from Biden-Harris campaign to Facebook," (Sept. 28, 2020).

[29] J. Bowden, "Facebook to reject ads that seek to delegitimize election, voting methods," *The Hill* (Oct. 1, 2020).

[30] A. Hall, "Liberal Media Used to Warn Against Mailing Votes; Now Big Tech, Left Are Protecting It," *Newsbusters.org* (Oct. 30, 2020).

potential voter fraud."[31] In 2020, Attorney General William Barr echoed the Commission.[32]

Once President Biden took office, his administration continued to pressure Big Tech companies to censor election-related information and discussions that ran counter to the administration's views. "The president's view is that the major platforms have a responsibility related to the health and safety of all Americans to stop amplifying untrustworthy content, disinformation and misinformation, especially related to COVID-19, vaccinations and elections," White House spokesperson Jen Psaki said in May 2021.[33]

The Big Tech companies responded with efforts to censor disfavored speech leading up to the 2022 midterm elections. According to a statement from YouTube, "Our teams continue to monitor the midterms closely, working to quickly remove content that violates our policies. We'll stay vigilant ahead of, during, and after Election Day."[34] Meta, the owner of

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[31] F. Lucas, "7 Ways the 2005 Carter-Baker Report Could Have Averted Problems With 2020 Election," *Daily Signal* (Nov. 20, 2020).

[32] "Attorney General William Barr: Mail-In Voting 'Absolutely Opens The Floodgates To Fraud'," *Daily Wire* (June 22, 2020).

[33] "White House says social media platforms should not amplify 'untrustworthy' content," *Reuters* (May 5, 2021).

[34] D. Klepper, "As 2022 midterms approach, disinformation on social media platforms continues," *PBS* (Oct. 21, 2022).

Facebook and Instagram, reopened its "election command center" to counter "misinformation about elections." *Id*.

3. "Climate change."

On January 9, 2022, Representative Ro Khanna (D-CA), a Biden ally in Congress, tweeted, "Misinformation being spread on social media is undermining our efforts to tackle climate change. As chair of the House Oversight Environment Subcommittee, I will be holding a hearing to hold social media companies accountable."[35] Following Khanna's threats, on April 22, 2022, Twitter announced that it would no longer air "advertisements that go against the scientific consensus of climate change."[36] Also in April 2022, Pinterest announced it would "prohibit users from sharing climate misinformation on its site, banning the content outright." *Id*.

In June 2022, White House advisor Gina McCarthy threatened that "tech companies have to stop allowing specific individuals over and over again to spread disinformation" opposed to the administration's preferred view of whether human activity causes

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[35] *See* https://twitter.com/reprokhanna/status/1480313847806365696.

[36] R. Maruf, "Twitter bans 'misleading' climate change ads," *CNN* (Apr. 23, 2022).

climate change.[37] McCarthy praised Biden allies in Congress, suggesting that Congress would take steps to punish Big Tech companies if they did not censor information opposed to the administration's views. "We do see Congress taking action on these issues, we do see them trying to tackle the misinformation that's out there, trying to hold companies accountable."[38]

On July 13, 2022, Rep. Lance Gooden (R-TX) and two other congressmen wrote a letter to McCarthy demanding that she "preserve all documents and communications with Big Tech companies as it relates to your efforts to censor and regulate free speech"[39]:

> Recently, you claimed, "The tech companies have to stop allowing specific individuals over and over again to spread disinformation." Major platforms, including Meta (Facebook), Google, Amazon, and Twitter, have cracked down on users' ability to freely question the Biden administration's narrative on climate change. We are concerned this violates users' First Amendment rights.

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[37] B. Gernan, "Top Biden aide prods big tech to crack down on climate change misinformation," *Axios* (June 9, 2022).

[38] A. Hall, "Biden climate adviser demands tech companies censor 'disinformation' to promote 'benefits of clean energy,'" *Fox News* (June 14, 2022).

[39] H. Hutchison, "Exclusive: 'An Alarming Pattern': GOP Rep Launches Probe Into Possible Big Tech-White House Collusion," *Daily Caller* (July 13, 2022).

D. Direct Control of Social Media Sites.

The Department of Homeland Security went so far as to try to create a so-called "Disinformation Governance Board" ("DGB") in April 2022, ostensibly to "combat the spread of disinformation ... ahead of the 2022 midterm elections."[40] Critics from all points of the political spectrum attacked the DGB as an assault on free speech. "The Federal Government has no business creating a Ministry of Truth. The Department of Homeland Security's 'Disinformation Board' is unconstitutional and unamerican," tweeted Sen. Tom Cotton (R-AR). *Id*. Harvard law professor emeritus Alan Dershowitz likewise attacked the DGB as "a very bad idea, an unconstitutional idea. And if it comes into effect, I will join others in helping to challenge it in court and we will win nine to nothing."[41]

After widespread criticism, the administration terminated the DGB entity in August.[42] But the government's censorship efforts continued unabated. In a lawsuit filed by the attorneys general of Missouri and Louisiana against the Biden administration, discovery has revealed that Facebook and the

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[40] K. Laco, "Free speech concerns mount over DHS 'disinformation' board as lawmakers, critics weigh in," *Fox News* (Apr. 30, 2022).

[41] L. Cacciatore, "Alan Dershowitz to Newsmax: DHS Misinformation Board Is Unconstitutional." *Newsmax* (May 2, 2022).

[42] T. Nerozzi, "Mayorkas officially cancels Homeland Security Disinformation Governance Board," *Fox News* (Aug. 25, 2022).

administration have created "a formalized process for government officials to **directly flag content on Facebook or Instagram** and **request that it be throttled or suppressed** through a special Facebook portal that **requires a government or law enforcement email to use**."[43] The attorneys general describe this Censorship Portal as a "massive, sprawling federal 'Censorship Enterprise.'"[44]

The Intercept's Lee Fang reported that "Twitter's [General Counsel] Vijaya [Gadde] ... met monthly with DHS to discuss censorship plans."[45] Discovery also revealed that Department of Homeland Security ("DHS") official Jen Easterly texted Microsoft executive Matthew Masterson, "Just trying to get us in a place where Fed can work with platforms to better understand the mis/dis[information] trends so relevant agencies can try to debunk/prebunk as useful." Masterson replied, "The coordination was appreciated. Was disappointed that platforms including us didn't offer more (we'll get there)."[46]

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[43] "Leaked Documents Outline DHS's Plans to Police Disinformation," *The Intercept* (Oct. 31, 2022) (emphasis added).

[44] J. DeMastri, "We Have the Emails: Internal Records Prove Biden Admin Colluded With Facebook, Twitter to Censor Users," *Western Journal* (Sept. 1, 2022).

[45] *See* https://twitter.com/lhfang/status/1587114424925442049.

[46] K. Klippenstein, L. Fang, "Truth Cops: Leaked Documents Outline DHS's Plans to Police Disinformation," The Intercept (Oct. 31, 2022); https://twitter.com/lhfang/status/1587114424925442049/photo/1.

The coercive effect of repeated threats by Biden and his congressional allies against social media companies has not been lost on other journalists. On November 13, 2022, after a caustic Twitter exchange between new Twitter owner Elon Musk and Sen. Edward Markey (D-MA), *Politico*'s White House editor Sam Stein tweeted, "Always risky to attack members of congress. Especially risky with Dems assured of Senate power. Curious play by Musk here. He has many interests before Congress."[47]

On August 10, 2022, the Department of Homeland Security Inspector General released a report entitled "DHS Needs a Unified Strategy to Counter Disinformation Campaigns." Among the political speech the DHS characterized as "disinformation" is speech that could "erode public trust in our government [or] negatively affect public discourse," and "claims of voter fraud during the November 2020 elections."[48]

On August 25, 2022, Meta/Facebook CEO Mark Zuckerberg admitted that the FBI approached Facebook alleging that the Hunter Biden story was merely Russian propaganda, and seeking to persuade Facebook to bury the story. "The FBI [said] there was a lot of Russian propaganda in the 2016 election [and] there is about to be some kind of a dump that is

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[47] *See* https://twitter.com/samstein/status/1591849114010279936.

[48] Office of Inspector General, Dept. of Homeland Security, "DHS Needs a Unified Strategy to Counter Disinformation Campaigns," (Aug. 10, 2022).

similar to that" related to Hunter Biden.[49] Facebook agreed to bury the story. *Id.*

On December 2, 2022, Elon Musk arranged for the release of Twitter records demonstrating the degree to which the Biden Administration, the Democratic National Committee, and certain Members of Congress directed Twitter to remove content which was critical of Democrats or their agenda.[50] Notably, "Twitter even resorted to a rarely used tactic to stop the dissemination of the story — blocking the sharing of links to the story via direct message, a tool usually only used in 'extreme cases,' such as to stop the distribution of child pornography." *Id.* "[Foreign h]acking was the excuse, but within a few hours, pretty much everyone realized that wasn't going to hold. But no one had the guts to reverse it," said one Twitter employee. *Id.*

In its "CensorTrack" database, the Media Research Center identified "more than 640 examples of bans, deleted content and other speech restrictions placed on those who criticized Biden on social media" between March 2020 and March 2022.[51]

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[49] T. Barrabi, "Mark Zuckerberg tells Joe Rogan Facebook was wrong to ban The Post's Hunter Biden laptop story," *New York Post* (Aug. 25, 2022).

[50] V. Nava, K. Garger, and B. Golding, "Hunter Biden laptop bombshell: Twitter invented reason to censor Post's reporting." *New York Post* (Dec. 2, 2022).

[51] J. Vazquez and G. Pariseau, "Protecting the President: Big Tech Censors Biden Criticism 646 Times Over Two Years," (Apr.

CONCLUSION

When providers made decisions to promote or censor content at the behest of government, they are not acting voluntarily or in good faith, as required by Section 230. When providers remove or restrict access to material because they or those in government find it politically objectionable, they are exceeding the scope of the immunity afforded by Section 230. It ceases to be simply a private transaction and has become government suppression of speech. To discourage government efforts to control the editorial decisions of providers, it is essential to narrow the grant the immunity provided by Section 230 to apply only to those who meet each of the statutory qualifications.

For the foregoing reasons, the decision of the Ninth Circuit should be reversed.

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