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**Digital Media Law Outline**

Social Media Moderation: Outline of Recent Developments (~Sept. 2020 – Present)

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# Outline

# Efforts to Prevent or Punish Blocking of Content and/or Deplatforming of Speakers

## Executive/Law Enforcement

### President Trump’s Executive Order on Social Media

#### Executive Order 13925, Preventing Online Censorship (May 28, 2020), <https://www.federalregister.gov/documents/2020/06/02/2020-12030/preventing-online-censorship>

#### Constitutional challenges to EO 13925

##### *Rock the Vote v. Trump*, No. 3:20-cv-06021 (N.D. Cal.)

###### Complaint (Aug. 27, 2020), <https://storage.courtlistener.com/recap/gov.uscourts.cand.364981/gov.uscourts.cand.364981.1.0.pdf>

###### Motion to Dismiss and Opposition to Motion for Preliminary Injunction (Sept. 23, 2020), <https://www.scribd.com/document/477329578/Rock-the-Vote-v-Trump-MTD#from_embed>

###### Order Denying Motion for Preliminary Injunction and Granting Motion to Dismiss (Oct. 29, 2020) (dismissal for lack of standing), <https://www.documentcloud.org/documents/7279160-Rock-the-Vote.html>

##### *Center for Democracy & Technology v. Trump*, No. 1:20-cv-01456 (D.D.C.)

###### Complaint (Jun. 2, 2020), <https://storage.courtlistener.com/recap/gov.uscourts.dcd.218638/gov.uscourts.dcd.218638.1.0_2.pdf>

###### Motion to Dismiss (Aug. 3, 2020), <https://storage.courtlistener.com/recap/gov.uscourts.dcd.218638/gov.uscourts.dcd.218638.17.0.pdf>

###### Memorandum Opinion (Dec. 11, 2020) (dismissal for lack of standing), <https://storage.courtlistener.com/recap/gov.uscourts.dcd.218638/gov.uscourts.dcd.218638.22.0_2.pdf>

#### Federal Communications Commission proceedings in response to EO 13925

##### Petition for Rulemaking of the National Telecommunications and Information Administration, *In re Section 230 of the Communications Act of 1934*, RM-11862 (Jul. 27, 2020), <https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf>

##### Statement of FCC Chairman Ajit Pai on the Department of Commerce’s Section 230 Petition for Rulemaking (Aug. 3, 2020), <https://docs.fcc.gov/public/attachments/DOC-365904A1.pdf>

##### Petition of Vimeo, Inc. to Dismiss, *In re Section 230 of the Communications Act of 1934*, RM-11862 (Aug. 4, 2020), [https://ecfsapi.fcc.gov/file/1080410753378/(as%20filed)%20Vimeo%20Opp%20to%20NTIA%20Pet.%208-4-20.pdf](https://ecfsapi.fcc.gov/file/1080410753378/%28as%20filed%29%20Vimeo%20Opp%20to%20NTIA%20Pet.%208-4-20.pdf)

##### Brian Fung, *FCC chairman says he'll seek to regulate social media under Trump's executive order*, CNN (Oct. 15, 2020), <https://www.cnn.com/2020/10/15/tech/fcc-section-230-ajit-pai/index.html>

##### Thomas M. Johnson Jr., *The FCC's Authority to Interpret Section 230 of the Communications Act*, Federal Communications Commission Blog (Oct. 21, 2020) (FCC General Counsel opining that FCC has authority to interpret Section 230), <https://www.fcc.gov/news-events/blog/2020/10/21/fccs-authority-interpret-section-230-communications-act>

##### Letter from Reps. Frank Pallone and Mike Doyle to Chairman Pai (Nov. 10, 2020) (asking that, following presidential election, FCC cease work on partisan and controversial items), <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/FCC%20Letter%20re%20stop%20work%20request.pdf>

##### Ajit Pai, *To Safe and Secure Holidays... and Networks*, Federal Communications Commission Blog (Nov. 18, 2020) (announcing agenda for December 2020 meeting, and omitting any work on Section 230 proceeding), <https://www.fcc.gov/news-events/blog/2020/11/18/safe-and-secure-holidays-and-networks>

##### Michael Balderston*, Ajit Pai Departs FCC*, TV Tech (Jan. 20, 2021), <https://www.tvtechnology.com/news/ajit-pai-departs-fcc>

##### April Glaser, *Biden picks Jessica Rosenworcel as acting FCC chief¸* NBC News(Jan. 21, 2021), <https://www.nbcnews.com/business/business-news/biden-picks-jessica-rosenworcel-run-fcc-n1255048>

#### President Biden’s Executive Order Revoking EO 13925

##### Executive Order 14029, *Revocation of Certain Presidential Actions and Technical Amendment* (May 14, 2021), <https://www.federalregister.gov/documents/2021/05/19/2021-10691/revocation-of-certain-presidential-actions-and-technical-amendment>

###

### Complaint filed by Republication National Committee with Federal Election Commission (Oct. 16, 2020) (accusing Twitter of making illegal in-kind contribution to Biden campaign by suppressing links to *New York Post* articles regarding Hunter Biden), <https://www.scribd.com/document/480341244/RNC-Complaint-Against-Twitter-Inc-Web#from_embed>

#### Notification with Factual and Legal Analysis, *In re Twitter, Inc.*, MURs 7821, 7827, 7868 (Aug. 16, 2021) (finding no reason to believe that Twitter made in-kind contributions, instead of acting out of commercial motive), <https://www.fec.gov/files/legal/murs/7821/7821_11.pdf>

#### *See also* Supplemental Statement of Reasons of Vice Chair Allen Dickerson and Commissioner James E. “Trey” Trainor, III, *In re Twitter, Inc.*, MURs 7821, 7827, 7868 (Sept. 13, 2021) (finding that Twitter’s editorial decisions protected by First Amendment and within regulatory exemption for media), <https://www.fec.gov/files/legal/murs/7821/7821_13.pdf>; Statement of Reasons of Commissioner Sean J. Cooksey, *In re Twitter, Inc.*, MURs 7821, 7827, 7868 (Sept. 13, 2021) (finding that Twitter’s editorial decisions within regulatory exemption for media), <https://www.fec.gov/files/legal/murs/7821/7821_12.pdf>

### *Twitter, Inc. v. Paxton*, No. 3:21-cv-01644 (N.D. Cal.) (lawsuit arguing that Texas AG Ken Paxton initiated investigation of Twitter in retaliation for deplatforming of Donald Trump)

#### Complaint (Mar. 8, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.cand.374770/gov.uscourts.cand.374770.1.0_1.pdf>

#### Motion for Temporary Restraining Order (Mar. 8, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.cand.374770/gov.uscourts.cand.374770.5.0_2.pdf>

#### Amicus Brief of Internet Association (Mar. 26, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.cand.374770/gov.uscourts.cand.374770.34.0_1.pdf>

#### Amicus Brief of Reporters Committee for Freedom of the Press (Mar. 26, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.cand.374770/gov.uscourts.cand.374770.35.0_1.pdf>

#### Motion to Dismiss (Mar. 29, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.cand.374770/gov.uscourts.cand.374770.37.0_1.pdf>

#### Opposition to Motion for Preliminary Injunction (Mar. 29, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.cand.374770/gov.uscourts.cand.374770.38.0_1.pdf>

#### Opposition to Motion to Dismiss (Apr. 16, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.cand.374770/gov.uscourts.cand.374770.58.0_2.pdf>

#### Order Granting Motion to Dismiss (May 11, 2021) (holding that complaint was premature before Paxton attempted to enforce investigative demands), <https://storage.courtlistener.com/recap/gov.uscourts.cand.374770/gov.uscourts.cand.374770.64.0.pdf>

#### Notice of Appeal (May 14, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.cand.374770/gov.uscourts.cand.374770.66.0.pdf>

#### Order Denying Motion for Preliminary Injunction Pending Appeal (Jun. 8, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.cand.374770/gov.uscourts.cand.374770.74.0.pdf>

#### Order, *Twitter, Inc., v. Paxton*, No. 21-15869 (9th Cir. Jun. 30, 2021) (denying motion for injunction pending appeal), <https://storage.courtlistener.com/recap/gov.uscourts.cand.374770/gov.uscourts.cand.374770.75.0.pdf>

## Legislation

### Federal legislative attempts to repeal Section 230 in its entirety

#### Based on the circumstances of their introduction, the measures discussed below are properly considered as responses to alleged censorship of conservative voices by social media sites.

#### 116th Congress (2019-2020)

##### S.5020, A bill to repeal section 230 of the Communications Act of 1934, <https://www.congress.gov/bill/116th-congress/senate-bill/5020/text>

###### Would sunset § 230 on January 1, 2023 unless subsequently amended

##### H.R.6395, William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, <https://www.congress.gov/bill/116th-congress/house-bill/6395>

###### President Trump vetoed H.R.6395, an omnibus military appropriations bill, because Congress refused his demand to include a full repeal of Section 230; Congress overrode the veto and the bill passed without any mention of Section 230. See Ilya Somin, *Congress Overrides Trump Veto*, Volokh Conspiracy (Jan. 1, 2001), <https://reason.com/volokh/2021/01/01/congress-overrides-trump-veto-of-defense-bill-that-includes-tight-constraints-on-use-of-emergency-powers-to-divert-military-construction-funds-to-the-border-wall-and-other-projects/>

##### Makena Kelly, *McConnell ties full repeal of Section 230 to push for $2,000 stimulus checks*, The Verge (Dec. 29, 2020), <https://www.theverge.com/2020/12/29/22204976/section-230-senate-deal-stimulus-talks-checks>

###### McConnell draft of stimulus bill, <https://www.documentcloud.org/documents/20438365-mcconnell-stimulus-offer>

###### The move by Sen. McConnell was widely seen as introducing a poison pill into the stimulus bill rather than an actual attempt to repeal Section 230.

#### 117th Congress (2021-2022)

##### H.R.874, Abandoning Online Censorship Act, <https://www.congress.gov/bill/117th-congress/house-bill/874/text>

###### Reintroduction of H.R.8896, with the same title, from the 116th Congress, <https://www.congress.gov/bill/116th-congress/house-bill/8896/text>

###### Upon passage, would repeal § 230(c) in its entirety.

### Federal legislation limiting or eliminating § 230 protection for content screening decisions

#### 116th Congress (2019-2020)

##### S.4534, Online Freedom and Viewpoint Diversity Act, <https://www.congress.gov/bill/116th-congress/senate-bill/4534/text>

###### Eliminates protection under § 230(c)(1) for removal of content

###### Amends § 230(c)(s) to condition immunity for screening content on objectively reasonable belief that the material is “obscene, lewd, lascivious, filthy, excessively violent, harassing, promoting self-harm, promoting terrorism, or unlawful”

##### S.4632, Online Content Policy Modernization Act, <https://www.congress.gov/bill/116th-congress/senate-bill/4632/text>

###### Same as S.4534 with respect to § 230

###### Also had unrelated provisions establishing copyright small claims procedures

##### S.4756, Don’t Push My Buttons Act, <https://www.congress.gov/bill/116th-congress/senate-bill/4756/text>

###### Eliminates protection for screening content for any entity that collects information regarding the habits, preferences, or beliefs of a user and utilizes an automated function to deliver content based on that information, unless the user knowingly and intentionally elects to receive such content

##### H.R.8517, Protect Speech Act, <https://www.congress.gov/bill/116th-congress/house-bill/8517/text>

###### Conditions protection for screening of content on:

action being taken in good faith based on an objectively reasonable belief that the material is (1) obscene, lewd, lascivious, filthy, excessively violent, promoting terrorism or violent extremism, harassing, promoting self-harm, or unlawful; or (2) violates the applicable terms of service or use; and

making publicly available terms of service or use that plainly state the criteria for content moderation practices;

and not restricting access to or availability of material on deceptive grounds

###### Also limits protection against liability for third-party content under § 230(c)(1)

##### H.R.8596, Limiting Section 230 Immunity to Good Samaritans Act, <https://www.congress.gov/bill/116th-congress/house-bill/8596/text>

###### Requires edge provider of an interactive computer service (e.g., social media website) to adopt and maintain written terms of service binding itself to a contractual duty of “good faith” that forecloses selective enforcement of moderation policies in order to qualify for statutory protection against being treated as the publisher of information distributed through the service by a third party

##### H.R.8922, Break Up Big Tech Act of 2020, <https://www.congress.gov/bill/116th-congress/house-bill/8922/text>

###### Removes protection from any social media site that displays user-generated content in an order other than chronological order, delays the display of such content relative to other content, or otherwise hinders the display of such content relative to other content

###### Also removes protection from any site that sells advertising targeted to users based on their data, displays such an advertisement to a user who did not opt in to such ads, places items into the stream of commerce or facilitates such placement, collects user data for commercial purposes, or uses a design or product that addicts users to the site

#### 117th Congress (2020-2021)

##### S.1384, 21st Century Foundation for the Right to Express and Engage in Speech Act (“21st Century FREE Speech”) Act, <https://www.congress.gov/bill/117th-congress/senate-bill/1384/text>

###### Would repeal § 230 and declare platforms to be common carriers

##### S.2031, Promoting Rights and Online Speech Protections to Ensure Every Consumer is Heard (“PRO-SPEECH”) Act, <https://www.congress.gov/bill/117th-congress/senate-bill/2031/text>

###### Would, inter alia, ban content moderation by all but “small internet platforms” unless they openly declare themselves to be “publishers” of content (thus presumably waiving § 230 protection)

##### S.2228, Disincentivizing Internet Service Censorship of Online Users and Restrictions on Speech and Expression (“DISCOURSE” Act), <https://www.congress.gov/bill/117th-congress/senate-bill/2228/text>

###### Would expressly state that § 230 is an affirmative defense

###### Eliminates protection under the law for anyone who:

“engages in a content moderation activity that reasonably appears to express, promote, or suppress a discernible viewpoint for a reason not protected from liability under subsection (c)(2)”;

has a dominant market share and “amplifies information provided by an information content provider 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

“solicits, comments upon, funds, or affirmatively and substantively contributes to, modifies, or alters information provided by an information content provider[.]”

Would amend § 230(c)(2)(a) to remove protection for removal of “otherwise objectionable” material and require removal determinations based upon the other listed categories to be objectively reasonable.

##### S.2335, Don’t Push My Buttons Act, <https://www.congress.gov/bill/117th-congress/senate-bill/2335/text>

###### Reintroduction of S.4756 from prior Congress

##### S.2338, Preserving Political Speech Online Act, <https://www.congress.gov/bill/117th-congress/senate-bill/2338/text>

###### Would amend § 230(c)(2) to replace "otherwise objectionable" with "threatening or promoting illegal activity," and to remove the statement that sites are protected for blocking material "whether or not such material is constitutionally protected."

###### Moderation of “political affiliation or speech” specifically excluded from “good faith” moderation under § 230(c)(2), except for platforms dedicated “to a specific set of issues, policies, beliefs, or viewpoints”

###### Platforms required to offer equal advertising opportunities to political candidates and forbidden to “censor” content of such ads

##### H.R.83, Protecting Constitutional Rights from Online Platform Censorship Act, <https://www.congress.gov/bill/117th-congress/house-bill/83/text>

###### Requires platforms to conform their moderation to First Amendment standards

###### Deletes § 230(c)(2)(B)

##### H.R.277, Limiting Section 230 Immunity to Good Samaritans Act, <https://www.congress.gov/bill/117th-congress/house-bill/277/text>

###### Reintroduction of H.R.8596 from prior Congress

##### H.R.3816, American Choice and Innovation Online Act, <https://www.congress.gov/bill/117th-congress/house-bill/3816/text>

###### Antitrust bill introduced by House Democrat with potentially severe but possibly unintended impact on § 230

###### Would allow an antitrust claim every time a “business user” believes that a platform has treated them unfairly compared to someone else

##### H.R.3827, Protect Speech Act, <https://www.congress.gov/bill/117th-congress/house-bill/3827/text>

###### Reintroduction of H.R.8517 from prior Congress

##### *See also* *E&C Republicans Announce Next Phase of Their Effort to Hold Big Tech Accountable* (Jul. 28, 2021), <https://republicans-energycommerce.house.gov/news/press-release/ec-republicans-announce-next-phase-of-their-effort-to-hold-big-tech-accountable/>

###### Package of 32 draft Republican bills grouped under topic headings including “Section 230 Reform,” “Content Moderation Practices to Address Certain Content,” “Protecting Children from Mental Health Harms and Cyberbullying,” “Improving Transparency,” and “Additional Accountability Bills”

###### The draft bills are a muddle of various broad limitations on and specific carve-outs from Section 230 protections for both moderation and publication of content; summaries available at the link

##### *See also* Energy and Commerce Committee Republican Staff, *Big Tech Accountability Platform* (Apr. 15, 2021), <https://republicans-energycommerce.house.gov/wp-content/uploads/2021/04/2021.04.15-Big-Tech-Memo-Staff-Legislative-Concepts.pdf>

###### Proposed House Republican framework for regulating tech companies

###### “Legislative concepts” include, inter alia: defining “Big Tech companies” as places of public accommodation; amending 230 to provide protection for moderation only to the extent that the speech at issue is unprotected by the First Amendment or specifically de-preferenced in the statute; eliminating protection for discrimination on the basis of political affiliation or viewpoint; eliminating all protection for Big Tech companies and/or social media companies, while leaving protection in place for small companies/startups; and/or requiring 230 to be reauthorized every 5 years.

### State legislation creating causes of action against platforms for content moderation

#### Florida

##### SB 1266 (2020), Stop Social Media Censorship Act, <https://www.flsenate.gov/Session/Bill/2020/1266/BillText/Filed/PDF>, creates private and AG causes of action for deletion, censoring, or algorithmic disfavoring of religious or political speech, and forbids relying upon user’s hate speech as a defense at trial

##### SB 7072 (2021), <https://www.flsenate.gov/Session/Bill/2021/7072/BillText/er/PDF>, prohibits social media sites (except for theme park operators) from deplatforming political candidates or “journalistic enterprises”; also requires, inter alia, platforms to restrict speech in a manner that is consistent across users and to provide users with the option to receive content in a raw sequential or chronological form

###### Signed by Governor on May 24, 2021

###### Constitutionality of bill challenged in *NetChoice v. Moody*, No. 4:21-cv-220 (N.D. Fla.)

Complaint (May 27, 2021), <https://www.ccianet.org/wp-content/uploads/2021/05/2021-05-27-CCIA-NetChoice-Complaint-for-Declaratory-and-Injunctive-Relief.pdf>

Motion for Preliminary Injunction (Jun. 3, 2021), <https://www.courtlistener.com/recap/gov.uscourts.flnd.371253/gov.uscourts.flnd.371253.30.0_1.pdf>

Amicus Briefs (Jun. 14, 2021),

Electronic Frontier Foundation and Protect Democracy Project, <https://storage.courtlistener.com/recap/gov.uscourts.flnd.371253/gov.uscourts.flnd.371253.91.0.pdf>

Media and First Amendment Organizations, <https://storage.courtlistener.com/recap/gov.uscourts.flnd.371253/gov.uscourts.flnd.371253.92.0.pdf>

Internet Association, <https://storage.courtlistener.com/recap/gov.uscourts.flnd.371253/gov.uscourts.flnd.371253.93.0.pdf>

Response in Opposition to Motion (Jun. 21, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.flnd.371253/gov.uscourts.flnd.371253.106.0_1.pdf>

Order Granting Preliminary Injunction (Jun. 30, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.flnd.371253/gov.uscourts.flnd.371253.113.0_1.pdf>

Answer (Jul. 15, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.flnd.371253/gov.uscourts.flnd.371253.118.0_1.pdf>

Notice of Appeal to Eleventh Circuit (Jul. 12, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.flnd.371253/gov.uscourts.flnd.371253.115.0.pdf>

Opening Brief of Appellants, *NetChoice LLC v. Attorney General*, No. 21-12355 (Sept. 7, 2021), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3532&context=historical>

#### Kansas

##### SB 2021, <http://www.kslegislature.org/li/b2021_22/measures/documents/sb187_00_0000.pdf>, creates private and AG causes of action for restricting, censoring, or suppressing speech not specifically covered by § 230(c)(2); states that political speech is by definition neither “harassing” nor “objectionable subject matter”

#### Kentucky

##### SB 111 (2021), <https://apps.legislature.ky.gov/record/21rs/sb111.html>, creates private and AG causes of action for deleting, censoring, algorithmically disfavoring, or shadowbanning religious or political speech

#### Louisiana

##### SB 196 (2021), Stop Social Media Censorship Act, <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1226896>, creates private and AG causes of action for deletion, censoring, or algorithmic disfavoring of religious or political speech, and forbids relying upon user’s hate speech as a defense at trial

###### Compare FL SB 1266

##### HB 14 (2021), <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1199928>, creates private cause of action for restriction of accounts or content on the basis of race, gender, political ideology, or religious beliefs

##### HB 602 (2021), Social Media Free Speech Act, <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1212156>, creates private and AG causes of action for deleting, censoring, algorithmically disfavoring, or shadowbanning religious or political speech, and forbids relying upon user’s hate speech as a defense at trial

###### Appears to be House counterpart of SB 196

###### Died in committee

#### New Jersey

##### SB 3748 (2021), <https://s3.documentcloud.org/documents/20706792/idiots.pdf>, prohibits social media sites from deplatforming political candidates or “journalistic enterprises”; also requires, inter alia, platforms to restrict speech in a manner that is consistent across users and to provide users with the option to receive content in a raw sequential or chronological form

###### Compare FL SB 7072

#### North Carolina

##### SB 497 (2021), <https://s3.documentcloud.org/documents/20542117/drs35222-mq-20d.pdf>, creates private and AG causes of action for deletion, censoring, or algorithmic disfavoring of religious or political speech, and forbids relying upon user’s hate speech as a defense at trial

#### North Dakota

##### HB 1144 (2021), Stop Social Media Censorship Act, <https://www.legis.nd.gov/assembly/67-2021/documents/21-0594-01000.pdf>, creates private causes of action for both posters and likely recipients of speech that is (1) restricted, censored, or suppressed and (2) does not fall within the scope of § 230(c)(2)’s protection

###### Compare FL SB 1266 and LA SB 196

#### Texas

##### SB 12 (2021), <https://legiscan.com/TX/text/SB12/2021>, creates private and AG causes of action for censorship on the basis of viewpoint or geographic location in Texas, and requires posting of detailed moderation policies and notice-and-appeal procedure

###### Died at end of legislative session in May 2021, reintroduced as SB 5, <https://capitol.texas.gov/tlodocs/871/billtext/pdf/SB00005E.pdf#navpanes=0>

##### HB 20 (2021), <https://capitol.texas.gov/tlodocs/872/billtext/pdf/HB00020F.pdf#navpanes=0>, declares social media websites common carriers and outlaws not just moderation of social media content but also filtering of email

###### House rejected amendments that would have allowed platforms to block Holocaust denialism, terrorist content, and vaccine disinformation

###### Passed Texas Senate on Sept. 2, 2021, and signed by Governor on Sept. 9, 2021, <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=872&Bill=HB20>

###### *See also* Complaint, *NetChoice, LLC v. Paxton*, No. 1:21-cv-840 (W.D. Tex. Sept. 22, 2021) (challenging constitutionality of HB 20), <https://www.ccianet.org/wp-content/uploads/2021/09/CCIANetChoiceTexasSocialMediaLawsuit.pdf>

#### Utah

##### SB 228 (2021), <https://le.utah.gov/~2021/bills/static/SB0228.html>, prohibits “inequitable moderation practices” and requires transparency in moderation policies and notice-and appeal process

###### Vetoed by Governor

#### Wisconsin

##### Senate Bill UNNUMBERED (2021), <https://legis.wisconsin.gov/senate/28/bradley/media/1124/bradley-tech-accounability-bill.pdf>, prohibits social media sites (except for theme park operators) from deplatforming political candidates; also requires, inter alia, platforms to restrict speech in a manner that is consistent across users and to provide users with the option to receive content in a raw sequential or chronological form

###### Compare FL SB 7072

#### Wyoming

##### SF 100 (2021), <https://www.wyoleg.gov/Legislation/2021/SF0100>, prohibits censorship and blocking on the basis of race, religion, viewpoint, or interactions with Wyoming

###### Bill died in committee

## Selected lawsuits attempting to hold platforms liable for content moderation/user blocking

### Decisions

#### *Enhanced Athlete Inc. v. Google LLC*, No. 4:19-cv-8260 (N.D. Cal. Aug. 14, 2020) (motion to dismiss), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3300&context=historical>

##### Unfair competition/false advertising/declaratory relief: “Here, Plaintiff does not contest that three of its four causes of action are barred by Section 230(c)(1). ... And the Court finds that Plaintiff’s causes of action for (1) unfair competition; (2) false advertising; and (3) declaratory relief seek to hold Defendants liable as a publisher.”

##### Good faith/fair dealing: “Plaintiff’s theory here—whether or not it ultimately proves meritorious—is premised on Defendants’ interference with the parties’ agreement (i.e., the Terms of Use and Community Guidelines). Thus, although the breach of the implied covenant of good faith and fair dealing claim is based on the same factual allegations that Defendants removed Plaintiff’s videos and terminated its accounts, the claimed source of liability is different. … The duty the defendants allegedly violated springs from a contract and not Defendants’ status as a publisher. … Section 230(c)(2) … provides immunity to defendants to ‘police content,’ provided they do so in good faith. The Court finds that Plaintiff has alleged sufficient facts to support its claim that Defendants did not[.] … [However,] [b]ecause the Court finds that the parties’ agreements authorized Defendants, in their discretion, to remove Plaintiff’s videos and delete its accounts, the Court finds that Plaintiff has failed to state a claim for breach of the implied covenant of good faith and fair dealing.”

#### *Wilson v. Twitter, Inc.*, No. 3:20-cv-495 (S.D.W.Va. Sept. 17, 2020) (adopted Oct. 8, 2020) (proposed findings and recommendations on motion to dismiss), <https://storage.courtlistener.com/recap/gov.uscourts.wvsd.229830/gov.uscourts.wvsd.229830.5.0.pdf>

##### Defense – Application of § 230: “As Twitter’s decision to prohibit Wilson’s participation on the platform was reached in the course of a traditional editorial function, namely deciding what type of content to publish, Wilson’s claim is precluded by application of § 230(c) of the CDA. While this case does not represent the ‘typical’ case envisioned by § 230 immunity, wherein a litigant seeks to hold an interactive computer service provider liable for publishing content from a third-party which the litigant finds objectionable, courts have readily found that the statutory immunity also applies to the factual scenario presented here, where the plaintiff objects to the removal of his or her own content.”

##### Title II of the Civil Rights Act, 42 U.S.C. § 2000a(a) (claim for discrimination against heterosexuals): “Reading Wilson’s complaints collectively—and generously—Wilson alleges that he is being denied access to Twitter’s services on the basis of his sexual orientation, and statements he made in support thereof. However, the CRA only protects against discrimination based on an individual’s ‘race, color, religion or national origin.’”

##### Title II of the Civil Rights Act, 42 U.S.C. § 2000a(a) (claim for religious discrimination): “While Title II of the CRA prohibits places of public accommodation from discriminating against individuals on the basis of their religion, … Wilson provides no facts in support of his allegation that Twitter discriminated against him on this ground. … Tweets which use offensive language to insult individuals based on their sexual orientation are prohibited by Twitter regardless of whether those tweets are motivated by religious or secular beliefs. Therefore, even if Wilson were driven by his religious beliefs to create content which Twitter found to be in violation of its policy, his personal motivation does not bar Twitter from enforcing its generally applicable rules regarding user conduct.”

#### *Zimmerman v. Facebook, Inc.*, No. 19-cv-4591 (N.D. Cal. Oct. 2, 2020) (motion to dismiss), <https://scholar.google.com/scholar_case?case=2802451009513451840>

##### Non-constitutional claims: “The plaintiffs’ claims relating to the defendants’ decision to block access to their Facebook profiles are barred by the Communications Decency Act (‘CDA’), 47 U.S.C. § 230. … A social media site’s decision to delete or block access to a user's individual profile falls squarely within this immunity.”

##### Constitutional claims: “To the extent that the constitutional claims are free speech claims premised on the blocking of the plaintiffs' accounts, they fail because Facebook is not a state actor. Claims brought under the federal constitution must be directed at conduct which can ‘be fairly attributable to the State.’ *Lugar v. Edmondson Oil Company*, 457 U.S. 922, 937 (1982). The same is true for claims brought under the California and North Carolina constitutions. … The plaintiffs' argument that Facebook is a state actor because of its joint action with government entities also does not save their constitutional claims. These allegations … pertain to the privacy-related claims brought in the Facebook MDL and do not relate to the blocking of the plaintiffs’ user accounts.”

##### Treason: “Finally, the plaintiffs’ claims relating to Facebook's allegedly treasonous conduct fail because ‘[t]here is no private cause of action for treason.’”

#### *Perez v. LinkedIn Corp.*, No. 4:20-cv-2188 (S.D. Tex. Oct. 9, 2020) (motion to dismiss/transfer venue), <https://storage.courtlistener.com/recap/gov.uscourts.txsd.1783635/gov.uscourts.txsd.1783635.21.0.pdf>

##### “Free Speech Violation”/First Amendment: “Plaintiff argues that even if the First Amendment does not apply to Defendant, Defendant has nevertheless violated his separate ‘right to freedom of speech.’ Plaintiff also argues conclusorily that Defendant is subject to the First Amendment because it is ‘a governmental entity and a puppet of the Chinese Communist Party’s political agenda,’ not a private actor and, because Defendant is functionally a state actor operating in the United States, it is subject to the First Amendment. … Plaintiff does not cite any authority to support his position that there exists an unrestricted right to freedom of speech separate and apart from the First Amendment, and the Court is aware of no such authority. Likewise, Plaintiff provides no authority for his claim that the First Amendment applies to foreign governments operating in the United States. Plaintiff has failed to plead any legally recognized theory. In an exercise of caution, and because Plaintiff proceeds pro se, his Complaint is dismissed without prejudice.”

##### Venue: “Because Plaintiff’s claim is dismissed without prejudice, judicial economy dictates that the Court address Defendant’s request for transfer of this case to the Northern District of California, San Jose Division. The Court concludes that Plaintiff has filed suit in the wrong forum and the matter must be transferred.”

#### *Ayyadurai v. Galvin*, No. 1:20-cv-11889 (D. Mass. Oct. 30, 2020 (motion for TRO), <https://storage.courtlistener.com/recap/gov.uscourts.mad.226888/gov.uscourts.mad.226888.20.0.pdf>

##### Lawsuit against Secretary of the Commonwealth of Massachusetts over reporting of plaintiff Senate candidate’s tweets to Twitter in advance of election, alleging government action in violation of First Amendment. *See* Complaint filed Oct. 20, 2020, <https://storage.courtlistener.com/recap/gov.uscourts.mad.226888/gov.uscourts.mad.226888.1.0_1.pdf>

##### Parties agreed that Mass. gov’t employees would not report plaintiff’s tweets to Twitter until election day, rendering motion for TRO moot; defendants allowed to use tweets or other messages to express their belief that plaintiff’s statements are false or misleading.

##### Case voluntarily dismissed with prejudice, *see* Stipulation of Dismissal (Aug. 10, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.mad.226888/gov.uscourts.mad.226888.196.0_1.pdf>

#### *Doe v. Google LLC*, No. 5:20-cv-7502 (N.D. Cal. Nov. 3, 2020) (motion for TRO), <https://www.courthousenews.com/wp-content/uploads/2020/11/youtubechannels.pdf>

##### Contract: “Although Plaintiffs’ lawsuit is based on contract and First Amendment theories, their TRO application focuses on their contract-based claims. … Defendants plausibly argue that the actions they took were made under YouTube’s TOS Provision ‘Removal of Content by YouTube.’ … With respect to Plaintiffs’ argument that YouTube contractually owed them an explanation for why their channels were suspended or deleted, Plaintiffs’ own declarations belie this theory as they state that YouTube referenced its harassment and cyberbullying policy in its email notices to the Plaintiffs.”

#### *Belknap v. Alphabet, Inc.*, No. 3:20-cv-1989 (D. Or. Dec. 1, 2020) (motion to dismiss), <https://storage.courtlistener.com/recap/gov.uscourts.ord.156919/gov.uscourts.ord.156919.2.0.pdf>

##### First Amendment: “Courts have, on rare occasions, concluded that a private entity was a state actor for First Amendment purposes, most notably when a private entity engaged in functions typically reserved exclusively to state or municipal government. … The Ninth Circuit has rejected arguments that Google and YouTube can be considered public forums subject to First Amendment regulation merely because they may have previously described themselves as public forums.”

##### Violation of Section 230: “The only affirmative obligation § 230 imposes—a requirement that ‘provider[s] of interactive computer service[s] … notify … customers that parental control protections … are commercially available [and] may assist the customer in limiting access to material that is harmful to minors’—is unrelated to Belknap’s allegations. 47 U.S.C. § 230(d). … [E]ven if Belknap could allege that Defendants violated § 230, it is unlikely that he would have a cause of action for that violation.”

#### *Atkinson v. Facebook Inc.*, No. 3:20-cv-5546 (N.D. Cal. Dec. 7, 2020) (motion to dismiss), <https://storage.courtlistener.com/recap/gov.uscourts.cand.364081/gov.uscourts.cand.364081.75.0_1.pdf>

##### First Amendment/Public Function: “[H]e argues that social networks like Facebook are akin to the public squares and meeting places conventionally managed by the government. The operation of these social networks, then, is an ‘exercise by a private entity of powers traditionally exclusively reserved to the State.’ … These arguments have been considered and rejected before.”

##### First Amendment/Entwinement: “Atkinson pleads no specific facts about which members of the United States government pressured Facebook, how they did so, or any causal connection between the alleged pressure and Facebook’s actions. He has therefore pointed to no facts creating an inference ‘plausible on its face’ that the federal government forced Facebook to create fuzzy community standards capable of being weaponized against the Trump administration. … Without facts showing that Facebook received specific directions from state officials, Atkinson fails to show that state officials ‘dominate’ Facebook’s decision making. … Even taking these accusations as true, they do not suggest the domination required … , but rather some more nebulous, definitively external pressure.”

##### § 230/Constructive Public Trust: “Atkinson wields the CDA as a sword and denies its applicability as a shield. He puts forth the novel theory that the immunity granted to publishers under the CDA ‘transforms [Facebook’s] editorial decision-making process into management of a constructive public trust,’ which provides the basis for a private right of action. … He does not, however, set forth any support for the proposition that Congress intended to impose the management of a constructive public trust as the tradeoff for the receipt of publishing immunity. Additionally, Atkinson does not, and cannot, point to any textual support in § 230 for a private right of action. … Furthermore, the public trust doctrine has never been applied outside the environmental context, and certainly not to the internet at large.”

##### Contract/Good Faith/Fair Dealing: “Though Atkinson’s claim is styled as a contract cause of action, he is really accusing Facebook of utilizing its community standards to make classic publishing decisions. Therefore, § 230(c)(1) immunizes Facebook from his state law causes of action.”

#### *Divino Group LLC v. Google LLC*, No. 5:19-cv-4749 (N.D. Cal. Jan. 6, 2021) (motion to dismiss), <https://storage.courtlistener.com/recap/gov.uscourts.cand.346328/gov.uscourts.cand.346328.65.0.pdf>

##### First Amendment: “First, plaintiffs argue that defendants have unreservedly ‘designated’ YouTube as a public forum for free expression and have therefore taken on the traditional and exclusive government function of regulating speech in that forum according to the requirements of the First Amendment. … Second, plaintiffs say that by invoking the protections of a federal statute—Section 230 of the CDA—to unlawfully discriminate against plaintiffs and/or their content, defendants’ private conduct becomes state action ‘endorsed’by the federal government. … Defendants’ first theory is expressly foreclosed by the Ninth Circuit’s recent decision in *Prager University v. Google LLC*…, which held that YouTube’s hosting of speech on a private platform is not a traditional and exclusive government function. … Second, while a private entity may be considered a state actor when the government compels the private entity to take a particular action, *Blum v. Yaretsky*, 457 U.S. 991 (1982), plaintiffs fail to plead any such compulsion. … [N]othing about Section 230 is coercive. … Section 230 reflects a deliberate *absence* of government involvement in regulating online speech[.] … Section 230 of the CDA does not single out particular types of speech as suitable for private censorship.”

##### Lanham Act: “[P]laintiffs allege that by making their videos inaccessible through application of Restricted Mode, YouTube falsely implies that the videos contain shocking or inappropriate content[.] … Considering precisely the same claim, the Ninth Circuit held that defendants’ statements about videos being unavailable in Restricted Mode were not actionable as ‘commercial advertising or promotion’; they were simply accurate explanations of the application of defendants’ content review and monitoring procedures… [and] did not imply any specific representation, as the Lanham Act requires[.]”

##### State law claims: “A court may decline to exercise supplemental jurisdiction where it ‘has dismissed all claims over which it has original jurisdiction.’ … Here, the factors of economy, convenience, fairness, and comity support dismissal of plaintiffs’ remaining state law claims.”

##### Declaratory judgment on constitutionality of § 230: “The Court need not reach the question of whether Section 230 immunity applies to bar plaintiffs’ claims or whether the statute is unconstitutional.”

#### *DJ Lincoln Enterprises, Inc. v. Google, LLC*, No. 2:20-cv-14159 (S.D. Fla. Jan. 19, 2021) (motion to dismiss First Amended Complaint), <https://storage.courtlistener.com/recap/gov.uscourts.flsd.571518/gov.uscourts.flsd.571518.43.0.pdf>

##### RICO: “To the extent that Plaintiff contends that Defendant was part of an enterprise with Alphabet, Inc. and YouTube, Plaintiff has not alleged any facts to support a conclusion that these related corporate entities are distinct for RICO purposes, rather than one corporate ‘person.’ To the extent that Plaintiff contends that Defendant was part of an enterprise with its officers, agents, or employees, or with Alphabet, Inc.’s or YouTube’s officers, agents, or employees, Plaintiff has not identified any of these individuals and has not alleged any facts to support a conclusion that the individuals did not operate within their official capacities for their corporate employers. Plaintiff does allege that Defendant was also part of an enterprise with ‘outside engineers and consultants.’ … However, Plaintiff has not identified any of these ‘outside’ individuals or entities and has not pled any facts to explain each outsider’s relationship to Defendant and role in the purported enterprise. … While Plaintiff alleges in a conclusory manner that members of the purported enterprise had a common purpose to discriminate against and censor conservatives and to damage businesses that conservatives run, Plaintiff has not alleged any facts to demonstrate that each member shared this common purpose. … As best the Court can discern from the Amended Complaint, the ‘scheme or artifice to defraud’ that Plaintiff alleges is Defendant’s scheme to suppress conservative viewpoints while claiming viewpoint neutrality. … And, as best the Court can discern, the transmitted wire communications that Plaintiff alleges are Defendant’s email, chat, and blog communications with Plaintiff about how to conform the website to Defendant’s standards and to optimize the number of visits. … Plaintiff has not explained how Defendant’s communications about website modifications were for the purpose of furthering the suppression of conservative viewpoints. … Moreover, Plaintiff has not adequately alleged wire fraud because a claim of wire fraud must comply with the heightened pleading standard in Rule 9(b) of the Federal Rules of Civil Procedure. … Plaintiff has not pled that Defendant schemed to obtain something from Plaintiff to which it was not entitled.”

##### Unfair trade practices: “Plaintiff’s factual allegations supporting a FDUTPA violation are those of fraud, including the same allegations that Plaintiff uses to support its claim of wire fraud. … As explained above, the Amended Complaint does not satisfy Rule 9(b). Count 4 of the Amended Complaint is therefore dismissed.”

##### Tortious interference: “Plaintiff has not identified any contract with which Defendant interfered, much less pled facts to show that Defendant knew of that contract and intentionally interfered with the contract. … Plaintiff has not identified any business relationship with which Defendant interfered. Interference with the expectation of obtaining business or with a relationship with the community in general is an insufficient basis for tortious-interference claim.”

##### Fraud: “Plaintiff alleges that Defendant ‘fraudulently induced Lincoln to make millions of dollars of alterations to its website by misrepresenting that the changes would improve’ the website’s search results and ‘by concealing the fact that Google discriminates against conservatives and that it blacklisted Lincoln.’ … As explained above, the Amended Complaint does not satisfy the heightened pleading standard under Rule 9(b) for pleading fraud. In addition, … Plaintiff has not alleged any duty of Defendant to disclose and has not provided any authority to show that Defendant had a duty to disclose.”

##### Defense – First Amendment: “Plaintiff has not plead a plausible fraud claim or any plausible claim. Should Plaintiff replead its claims, and should Defendant re-raise its First Amendment argument, Plaintiff shall provide a meaningful response to the argument complete with legal authority. The Court will not address the First Amendment issue further at this juncture.”

#### *Parler LLC v. Amazon Web Services, Inc.*, No. 2:21-cv-31 (W.D. Wash. Jan. 21, 2021) (motion for PI), <https://storage.courtlistener.com/recap/gov.uscourts.wawd.294664/gov.uscourts.wawd.294664.34.0_2.pdf>

##### Sherman Act: “While Parler has not yet had an opportunity to conduct discovery, the evidence it has submitted in support of the claim is both dwindlingly slight, and disputed by AWS. Importantly, Parler has submitted no evidence that AWS and Twitter acted together intentionally—or even at all—in restraint of trade.”

##### Contract: “Section 4.2 of the [Customer Services Agreement], which requires Parler to ‘ensure that [Parler’s] Content and [Parler’s] and End Users’ use of [Parler’s] Content . . . will not violate any of the Policies,’ including AWS’s Acceptable Use Policy. That AUP, as noted above, proscribes ‘activities that are illegal, that violate the rights of others, or that may be harmful to others, our operations or reputation” and “content that is defamatory, obscene, abusive, invasive of privacy, or otherwise objectionable.’ … AWS cites multiple examples of content posted on Parler’s site that undeniably meet this definition. … [T]he CSA gives AWS the right either to suspend or to terminate, immediately upon notice, in the event Parler is in breach. Parler has not denied that at the time AWS invoked its termination or suspension rights under Sections 4, 6 and 7, Parler was in violation of the Agreement and the AUP.”

##### Intentional interference with business expectancy: “Most fatally, as discussed above, it has failed to raise more than the scantest speculation that AWS’s actions were taken for an improper purpose or by improper means.”

#### *Murphy v. Twitter, Inc.*, No. A158214 (Cal. App. 1st Jan. 22, 2021) (appeal from sustainment of demurrer), <https://cases.justia.com/california/court-of-appeal/2021-a158214.pdf?ts=1611349241>

##### Defense – Application of § 230: “Murphy’s claims all seek to hold Twitter liable for requiring her to remove tweets and suspending her Twitter account and those of other users. Twitter’s refusal to allow certain content on its platform, however, is typical publisher conduct protected by section 230. … While Murphy is correct that some courts have rejected the application of section 230 immunity to certain breach of contract and promissory estoppel claims, many others have concluded such claims were barred because the plaintiff’s cause of action sought to treat the defendant as a publisher or speaker of user generated content. … Unlike in *Barnes*, where the plaintiff sought damages for breach of a specific personal promise made by an employee to ensure specific content was removed from Yahoo’s website, the substance of Murphy’s complaint accuses Twitter of unfairly applying its general rules regarding what content it will publish and seeks injunctive relief to demand that Twitter restore her account and refrain from enforcing its Hateful Conduct Policy.”

##### Contract: “Her claim necessarily fails … because Twitter’s terms of service expressly state that they reserve the right to ‘suspend or terminate [users’] accounts … for any or no reason’ without liability. … The fact that Murphy had no opportunity to negotiate the terms of service, standing alone, is insufficient to plead a viable unconscionability claim.”

##### Promissory estoppel: “No plausible reading of the six contract terms and general statements Murphy identifies promises users that they will not have their content removed nor lose access to their account based on what they post online. Indeed, the very terms of service that Murphy relies on in asserting her claims make clear that Twitter may suspend or terminate an account for any or *no* reason.”

##### Unfair competition: “As an initial matter, Murphy’s UCL claim fails for lack of standing because she does not allege … economic injury. … Murphy’s allegations that Twitter’s general declarations of commitment to free speech principles cannot support a fraud claim, because it is unlikely that members of the public would be deceived by such statements.”

#### *Rutenberg v. Twitter, Inc.*, No. 4:21-cv-548 (N.D. Cal. Jan 28, 2021) (motion for TRO), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3405&context=historical>

##### First/Fourteenth Amendment: “A fundamental flaw in Rutenburg’s entire case is that the claimed rights under the First Amendment (and the corollary claims under the Fourteenth Amendment) cannot be enforced against a private entity such as defendant Twitter, Inc. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1928 (2019)[.]”

#### *DeLima v. Google, Inc.*, 2021 DNH 025, No. 1:19-cv-978 (D.N.H. Jan. 28, 2021) (motion to dismiss), [https://cases.justia.com/federal/district-courts/new-hampshire/nhdce/1:2019cv00978/52124/39/0.pdf?ts=1611914371](https://cases.justia.com/federal/district-courts/new-hampshire/nhdce/1%3A2019cv00978/52124/39/0.pdf?ts=1611914371)

##### Civil rights: “Defendants are private companies and not state actors, and thus cannot be held liable under 42 U.S.C. § 1983, absent factual allegations that could lead to a finding of state action.”

##### First Amendment: “DeLima repeatedly alleges in her complaint that Defendants’ have violated the First Amendment and discriminated against her based on her protected speech and viewpoint. Yet she acknowledges that Defendants are private companies and not government entities, which is fatal to her claim.”

##### Defamation: “The act of a service provider disconnecting a social media account or domain name, or moderating or deleting content on these accounts, is not a “statement” for purposes of defamation law[.]”

##### Antitrust: “Even for a pro se litigant, simply providing a hyperlink to an online version of 15 U.S.C. § 1 and baldly concluding that Defendants violated the Sherman Act and other ‘Antitrust Laws’ is not sufficient to state an antitrust claim.”

##### Copyright: “Nor is a violation of ‘fair use laws’ a viable claim, as ‘fair use’ is a defense to a copyright or trademark infringement claim and not a basis for an affirmative claim.”

##### IIED: “DeLima has failed to identify any conduct ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.’ … Under the facts and circumstances alleged here, private publisher content, such as moderating content, removing content, and choosing advertisers and advertisements for their platforms, does not meet this standard.”

##### Breach of contract: “DeLima alleges that Google owes her compensation as a result of various acts, including disconnecting one of her domains…, keeping monetization she earned through another domain…, suspending or removing her from YouTube, manipulating or suppressing the view count on her YouTube channels, and failing to pay her ‘all of her earnings’ in 2018, 2019, and 2020 from these platforms. … With the proper factual support, including a more-precise description of the alleged contract at issue, DeLima may be able to assert a contract claim that survives the Rule 12(b) stage.

#### *Perez v. LinkedIn Corp.*, No. 5:20-cv-7238 (N.D. Cal. Feb. 5, 2021) (motion to dismiss), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3411&context=historical>

##### Note: This is a refiled version of the *Perez* case mentioned above.

##### Anti-SLAPP: “The statute is inapplicable here because LinkedIn has not initiated any suit against Perez to chill constitutionally protected speech. At most, Perez alleges that LinkedIn has chilled his alleged constitutionally protected speech by ‘wast[ing] a lot of time with judicial processes,’ ‘misrepresenting law cases,’ and refusing ‘multiple attempts to peacefully settle.’ … However, the anti-SLAPP applies against a party pursuing litigation and is designed to protect defendants from vexatious and suppressive litigation.”

##### IIED: “As LinkedIn argues, ‘[a] private party simply choosing to not provide access to its platform’ does not meet the threshold of extreme conduct exceeding the boundaries of a civilized society.”

##### First Amendment: “A fundamental precept of the First Amendment establishes ‘that the Free Speech Clause prohibits only governmental abridgment of speech.’ *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). The First Amendment does not prohibit a private entity’s abridgment of speech. *Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 737 (1996). This separation of constitutional enforcement between state actors and private individuals actually ‘protects a robust sphere of individual liberty.’ *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1928.”

#### *Millan v. Facebook, Inc.*, No. A161113 (Cal. App. 1st Mar. 25, 2021) (appeal of sustainment of demurrer), <https://www.courts.ca.gov/opinions/nonpub/A161113.PDF>

##### § 230(b): “That statute provides, in pertinent part, ‘It is the policy of the United States—[¶] … [¶] (2) 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; [¶] (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; [¶] … and [¶] (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.’ (47 U.S.C. § 230(b).) Millan’s amended complaint alleges Facebook failed to carry out these policies, but Millan has cited no authority and provided no argument for why Facebook’s failure to follow these policies could render it liable to him. … These policies are not substantive provisions that provide a basis for liability, nor do they create a private right of action.”

##### § 230(c)(2)(A): “Millan alleges Facebook failed to follow this provision by blocking his content based on discrimination and hate, rather than one of the acceptable reasons listed in the statute. But this provision provides an immunity, so even if Facebook acted discriminatorily, at most that would deprive it of the immunity that the statute provides.”

##### Title II of the Civil Rights Act, 42 U.S.C. § 2000a(a): “Millan alleges in his amended complaint that Facebook discriminated against him by blocking his post because it wanted to stop him from selling his services. Putting aside the question of whether Facebook constitutes a ‘public accommodation,’ the statute does not prohibit businesses from discriminating on this basis.”

##### 47 U.S.C. § 202: “Facebook does not satisfy the definition of a ‘common carrier.’ Millan’s complaint may be liberally construed to allege that Facebook generates digital signals in the form of ‘binary communication codes,’ as he puts it, but he does not allege that Facebook transmits these signals from their point of origin to their point of reception. Indeed, such allegations would be contrary to the general operation of the Internet, in which some companies create digital content and others own and operate the wires and other infrastructure that transmits the digital content to users. … The definitions Millan relies on, like 47 U.S.C. section 202(a) itself, are part of the Communications Act of 1934 (47 U.S.C. § 151 et seq.), which ‘divides the world of relevant technologies into two buckets: “information services” subject only to minimal regulation, and “telecommunications services” subject to the common carriage requirements.’ … Facebook qualifies as an information service and is not subject to 47 U.S.C. section 202(a).”

##### Federal Wiretap Act: “Millan’s conclusory allegation that Facebook intercepted electronic communications for years is insufficient, and Millan’s complaint fails to otherwise identify any specific communications that Facebook intercepted. … According to Millan’s own allegations, he voluntarily provided the comment to Facebook in the expectation that Facebook would display it publicly. Millan does not explain how the statute can be construed to prohibit this.”

##### 18 U.S.C. § 1343: “18 U.S.C. section 1343 is a criminal statute, and it does not create a private right of action for damages.”

#### *Daniels v. Alphabet Inc.*, No. 5:20-cv-4687 (N.D. Cal. Mar. 31, 2021) (motion to dismiss), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3437&context=historical>

##### First Amendment/Joint Action: “[T]he Ninth Circuit has recently observed that ‘[t]he Supreme Court has never explicitly recognized a Bivens remedy for a First Amendment claim.’ … Even if Mr. Daniels had pled a Bivens claim, and even if a Bivens remedy existed for a First Amendment violation, Mr. Daniels does not plausibly allege action by the federal government that deprived him of his First Amendment rights. … Mr. Daniels does not plead any such willful participation by defendants jointly with the federal government or with any individual member of Congress, nor does he plead any interdependence between defendants and the federal government or a substantial degree of cooperative action between them. The publicly expressed views of individual members of Congress—regardless of how influential—do not constitute ‘action’ on the part of the federal government. Likewise, Google LLC NetPac’s alleged donations to Speaker Pelosi’s and Rep. Schiff’s political campaigns do not suggest that the federal government ‘exercis[es] control over’ over defendants’ conduct.”

##### First Amendment/Coercion: “[Plaintiff’s] speculative assertions about the possibility defendants will be subpoenaed to testify before Congress or exposed to some other peril if they ignore letters from Congressional representatives do not support a theory of government action. Notably, … Mr. Daniels does not allege that the federal government directed a particular result with respect to his Fauci and George Floyd videos. … To the extent Mr. Daniels argues that Congressional representatives may exert pressure on an industry without passing a law that may then be deemed government action, none of the cases he cites supports such a theory.”

##### First Amendment/Government Nexus: “Mr. Daniels cannot succeed under a nexus theory. He does not plead any facts suggesting that Speaker Pelosi or Rep. Schiff were personally involved in or directed the removal of Mr. Daniels’s videos. He alleges only that they wanted certain kinds of videos removed and that his videos fell within that category. These allegations are not plausible. But even if they were, such allegations do not reflect the kind of government involvement in the conduct of private entities like defendants that is sufficient to support a nexus theory of government action.”

##### Breach of Contract: “YouTube expressly reserves the option to not provide notification of the reason for removal of a video based on its reasonable belief that certain circumstances apply. Mr. Daniels does not plead any facts suggesting that defendants were required to notify him of the specific reasons for the removal of his content or that YouTube’s alleged failure to provide such advance notification was inconsistent with the highly discretionary policy described in the Terms of Service quoted above. … [The Terms of Service do] not guarantee an appeals process in any particular form. Even if it did, Mr. Daniels acknowledges that he engaged in an appeals process for both the Fauci and George Floyd videos, even if those appeals did not resolve to his satisfaction. … Additionally, the Terms of Service state that YouTube may remove content in circumstances outside of a violation of the Community Guidelines.”

##### Good faith/fair dealing: “While a plaintiff may bring claims for both breach of contract and breach of the implied covenant, when both claims rely on the same alleged acts and seek the same relief, the Court may disregard the breach of the implied covenant claim as superfluous.”

##### Conversion: “Because Mr. Daniels has alleged nothing more than a failure to pay him what he is owed under the parties’ agreement—whether that be the Terms of Service, the YouTube Partner Program, or another agreement—he has not stated a claim for conversion.”

##### Unjust enrichment/Money had and received: “Here, Mr. Daniels’s unjust enrichment claim is based on precisely the same allegations as his purported breach of contract claim, and he does not contend that the alleged contract is unenforceable or invalid. Accordingly, the Court dismisses the unjust enrichment claim. … [L]ike a claim for unjust enrichment, a plaintiff cannot maintain a quasi-contract claim for money had and received where he also alleges a valid and enforceable contract.”

##### Unfair trade practices: “[W]here a plaintiff has not pled sufficient facts to survive a motion to dismiss with respect to its underlying claim, it has not pled sufficient facts to meet the unlawful prong of its unfair competition claim.”

##### Defense - Applicability of § 230: “With one exception, the Court concludes that Section 230(c)(1) immunity bars all of his other claims that are premised on YouTube’s removal of or restriction of access to Mr. Daniels’s videos from its platform … [T]o the extent Mr. Daniels may be able to state a claim for breach of contract regarding the alleged withholding of donations owed to him, the Court is not prepared to concluded at this junction that defendants would be immunity from liability for such a claim under Section 230(c)(1). … Mr. Daniels relies solely on conclusory assertions that YouTube acted in bad faith and that its conduct does not qualify for protection under Section 230(c)(2)(A). … Accordingly, except to the extent Mr. Daniels may be able to state a claim for breach of contract regarding YouTube’s failure to pay him based on SuperChat views and donations, … the Court concludes that Section 230(c)(2)(A) immunity applies to all of his state law claims.”

##### Defense - Threat to YouTube’s First Amendment rights: “Because the Court dismisses all claims at this time for the many reasons described above, it does not reach the issue of YouTube’s First Amendment rights.”

##### Leave to amend: “Because the Court finds that amendment would be futile as to Mr. Daniels’s claim for violation of the First Amendment, whether brought under § 1983 or Bivens, that claim is dismissed with prejudice. … [T]he record suggests that Mr. Daniels may be able to state a breach of contract claim based on obligations defendants owe to him for SuperChat views and donations under the YouTube Partner Program terms.”

#### *Freedom Watch, Inc. v. Google Inc.*, No. 19-7030 (11th Cir. May 27, 2020), cert. den. No. 20-969, 593 U.S. \_\_\_ (Apr. 5, 2021) (appeal from grant of motion to dismiss), <https://scholar.google.com/scholar_case?case=14832448379578706556>

##### First Amendment: “Freedom Watch contends that, because the Platforms provide an important forum for speech, they are engaged in state action. But, under *Halleck*, ‘a private entity who provides a forum for speech is not transformed by that fact alone into a state actor.’”

##### Antitrust: “Freedom Watch argues that we should infer an agreement primarily from the Platforms' parallel behavior, as each company purportedly refused to provide certain services to Freedom Watch. But … parallel conduct alone cannot support a claim under the Sherman Act.”

##### D.C. Human Rights Act: “The Act prohibits discrimination on the basis of political affiliation in ‘any place of public accommodations’ D.C. CODE § 2-1402.31(a); see also id. § 2-1401.02(24). Relying on a D.C. Court of Appeals case interpreting that statute…, the district court concluded that only physical places within the District of Columbia qualify as ‘places of public accommodation.’ … [T]he D.C. Court of Appeals has interpreted this statute and at minimum, its interpretation is a reasonable one.”

#### *Rutenberg v. Twitter, Inc.*, No. 4:21-cv-548 (N.D. Cal. Apr. 9, 2021) (order following order to show cause why action should not be dismissed given that Twitter, as a private non-state actor, cannot be held liable for a § 1983 claim), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3442&context=historical>

##### § 1983/First Amendment: “Section 1983 provides a remedy for the deprivation of federal rights—but only when that deprivation is caused by conduct that is ‘fairly attributable to the State’ and therefore undertaken under color of state law. … Rutenburg makes no allegation that Twitter exercised any state right or privilege to restrict her access to former President Trump’s Tweets. … Instead, Rutenburg points to a supposed delegation of authority from former President Trump to operate what she contends is a public forum. … At best, the amended complaint merely describes how Twitter using its own technical means reportedly disabled, removed, and otherwise restricted former President Trump’s Tweets and accounts. … None of this has any connection with the exercise of authority by a sovereign state. … Rutenburg cannot transform Twitter into a ‘state actor’ based on an allegation that the company ‘administered’ former President Trump’s account, which is all that is alleged in the amended complaint.”

#### *Lewis v. Google LLC*, No. 20-16073 (9th Cir. Apr. 15, 2021) (appeal from grant of motion to dismiss), <https://cdn.ca9.uscourts.gov/datastore/memoranda/2021/04/15/20-16073.pdf>

##### Constitutional challenge to § 230: “Lewis’s alleged injuries—removing videos, cancelling advertisement sharing, and so-called ‘shadow banning’—all arose from the actions of YouTube, a private entity, as it enforced its own standards. Section 230 does not apply to Lewis’s conduct or provide a mechanism for sanctions that could affect Lewis; instead, it provides immunity to ‘providers of interactive computer services against liability arising from content created by third parties.’ … Without an injury, the district court did not err in finding Lewis lacked standing to bring the claim.”

##### First Amendment/§ 1983: “Here, Lewis sued private entities and asserted no actions that occurred under color of state law. … YouTube committed no § 1983 violation here.”

##### Title II of the Civil Rights Act, 42 U.S.C. § 2000a(a): “Title II ‘covers only places, lodgings, facilities[,] and establishments,’ and the statute itself is devoid of language which would ‘indicate congressional intent to regulate anything other than public facilities.’ *Clegg v. Cult Awareness Network*, 18 F.3d 752, 755–56 (9th Cir. 1994). To conclude Google or YouTube were places of public accommodation under Title II ‘would obfuscate the term ‘place’ and render nugatory the examples Congress provides to illuminate the meaning of that term.’ *Id.* at 755.”

##### Lanham Act: “[A] consumer cannot bring a claim under the Lanham Act. … Lewis asserted claims as a consumer on the Google platform and not as a competitor with a commercial interest in reputation or sales.”

##### Fraud by omission: “Lewis’s allegations did not show any alleged concealment of a material fact or reasonable reliance even as Lewis purported that YouTube failed to disclose that they censor hate speech. … YouTube disclosed that it reviews flagged content to determine whether it violates the Community Guidelines, which in turn prohibit ‘Hateful content.’”

##### Good faith/fair dealing: “YouTube’s terms and Guidelines explicitly authorized YouTube to remove or demonetize content on its platform that violated its policies, including ‘Hateful content., Thus, YouTube’s removal or demonetization of Lewis’s videos, when YouTube determined them to violate the Guidelines, cannot support a claim for breach of the implied covenant of good faith and fair dealing.”

##### Tortious interference with prospective economic advantage: “Lewis failed to allege, and the complaint cannot be read to find, that he had an economic relationship with a third party.”

#### *Rutenberg v. Twitter, Inc.*, No. 4:21-cv-548 (N.D. Cal. May 28, 2021) (motion for leave to file second amended complaint), <https://storage.courtlistener.com/recap/gov.uscourts.cand.372404/gov.uscourts.cand.372404.25.0.pdf>

##### Leave to amend: “Here, Rutenburg’s proposed amendments do not address the Court’s analysis from the prior Order dismissing this case for lack of subject matter jurisdiction, and are thus futile. Instead, these new allegations consist of additional details of Twitter, former President Donald Trump and his Twitter account, Rutenburg’s Twitter usage, and a discussion of the Second Circuit case, *Knight First Amendment Institute v. Trump*, 928 F. 3d 226 (2d Cir. 2019). These proposed amendments do not alter, let alone address, the Court’s prior determination that ‘Twitter is not a state actor, and is not exercising any sovereign state authority.’”

#### *Newman v. Google LLC*, No. 5:20-cv-4011 (N.D. Cal. Jun. 25, 2021) (motion to dismiss), <https://storage.courtlistener.com/recap/gov.uscourts.cand.361045/gov.uscourts.cand.361045.68.0.pdf>

##### § 1981/racial discrimination: “Plaintiffs’ only factual allegation in support of an inference that Defendants intentionally and purposefully discrimination against Plaintiffs is Plaintiffs’ belief that Defendants’ moderation decisions were made because of Plaintiffs’ race. Plaintiffs’ ‘personal belief of discrimination, without any factual support, is insufficient to satisfy federal pleading standards.’”

##### First Amendment: “Defendants’ actions with respect to editorial decisions on YouTube do not meet the Ninth Circuit’s test for a public function. … Section 230 does not coerce private entities like Defendants to take any action, including any action that violates Plaintiffs’ First Amendment rights. … [T]he federal government does not ‘encourage, endorse, and participate’ in the challenged editorial decisions of Defendants through Section 230. Nor does Section 230 ‘give the government a right to supervise or obtain information about private activity[.]’”

##### Lanham Act: “Plaintiffs allege that Defendants’ restriction of some of Plaintiffs’ videos in Restricted Mode constitutes false advertising because it likely conveys to users that there is something inappropriate in Plaintiffs’ videos. … Plaintiffs’ allegations are … precluded by the Ninth Circuit’s holding in *Prager III*. Specifically, Plaintiffs’ allegations still do not adequately plead that Defendants’ ‘statements concerning [their] content moderation policies . . . constitute ‘commercial advertising or promotion’ as the Lanham Act requires.’ *Prager III*, 951 F.3d at 999–1000.”

##### State law claims: “Here, the factors of economy, convenience, fairness, and comity support dismissal of Plaintiffs’ remaining state law claims.”

##### Constitutional challenge to § 230: “The Court dismisses Plaintiffs’ declaratory judgment claim for two reasons. First, Plaintiffs appear to seek declaratory relief in anticipation that Defendants will assert Section 230 as an affirmative defense to Plaintiffs’ claims. However, ‘using the Declaratory Judgment Act to anticipate an affirmative defense is not ordinarily proper.’ … Second, the Court is mindful of the doctrine of constitutional avoidance.”

###### *See also* Memorandum of Law for Intervenor United States in Support of the Constitutionality of 47 U.S.C. § 230(c), *Newman v. Google LLC*, No, 5:20-cv-4011 (N.D. Cal. Mar. 22, 2021) (urging the court not to address constitutional challenge to § 230, but arguing that the statute’s constitutionality should be upheld if that question was reached) <https://storage.courtlistener.com/recap/gov.uscourts.cand.361045/gov.uscourts.cand.361045.54.0.pdf>: “The Ninth Circuit has squarely held that YouTube is not a state actor capable of violating the First Amendment. *See Prager III*, 951 F.3d at 999. And, accordingly, § 230(c) does not deprive Plaintiff of a First Amendment claim they would otherwise be able to maintain against YouTube. *Denver Area* does not support a different conclusion.”

#### *Brock v. Zuckerberg*, No. 1:20-cv-7513 (S.D.N.Y. Jun. 25, 2021) (motion to dismiss), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3482&context=historical>

##### First Amendment: “Though the Second Circuit has not addressed the question of whether a social media provider is a state actor for First Amendment purposes, other circuits that have confronted the issue have unanimously held platforms like Facebook are not state actors. … Facilitating the exchange of communication or hosting a platform for discussion are not activities ‘that *only* governmental entities have traditionally performed.’ *Prager Univ.*, 951 F.3d at 998 (quoting *Halleck*, 139 S.Ct. at 1930).”

##### Violation of § 230: “Plaintiff does not allege that Facebook or the Individual Defendants ‘provided’ the information that led to the claim. Rather Plaintiff’s claims are based on Facebook’s alleged removal of content he personally created or shared.”

##### RICO: “Plaintiff’s claims, which stem from the Defendants’ motion to transfer the action pursuant to Facebook’s Terms of Service, must fail because they arise purely out of a litigation action.”

#### *Children’s Health Defense v. Facebook Inc.*, No. 3:20-cv-5787 (N.D. Cal. Jun. 29, 2021) (motion to dismiss), <https://www.courthousenews.com/wp-content/uploads/2021/06/facebook-vaccine-ruling.pdf>

##### First and Fifth Amendment *Bivens* claims against Facebook: “In *Correctional Services Corporation v. Malesko*, 534 U.S. 61, 66 (2001), the Supreme Court held that a plaintiff could not bring a *Bivens* action against a private corporation operating a halfway house under contract with the Bureau of Prisons. The Court stated that ‘[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations,’ and that ’the threat of suit against an individual’s employer was not the kind of deterrence contemplated by *Bivens*.’ … CHD contends that ‘*Malesko* doesn’t apply’ ‘because no other law permits suit against Facebook [or Poynter] for its past acts of viewpoint discrimination against CHD.’ … However, CHD does not cite any post-*Malesko* cases in which courts have permitted Bivens actions against private entities. To the contrary, after *Malesko* courts have consistently held that plaintiffs may not pursue *Bivens* actions against private entities.”

##### First and Fifth Amendment *Bivens* claims against Mark Zuckerberg/Personal involvement: “At best, CHD has alleged that Zuckerberg has made general statements about removing ‘misinformation that has the potential to lead to imminent or physical harm’ and discouraging ‘anti-vaccine’ content on Facebook, and that ‘on information and belief’ Zuckerberg met with Congressman Schiff to discuss the issue of vaccine misinformation on Facebook’s platform. CHD speculates that Zuckerberg and Schiff discussed ‘specific standards’ that would be used to identify and censor vaccine ‘misinformation,’ and CHD speculates that ‘Zuckerberg and/or the Doe defendants either read CHD’s March 4, 2019 letter or rejected it without reading.’ None of these allegations contain facts showing personal involvement by Zuckerberg in deciding to post the warning label on CHD’s Facebook page, the decisions to post fact-checks to particular CHD posts, or the decisions to ‘demonetize’ or ‘shadow-ban’ CHD. Throughout the SAC, the briefing, and the hearing on these motions, CHD and its counsel repeatedly equate any references to ‘vaccine misinformation’ with CHD’s content, and therefore that any statements by Facebook, Zuckerberg, the CDC, or any other entity about removing ‘vaccine misinformation’ from Facebook should be interpreted as statements about censoring CHD’s vaccine-related speech. The Court cannot make such an inferential leap[.]”

##### First and Fifth Amendment Bivens claims against Mark Zuckerberg/Joint action: “First, allegations involving non-federal actors, such as the WHO, the British government, and government-affiliated nonprofits such as the CDC Foundation and InfraGard, are irrelevant to determining whether CHD has plausibly alleged joint action. Second, general statements by the CDC and Zuckerberg about ‘working together’ to reduce the spread of health or vaccine misinformation, or to promote universal vaccination do not show that the government was a ‘joint participant in the challenged activity,’ specifically the decision to put the warning label on CHD’s Facebook page, the fact-checks, and Facebook’s ‘demonetization’ and ‘shadow-banning’ of CHD’s content and page. … Relying on Congressman Schiff’s February 2019 letter to Zuckerberg, CHD contends that Congressman Schiff ‘provided a substantive standard – deference to CDC/WHO pronouncements conclusively presumed to be “authoritative” – by which Facebook should identify and censor vaccine “misinformation” on its platform.’ … However, nowhere in the letter does Rep. Schiff direct Facebook to adopt any specific standard to follow when it determines what speech constitutes vaccine misinformation or whether particular posts are false or misleading. … Nor does the fact that Facebook directs users to the CDC website for information about vaccines mean that the CDC has supplied the ‘standard of decision’ for Facebook’s regulation of content on its platform. Similarly, simply alleging that Facebook and the CDC are ‘working together’ or ‘partnering’ to curb the spread of ‘vaccine misinformation’ does not allege that the specific acts challenged in this lawsuit were made pursuant to a CDC policy. Instead, what has plausibly alleged is that Facebook created its own algorithms and standards for detecting ‘vaccine misinformation,’ and that in doing so, Facebook may have relied on CDC information about vaccines to determine what information is ‘misinformation.’ That is not enough to show that Facebook’s actions were ‘compelled’ by any particular CDC ‘standard of decision.’”

##### First and Fifth Amendment Bivens claims against Mark Zuckerberg/§ 230 encouragement coupled with government pressure: “’Unlike the regulations in Skinner, Section 230 does not require private entities to do anything, nor does it give the government a right to supervise or obtain information about private activity.’ *Divino Grp. LLC v. Google LLC*, No. 19-CV-04749-VKD, 2021 WL 51715, at \*6 (N.D. Cal. Jan. 6, 2021). … [T]he immunity provided by Section 230 does not provide sufficient ‘encouragement’ to convert Facebook’s private acts into state action. … CHD alleges that Congressman Schiff’s February 2019 letter to Zuckerberg and subsequent public statements coerced Facebook to take action on vaccine misinformation or risk losing certain immunities under Section 230 of the CDA. … CHD alleges that Schiff pressured to Facebook remove ‘vaccine misinformation’ and later told reporters that ‘if the social media companies can’t exercise a proper standard of care when it comes to a whole variety of fraudulent or illicit content, then we have to think about whether [Section 230] immunity still makes sense.’ … These allegations are a far cry from the specific threats [discussed in earlier cases]. … Further, ‘[i]f the government is considering regulation, affected private parties can try to convince it there’s no need to regulate without thereby transforming themselves into the state’s agents.’”

##### “Takings” claim: “[R]egardless of how CHD chooses to characterize its Fifth Amendment claim, CHD still needs to establish ‘sufficient government action’ to assert a takings claim. … For the reasons stated supra, CHD has not done so.”

##### Lanham Act: “[T]he warning label and fact-checks are not disparaging CHD’s ‘goods or services,’ nor are they promoting the ‘goods or services’ of Facebook, the CDC, or the fact-checking organizations such as Poynter. In addition, the warning label and fact-checks do not encourage Facebook users to donate to the CDC, the fact-checking organizations, or any other organization. … All of the alleged misrepresentations – the warning label and the fact-checks – are simply providing information, albeit information with which CHD disagrees. … [C]ourts have held that “[t]he mere fact that the parties may compete in the *marketplace of ideas* is not sufficient to invoke the Lanham Act.’”

##### RICO: “CHD’s allegations of wire fraud – both those actually plead in the SAC and those unpled but asserted in CHD’s opposition briefs – do not constitute wire fraud because CHD has not alleged any facts showing that defendants engaged in a fraudulent scheme to obtain money or property from Facebook visitors to CHD’s page (or anyone else, including CHD).”

##### Declaratory relief: “[F]or all of the reasons stated supra, CHD has not plausibly alleged that defendants engaged in federal action and thus CHD may not seek injunctive relief based on alleged First Amendment violations. In addition, as CHD has failed to state a claim under the Lanham Act or RICO, there is no ‘case or controversy’ necessary to support a claim for declaratory relief.”

##### Motion to supplement record: “Many of the supplemental allegations – such as the allegation that the Biden Administration was ‘talking to’ social media companies so ‘they understand the importance of misinformation and disinformation and how they can get rid of it quickly’ – are very similar to allegations already contained in the SAC, and for the reasons discussed supra, they are insufficient.”

#### *Domen v. Vimeo, Inc.*, No. 20-616 (2nd Cir. Jul. 21, 2021) (appeal from grant of motion to dismiss), <https://scholar.google.com/scholar_case?case=2069640630825610871>

##### Defense – Application of § 230(c)(2): “Appellants’ allegations that Vimeo acted in bad faith are too conclusory to survive a motion to dismiss under Rule 12(b)(6). … Given the massive amount of user-generated content available on interactive platforms, imperfect exercise of content-policing discretion does not, without more, suggest that enforcement of content policies was not done in good faith.”

##### Anti-discrimination claims: “[A] plaintiff must allege facts sufficient to create an inference of intentional discrimination on account of the plaintiff’s membership in a protected class. … The amended complaint merely alleges, on information and belief, that other videos containing references to LGBTQ sexual orientations and gender identities were permitted to remain on the site. … That is not enough.”

#### *DJ Lincoln Enterprises, Inc. v. Google, LLC*, No. 2:20-cv-14159 (S.D. Fla. Jul. 21, 2021) (motion to dismiss Second Amended Complaint), <https://storage.courtlistener.com/recap/gov.uscourts.flsd.571518/gov.uscourts.flsd.571518.52.0.pdf>

##### RICO: “Plaintiff now alleges that a RICO enterprise consisted of Defendant together with ‘Alphabet, Inc., its CEO and Board of Directors, YouTube, its CEO and Board of Directors, and outside third-party engineers, search engine optimizers, and digital sales marketing consultants[.]’ … Plaintiff has not pled concrete, non-conclusory facts to support a plausible inference that each of these outside entities knew about and shared a fraudulent or otherwise criminal common purpose with the purported RICO enterprise.”

##### Fraud: “The allegations in the Second Amended Complaint do not satisfy the requirements of Rule 9(b). Plaintiff alleges that Defendant engaged in fraud by inducing Plaintiff to make costly modifications to its website to improve search results, when such modifications would not in fact improve the website’s search results. … Plaintiff makes only generalized allegations that Defendant communicated with Plaintiff between 2016 and 2018 in emails, blogs, and online chats. … At minimum, Plaintiff has not identified the precise statements that Defendant made to Plaintiff or the dates on which the statements were made. … Plaintiff also bases its fraud claims on omissions, alleging that Defendant behaved fraudulently by failing to disclose certain information to Plaintiff. … Possession of superior knowledge alone does not create a duty to disclose under Florida law. … And, according to Plaintiff’s own allegations, it was publicly knowable at least by 2017 that Defendant is biased against political conservatives and downgrades the search results for businesses owned by political conservatives. … Plaintiff has provided no legal authority to show that Florida law would impose a duty to disclose such publicly knowable information.”

##### Leave to Amend: “Plaintiff has twice previously amended its Complaint. In dismissing the Amended Complaint, the Court pointed out the same pleading deficiencies that it has identified in this Order … . The Court concludes that giving Plaintiff further opportunities to attempt to correct these deficiencies, which would undoubtedly lead to Defendant filing a fourth Motion to Dismiss, is inappropriate.”

#### *Orders v. Facebook*, No. 21-cv-H-04-0171 (Ohio Ct. Comm. Pl. Aug. 17, 2021) (motion for default judgment),<https://advance.lexis.com/api/permalink/0a50afc9-ecf8-4c13-ba68-efb76cc8f574/?context=1000516>

##### Plaintiff failed to obtain default judgment despite Facebook’s failure to appear; case dismissed without prejudice.

##### Defamation: “[T]here are two fatal defects with Orders' defamation claim. First, the statements made by Facebook are statements of opinion and factual statements that are true. Facebook stated that Orders had violated its policy on posts containing nudity or sexual activity. The fact that the suspension was for this reason is a true statement. Further, whether the Biden post actually violated Facebook's ‘community standards’ is a statement of opinion by Facebook that does not support a defamation claim. This leads to the second issue with Orders' defamation claim. Orders does not allege that Facebook's statement was published to anyone else.”

##### First Amendment: “Courts have refused to find that Facebook and other social media providers are state actors for purposes of being subject to constitutional claims.”

##### Defense – Application of § 230: “Courts have rejected claims like those brought by Orders based on this federal statutory right of social media platforms to police the content on their websites.”

#### *See also* Opinion of Thomas, J., concurring, *Biden v. Knight First Amendment Institute at Columbia University*, No. 20-197, 593 U.S. \_\_ (2021), <https://www.medialaw.org/images/medialawdaily/04.05.21knight2.pdf>

##### “Today’s digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. 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.”

##### “Any control Mr. Trump exercised over the account greatly paled in comparison to Twitter’s authority, dictated in its terms of service, to remove the account ‘at any time for any or no reason.’ Twitter exercised its authority to do exactly that. Because unbridled control of the account resided in the hands of a private party, First Amendment doctrine may not have applied to respondents’ complaint of stifled speech.”

##### “If part of the problem 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. Historically, at least two legal doctrines limited a company’s right to exclude.”

##### “But whatever may be said of other industries, there is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers.”

##### “Second, governments have limited a company’s right to exclude when that company is a public accommodation. This concept—related to common-carrier law—applies to companies that hold themselves out to the public but do not ‘carry’ freight, passengers, or communications.”

##### “Internet platforms of course have their own First Amendment interests, but regulations that might affect speech are valid if they would have been permissible at the time of the founding. … 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—especially where a restriction would not prohibit the company from speaking or force the company to endorse the speech. …There is a fair argument that some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated in this manner.”

##### “[U]nlike newspapers, digital platforms hold themselves out as organizations that focus on distributing the speech of the broader public. Federal law dictates that companies cannot ‘be treated as the publisher or speaker’ of information that they merely distribute. … The analogy to common carriers is even clearer for digital platforms that have dominant market share.”

##### “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. … Courts are split, however, about whether federal accommodations laws apply to anything other than ‘physical’ locations.”

##### “Because the space constraints on digital platforms are practically nonexistent (unlike on cable companies), … a regulation restricting a digital platform’s right to exclude might not appreciably impede the platform from speaking.”

##### “None of this analysis means, however, that the First Amendment is irrelevant until a legislature imposes common carrier or public accommodation restrictions—only that the principal means for regulating digital platforms is through those methods. Some speech doctrines might still apply in limited circumstances, as this Court has recognized in the past.”

##### “Plaintiffs might have colorable claims against a digital platform if it took adverse action against them in response to government threats. But no threat is alleged here. What threats would cause a private choice by a digital platform to ‘be deemed . . . that of the State’ remains unclear.”

##### “Threats directed at digital platforms can be especially problematic in the light of 47 U. S. C. § 230, which some courts have misconstrued to give digital platforms immunity for bad-faith removal of third-party content. … This immunity eliminates the biggest deterrent— a private lawsuit—against caving to an unconstitutional government threat. For similar reasons, some commentators have suggested that immunity provisions like § 230 could potentially violate the First Amendment to the extent those provisions pre-empt state laws that protect speech from private censorship. See Volokh, *Might Federal Preemption of Speech-Protective State Laws Violate the First Amendment?* The Volokh Conspiracy, Reason, Jan. 23, 2021. According to that argument, when a State creates a private right and a federal statute pre-empts that state law, ‘the federal statute is the source of the power and authority by which any private rights are lost or sacrificed.’”

### Other pending complaints

#### *Huber v. Biden*, No. 2:21-cv-936 (D. Ariz. May 28, 2021), <https://s3.documentcloud.org/documents/20983105/huber-lolsuit.pdf>

##### Claims (against Twitter) include First Amendment and equal protection claims

#### *State v. Google LLC*, No. 21-CV-\_\_\_\_\_ (Ohio Ct. Comm. Pl. Jun. 8, 2021), <https://www.documentcloud.org/documents/20802988-511038313-ohio-complaint-against-google>

##### Seeks declaration that Google is a common carrier and Google Search is a public utility in order to prevent the company from engaging in unfair discrimination or self-preferencing in search results

#### *O’Handley v. Padilla*, No. 2:21-cv-4954 (C.D. Cal. Jun. 17, 2021), <https://libertycenter.org/wp-content/uploads/2021/06/OHandley_Complaint.pdf>

##### Claims (against Twitter) include First Amendment, California Constitution free speech, Equal Protection, Due Process, and § 1985 conspiracy to interfere with civil rights claims, all arising out of alleged entwinement with actions of state officials.

#### *Martillo v. Twitter Inc*, No. 1:21-cv-11119 (D. Mass. Jul. 6, 2021), <https://s3.documentcloud.org/documents/21030576/batshit1.pdf>

##### Claims against various social media sites and university media outlets for allegedly discriminating against plaintiff, asserting Title II claim and claim for “denial of common carriage”

#### *Trump v. Facebook, Inc.*, No. 1:21-cv-22440 (S.D. Fla. Jul. 7, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.flsd.595800/gov.uscourts.flsd.595800.1.0_1.pdf>

#### *Trump v. Twitter, Inc.*, No. 1:21-cv-22441 (S.D. Fla. Jul. 7, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.flsd.595801/gov.uscourts.flsd.595801.1.0.pdf>

#### *Trump v. YouTube, LLC*, No. 1:21-cv-22445 (S.D. Fla. Jul. 7, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.flsd.595813/gov.uscourts.flsd.595813.1.0_1.pdf>

##### Nearly identical lawsuits seeking to treat the platforms as state actors under the First Amendment, to compel the reinstatement of the accounts of Trump and other like-minded individuals, and to obtain a declaration that Section 230’s protection for the editorial discretion of platform moderators is unconstitutional

##### *See also* District Court Certification of Constitutional Question, *Trump v. YouTube, LLC*, No. 1:21-cv-24455 (S.D. Fla. Jul. 12, 2021) (inviting U.S. Attorney General to intervene to express views on constitutionality of § 230), <https://storage.courtlistener.com/recap/gov.uscourts.flsd.595813/gov.uscourts.flsd.595813.11.0.pdf>; Motion for Preliminary Injunction, *Trump v. YouTube, LLC*, No. 1:21-cv-24455 (S.D. Fla. Aug. 23, 2021) (seeking to compel YouTube to reinstate Trump’s access to the platform), <https://www.courthousenews.com/wp-content/uploads/2021/08/trump-sues-youtube.pdf>

#### *Freedom Watch, Inc. v. YouTube, LLC*, No. 1:21-cv-22614 (S.D. Fla. Jul. 21, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.flsd.596673/gov.uscourts.flsd.596673.1.0.pdf>

##### Claim modeled on *Trump* lawsuits above

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# Efforts to Restrict User-Generated Content and/or Punish Platforms for Distributing Certain Content

## Executive Action

### Betsy Klein*, White House reviewing Section 230 amid efforts to push social media giants to crack down on misinformation*, CNN (Jul. 20, 2021), <https://www.cnn.com/2021/07/20/politics/white-house-section-230-facebook/index.html>

## Legislation

### Federal Legislation

#### 116th Congress (2019-2020)

##### S.3398, Eliminating Abusive and Rampant Neglect of Interactive Technologies (“EARN IT”) Act of 2020, <https://www.congress.gov/bill/116th-congress/senate-bill/3398/text>

###### Would establish the National Commission on Online Child Sexual Exploitation Prevention, direct the commission to develop best practices for interactive online services providers to prevent the online sexual exploitation of children, limit the liability protections of online service providers with respect to claims alleging violations of child sexual exploitation laws, and replace statutory references to child pornography with child sexual abuse material

##### S.5054, Stop Internet Sexual Exploitation Act, <https://www.congress.gov/bill/116th-congress/senate-bill/5054/text>

###### Would impose new verification regulations and functionality restrictions on adult content sites

##### H.R.8323, Bianca’s Law, <https://www.congress.gov/bill/116th-congress/house-bill/8323/text>

###### Would require social media companies to establish an office dedicated to identifying and removing violent and gory content that violates such company’s social media platform content moderation standards

##### H.R.8454, Eliminating Abusive and Rampant Neglect of Interactive Technologies (“EARN IT”) Act of 2020, <https://www.congress.gov/bill/116th-congress/house-bill/8454/text>

###### House companion bill to S.3398

###### *See* Riana Pfefferkorn*, House Introduces EARN IT Act Companion Bill, Somehow Manages to Make it Even Worse*, Stanford Center for Internet & Society (Oct. 5, 2020) (discussing differences between how House and Senate bills treat providers’ use of encryption technology), <https://cyberlaw.stanford.edu/blog/2020/10/house-introduces-earn-it-act-companion-bill-somehow-manages-make-it-even-worse>

##### H.R.8517, Protect Speech Act, <https://www.congress.gov/bill/116th-congress/house-bill/8517/text>

###### Defines creating or developing information under § 230(c)(1) as including instances in which a person or entity solicits, comments upon, funds, or affirmatively and substantively contributes to, modifies, or alters information provided by another person or entity

#### 117th Congress (2021-2022)

##### S.27, See Something, Say Something Online Act of 2021, <https://www.congress.gov/bill/117th-congress/senate-bill/27/text>

###### This bill requires an interactive computer service that detects a suspicious transmission to submit a suspicious transmission activity report to the DOJ describing the transmission.

###### A suspicious transmission is any post, message, comment, tag, or other user-generated content or transmission that commits, facilitates, incites, promotes, or otherwise assists the commission of a major crime.

###### Any provider of an interactive computer service that fails to report a known suspicious transmission shall not be immune from liability for such transmission and may be held liable as a publisher for the related suspicious transmission.

##### S.299, Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (“SAFE TECH”) Act, <https://www.congress.gov/bill/117th-congress/senate-bill/299/text>

###### In § 230(c)(1), “…shall be treated as the publisher or speaker of any information” now becomes “…the publisher or speaker of any speech”

###### § 230(c)(1)’s protection would not apply “to the extent the provider or user has accepted payment to make the speech available or, in whole or in part, created or funded the creation of the speech”

###### § 230(c)(1) is explicitly declared an affirmative defense

###### Adds new categorical exceptions, including: state or federal civil rights laws; state or federal antitrust laws; state and federal stalking, harassment, or intimidation laws; international human rights claims under the Alien Tort Claims Act; and wrongful death claims.

##### S.797, Platform Accountability and Consumer Transparency (“PACT”) Act, <https://www.congress.gov/bill/117th-congress/senate-bill/797/text>

###### Would mandate adoption and disclosure of content moderation policies, require notice-takedown-review processes and other transparency requirements, mandate removal of content on receipt of a court order, state that § 230 does not apply where a provider has actual knowledge of illegality, and add exemptions for federal civil laws and regulations as well as explicitly allowing state attorneys general to enforce such laws or regulations

###### Reintroduction and modification of S.4066 from prior Congress

##### S.2448, Health Misinformation Act of 2021, <https://www.congress.gov/bill/117th-congress/senate-bill/2448/text>

###### Would amend § 230 to provide that an interactive computer service shall be treated as the publisher or speaker of health misinformation that is created or developed through the interactive computer service during a declared public health emergency if the provider promotes that misinformation through an algorithm used by the provider (or similar software functionality), unless that promotion occurs through a neutral mechanism

##### H.R.285, Curbing Abuse and Saving Expression In Technology (“CASE-IT”) Act, <https://www.congress.gov/bill/117th-congress/house-bill/285/text>

###### Would prevent a company from using § 230 as a defense for a period of one year if that company “creates, develops, posts, materially contributes to, or induces another person to create, develop, post, or materially contribute to illegal online content.”

##### H.R.2000, Stop Shielding Culpable Platforms Act, <https://www.congress.gov/bill/117th-congress/house-bill/2000/text>

###### Would amend § 230 to explicitly state that it does not foreclose distributor liability

##### H.R.2154, Protecting Americans from Dangerous Algorithms Act, <https://www.congress.gov/bill/117th-congress/house-bill/2154/text>

###### Would treat platforms as the speakers of algorithmically selected user speech for the purposes of claims under 42 U.S.C. § 1985 and the Anti-Terrorism Act

##### H.R.3184, Civil Rights Modernization Act of 2021, <https://www.congress.gov/bill/117th-congress/house-bill/3184/text>

###### Would amend § 230 to clarify that such section has no effect on civil rights laws with respect to certain targeted advertisements

##### H.R.3421, Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (“SAFE TECH”) Act, <https://www.congress.gov/bill/117th-congress/house-bill/3421/text>

###### House counterpart bill to S.299

##### H.R.3827, Protect Speech Act, <https://www.congress.gov/bill/117th-congress/house-bill/3827/text>

###### Reintroduction of H.R.8517 from prior Congress

##### *See also E&C Republicans Announce Next Phase of Their Effort to Hold Big Tech Accountable* (Jul. 28, 2021), <https://republicans-energycommerce.house.gov/news/press-release/ec-republicans-announce-next-phase-of-their-effort-to-hold-big-tech-accountable/>

###### Package of 32 draft Republican bills grouped under topic headings including “Section 230 Reform,” “Content Moderation Practices to Address Certain Content,” “Protecting Children from Mental Health Harms and Cyberbullying,” “Improving Transparency,” and “Additional Accountability Bills”

The draft bills are a muddle of various broad limitations on and specific carve-outs from Section 230 protections for both moderation and publication of content; summaries available at the link

### State Legislation

#### California

##### S.B. 739 (2020), <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB739>, declares it a misdemeanor to distribute or cause to be distributed, with actual knowledge and intent to deceive, by mail, radio or television broadcast, telephone call, text message, email, or any other electronic means, including over the Internet, literature or any other form of communication to a voter that includes certain kinds of election misinformation

###### Signed by Governor, Sept. 18, 2020

#### Colorado

##### S.B. 21-132 (2021), <https://leg.colorado.gov/sites/default/files/documents/2021A/bills/2021a_132_01.pdf>, would create a state commission to “investigate and … hold hearings on claims” that social media sites failed to stop people from: engaging in hate speech; undermining elections; disseminating disinformation, conspiracy theories, or fake news; or authorize, encourage, or carry out violations of user privacy; the hearing officer would be authorized to issue orders to social media sites

## Selected court decisions on attempts to hold platforms liable for third party content/behavior

### Aiding and abetting terrorism

#### *Retana v. Twitter, Inc.*, No. 19-11389 (5th Cir. Jun. 16, 2021), <https://www.ca5.uscourts.gov/opinions/pub/19/19-11389-CV0.pdf>

##### The Fifth Circuit affirmed the dismissal of a claim against Twitter alleging that it had aided and abetted Hamas to radicalize a domestic shooter of Dallas police officers.

##### The court did not rely upon § 230, instead finding that the shooting was not an “act of international terrorism” under the relevant federal statute and that there was no connection established between Hamas and the shooter’s actions.

#### *Gonzales v. Google LLC*, No. 18-16700 (9th Cir. Jun. 22, 2021), <https://cdn.ca9.uscourts.gov/datastore/opinions/2021/06/22/18-16700.pdf>

##### On a consolidated appeal of the dismissal of claims against Google, Twitter, and Facebook related to the alleged use of their services to support domestic and international terrorist attacks, the Ninth Circuit issued a mixed opinion in which it held that most of the claims failed under Section 230 and/or because the pleadings failed to allege sufficient acts on the part of the platforms to render them responsible.

##### One claim related to an attack in Istanbul was revived, with the court noting that the judge below had not reach the § 230 defense and finding that the plaintiffs had adequately pleaded an aiding-and-abetting claim.

##### The court called on Congress to reconsider the breadth of § 230(c)(1)’s protection.

### Housing discrimination

#### *Vargas v. Facebook, Inc.*, No. 19-cv-5081 (N.D. Cal. Aug. 20, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.cand.346836/gov.uscourts.cand.346836.105.0.pdf>

##### A federal judge ruled that plaintiffs whose Third Amended Complaint alleged that Facebook enabled third parties' discriminatory housing ads had failed for the last time to plead how they were injured, and failed to plead around Section 230.

### Privacy-related claims

#### *Callahan v. Ancestry.com Inc.*, No. 3:20-cv-8437 (N.D. Cal. Mar. 1, 2021), <http://business.cch.com/ipld/CallahanAncestrycom20210301.pdf>

##### Ancestry.com secured dismissal of privacy and right of publicity claims brought by a class of individuals who alleged that their yearbook data were scraped by the genealogy website without their permission.

##### The court held that § 230 protected the display of the images, which were provided by the third parties who gave Ancestry the yearbooks, and that it did not matter that the third parties did not create that content.

#### *In re Zoom Video Communications Inc. Privacy Litigation*, No. 5:20-cv-2155 (N.D. Cal. Mar. 11, 2021), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3426&context=historical>

##### Zoom mostly succeeded on a § 230 defense in privacy claims arising out of the phenomenon of “zoombombing”; the court found that Zoom was an “access software provider” and that the zoombombers were third party providers of the intrusive content.

##### Section 230 did not, however, foreclose plaintiffs’ contract claims or claims not deriving from the nature of the intrusive content.

#### *Knapke v. PeopleConnect, Inc*, No. 2:21-cv-262 (W.D. Wash. Aug. 10, 2021),<https://storage.courtlistener.com/recap/gov.uscourts.wawd.296697/gov.uscourts.wawd.296697.25.0.pdf>

##### The court held that PeopleConnect was not protected by § 230 against a right-of-publicity claim arising out of its creation of advertisements for its online yearbook service using people’s yearbook photos without authorization, holding that the defendant was the creator of the content at issue.

##### The court distinguished *Callahan v. Ancestry.com*, above, on the basis that the earlier case involved Ancestry’s actual display of yearbook photos on its website rather than advertising.

#### *Hepp v. Facebook*, Nos. 20-2725 & 2885 (3rd Cir. Sept. 23, 2021), <https://www2.ca3.uscourts.gov/opinarch/202725p.pdf>

##### The Third Circuit held that Section 230 did not preclude state law right-of-publicity claims, which the Court of Appeals construed as claims “arising out of a law pertaining to intellectual property” and thus falling within the IP exception in § 230(e)(2). The court closely analogized right-of-publicity claims to trademark claims,

##### The court also found no basis to limit § 230(e)(2) to federal IP claims. The decision directly splits with the Ninth Circuit, which held in *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007),that § 230(e)(2) does not apply to state law intellectual property claims.

### Defective design of online service

#### *Lemmon v. Snap, Inc.*, No. 20-55295 (9th Cir. May 4, 2021), <http://cdn.ca9.uscourts.gov/datastore/opinions/2021/05/04/20-55295.pdf>

##### The Ninth Circuit held that Snap was not protected by § 230 on a defective design claim, in a case brought by the families of people who died in a car accident while recording themselves using Snapchat’s “Speed Filter.”

##### The Court found that the claim was explicitly not premised on content published by the deceased, as opposed to the design of the app which allegedly led them to undertake reckless behavior.

### Facilitation of peer-to-peer services

#### *Mass. Port Auth. v. Turo Inc.*, 487 Mass. 235 (2021), <https://scholar.google.com/scholar_case?case=15142371780672808138>

##### The Massachusetts Supreme Judicial Court drew a line between first-party content and editorial choices regarding third-party content in a case involving peer-to-peer car rental service Turo, holding that § 230 protected the latter but not the former

##### However, it also held that § 230 would not protect Turo if it had “more concentrated involvement” in a particular transaction on the site.

### Sex trafficking/FOSTA

#### *Doe v. Kik Interactive, Inc.*, No. 0:20-cv-60702 (S.D. Fla. Aug. 31, 2020), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3312&context=historical>

##### The court held that the FOSTA exception to § 230 requires that a defendant knowingly participate in a sex trafficking venture to be held liable on a federal civil claim, and that mere awareness of other trafficking incidents on the defendant’s website does not suffice to eliminate protection under § 230.

#### *M. L. v. craigslist, Inc.*, No. 3:19-cv-6153 (W.D. Wash. Sept. 11, 2020), <https://storage.courtlistener.com/recap/gov.uscourts.wawd.280469/gov.uscourts.wawd.280469.153.0.pdf>

##### The court held that the plaintiff had adequately alleged methods by which craigslist’s policies and practices regarding its “erotic services” section contributed to the creation of the ads resulting in the plaintiff’s being trafficked, such that craigslist could be subject to claims based on its development or creation of the ads under state and federal law.

##### The court noted that FOSTA did not create an exemption under § 230 for all claims under the federal Trafficking Victims Protection Reauthorization Act, but held that the plaintiff’s federal claim could still proceed based on the allegations above.

#### *U.S. v. Martono*, No. 3:20-cr-274 (N.D. Tex. Jan. 1, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.txnd.333192/gov.uscourts.txnd.333192.28.0.pdf>

##### In a criminal prosecution involving a website allegedly involved in commercial sex advertising, the district court rejected a First Amendment challenge to FOSTA.

#### *In re Facebook, Inc.*, No. 20-434 (Tex. Jun. 25, 2021), <https://www.courthousenews.com/wp-content/uploads/2021/06/tx-supreme-facebook.pdf>

##### The Texas Supreme Court held that three plaintiffs could proceed against Facebook on sex-trafficking related claims under the § 230 exception created by FOSTA.

##### The decision reads the exception quite broadly to allow civil claims under state law.

#### *Doe v. Twitter, Inc.*, No. 3:21-cv-485 (N.D. Cal. Aug. 19, 2021), <https://www.courthousenews.com/wp-content/uploads/2021/08/Doe-v.-Twitter-ruling.pdf>

##### The district court rejected a long list of sex trafficking-related civil claims against Twitter over an alleged refusal to remove links to CSAM videos, including a claim for direct sex trafficking liability, based on § 230 and/or the merits of the various claims.

##### However, the court found that the FOSTA exception to § 230 did not require a civil claim for beneficiary liability under the federal Trafficking Victims Protection Reauthorization Act to meet the high scienter standards of a criminal charge under the Act, and allowed that claim to proceed.

##### The court expressly rejected the reasoning of *Doe v. Kik Interactive*, above.

#### *Doe v. MindGeek USA Inc.*, No. 8:21-cv-338 (C.D. Cal. Sept. 3, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.cacd.811224/gov.uscourts.cacd.811224.66.0.pdf>

##### On a motion to dismiss, the court followed both *Doe v. Twitter* and *M. L. v. Craigslist* in finding that civil sex trafficking claim can proceed under FOSTA against operator of PornHub on “should have known” scienter standard, and declaring that the prevailing interpretation among the courts of the Ninth Circuit.

##### The court separately held that allegations regarding defendant’s activity crossed the line into creation of the offensive content for the purposes of the plaintiff’s other claims.

#### *J. B. v. G6 Hospitality, LLC*, No. 4:19-cv-7848 (N.D. Cal. Sept. 8, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.cand.352226/gov.uscourts.cand.352226.178.0.pdf>

##### Dismissed federal civil claim against Craigslist.

##### Diverging from other judges in the Ninth Circuit, Judge Gilliam held that a federal civil claim under § 1595 can only survive § 230 via FOSTA if the allegations would also support a criminal charge under § 1591, including meeting the latter section’s actual knowledge standard.

#### See also:

##### *Sex Trafficking: Online Platforms and Federal Prosecutions*, U.S. Gov’t Accountability Office (June 2021), <https://www.gao.gov/assets/gao-21-385.pdf>

###### GAO report finding that FOSTA has fragmented the online sex trafficking market by pushing it to overseas platforms and complex payment systems, creating significant challenges for law enforcement that did not exist prior to the law’s enactment

##### Complaint, *Doe Nos. 1-40 v. MG Freesites, Ltd.*, No. 3:20-cv-2440 (S.D. Cal. Dec. 15, 2020), <https://storage.courtlistener.com/recap/gov.uscourts.casd.695357/gov.uscourts.casd.695357.1.0.pdf>, and Complaint, *Doe v. MG Freesites, Ltd.*, No. 7:21-cv-220 (N.D. Ala. Feb. 11, 2021), <https://endsexualexploitation.org/wp-content/uploads/Doe-v.-MindGeek_Complaint.pdf>

###### Additional lawsuits accusing Pornhub’s parent MindGeek of profiting from partnership with a sex trafficking venture

### Publisher/distributor distinction

#### Statement of Thomas, J., respecting denial of certiorari, *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, No. 19-1284, 592 U.S. \_\_\_ (2020), <https://www.supremecourt.gov/opinions/20pdf/19-1284_869d.pdf>

##### Justice Thomas, in a case involving the interpretation of the “good faith” requirement of § 230(c)(2)(A), issued a ten-page statement criticizing courts for, inter alia, reading § 230(c)(1) to preclude distributor liability as well as publisher liability and to apply to situations in which platforms edit or comment upon third-party content.

##### Justice Thomas admitted that his comments lacked the benefit of briefing by the parties, but suggested the Court should take the next available opportunity to address the meaning of the statute.

##### So far, the Court has not taken Thomas up on his suggestion, denying cert in later cases in which Facebook obtained dismissals under § 230.

###### *See* *Igbonwa v. Facebook, Inc.*, No. 20-5849, 592 U.S. \_\_\_ (2020) (cert denied), <https://www.supremecourt.gov/orders/courtorders/120720zor_6jg7.pdf>; *Fyk v. Facebook, Inc.*, No. 20-632, 592 U.S. \_\_\_ (2021) (cert denied), <https://www.supremecourt.gov/orders/courtorders/011121zor_5he6.pdf>

###### *See also* *J. B. v. G6 Hospitality, LLC*, No. 4:19-cv-7848 (N.D. Cal. Dec. 10, 2020), <https://storage.courtlistener.com/recap/gov.uscourts.cand.352226/gov.uscourts.cand.352226.161.0.pdf>

Holding that Justice Thomas’s solo comments do not provide a basis for reconsideration of the dismissal of claims against Craigslist relating to allegations of sex trafficking on the site.

# Efforts to improve transparency of moderation practices

## Federal Legislation

### 116th Congress (2019-2020)

#### S.4975, Promoting Responsibility Over Moderation In the Social-media Environment (“PROMISE”) Act, <https://www.congress.gov/bill/116th-congress/senate-bill/4975/text>

##### Would require platforms to establish and publicly disclose moderation policies

### 117th Congress (2021-2022)

#### H.R.3067, Online Consumer Protection Act, <https://www.congress.gov/bill/117th-congress/house-bill/3067/text>

##### Would require platforms to publish terms of service that are “clear, easily understood, and written in plain and concise language,” including for social media platforms the content and behavior permitted or prohibited on the platform, the form that restriction of content or users can take, whether users can report content or other users, how a user can respond to a blocking request, and how a person can appeal such a request

##### Would also require platforms to develop, implement, and ensure compliance with policies regarding user content and behavior

#### *See also E&C Republicans Announce Next Phase of Their Effort to Hold Big Tech Accountable* (Jul. 28, 2021), <https://republicans-energycommerce.house.gov/news/press-release/ec-republicans-announce-next-phase-of-their-effort-to-hold-big-tech-accountable/>

##### Package of 32 draft Republican bills grouped under topic headings including “Section 230 Reform,” “Content Moderation Practices to Address Certain Content,” “Protecting Children from Mental Health Harms and Cyberbullying,” “Improving Transparency,” and “Additional Accountability Bills”

## State Legislation

### California

#### AB 587 (2021), <https://s3.documentcloud.org/documents/20533483/20210ab587_98.pdf>, would require a social media company to post their terms of service in a specified manner and with additional specified information, to submit biannual reports to the state attorney general regarding the current TOS and what categories of content violate the TOS, and to submit quarterly reports to the state AG on data on violations of the TOS.

### South Carolina

#### SB 551 (2021), <https://www.scstatehouse.gov/sess124_2021-2022/bills/551.htm>, would require platforms to post criteria for suspension of accounts and create private and AG causes of action for failing to inform holders of South Carolina-based accounts that they have been banned