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Freedom of Speech in the Age of Information and Misinformation

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The author would like to thank his parents, Steve and Cara Mehrer, for their constant support and motivation, and Professor Jeffery Schmitt for his guidance and knowledge in contract and constitutional law while writing this Comment.

FREEDOM OF SPEECH IN THE AGE OF INFORMATION AND MISINFORMATION

*By Edward "Trey" Mehrer III**

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The sensitive person's hostility to the machine is in one sense unrealistic, because of the obvious fact that the machine has come to stay. But as an attitude of mind there is a great deal to be said for it. The machine has got be accepted, but it is probably better to accept it rather as one accepts a drug—that is, grudgingly and suspiciously. Like a drug, the machine is useful, dangerous and habit-forming. The oftener one surrenders to it the tighter its grip becomes.[1]

I. INTRODUCTION

Social media plays an unprecedented role in the vast majority of human lives around the globe. With unprecedented impact comes substantial notoriety, which gives rise to critique and optimization especially regarding whether a platform is hosting "acceptable" speech.[2] Heated political debate has found a new home in the sphere of social media.[3] Debate of this sort, that falls on the side of "unacceptable" speech, can result in individual users being "canceled," deplatformed, demonetized, or subject to animus due to social identity theory.[4] As a result, commentators have begun contemplating and discussing the implications of free speech on social media.[5] Many of the discussions interface with the protection afforded to social media platforms via Section 230 of the Communications Decency Act ("CDA").[6]

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[1] GEORGE ORWELL, THE ROAD TO WIGAN PIER, 203–04 (Harcourt, Inc. 1958).

[2] The popularity of social media is shown by an approximate 1400% increase in adult use of social media from 2007 to 2019. Summer Allen, *Social Media's Growing Impact on Our Lives*, AM. PSYCH. ASS'N. (Sept. 20, 2019), https://www.apa.org/members/content/social-media-research. The CEOs of Facebook, Twitter, and Google faced intensive questioning whether the platforms had a role to play in the January 6th Capitol Riot. Gerrit De Vynck et al., *Big Tech CEOs Face Lawmakers in House Hearing on Social Media's Role in Extremism, Misinformation*, WASH. POST (Apr. 9, 2021, 1:30 PM), https://www.washingtonpost.com/technology/2021/03/25/facebook-google-twitter-house-hearing-live-updates/.

[3] Kathleen McGarvey Hidy, *Social Media Use and Viewpoint Discrimination: A First Amendment Judicial Tightrope Walk with Rights and Risks Hanging in the Balance*, 102 MARQ. L. REV. 1045, 1046 (2019).

[4] *See id.* at 1080–81.

[5] *See generally* Ira P. Robbins, *What is the Meaning of "Like"?: The First Amendment Implications of Social-Media Expression*, 2013 FED. CTS. L. REV. 127 (2013). For a discussion on social media platforms as an arena for conversation which implicates "bedrock constitutional principles of free speech and debate," *see generally* Hidy, *supra* note 3. Several commentators regard social media platforms as the new public forum—pursuant to caselaw —discuss the implications of the First Amendment. *See* Jeremy Robinson, *The Modern Public Forum*, 2 NO. 3 MD. B. J. 102, 105 (2021); Joseph C. Best, Comment, *Signposts Turn to Twitter Posts: Modernizing the Public forum Doctrine and Preserving Free Speech in the Era of New Media*, 53 TEX. TECH L. REV. 273, 274 (2021).

[6] Katie Mellinger, Comment, *The Section 230 Standoff: Safe Harbor Rollbacks Would Not Solve Alleged "Anti-Conservative Bias" in Social Media Content Moderation*, 10 WAKE FOREST J. L. & POL'Y

Commentators, politicians, and state legislatures participate in a newly evolving area of legal discussion in a myriad of manners—whether it be calling for governmental regulation of social media platforms, revocation, or amendments to the CDA.[7]

Due to the rise in discussion surrounding revocation or amendments to the CDA, this Comment discusses the implications that arise from the terms of service ("ToS") agreements on social media platforms. It is evident that the CDA and the platforms' ToS work together to provide social media platforms a double layer of protection from lawsuits. However, without the blanketed immunity provided under the CDA, the platforms' ToS agreements could expose social media platforms to countless civil lawsuits.[8] Ultimately, to preserve the technological marketplace of ideas, there is a necessity for either: the Supreme Court to expand the public forum doctrine to apply to those social media platforms with a substantial market power, or Congress to amend Section 230 of the CDA to combat private viewpoint discrimination—especially on the basis of political matters.[9]

Section II of this Comment provides background on the immense importance social media plays and on instances where citizens of various countries were deprived of social media by governments attempting to curb public demands for change; on the ToS agreements, which users must agree to in order to access and use social media sites; a brief overview of the evolution of the CDA, and the powers it affords social media companies; and, finally, a synopsis on the debacle that United States culture and social media

389, 394 (2020); Tanner Bone, Comment, *How Content Moderation May Expose Social Media Companies to Greater Defamation Liability*, 98 WASH. U. L. REV. 937, 937–38 (2021).

[7] The 116th Congress saw 26 different proposals to amend the current protection format of Section 230 of the CDA. VALERIE C. BRANNON & ERIC N. HOLMES, SECTION 230: AN OVERVIEW, CONG. RES. SERV. R46751 (2021).

[8] The CDA provides broad civil immunity to "interactive computer service[s]" and "information content provider[s]" with the exception of "suits brought under federal criminal law, intellectual property law, any state law 'consistent' with Section 230, certain electronic communications privacy laws, or certain federal and state laws relating to sex trafficking." *Id.* at 3–4.

[9] As will be discussed *infra*, in section III(A), the social media platforms have such breadth in numbers of users who use the platforms specifically for the exchange of ideas, and the companies hold themselves out as a place for dialogue that some sort of constitutional barrier should be in place to protect from discussion being forced towards a specific political narrative. Amendment, and not revocation, to Section 230 is seen widely as the most effective means for regulation of the social media companies while also allowing the social media platforms room for continuous growth. *Compare* U.S. DEP'T OF JUST., SECTION 230 – NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY?, KEY TAKEAWAYS AND RECOMMENDATIONS (2020) ("The Department of Justice has concluded that the time is ripe to realign the scope of Section 230 with the realities of the modern internet."), *and* Michael D. Smith & Marshall Van Alstyne, *It's Time to Update Section 230*, HARV. BUS. REV. (Aug. 12, 2021), https://hbr.org/2021/08/its-time-to-update-section-230 ("Today there is a growing consensus that we need to update Section 230. Facebook's Mark Zuckerberg even told Congress that it 'may make sense for there to be liability for some of the content,' and that Facebook 'would benefit from clearer guidance from elected officials.'"), *with Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies*, JOSH HAWLEY U.S. SENATOR FOR MO. (June 19, 2019), https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies (noting that Senator Hawley calls for evaporation of the Section 230 protection unless the companies agree to an audit of their content regulation policies).

platforms face in their battle against misinformation. Section III offers an analysis of the problematic nature of the power afforded to social media platforms through constitutional and contract law. Section IV is a proposal in consideration of an amendment to Section 230 of the CDA that could aid in strengthening the technological marketplace of ideas. Lastly, Section V will close with a summation of the key takeaways and reemphasize the goal of this Comment.

This Comment grapples with the divisive topic of misinformation on social media. The subjects covered include: COVID-19, Donald Trump's social media usage, and congressional response to the January 6th Capitol Riot. This Comment does not posit to have a definitive conclusion on the scientific or moral correctness of anything regarding the previous list. The following discussion is the Author's attempt at an objective analysis of the constitutional and contractual law implications, and to propose an amendment for Section 230 of the CDA to better suit the modern social climate within the United States.

II. BACKGROUND

A. Importance of Social Media

The United Nations stated in Article 19 of the Universal Declaration of Human Rights that access to the internet is a fundamental human right and each individual holds the "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[10] Narrowing the scope to the United States, a 2017 Supreme Court decision invalidated a law that prohibited sex offenders from accessing social media sites because, the court reasoned, social media sites are one of the most powerful modern-day tools for private citizens to have their voice heard. [11]

Speaking through statistics, approximately 4.48 billion people actively use social media worldwide.[12] Eighty-two percent of people ages 13 and up use social media in the United States.[13] Out of the total population 72.3%, or 240 million people, in the United States are actively using social media.[14] Facebook and YouTube lead the board with the most people active on their sites.[15] Respectively, Facebook has approximately 2.85 billion users,

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[10] U.N., Universal Declaration of Human Rights, Art.19, at 40 (2015), https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf.

[11] *See generally* Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

[12] Brian Dean, *Social Networking Usage & Growth Statistics: How Many People Use Social Media in 2022?*, BACKLINKO, https://backlinko.com/social-media-users (last updated Oct. 10, 2021).

[13] *Id.*

[14] *Id.*

[15] *Id.*

and YouTube, in 2021 alone, averaged 2 billion users each month.[16] Another popular social media platform, Twitter, has approximately 1.3 billion accounts on its site.[17]

These numbers are certain to grow each year as internet access becomes increasingly available through ambitious initiatives by technology tycoon Elon Musk. Through SpaceX, Musk initiated a program called "Starlink" where the company launches satellites into orbit for purposes of giving broadband internet to the entire globe.[18] As a result, a significant number of the global population will likely join social media platforms in the future, especially as parts of the globe that could not previously access the internet are capable of doing so through such ambitious initiatives.

a. Actions by Other Governments Against Social Media

This section highlights recent events, which show how some governments are aware of the importance that the internet, specifically social media, serves to facilitate speech and expression of ideas among societies.

i. Egypt and Tunisia

First, an event in Egypt has shown that, under the thumb of an authoritarian government, social media can be successfully used by citizens to organize demonstrations and their calls for democratic change. In Tunisia, in December 2010, the cultivation of boiling tensions surrounding political unrest, poverty, rampant unemployment, and corruption led to a man demonstrating his opposition to the current status quo via self-immolation.[19] This expressive form of opposition to government functionality sparked a geographical movement that caught wind through the Middle East and North Africa.[20] The opposition grew to such an extent that younger crowds in Egypt turned to demonstrations, demanding the resignation of their then President, Hosni Mubārak, free and fair elections, and democracy.[21] As a result of the ongoing unrest, the military soon took over Egypt, and the response to pro-democratic demonstrations grew increasingly violent.[22] These widespread pro-democratic movements became known as Arab Spring, while the

[16] *Id.*; *YouTube Statistics for 2022* (Mar. 5, 2022), https://www.smperth.com/resources/youtube/youtube-statistics/.

[17] *Twitter Statistics for 2022 // Facts & Figures*, SOCIAL MEDIA PERTH (Mar. 3, 2022), https://www.smperth.com/resources/twitter/twitter-statistics/.

[18] *See generally Technology*, STARLINK, https://www.starlink.com/ (last visited Sept. 27, 2022).

[19] *Egypt Uprising of 2011*, BRITANNICA (Jan. 19, 2022), https://www.britannica.com/event/Egypt-Uprising-of-2011. Self-immolation is a powerful means of protest, defined as "the practice of setting yourself on fire, especially as a protest against something." *Meaning of Self-Immolation in English*, CAMBRIDGE ENG. DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/self-immolation (last visited Sept. 27, 2022).

[20] *Egypt Uprising of 2011*, *supra* note 19.

[21] *Id.*

[22] *Id.*

Egyptian movement is referred to as the Egyptian Revolution.[23]

Less than two months after the powerful demonstration of self-immolation, Egypt shut down citizens' access to the internet.[24] In doing so, the newly established Egyptian government cut off internet and cellphone access to nearly 80 million individuals.[25] A report indicated that some of the only remaining internet traffic was for the Egyptian stock exchange and several government websites.[26] The Egyptian government attempted to remove the ability of their citizens to organize by pulling the plug from their ability to communicate, organize, and demonstrate.[27] Despite this effort, nearly 900 civilians were killed and 6,400 were injured.[28] The government clearly understood the importance of online communication, along with their ability to organize using such means, and attempted to calm the storm while they could. Eventually, Egypt's control was put up to election, followed by Mohammed Morsi being elected president approximately 18 months later.[29]

ii. Cuba

Second, Cuba illustrates that too much governmental control over the internet and social media can result in pro-democratic ideals being quashed by the overbearing force and voice of a government unwilling to appease its citizens. In July 2021, when Cuban citizens faced the unrelenting force of a harsh economic crisis within the country, people *en masse* took to the streets to protest the government's handling of their livelihood.[30] As the initial phases of the Cuban militant response were caught on cameras and broadcast to the world via social media, the Cuban government cut off access to key internet sources.[31] The key role that social media plays in demonstrations demanding change and political accountability was well-understood by the Cuban government; to such an extent that Ramiro Valdés, former secret chief

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[23] This Comment focuses specifically on the revolution in Tunisia and Egypt, but Arab Spring was not limited to these countries alone. The pro-democratic movements known as Arab Spring also included Bahrain, Libya, and Syria. *Arab Spring, Pro-Democracy Protests*, BRITANNICA, https://www.britannica.com/event/Arab-Spring (last updated Sept. 5, 2022).

[24] *Egypt Uprising of 2011*, *supra* note 19.

[25] Matt Richtel, *Egypt Cuts Off Most Internet and Cell Service*, N.Y. TIMES (Jan. 28, 2011), https://www.nytimes.com/2011/01/29/technology/internet/29cutoff.html.

[26] *Id.*

[27] *See generally Egypt Uprising of 2011*, *supra* note 19.

[28] *Egypt Unrest: 846 Killed in Protests - Official Toll*, BBC NEWS (Apr. 19, 2011), https://www.bbc.com/news/world-middle-east-13134956.

[29] David D. Kirkpatrick, *Named Egypt's Winner, Islamist Makes History*, N. Y. TIMES (June 24, 2012), https://www.nytimes.com/2012/06/25/world/middleeast/mohamed-morsi-of-muslim-brotherhood-declared-as-egypts-president.html.

[30] Barbara Ortutay, Frank Bajak & Tali Arbel, *Cuba's Internet Cutoff: A Go-to Tactic to Suppress Dissent*, AP NEWS (July 12, 2021), hhttps://apnews.com/article/business-technology-cuba-ca1ae7975e04481e8cbd56d62a7fb30e.

[31] Jose de Cordoba, Santiago Perez & Drew FitzGerald, *Cuban Protests Were Powered by the Internet. The State Then Pulled the Plug*, WALL ST. J. (July 15, 2021, 6:31 PM), https://www.wsj.com/articles/internet-powered-mass-protests-in-cuba-then-the-government-pulled-the-plug-11626358893.

of police, referred to it as a "'wild stallion' that had to be tamed."[32] Briefly shutting off access to the internet was made simple because Cuban citizens receive internet service through only one major provider—the Telecommunications Company of Cuba ("ETECSA").[33]

Cuba's move to quell protests was aimed at communication in general, not just the sharing of police detainments via social media.[34] Open Observatory of Network Interference ("OONI"), an international not-for-profit that probes for data on internet censorship, collected data showing that access to WhatsApp, Signal, and Telegram—all apps which are used as primary means of communication—had been blocked by ETECSA.[35] Eventually, the blocks on social media and the internet died down, but so did the pro-democratic movements.[36]

With renewed access to the internet, individuals, labeled as "dissidents" by the Communist Cuban government, formed a group on Facebook to organize and continue the endeavor of "the pueblo."[37] The group, named "Archipelago," was effectively suppressed by pro-Cuban groups surrounding the homes of the group's leaders, preventing even their individual efforts to use peaceful demonstrations as a call for change.[38] The suppression of pro-democratic movements in Cuba was further discouraged by hundreds of protestors being jailed and the Cuban government banning any and all demonstrations because they were allegedly orchestrated by the United States as a destabilization campaign.[39]

The effective suppression of pro-democratic ideals and calls for societal development previously mentioned by Cuba highlight an instance of a government combatting the powerful medium for the free exchange of ideas that is social media. The following section highlights a more authoritarian approach to disarming the powerful benefits of a technological marketplace of ideas.

iii. North Korea

Finally, the extreme case of North Korea demonstrates the danger behind internet censorship because selectively disseminating information that individuals have access to, or can engage with, can control any individual's

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[32] *Id.*

[33] Kevin Collier, *As Cubans Protest, Government Cracks Down on Internet Access and Messaging Apps*, NBC (July 13, 2021, 2:41 PM), https://www.nbcnews.com/tech/tech-news/cubans-protest-government-cracks-internet-access-messaging-apps-rcna1400.

[34] *Id.*

[35] *Id.*

[36] Marc Frank & Nelson Acosta, *With Cuban Dissidents Wary or in Jail, Call for Fresh Protests Falls Flat*, REUTERS (Nov. 16, 2021, 1:35 AM), https://www.reuters.com/world/americas/cuba-reopens-doors-tourism-threat-protests-looms-2021-11-15/.

[37] *Id.*; Cordoba et al., *supra* note 31.

[38] Frank & Acosta, *supra* note 36.

[39] *Id.*

narratives and scope of the world. According to North Korean defector, Yeonmi Park, North Korea understands the importance of access to the internet and how the ability to control access to ideas aids in creating a narrative for the people that they govern.[40] Park speaks to the notion that, under the control of the Kim regime, the entire history of the world and North Korea is congruent with the Kim dynasty.[41] Specifically, Park alludes to the idea that the regime is aware of the perpetually dense ocean of information that could be accessed by their citizens if they were to permit unfettered access, which is available in many nations today.[42] A major theme of Park's discussion on several podcasts is that Pyongyang, the capital of North Korea, has vastly different living experiences than the rural parts of the country.[43] So, while there has been an increase in internet activity originating from North Korea, the regime still strictly monitors and controls who and what people are able to access.[44]

B. Terms of Service Agreements

Censorship in the technological marketplace of ideas is not limited to the countries mentioned in the section above. In the United States, social media censorship takes place under the enforcement of a given platform's ToS.[45] Most social media platforms have ToS agreements that require the user to agree before the use of their platform is granted.[46] These agreements are adhesion contracts, which contain standard boilerplate language that is meant to apply to all users equally.[47] To prevent a painstaking analysis on behalf of the user, and to prevent the user from being scared off due to exposure to "legalese" language, these agreements typically take the form of

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[40] *See generally* The Joe Rogan Experience, *#1691 Yeonmi Park*, SPOTIFY (Aug. 2021), https://open.spotify.com/episode/0G5o6GYjWgbSvKG3W2W2xO?si=voQO7PQmRf2d7RaZXtmP5A&dl_branch=1.

[41] *See generally id.*

[42] *See generally id.*

[43] *See generally* The Jordan B. Peterson Podcast, *S4E26: Tyranny, Slavery and Columbia U | Yeonmi Park*, SPOTIFY (May 2021), https://open.spotify.com/episode/51FutdGMI7Upa8QireWeI4?si=529783765f4c4e72; Lex Fridman Podcast, *#196 Yeonmi Park: North Korea*, SPOTIFY (July 2021), https://open.spotify.com/episode/0enMvPZHMbIZxnKIYvX4Ut?si=4b48ab013897418f; The Joe Rogan Experience, *supra* note 40.

[44] Robert King, *North Koreans Want External Information, But Kim Jong-Un Seeks to Limit Access*, CTR. FOR STRATEGIC & INT'L STUD. (May 15, 2019), https://www.csis.org/analysis/north-koreans-want-external-information-kim-jong-un-seeks-limit-access (noting the "extreme lengths to which the North Korean government will go to prevent its citizens from accessing external information" which resulted in North Korea receiving a dead-last ranking of 180 countries in the World Press Freedom Index).

[45] *See* John Mack Freeman, *Censorship and the Terms of Service*, INTELL. FREEDOM BLOG (July 28, 2016), https://www.oif.ala.org/oif/censorship-terms-service/.

[46] Cadie Thompson, *What You Really Sign Up For When You Use Social Media*, CNBC (May 20, 2015, 3:11 PM), https://www.cnbc.com/2015/05/20/what-you-really-sign-up-for-when-you-use-social-media.html.

[47] CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 424–27 (Rachel Barkow et al. eds., 9th ed. 2019).

modified clickwrap contracts.[48] While the benefits of social media are well documented, moral dilemmas arise as users *must* agree with ToS agreements before using a platform.[49]

The 2017 edition of the U.S. Global Mobile Consumer Survey reported that, on average, 91% of users will accept these agreements without reading their contents.[50] The number climbs higher for ages 18–34, with a "rate of acceptance" of 97%.[51] Using metrics of the number of words per minute it takes to read one of the agreements (240wpm) and the number of syllables per word, it is calculated that Facebook's agreement is equivalent to a grade ten and twelve reading level, with both YouTube and Twitter being at a college level.[52] According to the Program for the International Assessment of Adult Competencies, 50% of the United States population, aged 16–65, fall at or below level two in literacy proficiency, and 86% fall at or below level three in literacy proficiency.[53] Thus, many users are agreeing to terms that they do not desire to read, nor that they can easily grasp.[54]

a. Twitter[55]

Twitter's ToS agreement is divided into six major sections: who may

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[48] Perry Viscounty et al., *Social Networking and the Law, Virtual Social Communities are Creating Real Legal Issues*, 18 BUS. L. TODAY 58, 59 (2009) (noting the contrast between traditional clickwrap contracts that required a considerable amount of information input on behalf of the user versus the modern form where the social media platforms require a user to "acknowledge that they have read the Terms of Use, which are available for review but not required to have been actually viewed.").

[49] The costs and benefits of social media range from building relationships, engaging in dialogue, education, business advertisement, etc. *See* Lauren Friedman Suits, *5 Benefits of Using Social Media*, LINKEDIN (Apr. 22, 2014), https://www.linkedin.com/pulse/20140422162738-44670464-5-benefits-of-using-social-media/ ("1. [b]uild relationships…2. [s]hare your expertise…3. [i]ncrease your visibility…4. [e]ducate yourself… [and] 5. [c]onnect anytime…."); Rdouan Faizi, Raddouane Chiheb & Abdellatif El Afia, *Exploring the Potential Benefits of Using Social Media in Education*, 3 INT'L J. OF EMERGING TECHNOLOGIES IN LEARNING 50 (Oct. 2013) (noting the collaborative impact that social media grants students who are sometimes too shy or lack a voice to achieve a common goal set out by their professor); Jayson DeMers, *The Top 10 Benefits of Social Media Marketing* (Aug. 11, 2014, 12:24 PM), https://archive.newportbeachlibrary.org/NBPL/0/edoc/777341/9102015%20-%20City%20Arts%20Commission%20-%2006%20Importance%20of%20Social%20Media%20-%20ATTACHMENT%20A.pdf ("1. [i]ncreased [b]rand [r]ecognition…2. [i]mproved brand loyalty…3. [m]ore [o]pportunities to [c]onvert…4. [h]igher conversion rates…5. [h]igher [b]rand [a]uthority…6. [i]ncreased [i]nbound [t]raffic…7. [d]ecreased [m]arketing [c]osts…8. [b]etter [s]earch [e]ngine [r]ankings…9. [r]icher [c]ustomer [e]xperiences…10. [i]mproved [c]ustomer [i]nsights….").

[50] 2017 Global Mobile Consumer Survey: US Edition, *The Dawn of the Next Era in Mobile*, DELOITTE 1, 12 (2017), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-2017-global-mobile-consumer-survey-executive-summary.pdf.

[51] *Id.*

[52] Nicholas LePan, *Visualizing the Length of the Fine Print, for 14 Popular Apps*, VISUAL CAPITALIST (Apr. 18, 2020), https://www.visualcapitalist.com/terms-of-service-visualizing-the-length-of-internet-agreements/.

[53] *Highlights of PIAAC 2017 U.S. Results*, PROGRAM FOR THE INT'L ASSESSMENT OF ADULT COMPETENCIES, https://nces.ed.gov/surveys/piaac/current_results.asp (last visited Sept. 27, 2022).

[54] *See* 2017 Global Mobile Consumer Survey, *supra* note 50; *Highlights of PIAAC 2017 U.S. Results*, *supra* note 53; LePan, *supra* note 52.

[55] During the publication of this Comment, Elon Musk's turbulent takeover of Twitter came into existence, phased out, and then became a reality. *Time of Billionaire Elon Musk's Bid to Control Twitter*, THE ASSOCIATED PRESS (Oct. 28, 2022), https://apnews.com/article/twitter-elon-musk-timeline-

use the services; privacy; content on the services; using the services; disclaimers and limitations of liability; and general.[56] Presently, the major focus pertains to the content on the services portion. Under this portion, users are informed of the "User Agreement" to which they must adhere or have their content removed or profiles suspended.[57]

Reasons for removing content include: safety, which encompasses threats of violence or terrorism, zero tolerance for child sexual exploitation, targeted harassment or desire for abuse, promotion of hateful conduct, promotion of suicide or self-harm, posting graphic violence or adult media, or using the services for the furtherance of illegal activities; privacy, which covers the exposure of private information of another party, and posting or sharing intimate photos or videos of another person; and authenticity, which applies to platform manipulation, interfering in elections or civic processes, impersonation of another group or individual, deceptively sharing manipulated media, or violating intellectual property rights of another party.[58] Lastly, there is a pinned portion of the agreement which references reports containing "misleading information" reported by one user against another user.[59]

The enforcement of these policies is accomplished per Twitter's "enforcement philosophy."[60] This philosophy includes a factorial analysis regarding whether:

> [T]he behavior is directed at an individual, group, or protected category of people; the report has been filed by the target of the abuse or a bystander; the user has a history of violating our policies; the severity of the violation; [and whether] the content may be [considered] a topic of legitimate public interest.[61]

b. Facebook by Meta ("Facebook")

Facebook's ToS—pertaining specifically to misinformation—takes a

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c6b09620ee0905e59df9325ed042a609. Accordingly, the exact terms of service applicable to Twitter may be outdated, as well as the procedures utilized during the content moderation process.

[56] *See generally* Twitter Terms of Service, TWITTER, https://twitter.com/en/tos (last visited Apr. 2, 2022).

[57] *Id.*

[58] The Twitter Rules, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Apr. 2, 2022).

[59] How Twitter Addresses Misinformation, TWITTER, https://help.twitter.com/en/resources/addressing-misleading-info (last visited Apr. 2, 2022) (noting their misinformation policy covers "misleading content…as claims that have been confirmed to be false by external, subject-matter experts or include information that is shared in a deceptive or confusing manner.") (emphasis removed).

[60] *See generally* Twitter's Approach to Policy Development and Enforcement Policy, TWITTER, https://help.twitter.com/en/rules-and-policies/enforcement-philosophy (last visited Apr. 2, 2022).

[61] *Id.*

tripartite approach: remove, reduce, and inform.[62] Facebook states that they "value free expression and keeping people safe…," and have their standard for removal of content for those that would "cause imminent physical harm…interfere with or suppress voting…[or] [w]hen videos are manipulated in ways that would not be apparent to an average person…."[63]

As a portion of their "Transparency Center," the site offers a "content removal experience," which gives screenshot examples of notifications that users would get if their content violated Community Guidelines and was removed.[64] The process begins by receiving a notification of removal and violation, a vague description of the decision process, an example of their standards on hate speech, and an ability to give one's disagreement with the decision of content removal.[65] Something to note is that Facebook's hate speech standard includes "claims about coronavirus (COVID-19)."[66]

Further, while Facebook does remove misinformation that violates their policies, another step of censorship that they take is labeling the post as misinformation and reducing the distribution and redistribution so that the content makes it onto fewer feeds.[67]

c. YouTube

YouTube's misinformation policy covers three different sections: general misinformation, misinformation regarding COVID-19, and election misinformation.[68] The broad categories of content that could potentially be policy-violating include: "[1] [p]romoting dangerous remedies or cures…[2] [s]uppression of census participation…[3] [m]anipulated content…[and 4] [m]isattributed content…."[69] YouTube follows a similar strategy to both Facebook and Twitter in that it will remove the violating content and send the user an email notification of obtaining their first "strike."[70] The strike system in place is how YouTube justifies the termination of a user's channel.[71]

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[62] *See generally* Facebook's Approach to Misinformation, META, https://transparency.fb.com/features/approach-to-misinformation/ (last updated Feb. 28, 2022).

[63] *Id.*

[64] *See generally* Facebook's Takedown Experience, META, https://transparency.fb.com/enforcement/taking-action/taking-down-violating-content/ (last visited Apr. 2, 2022).

[65] *Id.*

[66] *Id.*

[67] Facebook Preparing for Elections, META, https://about.facebook.com/actions/preparing-for-elections-on-facebook/?utm_source=Search&utm_medium=google&utm_campaign=USPublicAffairs&utm_content=Search-facebook%20false%20news-530675206314 (last visited Apr. 2, 2022); Guy Rosen et al., *Helping to Protect the 2020 US Elections*, META (Oct. 21, 2019), https://about.fb.com/news/2019/10/update-on-election-integrity-efforts/#misinformation.

[68] YouTube Misinformation Policies, YOUTUBE, https://support.google.com/youtube/answer/10834785?hl=en&ref_topic=10833358#zippy= (last visited Apr. 2, 2022).

[69] *Id.*

[70] *Id.*

[71] *Id.*

C. Communications Decency Act

The CDA was passed in 1996 as Title V of the Telecommunications Act ("the Act").[72] Upon its inception, the Act's purpose was to prevent the ability of children from accessing sexually explicit and gross material—or rather from those above the age of majority from sending sexually lewd material to minors.[73] However, after its enactment, the CDA was heavily challenged, especially by the American Civil Liberties Union ("ACLU").[74] The CDA, within the Act, was deemed unconstitutional because its language was too broad of a sweep and encroached upon the First Amendment right of adults to engage in "indecent" speech.[75]

As understood by former Attorney General William Barr, the renewed purpose of the CDA was to shield online platforms from being liable for hosting third-party content or removal of content.[76] By providing this shield, the CDA would allow for technology and online platforms to develop without fearing liability for removing "harmful content."[77] In its metamorphosis, Section 230 of the CDA has come to provide civil immunity to interactive computer services through a "Good Samaritan" protection.[78] This affords companies that provide platforms similar to YouTube, Facebook, and Twitter the ability to monitor the content and users on their platforms under "good faith" with absolute discretion.[79] The "good faith" clause is a

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[72] Sara Zeigler, *Communications Decency Act of 1996 (1996)*, FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/1070/communications-decency-act-of-1996.

[73] *Id.*

[74] *See generally* Reno v. ACLU, 521 U.S. 844 (1997).

[75] *Id.* at 874 (holding that "the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."). Under the overbreadth doctrine, a regulation is seen as being unconstitutional when the regulation itself suppresses a substantial quantity of speech that is afforded constitutional protection—thereby being broad in its application. Richard Parker, *Overbreadth*, FIRST AMEND. ENCYCLOPEDIA., https://www.mtsu.edu/first-amendment/article/1005/overbreadth (last updated Sept. 2017).

[76] *See* U.S. DEP'T OF JUST., JUSTICE DEPARTMENT ISSUES RECOMMENDATIONS FOR SECTION 230 REFORM (2020) ("Section 230 was originally enacted to protect developing technology by providing that online platforms were not liable for the third-party content on their services or for their removal of such content in certain circumstances.").

[77] *Id.* ("This immunity was meant to nurture emerging internet businesses and to overrule a judicial precedent that rendered online platforms liable for *all* third-party content on their services if they restricted *some* harmful content.").

[78] 47 U.S.C. § 230(c)(1) (2018) ("No provider or user of an interactive computer service shall be treated as publisher or speaker of any information provided by another information content provider.").

[79] 47 U.S.C. § 230(c)(2); Justice Department Issues Recommendations for Section 230 Reform, *supra* note 75 ("the combination of 25 years of drastic technological changes and an expansive statutory interpretation left online platforms unaccountable for a variety of harms flowing from content on their platforms and with virtually unfettered discretion to censor third-party content with little transparency or accountability."); Thomas Johnson, *The FCC's Authority to Interpret Section 230 of the Communications Act*, FED. COMMC'N COMM'N (Oct. 21, 2020, 10:30 AM), https://www.fcc.gov/news-events/blog/2020/10/21/fccs-authority-interpret-section-230-communications-act ("Chairman Pai noted that '[m]embers of all three branches of government have expressed serious concern about the prevailing interpretation' of Section 230, and observed that an overly broad interpretation could 'shield[] social media companies from consumer protection laws in a way that has no basis in the text' of the statute.").

regulation in place to potentially combat overbearing censorship, but the platforms claim to align with the good faith content moderation justified by their ToS. While this is a better form of protection in place than, say, North Korea or Cuba, the protection provided by the CDA is undermined by the ToS and lack of constitutional guardrails.

Once the social media giants decide on removing or filtering content, they use a combination of their ToS and the CDA to grant themselves impenetrable protection from lawsuits or complaints.[80] However, with such great discretion, social media giants bear the responsibility to designate their "Community Guidelines" in accordance with appropriate social climate and demands from public officials' statements.[81] The two-fold shield allowing absolute discretion combined with calls for zero access to social media for individuals with "unfavorable" opinions has led to much-heated debate concerning the constitutionality of the platforms' actions and mass demands for reform of the CDA.

D. The War Against Misinformation Has Led to Immense Pushback Against Social Media Platforms and the Communications Decency Act

Most people who paid close attention to their televisions or cellphones during the Trump administration are likely familiar with his coinage of "fake news." The idea of misinformation has permeated into United States' culture to such an extent that traditional news pundits will state one thing, while social media will contradict their precise statement.[82] Partisan news pundits inform individuals of a particular narrative surrounding a situation, only to be contrasted by their followers or "friends" on social media platforms manufacturing a situation that sows seeds of division by further entrenching the individual on their subjective viewpoint.[83]

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[80] Marvin Ammori, *The "New" New York Times: Free Speech Lawyering in the Age of Google and Twitter*, 127 HARV. L. REV. 2259, 2263–64 (2014).

[81] Susan Benesch & Rebecca MacKinnon, *The Innocence of YouTube*, FOREIGN POLICY MAG. (Oct. 5, 2012, 4:47 PM), https://foreignpolicy.com/2012/10/05/the-innocence-of-youtube/ ("Sovereigns of cyberspace such as Google, Facebook, and Twitter have no legislatures or courts, yet they are carrying out private worldwide speech 'regulation' – sometimes in response to government demands, sometimes to enforce their own terms of service and guidelines."). California House Democrats Anna Eshoo and Jerry McNerney sent letters to twelve television broadcasters suggesting they stop airing Fox News, Newsmax, and One America News Network for allegations of spreading misinformation. *See* Rebecca Klar, *House Democrats Demand Answers on TV* '*Misinformation Rumor Mills,'* THE HILL (Feb. 22, 2021, 11:52 AM), https://thehill.com/policy/technology/539868-house-democrats-press-cable-streaming-companies-for-carrying-misinformation; Chuck Ross, *House Democrats Pressure TV Broadcasters to Deplatform Conservative Networks*, NEWS TALK FLA. (Feb. 23, 2021), https://www.newstalkflorida.com/featured/house-democrats-pressure-tv-broadcasters-to-deplatform-conservative-networks/.

[82] Peter Suciu, *Spotting Misinformation On Social Media Is Increasingly Challenging*, FORBES (Aug. 2, 2021, 3:56 PM), https://www.forbes.com/sites/petersuciu/2021/08/02/spotting-misinformation-on-social-media-is-increasingly-challenging/?sh=e96b8b2771cd.

[83] *See generally* Christopher Bail et al., *Exposure to Opposing Views on Social Media Can Increase Political Polarization*, 115 PROC. NAT'L ACAD. SCI. U.S. AM. 9216 (2018) ("[O]ur study indicates that

Due to innate psychological processes, political ideology is a basic means of individuals forming in-groups and out-groups—otherwise known as finding a cultural home.[84] This process is explained through the social identity theory, which posits that an individual's social identity is formed through the groups or communities of which they are members.[85] Modern scholarship regarding social identity theory explores the implications that one's social identity, in turn, influences the behavior of the individual.[86]

As a matter of partisan identification, researchers equated the depth of political partisanship identification with that of religious affiliation.[87] Individuals will associate themselves as a member of either the Republican or Democratic Party and adopt the positions that the group advocates for.[88] The problem becomes that having a deeply entrenched identity with a political party and its doctrinal positions can lead to the association of these positions as fundamental to one's personality.[89] Affiliation of ideals with one's own personality opens the door to aggressive and violent responses to challenges on crystalized social views.[90]

Media platforms, such as Fox News Channel ("Fox") and The Cable News Network ("CNN"), release content that targets the fundamental root of how people deeply identify with communities within the United States.[91] So, when misinformation is spread, and deeply entrenched ideologies come clashing head-to-head, then minute political differences are capable of erupting into heated interpersonal conflict.[92]

While political speech is often moderated on social media platforms under the guise of misinformation, the Federal Communications Commission ("FCC"), in its Restoring Internet Freedom Order, noted "recent evidence suggests that hosting services, social media platforms, edge providers, and other providers of virtual Internet infrastructure are more likely to block content on viewpoint grounds."[93] Content moderation of misinformation

attempts to introduce people to a broad range of opposing political views on a social media site such as Twitter might be not only [sic] ineffective but counterproductive—particularly if such interventions are initiated by liberals.").

[84] Kirsten Weir, *Politics is Personal – Research by Political Psychologists Helps to Explain Why We Vote the Way We Do—And is Informing Ways to Improve Democratic Elections*, AM. PSYCH. ASS'N. (Nov. 1, 2019), https://www.apa.org/monitor/2019/11/cover-politics.

[85] Saul McLeod, *Social Identity Theory*, SIMPLY PSYCH., https://www.simplypsychology.org/social-identity-theory.html (last updated 2019).

[86] This modern approach to social identity theory is considered as an instrumentalist explanation of the intertwined relationship of social identity and behavior. *See* Michael Kalin & Nicholas Sambanis, *How to Think About Social Identity*, 21 ANN. REV. POL. SCI. 239, 240 (2018).

[87] *Id.* at 245.

[88] *Id.*

[89] *Id.*

[90] Larry Diamond et al., *Americans Increasingly Believe Violence is Justified if the Other Side Wins*, POLITICO (Oct. 1, 2020, 4:30 AM), https://www.politico.com/news/magazine/2020/10/01/political-violence-424157.

[91] Weir, *supra* note 83.

[92] *Id.*

[93] In the Matter of Restoring Internet Freedom, FCC Rcd. 17-166, 159 (2018).

based on viewpoint grounds is dangerous because once there is an accepted means by which to censor some speech on viewpoint grounds, then it could become acceptable to do so again to the speech of varying subject matters.[94]

Following the Capitol Hill Riots, several members of Congress sent letters to major television providers calling for the deplatforming of right-wing, conservative media outlets.[95] Facebook and Twitter removed former President Donald Trump's personal accounts and suspended him from access indefinitely, despite FCC Commissioner Brendan Carr expressly denouncing the call for political censorship.[96] Trump had characteristically used social media platforms as more of an uncensored journal, which was not the type of behavior that many deemed presidential.[97] Since Trump blocked accounts on Twitter from seeing his Twitter feed, he was sued for blocking a constitutionally protected forum.[98]

Both the United States District Court for the Southern District of New York and the Second Circuit Court of Appeals ruled that Trump blocking any user from accessing his Twitter feed was a violation of the First Amendment because the users could not share and engage with his Tweets.[99] On appeal, the Supreme Court dismissed the case for mootness because Donald Trump was no longer President, but in concurrence Justice Thomas gave an eerie account regarding the power of social media platforms.[100] Justice Thomas

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[94] *Compare* Jillian York & Corynne McSherry, *Content Moderation is Broken. Let Us Count the Ways.*, ELEC. FRONTIER FOUND. (Apr. 29, 2019), https://www.eff.org/deeplinks/2019/04/content-moderation-broken-let-us-count-ways (discussing the negative implications of content moderation on those communities which the moderation was meant to protect), *with* Johnathan Walter, *Content Moderation Is Not Synonymous With Censorship*, PUB. KNOWLEDGE (Nov. 16, 2020), https://www.publicknowledge.org/blog/content-moderation-is-not-synonymous-with-censorship/ (noting the necessity of content moderation for disposing of socially-frowned-upon forms of speech such as denying the holocaust, pushing conspiracy theories, and intentionally spreading disinformation). For the broad-ranging impact of smaller instances of censorship leading to larger forms of suppression *see also* Beina Xu & Elanor Albert, *Media Censorship in China*, COUNCIL ON FOREIGN RELATIONS (Feb. 17, 2017, 7:00 AM), https://www.cfr.org/backgrounder/media-censorship-china#chapter-title-0-5. Take into consideration the changing landscape of the argument behind the origin of COVID-19. As opposed to letting conversation and debate control the topic, media companies based their content moderation off of statements from politicians until they ultimately reversed the ban on lab-leak theory content after President Biden called for further investigation. *See* Joshua Cho, *U.S. Media Give New Respect to Lab Leak Theory—Though Evidence Is as Lacking as Ever*, FAIRNESS & ACCURACY IN REPORTING (June 28, 2021), https://fair.org/home/us-media-give-new-respect-to-lab-leak-theory-though-evidence-is-as-lacking-as-ever/.

[95] *See, e.g.*, Press Release, Office of Commissioner Brendan Carr, FCC Commissioner Carr Responds to Democrats' Efforts to Censor Newsrooms (Feb. 22, 2021), https://docs.fcc.gov/public/attachments/DOC-370165A1.pdf.

[96] *Id;* Sarah Needleman & Georgia Wells, *Twitter, Facebook and Others Silenced Trump. Now They Learn What's Next.*, WALL ST. J. (Jan. 10, 2021, 7:52 PM), https://www.wsj.com/articles/twitter-facebook-and-others-silenced-trump-now-they-learn-whats-next-11610320064?mod=article_inline.

[97] *See* Kara Swisher, *The End of Trump's Reign of Tweet Terror Is Near*, N.Y. TIMES (Nov. 17, 2020), https://www.nytimes.com/2020/11/17/opinion/trump-tweets-election.html.

[98] Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021).

[99] John R. Vile, *Biden v. Knight First Amendment Institute at Columbia Univ.*, FIRST AMEND. ENCYCLOPEDIA (Apr. 26, 2021), https://mtsu.edu/first-amendment/article/1907/biden-v-knight-first-amendment-institute-at-columbia-university.

[100] *See generally Biden*, 141 S. Ct. at 1220, 1221.

attempted to balance the fact that President Trump's Twitter feed constitutes a constitutionally protected public forum, yet Twitter possessed, and still does, an immense amount of power to wipe the forum away with "unrestricted authority…at any time for any or no reason."[101]

Prior to his indefinite ban, President Donald Trump responded to his Tweets being flagged by issuing Executive Order 13925 ("Trump's EO").[102] Trump's EO offers his own perspective on the importance of free speech in the modern era.[103] It further states that free speech is equally as important online—referring to social media—as it has historically been in town halls, universities, and the homes of all citizens of the United States.[104] The EO affirmatively states, "[w]e must seek transparency and accountability from online platforms, and encourage standards and tools to protect and preserve the integrity and openness of American discourse and freedom of expression."[105] Trump's EO further ordered the National Telecommunications and Information Administration ("NTIA") to file a petition requesting the FCC to swiftly consider and shine a light on existing ambiguities within Section 230 of the CDA.[106] The Chairman of the FCC, at the time Trump's EO was issued, left command in January of 2021, before any definitive action was taken, which preceded President Biden's revocation of Trump's EO.[107]

The Department of Justice ("DOJ"), however, issued its own perspective on Section 230 of the CDA, finding it "ripe for review."[108] The proposal found four wide-ranging ends that needed to be met, namely: (1) encouraging online platforms to address knowingly criminal content through incentivization; (2) promoting open discourse through greater transparency between the users and the platforms; (3) clarifying that the federal government can bring civil enforcement actions against platforms—for purposes of protecting citizens; and (4) ensuring that platforms with substantial market power are unable to claim immunity under Section 230 for antitrust cases.[109]

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[101] *Id.* at 1221.

[102] Robert Montanez, *Executive Order No. 13925: An Attempted Stop Sign on Our Global Cyber-Freeway*, GOLDEN GATE UNIV. L. REV.: GGU L. REV. BLOG (Oct. 2, 2020), https://ggulawreview.com/2020/10/02/executive-order-no-13925-an-attempted-stop-sign-on-our-global-cyber-freeway/.

[103] Exec. Order No. 13925, 85 Fed. Reg. 34079 (June 2, 2020).

[104] *Id.*

[105] *Id.* at 34080.

[106] *Id.* at 34081.

[107] Press Release, Office of Chairman Pai, Chairman Pai Statement Upon Departing the FCC (Jan. 20, 2021), https://www.fcc.gov/document/chairman-pai-statement-upon-departing-fcc.

[108] U.S. DEP'T OF JUST., SECTION 230 – NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY?, KEY TAKEAWAYS AND RECOMMENDATIONS (2020).

[109] U.S. DEP'T OF JUST., JUSTICE DEPARTMENT ISSUES RECOMMENDATIONS FOR SECTION 230 REFORM (2020)..S. DEP'T OF JUST., *JUSTICE DEPARTMENT ISSUES RECOMMENDATIONS FOR SECTION 230 REFORM* (2020).

Recent debates and proposals surrounding the CDA range from commentators and judicial opinions to executive and congressional actions.[110] The 116th Congress saw 26 bills attempting to amend the broadened scope of the CDA, some of which call for complete revocation, while others propose amendments.[111] This begs the question: what is the best way to hold social media goliaths accountable for their unchecked ability to moderate content and remove users for misinformation that has roots in political ideology?

III. DISCUSSION: CONSTITUTIONAL AND CONTRACT LAW DISPLAY THE NEED FOR A CHANGE IN LAW OR AN AMENDMENT TO SECTION 230 OF THE CDA

A. Constitutional Law Protections Are Implicated on Both Sides of the Coin

An age-old maxim is that history tends to repeat itself. Upon the inception of the United States, a key debate centered around whether suppression of speech, or more speech, was the solution to quell undesirable speech.[112] The speech concerned in this Comment has evolved from being hosted in the traditional government forum (e.g., town square) into the realm of privatized online platforms that are openly advertising as hosts for users and their speech. Defenders of social media platforms raise the argument that compelling platforms to moderate content in a particular manner or to host certain speech is, in and of itself, a violation of the private company's First Amendment rights.[113]

a. Social Media Platforms' First Amendment Right to Content Moderation

Social media platforms have their own forms of protected expression under the First Amendment as well. Expressions by the platforms, which are most commonly referred to as protected speech, are decisions on which content to moderate and how to moderate such content.[114] Moderation commonly takes the form of either a label that nudges users reading the post to fact check the post or simply take the post down for violating their ToS.[115]

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[110] *Id.*; Exec. Order No. 13925, 85 Fed. Reg. 34079 (June 2, 2020).

[111] VALERIE C. BRANNON & ERIC N. HOLMES, SECTION 230: AN OVERVIEW, CONG. RES. SERV. R46751 (2021).

[112] *Amendment 1.3.1 Historical Background of Free Speech Clause*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-2-1/ALDE_00000393/ (last visited Sept. 27, 2022). The idea supported in this Comment is known as the counterspeech doctrine. The counterspeech doctrine posits that the correct means of combatting unwelcomed speech is to *counter* it with better speech. Underpinned by the goal that eventually through conversation the idea proffered by the better speech will prevail. David Hudson, *Counterspeech Doctrine*, FREE SPEECH ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/940/counterspeech-doctrine (last updated Dec. 2017).

[113] Jennifer Huddleston, *Content Moderation, Section 230, and The First Amendment* (May 28, 2020), https://www.americanactionforum.org/insight/content-moderation-section-230-and-the-first-amendment/.

[114] *Id.*

[115] *Id.*

The First Amendment right of these platforms is most often implicated when states attempt to compel them to moderate content in a particular manner by employing legislation.[116]

The concept of constitutionally protected editorial control and judgment arose from the ruling in *Miami Herald Publishing Company, Division of Knight Newspapers, Incorporated v. Tornillo ("Miami Herald")*.[117] *Miami Herald* focused more on the right of freedom of the press, particularly the right against compelled speech by newspapers.[118] The statute in question was enacted by Florida, which gave political candidates the right to reply to press upon them hosting criticism towards the candidate.[119] In deciding whether the compulsory hosting of political speech was permitted under the First Amendment, Chief Justice Burger wrote:

> [T]he Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of *editorial control and judgment.* It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[120]

Chief Justice Burger's holding of the case appears to be resting entirely on the editorial nature of newspapers. The shield afforded to newspapers has yet to be extended to social media platforms in its entirety, but that does not preclude future courts from doing so.[121]

Federal trial courts have extended *Miami Herald* to search engines by

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[116] Most recently, Florida and Texas have attempted to pass state legislation to prohibit social media platforms from moderating content on a political basis. These states have kept no secret as to their intentions behind the legislation being a retaliation against the chilling of conservative ideals on social media platforms. John Villasenor, *Texas's New Social Media Law is Likely to Face an Uphill Battle in Federal Court*, BROOKINGS (Nov. 9, 2021), https://www.brookings.edu/blog/techtank/2021/11/09/texass-new-social-media-law-is-likely-to-face-an-uphill-battle-in-federal-court/; Jon Brodkin, *Big Tech Sues Florida, Saying Social Media Law Violates First Amendment* (June 1, 2021, 3:08 PM), https://arstechnica.com/tech-policy/2021/06/big-tech-sues-florida-saying-social-media-law-violates-first-amendment/.

[117] 418 U.S. 241, 251–52, 255 (1974).

[118] *See generally id.*

[119] *Id.* at 247.

[120] *Id.* at 258 (emphasis added).

[121] Jameel Jaffer & Scott Wilkens, *Social Media Companies Want to Co-opt the First Amendment. Courts Shouldn't Let Them.*, N.Y. TIMES (Dec. 9, 2021), https://www.nytimes.com/2021/12/09/opinion/social-media-first-amendment.html?auth=link-dismiss-google1tap.

reasoning that they exercise editorial judgment when they decide whether to present specific sites in search results.[122] Some commentators maintain that the search engine results are a form of Google's protected speech because, as a form of an editorial judgment, they are '"reporting about others' speech' in a way that 'is itself constitutionally protected speech.'"[123] The Supreme Court held that "the creation and dissemination of information are speech within the meaning of the First Amendment," but there is an argument to be made that simply running search engines is neither creation nor dissemination.[124]

With regards to social media platforms, however, there is a strong argument to be made against extending editorial judgment protection to platforms because users whose content is being moderated are the ones producing and editing the content. This contrasts with Chief Justice Burger's opinion in *Miami Herald*, as the qualification depended on the editorial judgment from the newspaper deciding precisely what goes within the content being published.[125] Whereas here, the users are the ones producing the content. Section 230 of the CDA explicitly protects social media platforms from being charged as the publishers or producers of the content, which further bolsters support for the aforementioned argument.[126] Instead, social media companies are treated as hosts of the content.[127] However, any claim to challenge this presumably protected editorial and judgment right by the social media platforms is moot due to the shield born by Section 230 of the CDA.[128]

b. To Protect or Not to Protect, That is the Question

Currently, the area of constitutionally protected speech on social media platforms only exists in a very specific substratum of the user population. Recent developments in caselaw have created a circuit split around the issues as to whether public officials can create public forums on social media websites, and whether public officials can restrict access to other users from viewing and posting on their profile page.[129] The circuit split is

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[122] *See generally* VALERIE C. BRANNON, FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT, CONG. RES. SERV. R45650 (2019).

[123] *Id.* at 36.

[124] *Id.* at 37.

[125] *Miami Herald*, 418 U.S. at 258.

[126] 47 U.S.C. § 230(c)(1).

[127] *See* U.S. DEP'T OF JUST., JUSTICE DEPARTMENT ISSUES RECOMMENDATIONS FOR SECTION 230 REFORM (2020) ("Section 230 was originally enacted to protect developing technology by providing that online platforms were not liable for the third-party content on their services or for their removal of such content in certain circumstances.").

[128] Thomas M. Johnson Jr., *The FCC's Authority to Interpret Section 230 of the Communications Act*, FED. COMMC'N COMM'N (October 21, 2020, 10:30 AM), https://www.fcc.gov/news-events/blog/2020/10/21/fccs-authority-interpret-section-230-communications-act.

[129] *Compare* Swanson v. Griffin, No. 21-2034, 2022 U.S. App. LEXIS 5179, at *2–4 (10th Cir. Feb. 25, 2022), *with* Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 234–35, 237 (2d Cir. 2019). A complete and extensive discussion regarding the circuit split between the 2nd Circuit Court of Appeals and the 10th Circuit Court of appeals is beyond the scope of this Comment.

why the Supreme Court would need to rule on the present issue because federal district courts have conflicting case precedent to work off. However, according to the Second Circuit Court of Appeals, public forums are only created by public officials that make social media profiles in their official capacity.[130] Following the precedent from the Second Circuit Court of Appeals, the New Mexico District Court determined that a social media public forum depends on the conduct of the user.[131]

In *Swanson v. Griffin*, a plaintiff's claim surpassed a motion to dismiss on the grounds that the defendant's Facebook page constituted a public forum.[132] Not every social media account operated by a public official is considered a governmental account or a public forum.[133] However, the court noted that a social media profile transforms into a public forum by the user "'intentionally open[ing]' a social media account 'for public discussion… upon assuming office, repeatedly us[ing] the [a]ccount as an official vehicle for governance and ma[king] its interactive features accessible to the public without limitation.'"[134]

The analysis was specifically geared towards Facebook, but the generality of the conduct described could translate seamlessly to other social media platforms.[135] Especially as Justice Gonzales expounded more conduct that is indicative of public forums as "designating a Facebook page 'as belonging to a "governmental officials,'" 'cloth[ing] the page in the trappings of [the] public office,' listing 'official contact information on the page,' and having the authority to control 'the interactive component of the page,' including blocking users."[136]

Once this public forum is created, then the user cannot block other users from their profile, nor can they delete comments made by others.[137] Any action of this sort would be consistent with former President Donald Trump's actions on Twitter, which the Second Circuit Court of Appeals considered viewpoint discrimination.[138] This is where the entire situation becomes incredibly murky.

Under the Second Circuit Court of Appeals ruling, public forums are

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[130] *See Trump*, 928 F.3d at 235–37. *See generally* VALERIE C. BRANNON, CONG. RSCH. SERV., LSB10141, UPDATE: SIDEWALKS, STREETS, AND TWEETS: IS TWITTER A PUBLIC FORUM? (2019).

[131] Swanson v. Griffin, 526 F. Supp. 3d 1005 (D.N.M. 2021). This case was subsequently overturned on appeal in the 10th Circuit Court of Appeals and is what gave rise to the circuit split. Swanson v. Griffin, No. 21-2034, 2022 U.S. App. LEXIS 5179 (10th Cir. Feb. 25, 2022). However, the New Mexico court's analysis on what conduct a public official would create a public forum is straightforward and generally applicable to various social media platforms and thus is relevant.

[132] *Swanson*, 526 F. Supp. 3d at 1015–16.

[133] *Id.* at 1011.

[134] *Id.* at 1011–12 (quoting *Trump*, 928 F.3d at 237).

[135] *Id.*

[136] *Id.* at 1012 (quoting Davidson v. Randall, 912 F.3d 666, 683 (4th Cir. 2019)).

[137] Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 234 (2d Cir. 2019).

[138] *Id.*

capable of existing within the realm of social media but are limited solely to the profiles of those government officials who hold their accounts in the appropriate capacity; yet, social media companies possess the power to control the access to public forums and what content the public official can communicate to private users.[139] The government actors who are hosting public forums on social media platforms use them to disseminate information regarding their political candidacy.[140] Therefore, if persons flock to these platforms to seek speech and discussion from political candidates and leaders, but general speech is constrained to the guidelines of the media platforms, then ideation can be altered based on how the politicians are forced to speak.[141] When politicians are removed or flagged for expounding their opinion, then their ideas become less prevalent, which removes the force and validity behind them.[142] For the sake of protection of speech and ideals, these platforms should not be able to censor political speech where the users creating the public forums cannot do the same. The technological marketplace of ideas will then turn into an echo-chamber for the platform's accepted viewpoint.

c. The Public Function Argument

Through the explosive development of social media companies like Facebook, Twitter, and YouTube, platforms akin to these giants now have control of such a substantial market of the worldwide population that these are the primary avenues where people communicate and gather their daily news and information.[143] In *Packingham v. North Carolina*, the Supreme Court noted the importance of social media, deeming it "the modern public square."[144] The Court held that a North Carolina law that precluded the ability of all registered sex offenders to access the internet was an abhorrent violation of the First Amendment rights of modern U.S. citizens.[145] After proclaiming social media "the modern public square," the Court recognized several vital aspects of social media platforms:

> Social media offers "relatively unlimited, low-cost capacity

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[139] *See* NetChoice, LLC. v. AG, Fla., 34 F.4th 1196 (11th Cir. 2022).

[140] Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1163 (9th Cir. 2022).

[141] For a discussion on the impacts of the "sociotechnical mechanism" of flagging posts on social media *see generally* Kate Crawford & Tarleton Gillespie, *What Is a Flag For? Social Media Reporting Tools and the Vocabulary of Complaint*, 18(3) NEW MEDIA & SOC'Y 410 (2016).

[142] Kimberlee Weaver et al., *Inferring the Popularity of an Opinion from Its Familiarity: A Repetitive Voice Can Sound Like a Chorus*, 92(5) J. OF PERSONALITY AND SOC. PSYCH. 821, 831 n. 7 ("A meta-analysis of the results for the three studies using the three person control condition . . . showed that, as would be logically expected, hearing three different people each advance an opinion leads observers to attribute greater group-level support for the issue than does hearing one group member repeat the same opinion three times . . . .").

[143] Fifty-three percent of people surveyed showed that they got their news information from social media platforms. Elisa Shearer, *More than Eight-in-Ten Americans Get News from Digital Services*, PEW RSCH. CTR. (Jan. 12, 2021), https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/.

[144] 137 S. Ct. 1730, 1737 (2017).

[145] *See id.* at 1735–38.

> for communication of all kinds." On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 states and almost every Member of Congress have set up accounts for this purpose. In short, social media users employ these websites *to engage in a wide array of protected First Amendment activity on topics "as diverse as human thought*."[146]

This decision established social media platforms as public forums protected from infringement by any *state actor*.[147] That is, perhaps, what prevents any court from extending this protection to users producing content on platforms. Namely, there is no state actor when Twitter or Facebook remove posts or profiles completely—only private actors. The state action doctrine requires that for a litigant to have standing in a lawsuit for the deprivation of a constitutionally protected right, they must show that the entity infringing on their constitutional right is a state actor—whether it be state, local, or federal—rather than a private actor.[148] However, the presence of only private actors has not precluded the Supreme Court from transmuting private actors into state actors because, under the public function test, a private actor's conduct may be transmuted into state action where the private actor is performing a traditionally and exclusively state-provided function.[149]

In *Marsh v. Alabama*, a Jehovah's Witness was arrested in Chickasaw, Alabama for disseminating religious literature in the company town without the appropriate permit.[150] On appeal, the Supreme Court determined that a company town stands as an exception to the state action doctrine.[151] Justice Black, writing for the Court, noted that "[s]ince these facilities are built and operate[] primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation."[152] Despite Justice Black's holding in *Marsh* being narrowed in subsequent decisions, there is a prevalent argument that *Marsh*, its company-town and

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[146] *Id.* at 1735–36 (citations omitted) (emphasis added).

[147] *Id.* at 1738; David Hudson, *Packingham v. North Carolina (2017)*, FREE SPEECH ENCYCLOPEDIA (2017), https://www.mtsu.edu/first-amendment/article/1529/packingham-v-north-carolina#:~:text=CC%20BY%202.0)-,In%20Packingham%20v.,from%20accessing%20social%20media%20websites.

[148] *State Action Requirement*, LEGAL INFO. INST. AT CORNELL L. SCH., https://www.law.cornell.edu/wex/state_action_requirement (last visited Sept. 27, 2022).

[149] *See* William Diamond, *State Action and the Public Function Doctrine: Are There Really Public Functions?*, 13 UNIV. OF RICH. L. REV. 579, 582 (1979); Hala Ayoub, Comment, *The State Action Doctrine in State and Federal Courts*, 11 FLA. STATE UNIV. L. REV. 893, 895–96 (1984).

[150] 326 U.S. 501, 502–03 (1946).

[151] *Id.* at 509–10.

[152] *Id.* at 506.

the public function exception to the state action doctrine, should apply to social media platforms.[153]

This argument was presented by Prager University ("PragerU") in *Prager University v. Google, LLC*, and the Ninth Circuit Court of Appeals held in favor of YouTube not hosting a traditional and exclusive public function.[154] PragerU, a nonprofit organization aimed at creating and disseminating videos to provide a conservative viewpoint for young people and young adults, brought suit against YouTube for placing some of their videos on "Restricted Mode," as well as demonetizing some of their videos.[155] PragerU's claim of First Amendment violation was denied on the grounds that opening their private platform is not nearly close to an activity that "only governmental entities have traditionally performed."[156] The key aspect of the decision was based on the Supreme Court precedent of *Manhattan Community Access Corporation v. Halleck*.[157]

The Supreme Court decision in *Halleck* centered around whether the corporation operating public access channels on a cable system constituted a state actor through its conduct.[158] Analogizing a social media platform to a company that oversees the operations of public access channels on a cable system is improper. Both are fundamentally different regarding the product they oversee.[159]

When taking into consideration the nature of social media platforms and their expansive reach, future courts should transform these private entities into actors that must protect the constitutional rights of freedom of speech and expression of its users. Courts should focus the scope directly on: (1) the unprecedented medium for exchanging ideas; (2) their designation as the modern-day public forum; (3) their breathtaking market power; and (4) each company's mission statement.

As mentioned above, the Court in *Packingham* deemed it unconstitutional for North Carolina to prevent complete access to social media because social media platforms have become the "modern public square."[160] How many people flock to today's public square? The current

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[153] Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 B.Y.U. L. REV. 576, 587–88 (2016). *See generally* Paul Domer, Note, *De Facto State: Social Media Networks and the First Amendment*, 95 NOTRE DAME L. REV. 893 (2019). *See generally* Lloyd Corp. v. Tanner 407 U.S. 551 (1972).

[154] 951 F.3d 991, 999 (9th Cir. 2020).

[155] *Id.* at 995–96.

[156] *Id.* at 998 (quoting Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019)).

[157] *Id.* at 997–98.

[158] *Halleck*, 139 S. Ct. at 1926.

[159] One is a company that has a hierarchical order of employees meant to create, host, and disseminate content. Whereas the other holds itself out to be a medium for user-created content and communication among any and every user on its platform.

[160] Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

population of the United States is approximately 333.1 million people.[161] Approximately 72.3%, or 240 million individuals, use social media in the United States, and 53% of people use social media as a means to get their news.[162] The immense reach that each of these social media platforms possess is vastly more expansive than the population that the Constitution affords its protection.

Collectively, Facebook, Twitter, and YouTube are likely aware of the platform power they possess, and in each of the company's mission statements, freedom of speech is addressed. Facebook states, "[p]eople deserve to be heard and to have a voice—even when that means defending the right of people we disagree with."[163] Twitter posted a 53-page document to transparently expound what their service is meant to provide, stating "[f]reedom of speech is a fundamental human right—but freedom to have that speech amplified by Twitter is not. Our rules exist to promote healthy conversations."[164] Lastly, YouTube's mission statement is "[o]ur mission is to give everyone a voice and show them the world. We believe that everyone deserves to have a voice, and that the world is a better place when we listen, share and build community through our stories."[165] Each of these statements are obvious in that they are expressly offering a tool to the public for hosting and engaging in public discourse. These statements align with the *Packingham* decision, where these social media platforms are not only intended to be the "modern public square," but actually operate in such a manner.[166] This public square is one that offers a place for discourse for, essentially, the majority of the world. Therefore, in analyzing the question of whether these platforms serve a traditional and exclusive public function, the platforms should be analyzed as the modern-day forum for discussion that they are—not as cable service providers as was done in *PragerU*.[167] Allowing the social media platforms with substantial market power to engage in *private* viewpoint discrimination is harmful to free speech and the technological marketplace of ideas, which could be prevented if the Supreme Court adopted the reasoning from the Second Circuit Court of Appeals.

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[161] *U.S. and World Population Clock*, U.S. CENSUS BUREAU., https://www.census.gov/popclock/ (last visited Sept. 27, 2022).

[162] Dean, *supra* note 12. Shearer, *supra* note 142.

[163] Facebook's Mission Page, META, https://about.facebook.com/company-info/ (last visited Apr. 3, 2022).

[164] *2020 Global Impact Report*, TWITTER 4 (2020), https://about.twitter.com/content/dam/about-twitter/en/company/global-impact-2020.pdf.

[165] YouTube Mission Statement, YOUTUBE, https://about.youtube/#:~:text=Our%20mission%20is%20to%20give,build%20community%20through%20our%20stories (last visited Apr. 3, 2022).

[166] Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

[167] Prager Univ. v. Google, LLC, 951 F.3d 991, 996–98 (2020).

B. Contract Theories Illuminate a Necessity to Update Section 230 of the Communications Decency Act

All contract remedies available to users are moot because of the blanketed immunity provided to the platforms in Section 230 of the CDA.[168] The immunity extends to all civil lawsuits that could be brought against the social media platforms regarding third-party content.[169] The second layer of protection from civil remedies lies within the ToS that each user *must* agree to before being permitted to use and have full access to the social media platform.[170] Despite the inability of users to bring suit by means of contract law, an exploration into its principles highlights why there is a need for reform.[171] Specifically, if there were to be complete revocation of the CDA, an analysis under contract law will show that users have claims of unreasonableness and/or unconscionability in the ToS agreements.

a. Adhesion Contracts and Reasonable Expectations

There is a common law duty to read contracts before signing and agreeing to the terms.[172] However, rooted in principles of fairness, the failure to read the contract does not void the contract.[173] Yet, this issue becomes complicated when courts inevitably enforce the terms of a contract based on this duty to read, despite the unreadability of the contract itself. These agreements will be forced onto the user despite any inability to understand or read it because it is presumed that individuals who have signed a contract have inherently understood the terms.[174]

Under the reasonable expectations doctrine, courts use the core principle of the doctrine to invalidate portions of adhesion contracts that are deemed unfair, unconscionable, or unreasonable.[175] Regarding adhesion contracts specifically, the doctrine of reasonable expectations is generally applicable.[176] Traditionally, the reasonable expectations doctrine is applied

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[168] *See* 47 U.S.C. § 230.

[169] *Id.* § 230(c).

[170] *Supra* Section II(C).

[171] The only contract claim, as of the publication of this Comment, to survive summary judgment and the shield of Section 230 is *Berenson v. Twitter, Inc.* because the executives of Twitter were in direct contact with Berenson and assured him that his posts and profile would not be removed*;* therefore, sparking a perfect claim for promissory estoppel to circumvent Twitter's statutory moat of protection. Berenson v. Twitter, Inc., No. 21-09818 WHA, 2022 U.S. Dist. LEXIS 78255 (N.D. Cal. Apr. 29, 2022) (holding that Berenson's breach of contract claim against Twitter for removing his profile after spreading COVID misinformation survives summary judgment).

[172] Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 BOS. COLL. L. REV. 2255, 2257–58 (2019).

[173] *Id.* at 2260.

[174] *Id.* at 2258.

[175] Adhesion Contract (Contract of Adhesion), CORNELL L. SCH., https://www.law.cornell.edu/wex/adhesion_contract_(contract_of_adhesion) (last visited Sept. 27, 2022).

[176] Knapp et al., *supra* note 47, at 426.

to insurance matters.[177] However, due to the formulation in the Second Restatement of Contracts, this principle is feasibly applicable to all contracts.[178]

At first glance, the difference in implication between insurance contracts and ToS adhesion contracts appears manifestly different. However, this is not the case. Under insurance claims, the doctrine of reasonable expectations will arise where the insurer applies a term in the contract in a manner that the insured was not reasonably anticipating.[179] For example, in *C&J Fertilizer, Inc. v. Allied Mutual Insurance Co*., the contract dispute was over the language used within the burglary clause and if there was sufficient evidence from a burglary to satisfy the clause.[180] The insured, C&J Fertilizer, had suffered nearly $10,000 in damages resulting from the burglary.[181] Here, the contract between the parties was an adhesion contract.[182] In its decision, the Supreme Court of Iowa stated the doctrine of reasonable expectations demanded it rule in favor of the insured because "there was nothing…which would have led plaintiff to reasonably anticipate [that the] defendant would bury…another exclusion denying coverage when…no marks were left on the exterior of the premises."[183]

Instances of ToS contracts and social media platform users are not much different in impact when compared to insurance claims. While there is money directly implicated in the insurance claims, there are social and real-world implications to being flagged or suspended from social media platforms.[184] Thus, a user understanding in an objectively reasonable manner how the ToS of a platform will be applied to their conduct is important to maintain an informed userbase.

Where the duty to read doctrine overlaps with the reasonable expectations of the contractee, the terms are enforced upon them in a manner that would not reasonably be expected by a common user.[185] As mentioned

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[177] *Reasonable-Expectation Doctrine Law and Legal Definition*, U.S. LEGAL, https://definitions.uslegal.com/r/reasonable-expectation-doctrine/ (last visited Sept. 27, 2022).

[178] Knapp et al., *supra* note 166, at 426.

[179] *Id.*

[180] 227 N.W.2d 169, 172 (1975).

[181] *Id.* at 171.

[182] *Id.* at 174.

[183] *Id.* at 177.

[184] *See* Crawford, *supra* note 140, at 420 ("The fact that flagging can be a tactic not only undercuts its value as a 'genuine' expression of offense, it fundamentally undercuts its legibility as a sign of the community's moral temperature."). Not only does the lack of access to worldwide engagement disappear but there are concerns that the system of deplatforming could lead to a downturn of democratic values. *See also* Brett Swanson, *Deplatforming and Disinformation Will Degrade Our Democracy*, AM. ENTER. INST. (Jan. 15, 2019), https://www.aei.org/technology-and-innovation/deplatforming-and-disinformation-will-degrade-our-democracy/ (noting the contrast between the Founding Fathers' want of an informed society for the exchange of ideas with the modern political tactic of getting the opposition deplatformed).

[185] There is an inherent overlap between the two doctrines as the duty to read doctrine can be undermined by the defensiveness of the doctrine of reasonable expectations. Charles Knapp, *Is There a "Duty to Read"?*, 66 HASTINGS L. J. 1084, 1092 (May 2015) ("In its strongest form, this doctrine … can potentially override the literal terms of a written agreement [duty to read] or not.").

earlier, approximately 91% of users are reported to assent to ToS without reading any portion of the agreement.[186] Meaning that, at the very least, 91% of the users are unaware of the terms they have assented to.[187] This is compounded by the number of users who attempt to read the ToS agreements, but fail to retain anything of substance due to the vague and academic nature of its contents.[188]

For a proper analysis of the ToS agreements, the initial question is: what would be reasonable enforcement of the misinformation policy proffered by either Twitter, Facebook, or YouTube?[189] In the guise of insurance contracts, reasonableness is measured at an objective level of what the reasonable contractee would believe they contracted for.[190] So, the contractee is looking to have a portion enforced according to objective, reasonable expectations at the time of contracting.[191]

Under the scope of COVID misinformation, Twitter, Facebook, and YouTube hone in on "misleading" content that they determine could cause "imminent physical harm," or which advertise "dangerous cures."[192] Under the duty to read doctrine, each user inherently assents to not spread such content.[193] The issue facing the validity of discourse on social media is highlighted when the companies censor content they believe to be "misleading," potentially causing "imminent physical harm," or "dangerous cures" to COVID.[194] While the social media companies may have the best interest of society at the forefront of their decision-making process, stopping the circulation of information regarding the efficacy of COVID treatment undercuts the developmental process of thought and science.[195]

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[186] 2017 Global Mobile Consumer Survey, *supra*, note 50.

[187] *Supra* notes 50–51 and accompanying text.

[188] *Supra* notes 50–51 and accompanying text.

[189] The ToS of each Twitter, Facebook, and YouTube is mentioned in *supra* Sections II(B)(a)–(c).

[190] Kate L. Hyde & Eduardo DeMarco, *Limitations on the Use of the Reasonable Expectations Doctrine and the Contra Proferentem Rule by Sophisticated Policyholders*, KENNEDYS (Jan. 14, 2019), https://kennedyslaw.com/thought-leadership/article/limitations-on-the-use-of-the-reasonable-expectations-doctrine-and-the-contra-proferentem-rule-by-sophisticated-policyholders/.

[191] *Id.*

[192] *Supra* Section 2(B)(a)–(c).

[193] Benoliel, *supra* note 171, at 2258–59.

[194] *Compare supra* Section 2(B)(a)–(c) (the section of this Comment that covers the ToS of Twitter, Facebook, and YouTube), *with* Munsif Vengattil & Elizabeth Culliford, *Facebook Allows War Posts Urging Violence Against Russian Invaders*, REUTERS (Mar. 11, 2022, 12:04 AM), https://www.reuters.com/world/europe/exclusive-facebook-instagram-temporarily-allow-calls-violence-against-russians-2022-03-10/ (noting that Facebook is permitting content to stay on their platform that directly calls for the death of Vladimir Putin and Alexander Lukashenko in connection to the war in Ukraine).

[195] There is a necessity for collaboration amongst the scientific community to ensure the further development of well-tested hypotheses and accepted facts. Daniel Mediati, *Science Is the Name but Collaboration Is the Game*, EARLY CAREER RSCH. CMTY. (Apr. 14, 2017), https://ecrcommunity.plos.org/2017/04/14/science-is-the-name-but-collaboration-is-the-game/#:~:text=Collaboration%20helps%20ECRs%20develop%20into,researcher%20during%20these%20early%20years ("In fact, a recent paper in *Science Advances* finds that multinational collaborative

Until recently, persons expressing political ideology and opinion on a myriad of political issues would not reasonably expect their content or profile to be removed for expressing a belief that is not the accepted viewpoint on a platform.[196] For example, Dr. Robert Malone is one of the individuals who holds several patents for the mRNA vaccine.[197] Dr. Malone was recently permanently suspended from Twitter after raising a question as to whether vaccine mandates are appropriate for the masses.[198] Here, the doctrine of reasonable expectations could void the binding ToS to contractees circulating scientific information. Specifically, regarding Dr. Malone, it is not likely an objectively reasonable expectation that someone with his academic background would be removed for spreading his legitimate opinion concerning vaccines that would allegedly lead to imminent physical harm.[199]

The doctrine of reasonable expectations could be applicable to ToS agreements as their enforcement in situations akin to Dr. Malone are unfair and unreasonable. Unreasonableness is shown by the lack of expectation of a high achieving academic being unable to voice his opinion on an issue that is directly applicable to his work history.[200] Unfairness is demonstrated through the inability of users to spread information regarding scientific problems unless it adheres to what the platform moderators deem as hard-set facts.[201] Both the unreasonableness and unfairness could void these ToS agreements under the reasonable expectations doctrine.

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publications achieve higher impact and an overall greater citation rate than publications without a multinational collaborative mindset.").

[196] The lack of expectation is evidenced by the multitude of cases opposing the censorship of political content against social media companies. *See* Will Feuer, *Trump Sues Facebook, Twitter, Google for 'Censorship of the American People',* N.Y. POST (July 7, 2021, 10:13 AM), https://nypost.com/2021/07/07/donald-trump-to-sue-mark-zuckerberg-jack-dorsey-report/ (covering the class-action suit filed by then President Donald Trump); Tom Parker, *Lawsuit Against Twitter Reveals How It Works with Democrats to Censor*, RECLAIM THE NET (June 18, 2021, 2:37 PM), https://reclaimthenet.org/twitter-california-democrats-sued-cenorship-election-conversations/ (discussing the lawsuit of political commentator Rogan O'Handly against Twitter and several Democratic politicians); Tyler O'Neil, *Lawsuit: Ex-Calif. Sec. of State Conspired With Twitter to Silence Critics, Secure His Path to the Senate,* PJ MEDIA (Jun. 18, 2021, 3:35 PM), https://pjmedia.com/news-and-politics/tyler-o-neil/2021/06/18/lawsuit-twitter-conspired-with-democrats-on-orwellian-censorship-of-election-concerns-n1455569 (covering Rogan O'Handly's lawsuit against former California Secretary of State Alex Padilla).

[197] U.S. Patent No. 5,589,466 (filed Dec. 31, 1996). *See also Patents by Inventor Robert W. Malone*, JUSTIA, https://patents.justia.com/inventor/robert-w-malone (last visited Sept. 27, 2022).

[198] *See* Ashley Sadler, *Twitter Bans mRNA Pioneer Dr. Robert Malone After He Raised Alarm About Pfizer COVID Shot Dangers*, LIFE SITE NEWS (Jan. 3, 2022, 1:52 PM), https://www.lifesitenews.com/news/twitter-bans-mrna-pioneer-after-he-warned-about-covid-shots/; U.S. Patent No. 5,589,446 (filed Dec. 31, 1996).

[199] The reasonable expectation test is measured by a standard of the "'average member of the public who accepts such a contract, not the subjective expectations of an individual adherent.'" Rose v. Sabala, 632 S.W. 3d 428, 434 (Mo. Ct. App. 2021) (quoting Hartland Computer Leasing Corp v. Insurance Man, Inc., 770 S.W.2d at 527– 28. (Mo. Ct. App. 1989)).

[200] Some contracts of adhesion are seen to be inherently unfair or unreasonable due to the inability to negotiate the terms or the lack of adequate bargaining power. Colonial Leasing Co. v. Best, 552 F. Supp. 605, 606–07 (D. Or. 1982).

[201] Unfairness and unreasonableness, in regard to adhesion contracts, are seen as two edges of the same sword in that a contract will be deemed as either if there is the presence of unequal bargaining power or an inability to negotiate terms. *See id.*

The principles of the reasonable expectations doctrine are important in the development of social media because, without the ability for users to discuss nuanced solutions to perpetually evolving situations, progress can be offset.[202] Moreover, if the mass of users is to accept a social media company's "truth" as absolute, then situations where interactions on the internet are bottlenecked into one narrative, like North Korea and Cuba, could become hyper-prevalent in modern societies.[203]

b. ToS as Adhesion Contracts May Be Void Due to Unconscionability

A gaze into the realm of unconscionability also highlights the notion that, but for Section 230 of the CDA, social media companies could be subject to civil suit for unconscionable ToS agreements being enforced to remove and suspend users and their content. Unconscionability is a tool that can be invoked by a party to argue that all or part of the contract should not stand for grounds of being wholly unfair, unduly harsh, or unreasonably oppressive to the extent that it would shock the conscience.[204] Two substrata exist within this defensive tool: procedural and substantive unconscionability.[205] Procedural unconscionability is presumed, but not always present, in contracts of adhesion.[206] Another factor for consideration is whether the contractee lacked a "meaningful choice when entering into the contract."[207] Substantive unconscionability is found in the unreasonableness of the terms of the contract itself.[208]

The ToS agreements that users *must* agree to are contracts of adhesion.[209] This is evidenced by the fact that these are non-negotiable contracts, which the users assent to without bargaining and provide minute rights to the users and, essentially, unlimited capabilities for the social media companies.[210] The contracts take the form of click-wrap, which provides no opportunity for negotiation of terms.[211] These ToS are presumptively

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[202] Mediati, *supra* note 194.

[203] *Supra* Section II(A)(ii)–(iii).

[204] *See* Brady Williams, Note, *Unconscionability as a Sword: The Case for an Affirmative Cause of Action*, 107 CAL. L. REV. 2015, 2016–17 (2019).

[205] *See* Paul Bennett Marrow, *Contractual Unconscionability: Identifying and Understanding Its Potential Elements*, COLUM. 18–20 (2000); Garcia v. Church of Scientology Flag Serv. Orga., Inc., No. 18-13452, 2021 U.S. App. LEXIS 32601, at *18 (11th Cir. Nov. 2, 2021).

[206] *Garcia*, 2021 U.S. App. LEXIS, at *18.

[207] Basulto v. Hialeah Auto., 141 So. 3d 1145, 1157 (Fla. 2014).

[208] *Id.* at 1157–58.

[209] Contracts of adhesion are "defined as those 'not . . . individually negotiated' that 'caus[e] a significant imbalance in the parties' rights and obligations . . . to the detriment of the consumer." DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 71 (2015). Adhesion contracts are commonplace in consumer contracts and are likely the most efficient means to have a uniform set of guidelines that the entire base of users are subject to. *The Enforceability of Adhesion Contracts*, L. SHELF EDUC. MEDIA, https://lawshelf.com/shortvideoscontentview/the-enforceability-of-adhesion-contracts (last visited Sept. 27, 2022).

[210] *See* Perry Viscounty et al., *supra* note 48.

[211] Andreas Johansson, *The Enforceability of Clickwrap Agreements* 23–24, https://www.diva-portal.org/smash/get/diva2:807840/FULLTEXT01.pdf (last visited Sept. 27, 2022).

unconscionable, just as adhesion contracts are assumed procedurally unconscionable. Pursuant to caselaw, these ToS are also procedurally unconscionable as the users lack a meaningful opportunity to decline the ToS—rather the users either accept or do not use.[212] Arguments have been presented regarding the ease of users not accepting the ToS and simply using other social media platforms.[213] Yet, these social media platforms—Facebook, Twitter, and YouTube—possess such substantial market power that using other platforms is inherently unattractive.

In many jurisdictions, courts will not invalidate portions of a contract without both substantive and procedural unconscionability.[214] The unreasonableness of the ToS, specific to Twitter, was prevalent in Justice Thomas's concurrence in *Biden v. Knight First Amendment Institute at Columbia University*.[215] Justice Thomas, when noting the platform's unfettered ability to permanently suspend the sitting President's constitutionally protected forum, called this power "unrestricted authority…[to wield] at any time for any or no reason."[216] Further, Justice Thomas notes the starkly unbalanced power between user and platform as he writes, "[a]lso 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 [social media] platforms."[217] The immense power in the hands of social media platforms resembles substantive unfairness and unreasonableness as their blanketed ToS grant them the power to remove the content of a sitting President without repercussion or justifiable means besides stated violations of a platform's ToS. The presence of both procedural and substantive unconscionability could invalidate the enforcement ToS against users posting content that is being removed under the guise of political ideation and a social media company's determination of "scientific fact." Both claims of unconscionability and reasonable expectations are moot due to the presence of Section 230 of the CDA, but their applicability to the present situation displays a necessity for change.

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[212] Basulto v. Hialeah Auto., 141 So. 3d 1145, 1157–58 (Fla. 2014).

[213] "Social media is not a requirement of life and there are other social media platforms available…." Loomer v. Facebook, Inc., No. 19-CV-80893-SMITH, 2020 U.S. Dist. LEXIS 99430, at *7 (S.D. Fla. Apr. 13, 2020).

[214] *See* Garcia v. Church of Scientology Flag Serv. Orga., Inc., No. 18-13452, 2021 U.S. App. LEXIS 32601, at *18 (11th Cir. Nov. 2, 2021); Ellis v. McKinnon Broadcasting Co., 23 Cal. Rptr. 2d 80, 83 (Cal. Ct. App. 1993).

[215] *See generally* 141 S. Ct. 1220, 1221–27 (2021).

[216] *Id.* at 1221, 1222.

[217] *Id.*

IV. AMENDING SECTION 230 OF THE COMMUNICATIONS DECENCY ACT CAN PRESERVE THE TRADITIONAL AND FUNDAMENTAL PRINCIPLE OF FREE SPEECH IN THE SPHERE OF SOCIAL MEDIA

States attempting to pass laws that regulate social media platforms or that would subject these platforms to liability will inevitably be struck down due to preemption.[218] A further obstacle will be that if a law is directly related to Section 230 of the CDA it must explicitly state so.[219] If the new legislation does not, then the courts will attempt to give effect to both the CDA and the new legislation in a non-conflicting manner.[220] During the 116th Congress, approximately 26 bills were introduced to alter the precise scope of Section 230 of the CDA.[221] The difficult battle that one has to consider in calling for an amendment is to focus not on vendetta-like legislation; instead, the approach should be focused on the promotion of freedom of speech, while still affording social media platforms the ability to grow as they have under the current scope of Section 230.[222]

A. Present Proposal for Legislative Amendment to Section 230 of the Communications Decency Act[223]

SECTION 1. SHORT TITLE.

This proposal may be cited as "The Proposal to End Private Social Media Viewpoint Discrimination."

SEC. 2. SCOPE OF PROTECTION.

(a) Section 230 of the Communications Act of 1934 (47 U.S.C. 230) is amended—

(1) in subsection (c), by adding at the end the following new paragraph:

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[218] Doe v. Am. Online, Inc., 783 So. 2d 1010, 1015–17 (Fla. 2001). The supremacy clause provides that federal law "shall be the supreme Law of the Land . . . ." U.S. CONST. art. VI, cl. 2.

[219] VALERIE C. BRANNON, FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT, CONG. RES. SERV. R45650 42 (2019).

[220] *Id.*

[221] VALERIE C. BRANNON & ERIC N. HOLMES, SECTION 230: AN OVERVIEW, CONG. RES. SERV. R46751 (2021); S. REP. No. 4062 (2020); S. REP. No. 4828 (2020); S. REP. No. 797 (2021); S. REP. No. 4534 (2020); S. REP. No. 1914 (2020); H.R. REP. No. 4027 (2020); S. REP. No. 3983 (2020); H.R. REP. No. 277 (2021).

[222] David Post, *A Bit of Internet History, or How Two Members of Congress Helped Create a Trillion or So Dollars of Value*, WASH. POST: VOLOKH CONSPIRACY (Aug. 27, 2015, 1:05 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/27/a-bit-of-internet-history-or-how-two-members-of-congress-helped-create-a-trillion-or-so-dollars-of-value/ (noting that the portion of Section 230 which prohibits social media companies from being liable for the content posted on their platform has allowed the platforms to accrue an extreme amount of value and power).

[223] The following proposal was made by combining the premises of the following congressional proposals: S. REP. NO. 4062 (2020); S. REP. NO. 4828 (2020); S. REP. NO. 797 (2021); S. REP. NO. 4534 (2020); S. REP. NO. 1914 (2020); H.R. REP. NO. 4027 (2020); S. REP. NO.. 3983 (2020); H.R. REP. NO. 277 (2021).

"(3) REQUIREMENT OF GOOD FAITH AND POLITICALLY UNBIASED CONTENT MODERATION BY QUALIFIED COMPANIES.

(A) GOOD FAITH CONTENT MODERATION.—The moderation practices of an interactive computer service provider are good faith if—

(i) the provider acts with an honest belief and purpose, observes fair operating standards, and acts without fraudulent intent; AND

(ii) has publicly available terms of service that plainly state the criteria the internet computer service provider will use in its content-moderating process; AND

(iii) any restrictions on user's access must be consistent with the terms of service and with any open representations regarding the provider's moderation process; AND

(iv) any restrictions of user's access must be based on an objectively reasonable belief that the moderated content falls within the proscribed categories of subsection (C)(2)(A) and (C)(3);[224] AND

(v) does not act in good faith if they—

I. enforce the terms of service of the interactive computer service provider, including enforcing policies of the provider to restrict access to or availability of material, against a user by employing an algorithm that selectively enforces those terms, if the provider knows, or acts in a reckless disregard of the fact, that the algorithm selectively enforces those terms; OR

II. take any other intentional action without an honest belief and purpose, without observing fair operating standards, or with fraudulent intent.

(B) POLITICALLY UNBIASED CONTENT MODERATION.—The content moderation of an interactive computer service provider will be considered politically biased if—

(i) the provider moderates information provided by other information content providers in a manner that—

(I) is designed to negatively affect a political party, political candidate, or political viewpoint; OR

(II) disproportionately restricts or promotes access to, or the

[224] Several of these criteria are drawn directly from the DOJ's determination of "good faith" content moderation. U.S. DEP'T OF JUST., SECTION 230 – NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY?, KEY TAKEAWAYS AND RECOMMENDATIONS 22 (2020).

availability of, information from a political party, political candidate, or political viewpoint; OR

(ii) an office or employee of an internet computer service provider acts inconsistent with subsection (A) of this article that is motivated by an intent to negatively affect a political party, political candidate, or political viewpoint."

(2) in subsection (f), by adding at the end the following new paragraph:

"(5) QUALIFIED COMPANIES.—An internet computer service provider is considered a qualified company, and subject to subsection (C)(3), if at any time during the most recent span of twelve months they—

(A) had more than 50,000,000 active monthly users in the United States;

(B) had more than 500,000,000 active monthly global users; OR

(C) had more than $1,000,000,000 in global revenue."

V. CONCLUSION

The current realm of the technological marketplace of ideas is at a tipping point. The relationship between users and social media platforms is one of incomparable amounts of bargaining, market, and narrative power. This Comment focused on two different solutions to potentially remedy the current imbalance: (1) Congress amending Section 230 of the CDA to combat private viewpoint discrimination; and (2) the Supreme Court expanding the rule put forth by the Second Circuit Court of Appeals to encompass all speech protected under the First Amendment.

Principles of contract law show why the current dynamic could be void if Section 230 of the CDA does not permit social media platforms the ability to bear both the sword and the shield of immunity for their conduct.[225] Users are subjected to the will of whichever platform they are using, which is bolstered by Section 230 of the CDA and their ToS. Collaboration is essential to the prosperity of a nation and the crystalizing of well-thought and well-tested theories and ideas. The only mode for collaboration is communication, and modern collaboration is most prevalent through social media platforms.

In aggregate, Twitter, Facebook, and YouTube have a user basis of global proportions—nearly 6.15 billion active users.[226] The United States user populace in 2020 was 240 million, or approximately 72.3% of the

[225] *Supra* Section III(B).
[226] *See supra* notes 16–17 and accompanying text.

nation's population.[227] The necessity for an amendment or doctrinal change is driven by the desire to make the United States less politically divisive. This can be fulfilled by using the democratic tools created at the inception of the United States and those tools that were made as a result of citizens having a protected right to freedom of expression—the internet. A less politically divisive tool, used by 53% for collecting news, could be extremely beneficial to the interpersonal relationships of the United States.[228] The presence of constitutionally protective guardrails, whether accomplished congressionally or via the Supreme Court, would permit the free exchange of speech to hold future United States' governments accountable for societal conditions—much like those during Arab Spring.

Constitutional law also shows there is a need for change.[229] How is it that companies can feasibly reap the rewards of constitutional protection under *Miami Herald*, yet, with a decisive blow, they can indefinitely ban *anyone* from using their platform—including sitting presidents? The Supreme Court deemed prohibiting access to social media platforms as unconstitutional because they are the "modern public square."[230] In the future, the Supreme Court should consider an analysis of the constitutionality of content moderation on social media under the machine that the platforms are—not under cable service provider precedents. At the very least, the Supreme Court should afford access to, and engagement with, those accounts held in an official capacity by public officials.[231]

Lastly, governments around the world are aware of the immense power that social media platforms hold. Look again to Cuba, North Korea, Egypt, and Tunisia. One country shuts down complete access to the internet and social media in order to quell domestic protests calling for better living standards.[232] The other refuses access to its citizens to maintain an authoritative thumb over their understanding of present and past reality.[233] In contrast, Arab Spring, a pro-democratic movement, was facilitated by the tools made available by social media companies.[234] Would Galileo have spent his final years in prison for his ideas that challenged the controlling narrative of the time if the global exchange of ideas was available in an instant?

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[227] Dean, *supra* note 12.
[228] Shearer, *supra* note 142.
[229] *See supra* Section III(A).
[230] Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).
[231] This would be consistent with the ruling in Knight First Amend. At Columbia Univ and contrary to the ruling put forth by the 10th Circuit in review of *Swanson v. Griffin*. *See generally* Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d at 239; Swanson v. Griffin, No. 21-2034, 2022 U.S. App. LEXIS 5179, at *11–12 (10th Cir. Feb. 25, 2022). The ruling would also be a further expansion of the theme espoused by Justice Thomas in his concurrence in *Biden v. Knight First Amend. Inst. at Columbia Univ.*. *See generally Biden*, 141 S. Ct. at 1227.
[232] *Supra* Section II(A)(a)(ii).
[233] *Supra* Section II(A)(a)(iii).
[234] *Supra* Section II(A)(a)(i).