# Guardians of the Virtual Realm: A Comparative Analysis of Digital Democracy Defense in the U.S. and EU

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## I. INTRODUCTION

The digital landscape has undergone significant evolution in recent years, reshaping the way individuals communicate, access information, and interact with online platforms.[1] As these platforms play an increasingly central role in public discourse and information dissemination, questions surrounding their liability for user-generated content have gained attention. This Comment delves into the comparative analysis of digital liability for social media platforms under U.S. law, focusing on Section 230, and E.U. law, examining both the E-Commerce Directive and the Digital Services Act (DSA). Understanding the legal frameworks governing digital liability is crucial for assessing the future

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1. Richard Wike et al., *Social Media Seen as Mostly Good for Democracy Across Many Nations, But U.S. Is a Major Outlier*, PEW RSCH. CTR. (Dec. 2022), https://www.pewresearch.org/global/2022/12/06/views-of-social-media-and-its-impacts-on-society-in-advanced-economies-2022/.

of platforms' self-regulation efforts. While the United States' approach, anchored by Section 230, has long provided broad immunity to online platforms, the European Union has embarked on a path toward more comprehensive regulation with the introduction of the DSA.[2] This dichotomy underscores contrasting philosophies regarding the balance between freedom of speech and the responsibility of online platforms in moderating content.

The convergence of U.S. and E.U. legal principles in the realm of digital liability is likely to be a pivotal point of contention and cooperation for social media platforms.[3] As platforms grapple with mounting pressure to address harmful content while preserving open discourse, reconciling divergent legal frameworks will be imperative.[4] Moreover, this juxtaposition presents an opportunity to explore nuanced differences in how freedom of speech is conceptualized and safeguarded in different societal contexts. By examining these contrasting approaches to digital liability, this Comment seeks to shed light on the multifaceted dynamics shaping the regulation of online platforms in an increasingly interconnected world.

This Comment explores novel issues introduced by the use of technology in Part II, which describes how social media platforms are utilized and contemplates possible solutions for platforms to self-regulate. Next, this Comment explores basic first amendment principles in Part III, which describes many of the pertinent and relevant precedents to help shed light on how the U.S. interprets the freedom of speech of intermediary platforms. In Part IV, this Comment describes the E.U.'s approach to intermediary liability and explains the current set of laws and regulations levied against platforms operating in the E.U. Part V, Section 230 in comparison to DSA, directly analyzes, compares, and contrasts the U.S. and E.U. approaches to intermediary liability. Part VI contemplates the future of regulation in the U.S. and the E.U. and analyzes recent or upcoming cases that will or have played a shape in influencing each respective governmental body. Lastly, this Comment concludes in Part VII. As the digital landscape continues to evolve, navigating the intersection of law, technology, and individual liberties will remain a pressing and modern challenge with far-reaching implications for the future of online discourse and democracy.

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2. Ross Chambers, *Conflicts Between E.U. and U.S. Social Media Regulation*, 92 U. CIN. L. REV. (2023), https://uclawreview.org/2023/11/29/conflicts-between-e-u-and-u-s-social-media-regulation/.

3. *Id.*

4. *Id.*

## II. NOVEL ISSUES INTRODUCED BY THE USE OF TECHNOLOGY

As put by Judge Newsom of the Eleventh Circuit, "not in their wildest dreams could anyone in the Founding generation have imagined Facebook, Twitter, YouTube, or Tik-Tok."[5] To understand the scope of the impact social media has on its users and society in general, it is important to clarify exactly how these platforms function: (1) Legally, social media platforms "are private enterprises, not governmental (or even quasi-government) entities."[6] (2) No one who uses social media platforms has any duty or obligation to contribute or consume the content that appears on those sites. (3) A characteristic of social media platforms that distinguishes them from traditional media outlets is that they do not create the majority of the content on their sites. Platforms like YouTube, Facebook, and X all collect and organize third-party content, which is then made available to other users on the platforms.[7] This dissemination of information is extremely novel and poses many complexities for legislation around the world. It is crucial that governmental bodies understand the scope and use of these platforms in order to properly regulate them.

It is clear that social media platforms function and are used in distinctly different ways than traditional media outlets most users are accustomed to, such as newspapers and internet service providers.[8] Social media platforms engage in the curation of their content and rely on algorithms in choosing how posts are displayed.[9] These platforms also set their own terms of service and have privately decided content-moderation company standards.[10] As such, when

> a platform removes . . . a user or post, it makes a judgment about whether and to what extent it will publish information to its users—a judgment rooted in the platform's own views about the sorts of content and viewpoints that are valuable and appropriate for dissemination on its site.[11]

5. *NetChoice v. Moody*, 34 F.4th 1196, 1203 (11th Cir. 2022).

6. *Id.* at 1204.

7. Brief of Solicitor General for the United States as Amicus Curiae at 3, *NetChoice v. Paxton*, 216 L. Ed. 2d 1313 (No. 22-555), *Moody v. NetChoice* 216 L. Ed. 2d 1313 (No. 22-277), et al.

8. *Id.*

9. *Twitter, Inc. v. Taamneh*, 143 U.S. 1206, 1216 (2023).

10. YOUTUBE, Community Guidelines, https://www.youtube.com/howyoutubeworks/policies/community-guidelines/.

11. *Moody*, 34 F.4th at 1210.

Although social media platforms are often celebrated for fueling creativity and globalization in our modern world, there are many concerns about the impact social media platforms have on shaping the content a user is exposed to, which raises concerns about manipulation in important areas like politics, public health, and broader social issues. Some argue that the basis for legislation is non-partisan and is inspired by a concern for bias.[12] One main concern stems from a platforms' ability to exercise influence over democratic discourse in the absence of any checks and balances.[13] Some believe that social media platforms should engage in self-regulation in order to avoid government regulation.[14] This idea becomes extremely important in Parts V and VI of this Comment where the vastly dissimilar approaches of the E.U. and the U.S. will inevitably come to a head. MIT Professor Michael Cusumano, in an article published by the *Harvard Business Review*, writes that platforms have "enabled the distribution of fake news and fake products, manipulation of digital content for political purposes, and promotion of dangerous misinformation on elections, vaccines, and other public health matters."[15] He posits that in order for platforms to avoid a tragedy-of-the-commons situation wherein platforms begin to prioritize short-term over long-term success and government intervention, platforms must begin the process of self-regulation.[16] Professor Cusumano describes self-regulation as the required steps social media platforms can take to fend off subjugation to governmental rules.[17]

As our complex and modern society continues to grapple with the unprecedented challenges posed by social media platforms in a legal context, it is essential to recognize their distinctive characteristics and functions. Quite unlike traditional media outlets, social media platforms act as intermediaries, organizing and curating third-party content rather than generating it themselves. This idea and distinction will prove crucial for the analysis necessary in the following parts of this Comment. The content moderation decisions made by these platforms embody a form of expressive autonomy that is rooted in their self-written and governed

12. Jamie Susskind, *We Can Regulate Social Media Without Censorship. Here's How*, TIME (July 22, 2022, 1:45 PM), https://time.com/6199565/regulate-social-media-platform-reduce-risks/.

13. *Id.*

14. Michael A. Cusumano et. al, *Social Media Companies Should Self-Regulate. Now.*, HARV. BUS. REV. (Jan. 15, 2021), https://hbr.org/2021/01/social-media-companies-should-self-regulate-now.

15. *Id.*

16. *Id.*

17. *Id.*

terms of service and standards. However, the potential impact that these platforms have in their ability to shape user exposure to information introduces many complex dilemmas. The ongoing discussion regarding legislative intervention versus self-regulation highlights the importance of carefully weighing the balance between protecting democratic discourse and maintaining the autonomy of these influential digital platforms. Nevertheless, the diverse approaches taken by different countries on this issue will present a difficult challenge for social media platforms.

## III. BASIC FIRST AMENDMENT PRINCIPLES

The First Amendment states that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[18] The First Amendment stands as a cornerstone of democratic principles and ensures the safeguarding of the freedom of speech, religion, press, assembly, and petition. While it's widely regarded as the cornerstone of individual freedom and frequently hailed as the most precious amendment, the nuances of the First Amendment are often overlooked. These intricacies, combined with shifting societal norms and technological progress, contribute to many misunderstandings about its scope and relevance. The dynamic communication landscape we exist in today, particularly with the emergence of social media, adds another layer of complexity to interpreting and implementing these rights. As society continues to navigate the complexities of the digital era, a nuanced comprehension of the First Amendment is essential in understanding how the U.S. differs in its regulation of the digital realm in comparison to other countries.

Given the plethora of First Amendment precedents relevant to this topic, I refer to the questions submitted by Solicitor General Elizabeth Prolegar, both of which have been accepted by the Court regarding two upcoming cases surrounding the struggle between government regulation and platform autonomy, which will be explored in Part VI of this Comment. The first question posed asks whether, "content-moderation restrictions comply with the First Amendment."[19] Content moderation involves the capacity of a business or platform to curate and organize the

18. U.S. Const. amend. I.

19. Brief of Solicitor General for the United States as Amicus Curiae at 2, NetChoice v. Paxton, 216 L. Ed. 2d 1313 (No. 22-555), Moody v. NetChoice 216 L. Ed. 2d 1313 (No. 22-277), et al.

third-party content it showcases to the public.[20] In essence, this question seeks to understand whether social media platforms are involved in, "constitutionally protected expressive activity when they moderate and curate the content that they disseminate."[21] This specific question hasn't been directly addressed in previous court rulings. Nonetheless, many of the fundamental principles guiding the interpretation of First Amendment rights can be gleaned from other decisions. Understanding these principles will be beneficial in grasping the framework the Court has established for interpreting the First Amendment in situations involving the distribution of information to the public.

In *Miami Herald Publishing v. Tornillo*, a Florida newspaper, *Miami Herald*, printed and spread editorials that criticized a candidate for the Florida House of Representatives seat, Pat Tornillo.[22] The issue in this case revolved around whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violated the guarantees of the freedom of press in the First Amendment.[23] After seeing the publications criticizing him, Tornillo demanded that *Miami Herald* print verbatim his replies.[24] *Miami Herald* declined to print Tornillo's replies; in response, Tornillo brought suit in Circuit Court, Dade County.[25] Tornillo brought this action under a "right of reply" Florida Statute, which provided that candidates for nomination or election who were assailed had the right to demand that the newspaper print the candidate's reply.[26] *Miami Herald* then sought a declaration that the Florida statute was unconstitutional, which was upheld by the Circuit Court and reasoned that dictating what a newspaper prints was a violation of the freedom of press under the First and Fourteenth Amendments of the Constitution.[27] The Supreme Court ultimately held that, "the choice of material to go into a newspaper . . . and the treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."[28] Although social media platforms are unique in that they are not exactly like newspapers, they, like *Miami Herald*, are private entities and thus have discretion in deciding how they

20. *Id.*
21. NetChoice v. Moody, 34 F.4th 1196, 1203 (11th Cir. 2022).
22. Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241, 243 (1974).
23. *Id.*
24. *Id.* at 244.
25. *Id.*
26. *Id.*
27. *Id.* at 245.
28. *Miami Herald*, 412 U.S. at 258.

disseminate third-party content to the public, regardless of what content they censor or choose to remove. Here, the Court made clear that editorial judgments, regardless of what they publish about political candidates are protected by the First Amendment.[29]

In further bolstering the protection of editorial judgment, as exemplified in *Miami Herald*, the Court similarly ruled in *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*.[30] In this case, the Court invalidated a directive from a state agency that aimed to compel a utility company to include the expression of a third party via billing envelopes, despite holding dissenting views.[31] The Court specifically deliberated on topics like compelled speech, editorial discretion, government interest, and the distinction between regulated speech in private and public forums.[32] The Court emphasized that, "the State is not free either to restrict appellant's speech to certain topics or views or to force appellant to respond to views that others may hold."[33] Thus, the Court affirmed that the government cannot coerce entities to convey a message they disagree with.[34] Furthermore, the Court acknowledged that entities, including corporations, retain the right to exercise editorial control over their own speech.[35] The government's endeavor to impose a specific message on the utility company infringed upon the company's editorial discretion, constituting a violation of the First Amendment.[36] Additionally, the Court differentiated between public and private forums and stressed that when the government seeks to regulate the content of a private entity's speech, it triggers heightened First Amendment scrutiny.[37] In this instance, the Court concluded that the "order is not a narrowly tailored means of furthering a compelling state interest," thus failing strict scrutiny.[38]

The issue in *Turner Broad. Sys. v. FCC* revolved around the constitutionality of Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, which mandated that cable television systems allocate a portion of their channels for transmitting local broadcast television stations.[39] These sections, known as must-carry

29. *Id.*
30. Pacific Gas & Electric Co. v. Public Utilities Com., 475 U.S. 1 (1986).
31. *Id.* at 4.
32. *Id.* at 9.
33. *Id.* at 11.
34. *Id.*
35. *Id.* at 14.
36. *Id.*
37. *Id.* at 20-21.
38. *Id.* at 21.
39. Turner Broad. Sys. v. FCC, 512 U.S. 622, 626 (1994).

obligations, were contested by cable programmers and operators, who argued that such obligations infringed upon their First Amendment rights.[40] Supporters of these Act sections, including Congress, contended that the must-carry provisions constituted antitrust measures aimed at averting market failure.[41] In this context, the Court affirmed that cable programmers and operators "engage in and transmit speech and . . . are entitled to the protection of the speech and press provisions of the First Amendment."[42] Moreover, the Court explicitly emphasized the paramount principle of the First Amendment, stating that individuals should have the freedom to choose how to express their own ideas and beliefs, and highlighted that "government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right."[43]

*Turner*, *Pacific Gas*, and *Miami Herald* represent highly significant legal precedents that collectively emphasize the importance of protecting free speech and editorial discretion.[44] Together, these cases establish a framework for understanding that government regulation should tread carefully to avoid encroaching upon the editorial decisions of private entities, including social media companies. Applying these precedents to the digital era in the United States suggests that governmental intervention in the content moderation policies of social media platforms may infringe upon their First Amendment rights. The principles of free expression and editorial independence established in these cases offer valuable guidance, urging for a delicate equilibrium between addressing legitimate concerns and safeguarding the autonomy of private entities in the realm of online communication. These precedents are crucial in understanding the laws at issue today because, as will be explored in this Comment, the U.S.'s approach to social media regulation is largely outdated and as made clear by the cases above, is mostly focused on other mediums of information dissemination. On the other hand, countries in the E.U. have taken a much more stringent and modern approach to the issues proposed by the complexities of social media.

40. *Id.*

41. *Id.* at 640.

42. *Id.* at 636.

43. *Id.* at 641.

44. *See*, *Hurley*, 515 U.S. 557 (1995); *Turner Broad. Sys*. 512 U.S. 622 (1994); *Pacific Gas & Electric Co.,* 475 U.S. 1 (1986); *Miami Herald Pub.,* Co 418 U.S. 241 (1974).

## IV. THE E.U.'S APPROACH TO INTERMEDIARY LIABILITY

The prevailing legislation in the E.U. surrounding social media regulation was first adopted in 2000 and was labeled the E-Commerce Direction 2000/31/EC.[45] This directive stipulates that providers of "hosting" services cannot be held responsible for the content they store for users, unless they became aware of the illegality of the content and fail to promptly remove it.[46] However, the E-Commerce Directive wasn't crafted to oversee social networks in their current form.[47] In response to the outdated directive, the E.U. recently enacted the Digital Services Act (DSA), which still maintains the same exemption outlined in the E-Commerce Directive, but modifies it.[48] As of February of 2024, the DSA rules now apply to all platforms operating in the E.U.[49] However, the DSA revised the exemption and added new obligations for providers to meet.[50] In essence, the DSA aims to regulate all internet intermediaries, but has a specific focus on social media platforms.[51] The DSA's primary objective is to curb illicit and detrimental activities online, as well as the dissemination of disinformation.[52] It guarantees user safety, upholds fundamental rights, and fosters a fair and transparent platform ecosystem.[53] The DSA focuses on regulation of social media platforms and takes off much of the onus from the citizens it aims to protect.[54] For citizens, it provides, "protection of fundamental rights, more control and choice, stronger protection of children online, less exposure to illegal content."[55] For providers and platforms, it posits to provide, "legal certainty [and] a single set of rules across the E.U."[56] The DSA is concerned with ensuring the exercise of greater democratic control and oversight over influential internet platforms and works to remove and

45. Florence G'sell & Anupam Chander, *Transatlantic Perspectives: Content Regulation, E.U. Digital Services Act and U.S. Section 230*, PROJECT LIBERTY (last visited Apr. 11, 2024). https://www.projectliberty.io/news/transatlantic-perspectives-content-regulation-E.U.-digital-services-act-and-us-section-230.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *The Digital Services Act,* E.U.R. COMM'N, https://commission.E.U.ropa.E.U./strategy-and-policy/priorities-2019-2024/E.U.rope-fit-digital-age/digital-services-act_en (last visited Apr. 9, 2024).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

censor manipulation and disinformation.[57] In comparison to other countries and bodies of law, the DSA is seen as one of the, "most ambitious regulation[s] in the world in the field of the protection of the digital space against the spread of illegal content, and the protection of users' fundamental rights."[58] As such, the E.U. has garnered worldwide attention in its enactment of the DSA and its protection of its citizens in cyberspace. The DSA package includes two important enactments; The Digital Services Act and the Digital Markets Act.[59] The Digital Markets Act (DMA) was created to establish explicit guidelines for major platforms and delineates the actions they must take and those they must avoid; the goal of this provision is to prevent those platforms from enforcing unjust conditions on businesses and consumers.[60] Where the DMA is more focused on platform competition law and mitigating unfair practices by digital platforms with larger market significance, the DSA is primarily focused on consumer protection and maintaining a more secure digital landscape within the scope of information services.[61] For the purposes of this Comment, my focus will center specifically on the DSA.

## V. SECTION 230 IN COMPARISON TO THE DSA

In 1996, Congress passed 47 U.S.C. § 230, which was designed to, "protect Americans' freedom of expression online by protecting the intermediaries [U.S. citizens] rely on."[62] This law is arguably the most influential in how the digital landscape is regulated and is heralded by social media platforms as it broadly shields them from liability.[63] When President Clinton signed this bill, he did so to garner support of the rising information industry that was making itself known via the internet.[64] At the time, in 1996, the internet was nothing like it is today. Professor Michael Smith from Carnegie Mellon goes as far as commenting that the protections outlined in Section 230, "were written a quarter of a century ago during a long-gone age of naive technological optimism and primitive

57. *Id.*

58. *The Digital Services Act (DSA)*, CYBER RISK GMBH, https://www.E.U.-digital-services-act.com/ (last visited Apr. 11, 2024).

59. *Id.*

60. *E.U. Digital Markets Act and Digital Services Act explained*, E.U.R. PARLIAMENT (Aug. 8, 2023, 14:53), https://www.E.U.roparl.E.U.ropa.E.U./topics/en/article/20211209STO19124/E.U.-digital-markets-act-and-digital-services-act-explained.

61. *Id.*

62. *Section 230*, EFF, https://www.eff.org/issues/cda230 (last visited Apr. 7, 2024).

63. *Id.*

64. G'sell, *supra* note 45.

technological capabilities."[65] As such, many call for its reform and reference governmental bodies like the E.U., who have ensured that their legislation remains modern and receptive to the rapidity with which technology evolves.

Section 230, part of the Communications Decency Act, holds that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[66] This language effectively protects internet platforms from being liable for content that is posted via their platform; in essence, this law means that platforms are not to be treated as publishers.[67] There are two crucial subsections of this law which specifically target user-generated posts.[68] Section 230(c)(1) serves to shield platforms from legal accountability regarding detrimental content uploaded by third parties onto their sites.[69] In contrast, Section 230(c)(2) permits platforms to moderate their platforms for such content, yet it does not mandate removal, providing protection from liability even if they opt not to remove it.[70] Interestingly, both conservatives and liberals criticize Section 230, but for different reasons. Section 230 allows for platforms, private entities, to moderate their own content; as such, those who use those platforms are bound by the terms and services each platform sets out.[71] Many conservative critics argue that binding users to their terms and services allows platforms to "muzzle" speech in a way that violates the First Amendment.[72] Conservatives believe that large social media companies are actively censoring users and in particular, those with right-leaning views.[73] Social media platforms, however, believe that any governmental regulation would violate their First Amendment rights as it would infringe on their right as private entities to moderate their own

65. 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.

66. 47 U.S.C. § 230.

67. Edward Longe, *The Future of the Internet Heads to SCOTUS*, THE JAMES MADISON INST. (2023), https://jamesmadison.org/the-future-of-the-internet-heads-to-scotus/?gad_source=1&gclid=Cj0KCQjwlN6wBhCcARIsAKZvD5jktd75JkBZSbbCfQIoz1sz-Ji89Ke7E.U.XdTijU3SYyU8LPAGBS-4MaAgS4EALw_wcB.

68. Smith, *supra* note 65.

69. *Id.*

70. *Id.*

71. Longe, *supra* note 67.

72. NetChoice, L.L.C. v. Paxton, F.4th 439, 447 (5th Cir. 2022).

73. Amy Howe, *Justices Take Major Florida and Texas Social Media Cases*, SCOTUSBLOG (Sept. 29, 2023, 9:48 AM), https://www.scotusblog.com/2023/09/justices-take-major-florida-and- texas-social-media-cases/.

content.[74] However, this disagreement from both sides of the aisle is not obsolete. Mark Zuckerberg, CEO and founder of Facebook, expressed to Congress that there could be justification for holding some content liable and noted that Facebook could do with more direction from elected officials.[75]

Where Section 230 provides an extremely broad protection for platforms' liability, the scope and protection the DSA provides is much narrower in its scope. While the DSA does provide for partial exemptions, it also affirmatively mandates duties aimed at combating illicit content.[76] Interestingly, because the E.U. is made up of nation-states, the DSA is structured to allow its provisions to align with the regulations delineating unlawful content in each nation.[77] Some nations, for example, like France, have laws that criminalize hate speech and in some instances, misinformation.[78] This contrasts extremely with the United States' approach where the freedom of speech is interpreted much more broadly and is guided by the provisions of the First Amendment.[79] Moreover, the DSA contains procedural protections that obligate platforms to keep their users informed about content-moderation decisions that impact them and allows users to challenge those terms. In contrast, because in the U.S.'s platforms are considered private entities, they are allowed to dictate the content they choose to carry and can moderate it at their own discretion.[80] This idea will become essential in analyzing the proposed Florida and Texas laws currently at issue in Part VI of this Comment.

Whereas under Section 230 internet platforms are allowed to host content that claims COVID-19 was a government ploy, or that the Holocaust is a conspiracy, under the DSA such content would be deemed illegal in many countries.[81] As such, the DSA and Section 230 are clearly at conflict with one another; this dichotomy will prove extremely difficult for social media platforms to regulate themselves in a way that ensures their compliance with each set of laws. Given that the DSA is much

74. Mackenzie Cerwick, *Censoring Social Media: Texas B 20*, JETLAW (Oct. 6, 2021), https://www.vanderbilt.edu/jetlaw/2021/10/06/censoring-social-media-texas-hb-20/#:~:text=Critics%20argue%20that%20this%20sweeping,sites%20like%20Twitter%20and%20Facebook.

75. Smith, *supra* note 65.

76. G'sell, *supra* note 45.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Dawn Carla Nunziato, *The Digital Services Act and the Brussels Effect on Platform Content Moderation*, 24 U. OF CHIC. J. INT. L. 115 (2023), https://cjil.uchicago.edu/print-archive/digital-services-act-and-brussels-effect-platform-content-moderation.

stricter than Section 230, it is theorized that social media companies will likely gear their policies toward the E.U.'s approach in order to avoid liability.[82] Moreover, the DSA imposes more substantial and weighty financial penalties for breaches of its regulation.[83] However, if the DSA's incentives for platforms to moderate harmful content become applied globally, as anticipated, this could generate conflict with the proposed state laws in Texas and Florida, which would prohibit platforms from moderating content in a way that discriminates against different viewpoints.[84]

## VI. THE FUTURE OF REGULATION IN THE U.S. AND THE E.U.

### *A.* Moody v. NetChoice *and* NetChoice v. Paxton

On September 29, 2023, the Supreme Court of the United States agreed to review two important cases, *Moody v. NetChoice* and *NetChoice v. Paxton*; both implicate extremely relevant and novel issues regarding the interpretation of the First Amendment, and will likely implicate Section 230.[85] The laws at issue in these cases come from legislation in Texas and Florida adopted in 2021, which are aimed at "prohibiting platforms from removing, deleting, or deplatforming speech of speakers based on viewpoint."[86] Although aiming to achieve similar effects in content regulation and censorship, these laws differ in various aspects. The U.S. Court of Appeals for the Eleventh Circuit enjoined Florida's law, S.B. 7072, in response, stating that it infringed upon the First Amendment rights of the social media platforms it targeted.[87] Conversely, the U.S. Court of Appeals for the Fifth Circuit upheld Texas's analogous law, H.B. 20.[88] Both laws were enacted in response to conservative legislators' view that large social media companies are actively censoring users, particularly those with conservative views.[89] However, social media companies argue that both the Texas and Florida

82. *Id.*

83. *Id.*

84. *Id.*

85. Docket No. 22-555, SUP. CT. OF THE U.S., https://www.supremecourt.gov/docket/docketfiles/html/public/22-555.html (last visited Apr. 7, 2023).

86. Timothy Zick, *The Supreme Court Will Decide if Texas Is Allowed to Kill the Internet*, SLATE (Sept. 29, 2023, 1:57 PM), https://slate.com/news-and-politics/2023/09/supreme-court-texas-twitter-social-media-lawsuit.html.

87. Moody, 34 F.4th at 1203.

88. Howe, *supra* note 73.

89. *Id.*

laws infringe upon their First Amendment rights.[90] The Supreme Court's verdict on this matter will significantly influence how states perceive their authority, or its absence, in regulating social media companies and the content they host.[91]

The law in question in Florida, S.B. 7072, specifically targets various forms of content moderation, including shadow banning, deplatforming, censorship, and post-prioritization.[92] This legislation focuses on social media platforms with a minimum of 100 million monthly individual users and annual gross revenue surpassing $100 million. Florida's rationale behind enacting this law is rooted in legislators' perception that social media platforms are unjustly restricting or censoring specific individuals in the state. The governor of Florida, Ron DeSantis signed this law into effect in May of 2021 and reasoned that, "many in [Florida] have experienced censorship and other tyrannical behavior firsthand in Cuba and Venezuela . . . [and] if Big Tech censors enforce rules inconsistently, to discriminate in favor of the dominant Silicon Valley ideology, they will now be held accountable."[93] However, the Eleventh Circuit made a pivotal legal ruling by upholding the preliminary injunction against Florida's law.[94] In their ruling, the Circuit Court underscored that when social media platforms opt to remove users, posts, deprioritize content, or enforce their own community standards, they are effectively exercising rights that are safeguarded by the First Amendment.[95] As put by Judge Kevin Newson, who wrote for the panel, "when platforms choose to remove users or posts, deprioritize content in viewers' feeds or search results or sanction breaches of their community standards, they engage in First Amendment-protected activity."[96] Although this ruling aligns with the broader legal consensus in the U.S., that social media platforms as private actors have discretion to enforce their own rules, it contrasts sharply with the E.U.'s approach in the DSA. This decision to further recognize platforms as private entities with the right to moderate their content and shape their users' experience how they

90. *Id.*

91. *Id.*

92. FLA. STAT. § 501.2041 (2021).

93. *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, RON DESANTIS 46TH GOVERNOR OF FLORIDA (May 24, 2021), https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of- floridians-by-big-tech/.

94. *Moody*, 34 F.4th at 1203.

95. *Id.* at 1210.

96. Adam Liptak, *Supreme Court to Hear Challenges to State Laws on Social Media*, N.Y. TIMES (Sept. 29, 2023), https://www.nytimes.com/2023/09/29/us/supreme-court-social-media-first-amendment.html/.

see fit is squarely at odds with the DSA and will prove tricky for social media platforms to traverse when modifying how they regulate their content and users.

The Texas law, H.B. 20, was also enacted for similar reasons as the Florida law. Texas Governor Greg Abbott noted that social media platforms are essentially a "modern-day public square" and should be used for citizens to express their viewpoints; however, he believes, "there is a dangerous movement by social media companies to silence conservative viewpoints and ideas."[97] Moreover, Texas Attorney General Ken Paxton rejects the platforms' argument that they have the right to refuse service to certain users because of their right of editorial discretion.[98] Paxton, instead, contends that platforms are not engaging in editorial discretion because, "they do not affirmatively select almost any user content, and no reasonable associates the [p]latforms with making those kinds of choices."[99] Paxton also relies on Section 230 to push the idea that social media platforms' claim of editorial discretion, "is irreconcilable with their explanation of a legal regime set up by Congress to treat them as conduits, not editors of communication."[100] Using the rationale Section 230 is premised upon, Paxton essentially argues that platforms are conduits of speech and as such have no First Amendment right to dictate the speech posted via their mediums.[101] Interestingly, because of the provisions of H.B. 20, which would require platforms to disclose how they manage and moderate their content, its contents align more with the DSA and its own goals and protections.

Whereas the Eleventh Circuit upheld the injunction levied against S.B. 7072, the Fifth Circuit reserved a lower court's order to block H.B. 20.[102] Judge Oldham, writing for the Circuit, stated that the Texas law, "does not regulate the [p]latform's speech at all; it protects other people's speech and regulates the [p]latform's conduct."[103] The Fifth Circuit essentially ruled that social media platforms do not have a recognized right to engage in content moderation and instead propose that what these

97. *Governor Abbott Signs Law Protecting Texans from Wrongful Social Media Censorship*, OFFICE OF THE TEXAS GOVERNOR (Sept. 9, 2021), https://gov.texas.gov/news/post/governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship.

98. NetChoice v. Paxton, Response to Petition for Writ of Certiorari, No. 22-555, at 20 (Dec 2022).

99. *Id.* at 22.

100. *Id.* at 23.

101. *Id.*

102. Liptak, *supra* note 96.

103. Paxton, F.4th at 447.

platforms are doing is a form of "censorship."[104] If this Texas law is ultimately declared constitutional by the Supreme Court, then both the state and individuals using those platforms could sue them for issues arising over content regulation and could even be mandated to reimburse those possible litigants for their attorney's fees if their claims prove meritorious.[105] How the Supreme Court will decide these cases is largely up for debate. However, its ruling will be monumental in establishing the U.S.'s boundaries of free expression and will hopefully clarify the extent to which government intervention is permissible without infringing upon the First Amendment rights of private entities.

### *B.* Peterson v. Google & YouTube *and* Elsevier v. Cyando

The European Court of Justice held in 2021 that YouTube (of which Google is the sole shareholder and legal representative) and a file sharing platform are not liable for copyright infringement material uploaded by a user on their websites.[106] This was a landmark case in the E.U. as it clarified that, under the E-Commerce Directive, platforms are able to escape liability so long as they are not contributing to the access of such illegal content.[107] The disputes in the first case involve Mr. Peterson, a music producer and owner of Nemo studios, and his claim that one of his clients' protected art was illegally accessible on YouTube.[108] Peterson produced screenshots to Google Germany and levied a cease-and-desist declaration with threats of penalization.[109] Google Germany then forwarded the screenshot evidence to YouTube, then tracked down the videos manually, and blocked access to them; however, both parties disputed the extent to which access to the content was effectively blocked.[110] Later, more illicit recordings of Peterson's artist were published on YouTube, which led to Peterson's request for an injunction and a demand for damages.[111] At the time of the requested injunction, the case had reached the German Federal Court of Justice, which then stayed

104. Karen Gullo, *Court's Decision Upholding Disastrous Texas Social Media Laws Puts the State, Rather Than Internet Users, in Control of Everyone's Speech Online*, EFF (Oct. 6, 2022), https://www.eff.org/deeplinks/2022/10/courts-decision-upholding-disastrous-texas-social-media-law-puts-state-rather.

105. *Id.*

106. Joined cases C-682/18 and C-683/18, *Frank Peterson and Elsevier Inc. v. Google LLC and Others* (June 22, 2021).

107. *Id.* at *460.

108. *Id.* at ¶ 22.

109. *Id.*

110. *Id.*

111. *Id.* at ¶ 24.

the proceedings to request clarification from the European Court of Justice.[112]

The ruling of this case was decided jointly along with *Elsevier v. Cyando* wherein Elsevier, an international specialist publisher brought suit against Cyando a file-hosting and sharing platform that allows all internet users to store any file, regardless of its content.[113] However, according to Cyando's terms and conditions of service, "users of its platform are prohibited from infringing copyright."[114] The facts of this case are extremely similar to its joint case, *Peterson v. Google*, because much like Peterson, Elsevier similarly notified Cyando that certain works protected by copyright had been illegally uploaded and disseminated via its platform.[115] Elsevier also requested a prohibitory injunction and damages from Cyando to a Higher Regional Court in Germany.[116] In responding to these joint cases, the Court ultimately offers a balanced interpretation of the removal of illegal content and intends to reconcile between conflicted interpretations of the E-Commerce Directive.[117] The Court reasoned that although platforms are liable for the existence of illegal content once they have been made aware of its existence, when equivalent copies of the same infringement are posted, it can be challenging to for platforms to identify those infringements.[118]

This case focused on the interpretation of the exemption held in the E-Commerce Directive, which has been passed down and recognized by the DSA. As explained by the Court in its ruling of these joint cases, "[a] service provider can benefit from the exemptions for 'mere conduit' and for 'caching' when [it] is in no way involved with the information transmitted."[119] This case is extremely valuable in outlining just how far this exemption can go in shielding platforms from liability in E.U. and it makes clear that, "[a] service provider who deliberately collaborates with one of the recipients of [its] service in order to undertake illegal acts goes beyond the activities of 'mere conduit' . . . and . . . cannot benefit from

112. *Id.* at ¶ 39.
113. *Id.* at ¶ 41.
114. *Id.* at ¶ 44.
115. *Id.* at ¶ 45-47.
116. *Id.* at ¶ 47.
117. Zoi Krokida, *AG's Opinion on Peterson/YouTube: Clarifying the Liability of Online Intermediaries for the Violation of Copyright-Protected Works?*, KLUWER COPYRIGHT BLOG (Jan. 6, 2021), https://copyrightblog.kluweriplaw.com/2021/01/06/ags-opinion-on-peterson-youtube-clarifying-the-liability-of-online-intermediaries-for-the-violation-of-copyright-protected-works/.
118. *Id.*
119. *Id.*

the liability exemptions established for [those] activities."[120] As is further enforced by the DSA, in order to qualify for this exemption, it is crucial that platforms be able to show that they had never obtained knowledge or awareness of the illegal activities being published via their platforms.[121] Moreover, if a platform is made aware of such illegal content, they are obligated to remove or disable access to the illicit matter.[122] This, however, as demonstrated in the joint cases described above, can be a challenge for courts in delineating how to traverse the exemption when content providers remove illegal content that is then reposted.

It is important to note that these joint cases were decided before the DSA came into effect. It is unclear how these cases would have been decided had the DSA already been ratified, but given that the DSA introduces a more nuanced liability regime that establishes more responsibility and liability for larger online platforms (like Google and YouTube), I believe that *Peterson v. YouTube & Google* would have come out differently while the ruling in *Elsevier v. Cyando* likely would have remained mostly unchanged. A primary goal of the DSA is to combat the spread of illegal content on the internet; the DSA specifically outlaws actions like using, reproducing, or disseminating copyrighted works without prior authorization from the rights holders.[123] As such, the DSA will hold service providers who enable users to share such illegal content to a liability framework that is much more expansive than was provided in the E-Commerce Directive.[124]

While the DSA maintains the same exemption of liability to platforms that are not actively involved in the transmission of illegal matters as illustrated in the E-Commerce Directive, it does further outline new due diligence obligations for intermediary services.[125] The new and extended rules provided in the DSA include those, "related to illegal content, content moderation, algorithm oversight and mandatory

120. Joined cases C-682/18 and C-683/18, Frank Peterson and Elsevier Inc. v. Google LLC and Others at *460.

121. *Id.*

122. *Id.*

123. Carmine Perri & Francesca Tugnoli, *The Intersection Between the New Digital Services Act and Copyright Directive No. 790/2019 with Regard to the Liability of Hosting Providers*, ICTLC ITALY (Feb. 10, 2023), https://www.ictlc.com/the-intersection-between-the-new-digital-service-act-and-copyright-directive-no-790-2019-with-regard-to-the-liability-of-hosting-providers/?lang=en.

124. *Id.*

125. Sally O'Brien, *E-Commerce Directive Versus the New Digital Services Act: Is There a New Liability Regime for Online Service Providers?*, L&P (Nov. 2, 2022), https://www.loganpartners.com/e-commerce-directive-versus-the-new-digital-services-act-is-there-a-new-liability-regime-for-online-service-providers/.

information to be provided to consumers and business."[126] These obligations will, however, vary depending on the size, role, and impact of the digital platform at issue.[127]

## VII. CONCLUSION

It is evident that the digital landscape is evolving rapidly, constantly presenting society with modern challenges that may have profound implications for online discourse and democracy. The comparison between the U.S. and E.U. approaches, as exemplified by Section 230 and the DSA, reveals divergent philosophies regarding intermediary liability and content moderation. While the U.S. emphasizes broad protections for platforms and minimal intervention, the E.U. opts for a more stringent regulatory regime with proactive measures to address illicit content.

As we move forward, it is imperative for policymakers, legal scholars, and technology companies to engage in dialogue and collaboration to navigate these complexities. Balancing the protection of individual liberties with the responsibility to combat harmful content will require thoughtful consideration and adaptation in both governmental regulatory frameworks. Ultimately, the trajectory of online governance will significantly impact the future of digital communication and democratic discourse.

126. *Id.*
127. *Id.*