

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FREEDOM DEFENSE
INITIATIVE, *et al.*,

Plaintiffs,

-v-

LORETTA LYNCH, in her official capacity as
Attorney General of the United States,

Defendant.

Case No. 1:16-cv-01437-JEB

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

SUMMARY OF FACTS 1

ARGUMENT 5

I. PLAINTIFFS HAVE STANDING TO ASSERT THEIR CLAIM..... 5

II. PLAINTIFFS HAVE STATED A COGNIZABLE CONSTITUTIONAL CLAIM..... 12

CONCLUSION..... 36

CERTIFICATE OF SERVICE 37

TABLE OF AUTHORITIES

Cases	Page
<i>Abrams v. United States</i> , 250 U.S. 616 (1919).....	27
<i>Aetna Life Ins. Co. v. Haworth</i> , 300 U.S. 227 (1937).....	6
* <i>Allen v. Wright</i> , 468 U.S. 737 (1984).....	7
<i>Alliance for Cmty. Media v. FCC</i> , 56 F.3d 105 (1995).....	29
<i>Am. Mfrs. Mutual Ins. Co. v. Sullivan</i> , 526 U.S. 40 (1999).....	31
<i>Anthony v. Yahoo! Inc.</i> , 421 F. Supp. 2d 1257 (N.D. Cal. 2006)	17, 18
<i>Ark. Writers’ Project, Inc. v. Ragland</i> , 481 U.S. 221 (1987).....	27
<i>Ayotte v. Planned Parenthood</i> , 546 U.S. 320 (2006).....	35
<i>Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.</i> , 206 F.3d 980 (10th Cir. 2000)	18
<i>Brandon v. Holt</i> , 469 U.S. 464 (1985).....	10
<i>Butler v. Adoption Media, LLC</i> , 486 F. Supp. 2d 1022 (N.D. Cal. 2007)	14, 15, 16
<i>Carey v. Brown</i> , 447 U.S. 455 (1980).....	7
* <i>Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.</i> , 793 F.2d 1322 (D.C. Cir. 1986).....	11, 12
<i>Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y.</i> , 447 U.S. 557 (1980).....	26, 27

Chaplinsky v. N.H.,
315 U.S. 568 (1942).....27

Columbia Broad. System, Inc. v. Democratic Nat’l Comm.,
412 U.S. 94 (1973).....25, 28

Connick v. Myers,
461 U.S. 138 (1983).....7

Consolidated Edison Co. of N. Y. v. Public Serv. Comm’n of N. Y.,
447 U.S. 530 (1980).....22, 25

Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,
473 U.S. 788 (1985).....26

**Denver Area Educ. Telcomms. Consortium v. FCC*,
518 U.S. 727 (1996)..... 24-34

Dombrowski v. Pfister,
380 U.S. 479 (1965).....32

Elrod v. Burns,
427 U.S. 347 (1976).....8

FCC v. League of Women Voters of Cal.,
468 U.S. 364 (1984).....25

FCC v. Pacifica Found.,
438 U.S. 726 (1978).....21, 22

Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs., Inc.,
528 U.S. 167 (2000).....7

Gen. Motors Corp. v. Tracy,
519 U.S. 278 (1997).....7

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974).....27

Grayned v. City of Rockford,
408 U.S. 104 (1972).....32

Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982).....32

Hunter v. Erickson,
393 U.S. 385 (1969).....29

In re Cox,
3 Cal. 3d 205 (1970)13, 14

Interstate Circuit, Inc. v. Dallas,
390 U.S. 676 (1968).....25

Isbister v. Boys’ Club of Santa Cruz,
40 Cal. 3d 72 (Cal. 1985).....16

Jacobellis v. Ohio,
378 U.S. 184 (1964).....33

**Jet Courier Servs., Inc. v. Fed. Reserve Bank*,
713 F.2d 1221 (6th Cir. 1983)8, 9

Klayman v. Zuckerberg,
753 F.3d 1354 (D.C. Cir. 2014).....11

Ky. v. Graham,
473 U.S. 159 (1985).....10

Linton v. Comm’r of Health & Env’t,
973 F.2d 1311 (6th Cir. 1992)7

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992).....7

Miller v. Cal.,
413 U.S. 15 (1973).....32, 33

NAACP v. Claiborne Hardware Co.,
458 U.S. at 913 (1982).....7

Nat’l Fed’n of Blind v. Target Corp.,
582 F. Supp. 2d 1185 (N.D. Cal. 2007)14

**Nat’l Treasury Emples. Union v. Whipple*,
636 F. Supp. 2d 63 (D.D.C. 2009)11

N.Y. Times Co. v. Sullivan,
376 U.S. 254 (1964).....27

Newsome v. Norris,
888 F.2d 371 (6th Cir. 1989)8

Perry Ed. Assn. v. Perry Local Educators’ Assn.,
460 U.S. 37 (1983).....26

Pierson v. Ray,
386 U.S. 547 (1967).....34

Police Dept. of the City of Chi. v. Mosley,
408 U.S. 92 (1972).....10

Red Lion Broad. Co. v. FCC,
395 U.S. 367 (1969).....20, 21, 25, 27

**Reno v. ACLU*,
521 U.S. 844 (1997)..... 18-23

Roberts v. AT&T Mobility LLC,
No. 15-CV-03418-EMC, 2016 WL 1660049, (N.D. Cal. Apr. 27, 2016)31

Romer v. Evans,
517 U.S. 620 (1996).....10

Rotary Club of Duarte v. Bd. of Dirs.,
178 Cal. App. 3d 1035 (Cal. App. 2d Dist. 1986)14

Sable Commc’ns of Cal., Inc. v. FCC,
492 U.S. 115 (1989).....21, 26, 27

Schenck v. United States,
249 U.S. 47 (1919).....27

Schneider v. State (Town of Irvington),
308 U.S. 147 (1939).....22

Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.,
502 U.S. 105 (1991).....26

Se. Promotions, Ltd. v. Conrad,
420 U.S. 546 (1975).....20

Susan B. Anthony List v. Driehaus,
134 S. Ct. 2334 (2014).....6

Tx. v. Johnson,
491 U.S. 397 (1989).....27

Turner v. Ass’n of Am. Med. Colls.,
167 Cal. App. 4th 1401 (Cal. App. 1st Dist. 2008).....14

Turner Broad. System, Inc. v. FCC,
512 U.S. 622 (1994).....21, 25, 27

United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg’l Transit Auth.,
163 F.3d 341 (6th Cir. 1998)34

United States v. United States Gypsum Co.,
438 U.S. 422 (1978).....33, 34

Urhausen v. Longs Drug Stores Cal., Inc.,
155 Cal. App. 4th 254 (2007)14

**Warth v. Seldin*,
422 U.S. 490 (1975).....6, 7, 8

Waters v. Churchill,
511 U.S. 661 (1994).....33

W. Va. Bd. of Ed. v. Barnette,
319 U.S. 624 (1943).....27

Wilson v. Haria and Gogri Corp.,
479 F. Supp. 2d 1127 (E.D. Cal. 2007).....14

Wynn v. Monterey Club,
111 Cal. App. 3d 789 (Cal. App. 2d Dist. 1980)14

Young v. Am. Mini Theatres, Inc.,
427 U.S. 50 (1976).....27

Zeran v. Am. Online, Inc.,
129 F.3d 327 (4th Cir. 1997)35

Constitution

**U.S. Const. amend. I*.....1

U.S. Const. art. III, § 2.....5

Statutes

47 CFR § 76.702.....32

*47 U.S.C. § 230.....1, 3-6, 9-13, 16-18, 22, 24, 34, 35

47 U.S.C. § 223.....20, 23

47 U.S.C. § 531.....24

47 U.S.C. § 532.....24

*Cal. Civ. Code § 51.....3-5, 13, 14

Cal. Civ. Code § 54.....14

Cal. Civ. Code § 55.....14

INTRODUCTION

Defendant Loretta Lynch (“Defendant” or the “Government”) moves to dismiss this action on two grounds. First, the Government claims that “Plaintiffs cannot establish Article III standing” because “Plaintiffs’ alleged injury” is not “fairly traceable to the” Government or the challenged federal statute (47 U.S.C. § 230) and “Plaintiffs’ alleged injury is also not redressable by their requested relief.” (Def.’s Mem. at 1). And Second, the Government claims that “even if Plaintiffs could establish Article III standing, they fail to state a cognizable constitutional claim because they do not identify any state action that could implicate the First Amendment.” (Def.’s Mem. at 1-2). The Government is wrong on both counts.

The challenged congressional statute—which, by definition, is an Act of “Congress”¹—alters the legal relations between Plaintiffs on the one hand and Facebook, Twitter, and YouTube on the other such that these media giants are permitted to censor, with impunity, Plaintiffs’ speech based on its content and viewpoint. Consequently, state action lies in the enactment of this federal statute regardless of whether the private acts are attributable to the Government. And the resulting injury is “fairly traceable” to the challenged statute and “redressable” by the relief requested. In sum, the Government’s motion should be denied.

SUMMARY OF FACTS²

Plaintiff Pamela Geller is the president of Plaintiff American Freedom Defense Initiative (“AFDI”), and Plaintiff Robert Spencer is the vice president. Plaintiffs Geller and Spencer engage in protected speech through AFDI’s activities, including AFDI’s use of social media, which include Facebook, Twitter, and YouTube. (Compl. ¶¶ 10, 11).

¹ The First Amendment provides, in relevant part, “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I.

² The relevant facts are set forth more fully in the Complaint. (*See* Compl. [Doc. #1]).

In addition to being the president of AFDI, Plaintiff Geller is the publisher of PamelaGeller.com and author of *The Post-American Presidency: The Obama Administration's War on America* and *Stop the Islamization of America: A Practical Guide to the Resistance*. Plaintiff Geller is also the administrator of various Facebook pages which have over 400,000 “likes,” and she manages several YouTube channels, including the Pamela Geller YouTube channel, which has over 16,000 subscribers. (Compl. ¶¶ 12-16).

In addition to being the vice president of AFDI, Plaintiff Spencer is the director of Plaintiff Jihad Watch and the author of fifteen books, including the *New York Times* bestsellers *The Truth About Muhammad* and *The Politically Incorrect Guide to Islam (and the Crusades)*. His latest books are *The Complete Infidel's Guide to ISIS* and *The Complete Infidel's Guide to Iran*. Plaintiff Spencer sells his books through Jihad Watch and through Facebook, Twitter, and YouTube. (Compl. ¶¶ 17).

Plaintiffs make wide use of Facebook, Twitter, and YouTube to promote their religious and political messages as well as to promote their non-profit work and commercial interests. Plaintiffs actively seek business connections with California consumers, donors, readers, viewers, and listeners to promote these activities. (Compl. ¶¶ 6-26).

Facebook, Twitter, and YouTube have engaged in discriminatory business practices that have resulted in the censorship of Plaintiffs' speech, thereby preventing Plaintiffs from expressing certain views and promoting certain commercial interests through advertising. (Compl. ¶¶ 49-54, 58-61, 78-125).

Defendant Loretta Lynch is the Attorney General of the United States. In her official capacity as Attorney General, Defendant Lynch enforces the laws of the United States, including the Communications Decency Act (“CDA”). (Compl. ¶ 20).

Facebook, Twitter, and YouTube are California corporations, and they are the world's largest social media forums. These social media giants actively seek business connections with Californian consumers, and their principal places of business are in California. (Compl. ¶¶ 35-42).

Through the use of Facebook, Twitter, or YouTube, any person with access to the Internet can become a town crier with a voice that resonates farther than it could from any soapbox, and the same individual can become a pamphleteer. In sum, the Internet, particularly through social media, has become the new marketplace of ideas. (Compl. ¶¶ 38-39).

Today, the impact of the Internet as a medium of worldwide human communication cannot be overstated. Social media, particularly including Facebook, Twitter, and YouTube, are exceedingly important for worldwide human communication and thus provide important forums for that communication. Denying a person or organization access to these important social media forums based on the content and viewpoint of the person's or organization's speech on matters of public concern, as in this case, is an effective way of silencing or censoring speech and depriving the person or organization of political influence and business opportunities. (Compl. ¶¶ 41-43).

Businesses that provide Internet services in California, such as Facebook, Twitter, and YouTube, are subject to § 51 of the California Civil Code, which prohibits discrimination on the basis of political affiliation, religious affiliation, or political or religious beliefs, including speech expressing those beliefs. Facebook's, Twitter's, and YouTube's discrimination against Plaintiffs as set forth in the Complaint violates § 51 of the California Civil Code (Compl. ¶¶ 46-53), but for § 230 of the CDA.

By way of § 230, the Government is empowering this type of discrimination and censorship. By its own terms, § 230 permits Facebook, Twitter, and YouTube “to restrict access to or availability of material that [they] consider[] to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.” (Compl. ¶ 67).

Section 230 is not tied to a specific category of speech that is generally proscribable (*i.e.*, obscenity), nor does it provide any type of objective standard whatsoever. (Compl. ¶ 70).

In summary, § 230, facially and as applied:

- is a content- and viewpoint-based restriction on speech;
- is vague and overbroad and lacks any objective criteria for suppressing speech;
- permits Facebook, Twitter, and YouTube to engage in government-sanctioned discrimination and censorship of free speech;
- permits Facebook, Twitter, and YouTube to engage in government-sanctioned discrimination that would otherwise violate California Civil Code § 51;
- permits Facebook, Twitter, and YouTube to engage in government-sanctioned censorship of speech that would otherwise violate Article I, section 2 of the California Constitution;
- confers broad powers of censorship, in the form of a “heckler’s veto,” upon Facebook, Twitter, and YouTube officials, who can censor constitutionally protected speech and engage in discriminatory business practices with impunity by virtue of this power conferred by the federal government;
- grants Facebook, Twitter, and YouTube and their officers, agents, and employees unbridled discretion to censor Plaintiffs’ speech such that their decisions to limit

Plaintiffs' speech are not constrained by objective criteria, but may rest on ambiguous and subjective reasons; and

- permits Facebook, Twitter, and YouTube to restrict Plaintiffs' speech based on its content and viewpoint.

(Compl. ¶¶ 129-37).

As a direct and proximate result of Facebook's, Twitter's, and YouTube's discriminatory business practices and censorship as set forth in the Complaint—discrimination and censorship which are made possible by § 230—Plaintiffs have suffered irreparable harm, including the loss of their right to free speech, entitling them to declaratory and injunctive relief. (Compl. ¶ 138).

By operation and application of Facebook's, Twitter's, and YouTube's discriminatory business practices as set forth in the Complaint—discrimination which is made possible by § 230—Facebook, Twitter, and YouTube have unlawfully deprived Plaintiffs of their full and equal accommodations, advantages, facilities, privileges, or services in violation of § 51 of the California Civil Code. (Compl. ¶ 139).

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO ASSERT THEIR CLAIM.

Article III of the Constitution confines the federal courts to adjudicating actual “cases” or “controversies.” U.S. Const. art. III, § 2. As stated by the Supreme Court:

A justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Where there is such a concrete case admitting of an immediate and definite determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (citations omitted).

Here, there is nothing hypothetical, abstract, academic, or moot about the legal claims advanced. This case presents a real and substantial controversy between parties with adverse legal interests, and this controversy can be resolved through a decree of a conclusive character. *Id.* It will not require the Court to render an opinion advising what the law would be upon a hypothetical state of facts. *Id.*

In sum, this Court has the power to hear and decide this case. It can determine whether the challenged federal statute alters the legal relations of the parties (thereby creating state action) in a way that infringes upon Plaintiffs' right to free speech. The Court could then declare the statute, either facially or as applied, unconstitutional and enter an appropriate order enjoining its application.³ Thus, this case presents a justiciable controversy in which the judicial function may be appropriately exercised. *Id.*

In an effort to give meaning to Article III's "case" or "controversy" requirement, the courts have developed several justiciability doctrines, including standing. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). "The doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Id.* (internal quotations and citation omitted).

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Consequently, to invoke the jurisdiction of a federal court, "[a] plaintiff must allege

³ The Court could carve out legitimate purposes for and applications of § 230, while prohibiting its use as a blunt instrument for censorship, as in this case. For example, § 230 could continue to provide immunity for defamation claims against Facebook, Twitter, and YouTube that are based on the postings and publications of third parties. In such a case, there is no censorship of speech; there is simply immunity from certain causes of action. Should such a remedy be too unworkable, then it would be the duty of the Court to strike down the entire provision and leave it to Congress to draft one that does comport with the First Amendment. *See infra*.

personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

In its motion, the Government does not challenge the injury-in-fact element, but "assum[es] for purposes of [its] motion only that Plaintiffs have alleged a cognizable injury-in-fact."⁴ (Def.'s Mem. at 8). Nonetheless, for purposes of completeness, Plaintiffs will address this first element of standing, as well as "traceability" and "redressability" because the three elements are often interconnected.

While the necessary injury-in-fact to confer standing is not susceptible to precise definition, it must be "distinct and palpable," *Warth*, 422 U.S. at 501, and not merely "abstract," "conjectural," or "hypothetical," *Allen*, 468 U.S. at 751. Put another way, the injury must be both "concrete and particularized," meaning "that the injury must affect the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added).

To that end, courts have recognized that "[a]n economic injury which is traceable to the challenged action satisfies the requirements of Article III." *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1316 (6th Cir. 1992); *see also Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997) (holding that consumers who suffer economic injury from a regulation prohibited under the Constitution satisfy the standing requirement); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184 (2000) (acknowledging that regulations injuring a plaintiff's "economic interests" create the necessary injury-in-fact to confer standing).

⁴ The Government also does not challenge the fact that Plaintiffs' speech at issue is the type of speech that is afforded full protection under the First Amendment. *See, e.g., Connick v. Myers*, 461 U.S. 138, 145 (1983), ("[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.") (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) & *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

In addition, the Supreme Court has long held that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) (“The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.”) (citing *Elrod*).

Here, Plaintiffs have alleged economic injury flowing from the challenged government action. (*See, e.g.*, Compl. ¶¶ 15, 17, 78, 139). Plaintiffs have also alleged injury arising out of their inability to express certain views and to promote certain commercial interests through advertising. (*See, e.g.*, Compl. ¶¶ 78-87). As the Government concedes for purposes of this motion, Plaintiffs satisfy the “injury-in-fact” requirement for standing.

A cognizable injury, such as those suffered by Plaintiffs, can be “fairly traceable” to the challenged action even if it doesn’t come directly from the action. In other words, an indirect injury that flows from the challenged action is sufficient to confer standing.

As noted by the Court in *Warth v. Seldin*, “The fact that the harm to petitioners *may have resulted indirectly* does not in itself preclude standing. When a governmental prohibition or restriction imposed on one party [or, in this case, the granting of governmental immunity that changes the legal relations of the parties] causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights.” *Warth*, 422 U.S. at 504-05).

In *Jet Courier Services, Inc. v. Federal Reserve Bank*, 713 F.2d 1221 (6th Cir. 1983), for example, the Sixth Circuit stated as follows: “Here, if the affidavits of customers of the air

couriers are credited, these couriers will suffer economic losses *flowing from actions which the private banks will take in response to the revised schedules of the Federal Reserve Banks.* Though the injury alleged by the plaintiffs is indirect, it is ‘distinct and palpable’ and ‘fairly traceable’ *to the action of the Board of Governors. . . .* We believe the plaintiffs have sufficiently alleged a ‘personal stake,’ . . . in the outcome of the controversy and have demonstrated a likelihood that their injury would be redressed by a favorable decision. Thus they have satisfied the constitutional requirements for standing.”⁵ *Id.* at 1226 (emphasis added).

Consequently, even indirect harm caused by third parties that is fairly traceable to government action is sufficient to confer standing to challenge the action at issue. Thus, where the injury to a party flows from actions which a private party takes in response to government action, the injured party has standing to challenge that government action. In short, Plaintiffs have standing to challenge § 230 in light of the injuries they have suffered from third parties as a result of this federal statutory provision.

Consider, for example, a hypothetical situation in which the Government enacted an immunity statute that permitted private restaurants and other private businesses to refuse service to blacks and Hispanics, thus immunizing these businesses from any local or state anti-discrimination laws. Similarly, consider a situation in which the Government enacted a statute granting immunity to private persons who assaulted anyone who was picketing against racial or ethnic discrimination outside such a business. Based on the Government’s theory here, a black or Hispanic person who was denied service by a private business or assaulted for picketing the business couldn’t challenge either federal statute on First Amendment free speech or Fifth

⁵ The Sixth Circuit ultimately concluded that “[e]ven though the constitutional requirements for standing [were] satisfied, those based on prudential considerations” were not because the plaintiffs were “not arguably within the zone of interests which Congress sought to protect in enacting the MCA.” *Jet Courier Servs., Inc.*, 713 F.2d at 1226-27. There are no such “prudential considerations” at issue here, nor does the Government argue that such considerations exist.

Amendment equal protection grounds.⁶ The Government would contend, as in this case, that the discriminatory denial of services and the injury caused by the assault were not “fairly traceable” to the Government’s grant of immunity, and nevertheless, there is no state action in either situation since the harms (denial of service and physical injury) were caused by private parties. That view of the law is wrongheaded and, indeed, dangerous to our free Republic. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996) (striking down on constitutional grounds a law that withdrew specific legal protection from the injuries caused by discrimination against homosexuals, including discrimination caused by private parties).

The Government also asserts that “Section 230 is not a statute that the Attorney General enforces against private parties and that can be challenged in an enforcement proceeding or pre-enforcement proceeding.” (Def.’s Mem. at 10). The Government is mistaken. A claim against a government official in his or her official capacity is a claim against the governmental entity he or she represents. *See Ky. v. Graham*, 473 U.S. 159 (1985); *see also Brandon v. Holt*, 469 U.S. 464, 471-72 (1985) (holding that “a judgment against a public servant ‘in his official capacity’ imposes liability on the entity that he represents”). Consequently, a lawsuit against the Attorney General in her official capacity is a lawsuit against the federal government—the entity responsible for enacting § 230. And this challenged section of federal law is a provision of a federal statute (the Communications Decency Act) that the Attorney General is responsible for enforcing. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997) (reviewing a constitutional challenge to

⁶ In addition to the equal protection violation caused by the discriminatory refusal of service in our first hypothetical situation, a law that discriminates against certain speakers, as in our second situation, violates both the First Amendment and the equal protection guarantees of the Fifth and Fourteenth Amendments. *See Police Dept. of the City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (“[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.”).

the Communications Decency Act). Consequently, suing the Attorney General in her official capacity for the relief requested here is entirely proper.

Regarding traceability, this element “examines whether there is a causal connection between the claimed injury and the challenged conduct, that is, whether the asserted injury was the consequence of the defendant’s actions. Causation does not require that the challenged action must be the ‘sole’ or ‘proximate’ cause of the harm suffered, or even that the action must constitute a ‘but-for cause’ of the injury. . . . At its core, the causation inquiry asks whether the agency’s actions *materially increase[d] the probability of injury.*” *Nat’l Treasury Emps. Union v. Whipple*, 636 F. Supp. 2d 63, 73 (D.D.C. 2009) (quotation marks, brackets, and citations omitted) (emphasis added).

Here, there is no question that the challenged provision of federal law “materially increased the probability of injury” to Plaintiffs. The very reason why Facebook, Twitter, and YouTube are able to engage in their discriminatory practices with impunity is § 230. See *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014) (concluding that § 230 foreclosed tort liability predicated on Facebook’s decision to allow or to remove content). In other words, the Government has sanctioned these discriminatory practices by placing them above the law. Consequently, the traceability element is satisfied.

Finally, regarding redressability, the D.C. Circuit stated:

The “fairly traceable” and “redressability” requirements for Article III standing ensure that the injury is caused by the challenged action and can be remedied by judicial relief. When, as in this case, the relief requested is simply the cessation of illegal conduct, the Court has noted that the “fairly traceable” and “redressability” analyses are identical.

Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin., 793 F.2d 1322, 1334 (D.C. Cir. 1986).

Because the relief requested here is an order that seeks to nullify and/or strike down a provision of federal law from which the injury to Plaintiffs flows, the fairly traceable and redressability analyses are “identical.” *Id.*

In conclusion, Plaintiffs have alleged a personal injury that is fairly traceable to the challenged federal statute and likely to be redressed by the requested relief. Therefore, Plaintiffs have standing to assert their claim.

II. PLAINTIFFS HAVE STATED A COGNIZABLE CONSTITUTIONAL CLAIM.

The Government, by enacting § 230 of the Communications Decency Act, has conferred broad powers of censorship upon Facebook, YouTube, and Twitter and has thereby altered the legal relations between these social media giants and Plaintiffs. As a result, state action lies in this challenge.

To begin, the Government’s argument is internally inconsistent. In its memorandum, the Government asserts that “Plaintiffs here retain the ability to challenge the restrictions on their speech that they complain about here, *i.e.*, by suing the social media companies directly. If Section 230 is raised as a defense to that lawsuit, Plaintiffs remain free to raise the First Amendment in opposition to that defense.” (Def.’s Mem. at 11) (emphasis added). In effect, the Government is playing fast and loose with its assertion that there is no state action. That is, on the one hand, the Government asserts no state action; on the other, the Government gives lip service to a First Amendment claim in a suit against the non-governmental social media giants. The fact remains, and the Government implicitly acknowledges it here, state action lies in this challenge to a law enacted by Congress—a law which forecloses the very legal action the Government urges Plaintiffs to pursue (*i.e.*, a lawsuit against the social media companies directly).

Because of § 230, Plaintiffs are deprived of legal protection that would otherwise be available. That is, Facebook, Twitter, and YouTube are able to engage in unlawful, discriminatory business practices that suppress Plaintiffs' speech because the Government has authorized such practices through the gaping immunity portal § 230 provides.

More specifically, a business providing services via the Internet and doing business in California⁷ must comply with the California Unruh Civil Rights Act (California Civil Code § 51).⁸

Section 51 of the California Civil Code provides, in relevant part,

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Cal. Civ. Code § 51(b).

Section 51 is broadly construed to include all forms of discrimination. "Civil Code section 51, on its face, appears to be aimed at preventing discrimination in public accommodations on the basis of race, sex or religion. In *In re Cox, supra*, however, it was held that the Unruh Civil Rights Act prohibits a business establishment from arbitrarily excluding any

⁷ Facebook, Twitter, and YouTube are all California corporations. (Compl. ¶¶ 35-37). And each Plaintiff does business in California. (Compl. ¶¶ 15, 23, 27).

⁸ The Government claims that it is not "clear how California law can require a private social media company to publish Plaintiffs' speech . . . or how such a state-law requirement would be consistent with the First Amendment, which arguably protects a social media company's editorial control or judgement from government regulation that would require publication of a certain message." (Def.'s Mem. at 8 n.1). To begin, we explain in the text above how California law prohibits the discrimination at issue here. And but for the immunity granted by the Government, Plaintiffs could pursue legal remedies under this state law. Regarding the Government's latter argument involving the First Amendment rights of the social media giants, it is evident that Facebook, Twitter, and YouTube are unique. They are not like magazines, newspapers, television or radio stations. Unlike these other traditional media, Plaintiffs manage and operate their *own* Facebook pages, their *own* Twitter accounts, and their *own* YouTube channels. And this is why it would be appropriate to permit § 230 to be used in a way that would immunize Facebook, Twitter, and YouTube from liability for third-party content appearing on these private pages, accounts, and channels, but not permissible to grant these social media giants the power to directly censor these private pages, accounts, and channels.

prospective customer.” *Wynn v. Monterey Club*, 111 Cal. App. 3d 789, 796 (Cal. App. 2d Dist. 1980). “[Both] its history and its language disclose a clear and large design to interdict all arbitrary discrimination by a business enterprise. That the act specifies particular kinds of discrimination—[sex], color, race, religion, ancestry, and national origin—serves as illustrative, rather than restrictive, indicia of the type of conduct condemned.” (*In re Cox* (1970) 3 Cal. 3d 205, 212 [90 Cal. Rptr. 24, 474 P.2d 992].)” *Rotary Club of Duarte v. Bd. of Dirs.*, 178 Cal. App. 3d 1035, 1047 (Cal. App. 2d Dist. 1986) (emphasis added).

In light of its history and application, a California business establishment violates § 51 by discriminating on the basis of political affiliation, religious affiliation, or political or religious beliefs.

Moreover, a business that provides Internet services, such as Facebook, Twitter, and YouTube, are subject to this law (but for the challenged federal statute which exempts them in this case). Here is what a California Appellate Court said about a companion civil rights statute, the California Disabled Persons Act (California Civil Code §§ 54-55):

The [Disabled Persons Act] is “intended to secure to disabled persons the ‘same right as the general public to the full and free use’ of facilities open to the public.” (*Urhausen v. Longs Drug Stores California, Inc.* (2007) 155 Cal. App. 4th 254, 261 [65 Cal. Rptr. 3d 838].) Its focus is upon *physical* access to public places, though the statute may also be construed as requiring equal physical access to a nontangible location such as an Internet site. (Compare *Wilson v. Haria and Gogri Corp.* (E.D. Cal. 2007) 479 F. Supp. 2d 1127, 1140, fn. 16, with *National Federation of Blind v. Target Corp.* (N.D. Cal. 2007) 582 F. Supp. 2d 1185.)

Turner v. Ass’n of Am. Med. Colls., 167 Cal. App. 4th 1401, 1412 (Cal. App. 1st Dist. 2008) (emphasis added).

A case arising out of the U.S. District Court for the Northern District of California is more to the point. In *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022 (N.D. Cal. 2007), the plaintiffs alleged “that defendants’ refusal to offer same-sex domestic partners the adoption-

related services on ParentProfiles.com, on the same terms and conditions offered married couples, constitutes unlawful discrimination on the basis of marital status, sexual orientation, and sex, in violation of the Unruh Act.” *Id.* at 1054.

In this case, the business was physically located in Arizona, but it provided its Internet services to consumers in California. The court stated, in relevant part, the following:

Defendants in this case have actively sought business connections with Californian consumers, and as of October 2002, their Internet business was more closely tied to California than to any other state (based on the profiles posted by residents of various states). California has a strong interest in regulating defendants’ activities because of defendants’ penetration into the California economy, and the likelihood of exposure for violating California law was a foreseeable and reasonable business expense.

As explained in some detail above, the question whether the Unruh Act prohibited marital status discrimination was not completely resolved in 2002. In 2005, however, the California Legislature clearly stated its agreement with the California Supreme Court’s rulings, going back 35 years, that the categories listed in the Unruh Act should be considered illustrative rather than restrictive; and also “affirmed” that the bases of discrimination prohibited by the Unruh Act include marital status and sexual orientation.

Defendants assert that plaintiffs’ application to post their profile was denied in October 2002 pursuant to a policy that only opposite-sex married couples should be permitted to use the ParentProfiles service. They claim that this policy was applied evenly and was not personal to plaintiffs. The court finds that there is a triable issue as to whether the policy of not allowing unmarried couples to post profiles on ParentProfiles.com amounts to marital status discrimination.

Butler, 486 F. Supp. 2d at 1055-56.

The court’s discussion of the alleged discrimination is relevant and quoted more fully below:

[P]laintiffs contend that defendants are operating a public business, and do not have the option under the Unruh Act to violate the law based on their own beliefs. They also assert that defendants’ allegedly neutral policy was and is applied in a discriminatory manner. They argue that the policy was applied in a discriminatory fashion in 2002, by virtue of the fact that defendants made exceptions to their policy for single people, but not for same-sex couples. They

also assert that defendants have admitted that they do not provide services to gays and lesbians.

The court is not persuaded by defendants' claim that ParentProfiles.com is not a "business establishment." As described herein, the ParentProfiles.com website is plainly a business establishment as defined under California law. *See Isbister*, 40 Cal. 3d at 78-79 (in enacting the Unruh Act, the Legislature intended that "business establishments" be interpreted in the broadest sense reasonably possible).

With regard to the claim that Adoption Profiles LLC has legitimate business reasons for its "married-couples-only" policy—which the court notes appear to conflict with the claim that ParentProfiles.com is not a "business establishment"—the court finds that defendants have not actually articulated any such legitimate business reason.

Butler, 486 F. Supp. 2d at 1056-57.

Regarding the question of whether California law should apply to the situation presented with Facebook, Twitter, or YouTube, that is a straightforward question answered in Plaintiffs' favor in that not only do Facebook, Twitter, and YouTube "actively [seek] business connections with Californian consumers," their principal places of business are in Northern California. And given that in enacting the Unruh Act, the California Legislature intended that "business establishments" be interpreted in the broadest sense reasonably possible, *see Isbister v. Boys' Club of Santa Cruz*, 40 Cal. 3d 72, 78 (Cal. 1985) ("By its use of the emphatic words 'all' and 'of every kind whatsoever,' the Legislature intended that the phrase 'business establishments' be interpreted 'in the broadest sense reasonably possible.'") (citations omitted), it is evident that Facebook, Twitter, and YouTube are each considered a "business establishment" under this law.

This now leads us to the immunity provision. Section 230 of the Communications Decency Act provides, in relevant part, as follows:

(c) Protection for "Good Samaritan" blocking and screening of offensive material.

(1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].

47 U.S.C. § 230(c). The statute further provides the following: “State law. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” *Id.* at § 230(e)(3).⁹

“Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.” *Anthony v.*

⁹ (f) Definitions. As used in this section:

(1) Internet. The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service. The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider. The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider. The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

47 U.S.C. § 230(f).

Yahoo! Inc., 421 F. Supp. 2d 1257, 1262 (N.D. Cal. 2006) (quoting *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000)).

By its plain language, § 230 would apply since Plaintiffs would be seeking to hold Facebook, Twitter, and YouTube civilly liable for denying access to their services (*i.e.*, their discriminatory business practice)—an “action voluntarily taken . . . to restrict access.”

Here, § 230 is effectively operating as a Government-enforced heckler’s veto. On this point, *Reno v. ACLU*, 521 U.S. 844 (1997), is instructive.

In *Reno*, the Court held two provisions of the Communications Decency Act of 1996 unconstitutional under the First Amendment. At issue was the constitutionality of two provisions enacted to protect minors from “indecent” and “patently offensive” communications on the Internet. While these statutory provisions carried criminal penalties for those who violated them, the case nonetheless supports Plaintiffs’ claim that the immunity provision at issue here also runs afoul of the First Amendment.

To provide the necessary background and context, we begin with the Court’s description of the Internet in general. In its opinion, the Court said the following:

- “The Internet is an international network of interconnected computers. [It] is a unique and wholly new medium of worldwide human communication.” *Id.* at 849-50 (internal quotations omitted).
- “Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. . . All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium—known to its users as ‘cyberspace’—

located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.” *Id.* at 851.

- “[A]t any given time tens of thousands of users are engaging in conversations on a huge range of subjects. It is no exaggeration to conclude that the content on the Internet is as diverse as human thought.” *Id.* at 852 (internal quotations omitted).
- “The Web is thus comparable, from the readers’ viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services. From the publishers’ point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers.” *Id.* at 853.
- “[U]nlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a ‘scarce’ expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that ‘as many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999.’ This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, ‘the content on the Internet is as diverse as human thought.’ . . . We agree with its conclusion that our cases provide no basis for

qualifying the level of First Amendment scrutiny that should be applied to this medium.”
Id. at 870.

Today, the impact of the Internet as a “medium of worldwide human communication” cannot be overstated. To that general proposition, we would add that social media, particularly including Facebook, Twitter, and YouTube, are exceedingly important. Consequently, denying a person or organization access to these important mediums based on the speaker’s viewpoint on matters of public concern would be an effective way of silencing or censoring speech. Indeed, this power—granted by the Government by way of the challenged immunity provision—to censor speech with impunity could literally impact the upcoming presidential election. (Complaint ¶ 127); *see generally* Robert Epstein & Ronald E. Robertson, *The search engine manipulation effect (SEME) and its possible impact on the outcomes of elections* (available at <http://www.pnas.org/content/112/33/E4512.full.pdf?with-ds=yes> (study suggesting that a search engine company has the power to influence the results of a substantial number of elections with impunity) (last visited Sep. 29, 2016). In short, it is indisputable that the Government, by way of this federal law, is *empowering* the censorship of speech since it has effectively removed all legal barriers for doing so.

The two provisions at issue in *Reno* were as follows: 47 U.S.C. § 223(a), which prohibited the knowing transmission of obscene or indecent messages to any recipient under 18 years of age, and 47 U.S.C. § 223(d), which prohibited the knowing, sending or displaying of patently offensive messages in a manner that was available to a person under 18 years of age.

In its analysis, the Court made the following relevant observation:

In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975), we observed that “each medium of expression . . . may present its own problems.” Thus, some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers, *see Red Lion*

Broadcasting Co. v. FCC, 395 U.S. 367 (1969); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). In these cases, the Court relied on the history of extensive government regulation of the broadcast medium, *see, e.g., Red Lion*, 395 U.S. at 399-400; the scarcity of available frequencies at its inception, *see, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637-38 (1994); and its “invasive” nature, *see Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989).

Those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as “invasive” as radio or television.

Reno, 521 U.S. at 868-69 (emphasis added). In other words, because of the unique characteristics of radio and television—characteristics that do not exist in “the vast democratic fora of the Internet”—the Court has been more willing to uphold speech regulations affecting those fora. The Court stated further:

[U]nlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a “scarce” expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that “as many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999.” This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line *can become a town crier with a voice that resonates farther than it could from any soapbox*. Through the use of Web pages, mail exploders, and newsgroups, the same individual *can become a pamphleteer*. As the District Court found, “the content on the Internet is as diverse as human thought.” . . . We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

Id. at 870 (emphasis added).

In its First Amendment analysis of the challenged provisions, the Court stated as follows:

We are persuaded 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.

Reno, 521 U.S. at 874; *see also id.* at 875 (“*Pacifica* itself admonished that ‘the fact that society may find speech offensive is not a sufficient reason for suppressing it.’”) (quoting *Pacifica Found.*, 438 U.S. at 745).

The Court also properly dismissed the Government’s argument that the regulations were simply “time, place, and manner” restrictions:

The Government first contends that, even though the CDA effectively censors discourse on many of the Internet’s modalities—such as chat groups, newsgroups, and mail exploders—it is nonetheless constitutional because it provides a “reasonable opportunity” for speakers to engage in the restricted speech on the World Wide Web. . . . This argument is unpersuasive because the CDA regulates speech on the basis of its content. A “time, place, and manner” analysis is therefore inapplicable. *See Consolidated Edison Co. of N. Y. v. Public Serv. Comm’n of N. Y.*, 447 U.S. 530, 536 (1980). It is thus immaterial whether such speech would be feasible on the Web (which, as the Government’s own expert acknowledged, would cost up to \$ 10,000 if the speaker’s interests were not accommodated by an existing Web site, not including costs for database management and age verification). The Government’s position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books. In invalidating a number of laws that banned leafletting on the streets *regardless of their content*—we explained that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 163 (1939).

Reno, 521 U.S. at 879-80.

The immunity provision at issue here is similarly, on its face, a content-based speech restriction. *See* 47 U.S.C. § 230 (permitting Facebook, Twitter, and YouTube “to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable”).

In rejecting the Government’s argument that the “knowledge” requirement found in both statutory provisions saves the CDA from overbreadth, the Court made the following point which is relevant here:

The Government’s assertion that the knowledge requirement somehow protects the communications of adults is therefore untenable. Even the strongest reading of the “specific person” requirement of § 223(d) cannot save the statute. *It would confer broad powers of censorship, in the form of a “heckler’s veto,”* upon any opponent of indecent speech who might simply log on and inform the would-be discourses that his 17-year-old child—a “specific person . . . under 18 years of age,” 47 U.S.C. § 223(d)(1)(A) (Supp. 1997)—would be present.

Reno, 521 U.S. at 880 (emphasis added). The challenged immunity provision does precisely this: it confers broad powers of censorship, in the form of a “heckler’s veto,” upon Facebook, Twitter, and YouTube censors, who can censor constitutionally protected speech with impunity *by virtue of this power granted by the Government*. This is also why state action exists in this case.

The Court concludes its opinion with the following relevant observation:

In this Court, though not in the District Court, the Government asserts that—in addition to its interest in protecting children—its “equally significant” interest in fostering the growth of the Internet provides an independent basis for upholding the constitutionality of the CDA. . . . The Government apparently assumes that the unregulated availability of “indecent” and “patently offensive” material on the Internet is driving countless citizens away from the medium because of the risk of exposing themselves or their children to harmful material.

We find this argument singularly unpersuasive. The dramatic expansion of this new *marketplace of ideas* contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, *we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it*. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

Reno, 521 U.S. at 885 (emphasis added).

In summary, there is little dispute that Facebook, Twitter, and YouTube have become the gatekeepers for this expansive and new “marketplace of ideas.” And by granting these social media giants license to censor any speech they deem “objectionable,” the Government is effectively closing this “marketplace” to consumers/speakers such as Plaintiffs, in violation of the First Amendment. In the final analysis, § 230, as applied here, is interfering with the free exchange of ideas rather than encouraging it.

Denver Area Educational Telecommunications Consortium v. FCC, 518 U.S. 727 (1996), which was referenced in *Reno*, firmly supports Plaintiffs’ claim, contrary to the Government’s efforts to distinguish this case. (See Def.’s Mem. at 15-16).

In *Denver Area Educational Telecommunications Consortium*, the petitioners challenged three provisions of the Cable Television Consumer Protection and Competition Act of 1992 (“Act”) that related to the broadcasting of “patently offensive” sex-related material on cable television. Specifically, the first challenged provision, § 10(a), *permitted* cable operators to decide whether or not to broadcast such programming on leased access channels.¹⁰ The second challenged provision, § 10(b), required leased channel operators to segregate and to block that programming if allowed. And the third challenged provision, § 10(c), applied to public, educational, and governmental channels. The Court upheld the first provision because of the

¹⁰ A “leased channel” is a channel that federal law requires a cable system operator to reserve for commercial lease by unaffiliated third parties. About 10 to 15 percent of a cable system’s channels would typically fall into this category. See 47 U.S.C. § 532(b). “Public, educational, or governmental channels” . . . are channels that, over the years, local governments have required cable system operators to set aside for public, educational, or governmental purposes as part of the consideration an operator gives in return for permission to install cables under city streets and to use public rights-of-way. See § 531; see also H. R. Rep. No. 98-934, p. 30 (1984) (authorizing local authorities to require creation of public access channels). Between 1984 and 1992, federal law (as had much pre-1984 state law, in respect to public access channels) prohibited cable system operators from exercising *any* editorial control over the content of any program broadcast over either leased or public access channels. See 47 U.S.C. §§ 531(e) (public access), 532(c)(2) (leased access).

Denver Area Educ. Telcomms. Consortium, 518 U.S. at 734.

government's strong (*i.e.*, compelling) interest in protecting children from sexually explicit material, the permissive aspect of the statute, and the nature of the medium. However, the Court concluded that the second and third provisions violated the First Amendment because they were not appropriately tailored to achieve the compelling interest of protecting children.

The D.C. Circuit upheld all of the provisions. The Supreme Court's discussion of the D.C. Circuit's rationale is relevant here. Per the Court, quoted at length:

The Court of Appeals held that this provision did not violate the First Amendment because the First Amendment prohibits only "Congress" (and, through the Fourteenth Amendment, a "State"), not private individuals, from "abridging the freedom of speech." Although the court said that it found no "state action," 56 F.3d, at 113, it could not have meant that phrase literally, for, of course, petitioners attack (as "abridging . . . speech") a congressional statute—which, by definition, is an Act of "Congress." More likely, the court viewed this statute's "permissive" provisions as not themselves restricting speech, but, rather, as simply reaffirming the authority to pick and choose programming that a private entity, say, a private broadcaster, would have had in the absence of intervention by any federal, or local, governmental entity.

We recognize that the First Amendment, the terms of which apply to governmental action, *ordinarily* does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech—and this is so *ordinarily* even where those decisions take place within the framework of a regulatory regime such as broadcasting. Were that not so, courts might have to face the difficult, and potentially restrictive, practical task of deciding which, among any number of private parties involved in providing a program (for example, networks, station owners, program editors, and program producers), is the "speaker" whose rights may not be abridged, and who is the speech-restricting "censor." Furthermore, as this Court has held, the editorial function itself is an aspect of "speech," *see Turner*, 512 U.S. at 636, and a court's decision that a private party, say, the station owner, is a "censor," could itself interfere with that private "censor's" freedom to speak as an editor. Thus, not surprisingly, this Court's First Amendment broadcasting cases have dealt with governmental efforts to *restrict*, not governmental efforts to provide or to maintain, a broadcaster's freedom to pick and to choose programming. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (striking restrictions on broadcaster's ability to refuse to carry political advertising); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding restrictions on editorial authority); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (striking restrictions); *cf. Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 530 (1980) (striking ban on political speech by public

utility using its billing envelopes as a broadcast medium); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557 (1980) (striking restriction on public utility advertising).

Nonetheless, petitioners, while conceding that this is ordinarily so, point to circumstances that, in their view, make the analogy with private broadcasters inapposite and make this case a special one, warranting a different constitutional result. As a practical matter, they say, cable system operators have considerably more power to “censor” program viewing than do broadcasters, for individual communities typically have only one cable system, linking broadcasters and other program providers with each community’s many subscribers. *See Turner, supra*, at 633 (only one cable system in most communities; nationally more than 60% of homes subscribe to cable, which then becomes the primary or sole source of video programming in the overwhelming majority of these homes). Moreover, concern about system operators’ exercise of this considerable power originally led government—local and federal—to insist that operators provide leased and public access channels free of operator editorial control. H. R. Rep. No. 98-934, at 30-31. To permit system operators to supervise programming on leased access channels will create the very private-censorship risk that this anticensorship effort sought to avoid. At the same time, petitioners add, cable systems have two relevant special characteristics. They are unusually involved with government, for they depend upon government permission and government facilities (streets, rights-of-way) to string the cable necessary for their services. And in respect to leased channels, their speech interests are relatively weak because they act less like editors, such as newspapers or television broadcasters, than like common carriers, such as telephone companies.

Under these circumstances, petitioners conclude, Congress’ “permissive” law, *in actuality*, will “abridge” their free speech. And this Court should treat that law as a congressionally imposed, content-based, restriction unredeemed as a properly tailored effort to serve a “compelling interest.” *See Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). They further analogize the provisions to constitutionally forbidden content-based restrictions upon speech taking place in “public forums” such as public streets, parks, or buildings dedicated to open speech and communication. *See Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985); *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45 (1983); *see also* H. R. Rep. No. 98-934, *supra*, at 30 (identifying public access channels as the electronic equivalent of a “speaker’s soap box”). And, finally, petitioners say that the legal standard the law contains (the “patently offensive” standard) is unconstitutionally vague. *See, e.g., Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968) (rejecting censorship ordinance as vague, even though it was intended to protect children).

Like petitioners, JUSTICES KENNEDY and THOMAS would have us decide these cases simply by transferring and applying literally categorical standards this

Court has developed in other contexts. For JUSTICE KENNEDY, leased access channels are like a common carrier, cable cast is a protected medium, strict scrutiny applies, § 10(a) fails this test, and, therefore, § 10(a) is invalid. *Post*, at 796-801, 805-807. For JUSTICE THOMAS, the case is simple because the cable operator who owns the system over which access channels are broadcast, like a bookstore owner with respect to what it displays on the shelves, has a predominant First Amendment interest. *Post*, at 816-817, 822-824. Both categorical approaches suffer from the same flaws: They import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect.

The history of this Court's First Amendment jurisprudence, however, is one of continual development, as the Constitution's general command that "Congress shall make no law . . . abridging the freedom of speech, or of the press," has been applied to new circumstances requiring different adaptations of prior principles and precedents. The essence of that protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required. *See, e.g., Schenck v. United States*, 249 U.S. 47, 51-52 (1919); *Abrams v. United States*, 250 U.S. 616, 627-628 (1919) (Holmes, J., dissenting); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 639 (1943); *Texas v. Johnson*, 491 U.S. 397, 418-420 (1989). At the same time, our cases have not left Congress or the States powerless to address the most serious problems. *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Over the years, this Court has restated and refined these basic First Amendment principles, adopting them more particularly to the balance of competing interests and the special circumstances of each field of application. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (allowing criticism of public officials to be regulated by civil libel only if the plaintiff shows actual malice); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (allowing greater regulation of speech harming individuals who are not public officials, but still requiring a negligence standard); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (employing highly flexible standard in response to the scarcity problem unique to over-the-air broadcast); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231-232 (1987) (requiring "compelling state interest" and a "narrowly drawn" means in context of differential taxation of media); *Sable, supra*, at 126, 131 (applying "compelling interest," "least restrictive means," and "narrowly tailored" requirements to indecent telephone communications); *Turner*, 512 U.S. at 641 (using "heightened scrutiny" to address content-neutral regulations of cable system broadcasts); *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566 (restriction on commercial speech cannot be "more extensive than is necessary" to serve a "substantial" government interest).

This tradition teaches that the First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems. This Court, in different contexts, has consistently held that government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech. JUSTICES KENNEDY and THOMAS would have us further declare which, among the many applications of the general approach that this Court has developed over the years, we are applying here. But no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes. That is not to say that we reject all the more specific formulations of the standard—they appropriately cover the vast majority of cases involving government regulation of speech. Rather, aware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications, *see, e.g.*, Telecommunications Act of 1996, 110 Stat. 56; S. Rep. No. 104-23 (1995); H. R. Rep. No. 104-204 (1995), we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now. *See Columbia Broadcasting*, 412 U.S. at 102 (“The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence”); *Pacifica, supra*, at 748 (“We have long recognized that each medium of expression presents special First Amendment problems”). We therefore think it premature to answer the broad questions that JUSTICES KENNEDY and THOMAS raise in their efforts to find a definitive analogy, deciding, for example, the extent to which private property can be designated a public forum, compare *post*, at 791-793, 794 (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part), with *post*, at 826-829 (THOMAS, J., concurring in judgment in part and dissenting in part); whether public access channels are a public forum, *post*, at 791-792 (opinion of KENNEDY, J.); whether the Government's viewpoint neutral decision to limit a public forum is subject to the same scrutiny as a selective exclusion from a pre-existing public forum, *post*, at 799-803 (opinion of KENNEDY, J.); whether exclusion from common carriage must for all purposes be treated like exclusion from a public forum, *post*, at 797-798 (opinion of KENNEDY, J.); and whether the interests of the owners of communications media always subordinate the interests of all other users of a medium, *post*, at 816-817 (opinion of THOMAS, J.).

Rather than decide these issues, we can decide these cases more narrowly, by closely scrutinizing § 10(a) to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech. The importance of the interest at stake here—protecting children from exposure to patently offensive depictions of sex;

the accommodation of the interests of programmers in maintaining access channels and of cable operators in editing the contents of their channels; the similarity of the problem and its solution to those at issue in *Pacifica, supra*; and the flexibility inherent in an approach that *permits* private cable operators to make editorial decisions, lead us to conclude that § 10(a) is a sufficiently tailored response to an extraordinarily important problem.¹¹

Denver Area Educ. Telcomms. Consortium, 518 U.S. at 737-43 (emphasis added).

The Court summarized its analysis as follows:

The existence of this complex balance of interests persuades us that the permissive nature of the provision, coupled with its viewpoint-neutral application, is a constitutionally permissible way to protect children from the type of sexual material that concerned Congress, while accommodating both the First Amendment interests served by the access requirements and those served in restoring to cable operators a degree of the editorial control that Congress removed in 1984.

Denver Area Educ. Telcomms. Consortium, 518 U.S. at 747.

Social media giants Facebook, Twitter, and YouTube have monopolized social media. The power they wield is immense—indeed, far more immense than a cable operator in light of the way people communicate and receive information today via computers, smartphones, and other electronic devices. For example, Facebook boasts more than one *billion* daily active users. See Facebook Stats at <http://newsroom.fb.com/company-info/> (last visited Oct. 3, 2016).

¹¹ Despite the fractured nature of the opinion, the Court clearly rejects the D.C. Circuit’s conclusion that there is no state action (and, therefore, no First Amendment claim). Indeed, a majority of the Court *is* addressing the case in its unique First Amendment context. See *Denver Area Educ. Telcomms. Consortium*, 518 U.S. at 753 (“For the reasons discussed, we conclude that §10(a) is consistent with the First Amendment.”). The Government is wrong when it argues otherwise (Def.’s Mem. at 16 [stating “no majority opinion was reached on the state action issue”]), and Plaintiffs’ position is confirmed by Justice Kennedy’s dissent, in which he makes the following relevant observations:

Though the two provisions differ in significant respects, they have common flaws. In both instances, Congress singles out one sort of speech for vulnerability to private censorship in a context where content-based discrimination is not otherwise permitted. *The plurality at least recognizes this as state action, ante*, at 737, *avoiding the mistake made by the Court of Appeals, Alliance for Community Media v. FCC*, 56 F.3d 105, 112-121 (1995). *State action lies in the enactment of a statute altering legal relations between persons, including the selective withdrawal from one group of legal protections against private acts, regardless of whether the private acts are attributable to the State.* Cf. *Hunter v. Erickson*, 393 U.S. 385, 389-390 (1969) (state action under the Fourteenth Amendment).

Denver Area Educ. Telcomms. Consortium, 518 U.S. at 782 (Kennedy, J., dissenting) (emphasis added).

Consequently, these social media giants are not *ordinary* private actors such that the *ordinary* rules should apply to government regulations that *empower these private actors to censor speech*. Indeed, the “practical task” the Court was concerned with in *Denver Area Educational Telecommunications Consortium* does not exist here. *See Denver Area Educ. Telcomms. Consortium*, 518 U.S. at 737 (describing “the difficult, and potentially restrictive, practical task of deciding which, among any number of private parties involved in providing a program (for example, networks, station owners, program editors, and program producers), is the ‘speaker’ whose rights may not be abridged, and who is the speech-restricting ‘censor’”). Here, we know who the speaker is—the manager or administrator of the Facebook page, Twitter account, or YouTube channel (*i.e.*, Plaintiffs). We know who the censors are: Facebook, Twitter, and YouTube. There are no “practical” difficulties with this situation. And it would be a tortured understanding of the term “editor” to argue that Facebook, for example, would have a free speech right in editing Plaintiff Geller’s personal Facebook page. *See generally id.* at 737-38.

In sum, under the circumstances presented by this case, Justice Kennedy’s observation is on point: “State action lies in the enactment of a statute altering legal relations between persons, including the selective withdrawal from one group of legal protections against private acts, regardless of whether the private acts are attributable to the State.” *Id.* at 782 (Kennedy, J., dissenting).

The Government argues that this Court should ignore Justice Kennedy’s articulation of the law regarding state action (an articulation that is directly applicable here). For support of its position, the Government relies principally on an unpublished amended order from a district court in the Northern District of California that granted the defendant’s motion to compel

arbitration and stayed the proceedings pending arbitration between the private parties.¹² (*See* Def.’s Mem. at 15-16 [citing *Roberts v. AT&T Mobility LLC*, No. 15-CV-03418-EMC, 2016 WL 1660049, (N.D. Cal. Apr. 27, 2016) (distinguishing *Denver Area*)]). At issue in *Roberts* was whether the court’s enforcement of private arbitration agreements entered into between and among the parties would violate the plaintiffs’ rights as protected by the Petition Clause of the First Amendment. Not surprising, the court found no state action.

In its memorandum, the Government, relying on *Roberts*, argues that “[a]s pertinent here, a plurality of the Supreme Court assumed that these statutory provisions permitting cable operators to prohibit or limit certain programs based on content could constitute state action implicating the First Amendment, although no majority opinion was reached on the state action issue,” referring to the Supreme Court’s opinion in *Denver Area Educational Telecommunications Consortium*. (Def.’s Mem. at 15-16). The Government is mistaken. (*See also supra* n.11). A careful reading of the Supreme Court’s opinion shows that Justice Kennedy was referring to that part of Justice Breyer’s opinion (Part II) in which he addressed state action, and Justice Breyer was joined in that part by Justices Stevens, O’Connor, and Souter. Justice Kennedy clearly agreed with these four Justices that state action did exist. *Denver Area Educ. Telcomms. Consortium*, 518 U.S. at 782 (“The plurality at least recognizes this as state action,

¹² The other case relied upon by the Government to resist a finding of state action under *Denver Area Educational Telecommunications Consortium* is *American Manufacturers Mutual Insurance Company v. Sullivan*, 526 U.S. 40 (1999). (Def.’s Mem. at 16). The Government provides no discussion of this case. Instead, it cites it for the unremarkable proposition that the “[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action.” (Def.’s Mem. at 16 [citations omitted]). At issue in *American Manufacturers Mutual Insurance Company* was Pennsylvania’s workers’ compensation regime which provided that an employer or insurer may withhold payment for disputed medical treatment pending an independent review to determine whether the treatment is reasonable and necessary. The Court held that the insurers were not “state actors” under the Fourteenth Amendment, and that the Pennsylvania regime does not deprive disabled employees of property within the meaning of that Amendment. Suffice to say, this case did not involve a congressional statute that altered the legal relations between the parties like in this case.

[referring to Part II], avoiding the mistake made by the Court of Appeals”). Moreover, Justice Breyer didn’t just “assume” state action in his opinion; he clearly analyzed the challenged regulations under the First Amendment and rejected the D.C. Circuit’s conclusion that no state action existed. *See, e.g., id.* at 737 (“Although the [D.C. Circuit] said that it found no ‘state action,’ . . . it could not have meant that phrase literally, for, of course, petitioners attack (as ‘abridging . . . speech’) a congressional statute—which, by definition, is an Act of ‘Congress.’”); *see also id.* at 747 (“Our basic disagreement with JUSTICE KENNEDY is narrow. Like him, we believe that we must scrutinize § 10(a) with the greatest care.”).

In sum, this Court should avoid the mistake urged here by the Government that no state action lies in this challenge to § 230—a congressional statute which clearly alters the legal relations between Plaintiffs and the censoring social media giants.

Also relevant here is the Supreme Court’s discussion of the petitioners’ vagueness argument:

Finally, petitioners argue that the definition of the materials subject to the challenged provisions is too vague, thereby granting cable system operators too broad a program-screening authority. *Cf. Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)) (vague laws may lead to arbitrary enforcement); *Dombrowski v. Pfister*, 380 U.S. 479, 486-487 (1965) (uncertainty may perniciously chill speech). That definition, however, uses language similar to language previously used by this Court for roughly similar purposes.

The provisions, as augmented by FCC regulations, permit cable system operators to prohibit

“programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.” 1992 Act, § 10(a), 106 Stat. 1486.

See also 47 CFR § 76.702 (1995) reading approximately the same definition into § 10(c)). This language is similar to language adopted by this Court in *Miller v. California*, 413 U.S. 15, 24 (1973), as a “guideline” for identifying materials that

States may constitutionally regulate as obscene. In *Miller*, the Court defined obscene sexual material (material that lacks First Amendment protection) in terms of

“(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work *depicts or describes, in a patently offensive way*, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” *Ibid.* (emphasis added; internal quotation marks omitted).

The language, while vague, attempts to identify the category of materials that Justice Stewart thought could be described only in terms of “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring opinion). In § 10(a) and the FCC regulations, without *Miller*’s qualifiers, the language would seem to refer to material that would be offensive enough to fall within that category *but for* the fact that the material also has “serious literary, artistic, political or scientific value” or nonprurient purposes.

This history suggests that the statute’s language aims at the kind of programming to which its sponsors referred—pictures of oral sex, bestiality, and rape, *see* 138 Cong. Rec. S642, S646 (Jan. 30, 1992) (statement of Sen. Helms)—and not at scientific or educational programs (at least unless done with a highly unusual lack of concern for viewer reaction). Moreover, as this Court pointed out in *Pacifica*, what is “patently offensive” depends on context (the kind of program on which it appears), degree (not “an occasional expletive”), and time of broadcast (a “pig” is offensive in “the parlor” but not the “barnyard”). 438 U.S. at 748, 750. Programming at 2 o’clock in the morning is seen by a basically adult audience and the “patently offensive” must be defined with that fact in mind.

Further, the statute protects against overly broad application of its standards insofar as it permits cable system operators to screen programs only pursuant to a “written and published policy.” 1992 Act, § 10(a), 106 Stat. 1486. A cable system operator would find it difficult to show that a leased access program prohibition reflects a rational “policy” if the operator permits similarly “offensive” programming to run elsewhere on its system at comparable times or in comparable ways. We concede that the statute’s protection against overly broad application is somewhat diminished by the fact that it permits a cable operator to ban programming that the operator “*reasonably believes*” is patently offensive. *Ibid.* (emphasis added). But the “reasonable belief” qualifier here, as elsewhere in the law, seems designed not to expand the category at which the law aims, but, rather, to provide a legal excuse, for (at least) one honest mistake, from liability that might otherwise attach. *Cf. Waters v. Churchill*, 511 U.S. 661, 682 (1994) (SOUTER, J., concurring) (public employer’s reasonable belief that employee engaged in unprotected speech excuses liability); *United States v.*

United States Gypsum Co., 438 U.S. 422, 453-55 and n. 29 (1978) (“meeting competition” defense in antitrust based on reasonable belief in the necessity to meet competition); *Pierson v. Ray*, 386 U.S. 547, 555-557 (1967) (police officer has defense to constitutional claim, as did officers of the peace at common law in actions for false arrest, when the officer reasonably believed the statute whose violation precipitated the arrest was valid). And the contours of the shield—reasonableness—constrain the discretion of the cable operator as much as they protect it. If, for example, a court had already found substantially similar programming to be beyond the pale of “patently offensive” material, or if a local authority overseeing the local public, governmental, or educational channels had indicated that materials of the type that the cable operator decides to ban were not “patently offensive” in that community, then the cable operator would be hard pressed to claim that the exclusion of the material was “reasonable.” We conclude that the statute is not impermissibly vague.

Denver Area Educ. Telcomms. Consortium, 518 U.S. at 750-53.

Here, § 230 is not tied to a *specific* category of speech that is generally proscribable (*i.e.*, obscenity), nor does it provide any type of objective standard whatsoever. The statute does permit the restriction of obscenity, but it also permits censorship of speech that is “otherwise objectionable, whether or not such material is constitutionally protected.” 47 U.S.C. § 230(c)(2)(A). Further, the subjective “good faith” of the censor does not remedy the vagueness issue—it worsens it. *See, e.g., United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) (stating that a speech restriction “offends the First Amendment when it grants a public official ‘unbridled discretion’ such that the official’s decision to limit speech is not constrained by *objective criteria*, but may rest on ‘ambiguous and subjective reasons’”) (citation omitted).

In the final analysis, the Government has empowered social media giants Facebook, Twitter, and YouTube to shape public discourse by granting them the power to censor any speech they deem “objectionable.” The First Amendment implications of this case are clear, and they demand the denial of the Government’s motion.

Plaintiffs want to emphasize one final point. As the Government notes in its motion, § 230 immunity can validly serve the important policy goal of “maintain[ing] the robust nature of Internet communication.” (Def.’s Mem. at 3). In other words, it can properly act as a *shield* against defamation claims arising from postings by third parties, for example. *See, e.g.*, 47 U.S.C. § 230(c)(1). However, it should not be allowed to be used as a *sword* to restrict speech in the way it is employed here—that is, by permitting Facebook, Twitter, and YouTube to *directly* censor Plaintiffs’ personal Facebook pages, Twitter accounts, and YouTube channels. Indeed, by allowing § 230 to be used as a sword, it undermines this very goal of maintaining the robust nature of the Internet, thereby raising the serious First Amendment concerns advanced by Plaintiffs in this challenge.

Consequently, the valid concerns raised by the Fourth Circuit in *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), and cited by the Government in its memorandum (Def.’s Mem. at 3), are not directly implicated by this challenge. It is likely possible for this Court to craft a remedy that protects businesses such as Facebook, Twitter, and YouTube from “potential liability for each message republished by their services” while at the same time protecting Plaintiffs’ speech from the direct censorship of Facebook, Twitter, and YouTube (*i.e.*, permit the shield but not the sword). *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006) (“It is axiomatic that a statute may be invalid as applied to one state of facts and yet valid as applied to another. Accordingly, the normal rule is that partial, rather than facial, invalidation is the required course, such that a statute may be declared invalid to the extent that it reaches too far, but otherwise left intact.”) (internal citations, quotations, and punctuation omitted). And insofar as it is not possible to do so, then the Court is duty bound to declare the entire provision unlawful and leave it to Congress to craft an appropriate statute, *see id.*—one that truly maintains

the robust nature of the Internet while at the same time protecting, rather than inhibiting, free speech.

CONCLUSION

For the foregoing reasons, Plaintiffs hereby request that the court deny Defendant's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2016, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

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