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From the Editors…

Welcome to the 33rd volume of the MIDWEST LAW JOURNAL. This is the official publication of the Midwest Academy of Legal Studies in Business. The mission of the MLJ is to publish articles of general interest to teachers of business law, the legal environment and related fields of law.

The MLJ, with a less than 25% acceptance rate, requires that all prospective journal entries undergo a double-blind peer review vetting process. We would like to say a sincere thank you to our Articles Editor, John Paul, and to the Associate Editors that help make the Midwest Law Journal a success. This year you went above and beyond in reviewing the many articles we received. We could not do it without you. Please accept our heartfelt thanks. As you read this edition, if you have any interest in participating as an editor (or reviewer), please contact us and we will get you signed up!

We also would like to thank all authors for their submissions this year. We received more submissions this year that we have since start of the pandemic. It is exciting to have so many great articles to read! This year's Best Article Award winner *is The Pepsi Generation Goes to Court: A Teaching Note Utilizing a Netflix Documentary to Teach Contracts and Ethics* by Michael Conklin and Justin Blount. Congratulations!

The MLJ is listed in CABELL'S JOURNAL OF PUBLISHING OPPORTUNITIES (Management) and is available on both Westlaw® and LexisNexis® databases. Please remember that the Journal is now published online. You will be able to find the Journal in full on the Midwest Academy of Legal Studies in Business website – www.MALSB.org.

The MLJ does not require attendance at the Midwest Academy of Legal Studies in Business conference to be considered for publication. However, you are always welcome and encouraged to attend. Our next annual meeting is held in Chicago, at the Drake Hotel, in conjunction with the MBAA annual conference in March 2024. Please go to www.MALSB.org for more information.

Thank you,

Dr. Beth Hazels, Co-Editor-In-Chief
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THE PEPSI GENERATION GOES TO COURT: A TEACHING NOTE UTILIZING A NETFLIX DOCUMENTARY TO TEACH CONTRACTS AND ETHICS

Michael Conklin[*]
Justin Blount[**]

I. INTRODUCTION

This teaching note provides everything needed to utilize a recent Netflix documentary to illustrate various aspects of contract formation and legal ethics. This can be performed as an in-class discussion, as an optional extra credit assignment, or as a take-home assignment with in-class discussion. The documentary provides an in-depth investigation into the famous *Leonard v. Pepsi* case. This includes detailed, behind-the-scenes access to how Leonard devised and modified his legal strategy, the long and arduous litigation process including settlement negotiations, the judge's decision, and the appellate process, and how the various actors from both sides view the incident in hindsight. This is an excellent catalyst for igniting discussion and demonstrating the real-world application of legal principles such as advertisements as offers, the objective theory of contract formation, the statute of frauds, inadmissibility of mitigation efforts, and contracts for an illegal purpose.

This activity is consistent with existing literature on how active learning helps bridge the gap between theory and practice, is effective at reaching students with diverse learning styles, and produces more student engagement. This activity also demonstrates some of the more practical aspects of litigation that are often overlooked in legal education. Examples include power disparities between plaintiff and defendant, venue selection, delaying tactics, the discomfort incurred from legal uncertainties, the difference between "winning" a lawsuit and avoiding a lawsuit altogether, and the long-term costs of unethical behavior. Students find the ambitious college student plaintiff and his relentless pursuit of one of the largest corporations to be highly engaging. The documentary is also highly entertaining, as it accurately portrays extravagant 1990s pop culture, provides a behind-the-scenes perspective from those involved in the case, and has a surprise twist in how Leonard's attorney was the brazen and now disgraced Michael Avenatti. This teaching note includes discussion questions with instructor notes and multiple-choice, attention check questions.

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II. PEDAGOGICAL FOUNDATION

Effective pedagogy in the business law classroom requires the implementation of teaching methods beyond just the lecture format in order to reach students with diverse learning styles.[1] Active learning—also known as experiential learning, problem-based learning, student-centered learning, and collaborative learning—has largely supplanted the case method as the ideal pedagogical practice in college courses.[2] Like the case method popular in the twentieth century, active learning helps bridge the gap between theory and practice.[3] But unlike the case method, active learning techniques are not limited to cases and therefore allow for more creativity—and consequently more student engagement.[4] Existing literature on the subject emphatically demonstrates the numerous benefits of moving beyond lecture and rote memorization and onto active learning.[5] For example, focusing on lecturing and memorization risks leaving the student with the false impression that real-life contracts issues are a purely black-letter issue where high certainty and consensus are had, when in reality, ambiguity exists in applying contract law to real life.[6]

Because of the significance of contracts in business, experiential learning practices are particularly beneficial to the study of contracts.[7] Students are unlikely to experience a contracts issue in the real world that manifests exactly as one from a case studied in college. Therefore, learning how to apply the law to different scenarios rather than just memorizing the law is needed. Active learning is the ideal pedagogical tool to augment students' ability to apply the concepts and knowledge of the course to novel situations—the final stage in Kolb's learning cycle.[8] Furthermore, active learning has been demonstrated to significantly enhance long-term memory of the material, thus further improving real-world applicability in former students.[9] And finally, the use of active learning to teach contracts is highly efficient,[10] thus allowing for the ideal utilization of limited class time even in demanding mini-session courses.

The use of videos as an active learning tool to supplement traditional pedagogies is supported by a large body of empirical research.[11] The use of videos is likely much less intimidating to students who are new to the subject of contracts.[12] Unlike traditional pedagogies such as lecture

[1] M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 SEATTLE U.L. REV. 139 (2001).
[2] Larry A. DiMatteo & Leigh Anenson, *Teaching Law and Theory Through Context: Contract Clauses in Legal Studies Education*, 24 J. LEGAL STUD. EDUC. 19, 20–22 (2007).
[3] *Id.* at 20.
[4] *Id.*
[5] *Id.* at 22.
[6] *Id.* at 25-26.
[7] *Id.* at 20.
[8] DAVID A. KOLB ET AL., ORGANIZATIONAL BEHAVIOR: AN EXPERIENTIAL APPROACH (1991).
[9] Donald F. Van Eynde & Roger W. Spencer, *Lecture Versus Experiential Learning: Their Differential Effects on Long-Term Memory*, 12 BEHAV. TEACHING REV. 52, 57 (1988).
[10] Carol Chomsky & Maury Landsman, *Using Contracts to Teach Practical Skills: Introducing Negotiation and Drafting into the Contracts Classroom*, 44 ST. LOUIS L.J. 1545, 1559 (2000) (Explaining that with the use of active learning to teach contracts, "students can learn enormous amounts from any such effort even if the problem itself is very simple and only a small amount of time is devoted to the problem.").
[11] Timothy J. Ellis, *Multimedia Enhanced Educational Products as a Tool to Promote Critical Thinking in Adult Students*, 10 J. EDUC. MULTIMEDIA & HYPERMEDIA 107, 110 (2001).
[12] Judith Kish Ruud, William N. Ruud & Farzad Moussavi, *You've Got A Deal! Using the Film Draft Day to Teach Fundamental Contract Law and Analytical Skills*, 34 J. LEGAL STUD. EDUC. 41, 45–46 (2017).

and case studies, videos take abstract concepts and translate them into observable behaviors that can then be critically analyzed by the class.[13] Videos show unambiguous context of the events in question so that everyone is on the same page regarding the characters and their behavior, which helps eliminate confusion in the discussion of how the law applies.[14] Additionally, videos show subtle context often not ascertainable from reading a case study such as hand gestures, sarcastic inflection, level of seriousness or jovialness in the conversation, etc., all which may be relevant to the more subjective aspects of the law. Finally, the use of video scenarios makes salient the human effect of the law; it reminds students that the law often has an immense effect on the lives of everyday people.

III. THE NETFLIX DOCUMENTARY

Pepsi, Where's My Jet? is a compelling documentary released on Netflix in 2022.[15] It covers the background, litigation, and aftermath of the famous *John Leonard v. PepsiCo, Inc.* case.[16] The case involved an ambitious, 21-year-old college student who saw a Pepsi Points commercial that depicted a Harrier jet accompanied by the text "Harrier Fighter 7,000,000 Pepsi Points."[17] Leonard quickly realized that such a jet would be worth about $32 million and, because Pepsi allowed for the purchase of Pepsi Points at $0.10 each with no stated limit, this could be a very lucrative deal. Leonard acquired $700,000 (7,000,000 × $0.10) from financial backers and sent a cashier's check to the Pepsi fulfillment center requesting his Harrier jet. Pepsi returned the check with a note explaining that the Harrier jet in the commercial "is fanciful and is simply included to create a humorous and entertaining ad."[18] Litigation then ensued, largely around whether the commercial constituted an offer for the Harrier jet that Leonard then accepted.

The Netflix documentary provides a highly entertaining look at 1990s pop culture. It truly captures the feel of a unique decade. Students will no doubt find the fashion, music, slang, and commercials to be highly amusing when compared to modern standards. The documentary also provides insightful backstory regarding Leonard, one of his eccentric financial backers, the Pepsi marketing team, Pepsi executives, and Leonard's attorney, who was none other than the now disbarred and imprisoned Michael Avenatti.[19] The documentary also brings to light aspects of the incident that were previously unknown.

By showing the viewer a behind-the-scenes look at the evolution of the case, students will gain valuable experience about the real-world implications and costs of litigation. This is something that is sadly often overlooked in legal education; reading one-page case summaries in a textbook provides a dangerously overly simplistic perception of the legal process. For example, Leonard describes how much of the litigation process was just waiting.[20] He also talks about the mental

[13] *Id.* at 45.
[14] *Id.*
[15] *Pepsi, Where's My Jet?* (Netflix 2022).
[16] Leonard v. PepsiCo, Inc., 88 F. Supp. 2d 116 (S.D.N.Y. 1999).
[17] *Pepsi Commercial*, YOUTUBE (2022), https://youtu.be/z9_4e4WUXr4.
[18] *Leonard*, 88 F. Supp. 2d at 120.
[19] *Lawyer Michael Avenatti Sentenced to 14 Years in Federal Prison for Stealing Millions of Dollars from Clients and Tax Fraud*, U.S. ATT'Y OFF., CENT. DIST. CAL. (Dec. 5, 2022), https://www.justice.gov/usao-cdca/pr/lawyer-michael-avenatti-sentenced-14-years-federal-prison-stealing-millions-dollars.
[20] *Pepsi, Where's My Jet?: Let's Make a Deal* (Netflix 2022), at 26:00.

hardship from the inherent uncertainty of not knowing what the outcome will be.[21] This frustration is exacerbated when settlement offers are involved, which is also discussed in the documentary. Another aspect of litigation often overlooked in legal education is how trial outcomes are frequently contingent upon extra-legal occurrences. Issues of venue selection, litigation gamesmanship, jury makeup, delaying tactics, financial-resource disparities between plaintiff and defendant, and presiding judge assigned are all illuminated in the documentary and explained by the people who went through the process.

IV. THE ACTIVITY

The primary issue at hand in the *Leonard* case is whether the Pepsi commercial constituted an offer that Leonard then accepted, forming a contract for the Harrier jet. The documentary provides in-depth background regarding Leonard, his financial backers, his attorneys, the marketing firm, Pepsi executives, and even U.S. Pentagon officials that weighed in on the matter. This allows students the ability to parse out the relevant facts and determine the likely outcome at trial. This background regarding the case also provides details that may initially appear to be relevant but upon closer consideration of the legal standards are not. This affords students the opportunity to practice identifying relevant legal factors.

This activity can be conducted in a variety of ways depending on the class's modality, length of the semester, and professor's preference. It can be given as an extra credit assignment, a graded homework assignment, or just an in-class activity for class participation credit. The heart of the assignment is to identify the factors of the case that favor each side to the litigation and be able to explain why each factor strengthens that side's position. This can either be written up and submitted, discussed in a class activity, or first written up and submitted for an assignment and then discussed in class.

Access to Netflix is required to watch the documentary. The vast majority of students will have access to Netflix from a personal account or through a friend or family member's account. In the unlikely event a student does not know anyone else with an account, it will cost $8.99 for a one-month subscription. Netflix functionality allows playback to be increased to 1.25 or 1.5 times normal speed for students in a hurry. The documentary does contain some profanity, roughly on par with a PG-13 movie. There is no sexually suggestive or otherwise problematic material.

This teaching note contains both attention check questions and discussion questions. While the attention check questions are intentionally designed to be explicitly answered in the documentary, the discussion questions are not. Students will be required to use higher-order skills to provide thoughtful responses. For example, the discussion questions include things like giving advice to the parties involved, asking hypotheticals such as what if Pepsi did XYZ instead, analyzing the pragmatism behind one of the character's stated theories on pursuing lawsuits, and identifying the factors involved in deciding to accept or reject a settlement negotiation? The documentary sets up the background for these questions but certainly does not answer them. Because of this, these questions are ideal for sparking lively classroom debate.

[21] *Id.*

This is a convenient, standalone activity that can be conducted at the beginning, middle, or end of the semester. It may seem counterintuitive to conduct such a class activity at the beginning of the semester before the relevant material has been taught. However, this sequencing allows the professor to show the need for learning the material that will later be covered throughout the semester. This sparks interest in students by demonstrating the practical value of the class and how the study of law can be interesting. This practice of showing the need for the information first and only then providing the information is consistent with the pedagogical practice of the inductive teaching method.[22] Unfortunately, business education frequently uses the direct instruction method, which involves first providing instruction followed by a corresponding problem.[23] This is not practical, as it is unlikely to be the case in real-world business settings where business leaders generally are confronted with a problem first and then must seek out a solution through a process of discovery.[24]

Using this class activity early in the semester has additional benefits. Doing so takes advantage of the natural energy and attentiveness that are more likely to be present earlier in the semester.[25] The use of a dynamic and engaging activity like this at the beginning of the semester sparks interest and helps set the tone for the rest of the semester.[26] Students will be exposed early to the type of learning process that is needed to excel at applying the law to real-life scenarios, which will help them throughout the rest of the course.[27] Finally, by utilizing this activity before covering contracts, real-life legal issues are presented to students not so much to solve, but to elicit learning issues; meaning, students learn what knowledge is necessary in order to address the problem.[28]

This activity is also an excellent fit for a "down day" in the semester, such as the Tuesday before Thanksgiving when the professor does not want to start a new section. It is also a great cumulative event after covering contracts or for a final's week activity if a traditional, in-class final exam is not administered. Additionally, this activity is a great review for a contracts exam.

The pedagogical practice of think-pair-share would also be a beneficial option of how to implement this activity in the classroom. Here, relevant questions are first posed to the class, and students are given a brief period of time to "think" individually. Then, students are "paired" up in groups for further discussion. Finally, the groups "share" their findings with the class. This practice

[22] Torsor Kotee & Casey Nguyen, *How Can Business Educators Best Prepare Learners with Both the Foundational Knowledge and Self-Direction Needed for Career Success?*, AACSB (Jan. 20, 2023), https://www.aacsb.edu/insights/articles/2021/07/instruction-vs-discovery-learning-in-the-business-classroom.
[23] *Id.*
[24] *Id.*
[25] Michael R. Koval, *Step Away from the Syllabus: Engaging Students on the First Day of legal Environment*, 30 J. LEGAL STUD. EDUC. 179, 180 (2013).
[26] Denise M. Anderson, et al., *The First Day: It Only Happens Once*, 16 TEACHING HIGHER EDUC. 293, 300 (2011); Susan Marsnik, Dale Thompson & Susan Supina, *Oh Naturelle! Health & Beauty: An Integrated Law, Ethics, and Strategy Case for the First Day of Class*, 39 J. LEGAL STUD. EDUC. 39, 40–41 (2022).
[27] Marsnik, Thompson & Supina, *supra* note 26, at 43.
[28] Dorothy H. Evensen, *To Group or Not to Group: Student's Perceptions of Collaborative Learning Activities in Law School*, 28 S. ILL. U. L.J. 343, 399 n. 124 (2004).

has extensive research behind it documenting how it increases critical thinking,[29] information retention,[30] student confidence,[31] and class engagement.[32]

A modified version of this activity would also be great for a Marketing class. It provides insight into the "Cola Wars" of the 1990s; a behind-the-scenes look at the collaborative process of creating advertisements, legal implications of advertisements, target demographics, the use of celebrity endorsements, and numerous ethical issues, such as Pepsi's marketing fiasco in the Philippines.

V. LEGAL ANALYSIS TEACHING NOTES

The basic legal issue presented in the case is whether or not Pepsi made an offer to Leonard such that his acceptance led to a valid contract. Generally, a valid offer requires that the offeror manifest a willingness to enter into a bargain in a manner that would justify another person believing that his or her assent will conclude the bargain.[33] This means that the words and/or conduct of the offeror must show that the offeror intends to make a commitment to be bound by the offer.[34] This intent is measured by an objective, reasonable person standard.[35] That is to say, whether or not an offeror's actions manifested an intention to be bound is determined by whether a reasonable person in the position of the offeree would believe he or she did, not what the offeror or offeree subjectively believed.[36] Thus, students should be able to identify that the key issue in this case is whether or not a reasonable person would believe that Pepsi actually manifested a serious intention to be bound to the bargain of exchanging a Harrier jet for $700,000 worth of Pepsi Points.

A. EVIDENCE FOR LEONARD

Generally, Leonard has the weaker case—he ultimately lost on summary judgment—but there is evidence that students can offer to support his side. In the commercial, the point total for the Harrier jet is presented in the exact same manner as the other items, which, it could be argued, implies that they are to be treated as equally valid. There is no disclaimer in the advertisement to inform the viewer that the Harrier jet is unavailable. Such a disclaimer would have been easy to add and is common practice in television advertisements.[37]

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[29] Mahmoud Kaddoura, *Think Pair Share: A Teaching Learning Strategy to Enhance Students' Critical Thinking*, 36 EDUC. RSCH. Q. 3 (2013).

[30] Aditi Kothiyal et al., *Effect of Think-Pair-Share in a Large CS1 Class: 83% Sustained Engagement*, *in* ICER '13: PROCEEDINGS OF THE NINTH ANNUAL INTERNATIONAL ACM CONFERENCE ON INTERNATIONAL COMPUTING EDUCATION RESEARCH 137 (Association for Computing Machinery, 2014).

[31] Ariana Sampsel, *Finding the Effects of Think-Pair-Share on Student Confidence and Participation* (Apr. 29, 2013) (Honors projects), https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1029&context=honorsprojects.

[32] Korhiyal et al., *supra* note 29.

[33] *See* RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. L. INST. 1981).

[34] *Id.* at § 2 (defining a "promise," the underlying basis of a contract, as a "manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made").

[35] *See* Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1125 (2008) (discussing the objective theory of contracts).

[36] *Id.*

[37] Here, students often recount absurd examples they have seen, such as "do not attempt to drive car upside down," or "product does not actually allow user to fly." The *Leonard* case helps illustrate why such disclaimers are

The advertising executive who developed the commercial said he came up with the idea for putting the Harrier jet in the advertisement from the old Neiman Marcus Christmas Catalogue fantasy present.[38] This fantasy present was an extravagant item listed for sale in the back of the catalogue, such as a his and hers mini submarine for $18,700 in 1963.[39] The fact that these were actual items available for purchase at the stated price lends some support for the notion that the Harrier jet was available.

The commercial was the result of a deliberate process involving the approval of multiple people at multiple stages of creation. This, it could be argued, supports the claim that it is to be taken seriously, as compared to something mentioned extemporaneously in a casual conversation.[40] The unaired first draft of the commercial listed 700,000,000 points for the Harrier jet, which Pepsi changed to 7,000,000 before running the initial version of the commercial.[41] While Pepsi explains that the change was simply to provide more aesthetically pleasing text, it could be argued that Pepsi was intentionally trying to make the Harrier jet appear obtainable.

Finally, the botched Pepsi marketing contest in the Philippines (discussed in Part VII) could perhaps be used to argue that Pepsi intentionally made "mistakes" in order to sell more product and therefore was not acting in good faith.

B. EVIDENCE FOR PEPSI

As explained by the judge in granting summary judgment, Pepsi had numerous grounds for why its commercial did not create a binding contract. The strongest is likely the general rule that advertisements do not constitute offers; rather, they function as invitations for offers.[42] The reason why can be easily illustrated by considering what would happen if Pepsi received $700,000 from 3,000 people each demanding a Harrier jet. Since less than 1,000 Harrier jets were ever made,[43] such an open invitation to anyone is not practical. There does exist a narrow exception to the general rule that advertisements are not offers. When the advertisement is "clear, definite, and explicit, and leaves nothing open for negotiation,"[44] it may be treated as an offer. But this is not the case in the Pepsi Points commercial, as the commercial did not contain any limiting words such as "first come, first served."[45]

As previously discussed, under the objective theory of contract formation, it is largely irrelevant whether Pepsi actually intended to offer the Harrier jet or not; rather, what matters is whether a reasonable viewer of the commercial would believe that it did. Here, a reasonable person would

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necessary—not because such a frivolous lawsuit regarding these issues would ultimately be successful but to avoid them in the first place.

[38] *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 20, at 16:00.

[39] *Id.*

[40] *See* RESTATEMENT (SECOND) OF CONTRACTS § 22 (AM. LAW. INST. 1981) (requiring that an offer manifest a serious intention to be bound by its terms).

[41] *Pepsi, Where's My Jet?: Landing the Plane* (Netflix 2022), at 24:45.

[42] 67 AM. JUR. 2D *Sales* § 114 (2021).

[43] *Harrier II Plus (AV-8B) VSTOL Fighter and Attack Aircraft*, AIRFORCE TECH. (Nov. 7, 2000), https://www.airforce-technology.com/projects/harrier/.

[44] Lefkowitz v. Great Minneapolis Surplus Store, 86 N.W.2d 689, 691 (Minn. 1957).

[45] *Leonard*, 88 F. Supp. 2d at 124.

likely comprehend the absurd nature of a business offering to give out $32 million items to anyone who gave the company $700,000. The depiction of the Harrier jet in the commercial is unrealistic and clearly intended for comedic purposes. It is flown by a teenager wearing no ear protection and holding a Pepsi in one hand and is landed on the front lawn of a high school, causing structural damage to the building, and comically ripping off the clothes of a teacher. This is in contrast to how the other, legitimate items available in the catalogue are depicted in ordinary use.

Additionally, millions saw the advertisement, and only one person attempted to accept the offer. This is evidence that the average, objective, reasonable person understood that the commercial did not make an offer. There are numerous people who would have gladly paid $700,000 for a $32 million item if they believed that was what Pepsi was seriously offering. A final piece of evidence on this point is that the commercial directs viewers to the catalogue for full details on the Pepsi Points campaign. In the catalogue, all the other items from the commercial are depicted and have a checkbox to request in the order form, but there is no mention of the Harrier jet.[46]

There is another potential contract formation issue related to the lack of a valid writing. The execution of this alleged agreement would constitute the "sale" of a good over $500 and therefore invoke the statute of frauds and require a writing to be enforceable.[47] Here, there is no writing because neither the commercial nor the order form submitted satisfies the writing requirement.[48] Leonard alleged that there were various writings that, when considered together, met the statute of frauds requirement.[49] While the court noted that a combination of different signed and unsigned writings could satisfy the statute of frauds, there must be at least one signed writing that establishes the contractual relationship, and the additional unsigned writing(s) must on their face clearly refer to the same transaction.[50] In this case, the order form that Leonard alleges formed the contract was not signed by Pepsi, the party to be charged.[51] Leonard sought to obtain additional contracts between Pepsi and its advertisers, but the court noted that Leonard would be nothing more than a third party to such contracts.[52] Thus, Pepsi's signature on those documents would be irrelevant to the formation of any contract with Leonard. This case thus provides students with an excellent example of how the statute of frauds allows parties to be quite creative in using business documents to satisfy the writing requirement, but those documents still must meet certain basic requirements.

In addition to the basic issue of whether or not Pepsi made a valid offer, there are other potential enforceability issues related to consideration and unconscionability. Normally, courts do not evaluate the adequacy of consideration in a contract.[53] However, a contract can be considered "unconscionable"[54] and rendered voidable when disparities in consideration are so great to constitute "such an agreement as no sane man not acting under a delusion would make, and that

[46] *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 20, at 2:30.
[47] *Leonard*, 88 F. Supp. 2d at 131.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] 17 C.J.S. *Contracts* § 175 (2021) ("In the absence of fraud, the law generally will not weigh the adequacy of the consideration for a contract; so long as it is something of real value, it is sufficient.").
[54] 17 C.J.S. *Contracts* § 178 (2021).

no honest man would take advantage of."[55] It would be a highly peculiar business decision for a company that is not in the business of distributing $32 million Harrier jets to agree to procure and distribute them to anyone who wrote a cashier's check for $700,000. As the judge in *Leonard* described, such an extreme, 41:1 disparity is simply "a deal too good to be true."[56]

A final legal issue that can be raised with students is the required contractual element of legality. To be enforceable, contracts must be for a legal purpose.[57] It is potentially illegal for a U.S. citizen to own a flight-capable Harrier jet. [58] The commercial that Leonard relies upon as creating an offer features a flight-capable jet, and thus this must be the subject matter that Leonard asserts is the basis of the contract. Demilitarizing a Harrier jet would likely render it incapable of flight.[59] Thus, the contract proposed by Leonard would either be illegal or for a different subject matter than what he alleges Pepsi offered.

Some of the evidence indicates that Leonard was not acting in good faith. He could have easily reached out to Pepsi to ask if it was serious about the Harrier jet before seeking out lawyers and acquiring $700,000 from financial backers. He never obtained a location to store the Harrier jet he allegedly believed he would receive. Before moving forward with his scheme, Leonard learned that Harrier jets are sold in a minimum quantity of six,[60] which is an indication that Pepsi was not serious about the Harrier jet. Finally, the $10 he included for shipping and handling would be vastly insufficient to cover the transportation of a Harrier jet.

C. IRRELEVANT EVIDENCE

There are several pieces of evidence from the documentary that students might raise but that are irrelevant to resolving the legal issues affecting the formation of a contract. Thus, this exercise serves as an effective tool for helping students learn how to focus on the material facts given the applicable legal standard.

After Leonard attempted to acquire the Harrier jet, Pepsi changed the advertisement from 7,000,000 Pepsi Points to 700,000,000.[61] Students often view this as relevant evidence that serves as an admission of guilt by Pepsi. In the documentary, this behavior leads to the accusation that "they were admitting it's an offer."[62] The court in *Leonard* explained that this alteration was not "probative of the seriousness of the offer."[63] It was prompted "less by the fear that reasonable people would demand Harrier jets and more by the concern that unreasonable people would threaten frivolous litigation."[64] This is similar to the public policy grounds behind Federal Rule of

[55] R. L. Kimsey Cotton Co., Inc. v. Ferguson, 233 Ga. 962, 966 (1975).
[56] Leonard v. PepsiCo, Inc., 88 F. Supp. 2d 116, 130 (S.D.N.Y. 1999).
[57] 17 C.J.S. *Contracts* § 4 (2023) (discussing the requirement that a contract must be for a legal purpose).
[58] Susanne M. Schafer, *Pentagon: Pepsi Ad Not 'The Real Thing'*, AP NEWS (Aug. 9, 1996), https://apnews.com/article/d4233cd81d28106f9b417931beb06479.
[59] *Id.*
[60] *Pepsi, Where's My Jet?: The Kid from Seattle* (Netflix 2022), at 27:00.
[61] *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 20, at 31:00.
[62] *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 20, at 31:30.
[63] *Leonard*, 88 F. Supp. 2d at 130.
[64] *Id.*

Evidence 407 for allowing a business to correct the circumstances that caused an injury without having the correction used against it in court.[65]

Leonard explains that he was concerned that if he planned on selling the Harrier jet immediately after acquisition, "that certainly would look like we were just trying to get Pepsi."[66] So they came up with a plan to take the Harrier jet to airshows.[67] This plan would have been unlikely to recoup the initial $700,000 investment plus attorney's fees. What little they would be paid to perform at airshows would largely be offset by expenses, such as storage, jet fuel, insurance, pilot salary, transportation costs, maintenance, etc. Regardless, this is largely a moot point, as there is little relevance to what a party to a contract plans to do with the item after the contract is executed.

VI. ETHICAL ANALYSIS TEACHING NOTES

The details surrounding this case provide colorful illustrations of various ethical principles. Regardless of legality, was it ethical to demand Pepsi acquire a $32 million item in exchange for $700,000? Here, providing the class an example in which the tables are turned may cause the students to change their minds. If a student mistakenly created an online advertisement to sell a $3,200 baseball card for $70, would it be ethical for someone to deliver the $70 and demand the student acquire and deliver the $3,200 baseball card?[68]

Was it ethical for Pepsi to be the first to initiate a lawsuit, thus ensuring that the case would be litigated in New York, a venue that was both geographically convenient to Pepsi and likely a sympathetic jurisdiction to a corporate interest?[69] While this may initially strike students as unfair, this type of a tactic is perfectly legal. For example, in 2018 MGM sued the Mandalay Bay shooting victims for similar reasons.[70] In our adversarial legal system, attorneys are to do what is best for their clients, not what is best for the opposition. But how far is it appropriate to take this principle? What if Pepsi had the ability to control the times of the depositions and went out of its way to schedule them at dates and times that were the most inconvenient to the out-of-state plaintiff? What if Pepsi intentionally delayed the process solely so that Leonard would be more likely to take the settlement offer rather than continue with the hassle of litigation?

The documentary recounts a little-known aspect of the Leonard litigation. Michael Avenatti admitted that Leonard was "highly unlikely to win this case in a court of law. [Therefore,] we are going to have to bring public pressure to bear."[71] Avenatti went digging for dirt on Pepsi to use against it to pressure it into a favorable settlement.[72] He eventually found out about a botched

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[65] FED. R. EVID. 407 ("When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product or its design, or a need for a warning or instruction.").
[66] *Pepsi, Where's My Jet?: The Kid from Seattle*, *supra* note 60, at 27:30.
[67] *Id.*
[68] Note that this is an intentionally generous analogy, as Pepsi did not make a mistake; rather, it made a fanciful commercial.
[69] *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 20, at 27:00.
[70] Elliott Mest, *MGM Sues Mandalay Bay Shooting Victims*, HOTEL MGMT. (July 17, 2018), https://www.hotelmanagement.net/legal/mgm-sues-mandalay-bay-shooting-victims.
[71] *Pepsi, Where's My Jet?: The Bad News Bears* (Netflix 2022), at 8:20.
[72] *Id.* at 31:40.

promotional campaign Pepsi ran in the Philippines in 1992 called "Pepsi Number Fever."[73] In this campaign, bottle tops of Pepsi had numbers printed on them, and one number was selected for recipients of bottles with that number to become millionaires.[74] Due to a printing error, instead of only a few winning numbers printed, 600,000 were printed, and hundreds of Filipinos believed they had won.[75] Pepsi offered to pay these people only 1/2,000th of the promised payout, which led to riots, arson, and even the death of five people.[76] Avenatti's plan was to threaten to run provocative advertisements referencing the "Pepsi Number Fever" contest if Pepsi did not agree to a favorable settlement offer.

This controversial scheme elicits various ethical considerations. First, ignoring the printing error, was it even ethical for Pepsi to run such a campaign in an impoverished country such as the Philippines? Manny Pacquiao, a Filipino boxer, politician, and advocate, implies that due to the poverty in the Philippines, advertising campaigns that offer the chance at a large reward are particularly suspect.[77] Pacquiao explains, "Because of the suffering of our people, when promotions like this happen, the people will try very hard."[78] Does the fact that the Pepsi product leads to poor health outcomes—which require more money to be spent on health care—further affect the ethics of such a campaign?[79]

This Philippines contest debacle and Avenatti's attempt to exploit it for financial gain is illustrative of how unethical behavior catches up to people in the long run. Avenatti continued the practice of trying to extort large corporations, which, over twenty-five years later, led to a 2.5-year prison sentence and disbarment after attempting to extort Nike.[80] Unethical behavior may lead to short-term gains but almost always catches up to the person in the long run.[81] Additionally, even when unethical behavior is advantageous in the short run, it imposes a heavy toll in the form of guilt, the burden of maintaining lies, and the psychological cost of living with the fear of being caught.[82] As Tom Hoffman describes in the documentary, his ethical behavior resulted in a happy, guilt-free lifestyle, and Avenatti's behavior landed him in prison.[83]

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[73] *Id.* at 33:15.
[74] *Pepsi, Where's My Jet?: Landing the Plane*, *supra* note 41, at 2:30. A million Philippine pesos was worth roughly $40,000 in 1992. *Id.*
[75] Darian Woods & Stacey Vaneck Smith, *Pepsi's Number Fever*, NPR (May 6, 2021, 2:47 PM), https://www.npr.org/2021/05/06/994388441/pepsis-number-fever.
[76] *Id.*
[77] *Pepsi, Where's My Jet?: Landing the Plane*, *supra* note 41, at 3:00.
[78] *Id.*
[79] Joe Leech, *13 Ways That Sugary Soda Is Bad for Your Health*, HEALTHLINE (Feb. 8, 2019), https://www.healthline.com/nutrition/13-ways-sugary-soda-is-bad-for-you.
[80] *Michael Avenatti Sentenced to Over Two Years in Prison for Attempting to Extort Nike and for Defrauding His Client*, U.S. DEPT. OF JUSTICE (July 8, 2021), https://www.justice.gov/usao-sdny/pr/michael-avenatti-sentenced-over-two-years-prison-attempting-extort-nike-and-defrauding.
[81] *See, e.g.*, *Ethics Pays*, BUS. ETHICS RES. CTR., https://www.businessethicsresourcecenter.org/ethics-pays/ (last visited Mar. 9, 2023).
[82] *See, e.g.*, John D. Kammeyer-Mueller, Lauren S. Simon & Bruce L. Rich, *The Psychic Cost of Doing Wrong: Ethical Conflict, Divestiture Socialization, and Emotional Exhaustion*, 38 J. MGT. 784 (2012).
[83] *Pepsi, Where's My Jet?: Landing the Plane*, *supra* note 41, at 16:00.

VII. CONCLUSION

As discussed in this teaching note, the use of active learning activities provides numerous benefits over lecture and the case study method. They bridge the gap between theory and practice, increase student engagement, and accurately represent the nuance in applying the law to real-life situations. These benefits are especially true when it comes to the study of contracts where real-life application is paramount. Additionally, the use of active learning to teach contracts is highly efficient, improves long-term memory of the learning objective, and engages higher order learning. In these ways, this teaching note is a valuable extension to the existing literature on active learning in the Business Law classroom. Videos are an ideal active learning tool because they are less intimidating to students, they provide easy to understand context, generate more topics of discussion, and demonstrate the human element of the law. The specific topic of the activity described in this teaching note provides students valuable insight into real-life contract formation.

This activity is highly versatile and can therefore be implemented in a variety of ways to best compliment the diverse needs of the particular class. This teaching note would be a valuable resource even for a professor who simply plays the short commercial to the class and then engages in dialogue about the potential legal ramifications, as the behind-the-scenes knowledge and engaging questions that allow for the discussion of numerous legal and ethical issues would benefit such a discussion. Additionally, this activity is versatile in its ability to be used at different points during the semester, including even before contracts is covered in class, thus functioning as a tool to spark interest and demonstrate the value of studying the subject.

APPENDIX A: DISCUSSION QUESTIONS

Because of the number of contractual and ethical issues brought up in this activity, there is no shortage of discussion questions that can be posed either as take-home essay questions or in-class discussion questions. The following are just a few options, with accompanying information for the professor. Note that the footnotes in these questions are for instructor reference and should be deleted before assigning to students.

1. With the hindsight of knowing that Leonard lost his case, what advice would you give Pepsi in 1996 about running the advertisement?

Note: While Pepsi ultimately "won" the lawsuit, in litigation there is often no real winner, just varying degrees of losers. In order to "win," Pepsi had to invest time and money throughout the three-year litigation process. This is an excellent illustration of this principle, as many students dismissively respond to the question by explaining that, since Pepsi won, there was no problem with running the advertisement. Such a response demonstrates as much of an understanding of the law as a misunderstanding of the costs of defending lawsuits. Additionally, this case focused on contract law, and there are other areas of law that could potentially be applicable, such as a state consumer protection act and the federal truth-in-advertising regulations.

2. Imagine Pepsi had a history of offering—and following through with—one extravagant prize in each of its previous promotional campaigns, how would that fact affect Leonard's case?

Note: This would certainly be a fact in favor of Leonard and might have gotten him past the summary judgment phase, but ultimately, the principle that advertisements are not offers would still be dispositive.[84] As long as Pepsi did not include "clear, definite, and explicit [language that] leaves nothing open for negotiation,"[85] the rule that advertisements are not offers would be controlling.

3. Does the commercial constitute an offer for the other items, such as the sunglasses and jacket?

Note: Likely not. Again, the general rule is that advertisements are not offers. The commercial did not contain "clear, definite, and explicit [language that] leaves nothing open for negotiation,"[86] so this general rule applies. Students often find this to be unfair. But the purpose for the general rule that advertisements are not offers can be explained by imagining a scenario whereby Pepsi had 5,000 jackets to meet the expected demand but was met with an unforeseeable demand for 10,000 jackets. Here, it would be unfair to force Pepsi to attempt to acquire 5,000 more jackets to meet this unforeseeable demand.

4. Todd Hoffman stated, "You can fight; you can always fight. You can always try. You can lose—you can win. But if you don't fight you already lost. So you always fight."[87] Is this a logical way to view the filing of lawsuits?

Note: This is ultimately an issue of personal preference, but the logic embodied in Hoffman's quote is highly suspect. First, a more reasonable outlook on when to fight should consider the probabilistic outcome from fighting. In other words, one should choose to fight when the weighted probability of what is to be gained from a success is greater than the weighted probability of the total costs (financial, temporal, and psychological). Second, it is likely impossible to "always fight," as people have finite financial and temporal resources to invest into fighting. If one attempted to "always fight," he or she may find himself or herself unable to take on an additional, more advantageous fight in the future because all his or her available resources are tied up fighting more trivial matters.

5. In the documentary, the advertising executives mention that part of the reason why they used the Harrier jet is because it was in the public domain.[88] What does it mean that an item is in the public domain and why was this beneficial to Pepsi?

Note: Works of authorship that are fixed in a tangible form of expression are protected by copyright law.[89] Examples include written works, photographs, paintings, and videos.[90] Copyright law grants authors the exclusive right to publish, reproduce, distribute, and publicly display or perform the copyrighted work for a specified statutory term.[91] Once the term of copyright protection has run, or if the author of the work has otherwise abandoned its copyright in the work, the work is said to

[84] *See supra* note 42 and accompanying text.
[85] Lefkowitz v. Great Minneapolis Surplus Store, 86 N.W.2d 689, 691 (Minn. 1957).
[86] *Id.*
[87] *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 20, at 29:00.
[88] *Id.* at 19:30.
[89] *See* 18 C.J.S. *Copyrights & Intellectual Property* § 3 (2023).
[90] *Id.* at § 7 (discussing the general nature of copyright law).
[91] *Id.*

be in the public domain.[92] This means that the previously copyrighted work is no longer subject to copyright protection and is able to be reproduced by the public without infringing on the copyright. [93] Additionally, most U.S. government creative works are copyright-free from inception.[94] Because the Harrier jet was in the public domain, using it in the commercial saved Pepsi the hassle of acquiring the rights to use it for commercial purposes.

6. The documentary discusses in detail Leonard's rationale for why he rejected Pepsi's settlement offer.[95] If you were a twenty-one-year-old college student like Leonard, how would you decide whether to accept or decline Pepsi's offer? Conversely, if you were an attorney for Pepsi, how would you decide how much to offer Leonard? In either scenario, would it be a good idea to take into consideration the attitude of the other side (in other words, if the other side was acting like a jerk, should you be less likely to accept its offer)?

Note: The question about what the Pepsi attorneys should offer to Leonard has great potential for the agency problem. The interests of a Pepsi attorney may not be perfectly aligned with the interests of PepsiCo. For example, perhaps the attorney wants to go to court because of the potential to appear on national news programs. It is also important to note that, while Pepsi almost certainly would have been successful after a full trial, the discovery process would have likely uncovered some inconvenient facts, such as how the advertisement originally listed the Harrier jet for 700,000,000 Pepsi Points but was changed to 7,000,000 Pepsi Points at the request of Pepsi executives.

In addition to these prescribed questions, discussing the case in class will inevitably lead to numerous questions arising organically from the students. Often these involve a misunderstanding as to details mentioned in the documentary that are largely irrelevant to the case. Students also often ask about related, hypothetical scenarios; discussing these further helps illustrate the legal concepts.

APPENDIX B: ATTENTION CHECK QUESTIONS

The following eight questions may be distributed for the students to answer while watching the documentary. These are simple questions, the purpose of which is just to provide confirmation that the student watched the documentary. These questions are evenly staggered throughout the documentary and are provided here in sequential order. The footnotes, which provide the exact time for where in the documentary the questions are answered, are for reference only and should be deleted before distributing to students. The correct answer is underlined.

[92] *Id.* at § 65.
[93] *Id.*
[94] *Copyright Exceptions for U.S. Government Works*, USA.GOV (June 6, 2022), https://www.usa.gov/government-works (explaining the general rule and providing narrow exceptions such as works prepared for the government by independent contractors and the use of a government work which implies a governmental endorsement).
[95] *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 20, at 37:00.

1. What is the name of Todd Hoffman's mother, who lives in Palm Beach Florida?[96]
   Ruth
   Phyllis
   Gertrude
   Edna

2. In the original business plan, John Leonard determined that he would need to acquire Pepsi Points from how many 12-packs to acquire the Harrier jet?[97]
   850,000
   1,200,000
   1,400,000
   1,650,000

3. What was the name of the advertising agency that produced the commercial?[98]
   Sterling Cooper Draper & Price
   Hamlin Hamlin & McGill
   Batton Barton Durstine & Osborn
   Wyant Wheeler Hellerman Teltow & Brown

4. John Leonard's second attorney was a highly controversial attorney named what?[99]
   Michael Avanetti
   G. Gordon Liddy
   Mark Geragos
   Denny Crane

5. John Leonard alleges that Pepsi stopped him from going on what show at the last minute?[100]
   The Oprah Winfrey Show
   60 Minutes
   The Jerry Springer Show
   The Late Show with David Letterman

6. The alleged arms dealer was only able to produce what item?[101]
   Shrimp platter
   Non-functioning helicopter
   Harrier jet owner's manual
   Speedboat

[96] *Pepsi, Where's My Jet?: The Kid from Seattle*, *supra* note 60 at 16:00.
[97] *Id.* at 24:20.
[98] *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 20, at 14:00.
[99] *Id.* at 40:00.
[100] *Pepsi, Where's My Jet?: The Bad News Bears*, *supra* note 71, at 19:00.
[101] *Id.* at 25:15.

7. What was the winning number from the Pepsi contest in the Philippines?[102]

42
140
349
789

8. The case was a question on which gameshow?[103]

Cash Cab
Jeopardy!
Who Wants to Be a Millionaire
The Hollywood Squares

[102] *Pepsi, Where's My Jet?: Landing the Plane*, *supra* note 41, at 4:30.
[103] *Id.* at 35:30.

THE FIRST AMENDMENT'S RIGHT TO REMAIN SILENT: WHY EXPRESSIVE SILENCE (THAT IS, NOT SPEAKING) IS A PROTECTED FORM OF SPEECH UNDER THE "DORMANT" FREE SPEECH CLAUSE

Jason R. Hildebrand*

ABSTRACT

While traditional forms of speech intuitively apply to the First Amendment Free Speech Clause, this article discusses the Supreme Court's consistent application of First Amendment protection to a less intuitive form of speech – not speaking. Recognizing a First Amendment right to remain silent, this article considers why expressive silence (that is, not speaking) is a form of speech protected by what could be called the "Dormant" Free Speech Clause. Doing so, this article examines five noteworthy Supreme Court opinions spanning eight decades. Importantly, this article also explains why the First Amendment right to remain silent is not a license to discriminate.

KEY WORDS: discriminate, dormant, expressive silence, First Amendment, free speech

I. INTRODUCTION

When asked which constitutional amendment protects a person's right to remain silent, those who have watched a cop show should correctly answer that it is the Fifth Amendment.[1] Though perhaps less recognizable, the *First* Amendment also affords individuals the right to remain silent.

The First Amendment's Free Speech Clause states that "Congress shall make no law . . . abridging the freedom of speech."[2] This prohibition extends to the states through the Constitution's Fourteenth Amendment.[3] While traditional forms of speech intuitively apply to the First Amendment, this article discusses the Supreme Court's consistent (and recent) application of First Amendment protection to a less intuitive form of speech—not speaking. Specifically, after quickly addressing what speech is and what freedom of speech means, this article considers why expressive silence[4] is a form of speech protected by what could be called the First Amendment's "Dormant" Free Speech Clause and examines why this protection is not a license to discriminate.

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[1] "No person … shall be compelled in any criminal case to be a witness against himself…." U.S. CONST. amend. V.

[2] U.S. CONST. amend. I.

[3] "Nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

[4] For purposes of this article, "expressive silence" is considered to be intentionally not speaking when otherwise compelled to speak.

II. WHAT IS SPEECH AND WHAT DOES FREEDOM OF SPEECH MEAN?

A. WHAT IS SPEECH?

Speech refers to expressive activity that is "intended to be communicative," and "in context would reasonably be understood . . . to be communicative."[5] The First Amendment's protections extend to individual and collective speech "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[6]

B. FREEDOM OF SPEECH IS NOT ABSOLUTE

If you are a parent with young children, you have likely said "no means no" at least once this week. In the First Amendment context, then, does "Congress shall make *no* law"[7] mean that *no* law can abridge our freedom of speech? Are we free to say whatever we want, whenever we want, wherever we want, however we want? The U.S. Supreme Court has famously answered no: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[8] In other words, "it is well understood that the right of free speech is not absolute at all times and under all circumstances."[9]

Given that the freedom of speech is not absolute, this part now briefly considers what is and what is not protected speech.

C. WHAT IS PROTECTED SPEECH?

According to the U.S. Supreme Court, freedom of speech "is the matrix, the indispensable condition, of nearly every other form of freedom."[10] However, determining what qualifies as speech, or expressive activity, protected by the First Amendment "can sometimes raise difficult questions."[11]

Free speech issues did not reach Supreme Court prominence until 1919, when in *Schenck v. U.S.*, the Court unanimously upheld the conviction of a Socialist Party member for mailing anti-war leaflets to draft-age men.[12] In *Schenck,* the Court noted that the leaflets did not receive First Amendment protection because "they create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[13] Since 1919, though, the Supreme Court has recognized numerous forms of expressive activity as protected speech.

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[5] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984).
[6] Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).
[7] U.S. CONST. amend. I (emphasis added).
[8] Schenck v. United States, 249 U.S. 47, 52 (1919).
[9] Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).
[10] Palko v. Connecticut, 302 U.S. 319, 27 (1937).
[11] 303 Creative LLC v. Elenis, 600 U.S. ___, 21-22 (2023).
[12] Schenck v. United States, 249 U.S. 47, 53 (1919).
[13] *Id*. at 52.

A non-exhaustive list of protected speech examples includes pure speech,[14] wearing black armbands to school to protest a war,[15] using certain offensive words and phrases to convey a political message, [16] contributing money to political campaigns, [17] truthfully advertising commercial products and professional services,[18] receiving information and ideas,[19] engaging in symbolic speech such as desecrating the American flag[20] (a form of speech that the Court considers to be "a primitive but effective way of communicating ideas"[21]), certain false statements,[22] rhetorical hyperbole,[23] and designing custom websites.[24]

D. WHAT IS NOT PROTECTED SPEECH?

1. PROHIBITED SPEECH

The Supreme Court has recognized "certain well-defined and narrowly limited"[25] categories of speech that the government may prohibit because of their harmful content, that is, speech that is not protected by the First Amendment.[26] Explaining the appropriateness of the prohibition, the Court has stated that "[i]t has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[27] At least

[14] *E.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (recognizing that the Supreme Court has repeatedly held that pure speech is "entitled to comprehensive protection under the First Amendment").
[15] *E.g.*, *id.*
[16] *E.g.*, Cohen v. California, 403 U.S. 15 (1971).
[17] *E.g.*, Buckley v. Valeo, 424 U.S. 1 (1976).
[18] *E.g.*, Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748 (1976).
[19] *E.g.*, Board of Education v. Pico, 457 U.S. 853 (1982) ("[W]e have held that in a variety of contexts, the Constitution protects the right to receive information and ideas…. This right is an inherent corollary of the right[] of free speech … explicitly guaranteed by the Constitution").
[20] *E.g.*, Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310 (1990).
[21] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).
[22] *E.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964); United States v. Alvarez, 567 U.S. 709 (2012) (plurality opinion invalidating the Stolen Valor Act, a federal law prohibiting false statement about receiving military decorations or medals). This form of protected speech was even cited in a recent indictment against former President Donald Trump: "The Defendant had a right, like every American, to speak publicly about the election and even to claim, falsely, that there had been outcome-determinative fraud during the election and that he had won." Indictment, U.S. v. Donald J. Trump, No. 1:23-cr-00257-TSC (Dist. Ct. D.C.).
[23] *E.g.*, Greenbelt Coop. Publishing Assn. v. Bresler, 398 U.S. 6, 14 (1970).
[24] *E.g.*, 303 Creative LLC v. Elenis, 600 U.S. ___ (2023).
[25] Chaplinsky, 315 U.S. at 571.
[26] R.A.V. v. St. Paul, 505 U.S. 377, 382-86 (1992).
[27] Chaplinsky, 315 U.S. at 572.

eight categories have been so recognized: incitement[28]; obscenity[29]; speech integral to criminal conduct[30]; defamation[31]; fraud[32]; fighting words[33]; true threats[34]; and child pornography.[35]

Although some speech is prohibited and therefore entitled to no Constitutional protection, other speech, while allowed, is nonetheless abridged through restrictions. Such permitted restrictions can be either content-neutral or content-based.

2. RESTRICTED SPEECH

Lawful restrictions or abridgements of speech generally hinge on the target of the restriction (that is, whether the *content* of the speech is targeted) and the government's interest in invoking the restriction.

a. CONTENT-NEUTRAL RESTRICTIONS

Content-neutral restrictions "are unrelated to the content of speech"[36] and generally control the time, place, and manner of speech. In most cases, content-neutral restrictions "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue."[37]

A statute that is a content-neutral speech restriction is subject to intermediate scrutiny.[38] "In order to survive intermediate scrutiny, a law must be narrowly tailored to serve a significant

[28] *E.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) ("[T]he constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.")

[29] *E.g.*, Roth v. United States, 354 U.S. 476 (1957) (framing the test for obscenity as: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Also noting that "this Court has always assumed that obscenity is not protected by the freedom[] of speech…. [I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."); Miller v. California, 413 U.S. 15 (1973) (recognizing obscenity as appealing to the prurient interest in sex and lacking serious literary, artistic, political, or scientific value); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (prohibiting students from making an obscene speech at a school-sponsored event).

[30] *E.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); United States v. Williams, 553 U.S. 285 (2008); United States v. Alvarez, 567 U.S. 709 (2012); Morse v. Frederick, 551 U.S. 393 (2007) (a/k/a the "Bong Hits 4 Jesus" case) (prohibiting students from advocating illegal drug use at a school-sponsored event).

[31] *E.g.*, Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); *but see* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that statements about public officials enjoy heightened constitutional protection from defamation liability; i.e., public officials must show that a defamatory statement was made with actual malice in order to win).

[32] *E.g.*, Donaldson v. Read Magazine, Inc., 333 U.S. 178 (1948) (rejecting a First Amendment challenge to federal laws prohibiting mail fraud).

[33] *E.g.*, Cohen v. California, 403 U.S. 15, 20 (1971) (defining fighting words as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction").

[34] *E.g.*, Virginia v. Black, 538 U.S. 343, 359 (2003) (true threats are "serious expression[s]" conveying that a speaker means "to commit an act of unlawful violence").

[35] *E.g.*, New York v. Ferber, 458 U.S. 747 (1982).

[36] Turner Broad. Sys. v. FCC, 512 U.S. 622, 662 (1994).

[37] *Id.*

[38] *E.g.*, Packingham v. North Carolina, 582 U.S. 98, 105 (2017).

government interest…. In other words, the law must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"[39]

For example, in *Clark v Community for Creative Non-Violence*,[40] the Supreme Court upheld a content-neutral National Park Service regulation prohibiting camping in certain national parks, noting that "the prohibition on camping, and on sleeping specifically, is content-neutral and is not being applied because of disagreement with the message presented."[41] The Court found that "the regulation narrowly focuses on the Government's substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence."[42]

The Court, however, has pointed out that: "Deciding whether a particular regulation is content-based or content-neutral is not always a simple task. We have said that the 'principle inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'"[43]

b. CONTENT-BASED RESTRICTIONS

The other form of speech restriction is content-based regulations, "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed…."[44] Though "presumptively unconstitutional,"[45] these laws can nonetheless survive if they pass strict scrutiny, where the government must show that the law is the "least restrictive means" of advancing a "compelling" government interest.[46]

In *Reed v Town of Gilbert*,[47] the Court addressed whether Gilbert, Arizona's comprehensive code governing the manner in which people may display outdoor signs was a content-based regulation, and if so, whether it survived strict scrutiny.[48] According to the Court, Gilbert's sign code:

> [I]dentifies various categories of signs based on the type of information they convey, then subjects each category to different restrictions. One of the categories is 'Temporary Directional Signs Relating to a Qualifying Event,' loosely defined as signs directing the public to a meeting of a nonprofit group . . . . The Code imposes more stringent

[39] *Id*. at 105-06 (quoting McCullen v. Coakley, 573 U.S. 464, 486 (2014)).
[40] 468 U.S. 288 (1984).
[41] *Id*. at 295. In *Clark*, Community for Creative Non-Violence (CCNV), a Washington, D.C.-based charity that provides services to the poor and homeless, was issued a renewable permit from the National Park Service to conduct a wintertime demonstration in Lafayette Park and the Mall for the purpose of demonstrating the plight of the homeless. However, the Park Service specifically denied CCNV's request to sleep in symbolic tents that would be erected as part of the demonstration, relying on the regulation prohibiting camping.
[42] *Id*. at 296.
[43] Turner, 512 U.S. at 642 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).
[44] *Id*. at 643.
[45] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).
[46] Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126 (1989).
[47] 576 U.S. 155 (2015).
[48] *Id*. at 159.

> restrictions on these signs than it does on signs conveying other messages.[49]

The Court held that the code was a content-based speech regulation that could not survive strict scrutiny.[50] Explaining its holding, the Court noted that "the restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign . . . . On its face, the Sign Code is a content-based regulation of speech."[51] After extensive analysis, the Court determined that "the Town has not met its burden to prove that the Sign Code is narrowly tailored to further a compelling government interest."[52]

Having established that the First Amendment's directive that Congress shall make *no* law abridging the freedom of speech is not actually absolute (it protects certain speech while abridging other speech through prohibition or restriction), this article now addresses whether expressive silence is a form of protected speech under the First Amendment.

III. IS NOT SPEAKING PROTECTED SPEECH?

A. THE "DORMANT" FREE SPEECH CLAUSE

Chief Justice John Marshall "gave the Dormant Commerce Clause doctrine its name"[53] in *Willson v. Black-Bird Creek Marsh Co.*[54]

> In *Black-Bird Creek*, Delaware authorized the Black-Bird Creek Marsh Company to construct a dam across a navigable creek in order to enhance the value of the adjoining property and to improve the health of the nearby inhabitants. The owner of a nearly 100-ton sloop, who had been sued for damaging the dam, challenged the right of the state to allow the dam to be built. Marshall framed the claim, stating there were no federal laws restricting the building of the dam, and thus the only constitutional restriction would flow from that, not that implicit in the commerce clause. "The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states . . . ."
>
> Without explanation, he concluded that there was no implicit dormant commerce limit in the case, establishing "[the Court did] not think that the act empowering the Black-Bird Creek Marsh Company to place a dam across the creek, can under all the circumstance of the case, be

[49] *Id.*
[50] *Id.*
[51] *Id.* at 164.
[52] *Id.* at 172.
[53] James M. McGoldrick, Jr., *The Dormant Commerce Clause: The Origin Story and the "Considerable Uncertainties" – 1824-1945*, 52 CREIGHTON L. REV. 243, 247 (2019).
[54] 27 U.S. 245 (1829).

> considered as repugnant to the power *to regulate commerce in its dormant state* . . . ."[55]

Although "the label 'dormant' has been criticized as misleading"[56] in the Commerce Clause context, it invites a more traditional application in the Free Speech Clause context. "Dormant" is defined as "marked by a suspension of activity: as … temporarily devoid of external activity . . . [,] temporarily in abeyance yet capable of being activated . . . [,] having biological activity suspended."[57] The term "connotes something with the potential for action, yet currently in repose."[58] It follows that expressive silence, or intentionally not speaking, can be a form of "dormant" speech.

For at least eighty years, the Supreme Court has consistently recognized that expressive silence can be a protected form of speech under the First Amendment, giving rise to what could be called the "Dormant" Free Speech Clause. For example, the Supreme Court has noted that: "The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas . . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect."[59] Also, more sharply, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[60]

Simply put, "[t]he First Amendment prohibits states from abridging the freedom of speech . . . . And the freedom to speak necessarily guarantees the right to remain silent."[61]

This part looks next at five Supreme Court opinions (four historical and one recent) affirming the right to remain silent under the First Amendment's "Dormant" Free Speech Clause.

B. HISTORICALLY RECOGNIZED

Since at least 1943, the U.S. Supreme Court consistently has recognized that expressive silence is a protected form of speech under the First Amendment's "Dormant" Free Speech Clause. Four historical examples stand out due to their collective breadth of expressive activity: not saluting the flag[62]; not including a state motto on a license plate[63]; not including a third party's leaflet in billing envelopes[64]; and not including a particular group in a parade.[65] A brief summary of each form of expressive silence follows.

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[55] McGoldrick, Jr., *supra* note 53, at 247-48 (quoting Black-Bird Creek, 27 U.S. at 252 (emphasis added)).
[56] Martin H. Redish and Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L. J. 569, 570 (1987).
[57] Dormant, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993).
[58] Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 425 n.1 (1982).
[59] Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 559 (1985) (quoting Estate of Hemingway v. Random House, 23 N.Y. 2d 341, 348 (1968)) (emphasis in original).
[60] W. Va. State Bd. of Educ. v. Barnette, 319, U.S. 624, 642 (1943).
[61] 303 Creative LLC v. Elenis, 6 F.4th 1160, 1191 (10th Cir. 2021) (Tymkovich, J. dissenting).
[62] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
[63] Wooley v. Maynard, 430 U.S. 705 (1977).
[64] Pacific Gas & Electric Co. v. Pub. Utils. Comm'n of California, 475 U.S. 1 (1986).
[65] Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557 (1995).

1. NOT SALUTING THE FLAG

In *West Virginia Board of Education v Barnette*,[66] the Court addressed whether enforcing a West Virginia State Board of Education regulation requiring children in the public schools to salute the American flag violated the First Amendment. Such a salute contradicted the religious beliefs of Jehovah's Witnesses who "consider that the flag is an 'image' within [the Bible's] command"[67] to "not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them."[68] For this reason, Jehovah's Witnesses chose to not salute the flag in public school (and presumably elsewhere), a form of expressive silence. As noted by the Court, "children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency."[69]

Striking down the regulation in favor of a First Amendment right to remain silent, the Court recognized that "[h]ere . . . we are dealing with a compulsion of students to declare a belief . . . and an attitude of mind."[70] Continuing, it stated:

> It is now commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence . . . . To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind . . . . [This] transcends constitutional limitations . . . and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.[71]

Regarding the perils of compelled affirmation of belief, the Court starkly noted that:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men . . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. It

[66] 319 U.S. 624 (1943).
[67] *Id*. at 629.
[68] *Exodus* 20:4-5.
[69] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943).
[70] *Id*. at 631, 634.
[71] *Id*. at 631, 633-34, 642.

> seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings . . . .
> Words uttered under coercion are proof of loyalty to nothing but self-interest . . . . These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.[72]

Summarizing the First Amendment's right to remain silent, Justice William Murphy stated in his concurrence that: "[t]he right to freedom of thought . . . as guaranteed by the Constitution against State action includes both the right to speak freely *and the right to refrain from speaking at all*, except insofar as essential operations of government may require it for the preservation of an orderly society."[73]

Foreshadowing battles to come, the Court also took the opportunity to discuss why deciding this case was easier than if the facts involved conflicting individual rights: "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin."[74]

2. NOT INCLUDING A STATE MOTTO ON A LICENSE PLATE

In *Wooley v Maynard*,[75] the Court addressed "whether the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the motto 'Live Free or Die' on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs."[76] Like the students and their families in *Barnette*: "George Maynard and his wife Maxine are followers of the Jehovah's Witnesses faith. The Maynards consider the New Hampshire State motto to be repugnant to their moral, religious, and political beliefs, and therefore assert it objectionable to disseminate this message by displaying it on their automobiles."[77] Pursuant to these beliefs, the Maynards, as a form of expressive silence, began covering up the motto on their license plates.[78]

Holding the New Hampshire statute to be unconstitutional, the Court stated: "We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property . . . for the . . . purpose that it be observed and read by the public. We hold that the State may not do so."[79]

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[72] *Id*. at 640-42, 644.
[73] *Id*. at 645 (Murphy, J. concurring) (emphasis added). Justice Murphy went on to state that compulsion to give evidence in court would be an example of compelled speech being essential to the operation of government.
[74] *Id*. at 630-31.
[75] Wooley v. Maynard, 430 U.S. 705 (1977).
[76] *Id*. at 706-07.
[77] *Id*. at 707.
[78] *Id*. at 707-08.
[79] *Id*.

Once again recognizing the First Amendment's right to remain silent, the Court affirmed that the right to speak freely and the right to refrain from speaking at all, or expressive silence, are "complimentary components of the broader concept of 'individual freedom of mind'"[80] guaranteed by the First Amendment.

Drawing on the Court's analysis in *Barnette*, the Court continued:

> Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree. Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life – indeed constantly while his automobile is in public view – to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.' . . . The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.[81]

However, simply "implicating First Amendment protections"[82] does not end the inquiry. To determine whether an individual's First Amendment right to remain silent has been infringed, it also must be determined whether the State's countervailing interest is sufficiently compelling to justify the required act. In *Maynard*, New Hampshire argued that it required individuals to display the state motto on their license plates to advance two interests: (1) facilitate the identification of passenger vehicles; and (2) promote appreciation of history, individualism, and state pride.[83] Rejecting the State's argument, the Court noted that: "Even were we to credit the State's reasons and 'even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'"[84]

Summarizing the protections of the "Dormant" Free Speech Clause, the Court concluded by stating that "[w]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[85]

3. NOT INCLUDING A THIRD PARTY'S LEAFLET IN BILLING ENVELOPES

In *Pacific Gas & Electric Co v Public Utilities Commission of California*,[86] the

[80] *Id*. at 714 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).
[81] *Id*. at 715 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
[82] *Id*. at 715.
[83] *Id*. at 715-16.
[84] *Id*. at 716-17 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).
[85] *Id*. at 717.
[86] Pacific Gas & Electric Co v. Pub. Utils. Comm'n. of California, 475 U.S. 1 (1986).

Court addressed "whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees."[87] Specifically, the Commission ordered Pacific Gas & Electric to include materials from the utility ratemaking advocacy group Toward Utility Rate Normalization (TURN) four times a year for two years in its monthly billing envelopes, noting that TURN represents the interests of a significant group of residential utility customers and that these ratepayers would benefit from TURN's communications.[88] Leaning on its First Amendment right to remain silent, the utility company argued that it had "a First Amendment right not to help spread a message with which it disagrees,"[89] and sought to not include the leaflet in their envelopes (its own form of expressive silence).

Speaking for a plurality of the Court, Justice Lewis Powell affirmed the protection of the "Dormant" Free Speech Clause by ruling in favor of the utility company and observing that "[c]ompelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set."[90] In addition, the plurality recognized that: "'The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas . . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.'"[91]

Noting that compelled speech can be antithetical to free discussion fostered by the First Amendment, the opinion stated that: "For corporations as for individuals, the choice to speak includes within it the choice of what not to say . . . . The danger that appellant will be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude . . . ."[92]

The Court's plurality concluded with the following:

> [T]he Commission's order impermissibly burdens [the utility company]'s First Amendment rights because it forces [it] to associate with the views of other speakers, and because it selects the other speakers on the basis of their viewpoints. The order is not a narrowly tailored means of furthering a compelling state interest, and it is not a valid time, place, or manner regulation.[93]

[87] *Id*. at 4 (Powell, J. plurality).
[88] *Id*. at 5.
[89] *Id*. at 7.
[90] *Id*. at 9.
[91] *Id*. at 11 (emphasis in original) (quoting Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 524, 539 (1985).
[92] *Id*. at 16.
[93] *Id*. at 20-21.

4. NOT INCLUDING A PARTICULAR GROUP IN A PARADE

In *Hurley v Irish-American Gay, Lesbian & Bisexual Group of Boston*,[94] the Court addressed "whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey."[95] The group was GLIB (the Irish-American Gay, Lesbian and Bisexual Group of Boston) and the message it sought to impart at Boston's St. Patrick's Day-Evacuation Day Parade was "to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day Parade."[96] Massachusetts' public accommodation law prohibited "any distinction, discrimination or restriction on account of … sexual orientation … relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement."[97] Notwithstanding, the South Boston Allied War Veterans Council, a private group authorized by the City of Boston to organize and conduct the parade, refused to admit GLIB to the parade "because of its values and its message, i.e., its members' sexual orientation,"[98] another form of expressive silence. The Council's action prompted the group to file suit, alleging that the denial of their application to march in the parade violated Massachusetts' public accommodation law.[99]

The Court held that Massachusetts' public accommodation law, which required the Veteran's Council to admit a parade contingent expressing a message not of the Council's own choosing, violated the Council's First Amendment free speech rights.[100] In reaching this conclusion, the Court quickly acknowledged that parades are a form of expression.[101] The Court then affirmed the "Dormant" Free Speech Clause and the First Amendment right to remain silent when it stated: "'Since *all* speech inherently involves choices of what to say and what to leave unsaid,' . . . one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"[102]

The Court highlighted a crucial factor in its decision and in the First Amendment right to remain silent when it pointed out that the Massachusetts law had been applied in a "peculiar" way.[103] Namely, enforcement did not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. In fact, no individual member of GLIB claimed to have been excluded from parading as a member of any group that the Council approved to march; the Counsel had an all-comers policy with respect to individual marchers in the parade. Instead, the disagreement regarded the admission of GLIB as its own parade unit carrying its own banner.[104] "Since every participating unit affects the message

[94] Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995).
[95] *Id*. at 559.
[96] *Id*. at 561.
[97] *Id.*
[98] *Id*. at 562.
[99] *Id*. at 561.
[100] *Id*. at 559.
[101] *Id*. at 568.
[102] *Id.* at 573 (quoting Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal., 457 U.S. 1, 11 (1986) (plurality opinion) (emphasis in original).
[103] *Id*. at 572.
[104] *Id*.

conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade."[105]

As noted by the Court:

> Although the state courts spoke of the parade as a place of public accommodation, . . . , once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation. Under this approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.[106]

The Court summarized the First Amendment right to remain silent by noting that "it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control,"[107] a principle the Court called the "autonomy to control one's own speech."[108] Affirming once again the right to remain silent, the Court noted that "the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another."[109] Thus, "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."[110]

The Court concluded by observing that the very idea that a speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, "grates on the First Amendment."[111] Continuing: "The Speech Clause has no more certain antithesis. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one . . . ."[112]

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[105] *Id*. at 572-73.
[106] *Id*.
[107] *Id*. at 575.
[108] *Id*. at 574.
[109] *Id*.
[110] *Id*. at 575-76 (citations omitted).
[111] *Id*. at 579.
[112] *Id*.

C. RECENTLY RECOGNIZED

On June 30, 2023, the U.S. Supreme Court recognized a person's right to remain silent under the "Dormant" Free Speech Clause in *303 Creative LLC v Elenis*.[113] In this case, the Court addressed whether applying Colorado's public accommodation law to compel an artist to speak violates the First Amendment.[114]

Lorie Smith, a Colorado resident and a devout Christian who owns 303 Creative LLC, which offers website and graphic design, marketing advice, and social media management services. Ms. Smith decided to expand her offerings to include services for couples seeking websites for their weddings.[115] According to Ms. Smith: "[A]ll of the text and graphics on these websites will be original, customized, and tailored creations . . . . The websites will be expressive in nature, designed to communicate a particular message."[116] Even though Ms. Smith provides her website and graphic services to customers regardless of their race, creed, sex, or sexual orientation, as a form of expressive silence "she has never created expressions that contradict her own views for anyone – whether that means generating works that encourage violence, demean another person, or defy her religious beliefs."[117] For Ms. Smith, these religious beliefs, though perhaps not "popular in all quarters,"[118] include the sincerely held belief "that marriage should be reserved to unions between one man and one woman."[119]

The so-called "Accommodation Clause"[120] section of Colorado's Ant-Discrimination Act (CADA) prohibits a person from denying to an individual or group "because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation."[121] CADA defines a "place of public accommodation" as "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public . . . ."[122] Like the students and parents in *Barnette*, severe consequences followed failing to comply. For Ms. Smith, noncompliance meant the possibility of fines, cease-and-desist orders, and other affirmative actions, which could include mandatory educational programs and submitting ongoing compliance reports to Colorado officials.[123]

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[113] 303 Creative LLC et al. v. Elenis et al., 600 U.S. __ (2023).
[114] *Id*. at 1.
[115] *Id*. at 6.
[116] *Id* (quotations omitted).
[117] *Id*.
[118] *Id*.
[119] *Id*.
[120] *Id*. at 7.
[121] Colo. Rev. Stat. §24-34-601(2)(a) (2022).
[122] Colo. Rev. Stat. §24-34-601(1) (2022). The District Court acknowledged that "[a]s with the Massachusetts public accommodations law in *Hurley*, CADA has the effect of declaring the sponsors' speech itself to be the public accommodation. By compelling [Ms. Smith and 303 Creative] to serve customers they would otherwise refuse, [they] are forced to create websites – and thus, speech – that they would otherwise refuse." (303 Creative LLC v. Elenis, 6 F.4th 1160, 1177 (10th Cir. 2021)).
[123] 303 Creative LLC v. Elenis, 600 U.S. ___, 7 (2023).

In an effort to prevent Colorado from applying CADA's Accommodation Clause to "forc[e] her to create wedding websites celebrating marriages that defy her beliefs,"[124] Ms. Smith filed a pre-enforcement challenge in federal district court seeking an injunction against the State. Ultimately, the district court and the Tenth Circuit ruled against Ms. Smith. The Supreme Court granted certiorari "to review the Tenth Circuit's disposition."[125]

The Court recognized that "the wedding websites Ms. Smith seeks to create qualify as pure speech."[126] Hearkening back to the dual-rights conflict foreshadowed in *Barnette*,[127] the Court also noted that the wedding websites involved Ms. Smith's *own* speech[128]:

> As the parties have described it, Ms. Smith intends to vet each prospective project to determine whether it is one she is willing to endorse . . . . She will consult with clients to discuss their unique stories as source material . . . . And she will produce a final story for each couple using her own words and her own original artwork. Of course, Ms. Smith's speech may combine with the couple's in the final product. But for purposes of the First Amendment that changes nothing. An individual does not forfeit constitutional protection simply by combining multifarious voices in a single communication.[129]

Affirming the First Amendment right to remain silent, the Court observed that "[t]he framers designed the Free Speech Clause of the First Amendment to protect the 'freedom to think as you will and to speak as you think.'"[130] Continuing, it noted that:

> Generally . . . the government may not compel a person to speak its own preferred messages . . . . Nor does it matter whether the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include . . . . All that offends the First Amendment just the same.[131]

Alluding to one of the crucial deciding factors from *Hurley*, that is, maintaining an all-comers approach,[132] the Court noted that: "The parties agree that Ms. Smith will gladly create custom graphics and websites for gay, lesbian, or bisexual persons so long as the custom graphics and websites do not violate her beliefs. That is a condition . . . Ms. Smith applies to all customers."[133]

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[124] *Id*. at 6.
[125] *Id*. at 8.
[126] *Id*. at 10.
[127] *Supra* Part III.B.1.
[128] 303 Creative LLC v. Elenis, 600 U.S. ___, 10 (2023).
[129] *Id*. at 10-11 (citations omitted).
[130] *Id*. (quoting Boy Scouts of America v. Dale, 530 U. S. at 660-61).
[131] *Id*. at 10.
[132] *Supra* Part III.B.4.
[133] 303 Creative LLC v. Elenis, 600 U.S. ___, 15 (2023) (citations omitted).

While Ms. Smith sought to engage in her own protected First Amendment speech, Colorado, through CADA's Accommodation Clause, concurrently sought to alter her speech and compel a particular content and viewpoint of speech that she did not wish to engage in. In fact, as noted by the Tenth Circuit, "eliminating . . . ideas is CADA's very purpose."[134] Rejecting this content-based purpose, the Supreme Court stated that: "Colorado seeks to put Ms. Smith to a . . . choice: If she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs …. Under our precedents, that 'is enough' … to represent an impermissible abridgment of the First Amendment's right to speak freely."[135] Such choice "is something the First Amendment does not tolerate."[136]

Holding that CADA's application to Ms. Smith's expressive silence denies the First Amendment's promise for all persons "to think and speak as they wish, not as the government demands,"[137] the Court recognized: "that no public accommodations law is immune from the demands of the Constitution. In particular, this Court has held, public accommodations statutes can sweep too broadly when deployed to compel speech . . . . When a state public accommodations law and the Constitution collide, there can be no question which must prevail."[138] As determined by the Court, Colorado's law, as applied, swept too broadly.

The district court stated that: "Compelled speech may be found where the complaining speaker's own message was affected by the speech it was forced to accommodate. So here, the result of the Accommodation Clause is that 303 Creative is forced to create custom websites they otherwise would not."[139] If citizens were deprived of the First Amendment right to remain silent, which is "among our most cherished liberties,"[140] the Court noted that the government would be allowed:

> [T]o force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty. The government could require an unwilling Muslim movie director to make a film with a Zionist message, or an atheist muralist to accept a commission celebrating Evangelical zeal, so long as they would make films or murals for other members of the public with different messages . . . . Equally, the government could force a male website designer married to another man to design websites for an organization that advocates against same-sex marriage . . . . Countless other creative professionals, too, could be forced to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so . . . . As our precedents recognize, the First Amendment tolerates none of that.[141]

[134] 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021).
[135] *303 Creative*, 600 U.S. at 11 (quoting *Hurley*, 515 U.S. at 574).
[136] *Id*. at 16.
[137] *Id*. at 19.
[138] *Id*. at 13.
[139] 303 Creative LLC v. Elenis, 6 F.4th at 1178.
[140] 303 Creative LLC v. Elenis, 600 U.S. ___, 19 (2023).
[141] *Id*. at 12 (citations omitted).

Though posed as hypotheticals by the Court, a similar request actually was made in Detroit, Michigan in 2020. April Anderson, an openly gay woman and renowned pastry chef who has baked for Oprah Winfrey and appeared on NBC's Today show, owns the bakery *Good Cakes and Bakes* in Detroit.[142] In July 2020, Ms. Anderson received an order for a red velvet cake with the message: "I am ordering this cake to celebrate and have PRIDE in true Christian marriage. I'd like you to write on the cake, in icing, 'Homosexual acts are gravely evil. (Catholic Catechism 2357)."[143] Not surprisingly, the request was believed to be "strategic" and "targeted at metro Detroit's most well-known lesbian baker."[144] Consistent with the First Amendment right to remain silent, Jay Kaplan, staff attorney for the LGBTQ Project, ACLU of Michigan, opined that Ms. Anderson had the right to not inscribe the message on the cake: "When you are asked to do a particular message, you might be crossing the line of what could be compelled speech, especially if it's offensive . . . . [The business] provide[s] cakes, but we are not going to put that kind of message on the cake."[145]

Similarly in 2018, the Supreme Court was presented with Masterpiece Cakeshop's decision to not create a custom cake for a same-sex couple's wedding reception.[146] Masterpiece Cakeshop was a Lakewood, Colorado bakery owned by expert baker Jack Phillips.[147] Mr. Phillips told the same-sex couple that he would not make the custom cake because of his religious opposition to same-sex marriages.[148] "To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs."[149] The couple filed a charge with the Colorado Civil Rights Commission alleging that the Cakeshop's decision violated the Colorado Anti-Discrimination Act.[150] The Commission determined the shop's actions violated the Act, and that ruling was affirmed by the Colorado state courts.[151] The U.S. Supreme Court reviewed the decisions to determine "whether the Commission's order violated the Constitution."[152] The Court found that the Commission acted with hostility toward Mr. Phillips and that the Commission's consideration of the case "was inconsistent with the State's obligation of religious neutrality."[153] While mostly focusing on the Commission's impermissible hostility, the Court also observed that creating a wedding cake can be an exercise of protected speech.[154] It follows, then, that a baker deciding to not create a particular wedding cake can be an exercise of free speech through expressive silence. Further, that compelling a baker to bake a particular cake can betray the baker's convictions in a way that violates the First Amendment.

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[142] Susan Selasky, *Lesbian Baker in Detroit Got Homophobic Cake Order: Why She Made it Anyway*, DETROIT FREE PRESS (Aug. 13, 2020), https://www.freep.com/story/news/local/michigan/detroit/2020/08/13/detroit-baker-april-anderson-homophobic-cake-david-gordon/3343464001/od Cakes and Bakes in Detroit gets homophobic order (freep.com).
[143] *Id*.
[144] *Id*.
[145] *Id*.
[146] Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018).
[147] *Id*. at 1724.
[148] *Id*. at 1723.
[149] *Id*. at 1724.
[150] *Id*. at 1723.
[151] *Id*.
[152] *Id*.
[153] *Id*.
[154] *Id*.

Simply put: "When speech is compelled . . . additional damage is done . . . [since] individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning."[155] Quite tellingly, the Supreme Court has never allowed compelled speech under strict scrutiny.[156] In doing so, the Court has definitively affirmed the First Amendment's right to remain silent under the "Dormant" Free Speech Clause.

IV. IS THE FIRST AMENDMENT'S RIGHT TO REMAIN SILENT A LICENSE TO DISCRIMINATE?

In light of the First Amendment's well-established right to remain silent, an important question remains: Is the First Amendment right to remain silent a license to discriminate; that is, does it similarly convey a "constitutional right to refuse to serve members of a protected class?"[157] Does it pave the way for what Justice Sotomayor calls "reactionary exclusion" that would allow a business to "hang a sign that says, 'No Blacks, No Muslims, No Gays?'"[158] For example, if *Heart of Atlanta Motel, Inc. v United States*[159] was revisited post-*303 Creative*, could the Court rely on the "Dormant" Free Speech Clause and the First Amendment right to remain silent to allow a hotel to exclude patrons based on race (or any other protected class)? Very simply, no.

In the early 1960s, The Heart of Atlanta Motel, Inc. owned a 216-room motel in Atlanta, Georgia, and despicably refused to rent rooms to Black customers because of their race or color.[160] This practice continued despite the passage of Title II of the Civil Rights Act of 1964.[161] Essentially a federal public accommodations law, Title II entitled "all persons . . . to the full and equal enjoyment of the . . . services . . . of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."[162] In an effort to perpetuate its discriminatory practices, the motel filed a declaratory judgment action attacking Title II's constitutionality.[163] While the motel unsuccessfully challenged the Act's constitutionality under the Commerce Clause[164] and the Fifth Amendment,[165] it is not much of a mental leap to wonder, in light of *303 Creative* and the other "Dormant" Free Speech Clause cases discussed above, whether a First Amendment right to remain silent argument could apply, considering the motel claimed that it was "deprived of the right to . . . operate its business as it wishes."[166] Rightfully said, "[t]he First Amendment does not go so far."[167]

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[155] Janus v. ACFSME, 585 U.S. __, 9 (2018).
[156] On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit Brief for The Petitioners, 303 Creative LLC v. Elenis, No. 21-476 (Supreme Court of the United States).
[157] 303 Creative LLC v. Elenis, 600 U.S. ___, 1 (2023) (Sotomayor, J. dissenting).
[158] *Id*. at 2, 4.
[159] 379 U.S. 241 (1964).
[160] *Id*. at 243, 249.
[161] *Id*. at 244.
[162] *Id*. at 247.
[163] *Id*.
[164] U.S. CONST. Art. 1, § 8, cl. 3 (giving Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes").
[165] "No person shall be … deprived of life, liberty, or property, without due process of law…" U.S. CONST. amend. V.
[166] Heart of Atlanta, 379 U.S. at 241, 244.
[167] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 643 (1943) (Black, J. and Douglas, J. concurring).

A. SPEECH V. CONDUCT

"No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do."[168] A fundamental inquiry, consistently seen across *Barnette*, *Maynard*, *Pacific Gas & Electric Co.*, *Hurley*, and *303 Creative*, is whether speech or conduct in implicated. This inquiry ultimately distinguishes those cases from *Heart of Atlanta*. Courts have long drawn a line between speech and conduct with respect to First Amendment protection. Regarding conduct, there are innumerable services that no one could argue implicate the First Amendment.[169] "The courts are well equipped to distinguish protected speech from unprotected conduct, as they must do in every free-speech case."[170]

In *303 Creative*, it was noteworthy that Ms. Smith did "not seek to sell an ordinary commercial good but intend[ed] to create customized and tailored speech for each couple."[171] Colorado even stipulated that "each website 303 Creative designs and creates is an original, customized creation for each client . . . [and] will be expressive in nature."[172] As noted above, "the parties agree[d] that Ms. Smith will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites do not violate her beliefs."[173] In fact, Ms. Smith would sell a website celebrating an opposite-sex wedding to anyone, including a gay couple who wished to purchase an opposite-sex wedding website for a friend.[174] Importantly, Ms. Smith's decisions are always based on the message, not the person. They are not status or conduct-based decisions, but speech-based decisions, which brings those decisions within the protection of the First Amendment right to remain silent.[175]

The expressive silence, that is, the speech component of Ms. Smith's websites in *303 Creative* and the expressive silence of not saluting the flag in *Barnette*, of not including a state motto in *Maynard*, of not including a third party's leaflet in billing envelopes, and of not including a particular group in a parade, is what distinguishes these cases from the discriminatory conduct in *Heart of Atlanta* and provides assurance that the First Amendment right to remain silent is not a license to discriminate. Simply servicing a customer in the context of providing an ordinary commercial good is not speech; there is no expressive activity that can be reasonably understood to be communicative.[176] In these circumstances, compelled speech does not occur; as seen in the above cases, compelled speech occurs when a person is required to voice or endorse another's message. Capturing this distinction, the Court in *303 Creative* observed that "[through CADA] Colorado does not just seek to ensure the sale of goods or services on equal terms. It seeks to use its law to compel an individual to create speech [Ms. Smith] does not believe."[177]

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[168] *Id*.
[169] 303 Creative LLC v. Elenis, 600 U.S. ___, 13 (2023).
[170] On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit Brief for The Petitioners, 303 Creative LLC v. Elenis, No. 21-476 (Supreme Court of the United States).
[171] *303 Creative*, 600 U.S. at 14.
[172] *Id*.
[173] *Id*. at 15 (quotations omitted).
[174] *Id* at 36 (Sotomayor, J. dissenting).
[175] *Id*. at 15.
[176] *See* Clark v. Community for Creative Non-violence, 468 U.S. 288, 294 (1984).
[177] 303 Creative LLC v. Elenis, 600 U.S. ___, 6 (2023).

B. CONDUCT WITHOUT SPEECH

To further draw out the importance of the distinction between speech and conduct, it is interesting to reimagine *303 Creative* under different facts that remove the speech component.

For example, what if Ms. Smith sold only computers instead of designed custom websites and chose to not sell a computer to an engaged or married gay couple?[178] Because this characterizes simply "sell[ing] an ordinary commercial good"[179] and lacks any speech component, Ms. Smith likely would not prevail if her actions were challenged under a standard public accommodations law.

Alternatively, what if Ms. Smith sold domain names instead of custom websites and refused to service a customer who requested the domain: gaymarriageislegit.com? Although the Court recognized that "determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions,"[180] it is likely that a court would determine that there was no expressive nature or design element to the service provided (that is, simply securing the domain name) and therefore that Ms. Smith could not turn away the customer based on her First Amendment right to remain silent.

What if Ms. Smith offered wedding website templates that couples customized after the template was downloaded, but would not sell a template to an engaged gay couple for their wedding? While perhaps even a closer call, this likely would lack the necessary expressive activity by Ms. Smith to be protected by the First Amendment. Significantly, the templates would not be "original, customized . . . tailored creations . . . designed to communicate a particular message,"[181] nor would providing templates result in Ms. Smith "vet[ting] each prospective project" or "consult[ing] with clients to discuss their unique stories as source material" for a "final story for each couple using her own words."[182] All were relied on by the Court in *303 Creative* to ascribe First Amendment Free Speech protection.

While reinforcing the legal distinction between speech and conduct, these examples also demonstrate the critical importance of public accommodation laws, which was recognized by the Court in *303 Creative*:

> [W]e do not question the vital role public accommodations laws play in realizing the civil rights of all Americans. This Court has recognized that governments in this country have a compelling interest in eliminating discrimination in places of public accommodation . . . . This Court has recognized, too, that public accommodations laws 'vindicate

[178] Note, of course, that this is contrary to the facts in 303 Creative, in which the Court noted that the parties stipulated that Ms. Smith will "work with all people regardless of classifications such as race, creed, sexual orientation, and gender, and she will gladly create custom graphics and websites for clients of any sexual orientation." *Id.* at 7.
[179] *Id*. at 14.
[180] *Id*. at 17.
[181] *Id*. at 6 (quotations omitted).
[182] *Id*. at 11 (quotations omitted).

> the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"[183]

V. CONCLUSION

While traditional forms of speech intuitively apply to the First Amendment Free Speech Clause, this article discusses the Supreme Court's consistent application of First Amendment protection to a less intuitive form of speech – not speaking. Recognizing a First Amendment right to remain silent, this article considers why expressive silence (that is, not speaking) is a form of speech protected by what could be called the First Amendment's "Dormant" Free Speech Clause. In doing so, this article examines five noteworthy Supreme Court opinions spanning eight decades. The most recent of these, *303 Creative LLC v Elenis*, decided in June 2023, confirms that expressive silence is a protected form of speech. Highlighting the constitutionally significant distinction between speech and conduct, this article also makes clear that *303 Creative* and the First Amendment right to remain silent do not grant a license to discriminate or to refuse to serve members of a protected class. This article reimagines *303 Creative* using alternative facts that remove the speech component from the challenged activity and argues that the activity would not be tolerated under a typical public accommodation law.

[183] *Id*. at 12 (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964)).

EXPANDING ACCESS TO EXCHANGES: A PROPOSAL TO ADDRESS HEALTHCARE AFFORDABILITY IN THE UNITED STATES

Lukas J. Helikum, Ph.D. and Gita K. Sharma, J.D., LL.M.*

I. INTRODUCTION

Healthcare costs have increased significantly, especially over the last several years, such that healthcare affordability is a challenge for millions of Americans. While the Patient Protection and Affordable Care Act (the Affordable Care Act or ACA),[1] enacted in 2010, went a long way to keep its promise to expand access to health coverage, it did little to rein in costs for patients (and their families). Most households in the United States rely on employer-provided health coverage where out-of-pocket expenses, including premiums, deductibles, and co-payments, have made medical care increasingly unaffordable for many.

We start by providing background information on the health insurance landscape in the United States and a sense of the unaffordability crisis due to rising costs to individuals and families. This paper documents some of the most adverse impacts of shifting ever-increasing costs to employees through employer-sponsored plans. We propose and discuss expanded access to government health insurance Exchanges—which are already in place—as an effective strategy for cost control and quality improvements. Our aim is to use a fact-and data-driven approach to help address this complex issue by proposing a strategy that is practical and has the potential to ease the healthcare cost burden for many.

II. CONTROLLING HEALTHCARE COSTS REMAINS ELUSIVE

Employer-sponsored coverage is the most prevalent way for individuals to obtain health insurance in the United States—covering more than half of the nonelderly population (under age 65)—approximately 165 million people (see Figure 1).[2]

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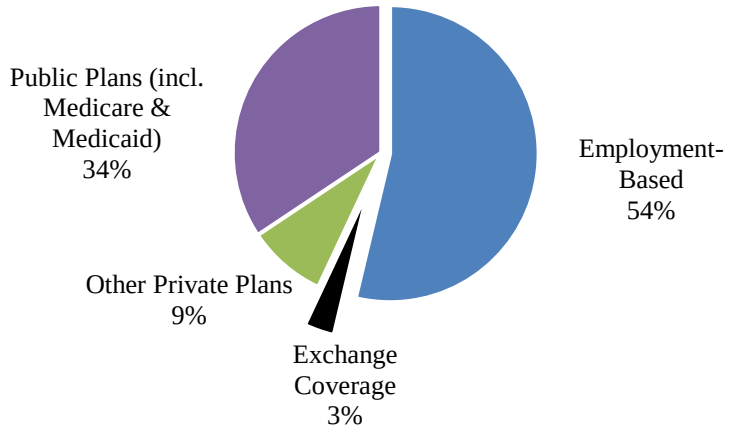
[1] Patient Protection and Affordable Care Act, Pub. L. No. 111-48 (2010) (as amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-52 (2010)).

[2] Sara S. Collins, *The Current Status of Employer Health Insurance Coverage in the United States*, COMMONWEALTH FUND (Oct. 20, 2021), https://doi.org/10.26099/6mv0-an15.

Fig. 1: Health Insurance Coverage in the US in 2020



Source: census.gov (2021)

Having health insurance tied to employment has many drawbacks. This includes preventing many from changing jobs, starting a business, or retiring early—a phenomenon referred to as "job lock." In addition, employers—particularly smaller employers—often shift a large share of cost-sharing for health care to their employees.

A. THE AFFORDABLE CARE ACT: PROMISE & SHORTCOMINGS

The Affordable Care Act is undoubtedly a significant piece of federal legislation that fundamentally changed health policy in the United States affecting individuals, employers, and health plans. Over the last decade, the ACA has faced numerous court challenges and several key provisions were rolled back.[3]

One of the principal goals of the ACA was to expand health insurance coverage for millions of Americans, and it did so, in part, through the establishment of Exchanges[4] and providing subsidies for those meeting income and other criteria. Exchange plans, which came into effect starting in 2014, are categorized by metal levels—bronze, silver, gold, and platinum.[5] The metal levels are

[3] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); California v. Texas, 2021 WL 2459255 (U.S. 2021); Braidwood Management Inc. v. Becerra, 2023 2703229 (N.D. Tex. 2023).

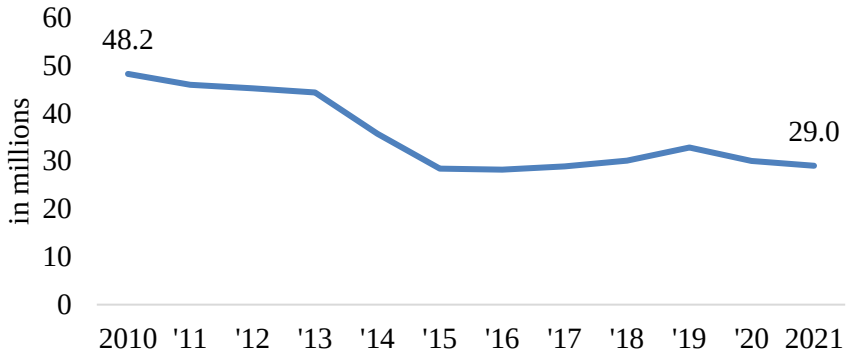
[4] Each state is required to establish its own Exchange (sometimes referred to as the Marketplace) or participate in a federally facilitated Exchange. Expansion of coverage also resulted from the option given to states to expand Medicaid beyond the minimum federal guidelines to provide coverage to more eligible individuals. Medicaid is a federal/state partnership with shared authority and financing providing health coverage for low-income individuals, children, and people with disabilities.

[5] Regardless of metal level, all plans must cover ten essential benefits, including coverage for (1) ambulatory patient services, (2) emergency services, (3) hospitalization, (4) maternity and newborn care, (5) mental health and substance use disorder services, (6) prescription drugs, (7) rehabilitative and habilitative services and devices, (8) laboratory services, (9) preventive and wellness services and chronic disease management, and (10) pediatric services.

an indication of what portion of health care costs the plan will pay on average and what portion the individual will pay. In addition, certain individuals may be eligible for a premium tax credit toward the cost of purchasing health insurance coverage from an Exchange. Individuals who receive premium tax credit payments may also be eligible for cost-sharing reductions that reduce overall expenses. These Exchange subsidies are designed to reduce expenses related to out-of-pocket expenses, such as deductibles, co-payments, co-insurance, and annual cost-sharing limits.[6]

Although access to coverage has been expanded significantly under the ACA (see Figure 2, showing the decline in the uninsured rate), one of the criticisms of the law is that there has not been as much success in lowering overall costs.

Fig. 2: Nonelderly Uninsured Population in the United States



Source: National Health Interview Survey's (NHIS) Health Insurance Coverage Reports (2022)

There is some evidence that the ACA reduced the financial burden of medical bills on low-income adults on the national level.[7] Using data from a nationally representative sample of adults between 20 to 64 years of age, a 2020 study found that the number of adults experiencing catastrophic expenditures yearly declined from 13.6 million (7.4%) in 2010 to 11.2 million (5.9%) in 2017.[8] This study concludes that the ACA achieved one of its principal goals of improving financial protection for the lowest-income Americans. In contrast, improvements were not documented for higher-income populations as well as the privately insured.[9] Rather, the privately insured represent an increasing share of catastrophic expenditures cases. About one in three individuals with private insurance in the poorest quartile experience catastrophic spending per year, which explains why so many, including those with insurance, worry about healthcare

[6] An annual cost-sharing limit applies under a health plan, which is the total dollar amount an individual would be required to pay out of pocket for use of covered services in a plan year. Once the out-of-pocket spending meets this limit, the health plan generally pays 100% of covered costs for the remainder of the plan year.

[7] Hiroshi Gotanda et al., *Out-of-pocket spending and financial burden among low-income adults after Medicaid expansions in the United States: quasi-experimental difference-in-difference study*, BMJ (Feb. 5, 2020), https://www.bmj.com/content/368/bmj.m40.

[8] Charles Liu et al., *Catastrophic health expenditures across insurance types and incomes before and after the Patient Protection and Affordable Care Act*, JAMA NETWORK OPEN (Sept. 24, 2020), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2770949.

[9] *Id.*

affordability. This observation is consistent with data that shows that most respondents consider the affordability of healthcare either a very big (56%) or a moderately big (30%) problem.[10]

i. ROLLBACK OF KEY ACA PROVISIONS: INDIVIDUAL SHARED RESPONSIBILITY & CADILLAC TAX

Two key provisions that had been contemplated as ones that would help rein in costs in the long term were ultimately rolled back some years after the ACA's enactment.

Individual Shared Responsibility: The first provision imposed a penalty (often referred to as the "individual shared responsibility" or "individual mandate") for any months where an individual failed to maintain minimum health insurance coverage. This provision went into effect in 2014, but as of 2019, this requirement was effectively repealed, when any shared responsibility payment was reduced to zero.[11] The individual mandate was considered an important tool for encouraging individuals—especially young, healthy adults—to purchase health insurance. Without this penalty, healthier individuals often choose not to purchase coverage, thereby driving up premiums for those who remain in the insurance market.[12] Since the repeal of the penalty, a few states and the District of Columbia have adopted state individual mandate requirements.[13] For example, modeled after the federal provision, New Jersey enacted legislation in 2018 to implement its own individual mandate starting in 2019.[14] However, without the federal mandate, these handful of state-level mandates are not enough to make the insurance risk pools broad enough to have a meaningful impact in lowering overall health premiums.

Tax on High-Cost Coverage: The second provision that was likely to have made an impact on healthcare costs, the excise tax on high-cost coverage,[15] was repealed before it even went into effect.[16] This provision was intended to be a significant revenue raiser by imposing a 40% excise tax on the portion of employer health coverage that exceeded a specified threshold amount. The excise tax was included in the ACA to raise revenue to offset the cost of other ACA provisions (such as providing subsidized coverage under the Exchange) and to curb some of the tax advantages that economists argue lead to an overconsumption of coverage and health services.[17] The U.S. Congressional Budget Office estimated that the excise tax, had it taken effect, would

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[10] *See, e.g., Report: Biden Nears 100-Day Mark With Strong Approval, Positive Rating for Vaccine Rollout, Americans' views of the problems facing the nation*, PEW RES. CEN., (April 2021), https://www.pewresearch.org/politics/2021/04/15/americans-views-of-the-problems-facing-the-nation.

[11] Tax Cuts and Jobs Act, Pub. L. 115-97, § 11081(b), 43 U.S.C. § 5000A (Dec. 22,2017).

[12] Jennifer Tolbert et al., *State Actions to Improve Affordability of Health Insurance in the Individual Market,* KFF ISSUE BRIEF (July 17. 2019), https://www.kff.org/health-reform/issue-brief/state-actions-to-improve-the-affordability-of-health-insurance-in-the-individual-market.

[13] States that have so far enacted legislation to implement individual mandates with penalties for non-compliance include California, Rhode Island, Massachusetts, New Jersey, and Vermont.

[14] Individuals filing a New Jersey income tax return pay a penalty generally based on income and family size that is capped at the statewide average annual premium for bronze-level health plans on the statewide Exchange. *See* State of New Jersey Shared Responsibility Requirement, https://nj.gov/treasury/njhealthinsurancemandate/responsibilitypayment.shtml.

[15] 43 U.S.C. § 4980I(a) (repealed 2019).

[16] Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, § 503 (2019).

[17] *Excise Tax on High-Cost Employer-Sponsored Health Coverage: In Brief*, CONG. RES. SERV. (Mar. 24, 2016), https://crsreports.congress.gov/product/pdf/R/R44147/6.

have increased federal revenues by $87 billion between 2016 and 2025[18]—monies that could have been used to address some of the affordability concerns.

ii. ACA'S COST-SHARING LIMITS & FIRST-DOLLAR COVERAGE

The ACA also included certain consumer protection requirements designed to alleviate the out-of-pocket spending burden on individuals and families.

Cost-Sharing Limits: The ACA requires that "cost-sharing" be limited, thereby putting a cap on out-of-pocket maximum spending.[19] Before the enactment of this provision, health plans were not required to establish an annual out-of-pocket maximum. Plans that did establish such a limit had considerable discretion in designing the amount of the maximum and the expenses that counted toward it. These limits, which were first imposed starting in 2014, have been adjusted annually—for 2023, the overall cost-sharing limits are $9,100 for individual coverage and $18,200 for family coverage, marking a 4.6% increase above the 2022 limits. Since 2015, cost-sharing limits have risen sharply—from $6,450 to $9,100 for individual coverage and from $12,900 to $18,200—marking an increase of more than 41% in less than ten years. In addition, premiums (the amount the insurance company charges in exchange for providing health coverage) do not count toward the cost-sharing limit.

First-Dollar Coverage: A popular consumer-centric ACA provision is the requirement that most health plans and insurers provide certain preventive services (such as blood pressure screening, immunizations, and obesity screening) without imposing any cost-sharing.[20] As a result, deductibles, copays, coinsurance, or other cost-sharing may not be imposed on these services. This provision is often referred to as providing "first-dollar coverage." More than an estimated 150 million are benefiting from the ACA's preventive services provision across a range of services and conditions.[21] Gains in access to services were due in large part to uninsured individuals obtaining health coverage, including people who became covered under the Exchanges through the ACA starting in 2014.[22]

With the public health emergency starting in early 2020, the federal government required health insurers to cover COVID-19-related diagnostic products and related services furnished during urgent care or in an emergency room setting without cost-sharing.[23] The importance of the

[18] This figure was based on the tax's implementation beginning in 2018. *See* Cong. Budget Off., Insurance Coverage Provisions of the Affordable Care Act - CBO's March 2015 Baseline (Mar. 9, 2015).
[19] Affordable Care Act, Pub. L. No. 111-148, § 1302(c) (2010). Essentially, the maximum out-of-pocket spending limit is a financial safety net—after this amount is reached, the insurance company typically pays 100% for covered services for the rest of the year.
[20] Affordable Care Act, Pub. L. No. 111-148, § 2713 (2010). Recommendations and guidelines for covering required preventive services are updated regularly. *See Health Benefits & Coverage: Preventive Health Services*, HEALTHCARE.GOV, https://www.healthcare.gov/coverage/preventive-care-benefits.
[21] U.S. Dep't of Health & Hum. Serv., Off. of the Assistant Secretary for Plan. & Evaluation, Issue Brief, *Access to Preventive Services without Cost-sharing: Evidence from the Affordable Care Act* (HP-2022-01) (Jan.11, 2022), https://aspe.hhs.gov/sites/default/files/documents/786fa55a84e7e3833961933124d70dd2/preventive-services-ib-2022.pdf.
[22] Sherry A. Glied et al., *Effect of the Affordable Care Act on Health Care Access*, COMMONWEALTH FUND (May 8, 2017), https://doi.org/10.26099/0e35-gh36.
[23] Families First Coronavirus Response Act, Pub. L. No. 116-127, § 6001 (2020).

inclusion of these costs and services under the preventive services requirement cannot be overstated. Ongoing legal challenges over the constitutionality of the ACA's preventive services could eventually send this issue to the Supreme Court.[24] Even if eventually upheld by the high court, the uncertainty adds to the hardship and uncertainty for millions who have come to rely on the ACA's first-dollar coverage for certain covered services.

B. THE DILEMMA OF "UNDERINSURANCE"

In addition to the rising cost of health insurance, many face difficulty affording care–even with health insurance. "Underinsured" refers to people who have health insurance but who are still faced with large medical expenditures because their plan's coverage is inadequate. Underinsurance is the result of insurance plans that include prohibitively high deductibles or plans that fail to cover a significant portion of the costs that the covered individual incurred. The latter can be due to copays, limited coverage of services or procedures, and policies that feature inadequate in-network options while also having limited out-of-network reimbursements. While underinsured individuals are, by definition, not uninsured, they suffer many of the same adverse consequences when health care is unaffordable.

Recent data suggests that this problem has been exacerbated over the last decade, even after the ACA's enactment. Actual healthcare expenditures and the risk of potential expenditures (deductibles) are compared with household income to determine an individual's underinsurance status.[25] According to estimates, more than one in five (21%) working-age adults in the United States were classified as underinsured in 2020, up from 16% in 2010.[26] Essentially, with these huge cost barriers, too many Americans have health insurance "in name only."[27]

C. LACK OF AFFORDABILITY LEADS TO SERIOUS CONSEQUENCES

The lack of affordability for a significant portion of the U.S. population has continued to be concerning. Based on U.S. Bureau of Labor Statistics data, healthcare expenses have significantly increased over the last two decades at a pace higher than overall inflation.[28] This trend has led to an increasing affordability crisis that is not new but constantly worsening as costs have risen two to three times faster than wages over the same period. Despite a multitude of healthcare policy initiatives, the trend of rising healthcare unaffordability has not been contained or even significantly slowed.

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[24] *See* Braidwood Mgmt. Inc. v. Becerra, 2023 2703229 (N.D. Tex. 2023).

[25] For this purpose, adults are counted as "underinsured" if they were continuously insured throughout the year but experienced one (or more) of the following: out-of-pocket costs (not including premiums) equaled 10% or more of income; out-of-pocket costs (not including premiums) equaled 5% or more of income if low-income (<200% of poverty); or deductibles equaled 5% or more of income.

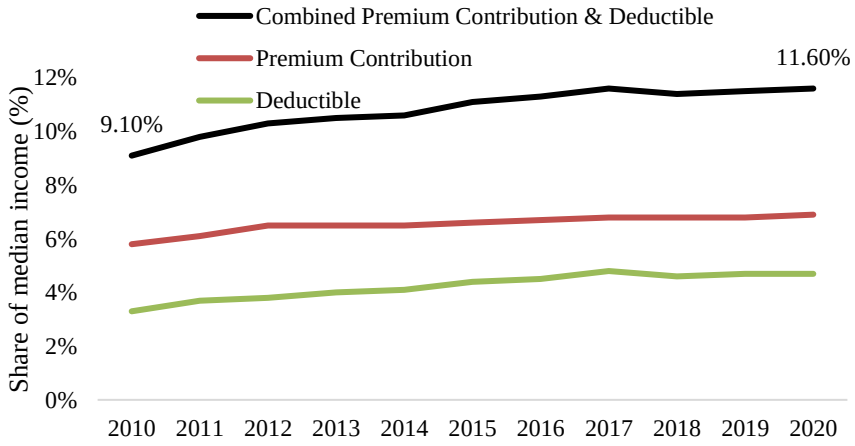
[26] Sara A. Collins et al., *U.S. Health Insurance Coverage in 2020: A Looming Crisis in Affordability*, COMMONWEALTH FUND ISSUE BRIEF (Aug. 19, 2020), https://doi.org/10.26099/6aj3-n655.

[27] David Blumenthal & Sara Collins, *Millions of Americans have Health Insurance that isn't 'Good Enough'*, STAT (Nov. 4, 2022), https://www.statnews.com/2022/11/04/millions-americans-health-insurance-isnt-good-enough.

[28] Shameek Rakshit et al., *How Does Medical Inflation Compare to Inflation in the Rest of the Economy?* PETERSON-KFF HEALTH SYS. TRACKER (Nov. 30, 2022), https://www.healthsystemtracker.org/brief/how-does-medical-inflation-compare-to-inflation-in-the-rest-of-the-economy. (Using Bureau of Labor Statistics data, including the consumer price index and producer price index to analyze prices for medical care compared to other goods and services.)

An examination of data from the 2020 Medical Expenditure Panel Survey (MEPS–IC) reports consistent findings (see Figure 3). Focusing on the years from 2010 to 2020, the data shows that the sum of premium contributions and deductibles as a share of median household income has increased significantly from 9.1% to 11.6%.[29] The analysis further suggests that this trend has a particularly adverse impact on families with lower incomes. Employees in firms with lower average wages contribute a larger share of their overall premium and a larger dollar amount for family coverage, on average, than employees who work in firms with higher average wages.

Fig. 3: Healthcare Costs as a Share of Household Income in the United States

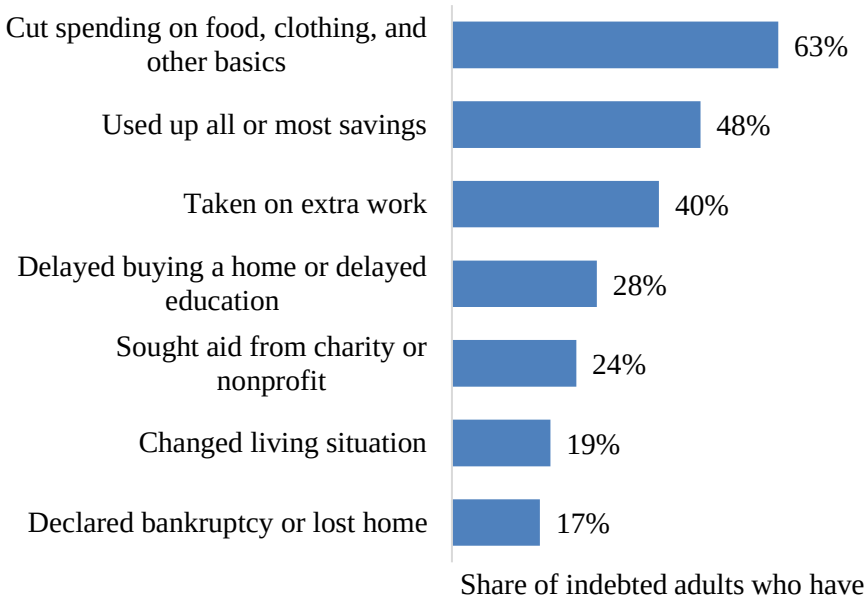


Source: The Commonwealth Fund (2022)

A 2022 investigatory survey on healthcare debt revealed that more than half of the adults in the United States report going into debt because of medical or dental bills over the course of five years.[30] The same data further shows that one in four adults with medical debt owed at least $5,000. While about 20% of debtors say that they do not expect to ever pay off their debt, this does not mean that the debt is having no adverse consequences (see Figure 4). Not surprisingly, medical debt causes significant burdens for those affected, from spending less on food, clothing, and other necessities to taking up additional work to combat financial insecurity.[31]

[29] Sara R. Collins et al., *State Trends in Employer Premiums and Deductibles, 2010–2020*, COMMONWEALTH FUND (Jan. 12, 2022), https://doi.org/10.26099/m5dt-5f70.
[30] Noam N. Levey, *100 Million People in America are Saddled with Health Care Debt*, KAISER HEALTH NEWS (June 16, 2022), https://khn.org/news/article/diagnosis-debt-investigation-100-million-americans-hidden-medical-debt.
[31] Lunna Lopes et al., *Health Care Debt in the U.S.: The Broad Consequences of Medical and Dental Bills*, KAISER FAM. FOUND. (June 16, 2022), https://www.kff.org/report-section/kff-health-care-debt-survey-main-findings.

Fig. 4: Consequences of Health Care Debt



Source: KFF Health Care Debt Survey (2022)

A 2020 survey found that 23 million people (nearly one in ten adults) owe significant medical debt.[32] According to the same survey, about 16 million people (6% of adults) in the United States owe more than $1,000, and 3 million people (1% of adults) owe medical debt of $10,000 or more. However, the prevalence and size of healthcare debt are notoriously difficult to estimate with precision because data is difficult to obtain and often incomplete. A more recent 2022 finds that more than four in ten adults report some debt caused by medical or dental bills, and an additional 16% of adults report having such debts in the past that have since been paid off.[33]

Medical debt (and the fear of it) also lead to seriously non-financial—that is, medical consequences by blocking or deterring individuals from accessing needed health care. About one in seven of those carrying debt said that they have been denied access to a hospital, doctor, or other health care provider because of unpaid bills. In addition, about two out of three adults reported putting off care that they or a family member needed due to cost.[34]

More than one in three adults who had a commercial insurance plan with a deductible of $1,000 or more reported not accessing needed health care due to cost. In addition, more than four in ten adults with a deductible of that size reported problems paying medical bills and accumulating

[32] Matthew Rae et al., *The Burden of Medical Debt in the United States.* PETERSON-KFF HEALTH SYSTEM TRACKER (Mar. 10, 2022), https://www.healthsystemtracker.org/brief/the-burden-of-medical-debt-in-the-united-states. (Analyzing data from the Survey of Income and Program Participation to understand how many people have medical debt and how much they owe. For purposes of this survey, a threshold of $250 was defined as "significant" medical debt to distinguish people who owe relatively small amounts.)
[33] Lopes, *supra* note 31.
[34] Levey, *supra* note 30.

medical debt.[35] These facts are not surprising in light of the limited financial resources of many in America. According to recent data, only 44% of respondents would pay for a $400 emergency expense with money currently in their bank accounts or with cash. About 15% would use a credit card and pay it off over time and 12% could not afford to pay for the expense at all.[36] These results are consistent with more recent data from 2022 where about half of adults say that they would be unable to pay a $500 unexpected medical bill without borrowing money. This statistic includes about 30% of people who currently do not have medical debt, which puts those individuals, and indeed their families and other dependents, at risk of falling into debt.[37]

With healthcare costs rising, there has been a rise in nontraditional options that market relief from the high out-of-pocket cost burden. However, these plans often do not provide comprehensive medical care, covering only a small portion of medical bills because of contractual plan limitations. Lacking transparency and consumer protections, these "skinny plans" often do not cover many standard benefits such as maternity care and hospitalization in addition to having no annual limit on how much patients can be required to pay out-of-pocket.[38]

D. BROAD CONSENSUS THAT COSTS ARE TOO HIGH AND NEED FOR REFORM

Healthcare reform remains a top priority for Americans. A 2021 survey finds that only 6% of participants consider this issue unimportant.[39] Data from this large, representative sample of adults in the United States (N = 5,360) shows that a majority of respondents (58%) think that the reduction of healthcare costs should be a top priority for the President and Congress. This highlights the need for effective policy proposals that address healthcare costs and affordability.

III. EMPLOYER COVERAGE CHALLENGES

In line with the overall rise in healthcare expenditures, health insurance premiums and worker contributions under employer-sponsored coverage have steadily increased for the past several decades while wages have stagnated.[40] Even after decades of providing health care to their workers, many employers appear to lack the necessary expertise to fully understand the health coverage they purchase and what they (and in turn, their employees) are paying as a result. As a

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[35] *2020 Biennial Health Insurance Survey*, COMMONWEALTH FUND, https://www.commonwealthfund.org/publications/surveys/2020/aug/2020-biennial-health-insurance-survey.

[36] Board of Governors of the Fed. Res. Bank, Report on the Economic Well-Being of U.S. Households in 2021 (May 2022), https://www.federalreserve.gov/publications/2022-economic-well-being-of-us-households-in-2021-executive-summary.htm.

[37] Lopes, *supra* note 31.

[38] Julie Appleby, *New Health Plans Offer Twists on Existing Options, With a Dose of "Buyer Beware,"* KAISER FAM. FOUND. (Nov. 4, 2021), https://khn.org/news/article/new-health-plans-offer-twists-on-existing-options-with-a-dose-of-buyer-beware.

[39] *Report: Biden Nears 100-Day Mark With Strong Approval, Positive Rating for Vaccine Rollout, Americans' views of the problems facing the nation*, PEW RES. CTR. (April 2021), https://www.pewresearch.org/politics/2021/04/15/americans-views-of-the-problems-facing-the-nation.

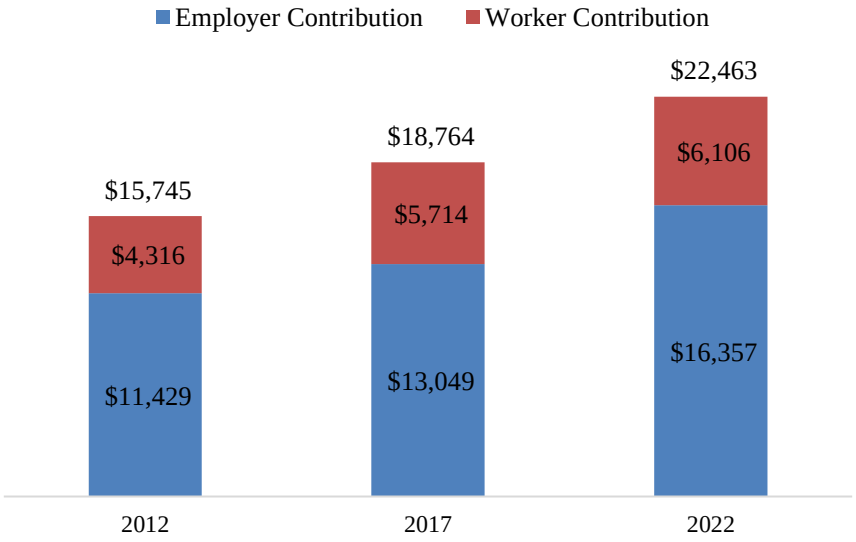
[40] Sam Hughes et al., *Health Insurance Costs are Squeezing Workers and Employers*, CTR. AM. PROGRESS REP. (Nov. 29. 2022), https://www.americanprogress.org/article/health-insurance-costs-are-squeezing-workers-and-employers. (The authors note that "without policies to keep in check health care prices for private insurance, high [employer-sponsored insurance] premiums and cost sharing; affordability problems; and income-based inequities among workers will continue to worsen.").

result, employers, both large and small, have been "forced to look around and assemble [a] hodgepodge of vendors [and] the vast majority don't have sophisticated benefit teams."[41]

A. CONTINUAL INCREASE IN EMPLOYEE PREMIUMS

In 2022, the average annual premiums for employer coverage increased to $22,463 for family coverage and $7,911 for single coverage.[42] This represents a 20% increase in average family premiums since 2017 and a 43% increase since 2012 (see Figure 5). Given the large share of individuals who obtain health care coverage through their employers, the fast pace of insurance premium increases—a cost that workers bear regardless of whether they are consuming health care or not—is a major factor contributing to the affordability crisis.

Fig. 5: Average Annual Worker and Employer Premium Contributions for Family Coverage Between 2012 and 2022



Source: KFF 2022 Employer Health Benefits Survey (2022)

The data shows that average premiums do not differ significantly by employer size though covered workers in small firms tend to contribute a larger percentage of the total premium (that is, the employer's share is lower) than workers who are employed in large firms. The difference in worker contributions is economically and statistically significant for both single coverage and family coverage. A similar trend is observed for firms that employ a larger share of lower-wage workers. Worker contributions towards the insurance premiums are particularly high for workers who have a family plan while working for a small employer. In 2022, workers in 31% percent of small firms paid more than half of the premiums while workers in another 28% of small firms paid

[41] Bob Hermon, *Employers are Flying Blind When Buying Health Coverage*, AXIOS (Feb. 25, 2022), https://www.axios.com/2022/02/25/employers-health-benefits-consultants-hr-rebates.

[42] *2022 Biennial Health Insurance Survey*, COMMONWEALTH FUND (Sept. 2022), https://www.commonwealthfund.org/sites/default/files/2022-09/Collins_state_of_coverage_biennial_survey_2022_db.pdf.

between 25% and 50% of the premium.[43] U.S. employers expect health benefit cost per employee to continue to rise,[44] which will undoubtedly push more employers to pass on some of that burden to employees by way of increased premiums and cost-sharing.

B. EMPLOYEE COST-SHARING ON THE RISE

Most health insurance policies feature cost-sharing provisions, meaning that a covered individual must pay a share of the cost when accessing covered services. Cost-sharing can be in the form of general deductibles (an amount that is paid by the enrollee before expenses are paid for by the plan), copays (a fixed amount), or coinsurance requirements (a share of the covered amount). As discussed in more detail above in Section II, while the ACA established annual limits on cost-sharing (out-of-pocket expenses), those limits are quite high and increase year-over-year.

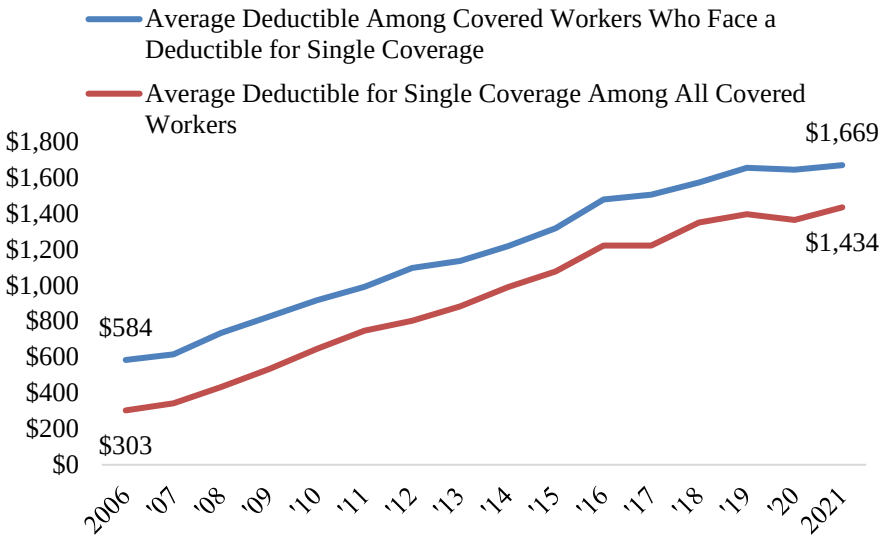
Workers with employer coverage that included a deductible faced an average annual deductible of $1,669 for single coverage in 2021.[45] This figure has increased by 13% from 2016 and about 68% over the previous decade. While almost three in ten workers have deductibles over $2,000, the likelihood of facing a large deductible is significantly higher for those who work in small firms (45% vs. 22%). It is important to keep in mind that these amounts do not include other types of cost sharing, such as copays, which often exist as part of the same plans. In addition to increasing average deductibles, the data also shows that a growing share of covered workers have a plan with a deductible, meaning that fewer plans have no deductible. This information is represented by the red line in Figure 6. The average general annual deductible for single coverage is $1,434 in 2021, which represents a 92% (17%) increase from 2011.

[43] *2022 Employer Health Benefits Annual Survey*, KAISER FAM. FOUND. (Oct. 2022), https://files.kff.org/attachment/Report-Employer-Health-Benefits-2022-Annual-Survey.pdf.

[44] Beth Umland et al., *Health Benefits Cost Growth Will Accelerate to 5.6% in 2023* (Aug. 11, 2022), https://www.mercer.us/our-thinking/healthcare/health-benefit-cost-growth-will-accelerate-in-2023.html. Because health plans typically have multi-year contracts with health care providers, it is likely that the impact of the price inflation will be phased in over the next few years as contracts come up for renewal and providers negotiate higher reimbursement levels.

[45] *2021 Employer Health Benefits Annual Survey*, KAISER FAM. FOUND. (Nov. 2021), https://files.kff.org/attachment/Report-Employer-Health-Benefits-2021-Annual-Survey.pdf.

Fig. 6: Average Annual Deductibles for Single Coverage



Source: KFF 2021 Employer Health Benefits Survey (2021)

While other factors can have an impact on a person's ability to access health care, insurance status is the most important determinant.[46] Unsurprisingly, however, studies show that high deductibles and significant cost-sharing can become a barrier to care as individuals, especially those with lower incomes, are discouraged from accessing services even when urgently needed. This is part of the underinsurance problems since a large percentage of adults who are insured all year nonetheless report cost-related problems getting health care.

C. LIMITED PLAN CHOICE

For the overall commercial healthcare market, "[p]rices that stem from a lack of competition, and thus a lack of choice, are unlikely to reflect value to consumers."[47] Three in four firms offer only one single plan type (with 21% offering two and 4% offering three or more). Large firms tend to offer more choices while also employing a larger number of individuals whereas 38% of covered workers in small firms are limited to "choosing" from one single plan type. [48]

This is consistent with anecdotal evidence that employers, especially smaller ones, often lack the necessary expertise to make informed health coverage purchasing decisions.[49] A large share of

[46] Mary Sue Coleman et al., *Hidden Costs, Value Lost: Uninsurance in America*, INST. MED. NAT'L ACAD., https://nap.nationalacademies.org/catalog/10719/hidden-costs-value-lost-uninsurance-in-america.
[47] Benedic N. Ippolito, *Increasing Cost Pressures in the Commercial Health Care Market*, AM. ENTERPRISE INST. REP. (Sept. 27, 2021), https://www.aei.org/research-products/report/increasing-cost-pressures-in-the-commercial-health-care-market.
[48] *2021 Employer Health Benefits Annual Survey*, KAISER FAM. FOUND. (Nov. 2021), https://files.kff.org/attachment/Report-Employer-Health-Benefits-2021-Annual-Survey.pdf.
[49] Herman, *supra* note 41.

employees in the United States work for smaller employers—according to census data, firms with less than 500 workers employed more than 61 million individuals in 2019.[50]

IV. AFTER A ROCKY START, EXCHANGES HAVE BECOME ROBUST

Launched in 2014, the Exchanges were created under the ACA as a single point of access for individuals to enroll in government-facilitated health coverage and to apply for income-based subsidies (depending on eligibility). The first annual open enrollment period began in October 2013 and was fraught with technical difficulties as a new health insurance marketplace was launched from scratch. While the ACA encouraged each state to establish its own Exchange, a federally facilitated Exchange was needed for states that elected not to establish their own.[51] This led to several problems with the initial deployment. Despite the rocky start, approximately eight million individuals signed up for Exchange coverage between October 2013 and March 2014. Since the initial launch, the federal government took key steps to address the technical concerns by increasing support capacity for the systems, requiring additional software quality reviews, and improving the functionality of key information technology systems.[52]

As the technological problems were addressed and the familiarity with the Exchanges for consumers and insurers grew, enrollment began to increase in 2015 and 2016. The number of enrollees stabilized between 2016 and 2021, ranging between 11.5 and 12.5 million (see Figure 7). A record number of people signed up through the Exchanges to obtain health coverage for 2022, a year-over-year growth rate of more than 20% resulting in almost 14.5 million enrollees.[53]

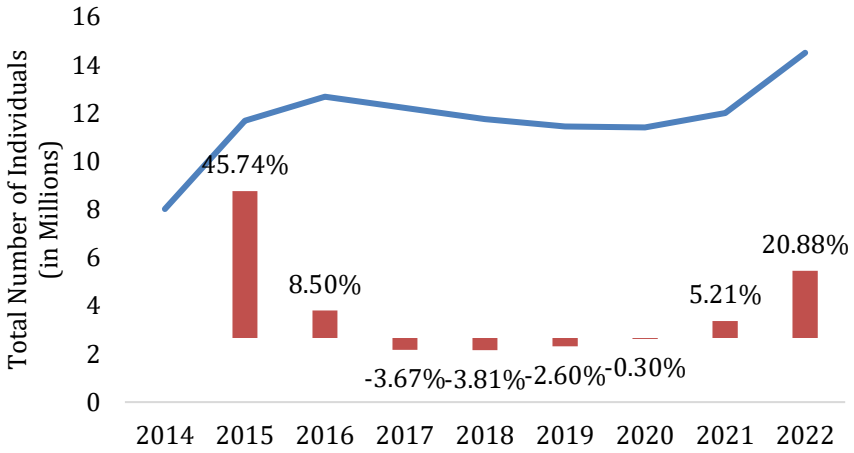
[50] U.S. CENSUS BUREAU, 2019 STATISTICS OF U.S. BUSINESSES (SUSB) ANNUAL DATASETS BY ESTABLISHMENT INDUSTRY, https://www.census.gov/data/tables/2019/econ/susb/2019-susb-annual.html.

[51] Based on U.S. governmental data, as of January 31, 2023, there were twenty-one state-based Exchanges, with three state-based exchanges using the federal platform. *See* Centers for Medicare & Medicaid Services: State-based Exchanges, https://www.cms.gov/cciio/resources/fact-sheets-and-faqs/state-marketplaces#:~:text=As%20of%20January%2031%2C%202023,platform%20(SBE%2DFPs).

[52] Gov't Accountability Off. Rep., *CMS Has Taken Steps to Address Problems, but Needs to Further Implement Systems Development Best Practices* (Mar. 2015), https://www.gao.gov/assets/gao-15-238.pdf.

[53] Press Release, U.S. Dep't of Health & Hum. Serv., All-Time High: 13.6 Million People Signed Up for Health Coverage on the ACA Insurance Marketplaces With a Month of Open Enrollment Left to Go (Dec. 22, 2021), https://www.hhs.gov/about/news/2021/12/22/all-time-high-13-million-people-signed-up-for-health-coverage.html.

Fig. 7: Marketplace Plan Enrollment and Year-to-Year Percentage Changes in the US



Source: KFF (2022)

A. EXCHANGES OFFER SAVINGS, CHOICES, STANDARDIZATION, AND ASSISTANCE

In light of the complex health insurance landscape and the challenges associated with employer coverage, the Exchanges can offer a larger selection of plans, more affordable coverage due to available subsidies, and the ability for consumers to make a more informed decision by offering plan standardization and assistance during the enrollment process.

i. COST SAVINGS (PREMIUMS & DEDUCTIBLES)

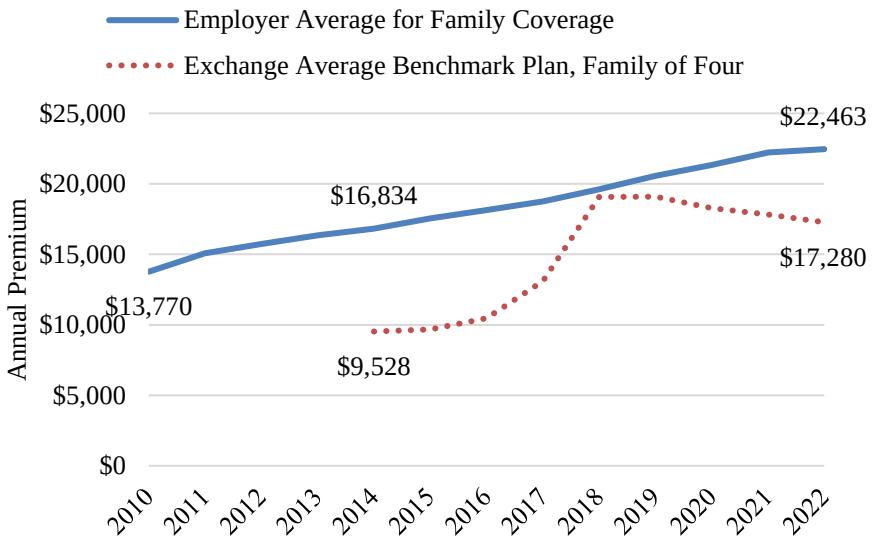
The median deductible for an individual enrollee on the Exchanges decreased between 2017 and 2021 from $1,000 to $750 after subsidies.[54] This decline was driven by cost-sharing reduction subsidies, which were part of the ACA that offset the trend of increasing deductibles for more than half of enrollees. As a result, Exchange enrollees generally have smaller deductibles than those who rely on employer coverage if they qualify for subsidies. The shift towards plan enrollment with lower deductibles offers greater financial protection to consumers, especially in cases of unforeseen medical emergencies and conditions that require long-term treatment, including chronic illnesses.

Another important dimension to affordability is the monthly premiums that a plan charges. Figure 8 compares the average annual premium for family coverage of the average employer plan to the average "benchmark plan" for a family of four on the Exchanges. In contrast to the steady increases in premiums for the average employer plan, the average annual premium for Exchange coverage has declined since 2019. In 2021, the average Exchange premium for family coverage was almost 20% lower than the average employer plan. It is important to note that this difference does not account for additional subsidies—which are available on the Exchanges – that further

[54] U.S. Dep't of Health & Hum. Serv. Rep., Off. of Assistant Secretary for Plan. Eval., *Health Insurance Deductibles Among Healthcare.gov Enrollees, 2017-2021* (Jan. 13, 2021), https://aspe.hhs.gov/reports/marketplace-deductibles-federal-platform-2017-2021.

decrease costs for eligible individuals and families. The average annual premium was only $1,968 in 2021 and further dropped to $1,596 in 2022 after the premium tax credit is considered.[55] This difference between employer coverage and the Exchanges is meaningful, both statistically and economically, and has the potential to address healthcare unaffordability for certain segments of the population.

Fig. 8: Annual Family Plan Premiums 2010 to 2022



Source: The Commonwealth Fund 2021 Biennial Health Insurance Survey (data from here, here, and here)

Notably, legislation enacted in October 2022 extended the eligibility for enhanced financial assistance by lowering premiums for qualifying individuals for coverage purchased on the Exchange through December 31, 2025.[56]

ii. MORE PLAN CHOICES

The 2022 Exchange open enrollment period saw near-all-time high participation from insurers. A total of 213 insurers offered coverage on the Exchanges–an increase of 32 insurers compared to 2021.[57] This meant that the average consumer had close to six insurers to choose from–up from four to five insurers in 2021. On average, 5.9 insurers were available to consumers in each state, which is close to the maximum of 6.0 in 2015 and an increase of 18% from the prior year. Overall, the pattern of insurers participating closely reflects the Exchange open enrollment pattern since the launch of the Exchanges in 2014.

[55] The premium tax credit is a refundable tax credit that helps cover the health insurance premiums for eligible individuals and families if plans are purchased via the Exchanges. More information is available from the IRS at https://www.irs.gov/affordable-care-act/individuals-and-families/the-premium-tax-credit-the-basics.
[56] Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 12001 (2022).
[57] Press Release, U.S. Dep't of Health & Hum. Serv., All-Time High: 13.6 Million People Signed Up for Health Coverage on the ACA Insurance Marketplaces With a Month of Open Enrollment Left to Go (Dec. 22, 2021), https://www.hhs.gov/about/news/2021/12/22/all-time-high-13-million-people-signed-up-for-health-coverage.html.

In addition to the number of participating insurers, each insurer offers a variety of plan choices on the Exchanges with varying features categorized into four "metal tiers" (bronze, silver, gold, and platinum) based on how much of the out-of-pocket costs are covered through the plan.

iii. PLAN STANDARDIZATION

While both employer-sponsored plans and Exchange plans have disclosure requirements to increase transparency, an individual may be able to get a more reliable estimate of anticipated spending based on the Exchange. This is because "standardized plans" are a policy option that has the potential to greatly simplify consumer comparison shopping on the Exchanges and bring more value to consumers by offering the same actuarial value, maximum out-of-pocket spending, deductibles, and cost-sharing for a given metal level of coverage. The ACA already requires qualified health plans to cover the various predetermined categories of essential health benefits and limit maximum out-of-pocket spending. The actual deductibles and cost-sharing for specific services vary widely within these broader requirements and limits offering meaningful choices among those standardized plan options.

Beginning in 2023, federal regulations require insurers to offer standardized plans if they wish to sell their qualified health plans through the federal Exchange.[58] For now, state-based Exchanges operating their own eligibility and enrollment platforms and state-based Exchanges using the federal platform have the option to require standardized plans by metal level to make it easier for consumers to compare plans. Research shows that consumers struggle to understand the meaning of basic healthcare terms, such as deductibles, coinsurance, and out-of-pocket limits. Thus, further standardization is expected to support more informed decision making and better outcomes.[59]

According to health policy experts, standardized plans have the potential to "facilitate competition among [insurers] by improving transparency for consumers and distilling competition down to crucial factors like premium price, provider network, and plan quality, rather than allowing [issuers] to compete based on complicated and opaque cost-sharing structures."[60] To this end, insurers offering coverage on the Exchanges are required to submit to network adequacy reviews and provide information on whether providers participating in their network offer services through telehealth.[61]

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[58] Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2023 45 CFR pt. 144, 147, 153, 155, 156, & 158, 87 Fed. Reg. 27,208 (May 6, 2022).

[59] ACA required standards for definitions of certain insurance-related terms, which led to the requirement that insurers provide access to the uniform glossary developed by federal agencies. *See* Quincy L, *What's Behind the Door: Consumers' Difficulties Selecting Health Plans,* CONSUMERS UNION (Jan. 2012), https://advocacy.consumerreports.org/wp-content/uploads/2013/03/Consumer_Difficulties_Selecting_Health_Plans_Jan2012.pdf.

[60] Rose C. Chu et al., & Sommers, B.D, Issue Brief No. HP-2021-29, Facilitating Consumer Choice: Standardized Plans in Health Insurance Marketplaces, U.S. DEP'T OF HEALTH & HUM. SERV., ASSISTANT SECRETARY FOR PLANNING & EVALUATION (Dec. 28, 2021), https://aspe.hhs.gov/reports/standardized-plans-health-insurance-marketplaces.

[61] Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2023 45 CFR pt. 144, 147, 153, 155, 156, & 158, 87 Fed. Reg. 27208, 27,322 (May 6, 2022).

iv. ASSISTANCE TO APPLICANTS

Since the Exchanges are supported by the government, investments are made over time to offer assistance. So-called "Navigators" are required to be trained and certified before they assist applicants on the Exchanges. Since they are not affiliated (or employed) directly by a provider, they can provide unbiased information to facilitate health plan selection among the various options offered on the Exchange. In addition, Navigators help applicants determine eligibility and apply for subsidies (premium tax credits or cost-sharing reduction subsidies).

For the 2023 Exchange open enrollment, the federal government invested millions in additional funding to support Navigators in states using the federally facilitated Exchanges. These funds were used for outreach, education, and direct enrollment efforts.[62] This figure represents the largest marketing investment for open enrollment since the launch of the Exchanges in 2014. As a direct consequence, Exchange plan enrollment has continued to hit all-time highs in recent years.

Another initiative to improve plan selection requires independent (often web-based) brokers to display a prominent and clear rationale for all explicit Exchange health plan recommendations. In addition, the methodology for the default display order of plans on their websites (for example, alphabetically based on a plan name, from lowest to highest premium, etc.) will be required to be clearly indicated to ensure that consumers are better able to make informed decisions by shopping for and selecting from those Exchange plans that best fit their needs.[63]

B. MORE AFFORDABLE COVERAGE FOR FAMILY MEMBERS OF EMPLOYEES

One of the most significant administrative actions since the passage of the ACA has been to fix the so-called "family glitch"—by amending the existing regulations regarding eligibility for premium tax credits on the Exchanges. The revised rules provide that affordability of employer coverage for family members of an employee would be determined based on the employee's share of the cost of covering the employee and those family members.[64] Previously, affordability had been based on the cost of covering ***only*** the employee. This change took effect in 2023, allowing more individuals to enroll in Exchange coverage and qualify for subsidies. According to government estimates, this policy change is projected to increase the number of individuals with premium tax credit-subsidized Exchange coverage by about 1 million.[65]

This revised rule provides that an employer plan is considered affordable for related individuals only if the portion of the annual premium the employee must pay for family coverage does not exceed 9.5% of household income. Thus, the modification to the rule enables access to subsidized

[62] Press Release, U.S. Dep't of Health & Hum. Serv., HHS Announces Additional Navigator Resources to Support the Extended Healthcare.gov Open Enrollment Period (Dec. 16, 2021), https://www.hhs.gov/about/news/2021/12/16/hhs-announces-additional-navigator-resources-to-support-extended-healthcaregov-open-enrollment-period.html.

[63] U.S. Dept. of Health & Hum. Serv., Fact Sheet, HHS Notice of Benefit and Payment Parameters for 2023 Final Rule Fact Sheet (April 28, 2022), https://www.cms.gov/newsroom/fact-sheets/hhs-notice-benefit-and-payment-parameters-2023-final-rule-fact-sheet.

[64] Affordability of Employer Coverage for Family Members of Employees, 26 C.F.R. pt. 1, 87 Fed. Reg. 61,979 (Oct. 13, 2022).

[65] The modified rule is based on the current administration's conclusion that it is a "better reading of [statutory] provisions."

Exchange coverage for those individuals who are covered by family coverage through a family member's employer that costs more than 9.5% of their household income. Households in this situation are given additional options that provide health coverage at a lower cost and/or with more comprehensive benefits. The revised interpretation of the rule is deemed more equitable as family members of employees would not be required to pay more out of pocket as a share of household income for employer coverage than they would if they were on the Exchange.

While certainly a welcome step toward giving families a more affordable option, the modified rule has its challenges. Notably, since the employee would still be deemed as being offered affordable self-only coverage, the employee would not be eligible for premium tax credits on the Exchange. The family would thus have to purchase two policies—one for the employee through the employer and one through the Exchange for the remaining family members. Having to enroll in multiple plans could be burdensome for families who would then have to navigate different provider networks and drug formularies and incur separate deductibles and limits on out-of-pocket spending. For these reasons, it is expected that many who become eligible for coverage under the modified rule may not opt for Exchange coverage, but rather purchase one employer plan for all family members.[66]

For some families "split coverage" (that is, the employee enrolling in employer-sponsored coverage and the family members enrolling in the Exchange) could lead to lower premiums and cost-sharing for the family as a whole or could even lead to uninsured individuals gaining health coverage. For other families, the cost of the two coverages could be higher, such as having two deductibles and out-of-pocket maximums to satisfy. Thus, it would be desirable for Exchanges to provide clear resources to help ensure that families who choose to enroll in split coverage are truly benefitting from doing so.[67] In addition, employees may need specific information (such as coverage eligibility and cost) from their employer to evaluate whether to enroll family members in subsidized Exchange coverage. Currently, there is no requirement that an employer must provide this information to employees, creating a further "stumbling block" and highlighting that implementation of the family glitch fix is an area where more trained assistance on the Exchanges would be beneficial to help individuals make the right decision for them.[68] Since many may not be aware of those changes and their new subsidy eligibility, for example, if they were previously not eligible to receive financial assistance to purchase Exchange coverage, targeted outreach is critical. Thus, the success of the fix to the "family glitch" will largely depend on the ability of the Exchanges to update their technology, broadcast the new opportunity, and help consumers understand their new coverage options.[69]

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[66] Timothy S. Jost, *A Fix for the Family Glitch*, TO THE POINT BLOG, COMMONWEALTH FUND (April 12, 2022), https://doi.org/10.26099/zr4t-en75.

[67] American Benefits Council, *Comment Letter: Affordability of Employer Coverage for Family Members of Employees (REG-114339-21)* (June 6, 2022), https://www.americanbenefitscouncil.org/pub/?id=45F8BCE5-1866-DAAC-99FB-C6C96B558A99.

[68] Kaye Pestaina & Karen Pollitz, *Navigating the Family Glitch Fix: Hurdles for Consumers with Employer-Sponsored Coverage* (Nov. 21, 2017), https://www.kff.org/health-reform/issue-brief/navigating-the-family-glitch-fix-hurdles-for-consumers-with-employer-sponsored-coverage/#.

[69] Rachel Schwab, et al., *Implementing the Family Glitch Fix on the Affordable Care Act's Marketplaces,* TO THE POINT BLOG, COMMONWEALTH FUND (Dec. 8, 2022), https://doi.org/10.26099/p0d8-v245.

C. WHO IS MOST LIKELY TO BENEFIT FROM EXPANDED ACCESS TO EXCHANGES?

While the shortcomings of employer coverage are apparent when looking at the cross-section of all covered individuals, the extent to which health care is affordable and meets the needs of the insured differs widely. The proposed expansion of access to Exchanges is expected to benefit particularly those who are currently not well served by their employer-provided plan, which can be due to a wide variety—and multiple—factors.

More than one in three covered workers (38%) experience a lack of options and are forced to pick from a single plan type provided by their employer.[70] In contrast, Exchanges offer significantly more provider choices and plans are available in four metal tiers to allow the customer to choose the optimal coverage, given their specific circumstances and preferences. Almost three in ten (29%) workers with employer coverage face a deductible over $2,000—a situation that is about twice as likely to involve employees who work for small firms. Similarly, a total of 22 states in the United States show an average deductible of five percent or more of the median household income as of 2020. Approximately 140 million Americans live in one of those states with high deductibles based on 2021 census.gov data. While it is outside the scope of this paper to examine the causes of why the deductibles in these states are higher, accessing coverage through the Exchanges opens up additional plan options and subsidies to avoid situations in which individuals find themselves subject to adversely high deductibles for those who qualify.

For premiums, the data shows that the average employee share of the insurance premium is 8.5% or more of the median household income in eight states (as of 2020). This includes populous states such as Texas and Florida. Importantly, many employees are paying high premiums (relative to their income) while simultaneously facing a large deductible as part of their plan. This goes against the widespread intuition that higher premiums should be associated with better coverage and lower deductibles.[71] Workers often pay more of the insurance premium, both in relative and absolute terms, when they work for a small firm and are enrolled in a family plan.[72] By offering more choices and professional assistance, the Exchanges are expected to improve outcomes through lower costs and more comprehensive coverage in those circumstances.

Individuals who are at risk of job loss or who frequently change employers can experience adverse consequences when their health insurance coverage is tied to their employment. The so-called "Great Resignation" of 2021 and 2022 saw all-time high numbers of workers quit their jobs.[73] According to the U.S. Bureau of Labor Statistics, a record-breaking number of 48 million workers quit their jobs in 2021—a trend that continued into 2022. Since deductibles are reset when coverage changes due to a change in employment, individuals may end up paying more than the maximum deductible per year even if they maintain uninterrupted coverage.

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[70] 2021 Kaiser Family Foundation (KFF) Employer Health Benefits Annual Survey (Nov. 2021), https://files.kff.org/attachment/Report-Employer-Health-Benefits-2021-Annual-Survey.pdf.

[71] Collins, *supra* note 29.

[72] 2022 Kaiser Family Foundation (KFF) Employer Health Benefits Annual Survey (Oct. 2022), https://files.kff.org/attachment/Report-Employer-Health-Benefits-2022-Annual-Survey.pdf.

[73] Roy Maurer, *Will Workers Continue to Leave Their Jobs in Record Numbers?*, SOC'Y HUM. RESOURCE MGMT. NEWSL. (Dec. 7, 2021), https://www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/Pages/BLS-Quits-JOLTS-Great-Resignation-Record-Numbers.aspx.

In 2022, more than one in five adults with employer-provided coverage were underinsured.[74] While this could be due to multiple factors (limited plan availability, unfit plan choice due to lack of knowledge and inadequate assistance, etc.), access to Exchanges can help reduce the underinsurance problem by offering more affordable, comprehensive coverage and assistance with plan selection. Finally, subsidies available via the Exchanges are explicitly designed to provide additional financial support to those who need it the most.

V. EXCHANGES OFFER VIABLE POTENTIAL TO CONTROL COSTS

The United States has long had a history of the provision of health insurance via employer-sponsored coverage. But as the cost of healthcare continues to increase, employers often shift more of the burden onto employees in the form of higher out-of-pocket expenditures.[75] In recent years, there has undoubtedly been a shift toward more of a gig-based economy along with job separations spiking—according to the U.S. Bureau of Labor Statistics, almost 70 million Americans either quit, were fired, retired, or otherwise left their jobs in 2021. This "job market churn" inevitably disrupts many people's health coverage as highlighted by the COVID-19 crisis, which underscored the "risks of having health insurance tied to employment."[76] As the public health emergency is lifted with many COVID-19-related costs and services no longer being covered without cost-sharing, access to affordable coverage takes on a renewed significance and the Exchanges can serve as a "critical safety net."[77]

While several of the ACA provisions fell short of curbing healthcare costs, the vehicle within the ACA that offers a potential promise is the already-established Exchanges in each of the states. Rising costs are at the forefront of the minds of voters—as an example, Oregon became the first state in the United States to approve a ballot measure in explicitly declaring affordable health care a fundamental human right.[78]

The "safety net" created by expanding access to the Exchanges as well as enhanced subsidies have made it easier for qualifying individuals to enroll in, and afford the cost of, health coverage. Navigators and other Exchange personnel provide logistical support that is crucial for individuals struggling to understand complex plan options and cost features. More changes are on the horizon for Exchanges, including improvements to the plan selection process to make standardized plan displays more readily identifiable for consumers and more marketing and facilitation by Exchange navigators and consumer assisters.[79] In addition, the recently revised rules to address the "family

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[74] 2022 Commonwealth Fund Biennial Health Insurance Survey (Sept. 2022), https://www.commonwealthfund.org/sites/default/files/2022-09/Collins_state_of_coverage_biennial_survey_2022_db.pdf.

[75] Jake Spiegel & Paul Fronstin, *Issue Brief No. 564: Recent Trends in Patient Out-of-Pocket Cost Sharing*, EMP. BENEFIT RES. INST. (July 28, 2022), https://www.ebri.org/docs/default-source/ebri-issue-brief/ebri_ib_564_oopcostsharing-28july22.pdf?sfvrsn=9d57382f_4.

[76] Bob Herman, *Workers are Changing Health Plans More than Ever*, AXIOS (Feb. 25, 2022), https://www.axios.com/workers-change-health-plans-more-than-ever-a5f3fd65-5e91-47be-ad68-0813f5837929.html.

[77] Sabrina Corlette & Maanasa Kona, *Mitigating Coverage Loss When the Public Health Emergency Ends*, COMMONWEALTH FUND BLOG (Apr. 26, 2022), https://doi.org/10.26099/qzxs-1r33.

[78] Oregon Measure 111, Right to Healthcare Amendment (2022).

[79] Timothy S. Jost, *New Rule Proposed to Simplify ACA Consumer Choice and Aid Enrollment*, COMMONWEALTH FUND BLOG (Jan. 17, 2023), https://doi.org/10.26099/j06a-ma64.

glitch" go a long way in making family members eligible for lower-premium subsidized Exchange plans, thereby relieving some of the economic hardship.

Given the promise and continuing growth of Exchanges over the last decade, Congressional action to enhance and more permanently fund cost-sharing reduction subsidies that further reduce copayments, deductibles, and other out-of-pocket payments for the more vulnerable lower-income families would be advantageous.[80] This would reduce uncertainty leading to more individuals turning to the Exchanges as a reliable alternative to employer coverage, with more robust insurer competition acting as a check on premiums. In turn, more healthy people would likely choose to buy coverage previously deemed unaffordable[81]—with a healthier risk pool further lowering premiums and cost-sharing for all.

[80] *See* Michael Simpson et al., *How Polices to Expand Insurance Coverage Affect Household Health Care Spending*, COMMONWEALTH FUND (Jan. 19, 2023), https://doi.org/10.26099/fv5e-sh06.

[81] John Holahan et al., *Changes in Marketplace Premiums and Insurer Participation, 2022-2023*, URB. INST. (Apr. 2023), https://www.urban.org/sites/default/files/2023-03/Changes%20in%20Marketplace%20Premiums%20and%20Insurer%20Participation%2C%202022-2023.pdf.

A TIPPING POINT FOR TIPPING? TRENDS FROM A BEHAVIORAL LENS

Jose Maria Marella*

ABSTRACT

Why does tipping persist? Centered on the idea of bounded material self-interest, behavioral law and economics suggests that customers tip as a prosocial act amid a perceived inadequacy of minimum wage laws to guarantee economic security. The latest technology (for example, tablets with preset tip amounts used in restaurants and prompts and notifications on ride-sharing apps) simply reinforce a burden shift where customers are expected to account for tipped workers' income. It remains unclear whether adopting and implementing improved wage conditions for tipped workers will ease the pressure to tip. Still, drawing analogies from and comparisons against other countries' wage regimes and tipping cultures, tipping appears unnecessary when wage laws already guarantee livable wages.

INTRODUCTION

Tipping is a problematic yet persistent practice. Viewed in the 1800s as antithetical to American industrial ingenuity,[1] the thought of fawning for gratuities was deemed degrading.[2] Yet, by the early 1900s, the Pullman railroad company worked public sympathy into acquiescing to the practice by deliberately hiring and underpaying workers of color, making such facts widely known.[3] Spreading to other sectors, despite state laws prohibiting the practice,[4] tipping persisted as patrons were more afraid to violate the custom.[5]

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[1] *See* KERRY SEGRAVE, TIPPING: AN AMERICAN SOCIAL HISTORY OF GRATUITIES 23 (1998).

[2] Clyde Davis, *Tips*, ATLANTIC (1946), https://www.theatlantic.com/magazine/archive/1946/09/tips/ 655555/.

[3] SEGRAVE, *supra* note 1, at 17-18.

[4] *See, e.g.*, Kirb State, Session Laws (1909), Ch. 249, Secs. 439-440; WILLIAM KIRBY, A DIGEST OF THE STATUTES OF ARKANSAS 683 (1916); and South Carolina, Session Laws (1915), Secs. 1-5.

[5] SEGRAVE, *supra* note 1, at 39.

Traditional economic theories find tipping to be an "economic anomaly."[6] One study tested the theory that tips are a buy-in for better quality services for future transactions.[7] Surveying patrons from 700 Minnesota-based diners, the study found that any difference between the amounts tipped by regular and non-regular customers was statistically insignificant.[8] Building on this Minnesota study, another researcher surveyed 369 restaurant patrons from the United States and Israel, and found that incentivizing good future services is not a primary motivation for the sensitivity of tips to service quality.[9]

Turning to behavioral economics, recent phenomena of "tipflation," "tip creep," or "guilt tipping"[10] advance a choice architecture framework. [11] Considering the restaurant tablets or Uber prompts with preset percentages, but less prominent opt-out or custom amounts, customers are painted as suggestible actors who, because the awkwardness of the situation diverts their mental faculties away from careful deliberation,[12] are nudged to tip more than they might otherwise do.[13] Given the near-unavoidable ritual, one might expect customers to think ahead and get around the situation, perhaps by paying in cash instead of card. But there appears to be more to tipping than the deployment of new technology to nudge customers.

This paper proffers another view from behavioral law and economics, building on the idea of bounded material self-interest. This perspective suggests that customers act prosocially and

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[6] *See* Megan Nelson, *A Case Study in Tipping: An Economic Anomaly*, *in* CROSSING BORDERS: A MULTIDISCIPLINARY JOURNAL OF UNDERGRADUATE SCHOLARSHIP (2017).

[7] *See* Örn Bodvarsson & William Gibson, *Economics and Restaurant Gratuities: Determining Tip Rates*, 56 AM. J. ECON. & SOC. 187 (1997).

[8] *Id*. at 196-197.

[9] Ofer Azar, *Tipping Motivations and Behavior in the U.S. and Israel*, 40 J. APPLIED SOC. PSYCHOL. 421, 422-23, 452 (2010). *See also Do tips make for better service?*, ECONOMIST (Jan. 15, 2022), https://www.economist.com/international/2022/01/15/do-tips-make-for-better-service.

[10] *See* Rocio De La Fe, *Has tipping gotten out of control?*, CBS8 (Jan. 27, 2023), https://www.cbs8.com/article/news/local/consumers-are-over-tipflation/509-c25397bc-eb01-4773-a1c1-166a592fa634; Isabel Rosales, *What is tipflation? When to tip and when to skip*, ABC7 (Dec. 5, 2022), https://abc7chicago.com/what-is-tipflation-tipping-when-to-tip-etiquette/12525759/; *and* Aimee Picchi, *How "tipflation" and "tip creep" are sparking a backlash: "I don't feel obligated" to tip*, CBS NEWS (Jan. 27, 2023), https://www.cbsnews.com/news/tipping-backlash-inflation-who-should-get-tipped/.

[11] CASS SUNSTEIN & RICHARD THALER, NUDGE: THE FINAL EDITION (2021).

[12] *See* Luiz Pessoa, *How do emotion and motivation direct executive control?*, 13 TRENDS COGNITIVE SCI. 160, 161-162 (2009): "When emotional content is high in threat, resources are diverted towards the processing of the item. The mobilization of the resources is more extreme, and the effects on behavior considerably more dramatic. In this case, the main impact on behavior comes from the recruitment of attentional/effortful control that is required to prioritize the processing of high-threat information—thus, 'hard' prioritization occurs. In particular, attentional/effortful control is envisaged as involving processing resources that are strongly shared by several executive functions. Because high-threat is expected to recruit such 'common-pool resources', it will impair other executive functions that are reliant on them, including inhibition, shifting and updating."

[13] *See* Sara Morrison, *Everyone wants a tip now. Do you have to give them one?*, VOX (Oct. 7, 2022), https://www.vox.com/recode/2022/10/7/23389885/square-toast-tipping-retail-tipflation-guilt; World Travelers dot NL, *Tipflation | The tip inflation phenomenon in America that is spreading to Europe*, Wereldreizigers.nl (Aug. 24, 2022), https://www.wereldreizigers.nl/en/travel-news/tipflation-tip-inflation-tip-inflation-phenomenon-america-canada-europe/.

assume the burden of pitching in for tipped workers' livable wages, which United States federal minimum wage law has failed to guarantee. Additionally, this framework accounts for the latest technological advancements (for example, tablet-configured tipping options) not simply as a nudging mechanism, but rather as reinforcing the burden shift to guarantee livable wages from labor legislation to customer pockets. As such, tipping in the United States is not so much an economic anomaly, but a practice borne by human responses to perceived socio-economic inequalities. Absent a policy that guarantees fair wages, and amid proposed legislation to standardize or increase minimum wage, tipping persists.

Part I proceeds by describing tipped workers' economic status vis-à-vis the minimum wage laws, particularly the subminimum wage regime. Part II discusses patrons' prosocial tendencies amid tipped workers' perceived economic insecurity. Before concluding in Part IV, Part III contemplates the effects of, and potential issues with, replacing tipped workers' subminimum wage regime with a fairer and unified minimum wage system.

I. TIPPED WORKERS' ECONOMIC POSITION

The history of federal minimum wage laws in the United States demonstrates declining wage security accorded to tipped workers. In 1938, the Fair Labor Standards Act[14] (FLSA) was enacted to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers[.]"[15] Employers were obligated to pay their employees—without distinction as to kind of employment—an hourly minimum wage that gradually increased from 25 cents, 30 cents, and 40 cents over a seven-year period.[16] Thereafter, the Administrator of the Wage and Hour Division of the Department of Labor would regularly convene an industry committee to investigate labor conditions and fix the appropriate minimum wage through a wage order.[17]

While the FLSA mandates a national minimum wage standard for workers in general,[18] the law carves out a separate minimum wage regime for tipped workers. The FLSA reflects the dualist treatment between non-tipped and tipped workers, with the former typically guaranteed higher minimum wages because their duties do not occasion the receipt of gratuities which the latter customarily enjoy.[19] A "tipped employee" is one who is engaged in an occupation that customarily and regularly earns more than $30.00 a month in tips.[20] Employers are allowed to pay tipped employees a floor cash wage, presently fixed at $2.13 per hour,[21] if, combined with tips actually received, the worker's total pay meets the federal minimum wage; else the employer will pay the difference.[22]

[14] Fair Labor Standards Act of 1938, 52 Stat. 1060 (FLSA).
[15] *Id.* § 2(a)-(b).
[16] *Id.* § 6(a).
[17] *Id.* § 8.
[18] *Id.* § 206.
[19] *See* Ofer Azar, *The Economics of Tipping*, 34 J. ECON. PERS. 215, 221 (2020).
[20] 29 U.S.C. § 203(t) (1938).
[21] U.S. DEP'T OF LABOR WAGE & HOUR DIV., FACT SHEET #15: TIPPED EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA), https://www.dol.gov/agencies/whd/fact-sheets/15-tipped-employees-flsa.
[22] 29 U.S.C. § 203(m)(2)(a) (1938).

If minimum wage is meant to "protect workers against unduly low pay," and "ensure a just and equitable share of the fruits of progress,"[23] then tipping in the United States is not exactly a gratuity, that is, over and beyond the exchange of value. Rather, tips directly comprise wages. In 1991, this tipped minimum wage was fifty percent the value of overall minimum wage but has been fixed at $2.13 per hour since 1996. Had this kept up with inflation, present direct wages should be $6 per hour.[24]

The FLSA, and wage orders pursuant thereto, only provide a federal minimum. States are still free to set floor wages that exceed this minimum. Department of Labor statistics[25] show that, in seven states that require employers to pay tipped workers the full state minimum wage before tips, minimum hourly direct wages range from $4 to $15.74; whereas, for twenty-eight states that require employers to pay tipped workers a minimum cash wage above that required pursuant to the FLSA, the range is $2.23 to $11.85. Meanwhile, fifteen states plainly adopt the federal minimum.

Tying tipped workers' economic well-being to a discretionary practice[26] seems acceptable during economic booms, but places them in precarity during downturns, especially when customers themselves are financially strained.[27] Amid such insecurity, the touchscreen tablets and app notifications—though considered abrasive technology[28]—strive to secure the livable wages that the tipped federal minimum wage may have failed to guarantee.

II. CUSTOMER AS BENEVOLENT DICTATOR

Behavioral economists have found that people's material self-interests are bounded. Motivated by fairness[29] or prosocial considerations,[30] people manifest selfless behavior.[31] One study tested this material boundedness by iterating the dictator game—an experiment where a "dictator"

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[23] INT'L LABOUR ORG., MINIMUM WAGE POLICY GUIDE 3 (2016).

[24] Alana Semuels & Malcolm Burnley, *Low Wages, Sexual Harassment and Unreliable Tips. This is Life in America's Booming Service Industry*, TIME (Aug. 22, 2019), file:///Users/takingmarella10/Desktop/Tipflation/Labor%20Literature/How%20a%20Booming%20Economy%20Left%20American%20Service%20Workers%20Behind%20Time.pdf.

[25] U.S. Dep't of Labor, Wage & Hour Div., *Minimum Wages for Tipped Employees* (Jan. 1, 2023), https://www.dol.gov/agencies/whd/state/minimum-wage/tipped.

[26] Azar, *supra* note 19, at 215.

[27] Tess Owings, *'Tipflation' Leaving Consumers Confounded*, FOOD INST. (Dec. 15, 2022), https://foodinstitute.com/focus/tipflation-leaving-consumers-confounded/.

[28] Jenna Herazo, *Coastal Carolina University marketing expert breaks down 'tipflation,'* ABC15 NEWS (Feb. 3, 2023), https://wpde.com/news/local/tipflation-marketing-credit-card-restaurants-coffee-shops-matthew-gilbert-february-3-2023.

[29] The Bridge, *Critiques of Law and Economics*, https://cyber.harvard.edu/bridge/LawEconomics/critique2.htm.

[30] Johannes Leder & Astrid Schütz, *Dictator Game*, *in* ENCYCLOPEDIA OF PERSONALITY AND INDIVIDUAL DIFFERENCES 1-4 (Virgil Zeigler-Hill & Todd Shackelford eds., 2020).

[31] *See* Sendhil Mullainathan & Richard Thaler, *Behavioral Economics* 5 (NBER Working Paper Series No. 7948, 2000); Max Witynski, *Behavioral economics, explained*, UCHICAGO NEWS EXPLAINER SERIES, https://news.uchicago.edu/explainer/what-is-behavioral-economics.

receives an endowment and unqualifiedly decides how much to split with a recipient. One treatment set was carried out double-blind, that is, neither dictator nor recipient knew anything about the other, while in the other treatment set, the recipient was disclosed to be a local branch of the American Red Cross.[32] In the second set devised with a more "deserving" recipient, the study significantly found that the splits tripled.[33] In another experiment, where recipients were explicitly identified as poor, dictators donated on average two-thirds of their endowments.[34] As opposed to the selfish rational economic agent, dictators were found to be empathically responsive, increasing altruistic behavior to recipients deemed worthy.[35]

It could very well be that—as the FLSA's direct cash wage component has failed to keep up with inflation, making tipped workers' income heavily dependent on tips—customers may be manifesting altruistic behavior by filling in where social legislation is found inadequate. Thus, it is not simply that customers act prosocially according to behavioral economics, but perhaps a perceived inadequacy of federal minimum wage levels provides an implicit motivation, or at least a critical backdrop, for which to act selflessly.

One survey of people's tipping motivations found that: "[T]he significant number of people tip because they know that waiters receive low wages suggests that people sometimes tend to take actions to fill gaps created by others. Here, people tip to increase the low wages paid to waiters by their employers."[36] It was found that an awareness that waiters earn low wages and are tip-dependent had a statistically significant effect on tips, increasing the amount thereof.[37]

No similar studies, correlating tips with motivations therefor, have since been conducted. The latest technology, for example, check-out counter tablets, would have easily facilitated this, except that information thereon is proprietary data safeguarded by the companies operating these tablets.[38] One such study might be designed to ask tippers about their awareness of tipped minimum wages, accounting for interstate differences, and whether patrons find these fair, then correlating these factors with whether and how much they tip, among other material factors.

Additionally, the prosocial view suggests that tipping is borne more out of a concern for perceived material disparities with service workers, rather than just the actual terms of the transaction. One survey found that, for people who tip motivated by perceived low wages, tip

[32] Catherine Eckel & Philip Grossman, *Altruism in Anonymous Dictator Games*, 16 GAMES & ECON. BEHAV. 181, 185-186 (1996).

[33] *Id*. at 186-189.

[34] Pablo Brañas-Garza, *Poverty in dictator games: Awakening solidarity*, 60 J. ECON. BEHAV. & ORG. 306, 314-315 (2006).

[35] Christina Fong, *Evidence From an Experiment on Charity to Welfare Recipients: Reciprocity, Altruism and The Empathic Responsiveness Hypothesis*, 117 ECON. J. 1008, 1010, 1020 (2007).

[36] Azar, *supra* note 9, at 424.

[37] *Id*. at 434.

[38] *See* Morrison, *supra* note 13 ("Michael Lynn, a professor of consumer behavior and marketing at Cornell University, has studied tipping for decades. He says tablet tipping data is hard to come by and harder still to compare to whatever pre-tablet tipping data is out there.").

levels were not as responsive to service quality.[39] This insight dovetails with findings by traditional economic theory that tipping is unrelated to either experienced or expected quality of service.[40]

The above issues also implicate the characterization of a tip as a gratuity. A gratuity is commonly understood as something voluntarily given, which is over and above the terms of the transaction.[41] Yet, the FLSA's tipped minimum wage regime makes tips a component of wages, with customers directly subsidizing tipped workers' economic security. In other words, does a tip lose its supposed voluntariness if the tipper is prompted by some moral compulsion borne by a perceived economic disparity? Is a tip still "over and above" the exchange of value if it directly accounts for tipped workers' wages?

By these accounts, present structures and attitudes remain unchanged from when tipping first became pervasive, as companies like the Pullman railroad company prodded its patrons to tip by drawing attention to their underclass workers.[42] Factoring in the latest tablet-prompted tipping technology simply reinforces customers' expected burden of pitching in for tipped workers' wages. Such technology may even demonstrate just how benevolent customers are—that despite the rather brusqueness of getting them to openly display their tips at the payment counter, they still do so. Whether they sustain some disutility and tip grudgingly, or feel a warm glow of generosity, would not make tipping any less prosocial.

III. TOWARDS MANDATED ECONOMIC SECURITY

As tipped workers capitalize on the nudging technology to hedge against tipping uncertainty, dictator benevolence also has limits. Customers are also recovering from the pandemic and keeping up with inflation, now tipping lesser in frequency and amount compared to pre-pandemic levels.[43] Still, depicting antagonistic interests between customers and the service industry is not only unfair,[44] but distracts from the more important initiative of securing livable wages for tipped workers.

[39] Azar, *supra* note 9, at 452.

[40] Sarah Todd, *How Much to tip in a post-pandemic world*, QUARTZ (June 18, 2021), https://qz.com/2020096/how-much-to-tip-in-a-post-pandemic-world.

[41] *See* Jackson Lewis, *Some Basics on Tips & Gratuities in California*, JD SUPRA (Dec. 6, 2022), https://www.jdsupra.com/legalnews/some-basics-on-tips-gratuities-in-6566097/; Labor Comm'r's Office, Cal. Dep't of Indus. Relations, Tips and Gratuities, https://www.dir.ca.gov/dlse/faq_tipsandgratuities.htm; Kara Gammell, *How much should I tip? The etiquette of service charges and gratuities*, GUARDIAN (Sept. 29, 2014), https://www.theguardian.com/money/2014/sep/29/how-much-should-i-tip-etiquette-tipping-service-charges.

[42] SEGRAVE, *supra* note 1, at 18.

[43] Tom Huddleston, Jr., *The pandemic-era bump in tipping is officially over—and inflation might be to blame*, CNBC (June 8, 2022), https://www.cnbc.com/2022/06/08/the-pandemic-era-bump-in-tipping-is-over-inflation-might-be-to-blame.html; Jessica Dickler, *Amid persistent inflation, cash-strapped consumers are tipping less*, CNBC (Nov. 25, 2022), https://www.cnbc.com/2022/11/25/amid-persistent-inflation-cash-strapped-consumers-are-tipping-less.html.

[44] Ligaya Mishan, *When Did Hospitality Get So Hostile?*, N.Y. TIMES STYLE MAG. (Feb. 10, 2023), https://www.nytimes.com/2023/02/10/t-magazine/restaurants-hostile-eating-out.html.

Minimum wage legislation ensures that workers are provided at least the minimal conditions to obtain a subsistence standard of living.[45] There have been recent legislative proposals seeking to amend the FLSA by eliminating the subminimum wage regime for tipped workers and guaranteeing them the same minimum wage rate as other kinds of workers.[46] Adopting such legislation could cause an attitudinal shift, abating customers' prosocial motivations, and causing them to tip less or cease doing so altogether.

That patrons will tip less after eliminating tipped workers' subminimum wage regime might seem speculative absent a rigorous study *ex post* any such amendments. Behavioral economics' dictator game simulations only establish that prosocial behavior increases due to perceived "deserving-ness" due to economic disparities, but are not determinative of the opposite results, that is, more wage security yields less tipping. Given varying tipped minimum wage regimes at the state level, a cross-state comparison could have also provided some predictive analyses on how tipping responds to improved wage security. Nevertheless, a glance at other jurisdictions providing workers with better wage security would in the meantime be a useful heuristic.

Cursorily, there appear to be no strong tipping cultures in countries with a unified minimum wage regime. That is the case in Australia, where, as of July 2022, its Fair Work Commission set minimum wage at the equivalent of $14.47 per hour regardless of type of worker.[47] Tipping in Australia is perceived as unnecessary as workers are not dependent thereon for their economic well-being.[48] Meanwhile, by April 2023, the United Kingdom raised its National Living Wage for workers aged 23 and over to the equivalent of $12.54 per hour.[49] The U.K. government had even introduced legislation that made it illegal for tips and gratuities to comprise minimum wage.[50] Moreover, the U.K. government backs initiatives that communicate to patrons that tips are purely discretionary and voluntary.[51]

On the other hand, service charges are compulsorily imposed and set by business owners, who retain discretion over allocation, often fully compensating staff for their services, but with a portion sometimes accruing to owners themselves.[52] In France, tipping is considered unusual since French legislation already mandates a *service compris* to be included in an item's cost, which is meant to

[45] Dynamex Operations West, Inc. v. Superior Court of Los Angeles County, 4 Cal. 5th 903, 952 (Cal. 2018).

[46] *See* Pay Workers a Living Wage Act, H.R. 3164, 114th Cong. (2015); Tip Income Protection Act of 2018, H.R. 5180, 115th Cong. (2018); Raise the Wage Act of 2021, H.R. 603, 117th Cong. (2021); *and* Fair Pay Act of 2021, H.R. 2243, 117th Cong. (2021).

[47] *See* Austl. Fair Work Comm'n, Nat'l Minimum Wage Order 2022 (June 28, 2022).

[48] *See* John Frank Burgess, *Tipping in Australia: The Result of American Influence?*, 36 J. AUST'L STUDIES 377 (2012); Melissa Compagnoni, *Should we leave a tip? Australia's tipping culture explained*, SPECIAL BROAD. SERV. (Aug. 16, 2022), https://www.sbs.com.au/language/english/en/article/should-we-leave-a-tip-australias-tipping-culture-explained/5nub7yae7.

[49] *See* Government of the United Kingdom, National Minimum Wage and National Living Wage rates, UK GOV'T OFFICIAL WEBSITE, https://www.gov.uk/national-minimum-wage-rates.

[50] The National Minimum Wage Regulations 1999 (Amendments), Regulation 2009, Section 31(1)(e).

[51] LOW PAY COMM'N, A REVIEW OF CURRENT PRACTICES IN RELATION TO TIPS & GRATUITIES 21-22 (2018).

[52] Internal Revenue Serv., *Tips Versus Service Charges: How to Report*, NEWS RELEASE (Feb. 8, 2015).

cover staff wages.[53] A study of restaurant tipping in Europe found tip size in France to be the lowest,[54] suggesting that "service-inclusive pricing norms will result in significantly lower service gratuities."[55] Another cross-country study also found an extremely low prevalence of tipping in Japan.[56] Supposedly, tips are outrightly rejected in Japan because they insinuate that workers do not earn fair wages.[57] Some U.S. businesses have actually attempted to implement service charges to insulate staff wages against the whims and biases of patrons,[58] but such practice has yet to catch on.

IV. CONCLUSION

Amid these issues, the latest "tablet-induced guilt trips"[59] are but a stopgap measure that fails to address deeper structural inequalities in the service industry particularly, and in the labor economy generally. Even with the use of aggressive tip-grabbing technology, a tipping point for tipping is unlikely; the discomfort experienced by customers might just not be enough to shake off the concern that waitstaff are barely scraping enough day to day. In contrast, some mandated security in the form of standardized and livable minimum wages could ease some of the pressure that, over the decades, has been focused on customers. Maybe by then, a tip will mean what it should have always been—a gratuity over and above the exchange of value in a transaction, because the worker is already adequately compensated for services rendered.

[53] Nicolas Guéguen & Céline Jacob, *The effect of touch on tipping: an evaluation in a French bar*, 24 HOSP. MGMT. 295, 296 (2005). *See also* Heather Stimmler, *Tipping Etiquette in France*, SECRETS OF PARIS (Feb. 8, 2022), https://secretsofparis.com/practical/money-matters/tipping/.

[54] Stefan Gössling, et al., *Restaurant tipping in Europe: a comparative assessment*, 24 CURRENT ISSUES TOURISM 811, 818 (2021).

[55] *Id*.

[56] Michael Lynn, et al., *Consumer Tipping: A Cross-Country Study*, 20 J. CONSUMER RESEARCH 478, 485 (1993).

[57] Greg Rodgers, *A Guide to Tipping in Japan*, TRIPSAVVY (Aug. 27, 2019), https://www.tripsavvy.com/tipping-in-japan-1458316; Casey Baseel, *Five reasons there's no tipping at restaurants in Japan*, Japan Today (Aug. 27, 2018), https://japantoday.com/category/features/food/five-reasons-there%E2%80%99s-no-tipping-at-restaurants-in-japan.

[58] *See* Jessica Sidman, *Should You Tip on Top of a Restaurant Service Charge?*, WASHINGTONIAN (Sept. 20, 2022), https://www.washingtonian.com/2022/09/20/should-you-tip-on-top-of-a-restaurant-service-charge/.

[59] Charlie Warzel, *Tipping is Weird Now*, ATLANTIC (Jan. 6, 2023), https://www.theatlantic.com/technology/archive/2023/01/technology-pandemic-economy-gratuity-tipping-etiquette-square/672658/.

CORPORATE FREE SPEECH AND THE TEXAS SOCIAL MEDIA ANTI-CENSORSHIP LAW

Don Mayer*

INTRODUCTION

Many claim that free speech is the cornerstone of democracy.[1] Only a well-informed public can wisely decide political issues facing the Republic.[2] Yet social media has not informed the citizenry very well. What it has done instead—and quite profitably—is to deepen political divisions, replacing reasoned discourse with anger and deep distrust toward the viewpoints and speech of others.[3] Social media does this by algorithmically stoking moral outrage and solidifying social

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[1] Ronald Dworkin, *The Right to Ridicule*, N.Y. REVIEW OF BOOKS, Mar. 23, 2006 ("Free speech is a condition of legitimate government. Laws and policies are not legitimate unless they have been adopted through a democratic process, and the process is not democratic if government has prevented anyone from expressing his convictions about what those laws and policies should be.").

[2] As Chief Justice Charles Evans Hughes presciently observed nearly 100 years ago:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

DeJonge v. Oregon, 299 U.S. 253, 19-20 (1927).

[3] Barack Obama observed in 2020 that the U.S. now has a media landscape dominated not just by Facebook but by Fox News, a landscape that allows Americans to choose their own "distorted reality." This means, he says, we "no longer have a shared set of facts." Peter Kafka, *Obama: The Internet Is 'the Single Biggest Threat to Our Democracy*, VOX, Nov. 16. 2020. *See also* Jeffrey Goldberg, *Why Obama Fears for our Democracy*, ATLANTIC, Nov. 15, 2020. ("If we do not have the capacity to distinguish what's true from what's false, then by definition the marketplace of ideas doesn't work. And by definition our democracy doesn't work. We are entering into an epistemological crisis.") *Id.* Justice Oliver Wendell Holmes Jr. referred to the "free trade in ideas" within "the competition of the market" in his 1919 dissent in Abrams v. United States, 250 U.S. 616 (1919). Justice William O. Douglas in United States v. Rumely stated that "[l]ike the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas." 345 U.S. 41, 56 (1953). But the basic idea that "good speech" will ultimately crowd out "bad speech" pre-dates a significant body of psychological research concluding that many people will cling to false and improbable notions despite weighty and reliable information to the contrary. Giovanni Luca Ciampaglia & Filippo Menczer, *Biases Make People Vulnerable to Misinformation Spread by Social Media*, SCIENTIFIC AMERICAN, June 21, 2018. *See also* Christopher Seneca, *How to Break Out of Your Social Media Echo Chamber; Platforms like Facebook are designed to profit from humans' confirmation bias*, WIRED, Sept. 17, 2020 ("It's a tale of two feeds, because thanks to confirmation bias and powerful proprietary algorithms, social media platforms ensure we only get a single side of every story . . . Even though most Americans continue to describe themselves as holding balanced views, we still naturally gravitate toward certain content online. Over time, algorithms turn slight preferences into a

identities,[4] all to increase user engagement (and profits). Doing so exacerbates political polarization not only in the United States, but also in other countries where social media platforms (SMPs) have an outsize influence on democratic politics.[5] As early as 2016, 44 percent of all Americans said they got their news about candidates from SMPs like Facebook, Twitter, Instagram, and YouTube.[6]

Yet "political news" is all too often not informative at all. More and more, politicians seem to prefer "sound bites" or other performative utterances on cable or social media that seek media attention; building followers by making morally outraged posts or posturing for the press will generate fund-raising far more than speaking rationally on matters of public interest.[7] Citizens have come to see politics as performance or entertainment. We have, as Megan Garber claims, lost

polarized environment in which only the loudest voices and most extreme opinions on either side can break through the noise.") https://www.wired.com/story/facebook-twitter-echo-chamber-confirmation-bias/.

[4] ROGER MCNAMEE, ZUCKED: WAKING UP TO THE FACEBOOK CATASTROPHE 91 (2019) ("The competition for attention across the media and technology spectrum rewards the worst social behavior. Extreme views attract more attention, so platforms recommend them. Unfortunately, people in a filter bubble become increasingly tribal, isolated, and extreme. They seek out people and ideas that make them comfortable . . . . Social media has enabled personal views that had previously been kept in check by social pressure—white nationalism is an example—to find an outlet.").

[5] Alexandra Stevenson, *Facebook Admits it was Used to Incite Violence in Myanmar*, N.Y. TIMES, Nov. 6, 2018 ("Facebook failed to prevent its platform from being used to "foment division and incite offline violence" in the country, one of its executives said in a post on Monday, citing a human rights report commissioned by the company."). *See also* MAX FISHER, THE CHAOS MACHINE: THE INSIDE STORY OF HOW SOCIAL MEDIA REWIRED OUR MINDS AND OUR WORLD 155-172 (2022). Fisher describes how the algorithms used by social media platforms are designed to maximize user "engagement" in the service of corporate profits, regardless of the social and political consequences. Fisher details how hate speech has spilled over into violence, both in the U.S. and abroad, and how social media giants like YouTube and Facebook claim to champion free speech but mostly prize higher profits. This has resulted in cultural shifts in societies where people are polarized not by beliefs based on facts, but on misinformation, outrage, and fear. Fisher's book has a fairly complete description of how Facebook activated anti-Rohingya emotions among the Buddhist majority in Myanmar, and how "content" was not managed except for user engagement (and profits), resulting in a death and displacement of thousands of the Rohingya in Myanmar. Over 6,000 Rohingya were killed in the first months after violence broke out in 2017. *Myanmar Rohingya: What you need to know about the crisis*, BBC NEWS, Jan. 23, 2020, https://www.bbc.com/news/world-asia-41566561. *See also Number of internally displaced Rohingya doubles, to 800,000*, U.N. NEWS, Feb. 11, 2022, https://news.un.org/en/story/2022/02/1111812.

[6] SHEERA FRENKEL & CECILIA KING, AN UGLY TRUTH: FACEBOOK'S BATTLE FOR DOMINATION 15 (2021). By 2022, at least half of U.S. citizens got some of their news from social media. *Social Media and News Fact Sheet*, PEW RES. CTR., Sept. 20, 2022, https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet/.

[7] *See, e.g.*, Chris Cilliza, *Marjorie Taylor Greene's Empty Politics*, CNN, Feb. 25, 2021 (Cilliza begins by noting a sign that Rep. Greene put up outside of her D.C. office; the sign said, "There are two genders: Male and Female. Trust the Science." What Cilliza calls "performative politics" is increasingly common; "politicians make statements that are not intended to affect debate or policy in D.C., but to raise money . . . .

Greene isn't putting that sign up because she thinks it might have some sort of actual effect on the debate over the Equality Act. The bill has support among the Democratic House majority and is likely to pass. Greene knows that. All she is doing is rallying her political base by putting on a performance with zero actual effect on how or whether this bill will become a law or not.").

the plot."[8] Even the events at the U.S. Capitol on January 6, 2021 have opposing narratives, depending on which side of the political divide is telling the story.[9]

The storming of the U.S. Capitol on January 6, 2021 was historic and troubling.[10] Law enforcement agencies have been able to arrest and prosecute "the boots but not the suits."[11] Consequences for "the suits" came far sooner on social media than in the courts, since right after January 6, SMPs such as Facebook and Twitter acted to suspend President Trump's accounts.[12] In addition, Amazon, Apple, and Google effectively banished the social media site Parler,[13] an alternative to Twitter that some of Trump's supporters had used to encourage and plan the attack.[14] Financial service apps such as PayPal and Stripe stopped processing payments for the Trump campaign and for accounts that had funded travel to D.C. for Trump's supporters.[15]

But the SMPs' response to the events of January 6 soon caused a backlash among G.O.P. politicians. Many Republican officeholders saw the post-January 6 de-platforming of Trump by Twitter and Facebook as proof that social media had a distinct left-leaning bias.[16] In 2021, both

[8] Megan Garber, *We're already living in the Metaverse*, ATLANTIC, Mar. 2023 ("We will become so distracted and dazed by our fictions that we'll lose our sense of what is real. We will make our escapes so comprehensive that we cannot free ourselves from them. The result will be a populace that forgets how to think, how to empathize with one another, even how to govern and be governed.").

[9] In the age of "alternative facts," even the fact that it was Trump supporters who stormed the Capitol has been challenged by some. *See, e.g.*, Caitlin Dickson, *Capitol riot was false-flag operation by leftists, Trump backers claim, with no basis*, YAHOO! NEWS, Jan. 6, 2021. *See also* Tucker Carlson's three-part documentary on the events of January 6th, as noted in Bill McCarthy, *Tucker Carlson's 'Patriot Purge' film on Jan. 6 is full of falsehoods, conspiracy theories*, POYNTER, Nov. 8, 2021, https://www.poynter.org/fact-checking/2021/tucker-carlsons-patriot-purge-film-on-jan-6-is-full-of-falsehoods-conspiracy-theories/. *See also* Emily Brooks et al., *Tucker Carlson shows the first of his Jan. 6 footage, calls it 'mostly peaceful chaos,'* THE HILL, Mar. 06, 2023.

[10] Remy Tumin & Jeremiah M. Bogert, Jr., *A Pro-Trump Mob Storms the Capitol*, N.Y. TIMES, Jan. 6, 2021. *See also* Dmitriy Khavin et al., *Days of Rage: How Trump Supporters Took the U.S. Capitol.* N.Y. TIMES, Nov. 10, 2021. Within weeks of January 6, 2021, five police officers who had served at the Capitol on Jan. 6 died, and some 150 police officers had reported injuries. Chris Cameron, *These are the People who Died in Connection With the Capitol Riot*, N.Y. TIMES, Jan. 5, 2022.

[11] The phrase can be attributed to Glenn Kirschner. *The Boots and the Suits featuring @GlennKirschner2*, THE DAILY BEANS, Aug. 8, 2022, https://www.youtube.com/watch?v=Dr5iUiROli8.

[12] Kate Conger et al., *Twitter and Facebook Lock Trump's Accounts After Violence on Capitol Hill*, N.Y. TIMES, Jan. 6, 2021, www.nytimes.com/2021/01/06/technology/capitol-twitter-facebook-trump.html. *See also* Elizabeth Dwoskin & Nitasha Tiku, *How Twitter, on the front lines of history, finally decided to ban Trump*, WASH. POST, Jan. 16, 2021 ("A dozen current and former employees and close observers of the company reconstructed the critical decision, marked by tearful meetings, bitter internal arguments and the culmination of years of debate within the company.").

[13] Alex Fitzpatrick, *Why Amazon's Move to Drop Parler is a Big Deal for the Future of the Internet*, TIME, Jan. 21, 2021.

[14] Sheera Frenkel, *The storming of Capitol Hill was organized on social media*, N.Y. TIMES, Jan. 6, 2021.

[15] Ian Bremmer, *The Technopolar Moment*, FOREIGN AFFAIRS, Nov/Dec. 2021 ("Major financial service apps, such as PayPal and Stripe, stopped processing payments for the Trump campaign and for accounts that had funded travel expenses to Washington, D.C., for Trump's supporters.").

[16] *See* Alison Durkee, *Are Social Media Companies Biased Against Conservatives? There's No Solid Evidence, Report Concludes*, FORBES, Feb. 1, 2021 ("Trump and other Republicans have repeatedly argued they're being treated unfairly by social media companies. 'Big Tech is out to get conservatives,' Rep. Jim Jordan (R-Ohio) said at a House antitrust subcommittee hearing in July. 'That's not a suspicion. That's not a hunch. That's a fact.'"). The House Oversight Committee, with a new GOP majority, began hearings in February 2023 with accusations that Twitter worked with government officials to suppress the Hunter Biden laptop story in the weeks prior to the 2020 election. Will Oremus et al., *At combative hearing, GOP fans allegations of collusion by government, Big Tech*, WASH. POST,

Florida and Texas passed anti-censorship laws, authorizing plaintiffs to sue social media platforms that might censor posts based on the user's political viewpoint.[17] On the federal level, Senator Josh Hawley of Missouri had previously sponsored a bill to amend Section 230 of the Communications Decency Act (CDA).[18] That proposal would remove the immunity that large social media platforms receive under Section 230 unless they submit to an external audit that proves that their algorithms and content-removal practices are politically neutral.[19] When Governor Greg Abbott signed the Texas legislation, he said: "There is a dangerous movement by some social media companies to silence conservative ideas and values. This is wrong and we will not allow it in Texas."[20]

Soon after the Texas and Florida anti-censorship bills became law, NetChoice LLC, a trade association for large social media platforms, filed separate lawsuits seeking injunctive relief from each law. In the Florida case, *NetChoice v. Moody*, the district court issued an injunction based primarily on First Amendment issues,[21] and the Court of Appeals for the Eleventh Circuit affirmed that injunction.[22] In the Texas case, the district court issued an injunction based on First Amendment issues,[23] but the Court of Appeals for the Fifth Circuit overturned that injunction, finding that the First Amendment rights of the SMPs were not being infringed.[24] In both cases, the main issues were whether the Texas and Florida laws violated the First Amendment rights of SMPs, whether Section 230 of the CDA somehow preempted those statutes, and whether social media platforms have become essential "public squares" or "common carriers" that must not discriminate among various kinds of posted content. The common carrier and public square concepts may well come up in oral argument when the Court considers *NetChoice v. Paxton* in the October 2023 term,[25] but this paper will focus on the First Amendment issues and the U.S. Supreme Court's relevant precedents on free speech.

Feb. 8. 2023 ("The House Oversight Committee grilled three former Twitter executives on the company's 2020 decision to block users from sharing a controversial New York Post story about Joe Biden's son, Hunter Biden, and the scandalous contents of a laptop that allegedly belonged to him. That decision, which Twitter later reversed, has become the right's go-to example of what it views as anti-conservative 'censorship' by Silicon Valley social media firms—even though the company's leaders have long since agreed it was a mistake.").

[17] Unlawful acts and practices by social media platforms, FLA. STAT. § 501.2041 (2021); TEX. CIV. PRAC. & REM. § 143A.002 (2021).

[18] Communications Act of 1934 § 230, 47 U.S.C. § 230.

[19] *Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies*, Josh Hawley U.S. Senator for Missouri (June 19, 2019), https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies. The bill would require companies to prove their political neutrality by "clear and convincing evidence." Hawley introduced the measure in June of 2019, claiming that:

> There's a growing list of evidence that shows big tech companies making editorial decisions to censor viewpoints they disagree with. Even worse, the entire process is shrouded in secrecy because these companies refuse to make their protocols public. This legislation simply states that if the tech giants want to keep their government-granted immunity, they must bring transparency and accountability to their editorial processes and prove that they don't discriminate.

[20] Allum Bokhari, *Texas Governor Greg Abbott Signs Bill Fighting Social Media Censorship*, BREITBART NEWS, Sept. 10, 2021.

[21] NetChoice v. Ashley Brooke Moody, 2021 U.S. Dist. LEXIS 121951 (2021).

[22] NetChoice, LLC. v. Attorney General, 34 F.4th 1196 (11th Cir. 2022).

[23] NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092 (W.D. Tex. 2021).

[24] Netchoice, LLC. v. Paxton, 49 F.4th 439 (5th Cir. 2022).

[25] *Paxton, cert. granted*, __ S. Ct. __, 2023 (U.S. Sep. 29, 2023) (No. 22-555).

This paper proceeds as follows: Part I provides a brief overview of the Florida and Texas laws and the litigation they spawned;[26] Part II provides an in-depth look at the Texas law and notes the federal district court's opinion enjoining that law;[27] and Part III compares the federal district court and Fifth Circuit opinions on HB20, as the Fifth Circuit decided to stay the district court's injunction. The comparison in Part III primarily focuses on First Amendment issues, but the Fifth Circuit's 2-1 decision overturning the injunction also turned on Section 230 of the CDA as well as the common carrier concept, a concept the Texas legislature embraced in passing its legislation. While potential Section 230 changes and the judicial use of the common carrier concept are likely to be key issues for SMPs going forward, they are here considered only briefly, along with the views of Fifth Circuit Judge Leslie Southwick who dissented on the majority's application of the First Amendment to HB20.[28] Part IV considers how the Supreme Court should respond to *NetChoice v. Paxton*, given that the Eleventh Circuit in *Moody v. NetChoice* has rejected as unconstitutional a very similar Florida anti-censorship law, citing many of the same First Amendment decisions by the Supreme Court.[29]

I. THE FLORIDA AND TEXAS SOCIAL MEDIA ANTI-CENSORSHIP LAWS

Both before and after January 6, 2021, but especially after, G.O.P. politicians offered numerous bills to limit SMPs' immunities under Section 230[30] and to propose state laws that would require SMPs to be politically neutral. In 2021, Florida was the first state to adopt social media "anti-censorship" legislation,[31] followed by Texas.[32] During 2021, similar measures were introduced in many other states, almost all of them states that had given Donald Trump their electoral votes in 2020.[33] In Florida, the Lieutenant Governor said:

[26] *See infra* notes 30-40 and accompanying text.
[27] *See infra* notes 41-54 and accompanying text.
[28] *See infra* notes 55-140 and accompanying text
[29] *See infra* notes 141-169 and accompanying text. The Court has granted certiorari in both Circuit Court cases, combining the appeals of Florida and NetChoice from the differing conclusions by the two Circuit Courts. *Paxton, cert. granted*, __ S. Ct. __, 2023 (U.S. Sep. 16, 2023) (No. 22-555).
[30] On the federal level, numerous proposals emerged in both the House and the Senate to amend (or abolish) Section 230. While none of the following bills are anywhere near advancing to a floor vote in the 117th Congress, it is worth noting how many proposals limit the kind of content moderation that will still qualify for immunity under § 230, and how many proposals would just do away with § 230. See Meghan Anand et al., *All the Ways Congress Want to Change Section 230*, SLATE MAGAZINE, Mar. 23, 2021, https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html.
[31] Unlawful acts and practices by social media platforms, FLA. STAT. § 501.2041 (2021). Florida legislation was signed by Gov. Ron DeSantis on May 24, 2020. The legislation comes in two parts, with §501.2041 proscribing "Unlawful acts and practices by social media platforms." A related law seeks to prevent the de-platforming of candidates for public office in Florida. Social media deplatforming of political candidates, FLA. STAT. § 106.072.
[32] TEX. CIV. PRAC. & REM. § 143A.002 (2021). Cat Zakrzewski, *Texas Governor signs bill prohibiting social media giants from blocking users based on viewpoint*, WASH. POST, Sept. 9, 2021, https://www.washingtonpost.com/technology/2021/09/09/govgregabbott-social-media-censorship-bill/.
[33] Megan Kashtan, *Tracking Proposed Social Media Legislation in America*, LEADERSHIP CONNECT, April 29, 2021, https://www.leadershipconnect.io/business/2021/04/29/tracking-proposed-social-media-legislation-in-america/. Most of these bills have no co-sponsors who were Democrats. All of them provide new legal causes of action for individuals and organizations that believe that social media platforms are censoring material on the basis of political or religious viewpoints. *Id.*

> What we've been seeing across the U.S. is an effort to silence, intimidate, and wipe out dissenting voices by the leftist media and big corporations . . . . Thankfully in Florida we have a Governor that fights against Big Tech oligarchs that contrive, manipulate, and censor if you voice views that run contrary to their radical leftist narrative.[34]

When signing Texas' anti-censorship bill, Governor Greg Abbott said that: "Freedom of speech is under attack in Texas. There is a dangerous movement by some social media companies to silence conservative ideas and values. This is wrong."[35] The new law, he said, "fights back against Big Tech political censorship. It prevents social media companies from banning users based on the users' political viewpoints."[36]

In June of 2021, in the case of *NetChoice v. Moody*, District Court Judge Robert Hinkle entered an injunction and ruled that the Florida social media anti-censorship laws were unconstitutional.[37] His ruling was appealed to the Eleventh Circuit, not only by Florida but by eight other state attorneys general. That injunction was based not only on the pre-emptive effect of Section 230,[38] but also on cases granting First Amendment rights to private entities. The Eleventh Circuit affirmed Judge Hinkle's injunction, relying on both Section 230's pre-emptive power and the First Amendment. [39] The Texas law, however, having been ruled unconstitutional and enjoined by District Court Judge Robert Pitman, was received far more favorably by the Fifth Circuit.[40]

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[34] *Id.*

[35] Office of the Governor Greg Abbott, *Signing House Bill 20 Into Law*, FACEBOOK (Sep. 9, 2021), https://www.facebook.com/watch/live/?ref=watch_permalink&v=551694886068292. *See also* Cat Zakrzewski, *Texas governor signs bill prohibiting social media giants from blocking users based on viewpoint*, WASH. POST, Oct. 9, 2021; Kevin Hazard, *Texas Gov. Greg Abbott Signs Social Media 'Censorship' Bill*, JOURNAL BEAT, Oct. 9, 2021, https://journal-beat.com/texas-gov-greg-abbott-signs-social-media-censorship-bill/.

[36] *Id.*

[37] NetChoice LLC. v. Moody, 546 F. Supp. 3d 1082, 1091 (N.D. Fla. 2021) (". . . state authority to regulate speech has not increased even if, as Florida argued nearly 50 years ago and is again arguing today, one or a few powerful entities have gained a monopoly in the marketplace of ideas, reducing the means available to candidates or other individuals to communicate on matters of public interest.") (citing Miami Herald Publishing v. Tornillo, 418 U.S. 241 (1974)). As to *Tornillo*, *see infra* notes 66-67 and accompanying text.

[38] Judge Hinkle explained the Section 230 pre-emption in this way:

> But deplatforming a candidate restricts access to material the platform plainly considers objectionable within the meaning of 47 U.S.C. Section 230 (c)(2). Good faith, for this purpose, is determined by federal law, not state law. Removing a candidate from a platform based on otherwise legitimate, generally applicable standards—those applicable to individuals who are not candidates—easily meets the good-faith requirement. Indeed, even a mistaken application of standards may occur in good faith . . . . The federal statute also preempts the parts of Florida Statutes § 501.2041 that purport to impose liability for other decisions to remove or restrict access to content.

Id. at 1090.

[39] NetChoice, LL.C. v. Attorney General, 34 F.4th 1196 (11th Cir. 2022).

[40] *See infra* notes 73-96 and accompanying text.

II. HB 20 IN TEXAS AND THE DISTRICT COURT'S INJUNCTION

The Texas law, often referred to as HB20, relates to "censorship of or certain other interference with digital expression, including expression on social media platforms or through electronic mail messages."[41]

A. KEY PROVISIONS OF THE TEXAS LAW

A key aspect of the Texas law requires various notifications to users, the disclosure provisions of section 2 of HB20. Section 120.103 reads as follows:

> (a) Except as provided by Subsection (b), if a social media platform removes content based on a violation of the platform's acceptable use policy under Section 120.052, the social media platform shall, concurrently with the removal:
>
> (1) notify the user who provided the content of the removal and explain the reason the content was removed;
>
> (2) allow the user to appeal the decision to remove the content to the platform; and
>
> (3) provide written notice to the user who provided the content of:
>
> (A) the determination regarding an appeal requested under Subdivision (2); and
>
> (B) in the case of a reversal of the social media platform's decision to remove the content, the reason for the reversal.

Section 120.103 is tied to an elaborate set of disclosure rules announced in Section 120.052, the "acceptable use policy" provisions. This section requires each covered company to publish an acceptable use policy that is "easily accessible" to a user, a policy that must (1) reasonably inform users about the types of content allowed on the social media platform; (2) explain the steps the social media platform will take to ensure content complies with the policy, and the means by which users can notify the platform of "content that potentially violates the acceptable use policy, illegal content, or illegal activity."[42] The platform must also provide an email address or some other "intake mechanism" to handle user complaints.[43]

New legal remedies were also provided through amendments to Texas' Civil Practice and Remedies Code. The code was amended by adding Chapter 143A. In 143A.001, to "censor" is defined as "to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression."[44] Further, a social media platform may not censor a user's expression based on "the viewpoint of the user or another person."[45] Users able to prove that the social media platform has violated the law can get declaratory relief,

[41] Tex. H.B. 20, preamble (2021).
[42] Tex. H.B. 20, § 120.052(b) (2021).
[43] Tex. H.B. 20, § 120.052(b)(A) (2021).
[44] Tex. H.B. 20, § 143A.001(a)(1) (2021).
[45] Tex. H.B. 20, § 143A.007(a) (2021).

including costs and reasonable attorney's fees as well as injunctive relief.[46] A social media platform that does not comply with any court orders can be placed in contempt, and courts may order measures to ensure compliance.[47] In section 143A.008, "any person" may notify the Texas Attorney General of a violation or "potential violation" of the law by a social media platform, and the attorney general "may bring an action" to enjoin violations or even potential violations; reasonable attorney's fees as well as investigative and court costs can be ordered by a judge who agrees there has been a violation.[48]

B. *NETCHOICE, LLC V. PAXTON* IN THE FEDERAL DISTRICT COURT

On September 22, 2021, NetChoice and the Computer and Communications Industry Association (CCIA) filed a lawsuit against Texas Attorney General Ken Paxton in the Western Federal District Court of Texas.[49] The plaintiffs claimed that the new law "prohibits the platforms from engaging in their own expression to label or comment on the expression they are now compelled to disseminate."[50] Further, plaintiffs alleged that "(e)very single editorial and operational choice platforms make could subject those companies to myriad lawsuits."[51]

> At a minimum, H.B. 20 would unconstitutionally require platforms like YouTube and Facebook to disseminate, for example, pro-Nazi speech, terrorist propaganda, foreign government disinformation, and medical misinformation. In fact, legislators rejected amendments that would explicitly allow platforms to exclude vaccine misinformation, terrorist content, and Holocaust denial.[52]

The plaintiffs' complaint acknowledged that the internet can further the public good, but noted that "the Internet also attracts some of the worst aspects of humanity."[53] According to the plaintiffs, the right to moderate content was not only essential as a practical matter but was also a First Amendment right to do so without interference from government. Judge Pitman agreed, granting NetChoice LLC and the other plaintiffs injunctive relief against the State of Texas in December 2021.[54]

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[46] Tex. H.B. 20, § 143A.007(b)(2) (2021).
[47] Tex. H.B. 20, § 143A.007(a) (2021).
[48] Tex. H.B. 20, § 143A.00 (2021).
[49] Complaint, NetChoice LLC v. Paxton, 573 F. Supp. 3d 1092 (W.D. Tex. 2021) (No. 1:21-cv-00840) https://s3.documentcloud.org/documents/21068956/netchoice-ccia-paxton-complaint.pdf.
[50] *Id*. at 2.
[51] *Id*. at 13.
[52] *Id*. After Judge Pitman enjoined application of the Texas law, a majority on the Fifth Circuit found that the injunction was procedurally improper, and Judge Oldham, who authored the opinion, found the plaintiffs' invocation of Holocaust deniers as hypothetical. *See infra* note 134. The plaintiffs' complaint here, however, states that the Texas legislature actively considered amendments that would have excluded content moderation of Holocaust denials; but the Texas legislature decided to include such speech as protected viewpoint speech for Texas citizens.
[53] *Id*. at 13.
[54] NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092 (5th Cir. 2021).

III. COMPARING THE DISTRICT AND CIRCUIT COURT OPINIONS IN *PAXTON V. NETCHOICE, LLC*

In this Part, we review the Judge Pitman's opinion in *Paxton* and compare it to the Fifth Circuit ruling that reversed his injunction against HB20. We will address the procedural and First Amendment issues just below, then more briefly discuss Section 230 and common carrier issues.

A. PROCEDURAL AND FIRST AMENDMENT ISSUES

Judge Pitman sees the Supreme Court's First Amendment precedents as affirming corporate free speech rights. Fifth Circuit Judges Oldham and Jones, however, find bases for distinguishing them. What follows is a comparison of their respective views. As we will see, the use of First Amendment precedents can be quite strained when it comes to social media platforms; there are many potentially applicable Supreme Court decisions on First Amendment rights regarding newspapers,[55] public parades,[56] corporate communications on public policy,[57] and shopping centers,[58] but SMPs are not exactly like any of these, which allows for different interpretations by the Fifth and Eleventh Circuits.

Judge Pitman concedes from the start that a preliminary injunction is an "extraordinary remedy,"[59] a point that the Fifth Circuit clearly agrees with in later setting aside his injunction of HB20. But Pitman also finds the Texas law to be an extraordinarily clear infringement of the SMP's First Amendment rights.[60] Citing *Manhattan Community Access Corp v. Halleck*,[61] he claims that "social media platforms have a First Amendment right to moderate content disseminated on their platforms.[62] He also finds that the disclosure requirements in section 2 are "inordinately burdensome given the unfathomably large numbers of posts on these sites and apps.[63]

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[55] Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241 (1974)

[56] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).

[57] Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 465 U.S. 1 (1986).

[58] Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

[59] "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 1101 (citing Winter v. Nat. Res. Def. Council, Inc. 555 U.S. 7, 20 (2008)).

[60] His ruling was based solely on the plaintiff's First Amendment claims and did not address any Section 230 arguments, finding that the pre-emptive effect of the First Amendment was a sufficient basis for granting the preliminary injunction.

[61] NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092, 1106 (5th Cir. 2021) (citing Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. __, 139 S. Ct. 1921 (2019)). *Halleck* is interesting for many reasons, including a 5-4 divided Court, with Justice Kavanaugh writing for a majority that found a private contractor for the municipality was not a governmental actor bound by the First Amendment. The case highlights how divided the Justices are generally on how private enterprises might occasionally operate as public forums, and be subject to First Amendment claims. *See infra* notes 146-151 and accompanying text.

[62] Citing three Supreme Court cases, Judge Pitman, concludes that Texas' anti-censorship legislation compels social media platforms to significantly alter and distort their products. Those cases are Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241 (1974), Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995) and Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1 (1986).

[63] "For example, in three months in 2021, Facebook removed 8.8 million pieces of 'bullying and harassment content,' 9.8 million pieces of 'organized hate content,' and 25.2 million pieces of 'hate speech content.' During the last three months of 2020, YouTube removed just over 2 million channels and over 9 million videos because they violated its policies." *Paxton*, 573 F. Supp. 3d at 1111.

HB20's requirements also burden First Amendment expression by "forc[ing] elements of civil society to speak when they otherwise would have refrained."[64] By contrast, Judge Oldham begins his opinion by categorically rejecting content moderation as speech, and characterizing it instead as conduct,[65] negating the notion that SMPs have any First Amendment protections at all.

Judge Pitman concludes that social media platforms have a First Amendment right to moderate content disseminated on their platforms. He uses three Supreme Court opinions to buttress this view, starting with the *Tornillo* case.[66] In that case, the Court dealt with a Florida statute that required newspapers to print a candidate's reply if a newspaper assailed her character or official record, a so-called "right of reply" statute. The *Tornillo* Court understood in 1984 that, like social media today, newspapers were viewed with suspicion for having monopolistic controls over speech in the media; but concluded that newspapers nonetheless did exercise "editorial control and judgment" by selecting the "material to go into a newspaper," deciding the "limitations on the size and content of the paper," and deciding how to treat "public issues and public officials—whether fair or unfair."[67]

Judge Pitman cites a second Supreme Court decision, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,[68] where the Court held that a private parade association had the right to exclude a gay rights group from having their own float. A Massachusetts law prohibited discrimination in any public place of accommodation, resort, or amusement."[69] The association had routinely been permitted by the city to have its annual St. Patrick's Day parade, which essentially made it — in plaintiffs' view — a public event in a public space. Judge Pitman noted that this law, if it required the private organization to allow symbolic speech contrary to their own viewpoints, "alter[ed] the expressive content" of the private organization.[70] In *Hurley*, the Court had concluded that the state's power to require a private parade association to include the gay rights float violated the association's First Amendment right of "autonomy to choose the content" of its own message.[71] According to Judge Pitman, the general rule that speakers have the "right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."[72]

Hurley is not persuasive to Judge Oldham, however, since in that case, there was a set of lower court opinions applying the Massachusetts law in a First Amendment context, and he regards the overbreadth doctrine as needing to exclude all possible interpretations of the challenged law;

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[64] *Id.* at 1112 (citing Washington Post v. McManus, 944 F.3d 506, 514 (4th Cir. 2019)).
[65] Early in his opinion, Judge Oldham claims that content moderation is basically censorship, not speech. "Next, applying Supreme Court precedent, we (C) hold that Section 7 does not regulate the Platforms' speech at all; it protects *other people's* speech and regulates the Platforms' *conduct.*" Netchoice, LLC. v. Paxton, 49 F.4th 439, 448 (5th Cir. 2022) (emphasis in original). And, applying the concept that content moderation is censorship, Judge Oldham continues, "That is, censorship is at best a form of expressive *conduct*, for which the overbreadth doctrine provides only "attenuate[d]" protection." *Id.* at 451 (emphasis in original).
[66] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).
[67] "It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.* at 258.
[68] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).
[69] Mass. Gen. Laws § 272:98 (1992)
[70] NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092, 1106 (W.D. Tex. 2021).
[71] *Hurley*, 515 U.S. at 573.
[72] *NetChoice LLC v. Paxton*, 573 F. Supp. 3d at 1106 (citing *Hurley*, 515 U.S. at 573.).

without specific applications of the law, then, courts should be wary of declaring that no part of a challenged law could be within First Amendment bounds. He states that plaintiffs bringing a facial challenge to a legislative statute must "establish that no set of circumstances exists under which the Act would be valid."[73] Judge Oldham notes that such a challenge is difficult one, and that the plaintiffs (1) are not trying to show that HB 20 is "unconstitutional in all of its applications" and (2) are asking "a federal court to invalidate HB 20 in its entirety before Texas even tries to enforce it."[74] This means that NetChoice LLC must challenge HB 20 based on the Supreme Court's First Amendment overbreadth doctrine, where a law may be invalidated as overbroad, but only "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[75] Here, Judges Oldham and Jones approvingly cite *Americans for Prosperity Foundation v. Bonta*, which limits the overbreadth doctrine to "the First Amendment context."[76]

For Judges Oldham and Jones, *Hurley* and *Tornillo* are distinguishable because those cases "involved challenges to concrete applications of an allegedly unconstitutional law, raised by a defendant in state court proceedings."[77] Therefore, ". . . .even if these cases supported the Platforms' argument about their substantive First Amendment rights, they would provide no support for the Platforms' attempt to use the First Amendment as a sword to facially invalidate a law before it has been applied to anyone under any circumstances."[78] The majority makes the same point about Judge Pitman's use of the *Pacific Gas & Electric* case.

In *PG&E*, the West Coast utility had a practice of including a monthly newsletter in its billing envelopes. "In appearance no different from a small newspaper," the newsletter included political editorials and stories on matters of public interest alongside "energy-saving tips to stories about wildlife conservation."[79] Concerned that the expense of PG&E's political speech was falling on customers, the California Public Utilities Commission decided to apportion the billing envelopes' "extra space"—that is, the space occupied by the company's newsletter—and permit a third-party group representing PG&E ratepayers to use that space for its opposing messages four months each year.[80] PG&E objected, arguing that the First Amendment prevented the Commission from forcing it to include an adverse party's speech in its billing envelopes. In ruling for PG&E, the Court's plurality held that the Commission's order both interfered with PG&E's own speech and impermissibly forced it to associate with the views of other speakers.

To Judge Pitman, the *PG&E* case, as well as *Tornillo* and *Hurley*, stand for the proposition that

[73] Citing U.S. v. Salerno, 481 U.S. 739, 745 (1987); *see also* Americans for Prosperity Found. v. Bonta, 594 U.S. ___, 141 S. Ct. 2373, 2387 (2021).
[74] NetChoice LLC v. Paxton, 49 F.4th 439, 448 (5th Cir. 2022) (citing Wash. State Grange v. State Republican Party, 552 U.S. 442, 449 (2008)). It is not entirely clear, however, that HB20 has a "plainly legitimate sweep." *See infra* notes 116-128 and accompanying text.
[75] *Id*. at 450 (citing Am. for Prosperity Found. v. Bonta, 594 U.S. __, 141 S. Ct. 2373 (2021).
[76] *Bonta*, 141 S. Ct. at 2387. In *Massachusetts v. Oakes*, the Court noted that "[o]verbreadth is a judicially created doctrine designed to prevent the chilling of protected expression." Massachusetts v. Oakes, 491 U.S. 576, 584 (1989) (plurality op.); *see generally* Lewis D. Sargentich, Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). The doctrine addresses "threat[s] to censure comments on matters of public concern." Thornhill v. Alabama, 310 U.S. 88, 97 (1940).
[77] *Paxton*, 49 F.4th at 451.
[78] *Id.*
[79] Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal, 465 U.S. 1, 8 (1986).
[80] *Id.* at 5-6.

"private companies that use editorial judgment to choose whether to publish content—and, if they do publish content, use editorial judgment to choose what they want to publish—cannot be compelled by the government to publish other content."[81]

By contrast, Judge Oldham views the PG&E case in terms of its distinct factual setting, noting that PG&E never lost its own right to speak. He claims that Section 7 of HB20 does not prohibit SMPs from speaking. "Platforms can add addenda or disclaimers—containing their own speech—to users' posts. And many of them already do this, thus dramatically underscoring that Section 7 prohibits *none* of their speech."[82] But Judge Oldham is most likely wrong to claim that adding disclaimers to user's posts is not prohibited by Section 7 of HB20, and is most likely wrong to claim that content moderation by SMPs is always "censorship" and never "speech" protected by the First Amendment.[83] Here, we are aided by Section 230 of the Communications Decency Act[84] as well as some of Justice Clarence Thomas' interpretations of Section 230 as they relate to corporate free speech.[85]

B. SECTION 230, AND SMPS AS COMMON CARRIERS

1. SECTION 230

Congress enacted Section 230 in 1996 to ease uncertainty regarding online platforms' exposure to defamation liability for the content they host.[86] In *Stratton Oakmont, Inc. v. Prodigy Services Co.,*[87] a New York state court found that Prodigy's online platform had "content guidelines"

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[81] NetChoice LLC v. Paxton, 573 F. Supp. 3d 1092, 1107 (W.D. Tex. 2021).

[82] *Paxton*, 49 F.4th at 448.

[83] *See infra* notes 129-131 and accompanying text as to why disclaimers placed by SMPs on user posts may well be violations of HB20.

[84] Communications Decency Act of 1996 (CDA), Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 47 U.S.C.).

[85] *See infra* notes 100-102, discussing Justice Thomas' opinion in Malwarebytes Inc. v. Enigma Software Grp., LLC, 592 U.S. __, 141 S. Ct. 13, 14-15 (2020).

[86] 47 U.S.C. §230(b) (2000). Specifically, Congress listed the goals of the statute:

> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
> (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
> (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
> (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

Senate co-sponsors Ron Wyden (D-OR) and Christopher Cox (R-CN) were concerned about two cases, where federal courts had held fledgling Internet service providers liable for content posted by users. Those cases are *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), and *Stratton Oakmont v. Prodigy Servs. Co*., 1995 N.Y. Misc. LEXIS 229, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. May 24, 1995). *See also infra* note 89, discussing the Fifth Circuit's understanding of Section 230.

[87] *Stratton Oakmont*.

prohibiting certain obscene and offensive content. Prodigy used an "automatic software screening program" as well as manual review "to delete notes from its computer bulletin boards" that violated the guidelines. The court held that this conduct "constitute[d] editorial control" over the platform, so the platform was akin to a newspaper and Prodigy could be held liable for defamation on that basis.[88]

As Judge Oldham tells it, Congress disagreed with the decision and ". . . abrogated it by enacting Section 230 of the of the Communications Decency Act (CDA)."[89] According to Judge Oldham, Section 230 undercuts the plaintiffs' argument that content moderation is protected speech.

> Recall that they rely on two key arguments . . . . first, they suggest the user-submitted content they host is *their speech*; and second, they argue they are *publishers* akin to a newspaper. Section 230, however, instructs courts *not* to treat the Platforms as 'the publisher or speaker' of the user-submitted content they host. *Id.* §230(c)(1).[90]

Judge Oldman also asserts:

> Section 230 reflects Congress's judgment that the Platforms do not operate like traditional publishers and are not "speak[ing]" when they host user-submitted content. Congress's judgment reinforces our conclusion that the Platforms' censorship is not speech under the First Amendment.[91]

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[88] The court in *Stratton Oakmont*, prior to Section 230's enactment, looked at the control exercised by Prodigy and found editorial speech that subjected the firm to legal liability.

> By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and 'bad taste,' for example, PRODIGY is clearly making decisions as to content . . . and such decisions constitute editorial control. That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made, does not minimize or eviscerate the simple fact that PRODIGY has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards. Based on the foregoing, this Court is compelled to conclude that for the purposes of plaintiffs' claims in this action, PRODIGY is a publisher rather than a distributor.

Id. at 10-11.

[89] NetChoice LLC v. Paxton, 49 F.4th 439, 466 (5th Cir 2022) ("One of the specific purposes of [§230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.") (citing H.R. Rep. No. 104-458, at 194 (1996)). As the Fifth Circuit's majority opinion continues,

> Congress instructed that "No provider or user of an interactive computer service [*i.e.*, online platform] shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Online platforms are thus immune from defamation liability for the content they host, unless they play a part in the "creation or development" of that content. § 230(f)(3).) And this is true *even if* the online platforms act "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."

Id. at 466.

[90] *Id.* (emphasis in original).

[91] *Id*. at 465-66.

But Judge Oldham misreads Section 230. First, because Section 230 was a legislative response to the *Stratton-Oakmont* case, it is more accurate to see Section 230 as allowing some content moderation rather than conferring immunity only if there were no content moderation at all; after all, it was because Prodigy exercised content moderation that the New York court had treated it as a publisher. Second, the co-sponsors of Section 230 have been clear about the law's intent. Former Senators Ron Wyden and Christopher Cox affirmed in their *amicus* brief in *Gonzalez v. Google* that

> Congress drafted Section 230 in a technology-neutral manner that would enable the provision to apply to subsequently developed methods of presenting and moderating user-generated content . . . . The targeted recommendations at issue in this case are an example of a more contemporary method of content presentation.[92]

Wyden and Cox also asserted that "[r]ecommending systems that rely on such algorithms are the direct descendants of the early content curation efforts that Congress had in mind when enacting Section 230."[93]

At the oral arguments in *Google v. Gonzalez* in February 2023,[94] several Justices were skeptical of the notion that Section 230 would not protect SMPs use of content moderating algorithms to make recommendations to users, algorithms that "ranked' or "recommended" links to a user.[95]

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[92] Brief of Senator Ron Wyden and former representative Christopher Cox as Amici Curiae in support of Respondent, at 3. https://www.supremecourt.gov/DocketPDF/21/21-1333/252645/20230119135536095_21-1333%20bsac%20Wyden%20Cox.pdf/,

[93] They stated:

> Section 230 protects targeted recommendations to the same extent that it protects other forms of content curation and presentation. Any other interpretation would subvert section 230's purpose of encouraging innovation in content moderation and presentation the real time transmission of user generated content that Section 230 fosters has become a backbone of online activity…. given the enormous volume of content created by Internet users today section 230's protection is even more important now than when the statute was enacted.

Id. at 26.

[94] In *Gonzalez v. Google*, the family of a woman killed in ISIS terrorist attacks in Paris in 2015 sought to use the Anti-Terrorist Act (ATA), 18 USCS § 2333, to claim that Google's YouTube had essentially aided and abetted ISIS by helping it recruit terrorists. Nohemi Gonzalez, a 23-year-old U.S. citizen, studied in Paris, France during the fall of 2015. On November 13, 2015, when she was enjoying an evening meal with her friends at a café, three ISIS terrorists—Abdelhamid Abaaoud, Brahim Abdeslam, and Chakib Akrouh—fired into the crowd of diners, killing her. This occurred as part of a broader series of attacks perpetrated by ISIS in Paris on November 13 (the "Paris Attacks"). ISIS carried out several suicide bombings and mass shootings in Paris that day, including a massacre at the Bataclan theatre. The day after the Paris Attacks, ISIS claimed responsibility by issuing a written statement and releasing a YouTube video. Two lower courts had granted Google's motions to dismiss based on Section 230, and the Supreme Court granted certiorari. Gonzalez v. Google, Inc., 335 F. Supp. 3d 1156 (N.D. Cal. 2018); Gonzalez v. Google LLC, 2 F.4th 871 (9th Cir. 2021). The Supreme Court granted certiorari on Oct. 3, 2022. Gonzalez v. Google, 143 S. Ct. 80 (2022).

[95] The oral arguments in *Gonzalez v. Google* took place on Feb. 21, 2023 and revealed bewilderment among the Justices as to how they might create a workable exception to the kind of blanket immunity that lower courts have almost universally conferred on social media platforms. Jesse Bravin, *Supreme Court Justices Express Skepticism at Holding Google Liable for Content* WALL ST. J., Feb. 21, 2023 ("Supreme Court justices reacted skeptically Tuesday to claims that YouTube parent Google LLC could be sued for algorithms that automatically recommended extremist

(Such recommendations tend to push highly charged emotional content, including ISIS recruitment videos, and have evidently favored a lot of extreme views that perpetuate user "engagement."[96]) These algorithms may be a new development since the CDA and Section 230, but they are a kind of content moderation; in terms of the Texas statute, promotion or demotion of content is a suspect category for its potentially discriminatory effects,[97] but is well within the intent and language of Section 230.

Although Judge Oldham sees it differently, the language of Section 230 seems to imply that platforms are "speaking" for First Amendment purposes when they modify user-submitted content; Section 230 explicitly provides for the removal of "otherwise objectionable" material. Along with the de-platforming of Donald J. Trump, it was the SMPs' removal of certain "otherwise objectionable" material that triggered the Texas and Florida laws to mandate political neutrality for SMPs.[98] As the Eleventh Circuit concluded when it upheld the district court's injunction against Florida's law:

> Federal law's recognition and protection of social-media platforms' ability to discriminate among messages—disseminating some but not others—is strong evidence that they are not common carriers with diminished First Amendment rights.[99]

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recruiting videos, in the first session of a two-day round of arguments testing the liability of internet providers for material posted online.") *See also* Nina Totenberg, *No ideological splits, only worried justices as High Court hears Google case*, NPR, Feb. 23, 2023 ("Justice Amy Coney Barrett questioned Twitter's liability for a retweet of a link to a terrorist video. And Justice Neil Gorsuch asked whether artificial intelligence should be treated differently than algorithms because it is actual content that is being created and provided by the platform. Justice Brett Kavanaugh worried about the consequences of any broad decision in the case. It could, he said, "crash the digital economy," and "lawsuits will be nonstop."), https://www.npr.org/2023/02/21/1158628409/supreme-court-section-230-arguments.

At the same time, some Justices expressed concern that the algorithms that "push" targeted and emotion-laden content toward users was not what Congress sought to protect with Section 230. Transcript of Oral Argument, Gonzalez v. Google, 143 S. Ct. 80 (2022) (no. 21-133) https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-1333_f2ag.pdf.

[96] FISHER, *supra* note 5. Fisher reports that Rene DiResta at the Stanford Internet Observatory has observed how artificial intelligence—at the heart of social media's algorithms—created "engagement driven metrics." "The algorithmic logic was sound, even brilliant. Radicalization is an obsessive, life-consuming process. Believers come back again and again, there obsession becoming an identity, with social media platforms the center of their day-to-day lives . . . . Recruits were drawn together by some ostensibly life-or-death threat: the terrible truth of vaccines, the illuminati agents who spread Zika, the feminists seeking to overturn men's rightful place atop the gender hierarchy . . ." Ordinary people began to feel like they were soldiers in an online army fighting for their cause," she said. It was only a matter of time until they willed one another to action." *Id*. at 65-66. In 2020, Twitter's researchers determined that Twitter's algorithms "systematically boosted conservative politics, which tend to be preoccupied, across societies, with drawing sharp boundaries between us and them." *Id*., at 139. "Though it represented just a slice of YouTube's billions of video recommendations, the results were alarming. More than 80 percent of recommended videos were favorable to Trump, whether the initial query was 'Trump' or 'Clinton.'" *Id*. at 136. "But thanks to the preferences of the algorithms for extreme and divisive content, it was mostly fringe radicals who benefited, and not candidates across the spectrum." *Id.* at 153.

[97] 2021 Tex. HB 20, 143A.001(1) ("'Censor' means to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or *otherwise discriminate against expression*.") (emphasis added).

[98] *E.g*., suppressing the Hunter Biden laptop story, or labelling #StopTheSteal posts, or labelling vaccination misinformation or Q Anon conspiracy theories as potentially false, all "discriminate" against what some people and politicians now regard as "conservative" speech.

[99] NetChoice, LLC. v. Attorney General, 34 F.4th 1196, 1221 (11th Cir. 2022).

As to the possibility that the common carrier concept could limit content moderation, most Supreme Court Justices have had little to say. Justice Thomas has been the primary voice for suggesting that the common carrier concept might be applied to SMPs.[100] He has also issued opinions about Section 230, noting that when the appropriate case arises, the Court must evaluate not only the express language of Section 230 but also its overall intent. Interestingly, though, Justice Thomas' opinion in *Malwarebytes, Inc. v. Enigma Software Group USA*,[101] seems to take a quite different view from Judge Oldham. In *Malwarebytes*, he notes:

> Taken at face value, Section 230 alters the *Stratton Oakmont* rule in two respects. First, Section 230 (c)(1) indicates that an Internet provider does not become the publisher of a piece of third-party content—and thus subjected to strict liability—simply by hosting or distributing that content. Second, Section 230(c)(2)(A) provides an additional degree of immunity when companies take down or restrict access to objectionable content, so long as the company acts in good faith. In short, the statute suggests that if a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by Section 230 (c)(1)**;** and if it takes down certain third-party content in good faith, it is protected by Section 230(c)(2)(A).[102]

Justice Thomas's comments point to his view that good faith removal of objectionable content is federally protected under Section 230; depending on how "good faith" is interpreted, state laws like HB20 that would remove that immunity would be preempted, as NetChoice argued in both the Florida and Texas cases. At the same time, Justice Thomas has clearly suggested that perhaps section 230 had been interpreted too broadly and could be narrowed or eliminated in a future case.[103]

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[100] In 2021, the Supreme Court considered a case where the plaintiffs had challenged President Trump for blocking certain users from commenting on his Twitter "tweets." Once President Trump was "de-platformed" from Twitter, the case was essentially moot, and was dismissed, but Justice Thomas, concurring, wrote separately to highlight the problem of "old doctrines" being applied to "new digital platforms." Biden v. Knight First Amendment Institute at Columbia University, 593 U.S. ___ ,141 S. Ct. 1220 (2022). As Justice Thomas stated, "I write separately to note that this petition highlights the principal legal difficulty that surrounds digital platforms—namely, that applying old doctrines to new digital platforms is rarely straightforward. Respondents have a point, for example, that some aspects of Mr. Trump's account resemble a constitutionally protected public forum. But it seems rather odd to say that something is a government forum when a private company has unrestricted authority to do away with it." *Id.* at 1221. "If part of the problem is private, concentrated control over online content and platforms available to the public, then part of the solution may be found in doctrines that limit the right of a private company to exclude. Historically, at least two legal doctrines limited a company's right to exclude." *Id*. at 1222. He goes on to mention the common carrier doctrine and the public accommodation doctrine. *Id.* at 1222-23.

[101] Malwarebytes Inc. v. Enigma Software Group, LLC, 592 U.S. __, 141 S. Ct. 13, 14-15 (2020). Certiorari was denied, but Justice Thomas wrote to register his discomfort with the way courts have so broadly interpreted Section 230's immunity provisions for SMPs.

[102] *Id.* at 14.

[103] As Justice Thomas notes, "With no limits on an Internet company's discretion to take down material, §230 now apparently protects companies who racially discriminate in removing content. *Sikhs for Justice, Inc. v. Facebook, Inc*., 697 Fed. Appx. 526 (CA9 2017), aff'd 144 F. Supp. 3d 1088 (ND Cal. 2015)." *Malwarebytes*, 141 S. Ct. at 10.

But again, Justice Thomas is quite receptive to the notion that SMPs might be classified as "common carriers."[104] In passing HB 20, the Texas legislature expressly denominated SMPs as common carriers,[105] a concept which would require non-discrimination or some version of "neutrality" from the content moderation practices of SMPs. It is possible that several Justices may find the common carrier argument appealing, so we address it here.

2. THE "COMMON CARRIER" CONCEPT APPLIED TO SMPS

The view that SMPs should be treated as common carriers had been suggested earlier by Justice Thomas and is a view that the Fifth Circuit majority endorsed on appeal.[106] The notion that SMPs are common carriers sees them as today's public square, a place that should allow for the maximum set of political viewpoints. Here, we will only briefly address the common carrier issue; the Supreme Court grant's grant of certiorari in *NetChoice v. Paxton* included only the following issues:

1. Whether the law's content moderation restrictions comply with the First Amendment.
2. Whether the law's individualized explanation requirements comply with the First Amendment.[107]

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[104] *See supra* note 94.

[105] 2021 Tex. HB 20, section 1:

> (1) social media platforms function as common carriers, are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States; and
>
> (2) social media platforms with the largest number of users are common carriers by virtue of their market dominance

[106] NetChoice LLC v. Paxton, 49 F.4th 439 at 448, 469 (5th Cir. 2022) ("The common carrier doctrine is a body of common law dating back long before our Founding. It vests States with the power to impose nondiscrimination obligations on communication and transportation providers that hold themselves out to serve all members of the public without individualized bargaining. The Platforms are communications firms of tremendous public importance that hold themselves out to serve the public without individualized bargaining. And Section 7 of HB 20 imposes a basic nondiscrimination requirement that falls comfortably within the historical ambit of permissible common carrier regulation.") .

[107] In January 2023, the Court invited the Solicitor General to "file a brief expressing the views of the United States." On August 14, 2023, Elizabeth Prelogar did file her brief, and in granting certiorari in September of 2023, the Court noted, "The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the Solicitor General in her brief for the United States as *amicus curiae*." NetChoice, LLC v. Paxton, 2023 U.S. LEXIS 2953, __ S. Ct. __, 2023 WL 6319650. In her brief, the Solicitor General isolated two of four potential issues, *viz.*, those noted above. The common carrier issue is thus not explicitly raised in the grant of certiorari.

One reason might be that, despite the Texas legislature's view that SMPs should be common carriers, neither NetChoice nor the State of Texas framed their petitions for certiorari in terms of the common carrier argument. Texas, for example, posed these two issues for the Court: "Whether States may, consistent with the First Amendment, forbid dominant communications companies from denying users equal, nondiscriminatory access to the media in which modern communication often occurs. 2. Whether States may, consistent with the First Amendment, require dominant social-media platforms to provide truthful, factual information to users about various aspects of their services." Ken Paxton, Attorney General for the State of Texas, Response to Petition for Writ of Certiorari, NetChoice, LLC. et al. v. Paxton, No. 22-255.

In passing, we note that the common carrier argument has not only received a great deal of attention from the Texas legislature and from Justice Thomas,[108] but also has been raised in several law review articles and is the basis for Senator Hawley's proposed changes to section 230.[109] Again, it is unclear how much support there is among the current Justices for declaring SMPs of a certain size to be common carriers, whether it is even a good idea to do so,[110] or whether Section 230 as written would support a judicial finding that SMPs were common carriers and had to offer open access to all users.[111]

C. THE SOUTHWICK DISSENT

The Fifth Circuit opinion in *NetChoice LLC v. Paxton* was not unanimous. Judge Leslie Southwick agreed that some disclosure provisions of HB 20 could survive Section 230 pre-emption challenges,[112] but he claims that few of the cases cited in Judge Oldham's discussion on common

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[108] *See supra* note 94.

[109] *See, e.g.*, Adam Candeub, *Bargaining for free Speech: Common Carriage, Network Neutrality, and Section 230*, YALE J. L. & TECH 391 (2020).

[110] Along with Candeaub, *id.*, compare Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377 (2021) with Ashutosh Bhagwa, *Why Social Media Platforms are not Common Carriers*, 2 J. FREE SPEECH L. 127 (2022). At least one commentator in the business media thinks making SMPs as common carriers is a bad idea. *See* Adam Thierer, *The Danger Of Making Facebook, LinkedIn, Google And Twitter Public Utilities*, FORBES, July 24, 2011 ("First, a utility is typically considered an "essential facility" that has no good alternatives. Local sewage and water systems are the classic examples. Social networking sites are in a different league and would hardly be considered essential services . . . . Second, there's the problem of "regulated monopoly" becoming a self-fulfilling prophecy. Critics apparently don't see the irony of classifying all these services as regulated monopolies when they all compete so vigorously against each other. That's not the case in typical utility sectors. The very act of imposing 'utility' status on a service or platform tends to shelter it from competition and lock them in as real monopolies for the long-haul . . . . Third, public utilities are, by their very nature, non-innovative. Consumers are typically given access to a plain vanilla service at a "fair" rate, but without any incentive to earn a greater return, innovations suffers. Of course, social networking sites are already available to everyone for free! And they are constantly innovating. So, it's unclear what the problem is here and how regulation would solve it.")

[111] Section 230 does not mention ISPs as common carriers, and if it was not Congress' intention (or language) to make them so, it is not clear whether federal courts could or should make it so. If the task of the judiciary is to determine "what the law is," it follows that it should not seek to graft the common carrier concept onto existing law for SMPs.

[112] The disclosure provisions of HB20 are fairly extensive and include provisions on "Public Disclosures" (Tex. Bus. & Com. Code § 120.051), Acceptable Use Policy (Tex. Bus. & Com. Code § 120.052), and a Biannual Transparency Report (Tex. Bus. & Com. Code § 120.053). The plaintiffs had argued that the disclosure requirements were unduly burdensome, chilling free speech. The majority rejected that article on the basis that ". . . the Platforms already largely comply with them." Netchoice, LLC v. Paxton, 49 F.4th 439, 485 (5th Cir. 2022). Also, the Fifth Circuit's majority emphasized that a preliminary injunction is premature, since Texas has not brought any enforcement actions against SMPs based on HB20's disclosure provisions.

> The Platforms all but concede that publishing an acceptable use policy and high-level descriptions of their content and data management practices are not *themselves* unduly burdensome. Instead, they speculate that Texas will use these disclosure requirements to file unduly burdensome *lawsuits* seeking an unreasonably intrusive level of detail regarding, for example, the Platforms' proprietary algorithms. But the Platforms have no authority suggesting the fear of litigation can render disclosure requirements unconstitutional—let alone that the fear of *hypothetical* litigation can do so in a pre-enforcement posture.

Id. at 485-86. Judge Southwick, while disagreeing with the majority's First Amendment analysis, states that ". . . the majority is certainly correct that a successful facial challenge to a state law is difficult. Consequently, I agree that a facial challenge to the Disclosure and Operations provisions in Section 2 of HB 20 is unlikely to succeed on the merits. These portions of the law ought not to be enjoined at the preliminary injunction stage." *Id.* at 495.

carrier law actually touch on First Amendment speech rights. He notes that First Amendment precedents cited in the majority's opinion actually reinforce the idea that common carriers retain their First Amendment protections for their own speech.[113]

> We are in a new arena, a very extensive one, for speakers and for those who would moderate their speech. None of the precedents fit seamlessly. The majority appears assured of their approach; I am hesitant. The closest match I see is caselaw establishing the right of newspapers to control what they do and do not print, and that is the law that guides me until the Supreme Court gives us more.[114]

Southwick (rightly) assumes that bias is part of our lives, and indeed, that SMPs may in fact be biased, noting that: "The majority's perceived censorship is my perceived editing. The Platforms can act with obvious bias. The lack of First Amendment protection for their biases is not so obvious."[115] In so doing, Judge Southwick takes note of the Eleventh Circuit's decision in the NetChoice challenge to Florida's law.

> In assessing a similar law, the Eleventh Circuit held "a private entity's decisions about whether, to what extent, and in what manner to disseminate third-party-created content to the public are editorial judgments protected by the First Amendment" and that "social-media platforms' content-moderation decisions constitute the same sort of editorial judgments and thus trigger First Amendment scrutiny." … I agree.[116]

Reviewing cases like *Miami Herald*, *Hurley*, and *PG&E*, Judge Southwick concludes that the majority's "either/or" dichotomy is not mandated by Supreme Court's First Amendment decisions. The "either/or" dichotomy suggested by Judge Oldham—that censorship is always conduct, not speech—holds that a social media platform cannot be both a "conduit" for others' speech and a "speaker" or "publisher" when it comes to content moderation. Yet Justice Thomas' opinion in Malwarebytes strongly suggests that Section 230 recognizes content moderation as speech, not "censorship,"[117] and the oral arguments in *Gonzalez v. Google* in February of 2023 suggest that the Justices take seriously the notion that algorithmic content moderation might be seen as speech that would "aid and abet" a terrorist organization like ISIS.[118]

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[113] Here, Judge Southwick cites *Turner Broadcasting Systems v. FCC*, 512 U.S. 622 (1994), looking at a challenge to Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 USCS 534 and 535 (the "must-carry" provisions), which required cable operators to carry the signals of specified numbers, based on cable system size, of local commercial television stations and local noncommercial educational television stations. Turner Broadcasting and other cable companies objected that this violated their First Amendment rights. Judge Southwick implicitly analogizes cable operators with common carriers, and because Judge Southwick differs from the majority that content moderation was speech, not censorship, he concludes that an intermediate level of scrutiny should apply to HB20's anti-censorship provisions. *Paxton*, 49 F.4th 439 at 504.

[114] *Paxton*, 49 F.4th at 496.

[115] *Id.*

[116] *Id*. at 496-97 (citation omitted) (quoting NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1212 (11th Cir. 2022)).

[117] *See supra* notes 97–100 and accompanying text.

[118] *See supra* notes 89–93 and accompanying text. Ultimately, the Court in both *Gonzalez v. Google* and its companion case, *Twitter v. Taamneh*, decided not on Section 230 or First Amendment grounds, but on the failure of plaintiffs to

D. CRITIQUES OF THE OLDHAM OPINION

The Fifth Circuit's majority opinion misses the mark in several ways. First, the claim that the SMP corporations are engaged in "conduct," not "speech," runs counter to important Supreme Court opinions about symbolic speech.[119] Second, the opinion appears to misinterpret Section 230. Third, the opinion overlooks the larger landscape of social media and how the Texas law discriminates based on the "size" of SMPs. Fourth, the opinion misstates the literal meaning and intent of the Texas law in saying that the SMPs are free to speak about the posts that they host. Finally, Judge Oldham unintentionally reveals his own bias at several points.[120]

First, the speech/conduct distinction is not well-established as part of First Amendment law. In general, symbolic speech has been protected in several cases before the Court. Where there is "conduct," such as flag burning,[121] draft card burning,[122] or wearing a black arm band at school as a war protest,[123] what looks like conduct can also be seen as speech. Corporate conduct like making campaign contributions is now constitutionally protected under the *Citizens United* decision.[124] Making campaign contributions does seems like conduct; it requires a certain amount of physical activity—writing the check, or keying in the appropriate amounts on an internet platform—yet is constitutionally protected as "political speech." If Donald Trump's Truth Social media company wanted to ban all "liberal" political speech or contribute part of its profits to certain GOP candidates, it would be censoring liberal views and trying to defeat "liberal" candidates; but doing so would (and should) also be protected speech in both instances.

Second, the Fifth Circuit's opinion seems to misinterpret Section 230. As Justice Thomas suggested in the *Malwarebytes* case, content moderation is most likely a form of speech currently protected by Section 230.[125]

Third, the Fifth Circuit's opinion gives short shrift to the plaintiffs' argument that HB 20 improperly discriminates based on size; only social media platforms with over 50 million users on an average monthly basis are subject to the law's requirements.[126] This leaves out Telegram, Parler, 4chan, as well as Donald Trump's Truth Social platform. Truth Social reports that it has 10 million users, so presumably Texans can both post and read all of the right-leaning ideas, opinion, and information that they want (as well as plenty of misinformation, disinformation, and

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show aiding and abetting on the part of the SMPs. *See* Gonzalez v. Google, LLC 598 U.S. ___, 143 S. Ct. 80 (2023); Twitter v. Taamneh, No. 21-1496, 598 U.S. ____ (2023).

[119] In general, symbolic speech has been protected in several cases before the Court. Where there is "conduct," such as flag burning, or draft card burning, or wearing a black arm band at school as a war protest, what looks like conduct can also be seen as speech. *See infra* notes 121-24.

[120] Judge Oldham may indeed be politically biased; he was formerly general counsel to Governor Greg Abbott. Press Release, Office of the Governor of Texas, Governor Abbott names Andrew Oldham General Counsel, Jan. 2, 2018, https://gov.texas.gov/news/post/governor-abbott-names-andrew-oldham-general-counsel.

[121] Texas v. Johnson, 491 U.S. 397 (1989).

[122] U.S. v. O'Brien, 391 U.S. 367 (1968).

[123] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

[124] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[125] *See supra* notes 94-96 and accompanying text.

[126] 2021 Tex. HB 20, 143A.004(c) ("This chapter applies only to a social media platform that functionally has more than 50 million active users in the United States in a calendar month.").

conspiracy theories that keep them engaged on any given SMP). What, then, is the rational basis for requiring only larger social media platforms to obey HB20? The bill's sponsors seemed to think that only the larger SMPs are "semi-public" places, but all SMPs, regardless of size, are places where members of the public can find both information and disinformation and various viewpoints. Under HB20's exclusion of smaller SMPs, if a user tries to post something anti-Trump on Truth Social, he or she can be banned by the platform (presumably by Donald Trump's directives), but Facebook cannot ban, demote, or label even the most obvious lies coming from Donald Trump.[127]

In sum, Texans have a wide variety of political speech they can read or listen to. Taking into account not only Facebook, Twitter and YouTube, but the various smaller social media sites, citizens have access to plenty of free speech that is literally free; there is no charge to sign up for parlor, 8 Chan, Truth Social or any other explicitly "right wing" social media platform. No one in Texas who wants to hear right wing, "conservative," or extremist viewpoints is actually prevented from doing so by larger social media platforms, which calls into question not only how important or compelling the State's interest here actually is, but whether HB20 even has a rational basis.[128]

Fourth, and contrary to Judge Oldham's assertion,[129] HB20 does not allow SMPs a full range of free speech. HB 20 defines "censor" as to block, ban, demonetize, de-boost, or "otherwise discriminate against expression."[130] Thus, if Facebook were to routinely label QAnon posts from my friend in Abilene as "false and misleading," but would not routinely do so for others' posts that made false accusations about Roger Stone, Donald Trump, or Marjorie Taylor Greene, my friend could have a complaint under HB20 that could merit attorney's fees, injunctive relief, and more. Why? Because Facebook would be "otherwise discriminating against expression" by labeling my friend's posts but saying nothing when her conservative heroes are subjected to false accusations on its platform.[131]

Finally, Judge Oldham may have unintentionally revealed his own bias at several points. One point is when he claims that concerns about forcing websites to post speech from Nazis, terrorist

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[127] This also raises the question of how "conservative" is the lie that the 2020 election was stolen, or that the January 6 insurrection was just part of a "normal tourist visit." *See* Grace Seegers, *Some Republicans downplay January 6 riot amid Democratic objections*, CBS NEWS, May 13, 2021, https://www.cbsnews.com/news/capitol-riot-january-6-hearing-lawmakers-clash/. *See also*
Emily Brooks et al., *Tucker Carlson shows the first of his Jan. 6 footage, calls it 'mostly peaceful chaos,'* THE HILL, Mar. 06, 2023. Historically, conservatives have shown considerable deference to both truth and tradition; that blatant lies about Hilary Clinton, Pizzagate, the 2020 election, or the January 6th insurrection are necessarily "conservative" is a bit bizarre, but presumably, Facebook's labelling or demotion of Tucker Carlson's posts on its platform could be the subject of some sorts of discrimination that would violate HB20.

[128] *See infra* notes 167-69 and accompanying text.

[129] *Paxton*, 49 F.4th at 483. ("Section 7 is plainly unrelated to the suppression of free speech because at most it curtails the Platforms' censorship—which they call speech—and only to the extent necessary to allow Texans to speak without suffering viewpoint discrimination.) *Id.*

[130] HB20 specifies censorship as follows:
"Censor" means to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or *otherwise discriminate against expression*. 2021 Tex. HB 20, 143A.001(1) (Emphasis added.)

[131] Without statutory damages being specified in HB20, it would be difficult for courts to asses actual damages to users who complained of viewpoint discrimination. Many states have standing requirements that would disqualify cases where there is no "tangible injury," and it would be difficult to assess monetary damages in the hypothetical case noted here, the kind of case likely to be raised by a disgruntled user.

propaganda, and Holocaust deniers are hypothetical.[132] But these are hardly hypothetical. It is now well known that disinformation, terrorist propaganda, and conspiracy theories thrive on the Internet, largely because they are more engaging and fit the business model of large SMPs, keeping users engaged for as long as possible.[133] The vast majority of these tend to be more extremely "right" than "left," and include Holocaust denial, the Great Replacement theory, and plenty of neo-Nazi calls to action, like those that preceded the Charlottesville and January 6 riots.[134]

Some bias is also evident when he writes that the purpose of SMPs' content moderation ". . . is to eliminate speech, not promote or protect it."[135] In fact, large SMPs have often erred on the side of inclusivity, especially where doing so increases user engagement and therefore advertising revenue.[136] Also, by most accounts, not having some forms of content moderation would make an SMP less attractive, less popular (the "chaos version") and actually discourage people from using the platform for speaking or reading.

He may also be revealing some bias in saying that the platforms "are nothing like the newspaper in *Miami Herald*. Unlike newspapers, the platforms exercise virtually no editorial control or judgment."[137] He claims that: "The platforms use algorithms to screen out certain obscene and spam related content. And then virtually everything else is just posted to the platform with zero editorial control or judgment."[138] But this is not how content moderation works for social media platforms, where there are many (even though often ineffective) content moderators working to eliminate illegal or extremely harmful material from the sites.[139]

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[132] As Judge Oldham writes, "Far from justifying pre-enforcement facial invalidation, the Platforms' obsession with terrorists and Nazis proves the opposite. The Supreme Court has instructed that "[i]n determining whether a law is facially invalid," we should avoid "speculat[ing] about 'hypothetical' or 'imaginary' cases." *Paxton*, 49 F.4th at 452.

[133] The presence of terrorist propaganda on social media sites is well known, and hardly hypothetical, and the subject of a major lawsuit in the Supreme Court's 2022-23 term, Gonzalez v. Google. See *supra* notes 89–93 and accompanying text.

[134] FISHER, *supra* note 5 ("The rally and the group behind it had been constituted, it turned out come on social media.. . .But it was Facebook that grew the event from a Redditor meet up into a trans extremist coming out party. . . .On a more neutral social network, the result might have resolved as five or six distinct clusters—say, confederacy revivalists, neo-Nazis, anti-government militias, alt-right meme circles—that kept to themselves in the offline world. But on Facebook, just as on YouTube in Germany, the platform merged these otherwise disparate communities together, creating something entirely new. And at the very center: the event page for unite the right.") *Id.* at 205-07.

[135] Paxton, 573 F.4th at 455.

[136] Fisher, *supra* note 5. *See also* FRENKEL AND KANG, *supra* note 6. ("The root of the disinformation problem, of course, lay in the technology. Facebook was designed to throw gas on the fire of any speech that invoked any motion, even if it was hateful speech dash it's algorithms favorite sensationalism.") *Id.* at 182. Zuckerberg himself has shown strong libertarian tendencies; he defended posts from Holocaust deniers as free expression. "The patrons of Silicon Valley enjoyed defending absolutist positions, which they saw as intellectually rigorous. The holes in their arguments––the gray areas that people like Alex Jones or Holocaust deniers inhabited—were ignored." *Id.* at 206.

[137] *Paxton*, 49 F.4th at 459.

[138] *Id.*

[139] John Koetsier, *Facebook Makes 300,000 Content Moderation Mistakes Every Day*, FORBES, June 9, 2020. ("Facebook employs about 15,000 content moderators directly or indirectly. If they have three million posts to moderate each day, that's 200 per person: 25 each and every hour in an eight-hour shift. That's under 150 seconds to decide if a post meets or violates community standards.") *Id.*

In brief, Judge Oldham's opinion may reflect the unique makeup of the Fifth Circuit,[140] rather than a carefully crafted, judicious opinion based on fact and precedent.

IV. *NETCHOICE V. PAXTON*, THE U.S. SUPREME COURT, AND THE IDEALS OF POLITICAL SPEECH

The Supreme Court has granted certiorari for challenges to the Texas and Florida statutes. In May 2023, the Court asked the Solicitor General to weigh in with the U.S. government's views on both the *Paxton* and *Moody* cases.[141] As noted above, the Court granted certiorari to resolve two issues: (1) whether the laws content moderation restrictions comply with the First Amendment; and (2) whether the laws individualized explanation requirements comply with the First Amendment.[142]

As to these basic First Amendment issues, the sharp distinction between conduct and speech that Judge Oldham relies on is not something that the Supreme Court can easily endorse, given earlier decisions such as *Citizens United* or *Tinker v. Des Moines.*[143] Further, Judge Oldham's view—that Section 230 underscores Congress's determination that social media platform content moderation is not speech—is most likely in error.[144] Congress is not likely to amend Section 230 anytime soon in a way that brings clarity on whether content moderation by SMPs is "speech" or "conduct." Even if Congress did, the Court would retain the power to decide whether SMP content moderation is protected speech under the First Amendment.

But the First Amendment issues to be argued at the Court this term in *NetChoice v. Paxton* include some thorny questions as to how and when a private entity might provide a "public forum" subject to First Amendment strictures. This issue was addressed by the Court's 2019 decision in *Manhattan Community Access Corp. v. Halleck.*[145] Documentary film makers DeeDee Halleck and Jesus Papoleto Melendez produced public access programming in Manhattan and submitted a documentary on how the Manhattan Neighborhood Network ("MNN") had neglected the East Harlem community. But MNN refused to air the film and subsequently suspended Halleck from using the public access channels. They sued. A federal district court dismissed their lawsuit on the basis that MNN was not a state actor.[146] On appeal, the Second Circuit reversed,[147]finding that MNN qualified as a state actor because it performed a traditional public function in regulating speech on the public access channels. The Supreme Court, in a 5-4 decision, reversed the Second

[140] Emma Platoff, *Trump-appointed judges are shifting the country's most politically conservative circuit court further to the right*. TEXAS TRIBUNE, Aug. 30, 2018. *See also* David Smith, *How Trump reshaped the fifth circuit to be the 'most extreme' U.S. court*, THE GUARDIAN, Nov. 15, 2022.

[141] Moody v. NetChoice, LLC, 2023 U.S. LEXIS 535, 598 U.S. __, 143 S. Ct. 744, 214 L. Ed. 2d 448, 91 U.S.L.W. 3180, 2023 WL 349996 (Jan. 23, 2023). "The Solicitor General is invited to file briefs in this case expressing the views of the United States." (Jan. 23, 2023). NetChoice, LLC v. Paxton, 2023 U.S. LEXIS 523, 143 S. Ct. 744, 214 L. Ed. 2d 448, 91 U.S.L.W. 3180, 2023 WL 349998 (Jan. 23, 2023).

[142] NetChoice, LLC v. Paxton, 2023 U.S. LEXIS 2953, __ S. Ct. __, 2023 WL 6319650.

[143] Tinker v. Des Moines Indep. Comm'n Sch. Dist., 393 U.S. 503 (1969). See also *supra* notes 121–124 and accompanying text.

[144] See *supra* notes 98–103 and accompanying text.

[145] Manhattan Comm'n Access Corp. v. Halleck, 587 U.S. __, 139 S. Ct. 1921 (2019).

[146] Halleck v. N.Y.C., 224 F. Supp. 3d 238 (2016).

[147] Halleck v. Manhattan Comm'n Access Corp., 882 F.3d 300 (2d Cir. 2018).

Circuit; Justice Kavanaugh's opinion determined that a private corporation that oversees public access channels in Manhattan is not a governmental actor subject to First Amendment constraints.

Writing for a 5-4 majority, Justice Kavanaugh found that a cable television system's operation of public access channels was not "a traditional, exclusive public function."[148] Kavanaugh stated that "a private entity such as MNN who opens its property for speech by others is not transformed by that fact alone into a state actor."[149]

The *Halleck* case brought a sharp dissent from Justice Sotomayor, joined by Justices Breyer, Ginsburg, and Kagan. As Justice Sotomayor wrote,

> I would affirm the judgment below. The channels are clearly a public forum: The City has a property interest in them, and New York regulations require that access to those channels be kept open to all. And because the City (1) had a duty to provide that public forum once it granted a cable franchise and (2) had a duty to abide by the First Amendment once it provided that forum, those obligations did not evaporate when the City delegated the administration of that forum to a private entity. Just as the City would have been subject to the First Amendment had it chosen to run the forum itself, MNN assumed the same responsibility when it accepted the delegation.[150]

Halleck illustrates the difficulties the Justices may have with line-drawing when it comes to private entities that serve a public purpose, which is the basic thrust of HB20—seeing large SMPs as serving as a public forum or a common carrier. An operative distinction between the *Paxton* case and *Halleck* might be the deliberate establishment of an open forum by the City; but attorneys for Texas can be expected to argue that Section 230 has established a kind of open forum.

If the Supreme Court cannot determine if SMPs have First Amendment speech rights that are infringed by the Texas law, it seems likely that the Court could embrace Judge Oldham's cautionary approach that the overbreadth doctrine should be limited to actual applications of the Texas law, not hypotheticals. That approach would require the Court to affirm the Fifth Circuit's stay of Judge Pitman's injunction, affirming those parts of Judge Oldham's opinion that caution restraint on enjoining laws based on the overbreadth doctrine.[151] This procedural determination would at least give the Court and Congress more time to consider the role of SMPs in society and how they might best be regulated, but it will likely be some time before a majority can agree on the concept of SMPs as common carriers, or how private entities become sufficiently public to invoke state action subject to First Amendment precedents, or whether SMPs should be regarded as common carriers subject to state rules of equal access.

Ideally, the Court should provide some clear direction as to the free speech rights of SMPs rather than take a procedural tack. There are good reasons to do so. The First Amendment gives

[148] Halleck, 139 S. Ct. at 1926.
[149] *Id.*
[150] *Id.* at 1936.
[151] Netchoice, LLC v. Paxton, 49 F.4th 439, 452 (5th Cir. 2022).

high ranking to political speech as protected activity under the First Amendment.[152] In theory, HB20 aims to ensure that Texas citizens get to exercise a full range of political speech on major social media platforms. But those aims are not clearly furthered by HB20; Facebook, Twitter, and You Tube have not been systematically squelching "conservative" views. There are numerous incidents of alleged censorship of conservative speech that have become standard talking points for GOP politicians and their allies in the media.[153] Nonetheless, it is demonstrably false to say that "Big Tech" SMPs have been systematically discriminating against conservative viewpoints.[154]

Many sources indicate that, far from censoring conservative viewpoints, SMPs have favored those viewpoints. In a study by the New York University Stern Center for Business and Human Rights, the authors conclude that the major social media firms were very sensitive to claims of bias by GOP politicians and right-wing commentators.

> But the claim of anti-conservative anonymous is itself a form of disinformation: a falsehood with no reliable evidence to support it. No trustworthy large scale studies have determined that conservative

[152] The Supreme Court has made it clear that discussion of public issues and debate on the qualifications of candidates, are forms of political expression integral to the system of government established by the federal Constitution. Buckley v. Valeo, 424 U.S. 1 (1976). The Court typically applies strict scrutiny to government actions that infringe on the right to political expression.

[153] Complaints that Facebook is politically biased against conservative thought are not new and pre-date January 6. For example, there were complaints that (1) Instagram allowed the hashtag #KillTrump. A search of Twitter's site on Sept. 27, 2021 for #KillTrump only showed a tweet by Ari Fleisher noting a New York Post article complaining of the #KillTrump hashtag. Ari Fleischer, TWITTER (Jan. 13, 2021), https://twitter.com/hashtag/KILLTRUMP?src=hashtag_click. (2) Instagram "cancelled" Esther Bergh for posting a photo of Bill DeBlasio's daughter in a bathtub, baring her body. Doree Lewak, *How social media censorship 'silences' conservative thought*, N.Y. POST., Oct. 10, 2020. (3) SMPs refused to allow posts alleging that Planned Parenthood was selling body parts of the babies they were aborting. Sean Robertson, *Facebook ADMITS to Censoring Conservatives*, FREEDOMWIRE, June 26, 2020. (4) SMPs allegedly scuttled the story about Hunter Biden's laptop that emerged just before the 2020 election. Jeff Charles, *Conservatives, This is Why They Censor You*. RED STATE, Nov. 17, 2020, https://redstate.com/jeffc/2020/11/17/conservatives-this-is-why-they-censor-you-n281098. (5) Social media allegedly censors Christians like Franklin Graham and Seth Gruber, as well as videos from Project Veritas. But people can still access Project Veritas on Facebook, as the author did on March 23, 2023. Many of the videos can be played but come with this notation at the bottom of the post: "Visit the COVID-19 information center for vaccine resources."

[154] Paul and Barrett & J. Grant Sims, *False Accusation: The Unfounded Claim that Social Media Companies Censor Conservatives*, N.Y.U. STERN CTR. BUS. & HUM. RTS., February 2021. *See also* Alex Thompson, *Why the right wing has a massive advantage on Facebook*, POLITICO, Sept. 26, 2020 ("But Facebook says there's a reason why right-wing figures are driving more engagement. It's not that its algorithm favors conservatives — the company has long maintained that its platform is neutral. Instead, the right is better at connecting with people on a visceral level, the company says."). *See also* James Clayton, *Social media: Is it really biased against US Republicans?*, BBC, Oct. 27, 2020 ("One of the Republican criticisms of social media is that its algorithms push down conservative content. But that isn't borne out by the data for Facebook. Data from CrowdTangle, a public insights tool owned by Facebook, puts together the most popular posts for each day on Facebook. On any given day the top 10 most popular political posts are dominated by right-leaning commentators like Dan Bongino and Ben Shapiro, along with posts by Fox News and President Trump."). *See also* Mark Sullivan, *New study: Social media's alleged anti-conservative bias is 'disinformation*,' FAST COMPANY, Feb. 2, 2021. Since Elon Musk acquired Twitter, any bias on the Twitter platform has veered to the right, not the left. Katherine Tangalakis-Lippert & Hannah Getahun, *Elon Musk says his politics are in the center but extremism experts say he's using Twitter to increasingly empower right-wing viewpoints*, BUSINESS INSIDER, Dec. 10, 2022.

> content is being removed for ideological reasons or that searches are being manipulated to favor liberal interests.[155]

In the months between the 2020 election and the January 6 insurrection, both Facebook and Twitter allowed #StopTheSteal posts and allowed extremists to organize online. A team working with the House January 6 committee found that roughly fifteen social networks played a significant role in the attack.

> It described how major platforms like Facebook and Twitter, prominent video streaming sites like YouTube and twitch and smaller fringe networks like Parler, gab and 4 Chan served as megaphones for those seeking to stoke division or organize the insurrection. It detailed how some platforms *bent their rules to avoid penalizing conservatives out of fear of reprisals*, while others were reluctant to curb the '#Stop the Steal' movement after the attack.[156]

As of March 2023, Facebook still had pages for Sean Hannity, Support Roger Stone, Tucker Carlson, and a group, albeit small, that "Hates Hilary Clinton;" you could also find "material" on "Pizzagate," the conspiratorial allegations that Hilary Clinton was instrumental in a child-sex slavery ring running out of a pizza parlor in Washington, D.C. The "censorship" by Facebook around "Pizzagate,"[157] if it can even be called censorship, is this caveat: "This search may be associated with QAnon, a violence-inducing conspiracy theory. Experts say QAnon and the violence it inspires are a significant risk to public safety. For more information about QAnon, go to the Global Network on Extremism and Technology website." But even Facebook is not sure that labelling misinformation is effective in stopping its spread.[158]

In sum, there is little wisdom or practicality with HB20. First, Texas residents can already speak at will on a wide variety of political topics on both major SMPs and smaller ones like Parler and Donald Trump's Truth Social[159] platform; they have multiple outlets through to share their thoughts, ideas, or theories about how the United States is or should be governed. Further, in focusing on the rights of Texas speakers to have unfettered access to the largest SMPs, HB20 fails to address how SMPs have undermined constructive political discourse. The basic problem with political speech and SMPs is that the SMPs business model is to engage user's attention for as long as possible, a business model that has given rise to the growing popularity of more extreme

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[155] Paul and Barrett & J. Grant Sims, *False Accusation: The Unfounded Claim that Social Media Companies Censor Conservatives*, N.Y.U. STERN CTR. BUS. & HUM. RTS., February 2021.

[156] Cat Zakrewski et al., *What the Jan. 6 probe found out about social media, but didn't report*, WASH. POST, Jan. 17, 2023 (emphasis added).

[157] Michael Sebastian & Gabrielle Bruney, *Years After Being Debunked, Interest in Pizzagate Is Rising—Again. Here are ten key things to know about the bizarre conspiracy theory*, ESQUIRE, Jul. 24, 2020.

[158] Geoffrey A. Fowler, *Twitter and Facebook warning labels aren't enough to save democracy; This election proved Big Tech still hasn't figured out how to make truth spread faster than lies*, WASH. POST, Nov. 9, 2020. Actually, the SMPs probably do know how to suppress disinformation and misinformation that spreads "like wildfire" on their platforms but have no particular financial incentive to do so.

[159] "Truth Social is America's 'Big Tent' social media platform that encourages an open, free, and honest global conversation without discriminating on the basis of political ideology." Truth Social, https://truthsocial.com/ (last visited Nov. 6, 2023).

statements, conspiracy theories, and disinformation on SMPs.[160] Rather than forcing users to leave their mental and emotional comfort zones, SMPs make far more money pushing users down "rabbit holes" of emotionally and morally charged posts, generating more extreme and engaging claims. This means that, contrary to the hopes of J.S. Mill and Oliver Wendell Holmes, Jr., "good speech" has little practical chance of driving out "bad speech" in the "marketplace of ideas."[161]

Second, HB20 seems largely impractical for SMPs and for the judiciary. How will SMPs know what is actually a "conservative viewpoint" that they must allow under HB20 without comments, demotion, or labels? How will a court be able to objectively evaluate the validity of a user's complaint that a SMP has censored "conservative" viewpoints,[162] and how will the Texas Attorney General to decide whether and when SMPs have violated HB20 by failing to give full exposure to "conservative" perspectives? For example, if Twitter were to block the tweets of Marjorie Taylor Greene or George Santos, would the Texas Attorney General actually be defending "conservative values" or conservative viewpoints? Are "conservative perspectives" whatever alt-right groups or G.O.P. politicians say or believe? What if a defendant SMP were to claim that it was labelling, demoting, or banning only statements it regarded as clearly false? Would defending "truth" be a defense to actions brought by a platform's users or the Texas Attorney General?[163] For example, if Facebook were to block all #StopTheSteal posts, would that represent an anti-conservative bias, or, would it represent, as Chief Justice Hughes noted, ". . . safeguarding the community from incitements to the overthrow of our institutions by force and violence"?[164]

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[160] *See* generally FISHER, *supra* note 5.

[161] In Areopagitica, John Stuart Mill wrote, "And now the time in speciall is, by priviledge to write and speak what may help to the furder discussing of matters in agitation. The temple of Janus with his two controversal faces might now not unsignificantly be set open. And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter." JOHN STUART MILL, AREOPAGITICA (1644) (First Amendment Watch, N.Y.U.), https://firstamendmentwatch.org/history-speaks-essay-john-milton-areopagitica-1644/.

In his dissent in *Abrams v. U.S.*, Justice Oliver Wendell Holmes wrote that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." 250 U.S. 616 (1919) at 630. But ideas are different from goods in the marketplace. Matthew Gentzkow and Jesse M. Shapiro, *Competition and Truth in the Market for News*, 22 J. OF ECON. PERSPECTIVES, No. 2, 133-154 (Spring 2008). Also, we no longer see competing ideas, but deliberate (and entirely legal) falsehoods that serve to reinforce people's existing beliefs, whether on cable channels, broadcast networks, online blogs or social media platforms. The marketplace of ideas is, at least on SMPs, a marketplace of emotions that now inhibits civil discourse. As Megan Garber has written, we have become so distracted by fictions that we no longer know what is real or true. "The result will be a populace that forgets how to think, how to empathize with one another, even how to govern and be governed.". Garber, *supra* note 8.

[162] Unless the law were read to read that SMPs must post everything that users submit without labels, comments, or "demotions," a judge would have to determine if there had been unlawful discrimination against conservative viewpoints, necessitating a potentially impossible task of determining whether "liberal" viewpoints were favored over "conservative" viewpoints on a given SMP.

[163] As former Senator Jeff Flake (R-AZ) put it, "From the very beginning of America, our freedom has been predicated on truth. For without a principled fidelity to truth and to shared facts, our democracy will not last . . . . It is elementary to have to say this, but we did not become a great nation by believing or espousing nonsense, or by embracing lunacy. And if my party continues down this path, we will not be fit to govern." Jeff Flake, *In today's Republican Party, there is no greater offense than honesty*, WASH. POST, May 11, 2021, https://www.washingtonpost.com/opinions/2021/05/11/jeff-flake-liz-cheney-republican-party/.

[164] *See supra* note 2.

Third, Judge Oldham talks about HB20's "plainly legitimate sweep."[165] Yet there may actually be an "irrational" basis for HB20 and thus some reason to question the "legitimate sweep" of HB 20. Not only is HB20 based on a faulty premise that Texans cannot fully express their political views in public fora (social media and otherwise), trying to solve a problem that does not exist, but there is clear inconsistency—we could accurately call it irrationality—in the exercise of its police powers under the Constitution to protect the health, safety, welfare, education, and freedom of speech for its citizens. We read the claims of Governors Abbott and DeSantis in signing legislation commanding political neutrality on SMPs, but there is evident bias in both those state legislatures in the banning of so-called "liberal" books in school libraries.[166] Arguably, the governments of Florida and Texas do not so much want "political neutrality" or even "free speech" in all channels of communication and education, but are enacting "the politics of grievance" that has become an animating theme for the GOP locally and nationally.[167] It is possible that the Governor and a majority of the Texas legislature truly believe that they are just re-balancing ideological perspectives for the benefit of Texas citizens. But given that Texas residents have abundant opportunities to write and to read "conservative" social media posts, it is not entirely clear that Texas even has a rational basis to enact HB20 into law.[168]

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[165] *Paxton*, 493 F.4th at 487.

[166] Brian Lopez, *Texas has banned more books than any other state, new report shows*. Texas Tribune, Sept. 19, 2022. For Florida's censorship of "liberal" ideas, see Francine Prose, *Ron DeSantis' academic restrictions show he hopes to change history by censoring it*, GUARDIAN, Feb. 09, 2023.

[167] Bill Schneider, *Grievance politics, rather than problem solving, now at the heart of Republican Party*. THE HILL, Mar. 19, 2023, https://thehill.com/opinion/campaign/3907317-grievance-politics-rather-than-problem-solving-now-at-the-heart-of-republican-party/. As Tom Leatherbury opined in the Dallas Morning News in July 2021,

> While it is tempting to act on issues that are popular in the moment for political gain, effective policymaking requires measured solutions instead of reactionary populism. Legislation like SB12 promises detrimental effects that curtail the ability of private social media platforms to moderate their own content; threatens to make the internet a more unreliable, extremist arena; and is unlikely to withstand inevitable, swift, and vigorous constitutional challenges.

Tom Leatherbury, *Texas' social media censorship bill pushes unconstitutional limits on free speech; If the Legislature pursues the bill, it could cost the state millions to defend*, DALLAS MORNING NEWS, July 11, 2021, https://www.dallasnews.com/opinion/commentary/2021/07/11/texas-social-media-censorship-bill-pushes-unconstitutional-limits-on-free-speech/.

[168] As introduced in the Texas legislature, the Social Media Anti-Censorship Act had "findings" as follows:

> SECTION 2. The legislature finds that:
>
> (1) this state has a compelling interest in holding certain social media websites to higher standards for having substantially created a digital public square; and
>
> (2) this state has an interest in helping its residents enjoy their free exercise of rights in certain semi-public forums commonly used for religious and political speech.

https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB03001I.pdf. Notice that the compelling interest is in "holding certain social media websites to higher standards" and assisting in the free exercise of "rights." But no Texas citizen's conservative-minded speech is actually barred from publication or being seen by other Texans just by the fact that one or more larger SMPs have demoted, banned, or labelled their posts. The legislation rests on the assumption that larger SMPs have created "semi-public forums," an assumption that does not on its own provide a rational basis or an important state interest. The rational basis test is used by courts where there are no fundamental rights or suspect classifications at stake. Here, rights of free speech are being invoked not only by Texas but by the plaintiffs, but even without those claims, it is hard to see much of a rational connection between HB20's goals and the means chosen to achieve them. More likely, given the misperception of "Big Tech" bias against conservative viewpoints, this legislation has an *irrational* basis, and does not seem to further any general good for the citizens of Texas.

Even if there might be a rational basis for HB20, it should be clear—despite Judge Oldham's opinion—that HB20's anti-censorship provisions are also content specific legislation and should be seen as the State unconstitutionally compelling certain kinds of SMP speech, in which case Texas cannot provide an important government interest with means that are substantially related to that interest.

Preferably, then, most of the Justices hold to existing precedents for the right of private entities such as Facebook, Twitter, and Google to continue content moderation. That moderation would exclude "speech" that is detrimental to the public good, including gross misinformation (for example, #StopTheSteal) and conspiracy theories, and, because hate speech does lead to violence,[169] to exercise content moderation without having to be "politically neutral" by including all kinds of extremist "speech" that poisons public discourse.

CONCLUSION

The issues for free speech and democratic governance raised by the growing influence of SMPs are numerous and momentous. Social media platforms now play a key role in the politics of our time. Misinformation and disinformation, sometimes in the guise of conspiracy theories, have solidified political polarization, and the level of hostility and mutual distrust between members of the two main political parties in the United States has intensified with the rising influence of SMPs. Self-regulation by SMPs that would further civil discourse has, by most accounts, utterly failed, the basic problem being that SMPs are more profitable when they encourage moral outrage, often based on misinformation. While the aim of political neutrality may sound fairly benign, the Texas anti-discrimination law is most likely a violation of SMP free speech rights and does nothing to create a social media environment where truth is told and citizens are well informed.

The Texas law tries to solve a problem that does not actually exist, the "problem" that SMPs are highly biased in favor of "liberals" or that they are "anti-conservative." This legislative "solution" is not only unworkable from a practical standpoint—HB20 also has at least two constitutional infirmities, including First Amendment issues and Supremacy Clause issues based on section 230. However, for Governor Abbott and most of the legislature, the very act of "owning the liberal" SMPs is good political theater for most GOP voters and the politics of grievance.

But the politics of grievance leaves our Supreme Court—and Congress—with a large set of conundrums to consider. While it is clear that the self-regulation by SMPs has been poorly and inconsistently executed and has failed the public good in many ways, we are still a long way from knowing how those SMPs should best be regulated. Ideally, SMPs would effectively moderate hate speech, disinformation, and conspiracy theories in ways that present opposing ideas and narratives for SMP users to confront and reflect on as part of their civic engagement, but a government requirement for SMPs to balance opposing views instead of algorithmically pushing

[169] Daniel Bynam, *How hateful rhetoric connects to real-world violence*. BROOKINGS INST., Apr. 9, 2021, https://www.brookings.edu/blog/order-from-chaos/2021/04/09/how-hateful-rhetoric-connects-to-real-world-violence/. *See also* FISHER, ch. 7, *supra* note 5. Fisher documents the hate speech that led to the genocide in Myanmar, disinformational hate speech that created the Rohingya genocide. "There has never been a more powerful tool for the rapid dissemination of hate speech and racist-nationalist vitriol than Facebook and other social media, Ashley Kinseth, a human rights worker in Myanmar, wrote amid the killing." *Id.* at 163.

emotional engagement would also present First Amendment issues. Some disclosure requirements—if not unduly burdensome—could be a fair start to understanding how algorithms are pushing political polarization toward uncivil public discourse, but to be nationally effective as a way to understand the impact of SMPs on political speech, those disclosure requirements should come from Congress, not the states.

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